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2003 WL 24072371 (2nd Cir.)
For opinion see [366 F.3d 89](#)

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

MAISIE SHENANDOAH; Elwood Falcon; Diane Shenandoah; Minor Child Adah Shenandoah by and through her mother, Diane Shenandoah; Minor Child Pete Shenandoah by and through his mother, Diane Shenandoah; Minor Child Cameron Shenandoah by and through his mother, Diane Shenandoah Danielle Shenandoah-Patterson; Minor Child Clairese Patterson by and through her mother, Danielle Shenandoah-Patterson; Minor Child Jolene Patterson by and through her mother, Danielle Shenandoah-Patterson; Minor Child Preston Patterson by and through his mother, Danielle Shenandoah-Patterson; Victoria Shenandoah-Halsey; Matthew Jones; Minor Child Wesley Halsey by and through his mother, Victoria Shenandoah-Halsey; Minor Child Vincent Halsey by and through his mother, Victoria Shenandoah-Halsey; Monica Antone-Watson; Minor Child Martina Watson by and through her mother, Monica Antone-Watson; Minor Child Kyle Watson by and through his mother, Monica Antone-Watson; Lawrence Thomas and Arnold Thomas, Petitioners-Appellants,
v.

ARTHUR RAYMOND HALBRITTER; Peter Carmen; Marilyn John; Dick Lynch, Paul Rinko; Stewart F. Hancock; Richard Simons; Arthur Pierce; Gary Gordon; 'John Does' being all members of the Men's Council; 'Jane Does', being all members of the Clan Mothers; Jeff Jost; Jack McQueenie; Dan Caputo; Kevin Storm; Chris Manwaring; Gene Rifenburg; Larry Kutz; Officer Urtz; Frank Siminelli; Lori Billi; Corky Ryan; Kevin O'Neil; Bill Pendock; and Oneida Housing Corporation, Inc., Respondents-Appellees.

No. 03-7862.

October 23, 2003.

On Appeal from Final Judgment and Order of the United States District Court for the Northern District of New York in Civil Matter No: 02-CV-1430 (NAM/GJD)

Brief for Plaintiffs-Appellants

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****i*** Table of Contents

Preliminary Statement ... 01

Statement of Subject Matter and Appellate Jurisdiction ... 01

Standard of Review ... 02

Issues Presented for Review ... 02

Statement of Case ... 04

Summary of Argument ... 28

Point 1 DISTRICT COURT ERRONEOUSLY DETERMINED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' WRIT OF HABEAS CORPUS TO CHALLENGE WHETHER THE HOUSING ORDINANCE WAS IN FACT A BILL OF ATTAINDER SPECIFICALLY AND EXPRESSLY PROHIBITED BY THE INDIAN CIVIL RIGHTS ACT ... 33

A. Congress expressly provided in the ICRA ([25 U.S.C. §1303](#)) 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. ... 33

B. 'As applied' to only the plaintiffs', the 'housing' program is a Bill of Attainder having nothing to do with improving plaintiffs' homes but everything to do with inflicting upon only the plaintiffs the additional punishment of homelessness and being rendered incapable of living on the sovereign territory, thereby triggering the habeas corpus remedy and jurisdiction under the ICFA as Congress clearly intended. ... 42

C. The district court failed to properly apply and construe the term "detention" as used in [25 U.S.C. §1303](#) consistent with the legislative history of the ICRA and the decision of the Second Circuit in *Pcodry v. Tonawanda Band of Seneca Indians*, C.A.2 (N.Y.) 1996, 85 F.3d 874, cert. denied 519 U.S. 1041 ... 49

Point II FUTILITY DEFENDANTS' TRIBAL COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT ... 53

***ii** POINT III IN ADDITION TO MAKING NUMEROUS GROSS ERRORS IN ITS FINDINGS AND DECISIONS, RATHER THAN GRANTING RESPONDENTS' MOTION UNDER RULE 12(b) TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, DISTRICT COURT SHOULD HAVE DEFERRED ITS JURISDICTIONAL DECISION PENDING HEARING ON THE MERITS OF PLAINTIFFS' HABEAS CORPUS APPLICATION ... 58

CONCLUSION AND RELIEF SOUGHT ... 61

***iii** TABLE OF AUTHORITIES

Cases

[Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135-36, 112 S.Ct. 515, 116 L.Ed.2c 496 \(1991\)](#) ... 38

[Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 \(1917\)](#) ... 37

[Caminetti v. U.S., 242 U.S. 470, at 485, 37 S.Ct. 192 \(U.S.1917\)](#). ... 38

[Cobell v. Cobell, 503 F.2d 790 \(9th Cir. 1974\)](#), cert. denied, [421 U.S. 999 \(1975\)](#) ... 53

[Cummings v. Missouri, 71 U.S. 277, 323 \(1867\)](#). ... 44

[Davis v Kinloch, 752 S.W. 2d 420 \(Mo. Ct. App. 1988\)](#) ... 42

[Dodge v. Nakai, D.C.Ariz. 1969, 298 F.Supp. 26](#) ... 34

[Dodge v. Nakai, 298 F.Supp. 26,34 \(D.C.Ariz. 1969\)](#) ... 34

[Herbert v. National Academy of Sciences, 974 F2d. 192, 197-98 \(D.C. Cir. 1972\)](#). ... 60

[Kennedy v. Mendoza- Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 \(1963\)](#) ... 34

[McMullen v United States of America, 953 F.2d 761 \(2nd Circuit 1992\)](#) ... 43

[McMullen, 769 F. Supp. 1278, 1284 \(S.D.N.Y. 1991\)](#). ... 43

[McMullen v. United States, supra, 989 F.2d 603, 607](#) ... 48

[National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 \(1985\)](#) ... 56

[Nixon v. Administrator of General Services, 433 U.S. 425, 474 \(1977\)](#). ... 44

[Oneida Indian Nation of New York, Robert Burr, et al v. William P. Clark, Secretary of the Interior et al and Oneida Indian Nation of New York and Ray Halbritter, defendant-intervenors, 593 F.](#)

[Supp. 257 \(U.S.D.C. N.D. New York 1984\)](#) ... 06

[Plumbing Indus. Bd. v. E.W. Howell Co., 126 F.3d 61, 65 \(2d Cir. 1997\).](#) ... 02

***iv** [Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 \(2d Cir. 1996\)](#), cert. denied, [519 U.S. 1041](#) ... 02

[Poodry v Tonowanda, 85 F.3d 874 \(1995\)](#) ... 40

[Poodry v. Tonawanda Band of Seneca Indians, C.A.2 \(N.Y.\) 1996, 85 F.3d 874](#), cert.denied [519 U.S. 1041](#) ... 41

[Poodry v Tonawanda Band of Seneca Indians, 85 F.3d 874 \(2d Cir\)](#), cert denied [519 U.S. 1041 \(1996\)](#). ... 10

[Poodry v. Tonawanda Band of Seneca Indians, C.A.2 \(N.Y.\) 1996, 85 F.3d 874](#), cert.denied [519 U.S. 1041](#) ... 49

[Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 101 \(8th Cir. 1976\)](#) ... 57

[Rosebud Sioux Tribe, 534 F.2d 98, 101.](#) ... 58

[Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 \(1981\)\)](#) ... 38

[Santa Clara Pueblo v. Martinez, 436 U.S. 49, 76](#) ... 39

[Santa Clara Pueblo v. Martinez, 436 U.S. at 71.](#) ... 40

[Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 \(1978\)](#) ... 33

[Selective Service] at 847, 104 S.Ct. at 3352; ... 43

[Settler v. Lameer, 419 F.2d 1311 \(9th Cir. 1969\)](#) ... 40

[Settler v. Yakima Tribal Court, 419 F.2d 486 \(9th Cir. 1969\)](#), cert. denied [398 U.S. 903 \(1970\)](#). ... 40

[Shenandoah v. Halbritter 275 F.Supp.2d 279 \(N.D.N.Y.,2003\)](#) ... 01

[Shenandoah v. United States Department of Interior, Halbritter et al, 159 F.3d 708, 713 \(2d Cir. 1998\)](#) ... 02

[Shenandoah et al v U.S. Dept. of Interior, Halbritter, et al, \(1997 W.L. 214947 N.D.N.Y.\)](#) ... 06

[Shenandoah v. U.S. Dept. of Interior et al., 159 F.3d 708 \(C.A.2,1998\)](#) ... 06

[Shenandoah v. U.S. Dept. of Interior et al., 159 F.3d 708 \(C.A.2,1998\).](#) ... 09

***v** [Shenandoah et al v U.S. Dept. of Interior, Halbritter, et al, 1997 W.L. 214947 N.D.N.Y.\)](#) ... 10

[Shenandoah v. U S. Dept. of Interior et al., 159 F.3d 708 \(C.A.2,1998\)](#) ... 11

[Sutton v. United States Department of Transportation, 38 F.3d 621, 624 \(2d Cir. 1994\).](#) ... 02

[Talton v. Mayes, 163 U.S. 376 \(1896\)](#) ... 39

[Trop v. Dulles, 356 U.S. 86, 102 \(1958\)](#) ... 32

[Trop v. Dulles, 356 U.S. 86 \(1958\),](#) ... 46

[Trop v. Dulles, 356 U.S. 86 \(1958\)](#) ... 50

[United States v. Lovett, 328 U.S. 303, 315 \(1945\)](#) ... 34

[U.S. v. Brown 381 U.S. 437, 442, \(U.S.Cal. 1965\)](#) ... 35

[United States v. Brown, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 \(1948\)](#) ... 38

[United States v. Brown, 381 U.S. 437, 443, 85 S.Ct. 1707, 1712, 14 L.Ed.2d 484 \(1965\)](#) ... 43

[United States v. Brown, 381 U.S. 437 \(1965\)](#) ... 44

[United States v. Lovett, 381 U.S. \(1946\)](#) ... 44

[United States v. Lovett, 328 U.S. 303, 315 \(1945\)](#). ... 42

[Wilson v. Marchington, 127 F. 2d 805, 811 \(9th Cir. 1997\)](#) ... 57

***1 PRELIMINARY STATEMENT**

This is an appeal by plaintiffs from an Order dated August 12, 2003 (SPA-1) [FN1] of the United States District Court for the Northern District of New York and of the Memorandum-Decision and Order dated August 8, 2003 (SPA-2) of the Honorable Norman A. Mordue, United States District Court Judge. The Decision and Order granted defendants' motion to dismiss plaintiffs' Complaint under [Federal Rules of Civil Procedure, Rule 12\(b\)](#) for lack of subject matter jurisdiction. The Decision has been published at [Shenandoah v. Halbritter 275 F.Supp.2d 279 \(N.D.N.Y.,2003\)](#).

FN1. "SPA-1" refers to the separate 'Special Appendix' accompanying plaintiffs-appellants Brief, page 1. Reference "(A-1)" or simply "(1)" refers to page 1 of the separate 'Joint Appendix' comprised of three (3) Volumes with the pages being numbered consecutively without break.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction in the district court was predicated on [25 U.S.C. §1331](#) (federal question jurisdiction); [25 U.S.C. §1303](#) (habeas corpus under the ICRA); and [25 U.S.C. §1302](#) (substantive rights under the ICRA)

Jurisdiction of the Court of Appeals is based on [28 U.S.C. §2253](#) in that it is a review of a final order of a district judge in a habeas corpus proceeding and [28 U.S.C. §§1291](#) and [1294](#) in that this appeal is from a final decision of the United States District Court for Northern New York. This appeal is an appeal of right taken pursuant to [Rules 3](#) and [*24 of the Federal Rules of Appellate Procedure](#) in that the notice of appeal (A-933) was timely filed with the clerk of the district court on August 19, 2003.

STANDARD OF REVIEW

As to all issues of this appeal, the standard of review is *de novo*. See, [Sutton v. United States Department of Transportation, 38 F.3d 621, 624 \(2d Cir. 1994\)](#). See also, [Shenandoah v. United States Department of Interior, Halbritter et al, 159 F.3d 708, 713 \(2d Cir. 1998\)](#) (citing [Plumbing Indus. Bd. v. E.W. Howell Co., 126 F.3d 61, 65 \(2d Cir. 1997\)](#)).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court failed to properly apply and construe the term "detention" as used in [25 U.S.C. §1303](#) of the Indian Civil Rights Act ("ICRA") consistent with the legislative history and the decision of the Second Circuit in [Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 \(2d Cir. 1996\)](#), cert. denied, [519 U.S. 1041?](#)

2. Whether the court erred when it determined that it lacked subject matter jurisdiction over plaintiffs' ICRA writ of habeas corpus filed by plaintiffs to challenge the defendants' 'housing program' as really being a "Bill of Attainder" *as applied* to plaintiffs and therefore, in violation of [25U.S.C. § 1302\(9\)](#) of the ICRA?

***3** 3. Whether the court erred when it determined that even if defendants' 'housing' program were a 'Bill of Attainder' as applied to plaintiffs in violation of [§1302\(9\)](#) of ICRA, it still lacked subject matter jurisdiction over plaintiffs' writ of habeas corpus because, in the court's opinion, plaintiffs failed to show that the housing program caused sufficient 'restraints upon their liberty' to trigger habeas corpus relief?

4. Whether the court erred when it determined that it lacked subject matter jurisdiction over plaintiffs' writ of habeas corpus to review and determine whether the defendants had by design and intention achieved a "*de facto* 'banishment' " of plaintiffs from the sovereign Oneida Nation

Territory using the 'housing' program as the means?

5. Whether the court erred in failing to recognize that defendants accomplished a *de facto* banishment of plaintiffs from the Oneida Nation Territory in violation of the ICRA and the holding of *Pocdry*, *supra*, such *de facto* banishment being achieved by defendants through the cumulative impact of: (a) defendants' prior revocation of any and all tribal rights, benefits or privileges; and (b) the defendants' recently enacted 'housing program' by which defendants condemned plaintiffs' homes for immediate demolition while also denying the financial compensation and housing assistance package freely given to all others but plaintiffs under the same program?

*4 6. Whether the court erred in failing to find that the *de facto* banishment of plaintiffs achieved by defendants' housing program as applied to plaintiffs constituted sufficient 'restraint on liberty' so as to invoke the remedy of habeas corpus under the Indian Civil Rights Act?

7. Whether the court erred by granting defendants' motion to dismiss for lack of subject matter jurisdiction rather than deferring its jurisdictional decision pending an evidentiary hearing on the merits of plaintiffs' habeas corpus applications?

8. Whether the court made errors of fact and law regarding the jurisdictional claims of plaintiffs including but not limited to interpretation of defendants' tribal court rulings; the futility of plaintiffs pursuing any relief in the defendants' tribal court; the significance to plaintiffs of being able to remain living on the 32-acre Oneida Territory, and the irreparable harm being suffered and likely to be suffered by plaintiffs?

STATEMENT OF CASE

This case concerns nineteen individual plaintiffs who have lived for many, many years on a street known as "Territory Road" within the 32-acre sovereign Territory of the Oneida Indian Nation ("Territory"). (A-29) The Oneida Indian Nation is one of the six Indian Nations comprising the Haudenosaunee, also known as the Iroquois Confederacy. The Oneida Territory is the last *5 remaining 32-acres which was never seized or acquired by either the United States or the State of New York and is the cultural and spiritual center of the Oneida Nation and the plaintiffs.

The plaintiffs comprise six (6) 'household families', each living in their privately owned home on Territory Road within the 32-acre Oneida Nation Territory. Four of the six plaintiffs' households consist of direct family members of the Schenandoah family, also known as Shenandoah. Plaintiff Maisie Shenandoah is the mother of Plaintiff Diane Schenandoah, Vicky Schenandoah-Halsey and Danielle Shenandoah Patterson. Maisie Shenandoah is also the Aunt of defendant Halbritter and with whom there has been a leadership struggle for the last ten years.

Some of the plaintiffs are not 'members' of the Oneida Indian Nation, however, they are members of one or another of the other Indian Nations within the Haudenosaunee. (SPA-2) As such, they are entitled to live on the Oneida Territory even though they are not 'members' of the Oneida Nation. The defendants have used their control over the Oneida government to make the other plaintiffs '*members-not-in-good-standing*'. (SPA-29) As a result, none of the plaintiffs are '*members-in-good-standing*' of the Oneida Nation.

The plaintiffs and defendants have been embroiled in a Leadership Dispute for the past ten (10) years beginning in *6 1993. The following facts are from the opinion and decision of the Honorable Rosemary Pooler, who was then serving as a U.S. District Court judge for Northern New York and rendered her decision in [Shenandoah et al v U.S. Dept. of Interior, Halbritter, et al, \(1997 W.L. 214947 N.D.N.Y.\)](#) (SPA-22) Additional facts are provided in [Shenandoah v. U.S. Dept. of Interior et al., 159 F.3d 708 \(C.A.2,1998\)](#) affirming portions of the district court's decision. (copy at SPA-16)

The plaintiffs consist of "Traditional Leaders" within the Traditional Form of Self Governance of the Oneida Indian Nation of New York as duly recognized by the U.S. Bureau of Indian Affairs by letter dated July 29, 1987. (SPA-22)

In [Oneida Indian Nation of New York, Robert Burr, et al v. William P. Clark, Secretary of the Interior et al and Oneida Indian Nation of New York and Ray Halbritter, defendant-intervenors, 593 F. Supp. 257 \(U.S.D.C. N.D. New York 1984\)](#), the leadership issue was being hotly contested with defendant Ray Halbritter aligning himself with his Aunt, plaintiff Maisie Shenandoah and the other plaintiffs. In 1984, defendant Halbritter claimed to be of the "traditionalist faction" or "Marble Hill Oneidas".

In *Oneida Indian Nation*, *supra*, the district court accepted the arguments of the Honorable Frederick J. Scullin, Jr., then the U.S. Attorney responsible for defending the Department of *7 Interior's ("D.O.I.") acceptance and recognition of Ray Halbritter as the Traditional 'representative' of the Oneida Indian Nation of New York. Plaintiff Maisie Shenandoah, in her position as Clan Mother, had appointed defendant Halbritter to a temporary 'seat warmer' position as 'representative' of the Oneida Nation.

However, in 1993, to the complete surprise and extreme disappointment of plaintiffs, the

defendants announced that they had on behalf of the Oneida Nation entered into a 'Gaming Compact', which they had surreptitiously negotiated with the State of New York and the United States. Because the plaintiffs had always been adamantly opposed to casinos and Gambling Compacts and defendant Halbritter had secretly exceeded his limited scope of authority, the plaintiffs removed defendant Halbritter from his temporary position in the Oneida Nation government and the Bureau of Indian Affairs ("B.I.A.") accepted such removal on August 10, 1993.

Defendant Halbritter, however, did not want to lose his assumed power over the Oneida Nation, therefore, he used his connections with Federal and State representatives who pressured the B.I.A. to reverse its decision to accept the plaintiffs removal of defendant Halbritter, which the B.I.A. did on August 11, 1993. Since that date, defendant Halbritter has been recognized by the governments of the U.S. and N.Y. as the *8 'representative' of the Oneida Indian Nation to the United States and been given *de facto* authority to form a new - nontraditional -- Oneida Nation government. (SPA-16)

Plaintiffs objected to the B.I.A.'s appointment of defendants' and have continued to be very vocal about their opposition and rejection of defendants' authority and power over the Nation. In 1993, several of the plaintiffs participated in a 'Press Conference' at which they openly and publicly denounced the defendants' usurpation of power and control over the Oneida Nation with the U.S. backing and support.

Defendants, without any judicial proceedings of any kind, took the following legislative punitive actions against those members (including some of the plaintiffs) who participated in the 1993 press conference: (a) labeled them '*dissidents*'; (b) found them guilty of '*treason*', and (c) made them '*members NOT-in-good-standing*', and (d) stripped them of any and all status, rights, benefits, participation and entitlements within the Oneida Nation. (A-29) The defendants also return rather than distribute among the plaintiffs to the U.S. those monies and supplies given to the Oneida Nation under various Treaties for the benefit of plaintiffs.

In 1995, the remaining plaintiffs who had not participated in the 1993 Press Conference walked in a peaceful 'March for Democracy' as another form of protest by plaintiffs against the *9 defendants' seizure and control of the Oneida Indian Nation. (A-29) Again, using their power and control over the Oneida government and without any judicial proceedings of any kind, defendants imposed the very same legislative punitive actions against these March for Democracy participant plaintiffs as they had previously imposed upon those plaintiffs who had participated in the 1993 press conference. (A-29)

In furtherance of their never ending struggle to return the Traditional form of government to the Oneida Nation, in 1995, several of the plaintiffs filed an appeal to the U.S. Bureau of Indian Affairs asking the B.I.A. to 'undo' what it had done in 1993, reversing the appointment of Halbritter as 'representative' with power to create a whole new form of governance of the Oneida Nation. (SPA-16)

The plaintiffs' appeal to the B.I.A. is still pending and seeks to have the B.I.A. reverse its 1993 decision to install defendant Halbritter into a position of power over the Oneida government. The B.I.A. has not yet acted on the appeal as noted later by the Second Circuit Court in [Shenandoah v. U.S. Dept. of Interior et al., 159 F.3d 708 \(C.A.2,1998\)](#).(SPA-16)

In 1996, some of the plaintiffs including Maisie Shenandoah commenced a lawsuit in the U.S. Federal Courts against some of the defendants including Halbritter seeking: (a) reversal of the B.I.A.'s 1993 reversal of its decision to accept plaintiffs as *10 Traditional Leaders of the Traditional form of sovereign Oneida self-governance; (b) removal of Halbritter from the Oneida government; (c) ruling that Halbritter was not the proper leader of the Oneida Nation and did not have the authority he had assumed to bind the Nation with his signature; and (d) holding that the defendants had violated the plaintiffs' rights under the Indian Civil Rights Act by stripping plaintiffs of any and all rights, benefits, participation and standing within the Oneida Indian Nation. (SPA-22)

The Honorable Rosemary Pooler, then Judge of the U.S.D.C.N.Y. and now a Judge of the Second Circuit Court of Appeals, issued her decision in [Shenandoah et al v U.S. Dept. of Interior, Halbritter, et al, 1997 W.L. 214947](#) N.D.N.Y.) (SPA-22).

In its 1997 decision, the district court described the leadership dispute between the plaintiffs and defendants. The district court also did an exhaustive analysis comparing the punitive sanctions imposed by defendants *up to that point in time* and compared those punitive sanctions to the facts and holding of [Poody v Tonawanda Band of Seneca Indians, 85 F.3d 874 \(2d Cir\)](#), cert denied [519 U.S. 1041 \(1996\)](#). In dismissing plaintiffs' complaint, the district court noted: For purposes of this motion, defendants Halbritter and John do not dispute the Second Circuit's holding [in *Poody*] that permanent banishment constitutes custody *11 or detention. (cite omitted) Rather, they argue that the allegations of plaintiffs' complaint do not constitute

permanent banishment. In other words, defendants contend that the punishments plaintiffs received fall below *Poodry* in the continuum of habeas corpus protection.

Shenandoah, supra, SPA-27

The district court then dismissed plaintiffs' in 1997 complaint for lack of subject matter jurisdiction:

In stark contrast [to *Poodry*], plaintiffs have not alleged that Halbritter and John served them with any notice of banishment or *attempted to remove them from Oneida Nation territory*.

...

Until such time as plaintiffs suffer actual banishment rather than essential banishment they allege, their remedies lie within the political process of the sovereign Oneida Nation and not the confines of the federal district court.

Shenandoah, supra, SPA-27-28 (emphasis supplied)

Plaintiffs appealed the district court's decision. This Court's decision rendered on this matter, [*Shenandoah v. U.S. Dept. of Interior et al.*, 159 F.3d 708 \(C.A.2,1998\)](#) [FN2] The Second Circuit Court detailed the long history of the leadership dispute between plaintiffs and defendants and affirmed the district court's dismissal of plaintiffs' complaint ruling that as of 1997, the defendants had *not yet done enough to plaintiffs *12* to bring plaintiffs' claims within the ICRA habeas corpus provision. (copy at SPA-16)

FN2. Judge Mordue, on page 2 of his August 8, 2003 Memorandum-Decision and Order dismissing plaintiffs' complaint, referred to and cited this Second Circuit Court decision by saying "[i]n spite of various and highly contentious legal battles disputing the fact that defendant, Raymond Halbritter is recognized by the federal government as the official representative of the Oneida Indian Nation of New York." (SPA-3)

Plaintiffs' complaint alleges that one or more of the six plaintiffs were suspended or terminated from employment positions, lost their "voice[s]" within the Nation's governing bodies, lost health insurance, were denied admittance into the Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities such as the casino, Turning Stone park, the gym, and the Bingo Hall, were stricken from Nation membership rolls, were prohibited from speaking with a few other Nation members, and were not sent Nation mailings. The complaint also alleges that one member of Halbritter's governing Men's Council threw a large rock at one of the plaintiffs and grabbed the plaintiff through a car window.

Although the alleged misconduct, if true, is serious, it is insufficient to bring plaintiffs within ICRA's habeas corpus provision.

Ibid, 714, also SPA-20

Immediately after the Second Circuit's 1998 decision in *Shenandoah*, supra., the defendants instructed their attorneys, including one "Eleanor Smith" from the law firm of Zuckerman, Spaeder, Taylor and Kolker, in Washington, D.C., to "*work to evict the plaintiffs and the other 'dissidents' from the 32-acre Oneida Nation territory*". (A-455) Defendants' scheme was to devise a means by which to remove the plaintiffs from the Territory in the hopes of avoiding the holding of *Poodry* barring 'banishment' by developing a "*health and safety housing plan that could be used to accomplish the same ends [forcible ejection of plaintiffs from the Territory] and provide a *13 seemingly 'legitimate' justification for ridding the Territory of the dissidents [the plaintiffs]*". (455)

The defendants scheme to forcibly eject plaintiffs off of the Sovereign Territory by creating a subterfuge of a 'housing' program was admitted and revealed by one of the defendants himself, defendant Rinko, to one of plaintiffs' counsel Barbara Olshansky of the Center for Constitutional Rights. (454) Defendants' attorney Eleanor Smith had indicated to Rinko that she and others in her law firm were directed by defendants to devise a scheme to evict the plaintiffs and other dissidents off of the 32-acre Territory. (455) According to defendant Rinko, the original plan of attorney Smith for forcibly removing plaintiffs off of the Territory was to designate the entire 32-acre Territory as a 'cultural and historical site' and bar individuals from living on the site. (455) Defendant Rinko informed plaintiffs' counsel Olshansky that a decision had been made by defendants to instead develop a "health and safety housing plan that could be used to accomplish the same ends [forcible removal of the plaintiffs from the Territory] and provide a seemingly 'legitimate' justification for ridding the Territory of the dissidents [the plaintiffs]". (455)

In 1999, in direct furtherance of the defendants' plan to evict the plaintiffs from the 32-acre Territory and disguise that eviction as part of a legitimate housing program, the **14* defendants

conducted 'inspections' of plaintiffs' homes for the purpose of identifying specific conditions which defendants would later specifically prohibit and forbid under defendants' 'housing' program. By defining as 'deficiencies' under defendants' new housing code the existing condition and style of plaintiffs' homes, defendants made certain that plaintiffs' homes would fail to meet the new standards, thus be 'condemned' and ordered for immediate demolition.

One example of defendants defining an existing condition or style of plaintiffs' homes to be a 'deficiency' under the defendants' new housing code is the fact that all but one of the plaintiffs' homes is not 'sitting' on a 'foundation'. Defendants purposely wrote the new retroactively applied housing standards so as to require all homes to be on foundations with failure resulting in the home being condemned and ordered immediately vacated and demolished. In this same ordinance, however, defendants also specifically prohibited any home from being moved in order to place it on a foundation, thereby not only assuring the *immediate* condemnation and demolition of plaintiffs' homes but also preventing plaintiffs from being able to avoid that sentence.

Therefore, the first step of defendants' plan to use the 'housing' program to evict plaintiffs from the 32-acre Oneida Territory was to adopt and require 'housing standards' using the ***15** existing characteristics of plaintiffs' homes as "deficiencies" which would be retroactively prohibited and forbidden so that plaintiffs' homes were condemned instantly upon enactment of the 'housing' program. The standards mandated by defendants under the housing program do not strictly follow either National, New York State or local building codes, but were specifically customized and concocted by defendants to make certain that plaintiffs' homes 'failed'.

However, the defendants had a problem that there were and are many other homes with identical conditions as those of plaintiffs that are located on properties also within the control of the defendants and the Oneida Nation. One such home is located in "Marble Hill" and owned by Ken Phillips and another such home was just a few houses down Territory Road from the plaintiffs' homes and owned by defendant Clint Hill, a member of the defendants' men's council. The defendants did not want to inflict upon the owners of these 'deficient' homes the punishment of confiscation, seizure and forfeiture without compensation as defendants wanted to inflict upon the plaintiffs. The defendants wanted to 'rid' the Territory of the plaintiffs, inflicting forfeiture of their homes in the process thereby both exacting an additional severe penalty upon plaintiffs for their prior alleged treason as well as rendering plaintiffs incapable of returning and living on the ***16** Territory. But, defendants did not want to inflict this punishment on any one else.

Therefore, the second step to target only the plaintiffs and avoid inflicting punishment on any one other than the plaintiffs was for the defendants to make the 'housing program' applicable to only the 32-acre Territory and none of the other approximately 14,000 acres of Oneida owned lands because all of the 'dissident' and 'treasonous' plaintiffs lived on the 32-acre Territory.

Defendants still had a problem, however. There were other people such as defendant Clint Hill (who sits on the defendants' 'men's council' who would be passing these new laws and 'housing' program) who also lived on the 32-acre Territory in homes identical to those of plaintiffs and those homes would also be condemned under the new housing program because it was not possible to 'carve' out exceptions immunizing those other homes without revealing to plainly the true intent and purpose of the defendants' housing program - to target the plaintiffs.

Therefore, the third step to defendants' plan for using the 'housing' program to evict only plaintiffs from the Territory was to devise a way within this very same 'housing' program to give to everyone else living on the Territory except for plaintiffs a very substantial 'housing' *financial* aid, support and assistance package not only to avoid inflicting punishment ***17** upon those 'innocent' people such as defendant Clint Hill but also to enable everyone other than the plaintiffs to rebuild their new homes on the 32-acre Territory if they desired.

The financial compensation/reimbursement package given to everyone except plaintiffs should cover all costs and expenses associated with and incidental to having one's home condemned including moving to and from the existing home to a temporary house, as well as the cost of temporary housing while the new home was being built and assistance with the actual cost of building the new home. The defendants, therefore, built-in to their new 'housing' program for the benefit of everyone except plaintiffs the following "financial package": (a) *free temporary housing while a new home is being built ON the 32-acre Territory*; (b) *a \$50,000.00 grant per household member to help cover the costs of building the new home*; (c) *an Oneida Indian Nation guaranteed mortgage to not only lower the cost of borrowing whatever additional moneys are needed to rebuild the new homes but to make it even possible to obtain any mortgage financing since the home would be on sovereign Oneida Nation Territory and immune from foreclosure remedies*; (d) *reimbursement for all moving expenses both to the temporary housing and then back into the new home*; (e) *fair compensation for the value of the existing home being condemned and ***18** demolished, and (f) a guaranteed right to rebuild the new home in the*

exact same location on the 32-acre Territory.

The fourth and final step in the targeted ejection, removal and punishment of plaintiffs was for the defendants to devise a way to make this financial package available to everyone except for plaintiffs. Not only was the very significant financial package designed to avoid any punitive aspects being inflicted upon others living on the Territory, but defendants knew financial assistance was absolutely necessary and essential for plaintiffs to be able to return to the 32-acre Territory and replace the homes condemned and demolished by defendants under the 'housing' program. The challenge for defendants was to figure out a way to identify and target only the plaintiffs for denial of this financial package while making it freely available to everyone else.

Defendants accomplished this by making such financial package available to only '*members-IN-good-standing*' and using the label of '*members-not-in-good-standing*' as identifying the only people being denied the housing financial package. Defendants used the fact that they themselves had previously made most of the plaintiffs '*not-in-good-standing*', therefore, defendants knew that by making the financial package available to only members-in-good-standing would by definition carve out and exclude only the plaintiffs.

***19** By defining and using existing characteristics of plaintiffs' homes as '*deficiencies*' guarantee that plaintiffs' homes would be condemned for demolition. Denying to only plaintiffs the very significant and necessary financial package being freely given to everyone else living on the Territory who was '*caught*' in the same '*housing*' program enabled the defendants to devise a means by which only the plaintiffs would suffer the punishment of being made homeless, forcibly ejected from the Territory and unable to return to live on the 32-acre Territory.

The targeted punitive purpose of the '*housing*' program as applied to plaintiffs (condemnation of their homes and denial of financial assistance or compensation) makes the '*housing*' program a Bill of Attainder *as applied* to plaintiffs and such is expressly prohibited by and in violation of the rights and protections of plaintiffs under the Indian Civil Rights Act.

The consequence to plaintiff of defendants retroactively applying new '*housing*' standards which use and define as a '*deficiencies*' certain existing characteristics of plaintiffs' homes in order to be able to condemn and demolish plaintiffs' homes together with the targeted denial of any financial compensation, assistance or reimbursement makes this '*housing*' program nothing less than *de facto* banishment from the Territory.

***20** After it was adopted, the plaintiffs objected to the new housing program, pointing out how it targeted them for different treatment and would result in them being made homeless. However, because defendants had stripped plaintiffs of any and all rights of Oneida Nation membership, plaintiffs had no voice, nor vote nor other rights to object.

In November 2001, in direct furtherance and enforcement of their '*housing*' program, defendants numbering almost 22 armed and uniformed officers, issued orders to themselves authorizing themselves to forcibly enter the 1988 mobile home of plaintiff Danielle Schenandoah-Patterson for the purpose of performing the condemnation '*inspection*', the first step in the '*housing*' program process devised by defendants to inflict additional punishment upon and banish plaintiffs from the Territory.

Because plaintiff Danielle Schenandoah-Patterson did not sit idly by and watch as defendants began the invasion of home in furtherance of the sham process designed and intended not to improve her housing but to make her homeless and banished from her home on the 32-acre sovereign Oneida Territory, the defendants seized, handcuffed, arrested and incarcerated her. Defendants claimed that she had '*interfered*' with their '*inspection*' which the defendants themselves had '*authorized*' using the defendants' own tribal court to carry out and ***21**

implement the sentence of homelessness and banishment passed by the housing program. Approximately one year later, the defendants brought '*charges*' against plaintiff Danielle Schenandoah-Patterson and on a Friday evening in October 2002, the defendants for the second time, forcibly seized, handcuffed, arrested Plaintiff Danielle Schenandoah-Patterson, driving her almost seven (7) hours away in order to have her incarcerated in a Pennsylvania Prison where she was stripped searched, '*body cavity*' searched and '*processed*' by the Prison Guards, all at the direction of the defendants.

After three days of imprisonment and separation from her three minor children (all of whom are also plaintiffs in this action), and being denied her prescription medications, the defendants flew plaintiff back from Pennsylvania in their casino funded private jet where she was to '*stand trial*' before the very same people who had crafted the '*housing program*' designed to punish the plaintiffs and remove them from the Territory.

In reference to this horrific ordeal suffered by plaintiff Danielle Schenandoah-Patterson and her three minor children at the hands of defendants under the guise of the defendants' '*housing*' program, Judge Mordue stated in his decision dismissing plaintiffs' complaint for lack of subject

matter jurisdiction because plaintiffs had failed to show sufficient ***22** restraints upon their liberties: "*The only plaintiff who is alleged to ever have been in actual custody of defendants is Danielle Paterson, but it is clear that the custody was limited in duration...*" (SPA-14)

The defendants had seized and imprisoned plaintiff in October 2002 based upon charges lodged by defendants in defendants own tribal court arising out of the alleged incidents during the 2001 inspections a year earlier. Defendants charged plaintiff with: (a) refusing to allow the inspection of her home; (b) resisting arrest when she was being arrested for refusing to allow the inspection and (c) committing battery when defendants grabbed and wrestled with her while forcibly entering her home, knocking her off balance and she kicked one of the armed police officers as she fell backwards having been pushed off balance by the many armed defendants carrying out the inspection. (video at A-00936)

After being transported to defendants' court in handcuffs and leg-shackles, the defendants told plaintiff that she would remain 'in custody' unless and until she gave defendants 'permission' to demolish her home because it failed to meet the new 'housing' program standards. Even though she knew this would leave her and her three children homeless, she ultimately 'consented' due to the immense stress, duress and coercion and her need to be reunited with her three minor children. She is a ***23** single mother supporting her three children because their father, an Oneida member in-good-standing receiving significant monetary distributions and compensation from the defendants, refuses to pay her any child support and the defendants use their control over the Oneida Nation to invoke Sovereignty and Immunity in order to refuse efforts to garnish his tribal distributions for such child support.

Plaintiff was given '24-hours' to remove all of her personal possessions and vacate her home so that defendants could immediately demolish it, which they did.

Immediately after demolishing her home and rendering her homeless, the defendants then used their control over the Oneida Nation to instigate, finance and promote a Child Custody Action against plaintiff in the New York State Courts seeking to have custody of her three children taken away from her because she was now homeless, it being irrelevant to defendants that they themselves had made her homeless. [FN3]

FN3. Defendants seek to make great weight out of their 'offer' to 'house' Danielle in the defendants' White Pines rental project built with U.S. Housing and Urban Development funds outside of the 32-acre sovereign Oneida Territory on *non-sovereign U.S. land*. This argument completely begs the issue in that the whole purpose of defendants' 'housing' program was to achieve exactly what they criticize plaintiff Danielle for not doing - accept her banishment from the 32-acre Territory and live elsewhere. Defendants also seek to side-step the fact that only the plaintiffs are not given the right to rebuild their homes on the 32-acre Territory, and only the plaintiffs are forced to choose between banishment to rental housing off the Territory or abject homelessness. Sentencing plaintiffs under the 'housing' program to choose between homelessness or banishment to rental housing off the Territory *without any or ability to rebuild one's own home on the 32-acre Territory* is a far cry different and significantly more punitive by design than the 'dream' which defendants enabled other people living on the 32-acre territory such as Watson, Stout, Cornelius and defendant Clint Hill to fulfill. There is no explanation for the difference in treatment between plaintiffs and others except for defendants' admitted intent to punish and banish the plaintiffs.

***24** Also in November 2002, the defendants issued their tribal court orders authorizing the very same forced armed inspections of the other plaintiffs' homes which defendants had done to Danielle's home.

In an effort to stop not only the pretext inspections but also any and all other actions or enforcement of the 'housing' program against the plaintiffs by the defendants under and in furtherance of the defendants' 'housing program', the plaintiffs commenced the subject action in the district court. Plaintiffs sought a 'temporary restraining order' at the same time they filed their Complaint, which TRO would have protected plaintiffs from the defendants doing to them what the defendants had just done to plaintiff Danielle Schenandoah-Patterson and her three children - render them homeless and driven off and banished from living on the Territory. By his letter decision of November 13, 2002, Judge Mordue rejected and denied plaintiffs' motion for a temporary restraining order Judge Mordue stated on November 13, 2002 that ***25** "... there is a significant question regarding whether there is any basis for district court jurisdiction under the Indian Civil Rights Act ...".

Judge Mordue never wavered from this opinion Throughout the almost nine (9) months that plaintiff's case was before the district court, regardless of the facts and proofs presented by

plaintiffs or whatever actions were taken by defendants in furtherance of executing their plan to use the 'housing' program as a means to forcibly evict and remove plaintiffs from their homes and off of the Territory.

The district court repeatedly rejected and denied plaintiffs' petitions for relief and protection from the defendants' 'housing program'. The court rejected claims that defendants housing program violated the rights of plaintiffs under the Indian Civil Rights Act, specifically rejecting arguments that the housing program violated the express prohibitions against *any bills of attainder or de facto banishment*, which defendants' housing program clearly is.

As predicted by plaintiffs when they filed their complaint in November 2002, by July 23, 2003 the defendants had issued their 'tribal court' "NOTICE and ORDER of CONDEMNATION, DEMOLITION and REMOVAL" which:

(A) Condemned the plaintiffs' homes for failing to have a *FOUNDATION*, a 'defect' that defendants purposely *26 crafted in their 'housing' ordinance, a 'defect' which is NOT a deficiency under applicable New York State Law, nor a 'defect' under the United States HECP program.;

(B) ordered plaintiffs to immediately vacate their homes - under pains and threat of arrest, in the identical manner as these very same defendants had done to Plaintiff Danielle Schenandoah-Patterson.;

(C) ordered the immediate seizure, forfeiture, destruction, demolition and removal of the plaintiffs' homes.

By letter dated July 28, 2003 to the district court, the defendants informed the court that one of the five remaining homes had 'passed inspection'. The home that passed defendants' inspections is occupied by a non-party, Mr. Kirby Watson, the husband of plaintiff Monica Antone-Watson, who is the actual owner of such home. Mr. Kirby Watson is a 'member-in-good-standing' while plaintiff Monica Antone-Watson is not. The defendants addressed their letter to Mr. Kirby Watson advising that 'his' home had passed inspection even though the defendants had actual knowledge that home is actually owned by plaintiff Monica Antone-Watson.

By letter of August 5, 2003 to the district court, the defendants represented and promised that they would 'maintain the status quo' while an appeal was pending *before the defendants' own tribal court system*.

Three days later, on August 8, 2003, the district court granted defendants' motion to dismiss plaintiffs' Complaint *27 under [FRCP 12](#) for failing to state a cause of action under which relief can be granted [lack of jurisdiction] and issued its Memorandum and Decision. This decision rendered moot and also denied plaintiffs' motion for preliminary injunction which would have enjoined the defendants from taking any further action whatsoever against the plaintiffs in furtherance of defendants' 'housing program' until the merits of plaintiffs' habeas corpus petition could be heard.

In spite of plaintiffs' repeated requests during the nine months the matter was before the district court, the district court did not hold either oral arguments or an evidentiary hearing with respect to defendants' motion to dismiss or plaintiffs' claims, but rendered its summary dismissal decision without any evidentiary hearing or waiting until the merits had been heard.

The district court noted in its decision that it was required to accept plaintiffs' factual allegations as true if it decided defendants' motion to dismiss pursuant to [F.R.C.P. 12\(b\) \(6\)](#), however, the court proceeded to decide defendants' motion to dismiss pursuant to [F.R.C.P. 12\(b\) \(1\)](#) for lack of subject matter jurisdiction and observed that it did not need to accept as true contested jurisdictional allegations. The district court further acknowledged that it resolved jurisdiction facts by referring to evidence outside of the *28 pleadings (including almost 20 very lengthy affidavits on behalf of plaintiffs and five on behalf of defendants with each having attached numerous complex documents and exhibits), but still refused to conduct any evidentiary hearing or defer its jurisdictional decision until the merits were heard.

SUMMARY OF ARGUMENT

In 1998, Judge Pooler and the Second Circuit determined that as of that point in time, the defendants had *not yet done enough* to the plaintiffs to rise to the level of "severe actual or potential restraints on plaintiffs' liberties" sufficient to trigger habeas corpus protection under the Indian Civil Rights Act. This holding was in spite of the fact that the defendants had already convicted plaintiffs of treason, stripped and deprived them of and all Nation rights, benefits, distributions, participation or other entitlements given and available to others.

Since that 1998 determination, however, the defendants have: (a) enacted a housing program designed and intended to remove the plaintiffs from the 32-acre sovereign Oneida Nation Territory (as admitted by the defendants themselves as being the true and real purpose of the housing program); (b) adopted new housing standards known and designed to 'fail' plaintiffs' homes while also adopting laws prohibiting corrective work to avoid the sentence of

condemnation; (c) issued orders condemning all *29 of the plaintiffs' homes; (d) ordered plaintiffs to immediately vacate their homes under pains of arrest for failing to do so; (e) forcibly prevented plaintiffs from effecting repairs on their homes; (f) forcibly entered all of the plaintiffs' homes to conduct sham inspections because the outcome of the inspections was already known and preplanned; (g) forcibly seized, handcuffed, imprisoned one of the plaintiffs for not standing idly by while the defendants carried out their plan to make her homeless; (h) threatened to keep one of the plaintiffs in prison unless she agreed to allow defendants to demolish her home; (i) immediately after destroying her home, instigated child custody litigation against her based upon the homelessness caused by defendants' themselves; (j) have succeeded in forcing one of the plaintiffs off of the Territory and rendering incapable of returning to rebuild the home defendants destroyed; (k) are threatening and taking the steps to do the same to all of the other plaintiffs. The plaintiffs live in a constant state of fear and apprehension under the tyranny of defendants. They fear arrest at any instant, day or night, unless they submit and surrender to the sentence of homelessness and banishment imposed upon them by the 'housing' program. If they fail or refuse to immediately vacate and abandon their homes as ordered by *30 defendants, they are subject to immediate arrest and imprisonment not to be released until they do. Their liberty and freedom to be secure in their homes, which are identical to the homes of other members of the Nation, is restrained and denied. There is an imminent and ever present threat that the defendants will do to the other plaintiffs what they did to plaintiff Danielle Patterson and drive them homeless from the Territory as they did Danielle. These are sanctions and restraints not shared by the general membership. There was no trial or hearing of any kind afforded to the plaintiffs.

Clearly, the housing program is simply another layer and form of additional punishment inflicted by defendants upon the plaintiffs in continuation of the multi-year leadership dispute for which defendants had previously summarily convicted plaintiffs of alleged 'treason' arising out of the 1993 press conference and 1995 March for Democracy. The 'housing' program was purposely crafted by defendants to inflict upon plaintiffs the punishment of seizure, forfeiture and confiscation of their homes without compensation, thereby not only exact a significant additional penalty or fine upon plaintiffs for their prior alleged acts of treason, but also to ensure that plaintiffs are forcibly removed from the Territory and denied the means by which to return.

*31 The punitive purpose of the housing program as applied to plaintiffs is revealed not only by defendants' own admissions, but also by the targeted denial to only plaintiffs of the substantial financial compensation package freely given to everyone other than the plaintiffs under the very same program.

The defendants' 'housing' program is a Bill of Attainder *as applied to plaintiffs*, and as such, is in violation of 1302(9) of the ICRA. By definition, and the clear intent of Congress, being subjected to a Bill of Attainder is in and of itself an 'unreasonable restraint upon liberty' sufficient to trigger habeas corpus review under ICRA.

In addition, the defendants through the cumulative effect of all the punitive measures aimed at the plaintiffs have achieved a *de facto* banishment of the plaintiffs, and such banishment is in violation of the ICRA, accord Poodry, *supra*.

This illegal conduct on the part of the defendants is precisely the kind of misconduct that Congress intended to remedy by enacting the Indian Civil Rights Act of 1968. The district court erroneously adopted defendants' position that the dispute was merely a 'membership' dispute and the burden upon the plaintiffs simply 'economic'.

The district court erred in not seeing the extremely harsh punitive aspects of the housing program as applied to plaintiffs, resulting in forfeiture of homes and property and *32 causing plaintiffs' homelessness and complete financial inability to remain living on the 32-acre Territory. The district court erroneously accepted the subterfuge and deception concocted by defendants under the guise of a 'housing' program that concealed defendants' real purpose of ridding the Territory of and inflicting additional punishment upon only the plaintiffs.

The district court erroneously determined that it did not have jurisdiction to consider plaintiffs' applications for writ of habeas corpus to review and contest the 'detention' imposed under the housing program, such 'detention' being the unreasonable restraints upon plaintiffs' liberty to live on the Territory. The district court erroneously declined jurisdiction to review plaintiffs' claims that the housing program was a Bill of Attainder as applied to plaintiffs. The district court erroneously declined jurisdiction to review plaintiffs' claims that the housing program was *de facto* banishment as applied to plaintiffs, banishment without question being severe punishment and restraint on personally liberty "universally decried by civilized people". [Trop v. Dulles, 356 U.S. 86, 102 \(1958\)](#).

*33 POINT I

DISTRICT COURT ERRONEOUSLY DETERMINED THAT IT LACKED SUBJECT MATTER

JURISDICTION OVER PLAINTIFFS' WRIT OF HABEAS CORPUS TO CHALLENGE WHETHER THE HOUSING ORDINANCE WAS IN FACT A BILL OF ATTAINDER SPECIFICALLY AND EXPRESSLY PROHIBITED BY THE INDIAN CIVIL RIGHTS ACT

A. Congress expressly provided in the ICRA ([25 U.S.C. §1303](#)) 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.

By enacting the Indian Civil Rights Act of 1968 ("ICRA"), Congress imposed "certain restrictions upon tribal governments, similar, but not identical to, the restrictions contained in the Bill of Rights and made applicable to states pursuant to the Fourteenth Amendment" to the United States Constitution. [Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 \(1978\)](#).

The Indian Civil Rights Act clearly, unambiguously and unequivocally states: "*No Indian Tribe in exercising powers of self-government shall--(9) pass any bill of attainder or ex post facto law.*" [§ 1302](#). Constitutional rights.

By its very definition, a bill of attainder is the legislative infliction of *additional punishment* in relation to a 'crime' for which the person had already been convicted and sentenced.

The Supreme Court has defined bills of attainder as:

... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a ***34** way as to *inflict punishment* on them without judicial trial.

[United States v. Lovett, 328 U.S. 303, 315 \(1945\)](#). (emphasis added)

Therefore, Congress understood and intended the ICRA to vest the courts of the United States with habeas corpus jurisdiction to review and determine whether any person had been subjected to additional punishment in the form of a bill of attainder. Other United States' courts have followed and enforced this clear Congressional intent.

In [Dodge v. Nakai, D.C.Ariz. 1969, 298 F.Supp. 26](#), a tribal council order merely excluding from the reservation the program director of a non-profit legal service corporation organized to provide legal assistance to indigent Indians was found to constitute an unlawful bill of attainder in violation of the ICRA.

The factors to be considered in determining whether a legislative act imposes 'punishment' on a person are set forth in [Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 \(1963\)](#). Upon consideration of those factors, the Court concludes that the exclusion of Mitchell from the Navajo Reservation constitutes 'punishment' as that term has been interpreted by the Courts.

[Dodge v. Nakai, 298 F.Supp. 26,34 \(D.C.Ariz. 1969\)](#)

The clear intent of Congress in the ICRA, by BOTH expressly prohibiting any Indian Tribe from passing "*any bill of attainder*" and then providing as the only remedy under the ICRA the privilege of the writ of habeas corpus to test the legality ***35** of his "detention" was to equate "bills of attainder" with impermissible "detention" as contemplated under the ICRA. Any other interpretation renders the ICRA nonsensical and void.

Bills of Attainder are so repugnant that they are specifically and explicitly prohibited by the Bill of Rights.

While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply--trial by legislature. [U.S. v. Brown 381 U.S. 437, 442, \(U.S.Cal. 1965\)](#)

Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense. [FN18]

***36** FN18. III (John C.) Hamilton, History of the Republic of the United States, p. 34 (1859), quoting Alexander Hamilton. James Madison expressed similar sentiments: Ibid at 444

In 1810, Chief Justice Marshall, speaking for the Court in [Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162](#), stated that '(a) bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.' This means, of course, that what were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups. Ibid at 447

Congress, being likewise repulsed by bills of attainder, included a clear, specific and explicit prohibition against *any* bills of attainder when it enacted the ICRA in 1968. Congress also specifically provided, at [25 U.S.C. §1303](#) of ICRA, that victims of arbitrary acts on the part of tribal governments have the right to seek review by habeas corpus: "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."

Thus, Congress, using its plenary powers over Indian tribes, prohibited 'any' bill of attainder with the remedial purposes of the ICRA requiring that all criminal convictions *and* ***37** *punishments* inflicted by Indian tribes in violation of the ICRA be reviewable by habeas corpus.

It is axiomatic that the court's role is to apply a statutory provision as written, not as court would write it. Where the legislature makes a plain provision without making any exceptions, the courts can make none. Courts must construe statutes as they are written, and not rewrite them to suit their views of what they think statutes ought to say or to avoid difficulties or conflicts in construing and applying them to certain people or groups. Courts should confine themselves to construction of a statute as it is written and not attempt to supply omissions, create exceptions or otherwise amend or change the law under the guise of construction.

It is settled law that in construing a statute, the court must follow the *plain meaning rule*. See 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46.01 (5th ed.1992) (hereinafter *Sutherland*). "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms." [Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 \(1917\)](#). "The 'strong presumption' that the plain language of the statute expresses congressional intent *1251 is rebutted only in 'rare and exceptional circumstances,' when a contrary ***38** legislative intent is clearly expressed." [Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135-36, 112 S.Ct. 515, 116 L.Ed.2d 496 \(1991\)](#) (citations omitted) (quoting [Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 \(1981\)](#)).

This requirement that the Court accept the plain language is tempered only by the admonition that a literal interpretation must be rejected if it would lead to an absurd result. See 2A *Sutherland* § 46.07; [United States v. Brown, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 \(1948\)](#). However, it is settled law that "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." [Caminetti v. U.S., 242 U.S. 470, at 485, 37 S.Ct. 192 \(U.S.1917\)](#).

The plain meaning rule applies here in that Congress intended to vest the courts of the United States with habeas corpus jurisdiction to review and grant relief to any person subjected to any bill of attainder by any Indian tribe.

Directly consistent with this plain meaning of the ICRA, in *Santa Clara Pueblo vs. Martinez*, supra., at 59, the U.S. Supreme Court held that Congress did not intend to create a private cause of action for injunctive and declaratory relief in a the federal courts to enforce ICRA and that the only remedy provided ***39** by Congress under the ICRA in the federal courts is a habeas corpus action. The Supreme Court in *Santa Clara Pueblo* made the following observation regarding the legislative history underlying [25 U.S.C. §1303](#) (right of habeas corpus relief): This history, extending over more than three years, indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments on one hand, and on the other, avoiding undue or precipitous interference in the affairs of the Indian people."

As originally proposed, the ICRA would have provided for a trial *de novo* in the district court of *all* tribal 'convictions' The ultimate change to habeas corpus as the only procedure for review was intended merely to limit the inquiry to deciding whether an accused's Constitutional rights were violated, not to exclude certain criminal cases from review altogether. See, [Santa Clara Pueblo v. Martinez, 436 U.S. 49, 76](#) (dissenting opinion) (quoting from the Senate Summary Report)

The Supreme Court also specifically recognized in *Santa Clara Pueblo* that the ICRA was passed to modify cases such as [Talton v. Mayes, 163 U.S. 376 \(1896\)](#) which had held that the Fifth Amendment did not affect tribal self-government. The Supreme Court stated as follows:

As the court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of self-government which tribes otherwise possess (citations omitted). Title I of the ICRA, [25 U.S.C. §§1301-1303](#), represents an exercise of that authority. In [*40 25 U.S.C. §1302](#), Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and Fourteenth Amendment.
(emphasis added)

The remedial or curative purpose of habeas corpus in the context of Indian criminal proceedings was recognized by the Ninth Circuit over 25 years ago in [Settler v. Lameer, 419 F.2d 1311 \(9th Cir. 1969\)](#) and [Settler v. Yakima Tribal Court, 419 F.2d 486 \(9th Cir. 1969\)](#), cert. denied [398 U.S. 903 \(1970\)](#).

In fact, the Supreme Court referenced *Settler v. Yakima*, supra, in *Santa Clara Pueblo* as an example of an situation where a writ of habeas corpus would be available "to a person detained by a [tribal] court in violation of the Constitution." [436 U.S. at 56, n.7](#). It is respectfully submitted that the legislative seizure, forfeiture and confiscation of private homes is typical of "the most serious abuses of tribal power [which occur] in the administration of criminal justice", which Congress sought to remedy by enacting the ICRA. [Santa Clara Pueblo v. Martinez, 436 U.S. at 71](#).

This court recognized the expansive jurisdiction of the United States Courts under the ICRA in [Poodry v Tonowanda, 85 F.3d 874 \(1995\)](#). "We begin with three decades of case law rejecting the notion that a writ of habeas corpus ... is a formalistic remedy whose availability is strictly limited to [*41 persons in actual custody](#)." Id, at 893. Poodry also quoted from the case of *Jones v Cunningham* as follows: "It [habeas corpus] is not now and never has been a static narrow, formalistic remedy: its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." Id.894, [Jones, 371 U.S. 236, 240](#). Actual physical custody is not a jurisdictional prerequisite for federal habeas review under Indian Civil Rights Act of 1968. *Poodry v. Tonawanda Band of Seneca Indians*, C.A.2 (N.Y.) 1996, [85 F.3d 874](#), cert.denied [519 U.S. 1041](#).

If the defendants' 'housing program' is a bill of attainder as applied to plaintiffs, then the plain meaning of ICRA is that Congress determined that being subject to a bill of attainder constitutes sufficient 'detention' under ICRA to vest the United States courts with habeas corpus jurisdiction to review the 'legality' of that 'detention' and issue appropriate remedial orders releasing the plaintiffs from the illegal detention and unreasonable restraints imposed by that bill of attainder. To the extent that the district court read the ICRA as reflecting a policy of limited access to the federal courts to review unconstitutional and expressly prohibited punishments in the form of bills of attainder, such holding was incorrect and should be reversed.

[*42](#) B. 'As applied' to only the plaintiffs, the 'housing' program is a Bill of Attainder having nothing to do with improving plaintiffs' homes but everything to do with inflicting upon only the plaintiffs the additional punishment of homelessness and being rendered incapable of living on the sovereign territory, thereby triggering the habeas corpus remedy and jurisdiction under the ICRA as Congress clearly intended.

In the ICRA, Congress specifically incorporated [Article I, Section 9, Clause 3 of the Constitution](#), the right to be free from illegal bills of attainder and ex post facto laws. [25 U.S.C. §1302\(9\)](#). As previously noted, the Supreme Court has defined bills of attainder as:

... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial.

[United States v. Lovett, 328 U.S. 303, 315 \(1945\)](#).

The present matter is directly on point with [Davis v Kinloch, 752 S.W. 2d 420 \(Mo. Ct. App. 1988\)](#) in which the court found *under the circumstances* the legislative act of defendants sending a letter *revoking* the plaintiff's license to continue operating his restaurant constituted a prohibited bill of attainder. In *Davis*, as is here, there was a well-documented historical dispute between the parties and in furtherance of that dispute, the mayor *revoked* the right of the plaintiff to continue operating his restaurant. In this subject matter, the defendants designed and concocted a scheme by which they could revoke the right of the plaintiffs to remain living in their [*43](#) homes by purposely selecting new standards known in advance to fail the plaintiffs' homes; forcibly evicting plaintiffs from their homes; seizing plaintiffs' homes, then destroying plaintiffs' homes, while denying ONLY TO PLAINTIFFS the financial support and assistance given to others under the very same program, thereby achieving a *de facto* banishment of only the plaintiffs by destroying all capability of plaintiffs to live on the Territory.

The defendants' 'housing program' being a Bill of Attainder 'as applied' to plaintiffs is also directly in accord with this Court's analysis and holding in [McMullen v United States of America, 953 F.2d](#)

[761 \(2nd Circuit 1992\)](#) in which the Second Circuit specifically found that a "*Supplementary Extradition Treaty is a bill of attainder as applied to McMullen*". Ibid 764

[The district court] held that the three requisites had been satisfied, since the Supplemental Extradition Treaty: (1) specified the affected parties; (2) imposed punishment, and (3) failed to provide the protection of judicial process. [Selective Service] at 847, 104 S.Ct. at 3352; [McMullen, 769 F. Supp. 1278, 1284 \(S.D.N.Y. 1991\)](#). We agree.

Ibid 765.

The Bill of Attainder Clause serves as an important "bulwark against tyranny". [United States v. Brown, 381 U.S. 437, 443, 85 S.Ct. 1707, 1712, 14 L.Ed.2d 484 \(1965\)](#) The Supreme Court in *Brown*, supra. at 441, described the widespread employment of bills of attainder in England during the sixteenth *44 century to punish citizens for attempting the overthrow of the government.

At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bill of pains and penalties. [Article I, Section 9, Clause 3 of the Constitution](#) prohibits these lesser penalties as well as those of imposing death. [Cummins v. Missouri, 71 U.S. 277, 323 \(1867\)](#). Historically, used in England in times of rebellion of "violent political excitements", bills of pains and penalties commonly imposed imprisonment, *banishment*, and the *punitive confiscation of property*. See, [Nixon v. Administrator of General Services, 433 U.S. 425, 474 \(1977\)](#). In this country, the list of punishments has been expanded to include legislative bars to participate by individuals or groups in specific employments or professions. See., e.g., [United States v. Brown, 381 U.S. 437 \(1965\)](#), Communist Party members were barred from offices in labor union); *United States v. Lovett*, 381 U.S. (1946) (salaries terminated to three named Government employees).

The determination of whether a legislative act such as defendants' ordinance constitutes an impermissible bill of attainder is *very fact dependent* and *requires an examination* of the legislation under the three tests: (a) historical, (b) functional and (c) motivational tests. Under all three tests, the defendants' 'housing program' *as applied* to plaintiffs, *45 constitutes a prohibited bill of attainder: (a) *historically*, the seizure and forfeiture of homes (whether those homes be 'estates' or 'trailers') has been punishment inflicted by bills of attainder upon people who have been previously 'convicted' of 'treason', as plaintiffs had been; (b) *functionally*, *only the plaintiffs* were identified and targeted by the label 'not-in-good-standing' for suffering the sentence under the 'housing program' of having their homes demolished without compensation, being denied any and all financial assistance under the program and thereby being rendered homeless and incapable of living on the Territory, thus accomplishing a *de facto* banishment of only the plaintiffs without having to actually utter the word 'banished'; and (c) *motivationally*, the defendant Rinko's own admission to Attorney Olshansky conveying the admission of another of defendants' attorneys, Eleanor Smith, confirmed that the REAL PURPOSE of defendants' housing ordinance was to 'rid' the Territory of the plaintiffs and thereby inflict additional punishment upon the plaintiffs for their prior alleged treason. The facts chronicling the multi-year dispute between plaintiffs and defendants also reveal the real punitive purpose of defendants' program that targets and denies to only the plaintiffs any of the financial assistance given to others under the same program.

*46 Under all three tests, defendants' housing ordinance is revealed and exposed as a 'textbook' bill of attainder as applied to plaintiffs.

The district court committed error by failing to do a proper analysis of the defendants' housing program as applied to plaintiffs, consistent with *McMullen v United States of America*, supra. The district court erroneously resolved numerous contested questions of fact in order to dismiss plaintiffs' cause without any factual hearing or decision on merits.

Plaintiffs' claims go directly to contesting the defendants' characterization of its 'housing program' as a 'home improvement' program, especially as applied to plaintiffs. In [Trop v. Dulles, 356 U.S. 86 \(1958\)](#), supra, the Supreme Court disposed of an identical bit of semantics as follows:

How simple would be the tasks of constitutional adjudication and of law generally is specific problems could be solved by inspection of the labels pasted on the! Manifestly the issue of whether [the law in question] is a penal law cannot be thus determined. [356 U.S. at 94](#).

In all of the legal arguments filed by defendants' attorneys, the defendants have offered absolutely NO explanation why the defendants wrote their 'housing' program so as to identify only the plaintiffs [by using the label "members not-in-good-standing"] as being the ONLY persons living on the Territory targeted to have their homes condemned and demolished while also being *denied all of the financial package assistance* *47 'housing improvement' aspects of the program freely given to all others living on the Territory.

Defendants not only knew such 'financial improvement' package is essential and necessary for

plaintiffs to be able to remain living on the Territory, but defendants purposely targeted only the plaintiffs for such disparate treatment to take advantage of the fact that defendants had previously denied to plaintiffs any and all other member benefits. By rendering the plaintiffs destitute and homeless, the defendants knew they would achieve a *de facto* banishment from the Territory.

As applied to only the plaintiffs, the defendants' 'housing program' is not about 'improving' the quality of housing, but is about layering on additional punishment AND driving the plaintiffs out of and off of the Territory. As applied to only the plaintiffs, the defendants' 'housing program' is nothing more than a 'Bill of Attainder' aimed and targeted at ONLY the plaintiffs in direct violation of the express and specific prohibition against bills of attainder contained in the Indian Civil Rights Act. As applied to only plaintiffs, the defendants intentionally crafted their housing program to deny to ONLY the plaintiffs the ability to live peacefully on the 32-acre sovereign Territory and subject only the plaintiffs to the unreasonable restraint and denial of liberty to live ON the 32-acre Territory.

***48** As applied only to plaintiffs, the 'housing program' is nothing more than legislative infliction of additional punishment upon only the plaintiffs for what the defendants previously claimed were 'treasonous' verbal attacks upon the defendants. The retroactive application of new housing standards designed to fail plaintiffs homes coupled with the targeted deprivation of financial assistance necessary to rebuild a home in the same location constitutes *de facto* banishment from plaintiff's native, sovereign Territory and satisfies the historical or traditional test as punishment associated with bills of attainder. See, e.g. [McMullen v. United States, supra, 989 F.2d 603, 607.](#)

The discriminatory denial by defendants to only plaintiffs of the financial aspects of the 'housing improvement' program necessary to perform the 'home improvement' serves no legitimate purpose. The general membership of the Oneida Nation is not subjected to the 'housing program', nor are any others sentenced to be made homeless by having their privately owned homes demolished after being forcibly evicted and being denied financial housing assistance and support.

The defendants' 'housing program' violates the Bill of Attainder clause of the ICRA and is sufficient as a matter of law to furnish the jurisdictional predicate for the court to hear an application for a writ of habeas corpus under ***4925 U.S.C. §1303**. If being subjected to additional punishment under a bill of attainder were not a sufficient restraint on liberty to permit habeas corpus review under **25 U.S.C. §1303**, it would be impossible to have judicial review of most if not all violations of the Bill of Attainder Clause of the ICRA, **25 U.S.C. §1302(9)**. Given Congress' clear, unequivocal and unambiguous provision for judicial review of violations of **25 U.S.C. §1302(9)** by habeas corpus, the district court should have found that Congress intended that the possibility of the housing program being a bill of attainder as applied to plaintiffs was sufficient 'detention' to furnish jurisdiction for habeas corpus review and relief, therefore, it was error to dismiss plaintiffs' complaint and not allow this matter to proceed to a hearing on the merits.

C. The district court failed to properly apply and construe the term "detention" as used in **25 U.S.C. §1303** consistent with the legislative history of the ICRA and the decision of the Second Circuit in *Poodry v. Tonawanda Band of Seneca Indians*, C.A.2 (N.Y.) 1996, **85 F.3d 874**, cert. denied **519 U.S. 1041**

This present situation is as egregious a violation of plaintiffs' rights and protections under the ICRA as that suffered by the plaintiffs in *Poodry*.

The only difference between the present case and that in *Poodry*, *supra*, is that in *Poodry*, the tribal defendants actually uttered the word "banished" and created a *de jure* (in law) banishment of the plaintiffs whereas in this present matter, the ***50** tribal defendants crafted a subterfuge they called a 'housing program' and achieved exactly the same *de facto* (in fact) banishment of plaintiffs to the same level and degree as imposed upon the plaintiffs in *Poodry*.

The defendants here, however, have been able to achieve the *actual* banishment of plaintiffs without ever uttering the word 'banished'. Plaintiffs' claims go directly to contesting the defendants' characterization of its 'housing program' as a 'home improvement' program, especially as applied to plaintiffs.

In *Trop v. Dulles*, **356 U.S. 86 (1958)**, *supra*, the Supreme Court disposed of an identical bit of semantics as follows:

How simple would be the tasks of constitutional adjudication and of law generally is specific problems could be solved by inspection of the labels pasted on the! Manifestly the issue of whether [the law in question] is a penal law cannot be thus determined. **356 U.S. at 94.**

The defendants learned from *Poodry* and the previous decisions between the plaintiffs and defendants by the district court and Second Circuit by which they knew not to use the term

'banish' because that would have 'labeled' their real objection, and admitted and revealed what they were really doing to plaintiffs.

The defendants here have achieved *in fact* that which they knew they were specifically prohibited from doing *by law* and hope to avoid discovery by trying to cloak themselves in the very subterfuge they concocted to conceal their true, real ***51** intent and purpose. The district court committed error by not examining the defendants' housing program as such applied to plaintiffs as defendants achieving a *de facto* banishment of plaintiffs in direct violation of *Poodry*.

All of the repugnancy, severe restraint upon liberties and analysis of *Poodry*, apply equally to this situation in which the plaintiffs have been banished *in fact* as compared to *Poodry* where the plaintiffs were banished in law.

The *de facto* banishment of the plaintiffs from the Oneida Nation Sovereign Territory has been accomplished by the defendants' intentionally layering on one deprivation after another of Tribal benefits [including denial of plaintiffs' rights under various treaties with the United States], then in 2000, adopting new 'housing standards' purposely selected to guaranty that plaintiffs' homes failed 'inspections' while simultaneously denying ONLY to plaintiffs any and all financial reimbursement, compensation or assistance given to all others under the very same program and which defendants knew are absolutely essential to the plaintiffs' ability to rebuild new homes on the 32- acre Oneida Territory.

The *de facto* banishment of only the plaintiffs achieved by the defendants' 'housing program' violates the ICRA in the same manner as de Jure banishment did in *Poodry*. As such, there exists sufficient as a matter of law to furnish a jurisdictional ***52** predicate for the court to hear an application for a writ of habeas corpus under [25 U.S.C. §1303](#).

If questions of *de facto* banishment were not a sufficient restraint on liberty to permit habeas corpus review under [25 U.S.C. §1303](#) as de jure banishment was in *Poodry*, it would be impossible to have judicial review of most if not all 'banishment' violations under the ICRA because those in control of Tribal governments, as these defendants did, would devise more devious and sophisticated means by which to achieve a *de facto* banishment without uttering the word "banished".

Such a holding would enable those in control of Tribal governments to circumvent the prohibitions and limitations imposed on them by Congress through the ICRA, and would deprive the victims of *de facto* banishment of the rights and protections and remedies Congress intended for them, as confirmed and held in *Poodry*. It is respectfully submitted that the district court misread the function and intent of the ICRA, as clarified in *Poodry*. The district court misapplied the law and contradicted the holding in *Poodry*, *supra*, in declining to exercise subject matter jurisdiction in this case.

***53** POINT II

FUTILITY DEFENDANTS' TRIBAL COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT

"That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies." See [United States ex rel. Cobell v. Cobell, 503 F.2d 790 \(9th Cir. 1974\)](#), *cert. denied*, [421 U.S. 999 \(1975\)](#).

The district court stated that because it had granted defendants' motion to dismiss plaintiffs' complaint, it "need no address defendants alternative arguments concerning plaintiffs' failure to exhaust administrative remedies prior to seeking habeas corpus relief ..." However, throughout its decision and analysis, the district court makes erroneous conclusions of law pertaining to the subject matter jurisdiction of the defendants' tribal court over the claims being raised by plaintiffs.

These erroneous conclusions and statement of law by the district court as to the jurisdiction of the defendants' tribal court indirectly and directly caused the district court to ultimately dismiss plaintiffs' complaint.

ON page 3 of its Memorandum and Decision (SPA-5), the district court states: [t]he housing ordinance at issue was upheld in September 2001 by [Tribal Court] Chief Judge Stewart F. Hancock, Jr. of the Oneida Indian Nation Trial Court as valid ***54** under the ICRA and as a reasonable exercise of the Oneida Indian Nation's power of self-government under Santa Clara..."

An examination of the September 10, 2001 tribal court decision cited by the district court (SPA-38) reveals that the district court was in error in its interpretation and understanding of the holding of that tribal court ruling. Specifically, the only issue before the tribal court at that time in September 2001 was the question of the mandatory inspections (SPA-45), having nothing to do with whether the whole 'housing' program as applied to plaintiffs was in fact a bill of attainder or whether the 'housing' program was a means by which defendants could accomplish *de facto* banishment of plaintiffs without uttering the label 'banished'.

A decision that an inspection carried out under Ordinance No. 94-01B and Ordinance No. 00-03 would constitute an "unreasonable search and that the inspection provisions of the Ordinance were for that reason invalid would, in this Court's judgment, amount to an unwarranted interference with the Nation government's judgment in instituting the Housing Improvement Program and enacting the inspection provisions as part of the legislation necessary to implement it. Ibid. SPA-50

Directly contrary to the understanding of the district court, the defendants' tribal court has absolutely no jurisdiction to hear and decide the claims of the plaintiffs presented here.

***55** Reference the Memorandum Decision of the defendants' Oneida Nation Court filed on January 9, 2001 (SPA-31) in which these plaintiffs pursued Indian Civil Rights Act claims against the defendant Halbritter and the defendants' tribal court summarily dismissed plaintiffs' claims on the ground of "the Oneida Nation Court lacks subject matter jurisdiction because the complaint involves matters which are expressly excluded from this Court's jurisdiction under Article 3, subsections

The January 9, 2001 is an exhaustive and excellent discussion as well as inclusion of the Article 3 specifically delineating the limited subject matter jurisdiction which these very same defendants vested in their own tribal court which they devised to further insulate and immunize themselves against actions and claims such as this by plaintiffs under the ICRA. (SPA-33) Furthermore, the defendants have acknowledged that their tribal court does not have subject matter jurisdiction. This misunderstanding of the defendants' tribal court jurisdiction permeated the district court's entire thought process and analysis from the very outset. Reference the court's Memorandum and Decision at page 8 (SPA-8) where the district court states:

In the absence of federal court jurisdiction - an obstacle brought to the attention of plaintiffs on the day their lawsuit was filed (A-0015) and subsequently during the telephone conference in May 2003 - it should have been clear to plaintiffs that their ***56** remedy, if any, in challenging enforcement of the housing ordinance lay in those remedies available through the Oneida Nation Trial and Appellate Courts. Ibid at SPA-9

Because of the district court's erroneous understanding that the defendants' tribal courts have no subject matter jurisdiction, the district court erroneously dismissed plaintiffs' complaint, noting incorrectly that the defendants' had tribal court jurisdiction to hear plaintiffs' appeal (SPA-12) Defendants' preemptive foreclosure of the "judicial process" by denying the Tribal Court of the authority or jurisdiction to hear the claims and objections to the ordinances and their enforcement against the plaintiffs bars any claim of failure to exhaust tribal remedies. The decisional authority indicates makes clear that Plaintiffs cannot be required to seek a remedy through a process that is utterly futile.

In [National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 \(1985\)](#), the Supreme Court specifically stated that exhaustion of tribal remedies is not required where: an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction.

Plaintiffs' situation falls squarely within the enumerated exceptions. Furthermore, the nature of the Plaintiffs' situation ***57** - evidence by what happened to Danielle Shenandoah -- shows that efforts to exhaust the "tribal remedies" proposed by Defendants would necessarily fail. Federal Courts when confronted with issues of whether litigants have been afforded due process of law in tribal courts have expressly held that basic due process guarantees must be adhered to in the tribal forum:

A federal court must also reject a tribal judgment if the defendant was not afforded due process of law.... The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments, we must ask no less of Native American tribes.

[Wilson v. Marchington, 127 F. 2d 805, 811 \(9th Cir. 1997\)](#)

Such circumstances precisely mirror those found in [Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 101 \(8th Cir. 1976\)](#). *Rosebud Sioux Tribe* involved an election dispute in which incumbent members of a tribal council refused to yield their positions to the winners of the election. Instead, the incumbents passed a tribal resolution declaring the president-elect of the tribal council guilty of illegal activities, and vested the incumbent president with the power to imprison for contempt those persons who failed to cooperate with the investigation. In holding that the winners were not required to exhaust their tribal remedies before filing their ICRA claims, the Eighth Circuit stated:

***58** ... to require the appellees to resort to tribal remedies would be a futile gesture and would cause irreparable harm. There is sufficient evidence to support the District Court's conclusion

that appellees could not receive a fair hearing from the Tribal Council ... and the Tribal Council was the supreme judicial authority.

[Rosebud Sioux Tribe, 534 F.2d 98, 101.](#)

POINT III

IN ADDITION TO MAKING NUMEROUS GROSS ERRORS IN ITS FINDINGS AND DECISIONS, RATHER THAN GRANTING RESPONDENTS' MOTION UNDER [RULE 12\(b\)](#) TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, DISTRICT COURT SHOULD HAVE DEFERRED ITS JURISDICTIONAL DECISION PENDING HEARING ON THE MERITS OF PLAINTIFFS' HABEAS CORPUS APPLICATION

The district court devoted over one-half of its Memorandum-Decision to rendering 'findings of fact' which it later used and relied upon to justify its refusal to exercise subject matter jurisdiction in this case. A vast majority of these findings of fact directly were at best disputed by the parties with many being directly contrary to the proofs and documents submitted via the numerous Affidavits comprising the 'factual' record below. Plaintiffs submitted twenty-one (21) affidavits or declarations in support of its contentions and arguments. Defendants submitted five (5) affidavits or declarations in support of its arguments.

From the outset, the district court adopted an incorrect standard applicable to plaintiffs' habeas corpus petition when it rejected and denied plaintiffs' request for a temporary ***59** restraining order on November 13, 2002. The district court never wavered from this erroneous standard, and in fact, appears to have ignored filings by plaintiffs which were filed and served in early July 2003, but not docketed or considered until August 8, 2003, the date of the district court's order of dismissal.

The pivotal issue before the district court is determining the real purpose of the defendants' housing program as such program is applied to the plaintiffs.

On February 23, 2003 (00638), plaintiffs pointed out to the district court that defendants had never denied the express and specific admission of defendant Rinko to Attorney Barbara Olshansky that another of defendants' attorneys named Eleanor Smith had admitted to defendant Rinko that she and others had been directed by defendants to *devise a scheme by which to "evict the plaintiffs and other 'dissidents' from the 32-acre Oneida Nation territory."* [Olshansky Declaration, p. 2, par. 3]

Plaintiffs further noted that defendants had not denied the admission by defendant Rinko that defendants made a *"decision to develop a health and safety housing plan that could be used to accomplish the same ends [forcible eviction of the plaintiffs from their homes and from the 32-acre Territory] and provide a seemingly 'legitimate' justification for ridding the Territory of the dissidents"*. (A-454)

***60** Approximately one week later, defendants were permitted to file a surreply which included a declaration by defendant Rinko in which he denies saying those statements to Attorney Olshansky (which were contemporaneously written in notes maintained by Attorney Olshansky), however, NO sworn statement was ever forthcoming from defendants' attorney Eleanor Smith denying that she spoke those or similar words to defendant Rinko.

Rather than hold an evidentiary hearing, or defer its decision as to jurisdiction until the merits had been heard, the district court abused its discretion and resolved the pivotal question of fact as to whether the real purpose of the defendants' housing program as applied to plaintiffs was to inflict additional punishment.

The district court made numerous findings of disputed fact without holding any evidentiary hearing or waiting until a record on the merits had been developed. It was error for the district court to have refused to consider plaintiffs' plight without at least holding evidentiary hearings to resolve the dispute on the merits, which in this case, were inextricably intertwined with the jurisdictional decision concerning the level of 'detention' necessary to invoke habeas corpus relief and whether the defendants' housing program was in reality a bill of attainder as applied to plaintiffs. See, ***61**[Herbert v. National Academy of Sciences, 974 F2d. 192, 197-98 \(D.C. Cir. 1972\)](#).

CONCLUSION AND RELIEF SOUGHT

The plaintiffs are challenging the defendants' 'housing' program as being a 'Bill of Attainder' in direct violation of [25 U.S.C. §1302\(9\)](#) of the Indian Civil Rights Act and are also claiming that the 'housing' program constitutes de facto Banishment of plaintiffs from the 32-acre Oneida Nation sovereign Territory and in direct violation of the plaintiffs' rights and protections under the Indian Civil Rights Act.

Congress specifically provided at [25 U.S.C. §1303](#) of ICRA that victims of arbitrary acts on the part of tribal governments have the right to seek review by habeas corpus: "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."

If the courts of the United States summarily refuse jurisdiction of cases seeking to determine whether actions of tribal government do violate prohibitions of the ICRA against Bills of Attainder and de facto banishment, then victims of such actions have absolutely no forum in which their claims can be heard. Such would directly contravene the purpose and intend of Congress when it enacted the ICRA.

***62** The district court erroneously summarily denied jurisdiction of plaintiffs' challenge without any evidentiary hearing or deferring such jurisdiction question until after the merits had been presented and applied incorrect standards for reviewing and determining whether the restraints upon plaintiffs' liberty were sufficiently severe to constitute 'detention' as contemplated by Congress in the ICRA.

The district court's Memorandum-Decision and Order of August 8, 2003, and the Decision and Order of August 12, 2003 [p. A-935] should be reversed and this case remanded to the district court to determine the merits of plaintiffs' application for writ of habeas corpus consistent with the principles and arguments set forth above.

v.

2003 WL 24072371

Briefs and Other Related Documents ([Back to top](#))

- [2003 WL 24072370](#) (Appellate Brief) Reply Brief for Plaintiffs-Appellants (Dec. 23, 2003)[Original Image of this Document \(PDF\)](#) 
 - [2003 WL 24072369](#) (Appellate Brief) Brief for Appellees (Dec. 08, 2003)[Original Image of this Document \(PDF\)](#) 
 - [03-7862](#) (Docket) (Aug. 25, 2003)
- END OF DOCUMENT