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Separation of Powers in Tribal Government: What, Why, and How?

Dan Lewerenz, U. North Dakota School of Law

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Roadmap

- What is Separation of Powers?
 - What is Judicial Review?
 - What is Judicial Independence?
- Why Separate Powers?
- How do Governments Separate Powers?
 - American Governments
 - Tribal Governments
 - Tribal Judicial Review
 - Tribal Judicial Independence



What is Separation of Powers?

Separation of Powers

- “[T]he division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent concentration of power and provide for checks and balances.”
Nat’l Conf. of State Legislatures, *Separation of Powers*.
- “The separation of powers doctrine requires that each branch of government be permitted to exercise its duties without interference from the other two branches of government.
Office of Navajo Nation President v. Navajo Nation Council, SC-CV-02-10 (Navajo Nation 2010).

Judicial Review

- “[J]udicial review [is] the ability of the Court to declare a Legislative or Executive act in violation of the Constitution.”

U.S. Courts website, *About the Supreme Court*.

- Constitution gives Courts power over “all Cases . . . Arising under this Constitution.”
- Idea that Courts lack power of judicial review because it’s not expressly mentioned is “too extravagant to be maintained.”

Marbury v. Madison, 5 U.S. 137 (1803).

Judicial Independence

- “Judicial independence means that judges are not subject to pressure and influence and are free to make impartial decisions based solely on fact and law.”

American Bar Association, *Independent Judiciary*

- Is judicial independence possible? Ignoring political consequences is like ignoring “a crocodile in your bathtub. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”

Former California Supreme Court Justice Otto Kaus.

Why Separate Powers?

Why Separate Powers?

- Checks and balances.
- Clear responsibilities.
- Multiple centers of recourse.

Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013).

- Navajo's three-branch structure established "after an episode of serious governmental malfeasance in order to benefit the Navajo People, to ensure that such abuse is not repeated."

Office of Navajo Nation President.

Why Judicial Review?

- In any government, there will be questions about the proper exercise of governmental powers. “A community will need to identify who possesses the authority to answer those questions or resolve any ambiguities.”

MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY:
CONSTITUTIONS OF NATIVE NATIONS 190 (2014).

- “Judicial review develops [] principles of fairness and due process Denial of judicial review would be a deprivation of what the courts have to offer,” including expertise in fairness, civil rights, etc.
Navajo Skill Ctr. v. Benally, No. A-CV-08-84 (1986).

Why Judicial Independence?

- “The Navajo public has an interest in a strong and independent judiciary. Navajo sovereignty is strengthened by a strong and independent judiciary.”

Clark v. Diné College, No. SC-CV-25-10
(Navajo Nation 2010).

- For Tribal economic development, “there must be an independent judiciary designed and empowered to render impartial judgments in cases involving conflict between the tribal council and others.”

John Mohawk, 39 BUFF. L. REV. 495, 501 (1991).

How do Governments Separate Powers?

American Government

- Article I: Congress – All legislative Powers . . .
 - “Legislative power is the power to make the law, to decide what the law should be.”
- Article II: President – The executive Power . . .
 - “Executive power is power to execute or enforce the law as enacted.”
- Article III: Courts – The judicial Power . . .
 - “Judicial power is the power to interpret and apply the law to disputes between parties.”
Quotations from *SEIU, Local 1 v. Vos*, 2020 Wis. 67.

American Judiciary

- Judicial Review
 - Established by *Marbury v. Madison* (1803)
- Judicial Independence
 - Federal: Nomination-and-confirmation, life tenure, salary cannot be reduced.
 - States: Varies

Tribal Government: Osage Nation

- Article V: Distribution of Powers of Government
 - Section 1. Governing Powers: The Powers of the government of the Osage Nation shall be vested in the three (3) separate branches: the Legislative, the Executive, and the Judicial.
 - Section 2: Separation of Powers: The Legislative, Executive and Judicial branches of government shall be separate and distinct and no person or collection of persons, charged with official duties under one of those branches, shall exercise any power properly vested in either of the others except as expressly provided in the Osage Nation Constitution.

OSAGE NATION CONSTITUTION.

Osage Nation (continued)

- Article VI: Legislature, § 1. Legislative Power
 - Vested in Osage Nation Congress.
- Article VII: Executive
 - § 1. Supreme Executive Power: Vested in Principal Chief “Ki-he-kah Dto-dah-ha.”
 - § 14. Tribal Enterprise Boards
- Article VIII: Judiciary, § 1. Judicial Power
 - Vested in Courts; includes “interpreting the laws of the Osage Nation,” “judicial review of certain holdings and decisions of administrative agencies”

OSAGE NATION CONSTITUTION.

Osage Nation (continued)

- Article XV: Natural Resources & Minerals Management
 - § 1-3. Use, develop, conserve natural resources for benefit of Osage People; minerals reserved to Osage Nation; right to income (“headrights”) protected
 - § 4. Management of the Osage Mineral Estate: Osage Minerals Council “recognized by the Osage Nation government as an independent agency within the Osage Nation established for the sole purpose of continuing its previous duties to administer and develop the Osage Mineral Estate”

OSAGE NATION CONSTITUTION.

Tribal Gov't: Ho-Chunk Nation

- Article III: Organization of the Government
 - Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be composed of four (4) branches: General Council, Legislature, Executive, and Judiciary.
 - Section 3: Separation of Functions. No branch of the government shall exercise the powers or functions delegated to another branch.

HO-CHUNK NATION CONSTITUTION.

Ho-Chunk Nation (continued)

- Article IV: General Council
 - § 1. Powers of the General Council: “all inherent sovereign powers.”
 - § 2. Delegation of Authority: legislative branch to make laws; executive branch to enforce laws; judicial branch to interpret and apply laws.
 - § 3. Powers Retained by the General Council: includes “review and reverse actions of the Legislature” and “decisions of the Judiciary which interpret actions of the Legislature,” but not “decisions of the Judiciary which interpret this Constitution.”

HO-CHUNK NATION CONSTITUTION.

Tribes and Judicial Review

- Many Tribes: power to interpret and apply; judicial review might be assumed, but it is unclear.
- Article VII – Judiciary
 - § 3. Powers of the Courts: The Judiciary shall have the power to: A. interpret, construe and apply this Constitution and the laws and customs of, or applicable to, the Fort McDowell Yavapai Nation; B. declare the laws for the Fort McDowell Yavapai Nation void if such laws are inconsistent with this Constitution.

FORT MCDOWELL YAVAPAI NATION CONSTITUTION.

Tribes and Judicial Review (cont.)

- Article IV – Tribal Court
 - § 3. Powers. The Tribal Court shall be empowered to exercise all judicial authority of the Tribe. Said authority shall include, but not be limited to . . . the power to review and overturn tribal legislative and executive actions for violation of this Constitution or the Indian Civil Rights Act of 1968.

CONSTITUTION AND BY-LAWS OF THE CONFEDERATED
TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON.

- Similar language in Art. IX, § 3, of
CONSTITUTION AND BY-LAWS OF THE ROSEBUD SIOUX TRIBES OF
SOUTH DAKOTA.

Limitations on Judicial Review

- Article X – Judicial Branch of Government
 - The Judicial Branch shall have no power to review Executive Branch decisions made within the scope of the enumerated powers of the Executive Branch. The Judicial Branch shall have limited review of legislation passed by the Legislative Branch to determine whether the subject legislation is consistent with or in conflict with this Constitution.

CROW TRIBE CONSTITUTION.

Limitations on Judicial Review

- Elections:

- Cheyenne River Sioux Tribe: No judicial review of challenged ballot.

LaPlante v. Cheyenne River Sioux Tribe Election Bd.
(2021).

- “A Court of Indian Offenses may not adjudicate an election dispute, . . . [or] any internal tribal governmental dispute, unless the relevant tribal governing body passes a resolution, ordinance, or referendum granting the court jurisdiction.”

25 C.F.R. §11.118(b).

Tribes and Judicial Independence

- Article IX – The Judicial Branch
 - § 3. [T]he salary of any judge shall neither be increased nor decreased during the term in office.

PUEBLO OF ISLETA CONSTITUTION.

- Article V – Judiciary
 - § 6. Judicial Independence. The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions shall exercise powers properly belonging to the judicial branch of government.

GRAND TRAVERSE BAND OF OTTAWA AND
CHIPPEWA INDIANS CONSTITUTION.



Questions?

Dan Lewerenz dan.lewerenz@und.edu