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Eugene R. Fidell  
*Yale Law School*

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# COMPETING VISIONS OF APPELLATE JUSTICE FOR INDIAN COUNTRY: A UNITED STATES COURT OF INDIAN APPEALS OR AN AMERICAN INDIAN SUPREME COURT

Eugene R. Fidell\*

## Introduction

In 2013 I proposed the establishment by federally recognized tribes of an opt-in American Indian Supreme Court that would review decisions of tribal courts.<sup>1</sup> After that article went to press, the congressionally created<sup>2</sup> Indian Law and Order Commission (ILOC)<sup>3</sup> released an important report, *A Roadmap for Making Native America Safer*.<sup>4</sup> Because the ILOC Roadmap offers a markedly different suggestion for a new court, a postscript to my article seems in order. I have also had a few further thoughts unrelated to the Roadmap that may shed additional light on aspects of the American Indian Supreme Court proposal. Part I of this article will comment on the court suggested by ILOC, referred to here as the Roadmap Circuit. Parts II and III will elaborate on the potential scope of federal question jurisdiction that an American Indian Supreme Court, which would be fundamentally different from the Roadmap Circuit, might enjoy, and the permissibility and political feasibility of subjecting an American Indian Supreme Court's decisions on federal questions to review by the Supreme Court of the United States.

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\* Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law, Yale Law School.

1. Eugene R. Fidell, *An American Indian Supreme Court*, 2 AM. INDIAN L.J. 1, 13-14 (2013), <http://www.law.seattleu.edu/Documents/ailj/Fall%202013/Fidell-Final.pdf>.

2. 25 U.S.C. § 2812 (2012); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 235, 124 Stat. 2258, 2282-86; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 909(a), 127 Stat. 54, 126.

3. *Indian Law and Order Commission*, UCLA AM. INDIAN STUDIES CTR., <http://www.aisc.ucla.edu/iloc/> (last visited Apr. 9, 2016).

4. *See generally* INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES (Nov. 2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf) [hereinafter ROADMAP].

### *I. The Proposed Roadmap Circuit*

The ILOC commissioners made the following dramatic recommendations, among others:

**1.1:** *Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe's exercise of opting out, Congress would immediately recognize the Tribe's inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe's lands as defined in the Federal Indian Country Act. This recognition, however, would be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.*

**1.2:** *To implement Tribes' opt-out authority, Congress should establish a new Federal circuit court, the United States Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current*

*Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings so as to ensure that defendants' Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.*

. . . .

**1.3:** *The Commission stresses that an Indian nation's sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.*<sup>5</sup>

The full report explained:

The mirror of this special circuit court jurisdiction at the Tribal court level is this: Tribal courts do not become Federal courts for general purposes. Tribes retain full and final authority over the definition of the crime, sentencing options, and the appropriate substance and process for appeals outside of the narrow jurisdiction reserved for the new Federal circuit court.

It has been argued that the government-to-government relationships between Tribes and the U.S. government mean that the U.S. Supreme Court is the appropriate initial forum for any appeal of a Tribal court decision. While this may be true in concept, the Commission also seeks to ensure that Tribal court operations continue in the smoothest manner possible and that appeals are minimally disruptive to the ongoing delivery of justice services in Tribal communities.

With 566<sup>[6]</sup> federally recognized tribes in the United States, the U.S. Supreme Court might be asked to hear many appeals from Indian country, but choose only a few to remain responsive

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5. *Id.* at 23-25.

6. The number has since risen to 567, with the addition of the Pamunkey Indian Tribe. *See* Final Determination for Federal Acknowledgement of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015). The current list appears at Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 81 Fed. Reg. 26,826 (May 4, 2016).

to the wide array other issues and subject matters brought to its attention. Tribal courts could become paralyzed by the wait and by the loss of confidence generated by the cloud of uncertainty resulting from dozens of denied appeals. Having a panel of Article III judges—all with the highest expertise in Indian law, ruling in a forum designed in consultation between the U.S. government and Tribal governments—hear such cases first meets not only the demands of practicality, but also reinforces Tribal sovereignty.<sup>7</sup>

There is much to be said for the ILOC proposal to allow tribes to opt out of federal and state criminal jurisdiction and resume criminal jurisdiction over all persons who are present within the tribe's lands. This would fundamentally alter the legal environment within which tribes currently function. But under the proposal, the shift would come at a potentially heavy price if it required tribal compliance with the full panoply of protections granted by the United States Constitution.<sup>8</sup> From that perspective, therefore, the change—which reflects what ILOC commissioners have referred to as a “grand bargain”—could instead prove to be a Faustian bargain. Presented with the choice, some—perhaps most—tribes would quite likely conclude that the trade-off entailed, on balance, an unacceptable compromise of tribal sovereignty. Significantly, although the National American Indian Court Judges Association adopted a resolution supporting the ILOC report, it recommended that tribal courts be required to comply with the Indian Civil Rights Act rather than the Bill of Rights.<sup>9</sup>

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7. ROADMAP, *supra* note 4, at 24 (footnote omitted).

8. This assumes that where the drafters referred to equivalent rights they meant identical rights. If equivalence means something other than mirror-image, then a huge ambiguity will loom over the entire project. At present, the received learning is that a tribe's application of the protections afforded by the Indian Civil Rights Act, 25 U.S.C. § 1302 (2012) (“ICRA”), need not literally replicate the Bill of Rights jurisprudence applicable to federal and state governments. For example, “[t]he right to counsel under ICRA is not coextensive with the Sixth Amendment right.” *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016); *see generally* MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 349-51 (2011) [hereinafter FLETCHER, *TRIBAL LAW*]. Indeed, not every provision of the Bill of Rights is incorporated even generally in ICRA. MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* § 6.4, at 247-48, 251 (2016).

9. Nat'l Am. Indian Ct. Judges Ass'n, Res. No. 2015-01 (Oct. 24, 2015), <https://turtletalk.files.wordpress.com/2015/10/resolution-2015-01.pdf>. The Coalition of Bar Associations of Color also supported the ILOC recommendations, but without the qualification about applying ICRA protections. Coalition of Bar Ass'ns of Color, *Resolution Supporting Implementation of the Indian Law and Order Commission Recommendations* (Mar. 2, 2015),

Such a change could make ILOC's proposal far more palatable from a tribal perspective, although it would also likely stir up opposition from Congress and some states.

The Roadmap proposes creation of a new federal circuit as a means of implementing the ILOC opt-out recommendation. The claim is that such a court would provide a uniform rule of decision rather than having divergent outcomes with respect to the application of constitutional protections depending on which existing geographical circuit contained the particular tribe's Indian country.

Several aspects of the ILOC proposal give pause. Among these is the fact that it seems to go far beyond merely filling in the gap that would be created once federal and state law are ousted from Indian country. Ironically, the proposal seems to expose to federal review a broad range of tribal court decisions that are not currently subject to such review. At present, the role of the federal courts is confined to providing habeas review for detention in violation of the Indian Civil Rights Act<sup>10</sup> and assessing whether a tribe has acted within its jurisdiction in dealing with a nonmember.<sup>11</sup>

The Roadmap Circuit would have far broader jurisdiction, and, except for appellate review of district court habeas decisions under the Indian Civil Rights Act (which would remain as is), would seemingly entail direct appellate review of tribal court decisions without requiring litigants to start at the district court level. That direct review would obviously impose on tribal courts a heightened requirement for full development of a record in non-habeas cases, since there would no longer be a district court that could

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<https://c.ymcdn.com/sites/www.napaba.org/resource/resmgr/CBAC/2015-17CBAC.pdf>. At its 2015 Midyear Meeting in Houston, the American Bar Association House of Delegates endorsed all of the ILOC recommendations except for "the new circuit court provision of Recommendation 1.2." ABA House of Delegates, Res. 111A (Rev.) (Feb. 9, 2015), [http://www.americanbar.org/content/dam/aba/images/abanews/2015mm\\_hodres/111a.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/111a.pdf). As proposed by the Section of Individual Rights and Responsibilities, the Criminal Justice Section, and the National Native American Bar Association, the resolution had not included such an exception. The revised resolution also "urge[d] Congress to establish a means of creating a consistent, uniform, and predictable body of case law dealing with the civil rights issues and matters of Federal law interpretation arising in Indian country . . ." *Id.*

10. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69-70 (1978).

11. *E.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Tribal court jurisdiction over nonmembers appears much more fragile than it should, as witness the affirmance by an equally divided Court in *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (civil action for sexual assault of a tribal member in a store located on tribal land).

be counted on to perform that function. There are negatives to this in terms of time and expense but there is also a significant positive good in the sense that the more complete the record generated in the tribal court is, the less likely the reviewing court is to interfere with the substance of the tribal court's decision.

The Roadmap Circuit would review tribal court non-habeas proceedings in much the same way that a geographical circuit might review federal agency actions under the Administrative Orders Review Act (also known as the Hobbs Act)<sup>12</sup> or other federal legislation that provides for direct review in the courts of appeals.<sup>13</sup>

ILOC's favorable reference to the performance of the United States Court of Appeals for the Federal Circuit in patent cases is one with which many observers would disagree. Indeed, the Supreme Court has had to intervene more often than one would have expected in that arcane area.<sup>14</sup> But whatever the case with respect to that admittedly arcane field, there is nothing specialized about habeas law or the application of the guarantees of the Bill of Rights once the decision has been made (as the ILOC proposal seemingly does) that those protections will be available in the same manner and to the same extent as they are outside Indian country. In other words, there is a tension baked into the Roadmap Circuit proposal: a case decided by the new court would be indistinguishable, doctrinally, from one decided by, say, the Ninth Circuit. Of course, if the touchstone becomes not the Bill of Rights but, as the National American Indian Court Judges Association recommended,<sup>15</sup> the Indian Civil Rights Act, the case for a Roadmap Circuit would be stronger to the extent that doctrine may not perfectly replicate the Bill of Rights and there are likely to be tribe-specific variations.

Additionally, the ILOC proposal would require exhaustion of tribal remedies in habeas cases. A tribal court defendant who is incarcerated on the basis of a proceeding that violates the Indian Civil Rights Act must invoke tribal trial and appellate court remedies before proceeding to federal district court for a writ of habeas corpus.<sup>16</sup> To be sure, requiring exhaustion where tribal court jurisdiction is disputed is a way of respecting the dignity

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12. 28 U.S.C. § 2343 (2012).

13. *E.g.*, Clean Air Act, 42 U.S.C. § 7607(b) (2012).

14. *See generally* John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657 (2009).

15. *See* Nat'l Am. Indian Ct. Judges Ass'n, *supra* note 9.

16. 25 U.S.C. § 1303 (2012); *e.g.*, *Alvarez v. Tracy*, 773 F.3d 1011 (9th Cir. 2014).

of tribal legal institutions (and therefore of tribes), but habeas is supposed to be a speedy remedy<sup>17</sup> and demanding one or two tribal courthouse stops before a tribal prisoner can seek review by the Article III judges of the Roadmap Circuit could significantly retard a process that is intended to lead to prompt release from arbitrary detention.<sup>18</sup>

At present, federal courts may police tribal compliance with the Indian Civil Rights Act only by writ of habeas corpus.<sup>19</sup> Thus, if a person is not in custody, the sole and final remedy will be in tribal court. It seems from paragraph 1.2 of ILOC's description that the commission intends that any violation of the Fourth, Fifth, Sixth, and Eighth Amendments could be reviewed by the Roadmap Circuit.<sup>20</sup> If so, and if the limitation announced in *Martinez* were abandoned, the result would be to expose a broad new swath of tribal court decisions to federal court review. Or perhaps those critical bodies of federal constitutional law will be applicable (and hence subject to district court and Roadmap Circuit review) only if they lead to incarceration. If so, adoption of the ILOC proposal will arguably discourage tribal courts from imposing jail sentences (even where merited) and resort instead to fines and other noncustodial punishments such as property forfeiture or banishment as ways to avoid federal intrusion on the administration of justice by tribal courts.

If the Roadmap Circuit proposal's exhaustion component can be viewed as vindicating tribal dignity interests, there is also a sense in which precisely the opposite is true. What's wrong with creating a Roadmap Circuit that would review both tribal habeas cases from the district courts and tribal court decisions in non-habeas cases, subject to discretionary

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17. Absent a contrary order enlarging the response time for good cause shown, federal habeas petitions must be answered by the custodian within three days. 28 U.S.C. § 2243 (2012).

18. Roadmap Recommendation 1.2's reference to the Speedy Trial Act, 18 U.S.C. § 3161 (2012), is difficult to explain. It deals with ensuring speedy trial in criminal cases in the federal district courts, rather than with access to habeas corpus. Subjecting tribal courts to this statute would be a giant and widely unwelcome step in the direction of submerging tribal justice in the federal judicial system. In addition, ILOC's narrative explanation refers to exhaustion of tribal remedies not only in the context of the constitutional right to a speedy trial, U.S. CONST. amend. VI, but also to a host of other rights conferred by the Bill of Rights, including Sixth Amendment rights other than the right to a speedy trial, such as public trial, venue, confrontation, compulsory process, and effective assistance of counsel. See ROADMAP, *supra* note 4, at 24-25.

19. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

20. See ROADMAP, *supra* note 4, at 23-24.



review for either category of cases by the Supreme Court of the United States?

One problem is that this architecture, by requiring the involvement of an intermediate federal court, would treat tribes as second-class entities. Congress has provided that decisions of the highest courts of the states, Puerto Rico and the District of Columbia on federal questions are reviewable directly by the Supreme Court, rather than after an intermediate stop at the pertinent geographical circuit.<sup>21</sup> Requiring tribal cases to make such a stop would signal that tribes do not possess the same dignitary interests as states.<sup>22</sup> This is rubbing salt in the wound inflicted by the Supreme Court's holding in *Cherokee Nation v. Georgia*<sup>23</sup> that tribes do not qualify as foreign states within the meaning of Article III's grant of original jurisdiction to the Court.<sup>24</sup> Tribes, it is said, are "domestic dependent nations,"<sup>25</sup> whereas the states' consent was needed to bring the Constitution of 1787 into being.<sup>26</sup> True enough, but is it a posture that symbolically or otherwise serves tribal interests? To interpose a specialized federal court between tribes and the Supreme Court is reminiscent of the arrangement under which, until 1970, decisions of the local courts of the District of Columbia were subject to review by the United States Court of Appeals for the District of Columbia Circuit.<sup>27</sup> Treatment as foreign nations may be a bridge too far given *Cherokee Nation*, but would tribes really wish to be treated as if they were mere territories, as the Roadmap seems to propose?

Uniformity, consistency and predictability—interests the ILOC proposal seeks to vindicate—are highly laudable objectives. But the Roadmap Circuit proposal does not fill those needs because, lacking jurisdiction over non-tribal cases, the new court could not compel uniformity on the part of any district court or geographical circuit in cases presenting the same constitutional issues outside the tribal context. Ensuring uniformity and resolving circuit splits would thus be the task of the Supreme Court. To the extent that the geographical circuits at times diverge on questions of federal

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21. 28 U.S.C. §§ 1257-1258 (2012).

22. *Cf.* Fidell, *supra* note 1, at 25-26.

23. 30 U.S. (5 Pet.) 1 (1831).

24. U.S. CONST. art. III, § 2, cl. 1.

25. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

26. U.S. CONST. art. VII (requiring ratification by nine state conventions).

27. The D.C. Circuit's role survived until Congress passed the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473; *see also, e.g.*, 48 U.S.C. § 1424-3 (2012) (reviewing decisions of appellate division of territorial district court).

Indian law (*e.g.*, who is an Indian?),<sup>28</sup> the splits are unfortunate but far from beyond the ability of the current federal appellate system to remedy, either through Supreme Court review on certiorari or by judicious exercise of the geographical circuits' power to subject a case to hearing or rehearing *en banc*.

Recommendation 1.2 would confer on the Roadmap Circuit jurisdiction over "criminal cases arising in Indian country."<sup>29</sup> Taken literally, this would mean that the new court would hear appeals from cases involving garden variety federal crimes of general application, such as drug offenses. The result would be that there might be one rule for federal drug offenses committed on a reservation and another, articulated by the geographical circuit, for the identical offense committed just outside. This ill serves the interest in uniformity.

That the current architecture is imperfect could not be clearer. Yet the Roadmap Circuit proposal raises a host of issues. Above all, by creating a new federal court for Indian matters, it would draw tribal legal institutions ever more tightly into the federal embrace, which would defeat the central purpose of the proposed reform. That is reason enough to look elsewhere for reform of the structure for Indian cases. It need only be added that the very premise for the proposal—abandonment of the current basic arrangements that subject Indian country to federal and in some places state criminal jurisdiction—is difficult to imagine from a political perspective.

The ILOC proposal will be a hard sell with Congress. The political impediments are so daunting that it is superfluous to point out other factors that would be difficult to sort out even if Congress were to turn back the hands of the clock to a nineteenth century model of tribal jurisdiction:<sup>30</sup> the politics of selection and confirmation of judges to a Roadmap Circuit would be extraordinary. Because the proposal calls for an Article III court, confirmation hearings would fall to the Senate Committee on the Judiciary rather than the Senate Committee on Indian Affairs.<sup>31</sup> Could a case be made

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28. See, *e.g.*, Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. RACIAL & ETHNIC JUST. 241 (2010); *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (*en banc*).

29. ROADMAP, *supra* note 4, at 23-4.

30. The ILOC proposal seems to restore the state of affairs after *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Ex parte Crow Dog*, 109 U.S. 556 (1883), but before the Major Crimes Act, 18 U.S.C. § 1153 (2012), *United States v. McBratney*, 104 U.S. 621 (1881), and *Draper v. United States*, 164 U.S. 240 (1896).

31. Standing Rules of the Senate, S. DOC. NO. 113-18, at 25-26 (2013) (Rule XXV(m) – Standing Committees).

for a kind of Indian preference for the new court? To be sure, the country broadly views diversity on the federal bench as highly desirable, but even a gentleman's agreement, much less an explicit provision of law,<sup>32</sup> to require that some or all of the seats on a new federal court be held by Indians would be problematic. It might work out that way, at least in part, but it is not hard to imagine how complicated the politics of nomination and confirmation might become, potentially leading to divisiveness and hard feelings where precisely the opposite ought to be the goal. Not that judicial selection politics would be simple with the American Indian Supreme Court I have proposed,<sup>33</sup> but at least such a system would involve Indian politics decided by tribes and not "inside-the-Beltway" politics, rife with such familiar evils as hidden "holds" or trade-offs on issues entirely unrelated to the merits of a particular nominee.

## *II. The Potential Scope of the Federal Question Jurisdiction of an American Indian Supreme Court*

To its framers, a main virtue of the ILOC proposal is the superimposition of a federal court. There are two reasons why the imposition of such a court might actually be a vice. First, it would come at an exorbitant symbolic price. Second, it would implicitly see federal law as the main event and as most deserving of legislative restructuring, whereas it is the growing number of tribal courts that should be looked to as the focus and engine of legal development in Indian country. Those courts can be expected to continue to grow over time, both in number and activity level. The challenge is to harness their energy in ways that maximize tribal influence. An American Indian Supreme Court would be more likely to foster tribal court development than a court that remained inherently an institution of the dominant society. Moreover, as an Article III court, the Roadmap Circuit would inevitably be subject to the shifting tides of the highly charged and largely opportunistic national debate over (depending on one's

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32. *Cf.* 10 U.S.C. § 942(b)(3) (2012) (political balance requirement for U.S. Court of Appeals for the Armed Forces); Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SEC. L. & POL'Y 303, 308 (2011) (describing balance requirement as "indefensible"). The Obama administration proposed repeal of this provision of the Uniform Code of Military Justice in 2015. ILOC's intent is that judges of the Roadmap Circuit would be nominated by the President "in consultation with tribes." Testimony of Troy A. Eid and Affie Ellis on "A Roadmap for Making Native America Safer" Before the Sen. Comm. on Indian Affairs (Feb. 12, 2014), <http://www.indian.senate.gov/sites/default/files/upload/files/021214Troy%20Eid%20Affie%20Ellis%20SCIA%20Testimony.docx>.

33. *See* Fidell, *supra* note 1, at 30-31.

politics) judicial activism and judicial restraint. Perhaps those tides might wash over an American Indian Supreme Court as well. In a new court, a measure of activism is to be expected, although whether and to what extent that would be true of an American Indian Supreme Court would necessarily be a function of who was named to it and what constraints were imposed by the governing document.

My 2013 article, *An American Indian Supreme Court*, attempted to identify categories of tribal court litigation that might lend themselves to review by an opt-in nationwide court.<sup>34</sup> The ILOC proposal prompts a few additional observations on this important aspect of the matter.

Federal questions can arise in a variety of ways in tribal court. The most fertile source of such questions is the ICRA, which applies to all federally acknowledged tribes.<sup>35</sup> Even though the Supreme Court held in *Martinez* that that legislation did not give rise to implied rights of action justiciable in district court, that ought not to preclude *tribal* courts from enforcing its provisions in non-habeas contexts. *Martinez* should not be read as limiting tribal court jurisdiction because doing so would utterly frustrate congressional policy, which—in the years since 1968—is to foster self-determination and the development and empowerment of tribal institutions.<sup>36</sup>

Several other Acts of Congress are explicit bases for tribal court adjudication. These include, in part, the Indian Child Welfare Act,<sup>37</sup> as well as a provision related to mortgage foreclosure actions instituted by the Department of Housing and Urban Development,<sup>38</sup> both of which were mentioned in *Nevada v. Hicks*.<sup>39</sup> On the other hand, *Hicks* held that tribal courts lack jurisdiction over Section 1983<sup>40</sup> civil rights claims.<sup>41</sup> The stated basis for this holding was that tribal courts, like most state courts (but unlike federal courts),<sup>42</sup> are courts of general jurisdiction.<sup>43</sup>

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34. *Id.* at 26.

35. 25 U.S.C. § 1301(1) (2012).

36. *E.g.*, Indian Self-Determination and Educational Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of U.S.C.)

37. 25 U.S.C. § 1911(a) (2012).

38. 12 U.S.C. § 1715z-13(g)(5) (2012).

39. 533 U.S. 353, 367 (2001).

40. 42 U.S.C. § 1983 (2012).

41. *Hicks*, 533 U.S. at 369.

42. *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

43. *See* B.J. Jones, *The Independence of Tribal Justice Systems and the Separation of Powers* 3 (n.d.), [http://law.und.edu/tji/\\_files/docs/bjones-jud-indep-memo.pdf](http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf) (citing Satiacum

Other federal causes of action that might find their way into tribal court and hence could come before an American Indian Supreme Court include those predicated on a treaty, such as the controversies over the Cherokee and Seminole Freedmen,<sup>44</sup> or judge-made federal Indian law, of which there is no shortage.<sup>45</sup> In addition, federal causes of action can be created by federal common law.<sup>46</sup>

The classic rule for federal question cases<sup>47</sup> is that of the well-pleaded complaint: the federal claim must be a part of the plaintiff's affirmative case as opposed to merely forming the basis for a defense.<sup>48</sup> No such rule would have to apply in tribal court, and hence such a court might adjudicate a federal question that arose only as a matter of defense. There would correspondingly be no reason to object to a system under which such a case could in time come before the proposed American Indian Supreme Court, and from there to the Supreme Court of the United States.

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v. Sterud, 10 Indian L. Rptr. 6013, 6014 (Puy. Tr. Ct. 1982)); *see, e.g.*, CITIZEN POTAWATOMI NATION CONST. art. 11, § 2, <http://thorpe.ou.edu/constitution/potawatomi/potawatconst.html> (last modified Apr. 21, 1998). Some tribes explicitly describe their courts as courts of limited jurisdiction. *See, e.g.*, BLACKFEET TRIBAL LAW & ORDER CODE § 1 ("The Blackfeet Tribal Court is a court of 'limited jurisdiction'."), <http://indianlaw.mt.gov/content/blackfeet/codes/1999/chapter01.pdf>; *cf.* Kimsey v. Reibach, 6 Am. Tribal L. Rptr. 119, 124 (Grand Ronde Tribal Ct. 2005) (disclaiming subject matter jurisdiction over defamation actions absent tribal legislation recognizing cause of action).

44. *See e.g.*, Cherokee Nation v. Nash, No. 1:13-CV-01313, (D.C. Cir. filed Aug. 28, 2013) (Cherokee Freedmen) (pending). A treaty can also generate intertribal disputes. *See e.g.*, Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129 (9th Cir. 2015) (determination of "usual and accustomed fishing grounds and stations," as between tribes, under Treaty of Point Elliott, 12 Stat. 927 (1855)); United States v. Washington, No. C70-9213RSM, 2015 U.S. Dist. LEXIS 93516 (W.D. Wash. July 17, 2015) (Subproceeding No. 11-2); United States v. Washington, No. C70-9213, 2015 U.S. Dist. LEXIS 176969 (W.D. Wash. July 9, 2015) (Subproceeding No. 09-01).

45. *See e.g.*, Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985) (tribal court jurisdiction presents § 1331 federal question). For a current example of an intertribal dispute that arose from alleged violations of federal statutes see Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes, Civil No. 16-559-W (W.D. Okla.) (pending) (protection of ancestral remains and funerary objects; invoking National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 916 (1966) (codified as amended in scattered sections of 54 U.S.C.) and National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (2012)).

46. *See* Illinois v. City of Milwaukee, Wis., 406 U.S. 91 (1972); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 783-84 (6th ed. 2009).

47. 28 U.S.C. § 1331 (2012).

48. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 154 (1908).

*III. Supreme Court Review of Decisions of an American Indian Supreme Court on Federal Questions*

In 2013 it seemed that there could be no substantial objection to extending the certiorari jurisdiction of the Supreme Court of the United States to federal questions decided by an American Indian Supreme Court.<sup>49</sup> Obviously, given the Supreme Court's appellate and miscellaneous dockets,<sup>50</sup> it would be unthinkable to extend the certiorari jurisdiction to the hundreds of individual tribal court systems, but extending it to a single nationwide American Indian Supreme Court would make the expansion easily manageable. In this respect, the expansion would be no more demanding than that entailed in ILOC's Roadmap Circuit proposal, which similarly would add only a single court to the roster of entities the decisions of which would be subject to review by writ of certiorari. To the extent that cases were funneled through a single intermediate court, the chances for a conflict among the circuits would be slim. The Supreme Court therefore would be unlikely to grant many certiorari petitions from an American Indian Supreme Court (or, for that matter, from a Roadmap Circuit).

But is there an objection on the ground that an American Indian Supreme Court would exist outside the constitutional framework? Tribes are not subject to the Supremacy Clause,<sup>51</sup> even though some tribal codes include provisions that subject tribal officials to federal law.<sup>52</sup> Since Congress

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49. Fidell, *supra* note 1, at 26. One consideration that did not occur to me at the time, but that is pointed out in a subsequent student article, is that the lack of Supreme Court review of tribal court decisions on federal questions (along with other factors) "may make some judges reluctant to grant broad tribal adjudicatory jurisdiction." M. Gatsby Miller, Note, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1841 n.99 (2014) (citing Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1557 (2013)). It is probably impossible to test the hypothesis empirically, as there are not likely to be fingerprints in published opinions, but on the face of it, it seems plausible.

50. See generally *The Supreme Court – The Statistics*, 129 HARV. L. REV. 381, 389 (2015) (Table II).

51. See generally Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

52. At one time the Hopi hierarchy of precedential authority surprisingly included "Laws, rules and regulations of the Federal Government and cases interpreting such. Such laws, rules and regulations may, in circumstances dictated by the Supremacy Clause of the U.S. Constitution, be required to take a higher order or precedence." Hopi Tribe Res. No. H-12-76 § 2(a)(5) (n.d.). The Tribe also provided,

The Courts of the Hopi Tribe shall not recognize nor apply any federal, state, or common law rule or procedure which is inconsistent with either the spirit or the letter of either the Hopi Constitution and Bylaws or any Hopi Ordinance or

would have to act in order to extend the certiorari jurisdiction,<sup>53</sup> an American Indian Supreme Court would have a federal imprimatur, even if it were in all other respects entirely a product of tribal agreement.

A pertinent case is *Hirota v. MacArthur*,<sup>54</sup> in which the Supreme Court denied leave to file original petitions for writs of habeas corpus with respect to convictions rendered by the victorious Allies' International Military Tribunal for the Far East, which was not a United States court.<sup>55</sup> The meaning of *Hirota* is far from clear,<sup>56</sup> but it arguably raises an issue as to whether Congress could, without exceeding the outer limits set in Article III, authorize the Supreme Court to exercise appellate jurisdiction over decisions of an American Indian Supreme Court. One answer is that Congress's "plenary power" over Indian affairs, whatever its source(s),<sup>57</sup> would permeate such a court, even if it were established not by Act of Congress but by intertribal agreement. Even if such a court were not

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Resolution or the custom, traditions, or culture of the Hopi Tribe, unless otherwise required, in the case of federal law, by the Supremacy Clause of the U. S. Constitution.

*Id.* § 2(b). Under the 2012 code, however, federal law is not deemed binding. HOPI CODE § 1.5.4(5) (2012), <http://www.tribal-institute.org/download/August2012HopiCode.pdf>. Before the 2012 codification, federal law, in addition to ranking only fifth in priority, was deemed persuasive rather than mandatory, *see* Hopi Indian Credit Ass'n v. Thomas, 1 Am. Tribal L. Rptr. 353 (Hopi App. 1998), *reprinted in* FLETCHER, TRIBAL LAW, *supra* note 8, at 101, although the Hopi court also acknowledged an exception to the tribal statutory order of precedence "when the U.S. Constitution's Supremacy Clause applies." *See* FLETCHER, TRIBAL LAW, *supra* note 8, at 104 n.1 (quoting Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84, 1996.NAHT.0000007 (Hopi Tribal Ct. 1996)); *cf.* LOWER SIOUX INDIAN COMMUNITY IN MINN. CONST. pmb., <http://thorpe.ou.edu/IRA/minnsiouxcons.html> (affirming earnest intention to "support, respect and promote the integrity of the Constitution of the United States"); CHICKASAW NATION CONST. art. XVII, [https://www.chickasaw.net/Documents/Long-Term/CN\\_Constitution\\_Amended2002.aspx](https://www.chickasaw.net/Documents/Long-Term/CN_Constitution_Amended2002.aspx) (ratified as amended June 21, 2002) (requiring tribal officials to swear or affirm that they "will support, obey and defend the Constitutions of the Chickasaw Nation, and the United States of America").

53. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.").

54. 338 U.S. 197 (1948) (per curiam).

55. *Id.* at 198.

56. *See* FALLON ET AL., *supra* note 46, at 272-73 n.4, 1182-83 (discussing *Munaf v. Geren*, 553 U.S. 674 (2008)).

57. *See e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979); *United States v. Kagama*, 118 U.S. 375 (1886). *See generally* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 306-13 (6th ed. 2011).

deemed sufficiently federal in the abstract,<sup>58</sup> once Congress enacted an extension of the certiorari jurisdiction to cover it, that in itself would arguably invest it with a federal character sufficient to overcome any Article III objection. The availability of review of state court decisions by the Supreme Court of the United States has long been understood not to transform the state courts into federal courts.<sup>59</sup> It is far from clear that the same would hold true with respect to an American Indian Supreme Court. If an extension of the certiorari jurisdiction did have that effect, some might well find the price too steep.

### *Conclusion*

The sheer number, persistence and variety of suggestions over the years for a nationwide Indian court<sup>60</sup> is impressive and suggests that, whatever the details (in which of course the Devil lurks), something significant is missing from the current architecture of tribal justice across the United States. “[A]sking Congress for a complete restructuring of federal Indian law is unlikely and is not a practical solution to the issue of tribal jurisdiction.”<sup>61</sup>

For the reasons explained in Part I, the circuit court urged in the ILOC Roadmap is not only politically improbable but unwise,<sup>62</sup> and, in any event, ILOC’s Roadmap Circuit should not be preferred to the American Indian Supreme Court I have suggested. A review of existing federal legislation and the work of tribal courts reveals that tribal courts will, with increasing frequency, decide questions arising under federal law. Creation of a direct appellate route from an American Indian Supreme Court to the Supreme Court of the United States would likely be controversial and may run into

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58. *See United States v. Wheeler*, 435 U.S. 313 (1978); *see also Talton v. Mayes*, 163 U.S. 376 (1896).

59. In 1821, the Court ruled in *Cohens v. Virginia*:

The American people may certainly give to a national tribunal a supervising power over those judgments of the State courts, which may conflict with the Constitution, laws, or treaties, of the United States, without converting them into federal Courts, or converting the national into a State tribunal. The one Court still derives its authority from the State; the other still derives its authority from the nation.

19 U.S. (6 Wheat.) 264, 421-22 (1821).

60. Fidell, *supra* note 1, at 3-11.

61. Miller, *supra* note 49, at 1860 n.203.

62. *See supra* Part I.



equally strong headwinds,<sup>63</sup> but is within Congress's power and in principle its benefits—both practical and symbolic—would exceed the costs. While the ILOC proposal may not be what the doctor ordered, the very fact that a congressionally chartered blue-ribbon body thought the time was right for a hard look at some basic structural issues is a significant and encouraging development for those concerned with tribal interests and the administration of justice.

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63. Cf. Judith Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241, 265 n.165 (1998) (noting that although Supreme Court certiorari review of tribal court decisions on federal questions “is far preferable [to *de novo* review in the lower federal courts], neither the Court nor Congress appears likely to adopt it”); see also Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 556 n.126 (1997) (quoting Robert Laurence, Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act, 10 CAMPBELL L. REV. 411, 415 (1988)). These gloomy, snowball's-chance-in-hell predictions were predicated on the notion that, as expanded, the writ of certiorari would run to hundreds of tribal courts, which is a far cry from adding a single new court for the Supreme Court (with broad discretion over its certiorari docket) to oversee.