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Gregory D. Smith

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# NATIVE AMERICAN TRIBAL APPELLATE COURTS: UNDERESTIMATED AND OVERLOOKED

Gregory D. Smith\*

## I. INTRODUCTION

The more than 500 federally recognized Native American tribes in the United States<sup>1</sup> operate between 250 and 300 trial courts and more than 150 appellate courts.<sup>2</sup> Although the quality of tribal court systems and the prestige and respect accorded to them all continue to rise,<sup>3</sup> tribal courts still endure occasional

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\*Chief Justice, Supreme Court of the Nottawaseppi Huron Band of the Potawatomi Indians [hereinafter NHBP] (Michigan), the Supreme Court of the Pawnee Nation (Oklahoma), and the Stockbridge-Munsee Mohican Court of Appeals (Wisconsin). He is also a judge of the Bishop Paiute Court of Appeals (California) and Gila River Indian Community [hereinafter GRIC] Court of Appeals (Arizona), and an administrative judge of the Department of the Interior's Court of Indian Appeals. Judge Smith teaches for the National Judicial College and the Tennessee Judicial Academy. He is a part-time municipal judge for Pleasant View, Tennessee, and was the 2017 Outstanding Judge of the Year for the Tennessee Municipal Judges Conference. He has served on the Tennessee Court of the Judiciary, and wrote the benchbook used by Tennessee's municipal judges. See GREGORY D. SMITH, TENNESSEE MUNICIPAL JUDGES BENCHBOOK (2014), available at [http://www.tncourts.gov/sites/default/files/docs/wedding\\_ethics-handouts.pdf](http://www.tncourts.gov/sites/default/files/docs/wedding_ethics-handouts.pdf).

1. See, e.g., Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26826, 26827–32 (May 4, 2016) (listing “federally acknowledged Indian tribes in the contiguous forty-eight states and Alaska”).

2. See, e.g., Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 73 n.79 (2013) (referring to trial courts); *Tribal Courts and the Administration of Justice in Indian Country*: Hearing on S. 110-576 Before the S. Comm. on Indian Affs., 110th Cong. 1 (2008) (referring to appellate courts), available at <https://indian.senate.gov/sites/default/files/upload/files/July242008.pdf>.

Justice Fletcher, an appellate judge for several tribes and a professor at the Michigan State University College of Law, is also the chief reporter for the ALI's Restatement of the Law of American Indians. See *Matthew L. M. Fletcher*, MICH. ST. U. COLL. OF L. (2015), [http://www.law.msu.edu/faculty\\_staff/profile.php?prof=494](http://www.law.msu.edu/faculty_staff/profile.php?prof=494).

3. Fletcher, *supra* note 2, at 73–74; *accord* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987) (recognizing that “[t]ribal courts play a vital role in tribal self-government,” and that “the Federal Government has consistently encouraged . . . their development”

condescension by non-tribal jurists.<sup>4</sup> Yet “[w]hen judges, either trial or appellate, treat parties or their lawyers with anything less than respect, it reflects poorly on both the individual judge and the judicial system as a whole.”<sup>5</sup> State and federal judges should not underestimate the Native American tribal court system.

The congressionally mandated federal policy to develop, fund, and support tribal courts in Indian Country is to include tribal appellate courts.<sup>6</sup> “Tribes that have trial courts typically

(citation omitted)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (recognizing that “[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians” (citations omitted)); *In re Zemyan*, 1987 Mont. Fort Peck Tribe LEXIS 2 at \*8 (Ft. Peck App. June 6, 1987) (pointing out that the “Tribal Counsel has gone to great lengths to raise the standard of its Tribal Court”).

4. *See, e.g., Alvarez v. Tracy*, 773 F.3d 1011, 1024 (9th Cir. 2014) (Kozinski, J., dissenting) (comparing tribal court unfavorably to “a tribunal run by marsupials”), *opinion withdrawn and replaced sub nom. Alvarez v. Lopez*, 835 F.3d 1024 (9th Cir. 2016) (replacing both majority and dissenting opinions).

All judges—federal, state, or tribal—would be wise to embrace the insights of Judge Côté on how appellate judges should conduct themselves. *See generally* J.E. Côté, *A Practical Guide to Appellate Judging*, 16 J. APP. PRAC. & PROCESS 15 (2015). Applying his advice will help judges avoid the dreaded “Black Robe Fever.” *See, e.g.,* William Weisenberg, *Judicial Professionalism in a New Era of Judicial Selection: Improving the Election of Judges, Part II*, 56 MERCER L. REV. 859, 879 (2005) (describing this ailment, to which some judges are subject, as causing “horrible, condescending, arrogant, mean, [and] lazy” behavior on the bench). Judges should also remember that harsh words from the court land with a heavier blow than would the same sentiment offered by a private individual. *See, e.g.,* Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Through October 2010*, 87 NOTRE DAME L. REV. 2165, 2174 (2012) (referring to “harsh tone” of Supreme Court opinion that uses “a shaming mechanism by which [the Court] picks the worst judicial offenders each year and loudly points out their errors for the public to see”). Tact is a must for appellate judges. *See e.g.,* Pasco M. Bowman, II, *A Tribute to the Honorable Richard Sheppard Arnold for his Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit*, 1 J. APP. PRAC. & PROCESS 188, 188 (1999) (praising Judge Arnold’s “tact, courtesy, good judgment, and respect for others”).

5. Marshall L. Davidson, III, *Attracting Undue Scrutiny on Appeal: An Appellate Judge’s Perspective*, 17 J. APP. PRAC. & PROCESS 177, 186 (2016). Sadly, “[h]istory proved that judges too were sometimes tyrants,” *Poulos v. N.H.*, 345 U.S. 395, 426 (1953) (Douglas & Black, JJ., dissenting), and as a matter of fact, the Oklahoma Constitution was partially tailored to negate the authority of an overly arrogant territorial supreme court justice. *See Ex Parte Owens*, 258 P. 758, 807 (Okla. Crim. App. 1927) (describing the justice as “a judicial tyrant”), *vacated*, *Dancy v. Owens*, 26 Okla. 37 (Okla. 1927).

6. *See generally* 25 U.S.C. §§ 3601–3631 (2018) (Indian Tribal Justice Act), available at [usc.house.gov](http://usc.house.gov) (describing financial and technical support available to tribal justice systems); *see also id.* § 3602(8) (including tribal appellate courts and intertribal appellate courts in definition of tribal justice system); *Simmonds v. Parks*, 329 P.3d 995, 1012 (Alaska 2014) (recognizing that “[t]he federal policy of promoting tribal self-government

also have an appellate court,”<sup>7</sup> although there is no federal requirement that a tribe have an appellate court if it has a trial court.<sup>8</sup> This essay will discuss some of the traits typical of tribal appellate courts to show both that the system is professional and that it deserves better recognition than tribal appellate courts currently receive.

## II. BACKGROUND: A SHORT HISTORY LESSON

There is a general perception that tribal appellate courts are a new and novel creation of the mid-twentieth through early twenty-first centuries.<sup>9</sup> This is wrong. Some scholars trace the roots of tribal courts to *Ex Parte Crow Dog*.<sup>10</sup> This presumption is also incorrect. While *Crow Dog* and the Indian Reorganization Act of 1934<sup>11</sup> greatly bolstered the initiation of

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encompasses the development of the entire tribal court system, including appellate courts” (citation omitted); *cf.* *Whitewing v. Oneida Hous. Auth.*, 2001 Oneida Trial Lexis 39 (Oneida App. Comm. June 4, 2001), at \*19 (suggesting that tribal trial and appellate courts were modeled on state- and federal-court blueprint).

7. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][c][iv][C] (Nell Jessup Newton ed. 2017) [hereinafter COHEN’S]; *see also* WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 71–72 (5th ed. 2009).

8. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 90 (4th ed. 2012).

9. *See, e.g.*, B. J. Jones, *Role of Indian Tribal Courts in the Justice System*, INDIAN COUNTRY CHILD TRAUMA CTR. 5 n.12 (Mar. 2000), [icctc.org/Tribal%20Courts.pdf](http://icctc.org/Tribal%20Courts.pdf) (stating—incorrectly—that “[i]t was not until 1934 that Indian tribes were allowed to set up their own justice codes and operate court systems enforcing tribal laws”). Several scholars trace the emergence of the modern tribal court system to 1959. *See, e.g.*, DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 407–08 (6th ed. 2011); *see also* *Williams v. Lee*, 358 U.S. 217 (1959); *but see* *In Re Estate of Komaquaptewa*, 2002 Hopi App. Lexis 8, \*29 n.15 (Hopi App. Aug. 16, 2002) (discussing courts “established in the late nineteenth century as a part of the Bureau of Indian Affairs’ assimilationist program for reservations” and referring to Indian Reorganization Act of 1934, under which “the federal government, for the first time, gave its imprimatur to tribes to create and operate their own judicial systems”).

10. 109 U.S. 556, 558 (1883) (granting habeas petition filed by Native American in federal custody because federal law did not extend to “any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes”). At least one scholar reports that the Bureau of Indian Affairs created the Court of Indian Offenses in 1880 to “civilize” Native Americans. CANBY, *supra* note 7, at 70. Others set the date of that court’s creation at 1883. *See, e.g.*, SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 203 (1993).

11. Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5102, 5103). This legislation is commonly known as the “IRA” or “The Indian New Deal.”

Native American tribal courts, the Cherokee Supreme Court was created even before enactment of the first Cherokee Constitution in 1827.<sup>12</sup> That court pre-dates President Jackson's initiation of the Trail of Tears, which moved most of the Cherokee Nation from Georgia and Tennessee to the land making up present day Oklahoma in the 1830s,<sup>13</sup> and was viable for over fifty years before the Supreme Court decided *Crow Dog*. By way of perspective, the Cherokee Supreme Court began operating prior to half of the states gaining admission to the Union.<sup>14</sup> On the other hand, some tribal appellate courts, such as the Bishop Paiute Court of Appeals, are only a few years old.<sup>15</sup> Irrespective of the age of a tribal appellate court, all have the goal of providing fundamental fairness and due process to all litigants.<sup>16</sup>

Native Americans are often unfairly perceived by the public as backwards and unsophisticated.<sup>17</sup> There are also questions of tribal judges being biased against non-Indians.<sup>18</sup>

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12. J. Matthew Martin, *Chief Justice John Martin and the Origins of Westernized Tribal Jurisprudence*, 4 ELON L. REV. 31, 37–38 (2012) (noting that the “Supreme Court of the Cherokee Nation sat, for the first time, for the disposition of its business on the morning of October 9, 1823” (footnote omitted)) [hereinafter Martin, *Tribal Jurisprudence*]; J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823–1835*, 32 N.C. CENT. L. REV. 27, 32 (2009) (recognizing that “[t]he Cherokee Supreme Court was created by the Cherokee Nation’s laws and incorporated later into its 1827 Constitution”); see also CONSTITUTION AND LAWS OF THE CHEROKEE NATION 23 (1892) (reproducing text of 1839 Constitution, which provided that “[t]he Judicial power shall be vested in a Supreme Court, and such Circuit and inferior Courts as the National Council may, from time to time, ordain and establish”), available at <https://www.loc.gov/law/help/american-indian-const/PDF/28014172.pdf>.

13. Martin, *Tribal Jurisprudence*, *supra* note 12, at 50–51 (dating Trail to 1838–39).

14. See, e.g., *The United States from 1816 to 1850: The Era of Mixed Feelings*, ENCYCLOPEDIA BRITANNICA (2018), <https://www.britannica.com/place/United-States/The-United-States-from-1816-to-1850> (including map of states admitted by 1822).

15. See *Bishop Paiute Tribe Court of Appeals*, BISHOP PAIUTE TRIBAL NEWSLETTER, Apr. 2017, at 4, available at <http://www.bishoppaiutetribe.com/tribal-newsletters.html>.

16. See generally Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 25 (1999) (recognizing that “tribal governments are committed to providing due process”).

17. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (referring to members of Santa Clara Pueblo Indian tribe as “essentially a simple, uninformed and inferior people”); see also *Simmonds*, 329 P.3d at 1001–02 (showing that although an attorney had called the Minto Tribal Court an “ersatz institution,” the Alaska Supreme Court disagreed with that assessment).

18. Graham Safty, Note, *Federal Diversity Jurisdiction and American Indian Tribal Corporations*, 79 U. CHI. L. REV. 1593, 1623 (2012) (quoting Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 54 (2001)).

This is ironic since Congress has acknowledged that the United States Constitution is based largely on the Iroquois Confederation's Great Law of Peace,<sup>19</sup> which pre-dates Magna Carta.<sup>20</sup> Despite this history, Native Americans are still relegated to “demonstrating to the non-Indian public, including the federal judiciary and Congress, that tribal governments are committed to providing due process.”<sup>21</sup> Comparing this unflattering view with tribes such as NHBP pumping millions of dollars yearly into state and local revenue coffers suggests that the influence of tribal governments—including tribal courts—is overlooked due to stereotypes of how outsiders expect Native Americans to look or act.<sup>22</sup>

President Truman once declared that “[s]ome of the greatest leaders this country ever produced were the leaders of the Indian tribes.”<sup>23</sup> This opinion equally applies to tribal appellate courts. By way of example, the supposedly unsophisticated Indians elected Jesse Franklin, an African-American freedman, to the Creek Nation Supreme Court in

19. See H.R. Con. Res. 331, 100th Cong. (1988) (recognizing that Washington and Franklin both admired “the concepts of the Six Nations of the Iroquois Confederacy” and that the Articles of Confederation were “influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself”); accord Robert N. Clinton, *Sovereignty and the Native American Nation: The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1078 n.68 (1995); D. Jay Hannah, *The 1999 Constitutional Convention of the Cherokee Nation*, 35 ARIZ. ST. L. J. 1, 2 n.7 (2003).

20. Note, *Developments in the Law—Indian Law: Chapter Three: ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1710 n.9 (2016) (dating Great Law of Peace to 1142).

21. Suagee & Lowndes, *supra* note 16, at 25. This unjustified mandate for Native American courts to prove themselves is truly ironic when one considers that the track record of the United States in its relations with Indians deserves a “zero minus” grade according to President Truman. WHERE THE BUCK STOPS: THE PERSONAL AND PRIVATE WRITINGS OF HARRY S. TRUMAN 288 (Margaret Truman ed. 1989).

22. See, e.g., *NHBP Contributes a Record Breaking \$22.5 Million to Michigan*, TURTLE TALK 27 (May 2017), [www.nhbpi.com/wp-content/uploads/2017/04/May-TP\\_web.pdf](http://www.nhbpi.com/wp-content/uploads/2017/04/May-TP_web.pdf) (showing that the NHBP tribe contributed \$22.5 million dollars to the State of Michigan and the local government from gaming revenues in 2017). Tribal gaming generates billions of dollars in profits each year. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 814 at § 12:31 (2016).

23. WHERE THE BUCK STOPS, *supra* note 21, at 282. President Truman nominated William H. Hastie, the first African-American member of any federal court of appeals, to the Third Circuit in 1949. He was confirmed in 1950. See, e.g., *History of the Federal Judiciary—Judges—Hastie, William Henry*, FED. JUDICIAL CTR. (n.d.), <https://www.fjc.gov/history/judges/hastie-william-henry>.

1876,<sup>24</sup> while Thurgood Marshall, the first African-American member of the United States Supreme Court, took the bench in 1967.<sup>25</sup> Alabama's first African-American supreme court justice, Oscar W. Adams, Jr., took the bench in 1980,<sup>26</sup> over 100 years after Justice Franklin took his seat.<sup>27</sup> Native American appellate courts deserve recognition and respect for being progressively ahead of their state and federal counterparts regarding race relations. This essay will address additional areas in which the quality of tribal appellate courts is underestimated and overlooked.

### III. COURT STRUCTURE SIMILARITIES

Most tribal appellate court systems hear cases in panels of three judges appointed by the tribal council, although some tribal judges are elected.<sup>28</sup> This is similar to the traditional protocol used by the federal courts of appeals.<sup>29</sup> Similarly, the members of tribal appellate courts enjoy “absolute immunity for all judicial actions that are not ‘taken in a complete absence of

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24. Quintard Taylor, *African American Men in the American West, 1528–1990*, 569 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 107 (May 2000) (noting as well that other African-American freedmen “were elected judges and district attorneys in tribal courts”); see also Daphne E. Barbee-Wooten, *T. McCants Stewart: Hawaii’s First Black Lawyer*, 34 HAW. BAR J. 32, 34 (Feb. 2004) (noting that Stewart, an African-American from New York, served on the Liberian Supreme Court in 1911).

25. See, e.g., *History of the Federal Judiciary—Judges—Marshall, Thurgood*, FED. JUDICIAL CTR. (n.d.), <https://www.fjc.gov/history/judges/marshall-thurgood>; see also Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 YALE L.J. 19, 23 (1991).

26. See J. Mark White, *Justice Oscar W. Adams, Jr.*, 58 ALA. LAW. 151, 151 (May 1997). Justice Adams taught appellate procedure at the Cumberland School of Law while serving on the Alabama Supreme Court. He was one of my favorite professors.

27. With the single exception of Jonathan Jasper Wright, who was appointed to the South Carolina Supreme Court in 1870, no state had an African-American on its highest court until after the mid-1950s. Nineteen states have never had an African-American supreme court justice. See, e.g., *First Black Judges on the State Supreme Courts*, BALLOTOPEDIA (n.d.), [www.ballotpedia.org/First\\_black\\_judges\\_on\\_the\\_state\\_supreme\\_courts](http://www.ballotpedia.org/First_black_judges_on_the_state_supreme_courts).

28. COHEN’S, *supra* note 7, at § 4.04[3][c][iv][C]. For example, the Bishop Paiute Tribal Court of Appeals has “three justices and one alternate justice,” who sit in panels of three. The Presiding Justice sits on all appeals and the other justices rotate hearing cases. See BISHOP PAIUTE R. APP. 17.

29. See Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 537 & n.10 (2004) (discussing history of three-judge panels).

all jurisdiction” because the “long-standing federal policy supporting the development of tribal courts’ for the purpose of encouraging tribal self-government and self-determination” requires that tribal-court judges have “the same absolute judicial immunity that shields state and federal court judges.”<sup>30</sup>

Most tribes require at least some of the judges on the tribal appellate bench to be law trained.<sup>31</sup> Tribes vary as to whether a potential appellate judge must be a tribal member, Native American, lawyer, non-lawyer lay advocate, or have some combination of any of these qualifications.<sup>32</sup> Some tribes allow a single judge to sit as the appellate court on certain types of cases,<sup>33</sup> while other tribes contract with an outside appellate brokerage service that handles appeals for multiple tribes.<sup>34</sup> The

30. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003).

31. *See, e.g.*, GRIC CODE § 4.503(C)(1) (2009) (requiring at least two judges to be “attorneys . . . who have practiced in the area of federal Indian law and have a minimum of two years of experience working with tribal governments”); CANBY, *supra* note 7, at 71; *see also* Conklin v. Freeman, 1993 NPICA 2, 4 (Northern Plains Intertribal App. 1993) (discussing Ft. Berthold Tribal Court requirement that associate judge must be law trained).

32. *Compare* CODE OF THE SAC & FOX NATION § 203 (listing qualifying professional experience and education for position on Court as being “an attorney, . . . a lay advocate who has regularly practised before the Court as a member of the Bar of the Court for a period of seven years, or . . . an Indian graduate of an American Bar Association approved Law School . . . or a Paralegal program approved by the Supreme Court”) with ONEIDA CODE § 801.11(a)(2) (describing qualifying professional experience and education as “attend[ing] mandatory training, upon election or appointment, as required by the Judiciary training requirements”), MUSCOGEE (CREEK) CODE ANN. § 3-205 (requiring no specific professional experience or education); *see also Alternate Judge (Pro Tem)/Appellate Court Judge*, Mescalero Apache Tribal Court (Apr. 2017), <https://turtletalk.files.wordpress.com/2017/05/alternate-judge-tribal-court.pdf> (describing required professional experience and education in a job-opening announcement as “[a] law degree from an ABA approved law school, or a masters of Legal Studies with court experience, and at least three years of court experience including at least one year serving as a judge on any level” and also indicating that membership in “a state or tribal bar is highly preferred although not a prerequisite . . . if candidate has a Masters of Legal Studies with requisite experience”).

33. *See, e.g.*, Tribes v. Tenas, 1991 Mont. Salish and Kootenai Tribes Lexis 1 (Confed. S & K App. 1991) (dismissing an appeal upon parties’ failure to file briefs); Goes Ahead v. Nomee, 2000 ML 4984 ¶¶ 23–28 (Crow App. 2000) (recognizing that “the Crow Tribal Code does not specifically authorize a single judge of the Court of Appeals to finally decide an appeal,” and that a single judge’s doing so “must . . . be justified by emergency or exigent circumstances, and by legal authorities and precedent” and discussing unusual circumstances of case and relevant precedent); *accord* WIS. STAT. § 752.31(3) (2018) (allowing single-judge appeals in certain scenarios, such as traffic violations, enumerated elsewhere in the statute).

34. *See, e.g.*, *Member Tribes*, N. PLAINS INTERTRIBAL CT. OF APP. (2013), [http://npica-com.doodlekit.com/home/member\\_tribes](http://npica-com.doodlekit.com/home/member_tribes) (showing member tribes as the Mandan, Hidatsa, Arikara Nation, the Sisseton-Wahpeton Oyate, the Omaha Tribe of Nebraska, the Yankton

number of judges or justices serving on a tribal appellate court may differ: the Pawnee Nation Supreme Court has five justices who always sit en banc, for example, while the Oneida Court of Appeals has five judges who usually sit in panels of three.<sup>35</sup> The most common number of judges sitting on tribal appellate courts is three,<sup>36</sup> five,<sup>37</sup> or seven.<sup>38</sup> Usually, a tribe has a single appellate court that acts as the tribe's supreme court, which is also how nine state appellate systems function,<sup>39</sup> but a few tribes, such as the Mohegan Tribe, have multi-level appellate systems that provide for Tribal Council review and reversal of appellate decisions.<sup>40</sup>

Tribal appellate courts work and act similarly to state and federal appellate courts.<sup>41</sup> Tribal appellate courts review cases on the record, just as state and federal appellate courts review their cases.<sup>42</sup> The basic briefing procedures in tribal courts are

Sioux Tribe, the Ponca Tribe of Nebraska, and the Spirit Lake Tribe); CANBY, *supra* note 7, at 71; COHEN'S, *supra* note 7, at §4.04[3][c][iv][c]267 n.98 (referring to "[i]ntertribal courts now operat[ing] in California, Nevada, the Pacific Northwest, and the Southwest, among other locations").

35. Compare *Pawnee Nation Court—Supreme Court*, PAWNEE NATION OF OKLA. (2018), [www.pawneenation.org/page/home/government/pawnee-nation-court](http://www.pawneenation.org/page/home/government/pawnee-nation-court) (listing five justices of Supreme Court) and PAWNEE CODE §§ 202, 211 (providing that Court is to have five members and that "[e]ach Justice shall record in writing his decision, or the fact of his not participating when he is disqualified, on each case decided by the Supreme Court") with ONEIDA CODE § 801.8-1(b) (providing that justices will sit in panels of three unless party requests five-member panel).

36. See, e.g., POARCH BAND OF CREEK INDIANS CODE § 3-4-1 (2016).

37. See, e.g., CHEROKEE NATION CONST. art. VIII, § 1 (2003).

38. See, e.g., MUSCOGEE (CREEK) NATION CONST. art. VII, § 2 (2013).

39. See, e.g., *Supreme Court*, WYO. JUDICIAL BRANCH (2018), [www.courts.state.wy.us/](http://www.courts.state.wy.us/) Supreme. Readers interested in learning more about organization of state appellate courts can consult the website of the National Center for State Courts, which includes links to court websites for the various state court systems. See *State Court Websites*, NAT'L CTR. FOR ST. CTS. (n.d.), <http://www.ncsc.org/Information-and-Resources/Browse-by-State/State-Court-Websites.aspx>.

40. See *Mohegan Tribal Court System*, MOHEGAN TRIBE—CT. SYS. (2017), <https://www.mohegan.nsn.us/explore/government/tribal-court-system> (indicating both that the Mohegan Tribal Court has "two levels, a Trial Court and a Court of Appeals," and that "the Mohegan Constitution provides for a final review of Court decisions by the Council of Elders").

41. See, e.g., *Check Collect v. Mitchell*, 1994 Mont. Salish & Kootenai Tribe Lexis 3, \*4-\*5 (Confed. S & K App. 1994) (discussing similarities between federal and tribal rules of procedure); *Eggers v. Stiff*, 2001 ML 5092, \*34-\*39 (Crow App. 2001) (analyzing and applying federal law by analogy to matters not addressed in Crow decisions or rules of procedure).

42. See, e.g., *Means v. Dist. Ct.*, 1999 Nav. Sup. Lexis 12, 31 n.17 (Navajo 1999).

also identical to those used in state and federal appellate courts and the relevant processes are set out by ordinance or rules of court.<sup>43</sup> Oral arguments are normally allowed in tribal appellate courts, but as in state and federal appellate courts, sometimes may be held by Skype or conference call.<sup>44</sup>

Like all court systems, tribal appellate courts face budget issues and variances as to the facilities and resources available.<sup>45</sup> Some tribal appellate courts sit in multi-court and modern facilities.<sup>46</sup> Other tribal courts meet in makeshift facilities, such

43. See, e.g., *McLaughlin v. Begaye*, 2014 Navajo Sup. Lexis 2 (Navajo 2014) (discussing appellate rules and procedures); *Dallas v. Dep't. Pub. Works*, 2001 Oneida App. Lexis 10 \*4 (Oneida App. 2001) (discussing procedural skirmish before hearing); see also COHEN's, *supra* note 7, at § 4.05[7] 277 (addressing rulemaking in tribal courts).

44. See, e.g., *Fort Peck Hous. Auth. v. Beauchamp*, 1996 Mont. Fort Peck Tribe Lexis 9 (Ft. Peck App. 1996) (setting out procedural requirements for hearing, including permission for counsel to appear by telephone); *Confed. Tribes of the Chehalis Indian Reservation v. Hillstrom*, 2010 Chehalis Confed. App. Lexis 1 (Chehalis Confed. App. 2010) (referring to oral argument held by telephone); see also, e.g., *Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co.*, 2006 U.S. App. Lexis 27587 at 5 (5th Cir. 2006) (noting that oral argument had been held "by conference call"); *McCann v. Clerk of Jersey City*, 771 A. 2d 1123, 1127 (N.J. 2001) (noting that the court "heard oral argument by telephone"). Perhaps the most famous instance of a long-distance oral argument in a federal court of appeals was the 2017 motion hearing before the Ninth Circuit in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (denying emergency motion for stay). That panel "did not sit together: Judge Canby was in his chambers in Phoenix, Judge Clifton was in his chambers in Honolulu, and Judge Friedland was in her chambers in San Jose, California, when they heard the argument by telephone. Similarly, Mr. Flentje, Special Counsel to the Assistant Attorney General, argued for the federal government from Washington, D.C., while Mr. Purcell, Solicitor General of the State of Washington, argued from Olympia, Washington, and his co-counsel from the office of the Minnesota Attorney General (who was on the line, but did not argue) was in St. Paul, Minnesota." Howard J. Bashman, *Surveying the Landscape as Technology Revolutionizes Media Coverage of Appellate Courts*, 18 J. APP. PRAC. & PROCESS 7, 14 n.26 (2017).

45. O'BRIEN, *supra* note 10, at 204 (contrasting tribal courts that have "spacious new court rooms" with others that "make do in cramped, sometimes unheated, quarters that may also serve as offices or conference rooms" and noting that in some tribal courts "no funds are available to hire a prosecutor"); see also Heidi McNeil Staudenmaier & Metchi Palaniappan, *The Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 590-91 (2005) (discussing applicable legal authorities; legal-research resources; and court structures, procedures, and practices); *Sage v. Lodge Grass Sch. Dist.*, 1986 ML 1, ¶¶ 38-39 (Crow App. 1986) (assessing "whether there are special jurisdictional statutes or binding case precedent which would prevent this Court from exercising the jurisdiction normally accorded an Indian Tribe within its own reservation" and concluding that there appeared to be none).

46. See, e.g., *Judicial Branch*, GILA RIVER INDIAN COMMUNITY (2015), <http://www.gilariver.org/index.php/government/judicial-branch> (indicating that "[t]he Community's main court . . . is located in Sacaton, Arizona," and that "[t]here is a second court office located in the west end of the . . . Community").

as trailers, that are not as impressive, but those surroundings do not affect their sovereignty; these courts all address issues of equal importance.<sup>47</sup>

Lack of funds, staff, or resources is not an excuse for denying due process in any court, be it tribal, state, or federal.<sup>48</sup> The Navajo Supreme Court has suggested that the tribe should turn to federal authorities if tribal resources cannot support substantial justice and due process.<sup>49</sup> The Mashantucket Pequot Tribal Court once directed tribal judges to turn to state law to address issues of first impression that are not controlled by Mashantucket Tribal Court precedents or tribal ordinances. The court has in recent years increasingly acknowledged the development and application of Mashantucket case law and statutes, and the use of similar sources in the courts of other Native American nations around the country, and has instituted a

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47. See, e.g., Janet in Barnstable, *Mashpee Wampanoag Tribal Supreme Court Issues Its First Ruling!* MASS. L. UPDATES (Nov. 7, 2013), <https://blog.mass.gov/masslawlib/misc/mashpee-wampanoag-tribal-supreme-court-issues-1st-ruling/> (noting that Mashpee Wampanoag Tribal Supreme Court then sat in a double-wide trailer, but that the courtroom inside “looked like any other courtroom on Cape Cod”).

48. See, e.g., John v. Navajo Nation, 2011 Navajo Sup. Lexis 14 ¶¶ 4–5 (Navajo 2011) (asserting that “non-participation of the Nation in . . . defendant appeals cannot be excused for reasons of lack of staff or resources because few criminal appeals are filed in our courts,” pointing out that “[s]tatistics . . . show that of 19 total criminal cases filed by defendants since 2000, the Nation filed a response in only 9 of these cases,” and expressing concern that “the Nation continues to treat such matters lightly”); State v. Stefanovic, 572 N.W.2d 140, 144–145 (Wis. App. 1998) (declining to uphold sentence of one-year probation because trial court failed to seek extension and so lost jurisdiction over defendant after a year passed during appeal); Williams v. Bennett, 689 F.2d 1370, 1387 (11th Cir. 1982) (opining that “[n]o one is permitted to violate the constitution until a judge has found the violation to exist, and, where one has been found to exist, no one is entitled to continue unconstitutional action, free of liability, until the time set in an injunction for its correction”).

49. Acothley v. Perry, 2011 Navajo Sup. Lexis 4 \*31 (Navajo Mar. 1, 2011) (recommending “referral to the federal authorities of cases which cannot be duly resolved through plea bargains, settlement, and trial in [Navajo] courts within a reasonable time, and which meet the elements of federal crimes”); accord, 25 U.S.C. §§ 3651–3682 (Indian Tribal Justice and Legal Assistance Act, which describes Department of Justice’s outreach, support, and technical assistance available to tribal courts, including, in § 3681, the making of grants in support of “the development, enhancement, and continuing operation of tribal justice systems; the development and implementation of tribal codes and sentencing guidelines; inter-tribal courts and appellate systems; tribal probation services, diversion programs, and alternative sentencing provisions; tribal juvenile services and multi-disciplinary protocols for child physical and sexual abuse; and traditional tribal judicial practices, traditional tribal justice systems, and traditional methods of dispute resolution”); see generally COHEN’S, *supra* note 7, at § 4.04[3][c][iv], 264.

preference for their use.<sup>50</sup> Even so, the similarities between tribal appellate courts and state or federal appellate courts, from intent to application and implementation, are clear and should not be overlooked.<sup>51</sup>

#### IV. COURT STRUCTURE DIFFERENCES

A significant difference between tribal appellate courts and their state and federal counterparts is that many tribes, such as the Gila River Indian Community, include non-lawyer community judges as members of the appellate court, which allows input from the tribe on legal decisions directly affecting the tribe.<sup>52</sup> Further, again using Gila River as an example, some tribal appellate courts have alternate appellate judges who sit on a *pro tem* basis when conflicts arise that bar one of the primary

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50. *DeLorge v. Mashantucket Pequot Gaming Enter.*, 3 Mash. Tribal 1, 12–13 n.5 (Mash. Tribal Ct. 1997), *superseded by* *Barnes v. Mashantucket Pequot Gaming Enter.*, 2006 Mashantucket Tribal Lexis 12, \*4–\*5 (Mash. Tribal Ct. July 26, 2006) (indicating that Mashantucket Tribal Court need no longer look to Connecticut law).

51. *E.g.*, Monique Kreisman, Note, *United States v. Bryant, Federal Habitual Offender Laws, and the Right of Defendants in Tribal Courts: A Better Solution to Domestic Violence Exists*, 39 CAMPBELL L. REV. 205, 231–32 (2017) (discussing similarities between tribal courts and federal courts). Tribal appellate courts that publish their opinions usually use either Casemaker, Lexis, or Westlaw. As of this writing, Casemaker includes approximately sixty-five tribal-court decision sources, Lexis includes approximately thirty-two, and Westlaw includes approximately twenty-three. Some tribes report their decisions on their tribal websites. *See, e.g.*, *Index of Hopi Appellate Court Opinions and Decisions*, HOPI JUDICIAL BRANCH—HOPI TRIBAL COURTS (n.d.), [www.hopitribalcourts.com/court-cases/](http://www.hopitribalcourts.com/court-cases/) (including a searchable database of opinions); *Supreme Court*, OSAGE NATION—SUPREME COURT (2018), [www.osagenation-nsn.gov/who-we-are/judicial-branch/supreme-court](http://www.osagenation-nsn.gov/who-we-are/judicial-branch/supreme-court) (same). Others, such as the tribes of Oklahoma, have a statewide search engine for tribal court decisions. *See Oklahoma Tribal Court Reports*, WESTLAW (2018), [https://www.westlaw.com/Browse/Home/Cases/TribalCases/OklahomaTribalCourtReports?contextData=\(sc.Default\)&transitionType=Default&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Browse/Home/Cases/TribalCases/OklahomaTribalCourtReports?contextData=(sc.Default)&transitionType=Default&VR=3.0&RS=cblt1.0) (including search function for cases dating back to 1979).

52. GRIC CODE § 4.503(C)(2) (requiring one judge to be “a Community member who is familiar with the customs and traditions of the Community”). The appointment or election of appellate justices who did not complete law school is not unprecedented. Justice James F. Byrnes, who served on the United States Supreme Court during 1941 and 1942, never completed high school, college, or law school, yet served as the governor of South Carolina, as a United States Senator and Congressional Representative from South Carolina, and as Secretary of State in the Truman Administration. *See, e.g.*, *James F. Byrnes*, OYEZ (n.d.), [https://www.oyez.org/justices/james\\_f\\_byrnes](https://www.oyez.org/justices/james_f_byrnes).

judges from hearing a case.<sup>53</sup> There are several other structural differences between tribal appellate courts and the appellate courts in the state and federal system that, as the Supreme Court has acknowledged, “are influenced by the unique customs, languages, and usages of the tribes they serve.”<sup>54</sup> Those differences must be considered in connection with the history, traditions, and circumstances of each individual tribe.

Another difference is that lay advocates frequently appear in tribal appellate courts, but are seldom seen in state appellate courts or the federal courts of appeals.<sup>55</sup> A lay advocate is usually a non-lawyer who hopefully has some sort of legal training.<sup>56</sup> Some lay advocates provide excellent representation,

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53. GRIC CODE § 4.503(E) (providing that “[t]he Community Council shall appoint . . . three qualified persons as alternate judges,” who serve “only in the event of death, recusal, incapacity or any other event which renders a sitting judge unable to hear an appeal”); accord BISHOP PAIUTE R. APP. 17 (providing for “three justices and one alternate justice”). The author, an alternate appellate judge for the Gila River Indian Community Court of Appeals, has heard approximately sixty cases in that capacity.

54. *Duro v. Reina*, 495 U.S. 676, 693 (1990); see also Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 107 (2003) (quoting *Duro*); Mohegan Tribe of Indians of Conn. v. Mohegan Tribal Court, 2009 Mohegan App. LEXIS 2, \*31 (Mohegan App. Aug. 3, 2009) (noting that “it is impossible for the Mohegan Tribal Court to develop the law . . . without . . . inquiring into Mohegan custom and tradition as required by Rule 19 of the Mohegan Tribal Court Rules of Procedure”); see also Winnebago Tribe v. Bigfire, 24 Indian L. Rep. 6232, 6238–39 (Winnebago Tribal Ct. 1998) (involving trial-court discussion of tribal traditions in deciding cases).

55. See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 593 (2000) (characterizing lay advocates as “common” in tribal courts); Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 293 (2002) (acknowledging role of lay advocates, but opining that “[i]t is a legitimate issue whether this classification of practitioners should be eligible to practice before the [then being proposed] Sioux Nation Supreme Court . . . where the ability to write a brief is absolutely essential”).

56. See, e.g., SAULT STE. MARIE CHIPPEWA CODE §§ 87.102, 87.110 (1998) (defining lay advocate as “non-lawyer . . . who has been qualified by the Court to serve as an Advocate on behalf of a party” and setting out requirements for admission of lay advocates); 2 FT. PECK TRIBES COMPREHENSIVE CODE OF JUST. § 501(b) (2017) (setting out qualifications for lay advocates); FT. PECK TRIBAL CT. R. CIV. P. 1-7, 1-8 (addressing admission to bar and appearances in court) (codified as Appendix 2 to Fort Peck Tribe’s Comprehensive Code of Justice); see also O’BRIEN, *supra* note 10, at 204 (discussing role of lawyers in tribal courts, but noting that “in general . . . defendants usually represent themselves or are represented by a tribal paralegal or a friend”). In some circumstances, even a disbarred attorney may qualify as a lay advocate. See generally, e.g., *In Re Pascua Yacqui Tribe*, No. CA13-005 (Pascua Yacqui Ct. App. 2014) (discussing disbarred attorney retained as a lay advocate in a criminal proceeding), available at <http://www.pycourts.org/sites/default/files/filings/CA-13-005%20Opinion.pdf>.

while others flounder in their efforts.<sup>57</sup> Appearances by lay advocates and pro se litigation in tribal appellate courts are so common that they prompted the author to prepare a two-part guide for non-lawyer presenters of tribal-court appeals to help facilitate due process.<sup>58</sup>

Probably the most obvious difference between the tribal appellate court system and state or federal appellate courts is that the U.S. Constitution's Bill of Rights does not apply to Indians<sup>59</sup> on tribal lands or in tribal courts.<sup>60</sup> A tribal

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Lay advocates charge lower fees than lawyers and can assure that at least some practical aspects of due-process protections will be extended to the parties in legal proceedings conducted by courts sitting in remote tribal areas. See Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 305–06 (2010) (pointing out that “[i]n light of the inability of most Indians on reservations to pay a lawyer to act on their behalf, lay advocates play a critical role in ensuring that tribal members have access to the tribal justice system”). Although an advanced degree is generally not required of a lay advocate, it bears noting that the University of Tulsa offers a program in Indian law for non-lawyers that leads to the awarding of a master's degree in Indian law. See *Master of Jurisprudence in Indian Law (MJIL)*, UNIV. OF TULSA—COLLEGE OF LAW (2018), <https://law.utulsa.edu/academics/degrees/master-of-jurisprudence-mj/master-of-jurisprudence-in-indian-law-mjil/>.

Lay advocates are of course not unknown outside of tribal courts. In state courts, for example, the most common lay advocate seen is probably a court-appointed special advocate, who acts as a de facto guardian ad litem for a child in juvenile court, or a tribal lay advocate appearing on behalf of a tribe in an Indian Child Welfare Act case. See, e.g., *In re Alexis M.*, 2004 Cal. App. Unpub. Lexis 4676 \*6 n.3 (Cal. Dist. Ct. App. May 13, 2004) (noting that, under California court rules, “CASA advocates are ‘lay volunteers . . . appointed . . . to help define the best interests of children in juvenile court dependency . . . proceedings’”); *In re Elias L.*, 767 N.W.2d 98, 103–04 (Neb. 2009) (holding that tribe's Indian Child Welfare Act specialist, although not a lawyer, could represent tribe in litigation under the Act because “[h]er responsibilities require familiarity with the procedural and substantive requirements of [the Act] and familiarity with other social service agencies that are a part of the state child custody proceedings,” and tribe had “authorized her to speak for it”).

57. Gregory D. Smith, *A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants*, 4 AM. INDIAN L.J. 27, 35–37 (2015) (discussing due process concerns potentially arising from representation by lay advocates unfamiliar with law, procedure, and court rules).

58. See generally *id.*; Gregory D. Smith, *Guide for Tribal Appeals by Pro Se Litigants and Lay Advocates*, 4 AM. INDIAN L.J. 483 (2016).

59. “Indians” is the term used in the United States Code for Native Americans. See, e.g., 25 U.S.C. §§ 1603(c) (defining “Indian” as “any person who is a member of an Indian tribe”), 5129 (defining “Indian” as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation” and indicating that the term “shall further include all

government is not required to follow the American version of representative government.<sup>61</sup> The Indian Civil Rights Act (ICRA)<sup>62</sup> is designed to extend most, but not all, of the Bill of Rights to Native Americans.<sup>63</sup> Due to the political status of Native Americans, as discussed in the Indian Commerce Clause of the Constitution,<sup>64</sup> the Equal Protection Clause does not bar “Indian preference” in tribal-specific matters such as hiring,<sup>65</sup> establishment of religion,<sup>66</sup> jury trials in civil matters,<sup>67</sup> or

other persons of one-half or more Indian blood”). The author’s use of the term merely reflects that reality, and is not intended as a disparaging or otherwise offensive reference.

60. *Duro*, 495 U.S. at 693; *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (acknowledging that “as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which . . . had for its sole object to control the powers conferred by the constitution on the national government”); *see also* *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) (pointing out that tribes, “in the absence of Congressional constraints,” need not “comply with the constitutional limitations binding on federal and state governments”).

61. *See, e.g.*, *Jacobson v. Forest Cnty. Potawatomi Cmty.*, 389 F. Supp. 994, 995 (E.D. Wis. 1974) (citing *Talton* for the proposition that “[t]he United States Constitution does not apply to any Indian tribe”).

62. 25 U.S.C. § 1302(a); COHEN’S, *supra* note 7, at § 1.07.

63. *United States v. Alberts*, 721 F.2d 636, 638 n.1 (8th Cir. 1983) (recognizing that “[w]hile the Bill of Rights does not technically apply to Indians on Indian land, the Indian Civil Rights Act purports to give Indians these constitutional rights” and considering case “under fourth amendment standards”); *McCurdy v. Steele*, 506 F.2d 653, 655–56 (10th Cir. 1974) (pointing out that the Indian Civil Rights Act “tracks to some extent the language of the United States Constitution, but this does not necessarily mean that the terms ‘due process’ or ‘equal protection’ as used in the Act carry their full constitutional impact,” and that “the legislative history of the Act makes it clear that the provisions of the Fifteenth Amendment and certain procedural provisions of the Fifth, Sixth, and Seventh Amendments as well as some aspects of Fourteenth Amendment equal protection were not meant to be included among the enumerated rights”).

64. U.S. CONST. art. I, § 8, cl. 3 (referring to Congress’s power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes”).

65. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *accord* *United States v. First*, 731 F.3d 998, 1007 n.8 (9th Cir. 2013) (citing *Antelope*); *E. Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62, 64 (N.C. Cherokee Tribal Ct. 2003) (referring to Indian preference in hiring).

66. *E.g.*, *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) (recognizing that “Indian tribes are not prohibited from establishing religions”), *partially abrogated on other grounds by* *Tex. v. Cobb*, 532 U.S. 162 (2001); *see also* *Cavenham Forest Prods. v. Colville Conf. Tribes*, 1991 Colville App. Lexis 8, \*14 (Colville App. Feb. 22, 1991) (recognizing that reservation is “a homeland where members of the Tribes can maintain their tribal ties, culture, religion and economy”).

67. *Martinez*, 436 U.S. at 63 (pointing out that ICRA “does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases”); 25 U.S.C. § 1302(a)(10) (providing only that no

appointed counsel for indigents in all criminal cases.<sup>68</sup> In fact, the United States Supreme Court has long recognized that “[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority,”<sup>69</sup> and that “[t]he Bill of Rights, including the Sixth Amendment right to counsel . . . does not apply in tribal-court proceedings.”<sup>70</sup>

As a practical matter, a defendant facing tribal criminal charges enjoys the same basic individual protections, such as the guarantees against self-incrimination or double jeopardy, in a tribal-court setting as if charged in state or federal court except the guarantee of a twelve-person jury (because a jury of as few as six people is permissible in tribal courts) and the automatic right to appointed counsel for all indigent criminal defendants.<sup>71</sup>

tribe may “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons”).

68. *United States v. Bryant*, 579 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1954, 1962 (2016) (recognizing that “[i]n tribal court, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel”).

69. *Id.* (quoting *Martinez and Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008)); *see also One Hundred Eight Employees v. Crow Tribe of Indians*, 2001 ML 5093, 2001 Mont. Crow Tribe LEXIS 8, \*P 19 (Crow App. Nov. 21, 2001) (recognizing that neither the separation of powers doctrine nor the right to due process set out in the U.S. Constitution applies in tribal court “because the Tribe’s sovereign powers pre-date the Constitution and are independent of the State and Federal powers regulated by the Constitution”); *Hopi Tribe v. Mahkewa*, 1995 Hopi App. Lexis 8, ¶¶ 6, 7 (Hopi App. July 14, 1995) (finding that “[t]he Hopi Tribe is not restrained by due process guarantees in the United States or Arizona Constitutions”); Christopher J. Schneider, Note, Hornell Brewing Co. v. Rosebud Sioux Tribal Court: *Denigrating the Spirit of Crazy Horse to Restrain the Scope of Tribal Court Jurisdiction*, 43 S.D. L. REV. 486, 518 (1998) (referring to Supreme Court’s “recognition . . . that the United States Constitution did not confer rights upon the Indians, but instead, the Indians retained rights which preexisted the Constitution as an attribute of inherent sovereignty” (footnote omitted)).

70. *Bryant*, 136 S. Ct. at 1962 (citing *Martinez and Plains Commerce Bank*).

71. *See Morris v. Tanner*, 288 F. Supp. 2d 1133, 1143 (D. Mont. 2003) (explaining that “ICRA contains all of the constitutional measures that protect federal defendants except that one may be tried before a jury of six, and grand jury presentment is not required” (citation omitted)). The right to an expanded indigent counsel appointment arises in tribal law-and-order felony prosecutions, but that discussion is beyond the scope of this article. It has, however, been addressed elsewhere. *See generally Gila River Indian Community v. Thomas*, No. AC-2016-005 at (G.R.I.C. App. Dec. 15, 2016) (Smith, J., concurring) (discussing case initiated and tried under Tribal Law and Order Act); Jordan Cross, *VAWA 2013’s Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts*

Although tribal appellate courts have some clear distinctions from their state and federal court cousins, it would be short-sighted to underestimate the tribal appellate court or to presume that the tribal version of justice is somehow inferior.<sup>72</sup> Tribal courts are extremely diverse and not easily subject to generic pigeon-holing.<sup>73</sup> Their members include academics,<sup>74</sup> world-renowned social-activist lawyers,<sup>75</sup> and at least one

*All Boats or a Procedural Windfall for Non-Indian Defendants?* 67 CASE W. RES. L. REV. 379, 429 (2016).

72. See, e.g., *Howe v. Ellenbecker*, 774 F. Supp. 1224, 1232 n.6 (D. S. D. 1991) (noting importance of recognizing that tribal courts are “legitimate tribunals for the resolution of disputes that come within tribal jurisdiction”); *United States v. Walking Crow*, 560 F.2d 386, 388–89 (8th Cir. 1977) (pointing out that “tribal courts are not the creations of the federal Constitution or of federal statutes, and that their jurisdiction is inherent with respect to all matters that have not been taken away from them”); see generally Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

73. Craig Smith, Comment, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1417 n.151 (2010); Bill Kockenmeister, *Tribal Courts in Nevada Alive and Well*, 19 NEV. LAW. 26, 28 (Aug. 2011) (asserting that “[t]he old adage ‘if you’ve seen one you’ve seen them all’ certainly does not pertain to tribal courts in Nevada”). Judge Kockenmeister is the tribal judge for several different tribal trial courts, including the Bishop Paiute Tribal Court.

74. Paul Bender, a law professor at Arizona State University Sandra Day O’Connor School of Law, serves as Chief Justice on two tribal appellate courts. See, e.g., *Paul Bender*, ARIZ. ST. UNIV.—PEOPLE (n.d.), <https://isearch.asu.edu/profile/274462> (indicating that Professor Bender, a former law clerk to both Judge Learned Hand and Justice Frankfurter, “has served as a member of the Hopi Tribe’s Court of Appeals, and is currently Chief Justice of the Fort McDowell Nation Supreme Court, and the San Carlos Apache Court of Appeals”); see also, e.g., *Adams v. Comm. on Appellate Court Appointments*, 254 P.3d 367, 370 (Ariz. 2011) (same). Frank Pommersheim, a professor at the University of South Dakota School of Law, is the Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals and an Associate Justice of the Rosebud Sioux Supreme Court. See, e.g., *Frank Pommersheim*, UNIV. OF S.D. (2018), <https://www.usd.edu/faculty-and-staff/Frank-Pommersheim> (indicating that Professor Pommersheim is the author of several books, “more than 40 law review articles, and more than 125 judicial opinions”).

75. Walter Echo-Hawk was the chief legal counsel for the Native American Rights Fund (NARF), taught at both the University of Tulsa College of Law and the University of Hawai‘i at Mānoa William S. Richardson School of Law, and served on the Pawnee Nation Supreme Court. See *Walter Echo-Hawk Press Kit*, WALTER ECHO-HAWK (n.d.), [http://www.walterechohawk.com/data/press-kit/WEB\\_Press\\_Kit\\_Echohawk\\_20110202155551.pdf](http://www.walterechohawk.com/data/press-kit/WEB_Press_Kit_Echohawk_20110202155551.pdf) (including resume and other biographical information); *Walter Echo-Hawk*, UNIV. OF HAWAII AT MĀNOA—WILLIAM S. RICHARDSON SCHOOL OF LAW (2018), <https://www.law.hawaii.edu/person/walter-echo-hawk> (noting that Echo-Hawk is a tribal judge as well as an attorney, author, and law professor); Christine Zuni Cruz, an appellate judge for the Southwest Intertribal Court of Appeals and an Associate Justice on the Isleta Court of Appeals, runs the Southwest Indian Legal Clinic as a professor and associate dean at the University of New Mexico School of Law and has also taught at the University of

person who eventually became a U.S. Attorney and then a federal district judge, and has been garnering consideration for an appointment to the Supreme Court.<sup>76</sup> With this range of judicial qualifications on tribal appellate courts, it comes as no surprise to learn that a decision by a tribal appellate court of last resort interpreting a tribal constitution or tribal laws can bind the state or federal courts.<sup>77</sup> Presuming that the tribal appellate jurists lack the résumés of other judges grossly underestimates and overlooks the truth and documented facts. Tribal appellate judgeships, which are usually part-time jobs, can allow the tapping of outside legal talent not normally available for full-time judgeships.

## V. PRACTICAL CONSIDERATIONS FOR JUDGES

Many tribal judges are non-Indians.<sup>78</sup> There is a shortfall of qualified, worthy, and interested judicial candidates to cover all

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Saskatchewan College of Law. *See, e.g., Professor Christine Zuni Cruz*, UNIV. OF N.M. SCHOOL OF LAW (n.d.), <http://lawschool.unm.edu/faculty/zuni-cruz/> (describing Professor Zuni Cruz's background).

76. R. Kyle Alagood, *A Hard-to-Obstruct Supreme Court Nominee: Diane Humetewa FTW*, HUFF POST—THE BLOG (Feb. 16, 2016 (updated Feb. 27, 2016)), [http://www.huffingtonpost.com/r-kyle-alagood/a-hardtoobstruct-supreme-\\_b\\_9237712.html](http://www.huffingtonpost.com/r-kyle-alagood/a-hardtoobstruct-supreme-_b_9237712.html). A former member of the Hopi Appellate Court, Judge Humetewa is now a federal district judge and a professor at Arizona State University Sandra Day O'Connor School of Law. *Id.*; *see also* Julie Newberg, *ASU Advisor Diane Humetewa Named 1st American Indian Woman Federal Judge*, ARIZ. ST. UNIV. SANDRA DAY O'CONNOR COLLEGE OF LAW (n.d.), <https://law.asu.edu/content/asu-advisor-diane-humetewa-named-1st-american-indian-woman-federal-judge-0> (describing Judge Humetewa's background and reporting her reaction to her then-new appointment as federal judge).

77. *See, e.g., Marceau v. Blackfeet Hous. Auth.*, 519 F.3d 838, 843 (9th Cir. 2008) (pointing out that "principles of comity generally require federal courts to dismiss, or abstain from deciding, cases in which a party asserts that an Indian tribal court possesses concurrent jurisdiction" and that "[o]rdinarily, exhaustion of tribal remedies is mandatory" (citations omitted)), *rev'd in part on other grounds*, 540 F.3d 916 (9th Cir. 2008). Courts in some states, such as New Mexico, certify questions of tribal law to tribal courts instead of answering a tribal-law question without tribal input. *See e.g., Reed C. Easterwood, Note, Indian Self-Determination: The Federal Government, New Mexico, and Tribes in the Wake of Cheromiah*, 38 N.M. L. REV. 453, 479 (2008) (noting efficiency of "allowing Tribes to answer difficult tribal law questions").

78. Julie Cavanaugh-Bill, *The ABCs of Practicing in Tribal Court*, 19 NEV. LAWYER 42, 42 n.1 (Aug. 2011) (acknowledging that "[m]any tribal court judges are non-Indians"); Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 501 (2008) (noting that it is "very common for non-Indians to serve as judges on tribal courts" (footnote omitted)).

potential appellate judgeships in Indian Country.<sup>79</sup> On the other hand, many retired appellate judges, such as the late Chief Justice Frank F. Drowota, III, of the Tennessee Supreme Court,<sup>80</sup> have a wealth of experience that could be offered to the tribal appellate system. The retired appellate judge interested in entering into this arena could contract with a smaller tribe and work from home in another part of the United States in a manner similar to the way in which the judges of the various federal courts of appeals work together even though their chambers are located throughout the several states in each circuit. The caseload of most tribal appellate courts is not overwhelming—just a fraction of the number of cases a tribal trial court typically handles.<sup>81</sup>

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79. Cf. Michael J. Kelly, *The Kurdish Regional Constitution Within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN. ST. L. REV. 707, 762 (2010) (noting that tribal judges were at that time “mostly white,” as were “the public defenders and prosecutors,” and attributing this phenomenon to the “very low enrollment of Native Americans in law schools”); see also *Puyallup Tribe v. Conway*, 1996 Puyallup Trib. Lexis 9, \*8 (Puyallup Tribal Ct. Aug. 14, 1996) (recognizing that “[t]he number of cases on the docket is increasing, monetary support is often insufficient, and the number of Trial Court judges and staff frequently does not meet increasing demands”); *id.* at \*8 n.10 (comparing resources totaling \$2914.45 devoted to each case in a representative federal district court with “as little as \$50” in some tribal courts).

Although the job of the tribal appellate judge is rewarding on its own terms, it may bear noting that many tribal appellate courts are located near, or actually in, beautiful natural areas such as the Grand Canyon. To reach the Hualapai Nation’s tribal courts, for example, the incoming judge helicopters into the bottom of the Grand Canyon . . . unless he or she prefers to hike or ride a pack mule or donkey down into the Canyon. Time spent hearing oral arguments in these surroundings adds a great deal to the experience of being a contract appellate judge in a tribal justice system.

80. Chief Justice Drowota retired from the Tennessee Supreme Court in 2006 after thirty-five years on the bench, twenty-five of them on the Tennessee Supreme Court. He was on the Tennessee Court of Appeals from 1974 to 1980. See Lisa Lippy & Marshall Davidson, *The Retirement of Chief Justice Frank F. Drowota, III: A Tribute to a Legal Legend and All Around Nice Guy*, 3 TENN. J.L. & POLICY 95, 95, 98 (2006), available at <http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1049&context=tjlp>. The Tennessee Bar Association’s Outstanding Judicial Service Award is named in honor of Chief Justice Drowota. See, e.g., *TBA Honors Chancellor Butler for Outstanding Judicial Service*, TENN. ST. CTS. (July 16, 2015), [www.tsc.state.tn.us/news/2015/07/16/tba-honors-chancellor-butler-outstanding-judicial-service](http://www.tsc.state.tn.us/news/2015/07/16/tba-honors-chancellor-butler-outstanding-judicial-service) (explaining that “[t]he Drowota Award is given to a judge or judicial branch official of a federal, state or local court in Tennessee who has demonstrated extraordinary devotion and dedication to the improvement of the law, the legal system and the administration of justice as exemplified by the career of former Supreme Court Justice Frank F. Drowota III”).

81. *Curley v. David*, 1999 Navajo Sup. Lexis 13, \*3 (Navajo Sept. 1, 1999) (pointing out that the Supreme Court of the Navajo Nation “has a fraction of the caseload of the trial

Many jurists may be reluctant to venture into the world of tribal courts because they are not already familiar with federal Indian law, but tribal courts have much to gain from the outside experience of seasoned state and federal judges.<sup>82</sup> Sitting as a tribal appellate judge can be a way of discharging the judge's duty to help promote access to justice.<sup>83</sup> Applying tribal constitutions and ordinances does not differ from applying the constitutional and statutory provisions relevant to the cases heard in any other forum. The retired appellate judge who needs focused training to become proficient in Indian law can turn to the National Judicial College,<sup>84</sup> which offers a certification in Tribal Judicial Skills.<sup>85</sup> Also, the National Tribal Judicial

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courts, and has been specifically created as a court of review and granted review authority by the Navajo Nation Council"); *P.C. & M. Constr. Co. v. Navajo Nation*, 1993 Navajo Sup. Lexis 1, \*7 (Navajo Aug. 26, 1993) (acknowledging the "enormous caseload of the trial courts").

82. *Mustang Fuel Corp. v. Hatch*, 890 F. Supp. 995, 999–1000 (W.D. Okla. 1995) (recognizing that case involved both issues of federal law and issues previously decided by Cheyenne–Arapaho Supreme Court); see also B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 Wm. Mitchell L. Rev. 457, 476 (1998) (noting that "[c]ultural and legal education in the judicial forum is by no means a one-way street" and discussing ways in which federal and state courts and judges can work with tribal courts and judges).

83. See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT at Canon 1, R. 1.2 cmt. [4] (Feb. 2007), [https://www.americanbar.org/content/dam/aba/migrated/judiciaethics/ABA\\_MCJC\\_approved.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/judiciaethics/ABA_MCJC_approved.authcheckdam.pdf) (providing that "[j]udges should . . . promote access to justice for all").

84. The National Judicial College, created in 1963, is located at the University of Nevada at Reno. *About the NJC*, NAT'L JUDICIAL COLL. (2015–2018), <http://www.judges.org/about/the-njc-experience/history> (providing general information about NJC programs).

85. Many of the NJC Tribal Judicial Skills classes are available online. See, e.g., *Certificate Program Requirements—Tribal Judicial Skills*, NAT'L JUDICIAL COLL. (2015–2018), <http://www.judges.org/academic/certificate-program/tribal-judicial-skills/> (providing list of classes offered). Another excellent web-based option for judges interested in learning Indian law is the Native American Studies Graduate Certificate offered by Montana State University. See *Online Certificate in Native American Studies*, MONT. ST. UNIV. (n.d.), <http://catalog.montana.edu/graduate/letters-science/native-american-studies/online-certificate-native-american-studies/>; see also *Special Considerations for the Rural Court Judge*, NAT'L JUDICIAL COLL. (Aug. 1, 2016), <http://www.judges.org/special-considerations-rural-court-judge/> (describing online course "specifically designed for judges who preside over courts in rural areas and small, possibly isolated jurisdictions," which covers many topics relevant to the work of a judge on a tribal appellate court). The author is one of several judges from across the United States who team-teach the Rural Courts class for the NJC. See *id.* (noting that "[t]his course is taught by judges who preside over small and rural jurisdictions around the country, and understand the special issues confronting rural judges").

Center, the country's premier tribal-court judges' resource center, is housed at the NJC.<sup>86</sup>

If you are an active or senior appellate judge interested in embracing the opportunity of a new judicial challenge<sup>87</sup> that allows you to share your accumulated insight, wisdom, and experience,<sup>88</sup> a position on a tribal appellate court might be right for you. Judicial openings on tribal courts, at both the trial and appellate levels, are posted on websites such as Michigan State's "Turtle Talk," which is updated with new tribal-court jobs every Friday.<sup>89</sup> Also, some state bar associations, some tribal bar

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86. See *The National Judicial College Tribal Judicial Center*, NAT'L JUDICIAL COLL. (2015–2018), <http://www.judges.org/ntjc/> (providing an overview of resources available). It would be hard to express how valuable it is for the attorney who also sits as a part-time jurist on a tribal appellate court to have access to NJC judges' training. Its offerings include, for example, an appellate-judge certification program and scholarship-funded training offerings that provide CLE credits for attorneys acting as judges. See *Certificate Program Requirements—Appellate Judicial Skills*, NAT'L JUDICIAL COLL. (2015–2018), <http://www.judges.org/academic/certificate-program/appellate-judicial-skills/> (describing appellate-judge certificate program); *Scholarships*, NAT'L JUDICIAL COLL. (2015–2018), <http://www.judges.org/courses/scholarships/> (linking to list of available scholarships and information about the application process, and also linking to a list of current courses that includes as of this writing options like "21st Century Oral Arguments" and "Logic and Opinion Writing," both of which would be of use to the attorney acting as a judge on a tribal appellate court).

87. The cases before some tribal appellate courts can even involve international law. The lands of the Tohono O'odham Nation, for example, are currently a major focal point in connection with the construction of the proposed border wall with Mexico, while the lands of the Saint Regis Mohawk Indian Tribe overlap the border between the United States and Canada. See, e.g., *No Wall*, OFFICIAL WEB SITE OF THE TOHONO O'ODHAM NATION (2016), <http://www.tonation-nsn.gov/nowall/> (pointing out that "[t]he Tohono O'odham have resided in what is now southern and central Arizona and northern Mexico since time immemorial," that "[l]ong before there was a border, tribal members traveled back and forth" across what is now the border between the United States and Mexico, and that "the Nation has opposed fortified walls on the border for many years"); *History of Tribal Government*, SAINT REGIS MOHAWK TRIBE (n.d.), [https://www.srmt-nsn.gov/history\\_of\\_tribal\\_government](https://www.srmt-nsn.gov/history_of_tribal_government) (pointing out that "[t]he Mohawk are traditionally the keepers of the Eastern Door of the Iroquois Confederacy," that the tribe's "original homeland is the north eastern region of New York State extending into southern Canada and Vermont," and that the tribe was historically "the Iroquois nation closest to Albany and Montreal").

88. Cf. *Dep't of Human Res. v. Howard*, 918 A.2d 441, 449 (Md. App. 2007) (recognizing, in a case that did not involve tribal courts, the "inherent wisdom" of retired judges, acknowledging the public's and the judiciary's debt to "those retired judges who render continuing service in the discharge of the business of the courts," and characterizing as "invaluable" the "abundance of experience brought to bear by retired judges . . . in the administration of justice").

89. E.g., Neoshia Roemer, *Friday Job Announcements*, TURTLE TALK (July 6, 2018), <https://turtletalk.wordpress.com/2018/07/06/friday-job-announcements-82/> (listing various law- and court-related jobs, including two tribal-court judgeships).

associations, and some individual tribes post job openings for trial and appellate judges on their own sites.<sup>90</sup> The opportunities for professional growth and public service that the tribal court system offers the experienced jurist should not be overlooked or underestimated.

## VI. PRACTICAL CONSIDERATIONS FOR LAWYERS<sup>91</sup>

Prior to beginning service as a part-time tribal appellate judge, I presented approximately 700 appeals in various state, federal, and military courts. Since sitting as a contract tribal appellate judge, I have presented approximately 100 more state and federal appeals. Sitting as a tribal appeals judge changed my approach to presenting appeals. Unlike an appellate advocate, the appellate judge answers legal questions and educates the bar and the public about those legal issues. A better understanding of how the appellate judge thinks comes from the advocate's acting as an appellate judge herself, which offers the advocate invaluable insight into the best means of persuasion when writing briefs and answering questions at oral argument.

The only caveat a lawyer seeking a tribal appellate judgeship should keep in mind is that the candidate pool is extremely rich with talent, including law professors who are experts in tribal law, such as Arizona State University Sandra J. O'Connor College of Law Professor Robert N. Clinton.<sup>92</sup> Yet if you are an appellate attorney interested in broadening your expertise while providing an important public service, you

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90. See, e.g., *Job Postings*, NAT'L NATIVE AM. BAR ASS'N (n.d.), <http://www.nativeamericanbar.org/job-postings-2/>; *RFQ Pro Tem Judge*, NOOKSACK INDIAN TRIBE—HUMAN RESOURCES (June 2016), <http://nooksacktribe.org/wp-content/uploads/2011/12/RFQ-pro-tem-judge.pdf>.

91. Many of the education and training opportunities available for judges interested in expanding their knowledge of Indian law are also available to lawyers who act as appellate judges on tribal courts. See, e.g., notes 84–86, *supra*.

92. Professor Clinton teaches and writes about federal Indian law, tribal law, and Native American history, and is a co-author of textbooks about Indian law. *Robert Clinton*, ARIZ. ST. UNIV. SANDRA DAY O'CONNOR COLL. OF L. (n.d.), <https://isearch.asu.edu/profile/321397>. He is also Chief Justice of the Hopi Appellate Court and the Winnebago Supreme Court, a Justice of the Colorado River Indian Tribes Court of Appeal and the Hualapai Court of Appeals, and a Judge pro tem for the San Manuel Band of Serrano Mission Indians Tribal Court, and was for twenty years a Justice of the Cheyenne River Sioux Court of Appeals. *Id.*

should not get discouraged. Consider a *pro tem* or alternate-judge position as a way of getting your foot in the door.<sup>93</sup> If nothing else, you will see a unique aspect of the legal world that is overlooked by most appellate attorneys and appellate judges.

## VII. CONCLUSION

The National Congress of American Indians has bluntly told the United States Supreme Court that “tribes have no interest in error-prone courts.”<sup>94</sup> Indeed, “[a]n effective tribal judiciary is a critical player in the process of nation building,”<sup>95</sup> which certainly includes enhancing access to justice in Indian Country. The appellate system in Native American tribal courts offers a challenging arena that experienced appellate judges and practicing appellate attorneys should never overlook or underestimate. Serving as a judge on a tribal appellate court offers a chance to face new challenges, an opportunity for community service, and the prospect of expanding access to justice.



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93. See, e.g., *Request for Proposal—Pro Tem Judge*, HOPI TRIAL COURT (n.d.), <http://www.hopi-nsn.gov/wp-content/uploads/2015/12/PROTEM-RFP.pdf>.

94. Kreisman, *supra* note 51 n.225 (quoting NCAI amicus brief filed in *Bryant*).

95. GETCHES, *supra* note 9, at 408.