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Eugene R. Fidell

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## An American Indian Supreme Court

### Erratum

Due to error, volume 1 issue 2 was originally published as volume 2 issue 1. This document reflects the correct version of volume 2, issue 1.

## AN AMERICAN INDIAN SUPREME COURT

Eugene R. Fidell\*

### INTRODUCTION

In 1978, a judge of the United States Court of Military Appeals<sup>1</sup> described military justice as the third system of American criminal law, and noted that the Uniform Code of Military Justice governed more people than live in eighteen states.<sup>2</sup> Actually, there is a *fourth* system of American law: American Indian tribal courts. Unlike courts-martial, tribal courts also have civil jurisdiction. Although these courts are better known than they were in 1978, collectively they serve more people than several states, are studied at a growing number of law schools, and recently obtained important legislation expanding their criminal jurisdiction.<sup>3</sup> However, they still do not cast the kind of shadow they should over the landscape of American law. The current state of affairs presents an opportunity for Indian tribes. As I will explain, the creation of an American Indian Supreme Court would strongly serve sovereign tribal interests.

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\* Senior Research Scholar in Law, and Florence Rogatz Visiting Lecturer in Law, Yale Law School. I am indebted to the students in my Federal Indian Law and American Indian Tribal Law classes and Sam Deloria, Richard Du Bey, Matthew L.M. Fletcher, Joshua A. Geltzer, Linda Greenhouse, Peter Jaszi, BJ Jones, Ezra Rosser, Catherine T. Struve, Gerald Torres, and Luther A. Wilgarten, Jr. for important insights and challenging questions; to the staff of the Lillian Goldman Law Library for lightning-fast assistance; and to the Federal Bar Association's Indian Law Section for the opportunity to share my early thoughts on this topic at Pojoaque. See Eugene R. Fidell, *An American Indian Supreme Court: Need, Benefits, Costs*, in FED. B. ASS'N, 36TH ANN. INDIAN L. CONF., BEST PRACTICES AND CONTINUING CHALLENGES IN FEDERAL INDIAN LAW, COURSE MATERIALS 381 (2011).

<sup>1</sup> Created in 1950, the court has been known as the United States Court of Appeals for the Armed Forces since 1994. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(2), 108 Stat. 2663, 2831 (1994); Special Session for Court Name Change, 42 M.J. 9 (1994).

<sup>2</sup> William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 3 S. ILL. U. L.J. 1 (1978).

<sup>3</sup> Recent legislation has widened tribal jurisdiction to include non-Indians for certain offences. Compare *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), with Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014).

This article will begin with an overview of the place of tribal courts in the American judicial landscape, particularly their relationship with federal and state court systems. It will then describe a number of proposals for a nationwide tribal court. Finally, it will set forth a proposal for a nationwide American Indian Supreme Court, identifying a number of procedural and structural issues—some large, some not so large—that would have to be addressed in bringing such an entity into being.

## I. OVERVIEW AND HISTORY

### A. *The Tribal Judiciary and Its Relationship With Federal and State Courts*

Roughly 300 of the 566 federally acknowledged Indian tribes have courts or dispute resolution systems.<sup>4</sup> They dispose of thousands of cases every year. These courts are as varied as the tribes they serve: some tribes have traditional courts, some have courts pursuant to constitutions approved under the Indian Reorganization Act of 1934 (IRA), some rely on pre-IRA Courts of Indian Offenses,<sup>5</sup> some share trial courts with other tribes, some participate in inter-tribal courts, and many have appellate courts (either their own or inter-tribal ones).<sup>6</sup> However, at present, there is no nationwide appellate tribal court.

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<sup>4</sup> See *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 9 (2008) (statement of Hon. Roman J. Duran, First Vice Pres., Nat'l American Indian Court Judges Ass'n); STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 (Tina Dorsey et. al eds., 2005), available at [www.bjs.gov/content/pub/pdf/ctjaic02.pdf](http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf) (last visited Jan. 5, 2014). According to Sen. Byron L. Dorgan, there were, in 2008, "about 290 tribal district courts and more than 150 tribal appellate courts." S. Hrg., *supra* note 4, at 1. It is astounding that, as Professor Fletcher notes, "no one really knows how many tribal courts there are . . . ." Matthew L.M. Fletcher, *Am. Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 CALIF. L. REV. CIR. 1, 10 (2013).

<sup>5</sup> See 25 C.F.R. § 11 (2013). These are colloquially known as "CFR courts." For a general description of the methods of establishment of tribal courts see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][c][iv][B], at 265-66 (2012) [hereinafter COHEN'S HANDBOOK].

<sup>6</sup> These include the Southwest Intertribal Court of Appeals, see Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994); NORTHWEST INTERTRIBAL COURT SYSTEM, <http://www.nics.ws/> (last visited Jan. 5, 2014); INTERTRIBAL COURT OF NORTHERN CALIFORNIA; INTERTRIBAL COURT OF SOUTHERN CALIFORNIA, <http://icsc.us/> (last visited Jan. 5, 2014); NORTHERN PLAINS INTER-TRIBAL COURT OF

Current federal law requires litigants to exhaust tribal court remedies,<sup>7</sup> including appellate remedies,<sup>8</sup> before seeking relief in the Article III courts. It does not, however, provide for direct appellate review of decisions of any tribal court, trial or appellate, in any Article III court.<sup>9</sup> Tribal court prison sentences are, however, subject to district court habeas corpus review pursuant to the Indian Civil Rights Act (ICRA).<sup>10</sup> ICRA imposed important minimal procedural safeguards on tribal courts,<sup>11</sup> which are not subject to the United States Constitution.<sup>12</sup> The Article III courts may also exercise collateral review of decisions of tribal courts where a litigant claims that the tribal court has exceeded its jurisdiction. State courts enjoy no direct appellate jurisdiction over tribal courts.

### **B. A Survey of Previous and Recent Proposals**

Proposals for nationwide courts of one kind or another to deal with matters of Indian law have a long history and no discernible results. By way of preface to my proposal, it may be helpful to survey the earlier suggestions. The idea seems to be a hardy perennial, although it has morphed over time.

One such proposal appeared in an early version of the IRA. Commissioner of Indian Affairs, John Collier, proposed to establish a Court of Indian Affairs.<sup>13</sup> However, Professor Vine Deloria Jr. asserts that

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APPEALS, <http://www.npica.org/> (last visited Jan. 5, 2014); INTERTRIBAL COURT OF APPEALS OF NEVADA, see Jill Greiner, *Appellate Law in Nevada Indian Country: The Inter-Tribal Court of Appeals*, Nevada Lawyer, Aug. 2011, at 16.

<sup>7</sup> National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985) (federal question cases); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-19 (1987) (diversity cases).

<sup>8</sup> LaPlante, 480 U.S. at 17.

<sup>9</sup> Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 240 & n.444 (2002) [hereinafter Clinton, *No Federal Supremacy*]; Laurie Reynolds, "Jurisdiction" in *Federal Indian Law: Confusion, Contraction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 383 & nn.165-66 (1997).

<sup>10</sup> 25 U.S.C. § 1303 (2006).

<sup>11</sup> 25 U.S.C. § 1302 (2006), amended by TRIBAL LAW AND ORDER ACT OF 2010, Pub. L. No. 111-211, § 234(a), 124 Stat. 2258, 2279 (2010).

<sup>12</sup> E.g., Talton v. Mayes, 163 U.S. 376 (1896) (tribal court not subject to Fifth Amendment requirement for indictment by grand jury).

<sup>13</sup> Collier proposed to establish a 'Court of Indian Affairs' consisting of a chief judge and six associated. This court would accept all cases that presently go into federal district

“[t]he Collier proposal was virtually dead after the March [1934 tribal] congresses because it was difficult for Indians to conceive of and their response was generally to oppose change.”<sup>14</sup> Senator Burton Wheeler wrote in a memoir “when I began looking over the original draft, there were many provisions I didn’t like. It set up a special judicial system for the Indians, with a federal judge to try only Indian cases. I thought it was a crazy idea and had it thrown out in committee.”<sup>15</sup>

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courts and handle all inheritance and competency issues. It could also order the removal of any case involving Indians in a state of tribal court, to be heard by the Court of Indian Affairs. And it would be the national appeals court for the newly authorized tribal courts. It would even handle penalty cases and all crimes for which a term of five or more years in prison would be the penalty. State law, except where it was superseded by federal and tribal law, would prevail in civil cases.

Judges would serve for a period of ten years and would be subject to removal with the consent of the Senate for any cause. Appeals from the Court of Indian Affairs would be to circuit courts, apparently based on the residency of the parties or the geographical origin of the case. Ten special federal attorneys were to be appointed to advise and represent Indian tribes and communities. The court would also be empowered to hold hearings and conduct cases wherever the case might arise, suggesting that Collier had in mind a court that would periodically travel through Indian country and create dockets from the activities in each region. Considering the complete chaos that we presently see in the field of Indian litigation, Collier’s idea sparkles with brilliance. Most essential in his idea is the degree of homogeneity this court would bring to federal Indian law. . . .

VINE DELORIA, JR., *THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS* xiv (2002) [hereinafter DELORIA, REORGANIZATION ACT] (*discussing* H.R. Doc. No. 7902, Sess. tit. IV at 17-19 (1934)). *See also* 1 *H. Comm. on Indian Affairs, Hearings on Readjustment of Indian Affairs*, 73rd Cong. 12-14 (1934). The provision for jurisdiction over appeals from courts of “any chartered Indian community” appeared in § 6. H.R. Doc. No. 7902. It applied only to “cases in which said Court of Indian Affairs might have exercised original jurisdiction.” *Id.*

<sup>14</sup> DELORIA, REORGANIZATION ACT, *supra* note 13, at xv. *See also* FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 959-63 (1995). According to Collier’s annual report for 1934, “[t]he entire title creating a special court of Indian affairs was omitted and consideration of this subject adjourned until the next Congress. In view of the chaotic state of Indian law enforcement, it is important that this subject be given adequate consideration and that early remedial action be had.” FRANCIS PAUL PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY* 228 (2000) (statement of Comm’r of Indian Affs., Ann. Rep. for 1934).

<sup>15</sup> ELMER R. RUSCO, *A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT* 234 & n.18 (2000), (quoting BURTON K. WHEELER & PAUL F. HEALY, *YANKEE FROM THE WEST* 315 (1962)). Cohen and Melvin Siegel appear to have originated the idea for the court. RUSCO, *supra*, at 193, 197-98, 201.

However, Felix Cohen described the proposed court at the tribal congresses that were part of Collier's road show "This court would be of help not only to the Indian communities which ask for a charter under this act and receive charters, but also to the tribes which do not want charters. We hope that all the Indians will be given a voice in the selection of the judges. . . ." <sup>16</sup>

In short, this Court of Indian Affairs would have had appellate jurisdiction over tribal courts, criminal jurisdiction over major crimes, and judicial review jurisdiction over acts of the Commissioner of Indian Affairs.<sup>17</sup> It "would have jurisdiction over conflicts between Indian communities and the outside world, if they arose," and could order a tribe to comply with its charter,<sup>18</sup> but would not have jurisdiction over Indian claims against the federal government. Those were to remain within the jurisdiction of the Court of Claims.<sup>19</sup> Despite calls for revival of the idea, Congress found Collier unsalable and expendable,<sup>20</sup> and once Wheeler killed it in committee, it sank without a trace.

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<sup>16</sup> DELORIA, REORGANIZATION ACT, *supra* note 13, at 43. Cohen also expressed, I hope I have made it clear why we need a special federal court in addition to the local Indian court. It is because there are many cases which are too important for a local court to want or to have the right to handle. It is because you want a court of the highest authority before which each community and each individual can bring any grievances that may arise in the administration of the new policies of the administration. I ask you to remember when you discuss any provisions of this bill that wherever there is a provision which seems as if it might work an injustice on an Indian, that Indian will have the right to come before this court and insist, first, on his constitutional rights as a citizen of the United States, and, second, on his special rights as are given him by the charter of his community.

*Id.* at 44.

<sup>17</sup> The Court of Indian Affairs would deal, among other things, with any disputes between the community and one of its officers. If the community shuts out one of its members and doesn't live up to its constitution and its charter, why then that member, or the Secretary or the Commissioner acting on his behalf, can go into the Federal Court and compel the community to act in accordance with its charter. . . . And if any member of a community has any rights in the community he could go into this court and get protection.

*Id.* at 124. The court "would come to the reservation and do its work right here where you are." *Id.* at 150; *see also id.* at 339.

<sup>18</sup> *Id.* at 309.

<sup>19</sup> *Id.* at 383.

<sup>20</sup> *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 131, 152-53, 162-63 (1984).

Even so, since the 1930s, a variety of proposals have been advanced, some of which include a court that looks beyond a single reservation. For example, in 1978, the National American Indian Court Judges Association's Long Range Planning Project offered suggestions for inter-tribal appellate systems. The Association's report recommended that "[i]nter-tribal appellate systems should be established to insure a body of appeals judges who have no conflict of interest."<sup>21</sup> To be sure, there is no suggestion here of a nationwide tribal appellate court, but there is a recognition of the inherent limits of trying to dispense justice solely within the metes and bounds and political framework of a single tribe.

As noted, several inter-tribal appellate courts have come into being, along either regional or cultural lines. One notable idea that has, so far, proven to be stillborn was a proposal for a Great Sioux Nation Supreme Court.<sup>22</sup> Nonetheless, that effort, which built on a "long-held cultural ideal and vision of the tribes of the Great Sioux Nation,"<sup>23</sup> remains both timely and useful for its authors' identification of numerous critical questions of judicial organization and administration, and options for their resolution.

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<sup>21</sup> NAT'L AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 123 (1978). In addition to "the traditional way of the tribe," the report noted three alternative approaches:

1. An appeals panel could be made up of judges from one cultural unit, such as all Apache reservations, and judges from reservations other than the one where the trial was held would hear appeals. This approach insures cultural integrity.
2. Judges from a different reservation could hear an appeal. The judges should be aware of tribal traditions. This method avoids conflicts of interest.
3. A permanent appeals court made up of present or past Indian judges or tribal elders who are familiar with tribal traditions could be established.

*Id.*

<sup>22</sup> See generally Frank Pommersheim & John P. LaVelle, *Toward a Great Sioux Nation Judicial Support Center and Supreme Court: An Interim Planning and Recommendation Report for the Wakpa Sica Historical Society's Reconciliation Place Project (The Great Sioux Supreme Court)*, 17 WICAZO SA REV. 183, 216 (2002), available at <http://www.upress.umn.edu/journal-division/Journals/wicazo-sa-review> (last visited Jan. 6, 2014) [hereinafter Pommersheim & LaVelle]. The eligible tribes would have been the eleven Sioux tribes in the Dakotas and Nebraska, eight tribes that signed the 1851 and 1868 Treaties of Ft. Laramie, and four other Sioux tribes in Minnesota. *Id.* at 216-17. For background on the proposed court, see Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 327-29 (2004). See also Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, § 412, 114 Stat. 2868, 2905.

<sup>23</sup> Pommersheim & LaVelle, *supra* note 22, at 216; see also *id.* at 224.

These include who will decide which tribes would be invited to participate, what the court's relationship would be to existing tribal appellate courts, its jurisdiction, judicial selection and terms of office, governing law, regulation of the bar, and enforcement of judgments.<sup>24</sup> The proposal set forth below repeatedly reflects points raised by the Great Sioux Nation proposal's authors, Professors Frank Pommersheim and John LaVelle.

In 1990, Professor Robert Clinton proposed a Court of Indian Appeals in light of his concern about "how to accommodate such review with the sovereignty and autonomy of the tribes and nevertheless provide some assurance that the tribal governments discharge their legal responsibilities as part of the federal union."<sup>25</sup> One of two admittedly imperfect solutions he offered<sup>26</sup> was "for the tribes, by collective action and with the cooperation of Congress, or less preferably for Congress unilaterally, to create a standing specialized Court of Indian Appeals."<sup>27</sup> Professor Clinton felt his plan would dispel much of the criticism surrounding tribal court judgments.<sup>28</sup>

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<sup>24</sup> *Id.* at 217-224. Without an enforcement mechanism, a new court would be toothless: all symbol and no reality.

<sup>25</sup> Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 889 (1990) [hereinafter Clinton, *Tribal Courts*].

<sup>26</sup> The other was to extend the Supreme Court's certiorari jurisdiction to final judgments of tribal courts. *Id.* at 893 n.126. Professor Reynolds would also extend the certiorari jurisdiction to any tribal court ruling that involved a federal question. Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1153-54 (1995).

<sup>27</sup> Clinton, *Tribal Courts*, *supra* note 25, at 890 & n.123.

Furthermore, this court would be composed of independent judges formally appointed by the President but selected from and by the tribes. This court would serve as an appeals court of last resort to hear appeals from all tribal courts in matters raising questions under ICRA or other federal laws in which the tribal decision was adverse to the federal claim.

*Id.*

<sup>28</sup> The judicial independence of such a court and its supra-tribal nature should ameliorate the concerns of critics of tribal enforcement of the Indian Civil Rights Act who argue that tribal court enforcement of claims made under that Act cannot finally be committed to non-independent judges who sometimes are members of the tribe in question, who have no judicial independence, and who are sometimes pressured or removed from office for enforcing the mandates of federal law. Furthermore, staffing such a specialized court with Native American judges, who are familiar with reservation life and the special legal problems posed by the interface of Indian customary and written federal, state, and tribal law, would obviate the objections of tribal critics of federal court review who fear that federal court review will ignore special tribal problems and conditions and undermine the

The following year Michael Pacheco, an attorney in Oregon suggested an Article III Federal Indian Court of Appeals (FICA) “to avoid the inconsistent rulings rendered by the various federal courts on Indian matters” by removing “those matters from the current federal appellate review scheme.”<sup>29</sup> Although there is much of value in Pacheco’s plan, important aspects are, as I will elaborate below, unwise and contrary to the larger interests of Indian tribes. In any event, nothing of substance came of either his or Professor Clinton’s proposals.

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sovereignty of the various Indian tribes. While such a specialized national Indian Court of Appeals may be an appealing solution to many of the problems raised by critics of *Martinez*, this solution is not without difficulty. Indian sovereignty does not exist for Indian people as a whole; rather, it exists for each tribe. A single Indian Court of Appeals would not have the familiarity with the history, traditions, customary law, or conditions of each tribe needed to balance and accommodate its interpretations of the Indian Civil Rights Act or other federal laws with the actual interests or problems faced by the tribe whose decisions are at issue. Nevertheless, it is far more likely that a pan-tribal court composed of Native American judges could perform that delicate role better than a federal district judge who may never have set foot on an Indian reservation and who may have no familiarity with tribal traditions or governance.

*Id.* at 892 (In the United States Supreme Court case *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court held that no federal cause of action could be implied under the Indian Civil Rights Act of 1968 (ICRA) that would permit federal district courts to entertain civil claims brought under the Indian Civil Rights Act).

<sup>29</sup> Michael M. Pacheco, *Finality in Indian Tribunal Decisions: Respecting Our Brothers’ Vision*, 16 AM. INDIAN L. REV. 119, 154 & n.197 (1991). Eschewing any suggestion “that Indian tribunals should be under a separate judicial system,” *Id.* at 154. his plan had nine elements:

- (1) Congress should create and maintain the FICA.
- (2) The FICA should hear all appeals from Indian tribunals.
- (3) FICA decisions may only be reviewed by the United States Supreme Court by writ of certiorari.
- (4) The FICA should be comprised of panels with seven Native Americans on each panel.
- (5) A simple majority of the appellate panel should originate from the litigant tribe’s membership. If two tribes are involved, one neutral tribe panelist should preside.
- (6) The governing law should be that of the litigant tribes, the United States Constitution, and the relevant states, in that order of preference.
- (7) The judges for the appellate panels should be elected for life by the tribes’ members with no requisite amount of Anglo legal training.
- (8) The judgments of the FICA should be respected, receiving full faith and credit from all the states and other tribes.
- (9) The guiding principle of the FICA should be to assure that tribal rights are upheld even when adverse to a federal claim. Technical violations of federal law should not suffice for Supreme Court review.

*Id.* at 155. For Mr. Pacheco’s discussion of these features, see *id.* at 155-64.

Within a few more years, Michael C. Blumm and Michael Cadigan put forward yet another variant, a more radical plan, with a view, quite simply, to “eliminat[e] the [United States] Supreme Court from Indian law,”<sup>30</sup> and vest “an Indian Court of Appeals...with the jurisdiction taken from the Supreme Court.”<sup>31</sup> This new court’s jurisdiction “would be limited to questions of federal law in cases where (1) any party is a member of a tribe; (2) the issue concerns an Indian reservation, an Indian’s or tribe’s land, water or other property, or involves an Indian government; or (3) the dispute originates in Indian country” as defined in 18 U.S.C. § 1151.<sup>32</sup> Its decisions would be exempt from review by the Supreme Court.<sup>33</sup>

The basis for the Blumm and Cadigan proposal was that the Supreme Court had become “hostil[e] to the concept of Indian sovereignty.”<sup>34</sup> While I agree that the Court has in recent decades been (and continues to be), on the whole, hostile to tribal sovereignty, this particular proposal would simply rearrange the judicial deck chairs.<sup>35</sup> It has gained no traction in the twenty years since it was advanced. Moreover, it has nothing to do with the law developed by tribal courts, or the purposes served by my own proposal.

There have been at least three additional proposals of note. One would have created a two-tier Inter-Tribal Business Court to adjudicate disputes under a proposed Inter-Tribal Economic and Trade Treaty. The court would have relied on the Northwest Inter-Tribal Court System, but participating tribes could opt out and use their own courts for trials, appeals, or both.<sup>36</sup> The idea seems not to have gained traction.

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<sup>30</sup> Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK. L. REV. 203, 232 (1993).

<sup>31</sup> *Id.* at 232.

<sup>32</sup> *Id.* at 233 & n.172.

<sup>33</sup> *Id.* at 234.

<sup>34</sup> *Id.* at 206.

<sup>35</sup> See John J. Tutterow, Annotation, *Federal Review of Tribal Court Decisions: In Search of a Standard or a Solution for the Problem of Tribal Court Review by the Federal Courts*, 23 OKLA. CITY U. L. REV. 459, 490 (1998).

<sup>36</sup> See generally Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1113, 1133-34 (2008). The proposal to rely on the Northwest Inter-Tribal Court System reflects the likelihood

Another proposal was floated in 2010, when, in the course of analyzing membership disputes, Professor Suzianne Painter-Thorne urged tribes to “more fully assert their right to determine tribal membership by creating wholly independent judicial bodies such as an intertribal appellate court that would provide independent review of tribal membership decisions. Such a system would also provide redress for those aggrieved by enrollment decisions, quieting critics’ cries for federal oversight.”<sup>37</sup>

Professor Painter-Thorne has in mind something less than a nationwide institution<sup>38</sup> when she suggests the need for an inter-tribal appellate court system “operated by the tribes rather than an outside government,” and notes that such a forum “would strengthen the credibility of tribal courts and render any claim for federal review unnecessary.”<sup>39</sup> This inter-tribal appellate court has many benefits, such as, “parties’ cases could be heard before a neutral panel, leading to a greater perception of fairness and due process, and, thus, legitimacy of tribal enrollment

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that only a few cases would arise under the treaty, making the “creation (and funding) of an entirely new court . . . unfeasible and duplicate.” *Id.* at 1113.

<sup>37</sup> Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 346-47 & nn.330-31 (2010). She went on to say: Ideally, an intertribal appellate court would oversee appeals from the courts of multiple tribes, in much the way the United States Courts of Appeal[s] review appeals from district courts in their constituent states. Each tribe would have the option to become a member of an intertribal appellate court as an addition to their current tribal court system. The courts would be staffed and operated by the tribes themselves. In so doing, these “intertribal courts of appeal” would provide a level of judicial independence in the review of membership decisions that critics charge is currently lacking under the current structure of tribal governments and court systems.

*Id.* at 346-347.

<sup>38</sup> Perhaps, Painter-Thorne envisions a nationwide institution that would function on a regional basis:

A court system designed by the tribes could account for [tribal] diversity by organizing it so that tribes with similar histories or cultures are grouped together. Further, because *one court would not be charged with reviewing decisions from all tribal courts*, each court would have oversight over fewer tribes, reducing the complexity that would be a natural consequence if federal courts were involved.

*Id.* at 352 (emphasis added).

<sup>39</sup> *Id.* at 349 & nn.347-48.

decisions. Consequently, the main complaint against tribal sovereignty over membership decisions would be silenced.”<sup>40</sup>

Finally, Professor Wenona Singel has broadened the inquiry with a creative program for an “intertribal human rights regime in Indian country.”<sup>41</sup> Her proposal, which candidly acknowledges the significant impediments it would face,<sup>42</sup> entails the negotiation of norms to be included in a treaty, as well as, “an institutional framework for enforcement” that would reflect “examples set by the human rights instruments and institutions established by the United Nations and other regional systems.”<sup>43</sup> The details of the enforcement framework will be critical to a full assessment of the proposal, but her article strongly implies that norm interpretation would be local, even if the norms themselves are pan-Indian.<sup>44</sup> Her focus is on negotiated norms, whereas the proposal outlined below presupposes norms from various sources, but provides new enforcement machinery. Thus, the two concepts are not only incompatible, but actually complementary.

## II. THE PROPOSAL

I propose the creation of an opt in nationwide American Indian appellate court, building on the experience of existing inter-tribal appellate courts and the insightful work of earlier commentators. Professors Pommersheim and LaVelle may have been ahead of their time when they

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<sup>40</sup> *Id.* at 349-50 & nn.352-53. She also stated:

[T]he creation of an intertribal appellate court system would not require a change to any existing tribal government or court structure. Instead, it would provide an external layer of review in addition to whatever court system the tribe currently possessed. In fact, the structure of the court would be in tribal hands, ensuring continued tribal autonomy and sovereignty over its courts and membership decision making process. Further, decisions would be based on tribal law, tribal culture, and traditions. This would be possible because such a court system would be created, staffed, and operated by the tribes themselves. Consequently, such a court system would have a level of cultural awareness lacking in federal court adjudications of claims involving membership disputes.

*Id.* at 351 & nn.364-69.

<sup>41</sup> Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 608 (2012).

<sup>42</sup> *E.g., id.* at 619-20 (noting tribal tendency to isolationism and concerns over sovereignty).

<sup>43</sup> *Id.* at 612.

<sup>44</sup> *Id.* at 616-17.

outlined a Great Sioux Nation Supreme Court, and Professor Clinton may have been doing the same when he proposed certiorari review of tribal decisions by the Supreme Court of the United States. I believe now is the time to set our sights even higher, although I am under no illusions that success will come easily.<sup>45</sup> As Professor Pommersheim observed in connection with his own dramatic proposal for fundamental change in the legal environment within which tribes function, “this is the time to seize the initiative to advance the dialogue.”<sup>46</sup>

### **A. Potential Benefits**

The potential benefits of creating a nationwide inter-tribal supreme court would be significant and would far outweigh the costs.

The potential benefits include (1) an Indian-built, -funded, and -staffed institution on an equal footing with federal and state courts; (2) increased accountability of tribal officials;<sup>47</sup> (3) greater deference by Congress and the federal courts to tribal court decisions; (4) reduced danger of aberrant tribal court decisions that invite federal court interference; (5) a model for improved judicial independence throughout

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<sup>45</sup> In 2009, James BlueWolf identified as one alternative approach to the improvement of tribal governance the “creat[ion of] an American Indian Supreme Court to mediate all approved appeals to mediate internal tribal issues.” James BlueWolf, *Native Government*, SPEAK WITHOUT INTERRUPTION (Mar. 4, 2009), [www.speakwithoutinterruption.com/site/2009/03/native-government/](http://www.speakwithoutinterruption.com/site/2009/03/native-government/) (last visited Jan 13, 2014). He was not optimistic:

Yeah right! Like the Tribal governments would ever agree to that! In the meantime many natives continue to live without equal protection under the law, yet are subject to all the penalties and transgressions of both the American government and their own. It will be left to our children and grandchildren to figure out a solution.

*Id.*

<sup>46</sup> FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 257 (2009). Professor Pommersheim’s suggestion, *id.* at 307, for a constitutional amendment to better protect “[t]he inherent sovereignty of Indian tribes” from the shifting sands of congressional “plenary power” whim and Supreme Court jurisprudence is more far-reaching than the present proposal, but requires a kind of action that the Framers intentionally made extremely difficult. By comparison, the current proposal asks relatively little of Congress, and the central elements of it could move forward without congressional action of any kind, much less a constitutional amendment. For an insightful review of *Broken Landscape* see Angela R. Riley, *Book Review*, 60 J. LEGAL EDUC. 569 (2011).

<sup>47</sup> See Singel, *supra* note 41, at 608-11 (noting adverse internal and external effects).

Indian Country; (6) independent adjudication, *by an Indian institution*, of politically sensitive intra-tribal governance disputes and inter-tribal disputes such as access to culturally significant sites, natural resource allocation, child custody and other family law matters, and dual-membership issues; (7) reduced litigant recourse to federal and state courts; (8) economies of scale in the delivery of appellate justice; (9) encouragement of commerce with off-reservation interests by providing a reliable body of tribal law; (10) accelerated development of judicial expertise; and (11) accelerated development of a nationwide American Indian bar. Less directly related to the administration of justice, but still highly salient, in my view, is a final potential benefit: (12) affording this and succeeding generations of Indian leaders the opportunity to engage in institution building on a larger canvas than hitherto.

Some of these potential benefits are more likely to come to fruition than others. Some will be considered insubstantial, irrelevant, downright undesirable, or perhaps even insulting, depending on the observer. For instance, the third outcome—greater congressional and judicial deference to tribal court decisions—would be of great value, but, quite plainly, its realization would be a function of the unpredictable shifting political winds in Washington, and in the case of judicial deference, might take decades to achieve, assuming it were to come about. That kind of time frame, it seems to me, is unacceptable.

### **B. Potential Drawbacks**

As with any new endeavor, there will be new costs, including unanticipated consequences. A new court will require capital and operating expenditures for facilities and salaries. Unless the new court takes the place of some existing inter-tribal appellate courts, adding a further tier to the appellate structure<sup>48</sup> will add to the time and expense of litigation under existing exhaustion doctrine,<sup>49</sup> potentially dis-incentivizing

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<sup>48</sup> This is what Professor Painter-Thorne has in mind. Painter-Thorne, *supra* note 37, at 351 & n.365 (referring to “an external layer of review in addition to whatever court system the tribe currently possessed”). Professors Pommersheim and LaVelle, considering a Great Sioux Nation Supreme Court, argue strongly against replacing existing tribal appellate structures. Pommersheim & LaVelle, *supra* note 22, at 217.

<sup>49</sup> See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

litigants to resort to tribal court. Unfortunately, there is no way to handicap how litigant behavior might be affected. Nor is it clear whether addition of this tier would serve or disserve tribal interests. Thus, it could be argued that the sheer difficulty of obtaining review by the Supreme Court of the United States in routine cases challenging the exercise of jurisdiction by tribal courts is in itself an advantage that tribal interests may be loath to relinquish. On the other hand, there is no particular reason to believe that the Supreme Court would be more likely to review jurisdictional decisions by the proposed court than it is to review Article III courts of appeals decisions on tribal jurisdiction under current federal jurisprudence. It would be a hard sell, in any event, given the Court's parsimonious exercise of its power to grant certiorari. From this perspective, addition of the new court to the tribal appellate layer-cake seems likely to be either imponderable, or at worst, a wash.

Above all, tribal leaders and rank-and-file members will be alert to the danger that establishing a new court would compromise the autonomy of individual tribes. However, five features of this proposal minimize that danger: (1) the entire system would be the result of negotiations in which any tribe that wished to participate could do so or not at its sole discretion; (2) participation would be strictly on an opt in basis; (3) participating tribes could opt out; (4) the agreed-upon framework for the new court would be subject to review at stated intervals; and particularly significantly, (5) a participating tribe could legislatively overrule for the future any misinterpretation of its law.

### ***C. Proposed Elements of the Court***

Following are key elements of the proposal. The accompanying notes refer to sources and models, and identify policy questions. Plainly, these elements reflect the forms of judicial organization and administration known to and employed in the dominant society as well as many existing tribal and inter-tribal courts. To the extent there are alternatives that spring from or reflect Indian customs and institutions, modes of legal reasoning, and perspectives on the administration of justice, these should be given careful consideration so that the new court would be tribal in fact, as well as in name. What follows reflects my conviction that although the need for

a nationwide inter-tribal court can be debated “‘til kingdom come,” the concept cannot fully be evaluated until the discussion among stakeholders gets granular.

**1. *The Court Would Be Called the American Indian Supreme Court and Would Be a Court of Record.***

A variety of names suggest themselves. I propose this one for the basic reason that it advertises the fact that it is the highest court of a jurisdiction. Since one of the purposes of the exercise is to place tribal law on as equal a footing as possible with state and federal law, the name settled on will have considerable significance.

An alternative that involves a few more keystrokes, but usefully underscores the tribal, rather than the pan-Indian character of the court is “American Indian Nations Supreme Court.” It has been used in connection with the mock re-arguments of major Indian law cases at the University of Kansas’ School of Law’s annual Tribal Law and Governance Conferences.<sup>50</sup>

The proposal is not predicated on either the abolition or the withering-away of intra- or inter-tribal appellate courts. Whether those courts would endure in the new environment that would include an American Indian Supreme Court will be a function of how events unfold over time.

**2. *The Court Would Be Established By Multilateral Inter-Tribal Agreement (MITA).***

Since there is no existing nationwide inter-tribal political entity,<sup>51</sup> an *ad hoc* multilateral agreement seems to be called for. This is consistent

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<sup>50</sup> See Stacy L. Leeds, *Foreword: 2003 Tribal Law and Governance Conference*, 14 KAN. J.L. & PUB. POL’Y 47 (2004). See also CAROLE E. GOLDBERG, REBECCA TSOSIE, KEVIN K. WASHBURN & ELIZABETH RODKE WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 424 (2010).

<sup>51</sup> The National Congress of American Indians (NCAI) is of course inter-tribal, but some federally recognized tribes are not members, and in any event, it lacks governmental authority. NCAI would be one of the key institutional players in the consideration of any proposal along the lines of the one set forth in this article.

with the view that each tribe is an independent sovereign. The effective reality is that the MITA would be in the nature of a compact, for which there is precedent.<sup>52</sup> One premise of this exercise is to avoid congressional involvement, even though that may mean the loss of a potentially important funding source. Others may feel that the game is worth the candle.<sup>53</sup>

Getting to the point of negotiating a MITA, and then actually negotiating one, are beyond the scope of this essay. However, it is worth mentioning that without a sound process that includes an array of confidence- building strategies, the chances of success on the merits are nil, given the kind of cultural and political impediments that Professor Singel and others have identified.<sup>54</sup> Matters that would have to be addressed include the selection of a balanced organizing committee, distinguished conveners, rapporteurs and other experts; funding; transparency policies with respect to public participation and media access; and the identification and drafting of deliverables.

### ***3. The Court Would Not Be Created By an Act of Congress or Funded By the United States.***

The overarching concept is that the court is to be a creature of Indian America, not of the federal government. Consistent with this is the provision below that calls for the court's seat to be in Indian Country, and not in Washington, D.C. Some collateral aspects of establishment of the new court may require legislation. An example is the concept, noted below,<sup>55</sup> of extending the United States Supreme Court's certiorari jurisdiction to decisions of the new court that involve federal questions. The core concept would remain that the new court would be an Indian creation, not a congressional one.

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<sup>52</sup> See NAVAJO NATION & HOPI TRIBE, INTERGOVERNMENTAL COMPACT (Nov. 3, 2006), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001890.pdf> (last visited Nov. 25, 2013).

<sup>53</sup> See Pacheco, *supra* note 29, at 155 (urging that "Congress should create and maintain the FICA").

<sup>54</sup> *E.g.*, Singel, *supra* note 41, at 617-21.

<sup>55</sup> See *infra* text accompanying notes 91-100.

**4. *The Court Would Be Incorporated and Otherwise Organized so as to Ensure the Deductibility of Contributions for Federal Income Tax Purposes.***

Practical considerations arising from the Internal Revenue Code drive this part of the proposal. Deductibility will be critical if charitable contributions are to play more than a trivial role in the business plan. Despite the overall philosophical approach set forth above, one option is to secure a federal charter from Congress. Selection of any particular state in which to incorporate implies a posture of subservience that is to be avoided if possible. A preferable solution might be to incorporate under tribal law, but because the court would be inter-tribal, doing so might be objected to as implying linkage to a particular tribe.

**5. *The MITA Would Be Subject to Review By the Participating Tribes After Five Years and at Five-Year Intervals, Thereafter.***

Realism dictates some kind of scheduled review. Such a provision would allow participating tribes a chance to take stock of how the court and the MITA were holding up in real life. Additionally, it would likely allay fears of the new entity in some quarters. Periodic review of international agreements, especially those that were tough to negotiate in the first instance, is not uncommon to afford States parties an opportunity to take stock of actual experience in the early years of a new institution and to make mid-course corrections.<sup>56</sup>

**6. *The MITA Would Establish Only an Institutional Framework for the Adjudication of Cases, Although Substantive Rules of Law Could Be Added By Subsequent Agreement.***

This is a very important provision. The concept is that the MITA would be an empty vessel, merely creating a structure and a process, rather than substantive norms. Professor Singel's proposed Indian

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<sup>56</sup> *E.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, art. VIII(3), 729 U.N.T.S. 161 (1970), *entered into force*, Mar. 5, 1970; Rome Statute of the International Criminal Court, art. 123, 2198 U.N.T.S. 3 (2002), *entered into force*, July 1, 2002.

Country human rights program could provide the substance (as could Professor Pommersheim's constitutional amendment), and the court would be an appropriate framework for implementing those and other norms. One can speculate that, over time, tribes would move in the direction of enforceable inter-tribal norms on such subjects as adjudication of tribal agency action, common enrollment standards, or electoral matters. The court could play a role in that process.

***7. Participation Would be Open On an Opt In Basis to All Federally-Recognized Tribes and Any Other Indian Tribe, Whether or Not State-Recognized, if the Participating Tribes Unanimously Agree That the Tribe Should Be Permitted to Participate.***

The opt in concept is central to the proposal, but this feature highlights some major Indian Country policy issues that would need to be addressed in the MITA. If it is desired to downplay the federal role in designing the new institution, federal recognition could be dispensed with as a qualification for participation. Tribes that participate in the negotiation of the MITA may feel that state recognition is sufficient, but there will be differences of opinion on that.

Which tribes will be covered "is definitely a threshold question that must be answered and will likely set the tone for the entire project."<sup>57</sup> Tribes that have neither federal nor state recognition present a weak case for eligibility. Moreover, the requirement for unanimity may effectively exclude many, if not all, state-recognized or entirely unrecognized entities. Left unresolved is whether that requirement would afford state-recognized and unrecognized tribes (assuming they were permitted to participate) a veto under the unanimity clause when other such tribes seek to become participants.

Whether the door should be open to Canadian First Nations that are culturally related to tribes within the United States is an issue that may arise,<sup>58</sup> and obviously would require close study.<sup>59</sup> More pressing is

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<sup>57</sup> Pommersheim & LaVelle, *supra* note 22, at 217.

<sup>58</sup> *Id.*

whether there is a place in the proposed institution for the many federally recognized tribes that do not yet have court systems. The basic concept for an American Indian Supreme Court is that it would be in essence an appellate tribunal, but it is not hard to imagine that a court-less tribe might still find it desirable to opt in. For example, such a tribe might use other institutions, such as a tribal council, to perform adjudicatory functions that lend themselves to appellate review, such as membership decisions. Additionally, the court might develop in such a way that it could include a trial-level division for tribes that were too small or impecunious to support a trial court of their own.

***8. Tribes Could Opt Out of the MITA Only at Stated Intervals, and Any Opt Out Would Have No Effect on Pending Cases or The Validity of Final Judgments.***

Allowing unscheduled departures would materially harm the court and the entire project. Experience with international tribunals teaches that participating tribes may be tempted to bolt at the first sign of serious trouble. Hence, these precautions discourage defections and preserve the Rule of Law.

***9. The Procedure Employed By Any Tribe For Deciding to Opt In or Out Shall Be Determined By the Tribe in Accordance With Its Own Law, But the Validity of Such a Decision May Be Subject to Review by the Court.***

In a perfect universe, the court would not be placed in the position of deciding whether a tribe has validly opted in or out, but there may be no

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<sup>59</sup> Thus, it was observed in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17-18 (1831), that the Cherokees “and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion [sic] with them would be considered by all as an invasion of our territory, and an act of hostility.” See also *United States v. Pink*, 315 U.S. 203, 233 (1942) (“power over external affairs . . . is vested in the national government exclusively”). Thus, the Department of State does not recognize passports issued by tribes. U.S. DEP’T OF STATE, TRAVEL DOCUMENTS ISSUED BY NATIVE AMERICAN TRIBES OR NATIONS OR PRIVATE ORGANIZATIONS, 7 FOREIGN AFFAIRS MANUAL § 1300, APP. O. On the other hand, many American cities, which, as mere municipal corporations, lack any claim to sovereignty, have made sister-city agreements with cities in other countries.

alternative. The issue would be in the nature of a political question for which tribal organs of government must be responsible in the first instance. Questions will inevitably arise as to whether a group purporting to speak for a tribe in fact does so.<sup>60</sup>

***10. Participating Tribes Would Waive Their Sovereign Immunity to Whatever Extent They Have Waived It In Proceedings In Their Own or Other Courts and for Such Other Categories of Cases, as the MITA Provides.***

One would hope that tribes would broadly waive their immunity in cases before the court. Professor Painter-Thorne says this is necessary “so that the appeals court would have authority to review membership decisions.”<sup>61</sup> This will be a challenge in the MITA negotiations, and the end-result may be waiver only as to certain causes of action. This matter would likely be revisited in the periodic review process.

Unlike, for example, the arrangements applicable to the Southwest Intertribal Court of Appeals,<sup>62</sup> participating tribes would not be permitted to exclude certain kinds of cases.

***11. The Court Would Be Funded Exclusively By Tribes, and From Private Charitable Contributions Under an Equitable Formula that Reflects Tribes’ Varying Demographic and Economic Circumstances.***

Filing fees may generate a small income stream for the court, although any fee schedule should make allowance for *in forma pauperis* filings. Even mentioning charitable contributions may have the wrong connotation, since the whole idea behind the proposal is to erect an emphatically Indian institution, reliant on no one else. Nonetheless, financial support from philanthropic organizations could play an important part in negotiating the MITA and launching the court. Nor should such support for operating funds be rejected out of hand, especially before the

<sup>60</sup> *E.g.*, *Picayune Rancheria of Chukchansi v. Rabobank*, Civil No. 13-609 (E.D. Cal. 2013); *Shenandoah v. U.S. Dep’t of Interior*, 159 F.3d 708 (2d Cir. 1998).

<sup>61</sup> Painter-Thorne, *supra* note 37, at 351 & n.362.

<sup>62</sup> See Christine Zuni, *supra* note 6.

willingness and ability of tribes to negotiate and contribute their fair share has become clear. Negotiation of an equitable formula will inevitably be a challenge. Regrettably, the Indian Gaming Regulatory Act as currently written does not permit tribes to allow other, less well-off tribes to benefit from Revenue Allocation Plans.<sup>63</sup> Inter-tribal wealth transfers may be worthy of further exploration.

**12. *The Court Would Have Jurisdiction (1) Over Decisions of the Highest Court of a Tribe in Which Judgment Could Be Had; and (2) Subject to the Exhaustion of Any Applicable Tribal Court Remedies, Over Tribal Administrative Agencies, and Other Adjudicatory Bodies.***

This language seeks to capture all tribal adjudication, whether the deciding body is a court, an agency, or the tribal council.<sup>64</sup> The issuance of tribal regulations could also be subject to review by the court. The “highest court” concept is drawn from 28 U.S.C. § 1257(a), since there may be instances in which an existing tribal appellate court’s jurisdiction is discretionary. Where that court denied discretionary review, the American Indian Supreme Court’s review would run to the next lower tribal court.<sup>65</sup>

The proposal takes no position on whether a final judgment below is required.<sup>66</sup> It does contemplate appellate review as of right rather than as a matter of discretion; although, this could be revisited if the court’s caseload were to expand dramatically. Cases that present issues that are either less complicated or less important might be disposed of summarily (*i.e.*, without plenary briefing and argument, and typically without precedential effect), in keeping with the practice of the Article III courts of appeals. More important cases, or ones that involve an inter-tribal split on a point of law, could be heard *en banc*. Nothing would prevent the court

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<sup>63</sup> 25 U.S.C. § 2710 (2006).

<sup>64</sup> See COHEN’S HANDBOOK, *supra* note 5, § 4.04[3][c], 264 & n.78 (citing 25 U.S.C. §1903(12) (2006)).

<sup>65</sup> Professor Clinton included a comparable provision in his alternative proposal. Clinton, *Tribal Courts*, *supra* note 25, at 893 n.126 (analogizing to 28 U.S.C. § 1257 (2006)).

<sup>66</sup> The Southwest Intertribal Court of Appeals permits appeals from non-final orders by permission. S.W. Intertribal R. App. P. 3(f).

from engaging in mere error correction, but it would not have general “supervisory authority” over lower tribal courts.<sup>67</sup>

An alternative approach would be to confine the court’s appellate jurisdiction to the resolution of inter-tribal disputes and cases presenting issues of generic interest and importance within Indian Country. Limiting the jurisdiction to cases that meet some threshold of importance would imply that the court was a kind of constitutional court. In the absence of a governing document or agreed body of jurisprudence that functioned as a constitution for all tribes, such a limitation would represent a mismatch between the institution and the political environment.

Finally, a confidence-building strategy could be adopted. The tribal negotiators could agree to a gradual approach to jurisdiction, starting with those categories of cases that are most in need of independent extra-tribal appellate review, such as electoral, membership and other governance-related issues. Alternatively, they could start at precisely the other end of the spectrum, with those categories of cases that least trench on tribal autonomy, and that are therefore presumably less likely to be divisive. Garden-variety tort or contract cases would meet this description. The choice is one of strategy, in gauging the nature and depth of political support and opposition. Depending on experience under the initial approach to jurisdiction, a more expansive approach could later be developed.

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<sup>67</sup> Professors Pommersheim and LaVelle would limit their proposed Great Sioux Nation Supreme Court to “cases that have sufficient import across the Sioux Nation as a whole.” Pommersheim & LaVelle, *supra* note 22, at 218; *see also id.* at 222 (suggesting appealability as of right only for “cases involving challenges to tribal jurisdiction, civil rights (e.g., due process/equal protection claims), election disputes, and commercial issues”). The proposal presented here is more aggressive. Any concern over “floodgates” can be met through the judicious use of summary disposition. At the same time, the present proposal would present far less of a floodgates challenge than Professor Clinton’s alternative suggestion for Supreme Court review of tribal court decisions on federal questions by writ of certiorari, Clinton, *Tribal Courts*, *supra* note 25, at 893-97, simply because tribes outnumber states by a ratio of more than 11:1.

**13. *The Court Would Have Original Jurisdiction Over Cases Arising Between or Among Participating Tribes.***

One can easily imagine inter-tribal cases involving dual-membership issues; family law matters, such as adoption, child custody, and child welfare; burial controversies; and water and other natural resources issues.<sup>68</sup> Given the federal role in maintaining cadastral information for reservations, it is unlikely that the court's original jurisdiction would reach inter-tribal boundary issues like the interstate boundary issues occasionally adjudicated by the Supreme Court of the United States.<sup>69</sup>

**14. *The Court Would Have Power to Issue Writs of Habeas Corpus and to Release Persons on Reasonable Bail or Personal Recognizance and to Issue All Other Writs Necessary or Appropriate In Aid of Its Jurisdiction and Agreeable to the Usages and Principles of Law.***

The last clause is lifted from the All Writs Act.<sup>70</sup> In a proper case, the court could entertain a petition for an extraordinary writ based on its potential appellate jurisdiction,<sup>71</sup> although that power would be exercised sparingly. While federal courts may issue writs of habeas corpus at the request of persons held in custody in violation of ICRA,<sup>72</sup> giving express recognition to the new court's power to do so may reduce the number of habeas cases that wind up in the federal courts.

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<sup>68</sup> For types of cases that might qualify see *United States v. State of Washington*, Civil No. 9213, Subproceeding 09-1 (W.D. Wash. July 8, 2013) (inter-tribal dispute over "usual and accustomed fishing grounds"); *Hopi Tribe v. Navajo Nation*, Civil No. 13-8172 (D. Ariz. filed July 5, 2013) (pending) (access of one tribe to designated areas of another tribe's reservation for religious purposes); *Thlopthlocco Tribal Town v. Stidham*, WL 65234 (N.D. Okla. 2013), *appeal pending*, No. 13-5006 (10th Cir. filed Jan. 11, 2013) (relationship between federally-recognized tribal town and Muscogee (Creek) Nation); see also *Hopi Tribe v. Navajo Nation*, Civil No. 13-8172 (D. Ariz. Nov. 8, 2013) (dispute over inter-tribal compact remanded for arbitration).

<sup>69</sup> *E.g.*, *New Jersey v. New York*, 523 U.S. 767 (1998).

<sup>70</sup> 28 U.S.C. § 1651(a) (2006).

<sup>71</sup> See *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 254-55 (1957).

<sup>72</sup> See 25 U.S.C. § 1303 (2006); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

**15. The Court Would Have Authority to Issue Advisory Opinions.**

This is a judgment call. The federal ban on advisory opinions is rooted in Article III's case or controversy requirement,<sup>73</sup> which is inapplicable to tribal courts. Some tribal courts issue advisory opinions,<sup>74</sup> as do some state courts.<sup>75</sup>

**16. The Court Would Have Authority to Certify Questions of State Law to the Highest Court of a State, and to Respond to Questions of Tribal Law Certified By a Federal or State Court, But Only if the Courts of the Tribe Whose Law is in Issue Have No Provision for Responding to Certified Questions.**

Some tribal codes already make provision for responding to requests for rulings on questions of tribal law.<sup>76</sup> Because the proposal contemplates that tribal courts will in general be the authoritative judges of tribal law, the court would only respond to certified questions of tribal law where the tribe's own courts make no provision for such responses.

**17. The Court's Decisions Would Not Be Subject to Direct Appellate Review By Any Other Court, With the Sole Exception That Congress Could Authorize the Supreme Court of the United States to Review Its Decisions On Federal Questions.**

A major policy issue lurks here. On the one hand, the overarching principle is to create a free-standing Indian appellate court, liberated from

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<sup>73</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>74</sup> *E.g.*, S.W. Intertribal R. App. P. 3(c), 4(b); In re Termination and Settlement Agreement Between Mashpee Wampanoag Tribe, the Mashpee Wampanoag Indian Tribal Council, Inc., TCAM L.L.C., KSW Mass, L.L.C., At Mashpee, L.L.C., and Detroitma, L.L.C., Case No. CV-10-005 (Mashpee Wampanoag 2010) (finding jurisdiction to render advisory opinions); In re Certified Question re Village Authority to Remove Tribal Council Representatives, No. 2008-AP-0001 (Hopi App. 2010); In re Certified Question from the U.S. District Court for the Dist. of Arizona, 8 NAV. R. 134 (2001); MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 648-58 (2012) (collecting cases).

<sup>75</sup> *E.g.*, Opinion of the Justices to the Senate, 430 Mass. 1205 (2000).

<sup>76</sup> *E.g.*, Hopi Ord. 21, § 1.2.1.8(a).

direct federal review or control. On the other hand, it would make little sense for tribal court decisions on questions of *federal* law<sup>77</sup> to be impervious to review by the Supreme Court of the United States.<sup>78</sup> At present, unless a case meets the detention requirement for ICRA habeas corpus,<sup>79</sup> the only federal question a federal court can consider on collateral review of a tribal court ruling is whether the tribal court had jurisdiction. If the federal court finds that the tribal court *lacked* jurisdiction, it will address any other federal question that was presented *de novo*; if the federal court finds that the tribal court *had* jurisdiction, it is *functus officio* and cannot properly examine the correctness of any ruling the tribal court made on a federal question. Such rulings would thus, under present law, be impervious to review by any Article III court.<sup>80</sup>

Direct review by the Supreme Court, rather than through collateral proceedings begun afresh in the district courts (much less an “appeal” to those courts),<sup>81</sup> would treat the Indian forum as possessing the same dignity as the highest court of a state.<sup>82</sup> Sovereignty, however, is a tribe-by-tribe matter, rather than a concept applicable in gross to tribal America as a super-tribal entity in its own right.<sup>83</sup>

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<sup>77</sup> *E.g.*, Tulalip Tribes v. 2008 White Ford Econoline Van, No. TUL-CV-AP-2012-0404 (Tulalip App. 2013) (ICRA excessive fines clause applicable to civil forfeiture proceedings under tribal code).

<sup>78</sup> Mr. Pacheco proposed that “FICA decisions may only be reviewed by the United States Supreme Court by writ of certiorari.” Pacheco, *supra* note 29, at 155, 157. As noted above, he also argued that “[t]echnical violations of federal law should not suffice for Supreme Court review.” *Id.* at 155, 163. What he meant by this is unclear.

<sup>79</sup> *E.g.*, Mitchell v. Seneca Nation of Indians, 2013 U.S. Dist. LEXIS 46579 (W.D.N.Y. Mar. 29, 2013), citing, *e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996).

<sup>80</sup> It strains the imagination to envision a system for certification of federal questions to the Supreme Court of the United States by the American Indian Supreme Court, which in theory would be an alternative.

<sup>81</sup> See Gregory Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 DENVER U.L. REV. 761, 783-84 (1985).

<sup>82</sup> See Clinton, *Tribal Courts*, *supra* note 25, at 885 & n.113, 893-94.

<sup>83</sup> *Id.* at 892 (“Indian sovereignty does not exist for Indian people as a whole; rather, it exists for each tribe.”).

There may be controversy over whether Congress could confer this jurisdiction on the Supreme Court,<sup>84</sup> but it is hard to see why it could not do so since the Supreme Court undoubtedly has constitutional appellate jurisdiction over decisions of other non-Article III courts such as the territorial and military courts, not to mention state courts, which are themselves not Article III entities. To the extent that the American Indian Supreme Court might construe or apply a tribal treaty or an Act of Congress such as ICRA, the Violence Against Women Reauthorization Act, Indian Child Welfare Act, or Indian Gaming Regulatory Act, one would think its decisions would be within the judicial power of the United States under the “extend” clause of Article III, § 2, and therefore, within Congress’ authority over the Supreme Court’s appellate jurisdiction under the Exceptions and Regulations Clause.<sup>85</sup>

Even if federal questions were reviewable by the Supreme Court of the United States, tribal grounds of decision would not be so reviewable, just as is the case with state grounds of decision.<sup>86</sup> The Supreme Court could apply the same kind of test in determining whether a decision of the American Indian Supreme Court rested on an adequate and independent tribal ground, as it does in determining whether a state court decision rests on an adequate and independent state ground.<sup>87</sup> Tribes, however, might

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<sup>84</sup> See Clinton, *No Federal Supremacy*, *supra* note 9, at 240. A decade ago, Professor Struve saw no constitutional impediment to legislation “providing for Supreme Court review of the judgment of a tribe’s highest court.” Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 314 & n.117 (2003) (citing, *inter alia*, THE FEDERALIST NO. 82).

<sup>85</sup> But see COHEN’S, *supra* note 5, § 4.04[3][c] at 260-269. The foregoing discussion is not intended to suggest that Congress could not confer appellate jurisdiction over the new court on the Article III courts of appeals (or one of them). I agree with Professor Struve regarding Congress’s power. Struve, *supra* note 84, at 314 & n.117. I do not offer that approach because I believe review by a federal court below the level of the Supreme Court would not be in keeping with the dignity of an American Indian Supreme Court.

<sup>86</sup> *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass’n*, 426 U.S. 482, 488 (1976); see also Clinton, *Tribal Courts*, *supra* note 25, at 886.

<sup>87</sup> *Michigan v. Long*, 463 U.S. 1032 (1983). See Tutterow, *supra* note 35, at 500 (arguing that “such a non-review doctrine is both logically and politically appropriate to apply in the tribal court context”). Professor Clinton would exempt from review by the Supreme Court of the United States tribal court decisions that “over-vindicate” federal rights. Clinton, *supra* note 25, at 893 n.126. The difficulty with this, as he recognizes, is that it would “create nonuniformity.”

find it wise to argue that the presumption ought to be, on the contrary, that an ambiguous decision of the new court rested on tribal, rather than federal law grounds, the better to recognize the autonomy of tribal law and cabin external review.

***18. The Rules of Decision in Cases Before the Court Would Be the Constitutional, Statutory, Customary, or Common Law of the Tribe From Whose Court or Agency an Appeal Has Been Taken; Inter-Tribal Agreements; Indian Common Law; Federal Constitutional, Treaty or Statutory Law; State Law; and the Common Law.***

This is inspired primarily by the practice of the Southwest Intertribal Court of Appeals.<sup>88</sup> Primacy should be afforded to tribal law, although tribes have taken a variety of positions as to the sequence in which various sources of law will be turned to as rules of decision.<sup>89</sup> Whether the court should deem itself bound by federal law that the relevant participating tribe has not affirmatively adopted would likely be a matter of dispute.<sup>90</sup>

Thinking deeply a decade ago, about the governing law that would apply in a Great Sioux Nation Supreme Court, Professors Pommersheim and LaVelle asked, “Is the objective uniformity, diversity, or a principled blend of both?” They correctly concluded that “there is no right or wrong way.”<sup>91</sup> An American Indian Supreme Court would have to feel its way, ever mindful of the fact of tribe-by-tribe autonomy. The outcome will turn on the court’s ability to navigate what could be a series of political minefields. It will be a function of many factors, chief among them its willingness and ability to explain itself in terms that will resonate for and gain the support of tribal leaders.

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<sup>88</sup> See Zuni, *supra* note 6 (court “applies the law of the tribe which the tribe itself has adopted and recognizes”).

<sup>89</sup> The Rules of Decision Act for federal courts is 28 U.S.C. § 1652 (2006).

<sup>90</sup> See generally Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595 (2004).

<sup>91</sup> Pommersheim & LaVelle, *supra* note 22, at 223.

**19. Judgments of the Court Would Be Binding on The Parties and Enforceable By Writ Directed to Any Officer of Any Participating Tribe and, to the Extent Provided By Federal or State Law, Any Federal or State Officer.**

Enforceability of tribal court judgments is currently recognized in the Indian Child Welfare Act.<sup>92</sup> This part of the proposal adopts a pan-Indian approach to the extent that it requires officers of any participating tribe to enforce the court's judgments,<sup>93</sup> even though the proposal as a whole does not have a pan-Indian tilt as to jurisprudence.<sup>94</sup> The MITA could not confer enforcement authority on federal and state officials. Although the current proposal emphatically does not look to Congress to create the new court, Congress and the states would have to make provision for enforcement of judgments.

**20. A Tribe Would Be Entitled to Present Its Views as an Amicus Curiae in Any Case in Which It Is Not a Party.**

This is broadly inspired by Supreme Court Rule 34.4 and the practice of the Supreme Court of the United States in inviting the views of the Solicitor General. If a case were to turn on a question of federal law,

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<sup>92</sup> 25 U.S.C. § 1911(d) (2006).

<sup>93</sup> See Pommersheim & LaVelle, *supra* note 22, at 224 (identifying alternative approaches).

<sup>94</sup> Pan-Indianism is in tension with the concept of tribe-by-tribe autonomy. See Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. 141 (2006). Professor Fletcher has pointed out the "peril" of "careless invocation of inter-tribal common law or, worse, the invocation of pan-Indian customs." FLETCHER, *supra* note 74, at 117. With 566 federally-recognized tribes, anti-pan-Indianism could lead to chaos and reduce the esteem which tribal law might otherwise enjoy. No hard-and-fast position needs to be taken with respect to the centrifugal forces generated by a tribe-by-tribe approach when designing the proposed court, but it should be borne in mind that even without a nationwide appellate court the law of each individual tribe hardly exists in perfect isolation from the law of other tribes as matters now stand, given the increasing ease with which decisions can be accessed as well as the fact that some tribal court judges serve or have served on more than one court. To some this will be objectionable, but it does seem inevitable that over time a nationwide court would tend, at least around the edges, to harmonize tribes' separate bodies of jurisprudence, although positive law, such as constitutions and ordinances, would remain entirely within each tribe's discretion and could serve as a powerful check on such a tendency.

the views of the Solicitor General of the United States could also be requested.

**21. *The Court Would Maintain a List of Public Interest Organizations That Would Be Invited or Permitted When Appropriate to File Briefs as Amici Curiae.***

Some United States Courts of Appeals maintain “public interest lists” of nongovernmental organizations that are from time to time invited to file briefs as *amici curiae*

**22. *A Tribe Could Overrule the Court’s Interpretation of Tribal Law By Amending Its Constitution or Laws or Codifying Its Customary or Decision Law, But No Such Amendment or Codification Would Affect the Rights of Parties Under a Final Judgment.***

This is a key provision. The concept behind the court’s role is that it would be acting as if it were the highest court of a tribe, much as the Privy Council purports to be an integral part of the court structure of the particular British jurisdiction from which a case arises.<sup>95</sup> If the competent tribal body concluded that the court had misinterpreted some point of tribal law, that entity could set matters straight by modifying the underlying ordinance or declaring the point of customary law. Such an overruling would bind the court, albeit only *in futuro*, and only if the restated version did not offend some principle of law with higher standing, such as (presumably) an Act of Congress. Final money judgments would be sacrosanct.<sup>96</sup>

**23. *The Court Would Have a Chief Justice and Fourteen Associate Justices, of Whom Nine Would Be a Quorum.***

The size of the court will be a function of its anticipated caseload, cost, and the need to accommodate competing regional and tribal

<sup>95</sup> *Ibralebbe v. R.*, A.C. 900, 921-22.

<sup>96</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Previously entered injunctions could be affected by subsequent tribal legislation. See *Miller v. French*, 530 U.S. 327, 344 (2000).

expectations for representation on the bench. The larger the court, the more unwieldy it becomes<sup>97</sup> and the less judging any particular Justice will do, but the easier to achieve tribal balance and diversity.

***24. The Court Would Sit En Banc in Inter-Tribal Cases and Other Cases of Unusual Importance or to Reconcile Conflicting Panel Decisions.***

This is broadly based on the practice of the United States Courts of Appeals.<sup>98</sup>

***25. Justices Would Be Selected or Elected By the Participating Tribes Under Agreed-Upon Rules Regarding Geographical, Cultural, Land-Mass, Population, Gender, and Economic Balance.***

Few aspects of the proposal are as likely to engender controversy as the manner of selecting the court's members. A tribe that does not feel that it will have a fair chance to participate in that process is highly unlikely to opt in or, having opted in, to remain in when the court's decisions may have dramatic effects on issues of great symbolic and practical importance to the tribe and its members. Whether because of concern over inter-tribal disputes or internal governance issues with serious political implications, tribes are going to look for real guarantees of fairness before breathing life into the new entity. Should there be a one-tribe, one-judge standard or should tribal membership data be taken into account—and if the latter, who should be counted? Should a tribe have a right to have one of its own, or a judge of its own selection, sit on any case in which it has an interest? As is obvious, there are many variables, and the diversity of recognized tribes in terms of population and other factors will make resolution of this threshold challenge fiendishly difficult. The importance of broad agreement on this score cannot be overstated.

The manner of selecting the Chief Justice and Associate Justices would have to be settled in the MITA negotiations. Negotiators could draw

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<sup>97</sup> See Pommersheim & LaVelle, *supra* note 22, at 219.

<sup>98</sup> See FED. R. APP. P. 35.

on such models as the International Court of Justice, the International Criminal Court, and the European Court of Human Rights. The participating tribes might usefully consider some arrangement analogous to the UN Security Council, whereby the largest tribes would be guaranteed permanent representation on the court. This part of MITA negotiations will be among the most challenging.

***26. No More Than One Justice May Be a Member of Any Particular Tribe. A Person Who, for the Purposes of Membership of the Court, Could Be Regarded as a Member of More Than One Tribe Shall Be Deemed to Be a Member of the Tribe in Which That Person Ordinarily Exercises Civil and Political Rights.***

This is drawn from Article 7 of the Rome Statute of the International Criminal Court. It is desirable to have a judge from the tribe whose law is being applied sitting on the panel that hears a case, since that judge will be more familiar with the pertinent tribal jurisprudence. Having a mix of tribes represented can serve as a useful check on the rigor of the decision.

***27. At the Time of Selection or Election, Every Justice Would Have to (1) Be a Member of a Participating Tribe; (2) Hold a Law Degree; (3) Have Been Admitted to Practice in a Federal or State Court for at Least Five Years; and (4) Have Been a Member of the Bar of a Tribal Court for at Least Five Years.***

There are numerous policy judgments to be made with respect to eligibility for election to the court. A major issue is whether only members of participating tribes would be eligible to serve on the court. Potential compromise options would be to permit some number—presumably a minority—of non-Indians to serve or to permit members of nonparticipating tribes to serve.

A major structural issue is whether non-lawyers should be entirely excluded, even if they possess special knowledge of customary law. The proposal contemplates lawyer-judges. An alternative would be to permit

the election of some number—presumably a minority—of non-lawyers who have specialized knowledge of customary law. Inclusion of these individuals might reduce the court's standing *vis-à-vis* other American legal institutions. This concern could be alleviated by permitting no more than one lay judge on a panel.

***28. Only Persons Who Have Served as a Tribal Judge or a Judge of a Federal or State Court of Record for at Least Five Years Would Be Eligible to Serve On the Court.***

MITA negotiators might wish to consider whether the prior judicial service requirement would be unduly restrictive, as it would exclude law professors and practitioners who may be highly knowledgeable in Indian law but had never served as judges or had not served for the requisite period. It would also exclude some number of present or former tribal chiefs, presidents, or chairs.

***29. Justices Would Be Paid Out of a Central Fund For Time Actually Spent On the Court's Business.***

It is likely that the Chief Justice would have to spend full time on the business of the court. Associate Justices might need to serve only part time, depending on how the caseload develops over time.

***30. Justices Would Serve for Five Years, Renewable Once.***

Terms of office should be of sufficient duration to provide both the substance and appearance of judicial independence.<sup>99</sup> Given the number of tribes that might participate, there will be considerable tension between

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<sup>99</sup> Professors Pommersheim and LaVelle correctly argue that “[t]wo-year or even three-year terms appear too short to allow the [Great Sioux Nation Supreme] Court to establish roots, consistency, and the necessary rules that face any court in its initial steps of development.” Pommersheim & LaVelle, *supra* note 22, at 219. The point would seem to apply even more strongly to a nationwide court. Given the number of tribes eligible to participate and the desire to involve as many of them as reasonably possible in the interest of achieving both broad knowledge and tribal “buy-in,” life tenure, which one author proposed, see Pacheco, *supra* note 29, at 151, 161, would be a dreadful idea. Much of what Professors Pommersheim and LaVelle outline for the Great Sioux Nation Supreme Court is very sound, but their view that lifetime appointments are possible and worthy of consideration, Pommersheim & LaVelle, *supra* note 22, at 219, seems misplaced, particularly if – not that they suggested this – applied to a nationwide court.

the need for stability and the need for turnover. In any event, judicial terms should be staggered.<sup>100</sup>

**31. *Justices Would Be Removable Only for Disability, Misconduct, or Neglect of Duty.***

The MITA would have to include procedural and substantive provisions for removal of Justices for cause.<sup>101</sup> One approach would be to require a supermajority—two-thirds or three-quarters—of participating tribes to agree to a removal.

**32. *Associate Justices Would Be Allowed to Serve Concurrently On the Court and On One or More Tribal Courts, But Would Not Be Permitted to Sit On Cases Arising In Any Tribal Court of Which They Are a Judge.***

Permitting concurrent service on tribal courts would make good use of the talent and learning of tribal judges. Justices of the court should not be permitted to work for any agency of the federal government, to avoid any possible institutional conflict of interest. Otherwise qualified former federal officials, however, could be an excellent source of disinterested judicial talent and should not be viewed as ineligible.

**33. *The Court Would Have a Dedicated Courtroom, Clerk's Office, Marshal, and Judicial Center at Some Fixed Location in Indian Country, But Could Sit Anywhere In Indian Country or, for the Purpose of Improving Public Understanding of the Court, at Any Place In the United States.***

The seat of the court will be important both symbolically and practically. Given the distribution of reservations across the United States, the court's work will require it at times to "ride circuit."<sup>102</sup> This may impose some inconvenience and expense on litigants. The court's facilities and ceremonials should be in keeping with the dignity of a court of last resort.

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<sup>100</sup> See Pommersheim & LaVelle, *supra* note 22, at 219.

<sup>101</sup> *Id.*

<sup>102</sup> See Pacheco, *supra* note 29, at 157.

Co-location of the court at a law school in or near Indian Country may be a way of reducing library and other operating expenses. The court should not be prevented from hearing cases, on an exceptional basis, at law schools and other suitably dignified venues that will contribute to public understanding of the court and tribal law. Consideration could also be given to hearing argument telephonically or by video-teleconference in the interest of economy.<sup>103</sup>

***34. The Court Would Issue Its Own Rules of Practice and Procedure, and Would Have a Rules Advisory Committee.***

Judicial independence requires not only security of tenure and compensation, but also institutional independence. The court must be in a position to prescribe its own rules, and to adjust them in light of experience.

***35. The Court Would Regulate Admission to Its Bar and Maintain Disciplinary Machinery to Ensure Professional Responsibility.***

Control over its bar is also critical to the court's independence. Large policy issues lurk with respect to admission to practice. Should an examination be required or should admission be reciprocal with state, federal, and tribal courts? Should a law degree be required? Should persons knowledgeable in customary law be permitted to appear (with or without attorney co-counsel)?<sup>104</sup> A bar association can be a "critical partner of the judicial infrastructure in the effort to advance judicial legitimacy and also to provide a set of significant services that otherwise would overburden courts or go undone altogether."<sup>105</sup>

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<sup>103</sup> See *Appellate*, THE NORTHWEST INTERTRIBAL COURT SYSTEM, (Sept. 1, 2010) <http://www.nics.ws/appellate/appellate.htm> (last visited Nov. 25, 2013). The Northwest Intertribal Court System at times hears appeals by telephone.

<sup>104</sup> See generally Pommersheim & LaVelle, *supra* note 22, at 220-21.

<sup>105</sup> *Id.* at 221.

**36. *Indigent Parties Would Be Permitted to Appear Pro Se or, at the Court's Discretion, the Court Could Appoint a Member of Its Bar to Represent Them Pro Bono Publico.***

The new court may find its docket crowded with *pro se* cases. These cases may not be well presented and the court may have to take a more active role in the development of issues than would otherwise be the case. Appointment of *pro bono* counsel may alleviate this problem.

**37. *The Court Would Conduct an Annual Judicial Conference.***

A Judicial Conference would be of unusual value given the court's geographical sweep and the sheer number of potential and actual participating tribes. A conference also serves the interest in connecting the court to the bar, the legal academy, and federal and state opposite numbers. A Judicial Conference may also be a useful occasion for Continuing Legal Education programs. There already is a Tribal Judicial Conference under the auspices of the National American Indian Court Judges Association (NICJA). Rather than have competing conferences, one would hope the court and NICJA would pool their resources and collaborate on a single one.<sup>106</sup>

**38. *Justices Would Participate in Federal and State Judicial Conferences at the Court's Expense.***

Justices can be ambassadors for the court. Their presence at federal and state judicial functions will help to foster improved public understanding of the court's work.

**39. *Decisions Would Be Made Available Online and Through Commercial and Noncommercial Outlets.***

At present, tribal decisions are available through a welter of different systems. Some decisions are available online, either through free

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<sup>106</sup> For a discussion of some of the politics around a Tribal Judicial Conference, see Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 38-47 (1993).

tribal or organizational websites or via commercial fee-based providers. Other decisions are available only haphazardly or through informal personal networks. This Tower of Babel is a serious obstacle to the development of tribal law. Harmonization of the current patchwork system for publication of tribal jurisprudence is one area in which the court could play a leadership role. It could, for example, seek to work with Thomson Reuters to generate an “Analysis of Indian Law” that would supplant the “Indians” Digest Topic.<sup>107</sup> Adoption of a PACER-type system<sup>108</sup> for the court’s dockets, briefs, and decisions should be a priority. Additionally, oral argument records should be posted on the Internet promptly after any hearing.

***40. Justices Would Have Permanent or Temporary Law Clerks That Hold Law Degrees and, in the Case of Permanent Law Clerks, are Members of the Bar of a State, Federal, or Tribal Court.***

A combination of permanent and temporary law clerks may be desirable given the relatively short judicial terms of office contemplated. Serious personnel turbulence among both the Justices and the clerks would have an unsettling effect on its jurisprudence and institutional memory. There is no reason to rule out all reliance on law clerks who lack conventional legal training but are, for example, knowledgeable in customary law. There is, however, a danger in looking to internal court resources for customary law matters that ought to be a matter of proof if, as will likely be the case, they do not lend themselves to judicial notice.

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<sup>107</sup> See WEST’S ANALYSIS OF AMERICAN LAW 885-91 (2012) (listing key numbers for use in headnotes).

<sup>108</sup> United States government legal documentation system standing for Public Access to Court Electronic Records.

***41. The Court Would Apply Principles of Indian Preference  
In Hiring<sup>109</sup>.***

**CONCLUSION**

Opinions differ widely as to what lies in store for American Indian tribes. Some observers, whose views I respect, see events proceeding in a generally positive direction. Others, whose views I also respect, see bright spots on an otherwise gloomy horizon. Yet others may be filled with despair. I am in the second category. But, whichever of these perspectives proves the most accurate prediction of where the path leads, I suggest that there can be general agreement on the core principle that anything that tends to preserve and strengthen tribal autonomy and help place American Indian legal institutions on something more nearly approaching an equal footing with those of the dominant society is to the good. In that spirit, and with appreciation for those who have considered these issues in the past, I lay the foregoing proposal on the table for debate.

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<sup>109</sup> Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(i)(1982), provides an exception to Title VII's general nondiscrimination principals allowing certain employers under certain circumstances to exercise an employment preference in favor of American Indians.