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# Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members

Rob Roy Smith<sup>1</sup>

## I. Introduction

Imagine receiving a letter from the United States government informing you that you are no longer considered a United States citizen. “It couldn’t happen here,” you might say. However, with growing frequency across the country, citizens of federally recognized Indian tribes are told by their Indian tribal governments that they have been disenrolled (removed from their tribe’s membership rolls) or, worse, banished (disenrolled and barred from tribal lands and events).<sup>2</sup> Worse still, a growing number of tribal members find themselves deprived of their basic civil rights by their Indian tribal governments without any recourse to challenge their summary loss of tribal identity and loss of tribal services, including health care, education, and housing support.<sup>3</sup> Tribal banishments and disenrollments have long been among the reserved sovereign powers of tribal governments,<sup>4</sup> typically reserved for use against those who are not lawfully considered members or those members who have committed a heinous crime that

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<sup>2</sup> Individual Indian civil rights advocates claim that 1,500 people have been banished from twenty-three tribes nationwide between 1995 and 2006. Jason B. Johnson, *Former Pomo leader expelled from tribe*, SAN FRANCISCO CHRONICLE, May 1, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/05/01/BAG4AIF6H1.DTL>. Articles further suggest that as many as 4,000 people have been disenrolled from tribes in California since 2006. Michael Martinez, *Indians decry banishment by their tribes*, CHICAGO TRIBUNE, Jan. 14, 2006, [http://articles.chicagotribune.com/2006-01-14/news/0601140134\\_1\\_tribal-casino-american-indians-gaming-profits](http://articles.chicagotribune.com/2006-01-14/news/0601140134_1_tribal-casino-american-indians-gaming-profits). For instance, the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation of California has disenrolled about 15 percent of its members. *LaMere v. Super. Ct.*, 31 Cal. Rptr. 3d 880 (Cal. Ct. App. 2005). Heated enrollment and banishment disputes continued in 2009. See, e.g., *More than 700 removed from Chukchansi Tribe*, INDIANZ.COM, Mar. 2, 2009, <http://www.indianz.com/News/2009/013364.asp>; Lynda V. Mapes, *Snoqualmie banishment case ripping apart tribe*, SEATTLE TIMES, Feb. 20, 2009, [http://seattletimes.nwsourc.com/html/localnews/2008765115\\_snoqualmie20m0.html](http://seattletimes.nwsourc.com/html/localnews/2008765115_snoqualmie20m0.html). There is also the related issue of the disenrollment of the Cherokee Freedmen. See Alex Kellogg, *Cherokee Nation Faces Scrutiny For Expelling Blacks*, NPR, Sept. 19, 2011, <http://www.npr.org/2011/09/19/140594124/u-s-government-opposes-choerokee-nations-decision>; James Dao, *In California, Indian Tribes With Casino Money Cast Off Members*, N.Y. TIMES, Dec. 12, 2011, <http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all>.

<sup>3</sup> *Id.*

<sup>4</sup> See generally *United States v. Wheeler*, 435 U.S. 313 (1978).

seriously offends their respective Indian tribe's culture, traditions, or laws.<sup>5</sup> Recently, however, tribal banishments and disenrollments appear to be increasingly used to bar speech, prevent political confrontations, and to limit the scope of tribal benefits.<sup>6</sup> The actions of these tribal governments threaten more than just the individual rights of tribal members. The very nature of tribal sovereignty and tribal self-governance is at risk.

The question is whether individual Indian civil rights and tribal sovereignty can coexist. For centuries, Indian tribes have banished their members as punishment for serious offenses, and some advocates believe that imposing Anglo-style civil rights protections on Indian cultural practices amounts to continued paternalism.<sup>7</sup> Indian tribal governments, however, are not and should not be immune to shifting legal doctrines that afford greater rights to tribal members. Providing the basic protections of the Indian Civil Rights Act (ICRA),<sup>8</sup> such as due process and equal protection of laws, benefits both Indian tribes and individual tribal members. Ensuring the protection of civil rights of tribal members promotes trust in tribal institutions, avoids litigation, Bureau of Indian Affairs (BIA) interference, and negative media publicity, and, most importantly, strengthens tribal sovereignty by allowing tribes to craft tribal institutions that will protect tribal members' rights in a manner that best comports with tribal laws, customs, and traditions.

Tribes can and should take action now to adopt procedures that provide tribal members with meaningful due process rights to challenge tribal governmental actions that threaten their Indian civil liberties. An administrative process and a tribal court is not too much to ask when the alternative is considered: costly and embarrassing litigation, in addition to possible Congressional intervention. Indeed, two recent cases, *Sweet v. Hinzman*<sup>9</sup> and *Jeffredo v. Macarro*,<sup>10</sup> provide important examples of litigation arising out of questionable tribal government decisions affecting their members' civil liberties. The former, an egregious case involving the Snoqualmie Tribe in Washington State, signifies the dangers of unilateral tribal government decisions when banishments are made without oversight or review procedures. The latter provides a scenario wherein the Pechanga Band of Luiseño Indians in California tribal government walked a fine line before the Ninth Circuit Court of Appeals, ultimately prevailing in the case but also receiving a warning from the panel's dissent that disenrollment by a tribe could be gravely harmful to its former members.

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<sup>5</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) (citations and internal quotation marks omitted).

<sup>6</sup> The Dry Creek Band of Pomo Indians in California is considering a "code of conduct" that could lead to fines and banishment for members who criticize the tribe. Tribal leaders came up with the idea in hopes of protecting tribal businesses. The conduct code is proposed at a time when more than 140 members are facing disenrollment. *Dry Creek Band delays action on "code of conduct,"* INDIANZ.COM, Mar. 31, 2009, <http://64.38.12.138/News/2009/013855.asp>.

<sup>7</sup> See, e.g., Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 166–67 (1995).

<sup>8</sup> 25 U.S.C. §§ 1301–1303.

<sup>9</sup> *Sweet v. Hinzman*, 634 F.Supp.2d 1196 (W.D. Wash. 2008).

<sup>10</sup> *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2009).

This article provides an overview of the struggles faced by both individual tribal members and tribal governments as they come to terms with growing demands for greater protection of the rights and freedoms of individual tribal members from what is perceived to be arbitrary governmental actions, much of which is being subjected to the harsh light of non-Indian media scrutiny. Part II provides a brief overview of the ICRA. Part III discusses banishment litigation as it relates to the ICRA. Part IV explores the first ever banishment trial under the ICRA held in federal court in Washington State in 2009, challenging a tribal banishment action. Part V discusses a 2009 decision from the Ninth Circuit Court of Appeals rejecting Pechanga tribal member efforts to challenge a disenrollment action. Finally, Part VI discusses due process requirements under the ICRA, and suggests a meaningful framework that Indian tribes can follow to provide their members with civil rights protections in a manner that avoids future judicial and media defeats where issues of race and citizenship in Indian country meet.

## II. Overview Of The Indian Civil Rights Act

ICRA was passed by Congress in 1968 to impose upon tribal governments certain restrictions and protections afforded by the US Constitution's Bill of Rights.<sup>11</sup> ICRA represents a significant congressional intrusion into the internal affairs of Indian tribes prompted in part by US Supreme Court cases such as *Talton v. Mayes*, which confirmed that Indian tribes were not bound by the guarantee of individual rights found in the Fifth Amendment.<sup>12</sup> However, ICRA did not impose all of the protections afforded by the Bill of Rights to Indian tribes. Specifically, the act did not impose the establishment clause, the guarantee of a republican form of government, the requirement of a separation of church and state, the right to a jury trial in civil cases, or the right of indigent defendants to appointed counsel in criminal cases upon tribes.<sup>13</sup> Tribes may adopt other protections as part of a tribal "Bill of Rights" if they so choose.<sup>14</sup>

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<sup>11</sup> One of the main purposes of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. REP. NO. 90-841, at 5-6 (1967)).

<sup>12</sup> 163 U.S. 376 (1896) (holding that individual rights protections, which limit federal, and later, state governments, do not apply to tribal governments).

<sup>13</sup> 25 U.S.C. § 1302. ICRA was amended in 1986 to increase the sentencing limitations in § 1302(a)(7). This provision originally limited tribes to imposing sentences for a single offense to no greater than six months imprisonment or a fine of \$500, or both. ICRA was amended again as part of the Tribal Law and Order Act of 2010 to provide further tribal court criminal sentencing enhancements under certain circumstances. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

<sup>14</sup> Many Indian tribes responded to ICRA by adopting similar provisions as a "Bill of Rights" in their tribal constitutions. See, e.g., SNOQUALMIE TRIBE OF INDIANS CONST. art. XI, *available at* <http://www.snoqualmientribe.com/Documents/Constitution.pdf>. Some tribal constitutions, such as that of the Cahto Tribe of Laytonville Rancheria in California, require enrollment ordinances to be approved by the United States Bureau of Indian Affairs (BIA). When a disenrollment occurs under these circumstances, the BIA is vested with the authority to review the disenrollment for compliance with Tribal law. See *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, No. 2:10-CV-0136-GEB-GGH, 2011 WL 4404149 (E.D. Cal. Sept. 22, 2011) (affirming BIA decision reversing disenrollment action against Sloan family). However, such tribal constitutional provisions are the exception and not the rule. Therefore, most tribal disenrollment decisions are not reviewable by the federal courts. Federal courts generally lack

While ICRA imposed some limitations on tribes, ICRA did not represent a windfall for tribal members. Congress severely limited the ability tribal members have to compel Indian tribes to provide the promised individual civil rights to members. Congress only provided that 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.”<sup>15</sup> Filing a petition for a writ of habeas corpus, and meeting the requirements for issuance of such a writ, are thus the only means provided to individual tribal members to challenge such an action in federal court.

Initially, it appeared that the habeas limitation might not be so narrow after all. Following the passage of ICRA until 1978, federal courts heard eighty cases involving the application of ICRA, addressing tribal election disputes, tribal government employee rights, tribal membership and voting, and the conduct of tribal council members and council meetings.<sup>16</sup> However, the idea that ICRA vested federal courts with the power to broadly hear claims of civil rights violations committed by tribal governments changed in 1978, with the seminal US Supreme Court decision in *Santa Clara Pueblo v. Martinez*.<sup>17</sup>

*Santa Clara* involved a challenge to a tribal ordinance denying tribal membership to children of female (but not male) members who married outside the tribe as a violation of ICRA’s equal protection provision.<sup>18</sup> The court rejected the claim, finding that tribal common law sovereign immunity prevented a suit against the tribe and that Congress did not create a private cause of action in ICRA; rather, relief could only be available through a writ of habeas corpus.<sup>19</sup> The court also erected another hurdle to such cases by agreeing with the tribe that it had not waived its inherent sovereign immunity to the suit by Ms. Martinez.<sup>20</sup>

Tribal members seeking relief under ICRA have had limited access to the federal courts and limited remedies since.<sup>21</sup> ICRA neither permits a tribal member whose rights are violated to collect money damages against the tribal government, nor does it authorize an injunction.<sup>22</sup>

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jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. See *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

<sup>15</sup> 25 U.S.C. § 1303.

<sup>16</sup> See, e.g., *Indian Civil Rights Act*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/icra.htm> (last visited Feb. 1, 2012).

<sup>17</sup> 436 U.S. at 62 (noting that the habeas provision was designed to strike a balance between two competing objectives: to strengthen “the position of individual tribal members vis-à-vis the tribe” and “to promote the well-established federal ‘policy of furthering Indian self-government.’”).

<sup>18</sup> *Id.* at 51.

<sup>19</sup> *Id.* at 59, 62.

<sup>20</sup> *Id.* at 59.

<sup>21</sup> FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 14.02[2], at 956–57 (2005 ed.); see also *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996) (discussing similar habeas cases).

<sup>22</sup> *Santa Clara Pueblo*, 436 U.S. at 64–70 (discussing legislative history of ICRA).

### III. Post-*Santa Clara* Indian Civil Rights Act Litigation

*Santa Clara* dealt a severe blow to tribal members' ability to sue under ICRA. This is because the writ of habeas corpus is an extraordinary remedy available only where there is a criminal sanction, some element of detention, and all other available remedies have been exhausted.<sup>23</sup> As a result, there are only three post-*Santa Clara* ICRA cases brought by tribal members in federal courts that have survived motions to dismiss to reach a decision on the merits of their claims. These cases highlight the inability of tribal members to protect their rights except in the most egregious of circumstances (such as banishment without recourse in tribal court) and the risks that Indian tribes face when their tribal processes are opened to federal court scrutiny.

The leading case with respect to the availability of writs of habeas corpus under ICRA is *Poodry v. Tonawanda Band of Seneca Indians*.<sup>24</sup> In *Poodry*, five members of the Tonawanda Band of Seneca Indians petitioned for writs of habeas corpus under ICRA, challenging the legality of orders summarily issued by members of the tribal council purporting to convict them of "treason" and sentencing them to permanent "banishment" from the tribe's reservation without any hearing.<sup>25</sup> There was no applicable tribal court. The Second Circuit held that federal courts have subject matter jurisdiction to entertain applications for writs of habeas corpus to afford "petitioners access to a federal court to test the legality of their 'convict[ion]' and subsequent 'banishment' from the reservation."<sup>26</sup> The court reasoned that "banishment" was sufficiently akin to a criminal sanction for habeas relief to be warranted and "actual physical custody is not a jurisdictional prerequisite for federal habeas review."<sup>27</sup> Banishment is the most extreme punishment in Indian country, usually reserved for capital crimes such as murder or drug dealing.<sup>28</sup> The banished lose all rights to enter tribal land, to receive tribal benefits, or even to claim Indian identity.<sup>29</sup>

Following the *Poodry* decision, a California federal district court exercised jurisdiction in 2004 to hear a habeas due process challenge to a summary tribal disenrollment and banishment action in *Quair v. Sisco*.<sup>30</sup> The court in *Quair* held that banishment is a "detention in the sense of a severe restriction on petitioners' liberty not

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<sup>23</sup> *Poodry*, 85 F.3d at 890–93.

<sup>24</sup> *Id.* at 874.

<sup>25</sup> *Id.* at 874–79.

<sup>26</sup> *Id.* at 879, 897.

<sup>27</sup> *Id.* at 889–891, 893. The court found that the fact that there was no criminal proceed per se irrelevant because allegations of "treason" and "actions to overthrow the government" were such that the court reasoned these to represent "criminal conduct," for which banishment was a sanction "punitive in nature." The court further stated that a focus on "custody" or detention was misplaced; instead, the court focused upon "the 'severity' of an actual or potential restraint on liberty." The court found that the tribe was not implicated by the case against individual tribal council members whom were alleged to have acted outside the scope of their lawful authority so tribal sovereign immunity did not apply. *Id.* at 894, 899–900.

<sup>28</sup> Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007); Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88–89 (2007).L. REV. 85, 88 (2007).

<sup>29</sup> See, e.g., *Jeffredo v. Macarro*, 590 F.3d 751, 764–65 (9th Cir. 2009).

<sup>30</sup> 359 F.Supp.2d 948 (E.D. Cal. 2004).

shared by other members of the Tribe,” and exercised its jurisdiction because all available tribal remedies had been exhausted.<sup>31</sup>

The key fact in both cases—the same fact that allowed the federal court’s jurisdiction—was the manner in which the summary banishments took place. For example, if the tribes in *Poodry* and *Quair* had provided, at minimum, due process or a functioning tribal court, the federal courts would likely not have had habeas jurisdiction under ICRA to hear the cases. Likewise, if the tribes had only disenrolled the members without banishing them, the federal courts might not have had jurisdiction to hear the ICRA claims.<sup>32</sup> Indeed, the litigation avenues provided to tribal members under ICRA are limited; however, this should not mean that tribes should consider themselves to have *carte blanche* to act with respect to tribal member rights when banishments and disenrollments take place. A prime example of what can happen when an Indian tribe banishes tribal members without regard for tribal law or procedures is the Snoqualmie banishment dispute in Washington State.

#### IV. The Snoqualmie Banishments

In late 2007, a government control and voting dispute erupted within the Snoqualmie Indian Tribe.<sup>33</sup> After an April 27, 2008 banishment meeting, on May 9, 2008, the tribal council passed a resolution summarily banishing nine Snoqualmie tribal members, including the former chairman, former members of the tribal council, and some of their relatives, for alleged “treasonous” crimes, including meeting with the BIA and, in one instance, saying a prayer that offended the tribal leadership.<sup>34</sup> The nine tribal members were never allowed to contest the banishments, partly because the tribe has no tribal court.<sup>35</sup> In May 2008, the banished tribal members sought a writ of habeas corpus to challenge the banishments by suing the individual tribal council members who executed the banishment resolution.<sup>36</sup> They sought relief from the unlawful restraint on liberty imposed by the banishment sentence that stripped the members of their tribal membership, deprived them of access to vital tribal services, and excluded them from tribal lands.<sup>37</sup>

Soon after the case was lodged, the tribal council filed two motions to dismiss. The council argued, among other things, that that it was immune from suit and that there were forums available for Petitioners to exhaust, even though there was no tribal court at the time of the banishment.<sup>38</sup> Among the many arguments attempting to recast Petitioners’ writ as challenging elections and other internal tribal actions that are not subject to federal court review, the tribal council’s sovereign immunity was asserted

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<sup>31</sup> *Id.* at 971.

<sup>32</sup> *See, e.g.,* *Hendrix v. Coffey*, No. 08-6161, 305 Fed.Appx 495 (10th Cir. 2008) (affirming dismissal for lack of subject matter jurisdiction challenging disenrollment action under ICRA).

<sup>33</sup> *Sweet v. Hinzman*, 634 F.Supp.2d 1196, 1198 (W.D. Wash. 2008).

<sup>34</sup> *Petition for Writ of Habeas Corpus, Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195729 (W.D. Wash. 2008).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Sweet v. Hinzman*, 634 F.Supp.2d 1196, 1198–1200 (W.D. Wash. 2008).

vigorously and expansively as a way to block Petitioners from accessing federal courts to hear the substance of the due process claims.<sup>39</sup>

On September 8, 2008, Judge Robart of the United States District Court for the Western District of Washington denied the two motions to dismiss filed by the Snoqualmie tribal council member respondents.<sup>40</sup> The court held that *Poodry* is both “well-reasoned” and “persuasive,” and therefore “adopts the reasoning and holding of the *Poodry* decision” to reject Respondents’ first effort to have the case dismissed on sovereign immunity and other grounds.<sup>41</sup> The court also held that tribal sovereign immunity did not shield Respondents, who were sued in their official capacity for unlawful acts, from Petitioners’ ICRA claims, and that all necessary parties were before the court.<sup>42</sup> Respondents had argued that Petitioners needed to join, but could not join, the entire tribal general membership (all voters) as parties.<sup>43</sup>

Importantly, as in *Poodry*, the Snoqualmie tribal members did not challenge the ability of the tribe to exercise its sovereign right to banish tribal members; rather, the tribal members challenged the manner in which the banishments were executed by the tribal council members.<sup>44</sup> The only issue before the court was the legality of the way in which the banishments were carried out. This distinction is critical. The fact that the challenge was procedural, and not to the substance of the Snoqualmie Tribe’s law, traditions, and custom of banishment, enabled the court to review the tribe’s actions. Any challenge to the underlying tribal law would have faltered under the principle that federal courts will not sit in review of internal membership decisions of the tribe.<sup>45</sup>

Upon the completion of discovery, the *Sweet* case went to trial over two days, on February 18 and February 19, 2009, to hear the merits of the Snoqualmie tribal members’ due process, equal protection, and confrontation clause claims under ICRA.<sup>46</sup> This was the first trial ever held in federal court concerning a tribal banishment action. The trial testimony focused primarily on the Petitioners’ procedural due process claims and, in particular, whether the banished members received the required notice and opportunity to be heard that procedural due process under the ICRA requires for a banishment to be procedurally lawful.

Numerous legal and factual issues were at play. First and foremost was the question of what standards apply to judge the notice and opportunity to be heard required by ICRA. Petitioners argued that the inclusion of the rights secured by ICRA as part of the Snoqualmie Tribe’s Constitution (the Constitution’s language mirrors that of

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<sup>39</sup> Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State A Claim Upon Which Relief Can Be Granted, *Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195733 (W.D. Wash. 2008).

<sup>40</sup> *Sweet*, 634 F.Supp.2d at 1202.

<sup>41</sup> *Id.* at 1199.

<sup>42</sup> *Id.* at 1201–1202.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1199.

<sup>45</sup> “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.” *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see, e.g., Red Bird v. United States*, 203 U.S. 76 (1906).

<sup>46</sup> *Sweet v. Hinzman*, No. CO8-844JLR, 2009 WL 1175647, at \*1 (W.D. Wash. Apr. 30, 2009).



the ICRA) results in the same rights under the United States' legal system and the Snoqualmie system.<sup>47</sup> Therefore, "federal constitutional standards are employed in determining whether the challenged procedure[s] violate [ICRA]."<sup>48</sup> Respondents argued that tribal traditions and customs, including a series of banishments in the preceding twenty years, should play a role in determining the level of process provided, notwithstanding the inclusion of a "Bill of Rights" in the Snoqualmie Indian Tribe's Constitution.<sup>49</sup> In particular, Respondents suggested at trial that the Petitioners were lucky, as traditionally those accused of the crime of treason would have been sent over the Snoqualmie falls in a canoe.<sup>50</sup>

Second, Petitioners needed to carry the burden of proving their procedural due process claims. For Petitioners to prove a claim under ICRA § 1302(8) for denial of procedural due process, they needed to show that they did not receive adequate notice or an opportunity to be heard with respect to the April 27, 2008 banishment meeting that deprived petitioners of "liberty" interests within the meaning of the Due Process Clause.<sup>51</sup> As a threshold matter, Petitioners argued that their liberty interests were substantial because banishment is an extremely harsh penalty, ultimately meaning that Petitioners were barred from tribal lands and events, were removed from tribal rolls, were no longer eligible for any tribal benefits and were no longer considered Snoqualmie tribal members.<sup>52</sup> These substantial liberty interests, argued Petitioners, required Respondents to provide Petitioners with more, not less, procedural due process.<sup>53</sup>

After laying this ground work, Petitioners argued that their procedural due process rights were violated by Respondents in four respects: (a) by not providing adequate formal notice of the April 27, 2008 banishment meeting to Petitioners; (b) by making false charges against Petitioners; (c) by not providing an opportunity for the Petitioners to be heard at the April 27, 2008 banishment meeting; and (d) by not

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<sup>47</sup> *Id.* at \*8–9.

<sup>48</sup> *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988).

<sup>49</sup> Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State A Claim Upon Which Relief Can Be Granted, *Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195733 (W.D. Wash. 2008); Proposed Finding for Federal Acknowledgement of the Snoqualmie Indian Tribe, 58 Fed. Reg. 27162-01 (May 6, 1993) (discussing prior banishments).

<sup>50</sup> Transcript of Record, *Sweet*, 2009 WL 1175647.

<sup>51</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[D]ue process requires the government to 'provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

<sup>52</sup> *Sweet*, 2009 WL 1175647, at \*1.

<sup>53</sup> "The more serious the deprivation, the more formal the notice." *Flaim v. Medical College of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005) (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)).

following their own procedures for voting on banishment.<sup>54</sup> With respect to notice, Petitioners argued that the notice was not adequate under ICRA. Petitioners received a single certified mailing, sent April 18, 2008, containing a Resolution of Discipline and a letter dated April 8, 2008.<sup>55</sup> The Resolutions refer only to a “April membership meeting” that remained vague as to date, time, and location.<sup>56</sup> The April 8, 2008 letter indicated that a “vote on the recommended banishment . . . will be held at the April 26, 2008 Special Membership meeting in Issaquah, WA.”<sup>57</sup> The “26th” was crossed out and written over it was “27” with the initials “MAH.”<sup>58</sup> The letter did not provide a specific location within Issaquah or a time for the meeting.<sup>59</sup> Thus, Petitioners reasoned that in considering the “liberty interest that was deprived—tribal identity and a geographic restriction on movement—more formal notice was required to . . . apprise interested parties of the pendency of the action and to clearly invite Petitioners into the meeting and afford them an opportunity to present their objections.”<sup>60</sup>

With respect to opportunity to be heard, Petitioners were never allowed into the room where the banishment meeting was held (or even the lobby of Hilton Garden Inn in Issaquah where the meeting was held) to plead their innocence of the charges against them.<sup>61</sup> Petitioners argued that the opportunity to be heard was not sufficient under ICRA. Petitioners did not have the new “ID cards” required for entry into the meeting.<sup>62</sup> And, Petitioners were physically prohibited from entering the Hilton Garden Inn at the direction of the Respondents, as well as the hotel manager, tribal security staff, and two uniformed and armed Issaquah police officers hired by Respondents.<sup>63</sup> Given these facts and the substantial liberty interests burdened by banishment, Petitioners argued that they were entitled to more process than being kept outside on a chilly April day, without information from inside the meeting, for almost four hours.<sup>64</sup>

On April 30, 2009, the court issued its findings and conclusions in the case, emphatically ruling that the petitioners had been denied procedural due process,

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<sup>54</sup> Petitioners’ Trial Brief, *Sweet v. Hinzman*, No. CV8-844 JLR, 2009 WL 4464850 (W.D. Wash. 2009).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Sweet v. Hinzman*, No. CO8-844JLR, 2009 WL 1175647, at \*2 (W.D. Wash. Apr. 30, 2009).

<sup>58</sup> *Id.* “MAH” is Respondent Mary Ann Hinzman.

<sup>59</sup> *Id.*

<sup>60</sup> Petitioners’ Trial Brief, *Sweet*, 2009 WL 4464850.

<sup>61</sup> *Sweet*, 2009 WL 1175647, at \*3. “Due process requires that a party affected by government action be given ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“We have described the ‘root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)).

<sup>62</sup> *Sweet*, 2009 WL 1175647, at \*4.

<sup>63</sup> *Id.* at \*3.

<sup>64</sup> *Id.* at \*5. See Lynda V. Mapes, *Snoqualmies banish 8, disenroll 60*, SEATTLE TIMES, Apr. 28, 2008, [http://seattletimes.nwsources.com/html/localnews/2004377888\\_snoqvote28m.html](http://seattletimes.nwsources.com/html/localnews/2004377888_snoqvote28m.html); Lynda V. Mapes, *A tribe divided: Snoqualmie members fight for control of government, casino*, SEATTLE TIMES, Apr. 25, 2008, [http://seattletimes.nwsources.com/html/localnews/2004372482\\_snoqualmie25m.html](http://seattletimes.nwsources.com/html/localnews/2004372482_snoqualmie25m.html).

vacating the banishment, and granting the requested writ of habeas corpus.<sup>65</sup> The court was careful to note that it “does not believe it should delve into the inner workings of the banishment process”<sup>66</sup> because the *Sweet* petitioners did not challenge the ability of the tribe to impose the sanction, merely the process by which the sanction was issued. Thus, the court concluded that “Petitioners have demonstrated a violation of their right to due process.”<sup>67</sup> The court made clear that “Petitioners have exhausted all available tribal remedies,”<sup>68</sup> and that “banishment affects the liberty interests of Petitioners,”<sup>69</sup> such that “under traditional notions of due process, notice and opportunity to be heard, the facts combined demonstrate a denial of Petitioners’ right to due process under ICRA.”<sup>70</sup> As a result, for the first time in the post-*Santa Clara* era of Indian civil rights litigation, the court granted the petition and issued the writ,<sup>71</sup> effectively vacating the Snoqualmie Tribal Council’s action.

## V. Post-Snoqualmie Decisions

In December 2009, eight months after the *Sweet* decision, sixteen former tribal members who had argued their civil rights were violated by disenrollment from the Pechanga Band of Luiseño Indians in California had their claim rejected by the Ninth Circuit Court of Appeals.<sup>72</sup> *Jeffredo v. Macarro* involved a challenge to a 2006 decision of the Pechanga Band to disenroll certain tribal members. The disenrollment meant that those members lost numerous important benefits that were available to tribal members within the community.<sup>73</sup> At the time of their 2006 disenrollment from the tribe, every adult Pechanga member received a per capita benefit of more than \$250,000 per year, court papers noted.<sup>74</sup> Rather than challenge the decision by the tribe’s enrollment committee, which was upheld by the tribal council, the disenrolled members filed a petition for a writ of habeas corpus contending that their disenrollment was “tantamount to an unlawful detention,” under ICRA.<sup>75</sup>

A sharply divided Ninth Circuit panel disagreed with the tribal members and upheld a lower court’s dismissal of the lawsuit, stating: “Despite the novelty of this approach, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained.”<sup>76</sup> The court proceeded to reject the disenrolled members claims on a number of grounds. First, the court disagreed with the claim that the denial of access to the Senior Citizens’ Center, health clinic, and a denial of the ability of their children to attend tribal school amounted to unlawful detention.<sup>77</sup> Citing

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<sup>65</sup> *Sweet*, 2009 WL 1175647, at \*10.

<sup>66</sup> *Id.* at \*9.

<sup>67</sup> *Id.* at \*10.

<sup>68</sup> *Id.* at \*5.

<sup>69</sup> *Id.* at \*8.

<sup>70</sup> *Id.* at \*9.

<sup>71</sup> *Id.* at \*10.

<sup>72</sup> *Jeffredo v. Macarro*, 590 F.3d 751, 756 (9th Cir. 2009).

<sup>73</sup> *Id.* at 757.

<sup>74</sup> *Id.* at 761 n.1.

<sup>75</sup> *Id.* at 753, 756–57.

<sup>76</sup> *Id.* at 753.

<sup>77</sup> *Id.* at 757.

*Poodry*, the court found that the ICRA “does require ‘a severe actual or potential restraint on liberty’” and that the denial of access to certain facilities does not pose a severe actual or potential restraint on liberty:

Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation.<sup>78</sup>

In addition, the court emphatically rejected the disenrolled members’ claims that *Poodry* applied equally to their facts: “This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. . . . Appellants have not been convicted, sentenced, or permanently banished.”<sup>79</sup>

The court further rejected the claim that a living “under a continuing threat of banishment/exclusion” is sufficient to satisfy the detention requirement of Section 1303 of ICRA.<sup>80</sup> The court also rejected arguments that disenrollment, the act of stripping the disenrolled members of their Pechanga citizenship, is enough of a significant restraint on their liberty to constitute a detention. The court stated: “While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303,” acknowledging that the court’s power to review “relations between and among tribes and their members [is] correspondingly restrained.”<sup>81</sup>

Finally, the court rejected jurisdiction on two other grounds. First, the court noted that it was without jurisdiction to review a direct appeal of a tribal decision regarding disenrollment of members, noting that the disenrolled members failed to exhaust tribal administrative remedies.<sup>82</sup> Second, the court rejected a claim that the disenrollment was tantamount to a criminal proceeding.<sup>83</sup> The disenrollments, under the court’s analysis, were a civil matter, and a federal court’s intervention would circumvent tribal sovereignty.<sup>84</sup>

The dissent took a different view. In addition to disagreeing that the ICRA only vested a federal court with jurisdiction to review a tribal criminal proceeding, not a civil proceeding,<sup>85</sup> the dissent focused on the deprivations being suffered by the disenrolled members as a whole, noting: “The combination of the current and potential restrictions

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 757–58.

<sup>81</sup> *Id.* at 758 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978)).

<sup>82</sup> *Id.* at 759.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 759–60.

<sup>85</sup> *Id.* at 761.

placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty.”<sup>86</sup> The dissent made clear that “[a]lthough with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association.”<sup>87</sup> The dissent, as a matter of policy, hits the mark. Banishment and disenrollment decisions directly affect the social interactions, cultural identity, and, to the extent the actions end tribal benefits, economic well-being of tribal people.

The *Jeffredo* decision did not reference the *Sweet* case, possibly because of the timing of the two decisions. However, both *Sweet* and *Jeffredo* rely on the same cases—*Poodry* and *Quair*—to reach starkly different results. *Sweet* and *Jeffredo*, in some respects, are outliers. Whereas *Sweet* offered shocking facts of refusal to allow an opportunity to be heard and no available tribal forum to challenge a banishment, *Jeffredo* presented a tribal forum to review a disenrollment and tribal government actions that seem to have struck a majority of one Ninth Circuit panel, at least, as less offensive under principles of due process. Yet, it is possible to square the two cases and develop an analytic framework for what tribal government actions with respect to internal membership decisions may trigger federal court habeas review under ICRA.

First, it is clear that the action that the Indian tribe takes must amount to a detention or serve as a restraint on liberty, and thus, must still approach the level of banishment. While the dissent in *Jeffredo* makes an impassioned plea for a more expansive view of liberty interests, that view, while fair, is not the law. The loss of access to services or profits, taken alone or together, remains insufficient to make a claim of civil rights violations under ICRA. Second, it appears that the way the membership action is cast can affect the tribal members’ ability to seek review. Where a tribe casts the action as a criminal proceeding—using the term “treason” in the *Sweet* case, federal courts will be more willing to entertain habeas jurisdiction as a typical “criminal” proceeding. However, disenrollment remains a civil action. It remains unclear as to whether a banishment that only amounted to a civil infraction would be sufficiently akin to a criminal action to support federal court jurisdiction, and the murky distinction drawn between civil and criminal actions for purposes of habeas actions seems ripe for further refinement given the strong dissent in *Jeffredo*. Third, federal court jurisdiction can be avoided through sufficient tribal procedures or the failure of the tribal member litigants to exhaust their available remedies within the tribe.

Indeed, it is this final consideration—internal tribal processes and procedures for addressing the very real and substantial grievances of some tribal members that have suffered disenrollment or banishment decisions—where tribes can take affirmative steps to strengthen their tribal sovereignty, avoid future ICRA challenges, and provide meaningful civil rights to their members.

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<sup>86</sup> *Id.* at 763.

<sup>87</sup> *Id.* at 764.

## VI. Strengthening Tribal Sovereignty

*Sweet* will be a landmark case with respect to tribal government practices under ICRA. Simply by getting to trial, the *Sweet* Petitioners developed a framework for other individual tribal members deprived of the liberties guaranteed to them by Congress under ICRA to follow in future cases. The case also highlights the risk that tribal leaders take when they value expediency and/or political retribution over the civil rights of their members. Moreover, while *Jeffredo* marks a procedural victory for the tribal governments seeking to disenroll members, the dissent's stern warnings and the negative publicity associated with the case, even in victory, should be a cause for concern among Indian tribes who might be considering similar membership actions. Neither case should be read as a blank check to engage in membership decisions without consideration for the individual members' Indian civil rights. Now is the time for tribes to act, before the growing banishments, disenrollments, and the Cherokee Freedmen debate force Congress to take action.<sup>88</sup>

Indeed, cases such as *Sweet* and *Jeffredo* can and should be avoided by both tribal members and Indian tribes. Both sides can be deemed guilty of complacency: tribal members by not acting through the ballot box to remove tribal leaders who fail to protect civil rights, and tribal leaders for waiting until federal courts intervene to reconsider the issues. Neither should the *Sweet* case be viewed as an infringement on tribal sovereignty. Rather, Indian civil rights provide Indian tribes with an opportunity to bolster tribal sovereignty and respect for tribal institutions by ensuring that tribal members receive meaningful due process and an ability to challenge actions of tribal governments within the tribal system. The best way to avoid ICRA litigation and the resulting intrusion into tribal affairs is to protect individual tribal member rights in the first instance.

The *Poodry*, *Quair*, and *Sweet* cases have common themes. Federal courts have no choice but to intervene and review tribal government compliance with the implementation of ICRA's civil liberty protections when tribal members are banished and stripped of their tribal identity by the actions of tribal councils without any recourse to any judicial or administrative forum to meaningfully contest the tribal council's action. Of course, even after such intervention, the remedy provided to such aggrieved tribal members is procedural: there is nothing that can stop the tribe from simply taking the action again, only this time providing the due process that was denied in the first

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<sup>88</sup> Congress's plenary authority with respect to Indian affairs would enable Congress to amend ICRA to provide, for instance, a private right of action under the ICRA that would allow aggrieved tribal members to more easily sue in federal court without having to clear the hurdles imposed by Section 1303's habeas corpus requirement. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). As the US Supreme Court in *Santa Clara Pueblo* noted, "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." 436 U.S. 49, 71 (1978). Circumstances have changed since 1968, and the policies underlying the limitation on remedies, including the absence of tribal resources to provide for such forums to resolve these disputes, no longer exist. "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302," might no longer "be at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. See *supra* note 2 citing to articles discussing the Cherokee Freedman situation.

instance. However, this outcome is best viewed as an opportunity for both tribes and their members to create fundamental positive change as to how these actions are dealt with in the tribal government system.<sup>89</sup>

These cases teach us that Indian tribes can take three easy steps to avoid ICRA litigation in federal court:

- (1) make membership decisions transparent to avoid equal protection allegations;
- (2) provide administrative review to allow tribal members to contest tribal council actions through an informal review process; and
- (3) ensure the existence of a fully functioning independent tribal court system to review any administrative decisions.

There is no one-size-fits-all approach to providing individual tribal members with sufficient due process and equal protection. Indian tribes can and should take care to craft provisions that reflect tribal traditions and customs, while still adhering to the formalities imposed by ICRA. However, at a bare minimum, an administrative review process should provide the following: written notice and an opportunity to be heard; a prohibition on ex parte communications; written procedures for administrative hearings; written opinions or orders from decision-makers; and an opportunity for appeal to tribal court. While existing tribal courts can be used, lawyers and law trained judges need not be required. Tribal elders can be involved to the extent tribal leaders seek to foster a sense of community justice. Where such procedures are provided, the entire process can be contained within the tribal system. More importantly, the process itself will be viewed with respect by tribal member litigants.

There is good reason for Indian tribes to take these proactive steps. The increasing number of banishments and disenrollments within Indian country might give Congress reason to amend ICRA to impose further limitations on Indian tribes. Congress could also empower the BIA to take a more active role with respect to what are now considered internal and unreviewable decisions of tribes. Tribes can avoid further federal interference by working with tribal members and their advocates to create impartial forums to fairly decide tribal disputes within the tribe. Such accountability is needed not just because these disenrollment and banishment actions invite public criticism and possible federal interference in tribal internal affairs, but because it is the right thing to do to ensure tribal government integrity and the protection of civil liberties for tribal members.

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<sup>89</sup> In fact, the Snoqualmie Tribal Council attempted to banish the *Sweet* petitioners against after the federal court decision. However, because notice and opportunity to speak was provided the second time, the tribe's general members overwhelming voted against the tribal council's decision and directed that the Sweet family members be returned to tribal member status. The Sweet family, however, remains in membership limbo due to subsequent tribal government disputes that have paralyzed the tribe. Interviews with Carolyn Lubenau, Petitioner in *Sweet v. Hinzman* (2008–2009).

Tribal sovereignty can thus be used as both a shield and a sword. Regardless of how it is used with respect to tribal members, sovereignty must be wielded in a responsible manner that protects both the tribe and its members.<sup>90</sup> This is the time for tribes to be creative in how they provide forums for their members to seek to resolve disputes within the tribal governmental structure in a fair and impartial way. Tribal sovereignty is strengthened when the members subjected to tribal powers are provided a way to participate in a system that is created by the tribe for its members.

## **VII. Conclusion**

At the time of its passage, Congress noted that ICRA “should not be considered as the final solution to the many serious constitutional problems confronting the American Indian.”<sup>91</sup> This statement rings true today. The question now is: who will offer the solution—Indian tribes or Congress? Indian civil rights and tribal sovereignty should go hand-in-hand. The best way for Indian tribes to avoid adverse ICRA decisions is to provide protections for their own members’ basic civil rights within their tribal systems. Such processes will boost respect for tribal institutions, protect tribal sovereignty by eliminating unnecessary federal court review, and will help secure basic civil liberties for tribal members—results everyone can celebrate.

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<sup>90</sup> See Cedric Sunray, *Disenrollment Clubs*, INDIAN COUNTRY TODAY MEDIA NETWORK, Oct. 14, 2011, [http://indiancountrytodaymedianetwork.com/ict\\_sbc/disenrollment-clubs](http://indiancountrytodaymedianetwork.com/ict_sbc/disenrollment-clubs) (stating “If the decision of Indian country is to place sovereignty over humanity, then we all stand condemned”).

<sup>91</sup> *Santa Clara Pueblo*, 436 U.S. at 71 (citing 113 CONG. REC. 13473 (1967) (statement of Sen. Ervin)).