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THE NEED FOR MORE EXACTING ASSESSMENT OF THE INDIVIDUAL RIGHTS AND SOVEREIGN INTERESTS AT STAKE IN FEDERAL COURT INTERPRETATION OF "DETENTION" UNDER THE INDIAN CIVIL RIGHTS ACT'S REMEDY OF HABEAS CORPUS

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Abstract

Pursuant to its federally-recognized plenary power over Indian affairs, Congress enacted the Indian Civil Rights Act in 1968 as a major civil rights initiative aimed at filling the gap in civil rights enforcement within tribal communities. Its aim was to bind tribes, who otherwise are not accountable to the protections of the United States Constitution, to most of the rights protected in the 14th Amendment and Bill of Rights. For nearly a decade after its passage, federal courts reviewed claims of rights violations brought against tribes and those acting on their behalf in an official capacity under basic federal jurisdictional statutes like 28 U.S.C. § 1331 and § 1343, providing some measure of accountability for individual civil rights. That practice ended in 1978, when the Supreme Court decided the watershed case of Santa Clara Pueblo v. Martinez*, a decision that foreclosed remedial relief in the form of equitable relief and damages and left ICRA's habeas provision the only possibility for federal judicial review.*

While Santa Clara Pueblo *left interpretive room for federal courts to exercise jurisdiction over rights claims brought under ICRA in which individuals have been detained or restricted in geographical movement, federal courts have continued to restrict jurisdiction under ICRA since then to such an extent that it has become nearly impossible for individuals to gain actual redress for violations of rights expressly delineated and protected by ICRA. One way this has occurred is through the federal courts' collective diminishment of what constitutes a detention sufficient to involve habeas relief. Courts also elevate the interests of tribes through loose application of judicially-created principles of exhaustion and mootness, based on the state of affairs that exists not just at the time of filing but during the pendency of federal habeas cases as well. In many cases, these narrowing stances are taken in purported deference concerns about tribal sovereignty but without careful identification or evaluation of what the*

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sovereign impacts may actually be. In some cases, the sovereign interests of the tribe and its membership may best be advanced through federal court review of individual rights violations. The federal trust responsibility may also be implicated. The courts are wrong to summarily defer to the presumed interests of tribes without careful analysis of these goals.

Focusing on the courts' interpretation of what constitutes a "detention" sufficient to invoke ICRA's habeas jurisdiction, this article contains an exhaustive analysis of federal ICRA cases published since Santa Clara Pueblo*. It demonstrates how exactly federal jurisdiction has been defined and diminished and how this departs from Congress's original intent. Not only do these interpretations thwart Congress's intent, virtually eliminating federal review in all but the most extreme instances of physical restraint where all available tribal remedies are deemed to have been exhausted, but in many instances, they also do injustice to the federal policy of respect for tribal sovereignty and self-determination. If deference to sovereignty is to be a factor, a more exacting and case-by-case standard must be developed and adhered to, or ICRA is but a hollow promise.*

I. Introduction

The recognition of fundamental civil or human rights, even ones guaranteed under a Bill of Rights or Constitution, depends not just on their codification under law but on their enforceability. While the very existence of individual rights as a matter of legal or constitutional mandate may guide and limit government action, there inevitably will be encroachments. When that occurs, there must be effective remedies for seeking redress and correcting government practices or actions or the rights functionally cease to exist. "When one's civil liberties are infringed, there must be a process to challenge that

injury, an opportunity to be heard, and, critically, a system of judicial review to test the legitimacy of that deprivation."[1] As explained by the Supreme Court in its first case recognizing the right of judicial review of constitutional matters: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[2]

For rights violations perpetuated by state and local officials and governments, Congress has enacted civil rights legislation providing for causes of action, enabling both state and federal court to ascertain remedies.[3] The creation of federal courts with independence and jurisdiction to hear matters arising under federal law provides a forum for those concerned

[1] Brief of Andrea M. Seielstad, as Amicus Curiae in Support of Petitioner at 3, Tavares v. Whitehouse, No. 17-429, 2017 WL 4857396, at *3 (Oct. 23, 2017) (citing Boumediene v. Bush, 553 U.S. 723, 741 (2008).

[2] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[3] The primary legislative enactment setting forth causes of action for violations of individual rights by state and local officials is 42 U.S.C. §1983. This has been interpreted and expanded by the Supreme Court. For example, the Supreme Court has interpreted 28 U.S.C. § 1983 as authorizing individuals to seek judicial review of constitutional rights violations that occur at the hands not just of officials but of state and local governmental institutions themselves where their policies or customs result in a deprivation of an individual's civil rights. *See* Monell v. Dep't of Soc. Serv.'s, 436 U.S. 658, 690 (1977).

about their reception in state and local courts.[4] When federal officials violate individual rights, a federal cause of action has been directly implied from the Constitution.[5] This combination of congressional legislation and judicial decision-making has established a path by which individuals may seek legal redress in the form of civil actions seeking both damages and injunctive relief for violations of their rights.[6] The statutory availability of attorney fees expands the opportunities for legal representation as well.

In addition to these civil remedies, for violations that infringe directly upon liberty, the writ of habeas corpus, or "great writ of liberty,"[7] as it is often called, has

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[4] First enacted in 1875, Congress has created federal question jurisdiction in the federal courts. 28 U.S.C. § 1331 (2012); *see also* 28 U.S.C. § 1343 (2012).

[5] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971); *see also* Wounded Knee Legal Def./Offense Comm. v. F.B.I., 507 F.2d 1281, 1284 (8th Cir. 1974) (citing *Bivens* as authority for federal courts to grant injunctive relief, as well as monetary relief, in actions brought against federal agents). As a prerequisite to recovery in such an action, a plaintiff must of course show deprivation of a constitutionally protected right. *See* McNally v. Pulitzer Publ'g Co., 532 F.2d 69, 76 (8th Cir. 1976).

[6] Additionally, there may be local, state or federal administrative remedies or criminal prosecution investigated and advanced by executive agencies and officials. The scope of this paper, however, will focus on private causes of action and legal remedies that may exist.

[7] *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 147–53 (2001); *see also* Whitmore v. Avery, 63 F.3d 688, 693 (8th Cir. 1995) (discussing changes in the scope of habeas in the context of procedural default of state proceedings: "Habeas corpus, once taken seriously as the 'great writ of liberty,' now bears that label with irony, if at all." (citing *Darr v. Burford,* 339 U.S. 200, 225 (1950) (Frankfurter, J., dissenting) ("'The

been a "vital instrument" to check governmental power and secure remedies from unlawful restraint.[8] Dating back to English common law in the 14th century, it is a judicial remedy whose goal is to provide relief against the arbitrary use of government authority to imprison or otherwise restrict the liberty of individuals without just cause.[9] Colonial courts recognized the writ as matter of common law, as modern courts continue to do.[10] The writ is recognized in the U.S. Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[11] In the Judiciary Act of 1789, Congress granted the federal courts jurisdiction over habeas corpus to persons in federal custody or who were charged and set for trial before a federal court.[12] In 1867, at the height of post-Civil War reconstruction during which time some states and local authorities resisted adherence to federal civil rights laws, that Congress bestowed the right in federal court to challenge

great writ of liberty' ought not be treated as though we were playing a game.")).

[8] *See* Boumedine v. Bush, 553 U.S. 723, 739–740 (2008) (discussing the history of the writ of habeas corpus).

[9] *See id.* at 740.

[10] *See, e.g.*, *id.* at 774 (stating that even the provisions of the relatively contemporary Antiterrorism and Effective Death Penalty Act of 1996 "did not constitute a substantial departure from common-law habeas procedures.").

[11] U.S. CONST. art. I, § 9, cl. 2.

[12] The Judiciary Act of 1789, ch. 20, 1 Stat. 73.

unlawful state deprivation of liberty through the writ of habeas corpus.[13]

Thus, by 1867, individuals who were unlawfully detained in violation of the Constitution, treaties or any law of the United States could seek release in federal court using the writ of habeas corpus, whether they were detained pursuant to federal or state authority.[14] Although there has been an ebb and flow to the scope of the writ, particularly with respect to federal challenges to state detentions, the remedy of habeas corpus remains a crucial tool against arbitrary and unlawful rights violations that result in deprivation of liberty.[15] Additionally, those whose federally guaranteed rights have been encroached upon by federal, state or local authority, as indicated above, may seek injunctive relief and damages through other federal causes of action.[16]

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[13] Amending the Judiciary Act of 1789, the Act granted federal courts the power to issue writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385. *See generally* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31 (1965) (providing a historical overview of the Habeas Corpus Act); William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J.S. HIST., 530 (1970) (providing a history of the Habeas Corpus Act).

[14] Wiecek, *supra* note 13, at 531 (describing the evolution of habeas corpus petitions in 1867).

[15] *Federal Judicial History*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus [https://perma.cc/HR6T-ALFQ].

[16] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971); *see also* Wounded Knee Legal Def./Offense Comm. v. F.B.I., 507 F.2d 1281, 1284 (8th Cir. 1974) (citing *Bivens* as authority for federal courts

This ensures accountability by government officials at all levels of federal, state and local government to the civil rights laws of this nation.

The path for recognition of individual rights of Native Americans vis-a-vis tribal government action has taken a different, much more circumscribed path to federal recognition. Because tribes enjoy some measure of inherent sovereignty that predated the formation of the United States Constitution, they are not subject to the Bill of Rights or other Constitutional restrictions.[17] It was not until 1968, moreover, that Congress exercised its plenary power over tribal affairs and enacted the Indian Civil Rights Act (hereinafter "ICRA"). The ICRA bestows on tribes the requirement, as a matter of federal statutory law, that they adhere to fundamental rights similar to those of the Bill of Rights.[18]

With respect to enforcement of ICRA's substantive provisions, however, the Supreme Court determined in the case of *Santa Clara Pueblo v. Martinez* that Congress authorized federal review only when grounds for relief under the writ of habeas corpus exist.[19] While individuals must establish that a violation of one of the substantive provisions of ICRA has occurred and, sometimes, that they have exhausted tribal remedies, the key interpretive issue is whether the circumstances of

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to grant injunctive relief, as well as monetary relief, in actions brought against federal agents).

[17] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (finding that the laws of the Cherokee nation do not fall within the Fifth Amendment).

[18] 25 U.S.C. § 1302 (2012).

[19] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978); *see also* 25 U.S.C. § 1303 (2012).

their rights violations may qualify for habeas relief under the act: namely, whether a "detention" has occurred under § 1303.[20] Thus, in contrast to federal, state and local encroachments of federal substantive rights, the writ of habeas corpus is the only federal remedy available for those impacted by tribal officials or actions. Unless tribes independently provide for them within their own tribal court system, which is not universally the case, there are no causes of action that may be construed for damages or injunctive relief outside of the scope of habeas.[21]

Since *Santa Clara Pueblo*, a number of individuals impacted by very serious encroachments of their rights by tribal officials and possessing no further remedies within their tribal systems of justice have sought federal recognition and enforcement under ICRA's habeas provision in last ditch efforts to avert harm to the freedom and livelihood of individual tribal members as well as to the interests of the sovereign itself.[22] In some cases, individuals have been arrested and incarcerated by order of tribal court or council without counsel, jury trial or other due process.[23] In

[20] See *Santa Clara Pueblo*, 436 U.S. at 59.

[21] *See id.* at 70–72.

[22] The banishment and disenrollment cases often implicate complex issues impacting the sovereignty and self-determination of the tribal membership at large in addition to those of individual petitioners since such situations impact core issues such as the size and identity of those who may be recognized as tribal members as well as disputes over leadership authority, models of governance and economic development. *See infra* notes 168–217 and accompanying text. So, too, do cases impacting use and occupancy rights to land. *See infra* notes 218–253 and accompanying text.

[23] S*ee* Barbara Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 351–55 (detailing impacts in federal

others, they have been banished, disenrolled, or excluded from tribal facilities, services and cultural events.[24] Judges and tribal court advocates have been removed from office in retaliation for decisions or advocacy that challenged certain tribal action or officials.[25] When accompanied by disenrollment from tribal membership, individuals' political, cultural and legal identity and status as an Indian and member of a distinctive tribe

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proceedings on failure of tribal courts to guarantee defense counsel to those charged with crimes); *see also infra* notes 153–159 and accompanying text. In addition to this scholarly article, Professor Creel, over many decades of strenuous professional commitment, has advanced judicial, scholarly and practical understanding of ICRA and its impact on individual rights and tribal sovereignty in significant and innovative ways. Many of the habeas cases that have been filed on the matter of the Indian Civil Rights Act are the result of Professor Creel's work, individually and in her supervisory capacity of students enrolled in the University of New Mexico School of Law's Southwest Indian Law Clinic. She is also generous in sharing her expertise with others who are engaged in this work at the tribal and federal levels, and I am one who is particularly grateful to her for those efforts.

[24] *See infra* notes 165–94 and 195–217 and accompanying text.

[25] *See, e.g.*, Payer v. Turtle Mountain Tribal Council, No. A4-03-105, 2003 WL 22339181, at *5 (D.N.D. Oct. 1, 2003) (termination and replacement of their roles by tribal council members from school where they served as elected board members and grant administrators after securing $29 million in federal funding did not constitute a detention; even where council terminated tribal judge who reinstated petitioners and punished another for attempting to enforce that order, tribal court was their only forum in which to seek remedy).

may be lost altogether. The ramifications to individuals are often devastating, and there can be an impact as well on the collective interests of the tribe.[26] This article explores the scope of the remedies available for federal redress under ICRA and the federal courts' response to jurisdictional challenges brought by tribes in an effort to remove cases from the boundaries of ICRA's habeas provision.

While some decisions have rendered interpretations of ICRA's habeas requirement commensurate in scope to that of habeas relief challenging custodial situations under federal and state authority, a number of decisions have limited federal court review of individual rights much more narrowly. Indeed, it may be argued that such interpretations virtually eviscerate Congressional intent in enacting ICRA. *Santa Clara Pueblo v. Martinez* put the brakes on federal review of ICRA's substantive rights, citing a Congressional policy toward deference to tribal sovereignty and the need for federal judicial restraint in encroaching on it; but it did not preclude federal court review of tribal violations of its substantive rights altogether. Nor does it warrant restrictions in federal review beyond those inherent in the habeas remedy itself.[27]

With some exceptions, lower court opinions since *Santa Clara Pueblo* have effectively denied relief to individuals in ways unanticipated by Congress or the Supreme Court. This has particularly been the case with respect to exclusion and enrollment cases wherein tribal officials, often pressured or induced by distribution of gaming revenues and/or efforts by individual tribal

[26] For some of the impacts, *see* Brief of Andrea M. Seielstad, as Amicus Curiae in Support of Petitioner at 6, Tavares v. Whitehouse (No. 17-429) 2017 WL 4857396, at *6.

[27] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978).

members to advocate for accountability of tribal officials, have sought to dis-enroll or exclude tribal members from tribal census rolls and services.[28] The Ninth Circuit, in recent cases, has exacted a particularly severe toll on the ability of individuals to seek redress for violations of rights guaranteed to them under ICRA.[29]

In many cases, the rejection of federal jurisdiction is premised upon a summary and abstract deference to tribal sovereignty concerns.[30] Federal courts, in those instances, often make general reference to a policy of deference to tribal sovereignty concerns without

[28] For a comprehensive analysis of the phenomenon of tribal disenrollment, *see* Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 383 (2015) ("Chiefly caused by the proliferation of Indian gaming revenue distributions to tribal members over the last 25 years, the rate of tribal disenrollment has spiked to epidemic proportions. There is not an adequate remedy to stem the crisis or redress related Indian civil rights violations."). Efforts to challenge these decisions abound, under ICRA and other actions. *See, e.g.*, Alto v. Black, 738 F.3d 1111 (9th Cir. 2013); Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010); Timbisha Shoshone Tribe v. Kennedy, 687 F.Supp.2d 1171 (E.D. Calif. 2009); Quair v. Cisco, 359 F. Supp. 948 (E.D. Calif. 2004).

[29] *See, e.g.*, Tavares v. Whitehouse, 751 F.3d 863, 876–77 (9th Cir. 2017), *cert. denied* 138 S. Ct. 1323 (2018). For a fuller discussion of the case and ways in which it limits jurisdiction under ICRA, *see infra* notes 107–25; 212–17 and accompanying text.

[30] *See, e.g.*, *id.* at 878 (leaving the remedy in the case to the tribal courts).

analyzing the particular sovereign interests or impacts that are present in any given case.[31]

Tribes are often treated as monolithic units for the purposes of application of federal law, bestowed with common attributes of sovereignty and the need for deference to it. However, not all exercises of sovereignty are similar or based on exercise of inherent or internal tribal sovereign interests. Sometimes actions that violate individual rights, may also damage a tribes' sovereign interests and ability to engage in self-determination as well. For example, where a tribe takes land set aside for the purpose of individual and family livelihood and residence to further private development interests, there may be a net loss to the community of livable spaces. In many cases, federal funds or legal interests are implicated and/or outside private financial or business enterprises are driving the tribal action in ways that are not necessarily in the interests of collective self-determination of a particular tribal nation. Sometimes personas acting as tribal officials may act outside the boundaries of recognized governance structures to the grave detriment of the community, entering into questionable financial arrangements, taking land, compromising tribal programs and services, and/or dis-enfranchising or dis-enrolling members critical to the long-term sustainability of the tribe itself. While it is true that restraint on federal court review may be warranted with respect to some intratribal disputes, denying federal review may also have a devastating impact not just on the inability of individuals to have ICRA's substantive rights be recognized and enforced but on the sovereignty and well-being of the tribe as a whole. In any case, as discussed more fully below, more exacting criteria for rejecting review in the name of sovereignty should be

[31] *See infra* notes 324–29 and accompanying text.

applied by the federal courts, with an eye toward maximizing the interests of the individuals involved as well as the tribal community.

Focusing on the ICRA's habeas provision under § 1303, this article analyzes and critiques federal court interpretation and application of the scope of ICRA's habeas relief since *Santa Clara Pueblo*. Part II establishes the background of ICRA and its habeas corpus provision. Part III sets forth the courts' interpretation of what it means to be detained for the purposes of ICRA's federal habeas relief, dividing cases into the different contexts in which the grounds for habeas have been denied as well as those where detention has been found to exist, i.e., from actual incarceration to exertion of supervisory control by tribal courts or officials to banishment and other forms of physical restraint. Part IV describes federal court interpretation of "detention" in the context of § 1303, delineating how the 9th Circuit and some lower court opinions have restricted the scope of detention beyond the scope afforded in the context of federal and state proceedings.

The article argues, in Part V, how these narrow interpretations are wrong. Not only do they misinterpret Congress' goal in enacting ICRA, virtually eliminating federal review in cases other than actual incarceration, but they may also do injustice to the goal of self-determination and deference to tribal sovereignty that is often articulated as a reason to decline jurisdiction. In deciding what weight to ascribe and how to incorporate the interests of tribal sovereignty in any particular case, federal courts should conduct a more exacting analysis of the circumstances. As articulated in the Conclusion such

analysis should include considerations of the harm exacted on the individual petitioners as well as the community at large, the nature and source of the authority of the tribal actors encroaching on petitioners' rights, or the impact on the underlying land base, enrollment or other core sovereign rights and interests.

II. ICRA Background and Congressional Policy and Intent

Through a series of hearings spread over a nearly eight-year period, Congress investigated the issue of Indian civil rights. It included testimony from native and non-Indian perspectives. A "broad picture of constitutional neglect [emerged]."[32] As summarized by the Supreme Court: "[Congress's] legislative investigation revealed that . . . serious abuses of tribal power had occurred in the administration of criminal justice."[33] In the words of one senator who participated:

> As the hearings developed and as the evidence and testimony was taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights . . . The Constitution simply was not applicable.[34]

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[32] Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 577 (1972).
[33] See *Santa Clara Pueblo*, 436 U.S. at 71.
[34] 113 Cong. Rec. 35,473 (1967) (statement of Sen. Roman L. Hruska).

In response to this realization, Congress exercised its plenary power over Indian affairs and enacted the Indian Civil Rights Act.[35] A central purpose of ICRA was to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'"[36] Pursuant to this objective, Congress granted individuals subjected to tribal governmental action certain enumerated rights, embracing for the most part the same protections evidenced in the First, Fifth and Fourteenth Amendments to the Constitution.[37]

In enacting these provisions, Congress evinced an intent to extend to members of tribes certain rights against abuses by tribal officers and governments. Those rights excluded from those protected by the U.S. Constitutional Bill of Rights include the establishment clause or separation of church and state, right to counsel for indigent clients, the guarantee of a republican form of

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[35] 25 U.S.C. §§ 1301-03, 1311-12, 1321-26 (2012). It was "enacted as a rider to the Civil Rights Act of 1968." Burnett, *supra* note 32, at 557.

[36] *Santa Clara Pueblo*, 436 U.S. at 61 (quoting S. Rep. No. 841, at 5–6 (1967)).

[37] 25 U.S.C. § 1302 (2016). They include the rights "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." 25 U.S.C. § 1302(a)(6) (2012). It also guarantees "due process," both procedural and substantive, and equal protection under law, grants a right to freedom of speech and assembly, and prohibits the taking of land for public use without just compensation. 25 U.S.C. §§ 1302(a)(1), 1302(a)(5), and 1302(a)(8).

government, the right to a jury trial in civil cases, or the right of indigent defendants appointed counsel in criminal cases.[38] As summarized in the Senate Report accompanying the legislation:

> Title II of the [Indian Civil Rights Act] would grant to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments, state governments, and the Federal government. Investigations have shown that tribal members' basic constitutional rights have been denied at every level.[39]

The rights encapsulated in § 1302 of ICRA must be adhered to by tribal governments and their officials. However, their enforcement is a key issue. Of course, tribes may provide their own means of redress through waivers of sovereign immunity and authorizing legal action in tribal courts. However, violations may be the basis for review in federal court under one and only one grounds for relief: habeas corpus. § 1303 of the ICRA provides: "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."[40] This language has been the subject of much judicial interpretation.

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[38] The statute does provide a right to counsel at defendant's expense. 25 U.S.C. § 1302(a)(6) (2016).

[39] *See, e.g.*, S. Rep. No. 841, at 10–11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1864.

[40] 25 U.S.C. § 1303 (2012).

A. Early Interpretation and Enforcement of ICRA

After its enactment, it was widely understood that ICRA gave the federal courts broad powers to adjudicate claims of civil rights violations by tribal officials and governments.[41] "The first case to interpret ICRA, *Dodge v. Nakai,*" involved "the Navajo Tribe's exclusion from tribal territory of a nonmember [] director of the reservation's legal services program."[42] It did not present a claim petition for writ of habeas corpus.[43] Rather, "[t]he *Dodge* court" based its jurisdictional authority upon "statutes granting federal jurisdiction in controversies involving federal questions, civil rights and writs of mandamuses."[44] On the merits, it found that the Navajo Tribal Council's actions violated multiple provision under ICRA.[45] It held that the summary nature of the exclusion order violated due process and violative of the plaintiff's right to freedom of speech:

> This action . . . constitutes an abridgment of free speech on the Navajo Reservation, both the freedom of speech of the lawyer who is representing his clients in a manner deemed acceptable to his employer, and

[41] *See* Robert Berry, *Civil Liberties Restraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 23–27 (1993) (detailing the interpretations applied by the courts during this time).
[42] *Id.* at 23–24 (1993).
[43] *Id.* at 24.
[44] *Id*.
[45] See id.

> the freedom of speech of the clients who seek out that lawyer to act as their spokesman in the community.[46]

The court held also that the exclusion order was a legislative act effecting a punishment that violated ICRA's prohibition against a bill of attainder.[47]

For the first ten years following ICRA's enactment, most federal courts followed the *Dodge* example, basing their authority in the federal jurisdictional statutes that Dodge relied upon.[48] They construed ICRA as waiving sovereign immunity in the context of alleged violations of its substantive provisions and "turned their attention to the issue of how closely interpretations of ICRA guarantees should parallel interpretations of similar constitutional guarantees."[49] As summarized by the Tribal Law and Policy Institute:

> During the ten-year period from ICRA's passage to the *Martinez* decision, federal courts heard approximately Eighty Cases involving the application of the ICRA. These cases covered many subjects: tribal

[46] Dodge v. Nakai, 298 F. Supp. 26, 33 (D. Ariz. 1969).
[47] *Id.* at 34.
[48] *See* Berry, *supra* note 41, at 24.
[49] *Id.* at 24–25 (1993) (discussing the history and interpretations of ICRA with respect to its impact on tribal sovereignty, cautioning against proposals that would expand ICRA's enforceability in federal courts as diminishing tribal sovereignty in favor of those that would increase funding to tribal courts and the encouragement of intertribal courts of appeals: "If Congress acts to widen the scope of federal appeals under ICRA it may well diminish tribal sovereignty and gain only an empty victory for civil liberties." *Id.* at 30).

> election disputes, reapportionment of voting districts on Indian reservations ("one man, one vote"), tribal government employee rights; land use regulations and condemnation procedures; criminal and civil proceedings in tribal courts; tribal membership and voting; tribal police activities, conduct of tribal council members and council meetings, and standards for enforcing due process of law and equal protection of the laws in tribal settings.[50]

A number of interpretive guidelines emerged during this time period, including that (1) the substantive provisions need not be interpreted identically to the Constitutional Bill of Rights, (2) tribal custom, tradition and culture should be considered in interpreting and applying ICRA; and (3) ICRA permits different treatment between Indians and non-Indians in some circumstances, i.e., with respect to tribal

[50] *The Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/icra.htm [https://perma.cc/DRX6-L6P6]. The specific cases are catalogued at *Indian Civil Rights Act Federal Court Cases 1968-1978*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/icra-cases.htm [https://perma.cc/4DJ5-F8RA] [hereinafter *Federal Court Cases 1968-1978*]; *see also* THE INDIAN CIVIL RIGHTS ACT AT FORTY 167 (Kristen A. Carpenter et al. eds., 2012); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality"*, 130 HARV. L. REV. F. 173, 182 (2017) (discussing the effect of the passage of the ICRA).

membership requirements.[51] Even where physical restraint was lacking, the courts intervened and reviewed claims of rights violations. Jurisdiction in these cases was premised on 28 U.S.C. § 1343 and 1331.[52]

B. *Santa Clara Pueblo v. Martinez*

This trend abruptly changed, however, in 1978, when the U. S. Supreme Court issued its *Santa Clara Pueblo* decision, defining for the first time its interpretation of the scope of federal remedial relief intended by Congress in enacting ICRA. In *Santa Clara Pueblo*, a female member of the tribe and her children brought against the Santa Clara Pueblo and its governor in federal court a civil suit under ICRA's equal protection provision,[53] seeking declaratory and injunctive relief against enforcement of a tribal ordinance that prohibited "tribal membership to children of female members who married outside the tribe but extend[ing] membership to

[51] *See Federal Court Cases 1968-1978*, *supra* note 50. Many courts also developed the rule that individuals should generally exhaust tribal remedies prior to proceeding in federal court. *Id.*

[52] *See, e.g.*, Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana, 529 F.2d 233, 236 (9th Cir. 1976) (applying 28 U.S.C. § 1343(a)(4) (2012) which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) To recover damages or to secure equitable or other relief under any Act of Congress for the protection of civil rights, including the right to vote.").

[53] 25 U.S.C. § 1302(a)(8) (2012) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.").

the children of male members" who married outside the tribe.[54]

In surveying the legal landscape in which the matter was situated, the court began by reviewing several primary tenets of tribal sovereignty. Specifically, the Court focused on the tribe's separate and independent sovereign status that pre-dated the constitution. Stated the court: "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." [55] It also noted Congress' plenary power to "to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[56] Acknowledged the Court: "Title I of the ICRA, 25 U.S.C. §§ 1301–1303, represents an exercise of that authority."[57] Furthermore, ICRA's enumerated rights in § 1302 clearly modified the substantive law applicable to the tribe.[58] The issue became whether ICRA implied a civil cause of action for injunctive and declaratory relief to enforce the

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[54] *Federal Court Cases 1968-1978*, *supra* note 50; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 n.2 (discussing the ordinance and the mechanism by which the respondent's children prevented from tribe membership).

[55] *Santa Clara Pueblo*, 436 U.S. at 56 (citing *Talton* v Mayes, 163 U.S. 376 (1896)).

[56] *Id.* at 56–57 (citing United States v. Kagama, 118 U.S. 375, at 379–381, 383–384 (1886); Cherokee Nation v. Hitchcock, 187 U.S. 294, 305–307 (1902).

[57] *Santa Clara Pueblo*, 436 U.S. at 57.

[58] *Id.* at 58.

provisions of § 1302, or whether Congress intended the relief in § 1303 to be more narrow.[59]

Ultimately, the Court concluded the latter.[60] Because of the well-established common law principle of tribal sovereign immunity, like states, the federal government and even foreign nations, tribes enjoy sovereign immunity from civil suits as an inherent attribute of sovereignty.[61] However, sovereign immunity is subject to waiver or Congressional abrogation.[62] The extent of Congress' abrogation in ICRA was at issue in *Santa Clara Pueblo*.[63]

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[59] See id.

[60] *See id.* at 59 (holding that sovereign immunity protected the tribe from the suit).

[61] Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, 37 TULSA L. REV. 661, 666 (2002). Since 2014, the author has also represented petitioners in another ICRA case that has proceeded in the tribal and appellate courts of the Bishop Paiute Tribe, the federal district court, Eastern District of California, and the 9th Circuit. See Napoles v. Rogers, No. 16-cv-01933-DAD-JLT, 2017 WL 2930852 (E.D. Cal. 2017), aff'd, 743 F. App'x 136 (9th Cir. 2018). Squarely at issue in the federal portion of the case is the scope of § 1303's habeas provision and whether the requisite conditions of "detention" sufficient to warrant habeas exist. The following discussion about § 1303 and its scope liberally draw from briefs submitted in that appeal. Beyond this note, particular quotes and citations will not be provided, and some passages may be verbatim.

[62] *Santa Clara Pueblo*, 436 U.S. at 56–58; *see also* Michigan v. Bay Mills Indian Cmty, 134 S.Ct. 2024, 2032 (2014) (discussing the partial abrogation in the IGRA); United States v. Oregon, 657 F.2d 1009, 1012–13 (9th Cir. 1981).

[63] *Santa Clara Pueblo*, 436 U.S. at 56-58; *see also Bay Mills Indian Cmty.*, 134 S.Ct. at 2032; United States v. Oregon,

Nothing in the plain language of ICRA, or the legislative history, concluded the Court, indicated a congressional intent to waive tribes' sovereign immunity except as provided to review a detention under § 1303's habeas provision.[64] No suits for declaratory or injunctive relief could be implied against the tribe; nor, could they be applied against the governor, who was not protected by tribal immunity. In reaching its conclusion about why the governor could not be sued for injunctive and declaratory relief, the Court pointed to congressional language and legislative history that emphasized the tribe's interest in self-government and self-determination:[65]

> Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S. Rep. No.

657 F.2d 1009, 1013 (9th Cir. 1981). *But see* Dement v. Oglala Sioux Tribal Court, 874 F.2d, 510, 515 (8th Cir. 1989). As explained by the Eighth Circuit: "In [*Santa Clara Pueblo*], the Supreme Court held that federal court enforcement of the ICRA is limited to habeas corpus jurisdiction on behalf of persons in tribal custody. Furthermore, the ICRA cannot be directly enforced against Indian tribes because they are shielded from suit by sovereign immunity. The Act, however, may be enforced against officers of the tribe." *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 59).

[64] *Santa Clara Pueblo*, 436 U.S. at 58–59.

[65] *Id.* at 62–70.

> 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion. Indeed its description of the purpose of Title I, as well as the floor debates on the bill, indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.[66]

Thus, since *Santa Clara Pueblo*, federal courts have been required to engage in the inquiry remaining after *Santa Clara Pueblo*: mainly, whether the conditions sufficient to invoke federal jurisdiction under § 1303's habeas provision exist. The way this should happen and the scope of § 1303 was left to lower courts to interpret since *Santa Clara Pueblo.*

One issue of debate is the extent to which concerns for tribal sovereignty should be construed in the analysis. The Supreme Court in *Santa Clara Pueblo* elevated that concern to a counter-vailing policy concern. As explained by the Supreme Court in *Santa Clara Pueblo*: "In addition to its objective of strengthening the

[66] *Id.* at 69–70 (footnotes and citing authority omitted).

position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'"[67] How and to what extent that should be a factor, however, is a significant interpretive issue moving forward; and, as set forth more fully below, it is not something that the federal courts have sufficiently articulated.

III. Federal Court Interpretation of Detention under § 1303

The operative interpretive requirement for federal review of tribal habeas cases, therefore, is that there be circumstances constituting a detention. For those whose rights have been violated by tribal action or officials, only those individuals who are physically detained to a level sufficient to invoke habeas relief may seek federal enforcement of the substantive civil rights guaranteed under ICRA. For those whose rights have been violated but who have not been detained, remedies exist only to the extent the offending tribal government provides them.[68]

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[67] *Id.* at 62 (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)); *see* Fisher v. District Court, 424 U.S. 382, 391 (1976).

[68] While some tribes provide for direct civil rights actions, others do not. This is true also with respect to the extent to which ICRA provisions may be enforced within tribal criminal or quasi-criminal proceedings. Although details about what is provided by way of ICRA enforcement within tribal governments goes beyond the scope of this paper, a number of scholars have made efforts to survey those mechanisms. See, e.g., Klint A. Cowan, *International*

It is important to note at the outset that the determination of whether a substantive right has been violated must be ascertained by the federal court once it is determined there is jurisdiction, irrespective of the particular right involved.[69] Jurisdiction is determined

Responsibility for Human Rights Violations by American Indian Tribes, 9 YALE HUM. RTS. & DEV. L.J. 1, 41 (2006); Robert J. Mccarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 498–504 (1998); Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793, 818 (2006) (internal citation omitted) (citing evidence that 2,000 tribal members in California have been disenrolled from their tribes without cause); John Yankovich, *Without a Remedy: The Effectiveness of the Indian Civil Rights Act*, LAW J. FOR SOC. SCI. (Apr. 29, 2015), https://lawjournalforsocialjustice.com/2015/04/29/without-a-remedy-the-effectiveness-of-the-indian-civil-rights-act/ [https://perma.cc/SL49-P5FV]; Harold Monteau, *Indian Civil Rights Act Has Done Nothing for Individual Indians' Rights*, INDIAN COUNTRY TODAY (July 2,2012), https://newsmaven.io/indiancountrytoday/archive/indian-civil-rights-act-has-done-nothing-for-individual-indians-rights-b4W71ciTcEi98TDOUMkwuA/ (citing case where a tribal member was denied counsel, prosecutor acted as defense counsel, and tribe failed to read charges against him until day of trial) [https://perma.cc/4ZJZ-57AA]; Tom Robertson, *Tribal Justice – But Not for All*, MINN. PUB. RADIO (April 2001), http://news.minnesota.publicradio.org/projects/2001/04/brokentrust/robertsont_tribaljustice-m/index.shtml (reporting claims by tribal members of exclusion from reservation without any hearing, lack of separation of powers between judicial, legislative and executive branches of tribal government, leading to injustices) [https://perma.cc/P5J5-FA79]].

[69] This is important clarification because this point sometimes gets improperly conflated in the jurisdictional analysis. For example, in *Napoles v. Rogers*, the district court

solely by whether and to what extent a detention has occurred sufficient for invoking federal habeas review under ICRA's § 1303 and interpretative case law.[70] Section 1302 clearly modifies the substantive law applicable to the tribes.[71] The merits of the substantive rights violations are a separate evidentiary stage in the life of a habeas action.[72] If there is jurisdiction, the court then must ascertain the merits of whether a rights violation occurred and determine what remedies to impose. That is a separate inquiry that must be undertaken by the federal court once the jurisdiction for habeas is established.

Also distinct from the issue of jurisdiction is the actual relief that may be granted through habeas. Discharge from custody, of course, is essential in habeas. However, it is not the only remedy that has historically

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dismissed the habeas petition, in part, because of a belief that there was no authority under "§ 1303 [that] gives federal courts sitting in habeas the jurisdiction to resolve intra-tribal land ownership disputes." *Napoles v. Rogers*, No. 16-cv-01933-DAD-JLT, 2017 WL 2930852, at *11 (9th Cir. Nov. 21, 2018), *aff'd*, 743 Fed.Appx. 136 (9th Cir. 2018). ICRA does, however, prohibit tribes from taking land for public use without just compensation and has a due process clause as well. 25 U.S.C. §§ 1302(a)(5), (a)(8) (2012). The court, therefore, would first have to determine whether petitioners had been "detained" under § 1303. Then, they would have to make findings about the alleged substantive violations, including those that involved land or takings.

[70] *Santa Clara Pueblo*, 436 U.S. at 57–58.

[71] *Id.* at 59.

[72] 25 U.S.C. § 1302 (2012); 20 AM. JUR. TRIALS 1D *Federal Habeas Corpus Practice* §§ 28–51 (1973).

been granted.[73] Habeas corpus has been used to dismiss charges, order new trials or appellate process, direct appointment of counsel, remedy cruel or inhuman conditions of confinement.[74] Even if unconditionally released by custodial authorities from an unconstitutional confinement after the filing of a petition for habeas corpus, a person "may nevertheless be afforded relief in the nature of a declaratory judgment that his conviction was void, in order to remove the stigma and disabilities that would otherwise attach by reason of his conviction."[75]

A. Habeas Under § 1303

To invoke federal habeas relief under the ICRA, one whose rights under ICRA have been violated necessarily must establish a detention or, "a severe actual or potential restraint on liberty."[76] Actual imprisonment, of course, is the most fundamental basis for habeas jurisdiction. The precise circumstances in which that standard is met beyond imprisonment, however, has been a primary focus of judicial decision-making in cases interpreting ICRA as well as the other federal habeas statutes requiring a petitioner to be "in custody."[77] Outside of the ICRA context, as discussed in detail below, it has been widely acknowledged that actual physical imprisonment is not a jurisdictional

[73] 20 AM. JUR. TRIALS 1D *Federal Habeas Corpus Practice* § 52 (1973) ("the notion that the only relief available is discharge from custody has been abandoned by the Supreme Court.").
[74] *Id*. § 55.
[75] *Id*. (citing Carafas v. LaVallee, 391 U.S. 234 (1968)).
[76] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996).
[77] See, e.g., id.

prerequisite to habeas review.[78] With respect to ICRA, however, the federal courts have not embraced a universal view of the scope of ICRA's "detention" requirement. The majority of the federal circuits have determined that the "[t]erm 'detention' [used in the ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts."[79] As described in more detail below, the Ninth Circuit and some lower courts, however, have suggested that the scope under ICRA is actually narrower.

B. Scope of Custody in the Context of State and Federal Action

"In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail."[80] However, the remedy also served to provide judicial review in other situations limiting individuals' liberty. In *Hensley v. Municipal Court*, the Supreme Court explained:

> The custody requirement of the habeas statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality

[78] *See* Jones v. Cunningham, 371 U.S. 236, 240 (1963).
[79] Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010) (citing Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001)).
[80] *Jones*, 371 U.S. at 238.

> and federalism, its use had been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.[81]

In *Jones v. Cunningham*, the Supreme Court also stated: "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints that are not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."[82] *Jones* was a case in which an individual used habeas to challenge the conditions of parole, and the court acknowledged that parole could be grounds for habeas, depending on the conditions and consequences upon violating it.[83] In *Jones*, the Supreme Court detailed a number of examples that "show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II, c. 2—the forerunner of all habeas corpus acts—as permitting relief only to those in jail or like physical confinement."[84] For example, it was noted that the English courts provided remedies in habeas to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will since she was not "at her liberty to go where she please(d)."[85] Relief in habeas corpus was also held to be appropriate for an indentured

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[81] Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).
[82] *Jones,* 371 U.S. at 240.
[83] *Id.* at 243.
[84] *Id*. at 239.
[85] *Id.* at 239–40 (citing Rex v. Clarkson (1722) 93 Eng. Rep. 625; 1 Str. 444 (K.B.) (holding that the test for habeas was simply whether she was "at her liberty to go where she please(d)")).

18-year-old girl who had been assigned by her master to another man "for bad purposes" as well as for a parent to obtain his children from the other parent despite the fact that the children were not "not under imprisonment, restraint, or duress of any kind."[86]

Similar examples were noted by the Court regarding habeas in the United States. For example, courts have widely held that habeas corpus is available to aliens seeking entry into the United States, even though they were free to go elsewhere in the world.[87] It has also been regarded as the appropriate procedural method of questioning the legality of enlistment or induction into the military.[88] And, as in English courts, habeas has been repeatedly used in state courts by parents disputing over custody of their children.[89]

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[86] *Jones*, 371 U.S. at 239 (internal citations omitted).

[87] *Jones,* 371 U.S. at 239 (citing Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) (explaining that, even though the he was free to go anywhere else, "his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950); United States v. Jung Ah Lung, 124 U.S. 621, 626 (1888)).

[88] *See, e.g., Ex parte* Fabiani, 105 F. Supp. 139, 144 (E.D. Pa. 1952); United States *ex rel.* Steinberg v. Graham, 57 F. Supp. 938, 942 (E.D. Ark. 1944).

[89] *Jones,* 371 U.S. at 240 (citing Ford v. Ford, 371 U.S. 187 (1962); Boardman v. Boardman, 135 Conn. 124, 138 (1948); Barlow v. Barlow, 141 Ga. 535, 536—37 (1914); In re Swall, 36 Nev. 171, 174 (1913) ("the question of physical restraint need be given little or no consideration where a lawful right is asserted to retain possession of the child")); *see*

It is thus well established with respect to the federal "in custody" requirement that actual *physical* custody is not a jurisdictional prerequisite for federal habeas review. Explains the Supreme Court:

> Of course, [the] writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—*the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty*.[90]

What is critical under the precedent of federal habeas law is that the restrictive government action create an onerous physical and geographical constraint of "special urgency," or even threat of it under supervised control.[91] Also emphasized has been the idea that the petitioners' court- or government-ordered or imposed restraints be "not shared by the public generally."[92] In summary, custody for the purposes of habeas corpus relief involves "severe restraints on [a person's]

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also In re Hollopeter, 52 Wash. 41, 43 (1909) (holding that the husband was entitled to release of his wife from restraint by her parents); *Ex parte* Chace, 26 R.I. 351, 358 (1904) (holding that the wife was entitled to husband's society free of restraint by his guardian).

[90] *Jones*, 371 U.S. at 243 (emphasis added).

[91] Hensley v. San Jose Dist. Mun. Court, 411 U.S. 345, 351 (1973).

[92] *Id*. (quoting Jones, 371 U.S. at 240).

individual liberty,"[93] even restraints that fall "outside conventional notions of physical custody."[94]

As a result of this broad and historically-derived understanding of habeas, federal habeas jurisdiction has been established in a wide array of diverse circumstances. Historically, as indicated above, "[c]onfinement under civil and criminal process . . . Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals . . . as well as those under military control may all become proper subjects of relief by the writ of habeas corpus."[95]

With respect to matters implicating judicial action, situations have included orders of personal recognizance,[96] probation,[97] suspended sentences carrying a threat of future imprisonment,[98] a requirement to appear in court and not depart the state

[93] *Hensley,* 411 U.S. at 351.
[94] Edmunds v. Won Bae Chang, 509 F.2d 39, 40 (9th Cir. 1975).
[95] Wales v. Whitney, 114 U.S. 564, 571 (1885).
[96] *Hensley,* 411 U.S. at 351.
[97] United States *ex rel.* B. v. Shelly, 430 F.2d 215, 217–18 n.3 (2d Cir. 1970).
[98] Sammons v. Rodgers, 785 F.2d 1343, 1345 (5th Cir. 1986) (per curiam).

without permission,[99] and an order to attend alcohol counseling.[100]

Habeas relief also has been held to be central to challenges of executive detention as well, during times of war as well as peace. For example, the Supreme Court has entertained habeas petitions of admitted enemy aliens convicted of war crimes during a declared war and held in the United States[101] and its insular possessions,[102] and of an American citizen who planned an attack on military installations during the Civil War.[103] Neither citizenship nor territoriality have been determined to be essential to the exercise of the writ. Most recently, the Court determined that foreign citizens captured and transported to Guantanamo Bay, Cuba to be detained were eligible to have their constitutional claims reviewed under habeas.[104] The degree of dominion and control exercised by the United States was sufficient to trigger habeas jurisdiction, irrespective of the fact that

[99] Justices of Bos. Mun. Court. v. Lydon, 466 U.S. 294, 301 (1984) (holding that an obligation to appear in court and requirement that petitioner not depart the state without the court's leave demonstrated the existence of restraints on the petitioner's personal liberty "not shared by the public generally").

[100] *See also* Dow v. Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted "custody" because requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do.").

[101] *Ex parte* Quirin, 317 U.S. 1, 18-19 (1942).

[102] *In re* Yamashita, 327 U.S. 1, 4-5 (1946).

[103] *Ex parte* Milligan, 71 U.S. 2, 10 (1866).

[104] Rasul v. Bush, 542 U.S. 466, 480 (2004).

ultimate territorial sovereignty remained that of Cuba.[105] This case has particular applicability in the tribal context to the extent Indian tribes remain dependent sovereign nations under the ultimate authority and trusted responsibility of the United States. So, too, do the cases striking down denaturalization orders of United States citizens as a punishment for military desertion or other misconduct.[106]

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[105] *Id.* at 482 (illuminating how the scope of the present day habeas remedy is rooted in the common law: "Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" (citing *Ex parte* Mwenya, [1960] 1 QB 241 at 303 (C.A)).

[106] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 92–93 (1958) (reversing as unconstitutional a denial of a passport because a citizen's citizenship was revoked in a court martial proceeding as a punishment for military desertion: "Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. . . In time of war the citizen's duties include not only the military defense of the Nation but also a full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is

C. Detention Under ICRA's § 1303

Federal courts have interpreted ICRA's "detention" in a variety of contexts, creating opportunities to examine the scope of congressional definition of the term. There is virtually unanimous agreement that "a severe actual or potential restraint on liberty" is necessary for jurisdiction under § 1303.[107] A relatively minor point of departure has emerged in their interpretation of the scope of that requirement – specifically, with respect to whether the concept of "detention" in § 1303 was intended to be interpreted the same as that of the "in custody" requirement of the other federal habeas statutes.

The majority of circuits and district courts have agreed that though "actual physical custody is not necessarily a jurisdictional requirement for habeas

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secure. On this ground alone the judgment in this case should be reversed."); Klapprott v. United States, 335 U.S. 601, 611–12 (1949) (revoking citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes. The Second Circuit cited both of these cases and their rationales in holding permanent banishment of tribal members to constitution a "detention" under ICRA's habeas provision. *Poodry*, 85 F.3d at 895-96.

[107] *See Poodry*, 85 F.3d at 880; *see also* Jeffredo v. Macarro, 599 F.3d 913, 919 (9th Cir. 2010) (citing *Poodry*, 85 F.3d at 880 for the proposition that "§ 1303 does require 'a severe actual or potential restraint on liberty'" and showing that the Ninth Circuit has embraced this standard as well); Tavares v. Whitehouse, 851 F.3d 863, 879 (9th Cir. 2017) (Wardlaw, J., concurring in part and dissenting in part); Shenandoah v. Halbritter, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003) (quoting *Poodry* for the same proposition as in *Jeffredo*, 599 F.3d at 919).

review," the "[t]erm 'detention' [used in the ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts."[108] However, selected judicial decisions have suggested a distinction between "detention" and "custody." In *Tavares v. Whitehouse*, the Ninth Circuit suggested that, at least in the context of that case, "detention" under § 1303 was a subset of "custody" and, hence, more narrow in scope.[109] Finding that a temporary exclusion from tribal lands and services was insufficient to warrant federal habeas jurisdiction, the court stated: "We view Congress's choice of 'detention' rather than 'custody' in § 1303 as a meaningful restriction on the scope of habeas jurisdiction under the ICRA . . . But to the extent that the statute is ambiguous, we construe it in favor of tribal sovereignty."[110] In rendering that determination, the

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[108] *Jeffredo*, 599 F.3d at 918 (citing Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001)); Scudero v. Moran, 230 F. Supp. 3d 980, 984 (D. Alaska 2017) (citing *Jeffredo*, 599 F.3d at 918 (9th Cir. 2010); *see* Valenzuela v. Silversmith, 699 F.3d 1199, 1203 (10th Cir. 2012) (holding that "[t]he 'detention' language in § 1303 is analogous to the 'in custody' requirement contained in the [other] federal habeas statute[s]." (quoting Walton v. Tesuque Pueblo, 443 F.3d 1274, 1279 n.1 (10th Cir. 2006))).

[109] *Tavares*, 851 F.3d at 871, *cert. denied*, 138 S. Ct. 1323 (2018) (stating the argument which was the basis for Tavares' petitioners' appeal to the Supreme Court); *see* Petition for Writ of Certiorari, *Tavares*, 2017 WL 4251148 (No. 17-429); *see also* Brief for Seielstad as Amici Curiae Supporting Respondents, Tavares v. Whitehouse, 138 S. Ct. 1323 (2018) (No. 17-429), 2018 WL 1460776.

[110] *Tavares*, 851 F.3d at 876–77 (citing *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010); Ramah Navajo Sch. Bd.,

court presumes without actual analysis that the sovereign interests are best secured by declining jurisdiction based upon what it characterized as a temporary exclusion of petitioners from tribal lands and services.

It is yet unclear how the Ninth Circuit will proceed in future cases that implicate the scope of § 1303. The detention/custody distinction is counter to other well-established Ninth Circuit precedent as well as that of every other circuit that has examined the issue. As determined by the Ninth Circuit in another of its cases: "The term 'detention' in the [ICRA] statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts."[111] The decisions of the Tenth Circuit have similarly rejected this contention.[112] So, too, have the Third and Sixth Circuits.[113]

Inc. v. Bureau of Revenue, 458 U.S. 832, 846 (1982); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 113 (2017)).

[111] *Jeffredo*, 599 F.3d at 918; *see also* Boozer v. Wilder, 381 F.3d 931, 934 n.2 (9th Cir. 2004) ("Detention [as used in 25 U.S.C. § 1303] is interpreted with reference to custody under other federal habeas provisions."); *Moore v. Nelson,* 270 F.3d 789, 791 (9th Cir. 2001) ("There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other habeas statutes." (citing Poodry v. Tonawanda, 85 F.3d 874, 891 (2nd Cir. 1996))).

[112] *See, e.g.*, *Poodry,* 85 F.3d at 880; *see also* Valenzuela v. Silversmith, 699 F.3d 1199, 1203 (10th Cir. 2012) ("We have recognized that the 'detention' language in §1303 is analogous to the 'in custody' requirement contained in the other federal habeas statutes."); Dry v. CFR Court of Indian Offenses for Choctaw Nation, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999).

[113] *See, e.g.*, Kelsey v. Pope, 809 F.3d 849, 854 (6th Cir. 2016) ("[H]abeas claims brought under the Indian Civil Rights Act, 25 U.S.C. §1303, are most similar to habeas actions arising

The *Tavares* majority deviates from this precedent and the language used by Congress in its various habeas statutes in its suggestion that "detention" and "in custody" are used distinctively between tribal and state or federal systems. As noted by the dissent, the terms "detention" and "in custody" are used interchangeably in the precedents on habeas.[114] For instance, in a non-ICRA case the Third Circuit relied on the Second Circuit's analysis of "detention" in ICRA in support of its holding that a person sentenced to perform five hundred hours of community service was "in custody."[115] The *Tavares* majority also suggests that the use of the word "detention" in § 1303 is significant because, by contrast, the word "custody" is used in "every §" of federal habeas statutes 28 U.S.C. §§ 2241(c)(1)–(4), 2254(a), and 2255(a).[116] However, in actuality, the word "custody" does not appear in every habeas statute.[117] The word "detention" *also* appears frequently in most sections of the federal habeas statutes.[118] There

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under 28 U.S.C. §2241") (citing *Poodry*, 85 F.3d at 890–91); Barry v. Bergen Cty. Prob. Dep't, 128 F.3d 152, 160–61 (3d Cir. 1997) (relying, without citing, on the *Poodry* analysis of "detention" under ICRA in analyzing "in custody" under §2254(a)).

[114] *Tavares*, 851 F.3d at 880 (Wardlaw, J., concurring in part and dissenting in part).

[115] *Id.*; *see also Barry,* 128 F.3d at 161.

[116] *Tavares*, 851 F.3d at 880 (Wardlaw, J., concurring in part and dissenting in part).

[117] *See* 28 U.S.C. §§ 2245, 2249, 2253 (referring to "detention" only).

[118] *See* 28 U.S.C. §§ 2241, 2242, 2243, 2244, 2255 (2012) (referring to both "detention" *and* "custody,"

is no indication in any part of any section that the terms might have distinct meanings; if anything, the statutes suggest, as a whole, that "detention" and "custody" are interchangeable. As explained convincingly by the Second Circuit:

> We find the choice of language unremarkable in light of references to "detention" in the federal statute authorizing a motion attacking a federal sentence, *see* § 2255, as well as in the procedural provisions accompanying §2241, *see* §§2242, 2243, 22 44(a), 2245, 2249, 2253. Congress appears to use the terms "detention" and "custody" interchangeably in the habeas context. We are therefore reluctant to attach great weight to Congress's use of the word "detention" in § 1303.[119]

The legislative history similarly does not support a finding of a distinction between the two terms, surely not one limiting the concept in the tribal context. In fact, as accurately pointed out by the dissent in *Tavares*, the language used in § 1303, "legality of the detention of an Indian," is the same language used in the case of *Colliflower v. Garland*.[120] *Colliflower* is significant because it was referenced in the legislative history leading to the enactment of ICRA and provided the basis

interchangeably); *cf.* 28 U.S.C. §§ 2252, 2254 (2012) (referring to "custody" only).

[119] *Poodry,* 85 F.3d at 890–91.

[120] Colliflower v. Garland, 342 F.2d 369, 371 (9th Cir. 1965), *overruled by* United States v. Wheeler, 435 U.S. 313 (1978); *see* Davis v. Muellar, 643 F.2d 521, 532 n.13 (8th Cir. 1981).

for Congress' understanding of tribal detention orders.[121] It was natural, therefore, for Congress to use its wording when seeking to clarify whether habeas review or direct appeal and de novo trial of criminal cases would apply under ICRA.[122]

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[121] Specifically, in Senate Bill 962, the bill that initially authorized appeals of tribal court criminal convictions to federal court with trials de novo on appeal, Senator Erwin identified *Colliflower* as "forward thinking" and recommended that its standard review under habeas corpus be applied to all tribal court decisions, whether or not the tribal court functioned as a creation of the Bureau of Indian Affairs or were governed by the BIA's model code. Burnett, *supra* note 32, at 592 n.201, 592–93. As the Second Circuit acknowledged: Congress "frequently invoked [*Colliflower*] with approval during the 1965 [Subcommittee on Constitutional Rights of the Senate Judiciary Committee] hearings" that preceded the ICRA's enactment, indicating an intent for the ICRA's habeas provision to be as broad as, but "no broader than," its federal counterparts. *See Poodry*, 85 F.3d at 891, 893 (internal citations omitted); *see also Tavares*, 851 F.3d at 881, n.4 (Wardlaw, J., concurring in part, dissenting in part) ("My point is not that *Colliflower* is authoritative precedent for the exact issue before us. If it were, such a lengthy decision would be unnecessary. But given that there is, as the majority opinion notes, little other legislative history for us to consider, *Colliflower* is relevant because it apparently guided Congress's understanding that the habeas provision it was enacting within ICRA would be as broad as the federal habeas statutes that had long been part of the nation's laws. The majority opinion does not respond to this point." (internal citation omitted)).

[122] *Tavares,* 851 F.3d at 881 (Wardlaw, J., concurring in part, dissenting in part).

After careful analysis of the particular Indian court in place in *Colliflower*, most notably that it was a creature of the federal government, the Ninth Circuit held that "it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."[123] The main point of the analysis, in fact, was that the tribal court involved in *Colliflower* that issued the relevant order was an Indian court created by and still operating under the authority of the federal government – an extension of federally exercised jurisdiction, therefore. A careful reading of the case and discussion of the case in ICRA's legislative history, therefore, reveals a congressional intent to render ICRA's habeas provisions to be identical in scope to its federal counterparts.[124] The best interpretation of ICRA in light of *Colliflower* was that Congress was clarifying that habeas could be used to test the legality in federal court of tribal court orders, whether a creature of the federal government or the tribe's own inherent sovereignty, to the extent permitted the federal habeas statutes that apply to state or federal action.

In short, there really is no basis for the proposition that "detention" for the purposes of habeas in

[123] *Colliflower*, 342 F.2d at 379.

[124] *Poodry*, 85 F.3d at 891 (citing *Hearings on S. 961–968 and S.J. Res. 40 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee,* 89th Cong., 1st Sess. (1965) at 2, 24–25, 66–67, 91–92, 95, 220, 227 (hereinafter "*1965 Senate Hearings* "); *Senate Committee on the Judiciary, Summary Report of Hearings and Investigations Pursuant to S. Res. 194,* 89th Cong., 2d Sess. (1966) (hereinafter "*1966 Summary Report* ") at 13; *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968) at 47, 112-13 (hereinafter "*1968 House Hearing* ")).

ICRA should be more narrowly construed than that required in federal or state courts, and *Tavares* is out of step with other opinions of the Ninth Circuit as well as the uncontroverted decisions in all other federal circuits.[125]

D. Applicability of ICRA's Habeas Provision

It is sometimes argued that habeas applies only in the context of criminal proceedings. This argument was carefully mapped out and refuted by the Second Circuit in *Poodry v. Tolawanda Band*.[126] Proponents of this argument pointed to language in *Santa Clara Pueblo* describing habeas review as the exclusive vehicle for "federal-court review of tribal criminal proceedings."[127] Additional support has been construed from the fact that the first set of Indian rights bills, introduced in 1964 and

[125] *See Tavares*, 851 F.3d at 866–67 (distinguishing "detention" and "custody"). Indeed, these arguments were made in the appeal to the Ninth Circuit in *Napoles* as well as the petition for certiorari filed to the Supreme Court in the *Tavares* case. *See* Petition for a Writ of Certiorari at 11–20, Tavares v. Whitehouse, 138 S. Ct. 1323 (2018) (No. 17-429); Brief Amicus Curiae of the Goldwater Institute in Support of Petitioner at 13, Tavares v. Whitehouse, 138 S. Ct. 1323 (2018) (No. 17-429) ("ICRA's habeas review provision is *broader* than federal habeas."); Opening Brief for Appellant at 22–27, Napoles v. Rogers, 743 F. App'x 136 (9th Cir. 2018) (No. 17-16620).

[126] *Poodry*, 85 F.3d at 887–89 (although, because the court found the sanction in *Poodry* to be "criminal," the court did not ultimately decide the extent to which "civil" sanctions would qualify for habeas review. *See id.* at 888).

[127] *Id.* at 886 (citing *Santa Clara Pueblo,* 436 U.S. at 67).

1965, would have permitted the direct appeal to federal district court of any conviction "in any criminal action hereafter commenced in an Indian court." [128] Finally, some meaning was construed from an opinion in the context of state habeas regarding habeas over child custody proceedings wherein habeas jurisdiction was rejected for being outside of state court criminal convictions resulting in substantial physical constraints.[129]

Notwithstanding these arguments, "[t]he relevance of [the distinction between civil and criminal proceedings]"[130] is not easily borne out by the language of § 1303, which defines "detention by order of an Indian tribe" as the sole jurisdictional prerequisite for federal habeas review and does not explicitly limit its scope to the criminal context.[131] The legislative history of ICRA supports this conclusion as well. The final bill emerged from consideration of several previous bills. While one expressly referenced criminal proceedings, the others were more broad in scope; nothing in the bill language indicated an intent to limit the provision explicitly and exclusively to criminal proceedings.[132]

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[128] *Poodry*, 85 F.3d at 887–88 (citing S. 962, 89th Cong., 1st Sess. (1965) (emphasis added)); *see also* S. 1843, 90th Cong., 1st Sess. § 201(a), 113 CONG. REC. 13,474 (1967); S. 3048, 88th Cong., 2d Sess., 110 CONG. REC. 17,329 (1964).

[129] *Poodry*, 85 F.3d at 887 (citing Lehman v. Lycoming Cty. Children's Serv., 458 U.S. 502 (1982)).

[130] *Id*.

[131] *Tavares*, 851 F.3d at 871.

[132] ICRA's habeas provision appeared in the original S. 1843 in addition to remedial relief in the form of direct appeal of convictions in criminal actions. *See* S. 1843, 90th Cong., 1st Sess. § 103, 113 CONG. REC 13,474 (1967). The direct appeal option was removed from the final version, however. Because the original S. 1843 contained both direct appeals of criminal convictions and habeas relief, "it is not accurate to say that

Moreover, the congressional hearings on the statute clearly reveal a concern for matters other than criminal.[133] In the words of the Second Circuit: "To put the matter simply: it is not possible to draw from [ICRA's] legislative history a definitive conclusion as to whether Congress intended that habeas review be restricted to criminal convictions, or whether other circumstances of 'detention' by a tribal court order could trigger habeas review."[134] Nor did the Supreme Court in *Santa Clara Pueblo v. Martinez* speak to the scope of ICRA's habeas provision in such a manner.[135]

Courts addressing the issue have looked to the punitive and restrictive nature of the sanctions or conduct leading to the request for habeas relief irrespective of whether it was classified as criminal *per*

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the habeas provision *replaced* the section permitting a direct appeal; the latter was simply eliminated." *Poodry,* 85 F.3d at 888. The Senate Judiciary Committee Report discussing the removal of the direct appeal section, moreover, does not illuminate a specific reason for doing so. *See* S. REP. NO. 841, 90th Cong., 1st Sess. (1967).

[133] *See, e.g.,* Hearings on H.R. 15419, 15122, S. 1843 Before a Subcomm. of *Indian* Affairs of the Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968); see also Solomon v. La Rose, 335 F. Supp. 715, at 718–21 (D. Neb. 1971) (discussing the deprivation of Indian rights in matters of religion, taxation, free speech and tribal membership as well as in criminal proceedings). This is borne out also by the final legislative inclusion of such freedoms as well as the prohibition against the taking of property without due process or for a public use without just compensation. 25 U.S.C. § 1302 (2012).

[134] *Poodry,* 85 F.3d at 888.

[135] *Id.* at 887 (citing *Santa Clara Pueblo*, 436 U.S. at 67).

se.[136] Some explicitly have held, even in the absence of formal criminal prosecutions, that banishment and even disenrollment by tribal council action constitute a

[136] In *Hensley v. Municipal Court,* the Supreme Court determined federal habeas review to be invoked by an order of personal recognizance requiring petitioner to appear at times and places as ordered by any court or magistrate and other restraints "not shared by the public generally." 411 U.S. at 351 (quoting Jones v. Cunningham, 371 U.S. 236, 240).
A number of other cases have held habeas to be the appropriate remedy for other forms of judicial superintendence and control. *See, e.g.*, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 301 (1984) (holding that the obligation to appear in court and the requirement that petitioner not depart the state without the court's leave demonstrated the existence of restraints on the petitioner's personal liberty "not shared by the public generally") (quoting *Hensley*, 411 U.S. at 351); Sammons v. Rodgers*,* 785 F.2d 1343, 1345 (5th Cir.1986) (per curiam) (holding that a suspended sentence carrying a threat of future imprisonment was sufficient for habeas review); United States *ex rel.* B. v. Shelly*,* 430 F.2d 215, 217–18 n.3 (2d Cir. 1970) (holding that probation can give rise to a non-frivolous habeas petition). The Ninth Circuit has held that that a requirement to attend fourteen hours of alcohol rehabilitation constituted "custody" because requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do." Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam); *see also* Durbin v. California, 720 F.3d 1095, 1096 (9th Cir. 2013) (recognizing validity of habeas petition to challenge parole term of only two years); Barry v. Bergen Cty. Prob. Dep't, 128 F.3d 152, 160–61 (3d Cir. 1997) (holding that a sentence to 500 hours of community service met the requirement).

punitive sanction sufficient to implicate ICRA's habeas provision.[137] As explained by the district court in *Quair*:

> The court concludes that the disenrollment of a tribal member and the banishment of that tribal member constitutes a punitive sanction irregardless (sic) of the underlying circumstances leading to those decisions. The Supreme Court has noted that banishment historically has been considered a punitive sanction. Therefore, even if the circumstances leading to imposition of the sanction are not considered criminal conduct *per se,* the imposition of that sanction renders those proceedings criminal for purposes of habeas corpus relief.[138]

IV. Diverse Contexts Interpreting "Detention" Requirement

Since the Supreme Court's decision in *Santa Clara Pueblo* in 1978, there have been a significant number of cases brought in federal court under ICRA. Of those that have been brought, only a few have been successful on the merits, or even reached the merits.[139]

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[137] *See, e.g.*, Quair v. Sisco, 359 F. Supp. 2d 948, 967 (2004); *Poodry*, 85 F.3d at 879 (concluding that the circumstances of banishment constituted criminal conduct sufficient for the purposes of a writ of habeas corpus).

[138] *Quair*, 359 F. Supp. 2d at 967.

[139] Of the long list of cases referenced in the next sections, habeas relief has been granted in two banishment cases, *see, e.g.*, *Poodry*, 85 F.3d at 879; Sweet v. Hinzman, 634 F. Supp.

Section 1303's jurisdictional requirement and the doctrine of exhaustion have weeded out most claims. Nonetheless, it is instructive to analyze the claims that have been brought. The contexts of the claims may be grouped into a number of categories based on the circumstances underlying each petition: those articulating that a detention occurred (1) through actual incarceration, (2) the supervisory control exerted by the tribal court or other tribal entity, (3) through the circumstances giving rise to banishment and other forms of physical and geographical ejectment and restraint,

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2d 1196, 1200 (W.D. Wash. 2008), one anomalous land case brought by a private business entity not a member to any tribe, *see, e.g.*, Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980), and a very few criminal cases. *See,* e.g., Pacheco v. Geisen, No. 1:17-cv-749-WJ-KRS, 2019 WL 1494036, at *1 (D.N.M. Apr. 4, 2019) (granting habeas and vacating tribal charges and conviction in a case of uncontested facts alleging violations of right to counsel, right to trial by jury and cruel and unusual punishment); Toya v. Toledo, No. CIV 17-0258 JCH/KBM, 2017 WL 3995554, at *5 (D.N.M. Sept. 9) (recommending the granting of habeas relief in a criminal case in which petitioner was convicted and sentenced to jail without counsel or a right to a jury trial), *report and recommendation adopted by* No. CIV 17-0258 JCH/KBM, 2017 WL 4325764 (D.N.M. Sept. 26, 2017); Garcia v. Rivas, No. 15-cv-337 MCA/SCY, 2016 WL 10538197, at *7 (D.N.M. Mar. 11), *report and recommendation adopted by* No. 15-377 MCA/SCY, 2016 WL 10538196 (D.N.M. Apr. 12, 2016) (granting habeas for a tribal member who had been incarcerated for longer than the 6-year permitted of his sentence)). There are a few cases in which judicial superintendence and control have been held to constitute the requisite detention under 1303 as well. *See infra* notes 154–159 accompanying text, discussing *Dry v. CFR Court of Indian Offense for Choctaw Nation* and *Means v. Navajo Nation*.

and (4) those being ejected from tribal membership or services.

A. Actual Incarceration

A tribe member who is jailed or imprisoned unequivocally meets the requirements of detention if they are able to get their petition filed during the carceral window.[140] An imminent threat of imprisonment can also satisfy the custody requirement.[141] The "detention" requirement, thus, is not normally the main interpretive issue in habeas actions filed in criminal cases where

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[140] *Garcia*, 2016 WL 10538197, at *7 (granting habeas for a tribal member who had been incarcerated for longer than the 6-year permitted of his sentence). *But cf. Jeffredo,* 590 F.3d at 757 (holding that "the limitation of Appellants' access to certain tribal facilities *does not* amount to a 'detention'" when "[a]ppellants have not been convicted, sentenced, or permanently banished" (emphasis added)). Professor Barbara Creel of the University of New Mexico School of Law, one of the leading experts on tribal habeas cases, individually and in conjunction with the Southwest Indian Law Clinic at the University of New Mexico School of Law, has been at the forefront of representing individuals who have been convicted in tribal court without adherence to basic civil rights such as the right to counsel and due process. *See, e.g.*, Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative,* 18 MICH. J. RACE & L. 317 (2013). Her work makes an enormous contribution to those impacted by such convictions and the development of federal and tribal law on the matter.

[141] *Jeffredo*, 590 F.3d at 758 (citing Hensley v. Mun. Court, 411 U.S. 345 (1973); Edmunds v. Won Bae Chang, 509 F.2d 39 (9th Cir. 1975)).

individuals have been convicted and sentenced to terms of imprisonment by tribal courts. Other issues do arise in those contexts, however; and there are many barriers to an incarcerated individual getting relief in the federal courts. Many cases get dismissed on the grounds of exhaustion, based on arguments about tribal court appeals or proceedings that were not pursued.[142] Indeed, it is the rare case where a federal court finds that remedies have been exhausted or would be futile.[143] In

[142] Valenzuela v. Silversmith, 699 F.3d 1199, 1208 (10th Cir. 2012) (dismissed without prejudice for failure to exhaust tribal remedies after his tribal court sentence had been completed and he was released during the pendency of the case); Chipps v. Oglala Sioux Tribe, No. CIV. 10-5028-JLV, 2010 WL 1999458, at *8–9 (D.S.D. May 18, 2010) ("There is no question Mr. Chipps is being detained by the Tribe. Indeed, excluding the one day he was released to attend his mother's funeral, Mr. Chipps has been in continuous detention since his arrest by tribal authorities on July 1, 2009 … Although the wheels of justice are turning slowly, they are turning. Indian tribes have the inherent authority to make and enforce their criminal laws against Indian people on Indian lands. This court will not infringe on the Tribe's authority by short circuiting the Court's viable efforts to provide relief to Mr. Chipps." (citing United States v. Long, 324 F.3d 475, 480 (7th Cir. 2003)); *see also* Anderson v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, No. 1:10-CV-676, 2010 WL 5625054, at *2 (W.D. Mich. Dec. 21, 2010) (dismissed without prejudice due to failure to exhaust); Bercier v. Turtle Mountain Tribal Court, No.4:08-cv-094, 2009 WL 113606 (D.N.D. 2009); Darnell v. Merchant, No. 17-03063-EFM-TJJ, 2017 WL 5889754, at *8 (D. Kan. Nov. 29, 2017). Blue v. Marcellas, No. 4:06-cv-67, 2006 WL 2850600, at *3 (D.N.D. Sept. 29, 2006).

[143] *See* Toya v. Toledo, No. CIV 17-0258 JCH/KBM, 2017 WL 3995554, at *5 (D.N.M. Sept. 9) (recommending the granting of habeas relief in a criminal case in which petitioner was

some instances, cases have been dismissed on the grounds of exhaustion, or even mootness based on tribes' creation of new review entities or processes during the pendency of the habeas action.[144] There are issues about who is the proper custodian/defendant.[145] Some have

convicted and sentenced to jail without counsel or a right to a jury trial), *report and recommendation adopted by* No. CIV 17-0258 JCH/KBM, 2017 WL 4325764 (D.N.M. Sept. 26, 2017); *Garcia,* 2016 WL 10538197, at *7.

[144] For example, the Ninth Circuit summarily upheld dismissal in *Napoles v. Rogers*, to require the parties to complete proceedings before a tribal appellate court that was disbanded at and prior to the filing of the habeas action. 743 Fed.App'x 136, 136 (9th Cir. 2018). In *Coriz v. Rodriguez*, the magistrate recommended dismissal on the grounds of mootness of a case wherein the tribe vacated petitioner's conviction and sentence but filed virtually identical charges and kept petitioner in "pretrial" custody pending the resolution of those charges, rather than proceed forward with a case wherein the court had indicated that a finding of a violation of ICRA was likely. 1:17-cv-01258-JB-KBM, 2018 WL 6111783, at *3, *7 (D.N.M. Nov. 21, 2018). Although these issues of ripeness and mootness lie beyond the scope of this paper, they do present incredible challenges to the ability of individuals to have their rights determined in federal court, even where they established proper jurisdiction and had exhausted all remedies available at the time of filing. The federal court's extending of those doctrines in these circumstances creates an additional barrier to individuals having their rights determined in federal court that is not warranted by the language or legislative history of ICRA, nor interpretations of habeas under others of the federal statutes.

[145] *Toya*, 2017 WL 4325764, at *1 (habeas petition granted; tribal court conviction reversed based on denial of right to counsel and jury trial. . . following joinder of appropriate

even been dismissed on the grounds of mootness when individuals get released from tribal custody, or transferred to federal or other custody.[146] This has been

tribal official, as recommended in *Tova*, 2017 WL 3995554, at *5); Adams v. Elwell, No. CV 17-00285 RB/SCY, 2017 WL 3051951, at *2 (D.N.M. June 27, 2017) (petition dismissed because his custody was transferred from tribal to federal authority the day before the case was filed); Azure v. Turtle Mountain Tribal Court, No. 4:08-cv-095, 2009 WL 113597, at *3 (D.N.D. Jan. 15, 2009); Acosta-Vigil v. Delorme-Gaines, 672 F. Supp. 2d 1194, 1195 (D.N.M. 2009) (discussing the dispute about the appropriate parties); Lavallie v. Turtle Mountain Tribal Court, No. 4-06-CV-9, 2006 WL 1069704, at *3 (D.N.D. Apr. 18, 2006) (holding that the tribal court was best able to decide the merits of the case); Cantrell v. Jackson, No. CV 16-33-GF-BMM-JTJ 2016 WL 4537942, at *2 (D. Mont. Aug. 5, 2016); *see, e.g.,* Garcia v. Elwell, No. CV 17-00333 WJ/GJF, 2017 WL 3172826, at *2 (D.N.M. May 25, 2017) (dismissing tribe, but leaving actual wardens, tribal governor/tribal court judge) ("In a habeas corpus proceeding, the custodian or official having immediate physical custody of the petitioner is a proper party to the proceeding. However, where the petition collaterally attacks the petitioner's tribal conviction and sentence, rather than the manner in which the detention is being carried out, the immediate physical custodian may lack the authority to afford the relief requested by the petitioner. In these circumstances, the proper respondent is not necessarily the person with immediate physical custody but, instead, the official with authority to modify the tribal conviction or sentence." (citing Rumsfeld v. Padilla, 452 U.S. 426, 446–47 (2004); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 899–900 (2d Cir. 1996)).

[146] *See e.g.,* Brisbois v. Tulalip Tribal Court, CASE NO. 2:18-cv-01677-TSZ-BAT, 2019 WL 1522540, at *4 (W.D. Wash. Feb. 27), *report and recommendation adopted by* Case No. 2:18-cv-01677-TSZ-BAT, 2019 WL 1514550, at *1 (W.D. Wash. Apr. 8, 2019) (dismissing habeas petition due to petitioner being released from custody during the pendency

so even when serious jurisdictional challenges were presented such as the tribal court's lack of criminal jurisdiction over an individual who is not a member of the tribe.[147] However, of those cases where charges may have been dismissed, the ongoing collateral consequences of the convictions are sometimes assessed as grounds for continuation of the case.[148] A few challenges analyzed

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of the habeas case and the fact that petitioner's tribal court appeal was yet pending at the time he filed his federal action); Romero v. Goodrich, Civil No. 1:09-cv-232 RB/DJS, 2010 WL 8983216, at *11 (D.N.M. Mar. 9) (first decision recommending granting of habeas), *report and recommendation withdrawn* No. 1:09-cv-232 RB/DJS, 2010 WL 9450759, at *1 (D.N.M. Sept. 22, 2010). Habeas relief over tribal conviction and order of incarceration was initially recommended by the district court, but the case was ultimately dismissed as moot upon the tribe's commuting of his tribal sentence in light of federal charges pressed for his alleged assault of a federal officer during his period of tribal incarceration. Romero v. Goodrich, 480 F. App'x 489, 494 (10th Cir. 2012) (affirming dismissal as moot based on vacating tribal sentence and insufficiently articulated collateral consequences).

[147] *See Acosta-Vigil*, 672 F. Supp. 2d at 1196; Gillette v. Marcellais, No. A4-04-123, 2004 WL 2677268, at *3, *4 (D.N.D. Nov. 22), *reh'g denied,* No. A4-04-123, 2004 WL 2792331 (D.N.D. Dec. 1, 2004).

[148] *See, e.g.*, Stymiest v. Rosebud Sioux Tribe, No. CIV. 14-3001, 2014 WL 1165925, at *3 (D.S.D. Mar. 18, 2014.). Although *Stymiest* was dismissed without prejudice to permit petitioner to exhaust tribal remedies, the court found that the collateral consequences of the tribal court convictions, even though he had been released from tribal custody, were sufficiently great to justify a determination of ongoing detention notwithstanding his completing his tribal sentence. *Id.* ("In this case, Stymiest's tribal court convictions provided

the substantive limit imposed on Tribes of no more than one year of incarceration per "offense" under ICRA's § 1302(7).[149] Finally, issues have arisen with respect to the actual relief that the federal court may grant upon a finding of grounds that habeas is warranted.[150]

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a basis, at least in part, for determining that he was an "Indian" for the purposes of jurisdiction under 18 U.S.C. § 1153 and the resulting federal criminal conviction for assault resulting in serious bodily injury. In this case, the government was required to prove that Stymiest was recognized as an Indian by an Indian tribe. Evidence was presented that the Rosebud Sioux Tribe recognized Stymiest as an Indian by prosecuting him in tribal court. The jury was instructed that they could consider such evidence in determining whether the government had shown that the defendant was recognized as an Indian and therefore was an Indian for the purposes of federal jurisdiction. I find that Stymiest can demonstrate that he has been subjected to a severe actual or potential restraint on liberty partly as a result of his tribal court convictions.").

[149] *See, e.g.*, Alvarez v. Tracey *ex rel.* Gila River Indian Cmty. Dep't of Rehab. & Supervision, No. CV-08-2226-PHX-DGC (DKD), 2011 WL 1211549, at *3 (D. Ariz. Mar. 31, 2011) (denying Petitioner's argument that his conviction of five separate charges and sentencing to five consecutive years of incarceration violated § 1302(7) on the grounds that "two charges are different offenses if each 'requires proof of a fact which the other does not,' regardless of whether they arise from the same transaction." *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)); *see also* Miranda v. Achondo, 684 F.3d 844 (9th Cir. 2014); Bustamante v. Valenzuela, 715 F. Supp. 2d 960, 968 (D. Ariz. 2010) (the initial recommendation was to grant habeas but the rejected that part of the recommendation); *cf.* Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176, 1180 (D. Minn. 2005).

[150] Tortalita v. Geisen, No. 1:17-cv-684-RB-KRS, 2018 WL 2441157 at *2 (D.N.M. May 31, 2018) (vacating petitioner's

Interestingly, with respect to those cases affirmatively granting habeas relief, many involved situations in which neither the physical custodian nor other tribal official contested the underlying merits of the claims.[151]

B. Judicial Control and Restraint Pending or Following Judicial Action

As with other federal habeas statutes, there is an independent basis for jurisdiction created by the measures of judicial control and superintendence imposed under the cloak of authority of a tribal court.

In *Hensley v. Municipal Court,* the Supreme Court determined federal habeas review to be invoked by an order of personal recognizance requiring petitioner to appear at times and places as ordered by any court or

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sentence and conviction, not reversing it, was the appropriate remedy, as Petitioner had not specifically requested that and it invited federal courts in reversing a tribal court to develop a new remedy "that would further impede tribal sovereignty"). *But see* Alvarez v. Lopez*,* 835 F.3d 1024, 1030 (9th Cir. 2016) (wherein the court granted "automatic reversal" of a tribal court conviction because it had not afforded Petitioner the right to a jury trial).

[151] *See, e.g.*, Cheykaychi v. Geisen, Case No. 17-cv-01657-PAB, 2018 WL 6065492, at *2 (D. Colo. Nov. 19, 2018) (citing Chosa v. Geisen , No. 17-cv-00110-RB-SMV (D.N.M. May 24, 2017) (No. 13); Pacheco v. Massingill, No. 10-cv-00923-RB-WDS (D.N.M. January 9, 2012) (Docket No. 18) ; Van Pelt III v. G[ei]sen, No. 17-cv-00647-RB-KRS (D.N.M. May 11, 2018) (Nos. 33, 34); Tortalita v. Geisen, No. 17-cv-00684-RB-KRS (D.N.M. May 31, 2018) (Nos. 33, 35)) ("Because the § 1303 Petition is unopposed, the Petition will be granted and the tribal court convictions vacated").

magistrate and other restraints "not shared by the public generally."[152] Outside of the tribal context, a number of other cases have held habeas to be the appropriate remedy for other forms of judicial superintendence and control.[153]

This basis for habeas jurisdiction has also been recognized in the context of ICRA. In *Dry v. CFR*, petitioners' release on their own recognizance following charges of various violations of the criminal code was deemed by the Tenth Circuit to be sufficient.[154] Explained the court: "Although Appellants are ostensibly free to come and go as they please, they remain obligated to appear for trial at the court's discretion. This is sufficient to meet the 'in custody' requirement of the habeas statute."[155] Similarly, in *Means v. Navajo Nation*, the Ninth Circuit also upheld jurisdiction under § 1303 for pretrial release.[156] Under the terms of the release order, petitioner was prohibited from having contact with his former father-in-law or going within 100 yards of his home, and he was ordered to appear at trial and face arrest or additional punishment for failure to appear.[157]

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[152] Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)).

[153] *See supra* note 142 and accompanying text.

[154] Dry v. CFR Court of Indian Offenses for Choctaw Nation, 168 F.3d 1207, 1208 (10th Cir. 1999) (citing *Lydon*, 466 U.S. at 300–301). The court deemed "detention" and "in custody" to be analogous terms. *Dry*, 168 F.3d at 1208.

[155] *Id.*

[156] Means v. Navajo Nation, 432 F.3d 924, 928–29 (9th Cir. 2005) (agreeing with the district court that "Means was in custody for purposes of habeas jurisdiction under *Justices of Boston Municipal Court v. Lydon* and *Hensley v. Municipal Court*.").

[157] *Id.*; *see also* Fife v. Moore, 808 F.Supp.2d 1310, 1312–13 (E.D. Okla. 2011) (detention established for purposes of 1303

Although a recognized basis for establishing detention, orders of judicial superintendence granted in advance of final resolution of tribal proceedings such as pre-trial orders of release may sometimes conflict with the doctrine of exhaustion. Some courts have recognized that such pretrial habeas petitions need be considered due to the onerous restraints they impose or the fundamental jurisdictional issues implicated. For example, in *Means v. Northern Cheyenne Tribal Court*, the Ninth Circuit granted pretrial habeas consideration in advance of trial to consider a jurisdictional challenge to the prosecution in tribal court brought by an Indian who was not a member of that tribe.[158] Other courts,

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even though petitioner had been released on bond at the time of the filing) ("In *Dry v. CFR Court,* 168 F.3d 1207, 1208 & n.1 (10th Cir. 1999), the Tenth Circuit held that criminal defendants who had been released on their own recognizance pending trial by the Court of Indian Offenses for the Choctaw Nation were 'detained' for habeas purposes. In the case at bar, petitioners also await trial and have been released on bond. This requirement is satisfied."). The case also granted emergency injunctive relief since the allegation was the tribal court lacked jurisdiction altogether. *Fife*, 808 F. Supp. at 1315.

[158] Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998), *rev'd on other grounds by* United States v. Enas, 255 F.3d 662 (9th Cir. 2001). Although upholding a basis for jurisdiction based on the pre-trial detention of petitioner, the court also observed that petitioner, in fact, had presented his jurisdictional argument to both the Tribal Court and the Northern Cheyenne Court of Appeals, both of which denied his claim, prior to his filing in federal court, thereby exhausting his tribal court remedies to the

however, have required strict compliance with exhaustion in order to effectuate the purpose of exhaustion: namely, "to promote 'tribal self-government and self-determination' by allowing tribal courts to 'have the first opportunity to evaluate the factual and legal bases for the challenge to [their] jurisdiction.'" [159] The circumstances of each case and the remedies available at the time of filing must be assessed.

C. Challenges to Tribal Court Child Custody Determinations

A number of cases seeking to invoke ICRA's 1303 "detention" jurisdiction have involved challenges to child custody proceedings. Generally, it has been determined, as with respect to state court child custody determinations between private parties, that 1303 is not a proper vehicle for challenging custody determinations of a tribal court where it has proper jurisdictional authority over the matter.[160] Similar logic has been

satisfaction of the court; *see also* Carden v. Montana, 626 F.2d 82, 83 (9th Cir. 1980).

[159] *Means,* 154 F.3d at 949 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 15–16 (1987)). For an example of a pre-trial superintendence case that held exhaustion was mandatory, i.e, that petitioner must go through the trial and appellate processes afforded within the tribal system, see Lambert v. Fort Peck Assiniboine & Sioux Tribes, No. CV 15-82-GF-BMM-JTJ, 2016 WL 403045, at *2 (D. Mont. Jan. 11, 2016). *See also supra* note 146 and accompanying text for the exhaustion cases in the context of custody where individuals were alleging serious jurisdictional or other impediments to the tribal court process but were nonetheless required to go through the tribal court processes.

[160] Goslin v. Kickapoo Nation District Court, No. 98-4107-SC, 1998 WL 1054223, at *3 (D. Kan. Dec. 2, 1998) (drawing from the developed law under habeas jurisdiction for state courts

applied to dependency proceedings in which the tribal children's services department seeks intervention to address abuse, neglect or dependency.[161] Successful challenges under 1303 have occurred where individuals

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in 28 U.S.C. § 2254, and concluding "courts have held that federal habeas relief is not available under 25 U.S.C. § 1303 to test the validity of a child custody decree of an Indian tribal court." *Id.* (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 892)); *see also* Azure-Lone Fight v. Cain, 317 F.Supp.2d 1148, 1151 (D.N.D. 2004); Weatherwax *ex rel.* Carlson v. Fairbanks, 619 F. Supp. 294, 296 (D. Mont., 1985) (section 1303 is not proper vehicle for challenging a custody determination of the tribal court – "A child custody ruling is not sufficient to trigger federal habeas corpus relief since the custody involved is not the kind which has traditionally prompted federal courts to assert their jurisdiction."); LaBeau v. Dakota, 815 F. Supp. 1074, 1076–77 (W.D. Mich. 1993); Sandman v. Dakota, 816 F. Supp. 448, 451 (W.D. Mich.1992), *aff'd,*7 F.3d 234 (6th Cir. 1993); Shelifoe v. Dakota, No. 92-1086, 1992 WL 133065, at *1 (6th Cir. June 16, 1992) (unpublished table decision). In analyzing the scope of § 1303, some courts have drawn also from the law that has been applied in the context of state custody determinations. *See, e.g.*, *Doe v. Doe,* 660 F.2d 101, 105 (4th Cir. 1981); Sylvander v. New Eng. Home for Little Wanderers, 584 F.2d 1103, 1112 (1st Cir. 1978); Donnelly v. Donnelly, 515 F.2d 129, 130 (1st Cir. 1975).

[161] *See, e.g.*, Johnson v. B.J. Jones, No. 6:05-cv-1256-Orl-22KRS, 2005 WL 8159765, at *3 (M.D. Fla. Nov. 3, 2005). Explained the court: "'Habeas corpus relief under 25 U.S.C. § 1303 is generally not available to challenge the propriety or wisdom of a tribal court's decision in a child custody dispute' . . . In the Court's view, this limitation applies with equal force to child dependency proceedings." (quoting *Azure-Lone Fight*, 317 F. Supp. 2d at 1150).

have challenged the tribal court's authority over the custody determination itself, particularly when it involved recognition and enforcement of a prior state court determination on the matter. In *DeMent v. Oglala Sioux Tribal Court,* for example, the Eighth Circuit held that a federal court may hear a habeas petition upon a challenge to a tribal court illegally taking custody of children and exceeding its jurisdiction.[162] As explained by the court:

> [The petitioner] does not directly attack the tribal court's decision to award Redner custody. Rather, he alleges that the tribal court illegally took "custody" of the children on the reservation by making them wards of the tribal court and by refusing to enforce the California custody decree. This case no longer represents a child custody battle; it has become a dispute over whether a tribal court violates a non-Indian's due process rights by refusing to give full faith and credit to a state custody decree.[163]

Jurisdiction over such challenges may be rooted in the habeas provisions of § 1303 and present an independent basis for jurisdiction as a federal question under 28 U.S.C. § 1331.[164]

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[162] Dement v. Ogala Sioux Tribal Court, 874 F.2d 510, 515–16 (8th Cir. 1989); *see also* United States v. Cobell, 503 F.2d 790, 795 (9th Cir. 1974).

[163] *Dement*, 874 F.2d at 515.

[164] *See, e.g.*, Brown *ex rel* Brown v. Rice, 760 F. Supp. 1459, 1462 (D. Kan. 1991) (parents' challenge to tribal court authority to restrict movement of their children constituted a detention under § 1303 and an independent federal question

D. Physical Banishment, Ejectment, Physical and Geographical Restraint

In a number of tribal contexts, permanent banishment from tribal lands and/or exclusion from membership and tribal services have been imposed on individuals. In some tribal contexts, banishment was a traditional punishment employed to preserve order within the community and/or to rehabilitate the individual.[165] Historically, the remedy was imposed for periods of time in response to flagrant crimes such as murder to enable reflection by the individual and restore peace and security to the tribal membership.[166] In

basis for jurisdiction under § 1331). Explained the court: "The Supreme Court has held that challenges to the exercise of jurisdiction by a tribal court present a question of federal common law which can be heard in a federal court under the general federal question statute, 28 U.S.C. § 1331. Other courts have also held that parents may challenge the jurisdiction of tribal courts to make custody determinations under the habeas corpus provisions set out in 25 U.S.C. § 1303 . . . This would be another means of presenting basically the same federal question to this court." *Id.* (internal citations omitted).

[165] Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007); *accord* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88 (2007).

[166] Michael Cousins, *Aboriginal Justice: A Haudenosaunee Approach*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 141, 154–55 (Wanda D. McCaslin ed., 2005) ("Banishment rarely occurs for life, and individuals often return home after a prescribed period of exile. They are allowed to remain if they have fully embraced the principles of peace and unity."). The

modern times, however, banishment has been used to impose greater punishment in criminal cases than what is authorized under federal law.[167] Additionally, it has been invoked in retaliation for protests or other challenges to tribal leadership. When accompanied by disenrollment from tribal membership, it may be a means of decreasing the pool of per capita distributions available from gaming. A desire to expand tribal casinos or other facilities may also contribute to these actions as may disputes over accountability in the face of accusations of corruption and mismanagement of tribal

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devastating impact of banishment has even been characterized by Shakespeare:

> ROMEO
> Ha, banishment? Be merciful, say 'death,'
> For exile hath more terror in his look,
> Much more than death. Do not say 'banishment.'
> FRIAR LAURENCE
> Here from Verona art thou banishèd:
> Be patient, for the world is broad and wide.

WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 3, sc. 3.

[167] Originally and until 2010, tribes were limited to penalties of one-year of incarceration. *See* Pub. L. No. 99-570, §4217, 100 Stat. 3207 (codified at 25 U.S.C. §1302(7) (2006)). *But see* Pub. L. No. 111-211, 124 Stat. 2279 (codified at 25 U.S.C. §§1302(a)(7)(C)-(D), (b) (Supp. IV 2010)) (raising maximum sentence permitted to three years for any one offense for repeat offenders and up to nine years of sentences in cases where more than one violation of the criminal code has been established). Thus, there have been incentives to use banishment in response to repeat offenders or those who commit more major breaches of community norms and safety, where federal prosecutions did not effectively remove or punish the member.

funds and resources.[168] In the words of one journalist: "Although disenrollment is a relatively modern phenomenon among the 567 federally recognized tribes, its causes—greed and government corruption—are familiar."[169]

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[168] Suzianne D. Painter-Thorne, If You Build It, They Will Come: Preserving *Tribal Sovereignty* in the Face of *Indian* Casinos and the New Premium on Tribal Membership, 14 LEWIS & CLARK L. REV. 311, 312–14, 320 (2010) (citing Kevin Fagan, Tribes Toss Out Members in High-Stakes Quarrel, S.F. CHRON. (Apr. 20, 2008), https://www.sfgate.com/news/article/Tribes-toss-out-members-in-high-stakes-quarrel-3287315.php (noting that tribes in California alone have disenrolled over 5,000 members since 2002) [https://perma.cc/U8J3-CUEQ]); see Cecily Hilleary, Native American Tribal Disenrollment Reaching Epic Levels, VOICE OF AMERICA (Mar. 2, 2011), https://www.voanews.com/a/native-american-tribal-disenrollment-reaching-epidemic-levels/3748192.html [https://perma.cc/UK2Z-Q95R]; see also Marc Cooper, Tribal Flush: Pechanga People "Disenrolled" En Masse, L.A. WEEKLY (Jan. 3, 2008), http://www.laweekly.com/2008-01-03/news/tribal-flush-pechanga-people-disenrolled-en-masse/ (discussing how tribes have disenrolled thousands of members due to corruption and other problems stemming from gaming) [https://perma.cc/7W2E-GRZR]; Brook Jarvis, Who Decides Who Counts as Native American, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html [https://perma.cc/Q96H-A4A7].

[169] Jaime Dunaway, *The Fight Over Who's a "Real Indian,"* SLATE MAG. (June 12, 2018), https://slate.com/news-and-politics/2018/06/native-american-disenrollments-are-waning-after-decades-of-tribes-stripping-citizenship-from-members.html (describing the widespread phenomenon of tribal disenrollment, its connection to tribal greed, and

When it happens, the individuals are left alienated from their nations and communities and unable to partake in some or all of essential tribal events and services. They may be ostracized from critical cultural association as well. Oftentimes, banishment and disenrollment have been employed together, leaving the individual totally bereft of cultural connection and identity and ineligible for federal, state, and tribal programs applicable to Native Americans.[170] As with denationalization of citizenship, disenrollment and banishment can create a state of psychological devastation, as well as economic and legal disenfranchisement.[171] Indeed, one would be stripped from identity as an Indian altogether since each tribe determines its own criteria for membership as a matter of both tribal and federal law.[172] Although this point is not raised as often, it is also true that the integrity of the sovereignty of the tribe itself may be diminished as the membership and participation of active members in their communities is disrupted, and corrupt officials who took the offending actions may squander tribal resources and goodwill without accountability.[173] A number of scholars

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corruption fueled by gaming and casino development, while also indicating a reduction in disenrollment as well as exhibiting selective examples of reenrollment in response to advocacy initiatives of tribal members) [https://perma.cc/M9JF-KYVY].

[170] Associated Press, *Disenrollment Leaves Natives "Culturally Homeless,"* CBS NEWS (Jan. 20, 2014), https://www.cbsnews. com/news/disenrollment-leaves-natives-culturally-homeless/ [https://perma.cc/W8RW-EAZN].

[171] *See id*.

[172] *See id*.

[173] *See, e.g.*, Michael Martinez, *Indians Decry Banishment by Their Tribe,* Chi. Trib. (Jan. 14, 2016), http://articles.chicagotribune.com/2006-01-14/news/0601140134_1_tribal-casino-

have articulated the toll of both banishment and disenrollment, most arguing in the end for limited or no federal review of such cases despite the impacts and substantive rights violations.[174]

A significant number of federal habeas cases have involved banishment or other exclusion from tribal lands and/or facilities or services. As discussed in more detail below, tribal membership and enrollment decisions have been determined not to meet the requirements of § 1303. Two cases have determined permanent banishment to be grounds for federal habeas review.[175] The Ninth Circuit issued the landmark case holding that a tribal member who is "convicted of treason, sentenced to permanent banishment, and permanently [deprived of] any and all rights afforded to tribal members" is "detained" for purposes of ICRA habeas relief.[176] Such action was deemed a "severe actual or *potential* restraint on liberty."[177] In the second case, certain tribal officials convicted petitioners of treason and issued orders of "banishment" that read in part:

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american-indians-gaming-profits [https://perma.cc/838N-F7EB].

[174] *See* DAVID WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE AMERICAN DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 162 (Charlotte Cotè & Coll Thrush eds., 2017); *see also* Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 970–71 (2006).

[175] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 876, 878 (2d Cir. 1996); Jeffredo v. Macarro, 599 F.3d 913, 919 (9th Cir. 2010).

[176] *Jeffredo*, 599 F.3d at 919.

[177] *Id.* (emphasis added).

> You are to leave now and never return . . . [Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.[178]

As with many tribal disputes resulting in serious rights violations, the precipitating conduct that gave rise to the banishment was petitioners' challenge to the official actions of certain members of the tribal council.[179] Specifically, petitioners accused members of the Council, particularly its Chairman, of "misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal records."[180] In consultation with other tribal members, petitioners formed an Interim General Council of the Tonawanda Band.[181] The response by council members who were challenged was to accost petitioners in their homes with groups of 15 to 25 people, serve them with the banishment orders, which also removed them forever from the tribal rolls and their Indian citizenship.[182] The tribe issued notice to the federal government to have petitioners removed from federal rolls as Native Americans for the purpose of

[178] *Poodry*, 85 F.3d at 876.
[179] *Id.* at 877.
[180] *Id.* at 877–78.
[181] *Id.* at 878.
[182] *Id.*

access to health care and other federal benefits.[183] Electrical services of petitioners were also cut at the direction of tribal council members.[184] Following a thorough analysis of ICRA's habeas provision, the legislative history, *Santa Clara Pueblo*, and all interpretive priorities, including the twin aims of accommodating both tribal sovereignty and the rights of individuals,[185] the Second Circuit determined these circumstances demonstrated a sufficiently severe restraint on liberty to warrant jurisdiction under § 1303.[186] Explained the court:

> Indeed, we think the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason . . . We

[183] *Id.*
[184] *Id.*
[185] *Id.* at 900–01.
[186] *Id.* at 901.

> believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of the offense of treason.[187]

In *Sweet v. Hinzman*, the Western District of Washington similarly found that an order of banishment by the Snoqualmie Indian Tribal Council met the detention requirements.[188] In that case, petitioners alleged that "exclusion from tribal lands and loss of tribal identity is a severe restraint on their personal liberty" and that they would be denied access to critical services, including Indian Health Services' health care, and lose certain tribal employment opportunities, as a result.[189]

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[187] *Id*. at 895.

[188] Sweet v. Hinzman, 634 F. Supp. 2d 1196, 1200 (W.D. Wash. 2008).

[189] *Id*. at 1198; *see also* Colebut v. Mashantucket Pequot Tribal Nation Tribal Elders Council, No. 3:05CV247, 2006 WL 1646155, at *1 (D. Conn. June 9, 2006). In *Colebut*, the district court initially determined that petitioner, a former president seeking reinstatement to office, presented a colorable claim of subject matter jurisdiction under § 1303 where Council "'temporarily banished [Colebut] from the Mashantucket Pequot Tribal Reservation and/or other lands of the Mashantucket Pequot Tribe under the suspicion of possession of illegal drugs on the reservation' and declared Colebut's forfeit of 'all rights and privileges of tribal membership' save health care," but dismissed the case on the grounds that he had not yet exhausted remedies with the tribal council or ensured that they rendered a final decision. *Colebut*, 2006 WL 1646155, at *1. After that decision, however, the prosecutor withdrew the banishment and membership decisions, curing the detention. Colebut v. Mashantucket Pequot Tribal Nation Tribal Elders Council,

In each of these cases, what is critical is that the effect of the offending tribal action was to physically remove, eject, and restrain tribal members from tribal land. This happens in the case of actual forcible removal as well as by purported court order creating the risk of being arrested and cited and suffer other collateral consequences. As the *Poodry* court reasoned:

> "Restraint" does not require "on-going supervision" or "prior approval." As long as the banishment orders stand, the petitioners may be removed from the Tonawanda Reservation at any time. That they have not been removed thus far does not render them 'free' or 'unrestrained.' While 'supervision' (or harassment) by tribal officials or others acting on their behalf may be sporadic, that only makes it all the more pernicious. Unlike an individual on parole, on probation, or serving a suspended sentence—all "restraints" found to satisfy the requirement of custody—the petitioners have no ability to predict if, when, or how their sentences will be executed. The petitioners may currently be able to "come and go" as they please, [. . .] but the

No: 3:05CV247 (DJS) 2007 WL 174384, at *1 (D. Conn. Jan. 19, 2007). Thereafter, the individual sought to reopen the case for damages, but the court determined that the scope of § 1303 did not permit such a waiver of the tribe's sovereign immunity. *Id.* at *4.

> banishment orders make clear that at some point they may be compelled to "go," and no longer welcome to "come." That is a severe restraint to which the members of the Tonawanda Band are not generally subject. Indeed, we think the existence of the orders of permanent banishment alone-even absent attempts to enforce them-would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus.[190]

On the other hand, in *Jeffredo v. Macarro*—a case also involving dis-enrollment of tribal members and resulting collateral consequences—the Ninth Circuit found neither the possibility of banishment due to becoming a non-member nor petitioners' resulting denial of access to the Senior Citizens' Center, health clinic, and tribal school was sufficiently imminent or severe to constitute a detention.[191] The court explained:

> In the case before us, the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the

[190] *Poodry*, 85 F.3d at 895.
[191] Jeffredo v. Macarro, 599 F.3d 913, 918–19 (9th Cir. 2010).

> Tribe's actions. Their movements have not been restricted on the Reservation.[192]

A similar determination was rendered in another case by the Second Circuit in which petitioners experienced less severe restraints than banishment. Specifically, it was determined that loss of "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one's place on the membership rolls of the tribe are simply "insufficient to bring plaintiffs within [the] ICRA's habeas provision." [193] At least one federal court has determined that trespassing and excluding a non-member from a reservation did not present a proper basis for habeas in deference to the primacy of tribes' inherent authority to exclude those who are not members.[194] The lessons from

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[192] *Id.* at 919.

[193] Shenandoah v. U.S. Dept. of Interior, 159 F.3d 708, 714 (2d Cir.1998).

[194] Liska v. Macarro, No. 08-CV-1872IEG, 2009 WL 2424293, at *7 (S.D. Cal. Aug. 5, 2009). In *Liska*, the descendant of a tribe who was not permitted to enroll and, thus, was not a tribal member, did not present a proper basis for habeas even though he was banned from the reservation for trespassing upon it without permission. *Id.* at *1. According to the court, the petitioner "cited no authority for the proposition that a non-member of a tribe who is excluded from a reservation is 'detained' as contemplated by § 1303. In fact, Ninth Circuit authority conclusively establishes that "[i]n the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation." *Id.* at *7 (quoting Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410 (9th Cir. 1976)).

the cases, then, is that extreme and permanent forms of banishment from reservation lands are required before detention may be recognized for the purposes of federal habeas jurisdiction. It is not an easy standard to meet.

E. Membership and Disenrollment

Absent geographical banishment from tribal lands, the courts have determined that orders of disenrollment in and of themselves do not present the severity of restraint detention sufficient for § 1303.[195] Nonetheless, like banishment, the remedy of disenrollment by tribal officials has sometimes arisen in the context of intertribal disputes about governance or financial accountability and may sometimes be incentivized in tribal contexts where casino profits may be distributed to tribal members on a per capita basis. Notwithstanding the social and cultural implications of enrollment decisions, the federal courts have consistently declined to find habeas jurisdiction in matters concerning disenrollment of tribal members absent other indicia of geographical displacement.[196] Two primary reasons justify this conclusion. First, most courts have deemed disenrollment to be an insufficiently severe restraint on liberty.[197] Second, decisions about membership and enrollment are core to tribal sovereignty and self-determination. "[C]ourts have consistently recognized

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195 *See, e.g.*, Hendrix v. Coffey, No. CIV-08-605-M, 2008 WL 2740901, at *3 (W.D. Okla. July 10), *aff' d*, 305 F. App'x 495 (10th Cir. 2008) (declining to extend jurisdiction to claims brought by the plaintiffs); *see also* John v. Garcia, No. C 16-02368 WHA, 2018 WL 1569760, at *5 (N.D. Cal. Mar. 31, 2018) (notice of disenrollment insufficient).

196 *See infra* notes 198–201 and 205–11 and accompanying text.

197 *See, e.g.*, *John*, 2018 WL 1569760, at *4.

that in absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity."[198] In the words of the Eighth Circuit:

> The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations.[199]

As explained by the Ninth Circuit:

> While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303. While Congress' authority over Indian matters is extraordinarily broad . . . the role of courts in adjusting relations between and among tribes and their members [is] correspondingly restrained. Further, [a] tribe's right to define its own membership for tribal

[198] Martinez v. S. Ute Tribe of S. Ute Reservation, 249 F.2d 915, 920 (10th Cir. 1957) (upholding dismissal of the tribal membership action for lack of federal question jurisdiction).
[199] Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996).

> purposes has long been recognized as central to its existence as an independent political community. We have also noted that [a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress. Thus (while Congress may have authority in these matters) in the complete absence of precedent, we cannot involve the courts in these disputes.[200]

Efforts have been made to liken disenrollment to denaturalization of citizens, which has been recognized as a significant constitutional violation by the Supreme Court.[201] However, in the situation where tribal disenrollment has been at issue, the Supreme Court's precedent has been distinguished.[202] As the Ninth Circuit has declared in the face of the argument: "We do not wish to minimize the impact of the Tribe's membership decision on Appellants. Indeed, we recognize that

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[200] *Jeffredo*, 599 F.3d at 920 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32; Williams v. Gover, 490 F.3d 785, 789 (9th Cir. 2007)); *see also* Fondahn v. Native Village of Tyonek, 450 F.2d 520, 522 (9th Cir. 1971) (determining that *Santa Clara Pueblo* held "that a dispute involving membership in a tribe does not present a federal question").

[201] *See supra* note 107.

[202] *Jeffredo*, 599 F.3d at 921 (citing *Trop*, 356 U.S. at 87–88, 96) ("*Trop* is inapposite to this case. In *Trop* the statute left the defendant stateless. Further, the statute was penal in nature. Here Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants. Therefore, *Trop* is not controlling."). *But see Poodry*, 85 F.3d at 895–96.

Appellants have suffered a significant loss. Nevertheless, such loss is simply not equivalent to detention."[203]

While membership decisions may be entitled to more judicial restraint due to their fundamental bearing on this core aspect of tribal sovereignty, it is still necessary to examine the actual circumstances of confinement regardless of how a remedy is characterized. In *Quair v. Sisco,* petitioners were both banished and disenrolled.[204] Respondents sought to distinguish the two remedies and argued that disenrollment was not entitled to federal review.[205] However, the court found that it could examine "disenrollment" even if the tribal council had not used the word "banish" or did not technically apply the tribe's banishment penalty so long as the requisite conditions for habeas review were present.[206] The significant requirement was the need for restrictions on geographic movement.[207]

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[203] *Id.*; *see also* Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005). In *Lewis*, the plaintiff-appellants likewise sought judicial review of a tribal membership decision. *Id.* at 161. The court stated: "We agree with the district court's conclusion that this case is deeply troubling on the level of fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court." *Id.* at 963.

[204] Quair v. Sisco, No. 1:02-CV-5891 DFL, 2007 WL 1490571, at *1 (E.D. Cal. May 21, 2007).

[205] *Id.* at *2.

[206] *Id.* at *3.

[207] *Id.* ("Accordingly, the court may review the disenrollment of petitioners under § 1303 only if it similarly affects their geographic movement.")

That being said, habeas actions based on disenrollment have been distinguished from all others. Explained the court in *Quair*.

> But courts long have recognized that the right to define its membership is central to a tribe's 'existence as an independent political community.' Therefore, 'the [federal] judiciary should not rush to create causes of action that would intrude on these delicate matters.' Because the Tribe's disenrollment of Quair and Berna directly addresses tribal membership, the court must exercise great caution in deciding whether § 1303 applies to these decisions by the Tribe.[208]

The court ultimately determined in *Quair*, only with respect to the Tribe's decision to disenroll Petitioners, not with respect to banishment, that it did not have jurisdiction to resolve the habeas petition.[209]

Tavares v. Whitehouse is another recent case that lies at the cross-roads of banishment and dis-enrollment. The petitioners in *Tavares* were only facing partial disenfranchisement from certain tribal events, properties, offices, schools, health and wellness facilities, a park and casino, but not private land within the reservation, their own homes, or land owned by other tribal members.[210] Furthermore, the petitioners in *Tavares* were temporarily excluded from these tribally-sponsored services, events and tribal lands, for between

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[208] *Id.* at *2 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978)).
[209] *Id.* at *3.
[210] Tavares v. Whitehouse, 851 F.3d 863, 868 (9th Cir. 2017).

two and ten years.[211] It was a punishment for established violations of tribal laws that specifically gave the Tribal Council the power to discipline tribal members for disseminating false or defamatory information outside the tribe against tribal programs and/or tribal officials.[212] The punishment, moreover, was established in the Enrollment Ordinance, which provided punishment "up to and including disenrollment" for violations of the above-described tribal laws.[213]

A primary reason behind the court's decision in *Tavares* is the link between the temporary exclusion and membership rights of tribal members. "Unlike the Second Circuit, we distinguished between disenrollment and banishment, and recognized that there is no federal habeas jurisdiction over tribal membership disputes."[214] Furthermore, the court emphasized: "Because exclusion orders are often intimately tied to community relations and membership decisions, we cannot import an exclusion-as-custody analysis from the ordinary habeas

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[211] *Id.*

[212] *Id.* at 867.

[213] *Id.*

[214] *Id.* at 875 (citing Jeffredo v. Macarro, 599 F.3d 913, 920 (9th Cir. 2010)); *see Santa Clara Pueblo*, 436 U.S. at 72 n.32 (citations omitted) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.").

context."[215] As the Supreme Court explained in *Santa Clara Pueblo*:

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.[216]

Another primary reason, cited for the unique deference given to tribes for membership determinations, is the principle that "tribes have the authority to exclude non-members from tribal land."[217] Explained the Ninth Circuit:

> If tribal exclusion orders were sufficient to invoke habeas jurisdiction for tribal members, there would be a significant risk of undercutting the tribes' power because

[215] *Tavares,* 851 F.3d at 876.

[216] *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see also* Shenandoah v. U.S. Dep't of Interior, 159 F.3d 712, 714 (2d Cir. 1998) (evidence of retaliatory consequences against petitioners, including that they lost voice, lost health insurance and access to the health center, lost quarterly distributions, and were banned from tribal businesses and recreational facilities and from speaking with certain other members, was not a detention).

[217] *Tavares,* 851 F.3d at 876 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) (recognizing tribes' authority to exclude non-members)); *see also* Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).

> 'any person,' members and nonmembers alike, would be able to challenge exclusion orders through § 1303. Thus, tribal sovereignty vis-à -vis exclusion of non-members would collide with habeas jurisdiction.[218]

Reading *Quair II* together with *Tavares* it is clear that it does not matter whether the tribal government at issue uses the word "banish." The effect of the action against the tribal individual is what needs to be analyzed. If the effect of the action taken restricts geographic movement and /or causes a permanent and total destruction of their social, cultural, and political existence then habeas relief may be granted. This has proven to be a very difficult standard to meet, however.

F. Land Disputes

Dry Creek Lodge is an anomalous case decided after *Santa Clara Pueblo* in which the Tenth Circuit determined there was jurisdiction under § 1303 in a case challenging tribal action that blocked private land owners from gaining egress to their fee simple land located within the perimeters of the reservation.[219] Petitioners, who conferred with tribal officials and obtained a license prior to initiating the development project, had incurred loans to build a hunting lodge on the land in question over the objection of a neighbor who

[218] *Tavares,* 851 F.3d at 876.
[219] Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980).

had interest in an allotment.[220] The day after opening it, the Tribe closed the only access road to the property in response to the dispute involving the allottee through whose land the road also passed.[221] Efforts by petitioners to gain access to the tribal court were denied, and the tribal business councils refused to either consent to tribal court jurisdiction or reverse the decision closing access to the property, leaving petitioners with no remedies.[222] Also significant was the fact that petitioners were non-members, indeed non-Indians.[223] Their business interests within the exterior boundaries of the reservation were impeded by this action.[224]

Based on the circumstances of the case, the Tenth Circuit upheld jurisdiction under ICRA as an exception to *Santa Clara Pueblo's* habeas requirement. The court held: "The limitations and restrictions present in *Santa Clara Pueblo* should not be applied. There has to be a forum where the dispute can be settled."[225] It further explained its ruling as follows:

> By the decision in *Santa Clara Pueblo* the tribal members seeking injunctive relief under the Indian Civil Rights Act were in substance directed to the remedies available to them in their own tribal courts and from the officials they had elected. Much emphasis was placed in the opinion on the availability of tribal courts and, of course, on the intratribal nature of the problem sought to be resolved. With the

[220] *Id.* at 684
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *See id.*
[225] *Id.* at 685.

> reliance on the internal relief available the Court in *Santa Clara* places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or remedy the reason for the limitations disappears.
>
> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.[226]

Dry Creek Lodge is the only decision of its kind insofar as it created an exception to *Santa Clara Pueblo's* requirement that the remedy of habeas corpus be the only cause of action contained within Congress's waiver of sovereign immunity in ICRA.[227] It is a case about tribal interference with individual use and occupancy rights in land.[228] It suggests different standards may sometimes be applied with respect to non-members denied participation or access to tribal remedies.[229] Significantly, however, it suggests a broader scope of federal habeas jurisdiction in cases involving disputes that do not present merely intratribal matters.[230] This opens a window for greater scrutiny of what is and is not

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[226] *Id.*
[227] *Id.*
[228] *See id.* (reviewing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)).
[229] *See id.*
[230] *See id.*

a purely intratribal matter deserving of restraint in federal review.

Despite the interpretive possibilities illuminated in *Dry Creek Lodge*, however, no other court has granted jurisdiction based upon the *Dry Creek Lodge* exception. Rather, its provisions have been narrowly tailored when invoked in other contexts. In subsequent opinions from the Tenth Circuit, *Dry Creek Lodge* was interpreted as providing federal court jurisdiction to hear claims pursuant to §1302 "to entertain an ICRA lawsuit against an Indian tribe if: (1) the dispute involves a non-Indian, (2) a tribal forum is unavailable, and (3) the dispute involves issues outside internal tribal affairs."[231] In no

[231] Cohen v. Winkelman, 302 F. App'x 820, 823 (10th Cir. 2008) (citing Walton v. Tesuque Pueblo, 443 F.3d 1274, 1278 (10th Cir. 2006); Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y, 163 F.3d 1150, 1156 (10th Cir. 1998). This three-part understanding of *Dry Creek Lodge* has been recognized many times over. *See, e.g.,* Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1266 (10th Cir. 1998) (describing *Dry Creek* as "creating limited exception to tribal immunity in ICRA cases when the dispute does not concern internal tribal issues, the plaintiff is a non-Indian, and tribal remedies are unavailable"); Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1460 (10th Cir. 1989) ("A majority of the panel in *Dry Creek* concluded that such an exception exists under the ICRA where the dispute does not concern internal tribal issues, the plaintiff is non-Indian, and tribal remedies are unavailable."); Enterprise Management Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 892 (10th Cir. 1989) ("The majority in Dry Creek Lodge articulated an exception to the doctrine of sovereign immunity set out in Santa Clara Pueblo, basing its decision on three factors: an alleged violation of the Indian Civil Rights Act, the denial of a tribal forum, and a conflict involving a matter outside internal tribal affairs . . . The dispositive factors in Dry Creek Lodge are absent here. We therefore affirm the dismissal of the Tribe on the basis of its sovereign immunity from suit.");

other circumstances have these requirements been found to be met, however. It was not applicable in a case brought by an association of non-members seeking enrollment in a tribe.[232] The centrality of the enrollment issue, which was the core issue in *Santa Clara Pueblo* and is integral to tribes' ability to self-govern, as well as the fact that there was possibly another tribal forum in which to proceed, were cited as the reasons.[233] For similar reasons, most notably the availability of a tribal forum, the court declined to apply *Dry Creek Lodge* in an employment termination suit.[234] Typically, total unavailability of a forum has been held to be essential, not merely a tribal forum's determination that it lacked jurisdiction. As the Tenth Circuit held in *Walton v. Tesuque Pueblo*: "A tribal court's dismissal of a suit as barred by sovereign immunity is simply not the same thing as having no tribal forum to hear the dispute . . . ."[235] A contrary holding, the court has concluded, would directly conflict with *Santa Clara Pueblo*.[236] In short:

> In the nearly thirty years since that decision, we have applied the *Dry Creek* exception in only one case—*Dry Creek* itself. We have repeatedly emphasized its "minimal precedential

see also Jimi Development Corp. v. Ute Mountain Ute Indian Tribe, 930 F. Supp. 493, 496 (D. Colo. 1996); Sahmaunt v. Horse, 593 F. Supp. 162, 164 (W.D. Okla. 1984).

[232] *Ordinance 59 Ass'n*, 163 F.3d at 1156.

[233] *Id.* at 1156–57.

[234] *Cohen*, 302 F. App'x at 824.

[235] *Walton*, 443 F.3d at 1279.

[236] *Cohen,* 302 F. App'x at 824.

> value," reasoning that "the *Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara.*[237]

The Petitioners in *Napoles v. Rogers,* although tribal members unlike those in *Dry Creek Lodge*, made similar arguments about being forcibly and permanently removed from lands assigned to and continuously occupied by them and they emphasized also that their case did not present merely an intratribal land dispute; rather, it was a matter implicating a federal statute and trust agreement regarding land assignments and an intertribal land assignment ordinance implicating the interests of three distinct tribes.[238] They argued that the conditions of confinement and physical restraint were established both through physical geographical restraint as well as superintendence by the tribal court. Tribal officials cited them for trespass on multiple occasions on their original assigned land in order to pursue an expansion of the casino and possible hotel project. [239]

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[237] *Id.* at 823–24 (citing *Walton*, 443 F.3d at 1278; *Ordinance 59 Ass'n,* 163 F.3d at 1158; White v. San Juan Pueblo, 728 F.2d 1307, 1312 (1984)).

[238] First Amended Complaint at 30, Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852 (E.D. Cal. July 10, 2017). The author represented petitioners in this action. The district court dismissed the case for want of jurisdiction, finding that there was not a detention sufficient under §1303. The Ninth Circuit affirmed the dismissal on the grounds of exhaustion, referencing the pendency of new charges and proceedings before an appellate forum that did not exist at the time of filing of the habeas petition. 743 F. App'x 136, 136 (9th Cir. 2018).

[239] First Amended Complaint at 2, Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018).

Armed law enforcement officials from two jurisdictions encircled them, at times with hands on their holsters, ordering them to physically leave the land, creating fear for their safety and imminent arrest.[240] Additionally, the tribal court issued pretrial orders of superintendence banning petitioners from their land under threat of arrest and criminal prosecution.[241] Once petitioners were forced out, fencing was installed to prevent their re-entry.[242]

Napoles does not implicate disenrollment, membership, or eligibility for tribal services, areas of regulation that have been deemed to be core to tribal sovereignty. Rather, it is a case about physical, geographical restraint and the exertion of judicial superintendence during the pendency of trespass actions that were initiated by tribal officials.[243] Notwithstanding the totality of the circumstances, which petitioners argued were evidence of physical restraint similar to that established in *Poodry* and *Dry Creek Lodge* and fell within the line of cases like *Means* holding terms of judicial superintendence to meet the criteria for detention, the district court nonetheless dismissed the

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[240] *Id.* at 20–27, 29–31.

[241] *Id.* at 2. Restrictions that violated other of petitioners' rights were also imposed on them during the pendency of the action as well, including prohibitions against possessing firearms, weapons, or ammunition. Law enforcement from other jurisdictions were admonished to grant full faith and credit to the court order as well. *Id.* at 2, 24.

[242] *Id.* at 26.

[243] Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852, at *1 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018).

case for want of jurisdiction.[244] As with *Tavares*, the district court frames its analysis with recognition of tribal sovereignty and congressional primacy in Indian affairs, which caution restraint in federal court interpretation of federal statutes.[245] "With these principles in mind," it then steps to a discussion of detention under ICRA.[246] It attributes *Tavares* as significantly limiting the scope of habeas cases that may be heard in federal court absent actual physical restraint.[247] Finally, without explaining the difference the distinction would make with respect to tribal sovereignty or the scope of federal review, the district court distinguishes *Poodry* by likening it to a

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[244] *Compare id.*, at *6, *with* Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998) *rev'd on other grounds by* United States v. Enas, 255 F.3d 662 (9th Cir. 2001); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).

[245] *Id.* at *4 ("Two foundational principles guide this court's application of the statute: the concepts of "tribal sovereignty and congressional primacy in Indian affairs." (citing *Tavares*, 851 F.3d at 869)).

[246] *Id.*

[247] Stated the district court: "While the Ninth Circuit had earlier suggested agreement with the decision in *Poodry* to the extent it found that § 1303 requires 'a severe actual or potential restraint on liberty,' the decision in *Tavares* now makes it abundantly clear that any extension of 'detention' under § 1303 beyond actual physical custody must be narrowly construed by courts of this circuit. Indeed, the banishment at issue in *Tavares* was found insufficient to constitute detention—despite the fact that it barred the petitioners from entering *any* tribal land, including their own homes—because it was only temporary, lasting for ten years for some of the petitioners and two years for others." *Id.* at *5 (quoting Jeffredo v. Macarro, 599 F.3d 913, 919 (9th Cir. 2010)).

denationalization case, in contrast to what they suggest in *Napoles* was at root a takings case.[248]

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[248] *Id.* at *6, ("In *Poodry*, the Second Circuit found permanent banishment and disenrollment sufficient to constitute detention because it analogized such actions to the stripping of citizenship in denaturalization and denationalization proceedings. That is quite dissimilar from what is alleged by petitioners here, which more closely resembles a takings claim than a denaturalization or denationalization. Petitioners cite no authority, and the court has identified none, suggesting that § 1303 gives federal courts sitting in habeas the jurisdiction to resolve intra-tribal land ownership disputes." (citing *Poodry*, 85 F.3d at 895–96)).
Significantly, Congress did include a takings clause in ICRA's substantive provisions, but not expressly denationalization, 25 U.S.C. § 1302(a)(5) (2012) ("No Indian tribe, in exercising powers of self-government shall . . . take any private property for a public use without just compensation."). Moreover, and this goes beyond the scope of this paper but underscores the willingness of many federal courts to neglect careful consideration of the specific facts and ways in which federal review might further or undermine Congressional objectives, petitioners argued in this case that the land dispute underlying the rights violations was an inter-tribal, not intra-tribal, governed by a federal trust agreement and governing body and authority comprised of representatives from three tribes. For a description of that arrangement, see Ordinance Governing Land Assignments on the Bishop, Big Pine and Lone Pine Reservations (1962) ("By the Trust Agreement for Relief and Rehabilitation Grant to Unorganized Bands, [] (Hereinafter referred to as the 'Trust Agreement), approved April 17, 1939, by the Acting Commissioner of Indian Affairs, the governing body titled Trustees for the Owens Valley Board Paiute-Shoshone Indians, (Hereinafter referred to as the Owens Valley Board

The Ninth Circuit did not reach either the merits of the rights violation or the issue of whether there had been a detention sufficient to invoke the court's jurisdiction under § 1303. The dismissal was on the grounds of exhaustion, requiring petitioners to continue on in tribal appellate proceedings involving new trespass charges filed during the pendency of the federal habeas proceeding and a tribal appellate court that did not exist at the time of filing.[249] It did not explain how the tribal

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of Trustees), was created and recognized. The purpose of creating and recognizing the Owens Valley Board of Trustees was to receive and administer funds appropriated under the Emergency Relief Appropriation Act of 1938 for and on behalf of the Owens Valley Paiute-Shoshone Indians, under the direction and approval of the Commissioner of Indian Affairs. It was to this recognized governing body and their successors in office that the Commissioner granted and conveyed the said funds in Trust, subject to specified conditions stated in the Trust Agreement. Therefore, the recognized governing body of the Owens Valley Indian Bands is the Owens Valley Board of Trustees.").

[249] *See* Napoles v. Rogers, 743 F. App'x 136, 136–37 (9th Cir. 2018). Petitioners prevailed before the tribal court of appeals in the tribal council's first effort to have them trespassed from the land in question. Bishop Paiute Tribal Council v. Bouch, B-AP-1412-6-12 (Intertribal Ct. S. Cal. C.A. Nov. 2, 2015), *on reh'g*, Opinion (Intertribal Ct. S. Cal. C.A. June 1, 2016). The tribal appellate court reversed the convictions and remanded for further proceedings regarding the status of the land in question. On remand, rather than receive more evidence on the issue, however, the tribal court dismissed the case with prejudice. Order of Dismissal at 3, Bishop Tribal Council v. Bouch, No. BT-CV-TP-2014-0045 (Bishop Paiute Tribal Ct. Oct. 28, 2016) (Case nos. BT-CV-TP-2014-0045; BT-CV-TP-2014-0047; BT-CV-TP-2014-0048; BT-CV-TP-2014-0049; BT-CV-TP-0050; BT-CV-TP-2014-0051; BT-CV-TP-0052). Following the initial court of appeals decisions, representatives of the tribal council and court also cancelled

their contract with the Southern California Intertribal Court of Appeals, who the tribe had retained as their court of appeals at the time of the first trespass action and appeal. First Amended Petition, Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT at 25–26. Thereafter, when petitioners attempted to enter upon their land, the tribe filed a second trespass action and issued the orders and actions that were at issue in the case of Napoles v. Rogers ultimately before the Ninth Circuit. *Id.* at 18–21. Believing the charges to be precluded by the decisions in the first trespass action and without an appellate court to raise their objections and new rights violations, petitioners sought relief under ICRA in the form of the habeas corpus petition. *Id.* The circumstances existing at this time were the ones that formed the basis for the district court's decision in *Napoles v. Rogers*, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852, at *1 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018).

At the time of filing of their habeas petition, petitioners had exhausted all available tribal remedies. First Amended Complaint at 2, Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018). There was no appellate remedy available, the appellate court having been disbanded and not yet re-constituted. *See id.* at 28 (in the first amended complaint, the parties stated "it is unlikely an alternative forum will be constituted prior to Respondents' advancing the development project to the construction phase."). However, during the pendency of this case, tribal officials appointed new judges to a court of appeals, once again dismissed the charges that were pending at the time of the filing of the habeas petition, and filed a third set of virtually identical trespass charges against petitioners. It was this third set of charges that were pending (and before a panel of appellate judges that did not exist at the time of the filing of the original habeas case) at the time of the oral argument in the appeal before the Ninth Circuit. The Ninth Circuit, nonetheless,

respondents' creation of new remedies and legal actions during the pendency of the action, effectively circumventing those that existed at the time of filing, fit within the principles of exhaustion typically applied.

In fact, federal court jurisdiction is generally established as long as the petitioners are in custody when the petition for writ of habeas corpus is filed.[250] "The tribal exhaustion rule is based on 'principles of comity' and is not a jurisdictional prerequisite to review."[251] It is a prudential, not jurisdictional, consideration with numerous exceptions to its application.[252] Given the

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concluded: "Because an appeal is pending in tribal court regarding the subject of Plaintiffs' § 1303 habeas claim, Plaintiffs have not exhausted their tribal remedies and the district court did not have jurisdiction." Napoles v. Rogers, 743 F. App'x 136, 137 (9th Cir. 2018) (citing *Jeffredo*, 599 F.3d at 918).

[250] *See* Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (internal citations omitted). A brief discussion of exhaustion is included in this article to the extent it plays a role in the cases on "detention" under § 1303. However, the nuances of exhaustion and related justiciability doctrines like mootness in the context of tribal habeas cases demand their own inquiry that lie beyond the scope of this paper.

[251] Valenzuela v. Smith, 699 F.3d 1199, 1206 (10th Cir. 2012) (citing Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006)).

[252] In the words of the Supreme Court: "[E]xhaustion [is] not required where 'an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 n.12 (1987) (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985)). For example, a number of cases have held that "if a functioning appellate court does not exist, exhaustion is per se futile."

circumstances of the case in *Napoles* and the arguments presented by the parties, which focused predominantly on the issue of detention, a better approach would have been to conduct a more exacting review of the exhaustion doctrine prior to dismissing the case on those grounds.[253] The final disposition of the case, thus, may be construed as another example of a federal court summarily disposing of jurisdiction under ICRA without the depth of analysis warranted under the Act that is necessary to

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Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1036 (9th Cir. 1999) (citing Krempel v. Prairie Island Indian Cmty., 125 F.3d 621, 622 (8th Cir. 1997) (exhaustion of tribal remedies is not required when no functioning court existed at the time the original complaint was filed in district court)). *See also* Rosebud Sioux Tribe v. Driving Hawk, 534 F.2d 98 (8th Cir. 1976). Exhaustion is not required, moreover, where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where it would be futile. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 857 n.21 (1985) (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)). Neither must there be exhaustion if it would "serve no purpose other than delay." Nevada v. Hicks, 533 U.S. 353, 369 (2001) (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997).

[253] For example, and as advocated unsuccessfully by petitioners, if the court had concerns about exhaustion, a better approach would have been to reverse the district court's order of dismissal and remand the case for development of the record, as the court did in Dry v. CFR Court of Indian Offenses for the Choctaw Nation, 168 F.3d 1207 (10th Cir. 1999). *See Napoles*, 2017 WL 2930852, at *4 n.6.

guarantee protection of the individual rights as well as the interests of the sovereign.[254]

G. Miscellaneous Circumstances Which Have Been Held NOT to Meet the Standard for Habeas Review

Aside from the circumstances described above, habeas petitions under ICRA have been filed and denied in a variety of other circumstances. Jurisdiction over challenges to election have been denied.[255] As explained by one court:

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[254] The author recognizes that her role as an advocate for individuals and the impacts she has observed first-hand when rights are violated and there is no external redress likely has an influential effect on her response to these cases. Additionally, she acknowledges that the issue of exhaustion and justiciability lie beyond the scope of this article. However, her main point is that tribal sovereignty and self-determination as well as individual rights, both of which are critical to the sustained ability of indigenous people to exercise self-governance, warrant more exacting analysis of the actual interests of the tribe and actions of its officials and the way in which these interests and actions would be impacted by federal review or abstention. It is not enough to simply make general pronouncements of sovereignty and cut straight to a conclusion of abstention.

[255] *See, e.g.*, Lewis v. White Mountain Apache Tribe, 584 F. App'x 804, 805 (9th Cir. 2014) (holding Tribe's refusal to permit petitioner to run for election to the Tribal Council was not a sufficiently severe restraint on his liberty to constitute custody as it "does not create a deprivation of liberty similar to the types of infringement on personal movement previously recognized as establishing federal habeas corpus jurisdiction."); Scudero v. Moran, 230 F. Supp. 3d 980, 985 (D. Alaska 2017) (costs imposed on unsuccessful candidate for unsuccessfully challenging election results did not constitute a detention even if it were possible for him to lose his right to

> A tribe's right to define the qualifications for an office within the tribal government is similar to its right to define its own membership—it is central to a tribe's "existence as an independent political community." Likewise, the administrative procedures put in place to determine whether an applicant meets the qualifications for tribal office are equally important to a tribe's political independence and sovereignty.[256]

So too were purely monetary fines for unlawful logging;[257] revocation of a vending permit at a flea market;[258] temporary suspension of license to practice as

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vote as a result of being levied and not paying said costs; "the loss of one's 'voice' in a tribal community is insufficient to provide the necessary jurisdiction.").

[256] Lewis v. White Mountain Apache Tribe, No. CV-12-8073-PCT-SRB (DKD), 2013 WL 510111, at *6 (D. Ariz. Jan. 24) (citing *Santa Clara Pueblo,* 436 U.S. at 72 n.32), *report and recommendation adopted by* No. CV-12-8073-PCT-SRB (DKD), 2013 WL 530551 (D. Ariz. Feb. 12, 2013), *aff'd*, 584 F. App'x 136 (9th Cir. 2014).

[257] Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001) (purely monetary fine for unlawful logging does not constitute a detention).

[258] Walton v. Tesque Pueblo*,* 443 F.3d 1274, 1279 (10th Cir. 2006) (footnote omitted) (holding that the revocation of a flea market vendor's license to do business at a tribal flea market was insufficient to satisfy ICRA's custody requirement, nor did it fall within the *Dry Creek* exception).

an advocate in tribal court;[259] termination and replacement of employment;[260] and selective enforcement of an ordinance permitting inspection and demolishing of houses.[261] Also inadequate was a suit challenging disenrollment and eviction from federally-funded lease-to-own housing in retaliation for petitioners' opposing a tribal council candidate during an election cycle was insufficient.[262] Similarly a tribal member who was

[259] Poulson v. Tribal Court for the Ute Indian Tribe, Civ. No. 2:12-CV-497 BSJ, 2013 WL 1367045, at *2 (D. Utah Apr. 4, 2013) (suspension as lay advocates insufficient).

[260] Payer v. Turtle Mountain Tribal Council, No. A4-03-105, 2003 WL 22339181, at *5 (D.N.D. Oct. 1, 2003) (termination and replacement of their roles by tribal council members from school where they served as elected board members and grant administrators after securing $29 million in federal funding did not constitute a detention; even where council terminated tribal judge who reinstated petitioners and punished another for attempting to enforce that order, tribal court was their only forum in which to seek remedy).

[261] Shenandoah v. Halbritter, 366 F.3d 89, 92 (2d Cir. 2004) (allegedly selective enforcement of an ordinance permitting inspection and demolishing of houses of those who dissented from and claimed harassment and intimidation by tribal leaders was an economic harm, not a restraint of liberty sufficient to invoke ICRA's habeas provision).

[262] Quitiquit v. Robinson Rancheria Citizens Business Council, No. C 11-0983 PJH, 2011 WL 2607172, at *8 (N.D. Cal. July 1, 2011) ("Under *Jeffredo,* the court lacks jurisdiction under the ICRA to review an order of disenrollment, and the eviction order, which resulted from the ruling in the unlawful detainer action, does not serve to transform the disenrollment into a punitive 'banishment.'" In addition, as respondents argue, unlawful detainer is a civil action brought pursuant to state law, and it does not provide a basis for federal subject matter jurisdiction."); *see also* Round Valley Indian Hous. Auth. v. Hunter, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995).

domiciled off the reservation was not detained for the purposes of §1303 by virtue of being banned from entering tribal businesses and offices – except the court and health center.[263]

Efforts by tribal officials to retaliate against tribal court advocates or judges who advocated for or made rulings favorable to individuals who challenged tribal officials or action have been determined to fall short of the standard as well.[264] Suits by descendants of slaves owned by Cherokee Indian Nation and freed by 1866 treaty alleging violation of constitutional and statutory provisions from denial of their right to vote in tribal elections and right to participate in federal Indian benefits programs have been held not to present grounds for habeas jurisdiction under ICRA.[265] Altogether, some very serious rights violations have occurred and will continue to occur with no means of redress due to the unavailability of tribal remedies and

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[263] Mitchell v. Seneca Nation, No. 12-CV-119-A, 2013 WL 1337299, at *1, *4 (W.D.N.Y. Mar. 29, 2013). The court determined that the primary impact was economic; however, even cultural and social impacts acknowledged by the court were not enough. *Id.* at *4. According to the court, "barring access to Nation buildings is not a restraint severe enough to permit habeas corpus review." *Id.*

[264] Oviatt v. Reynolds, No. 17-4124, 2018 WL 2094505, at *1, *3 (10th Cir. May 7, 2018) (tribal court advocates did not establish basis for detention where they were banned from court services, tribal offices, courts, family services but there was no indication of permanent banishment).

[265] Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1458, 1461 (10th Cir. 1989); Wheeler v. Swimmer, 835 F.2d 259, 261 (10th Cir. 1987).

restrictions in federal court interpretations of detention under
§ 1303.

V. The Evolution of ICRA Under Federal Court Review

A. Revisiting Congress' Expressed Goals

Congress enacted the Indian Civil Rights Act at a time in American history where concern for civil rights was of pressing and nationwide concern. As Congress investigated the issue of Indian civil rights generally, including their rights with respect to state, federal, and local government officials, a clear picture emerged that some of the greatest civil rights violations occurred at the hands of tribal officials.[266] A variety of factors contributed to the denial or abridgement of Indian civil rights, including the "budgetary distress" and "paucity of resources" which could be allocated to law enforcement, legal counsel or tribal court development, the prohibition of trained lawyers and/or staffing of tribal courts with lay judges, compulsory testimony of defendants, and judges serving dual or multiple roles as trial and appellate judges or council members and judges.[267] Abuse of power by tribal councils and its relation also in many circumstances to harassment and discrimination based on religious affiliation also "appeared to manifest more than budgetary distress."[268]

What is clear about the act's enactment is that Congress intended to formally recognize and provide some form of federal remedy for violations of the

[266] *See* Burnett, *supra* note 32, at 584–88.
[267] *Id.* at 581–82.
[268] *Id.*

enumerated rights set forth in § 1302.[269] However, the federal courts have exerted extraordinary and limiting influence over the scope and enforceability of ICRA.

In the first cases filed after ICRA's enactment and in keeping with what seems to be the clearest picture of Congress's original intent, federal jurisdiction over all kinds of civil and criminal actions was widely acknowledged under the basic federal jurisdictional statutes for federal question and civil rights cases. Federal courts, in that iteration of interpreting the Act, performed the balancing of interests, by and large, through weighing of the seriousness of the particular alleged rights violation and the extent to which the standard under Anglo-American constitutional interpretations differed from those in the tribal context.[270] It was and continues to be widely acknowledged that "[j]udicial sensitivity is especially important in the area of Indian civil rights."[271] As noted by the United States Commission on Civil Rights shortly after its passage: "In enforcing the act, the courts will have the serious responsibility of drawing a balance between respect for individual rights and respect for Indian custom and tradition. Many important questions . . . will not be answered until the courts have settled them."[272]

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[269] *See id.* at 577 (discussing the "constitutional neglect which Senator Ervin was determined to remedy" when Congress held hearings in 1963 and 1965).

[270] *See supra* notes 41–52 and accompanying text.

[271] Burnett, *supra* note 32, at 557.

[272] *Id.* (citing U.S. Comm'n on Civil Rights, American Indian Civil Rights Handbook 11 (1972)).

However, as discussed above, beginning in 1978 with the Supreme Court's decision in *Santa Clara Pueblo*, a severe change to this method of balancing occurred. The first and most radical step was to determine that ICRA waived sovereign immunity only in the context of § 1303's habeas provision, meaning a deprivation of rights had to be so severe that it deprived the individual of his or her liberty before the courts would review the violations.[273] In addition to that, the Court emphasized for the first time not one, but two distinct purposes of ICRA: specifically, "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."[274] In other words, explained the court: "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'"[275] With respect to the goals of furthering Indian self-government, the Court was concerned that it not interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity, acknowledging that tribal forums might be in a better position to evaluate matters of custom and tradition than federal courts.[276] This balancing is what led the court to render its determination that habeas was the only federal remedy.[277]

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[273] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).
[274] *Id.* at 67–68 (citation omitted).
[275] *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974); Fisher v. District Court, 424 U.S. 382, 391 (1976)).
[276] *Santa Clara Pueblo*, 436 U.S. at 62, 70.
[277] *Id.* at 66.

While the limiting strictures of *Santa Clara Pueblo* widely have been accepted as binding, its determination that federal jurisdiction was foreclosed except when a detention sufficient to invoke the court's habeas jurisdiction was present is not necessarily born out in the legislative history. It is true that early versions of the legislation provided for direct appeal of all tribal court criminal convictions with trial de novo available on appeal.[278] This was presented as an expansion of the habeas remedy articulated in the case of *Colliflower v. Garland*.[279] However, the criminal jurisdiction of tribal courts was but one of many sources of rights violations identified by Congress. Other early bills considered the scope of the substantive rights that should be protected,[280] authorization of the U.S. Attorney General to investigate and prosecute civil rights violations in which Indian civil rights were involved,[281] provisions for the development of a new model code for the courts of Indian offenses and tribal courts,[282] provisions aimed at addressing inadequate law enforcement and recommending concurrent federal jurisdiction in some states who failed to perform their law enforcement duties

[278] S. 962, 89th Cong. (1965); *see also* Burnett, *supra* note 32, at 592–93.
[279] Burnett, *supra* note 41, at 592 n.201 (citing Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)).
[280] S. 961, 89th Cong. (1965); Burnett, *supra* note 32, at 589–92.
[281] S. 963, 89th Cong. (1965); Burnett, *supra* note 32, at 594–95.
[282] S. 964, 89th Cong. (1965); Burnett, *supra* note 32, at 595–96.

under Public Law 280,[283] and resolutions aimed at revising administrative practices of the Department of Interior related to attorney contracts and organization of legal materials related to Indian treaties, laws, executive orders, and regulations.[284]

Some tribes presented testimony raising concern about the trial de novo on appeal, financial burdens related to the need to hire tribal prosecutors.[285] The Department of the Interior and Bureau of Indian Affairs (BIA) registered objection to the direct appeal as well in nominal deference to the Department's appellate authority over federally established courts of Indian offenses; they urged federal appeal of reservation court decisions only and upon the full exhaustion of all administrative remedies. [286]

In the final versions, the substantive rights provision in S. 961 remained largely intact and S. 962 was amended to permit appeals of criminal convictions to federal court through the writ of habeas corpus, not trial de novo.[287] The primary concern about de novo review of all criminal convictions by tribal courts apparently was fear that it would precipitate "intolerable strain on the district courts, already suffering from a chronic overload of cases."[288] Federal review itself was not an issue—indeed, that arguably was what was desired by way of relief at the time of ICRA's drafting —nor was there an express concern related to deference to tribal sovereignty. There is little specific discussion in the

[283] S. 965., 89th Cong. (1965); S. 966, 89th Cong. (1965); S. 967, 89th Cong. (1965); Burnett, *supra* note 41, at 596–99.
[284] S. 968, 89th Cong. (1965); S.J. Res. 40, 89th Cong. (1965); Burnett, *supra* note 32, at 599–601.
[285] Burnett, *supra* note 32, at 593.
[286] *Id.* at 593–94.
[287] *Id.* at 602–04.
[288] *Id.* at 602 n.240.

legislative record illuminating the versions of the bill that included the habeas provision and how the remedy of habeas was to be viewed with respect to the direct de novo appeal option which was ultimate rejected, aside from the reference to the *Colliflower* case itself, which was a habeas case.[289] There is surely no indication anywhere in the record that habeas was intended to limit federal review with respect to all categories of rights violations, just those accompanying criminal convictions. It is also not clear what Congress understood about what exactly was intended as a precipitating condition for the filing of habeas in those criminal cases. It was the trial de novo, not review itself, that was the concern in the legislative debate;[290] and the details of how that would be redressed are not spelled out.

Also significant is the fact that the proposal in S. 963 to permit Attorney General investigation and prosecution of rights violations was removed from the final version in response to opposition by tribal leadership and Department of the Interior.[291] This left

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[289] *See supra* note 121.

[290] *See* Burnett, *supra* note 32, at 593.

[291] *Id.* at 603. Many who presented on behalf of tribes favored this requirement, as it addressed issues of abuse by state and local law enforcement and courts as well. However, leaders of some tribes, including the Pueblos of New Mexico who were very vocal in the opposition objected, stating: "We understand, better than non-Indians, the background and traditions which shape Indian conduct and thinking, and we do not want so important a matter to be tried by those who are not familiar with them." *Id.* at 594 (citing *1965 Senate Hearings*, *supra* note 124, at 352–53). The Department of the Interior wanted to maintain control and screening over

enforcement exclusively in the hands of those whose rights had been violated. Arguably, then, this lends further support to an intent by Congress to provide a more expansive scope of jurisdictional authority to address alleged violations of the substantive rights spelled out in ICRA.

The place where the tribes' unique cultural and sovereign attributes were considered was with regard to which substantive rights would be recognized. Initially, equal protection was omitted in deference to tribes' unique cultural values that may diverge from the Anglo-American vision of what must be equal between persons. Some tribes claimed not to be affected by any proposed substantive rights, as they had already adopted constitutions that virtually replicated the U.S. Constitution.[292] Others indicated they were financially and psychologically unprepared to incorporate these changes. "At the other extreme were the Pueblos, who were determined to maintain their closed and traditional societies."[293] Representatives of the Department of Interior and BIA and some attorneys acknowledged the various ways in which tribes were situated with respect to constitutional rights and recommended enumerating certain rights and leaving out others, rather than

complaints and determine which ones got forwarded to the justice department. *Id.* at 595.

[292] *Id.* at 589 (citing *1965 Senate Hearings*, *supra* note 124, at 325).

[293] *Id.* at 589. Stated one tribal representative: "We have long held to our tradition of tribal courts and we have our own codes. Naturally, we are familiar with the special conditions existing in our various communities, and the status of sovereignty which we have always enjoyed has made us dedicated to the task of preserving it." *Id.* (citing *1965 Senate Hearings*, *supra* note 124, at 352).

imposing the full constitutional requirements.[294] This became the prevailing vision and one ultimately accepted by Congress. Some rights were omitted such as the establishment of religion clause, right to grand jury, right to counsel at tribe's expense, right to jury in civil cases, and Fifteenth Amendment.[295] Those omitted, by and large, were out of consideration of the financial burden it would impose on already impoverished tribes with a few, like the establishment clause prohibition out of deference to unique cultural and traditional norms where government and beliefs were not necessarily separated.[296]

Other rights were expressly enumerated, and that is the approach ultimately embraced by Congress. One interesting development was that the Department of Interior submitted a proposal that included the privilege of habeas corpus in a list of other enumerated rights, including the right to jury trial in certain criminal cases, First Amendment rights, protection from search and seizure, right to confront witnesses, right to counsel at individuals' own expense, prohibition against ex post fact laws, excessive bail or fines, and the right to equal protection.[297] This also supports an interpretation that the habeas provision was, indeed, a concession limited to the arena of appeals of criminal convictions, not the exclusive remedy intended by Congress for violations of

[294] *Id.* at 590 (citing *1965 Senate Hearings*, *supra* note 124, at 317–18).

[295] *See* Burnett, *supra* note 41, at 591–92 (discussing the bill substitutes that preceded the ICRA),

[296] *See id.* (discussing the reasons for S. 961, 89th Cong. (1965)).

[297] 1965 Senate Hearings, supra note 124, at 318.

all the other enumerated rights. Based upon this legislative history, therefore, the Court's decision in *Santa Clara Pueblo* reflects in the name of tribal sovereignty a much more restrictive scope of federal jurisdictional authority over ICRA than what was envisioned by Congress.

The manner in which federal courts decided alleged ICRA violations in the first ten years after its enactment further underscores this understanding.[298] Relief was granted in a number of areas, outside the context of habeas, challenging issues arising in elections, with expression of speech, and other non-custodial matters.[299] The courts tailored the enumerated rights of ICRA to the unique customs, tradition and cultural norms of each tribe, and interpretative rules emerged with regard to the substantive provisions of the Act.[300] Physical custody was not a requirement to gain redress in federal court. As summarized in 1979, in proximity to the date of those decisions: "The infringement on tribal sovereignty has been mitigated by recent judicial decisions that use tribal customs and traditions as the basis for interpreting the ICRA."[301]

Also significant in framing *Santa Clara Pueblo* is legislative advocacy that took place not during but after the actual enactment of ICRA. After its passage, a number of tribes objected, and an amendment to ICRA was proposed by the National Council of Tribal

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[298] *See* discussion and authority *supra* Section I(A).

[299] Id.

[300] *Id.*

[301] Judy D. Lynch, Note, Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act, 1979 WASH. U. L. Q. 897, 918 (1979).

Chairmen.[302] "The resolution stated that the ICRA violates the principle of self-government associated with Indian tribes because courts have construed the Act as granting federal courts jurisdiction over issues such as the right to membership in a tribe, the operation of tribal elections, the selection of tribal officials, and the right to conduct tribal governmental business."[303] The proposed amendment would have limited ICRA's applicability to members of any tribe, bands, or groups "which has consented to the provisions of this subchapter by an affirmative vote of the adult members of the tribe, band, or other group of Indians in an election called by the Secretary of the Interior for that purpose."[304] This amendment did not pass, however, leaving ICRA and its impacts on sovereignty and independence in place as originally enacted. This advocacy initiative and Congress' response to it is telling because it demonstrates the extent to which the original ICRA intended to provide a remedy regardless of particular tribes' or tribal leaders' consent or desire to be guided by its principles.

In the wake of this failed legislative amendment, some federal courts did make efforts to infuse interpretations of ICRA with more consideration of tribal tradition, culture, and governance processes. However, federal jurisdiction to review claims was widely exercised, the limitations being construed in the form of

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[302] See Resolution Adopted by N.T.C.A. at National Meeting, December 5-8, 1973, Phoenix, Arizona, 1 INDIAN L. REP. 1. 63–65 (1974) [hereinafter Resolution].

[303] Lynch, *supra* note 301, at 912 (citing *Resolution*, *supra* note 302, at 63–65).

[304] *Id.* (citing *Resolution*, *supra* note 302, at 63–65).

interpretations of substantive rights.[305] In those cases where rights violations were found to have occurred, despite efforts at interpretations that resonated with cultural norms, federal courts regularly made declaratory judgments and enjoined tribal officials from persisting with the rights violations. For example, a number of federal district courts required tribal courts to permit legal representation by licensed lawyers.[306]

Some courts even authorized civil actions for damages against tribal officials who violated enumerated rights so long as such claims were brought in conjunction with an action for equitable or habeas corpus relief with which it shared a "common nucleus of operative fact."[307] However, both equitable and habeas remedies were clearly and widely understood to be authorized under ICRA in order to address enumerated rights violations. "The 1968 legislation has been interpreted to empower federal courts to decide cases not previously heard by the tribal courts or brought to federal courts by habeas corpus, to apply developing fourth and fifth amendment concepts, and to allow damage actions not authorized by the statute."[308]

Thus, although its ruling dramatically limited the scope of relief available, *Santa Clara Pueblo* gives

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[305] *Id.* at 912–15 (internal citations omitted); *see also* discussion *supra* Section I.

[306] Burnett, *supra* note 32, at 619 (footnotes omitted).

[307] *See, e.g.*, Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 91 (D. Mont. 1969) (citing and analogizing to United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that federal courts may exercise pendent jurisdiction in damage claims arising under state law as long as there is a 'common nucleus of operative fact' with federal claims that are properly before the court)); *see also* Burnett, *supra* note 32, at 618–19.

[308] Burnett, *supra* note 32, at 618–19.

meaning, not to Congress's intent itself, but to a vision of tribal sovereignty and the need for federal restraint in the review of alleged tribal rights violations that gained ascendancy after ICRA's enactment, and it does so in the face of tribal advocacy and proposed legislative reform that Congress rejected during and after ICRA's passage. The Court's impact on the enforceability of ICRA's substantive rights was substantial. Although tribes were not required to consent to ICRA's provisions before it could be applied, all remedies but those remaining under § 1303's habeas provision were foreclosed. This created a dramatic gap between the rights Congress set forth as deserving of protection, and the redress actually available to enforce them. As set forth above, neither the plain language nor legislative history of the act, or its interpretation by the federal courts in the ten years following the act, actually supports this determination; and it marks a devastating limitation on ICRA's efficacy in the recognition and enforcement of its substantive rights.

B. Even the Availability of Habeas has been Diminished by the Federal Courts in Ways that Thwart Congressional Intent

Although *Santa Clara Pueblo* still left room for federal review in situations where a detention sufficient to invoke habeas review existed, the majority of lower court decisions since *Santa Clara Pueblo* have tilted the balance against federal review of ICRA claims even further. The result has greatly curtailed the

enforceability of ICRA, except in the most extreme and unique of circumstances.[309]

One way this has occurred is through the federal courts expressly weighting tribal sovereignty more heavily than individuals' substantive rights to redress in the assessment of whether there is a detention under § 1303. Congress incorporated tribal sovereignty and self-determination concerns in its articulation of which enumerated rights would be included in ICRA.[310] *Santa Clara Pueblo* itself justified its foreclosing of equitable and declaratory remedies as stemming from the critical goal of deference to tribal sovereignty.[311] In doing to, the Court considered certain sovereign interests of the Santa Clara Pueblo, one of the tribes most resistant to ICRA.[312] The Santa Clara Pueblo was one of the tribes that advocated for amendments not ultimately embraced by Congress, in the distinctive area of enrollment and membership, which are core sovereign interests.[313] The case itself is about the tribe's membership rules that excluded children of mothers who married outside the tribe but not fathers.

As with *Santa Clara Pueblo*, many decisions, like those of *Poodry* and *Tavares*, have noted the unique importance of deferring to tribes in certain matters of exercising sovereignty, including circumstances implicating enrollment and membership and many other

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[309] *See supra* note 139.

[310] *Supra* notes 271–98 and accompanying text.

[311] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

[312] *See, e.g.*, *1965 Senate Hearings*, *supra* note 124, at 353–54 (detailing tribe opposition to the bills preceding the ICRA, including opposition from a representative from the Santa Clara Pueblo).

[313] For an in-depth discussion of tribal membership and its link to significance to tribal sovereignty, see Painter-Thorne, *supra* note 168.

interests.[314] A distinct problem with many of these decisions, however, is that the courts often quickly and summarily reject jurisdiction on the grounds of deference to tribal sovereignty without sufficient analysis of the particular sovereign interests, how they should be construed and weighted in light of other tribal and individual interests, and how they actually may be impacted in a given case.[315] Although hundreds of cases have been filed seeking relief under ICRA, jurisdiction has only been granted since *Santa Clara Pueblo* in a few very narrow circumstances: in a criminal case where an individual is actively incarcerated[316]; in a situation where an individual has been charged with an offense, incarceration is a possibility, and the court has exercised superintendence before or after conviction[317]; in two instances of banishment unaccompanied by

[314] Tavares v. Whitehouse, 851 F.3d 863, 877–78 (9th Cir. 2017); Poodry v. Tonawnda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996) (citing *Santa Clara Pueblo*, 436 U.S. at 55–56).

[315] *See, e.g., supra* notes 108–113 and accompanying text; *supra* notes 242–47 and accompanying text.

[316] *See, e.g.*, Garcia v. Rivas, No. 15-cv-337 MCA/SCY, 2016 WL 10538197, at *7 (D.N.M. Mar. 11), *report and recommendation adopted by* No. 15-377 MCA/SCY, 2016 WL 10538196 (D.N.M. Apr. 12, 2016) (granting habeas for a tribal member who had been incarcerated for longer than the 6-year permitted of his sentence).

[317] *See, e.g.*, Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998) *rev'd on other grounds by* United States v. Enas, 255 F.3d 662 (9th Cir. 2001).

disenrollment[318]; and in the *Dry Creek Lodge* situation, an exception which has never been re-applied.[319]
Moreover, in addition to narrowing the grounds for habeas jurisdiction, courts often invoke other doctrines, such as exhaustion or mootness, further restricting the circumstances where a federal court will actually review the merits of individual's rights violations. For example, even in the face of serious deprivations of rights where custodial circumstances are present, a number of federal courts have been inclined to summarily dismiss cases during their pendency based upon unilateral actions of tribal defendants to create new proceedings or appellate remedies and/or alter the legal predicate for the underlying custodial circumstances.[320] This exacts a serious toll on ICRA's goal of protecting individual rights. Indeed, it may be argued that the sum total of these interpretive measures has nearly eviscerated ICRA's impact as a remedy for recognition and enforcement of civil rights.

C. Problems in the Application of ICRA

There are several problems with how federal courts have interpreted and applied ICRA and *Santa Clara Pueblo* over the years. First, while most have articulated a standard of "detention" commensurate with

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[318] *See, e.g.*, Quair v. Sisco, 359 F. Supp. 2d 948, 967 (2004); *Poodry*, 85 F.3d at 879 (concluding that the circumstances of banishment constituted criminal conduct sufficient for the purposes of a writ of habeas corpus).

[319] Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980).

[320] *See, e.g.*, Jeffredo v. Macarro, 599 F.3d 913, 921 (9th Cir. 2010); Napoles v. Rogers, No. 1:16-cv-01933-DAD-JLT, 2017 WL 2930852, at *6 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018).

that understood in federal habeas law in other contexts, some courts, such as the Ninth Circuit, have suggested that "detention" under §1303 should be more narrowly construed than with respect to the federal habeas statutes.[321] As discussed above, that is not supported by ICRA's legislative history, and it causes further restriction on the enforceability of ICRA's substantive rights.

Additionally, many lower court opinions infuse their ultimate analysis of the jurisdictional question with an independent weighing of sovereign concerns over and above those that informed the Supreme Court's opinion in *Santa Clara Pueblo*. For example, in its most recent decision under ICRA, the Ninth Circuit framed its analysis with a section entitled "Principles Animating Habeas Jurisdiction Under § 1303 of the Indian Civil Rights Act."[322] The court announced: "We ground our opinion in two foundational principles in the Indian law canon—tribal sovereignty and congressional primacy in Indian affairs."[323] The two principles were combined to reach the interpretive conclusion that the court should refrain from interpreting federal statutes in a way that

[321] *See supra* notes 108–26 and accompanying text.

[322] Tavares v. Whitehouse, 851 F.3d 863, 869 (9th Cir. 2017).

[323] *Id.*; *see* Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes . . . must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" (alteration in original) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)).

limits tribal autonomy unless there are "clear indications" that Congress intended to do so.[324] As articulated by the Ninth Circuit in another case: "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters."[325]

As indicated above, there is strong evidence in the legislative record that Congress intended to create federal enforcement of ICRA's substantive rights, taking into account tribal traditions in the selection of rights to be guaranteed under the Act; and it is the federal judiciary that intrudes on the balance established by Congress by elevating a presumed deference to tribal sovereignty as a reason to decline jurisdiction in cases like *Tavares* and *Napoles* without explicitly identifying the sovereign interests that would be harmed and the cost to the community at large and individual petitioners that federal inaction imposes.[326]

By including blanket deference to tribal sovereignty, over and above analysis of the circumstances surrounding whether there has been a detention, the federal judiciary has caused an undue weighting of that goal. Not only does that give it disproportionate weight with respect to Congress's goal of protecting individuals from serious civil rights violations, but it results in unduly broad and inaccurate judgments of the sovereign interest at stake in any particular case. In many cases, this happens without even assessing what specific tribal traditions, interests or other measure of autonomy actually would be

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[324] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[325] *Jeffredo*, 599 F.3d at 918 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32).

[326] *See supra* notes 277–84 and accompanying text.

undermined. Rather, it is a loose and presumed deference to tribal forums and laws that is afforded and justifies abstention of federal judicial review. In this manner, remedies for those whose rights have been violated have been virtually eviscerated, except in the rare circumstances where there is a tribal forum, or where the individual is incarcerated or permanently banished and has managed to exhaust all tribal remedies existing prior to and even during the pending federal litigation.

Additionally, and this is perhaps the more significant point to be made, without a more sophisticated assessment of the particular sovereign interests and the way in which a specific tribe or even several tribes' ability to preserve its traditions, cultural identity and ability to engage in self-determination may be impacted by the enforcement of the individual rights asserted, summary deference to tribal sovereignty essentially eviscerates both of ICRA's goals, thereby nullifying it as a source of civil rights protections.[327] This diminishment of the sovereign or cultural interests may occur, for example, if there is no accountability and review of disenrollment decisions that deplete a significant sector of the tribe's membership. It may occur also when certain interests in land use and occupancy are at issue, since the ability to live contiguously on land reserved for the livelihood and wellbeing of individuals and families is core to sovereignty. When the interests

[327] In addition to limiting the remedies available to individuals in the face of substantive civil rights violations, an argument may be made that federal courts diminish the very sovereignty they claim to protect. However, this is a subject that goes beyond the scope of this article and will be addressed in a separate paper.

involve federal trust agreements and/or the land base and decision-making authority of other tribes, the need for federal review becomes even more imperative. Petitions involving actions taken in retaliation for citizen-based advocacy aimed at strengthening governing processes and accountability may also implicate these interests. Civil rights violations themselves and the impact they have on individuals and community members at large may exert their own impact on the strength and viability of the ability of a community to effectively engage in self-determination.

In response to concerns about civil rights under these interpretive restrictions, some have called for a revision of ICRA itself in order to address this problem.[328] Others have proposed tackling it from a human rights standpoint outside of the federal framework.[329] Others have called upon increased support for tribal sovereignty through greater reform within tribal systems combined with federal support and funding for such reforms, limited waivers of sovereign immunity, the creation of specialized intertribal courts of appeals to address

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[328] See, e.g., Carla Christofferson, Note, Tribal Courts' Failure to Protect Native Women: A Reevaluation of the Indian Civil Rights Act, 101 YALE L. J. 169, 170 (1992); Robert C. Jeffrey, Jr., Essay, The Indian Civil Rights Act and The Martinez Decision: A Reconsideration, 35 S.D. L. REV. 355, 356 (1990).

[329] ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 188–95 (2005); Robert T. Coulter, *Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview*, 31 AM. INDIAN L. REV. 573, 573–74 (2007); Klint A. Cowan, *International Responsibility FOR Human Rights Violations By American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 42–43 (2006).

membership disputes and other issues impacting core sovereignty concerns.[330]

In the meantime, and as long as there is an ICRA, federal courts would do well to apply ICRA in a manner that restores it as a functioning civil rights enforcement statute and gives meaning to Congress's intended goals. There are several points in the analysis that warrant reconsideration. One is surrounding the scope of *Santa Clara Pueblo*. Although widely accepted as immutable authority in terms of restricting federal review to the scope of habeas detention, the result in *Santa Clara Pueblo*, as described above, is not borne out in the legislative history of ICRA. However, even if the rule in *Santa Clara Pueblo* is the correct degree of interpretive deference to be given to the scope of enforcement remedy created by ICRA, the case does not in itself preclude federal court review of as many habeas cases as have been held not to meet § 1303's definition of "detention." Cases such as *Tavares*' and *Napoles*' narrowing of the scope of detention under ICRA from that under other federal habeas statutes exemplify one aspect of this doctrinal narrowing occurring since *Santa Clara Pueblo*.[331]

Another example of this unduly restrictive interpretive approach that bears restructuring es is with

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[330] *See, e.g.*, Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic*, 57 ARIZ. L. REV. 383, 472 (internal citations omitted) (2015); Pointer-Thorne, *supra* note 168.

[331] *See supra* notes 114–25 and 242–53 and accompanying text.

respect to the doctrines of mootness and exhaustion.[332] While exhaustion of existing tribal remedies may well be justified deference to the sovereign prerogative in cases where there are legitimate remedies that provide a reasonable and timely expectation of review, it is critical that the federal courts critically analyze the factual and legal context before determining justiciability. Allowing tribal respondents to evade federal review by manipulating justiciability doctrines like mootness and exhaustion during the pendency of habeas litigation has an especially deleterious impact on ICRA's efficacy as an instrument of rights enforcement as it enables tribal defendants to evade judicial review through procedural gamesmanship.[333] Not only do petitioners in those cases oftentimes remain in custody or under other effect from the rights violations during the pendency of the revised proceedings, but they and their advocates may suffer from more retaliatory actions while tribal laws, legal structures and processes, and officials who staff them may be changed to advance the outcome desired by the tribe.[334] Any damage to the collective sovereign interests of the tribe will also be advanced during this pendency.

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[332] *See supra* notes 143-47 and 252–54 and accompanying text.

[333] *See supra* notes 143–47 and 252–54 and accompanying text. Again, this subject and details of the reform needed lie beyond the scope of this article, but it bears noting as it intersects with the scope of habeas and arguments about what constitutes a "detention."

[334] The author, through her representation of individual petitioners over the years in *Napoles v. Rogers* and several other habeas cases, can attest personally to the weathering effect on petitioners and their counsel of these cases, especially when federal courts decline to exercise their jurisdiction in the name of exhaustion. Not only does declining federal review permit tribal officials to take actions to effectuate the outcomes they desire by manipulating legal

Like the court in *Dry Creek Lodge* determined, *Santa Clara Pueblo* need not preclude all causes of action, only those directly impacting or diminishing a particularly significant sovereign interest of the tribe, such as control over tribal membership criteria and rules.[335] Even where a significant sovereign interest may be identified, it must be balanced against other interests such as the impact on the rights of the petitioners involved and on the ability of the collective membership and sovereignty itself to engage in effective and appropriate self-governance under the complex web of tribal and federal legal constructs that define it in every tribal context.

Most importantly, if federal courts are to undergo analysis in each case of how to balance the requirements

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structures, their staffing and the laws themselves, but maintaining a defense over time is incredibly onerous. Petitioners, who are sometimes elderly, may die or suffer from illness. The time and cost of maintaining rigorous litigation and defense over time may be prohibitive. It is difficult also to find lawyers able or willing to represent petitioners. Those, such as the author, who engage in this work on a pro bono basis, and those supervising students in clinical programs in law schools such as the University of New Mexico's Southwest Indian Law Clinic may be challenged to maintain such complex, dynamic, and rigorous advocacy over time, along with other cases and obligations that they must meet. The parties and their counsel may literally become exhausted and unable to mount continued defenses when the legal doctrines of exhaustion and mootness are applied without careful analysis of the circumstances involved and the impacts that will likely ensue.

[335] Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980).

of ICRA in enforcing civil rights with any particular sovereign interests justifying restraint, it is imperative for federal courts to do that carefully and with particularity. Specifically, it is imperative that they assess the seriousness and impact of the alleged rights violations and conduct a different, more nuanced way of analyzing tribal sovereignty, rather than referencing the general importance of tribal sovereignty and summarily dismissing the case. While resolution of this issue goes beyond the scope of this article, the following factors should be evaluated when analyzing whether any particular sovereign interests weigh in favor of dismissal in the context of an ICRA habeas petition:

- The precise sovereign interest at stake in association with the alleged civil rights' violation, i.e., whether it is exercise of criminal jurisdiction, enrollment and tribal membership, economic development interests, dominion over land, upholding governance principles, a cultural or traditional norm, etc.;
- The precise way in which that sovereign interest potentially would be impacted by exercise of federal jurisdiction;
- Assessment and balancing of the divergent interests involved, i.e., individual, community, tribal, inter-tribal, federal, and a method for prioritizing among them when in conflict;
- Whether there are, in fact, any legitimate and effective appellate or habeas remedies to be pursued within the tribal setting by way of exhaustion as determined at the time of filing;

- Whether perceived remedies yet existing once a federal action has been filed were created during the pendency of that federal action in an effort to subvert federal review;
- The extent to which federal funding or other authority or decision-making is implicated in the tribal action, i.e., in providing law enforcement investigation or prosecutorial assistance, prison or jail facilities, funding to tribal courts, etc.;
- The extent to which the tribal action implicates federal interests, trust responsibility, land allocation or management, or federal funds or programs;
- Whether and to what extent there is a dispute about governance and/or lawful governance authority of the official taking action;
- The age and strength of the tribal judicial systems available and the extent to which interference or dysfunction with those processes is alleged as a part of the habeas petition, i.e., that processes have been circumvented, judicial officers or courts terminated or disbanded, lawyers excluded, or that previously recognized principles of judicial independence or consensus-based governance have been undermined, etc.
- The extent to which the tribe has restored independent self-determination within its

legal systems versus the role of federal government in oversight, funding, staffing or other influence in the operable tribal legal systems and laws. Federal judicial deference to tribal sovereignty is more questionable where the federal government exercises influence in the tribal system and/or the laws and processes are still patterned off of ones developed and imposed by the federal government.

- Whether the alleged rights violations are ones taken in retaliation by certain tribal officials in response to perceived action against the petitioner(s) in furtherance of alleged community interests or cultural and traditional norms because, if so, the federal court should resist dismissal until careful analysis is done to ensure the community interests and self-governance of the tribe are in proper hands;
- Whether and to what extent the alleged rights violations appear to be influenced by external business or political interests, i.e., to expand gaming or economic development motives, where the tribal defendants may stand to personally benefit or are advocating for the interests other governing bodies or the collective membership;
- Whether the rights violations implicate diminishment of private land or business interests, tribal land base, and/or models of use and occupancy by individuals;
- The extent to which other tribes besides the one whose officials are defendants in

the habeas action have interests at stake; and

- The extent to which the allegedly infringing action promotes or undermines the ability of the collective tribal membership or community to exercise self-determination.

It should not be sufficient for a court to cite to the general and competing goals of individual rights and tribal sovereignty, or even Congressional primacy in Indian affairs, and then dismiss the case in presumed deference to those goals. The issue of tribal sovereignty and its relation to individual rights is much more complex and nuanced.

Not every alleged rights violation presents the same challenge to tribal sovereignty. For example, review of criminal convictions or detentions that are alleged also to violate tribal law and abuse of checks and balances within tribal government may advance both individual and sovereign interests. In other cases, such as where multiple tribal interests and governing authority may be involved or federal trust agreements, lands, or matter of federal trust responsibility implicated, or those where individuals are disenrolled and excluded from opportunities and services critical to their identity and rights as individuals and Native Americans, careful federal review may actually best ensure that the sovereign interests of the tribe be protected. In some circumstances – for example, in a tribal setting with a well-established jurisprudence and multi-level judiciary that has yet to have a chance to resolve the underlying claims – deference to the tribal

remedy, and dismissal from federal court, may be the appropriate decision. However, in ones with fledgling and underfunded legal systems, lacking in some critical element necessary for their functioning or presenting some evidence of dysfunction or disruption to the normal processes in response to what is alleged to have happened in the habeas petition, the same deference may create a devastating outcome for petitioners and the community at large. In any case, it would be necessary for the court to analyze in detail, with factual presentation about the legal systems and actual manner in which it functioned in a given case, to ascertain that.

The officials of every organization and government, within and outside tribal governments, are capable of making sound decisions or ones in error or even in direct contravention of legal authority. In tribal communities, there is often great influence -- economic, historical and political – exerted by the federal government and other external entities, such as private corporations wishing to capitalize on economic development opportunities on tribal lands. When these forces combine, not only may individual rights be violated, as tribal officials attempt to take land, moneys and opportunities from others and/or coerce or punish those who speak out against desired actions, but the collective interests of the community at large and its ability to engage in self-governance in accordance to customs, traditions and laws may be undermined.

When scarce land set aside for the homes and livelihood of individuals is taken for development interests, for example, what happens to the ability of individuals and families to be able to continue to be secure in their ability to reside and sustain livelihoods? Is not that fundamental to tribal sovereignty? If individuals in tribes with small membership pools are dis-enrolled in order to maximize economic gain for the

interests of a few, what happens to the resulting pool of those able to sustain the functions and communities of the tribe. Is not a critical number of members necessary to the sustainability of sovereignty too? When those who speak out in the protection of the rule of law, tribal custom and tradition, opposing unauthorized taking of power and land, is it not in the benefit of all members to protect them from incarceration and banishment as a result of their actions? If tribal remedies are lacking or there are allegations that they have been usurped by those engaged in corrupt practices or abuse of power, would it not be appropriate for federal courts to incorporate careful consideration of those factors in their analysis under ICRA? And what about when the interests of several tribes and even the federal trust responsibility or other form of federal interest are alleged to be violated by the offending actions? Should that not also be a basis for federal judicial review?

Without some form of federal review, there is all too often little or no accountability for actions rooted in corruption, greed or mismanagement of tribal lands, resources and services. Lands can be sold or developed to better outside development interests that may not benefit tribal member. Membership can be diminished, or even terminated, to the point of extinguishment of critical pool of members to form a viable community. Those community members advocating for accountability and compliance with laws and traditions may be harassed, injured, or eliminated from the governance and collective voice of the tribe itself. People critical to a tribe's ability to exercise its sovereignty and self-determination in healthy and sustainable ways can be incarcerated, banished, or otherwise alienated from the

community, leaving the tribe itself more vulnerable to damage from outside political and economic forces. The factual circumstances in the cases brought before the courts reflect these real concerns.[336]

Sovereignty is critical to the ability of indigenous people to sustain their livelihood, customs, traditions and ability to engage in good governance and self-determination. In its best form, matters of individual and collective rights and their abuses would be resolved under the legal systems and laws of each tribe with fairness and due process to all involved as well as with careful consideration of the short- and long-term impacts on the tribe's sovereignty and the ability of the tribes' members to effectively engage in self-determination. However, in recognition of the fact that tribes, like their state, local and federal governmental counterparts, are not always perfect in their realization of protection of individual rights and goals critical to a well-functioning sovereign, Congress enacted ICRA. That Act does provide for federal review of substantive rights violations that qualify for habeas review. It did also take into account and balance the interests of tribal sovereignty. Unless federal courts undertake a factually-rigorous and accurate review of the interests, impacts and nuances of the individual and sovereign impacts in each case, however, there is no way for them to legitimately conclude that the "animating principles" of deference to tribal sovereignty and self-determination are best achieved by dismissal of habeas petitions seeking legal redress. Without doing so they afford a deference to tribal sovereignty, not anticipated by Congress, nor warranted under the terms and legislative history of the Act itself,

[336] Section III of this article details the various cases that have been presented to the federal courts for review, invoking the array of concerns described herein.

rendering it ineffective as an instrument of civil rights enforcement in all but the most particular of cases.

VI. Conclusion

The role tribal sovereignty should play and the way it should be construed with respect to ICRA and the enforcement of individual civil rights has a long and contentious history. Many viewed ICRA itself as a grievous assault on tribal sovereignty. For those, *Santa Clara Pueblo* was ushered in as a welcome and appropriate interpretation of Congressional intent.

As established in this article, however, *Santa Clara Pueblo* may have restricted federal review under ICRA beyond Congressional intent, and the lower courts have continued the restrictive interpretive agenda to such an extent that few remedies are actually available. Like an unfunded mandate, ICRA thus becomes an act with largely unenforceable standards. While some tribes provide suitable mechanisms and waivers of sovereign immunity, most do not, leaving individuals in very grievous situations without any redress. Additionally, the very interest that federal courts often seek to protect – tribal sovereignty and self-determination itself – may unwittingly be diminished where federal courts swiftly and summarily reject habeas actions, rather than go to the merits.

The law of federal habeas recognizes a need for relief in many circumstances other than actual incarceration. While there is a need to revisit whether habeas itself provides a suitable measure of redress,

federal courts may revive some of ICRA's intended purposes by adhering to an appropriate scope for "detention" and conducting a detailed and case-specific analysis of the particular sovereign interests at stake and how they would be undermined by federal review of the merits of petitioners' allegations of individual rights violations. Without that, ICRA remains an elusive and largely hollow articulation of rights. While it has impacted the jurisprudence of some tribal justice systems and produced concrete federal habeas relief for a few individual parties, the vast majority of rights violations go unchecked. The greater impact is on the collective interests of the sovereignty at large.

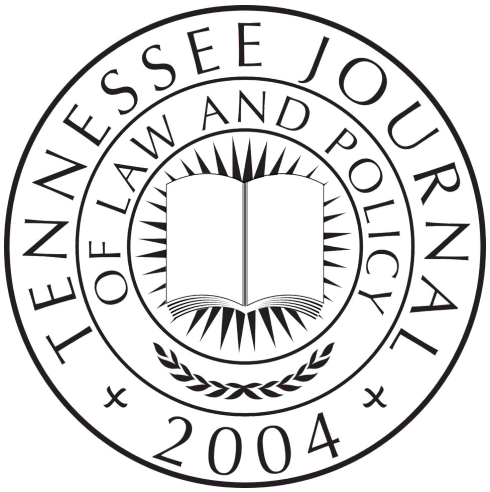
In the words of one of the founding fathers of the American Constitutional system of governance:

> *If [a] legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.*[337]

Although infused of history and cultural attributes independent and different from those

[337] United States v. Brown, 381 U.S. 437, 444 (1964) (emphasis added) (quoting 3 John C. Hamilton, History of the Republic of the United States: As Traced in the Writings of Alexander Hamilton and of His Contemporaries 34 (New York, D. Appelton 1859).

contributing to the establishment of the United States and, thus, entitled to a different measure of review in some instances than would occur in cases alleging violations by federal, state or local governmental actors, tribes without remedies are no less susceptible to these impacts.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