## Note

# Banishing Federal Overstep: Why Protecting Tribal Sovereignty Justifies a Narrow Reading of the Indian Civil Rights Act

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*At the heart of this Note is the need to preserve Tribal sovereignty. This Note focuses on a lesser-known issue currently being debated in circuit courts: whether Tribes should be permitted to banish Tribal members from their ranks without submitting to the scrutiny of federal courts.*

*Recently, there has been a resurgence in banishment discussions in Indian Country. To justify banishment, an individual's actions must reach the point that they disrupt Tribal cohesion, the Tribe's overarching cultural identity, and its bylaws. Banishment comes under federal review when banished individuals file a writ of habeas corpus under section 1303 of the Indian Civil Rights Act (ICRA). This provision provides that habeas review shall be available to any person to test the legality of their detention by an Indian Tribe. In 2022, the Tenth Circuit decided* Chegup v. Ute Indian Tribe of Uintah & Ouray Reservation*, which addressed whether the banishment of a Tribal member counted as "detention" within the meaning of the habeas provision of the ICRA. If the court agreed with the banished Tribal members that banishment constitutes "detention," then federal courts could impose themselves on issues of Tribal membership. However, if the court agreed with the Tribe that*

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*banishment does not include "detention," then the banished individuals would have no further federal remedy. The Tenth Circuit did not formally rule on this issue, but the court articulated it in a way that highlighted the relevant circuit split and opened the door for future courts to consider the issue.*

Chegup *also brought to the forefront the debate of Tribal sovereignty versus individual civil rights. This debate comes down to the fact that some individuals feel that they have been unjustly banished and attempt to circumnavigate a Tribe's sovereign decision-making power regarding membership by seeking a remedy from the federal courts instead. Should the habeas provision of the ICRA be read broadly to include banishment as "detention," thereby preserving individual civil rights and the individuals' right to remedy? Or should the provision be read narrowly so as not to include banishment, thereby preserving the critical practice of Tribal sovereignty and Tribal control over membership decisions? This Note argues the latter.*

*It is reasonable to ask if banishment constitutes a severe restraint on liberty and is subject to habeas review. However, if Tribes do not have control over determining Tribal membership, then their unique sovereign powers are significantly undermined. This must be avoided even if a few banished individuals, while still provided with procedural fairness through the Tribal court process, are left without legal remedy in federal court.*

## INTRODUCTION

> Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.[1]

At the heart of federal Indian law is Tribal sovereignty. In its 2022 decision, *Oklahoma v. Castro-Huerta*, the Supreme Court held that the States have jurisdiction over issues in Indian Country unless preempted.[2] This decision severely decreased Tribes' inherent sovereign powers, departing from how courts and scholars understood federal Indian law and Tribal rights for the last two centuries.[3] Despite the generally positive outcome for federal Indian law in *Haaland v. Brackeen*,[4] this decision left questions about Tribal sovereignty's future unanswered.[5] In short, Tribal sovereignty's future remains uncertain and under threat by the highest federal court, and the question is if lower courts will continue to follow the trend.

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1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941) (emphasis omitted).

2. 142 S. Ct. 2486, 2493–94 (2022).

3. *Id.* at 2506–11 (Gorsuch, J., dissenting) (rejecting the majority's holding as "ahistorical" and arguing that the decision disregards both the Court's prior holdings and other government actions that indicate Tribal sovereignty excludes the operation of state law unless Congress provides otherwise); *see also* Gregory Ablavsky & Elizabeth Hidalgo Reese, Opinion, *The Supreme Court Strikes Again — This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty [https://perma.cc/PDR3-FQ7F] ("[The decision is] a radical remaking of current law that casts aside foundational precedent — and could have profound consequences for Native nations and their authority.").

4. 143 S. Ct. 1609, 1622–23, 1641 (2023) (rejecting all the constitutional challenges to the Indian Child Welfare Act, an Act that gives Indian families priority in foster care and adoption proceedings involving an Indian child); *see also id.* at 1646 (Gorsuch, J., concurring) (discussing that upholding the Indian Child Welfare Act is important for Tribes because "[i]t installs substantive and procedural guardrails against the unjustified termination of parental rights and removal of Indian children from tribal life.").

5. *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring) (expressing how the equal protection issue regarding whether the Indian Child Welfare Act's preferences are a political or racial classification is still open); *see also* Arizona v. Navajo Nation, 143 S. Ct. 1804, 1813–14 (2023) (deciding, a week after *Brackeen*, that Tribes are not entitled to certain fiduciary rights that are not specifically identified in a treaty, thereby exposing uncertainty in how the Court will handle federal Indian legal issues).

In broad strokes, Tribal sovereignty refers to Tribes' inherent authority to govern themselves, determine membership, create laws, establish court systems, and so on.[6] Tribal banishment and disenrollment actions are examples of how Tribes exert their currently endangered sovereign powers.[7] Tribes should be permitted to banish Tribal members from their ranks without submitting to federal courts' scrutiny.[8] And, because Tribal courts have mechanisms ensuring procedural fairness, a person can be banished from their Tribe with no need for federal remedy—as involving the federal government in Tribal decisions rarely produces positive outcomes for communal Tribal rights.[9] Nevertheless, individuals who feel that the Tribe unjustly banished them go to federal courts for a remedy to get around the Tribe's sovereign decision-making power regarding membership.

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6. *See Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019) (highlighting that from an international law perspective, sovereign actors can generally exercise jurisdiction within their own territory, and external intervention into one's domestic sphere is contrary to international law).

7. Tribal banishment, whether temporary or permanent, involves a Tribe's decision to prohibit a Tribal member from being present on some or all Tribal lands. Similarly, Tribal disenrollment involves a Tribe's decision to punish Tribal members by stripping them of their Tribal membership due to the individuals' criminal conduct. For a discussion of these terms and their general definitions, see David E. Wilkins, *Exiling One's Kin: Banishment and Disenrollment in Indian Country*, 17 W. LEGAL HIST. 235, 239, 246–48 (2004).

8. *See* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 90–91 (2007) (discussing the ties between banishment and Tribal membership decisions). While this Note focuses on the federal government and the federal courts' infringement on sovereignty, it is important to mention that states also harm Tribal sovereignty. The Supreme Court significantly expanded state power over Tribes in *Castro-Huerta*. 142 S. Ct. at 2491 ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

9. *See, e.g.*, Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167 (1991) (exemplifying the hardships and debates surrounding Native Americans, citizenship status, and the pitfalls in how the federal government handled those issues); Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 387 n.154 (1953) (describing "graphically" how, over the course of a century, engagement with the Indian Bureau recurringly diminished one Indian Tribe's land holdings and economic strength); Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 180 (1978) (articulating how the Menominee had not needed to rely on state and federal welfare assistance until after the federal government terminated the Menominee Indians' Tribal status).

In 2022, the Tenth Circuit decided *Chegup v. Ute Indian Tribe of Uintah & Ouray Reservation*, considering who has jurisdiction over membership decisions.[10] The court addressed whether banishment constitutes detention within the meaning of the Indian Civil Rights Act's (ICRA) habeas corpus provision.[11] If the court agreed with the banished members that banishment constitutes detention, then federal courts could impose themselves on issues regarding Tribal membership.[12] However, if the court agreed with the Tribe that banishment does not constitute detention, the banished individuals would have no further federal judicial remedy.[13] The Tenth Circuit did not rule on this issue because Tribal remedies were not exhausted. However, the court articulated it in a way that highlighted a relevant circuit split and opened the door for future courts to consider the issue.[14]

*Chegup* brought forth the seminal debate of individual rights versus Tribal sovereignty.[15] Reading the ICRA's habeas provision broadly to include banishment may preserve individual rights because banished individuals would have a chance for a federal remedy and potentially get around an allegedly unfair Tribal decision.[16] Conversely, reading the provision narrowly to not include banishment would preserve Tribal sovereignty since Tribes would retain sole control over membership decisions.

While the Supreme Court has not decided a banishment case, the issue whether banishment constitutes detention under the ICRA's habeas provision has garnered discussion among

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10. 28 F.4th 1051, 1062–67 (10th Cir. 2022).

11. *Id.*; *see also* 25 U.S.C. § 1303 ("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.").

12. *See* Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 942 (2011) (raising similar questions to introduce the debate over banishment).

13. *Id.*

14. *Chegup*, 28 F.4th at 1062, 1070 (finding that the district court had abused its discretion in failing to prioritize and address the Tribal exhaustion requirement).

15. *See* discussion *infra* Part II.A.

16. *See generally Chegup*, 28 F.4th at 1063–67 (describing the delicate balance Congress sought between preserving individual rights and "needless intrusion[s]" on Tribal self-governance).

circuit courts.[17] Notably, banishment cases across the circuits involve various temporal aspects of said banishment—either temporary or permanent. For the purposes of this Note, banishment will be discussed broadly and whether the banishment at issue in each case was temporary or permanent is not examined in depth.

What is more important for this Note is that the ICRA was initially adopted to balance individual Tribal members' civil rights with Tribal sovereignty.[18] And within the federal legal system, a writ of habeas corpus allows a prisoner or detainee to come before the relevant court to determine if their imprisonment or detainment is lawful.[19] Thus, invoking habeas under the ICRA would first require determining if banished individuals are under "detention" and if they have the right to be heard by a federal court to potentially reverse the banishment order.[20] The Second Circuit holds that habeas review applies to banishment actions, treating "detention" under the ICRA as synonymous with the broader term "custody."[21] In contrast, the Ninth Circuit rejects this approach. It holds that banishment does not

17. While the Tenth Circuit ultimately refused to decide the issue in *Chegup*, the opinion noted that the Second Circuit says banishment does qualify as detention when, in contrast, the Ninth Circuit says it does not. *Id.* at 1065–66; *see also* 25 U.S.C. § 1303 (laying out the ICRA's habeas provision).

18. *See* Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, AM. INDIAN L.J. 41, 43–44 (2012) (providing some general background of the Indian Civil Rights Act).

19. *See* Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty."); *see also* Andrea M. Seielstad, *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*, 14 TENN. J.L. & POL'Y 63, 68–70 (2019) (outlining the evolution of the writ of habeas corpus as a means for challenging unlawful detention in federal courts).

20. *See* 25 U.S.C. § 1303; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–70 (1978) (limiting federal court jurisdiction to the ICRA's habeas provision, thereby rejecting the argument that federal courts could review claims of individual rights violations committed by Tribal governments).

21. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890 (2d Cir. 1996) ("We find the choice of language [between 'in custody' and 'detention'] unremarkable in light of references to 'detention' in [other federal statutes]."); *see also* Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 713–14 (2d Cir. 1998) (discussing *Poodry* in the context of its permanent banishment decision, while not tackling the issue of "banishment").

constitute detention, reading "detention" more narrowly than "custody" to cover only physical detainment.[22] The Ninth Circuit's rationale preserves Tribal sovereignty, so, as this Note argues, the decision was proper and future courts should follow it when reviewing the issue.

This Note sheds light on the general topic of banishment, which has recently garnered attention in the lower courts.[23] Interpretations of banishment, detention, and habeas review under the ICRA add new dimensions to the Tribal sovereignty question by pitting the constitutional-like rights of individual Tribal members against a Tribal government's rights—providing an interesting analysis in the context of the Supreme Court's decisions regarding federal Indian law. It is reasonable to ask, for example, if banishment from Tribal lands or a loss of Tribal citizenship constitutes severe restraints on liberty and is thus subject to habeas review.[24] However, if Tribes do not have complete control over determining Tribal membership, it significantly undermines their sovereign powers.[25] This catastrophe must be avoided, even if a few banished individuals, while provided with procedural fairness in Tribal courts, are left without federal remedy.[26] It frustrates Congress's original intent to preserve Tribal sovereignty if habeas review allows federal courts

22. Tavares v. Whitehouse, 851 F.3d 863, 871–72, 876–77 (9th Cir. 2017).

23. *See* Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., 28 F.4th 1051, 1059 (10th Cir. 2022) (declining to decide whether federal courts have jurisdiction to hear banishment-related cases).

24. *See generally* Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 389–446 (2015) (discussing disenrollment generally, but also interweaving issues of banishment and their ramifications since both disenrollment and banishment have cultural consequences on the individual).

25. Swift, *supra* note 12, at 945.

26. It is important to note that banishment still needs to be justified. Tribes cannot banish people without a legitimate reason to think that the banished member's presence on Tribal lands and as a Tribal citizen is a detriment to the Tribe. *See, e.g.*, COLVILLE TRIBAL LAW AND ORDER CODE §§ 3-2-4 to -6 (2004), https://static1.squarespace.com/static/572d09c54c2f85ddda868946/t/58225781be65942f5d738418/1478645633679/3-2-Exclusionandremoval.pdf [https://perma.cc/BPA7-WHXL] (establishing grounds for exclusion and procedural requirements for exclusion and removal proceedings). *See generally* Swift, *supra* note 12 (discussing a hypothetical sequence in which a Tribal council holds a full hearing before banishing an individual from Tribal lands).

to take over a Tribal decision about who can be a Tribal member or who is allowed on Tribal lands.[27]

Part I of this Note introduces the concept of banishment and its place (or lack thereof) under the ICRA's habeas provision. This Part sets the stage for the problem at hand—Tribes should oversee this fundamental membership decision, but people have gone to federal courts to get around Tribal decisions. Part II analyzes circuit court decisions regarding banishment and the ICRA's habeas provision, expanding on how debates about individual rights versus Tribal sovereignty fueled the decisions. Finally, Part III evaluates the arguments raised by the circuit courts, argues why preserving Tribal sovereignty is more persuasive than those favoring individual rights, and explains why federal habeas review threatens Tribal sovereignty. This Part also discusses potential limits and concerns about reading the ICRA narrowly. Nevertheless, this Note concludes that courts should approach habeas jurisdiction under the ICRA narrowly as the Ninth Circuit did, so "detention" and "custody" are not equivalent. Thus, future courts should find that banishment does not constitute detention.

## I. THE PROBLEM: CONTEXTUALIZING BANISHMENT UNDER THE ICRA AND THE IMPORTANCE OF TRIBAL SOVEREIGNTY

Tribes may need to banish someone for a variety of reasons. Banishment is an example of Tribes using their sovereign powers to determine Tribal membership and promote Tribal cohesion—powers that federal judicial review should not threaten. While Tribes should oversee this essential decision about membership, banished Tribal members have appealed to federal courts under the habeas provision of the ICRA to challenge a Tribe's decision.[28] Habeas review is available to test the legality

27. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 809–10, 830–47 (2007) [hereinafter Riley, *(Tribal)*] (discussing the balance between Tribal sovereignty and an Indian nation's right to govern itself and individual Tribal members' rights and liberties); *see also* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1061–65 (2007) [hereinafter Riley, *(Native)*] (advocating for an alternative theory of good Native governance in part because external encroachment pushes Tribes toward "cultural and political annihilation").

28. *See* Swift, *supra* note 12, at 944–45.

of detainment or a significant threat of detention.[29] However, courts have recently struggled with whether habeas review is available to individuals banished from their affiliated Tribe.[30]

This Part contextualizes the problem at hand—whether banishment has a place under the ICRA—and explains why banishment is one way that Tribes determine membership. Tribes must retain sole decision-making power regarding membership, even in the face of statutes like the ICRA, which Congress partly created to limit Tribal sovereignty.

### A. WHAT BANISH-MEANT AND WHAT BANISH-MEANS: A UNIQUE PUNISHMENT BY TRIBES

Generally, banishment is "the punishment of one who has incurred the displeasure of a group to which one had previously enjoyed full membership status."[31] Banishment is a sovereign power used by Tribes to promote what is best for the entire Tribe—to "maintain sovereign authority over their territory and members."[32] Tribes banish individuals permanently or temporarily from Tribal lands and often, but not always, strip them of their Tribal citizenship.[33]

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29. 25 U.S.C. § 1303; *see also* Means v. Navajo Nation, 432 F.3d 924, 928–29 (9th Cir. 2005) (providing an example of habeas jurisdiction applying regarding someone on pretrial release, but where the prosecution was ongoing, such a situation constituted "detention" under the ICRA).

30. *Compare* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 897 (2d Cir. 1996) (holding that habeas jurisdiction did apply in the case of a banishment from a reservation), *with* Tavares v. Whitehouse, 851 F.3d 863, 878 (9th Cir. 2017) (finding no habeas jurisdiction regarding exclusion and banishment from a reservation).

31. DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 13 (2017) (quoting William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 476 (1998) (internal quotation marks omitted)).

32. Swift, *supra* note 12, at 948.

33. Disenrollment and banishment are similar but different concepts. For this analysis, they will be used as the same unless the distinction is noted. *See* Wilkins, *supra* note 7, at 239 (noting that "disenrollment" is a legal term and did not appear until the 1930s, whereas "banishment" was used well before that); *cf.* Galanda & Dreveskracht, *supra* note 24, at 390–91 (articulating how disenrolled persons lose their indigenous identity, must leave ancestral lands, and are alienated from their community).

Among Native American Tribes, banishment has roots well before European contact.[34] Due to an absence of prisons in pre-colonizer America, banishment was a primary method Tribes used to punish criminals who harmed the entire Tribe through their actions—often related to murder or other killing crimes.[35] This practice was both a punishment and a rehabilitative effort—the banished person, no longer part of the Tribe, had to fend for themselves—requiring they reflect on their actions.[36] Hoping that the banishment and reflection would heal the person's spirit, banishment was rarely a permanent punishment, as the ultimate goal was to bring the individual back into the Tribal community as a safe and productive Tribal member.[37]

While banishment in today's Native American context is unique, different social and cultural contexts have used banishment or "banishment-like" practices throughout history. For

34. Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255 (2004) ("Banishment perhaps is most deeply rooted in certain tribal cultures in the Americas, which have used the punishment for centuries.").

35. *See* Stephanie J. Kim, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 J. MARSHALL L. REV. 239, 256 (1995) (noting "[b]anishment as a punishment has existed throughout the world since ancient times" and was used instead of prisons); Miller, *supra* note 34 (discussing the Cheyenne Law of Killing, which referenced the punishment of banishment for murder); *see also* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 167 (5th prtg. 1973) (discussing the banishment of killers under the Cheyenne Law of Killing); Riley, *(Native)*, *supra* note 27, at 1103 (discussing how Tribes used banishment as an alternative to execution for murder).

36. *See generally* Miller, *supra* note 34, at 260 n.50 ("[T]he American Indian approach to criminal justice called for rehabilitation of the criminal and assistance for the victim in order for the tribe to accept the criminal back into their tribal group." (quoting Kim, *supra* note 35)); Wilkins, *supra* note 7, at 239, 243, 245 (providing examples of Tribes allowing banished individuals to rejoin the Tribe after demonstrating rehabilitation); Carol A. Hand et al., *Restorative Justice: The Indigenous Justice System*, 15 CONTEMP. JUST. REV. 449, 450–54 (2012) (examining the differences between traditional Indigenous restorative justice systems and the European-based system practiced in the United States); Miller, *supra* note 34, at 255 n.8 ("Banishment calls for the offender to reconnect with nature rather than to disconnect through physical barriers such as prison walls.").

37. Kim, *supra* note 35; *see also* WILKINS & WILKINS, *supra* note 31, at 25 ("[A]lthough Native nations historically had the power to exclude, banish, or exile individuals, it was a power they rarely used, due to the spiritually cohesive nature of tribal collectives and the assortment of informal sanctions that were in place that generally worked to ensure peace and social order in the society.").

instance, "ostracism," a Greek tradition, occurred when city-states would annually vote the most unpopular person "off the island" to stay away for a specific time.[38] Additionally, country officials considered "transportation" in Great Britain and "exile" in Russia to be humane, progressive alternatives to execution or imprisonment—these practices also strengthened the banishing country's grip on far-off colonies or territories.[39] Other Indigenous cultures also engage in banishment practices, such as Australian Indigenous peoples' "walkabout"—which is more about a cultural, coming of age practice rather than a punishment or act of restorative justice.[40] These examples show that cultures worldwide engaged in some form of banishment for a long time, even if legal scholars do not widely discuss the history.

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38. *See, e.g.*, Sara Forsdyke, *Exile, Ostracism and the Athenian Democracy*, 19 CLASSICAL ANTIQUITY 232, 253–57 (2000) (placing the institution of ostracism against the background of Greek politics of the time); Anthoula Malkopoulou, *Ostracism and Democratic Self-Defense in Athens*, 24 CONSTELLATIONS 623, 623–28 (2017) (describing ostracism and its procedure).

39. *See, e.g.*, Clare Anderson, *Transnational Histories of Penal Transportation: Punishment, Labour and Governance in the British Imperial World, 1788-1939*, 47 AUSTRALIAN HIST. STUD. 381 (2016) (discussing the history of penal transportation in the Australian colonies and the Indian Ocean under the British Empire); Ebony Jones, Enslaved and Convicted: Criminal Transportation as Punishment During British Amelioration, 1823-1834, at 13–23 (2017) (Ph.D. dissertation, New York University) (ProQuest) (discussing generally the administration of criminal transportation by the British empire as a way to continue exerting control without resorting to "uncivilized" corporal punishments); NANCY KOLLMANN, CRIME AND PUNISHMENT IN EARLY MODERN RUSSIA 241–57 (2012) (discussing the Russian exile system and how it gradually replaced capital punishment); Zhanna Popova, *Exile as Imperial Practice: Western Siberia and the Russian Empire, 1879-1900*, 63 INT'L REV. SOC. HIST. 131, 135–37 (2018) (discussing how exile to Siberia served a dual purpose of punishment and movement of laborers for Russia's colonial ambitions).

40. *See, e.g.*, Sarah P Young, *Following the Footsteps of the Ancestors: The Walkabout Coming of Age Ceremony*, ANCIENT ORIGINS (June 25, 2019), https://www.ancient-origins.net/history-ancient-traditions/walkabout-coming-age-0012191 [https://perma.cc/C9LU-8RGB] (defining "Walkabout" as "a rite of passage for young men between the ages of 10 and 16 (though most commonly 12-13) years old" where the young man must live a "temporarily nomadic lifestyle and survive alone"); Sarah Prout, *On the Move? Indigenous Temporary Mobility Practices in Australia* 7–12 (Ctr. for Aboriginal Econ. Pol'y Rsch., Working Paper No. 48, 2008) (looking at walkabouts in the context of the spatial dimension of indigenous temporary mobility).

Though often unrecognized as a modern punishment, Tribal banishment in the United States does happen.[41] Recently, banishment has had a resurgence for acts like drug dealing or severe impediment of Tribal governing practices.[42] To justify modern banishment, these actions must still severely disrupt Tribal cohesion, cultural identity, and the Tribe's bylaws.[43]

Most banishment proceedings still have "rehabilitative, restorative, and re-integrative goals."[44] This means, as was true historically, that banishment's ultimate objective is for the individual to return to the community—provided the Tribe determines that the individual sufficiently learned from their past behaviors.[45] Allowing return connects to Indigenous

41. *See* T.S. Last, *More Tribes Bring Back Sentence of Banishment*, ALBUQUERQUE J. (June 24, 2016), https://www.abqjournal.com/797280/more-tribes-bring-back-sentence-of-banishment.html [https://perma.cc/ZZ8Z-Q362] (highlighting multiple instances of banishment since 2000).

42. Riley, *(Native), supra* note 27, at 1103–07; *see also* Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), https://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html [https://perma.cc/R5M8-9UPD] (describing applications of banishment by the Lummi and Chippewa of Grant Portage Tribes in response to drug dealing and violence); Renee Ruble, *Banishment Laws Revived Among Indians*, WASH. POST (Jan. 25, 2004), https://www.washingtonpost.com/archive/politics/2004/01/25/banishment-laws-revived-among-indians/68626da3-64a2-434d-9c1d-de8822648a94 [https://perma.cc/R67H-AU6C] (discussing the revival of banishment by multiple Tribes as a means for addressing gang violence and drug trafficking); Nate Hegyi, *'It Changed Our Lives': Banished Native Women Fight Tribal Leaders in Federal Court*, NPR (Dec. 27, 2019), https://www.npr.org/2019/12/27/790970580/it-changed-our-lives-banished-native-women-fight-tribal-leaders-in-federal-court [https://perma.cc/XBE6-U965] (describing four women who were banished for trying to destabilize a tribal government).

43. Riley, *(Native)*, *supra* note 27, at 1103–07, 1113–16 (discussing the necessity of Tribal community for survival and justifying banishment as a way to help maintain Tribal cohesion and protect cultural identity).

44. Miller, *supra* note 34, at 260.

45. *Id.*; *see also* Kim, *supra* note 35 (emphasizing the rehabilitative aims of banishment); LLEWELLYN & HOEBEL, *supra* note 35, at 158 ("By removing the murderer it lessened provocation to revenge; it disciplined the offender; allowance was made for the return of the culprit; but only when dangers of social disruption were over."); Nicholas K. Geranios, *Banishment a Blessing, Man Says Tlingit Youth Sent to Remote Island Calls Unusual Sentence 'Purification*,*'* SPOKESMAN-REV. (Jan. 15, 1998), https://www.spokesman.com/stories/1998/jan/15/banishment-a-blessing-man-says-tlingit-youth-sent [https://perma.cc/KB7Q-FWJW] (relaying that a banished individual felt their temporary banishment was a rehabilitative, transformative experience); Jessica Metoui,

understandings of community and belonging—when someone shows they can be a valuable part of the community, they should be allowed to rejoin their community.[46]

While there are success stories of positive rehabilitation and re-integration, banishment has cultural costs.[47] Again, banishment is "a means of expressing displeasure with the conduct of the banished, [where] the community takes the ultimate step and declares that the banished individual is no longer part of the community."[48] As a consequence, banished individuals may not attend Tribal events and services—such as powwows—essential to Tribal community life and culture.[49] Some phrase this exclusion as "another form of cultural genocide and an example of internalized oppression."[50] Combined with disenrollment, the ramifications of banishment may include losing one's job and deprivation of Tribal benefits such as health care, employment benefits, and housing.[51] Social costs also come from public shaming and exclusion from Tribal activities.[52] Tribes must make a challenging decision in whether to banish people—the banished individual's actions must have caused such disruption to the

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Comment, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 538 (2007) ("Banishment functions as rehabilitation for the offender who . . . is required to remain apart from society for a prescribed period of time and must build great self-sufficiency in order to survive.").

46. Galanda & Dreveskracht, *supra* note 24, at 395–96; Hand et al., *supra* note 36, at 452–54 (describing the Native American restorative system and how it focuses on the centrality of relationships).

47. Galanda & Dreveskracht, *supra* note 24, at 393–97 (discussing disenrollment generally and interweaving issues of banishment and its cultural ramifications).

48. William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment,* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 476 (1998).

49. Seielstad, *supra* note 19, at 128–29; *see also Disenrollment Leaves Natives "Culturally Homeless,"* CBS NEWS (Jan. 20, 2014), https://www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless [https://perma.cc/Z62L-6LD8] (discussing primarily disenrollment, but also mentioning banishment's place in Tribal membership disputes).

50. Donna Ennis, *The High Cost of Tribal Banishment*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://indiancountrytoday.com/archive/the-high-cost-of-tribal-banishment [https://perma.cc/4T24-ZSPF].

51. Hegyi, *supra* note 42 (articulating how banished members lost their jobs and homes).

52. *Id.* (discussing how the banished members in the *Chegup* case got "the look" from other community members).

Tribe's cohesion that it is worth the risk of the individual losing some cultural connections.[53]

Despite the costs, a Tribal council may still move to banish an individual for the reasons discussed prior. The procedure for such banishment is as follows (though procedures vary depending on the Tribes' governing powers). Typically, the individual's family will impose an initial reprimand, or community members will impose further sanctions if they do not see the family's actions as enough.[54] If the delinquent activity continues and the family's and community's penalties fail, banishment may be enforced as a final resort.[55] Before formal banishment occurs, there is a full hearing before the Tribal council and then an option to appeal to the Tribal court.[56] This hearing involves a community consensus "most often established through the presentation of oral testimony about an individual's character and wrongdoing."[57] After those proceedings, a banished individual may attempt a federal court appeal to challenge the Tribe's banishment decision.[58]

Ultimately, determining whether banishment is permissible comes down to the fact that Tribes are sovereign entities. To preserve their sovereignty, Tribal governments must be able to determine what is best for the Tribe—including membership decisions vis-à-vis banishment. Nevertheless, because of these consequences, banished individuals have approached federal courts to challenge Tribal decision-making powers by bringing their claims for unjust banishment under the ICRA.[59]

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53. Consequences may persist after a temporary banishment ends—while Tribes may restore individuals with Tribal benefits, social ramifications continue and lost cultural connections might be challenging to retrieve. *See* Ennis, *supra* note 50.

54. Galanda & Dreveskracht, *supra* note 24, at 395; Kunesh, *supra* note 8, at 92.

55. Galanda & Dreveskracht, *supra* note 24, at 395.

56. Swift, *supra* note 12 (discussing the general procedure for banishment in a hypothetical example).

57. Galanda & Dreveskracht, *supra* note 24, at 395; *see also* Miller, *supra* note 34 (discussing how banishment procedures and forms vary depending on the Tribes' governing systems).

58. *See* discussion *infra* Part I.C (providing a discussion of habeas review).

59. *See* discussion *infra* Part II (explaining the circuit split in adjudicating banishment and providing examples of bringing claims under the ICRA).

### B. THE INDIAN CIVIL RIGHTS ACT: A BALANCING ACT

In 1896, the Supreme Court, in *Talton v. Mayes*, explicitly stated that the United States Constitution does not apply to Tribal nations.[60] This was the understanding for nearly a century and, to some extent, remains true today.[61] Except for the ward-guardian analogy, the trust responsibility, and Congress's plenary power,[62] Tribes are not constrained by the federal government and are considered separate sovereigns. Thus, the Constitution does not apply to Tribal exercises of their inherent, retained authority, and Tribal governments were allowed to prosecute Tribal members who had no *federal* constitutional rights during the process.[63]

However, Congress can still exercise its plenary power to create federal statutory rights for Native peoples. Congress did so through the ICRA—articulating federally enforceable, quasi-constitutional individual rights that Tribal governments must recognize.[64] These rights, like those in the Bill of Rights and the Fourteenth Amendment, included the free exercise of religion, freedom of speech and press, the right to assemble, protection from unreasonable searches and seizures, prohibition from cruel

60. Talton v. Mayes, 163 U.S. 376, 382–83 (1896).

61. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) (affirming *Talton*, noting that Tribal sovereignty is inherent and not a product of the Constitution or federal government, but also noting the looming nature of the federal government's power where part of Tribal sovereignty is "implicitly lost by virtue of [Tribe's] dependent status"); *see also* United States v. Lara, 541 U.S. 193, 207 (2004) (affirming the principle mentioned in *Wheeler* and *Talton*, but also noting that *Wheeler* is not necessarily determinative because Congress enacted a new statute that "relax[ed] restrictions on the bounds of the inherent tribal authority that the United States recognizes").

62. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 680–82 (2016) (discussing Congress's plenary power).

63. Note the importance of the italicized "*federal*" because there is procedural fairness in the Tribal justice system and likely Tribal constitutional rights (depending on the Tribe's Constitution).

64. 113 CONG. REC. 35,473 (1967) (statement of Sen. Roman L. Hruska) (articulating the realization that the United States Constitution did not cover Indian Tribes).

and unusual punishment, equal protection, and due process, among others.[65] Importantly, the ICRA did not include rights such as the Sixth Amendment's right to counsel,[66] likely because the federal government did not want to fund said defense counsel for Tribes.[67]

In part, the ICRA came about through the broader 1960s Civil Rights Movement momentum. The ICRA, much like the Civil Rights Movement, focused on protecting individual civil rights with the hopes that doing so would abolish racial segregation and curtail disenfranchisement and discrimination.[68] Members of Congress were concerned that American Indian Tribal members would not be granted the same rights and liberties as other United States citizens.[69] Thus, Congress enacted the ICRA to balance Tribal members' individual civil rights with preserving Tribal sovereignty and self-determination.[70] In fact, the ICRA's primary purpose was to secure "for the American Indian the broad constitutional rights afforded to other Americans" and to "protect individual Indians from arbitrary and unjust actions of tribal governments."[71]

A shift in federal understandings and practices regarding the rights of Tribes also drove the statute's enactment. Before the 1960s, the federal government's practices of forced assimilation, displacement, and taking Tribal land forced many

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65. 25 U.S.C. § 1302.

66. *See* Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013) (supporting a right to defense counsel in Tribal courts and shedding light on this exclusion from the ICRA).

67. *See id.* at 359 (discussing the cost of a defense counsel system and noting Congress "has yet to undertake serious consultation on the right to counsel" in Tribal court).

68. *See* Swift, *supra* note 12, at 949–50, 953.

69. *Id.* at 953 (citing *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affs. of the H. Comm. on Interior & Insular Affs.*, 90th Cong., 2d Sess. 131 (1969) (statement of Sen. Sam J. Ervin, Jr.)) ("Disconcerted that tribes were not bound by the U.S. Constitution, the primary sponsor of the bill, Senator Sam Ervin, intended ICRA to 'grant the American Indians rights which are secured to other Americans.'" (citations omitted)).

70. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 557 (1971) (citing U.S. COMM'N ON C.R., AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 11 (1972)).

71. S. REP. NO. 90-841, at 5–6 (1967).

traditional Tribal nations to disappear entirely.[72] These practices weakened Tribal sovereignty immensely.[73] The 1960s, however, started a movement away from assimilation policies and practices. There was a shift in public discourse as discussions of Tribal sovereignty and Indian self-determination became more pronounced, in particular with the advancement of the American Indian Movement.[74]

Nevertheless, some members of Congress supported the ICRA because it increased Congress's control over criminal procedures in Indian Country.[75] The Act's legislative history demonstrates a detailed debate over how much the federal government should control Indian Tribes.[76] In fact, the ICRA's original draft had many more opportunities for federal review of ICRA violations, which would have increased federal jurisdiction over Tribes.[77] Opponents of the original proposal argued that imposing near identical restraints as articulated in the Federal Constitution onto Tribes would defeat the purpose of Tribal

72. *See generally* Burnett, *supra* note 70, at 566–70 (1971) (discussing the period between World War II and 1955 when there was mass termination and assimilation of Native peoples, as well as increased state jurisdiction over matters in Indian Country).

73. *Id.*

74. *See generally* THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969, at 157 (2001) (noting James Haley's, the chairman of the House Subcommittee on Indian Affairs, comments that Indians should participate in policy matters, but that the right of self-determination is in Congress); DENNIS BANKS WITH RICHARD ERDOES, OJIBWA WARRIOR: DENNIS BANKS AND THE RISE OF THE AMERICAN INDIAN MOVEMENT (2004) (discussing the American Indian Movement and its goal of confronting racism and activism rooted in Native American culture); THOMAS A. BRITTEN, THE NATIONAL COUNCIL ON INDIAN OPPORTUNITY: QUIET CHAMPION OF SELF-DETERMINATION 146–82 (2014) (describing the federal government's shift to promote Indian self-determination in the 1970s).

75. Morgan Medders, Note, *How the Ninth Circuit Severed the Indian Civil Rights Act from Federal Habeas Corpus Precedent Under the Guise of Tribal Sovereignty*, 42 AM. INDIAN L. REV. 423, 426 (2018); *see also* Tavares v. Whitehouse, 851 F.3d 863, 865–66 (9th Cir. 2017).

76. *Constitutional Rights of the American Indian: Hearing on S. Res. 53 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 87th Cong. (1961); *see also* Burnett, *supra* note 70, at 588–614 (providing a rich overview of the legislative history surrounding the ICRA).

77. Burnett, *supra* note 70, at 593 ("The Ervin bill made tribal court decisions similarly reviewable and expanded the scope of the review of all Indian court decisions by providing for trial de novo. S. 962 integrated criminal justice on the reservations directly into the existing federal system and reduced the Indian courts to a screening role.").

sovereignty.[78] In particular, Tribes were concerned that the original proposal required Tribes to follow the Constitution rather than their Tribal laws, constitutions, or customs.[79] Inserting an entire Constitution separate from Tribal law—which lawmakers did not consult Tribes in creating—sparked justifiable concern by some Tribes that specific measures would threaten Tribal culture and authority.[80] Similar to how the Bill of Rights and the Fourteenth Amendment limit the states' sovereignty, the ICRA limits Tribal sovereignty. Importantly, Tribal governments are still sovereign entities and, as the next Section explains, Congress ultimately intended for federal jurisdiction on Tribal issues to be minimal and only in exceptional circumstances.[81]

### C. HOW HABEAS CORPUS TIES INTO THE INDIAN CIVIL RIGHTS ACT

The writ of habeas corpus is a judicial remedy that aims to provide relief against the arbitrary use of government authority to restrict an individual's liberty without cause.[82] As part of the balancing effort by Congress, the only federal procedure to challenge ICRA violations is the writ of habeas corpus. This section of the ICRA provides: "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States,

78. *Id.* at 601 ("[Some Tribes] resisted measures which threatened their culture or the structure of their authority."); *see also* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359 (1969) (articulating how the legislative history reflects, at least in part, concern in Congress imposing requirements that would overly burden Tribal governance).

79. *See, e.g.*, Burnett, *supra* note 70, at 588–89 (articulating how the ICRA's senate hearings revealed that Indians were most concerned with questions about "how to control the sometimes arbitrary and unresponsive BIA [Bureau of Indian Affairs], how to more adequately fund tribal systems of justice, [and] how to halt violations of Indian rights by state and local officials").

80. *Id.* at 601 (noting that the Pueblo Indians opposed the ICRA bill).

81. In 1993, Congress prioritized and affirmed Tribal sovereignty by passing the Indian Tribal Justice Act of 1993. 25 U.S.C. § 3601. Additionally, Congress did not enact the American Indian Equal Justice Act of 1998. Under that Act, "Indian tribal governments [would be] subject to judicial review with respect to certain civil matters" and federal courts would have "original jurisdiction in any civil action or claim against an Indian tribe." American Indian Equal Justice Act, S. 1691, 105th Cong. §§ 1, 4 (1998). Rejecting this Act once again reaffirmed Tribal sovereignty as a priority.

82. Hensley v. Mun. Ct., 411 U.S. 345, 350–51 (1973).

to test the legality of his detention by order of an Indian tribe."[83] Thus, under the ICRA's habeas provision, a person could appeal to federal court and challenge a Tribal decision related to that person's detention.

The ICRA does not define "detention" or give any scope regarding what actions the Act's habeas provision covers. However, courts occasionally interpret "detention" with the same operative effect as how "custody" is used in other habeas statutes.[84] The debate over how broadly or narrowly to read "detention" sets the background for why courts split on whether banishment constitutes detention.[85] Just as the ICRA does not define "detention," other habeas statutes do not define "custody."[86] Thus, interpreting courts must look at other judicial opinions and how they read statutes' language and Congress's legislative intent.

Habeas corpus is used only in extraordinary circumstances to challenge "severe restraints on individual liberty."[87] If the circumstance is not "of special urgency," courts will require the individual claiming violations of liberty to use "more conventional remedies."[88] "Special urgency" requires the individual to exhaust all available state or other court opportunities and that their restraints are such that the general public does not share them.[89] "Custody," as used in non-ICRA federal habeas statutes, extends beyond physical incarceration and requires looking at facts like whether an individual's "freedom of movement" is determined by an authority figure and whether they "cannot come and go" on

83. 25 U.S.C. § 1303.

84. Other federal habeas provisions examined include 28 U.S.C. §§ 2242, 2243, 2244(a), 2245, 2249, 2253, 2255. *See also* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890–91 (2d Cir. 1996) (considering "detention" in light of the meaning of "custody" in the above habeas statutes).

85. Determining the definition of "detention" raises a question of statutory interpretation. Some may argue "detention" should be read broadly to encompass custody as it makes sense to interpret all federal habeas statutes similarly. Others may argue that "detention" should be read more narrowly than custody and should only apply to physical incarceration since Congress intentionally chose to use the term "detention" in the ICRA. *See infra* Part II.

86. *See* Jones v. Cunningham, 371 U.S. 236, 238 (1963) ("[T]he statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used.").

87. *Hensley*, 411 U.S. at 351.

88. *Id.* (discussing how habeas corpus is a remedy that should only be used when restraints on liberty are "severe" or "immediate").

89. *Id.* at 351–53 (discussing the circumstances that put the petitioner in custody for habeas corpus).

their terms.[90] For instance, an individual could be "in custody" if they are released but waiting for a court appearance for which they must appear.[91] This is true because the waiting individual faces more significant restraints than the average citizen would.[92] However, the use of "detention" in the ICRA is telling. "Detention" is typically read more narrowly and only applies if a person has been physically incarcerated or someone's complete movement has been similarly restricted, whereas "custody" has been interpreted to apply beyond physical incarceration,[93] and using that definition would harm Tribal sovereignty. Therefore, "detention" versus "custody" is a fact-specific assessment, varying from case to case.

Before courts impose habeas jurisdiction under the ICRA, some circuit courts hold that individuals alleging a violation must exhaust Tribal remedies.[94] Exhausting Tribal remedies looks different depending on the circumstances. However, exhaustion means the parties have done everything possible to reach a resolution in Tribal courts. For instance, in *Chegup* the court did not need to decide whether banishment constitutes detention because the plaintiffs had not exhausted all Tribal remedies.[95] The exhaustion requirement protects Tribal sovereignty because federal courts must defer to Tribal courts' processes

90. *Id.*; *see also Jones*, 371 U.S. at 243 (holding that the individual was in "custody" because he was on parole with significant restraints on his movement).

91. *Hensley*, 411 U.S. at 351–52.

92. *Id.* at 351.

93. Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., 28 F.4th 1051, 1065 (10th Cir. 2022) (citing Tavares v. Whitehouse, 851 F.3d 863, 871 (9th Cir. 2017)).

94. Not all courts use Tribal exhaustion for habeas corpus petitions. *See* Necklace v. Tribal Ct. of Three Affiliated Tribes of Fort Berthold Rsrv., 554 F.2d 845, 846 (8th Cir. 1977). *But see* Aguilar v. Rodriguez, No. 17-CV-1264 JCH/SMV, 2018 WL 4466025, at *8 (D.N.M. Sept. 18, 2018) (declining to follow *Necklace* and holding that the petitioner had to attempt to exhaust his Tribal remedies before the court would pass merit on his habeas claims); *Chegup*, 28 F.4th at 1061 (holding that the Tribal-exhaustion rule applies regardless of the basis for federal jurisdiction and exceptions to the Tribal-exhaustion requirement must be narrowly applied); Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 953–54 (9th Cir. 1998) (affirming the denial of relief under habeas where the petitioner failed to exhaust the Tribal appeals process or show that exhaustion would be a futile endeavor).

95. *Chegup*, 28 F.4th at 1067.

whenever there might be concurrent jurisdiction.[96] Through exhaustion, banished members have procedural protections against unlawful or inappropriate Tribal punishment decisions. Banished members must exhaust the Tribal appeals process before even considering federal intervention, allowing them to plead their case to the body with the sovereign power of membership decisions—the Tribe.[97] While it might seem odd that individuals must bring their case to the Tribe that banished them, Tribal courts are still fair and just adjudicatory bodies that must consider all relevant facts and apply them to Tribal law.[98] This Tribal court decision might reverse the banishment or keep it in place if that is what is best for Tribal cohesion. The exhaustion rule is another example of prioritizing Tribal sovereignty and self-determination above all else.

One case proves formative in understanding the scope of the ICRA through its habeas provision: *Santa Clara Pueblo v. Martinez*.[99] In *Santa Clara Pueblo*, Tribal members alleged the Tribe violated the equal protection provision of the ICRA through an ordinance dictating how Tribal membership passes down to their children.[100] The Supreme Court found no implied federal remedies for ICRA violations except through the habeas provision.[101] The Court reviewed the legislative history of the ICRA and placed great importance on the balancing act Congress sought to protect: individual civil liberties versus Tribal sovereignty. The Court found that to preserve Tribal self-determination and the sovereign powers of the Tribes, Congress intentionally meant for

96. Medders, *supra* note 75, at 438 ("[I]n cases where modes of appeal exist under a particular tribe's jurisdiction, litigants should always explore those before seeking redress through habeas corpus.").

97. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–19 (1987) (providing clarification on post-exhaustion procedures); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853–57 (1985) (discussing Tribal exhaustion doctrine).

98. *See infra* Part III.B.2 (discussing the concerns of intertwining Tribal councils and courts).

99. 436 U.S. 49 (1978).

100. *Id.* at 52 n.2 (describing the ordinance that establishes the membership rules at issue).

101. *Id.* at 51–52 ("Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts . . . . [W]e hold that the Act cannot be so read.").

the habeas provision to be the only federal remedy for violations of the ICRA.[102] Thus, the Court in *Santa Clara Pueblo* confirmed the importance of Tribal sovereignty and the ability of a Tribe to control membership decisions, articulating that "[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."[103]

The first Section of this Part demonstrated a problem—Tribal members are banished for various reasons, and these banished individuals may attempt to seek federal habeas review through the ICRA to reverse the banishment order or receive other remedies. The banishment discussion, the history of the ICRA as a balancing act, and the place of habeas relief within the statute creates a crucial stepping stone. The culmination of this Note informs the current debate of defining what constitutes "detention" under the habeas provision and, more importantly, what reading "detention" broadly or narrowly means for the balance between individual civil rights and Tribal sovereignty. If banishment is considered "detention," the gates are open for federal court interference; if it is not, the Tribes retain decision-making power regarding Tribal membership.

Since *Santa Clara Pueblo* held that Congress intended for limited federal remedies through the ICRA,[104] few cases have reached federal courts regarding these issues. Courts are split on the issue of whether they should read "detention" under the ICRA's habeas provision broadly or narrowly (and thus whether they should prioritize concern for Tribal members' civil rights over Tribal sovereignty).[105] The Second Circuit chooses a broad reading (prioritizing individual Tribal members' rights),[106] while

102. *Id.* at 69–70.

103. *Id.* at 72 n.32 (citation omitted).

104. *Id.* at 69–70.

105. *See generally* Riley, *(Tribal), supra* note 27, at 814–16 (examining how federal courts grapple with federal judicial review of ICRA claims).

106. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 888–95 (2d Cir. 1996) (pushing back on *Santa Clara Pueblo* and focusing more concern on civil rights violations by the Tribe and threats to severe restraints on liberty); *see also* Quair v. Sisco, 359 F. Supp. 2d 948, 971 (E.D. Cal. 2004) (following *Poodry* in allowing federal jurisdiction over banishment claims). *But see, e.g.*, Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005) ("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.").

the Ninth Circuit opts for a narrow reading (prioritizing Tribal sovereignty).[107] The next Part evaluates each circuit's position, the arguments for why "detention" should be read broadly or narrowly, and how either reading gets at the core debate over individual rights and the rights of the Tribe.

## II. BANISHED INDIVIDUALS USING THE ICRA TO AVOID TRIBAL DECISION-MAKING: BRIEFING THE FEDERAL CIRCUIT SPLIT

As mentioned in Part I, banished individuals claim relief under the ICRA to attempt to get around Tribal decision-making regarding membership. Before *Chegup*, uncertainty already existed regarding whether a Tribal member's banishment constitutes detention within the ICRA's habeas provision. Two federal circuits explicitly considered banishment and habeas jurisdiction, and split on whether banishment constitutes "detention" under the ICRA.[108] The Second Circuit held that a banishment order is a "detention,"[109] whereas the Ninth Circuit held that banishment is not "detention."[110] The Second Circuit adopted a broad interpretation of "detention," whereas the Ninth Circuit adopted a narrow interpretation, ultimately diverging on how much weight to give to Tribal members' individual rights versus Tribal sovereignty.[111]

While *Chegup* did not decide whether banishment constitutes "detention," these circuit court opinions impact the bigger question of Tribal sovereignty's reach as these issues become more common, vis-à-vis the existence of a circuit split in the

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107. Tavares v. Whitehouse, 851 F.3d 863, 871 (9th Cir. 2017).

108. *Compare Poodry*, 85 F.3d at 895 (discussing how this case's banishment is a restraint on liberty; thus, it is "detention" and habeas corpus review applies under the ICRA), *with Tavares*, 851 F.3d at 876–77 (discussing how this case's banishment was not a restraint on liberty and not a "detention," so habeas review did not apply).

109. *See Poodry*, 85 F.3d at 901 (summarizing how banishment constitutes "detention" and how the habeas provision of the ICRA applies).

110. *See Tavares*, 851 F.3d at 878 (concluding that banishment, in this case, was not "detention" and the district court lacked jurisdiction to review the banishment decision under the ICRA's habeas provision).

111. *Compare Poodry*, 85 F.3d at 897 (highlighting how the ICRA gives the court jurisdiction to limit Tribal sovereignty in the interest of protecting civil rights), *with Tavares*, 851 F.3d at 876 ("[T]he federal courts lack jurisdiction to review direct appeals of tribal membership decisions because they fall within the scope of tribes' inherent sovereignty.").

federal court system. Although future decisions undoubtedly depend on each case's unique facts, courts will have to choose a side of the circuit split and determine the balance between preserving individual civil rights and the amount of control Tribal governments should have as part of their sovereign rights.

Ultimately, this Note argues that Tribes should oversee fundamental decisions about membership and who is a part of the Tribal community. While some individuals have gone to federal courts to get around Tribal decisions, that procedure is misguided in most cases. Analyzing the circuit split on this issue is essential to understand why courts should not read "detention" under the ICRA broadly and should prioritize protecting Tribal sovereignty.[112]

### A. LEAVING THE DOOR OPEN: THE TENTH CIRCUIT'S REFUSAL TO DECIDE WHETHER "BANISHMENT" IS "DETENTION"

In 2022, the Tenth Circuit decided *Chegup v. Ute Indian Tribe of Uintah & Ouray Reservation*.[113] The court addressed whether Tribal members' banishment counted as "detention" within the meaning of the ICRA's habeas provision.[114] *Chegup* ultimately did not answer this question because the banished members had not exhausted Tribal remedies to overturn their banishment.[115] Nevertheless, the case remains pivotal as it describes banishment's contemporary importance and the balance between individual civil rights and Tribal sovereignty.

In *Chegup*, four women faced a five-year banishment for political retaliation.[116] According to the Tribe, the women interfered in ongoing litigation about the Tribe to the point that they "sought to destabilize the tribal government, causing waste in resources, delay in providing services, and diminishe[d] . . .

112. *See infra* Part III.A (noting how, in the interests of Tribal sovereignty, the general rationale of the Ninth Circuit in *Tavares* should be followed).

113. 28 F.4th 1051 (10th Cir. 2022).

114. *Id.* at 1062–67; *see also* Hegyi, *supra* note 42 (providing background on *Chegup* through an interview with one of the banished Tribal members).

115. *Chegup*, 28 F.4th at 1070 ("[W]e think it was improper in this case to consider whether banishment constituted detention before first addressing whether tribal exhaustion effectively mooted that question."); *see also* Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., No. 2:19-CV-00286-DAK, 2019 WL 6498177 (D. Utah Dec. 3, 2019), *rev'd and remanded sub nom.*, Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., 28 F.4th 1051 (10th Cir. 2022).

116. *See Chegup*, 28 F.4th at 1055–56.

respect [for] the Tribe as a sovereign entity," among other accusations.[117] After the women were banished, they sued the Tribe in Utah's federal district court, arguing that the Tribe did not provide due process and violated their civil rights.[118] The court dismissed the case, finding that Tribes are sovereign nations, so the court did not have jurisdiction over the dispute.[119]

The district court placed heightened importance on the fact that Tribes have sovereign immunity and "absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe."[120] For the district court, the banished members' situation was insufficient to constitute "detention" and invoke the ICRA's habeas corpus provision.[121] Moreover, "[t]he only remedy in federal courts expressly authorized by Congress in the ICRA is a writ of habeas corpus to test the legality of a detention by order of an Indian tribe."[122]

While remaining undecided on appeal, the case before the Tenth Circuit posed several open issues involving banishment that future courts must consider. First, and most important for the purposes of this Note, is the relationship between "detention" under the ICRA and "custody" under other federal habeas law.[123] The relationship hinges on if "custody" should be read interchangeably with "detention" in the ICRA context. If "detention" is read broadly to include "custody," it would require a lower burden of proof to establish federal judicial review. Conversely, if "detention" is read narrowly to exclude "custody," it would require a higher burden to establish federal review. The broad reading permits habeas review when a petitioner is subject to "severe restraints on individual liberty."[124] In contrast, the narrow reading focuses on "detention" being "commonly defined to

117. *Id.* at 1056 (internal quotation marks omitted) (citation omitted) (listing allegations against the banished people).

118. *Id.* at 1059.

119. *Chegup District Court*, 2019 WL 6498177, at *6.

120. *Id.* at *3 (quoting Walton v. Tesuque Pueblo, 443 F.3d 1274, 1277 (10th Cir. 2006)).

121. *Id.* at *6; *Chegup*, 28 F.4th at 1059.

122. White v. Pueblo of San Juan, 728 F.2d 1307, 1311 (10th Cir. 1984).

123. *Chegup*, 28 F.4th at 1067.

124. *See* Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973).

require physical confinement."[125] The relationship between these two terms is thus highly significant. It plays a major role in determining how easy or difficult it would be for the federal government to become involved with Tribal membership decisions.

Next, *Chegup* mentioned the issue of "whether exclusion from one area results in confinement everywhere else, and when, if at all, that condition is cognizable in habeas."[126] If a Tribe banishes someone from only part of Tribal lands, is that a "severe restraint on individual liberty" under the broad "custody-detention" view? Is it significant enough to equate to physical confinement under the narrow view? Determining whether exclusion from one area and not another versus all areas would be important in whether the punishment constitutes enough of a detainment to warrant federal habeas review. For this Note, this issue is not the focal point. However, as discussions on banishment, habeas review, and federal involvement in Tribal membership matters increase, it will be of importance.

Third, *Chegup* mentions the challenge of "determining the difference between temporary and permanent banishment."[127] Like the spatial issue, whether banishment is temporary or permanent might impact how much of a "severe restraint on individual liberty" or detainment the act is.[128] As the discussion develops around these issues and courts decide more cases, banishment's temporal aspect of each will become more critical and pronounced.

The *Chegup* court highlighted these challenges because it knew how other circuit courts split on deciding "detention's" scope, notably the debate between the Second and Ninth Circuits. *Chegup* opened the door for future courts to enter and decide which side of the split they land on—either limiting or maintaining Tribal sovereignty.

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125. *See Chegup*, 28 F.4th at 1065 (citing Tavares v. Whitehouse, 851 F.3d 863, 871 (9th Cir. 2017)).

126. *Id.* at 1067.

127. *Id.*

128. For this Note, the distinction between temporary and permanent banishment is unimportant. This Note takes the position that even temporary, yet prolonged, banishment should not be subject to habeas review. Nevertheless, what matters most is that banishment action, whether temporary or permanent, results in the banished individual petitioning for federal habeas review under the ICRA.

### B. A BROAD INTERPRETATION: THE SECOND CIRCUIT DEEMS BANISHMENT A FORM OF "DETENTION"

The Second Circuit in *Poodry v. Tonawanda Band of Seneca Indians* was the first federal court of appeals to determine whether banishment from an Indian reservation satisfies the ICRA's habeas detention requirement.[129] In *Poodry*, five members of the federally recognized Tonawanda Band of Seneca Indians in New York were convicted of treason and sentenced to permanent banishment.[130] The individuals had alleged that Tribal council members misused Tribal funds, suspended Tribal elections, excluded members of the Council of Chiefs from Tribal business affairs, and burned Tribal records.[131] In response to these allegations, the Tribal Council ordered the former members to "leave now and never return."[132] After the Tribal Council served the order, the banished members were allegedly harassed by other Tribal members and faced uncertainty about when they would be removed and forcibly banished from the reservation.[133]

The banished members subsequently sought habeas relief in federal district court, alleging that the Tribe's actions violated the ICRA's provisions.[134] They argued that courts should interpret "detention" broadly because "detention" under the ICRA is the same as "custody," which other federal habeas statutes use.[135] They also asserted that the ICRA aims to protect individual Tribal members' rights.[136] The Tribe argued that banishment was a conflict within the Tribe, and thus the district court lacked subject matter jurisdiction over the suit.[137] The district court agreed with the Tribe and dismissed the case, holding that

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129. 85 F.3d 874, 876 (2d Cir. 1996) (discussing how this is a case of first impression).

130. *Id.* at 877–78.

131. *Id.* at 876–78.

132. *Id.* at 876.

133. *Id.* at 878.

134. *Id.* at 879 ("[The targeted individuals claimed] that they had been denied several rights guaranteed under Title I of the Indian Civil Rights Act of 1968, including the right to a trial, the right to be informed of the nature or cause of accusations against them, the right to confront witnesses, the right to assistance of counsel . . . and the right to assemble peaceably . . . .").

135. *Id.* at 890–91.

136. *Id.* at 891 ("The petitioners call our attention to references in the ICRA's legislative history to protecting [sic] Indians from 'arbitrary action' of tribal governments.").

137. *Id.* at 879.

banishment was not enough for habeas jurisdiction under the ICRA.[138] The banished members appealed. Ultimately, the Second Circuit reversed, and held banishment to be a "sufficiently severe restraint on liberty" constituting "detention" within the ICRA.[139] Therefore, this court determined habeas jurisdiction was justified.[140]

The *Poodry* court importantly interpreted "detention" the same as "custody" in other federal habeas provisions.[141] Under this logic, the ICRA's habeas provision should be interpreted the same as other federal habeas provisions because "custody" and "detention" are used interchangeably across statutes.[142] Other federal habeas statutes say someone can pursue federal habeas review if they are "in custody."[143] Following *Poodry*, "custody" and "detention" do not require Tribal members to be in physical custody or experience the threat thereof; instead, they require only a severe restraint on the Tribal member's freedom.[144] This broad requirement, equating "custody" and "detention," has a lower burden of proof for the banished member than if the ICRA was only interpreted as requiring "detention" or incarceration.[145] Thus, the court held that the banished members experienced something at least as severe as incarceration, if not more severe.[146] Overall, *Poodry* prioritized individual Tribal members' civil rights over the Tribe's inherent sovereign right to determine Tribal membership. *Poodry*, wrongly and dangerously, cuts against Tribal sovereignty as the decision helps federal courts

138. *Id.*

139. *Id.* at 901.

140. *Id.* (concluding that the district court erred in deciding it lacked jurisdiction to "entertain the petitioners' applications for writs of habeas corpus under [the ICRA]").

141. *Id.* at 890–91.

142. *Id.* (arguing that the ICRA's habeas provision should be interpreted along with other federal habeas provisions since "Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context").

143. *Id.* (discussing other habeas provisions, including 28 U.S.C. §§ 2242, 2243, 2244(a), 2245, 2249, 2253, 2255).

144. *Id.* at 894 ("[P]hysical custody is no longer an adequate proxy for identifying all circumstances in which federal adjudication is necessary to guard against governmental abuse . . . .").

145. *See id.* at 895 (noting what constitutes a "severe restraint" can be determined simply by showing that an individual cannot "'come and go' as they please").

146. *Id.* (discussing the severity of "banishment as a restraint on liberty").

insert themselves in Tribal law and Tribal governance unnecessarily.

While not all courts use *Poodry* to justify federal habeas review, they rely on the opinion for distinguishing factors. Two years after *Poodry*, the Second Circuit tackled a similar issue in *Shenandoah v. U.S. Department of the Interior*.[147] The Oneida Nation Tribe subjected the plaintiffs in *Shenandoah* to punishments for reasons that boil down to political disagreement to the point of significant interference with the Tribal political process.[148] The plaintiffs involved a group of former Tribal members, alleging, among other things, that one or more of the six plaintiffs were either suspended or terminated from their jobs, banned from various Tribal businesses and recreation facilities, "stricken from Nation membership rolls," and "lost their 'voice[s]' within the Nation's governing bodies."[149] To this court, these actions did not amount to "detention" under the habeas provision of the ICRA.[150]

*Shenandoah* slightly limited *Poodry*, finding that Tribal disenrollment was not a severe enough restraint on liberty to warrant habeas jurisdiction under the ICRA.[151] The court noted that "[h]abeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment," singling out the permanence quality of banishment in *Poodry*.[152] The Court concluded that the *Shenandoah* plaintiffs had not made a claim comparable to the plaintiffs in *Poodry*; thus, their punishment was not severe enough to invoke the habeas provision of the ICRA.[153]

*Shenandoah* did not discuss the "detention" and "custody" debate; instead, it only held that the facts of the case did not involve a "severe actual or potential restraint on [the punished

147. 159 F.3d 708 (2d Cir. 1998).

148. *See id.* at 710–11 (discussing the political backdrop of the case).

149. *Id.* at 714.

150. *Id.* (noting that while the actions taken by the Tribe were serious, the punishment faced by the petitioners in *Poodry* was more severe).

151. *Id.*; *see also supra* note 128 (explaining that for the purposes of this Note, the "permanent" versus "temporary" debate is less important).

152. *Id.*

153. *Id.*

individuals'] liberty."[154] Also, this opinion importantly involves a *disenrollment*—similar to, yet distinct from banishment.[155] The Second Circuit has thus found that habeas jurisdiction encompasses banishment but not disenrollment.[156] For the purposes of this Note, the difference between banishment and disenrollment is insignificant. The consequences individuals face matter, particularly if they face complete spatial movement restrictions or destruction of their social, cultural, and political lives.[157]

### C. NARROWING THE FIELD: THE NINTH CIRCUIT'S DEVIATION HELD THAT BANISHMENT WAS NOT "DETENTION"

*Poodry* was the leading appellate precedent for banishment until the Ninth Circuit decided *Tavares v. Whitehouse* in 2017.[158] Before *Tavares*, the Ninth Circuit had dabbled with disenrollment cases. *Arviso v. Norton* and *Lewis v. Norton* exemplified the growing push for the federal government to get its hands on

154. *Id.* (internal quotation marks omitted) (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996)).

155. *See generally* Wilkins, *supra* note 7 (describing reasons for banishment and disenrollment from traditional law through the early twentieth century and into the modern era of Tribal banishment and disenrollment); Galanda & Dreveskracht, *supra* note 24 (discussing disenrollment generally but also interweaving issues of banishment); Judith M. Stinson, *When Tribal Disenrollment Becomes Cruel and Unusual*, 97 NEB. L. REV. 820, 836–48 (2019) (giving background on Tribal disenrollment as a form of punishment).

156. *Shenandoah,* 159 F.3d at 714. Worth briefly noting is that the court in *Shenandoah* says, "plaintiffs in the instant case have not alleged that they were . . . deprived of tribal membership," but it is still a part of the plaintiffs' complaint that they were "stricken from Nation membership rolls." *Id.* The court did not expand on why the plaintiffs did not allege deprivation of membership since it appears as though they did in the complaint. *Id.* It is nevertheless implied that the court would not have held anything less than the banishment in *Poodry*, including disenrollment, to induce habeas jurisdiction.

157. Seielstad, *supra* note 19, at 143; *see also* Stinson, *supra* note 155, at 842–43 (discussing banishment, disenrollment, and how disenrollment can be more extreme); Swift, *supra* note 12, at 976–78 (discussing how the line between banishment and disenrollment is arbitrary because both involve Tribes using their authority to exclude nonmembers); Tavares v. Whitehouse, 851 F.3d 863, 877 (9th Cir. 2017) (noting that the impact of disenrollment is similar to banishment because "[b]y incentivizing disenrollment, the . . . [banished members'] proposed construct runs counter to Congress's goal of 'strengthening the position of individual tribal members vis-à-vis the tribe' by enacting the ICRA." (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978))).

158. *Tavares*, 851 F.3d 863.

Tribal membership decisions.[159] These cases importantly held that Tribal membership decisions belong in the Tribes' hands and that the federal government does not have jurisdiction over these issues.[160]

In *Tavares*, the Tribe subjected four Tribal members to a temporary banishment from Tribal lands for petitioning to recall United Auburn Indian Community Tribal Council members and accusing them of dishonest financial practices in the media, among other allegations.[161] The recall petitions included press releases detailing their complaints to the media that, according to the Tribal Council, contained false and defamatory statements articulated outside a proper Tribal forum.[162] The members brought suit in federal court against the Tribal Council seeking relief under the habeas provision of the ICRA from the Tribe's decision to banish them.[163] The district court dismissed the claim for lack of subject matter jurisdiction, rationalizing that the punishment did not amount to "detention" sufficient to invoke federal habeas jurisdiction under the statute.[164] The Ninth Circuit affirmed, holding that, in the interest of preserving Tribal sovereignty, Tribal members facing temporary

159. Arviso v. Norton, 129 F. App'x 391 (9th Cir. 2005) (examining a case where the plaintiffs sought the intervention of the federal court system in deciding membership and enrollment procedures); Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005) (considering a case where the plaintiffs sought relief from the federal government when the Table Mountain Rancheria Tribe refused to accept their membership applications).

160. *Arviso*, 129 F. App'x at 394 ("Rather, 'courts have consistently recognized 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.'" (quoting Martinez v. S. Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957))); *Lewis*, 424 F.3d at 963 (noting that only the Tribe could determine membership).

161. *Tavares*, 851 F.3d at 867–68. Among the four banished members, one, Tavares, was banned for ten years, while the Tribal council banished the others for two years. *Id.* at 868. At the time this Note is published, the Ninth Circuit has not addressed whether a permanent banishment would have changed their decision. For this Note, the analysis focuses on banishment generally, covering all types of banishment—permanent or temporary. *See supra* note 128.

162. *Tavares*, 851 F.3d at 867.

163. *Id.* at 869.

164. *Id. See generally* Oviatt v. Reynolds, 733 F. App'x 929, 933 (10th Cir. 2018) ("Though the plaintiffs use the word 'banishment,' they have not alleged any facts creating a colorable basis for jurisdiction under the Indian Civil Rights Act."). In *Oviatt*, the plaintiffs were removed from Tribal buildings and Tribal court, not detained under the ICRA. *Oviatt*, 733 F. App'x at 929.

banishment cannot invoke the ICRA's habeas provision because it does not amount to "detention."[165]

*Tavares* significantly separated from the Ninth Circuit's previous decisions equating the ICRA with the federal custody standard.[166] The court deemed the distinction between "detention" and "in custody" significant because "detention" implies more substantial physical control.[167] Requiring something like physical control or incarceration is a higher standard for the individual seeking habeas review to meet. Thus, it would likely limit the number of cases permitting federal review of Tribal membership decisions. Reading "detention" narrowly to exclude "custody" as courts have interpreted that term in other federal habeas statutes would ensure that only situations involving a physical detainment permit habeas review under the ICRA. This more appropriately reflects Congress's intent; otherwise, Congress would have used "custody" when it created the statute.[168]

*Tavares* is crucial because it disagrees with the Second Circuit's *Poodry* decision. *Tavares* involved a temporary banishment from Tribal lands and facilities, making it different from *Poodry* fact-wise.[169] However, more important is how the Ninth Circuit held the difference between "detention" and "custody" to be substantial, departing from the Second Circuit's broad finding that "detention" and "custody" are the same and all that the individual needs to show is a sufficient restraint on liberty (a more discretionary finding).[170] *Tavares*'s rationale relied on the fact

165. *Tavares*, 851 F.3d at 876–77.

166. *See* Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001) (following *Poodry*, interpreting "detention" in the ICRA the same as "custody" in other federal habeas statutes); *see also* Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010) (affirming *Moore* that "'detention' in the statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts").

167. *Tavares*, 851 F.3d at 871 ("At the time Congress enacted the ICRA, 'detention' was generally understood to have a meaning distinct from and, indeed, narrower than 'custody.' Specifically, 'detention' was commonly defined to require physical confinement.").

168. *Id.* at 872 ("Congress could have used the parallel 'in custody' language or indicated that ICRA's habeas provision was to be read in light of that jurisprudence by using 'custody' rather than 'detention,' but it did not do so.").

169. *Id.* at 875 (discussing the differences between *Poodry* and *Tavares*).

170. *Compare id.* at 876–77 ("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."), *with* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 891 (2d Cir. 1996) ("Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context.").

that when Congress enacted the ICRA, courts interpreted "detention" to require physical confinement, not "custody."[171] The Court reinforced the view that Tribal sovereignty always permits Tribes to control membership decisions and exclude nonmembers from Tribal land.[172] Ultimately, the decision encourages the correct notion that federal courts should not be involved in Tribal membership decisions as that is a sovereign power that Tribes alone should hold.[173]

Analyzing these circuit decisions reveals that the primary circuit split issue is whether "detention" should be read broadly or narrowly, ultimately determining how much the federal courts and government can infringe upon Tribal sovereignty. The Second Circuit started the discussion with a broad reading of "detention" to include situations of banishment, prioritizing the banished Tribal members' civil rights and liberties as enacted under the ICRA over the Tribe's sovereignty.[174] Meanwhile, the Ninth Circuit read "detention" narrowly, determining that, above all else, the Tribe's sovereign power to determine membership should outweigh banished Tribal members' civil rights and liberties.[175] In the middle, the Tenth Circuit considered both the Second and Ninth Circuit's decisions, and opened the door for other courts to weigh the circuit split and potentially reevaluate whether banishment constitutes "detention."[176]

The Ninth Circuit's narrow reading is the better reading, as it limits federal courts' infringement on Tribal membership decisions. Part III emphasizes the Second Circuit's limitations and errors in embracing a broad interpretation and argues that future courts should follow the Ninth Circuit's decision when considering cases involving banishment and debates over Tribal sovereignty's extension.

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171. *Tavares*, 851 F.3d at 872.

172. *Id.* at 876.

173. *See id.* (holding that the Court lacks jurisdiction because Tribal membership decisions fall solely under the authority of the Tribe).

174. *See supra* Part II.B.

175. *See supra* Part II.C.

176. *See supra* Part II.A.

## III. FUTURE COURTS SHOULD CONSTRUE "DETENTION" UNDER THE INDIAN CIVIL RIGHTS ACT NARROWLY TO EXCLUDE "BANISHMENT" FOR THE INTEREST OF TRIBAL SOVEREIGNTY

Circuit courts should not assert habeas jurisdiction over Tribal banishment issues; doing so threatens and ultimately undermines Tribal sovereignty. Although the Supreme Court found that Congress may subject Tribal governments to federal judicial review and has done so regarding habeas actions, the ICRA did not expressly create a broader cause of action.[177] Thus, Courts should leave banishment issues to Tribal discretion under the umbrella of Tribal sovereignty.[178] From a historical analysis, federal intervention with Indian Tribes is rarely, if ever, good and frequently threatens Tribal sovereignty.[179] Also, evaluating individual rights as equal to collective rights is philosophically at odds with Tribal interests and Tribes' rights to police their citizens and determine what is best for the Tribe.[180] Today, any erosion of or attack on sovereignty threatens Tribes' ability to govern in other areas as well.[181]

This Part will also explain why this prioritization and concern for future threats to Tribal sovereignty is important and propose how courts can resolve future issues. The Ninth Circuit's decision in *Tavares* best encompasses the primary goal of preserving Tribal sovereignty and adequately addresses sovereignty's importance. The Second Circuit's broad interpretation

177. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64–65 (1978) (articulating that while the ICRA's habeas provision is an express authorization of federal judicial review, Congress did not mean for the broader scope of the ICRA to go beyond that). Implicitly, *Santa Clara Pueblo* is also saying that even the habeas provision should not be read more broadly than what it expressly says (in essence, that "detention" is used in the statute, not "custody").

178. *Tavares*, 851 F.3d at 876.

179. *See, e.g.*, Wolfley, *supra* note 9; Cohen, *supra* note 9; Herzberg, *supra* note 9.

180. Swift, *supra* note 12, at 945; *see also* Hayley Weedn, *Stay Out of the Cookie Jar: Revisiting* Martinez *to Explain Why the U.S. Should Keep Its Hands Out of Tribal Constitutionalism and Internal Self-Governance*, 20 WILLAMETTE J. INT'L L. & DISP. RESOL. 18, 45 (2012) ("The United States, having its own self-interests and its own distinct foundations, is encumbered from understanding and accounting for the full-breadth of intricacies of individual Native Nations.").

181. Swift, *supra* note 12, at 974–78 (articulating how interfering with Tribal rights and not deferring to Tribal sovereignty impacts Tribes' ability to self-govern).

of banishment and the ICRA's habeas provision in *Poodry* is misguided and underappreciates the concerns to protect Tribal nations' inherent sovereign powers.

### A. THE NINTH CIRCUIT'S NARROW READING OF THE INDIAN CIVIL RIGHTS ACT PROTECTS TRIBAL SOVEREIGNTY

Banishment should not constitute "detention" under the ICRA's habeas provision, mainly because courts and Congress must preserve Tribal sovereignty at all costs. Under *Tavares*, reviewing courts should deem the punishment as falling under the Tribe's sovereign power to determine Tribal membership.[182] By holding that banishment from Tribal land did not constitute detention under the ICRA and that no federal habeas remedy was available, the Ninth Circuit "ke[pt] with the goals of current federal Indian policy, the Tribe is self-governing."[183] *Tavares* importantly framed its holding by recognizing Tribal sovereignty's importance and Congressional intent and explicitly cautioned against federal courts broadly interpreting statutes like the ICRA.[184] While *Poodry* also noted the importance of deferring to Tribes and their sovereign powers, the Second Circuit broadened what does and does not fall under sovereign powers—such broad reading is reason enough to be cautious of the decision.

#### 1. The Current Heightened Threats to Tribal Sovereignty

Tribal sovereignty is implicitly recognized by the Constitution and is upheld by centuries of judicial precedent.[185] Despite this history, decisions like *Castro-Huerta*, threats to the Indian Child Welfare Act (ICWA) and potential looming challenges in

182. *Tavares,* 851 F.3d at 877–78 ("[T]he ability to determine the membership of the community has long been regarded as an essential attribute of sovereignty.").

183. *Id*. at 867.

184. *Id.* at 869.

185. *See generally* U.S. CONST. art. I, § 8 (articulating that Indian Tribes are separate from the federal government, the states, and foreign nations); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 329–35 (2018) (discussing that the constitutional text and design reinforce the importance of Tribal sovereignty); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978) (acknowledging that Tribes have self-governing powers); Talton v. Mayes, 163 U.S. 376, 382–84 (1896) (holding that the United States Constitution does not bind Tribes). *But see*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (discussing how Congress still has plenary power over Tribal relations and lands, signifying that there is federal government oversight of Tribes).

the aftermath of *Brackeen*, and general political trends—in particular the rise of a more conservative court—attempt to limit Tribal sovereignty by inserting state and federal governments into issues which should be left solely to Tribal governments.[186] As more cases regarding the limits and reach of sovereignty come about, federal courts must enter the banishment conversation—even if only implicitly in cases that define the scope of Tribes' sovereign powers when banishment is not the main issue in the case.

At the forefront of most, if not all, issues surrounding Tribal and federal Indian law is Tribal sovereignty. Moreover, determining what Tribal sovereignty embodies and means has varied throughout history and differs depending on someone's positionality. For instance, the Tribes would likely have a different view of what it means to exercise their sovereign powers than the United States government would.[187] Historically, federal intervention, whether through acts of Congress or the court system, is never helpful and has directly contributed to the erosion of

186. *See* Theodora Simon, *Tribal Sovereignty Under Attack in Recent Supreme Court Ruling,* ACLU NORCAL (July 12, 2022), https://www.aclunc.org/blog/tribal-sovereignty-under-attack-recent-supreme-court-ruling [https://perma.cc/3LME-G4WL] (stating that the *Castro-Huerta* decision gives states "unprecedented power . . . at the expense of Indigenous people and tribal sovereignty" and discussing the troubling outlook of Tribal sovereignty in future Supreme Court decisions); Nick Martin, *The Supreme Court's Attack on Tribal Sovereignty, Explained*, HIGH COUNTRY NEWS (July 1, 2022), https://www.hcn.org/articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained [https://perma.cc/PBE8-8BWL] (interviewing federal Indian law experts on the Supreme Court's decision in *Castro-Huerta* and its implications); Damon Scott, *Indian Country Urges Supreme Court to Uphold ICWA*, SEMINOLE TRIB. (Aug. 26, 2022), https://seminoletribune.org/indian-country-urges-supreme-court-to-uphold-icwa [https://perma.cc/YHY6-FKLP] (discussing how *Brackeen* has implications for upholding Tribal sovereignty and that threats to the ICWA are threats to sovereignty). *But see* Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (upholding the constitutionality of the ICWA, but leaving some threats to Tribal sovereignty still open).

187. *See* Manley A. Begay, Jr. et al., *Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?*, *in* REBUILDING NATIVE NATIONS 34, 48 (Miriam Jorgensen ed., 2007) (noting that Tribal conceptions of governance vary and listing the ways a Tribe's culture may influence those conceptions); *see also U.S. Department of the Interior: Indian Affairs*, BUREAU INDIAN AFFS., https://www.bia.gov [https://perma.cc/YR5Z-HYSD] (stating there are 574 federally recognized Tribes in the United States, further demonstrating the breadth of lived experiences and potentially differing perspectives on federal involvement in their lives).

Tribal sovereignty.[188] Also, applying individual rights as equal to the right of the Tribe as a whole directly conflicts with a Tribe's right to police its citizens.[189] In the wake of *Castro-Huerta*, the courts are more willing to decide issues regarding sovereignty and provide consistency, albeit with potentially harmful consequences regarding sovereignty, with the judicial precedence.[190]

*Castro-Huerta* involved the State of Oklahoma's prosecution of Victor Manuel Castro-Huerta, a non-Indian, for child neglect of his Cherokee stepdaughter in Tulsa, Oklahoma.[191] The debate in *Castro-Huerta* centered on the State's argument that federal jurisdiction is not exclusive and that there is concurrent state and federal jurisdiction "to prosecute crimes committed by non-Indians against Indians in Indian country."[192] Justice Brett Kavanaugh, in the majority opinion, explicitly limited the power of Tribal sovereignty, writing, "as a matter of state sovereignty, a State has jurisdiction over all its territory, including Indian country."[193] In his dissenting opinion, Justice Neil Gorsuch expressed concern with this rationale:

> Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom. . . . [T]he power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty.[194]

*Castro-Huerta* has thus made the already complex jurisdictional questions regarding Tribes, states, and the federal government even more complex by pushing aside the historical

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188. *See generally* Weedn, *supra* note 180, at 40–41 (articulating how federal intervention can be "a gross intrusion on tribal sovereignty").

189. Swift, *supra* note 12, at 945 ("Without sovereign authority to determine its own membership, a tribe's cultural identity is in peril. Denying habeas jurisdiction over banishment actions may leave some tribal members without a remedy, but such a result is necessary to preserve tribal sovereignty and promote tribal self-government.").

190. *See* Simon, *supra* note 186 ("The language in Castro-Huerta and the 5-4 vote are particularly troubling in light of other threats to tribal sovereignty, and to the very existence of Tribal Nations, pending before the court."); Martin, *supra* note 186 (conveying several law professors' opinions on how decisions similar in reasoning to *Castro-Huerta* are becoming more common and threatening to Tribal sovereignty).

191. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

192. *Id.* (explaining the jurisdictional question at issue in the case).

193. *Id.* at 2493.

194. *Id.* at 2511 (Gorsuch, J., dissenting).

understandings of Tribal sovereignty.[195] The decision "undermines the true definition of sovereignty, and restrains Tribes' ability to govern themselves, and ultimately protect tribal members and resources. This is the most significant threat to Tribal sovereignty in many years."[196]

The threat to Tribal sovereignty is still very much alive. This statement is true despite the landmark decision *Brackeen*, where the Supreme Court upheld the ICWA.[197] During the build-up, scholars, reporters, and the public discussed what the consequences of the court's decision might entail.[198] The case involved several states and a group of couples seeking to adopt or foster Indian children; the couples argued that the ICWA violates equal protection and the anti-commandeering principles of the Constitution and thus should not impede their adoption or foster proceedings.[199] The petitioners' claim was contrary to well-established law regarding the Indian Commerce Clause and the understanding of Tribes as distinct nations.[200] Therefore, the

195. *See* Lois Elfman, *Protecting Tribal Sovereignty*, DIVERSE: ISSUES HIGHER EDUC. (Nov. 7, 2022), https://www.diverseeducation.com/from-the-magazine/article/15302462/protecting-tribal-sovereignty [https://perma.cc/XQ3B-SF5S] (expressing the concerns *Castro-Huerta* raised, adding further complexity to Tribal sovereignty questions and pressing for legal academia to catch up).

196. Press Release, S. Ute Indian Tribe, Southern Ute Tribal Council Reaffirms Significance of Tribal Sovereignty (July 22, 2022), https://www.southernute-nsn.gov/wp-content/uploads/sites/15/2022/07/20220719-Southern-Ute-Tribal-Council-Reaffirms-Significance-of-Tribal-Sovereignty-FINAL.pdf [https://perma.cc/WP48-SETL] (providing one example of how Tribes have responded to *Castro-Huerta*).

197. Haaland v. Brackeen, 143 S. Ct. 1609, 1610 (2023).

198. *See* Karina Brown, *Two Lawsuits Could Threaten the Sovereignty of Indigenous Nations*, CROSSCUT (Jan. 10, 2023), https://crosscut.com/equity/2023/01/two-lawsuits-could-threaten-sovereignty-indigenous-nations [https://perma.cc/ZX5G-U4ZR] (discussing the *Brackeen* case and its implications). *See generally* Rebecca Nagel, *This Land*, CROOKED MEDIA (2021), https://crooked.com/podcast/this-land-season-2-coming-august-23rd [https://perma.cc/T5JB-GRNN] (providing extensive analysis on the history behind and implications of *Brackeen*).

199. Brown, *supra* note 198 (discussing *Brackeen*); *see also* Brackeen v. Haaland, 994 F.3d 249, 288–90 (5th Cir. 2021) (providing the Fifth Circuit's understanding of the relevant arguments in *Brackeen*), *aff'd in part, vacated in part, rev'd in part*, 143 S. Ct. 1609 (2023).

200. *See* Ian Millhiser, *The High Stakes in a Supreme Court Case About American Indian Children*, VOX (Nov. 8, 2022), https://www.vox.com/policy-and-politics/2022/11/8/23440460/supreme-court-brackeen-haaland-indian-child-welfare-act [https://perma.cc/VQJ6-VQAT] ("[T]he plaintiffs' legal arguments

Supreme Court's subsequent decision to deny the petitioners' claims and uphold the ICWA is a massive win for Tribal sovereignty.[201]

Nevertheless, mainly because the Court dismissed only the equal protection issue in *Brackeen* regarding alleged race-based preferences on standing grounds, there is still a fear that a subsequent case with a different group of petitioners might come down differently regarding the rights of Tribes.[202] Importantly, there will always be challenges looming to the ICWA and similar statutes (e.g., the ICRA) because, "like tribal sovereignty and the relationship between the federal government and tribes," these statutes, "for whatever reason, [are] threatening to people who want their land, money and power."[203] In fact, about a week after

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in *Brackeen* are quite aggressive, and they call for the Supreme Court to make several departures from longstanding law—at least some of which could have hugely disruptive consequences for millions of Americans and for countless federal laws.").

201. *See* Levi Rickert, *Braçkeen v. Haaland: A Moment for Our Children, Our Culture, Our Future*, NATIVE NEWS ONLINE (June 19, 2023), https://nativenewsonline.net/opinion/brackeen-v-haaland-in-a-moment-we-have-the-right-to-raise-our-own-children [https://perma.cc/8Z86-3D54] (articulating how real the threat to the ICWA was and how "[t]he *Brackeen v. Haaland* ruling was a huge and significant victory for those 500 plus tribes, 60 Native American organizations, and our allies that defended our right to raise our children. More than that, it was a victory for our children, our culture and our future"); Crystal Pardue, *Looking Beyond* Haaland v. Brackeen, ACLU (July 11, 2023), https://www.aclu.org/news/racial-justice/looking-beyond-haaland-v-brackeen [https://perma.cc/FY85-2AJH] (unpacking the Supreme Court's decision and its decision to reaffirm the ICWA's validity); Hina Naveed, *US Supreme Court Reaffirms Tribal Sovereignty*, HUM. RTS. WATCH (June 16, 2023), https://www.hrw.org/news/2023/06/16/us-supreme-court-reaffirms-tribal-sovereignty [https://perma.cc/XE4A-Y9T3] (describing the opinion's upholding of critical protections for Native children's rights "to remain connected to their families, community, and culture").

202. Nancy Marie Spears, *'A Place of Calm:' Indian Child Welfare Expert Unpacks the Historic Brackeen v. Haaland Decision*, IMPRINT (June 21, 2023), https://imprintnews.org/top-stories/a-place-of-calm-indian-child-welfare-expert-unpacks-the-historic-brackeen-v-haaland-decision/242395 [https://perma.cc/ZV93-7ECT] (articulating concerns regarding the equal protection standing dismissal); Theodore J. Griswold & Molly Gunther, *ICWA Affirmed, but Indian Country Trepidation Remains*, PROCOPIO (June 16, 2023), https://www.procopio.com/icwa-affirmed-by-scotus [https://perma.cc/Q9R8-QYMB] (describing Tribal attorneys' concerns).

203. Spears, *supra* note 202 (noting that these challenges will always persist but still highlighting the importance of this decision and its positive impact on Tribal sovereignty for the time being); *see also* Haaland v. Brackeen, 143 S. Ct.

the Supreme Court decided *Brackeen*, it decided *Arizona v. Navajo Nation*, in which the majority misunderstood the Navajo Nation's "affirmative steps" claim, disregarding the Tribe's understandings of a treaty.[204] *Navajo Nation* is an example of the Court failing to consider the best interests of sovereign nations despite exhibiting some understanding of Tribal sovereignty in the *Brackeen* decision.[205]

While there are undoubtedly positive steps the federal government is making in acknowledging the importance of consulting with Tribal nations and recognizing their inherent sovereignty, it is impossible to ignore the opposite direction federal courts appear to go when determining these "inherent" sovereign powers.[206] Any erosion to, and attack on, sovereignty threatens

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1609, 1661 (2023) (Kavanaugh, J., concurring) ("As the Court explains, the plaintiffs in this federal-court suit against federal parties lack standing to raise the equal protection issue. So the equal protection issue remains undecided.").

204. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1830–32 (2023) (Gorsuch, J., dissenting) (discussing in detail how the majority failed to recognize the historical context and proper interpretations of the treaty); *see also* Theodore J. Griswold & Ariel Jones, *Latest U.S. Supreme Court Decision a Setback for Native Tribes and Their Rights*, PROCOPIO (June 27, 2023), https://www.procopio.com/latest-scotus-setback-for-native-tribes [https://perma.cc/83AJ-R6E2] (describing the majority's deviation from principals of federal Indian law to opine that nothing in the 1868 treaty between the Navajo Nation and the U.S. creates a "conventional trust relationship" with regards to water).

205. Levi Rickert, *What a Difference a Week Makes*, NAVAJO-HOPI OBSERVER (July 3, 2023), https://www.nhonews.com/news/2023/jul/03/guest-column-what-difference-week-makes [https://perma.cc/AEW5-4XP2] (articulating the background of the *Navajo Nation* case and how the ruling against Navajo Nation's water rights goes against the rationale of *Brackeen*); *see also* Katrina Crumbacher, *Two Long-Awaited SCOTUS Decisions Underscore Fight for Tribal Rights*, NONDOC (June 24, 2023), https://nondoc.com/2023/06/24/supreme-court-issues-rulings-on-native-american-issues [https://perma.cc/86AQ-9DG8] ("Although last week saw the U.S. Supreme Court rule in favor of tribes and uphold the Indian Child Welfare Act, the court ruled Thursday against the Navajo Nation in a water rights dispute involving the Colorado River.").

206. *See* Press Release, White House, Fact Sheet: President Biden's FY 2023 Budget Honors Commitments to Tribal Nations and Tribal Communities (Mar. 28, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/03/28/fact-sheet-president-bidens-fy-2023-budget-honors-commitments-to-tribal-nations-and-tribal-communities [https://perma.cc/XDZ9-EWJZ] (confirming the Biden administration's commitment to Tribal sovereignty); Press Release, Dianne Feinstein, California Sen., Feinstein, Padilla Bills to Strengthen Tribal Sovereignty, Return Sacred Land to California Tribes Signed into Law (Jan. 5, 2023), https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=

the ability of a Tribe to govern itself in a multitude of areas, including who should and should not be a Tribal member and allowed on Tribal lands.[207] Thus, based on the severity of *Castro-Huerta*, the Court's continued uncertainty regarding Native issues as articulated in the standing issue in *Brackeen*, and *Navajo Nation* coming down against Tribal interests a week after *Brackeen*, the current Supreme Court is likely to read statutes like the ICRA broadly.

After *Santa Clara Pueblo v. Martinez*,[208] it should be up to the Tribal courts, not federal courts, to determine what the provisions of the ICRA mean. Moreover, the ICRA does not provide a federal remedy for violations other than the writ of habeas corpus.[209] While it is a challenging line to walk between individual Tribal members' rights versus the rights of Tribal governments, as protection for individual Tribal members' civil rights is incredibly important, the federal government and Supreme Court's recent and historical tendencies to undermine Tribal sovereignty should be taken seriously because federal influence over sovereign nations can drastically take away from the broader Tribal right to govern.[210]

In theory, because of the Tribal exhaustion doctrine, the ICRA's habeas doctrine should create adequate respect and

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FD9FC69F-D256-4B23-BFB7-E4E4BEC1A05C [https://perma.cc/W3QX-MR8C] (discussing a series of bills designed to restore Tribal stewardship of federal lands and ensure that federal land management respects Tribal sovereignty); *see also* Brown, *supra* note 198 (discussing how advocates and legal experts say this line of cases threatens a return to Termination Era policies where the U.S. government focused on ending the political status of Tribal governments and Indigenous peoples).

207. *See* Swift, *supra* note 12, at 978 (articulating the negative correlation between federal courts' review of Tribal actions and Tribes' ability to exercise their sovereign powers).

208. *See* 436 U.S. 49, 59 (1978) (recognizing that federal court intervention may undermine the authority of Tribal courts and infringe on the right of Native peoples to govern themselves—a driving force behind ICRA's enactment).

209. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 486 (2000) ("The only express remedy in Article III courts provided by ICRA is a habeas provision in 25 U.S.C. § 1303.").

210. Weedn, *supra* note 180, at 41–44 (articulating the balance between individual rights and Tribal self-governance).

consideration for sovereign Tribal governments.[211] However, reviewing courts do not always base applications on what habeas remedy means by respecting Tribal court jurisdiction.[212] Further, Congress still has plenary power over issues involving Indian Tribes and could enact "a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes," making past precedent nondeterminative.[213] Additionally, there could be judicially created exceptions to the Tribal exhaustion rule in the ICRA's habeas provision that would weaken the sovereign powers of Tribes.[214] It is possible, and perhaps likely, that Congress will use its plenary power or federal courts will decide to expand ICRA review to try and get more control over Indian issues.[215]

Part of this speculation may be motivated by Congress's desire to create federally enforceable rights for individual Tribal members.[216] However, Congress may also be motivated by the desire to return to Termination Era-like policies and restrict Tribal governments because they are unknown institutions that Congress has not taken the time to understand sufficiently.[217] Another part might be through the influence of the Supreme Court acting to limit Tribal sovereignty so that Congress might follow their trend.[218]

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211. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 21–22 (1987) (Stevens, J., dissenting in part) (providing clarification on the procedures after exhaustion).

212. *See, e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 906 (2d Cir. 1996) (Jacobs, J., dissenting) (discussing how the majority in this case acted in a way that diminished the role of Tribal courts and Tribal sovereignty).

213. United States v. Lara, 541 U.S. 193, 207 (2004).

214. Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post*-Oliphant *World?*, 5 AM. INDIAN L.J. 597, 633–34 (2017).

215. *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1627–28 (2023) (detailing that so long as Congress's authority to regulate Indians derives from the Constitution, Congress can supersede Tribal interests through its plenary power).

216. *See* 113 CONG. REC. 35,473 (1967) (statement of Sen. Roman L. Hruska) (articulating a desire for federally enforceable Tribal civil rights).

217. *See* Riley, *(Native)*, *supra* note 27, at 1063–64 (discussing how the concept of Native governance is elusive and somewhat confusing because of the diverseness of Indian nations and individual governmental systems).

218. *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*,

The use of plenary power and federal courts expanding ICRA review would violate the rights of Indian Tribes to govern themselves, determine laws, and follow said laws. In short, habeas relief is still a way for federal courts to insert themselves into the judicial, legislative, and cultural practices of a Tribe.[219] Suppose that federal courts abuse habeas review and that Tribal sovereignty is not respected or acknowledged; in that case, this will provide an opportunity for the modern-day assimilation of Indian peoples and Tribes by imposing the federal government's constitutional norms, which are often distinct from Tribal nations' norms.[220]

Just because Congress has this plenary authority, it does not mean that courts should assume that Congress always intends to completely "undermine Indian self-government."[221] Therefore, when courts propose that habeas review under the ICRA be expanded and read broadly, that is a reason for concern and pause. Such proposals and interpretations undermine Tribal sovereignty by inserting the federal government and courts.[222] Congress and the courts are responsible for balancing Tribal sovereignty while ensuring Tribal members still have their rights and personal liberties. One cannot outweigh the other. Not acknowledging and rectifying the harm broadening federal involvement in Indian issues causes to Tribal sovereignty would

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86 MINN. L. REV. 267, 280–81 (2001) (discussing a study of Supreme Court decisions articulating that Tribes have a twenty-three percent success rate in their cases and showing the record of decisions for and against Indian interests).

219. *See* Swift, *supra* note 12, at 970–71 (articulating why federal intervention vis-à-vis habeas jurisdiction over Tribal banishment cases is problematic).

220. *See* Cox, *supra* note 214, at 642 (noting that Tribes must be ready to "maintain[] the cultural integrity of their tribal courts" to impede the ICRA from "provid[ing] a vehicle for further assimilation of tribes"); *see also* Brown, *supra* note 198 (describing the interconnectedness of Tribal sovereignty, Tribe existence, and Tribal culture).

221. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014); *see also* Haaland v. Brackeen, 143 S. Ct. 1609, 1627 (2023) ("To be clear, however, 'plenary' does not mean 'free-floating.'").

222. *See* WILKINS & WILKINS, *supra* note 31, at 42 ("[M]ore often [federal courts] generally acknowledged in Congress and the executive branch a significant, sometimes absolute, power over Native nations' right to decide who belonged in their communities, who were entitled to benefit from tribal resources, and who had the final say over questions of membership or citizenship.").

severely weaken Tribes' self-determination.[223] And doing so goes against how the ICRA should be read—narrowly, as the next Subsection explains.

### 2. "Detention" and "Custody" Are Not Synonymous: *Tavares* Got It Correct

"Detention" and "custody" are not the same under the ICRA.[224] When assessing habeas jurisdiction, a court should read "detention" narrowly.[225] Therefore, temporary yet prolonged banishment should not constitute "detention" for the sake of preserving Tribal sovereignty.

Even following *Poodry*'s logic that "detention" and "custody" are the same,[226] the Supreme Court has held that the broadest interpretation of "custody" involves actual restraints on freedom of movement and a real possibility of incarceration.[227] Neither detention nor custody should involve banishment since a banished member can still move freely on non-Tribal lands, and banishment does not typically mean someone will end up in jail.[228] To protect Tribal sovereignty, courts should not read "detention" to be broader than "custody." Doing so means that federal involvement can seep into more Tribal issues, which is not in the best interest of Indian Tribes and Indian peoples.[229]

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223. Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657, 662 (1992) ("All must concede that to extend the civil reach of the ICRA without addressing the destruction of tribal sovereignty that Oliphant accomplished would be a blow to tribal self-determination.").

224. *See* Tavares v. Whitehouse, 851 F.3d 863, 871–72 (9th Cir. 2017) (distinguishing "custody" from "detention").

225. *See id.* at 871–73.

226. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890–91 (2d Cir. 1996).

227. Hensley v. Mun. Ct., 411 U.S. 345, 348 (1973).

228. Swift, *supra* note 12, at 972–73 ("Banishment does not entail imminent incarceration like the parole or release on one's own recognizance . . . [and] [w]hile banishment is a more significant restraint than those experienced by other tribal members, it is no greater than restraints on other nonmembers, who may be excluded from tribal lands." (footnote omitted)).

229. *See generally* Weedn, *supra* note 180, at 46 ("Although achieving harmony via internal means may take years of painstaking effort—whereas a federal solution *might* provide a more immediate fix—a resulting self-devised and distinctively catered solution is likely to ultimately prove more rewarding, both in terms of promoting tribal self-determination and preserving desired sociocultural norms.").

*Tavares* established the correct standard, arguing that the distinction between "detention" in the ICRA and "custody" in other federal habeas statutes was purposeful.[230] Congress intended those alleging ICRA violations should meet a heightened standard because of inherent Tribal sovereignty.[231] Importantly, *Tavares* concluded:

> 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 . . . . A temporary exclusion is not tantamount to a detention. And recognizing the temporary exclusion orders at issue here as beyond the scope of "detention" under the ICRA bolsters tribes' sovereign authority to determine the makeup of their communities and best preserves the rule that federal courts should not entangle themselves in such disputes.[232]

There is a reason the ICRA uses "detention" when other federal habeas law uses "custody." "Detention" is a subset of "custody" and requires a narrower scope.[233] Narrowing is appropriate because "[a]t the time Congress enacted the ICRA . . . 'detention' was commonly defined to require physical confinement," and to be detained does not equate with banishment.[234] Depending on the Tribe, banished members can still move freely in specific spaces and may even retain certain privileges.[235]

Further, if the population of the Tribe as a whole believes the banishment to be an unjust use of the Tribal council's power, they can use the democratic process to vote them out or move to change the Tribe's constitution or bylaws.[236] In *Tavares,* the Tribal council was made up of five elected officials, meaning it

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230. *See Tavares*, 851 F.3d at 871 (discussing the significance of using different terms—"custody" versus "detention").

231. *See* Swift, *supra* note 12, at 953–56 (articulating Congress's intention in balancing individual rights with Tribal sovereignty, requiring ICRA violations to meet a higher standard in the name of inherent sovereignty).

232. *Tavares*, 851 F.3d at 876–77 (citations omitted).

233. *Id.* at 871.

234. *Id.*

235. *See, e.g.*, Hegyi, *supra* note 42 (considering the *Chegup* case and how the banished members faced negative consequences for their banishment but were still able to move freely in designated spaces (e.g., the grocery store) and "retain[ed] tribal membership [despite losing] employee health and life insurance benefits.").

236. *Tavares*, 851 F.3d at 867 (articulating how the Tribal council, in this case, engaged in legislative and executive actions to discipline members that violated the Tribe's constitution).

has political accountability regarding fairness since it is subject to local elections and the political process.[237] With procedural fairness in place and some likelihood of political accountability, it is even more convincing to read the ICRA narrowly so as not to expand federal review on Tribal membership decisions.[238]

3. The Purpose of the Indian Civil Rights Act Supports a Limit on Federal Overreach

Reading the ICRA narrowly follows Congress's intent in enacting the ICRA. Unless and "until Congress acts, the tribes retain" their historic sovereign authority.[239] The debate between individual civil rights articulated in the ICRA and the inherent sovereignty of Indian nations is at the heart of discussions regarding potential federal habeas jurisdiction over banishment cases.[240]

The dispute hinges on how much control the federal government should have and whether the federal government can infringe on a Tribe's sovereign practices.[241] This struggle is described as follows:

> If [the federal judge or court] side[s] with the tribe and den[ies] the writ of habeas corpus, it means that the banished individual has no further

237. *Id.*

238. *But see* Harold Monteau, *Indian Civil Rights Act Has Done Nothing for Individual Indians' Rights*, ICT NEWS (Sept. 12, 2018), https://ictnews.org/archive/indian-civil-rights-act-has-done-nothing-for-individual-indians-rights [https://perma.cc/7SJZ-R58T] (expressing frustration with the lack of accountability and protections under Tribal law).

239. United States v. Wheeler, 435 U.S. 313, 323 (1978).

240. *See* Riley, *(Tribal)*, *supra* note 27 (discussing the balance between Tribal sovereignty, an Indian nation's right to govern themselves, and individual Tribal members' rights and liberties); Riley, *(Native)*, *supra* note 27 (articulating the tension between non-Westernized civil rights in Tribes and U.S. court interference in banishment); Angela R. Riley, *Tribal Sovereignty in a Post-9/11 World*, 82 N.D. L. REV. 953, 954–55 (2006) (dealing with new ways of thinking about Tribal sovereignty after 9/11 and how Tribes must manage sovereignty and respect individual civil rights).

241. *See* Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97, 123 (2007) (detailing the necessity of Tribal sovereignty over membership); Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership,* 92 VA. L. REV. 793, 846–50 (2006) (discussing Tribal citizenship power broadly); Clare Boronow, Note, *Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy*, 98 VA. L. REV. 1373, 1423–25 (2012) (describing enforcement mechanisms for Tribal human rights obligations).

> remedy. But if [the federal judge or court] agree[s] with the banished tribal member and grant[s] the writ of habeas corpus, [they] risk undermining the tribe's sovereignty by interposing a federal court in matters of tribal membership.[242]

Certainly, Tribes cannot hide behind sovereignty to threaten individual Tribal members' civil rights and do harm.[243] However, the Tribes should instead use the opportunity to lay out clear rules that members must follow to fulfill the balancing goals of the ICRA adequately.[244]

Additionally, habeas review over banishment should not occur because broadly interpreting habeas jurisdiction conflicts with Indian law canons of construction, which direct courts to interpret statutes in favor of Tribes.[245] Federal courts have treated issues involving Tribal citizens and nations differently.[246] Nevertheless, courts use several canons of construction to interpret statutes involving Indian Tribes consistently.[247] Three canons important to the ICRA include (1) "treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians"; (2) "all ambiguities are to be resolved in [the Indians'] favor"; and (3) "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[248] In short, the canons mean courts must interpret statutes in favor of Tribes.

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242. Swift, *supra* note 12.

243. *See infra* Part III.B.2 (proposing enforcement mechanisms to ensure proper and just Tribal membership decision-making).

244. *Cf.* Monteau, *supra* note 238 (expressing a need for Tribal adoption of the substantive rights in the ICRA and civil remedies beyond federal "habeas corpus" relief).

245. Swift, *supra* note 12, at 949, 971–74.

246. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (holding that "the unique trust relationship between the United States and the Indians" requires special principles for interpretation of statutes pertaining to Indian issues (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985))).

247. *See* Swift, *supra* note 12, at 949 (highlighting the importance of the Indian canons of construction).

248. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Nell Jessup Newton ed., 2017); *see also* Scott C. Hall, *The Indian Law Canons of Construction v. the* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 495 n.3 (2004) (restating the three canons and adding that treaties are to be construed as the Indians would have understood them); *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1721 (2016) (considering the Indian law cannons of construction).

Congress deliberately chose the limited habeas remedy, limiting federal intrusion into Tribal affairs. This Part speaks to the balancing effort between civil rights and Tribal sovereignty Congress made when enacting the ICRA.[249] *Santa Clara Pueblo v. Martinez* made this concern clear in determining that Tribal membership is critical to exercising Tribal sovereignty, self-governance, and a Tribe's "existence as an independent political community."[250] Further, neither the ICRA nor any other act of Congress explicitly regulates Tribes' ability to determine membership, so the courts should not extend into that territory.[251] Broadly reading habeas to include situations of banishment would infringe on this sovereign power, and federal courts should not get involved in those decisions.[252] If Congress did not make it clear that it intended to intrude on Tribal sovereignty, it should not be read broadly to include such infringement.[253] These arguments, in short, are a way to articulate that, above all else, Tribal sovereignty is what must be protected and preserved, and federal involvement is often not preferred.

### B. BANISHMENT IS A MEMBERSHIP DECISION FOR TRIBES TO CONTROL

All in all, Tribal membership decisions should be resolved within the Tribes to preserve sovereignty.[254] It is important not

249. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978).

250. *Id.* at 72 n.32 (first citing Roff v. Burney, 168 U.S. 218 (1897); and then citing Red Bird v. United States (*Cherokee Intermarriage Cases*), 203 U.S. 76 (1906)).

251. *Id.* ("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."); *see also* Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., No. 2:19-CV-00286-DAK, 2019 WL 6498177, at *3 (D. Utah Dec. 3, 2019) ("Because Indian tribes and their officials enjoy such immunity, 'absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe.'" (quoting Walton v. Tesuque Pueblo, 443 F.3d 1274, 1277 (10th Cir. 2006))).

252. *See* Weedn, *supra* note 180 (going over *Santa Clara Pueblo* and the importance of membership decisions for a Tribe).

253. *See Santa Clara Pueblo*, 436 U.S. at 72 (finding § 1302 does not authorize actions for relief against the Tribe or its officers).

254. *See* 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, 330–43 (2010) (advocating for solutions within Tribes since federal influence diminishes sovereignty).

to minimize the individual's civil rights claims or the potentially restricting and brutal consequences of banishment, and to recognize potential limits and concerns. However, banishment does not involve detaining an individual, and the remedy for banished Tribal members should remain in the Tribal court review process.[255] Thus, courts should narrowly read "detention" in the ICRA to preserve sovereignty, especially when the current political and judicial trends threaten that sovereignty.[256] If the federal government is involved, it should primarily be through uplifting and improving resources for Tribal courts and services.[257]

1. Tribes Are Best Suited to Review Membership Decisions

Continuing to read the ICRA narrowly and following Congress's intent is further recognition that federal courts are, with few exceptions, not the most appropriate forums for addressing Tribal membership concerns.

An inherent conflict of interest exists between the federal government and Tribal nations.[258] There is a long and tortured history of the federal government's misguided interactions regarding Indians and Tribal nations that persist today.[259] Thus, an increased federal jurisdiction in Tribal issues is inherently at odds with Tribal sovereignty.[260] Laws that increase federal jurisdiction over Indian peoples, connected with court decisions that expand federal or state jurisdiction, and limit Tribal jurisdiction create confusion in Indian Country—confusion leading to

255. Tavares v. Whitehouse, 851 F.3d 863, 878 (9th Cir. 2017) (citing Fisher v. Dist. Ct., 424 U.S. 382, 390–91 (1976)).

256. *See Fisher*, 424 U.S. at 390–91 ("[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.").

257. *See* Swift, *supra* note 12, at 955 (citing U.S. COMM'N ON C.R., THE INDIAN CIVIL RIGHTS ACT 74 (1991)) (articulating the importance of funding Tribal courts over promoting federal jurisdiction).

258. Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003) (providing an example where a conflict of interests exists between the federal government's Department of Justice and Native American Tribes).

259. *See, e.g.*, Cobell v. Babbitt, 91 F. Supp. 2d 1, 6 (D.D.C. 1999) (providing an example of how, in recent history, the federal government has severely misunderstood and mismanaged Tribal issues).

260. *See generally* Juliano, *supra* note 258 (describing at large the conflicts of the Depart of Justice's representation of Native American Tribes).

uncertainty over which laws apply and which sovereign should be respected in certain instances.[261] Doing so takes away from the legitimacy of Tribal governments and dramatically diminishes the Tribe's ability to enforce cultural practices and protect their autonomy.

Significantly, because the federal government and courts are not based in the communities where Tribal government actions occur, they may also be separated from Tribal community concerns and priorities.[262] This distance between Tribes and federal entities may reduce reliance on and successful cooperation with said federal entities.[263] It is not unreasonable to conclude that the federal government is not the best suited to handle the community concerns and priorities of the Tribe, and that the Tribe is rightfully justified in being skeptical of federal involvement due to cultural distance and historical conflict.

Thus, inserting federal government policies leads to further displacement and diminishment of the Tribal institutions within the Tribe, which are in the best position to provide trusted, assessable, and politically accountable justice in Tribal communities. Specifically, the federal government exerting jurisdiction over Tribal issues "was imposed on Indian nations without their consent in the late 19th century and is remarkably unchanged since that time. The system is complex, expensive, and simply cannot provide the criminal justice services that Native communities expect and deserve."[264] Tribal courts are the best forums to protect critical Tribal interests. Therefore, federal courts that

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261. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (considering the "jurisdictional maze" that surrounds law enforcement on Indian lands resulting from the "conflicting claims of three [different] sovereigns"); Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974) (describing the "jurisdictional crazy-quilt" of law enforcement in Indian Country).

262. *See* Weedn, *supra* note 180, at 28–29 (noting how the Tribes are best suited for knowing what is best for the community because they know and are connected to the community).

263. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 735–37 (2006) (articulating how federal officers sometimes carry with them a sense like "the cavalry has arrived," which is not a good thing from a Tribal perspective).

264. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at v (2015).

claim habeas jurisdiction over banishment cases are rarely appropriate apart from actual instances of detention and potential limits discussed next.

2. Potential Limits on Tribes and Checks on Tribal Abuses of Power

Despite their sovereign powers, Tribes can occasionally abuse their ability to banish individuals.[265] Thus, there should be some limits placed on Tribes regarding when a federal court can review banishment actions and whether habeas jurisdiction is appropriate. Additionally, discussing the limits and parameters of federal review will help enforce the ICRA's intent and encourage proper and just Tribal membership decision-making. One example of a limit would be if a Tribe decided to banish anyone with African American ancestry. Unfortunately, this is a practice that Tribes have historically used.[266]

Before the Civil War, many African Americans had incorporated with the Choctaw, Chickasaw, Cherokee, and Seminole Tribes, to name a few.[267] In some Tribal nations, most were enslaved people held by Tribal members, and in others, the Tribes fully incorporated them as citizens of the Tribes.[268] In the wake of the Civil War, some of these Tribes signed treaties with the

265. *See, e.g.*, Wilkins, *supra* note 7, at 250–51, 258, 261 (providing concerns of how Tribes might banish individuals for investigating corruption or greed).

266. *See, e.g.*, Terrion L. Williamson, Note, *The Plight of "Nappy-Headed" Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2004); ALAINA E. ROBERTS, I'VE BEEN HERE ALL THE WHILE: BLACK FREEDOM ON NATIVE LAND 27 (2021) (describing the rarity of people of African descent who "successfully overcame the strict hierarchy" imposed within these nations).

267. *See generally* KEVIN MULROY, THE SEMINOLE FREEDMEN: A HISTORY (2007) (providing a history on the Seminole freedmen, including their complicated relations with African Americans); CALEB GAYLE, WE REFUSE TO FORGET: A TRUE STORY OF BLACK CREEKS, AMERICAN IDENTITY, AND POWER (2022) (describing the history between Creek Nation, their slaves, and their Black members); Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National Identity: The Trials and Tribulations of the Cherokee Freedmen*, *in* CONFOUNDING THE COLOR LINE: THE INDIAN-BLACK EXPERIENCE IN NORTH AMERICA 223 (James F. Brooks, ed. 2002) (discussing identity formation among multiracial Native Americans and African Americans).

268. *See* ROBERTS, *supra* note 266, at 24, 27 (discussing Tribes' various degrees of adopting the institution of slavery and the presence of free Blacks in Native communities).

United States, agreeing to admit formerly enslaved people as citizens under certain conditions.[269] Throughout history, before and after the Civil War, African Americans had children and married Tribal members.[270] In creating membership rolls for those eligible to receive land under the General Allotment Act, however, the United States placed individuals of African American appearance on "Freedmen" rolls and those of Indian appearance on rolls as citizens "by blood."[271] Over the years, some of these Tribes have sought to exclude descendants from these freedmen rolls and sometimes from Tribal lands entirely.[272] Regarding banishment, Tribes can act against Tribal members, or even nonmembers,[273] for the interest of Tribal cohesion and social order. However, a limit may be put in place that discourages banishing those of African American ancestry simply for holding that identity.[274] Thus, banishment based on race alone with no other legitimate rationale could limit Tribes, and federal review may be warranted.

In scenarios like this, a federal court may be allowed to review the issue as the act of banishment may constitute a race-based abuse of power rather than one due to an individual's criminal conduct or actual threat to Tribal cohesion. Perhaps the best-proposed solution at this time is to adhere to § 1302(a)(8) of the ICRA (the statute's equivalent of the Fourteenth Amendment) and follow the rubric the United States Constitution has

269. *See, e.g.*, Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 139–40 (D.D.C. 2017) (holding that the U.S. and Cherokee Nation treaty guarantees Tribal citizenship of Cherokee-owned enslaved people before and during the Civil War because they have the same rights as native Cherokees).

270. *See* ROBERTS, *supra* note 266, at 25–26 (discussing interracial marriage and children).

271. *See* Philip Deloria, *When Tribal Nations Expel Their Black Members,* NEW YORKER (July 18, 2022), https://www.newyorker.com/magazine/2022/07/25/when-tribal-nations-expel-their-black-members-caleb-gayle-we-refuse-to-forget-alaina-e-roberts-ive-been-here-all-the-while [https://perma.cc/ABV5-LVXT] (mentioning "the separate membership rolls that the Dawes Commission produced" and general "by blood" rules).

272. *Id.* (discussing how Tribes sometimes restrict citizenship based on race).

273. The ICRA applies to "any person," which, importantly, includes nonmembers. *See* 25 U.S.C. § 1303. Therefore, it could cover African American Freedmen, be an improper banishment action, and be subject to federal review.

274. *See, e.g.*, Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 122, 146–47 (D.D.C. 2002) (showing how the federal government rejected Tribal exclusion of Freedmen descendants).

regarding Fourteenth Amendment concerns.[275] Additionally, more limits and exceptions may likely develop over time as more banishment decisions happen, depending on the circumstances in which they arise.[276] One way to think about these limitations and checks on potential abuse of power by Tribal governments is that for the time being, since banishment actions are still relatively uncommon, they are assessed on a case-by-case basis. While reading the ICRA and its habeas provision narrowly, to check Tribal governments' powers, reviewers can still assess certain factors, like banishing individuals for personal business or political interests not related to the Tribe, whether the Tribal government consists of elected officials who are politically accountable, et cetera.[277]

There are additional arguments that federal courts should assert habeas jurisdiction over Tribal banishment actions. Some scholars argue that Tribes should do all they can to exercise Tribal sovereignty in determining membership, but they argue it goes too far to say that Tribes can strip members of their membership or banish them from Tribal lands either temporally or permanently.[278] This argument says that federal courts, in short, are wrong to defer to the presumed interests of the Tribes

275. *See generally* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. 973 (2021) (discussing the standards of review used in equal protection analyses).

276. For instance, addiction and substance abuse are often seen as disabilities. This raises a question that might come up about limits regarding discriminatory banishment based on disability and what level of scrutiny that may receive when following the Fourteenth Amendment rubric. *See The Americans with Disabilities Act, Addiction, and Recovery for State and Local Governments*, ADA NAT'L NETWORK, https://adata.org/sites/adata.org/files/files/ADA_Addiction_Recovery_and_Govt-2021FINAL.pdf [https://perma.cc/BCT5-4W3V]; *see also* Equip for Equality, *Drugs, Alcohol and the ADA,* GREAT LAKES ADA CENTER (April 2018), https://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo33_Drugs_Alcohol_and_the_ADA.pdf [https://perma.cc/BY2F-KUE3].

277. *See, e.g.*, Seielstad *supra* note 19, at 184–85 (articulating some checks that might help with a more exacting assessment of handling habeas jurisdiction).

278. Medders, *supra* note 75 (arguing that, generally, the ICRA detention standard should be interpreted the same as federal custody to better attend to individual civil rights).

without carefully analyzing the goals of the sovereign interests and exactly why Tribal members may be banished.[279]

For instance, it would thus not be unheard of for a banishment case to involve Tribal officials banishing individuals for their own political or economic gain if the individual simply disapproved of their policies or position on issues.[280] There is a reason to pause here because it is essentially the ones who banish that determine if the banishment stays. Tribal courts "are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms" as these courts are influenced by the Tribe's unique culture and customs.[281] Additionally, because some may perceive Tribal courts as products of the federal efforts to control Native people through imposing formal court systems on Tribes, the modern Tribal legal system may face similar legitimacy challenges experienced by federal systems.[282]

Despite potential limits and concerns, it remains true that every governing body should be able, to some extent, to punish political opponents or individuals who threaten the Tribe's community.[283] The appropriate remedy is to refrain from allowing the federal courts to intervene and superimpose because they might likely do so for political and power-gaining purposes.

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279. Seielstad, *supra* note 19, at 73–74 ("When accompanied by disenrollment from tribal membership, individuals' political, cultural and legal identity and status as an Indian and member of a distinctive tribe may be lost altogether.").

280. *See* WILKINS & WILKINS, *supra* note 31, at 144 (describing how some cases involve Tribal officials "arbitrarily and capriciously disenrolling tribal members . . . to winnow out [those] who disapprove of the actions or direction taken by the tribal leadership").

281. Duro v. Reina, 495 U.S. 676, 693 (1990) (internal quotation marks omitted).

282. *See* Weedn, *supra* note 180 (discussing the impact of mainstream American culture on Tribal constitutions and definitions of individual Tribal members' rights).

283. *See, e.g.*, Riley, *(Native)*, *supra* note 27, at 1079 (providing an example of punishment in the employment context that "[l]ike the state and federal governments, Indian nations may lawfully stifle political speech in the employment context to protect the business interests of the governments" (citing Lauren Donovan, *Hall Says Tribes' Free Speech Intact*, BISMARCK TRIB. (Aug. 11, 2004))).

3. Suggestions for the Future: More Clarity and Encouraging the Tribal Process

The potential limits and concerns discussed prior certainly have merit and value because individual Tribal members' rights matter, and violations of those rights should be taken seriously. However, other scholars argue that "federal courts should refrain from exercising habeas jurisdiction over banishment actions, given tribal sovereignty and tribal authority to make membership decisions."[284]

Even if federal courts hold that Tribes have not violated the ICRA, allowing federal scrutiny of such claims brought under the ICRA imposes costs on Tribal governments and affects their ability to control the affairs of the Tribe. Perhaps a better way of using the federal government is not through judiciary actions but instead through Congress pursuing genuine, active efforts to alleviate issues that Tribal courts face, such as insufficient funds. Putting more federal funding into the development of Tribal courts but specifying that Tribes should use the funds how they see fit might be a way to ensure individual Tribal members' rights are given full attention while not diminishing Tribal jurisdiction.[285] If the federal government is to be involved, it should be in the way of promoting Tribal sovereignty and authority, not by inserting their views and opinions. In fact, through the modern trust responsibility, the federal government has duties to Tribes to provide services, protect Tribal sovereignty, and

284. Swift, *supra* note 12, at 945; *see also* Weedn, *supra* note 180 ("[I]n the interest of remaining true to its own policies of promoting tribal sovereignty and self-determination . . . the United States should also perhaps err on the side of remaining as detached as possible in issues concerning tribal matters of internal self-governance.").

285. *See* THE INDIAN CIVIL RIGHTS ACT, *supra* note 257 ("Congress should afford tribal forums the opportunity to operate with adequate resources, training, funding, and guidance, something that they have lacked since the inception of the ICRA . . . . [T]he Commission hopes that the current trend towards the narrowing of tribal jurisdiction will be reversed, and that, instead, the future will be one of promise and greater respect for tribal sovereignty and authority."); *see also* 25 U.S.C. § 3601 (finding that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments," and "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes," but "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation.").

protect Tribal resources like the Tribal court system.[286] Tribal forums are available to vindicate the rights created by the ICRA, and utilization of those instead of outside federal forces should be prioritized.[287]

## CONCLUSION

> [Tribal sovereignty] can restore the tribes' ability to tailor their justice systems to their unique histories, customs and culture . . . . Adjudicating and resolving disputes according to their own laws, customs and traditions is very important to them.[288]

As more political discussions regarding Tribal sovereignty develop, federal courts will undoubtedly face difficult decisions regarding the balance between Tribes' inherent sovereign powers and individual Tribal members' civil rights. Of course, this is not a "this or that" dichotomy, as the two systems must be balanced.

The Second, Ninth, and Tenth Circuits have considered the issue of banishment from Tribal lands under the ICRA. The Second Circuit's holding that federal courts have subject matter jurisdiction to review a writ of habeas corpus concerning a Tribal member's banishment from the Tribe has identifiable flaws.[289] Doing so expands past what Congress intended to be the Act's

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286. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 430 (2013) (articulating the three substantive components of the modern trust responsibility: a duty to provide services, a duty to protect Tribal sovereignty, and a duty to protect Tribal resources).

287. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief." (citations omitted)).

288. Faye C. Elkins, *What Does a Recent Supreme Court Decision Mean for Tribal, State, and Federal Law Enforcement?*, CMTY. POLICING DISPATCH (Jan. 2022), https://cops.usdoj.gov/html/dispatch/01-2022/McGirt_decision.html [https://perma.cc/CE26-5JXZ] (quoting Mike McBride III, a lawyer and former attorney general of the Seminole Nation, in the wake of *McGirt v. Oklahoma*, which the U.S. Supreme Court heard in July 2020).

289. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 890–91 (2d Cir. 1996) (using a broad interpretation of "detention"); Medders, *supra* note 75, at 428–30 (discussing *Poodry, Shenandoah,* and *Jeffredo* regarding how the detention requirement is the same as the federal custody standard).

curated balance between individual Tribal members' civil rights and a Tribe's sovereign powers. Thus, when future federal courts face these issues as the Tenth Circuit did in *Chegup*,[290] they should follow the reasoning of the Ninth Circuit's holding that "detention" should be read narrowly, not the same or broader than "custody," to preserve Tribal sovereignty.[291] The civil rights of individual Tribal members and Tribal sovereignty can and should coexist. However, strengthening individual civil rights through broad readings of the ICRA invites more federal court involvement in Tribal decision-making. To better preserve individual Tribal members' civil rights, Tribal sovereignty must take center stage. A narrow reading of the ICRA ensures this balance is met and that courts best preserve Tribal laws, cultures, and practices.

290. Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., 28 F.4th 1051, 1062–67 (10th Cir. 2022).

291. *See* Tavares v. Whitehouse, 851 F.3d 863, 876–77 (9th Cir. 2017).