

THE INDEPENDENCE OF TRIBAL JUSTICE SYSTEMS AND THE SEPARATION OF POWERS

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Introduction

Modern tribal courts are under constant pressure to conform their decision-making processes to tribally-appropriate dispute resolution techniques, all the while appeasing state and federal courts, founded upon the adversarial system of justice. Because many tribal courts are created by the legislative branch of government and their jurisdiction is prescribed by the tribal government, they may not have the broad judicial authority the federal courts have under the pronouncements of the United States Supreme Court in Marbury v. Madison. Many tribal courts unfairly receive criticism for this and it is often cited as a basis for some federal and state courts to refuse to acknowledge tribal court decisions. This criticism is oftentimes misplaced and premised upon a Euro-centric perspective of justice that postulates that a justice system must mirror the American legal system in order to be just. However, this criticism must be responded to because perceptions that tribal justice systems are not truly independent may impact the willingness of lenders to loan to tribal members in Indian country and the ability of the Tribe to engage in economic enterprises. Although many non-Indian commercial entities start with the presupposition that Tribal courts are not fair forums to adjudicate disputes in a fair and neutral way, oftentimes there is only anecdotal evidence for this and the real motivation is premised upon stereotypes of native persons as unreliable debtors. This paper will attempt to examine the claims of many that tribal justice systems are not truly independent and discuss whether this lack of independence, indeed if it is wanting, is impacting economic development opportunities in Indian country.

Many of the conflicts that arise between tribal governments and their justice systems center on the fundamental question of what authority a tribal court does and should have to question tribal executive or legislative action. Even in those tribal communities where the tribal court system is created under the authority of the tribal constitution, tensions exist because the concept of one individual resolving a major dispute in a tribal community may be antithetical to the consensus decision-making process that was very common in many tribal communities. In 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. Although these interventions may appear to be high-handed to some, they are not uncommon in relatively nascent tribal justice systems. It must be remembered that contemporary tribal justice systems are relatively new institutions and tensions will continue to surface between them and tribal governments, especially in areas such as election disputes, political removal proceedings, and conflicts between tribal members and their governments, as well as conflicts between coordinate different branches of tribal government. These tensions certainly existed in the early federal courts.

Most state and federal courts have stayed out of these purely intra-tribal frays and allowed Tribes to resolve their disputes internally. Indeed, the best argument for permitting

expansive tribal court jurisdiction may be that allowing tribal courts to hear and resolve such disputes inhibits the federal and state courts from becoming involved. When non-Indians and non-member Indians are involved in tribal court litigation, however, the federal and state courts seem much more willing to exercise some judicial control of tribal courts. Tribal Courts are not truly “independent” when federal and state courts can proscribe their jurisdiction and undermine their decisions by withholding recognition of their judgments. It is this challenge to tribal court independence that is just as daunting to tribal justice systems as internal efforts to circumvent tribal court authority.

This paper will examine some of the intra-tribal conflicts involving tribal justice systems that have arisen and will contend that the tensions between tribal governments and their justice systems are primarily the result of tribal courts searching for their identities in a tribal governmental structure that oftentimes differs dramatically from the federal and state constitutional regimes that most persons are conversant with. It will also examine how external pressures have served to undermine tribal court independence by depriving tribal courts of the inclusive ability to administer justice in tribal communities.

The earliest pronouncements of the U.S. Supreme Court recognized the sovereignty of American Indian Tribal governments and characterized them as “domestic dependent nations.” Chief Justice Marshall described the Indian tribe as “a distinct political society separated from others capable of managing its own affairs and government itself.” Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). As such Indian tribes are free to develop any type of governing system that they believe is best for their citizens. As the Ninth Circuit explained:

To lawyers, used to thinking of courts as the interpretative arm of government, it does seem strange that a single legislative and executive arm of government should be permitted to interpret the law, but we deal here not with state law, not with federal law, but with Indian law enacted by Indians. The Indians, except as inhibited by the Indian Civil Rights Act (ICRA), are free to structure their government as they see fit. Nothing precludes the Indians from vesting, as they did, the power of interpretation in a tribal council rather than in a tribal court. Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir., 1976).

The ICRA does not expressly require any “separation of powers” among the branches of Tribal governments. One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians, 2001 Crow 10 (Crow Ct. App. 2001). The Crow court went on to say, “it has long been recognized that a Tribal Council itself may hear appeals under Tribal law without violating the ICRA’s due process clause, and there does not appear to be any other Federal-law requirement for Tribes to maintain a separation of powers.” *Id.* at ¶ 21. See Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51, 58 (W.D. N.Y. 1972) (permitting appeals of decisions from Peacemakers Court to the Tribal Council).

Central to tribal sovereignty is the capacity for self - governance through tribal justice mechanisms. As Congress has found, tribal justice systems are “important forums for ensuring public health and safety and the political integrity of tribal governments.” They are “the appropriate forums for the adjudication of disputes affecting personal and property rights,” and

they are "essential to the maintenance of the culture and identity of Indian tribes." Indian Tribal Justice Act, 25 U.S.C. 3601. For this reason many tribes have instituted tribal courts.

Because many tribal courts are established by their tribal councils, they are in fact "legislative courts," rather than "constitutional courts." Satiacum v. Sterud, 10 ILR 6013, 6014 (Puy. Tr. Ct., 1982). However, unlike legislative courts in the U.S. federal system, tribal courts are courts of general jurisdiction, not limited jurisdiction. Id. Courts of limited jurisdiction, such as federal courts, are presumed to lack subject matter jurisdiction unless it is expressly granted. Id. Courts of general jurisdiction, such as state courts, are presumed to have jurisdiction unless limited by statute or "unless a showing is made to the contrary. Id.

The majority of tribal codes delineate the procedures to be followed by their tribal courts. They define the courts authority or jurisdiction to hear disputes, showing what types of cases can be brought, as well as granting the right of judicial review over decision made by the governing bodies in limited circumstances such as where tribal constitutional questions are raised or where civil rights come into play. Jones, B.J., Role of Indian Tribal Courts in the Justice System, ccan.ouhsc.edu/Tribal%20Courts.pdf (March 2000).

In Satiacum, the Puyallup Tribal Council Chairman, Robert Satiacum along with his Vice-Chairman sought to enjoin the Puyallup Tribal Council from conducting a recall campaign against them. 10 ILR at 6013. The Tribal Council members moved for dismissal, challenging the court's jurisdiction to hear the case, and arguing that sovereign immunity absolutely barred such proceedings. Id.

The Satiacum court flatly rejected the plaintiff's first argument. It distinguished between courts of general and limited jurisdiction. After reviewing the decisions of other tribal courts, the Court held that it was a court of general jurisdiction. Id. at 6014. It emphasized that a "tribal court derives its authority from the inherent sovereign power of the tribe" and, that as an integral institution of the tribe, it properly exercised the tribe's inherent judicial powers. Id. at 6015. The court ruled that it possessed the retained inherent power of the Puyallup Nation to hear cases involving all subject matters, except where limited by enactments of the tribal council. Id. at 6014-15. Thus, the court concluded that they had the right to hear the case, but found that sovereign immunity barred the complaint from going forward.

This precedent was used by the Confederated Salish & Kootenai Tribal Court of Appeals in Moran v. Council of the Confederated Salish and Kootenai Tribes, 22 ILR 6149 (C.S.&K.T. Ct. App., 1995). In the Moran case the Tribal Council and Tribal Chairmen appeal a temporary restraining order (TRO) issued *ex parte* by the trial court, preventing the Tribal Council from removing Judge Moran from his position of Chief Judge. The Tribal Council argues that the trial court lacked authority to issue the TRO. Here, the court goes through extensive lengths to show that the judicial system has the right to review the tribal council's actions. After making this holding the court stated:

Our holdings are soundly supported by the decision of courts of other tribes with constitutions virtually identical to the CS&KT Constitution. These courts have ruled in situations involving similar review. This appears to be the majority rule among tribal courts. See, e.g., Stone v. Swan, 19 ILR 6093, (Colv. Tr. Ct. 1992) (Colville Tribal Court

is court of general jurisdiction even though created by tribal business council, and possesses “inherent jurisdiction to review council and other tribal government actions to assure compliance with the provisions of the constitution, unless specifically limited”); Conklin v. Freeman, 20 ILR 6037 (N. Plns. Inter. Ct App. 1993) (Fort Berthold Tribal Court created by business council pursuant to IRA constitution had authority to review and set aside acts of tribal chairman which were not in compliance with tribal law); Committee for Better Tribal Government v. Southern Ute Election Board, 17 ILR 6095 (So. Ute. Tr. Ct. 1990) (absent legislation specifically denying jurisdiction, Southern Ute Tribal Court is proper forum to hear alleged violations of tribe’s constitution and code, as well as Indian Civil Rights Act); Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation, 13 ILR 6023 (Ute Tr. Ct. 1986) (Ute Tribal Court had jurisdiction to determine whether business committee complied with tribal constitution and Indian Civil Rights Act in enacting tribal ordinance, where business committee established tribal court and defined its powers and duties pursuant to tribal constitution).

In contrast, the few tribal courts, which have ruled they lack the power of judicial review, have done so either because controlling tribal law expressly prohibits judicial review of council actions, or the decision was summarily entered. See, e.g., Kowalski v. Elofson, 22 ILR 6007, 6008 (L. Elwaha Ct. App. 1993) (Lower Elwaha Tribal Court lacked power to review council actions pursuant to tribal ordinances expressly prohibiting such); Cf. Lac du Flambeau Band of Lake Superior Chippewa Indians v. One 200-250 Foot Small Mesh Gillnet, 16 ILR 6095 (Lac du Flam. Tr. Ct. 1989) (tribal court established by tribal council to establish court and define its powers and duties does not have authority to review council codes and regulations in absence of council legislation conferring such review authority).]

The C.S.& K.T. council did not like the precedent created by the Moran decision and so took action through the enactment of legislation to limit their tribal court’s powers of judicial review. See Peregoy, v. Tribal Council of the Confederated Salish and Kootenai Tribes, Cause No. 99-117-CV (C.S.& K.T. Tr. Ct.) (stating, “[in] response to [the Moran] decision, the Tribal Council enacted a governmental immunity ordinance, Ordinance 96, purporting to renunciate the Moran decision and to make the actions of the Tribal executive and legislative branch of governments insulated from judicial review except in limited circumstances.”).

Tribal Courts and Judicial Review

Court Having Authority

In 2002, the Kaw Nation dealt with a complex issue involving the separation of powers between their government branches. In the Matter of the Removal of Clyde F. McCauley, et al., 30 ILR 6142 (KNSC 2003). The Kaw Nation government has two legislative bodies, a seven member Executive council, and a General Council composed of all adult tribal members. Among the Executive Council’s powers is that of selecting judges to the Tribe’s Supreme Court and inferior courts. Those selected must then be confirmed by the General Council. In April of that year one of the district court judges resigned due to health concerns. Id. at 6143. Chief Judge Tripp made a request to the Executive Council for “Special Appointment” and recommended Judge Lujan, which the Executive Council appointed. Id. The Executive Council also voted to hire Judge Lujan as a District Judge to fill the vacancy permanently. Although the General

Council planned to confirm Judge Lujan's appointment in June, it was pushed back and was forgot about in their next meeting in September, the same month that elections for tribal positions were taking place. In the interim Judge Lujan kept acting on his special appointment.

Beginning that summer the Tribe's Chairman began taking action to remove some of the Executive Council members for voting on "matters in which they had a personal interest in violation of the Constitution." Id. These council members (Removal Respondents) moved to dismiss the claim, and also in a separate lawsuit involving their lawyer asserted the Judge Lujan was not properly seated as a district judge. Id. at 6144. Meanwhile Judge Lujan's confirmation vote with the General Council was scheduled for December 15, 2002. Id. On December 3 the Removal Respondents requested that the Tribe's Chairman call a special meeting of the Executive Council for Dec. 12. Id. Among the actions proposed for the meeting was to be a withdrawal of the motion to hire Judge Lujan, and to terminate the employment of the Chief Executive Officer among many other rash proposals. Id.

Thereafter, on December 5, 2002, Chairperson Guy Monroe brought suit to remove additional Executive council members, for mismanaging their Executive Council duties and asked the court for a temporary restraining order (TRO) to enjoin all the Removal Respondents from taking further unlawful actions in the name of the Executive Council. Id. Judge Lujan and the District Court granted these requests. Id. However, the Removal Respondents violated the TRO and held their December 12th meeting voting on many of the things they planned, including the withdrawal of support for Judge Lujan. Id. at 6144-6145. They claim that Judge Lujan had no authority to issue the TRO, because he was not properly seated, nor is he properly seated to hear the issue involving their removal proceedings.

The Supreme Court of the Kaw Nation held that Tribal Constitutional questions are matters of tribal law reserved for the tribal judiciary to resolve, and declared that the "Kaw Nation judiciary has the power to review the actions of the Kaw Nation's legislative bodies—The General Council and the Executive Council." Id. at 6146. The Supreme Court relied on Article V, § 6 of the Constitution, to prove their right to judicial review and even cited to Marbury v. Madison as persuasive authority. Id.

Then turning to the issues at hand the Kaw Nation Supreme Court, citing to other provisions of the Constitution, held the actions of the Removal Respondents to be unconstitutional and determined that the General Council's legislative powers take precedence over the Executive Council's if they are in conflict. Id. at 6147.

Court Lacking Authority

In the Howlett case, two members of the members of the Salish and Kootenai Tribes of the Flathead Reservation, Montana, brought suit in Federal District Court alleging that the refusal of their tribes to declare them eligible candidates for tribal council membership deprived them of their right to travel and their right to run for office in violation of the Indian Civil Rights Act. 529 F.2d 233, 235 (9th Cir., 1976). The Tribes had held them ineligible because they did not meet the residency requirements set out by the tribes. Id. at 241. The Tribes argued that the District Court lacked jurisdiction because Plaintiff's did not exhaust their tribal remedies by first bringing a claim in tribal court. Id. at 235.

The District Court held that they had proper jurisdiction and that Plaintiff's did not need to first exhaust inadequate tribal remedies. Id. at 240. The District Court determined that a claim in tribal court would be futile because of the facts in the case. The Plaintiff's after being declared ineligible to run for council membership by the five-member Election Committee, appealed to the whole Tribal Council, but the Council affirmed the decision of the Election Committee. Id. at 239. The Plaintiff's attorney then contacted the Chief Judge of the Tribal Court who informed him that he did not believe that the Tribal Court could override a decision reached by the entire Tribal Council, because the Tribal Council is the body which exercises appellate authority over matters decided by the Election Committee. Id.

Other cases that have determined that their tribal court powers of judicial review are limited include Citizen Potawatomi Nation Business Committee v. Barrett, 7 Okla. Trib. 310 (Sup. Ct. Citizen Band Potawatomi Tribe, 2001) (stating,

This Court has no doubt that the Potawatomi Constitution creates a "separation of powers" within the government...in the sense that the governmental powers... are divided between the different entities of the government which are created by the Constitution. This Court does not, however, perceive that the Constitution creates and "executive branch" and "legislative branch" as described by the District Court. In the first case decided by this Court, we noted that "...the separation of powers expressed in the Constitution is not the same as that in Anglo-American law..." Kinslow v. Business Committee, No.App. 87-01 (1988) (slip op. at 4) [, 1 Okla. Trib. 174, 183 (Cit. B. Potawatomi 1988)]. Rather, the governmental powers of the Citizen Potawatomi Nation are divided between, and vested in, the Citizen Potawatomi Indian Council, the three Executive Officers of the Nation, the business Committee, the Courts, a Grievance Committee, and an Election Board. In varying degrees, the power to legislate, the power to execute laws, which have been enacted, and other functions of the Nation are disbursed among the various constitutional entities of the Nation. Id. at *4.

Unlike the Potawatomi Nation the Sac and Fox Nation adopted a three branch structure of government in 1885, patterned on the government of the United States, giving the tribal court authority to judicially review actions of the Nation's Governing Council, Business Committee, and tribal officers and agents; to declare legislative or executive acts to be unconstitutional; and to enjoin unlawful actions by any executive officer or body of the Nation. Young v. The Tribal Grievance Committee, 5 Okla. Trib. 470, *4 (Sup. Ct. of the Sac and Fox Nation, 1998).

Political Question Doctrine

Similar to Federal and state courts, Tribal courts refrain from giving opinions or adjudicating cases that are solely political questions. Two such cases are Wells v. Blaine, 21 ILR 6129 (N. Plns. Intertr. Ct. App., 1994) and Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court, 20 ILR 6066 (Men. Tr. Sup. Ct., 1993).

In Wells, the Plaintiff, while a council member, induced the tribal council to pass a resolution allocating \$10,000 to pursue his state court claim asserting that South Dakota should honor his tribal court divorce decree. 21 ILR at 6129. Subsequently, the leadership of the council changed hands. The new council rescinded the prior council's actions, and the state court lawsuit

was dropped for lack of funding. Id. Wells filed suit in tribal court to recover damages and assert his claim against the Crow Creek Council. Id. The Northern Plains Intertribal Court of Appeals held that the action of one council to rescind the action of a previous council amounted to an unreviewable political decision. Id. The Wells court reasoned, in part, that it was reluctant to disturb tribal legislative actions involving the appropriation and expenditure of funds, suggesting that such was committed to the province of the council. Id. In this light, the Wells court looked unfavorably on the “assumption” that the tribal court serves as a “check on the actions of council, except to the extent that such actions of individual council members are *ultra vires*.” Id. at 6130.

In Menominee the Tribal Supreme Court considered the Tribal Legislatures political question argument, but determined that their claim was not of that type. 20 ILR at 6068. The Menominee Indian Tribe has a Constitutional form of government, with a legislative branch, having both legislative and executive power, and a judicial branch. The tribal court had issued an injunction in a secondary case against the tribal legislature. Id. at 6066. The issue here was if the tribal court had authority to issue such an injunction. In deciding that the tribal court had the authority to issue the injunction the court stated, “[t]hough judicial review is limited when the legislature exercises its law-making function, review is more comprehensive when it exercises its administrative function.” Id. at 6069. Here, it was determined that the legislative branch was using its executive power not its legislative power, and as such, their actions deserve a “more searching standard of review,” to insure that the ordinance itself is constitutional. Id. Clarifying their judicial role the court said,

[We] can neither intrude into the law-making process nor can [we] invalidate a law simply because it disagrees with the substance of the law. Yet, the court can declare a law invalid but only if the legislature failed to follow established procedures in enacting the law or if the substance of the law contravenes the constitution. In contrast, when the legislature draws on its executive power to administer its laws, the court may scrutinize the law application to insure that the law is applied equally and fairly. Id.

Court Overstepping their Boundaries

The Navajo Nation court system is viewed as a model of tribal court development. In 1958 the Navajo Tribal Council established the Navajo judicial system, a move that was viewed as the first step of a system of checks and balances in the Navajo Nation government. Moran, 22 ILR 6149, 61?? (citing Bennett v. Navajo Board of Election Supervisors, 18 Indian L. Rep. 6009, 6010 (Nav. Sup. Ct. 1990).

In 1985, the Navajo Nation Court of Appeals overturned a decision of the lower court, for exceeding their jurisdiction in a criminal case involving the Chief Justice of the Navajo Nation, the chief judicial officer of the judicial branch. McCabe v. Walters, No. A-CV-07-85 (Ct. of App., Navajo Nation, 1985). In McCabe, the Chief Justice, Judge Nelson J. McCabe, was arraigned before Judge Walters on charges constituting three offenses. Id. at ¶10. Judge McCabe entered a plea of not guilty, and was released on his own recognizance by Judge Walters. Id.

However, a few days later, Judge Walters apparently on his own motion, modified the terms of the Chief Judge's release order and as a condition of his personal recognizance release, ordered the Petitioner relieved from performing his judicial duties or exercising judicial functions of his position as Chief Justice of the Navajo Court of Appeals. Id. at ¶12. Whereupon, Justice McCabe filed for Writ of Prohibition with the Court of Appeals requesting that Judge Walters be restrained from taking any further action in his criminal case. Id. at ¶13. The next day, the Chief Justice, acting in his official capacity, issued the Writ of Prohibition and granted the relief requested. Id. Shortly thereafter, Judge Walter issued a bench warrant for Justice McCabe's arrest, for violating the conditions of his release. Id. at ¶15.

A special court of appeals was formed to sort out the issues. They determined that the district court exceeded its jurisdiction by ordering the Chief Justice, a judge of a higher court, relieved from performing his judicial duties as this action did not serve the purpose for which bail was intended—to insure that the criminal defendant appear at any subsequent hearing. Id. at ¶40. The court explained that “the Navajo judicial system, 7 N.T.C. §303, clearly establishes the supervisory jurisdiction over the district courts in the Court of Appeals of the Navajo Nation, and the power to remove or suspend the Chief justice rests solely with the Navajo Tribal Council, not with a district court judge.” Id. at ¶41. Also, 7 N.T.C. § 352 specifically grants removal authority of the Chief Justice upon a recommendation of the Advisory Committee of the Navajo Tribal Council. The court stated, “It was the intent of the Council that it alone retains the power to remove the Chief Justice, and where the statute is specific, no other entity possessed that removal authority under its discretionary powers.” Id.

Legislature Overstepping its Boundaries

Several cases have found that tribal legislatures have acted inappropriately in removing judges from tribal courts. See In the matter of Certified Questions II: The Navajo Nation v. MacDonald, (No. A-CV-13-89 (Nav. Sup. Ct. 1989) and In Re. Matter of CLB 0201, (Crow Ct of App. 2002).

The Navajo Supreme Court determined that a Tribal Chairman acting alone cannot terminate a probationary judge. No. A-CV-13-89, ¶16 (Nav. Sup. CT. 1989). The court analyzed the statute governing removal of judges, looking both at procedure and the intent of the legislation, to come to its conclusions. They explored issues of separation of powers, and found that the Navajo people have “an interest in a strong and independent judiciary” and as such any removal or appointments of judges must first come from recommendations from the Judiciary committee, before a chairman can act pursuant to 7 N.T.C. § 355(d). Id. at ¶¶19-23.

The proceedings in In Re. Matter of CLB 0201 were initiated by the Crow Court of Appeals, “in order to preserve and protect the independence and integrity of the Crow Tribal Judiciary, and in furtherance of the principle of ‘separation of powers.’” Id. at ¶10. In this case the duly elected Chief Judge and Associate Judges of the Crow Tribal Court had their positions vacated by the Tribal legislature after the tribe adopted a new constitution in 2001. Id. at ¶¶ 28-32. The court looked at the constitutionality of the proposed legislation for removing the three judges and found that it “constitutes gross interference with the Tribal Judicial Branch.” Id. at ¶66. They also said that it could “reasonably be inferred from the other branches actions that the ouster and replacement of all the sitting elected Judges was, inter alia, for the purpose of

improperly controlling the Tribal Judicial Branch's future decisions on issues of fundamental importance to the future of the Tribe." Id.

Not only did the court hold that the legislative action was in violation of the constitution but that it also violated the Judges due process rights guaranteed under the Indian Civil Rights Act. Id. at ¶68.

United Supreme Court Justice Sandra Day O'Connor recently summarized the current state of the tribal judiciary:

While tribal courts seek to incorporate the best elements of their own customs into the courts' procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition . . . some tribes have sought to provide tribal judiciaries with the authority to conduct review of regulations and ordinances promulgated by the tribal council. And one of the most important initiatives is the move to ensure judicial independence for tribal judges. Tribal courts are often subject to the complete control of the tribal councils, whose powers often include the ability to select and remove judges. Therefore, the courts may be perceived as a subordinate arm of the councils rather than as a separate and equal branch of government.

Sandra Day O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 5 (1997). Four years later, in 2001, the supreme court of the Navajo Nation issued a ruling that not only paralleled Justice O'Connor's statements but also responded to them. In Tuba City Judicial Dist. of the Navajo Nations v. Sloan, 57-97 (Navajo Trib. S.Ct. 2001), the court explained that a tribal "judiciary's function is to render judgments and to enforce its judgments and orders. No other branch or office of the government may legally interfere with the judiciary's duty to render judgments and enforce judgments in any way. Likewise, no other branch, office, or entity of the government may influence a court with the intent of altering its decision." Id. at ¶ 23.

Judicial independence is often synonymous with the division of powers among executive, legislative, and judicial branches of government. Notwithstanding any benefits stemming from these divisions, the United States government does not require that states employ separate judicial, legislative, and executive branches. Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225 (1908); Dreyer v. Illinois, 187 U.S. 71, 84 (1902). The federal government has taken a similar stance in regard to tribes. See Dodge v. Nakai, 298 F. Supp. 26, 33 n.2 (D. Ariz. 1969) (stating that the Navajo Tribe is not required to establish distinct branches of government).

Review of tribal council actions is a linchpin of judicial independence. In an effort to exercise this judicial independence, numerous tribes have assumed the power of judicial review. See Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court, 20 Indian L. Rptr. 6066 (Menominee Tribal Sup. Ct. 1993) (explaining that the Menominee constitution gives the tribal court the power to scrutinize legislation and enforce the constitutional duties and rights of the tribal legislature); Stone v. Swan, 19 Indian L. Rptr. 6093, 6094 (Colville Tribal Ct. 1992) (concluding that tribal courts of the Colville Confederated Tribes have inherent authority to

review the actions of tribal council and other tribal governmental entities); Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation, 13 Indian L. Rptr. 6023, 6026 (Ute T.C. 1986) (stating, “It is the province and duty of this tribal court to declare what the law is.”); Sekaquaptewa v. Hopi Tribal Election Bd., 13 Indian L. Rptr. 6009, 6009-10 (Hopi Tribal Ct. 1986) (explaining that the tribal court could interpret the tribal constitution and laws); Buffalo Horn v. N. Cheyenne Tribe, 12 Indian L. Rptr. 6019, 6020-21 (N. Chy. Tribal Ct. 1985) (tribal court ordered that a tribal election ordinance be amended); LeCompte v. Jewett, 12 Indian L. Rptr. 6025, 6027 (Chy. R. Sx. Ct. App. 1985) (tribal bylaws allowed judicial review of tribal council actions); Thompson v. Cheyenne River Sioux Tribe, 13 Indian L. Rptr. 6005, 6007-08 (Chy. R. Sx. Ct. App. 1985) (explaining that the tribal court had jurisdiction over constitutional questions of taxation); Means v. Oglala Sioux Tribal Council, 11 Indian L. Rptr. 6013, 6014 (Ogl. Sx. Tribal Ct. 1984) (allowed judicial review of council ordinance regulating council membership qualifications); Halona v. MacDonald, 1 Navajo Rptr. 189, 204-06 (1978) (concluding that the tribal code did not prevent judicial review of council actions).

In other cases, tribal courts have been stripped of judicial review. For instance, in McCurdy v. Steele, 353 F. Supp. 626 (D. Utah 1973), the Goshute Reservation lacked a judicial mechanism for hearing claims filed against the tribal council. The federal court stated, “It appears from the present record that the Confederated Tribes of the Goshute Reservation have no Goshute judge and rely instead upon the referral use of a Shoshone judge, for penal matters at least. A judicial system for the hearing of matters such as those in question apparently does not exist. Such matters would most likely come before the council itself.” *Id.* at 636. Three years later, the U.S. Court of Appeals for the Ninth Circuit stated that the Indian Civil Rights Act (ICRA) enables Indians to vest constitutional interpretation authorities in the tribal council. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 240 (9th Cir. 1976). Moreover, at least one tribal court has held that it lacks the power of judicial review because of deference to elders who obtain their tribal council positions based on a lifetime of wisdom and respect. *See Lane-Oreiro v. Lummi Indian Bus. Council*, 21 Indian L. Rptr. 6143 (Lummi Trib. Ct. 1994); *see also Lac du Flambeau Band of Lake Superior Chippewa Indians v. One 200-250 Foot Small Mesh Gillnet*, 16 Indian L. Rptr. 6095, 6097-98 (Lac du Flambeau Tribal Ct. App. 1989) (explaining that under provisions of the Lac du Flambeau tribal constitution, the tribal court could not review legislative actions).

Tribal councils, in an effort to limit the independence of tribal judiciaries, have argued that independent judicial review is either inappropriate or dangerous. *See generally* Fredric Brandfon, Comment, Tradition and Judicial Review in the American Indian Tribal Court System, 38 UCLA L. REV. 991, 1008 (1991) (internal citations omitted). In regard to the inappropriateness of judicial review, some contend that interbranch disputes within the tribe are political, not judicial, in nature. *See Chapoose*, 13 Indian L. Rptr. at 6025; *Halona*, 1 Navajo Rptr. at 189. In regard to the perils of judicial review, others claim that judicial review of tribal council activities may expose tribal resources to liability. *See LeCompte*, 12 Indian L. Rptr. at 6026. Specifically, “[s]hould the tribal councils be held liable for their actions by the tribal courts, the councils might lose a measure of their sovereign immunity, and . . . treasuries might be reached by plaintiffs with grievances against the councils.” Fredric Brandfon, Comment, Tradition and Judicial Review in the American Indian Tribal Court System, 38 UCLA L. REV. 991, 1008 (1991).

Notwithstanding these criticisms of independent judicial review, both the United States Supreme Court and tribal courts have pushed for such review, particularly in light of the ICRA. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the U.S. Supreme Court effectively ruled that tribal courts are institutions that independently review the limits on tribal government. See id. at 65 (stating, “Tribal forums are available to vindicate rights created by the ICRA.”). Similarly, the Southern Ute tribal court explained that “[w]here a tribe has not adopted a form of tribal government providing for distinct separation of powers, allowing court review for purposes of insuring compliance with constitutional provisions, statutory requirements and the Indian Civil Rights Act becomes a critical component in insuring a remedy exists to adequately protect guaranteed rights.” Committee for Better Tribal Gov’t v. S. Ute Election Bd., 17 Indian L. Rptr. 6095, 6096 (S. Ute Tr. Ct. 1990). Another tribal court ruled that there must be an independent tribal judiciary to hear claims under the ICRA. See Good Iron v. Hall, 26 Indian L. Rptr. 6029, 6030 (D. Ct. of Three Affiliated Tribes of the Fort Berthold Reservation 1998).

Judicial independence also hinges on a tribal judge’s immunity and a tribal council’s ability to remove a seated judge. Like judicial review, issues of immunity and removal serve as those “checks and balances” vital to the promotion of accountability and the deterrence of power abuse. See Tuba City Judicial Dist. of the Navajo Nations, 57-97, ¶ 27 (Navajo Trib. S.Ct. 2001). Regarding judicial immunity, the Eighth Circuit explained that a tribal judge is entitled to the exact same absolute immunity that shields state and federal court judges. Penn v. United States, 335 F.3d 786, 789 (8th Cir. 2003). In McKinney v. Bus. Council of the Shoshone-Paiute Tribes, 20 Indian L. Rptr. 6020 (Duck Valley Trib. Ct. 1993), a tribal council attempted to unseat a tribal judge because it disagreed with the judge’s ruling. However, the reviewing court ultimately held that the tribal council’s ability to remove a judge was not unfettered; the tribal council could not remove a judge from the bench unless it conducted hearings in accordance with both tribal law and the ICRA. Id. at 6020.

The tribal courts of the Crow Indian Reservation and the Navajo Nation also support limitations on the removal of tribal judges. The court of appeals for the Crow Indian Reservation in Montana ruled that the tribal council’s immediate removal of sitting elected tribal court judges violated the separation of powers doctrine expressly set forth in the tribe’s constitution, because it was tantamount to “gross interference” with the judicial branch. In re CLB 0201, 02-01, ¶ 66 (Crow Ct. App. 2002). The court went on to say that such removal also violated the tribal judges’ due process rights under the ICRA. Id. at ¶ 68. In 2002, the supreme court of the Navajo Nation extolled the benefits of an independent tribal judiciary by citing the swift removal of probationary judges as a means to that judiciary. The court said, “The Navajo public has an interest in a strong and independent judiciary. Navajo sovereignty is strengthened by a strong and independent judiciary. For these reasons, a probationary judge who has been determined to be unfit for office by the Judiciary Committee must be removed by the Chairman. The public is protected by the removal of the judge.” Navajo Nation v. MacDonald, 13-89, ¶ 23 (Navajo Trib. S.Ct. 1989)

A survey by the American Indian Law Center reflects the trends of federal and tribal caselaw indicating a movement toward a more independent tribal judiciary. See AMERICAN INDIAN LAW CENTER, INC., SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES (May 2000). Among other topics, the survey addressed tribal judicial independence.

Three particular questions and their answers shed light on the current independence of the tribal judiciary. One question asked, “Under what circumstances could a judge be removed from office prior to his/her term expiring?” Fifty-nine respondents claimed that removal could occur “for cause” specified in contracts or tribal legislation. Only twelve respondents said that removal could occur at the discretion of tribal council or the tribal executive committee, and only twelve respondents said that removal could occur for “other” reasons. Another question asked, “Does the tribal council or any other body apart from a formally designated appellate court have the power to review court decisions?” Seventy respondents answered no. Only sixteen respondents answered yes. An additional question asked, “Has a tribal judge been removed from office after he issued a controversial decision?” Seventy-six respondents answered no. Only nine respondents answered yes. Legal scholars, while citing the AILC survey, have also questioned its legitimacy, pointing out low response rates and ambiguities in the questions asked. See Catherine T. Struve, Tribal Immunity and Tribal Courts, 36 Ariz. St. L.J. 137, 180 n.226 (2004). In their opinion, judicial independence is even more pronounced. See id.

III. Conclusion

Critics of tribal courts contend that these courts are nothing more than dependant entities of the controlling tribal councils. Nevertheless, recent caselaw and survey data indicate that there is in fact a sizeable and growing degree of independence within the tribal judiciary.

Other Cases of interest

Saunooke v. Eastern Band of Cherokee Indians, No. 03-CV-510 (Cherokee Sup. Ct., 2004) (explaining that an appeal by a candidate to the Election Board should not have been denied. The Election Board did not certify the winner of an election because he may have aided someone who had defrauded the tribe.)

Harbell v. Department of the Interior, 31 ILR 3264 (U.S Dist. Ct. N.D of New York, 2004) (discussing confusion over which Mohawk tribal government the U.S. government should recognize, due to a dispute over the proposed constitution being adopted.)