American Indian Law Review

Volume 42 | Number 2

2018

How the Ninth Circuit Severed the Indian Civil Rights Act from Federal Habeas Corpus Precedent Under the Guise of Tribal Sovereignty

Morgan Medders

NOTES

HOW THE NINTH CIRCUIT SEVERED THE INDIAN CIVIL RIGHTS ACT FROM FEDERAL HABEAS CORPUS PRECEDENT UNDER THE GUISE OF TRIBAL SOVEREIGNTY

Morgan Medders[*]

I. Introduction

Two competing interests dominate the interplay between federal Indian law and individual civil rights. On one hand, the U.S. government uplifts tribal sovereignty and recognizes the importance of tribal self-governance, and nowhere is this more special than setting the guidelines for tribal membership. On the other hand, the individual liberties that the Bill of Rights secures must be conferred to everyone. The most recent display of this tension was demonstrated in *Tavares v. Whitehouse*.[1] Attempting to reconcile the constitutional guarantees of the Bill of Rights while carefully respecting tribal sovereignty, Congress enacted the Indian Civil Rights Act ("ICRA").[2] Generally, the Act extends most, but not all, of the Bill of Rights to Indian tribes, and thus requires that tribes provide these standards to their citizens. Among the provisions, the ICRA carves out a small pathway for habeas corpus relief, allowing tribal citizens to seek review in federal court for confinement.[3]

Quite often, unfortunately, claims under the ICRA generate tension between tribal sovereignty and civil rights. After the ICRA's enactment, questions arose as to how federal courts would interpret the habeas provision of the Act. This Note focuses on one of those questions. In 2017, several plaintiffs raised the issue of whether their temporary exclusion from tribal land constituted a detention for purposes of the ICRA.[4] Jessica Tavares, along with three other plaintiffs, brought suit in federal court under the ICRA against the Tribal Council of the United Auburn Indian Community ("UAIC") and sought habeas relief from the Tribe's decision

---

* Third-year student, University of Oklahoma College of Law.

1. 851 F.3d 863 (9th Cir. 2017).
2. 25 U.S.C. §§ 1301-1303 (2012).
3. *Id.* § 1303; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
4. *Tavares*, 851 F.3d at 867-69.

to, among other things, temporarily exclude them from tribal land.[5] They presented two arguments to the court: first, that the UAIC's decision to withhold per capita payments created a basis for habeas review; second, and most importantly, that the UAIC's decision to exclude petitioners from tribal lands established federal jurisdiction.[6] The Eastern District of California rejected these arguments and dismissed the claim for lack of subject matter jurisdiction under the ICRA.[7] The Ninth Circuit ultimately affirmed.[8] This Note examines how the Ninth Circuit resolved this contention in the *Tavares* opinion.

Tavares is an important benchmark in the relationship between self-determination and federal civil rights legislation relating to tribes. While this Note is an evaluation of the Ninth Circuit's opinion, the petitioners have filed for a writ of certiorari as of September 2017. The facts of this case fall somewhere in between the groups of cases where federal courts have found habeas jurisdiction adequate to evaluate a tribe's confinement of its own members and where courts have clearly deemed it inappropriate. While the *Tavares* court could have allowed petitioners a chance to vindicate their civil rights claim in federal court, it postulated this as antithetical to *Santa Clara Pueblo v. Martinez*[9] in that doing so would open the floodgates for tribal members seeking federal habeas review. Contemplating big picture ramifications on tribal governance and tribes' sovereignty to render binding judgments on tribal members, the court took a heightened stance on the ICRA's grant of federal subject matter jurisdiction and improperly foreclosed habeas review in this instance. Here, the Ninth Circuit proclaimed that the ICRA's federal habeas relief provision calls for a greater standard than the federal habeas corpus statute, and that relief extends to only those circumstances amounting to true physical confinement. While rationalizing that reversing an instance of temporary exclusion for lack of subject matter jurisdiction may provide justice for the individual, the court deferred towards preservation of tribal autonomy to set forth the specifications for membership.

Therefore, says the Ninth Circuit, in the interest of self-governance, tribal members facing temporary exclusion cannot invoke federal habeas jurisdiction because it is insufficient under the ICRA's detention standard. *Tavares* contradicts the Ninth Circuit's previous decisions equating the

5. *Id.* at 869.
6. *Id.* at 870-71.
7. *Id.* at 869.
8. *Id.* at 878.
9. 436 U.S. 49 (1978).

ICRA with the federal custody standard and improperly decided that petitioners did not suffer a severe restraint on liberty.

II. Law Before the Case

Prior to the enactment of the ICRA, tribes operated on their own sense of fundamental rights, which many tribes supplemented through adoption of various pieces of the Bill of Rights.[10] The first landmark Supreme Court case involving the relationship between Indian tribes and the Bill of Rights was *Talton v. Mayes*.[11] *Talton* involved the murder of two members of the Cherokee tribe on Cherokee land.[12] The defendant argued that his indictment by a small grand jury was unconstitutional and invoked the Fifth Amendment as his defense.[13] Rejecting the defendant's federal habeas petition and the right of the defendant to avail himself under the Fifth Amendment, the Court proclaimed broadly that the United States Constitution does not apply to Indian tribes.[14]

The reaction to *Talton* was significant. Members of the United States government were shocked by the notion that Indian Country did not fall under the ambit of the Constitution. Over time, Congress developed an interest in uniformly binding tribes and their members to the same constitutional principles binding the federal government.[15] In 1968, Congress solidified this interest with the passage of ICRA. The Act extends most of the Bill of Rights to tribes, as well as the principles of equal protection and due process.[16] While the text of these provisions was the same as those in the U.S. Constitution, the ICRA did not extend the underlying precedents along with them. Therefore, Indian tribes have largely been free to interpret the ICRA's Bill of Rights in their own way. As a result, traditional tribal notions of justice embedded themselves into interpretations of the ICRA.

Further, while Congress did not want to encroach on tribal self-governance, it still provided a narrow means of redress for judgments through habeas corpus relief.[17] With respect to habeas jurisdiction, the Act

10. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.04, at 979-80 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN].

11. 163 U.S. 376 (1896).

12. *Id.* at 379.

13. *Id.*

14. *Id.* at 382-83.

15. COHEN, *supra* note 10, § 14.04, at 980-81.

16. 25 U.S.C. § 1302 (2012).

17. *Id.* § 1303.

provides that "[t]he 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."[18] This provision of the ICRA is significant in later jurisprudence.

A. Background of ICRA's Interpretation

The ICRA was enacted in 1968 at the end of the Termination Era.[19] The Act was, in large part, a response to the salience of Congress's interest in overseeing some aspects of tribal criminal procedure.[20] Namely, Congress sought to respond to tribal exemptions from federal constitutional restraints.[21] Horror stories arose about gross injustice taking place in Indian Country.[22] The fear, although largely pretextual, was that tribal governments were enforcing judgments against their members in ways not constitutionally permissible in state or federal courts. Ironically, while Congress was concerned about Indian tribes committing civil rights violations against their members, state and local governments committing violations posed the greater danger. Several tribal members testified before Congress as to this notion.[23]

The ICRA is codified at 25 U.S.C. §§ 1301-1303. Section 1301 contains a definitional section,[24] which defines for purposes of the Act: "Indian tribe," "powers of self-government," "Indian court," and "Indian." Section 1302 is where the Act incorporates piecemeal provisions of the Bill of Rights through which Congress sought to limit the actions of tribal governments.[25] In particular, this section incorporates all of the First Amendment without the Establishment Clause,[26] the entire Fourth Amendment, the Takings Clause of the Fifth Amendment, the Sixth

18. *Id.*

19. For background on the Termination Era, see COHEN, *supra* note 10, § 1.06, at 84-93.

20. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1346 (1969).

21. Tavares v. Whitehouse, 851 F.3d 863, 865 (2017).

22. DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 380 (6th ed. 2011).

23. *Id.*

24. 25 U.S.C. § 1301 (2012).

25. *Id.* § 1302.

26. The Establishment Clause was not included because tribes enjoy the right to establish an official religion; notably, the Pueblo tribal structure is fundamentally Catholic.

Amendment,[27] and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Moreover, the ICRA imposes a sentencing cap that prohibits Indian tribes from imposing prison sentences greater than one-year and also includes respective fine limits.[28] Congress's rationale behind instituting this cap was to keep tribal courts fixed as misdemeanor courts and allow the federal government to handle the more expensive prosecutions.

Finally, § 1303 establishes federal habeas corpus jurisdiction. It states: "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."[29] Habeas relief for tribal members is certainly not a novel concept.[30] After the ICRA's enactment, it was not long before plaintiffs began seeking relief under the statute. The question, however, was what type of relief the ICRA provided.

This question was addressed in perhaps the most significant Indian civil rights case: *Santa Clara Pueblo v. Martinez*.[31] In *Santa Clara Pueblo*, petitioners brought a claim under the ICRA questioning the Santa Clara Pueblo's membership ordinance that denied membership to the descendants of female members who married outside of the Tribe.[32] The petitioners brought their claim under 25 U.S.C. § 1302, but the Supreme Court notably concluded that while normally federal statutes authorize a private right of action, such a right does not exist in regard to the ICRA.[33] Put another way, Congress did not manifest a clear intent to create a civil right of action under the ICRA.[34] Instead, the Court's only mechanism for review under the ICRA exists in § 1303.[35] Even criminal review is limited to only habeas corpus.[36]

---

27. Some components of the Sixth Amendment were not implemented because they would pose financial burdens on tribes. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978).

28. *Compare* 25 U.S.C. § 1302(a)(7)(B)-(D) *with* 25 U.S.C. § 1302(a)(8). This sentencing cap is the reason why the Act omits "life" in its Equal Protection and Due Process clauses.

29. 25 U.S.C. § 1303.

30. *See generally* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879).

31. 436 U.S. 49.

32. *Id.* at 52-53.

33. *Id.* at 72.

34. *Id.*

35. *Id.* at 67.

36. *Id.*

In summary, the Court rationalized that a private right of action does not exist under § 1302's Bill of Rights incorporations because the § 1303 habeas provision exists. Otherwise, Congress would not have placed the § 1303 provision in the ICRA. Finally, the *Santa Clara Pueblo* Court acknowledged that even though a § 1302 private right of action does not exist for tribal members, the federal government can bring a claim against a tribe under § 1302 to enforce provisions of the Bill of Rights against the tribes.[37] Unfortunately, this scenario has never occurred and is likely to never happen.

The ICRA's nearly identical language to the Bill of Rights does not necessarily mean that tribal incorporations mirror federal precedent. Indeed, tribes formulate their own standards of Due Process and Equal Protection.[38] The bottom line in *Santa Clara Pueblo* is that by not allowing a private right of action, the federal government gives great deference to the "tribalized" interpretations of the Bill of Rights. Though the ICRA is chronologically a Termination Era piece of legislation, the Court's decision in *Santa Clara Pueblo* clarifies its status as a self-determination mechanism for deference. Ultimately, because habeas jurisdiction is the only mechanism for tribal citizens to have their rights vindicated under the ICRA, plaintiffs began arguing for broader definitions of detention in order to squeeze their claims into federal court.

B. What Constitutes a Detention for Habeas Purposes

Limited to the narrow § 1303 mechanism, the issue for plaintiffs became determining what constitutes a detention under the ICRA. Various federal circuit courts attempted to answer that question. First, the Second Circuit in *Poodry v. Tonawanda Band of Seneca Indians* determined where federal review of tribal convictions is undoubtedly appropriate as an outer limit.[39] In *Poodry,* the Tonawanda Band of Seneca Indians permanently banished petitioners from tribal lands and stripped them of citizenship.[40] Petitioners brought a claim under the ICRA and argued that their permanent banishment from tribal lands qualified as a detention meriting habeas corpus review.[41] The court ultimately agreed and found that permanent banishment is a "severe restraint on liberty," not "civil in nature."[42] Also

37. *Id.* at 72.
38. COHEN, *supra* note 10, § 14.03, at 943-44.
39. 85 F.3d 874 (2d Cir. 1996).
40. *Id.* at 876.
41. *Id.*
42. *Id.* at 901, 888.

notable in *Poodry* is that petitioners lacked a tribal mechanism to appeal the judgment.[43]

While permanent banishment is sufficiently serious, other tribal actions have not risen to the level of deserving federal jurisdiction. In *Shenandoah v. Halbritter*, members of the Oneida Nation brought suit against the Nation's representative under the ICRA in response to the Tribe's housing ordinance.[44] The ordinance provided that the Tribe could inspect and eventually demolish homes noncompliant with building code standards.[45] Petitioners asserted that the representative was wielding this statute for harassment and intimidation and that this practice justified habeas corpus relief under the ICRA.[46] The Second Circuit disagreed.[47] Deciding that the ordinance was not sufficiently severe, the court reasoned that the statute and its effects were economic in nature and, "[a]s a general rule, federal habeas jurisdiction does not operate to remedy economic restraints."[48]

The Ninth Circuit declined to follow the Second Circuit's rationale that permanent banishment constitutes sufficient unlawful detention for purposes of the ICRA. *Jeffredo v. Macarro* involved disenrolled members of the Pechanga Tribe suing for relief.[49] The petitioners invoked *Poodry* and claimed that disenrollment was enough for habeas relief.[50] Notably, the disenrollment in this case did not bring banishment with it. The court found this distinction critical, stating that "the potential threat of future eviction is not sufficient to satisfy the detention requirement of § 1303."[51] Further, disenrollment alone was not enough under the statute: "The detention requirement is designed to limit the availability of habeas review to cases of special urgency."[52] The most substantial takeaway from the case, however, was the *Jeffredo* court's statement that the "detention" requirement in the ICRA is the same as the federal custody standard.[53]

Santa Clara Pueblo also contemplated the policy rationales behind the ICRA's § 1303 habeas provision as the only pathway for a tribal member to

43. *Id.* at 876.
44. 366 F.3d 89, 90 (2d Cir. 2004).
45. *Id.* at 91.
46. *Id.* at 90.
47. *Id.* at 92.
48. *Id.*
49. 599 F.3d 913, 915 (9th Cir. 2010).
50. *Id.* at 919.
51. *Id.* at 920.
52. *Id.* at 923 (internal quotations omitted).
53. *Id.* at 922.

vindicate a civil rights claim against the tribe in federal court.[54] The Court noted that Congress had a desire "not to intrude needlessly on tribal self-government" and in doing so only provided the habeas pathway to serve the dual statutory objectives of promoting the rights of individual tribal members and furthering Indian self-government.[55] The principles expounded in *Santa Clara Pueblo* remain significant: in order for Indian tribes to retain sovereignty, they should remain largely free from the intrusive effects of judicial review and any such review should be carefully limited.[56]

III. Statement of the Case

A. Facts

Petitioners Jessica Tavares, Donna Caesar, Barbara Suehead, and Dolly Suehead are four members of the United Auburn Indian Community (UAIC), a federally recognized Indian tribe.[57] The UAIC is located in the Sierra Nevada foothills of Auburn, California, and is comprised of two tribes: the Miwok and Maidu Indians.[58] It is a small community composed of roughly 170 members.[59] The governing body of the community is a five-member Tribal Council.[60] Interactions between the Tribal Council and the petitioners gave rise to the action.

The named plaintiff was a well-respected member of the UAIC.[61] The trial court noted that she formally served as a Tribal Council chair, informally referred to as "chief," and that the community held her opinions in high esteem.[62] The situation escalated for the petitioners when they decided to speak out against the Tribal Council's decisions; among other things, petitioners made allegations that the Tribal Council mismanaged its

54. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978).

55. *Id.* at 71; *see also* Morton v. Mancari, 417 U.S. 535, 551 (1974).

56. *Santa Clara Pueblo*, 436 U.S. at 67.

57. Tavares v. Whitehouse, 851 F.3d 863, 867 (9th Cir. 2017).

58. *About Us*, UNITED AUBURN INDIAN COMMUNITY, https://www.auburnrancheria.com/about (last visited Sept. 24, 2017).

59. *About Us: The Restoration Act*, UNITED AUBURN INDIAN COMMUNITY, https://www.auburnrancheria.com/about/copy_of_the-land-trust (last visited Sept. 24, 2017).

60. *About Us: Tribal Council*, UNITED AUBURN INDIAN COMMUNITY, https://www.auburnrancheria.com/about/tribal-council (last visited Mar. 31, 2018).

61. *Tavares*, 851 F.3d at 878 (Wardlaw, J., concurring in part and dissenting in part).

62. Tavares v. Whitehouse, No. 2:13-CV-02101-TLN-CKD, 2014 WL 1155798, at *4 (E.D. Cal. Mar. 21, 2014), *aff'd in part*, *appeal dismissed in part*, 851 F.3d 863 (9th Cir. 2017).

finances and was dishonest in conducting elections.[63] They gained substantial traction and eventually had these claims published in "non-tribal news outlets."[64]

Petitioners began a recall campaign.[65] Under the procedures for recall, they needed to acquire signatures from forty percent of the UAIC.[66] Petitioners maintained that they did, in fact, meet this requirement, but the Community disputed this.[67] Conveniently enough, the Tribal Council is also in charge of the Elections Committee that oversees this entire process.[68] The Tribal Council did not take well to the recall campaign and promptly notified the petitioners that they would be subject to disciplinary action and a potential withholding of per capita payments.[69] The notices issued by the Council stated that the petitioners acted maliciously to slander and commit libel against the Tribe, and that the petitioners' conduct of undermining the Council was harmful to tribal programs and business.[70] The Council stated that petitioners acted in violation of tribal law.[71]

Also included in the written notices was the result of the Tribal Council's determination of how it chose to respond to petitioners' conduct. The Council voted to issue two separate orders: (1) an order to withhold the petitioners' per capita payments, and (2) an order to exclude petitioners from tribal lands and facilities.[72] Petitioners were barred from all tribal events and could not attend tribal meetings.[73] They could, however, vote by absentee ballot.[74] The duration of each order varied between Tavares and the other petitioners: the exclusion order was for a period of ten years for Tavares and two years for the other three petitioners, while the per capita withholdings were for a period of four years for Tavares and six months for the other petitioners.[75]

---

63. *Tavares*, 851 F.3d at 867.
64. *Id.*
65. *Tavares*, 2014 WL 1155798, at *2.
66. *Id.* at *3.
67. *Id.*
68. *Id.*
69. *Id.* at *4.
70. Tavares v. Whitehouse, 851 F.3d 863, 867-68 (9th Cir. 2017).
71. *Id.* at 868.
72. *Id.*
73. *Tavares*, 2014 WL 1155798, at *4.
74. *Tavares*, 851 F.3d at 868.
75. *Id.*

The UAIC provided a narrow pathway for petitioners to appeal the Council's punishment, but only for the per capita withholdings.[76] This was also facilitated through the Council itself.[77] No mechanism existed for the petitioners to appeal the exclusion order.[78] As a result of the appeal process, the UAIC reduced the withholdings by six months for Tavares and one month for the other petitioners.[79]

The petitioners then brought a petition for a writ of habeas corpus to the Eastern District of California, claiming they were denied due process and punished in retaliation for exercising their First Amendment rights.[80] The trial court found that the restraint was severe but did not constitute "detention" under the ICRA.[81] The case was dismissed for lack of subject matter jurisdiction.[82] Petitioners appealed to the Ninth Circuit.[83]

B. Decision

The Analysis portion of the opinion begins by referencing two bedrock principles in Indian law: "tribal sovereignty and congressional primacy in Indian affairs."[84] With respect to tribal sovereignty, Indian tribes generally retain the sovereignty that existed prior to the genesis of the United States.[85] Tribal sovereignty was full and uncompromised until European nations discovered America.[86] After Indian tribes were limited to an occupancy right over land, the Court placed further jurisdictional limitations on the tribes.[87] The remaining aspects of sovereignty today, while not complete,

76. *Tavares*, 2014 WL 1155798, at *5.
77. *Id.* The Petitioners note this to be a due process concern.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at *10.
82. *Id.* at *12.
83. *See* Tavares v. Whitehouse, 851 F.3d 863, 865 (9th Cir. 2017).
84. *Id.* at 869.
85. *See id.*
86. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that upon discovery of the new world, the discovering European sovereign gets ownership of the underlying fee title to the discovered lands and the exclusive right to purchase the occupancy right of indigenous people). These are known respectively as the vesting of fee title and restraint on alienation clauses. In addition, the ownership of the underlying fee title extended to the United States after the Revolutionary War.
87. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribal courts do not have inherent jurisdiction to try and punish non-Indians); United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act as constitutional).

still protect the principle that tribes, as sovereigns, ought to govern themselves.

The United States Supreme Court pronounced the critical, and often contradicting, caveat that self-governance cannot be inconsistent with the guardian-ward relationship.[88] Inherent sovereignty is reduced by congressional primacy in Indian affairs, otherwise known as Congress's plenary power.[89] The relationship between these two principles is essentially that "[t]ribal sovereignty offers a backdrop against which the applicable federal statutes must be read."[90] Because Congress enjoys such broad authority over tribal matters, federal courts hesitate to interpret any statute against tribal sovereignty unless Congress expresses clear intent to establish a limitation.[91]

The first issue the *Tavares* court addressed was whether the UAIC's withholding of petitioners' per capita payments created federal habeas corpus jurisdiction.[92] The court quickly answered in the negative.[93] Per capita payments are "'the distribution of money or other thing[s] of value to all members of the tribe, or to identified groups of members, which [are] paid directly from the net revenues of any tribal gaming activity.'"[94] The court invoked two authorities to support its reasoning of why habeas jurisdiction was inappropriate for this issue. First, the court recognized the Second Circuit case, *Shenandoah*, as persuasive authority that economic penalties do not warrant federal habeas jurisdiction.[95] Second, the court invoked a federal regulation that designates per capita disputes to tribal courts.[96] Indeed, the court's brevity on this issue makes it clear that withholding per capita payments is entirely within the UAIC's sovereign authority and is insufficient to justify federal court review. The petitioner

88. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (noting that the tribes' relationship with the United States resembles that of a ward to a guardian). This idea did not acquire legal force until *Kagama*.

89. *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

90. *Tavares*, 851 F.3d at 869 (quoting McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) (internal quotations and ellipses omitted)).

91. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

92. *Tavares*, 851 F.3d at 870.

93. *Id.*

94. *What Are Per Capita Payments?*, MVSKOKE MEDIA (Jan. 27, 2017), https://mvskokemedia.com/what-are-per-capita-payments/.

95. *Tavares*, 851 F.3d at 870.

96. *Id.* "You must utilize or establish a tribal court system, forum or administrative process for resolving disputes arising from the allocation of net gaming revenue and the distribution of per capita payments." 25 C.F.R. § 290.23 (2000).

even acknowledged in oral argument that the case could not have been brought to federal court based on an economic benefit alone.[97]

After addressing per capita payments, the court then considered the claims brought by petitioners Donna Caesar, Dolly Suehead, and Barbara Suehead separately from Tavares. Here, the Ninth Circuit found the doctrine of mootness barred their appeals because there was no longer a live controversy.[98] The dissent agreed, but the petitioners disputed this in oral argument by claiming the orders have collateral consequences in the form of the stigma created by the Tribe referencing the orders in tribal publications.[99]

Next, the court addressed whether temporary exclusion orders are sufficiently serious for habeas jurisdiction. This is the key issue of the opinion. Normally, the requisite standard for determining habeas jurisdiction is when a person is "in custody,"[100] but the ICRA uniquely uses "detention" instead.[101] The court deemed this distinction to be a significant one because "detention" carries a meaning of stronger physical control.[102] Even more, the court referenced that members of Congress equated "detention" to imprisonment.[103] This difference, critical to the Ninth Circuit, was enough to find that the ICRA calls for true, physical confinement, as opposed to the more open-ended "custody" standard of the federal habeas statute.

With this initial understanding of "detention" under the ICRA, the court looked further to case law found in *Poodry*, *Shenandoah*, and *Jeffredo*. The Second Circuit in *Poodry* legitimized the ICRA habeas issue by being the first case where a federal circuit court found a tribal decision to be punishment outside of physical confinement—namely, permanent exclusion

---

97. Oral Argument at 28:23, Tavares v. Whitehouse, 851 F.3d 863 (9th Cir. 2017) (No. 14-15814), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000015567.

98. *Tavares*, 851 F.3d at 878.

99. Oral Argument, *supra* note 97, at 27:30.

100. Typically, the federal statute governing habeas relief is 28 U.S.C. § 2254, which provides:

> [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2012).

101. *Tavares*, 851 F.3d at 871.

102. *Id.*; *see also* 25 U.S.C. § 1303 (2012).

103. *Tavares*, 851 F.3d at 873.

from tribal land—sufficient for habeas jurisdiction.[104] *Poodry* received substantial attention. In particular, it left open the question of what other penalties might receive habeas jurisdiction under the ICRA. Two years later, *Shenandoah* attempted to foreclose this question by limiting *Poodry* only to permanent banishment.[105] The Ninth Circuit took issue with the Second Circuit's reluctance to distinguish disenrollment and banishment. Unlike the persuasive effects of *Poodry* and *Shenandoah*, *Jeffredo* presented precedent that the *Tavares* court implemented in its analysis: that federal habeas jurisdiction does not cover tribal membership disputes.[106]

Relying strongly on *Jeffredo* and other authority, the Ninth Circuit concluded that tribal sovereignty extends to decisions to exclude individual members from lands and facilities.[107] The tribes alone should make decisions on membership and intrusion, with federal court review only undermining this inherent tribal function. According to the *Tavares* court, habeas relief is a difficult threshold to pass in this instance.[108] Temporary exclusion is not as severe as the permanent banishment situation in *Poodry* and is therefore inadequate for habeas corpus. As a final point, the court noted that it does not look to diminish petitioners' situation or the seriousness of the allegations against the respondent, but ultimately, petitioners can only seek redress in tribal courts.[109]

The dissenting opinion criticized the majority for "[recalibrating] the balance" between tribal sovereignty and individual civil rights.[110] The dissent states that ICRA "detention" should be interpreted the same as federal "custody" based on *Jeffredo*.[111]The dissent impresses that the individual interests at stake in the petitioners' claims are critical.

---

104. *Id.* at 874.

105. Shenandoah v. Halbritter, 366 F.3d 89, 92 (2nd Cir. 2004).

106. *Tavares*, 851 F.3d at 875.

107. The last citation in the *Tavares* opinion invokes *Fisher v. District Court*, stating, "[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 [his or her] class," and further self-determination. *Tavares*, 851 F.3d at 878 (first alteration in original) (quoting Fisher v. Dist. Court, 424 U.S. 382, 390-91 (1976)).

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

109. *Id.* at 878 ("[T]he petitioners' remedy is with the Tribe, not in the federal courts."). In other words, the fact that the tribe does not provide as robust of an appeal system for the petitioners to avail themselves is not of federal concern.

110. *Id.* at 880.

111. *Id.*

IV. Analysis

The Ninth Circuit in *Tavares* excessively weighed the interests of the tribes in creating their own standards for membership against the interests of tribal members in having their rights vindicated in federal court. In this balancing act, *Tavares* unfortunately fell far against the individual's right to habeas relief, leaving far-reaching implications in its wake for the individual civil rights of tribal citizens. Federal circuit courts, particularly the Second and Ninth Circuits, have given much credence to the word choice of "detention," as opposed to "custody," in the ICRA. This is contrary to how habeas relief is traditionally utilized in American law and how 25 U.S.C. § 1303 should work.

Fundamentally, the ICRA detention standard should be interpreted the same as federal custody.[112] The Ninth Circuit recognized this notion in *Jeffredo* but later ignored it in *Tavares*.[113] *Jeffredo* realized that the standard for ICRA detention should be consistent with federal case law on what constitutes a severe restraint on liberty.[114] The dissenting judge acknowledged this principle in oral argument.[115] Despite this longstanding principle, *Tavares* was decided on the idea that the "detention" needed to be permanent, like the situation in *Poodry*, despite this being antithetical to federal case law.

In the petition for a writ of certiorari, the petitioner's question presented asks: "Should the 'detention' requirement for habeas review under the ICRA be construed 'more narrowly than' the 'custody' showing required under other federal habeas statutes?"[116] The Ninth Circuit should have answered "no" when addressing this question. Undoubtedly, the UAIC as a tribe should do all it can to exercise tribal sovereignty and determine membership. The Supreme Court has reinforced this as fundamental.[117] However, it goes too far to say that tribes can strip tribal members of their membership, either temporarily or permanently,[118] potentially without due process. *Tavares* foreclosed this scenario from reaching federal court by limiting a tribal member's right to be heard until the punishment amounts to

112. *See* COHEN, *supra* note 10, § 9.09, at 780.

113. Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010).

114. *Id.*

115. *Compare* Oral Argument, *supra* note 97, at 17:30, *with Tavares*, 851 F.3d at 871.

116. Petition for Writ of Certiorari at i, *Tavares*, 851 F.3d 863 (No. 14-15814), 2017 WL 4251148.

117. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978).

118. *Tavares* provides an example of a temporary repeal of tribal membership, while *Poodry* provides an example of a permanent repeal of tribal membership.

physical detention. *Santa Clara Pueblo* is distinguishable here, as the Court did not contemplate facts that involved tribal members being stripped of their very identity; instead, the facts were limited to specifications for membership.[119]

Federal habeas corpus's "severe restraint on liberty" standard is not as strict as the standard proffered by the Ninth Circuit here. Indeed, federal courts allow habeas relief in several areas outside of contemporaneous physical detention. Examples of this include habeas where an individual is out on parole,[120] or even where an individual is on probation.[121]

More importantly, the petitioners here not only enjoy citizenship in the UAIC,[122] an Indian tribe with foundations reaching past the birth of the United States, but they also enjoy citizenship in the United States. The very idea that tribal members retain both forms of citizenship is a key reason Congress enacted the ICRA. Just because the petitioners' claim involves a tribal council decision does not mean they should be deprived of their right to federal habeas review. To the contrary, petitioners' rights as Americans should predominate in this instance because their means of redress are narrowly limited, if available at all, to relief in federal court.

Another reason federal habeas review was appropriate in *Tavares* is because it is permissive in other legal spheres. Non-Indians have used this device against state punishments frequently throughout history.[123] In fact, habeas corpus relief has been granted in non-Indian contexts in non-permanent circumstances.[124] Because the right exists for non-Indians against enforcement of state laws, it is faulty to not also apply this to tribal members. In short, the "sufficiently serious" standard is interpreted more stringently when the petitioners are tribal members, even though American citizens should enjoy the same habeas rights irrespective of the jurisdiction where the detention takes place. In summary, the standard for habeas review against state government detentions should be the same for tribal

119. *Santa Clara Pueblo*, 436 U.S. at 51.

120. *See* Jones v. Cunningham, 371 U.S. 236 (1963).

121. *See* United States *ex rel.* B. v. Shelly, 430 F.2d 215 (2d Cir. 1970).

122. It is important to note that the enjoyment of membership occurred with the exception of the exclusion order discussed in this case.

123. *See* JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 293-305 (3rd ed. 2017) (chapter 8).

124. *Id.* at 307.

governments. This would allow tribal citizens access to the federal criminal justice system they are entitled to enjoy as American citizens.[125]

There should, no doubt, be a requirement to exhaust tribal court remedies to protect tribal sovereignty. Litigants should not be able to circumvent procedure where relief could perhaps be granted within the same tribe, but through a higher appellate process. Through this guideline, self-determination becomes more adequately protected from the risks contemplated in *Santa Clara Pueblo*.

Indeed, in cases where modes of appeal exist under a particular tribe's jurisdiction, litigants should always explore those before seeking redress through habeas corpus. Here, petitioners did not have any further avenues for appeal or mechanisms of tribal review in the UAIC's governmental structure. The *Tavares* court perhaps would have required exhaustion if UAIC methods of review did exist.[126] This would have correctly advanced the aims of *Santa Clara Pueblo* that federal courts need not be overburdened by habeas petitions inconsistent with self-determination. But, the fact that petitioners did not have any way of appealing the exclusion orders speaks directly to a lack of due process. This concern is heightened by the fact that the Tribal Council passing the punishment in *Tavares* was the same body against whom petitioners were speaking out. When tribal members are punished by tribes that lack a robust system of appeal, such as the situation in *Tavares*, tribal members should be able to avail themselves to the ICRA's 25 U.S.C. § 1303 habeas corpus provision for federal review.

It is hard to reconcile the notion that ICRA relief should only result out of criminal prosecutions with the simple truth that many tribes, like the UAIC, do not have a criminal code or a criminal court.[127] The UAIC punishment here is designated as civil in nature because the UAIC does not have a criminal code. The ICRA calls only for detention and is silent on a requirement for criminal prosecution.[128] Furthermore, a potential criminal requirement would allow tribes to circumvent the possibility of federal habeas corpus by simply not creating criminal courts. In this scenario, tribal

125. *See* Brief of Andrea M. Seielstad, as Amicus Curiae in Support of Petitioner, Tavares v. Whitehouse, 851 F.3d 863 (9th Cir. 2017) (No. 14-15814), 2017 WL 4857396.

126. *Tavares*, 851 F.3d at 873 (invoking ICRA legislative history memorandum by then House Minority Leader Gerald Ford discussing exhaustion requirement in state imprisonment contexts).

127. *Id.* at 874 n.12. The *Tavares* court declines to decide whether ICRA requires a criminal judgment, but the lack of a criminal prosecution does weigh heavy on the case.

128. *See* 25 U.S.C. § 1303 (2012).

governments could hypothetically impose any sentence on an individual member with federal habeas relief entirely foreclosed.

The Ninth Circuit focused heavily on the duration of punishment to determine that federal subject matter jurisdiction is lacking under the ICRA; specifically, that the *Tavares* temporary ban from lands and facilities does not equate to permanent banishment. In other words, if it is not permanent, then it is not severe. Yet the petitioners, like so many tribal citizens, place their entire cultural, personal, and professional identity in their tribe. To attach a requirement of permanence to exclusion is inconsistent with the federal habeas corpus jurisprudence standard of severity that should have been applied.[129] While the Ninth Circuit claimed it did not seek to minimize petitioners' situation, it perhaps did so by misunderstanding the significance that tribal members place in accessing tribal facilities and participating in the governmental process.[130] Any sentence, regardless of duration, that deprives tribal members of their natural right to be members of a tribe should always be questionable and investigated through habeas relief.

V. Conclusion

The Ninth Circuit incorrectly decided that federal subject matter jurisdiction under the ICRA was lacking in this case. The ICRA's "detention" requirement should be interpreted the same as the "custody" requirement in federal habeas corpus precedent. Holding that a severe restraint on liberty does not exist in *Tavares* will allow further civil rights abuses levied by tribes against individual members and will deprive tribal members of appropriate federal habeas corpus relief.

129. Habeas does not require permanent sentences. *See* PFANDER, *supra* note 123, at 293-307.

130. *See* Oral Argument, *supra* note 97, at 26:27; *see also id.* at 25:40 (counsel for petitioner inquiring as to how exclusion order is any different from a private individual saying "we don't want you at our party").