



Spring 2007

## Banishment as Cultural Justice in Contemporary Tribal Legal Systems: A Postscript on *Quair v. Sisco*

Patrice H. Kunesh

---

### Recommended Citation

Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems: A Postscript on Quair v. Sisco*, 37 N.M. L. Rev. 479 (2007).

Available at: <https://digitalrepository.unm.edu/nmlr/vol37/iss2/8>

# BANISHMENT AS CULTURAL JUSTICE IN CONTEMPORARY TRIBAL LEGAL SYSTEMS: A POSTSCRIPT ON *QUAIR V. SISCO*

PATRICE H. KUNESH\*

In *Banishment as Cultural Justice in Contemporary Tribal Legal Systems* (*Banishment as Cultural Justice*),<sup>1</sup> I examined the historical and contemporary use of banishment in American Indian societies, as well as recent challenges to such tribal decisions in federal courts under the habeas corpus provision of the Indian Civil Rights Act (ICRA).<sup>2</sup> These disputes pit traditional tribal customs and practices, which have weathered the test of time and have ensured the political and cultural survival of tribes, against the rights of individual tribal members to fairness in their dealings with a tribe—rights in the modern era of Indian law defined in terms of constitutional-like due process protections under the ICRA. Federal courts are arbiters of such internal conflicts, wrestling with the contours of federal jurisdiction to review tribal decisions and decision-making processes, and to define an individual tribal member's due process rights under ICRA's habeas corpus provision.<sup>3</sup>

In a series of cases, beginning with *Quair v. Sisco* (*Quair I*),<sup>4</sup> which is examined in detail in *Banishment as Cultural Justice*,<sup>5</sup> and the recent decision in *Quair v. Sisco* (*Quair II*),<sup>6</sup> the Federal District Court of the Eastern District of California assessed its jurisdiction to review tribal banishment and disenrollment decisions and, in *Quair II*, adopted an analysis that mirrors the construct proposed in *Banishment as Cultural Justice*.<sup>7</sup> The dispute in *Quair* began in October 2000, when two members of the Santa Rosa Rancheria Tachi Indian Tribe (the Tribe) were banished and disenrolled by the Tribe's General Council for hiring an attorney to pursue legal action against the Tribe, actions deemed to have directly threatened the stability and welfare of the tribal community.<sup>8</sup> In *Quair I*, the district court's authority to review the General Council's banishment and disenrollment decisions rested on the court's finding that banishment, a criminal proceeding, constituted a detention, and that the tribal member petitioners had exhausted available tribal remedies.<sup>9</sup> The court questioned the Tribe's hearing procedures, including whether the General Council

---

\* Assistant Professor of Law, The University of South Dakota School of Law.

1. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (2007).

2. Through Title I of the Indian Civil Rights Act (ICRA), Congress sought to impose on tribal governments most of the constitutional rights established in the Bill of Rights. See 25 U.S.C. §§ 1301–1303 (2000). The habeas corpus provision of the ICRA tests the legality of an individual's detention by order of an Indian tribe. *Id.* § 1303. For a detailed discussion of the ICRA, see Kunesh, *supra* note 1, Part II.B.2.

3. See Kunesh, *supra* note 1, Part II.B.2–4.

4. 359 F. Supp. 2d 948 (E.D. Cal. 2004).

5. See Kunesh, *supra* note 1, Part IV.C.

6. No. 1:02-CV-5891 DFL, 2007 WL 1490571 (E.D. Cal. May 21, 2007).

7. *Id.*; see also Kunesh, *supra* note 1, Parts IV.B, C (cautioning against federal court intervention in tribal membership matters, and proposing a balancing test that preserves tribal cultural and governmental identities).

8. *Quair I*, 359 F. Supp. 2d at 962; *Quair II*, 2007 WL 1490571, at \*1. For more information on the background of this dispute, see Kunesh, *supra* note 1, at 128–31. The General Council is comprised of all adult members of the Tribe who act collectively on behalf of the tribal community. *Quair I*, 359 F. Supp. 2d at 954; *Quair II*, 2007 WL 1490571, at \*1 n.1.

9. *Quair I*, 359 F. Supp. 2d at 971–72; *Quair II*, 2007 WL 1490571, at \*1.

provided the petitioners proper notice of the charges and an opportunity for a fair trial.<sup>10</sup>

Following this decision, the General Council convened a new hearing, this time sending the petitioners written notice of the hearing and advising them of their right to legal representation and to call witnesses.<sup>11</sup> The petitioners refused to attend the rehearing, maintaining that they would not receive a fair and impartial review before the same body that made the initial determinations.<sup>12</sup> Nonetheless, the General Council met on October 1, 2004 and, in separately presented resolutions, reaffirmed its earlier decisions to disenroll and banish the petitioners.<sup>13</sup> The petitioners then challenged these decisions under the ICRA, contending that the Tribe had yet again violated their due process rights in the rehearing process.<sup>14</sup>

In *Quair II*, the district court considered the General Council's disenrollment decisions independent from its banishment decisions, evaluating each action under the habeas corpus test set out in *Quair I*.<sup>15</sup> The court ultimately concluded that it lacked jurisdiction over the petitioners' disenrollment claims because the petitioners failed to prove that their physical freedoms were constrained severely enough to constitute a detention.<sup>16</sup> The court nevertheless retained jurisdiction to review the Tribe's banishment decisions subject to balancing the Tribe's interest against those of the petitioners.<sup>17</sup>

This Postscript presents a brief review of the jurisprudence that formed the basis for the *Quair I* decision and then analyzes the *Quair II* decision, discussing the implications of the district court's holding and focusing on the ramifications of the new elements of habeas corpus review under the ICRA. This Postscript concludes that the comity model, as proposed in *Banishment as Cultural Justice*, and as mirrored in *Quair II*, is the appropriate framework for the review and resolution of tribal disputes arising from banishment decisions because the comity model follows tribal notions of respect for fairness and individual dignity.

The following section presents a brief review of the jurisprudence underpinning the district court's recent decision in *Quair II* and analyzes the court's new approach to evaluating tribal decisions under the ICRA. Beginning in 1996, with the Second Circuit Court of Appeals' decision in *Poodry v. Tonawanda Band of Seneca Indians*,<sup>18</sup> federal courts have cobbled together a test to determine the reviewability of tribal banishment actions. In *Poodry*, the traditional Council of Chiefs of the Tonawanda Band of Seneca Indians banished several tribal members from the

---

10. *Quair I*, 359 F. Supp. 2d at 978; *Quair II*, 2007 WL 1490571, at \*1 n.3.

11. *Quair II*, 2007 WL 1490571, at \*1.

12. *Id.*

13. *Id.* at \*1–2. Unlike the 2000 hearing, where the General Council vote encompassed both disenrollment and banishment, these issues were separately presented to and voted on by the General Council in the 2004 rehearing. *See id.* at \*2. With some circumspection, Judge Levi noted, in the recent district court decision, that the General Council's rehearing “did not follow any codified adjudicatory procedures. Moreover, the ‘customary’ law that petitioners purportedly violated—the law against disturbing the stability and welfare of the Tribe—had not been reduced to writing in any code, statute book or similar document.” *Id.*

14. *Id.* at \*1.

15. *Id.* at \*2.

16. *Id.* at \*3–4.

17. *Id.* at \*4–6.

18. 85 F.3d 874 (2d Cir. 1996); *see also* Kunesh, *supra* note 1, Part IV.A.

reservation and instructed that their names be removed from the Tribe's membership rolls for actions that the Council considered treasonous.<sup>19</sup> The tribal members petitioned for habeas corpus review under the ICRA, claiming that the Council violated their due process rights by failing to give them any notice of the charges against them or an opportunity to participate in the Council's deliberations.<sup>20</sup> The Second Circuit held that permanent banishment, a severe form of punishment, constituted a sufficient restraint on the tribal members' liberty interests to qualify as a detention and permit federal review under the ICRA.<sup>21</sup>

The same approach was argued unsuccessfully in a set of cases involving the Oneida Tribe in New York. In *Shenandoah v. United States Department of Interior (Shenandoah I)*,<sup>22</sup> several tribal members filed habeas petitions under the ICRA alleging due process violations in tribal actions that terminated their health care and other tribal benefits, banned their presence from various locations on the reservation, and struck their names from the tribal membership rolls.<sup>23</sup> The Second Circuit dismissed the tribal members' petitions finding that these sanctions were insufficient to constitute an actual or threatened restraint on their liberty interests under the *Poodry* test.<sup>24</sup> The Second Circuit also dismissed petitioners' second habeas action, which challenged the Tribe's housing ordinance as an illegal seizure without compensation and as an illegal bill of attainder,<sup>25</sup> characterizing the loss of their homes under the operation of the tribal law as an economic restraint, not an impingement of their liberty interests required to trigger habeas review under *Poodry*.<sup>26</sup>

A few years later in *Quair I*,<sup>27</sup> a federal district court found the requisite jurisdiction under *Poodry* to review a sequence of tribal banishment and disenrollment decisions. The court initially accepted the *Poodry* court's view that banishment is criminal in nature, thus constituting a detention for purposes of ICRA jurisdiction.<sup>28</sup> To this finding, the court then added another component—the requirement of exhaustion of tribal remedies.<sup>29</sup>

Following the decision in *Quair I*, the Tribe's General Council reconsidered its earlier decisions and agreed to provide the petitioners with a rehearing, this time giving them notice of the rehearing by certified mail and advising them of their right

---

19. *Poodry*, 85 F.3d at 877–78; see also Kunesh, *supra* note 1, Part IV.A.

20. *Poodry*, 85 F.3d at 879.

21. *Id.* at 895–97.

22. 159 F.3d 708 (2d Cir. 1998). For a discussion of *Shenandoah v. United States Department of Interior (Shenandoah I)* and *Shenandoah v. Halbritter (Shenandoah II)*, 366 F.3d 89 (2d Cir. 2004), see Kunesh, *supra* note 1, Part IV.B.

23. *Shenandoah I*, 159 F.3d at 714.

24. *Id.*

25. *Shenandoah II*, 366 F.3d at 91.

26. *Id.* at 92 (“[F]ederal habeas jurisdiction does not operate to remedy economic restraints.”).

27. 359 F. Supp. 2d 948 (E.D. Cal. 2004); see Kunesh, *supra* note 1, Part IV.C.

28. *Quair I*, 359 F. Supp. 2d at 967. “[T]he district court concluded that the combined imposition of banishment and disenrollment ‘constitute[d] a punitive sanction irregardless [sic] of the underlying circumstances leading to those decisions’ that ‘render[ed] those proceedings criminal for purposes of habeas corpus relief,’ despite the absence of any underlying criminal proceedings in the case.” Kunesh, *supra* note 1, at 131 (second, third, and fourth alteration in original) (quoting *Quair I*, 359 F. Supp. 2d at 967).

29. *Quair I*, 359 F. Supp. 2d at 963.

to have legal counsel represent them and to present and confront witnesses.<sup>30</sup> Unlike the 2000 hearing, the General Council's votes at the 2004 rehearing to banish and disenroll petitioners were later approved by the Bureau of Indian Affairs as required under the Tribe's Articles of Community Organization.<sup>31</sup>

Tactically, the General Council's decision to separately consider and vote on the petitioners' banishment and disenrollment proved to be a key factor in the federal district court's review of the petitioners' claims. In *Quair I*, the General Council's 2000 combined vote compelled the court to hold, following *Poodry*, that "disenrollment from tribal membership and subsequent banishment from the reservation constitutes detention."<sup>32</sup> Uncoupling the issues and separating the votes in *Quair II* allowed the district court to view the General Council's 2004 disenrollment and banishment decisions as two distinct tribal sanctions,<sup>33</sup> and allowed the Tribe to maintain that the court lacked jurisdiction over disenrollment decisions, which, like membership decisions, have traditionally been withdrawn from federal review under the ICRA.<sup>34</sup> The court did not wholly reject this argument, finding instead that tribal membership decisions are subject to review under 25 U.S.C. § 1303 if all three prongs of the *Quair I* test are satisfied: "(1) the proceeding at issue is criminal and not civil in nature; (2) the Tribe is detaining [the petitioners]; and (3) [the petitioners] have exhausted all available tribal remedies."<sup>35</sup> The court then added a new substantive dimension to the detention component—"geographical movement."<sup>36</sup>

Significantly, in order to establish that the tribal action affects a detention for purposes of habeas corpus review, the petitioners had to prove that their "disenrollment, separate from banishment, restrict[ed] their physical freedom in any

---

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

31. *Id.* at \*2. In *Banishment as Cultural Justice*, I questioned the validity of the General Council's votes due to the absence of Bureau of Indian Affairs (BIA) approval since the General Council's authority to "control...loss of membership" requires the enactment of an ordinance or resolution subsequently approved by the BIA. Kunesh, *supra* note 1, at 133–34 (alteration in original) (internal quotation marks omitted). In *Quair II*, although the BIA approved the General Council's disenrollment and banishment resolutions, the question remains whether an enrollment ordinance, and concomitantly a disenrollment ordinance—a prerequisite to General Council action—was properly enacted and approved, as required under the Articles of Community Organization, thus ensuring the legitimacy of the Council's actions and petitioners' ability to completely exhaust tribal remedies.

32. *Quair I*, 359 F. Supp. 2d at 971; *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996) (holding that the tribe's banishment decision, combined with disenrollment, was subject to federal habeas review).

33. *Quair II*, 2007 WL 1490571, at \*2–6. Judge Levi further noted that the court's ruling in *Quair I* "does not govern the disenrollment of petitioners at the 2004 rehearing....Because the disenrollment and banishment of petitioners were inseparable before the rehearing, [the court] had no reason to consider whether the court had habeas corpus jurisdiction to review disenrollment separate from banishment." *Id.* at \*2 n.6.

34. *Id.* at \*2 ("[T]he [federal] judiciary should not rush in to create causes of action that would intrude on these delicate matters.") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (second alteration in original)); *see also* Kunesh, *supra* note 1, at 133 (noting "the doubtfulness of the court's jurisdiction over enrollment matters").

35. *Quair II*, 2007 WL 1490571, at \*2 (citing *Quair I*, 359 F. Supp. 2d at 963 and *Poodry*, 85 F.3d at 901). The *Quair* decisions establish a precarious principle that tribal banishment decisions, in and of themselves, constitute criminal proceedings for purposes of satisfying the detention prong of the *Poodry* jurisdictional test, regardless of the nature of the action underlying the banishment. *See* Kunesh, *supra* note 1, at 121–22, 132 n.360 (discussing language in the *Santa Clara* decision and in the ICRA's legislative history concerning federal habeas review for criminal proceedings).

36. *See infra* notes 37–41 and accompanying text.

way.”<sup>37</sup> Applying this new “geographic movement” component,<sup>38</sup> the court found that the petitioners’ disenrollment affected only their interests in “tangible tribal benefits,” such as distribution of gaming revenue,<sup>39</sup> yet as “nonmembers,” they arguably could still live on the reservation.<sup>40</sup> Under this elaboration, a tribal disenrollment decision that does not substantially constrain a person’s physical mobility within the geographic boundaries of the tribal community will not constitute a detention or warrant habeas corpus review under the ICRA.<sup>41</sup>

Unavailing, however, were the Tribe’s arguments that the additional procedures provided in the General Council’s 2004 rehearing cured the due process deficiencies in the Tribe’s 2000 hearing. In *Quair I*, the court refused to dismiss the case on summary judgment because it found several disputed material facts, such as whether the petitioners received any notice of the charges against them or notice of the General Council’s hearing to consider their banishment and disenrollment, as well as the petitioners’ right to call and question witnesses at the hearing.<sup>42</sup> The Tribe urged the *Quair II* court to find that its subsequent remedial actions, particularly the rehearing, notice to the petitioners of the rehearing by certified mail, and allowing them to be represented by legal counsel and to call witnesses on their own behalf, rectified the earlier court’s due process concerns, contending further that these measures were all the process that was due under the ICRA.<sup>43</sup>

37. *Quair II*, 2007 WL 1490571, at \*3.

38. *Id.* The court noted that although ICRA’s “detention” requirement is no broader than the analogous provision of “custody” in the federal habeas corpus statute, 28 U.S.C. § 2254(a) (2000), *see Quair II*, 2007 WL 1490571, at \*3 n.8, and that the scope of custody in federal habeas corpus jurisprudence has expanded to include non-physical custody conditions, it found no cases in which a court applied habeas corpus review “where the purported restraint [did] not limit the petitioner’s geographic movement.” *Id.* at \*3 (comparing cases that unsuccessfully attempted to invoke habeas corpus review for fines with cases involving denial of citizenship and deportation). Apparently, to maintain parallel requirements, the court in *Quair II* adopted a comparable geographic component for ICRA habeas corpus actions.

39. *Quair II*, 2007 WL 1490571, at \*3; *see also id.* at \*3 n.10 (listing several other membership benefits forfeited upon disenrollment such as health insurance, housing allotments, and certain employment benefits). Two of the most powerful rights and privileges of tribal membership not mentioned in the opinion are the right to vote and the right to serve the tribal community through elected or appointed office. *See infra* note 41 (discussing the fact the petitioners only raised the loss of “valuable benefits” and their “tribal identity”).

40. *Quair II*, 2007 WL 1490571, at \*3.

41. *Id.* at \*4 (“[P]etitioners have failed to show that disenrollment affects their physical freedom to a degree that it may be considered tantamount to detention. . .”). In dismissing the petitioners’ disenrollment claims, the court also noted that the petitioners failed to rebut the Tribe’s historical use of disenrollment and banishment. *See id.* at \*3 n.9. Nor did the petitioners sufficiently establish the consequences of disenrollment beyond the loss of “valuable benefits” and their “tribal identity.” *Id.* at \*4. Professor Angela Riley recently addressed the difficult task of balancing an individual’s rights to fairness with a tribe’s right to autonomy in the context of banishment and membership practices, noting that

[i]ndividuals who are illegitimately denied entry (or are subject to forced exit) may suffer great losses in terms of community and cultural identity. This might constitute a poignant loss for Indians, who are unlikely to be able to access a community outside the tribe where they will be able to speak their language, participate in religious ceremonies, commune with sacred sites, or engage with other Indians of the same (or similar) tribal affiliation.

Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1074 (2007) (footnote omitted). Professor Riley further urges tribes to “be particularly cautious about capriciously imposing exile.” *Id.*

42. *Quair v. Sisco (Quair I)*, 359 F. Supp. 2d 948, 978 (E.D. Cal. 2004); *Quair II*, 2007 WL 1490571, at \*4.

43. *Quair II*, 2007 WL 1490571, at \*4.

Despite these additional measures, the court refused to dismiss the banishment claim.<sup>44</sup> Although the Tribe's 2004 rehearing addressed the specific concerns identified in *Quair I* regarding notice and witnesses, the court in *Quair II* indicated that these were not the sum total of all of the ICRA rights and that broader concepts of due process needed to be further examined, for example, the right to a fair trial.<sup>45</sup> Without delineating the scope of these rights or the scope of the court's review, the court left a host of issues to be resolved. These issues include what type of hearing is required for banishment proceedings—a criminal trial or civil hearing; what, if any, additional due process protections the petitioners are entitled to; whether the Tribe's 2004 rehearing violated the ICRA in any other respect; and what remedies may be ordered by the court.<sup>46</sup>

Lastly, the court addressed the petitioners' claim that the Tribe's banishment decisions were a per se violation of the ICRA, negating any further inquiry into or balancing of the parties' respective interests.<sup>47</sup> The petitioners essentially argued that the Tribe's system of government constituted a violation of due process since its General Council exercised all the governing authority of the Tribe and no independent tribunal existed to provide a fair and impartial trial.<sup>48</sup> They further alleged that the customary practices of the Tribe were unwritten, thereby denying them "fair warning of proscribed criminal conduct."<sup>49</sup>

The court rejected these arguments on several grounds. First, the petitioners had premised their no balancing argument on the Ninth Circuit's decision in *Means v. Navajo Nation*,<sup>50</sup> which petitioners claimed had overruled *Randall v. Yakima Nation Tribal Court*<sup>51</sup> and had established a new rule that the due process "protections in ICRA are identical to those found in the United States Constitution."<sup>52</sup> The district court summarily rejected this argument, stating, "[R]ather than overruling *Randall*, the *Means* court[] followed *Randall*, foregoing the balancing test because of the nature of the Navajo Nation's adjudicatory system."<sup>53</sup> Whereas in *Means* the Ninth Circuit dispensed with the balancing test given the Navajo Nation's judicial system's close resemblance to the Anglo-American system,<sup>54</sup> in *Quair II*, the Tribe's

44. *Id.*

45. *Id.* Characterizing banishment as a criminal proceeding has obvious implications on the standard of process a tribe's actions will be measured against. A criminal trial requires more extensive procedures, and higher burdens of proof, than are required in a civil hearing.

46. *Id.* at \*4 n.12. The court's decision raises another significant issue as to the petitioners' relationship to the Tribe as nonmembers. While their political relationship to the Tribe may have been terminated, they are still inherently Indian persons.

47. *Id.* at \*4–5.

48. *Id.* at \*5.

49. *Id.* (internal quotation marks omitted).

50. 432 F.3d 924 (9th Cir. 2005).

51. 841 F.2d 897 (9th Cir. 1988).

52. *Quair II*, 2007 WL 1490571, at \*5. The petitioners' argument focused on a statement in the Ninth Circuit's decision in *Means* where the *Means* court noted that the defendant had received "all the criminal protections [under the ICRA as applied by the Navajo Nation judicial system] that he would receive under the Federal Constitution." *Id.* at \*5 n.15 (quoting *Means*, 432 F.3d at 935); see also Kunesh, *supra* note 1, at 139 n.399 and accompanying text (discussing the *Means* decision, which concerned a habeas corpus challenge to the Navajo Nation's assertion of criminal jurisdiction over a nonmember Indian).

53. *Quair II*, 2007 WL 1490571, at \*5 (emphasis added).

54. *Id.* (explaining that "a balancing of interests was unnecessary [in *Means*] because of the particular circumstances in that case, most notably the critically important factor that, unlike the Tribe here....the Navajo

“different traditions and customary procedures” necessitated weighing “petitioners’ interests against the interests of the Tribe to determine the scope of petitioners’ rights under ICRA.”<sup>55</sup>

The approach adopted in *Quair II* follows the Ninth Circuit’s analysis in *Randall*, which weighs “‘the individual right to fair treatment’ against ‘the magnitude of the tribal interest’” when the tribal procedures “differ significantly from those ‘commonly employed in Anglo-Saxon society.’”<sup>56</sup> The *Quair II* court also found the *Randall* balancing test applicable because petitioners made “no showing that their individual interests...surpass any countervailing tribal interests.”<sup>57</sup> Even so, the manner in which the Tribe’s historical form of government and traditional practices factor into this interest balancing approach is quite uncertain, especially in light of the deference to be given to tribal forums and the differences in the protections and interpretation of the ICRA.<sup>58</sup>

Although the court in *Quair II* did not determine the full extent of the protections guaranteed to individuals under the ICRA, it made several significant new determinations and refined the original *Poodry* test for federal habeas corpus review under the ICRA. First, tribal banishment decisions are criminal proceedings for purposes of federal habeas jurisdiction under the ICRA. Second, a federal court will consider tribal disenrollment and banishment decisions as separate and distinct sanctions when the tribe has independently deliberated each matter. Third, each tribal decision will be subject to the *Poodry* test, as expanded in *Quair I* (criminal proceeding, detention, and exhaustion of tribal remedies). Fourth, although cautiously prescribed, a tribal disenrollment decision will warrant habeas corpus review if it meets all three prongs of the *Quair I* test and the tribal member has proven that the disenrollment decision affects the member’s physical freedom to a degree tantamount to detention. Finally, a court will apply the *Randall* balancing test when a tribe follows a model of adjudication substantially different from the Anglo-American judicial system, meaning that whenever a tribe makes a decision based on tribal customary or traditional law, its interest in maintaining its cultural identity and the traditional values of the tribal community will likely be weighed against the individual tribal member’s interest in certain—but not yet fully defined—procedural, and perhaps substantive, protections in the tribe’s decision-making process.

These developments raise serious implications to due process challenges of tribal actions, most significantly that federal courts will continue to closely examine the process and procedural context of those decisions. The comity construct proposed

---

Nation guarantees criminal defendants the right to a jury trial and the right to counsel”).

55. *Id.*

56. *Id.* (quoting *Randall*, 841 F.2d at 900 (citations omitted in original)); see also Kunesh, *supra* note 1, Part V.B.

57. *Quair II*, 2007 WL 1490571, at \*5.

58. *Id.* at \*2 (“ICRA guarantees to individual tribe members certain rights that are similar but not identical to those in the Bill of Rights and the Fourteenth Amendment.” (citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881–82 (2d Cir. 1996))). Further, the *Quair II* court stated, “In passing ICRA, Congress sought to achieve a delicate balance between protecting the rights of individual members and respecting tribal sovereignty.” *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978)); see also Kunesh, *supra* note 1, at 134–35, 138–39 (discussing the responsibility of tribes to adjudicate internal tribal matters and the recognition of tribal forums to adjudicate such matters under *Santa Clara*).



in *Banishment as Cultural Justice* remains a conceptually useful framework for the review and resolution of such multifaceted tribal disputes, as well as for tribes to assess their own practices. This construct recognizes the cultural value of traditional tribal systems as well as the value of their customary commitment to “fair and honest” dealings.<sup>59</sup> Within these systems, “[a] tribe is neither required nor expected to use the same judicial procedure employed by federal courts.”<sup>60</sup> However, while “due process dictates no single model of procedural fairness, let alone a particular form of procedure,”<sup>61</sup> when a tribe undertakes the most serious and consequential consideration of banishment and disenrollment, it must ensure that its tribal laws and practices espouse time-honored respect for fairness and individual dignity.

---

59. *Bloomberg v. Dreamer*, Civ. Appeal No. 90–348, at 5 (Oglala Sioux Nation Sup. Ct. Nov. 29, 1990); see *Kunesh*, *supra* note 1, at 139.

60. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 891 (8th Cir. 2007).

61. *Id.* (citation omitted) (internal quotation marks omitted).