# Protecting Sovereignty

## The Role of Tribal Courts

Tribal Judicial Institute

UND School of Law

*This project was supported by grant no. 2010-IC-BX-K001 Awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and delinquency Prevention, and the Office for Victims of Crime. The opinions, findings, and conclusions or recommendations expressed in this publication/ program/ exhibit are those of the author(s) and do not necessarily reflect the views of the Department of Justice.*

## FOREWORD

*This publication is intended to serve as a resource for the planning, implementation and enhancement of tribal justice systems and to:*

- *provide general information relevant to tribal sovereignty and the role that tribal courts play in the protection and preservation of tribal sovereignty*
- *introduce the reader to the separation of powers doctrine and provide general points of discussion relevant to separation of powers*
- *introduce the reader to the concept of judicial independence, offer suggestions on means to achieve judicial independence and provide general points of consideration relevant to judicial independence*

# Table of Contents

# Protecting Sovereignty

## The Role of Tribal Courts[1]

### I. Tribal Sovereignty

Tribal sovereignty has, for many years, been the subject of much debate amongst historians, legislators and members of the legal community. The questions of tribal sovereignty emerged in the early 1800's in a trilogy of cases commonly referenced as "The Marshall Trilogy". Although these cases were rooted in territorial discussions one question that the Court addressed was the political status of tribes within the United States. In addressing this issue the Court drew upon international principles of law to ultimately find that tribes were in fact self-governing; however the Court determined that the self-governance of tribes in the United States had been diminished. Although legal scholars have criticized the Courts' application of international law, the holdings of the Court from the trilogy remain the primary backdrop for tribal sovereignty and ultimately for the political status that tribes now possess within the United States.

The holdings in these three major United States Supreme Court cases resulted in a determination that the political status of tribes was that of "domestic dependent nations".[2] The Court went on to find that Tribes possess inherent rights of self-governance subject to

[1] Authored by Michelle Rivard Parks, Associate Director, TJI, UND School of Law. Mrs. Parks is a former tribal prosecutor, tribal attorney and tribal judge.

[2] *Worcester v. Georgia*, 31 U.S. 515 (1832).

divestiture by the United States government.[3] Another way of stating this premise is that tribes maintain all "inherent" rights of a sovereign not otherwise extinguished by the United States Congress through treaty or legislative act. [4]

In a legal and governmental context sovereignty can be defined as the absolute and independent right to make one's own laws, rules or regulations and to be governed by the same.[5] To this end tribal governments retain this same absolute right to make laws and to be governed by them subject only to the plenary power of the federal government.[6] Tribes are thus trying to delicately balance the management of their own affairs with the scrutiny of outside jurisdictions, a difficult balance knowing that federal assertion of plenary power could, at any time, interfere with that exercise.

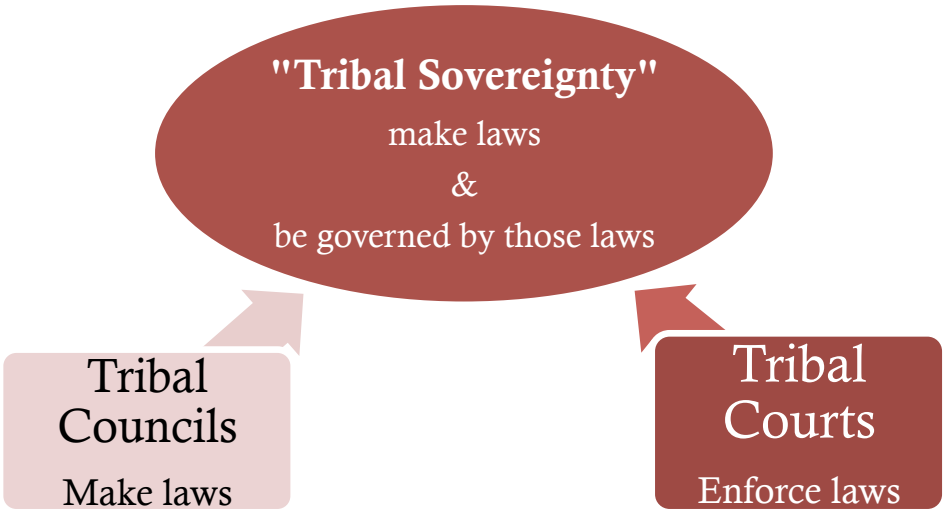
As a result of this very real concern, as tribes establish laws, rules and regulations, tribal courts play a vital role in the protection and preservation of tribal sovereignty. Tribal Courts protect and preserve sovereignty by:

- providing a forum for the interpretation of tribal laws, rules and regulations in a manner that is consistent with the values, customs and traditions of the tribe;
- circumventing the need for involvement of federal or state courts in the tribal dispute resolution process for those causes of action arising within the tribal community; and
- providing a forum for the enforcement of orders from outside jurisdictions as part of the larger legal landscape in the United States.

---

[3] Id.
[4] *Cohen's Handbook of Federal Indian Law*, § 4.01[1][a] (2005 ed.) (citing *United States v, Wheeler*, 435 U.S. 313, 322-323 (1978)).
[5] Blacks Law Dictionary, "Sovereignty", p. 1398 (1990)(6th ed).
[6] *U.S. v. Kagama*, 118 U.S. 375 (1886).

As tribal governments seek to address the safety needs of their communities, develop stable economies and provide for basic needs of community members the perception and integrity of tribal legal infrastructures and tribal courts become increasingly important factors in the protection and preservation of tribal self-determination.



## A. Tribal Governments

Each tribe has a unique history in terms of interaction with colonists and historical relationships with the United State's government. Equally true is the fact that tribal customs, traditions and notions of justice vary greatly among the more than 565 federally recognized tribes in the United States. Despite these truths, many modern forms of tribal governments find their roots in written constitutions that have been adopted by tribal members.

The written constitutions of tribes create a legal framework for tribal governments by establishing the governing body, a process for selecting tribal governmental officials and setting forth the duties and responsibilities of tribal government officials.[7] Although tribal constitutions afford tribes the opportunity to create separate braches of government to divide governmental authorities into legislative, judicial &/ or executive branches, many tribal constitutions have not done so. This lack of separation of governmental branches has contributed to problems with the independence and neutrality of some tribal courts as they struggle to interpret and enforce laws without concern for repercussions from the elected officials of the Tribe.[8] Such a lack of separation has also contributed to perceptions that tribal courts fail to afford fair and impartial forums for dispute resolution, irrespective of whether such perceptions are factually accurate or not.[9]

---

[7] Since the passage of the Indian Reorganization Act of 1934, written Constitutions have become a common legal mechanism to not only establish a government within a tribal community but to also serve as a guide for the duties, responsibilities and authorities that such government possess.

[8] Fletcher, Matthew L. M., Indian Courts and Fundamental Fairness: 'Indian Courts and the Future' Revisited (June 7, 2012). University of Colorado Law Review, Forthcoming; MSU Legal Studies Research Paper No. 10-15. Available at SSRN: http://ssrn.com/abstract=2079757. (stating that "…[M]any tribal judges face overt and covert attacks o their independence….For example, many tribal constitutions provide express or implied tribal council control over appointments and retention of tribal judges. Some tribal judges face threats from tribal legislatures on budgets as well.".)

[9] B.J. Jones, *The Independence of Tribal Justice Systems and Separation of Powers*, (2006) at 12 http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf (stating that " …Critics of

## B. Tribal Courts

Tribal justice systems, procedures and practices have been the subject of much scrutiny over the years. In fact this scrutiny began in the mid 1880's when criticism of tribal justice systems resulted in the passage of the Major Crimes Act (1885), thereby setting a backdrop for what would become a complex jurisdictional landscape wherein tribal, state and federal courts would each have varying roles in the administration of justice within tribal communities. The action of the Congress in 1885 was driven in large part due to fundamental and philosophical differences of justice between tribal and non-tribal communities. At the time that the Major Crimes Act was passed, the United States had already begun the provision of bureaucratic justice systems in Indian country with the approval of Courts of Indian Offenses, oftentimes referred to as C.F.R. Courts. These courts were established to address crimes in Indian country but did little to provide a forum for the resolution of non-criminal offenses.[10]

As tribes continue to plan, implement and enhance tribal justice systems many of those differences continue to be debated today. Tribes must consider whether to create tribal courts based upon an adversarial model like those we see in state and federal courts, more traditional forums and procedures or a hybrid of the both. Existing tribal courts range in form and function from adversarial systems, to peacemaking, to talking circles, elder councils or other such traditionally based forums. This of course further complicates matters for tribes as justice systems evolve. The decision of whether to develop justice systems that are similar to those in other jurisdictions, thereby minimizing outside scrutiny or to base tribal justice systems upon tribal traditions despite outside criticisms is riddled

---

tribal courts contend that these courts are nothing more than dependent entities of the controlling tribal councils. Nevertheless, recent case law and survey data indicate that there is in fact a sizeable and growing degree of independence within the tribal judiciary….").

[10] Crimes addressed often criminalized religious and spiritual customs and practices, which made them widely unpopular among most tribal communities.

with layers of political complexities. This matter is further complicated by the fact that tribal courts need to not only be in a position to resolve disputes arising within tribal communities but must also function within a legal landscape that spans across multiple jurisdictions.

So just how did tribes evolve from traditional and oftentimes spiritually rooted forums for dispute resolution, to adversarial justice systems that oftentimes function absent legal autonomy from tribal legislatures? To answer this question it is important to consider the Indian Reorganization Act of 1934[11], which authorized the legislative creation of tribal courts as well as the adoption of tribal law and order codes. Around this same period in history the United States Department of the Interior, through the Bureau of Indian Affairs circulated "model" tribal constitutions to those tribes opting to organize under the 1934 IRA. Such model constitutions were intended to serve as a guide for the organization of tribal governments; however many tribes simply adopted the model language, in some cases even those tribes opting out of the 1934 IRA adopted a constitution based upon this model. The model that was developed and disseminated by the BIA failed to reference any separation of powers and failed also to reference the creation of tribal courts. This has of course contributed to the high number of tribal courts that have been created by statutory law as opposed to constitutional law.

Although not all tribes are organized under the Indian Reorganization Act of 1934, and despite the fact that tribal court origins may vary from tribe to tribe, many tribal courts have been created by tribal legislation while a few tribal courts find their origins in tribal constitutions. The legislative creation of tribal courts has perpetuated much of the criticism that tribal courts have received over the years and has perpetuated a legal argument that

[11] 25 U.S.C. 476 (1934).

disputes between the tribal councils and tribal courts are political questions and thus nonjusticiable hence leaving the tribal judiciary as a subordinate of the tribal council.[12]

As tribes seek to exercise their sovereignty it is important that tribal laws be enforced in tribal forums free from the interference or scrutiny of outside jurisdictions. Although much of the early scrutiny surrounding tribal justice system rested upon distinct differences in notions of justice in present day much of the criticism of tribal courts focuses upon whether a tribal court is able to fairly and impartially resolve disputes due to a perception that there is a lack of separation between tribal legislators and tribal judges.[13] In fact in some outside jurisdictions tribal traditions are being drawn upon to provide alternative dispute resolution methods.[14] Having embraced alternative dispute resolution methodologies, critics instead have turned their sights upon the apparent lack of independence with tribal judiciaries and the lack of separation of powers to argue that tribal courts remain unstable forums for adjudicating legal disputes, especially for those who are not members of the tribe.[15] Such criticisms pose a real threat to tribes in terms of economic opportunities, community safety and autonomy over tribal lands and the actions that occur within tribal boundaries. In short the criticisms of tribal courts pose a real threat to tribal sovereignty. Whether such criticism is rooted in fact or not, there does exist at least an appearance of a conflict, which for many is enough to question the integrity of the tribal court system.

---

[12] B.J. Jones, *The Independence of Tribal Justice Systems and Separation of Powers*, (2006) http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf

[13] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (stating in relevant part that *"…some Indian tribal court systems have become increasingly sophisticated and resemble many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared…."*.)

[14] *See* Center for Court Information Tribal Justice Exchange http://www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities

[15] Samuel J. Brakel, "American Indian Tribal courts. The cost of Separate Justice" (1978), The American Bar Foundation.

## II. Separation of Powers & Judicial Independence

As the United States Constitution was drafted, great caution was taken to prevent the establishment of a government that mirrored what many viewed as a dictatorial form of government. Special care was taken to ensure that all self-governance powers not be placed in one group, hence the Constitution spread governmental authorities across three distinct branches of government: the legislative; the executive; and the judicial. In doing so the United States Constitution is designed to ensure that power is evenly distributed thereby creating checks and balances and further preventing any one branch from becoming supreme.[16]

In the wake of the Indian Reorganization Act of 1934, as tribes began to adopt written constitutions, the emphasis was on creating democratic forms of government that could maintain a government-to-government relationship with the United States, however it seems that distribution of political authority was not of predominant concern.[17] With a few exceptions, the governmental authorities within tribal infrastructures generally are not divided among branches but rather are reserved to and exercised by a Tribal Council or Board. From the onset of tribal constitutions it seems that little thought was given to the establishment of tribal courts as forums for enforcement or interpretation of laws within tribal communities, however as tribal governments have solidified their government-to

[16] Scholars have, for many years, recognized the influences of the Iroquois Confederacy upon the founding fathers and the United States Constitution. More specifically the influence upon the governmental structure, the liberties of the people and the notion of community well being.

[17] For many tribes, democratic governments were, to some degree, foreign as tribes for centuries had systems in place for the selection of tribal leadership and for some tribes such roles were divine. Equally true is that many traditional tribal systems of self-governance did in fact spread authorities or responsibilities across individuals and/or groups with little to no interferences. All one need do is consider the Iroquois Confederacy for evidence that such systems in fact existed (and also served as an underlying basis for the United States Constitution).

government relationships and are turning inward to address the needs of their own communities the importance of tribal courts in maintaining checks and balances is becoming glaringly important.[18] In other words tribes are seeing the dangers of having a singular branch of government that possesses all powers of self-governance with little to no checks and balances in place. Equally true is the fact that having forums for dispute resolution is essential to the preservation of self-governance from erosion by the federal government.[19] As tribes review their systems of self-governance and establish or enhance tribal courts, the source of authority and neutrality for those courts becomes an important part of the discussion.

### A. Separation of Powers Doctrine

Separation of powers refers to the division of federal and state governments into three branches: the legislative, the executive and the judicial.

- ***Legislative branch*** of the United States government is the United States Congress (consisting of the House of Representatives and the Senate);
- ***Executive branch*** of the United States government is vested with the President (subject to some limitations); and
- ***Judicial branch*** of the United States government is vested within the United States Supreme Court and all lower courts.

---

[18] Worthy of note is that many tribes adopted a version of a model or template constitution that was drafted and disseminated by the U.S. Department of Interior in the wake of the Indian Reorganization Act (1934). These constitutions did include language that made the tribal governments accountable to the citizens of the tribe through a petition process whereby tribal membership could overturn actions of the government or could remove individuals from office through the submission of petitions, however many tribes have found that disputes have arisen while the petition process is being exercised and they have been left with the issue of where to have such disputes resolved, again raising the importance of tribal courts.

[19] *See National Farmers Union Ins. C. v. Crow*, 436 U.S. 1315 (1984)(stating that individuals must first exhaust tribal remedies before filing a cause of action in the federal court).

Each branch of government is empowered to fulfill specified duties in a manner that is cohesive while not overlapping. In the federal government of the United States this separation of powers is based upon provisions found in Articles I-III of the Constitution.[20] The United Stated Constitution dictates that the legislative branch is empowered to make, amend or repeal laws, the executive branch is empowered to carry out those laws and the judicial branch is empowered to interpret the laws and apply the laws to actual disputes. [21] Because the judicial branch must interpret and apply laws and furthermore because the Constitution is one such law, it necessarily follows to the judicial branch to ensure that one branch of the government does not encroach upon the duties or responsibilities of another. In this manner there are checks and balances within the federal government to ensure that no branch exceeds the authorities to which it is vested.

To date there has been no federal mandate that tribes organize in a manner that affords separation of powers and for many tribes, such a notion is not rooted within historical notions of self-governance.[22] Despite these facts many tribes have determined that separating the branches of the government is a beneficial means to demonstrate governmental stability which translates into increased economic opportunities, improved relationships with other jurisdictions and a sense of fairness within the community. In the event that the Tribe determines a separation of powers to be necessary or beneficial to their respective community, it is key that any legislation or constitutional provisions developed reflect not only provisions creating a separation, but more importantly that any such separation be created in a manner that reflects and reinforces the priorities and beliefs of the community with respect to the administration of justice.

[20] Id.
[21] Blacks Law Dictionary, "Separation of Powers", p. 1365 (1990)(6th ed).
[22] David Getches, *Indian Courts and the Future*, NAICJA Report p. 39 (1978).

*For those tribes considering whether to establish a legislative separation of powers or a constitutional separation of powers the following examples may be helpful (this is NOT an exhaustive list):*

| | |
|---|---|
| **Example(s) of Legislative Separation of Powers** | Ho-Chunk Nation – Judiciary Act HCC § 1 (2005)<br>Stockbridge-Munsee- Tribal Court Code Chapter 1<br>Sisseton Wahpeton Oyate – Chapter 21-01-05<br>Confederated Tribes of the Umatilla Indian Reservation – Court Code |
| **Example(s) of Constitutional Separation of Powers** | Menominee Nation - Article V<br>Oglala Sioux Tribe - Article V<br>Snoqualmie Tribe - Article X<br>Turtle Mountain Band of Chippewa Article – Article IX<br>Winnebago Tribe of Nebraska - Article X |
| | See also Sample Constitution released by the BIA<br>www.bia.gov/cs/groups/public/documents/text/idc-001884.pdf |

*For those tribes that are opting to consider a constitutionally based separation of powers it is likely that constitutional revisions will be necessary to include provisions which create separate branches of tribal government and prescribe duties and authorities for each.*

| **CONSIDERATIONS FOR CONSTITUTIONAL REVIEW** | |
|---|---|
| **Tribal court establishment** | **Consider inserting language within the tribal constitution that:**<br>• Establishes the court as a branch of the trial government<br>• Sets forth the governmental duties, responsibilities & /or powers of the court (ie. to interpret & enforce laws) |
| **Judicial qualification & selection** | **Consider inserting language within the tribal constitution that establishes:**<br>• Qualifications for judges (ie. law trained, knowledge of tribal customs, age restrictions etc.) as a means of promoting consistency<br>• Sets forth the manner in which judges will be selected (ie. election or appointment)<br>• Establishes any term limits for judges<br>• Addresses procedures for discipline, removal or impeachment of judges |
| **Oversight of tribal court** | Many tribes have created committees or boards for the oversight of the tribal court. For such oversight committees or boards **consider inserting** |

| | |
|---|---|
| | **language within the tribal constitution that:**<br>• Sets forth the duties and responsibilities of oversight committee or board<br>• Establishes qualifications for committee/ board members<br>• Provides term limits for committee/ board members<br>• Creates a means of selecting &/or removing committee/ board members (ie. election or appointment) |

### B. Judicial Independence

Judicial independence refers to the concept that courts of law, including judges, should operate independent of all outside influence, including political influence to ensure that disputes can be resolved in a forum that is neutral to all parties. In its truest sense judicial independence would mean that judges are able to make decision without concern that they will be expected, forced or pressured by the general public, tribal officials or tribal leaders. While a Constitutional separation of powers is one means to establish judicial independence, there are multiple ways in which judicial independence can be achieved. In considering methods to achieve judicial independence it is important to consider judicial qualifications, judicial selection procedures, and judicial tenure. By establishing legal infrastructure in the form of tribal legislation or constitutional provisions that set forth judicial qualifications, procedures and tenure, tribes are able to create consistency and stability in the judiciary. Creating infrastructure that reduces judicial turnover and minimizes the potential for removal of a judge by political leaders for decisions of the court, directly links judicial independence to such infrastructure. In light of recent laws such as the Tribal Law and Order Act of 2010, enhanced sentencing provisions and the Violence Against A Women Act of 2013, special domestic violence jurisdiction provisions it is becoming increasingly important that tribes consider judicial qualifications, selection and tenure as a means to stabilize the judiciary and maximize jurisdictional responsibilities.[23]

[23] Tribal Law and Order Act of 2010. PL 111-211; Violence Against Women Act of 2013. PL 113-4. *(Both of these laws opened the door for tribes to either increase sentences in terms of jail*

### i) Judicial Qualifications

Although recent provisions of the TLOA and the VAWA have stressed the need for law-trained judges, tribes should balance that with the benefits of having the judiciary reflect tribal priorities and beliefs. In order to ensure that the tribal judiciary is equipped to respond to a wide array of disputes that may or may not require knowledge of custom and tradition, tribes may want to consider a hybrid approach when establishing judicial qualifications.

- Law trained:
    - law trained often means that the judicial candidate possesses a Juris Doctorate degree from an accredited law school however it may also refer to a candidate who has passed a tribal bar examination, received training on the tribal Constitution or Code or has received ongoing education as a member of the judiciary

- Traditional knowledge:
    - this may be applied literally thereby requiring a tribal judge have actual knowledge of the traditions and customs of the tribe or it may simply refer to an openness or willingness to incorporate the traditions and customs of the tribe into the dispute resolution process (this can also be accomplished by revisiting law and order codes to set forth procedures for tribal judges to follow that would enable the court to consider tradition and custom in eth dispute resolution process).

- Moral Character:
    - this can be a very subjective qualification, however through the development of tribal codes, ordinances or applicable constitutional provisions clarity can be afforded to this term. Moral character can be attested to in any number of

---

*time or fines in criminal cases or to exercise jurisdiction over non-Indian offenders in domestic violence cases but only if tribes meet specified prerequisites such as law trained judges.)*

ways, including but not limited to: the absence of a criminal history; the affidavits or statements of support of community members or professionals; or by prior actions from the bench (if applicable).

### ii) Judicial Selection

There are two primary means in which judges may be seated: 1) election; or 2) appointment. It is important to note that the procedure itself is not indicative of judicial autonomy and in fact even the federal judicial system is one that is based upon appointment, however judicial qualifications and tenure help to insulate the federal judges from political influence as the life tenure enables judges to freely decide cases without fear that they will lose their position. Although life tenures may not be necessary some sort of term limit can be helpful in achieving a similar result. Of course election, or vote of the people, is another means to insulate the judiciary from the legislative branch and one, which some tribes have opted to implement.

- Election vs. appointment
    - Election of a judge is often achieved in conjunction with general or special elections held by the Tribe. In this way there are no additional costs for the judicial election and political influence of existing governmental leaders can be minimized.
    - Appointment of judges can be a more challenging matter when considering independence although it is a process that is used to select judges in many jurisdictions. To maximize judicial independence in a jurisdiction where appointment is the process for judicial selection tribes should consider: 1) having a neutral body such as a board or committee available to screen potential applicants and perhaps even make recommendations; 2) make appointments for a defined term; 3) set a salary for the duration of the term;

and 4) consider an employment contract or legislative act that is legally enforceable and which includes provisions on the foregoing.

- Discipline by neutral body
    - When it comes to complaints against the judiciary it is important that the tribal government not be directly involved in addressing such complaints. To maximize judicial independence tribes should consider: 1) having a neutral body such as a board or committee available to hear grievances and either make recommendations for removal of a judge or impose sanctions; and 2) ensure that tribal constitutions, codes or ordinances specify grounds for removal or sanction of a judge as well as a process for the same; and 3) establishing ethical standards that judges and court personnel shall be bound by.

### iii) Judicial Tenure

Tenure of judges can help to insulate the judiciary from political influence as tit enables judges to freely decide cases without fear that they will lose their position. Tenures may be life long or for some shorter, yet specific term. Tribes should consider which form of tenure is most feasible within their own respective community.

- Life appointments
    - Such appointments refer to those made for the life of the judge (until the judge opts to step down from the bench or is removed for cause)
- Term appointments
    - Term appointments specifically refer to those appointments for a limited period of time (often 2-5 years)
    - As a best practice and to promote judicial independence, such appointments should be set forth in the constitution, code or ordinance governing the

judiciary. In the absence of such provisions resolution or contractual provisions may impose judicial terms of office.

When considering how to achieve judicial independence it is important for tribes to:

1. create institutional structures through constitutional, code or ordinance provisions (ie. judicial boards or committees)
2. establish constitutional (or at the very least a legislative) infrastructure that includes an establishment of the tribal court
3. create necessary legislative provisions to set for the procedures applicable to judicial selection, sanction or removal; and
4. create ethical standards and traditions through a legally enforceable code of judicial conduct

| JUDICIAL INDEPENDENCE | | |
|---|---|---|
| | **Tribal Constitution** | **Tribal Code or Ordinance** |
| **Independent Selection** | X | |
| **Independent Discipline &/ or Removal** | X | X |
| **Secure Tenure** | X | X |
| **Secure Salary** | | X |
| **Self-administration** | X | X |
| **Independent Accountability** | X | X |

***NOTE:*** *Language pertinent to the judiciary may be set forth in tribal constitutions, codes or ordinances as a means of stabilizing judicial independence. The following chart reflects* ***suggested*** *locations for specific provisional language. If both boxes were marked with an X then either the constitution or a code/ ordinance provision would be feasible dependent upon the infrastructure of the tribe.*

## III. Conclusion

While the foregoing discussion melds within a model adversarial process, it can be challenging to conceptualize judicial autonomy in forums, which are rooted in traditions, customs and spirituality of some tribes. In other words for some tribes laws are derived from divine origins hence no separation can be had between law and enforcement as they are one in the same, they are a way of life if you will. But for those tribes opting to establish tribal courts, separation of powers and judicial independence is an important subject for discussion. As tribes continue to assert political autonomy it is essential that tribal courts be included in the dialogue. Increasingly as questions of tribal sovereignty are brought before the United States Supreme Court, the strength and autonomy of the tribal courts are included within the Court's analysis and as such directly impact the future of tribal sovereignty.

# GUEST ARTICLE

## Political Question Doctrine

By: Maggie Eyre, Law Clerk

Tribal Judicial Institute, UND School of Law

Spring 2013

### I. Political Question Doctrine

The political question doctrine is related to the separation of powers doctrine.[i] It requires political branches, the legislative and executive branches, to resolve certain political questions among themselves rather than seek resolution through the judicial branch.[ii] The political question doctrine is intended to prevent the judiciary from "from intruding unduly on certain policy choices and value judgments that are constitutionally committed" to the legislative and executive branches of government.[iii]

An issue is political, rather than legal, "when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis."[iv] Defining what is considered a political issue, rather than legal issue, has proven elusive.[v] It is clear that, under the United States Constitution, there are particular questions of constitutional interpretation that are not to be judicially resolved, such as political questions.[vi] In Marbury v. Madison, Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive

officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."[vii]

It has been less clear what qualifies as a purely political question. Under a narrow interpretation, the political question doctrine will prohibit the judicial branch from deciding an issue when it is presented with an issue that "has been textually committed to another branch of government."[viii] "Textually committed to another branch of government" means that the issue is explicitly within the scope of the legislative branch or executive branch, which is manifested in a constitution.[ix] Conversely, under a broad interpretation, the political question doctrine may prohibit the judicial branch from deciding an issue when: (1) there is not a judicially manageable standard to decide the case on the merits, (2) judicial intervention could be interpreted as insufficient respect for the legislative branch or executive branch of government, or (3) the integrity of the judicial branch may be threatened by a judicial decision.[x]

There are certain factors that appear relatively consistently in cases law analyzing and applying the political question doctrine.[xi] One of the factors courts look at when determining whether the issue is political focuses on "whether the attack was on the government itself or on some manner in which [the government] has acted."[xii]

In Baker v. Carr, The United States Supreme court narrowed the application of the political question doctrine by providing a far more clear formula for applying the political question doctrine.[xiii] Justice Brennan explained that "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[xiv] Even if a case is about politics does not mean courts need to invoke the political question doctrine. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determines a find clearly for non-judicial discretion; or the impossibility of a court's

undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[xv]

In Powell v. McCormack, the United States Supreme Court decided that since it was not within the exceptions listed in Article I, Section 5 of the Constitution for legislature to refuse to seat a member-elected due to his expressed views the political question doctrine did not apply.[xvi] Since it was not a solely political issue, the Court could adjudicate it, and it ordered the House of Representatives to seat Powell.[xvii]

In Nixon v. United States, the Supreme Court refused to intervene in the Senate's interpretation and exercise of the impeachments powers vested in the legislative branch by the Constitution.[xviii] The Court concluded that the impeachment rules were for the Senate to interpret, the interpretation was solely political.[xix]

Determining whether an issue is solely political and warrants the judicial branch to invoke the political question doctrine is far from conclusive. In Vieth v. Jubelirer, the United States Supreme Court justices rendered a four-one-four decision which made it unclear whether the claims of partisan gerrymandering are or are not within the political question doctrine.[xx]

## II. Tribal Court Interpretations of the Political Question Doctrine

The pressure on tribal courts is to either to be consistent with traditional methods of dispute resolution or conforming to the adversarial system employed by federal and state courts.[xxi] There is continuous tension between tribal courts and tribal governments "especially in areas such as election disputes, political removal proceedings, and conflicts between tribal members and their governments."[xxii] Some of this tension may stems from the fact that the authority of tribal courts may not be as broad as the authority enjoyed by federal courts after the Supreme Court's decision in Marbury v. Madison and "[i]n certain situations tribal executive and

legislative officers have refused to recognize tribal court decisions that appear to expand judicial authority beyond what is prescribed under tribal law and have intervened into disputes."[xxiii]

The "separation of powers" is not expressly required under the Indian Civil Rights Act (ICRA) for branches of Tribal governments.[xxiv] If a tribal court is established under the tribal constitution, the tribal court has limited jurisdiction and is "presumed to lack subject matter jurisdiction unless it is expressly granted."[xxv] If a tribal court is established by it's tribal council, the tribal court has general jurisdiction and is "presumed to have jurisdiction unless limited by statute or unless a showing is made to the contrary."[xxvi] As stated above, the political question doctrine hinges on the face that there are separations of powers and therefore the judicial branch cannot adjudicate an issue that is solely political in nature.[xxvii] If there is no separation of powers, hypothetically the judicial branch can adjudicate any issue as long as it is not a court of limited jurisdiction and it has not been expressly prohibited from deciding the particular issue.

Tribal courts have refrained from rendering opinions or adjudicating cases, like federal and state courts, that are solely political questions.[xxviii] Two cases that exemplify tribal courts analyzing and applying the political question doctrine are Wells v. Blaine and Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court.

In Wells v. Blaine, [xxix] a tribal council member, Wells, convinced the tribal council to finance his pursuit of having his tribal court divorce decree recognized by South Dakota in state court.[xxx] The tribal council make up changed and the new council decided against financing this litigation.[xxxi] Wells filed suit to recover damages from the Crow Creek Council and the Northern Plains Intertribal Court of Appeals held that decision of a tribal council to abrogate the decision of a prior tribal council constituted an unreviewable political decision.[xxxii] The Wells court based its decision on the premise that courts should be reluctant to interfere with tribal legislative actions that focused on the appropriation and expenditure of tribal funds.[xxxiii] The Northern Plains Intertribal Court of Appeals concluded that these actions were within the purview of the tribal council rather than the tribal court.[xxxiv]

In Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court, the Tribal Supreme Court was deciding whether the tribal court had the authority to issue an injunction.[xxxv] The Tribal Legislature argued that the matter was unreviewable since it was a political question within the scope of their authority.[xxxvi] The Menominee court determined that it was not a solely political issue and it was within the scope of the tribal court's authority to issue such an injunction.[xxxvii] The Tribal Supreme Court reasoned that "[t]hough judicial review is limited when the legislature exercises its law-making function, review is more comprehensive when it exercises its administrative function.[xxxviii] This decision was based on the finding that the legislative branch was using its executive power rather than its legislative power.[xxxix]

---

[i] Native Village of Kivalina, et al. v. Exxonmobil Corp., et al., 663 F.Supp.2d 863, 871 (D. Cal., N.D.C. 2009) (citing Corrie v. Caterpillar, Inc., 503 F.3d 974, 980 (9th Cir. 2007)).
[ii] Native Village of Kivalina, 663 F.Supp.2d at 871 (citing Corrie, 503 F.3d at 980).
[iii] Native Village of Kivalina, 663 F.Supp.2d at 871 (quoting Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992)).
[iv] Native Village of Kivalina, 663 F.Supp.2d at 871 (quoting E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 785 (9th Cir. 2005)).
[v] The Doctrine Reappears: Political Question, Justia US Law.com (Jan. 28, 2013), http://law.justia.com/constituion/us/article-3/20-political-questions.html (citing Frank, *Political Questions, in Supreme Court and Supreme Law* 36 (E. Cahn ed., 1954)).
[vi] Constitutional Limitations on the Judicial Power: The Political Question Doctrine, Exploring Constitutional Conflicts (Nov. 21, 2012), http://law2.umkc.edu/faculty/projects /ftrials/conlaw/politicalquestions.html.
[vii] 5 U.S. (1 Cr.) 137, 170 (1803).
[viii] Constitutional Limitations on the Judicial Power: The Political Question Doctrine, Exploring Constitutional Conflicts (Nov. 21, 2012), http://law2.umkc.edu/faculty/projects /ftrials/conlaw/politicalquestions.html.
[ix] Id.
[x] Id.
[xi] The Doctrine Reappears: Political Question, Justia US Law.com (Jan. 28, 2013), http://law.justia.com/constituion/us/article-3/20-political-questions.html.
[xii] Id. (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912)).
[xiii] 369 U.S. 186 (1962).

[xiv] Id. at 210.
[xv] Id. at 217.
[xvi] 395 U.S. 486 (1969).
[xvii] Id.
[xviii] 506 U.S. 224 (1993).
[xix] Id.
[xx] 124 S. Ct. 1769 (2004).
[xxi] B.J. Jones, The Independence of Tribal Justice Systems and the Separation of Powers, 1 (Jan. 28, 2013), http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf.
[xxii] Id.
[xxiii] Id.
[xxiv] Id. at 2 (citing One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians, 2001 Crow 10 (Crow Ct. App. 2001)).
[xxv] Jones, supra, at 3 (citing Satiacum v. Sterud, 10 ILR 6013, 6014 (Puy. Tr. Ct. 1982)).
[xxvi] Jones, supra, at 3 (citing Satiacum v. Sterud, 10 ILR 6013, 6014 (Puy. Tr. Ct. 1982)).
[xxvii] See supra, Part I.
[xxviii] Jones, supra, at 6.
[xxix] 21 ILR 6129 (N. Plns. Intertr. Ct. App., 1994).
[xxx] Id.
[xxxi] Id.
[xxxii] Id.
[xxxiii] Id.
[xxxiv] Id.
[xxxv] 20 ILR 6066 (Men. Tr. Sup. Ct. 1993).
[xxxvi] Id. at 6068.
[xxxvii] Id.
[xxxviii] Id. at 6069.
[xxxix] Id.