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The Court of Indian Appeals: America's Forgotten Federal Appellate Court

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THE COURT OF INDIAN APPEALS: AMERICA'S FORGOTTEN FEDERAL APPELLATE COURT*

Chief Judge Gregory D. Smith ** & Bailee L. Plemmons ***

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I. Introduction

American federal Indian law scholars are calling for Congress to create either a federal United States Court of Indian¹ Appeals—equal in power to other United States circuit courts—or an American Indian Supreme Court.² The problem with this academic debate is that a viable and functioning federal appellate court,³ acting under the United States Department of the Interior’s regulatory authority, already exists to address Native American appeals in “Indian Country.”⁴ Known as the Court of Indian Appeals, this

1. The term “Indian” is the statutory definition reference used by Congress for Native Americans in the U.S. Code. *See* 25 U.S.C. §§ 1603(13), 1903(3) (2018). The term will be used interchangeably in this Article with Native American. Native Americans are people who trace their bloodlines back to indigenous populations in North America, which existed before Europeans “discovered” the “New World.” *In re Narragansett Indians*, 40 A. 347, 349 (R.I. 1898); *Cherokee Nation of Okla. v. Babbitt*, 944 F. Supp. 974, 977 (D.D.C. 1996). Canadians refer to similar indigenous populations as First Nations. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 27 n.99 (2006). In a few unique situations, such as the Mohawk Tribe in northern New York, tribal lands sometimes cross the border of Canada and the United States. Maya Ginga, Note, *Patently Absurd: Critiquing the USPTO’s Disparate Treatment and State Immunity in Inter Partes Review*, 75 WASH. & LEE L. REV. 1703, 1706 n.15 (2018). This also occurs on a few spots at the Mexico/United States border. *See No Wall: Background*, TOHONO O’ODHAM NATION, <http://www.tonation-nsn.gov/nowall/> (last visited June 13, 2020). The use of the term Indians is not intended to be disrespectful. It is simply using the term reference adopted by Congress to describe Native Americans. *Accord* *Morris v. Tanner*, 288 F. Supp. 2d 1133, 1135 n.2 (D. Mont. 2003); *In re Adoption of T.A.W.*, 354 P.3d 46, 47 n.2 (Wash. Ct. App. 2015).

2. *See, e.g.*, Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 144–45 (2015); Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK. L. REV. 203, 206–07 (1993); *cf.* Eugene R. Fidell, *Competing Visions of Appellate Justice for Indian Country: A United States Court of Indian Appeals or an American Indian Supreme Court*, 40 AM. INDIAN L. REV. 233 (2015–2016). The debate over a centralized U.S. Court of Indian Appeals is not a new concept, but instead traces back to the proposed version of the Indian Reorganization Act of 1934. *See* John T. Tutterow, Note, *Federal Review of Tribal Court Decisions: In Search of a Standard or Solution for the Problem of Tribal Court Review by the Federal Courts*, 23 OKLA. CITY U. L. REV. 459, 489–90 n.167 (1998).

3. A “federal court,” according to one tribal appellate court, means any court that has its power originate from the United States of America. *In re Full Faith and Credit*, 6 Okla. Trib. 232, 234 (Cherokee Jud. App. Trib. 1995), 1995 WL 17007140, at *1.

4. “Indian Country” is defined in 18 U.S.C. § 1151 (2018). While the land mass area called Indian Country is technically greater than merely the Native American reservations, generally “Indian Country” is, in practical application, considered the Native American reservations. What Americans refer to as a “re*servation” is called a “reserve” in Canada.

quasi-federal appellate court operates as a branch of the Department of the Interior's Court of Indian Offenses.⁵ The Court of Indian Appeals handles tribal appellate matters for multiple tribal nations and is a logical and proper forum for all Native American appeals to be resolved if Congress wishes to funnel all tribal court appeals to one central court.⁶ Logic, expense, and experience suggest that instead of creating a new appellate court in Indian Country to act as the final arbiter of cases involving Native Americans, Congress should expand the role of the Court of Indian Appeals.

An interesting aspect of the Court of Indian Appeals is that even though the court falls within the Department of the Interior's Bureau of Indian Affairs ("BIA")—a division of the Executive Branch of American government⁷—the court functions in a judicial capacity and is not subject to administrative review by the Department of the Interior.⁸ The Kiowa Court of Indian Appeals explains this anomaly as follows: "The Interior Department may provide the funding and initial laws and regulations of the [CFR]⁹ court and may refer to these courts as 'federal courts' . . . but such is not exclusive of tribal sovereignty."¹⁰ Because Courts of Indian Offenses (a/k/a "CFR Courts") are both federal and tribal in nature, they function as unique hybrid court systems, distinct from any other United States federal court.¹¹ There are several distinctions between the Court of Indian Appeals

See, e.g., State v. Grand River Enters. Six Nations, Ltd., 2014-NMCA-073, ¶ 2, 329 P.3d 723, 724 (N.M. Ct. App. 2014); State v. Grand River Enters., Inc., 2008 SD 98, ¶ 4, 757 N.W.2d 305, 307 (S.D. 2008); *In re* Adoption of Linda J.W., 682 N.Y.S.2d 565, 566, 568 (N.Y. Fam. Ct. 1998).

5. 25 C.F.R. § 11.200(a) (2008).

6. There are multiple branches and locations of the Court of Indian Offenses and the Court of Indian Appeals. For clarity, these courts will be referenced collectively in this Article as the "Court of Indian Offenses," "Court of Indian Appeals," or by the term of art nickname for these courts, "CFR Courts."

7. *See* Tillett v. Hodel, 730 F. Supp. 381, 382–83 (W.D. Okla. 1990); Alexander v. Salazar, 739 F. Supp. 2d 1333, 1336 (E.D. Okla. 2010).

8. 25 C.F.R. § 11.200(d) (2008). The Court of Indian Appeals is not to be confused with the Department of Interior's Board of Contract Appeals or Interior Board of Indian Appeals, which are administrative bodies who render decisions that are appealable to the U. S. Court of Appeals for the Federal Circuit. *See* Kaw Nation v. Norton, 405 F.3d 1317, 1318 (Fed. Cir. 2005).

9. "CFR" refers to the United States Code of Federal Regulations. As noted in footnote 6, "CFR Court" is a term of art.

10. Kiowa Election Bd. v. Lujan, 1 Okla. Trib. 140, 152 (Kiowa Ct. Indian App. 1987), 1987 WL 382994, at *4.

11. *See* Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders*,

and federal appellate courts, but the primary difference is that the Court of Indian Appeals' jurisdiction is more restrictive than federal circuit courts.¹² This Article will address the uniqueness of the Court of Indian Appeals and how it caters to the special needs of Native Americans—which are often overlooked during academic discussions related to this issue. Native American tribes that cannot, by choice or circumstance, field their own appeals court should turn to the preexisting Court of Indian Appeals as an appropriate forum. This option benefits Native American tribes economically because CFR Courts are funded by the BIA. This fact insulates Court of Indian Offenses proceedings from internal tribal politics that could influence decision-making.

II. A Short History Lesson on Tribal Courts

Cohen's Handbook of Federal Indian Law, America's premiere text on federal Indian law, explains the original Native American judicial systems as follows:

Before contact with Europeans, [North American] Indian tribes maintained order and cohesiveness through a variety of means, including strong social integration; adjudication and mediation... and the imposition of sanctions such as shaming, restitution, or, in extreme cases, capital punishment or expulsion from tribal groups. Like all other human societies, Native American tribes lived under rules or laws, as well as means of dealing with violations of those rules and resolving disputes.¹³

In the 1930s, when the Indian Reorganization Act (“IRA”) began the process of restoring self-determination to Native American tribes in the United States, the boilerplate constitutions provided by the Roosevelt Administration did not specifically designate funds for a judicial branch.

Tribal Protection Orders, and Tribal Child Custody Orders, 34 N.M. L. REV. 381, 394 n.108 (2004); *accord Kiowa Election Bd.*, 1 Okla. Trib. at 151, 1987 WL 382994, at *4.

12. *See, e.g., Oliphant v. Schlie*, 544 F.2d 1007, 1016 (9th Cir. 1976) (Kennedy, J., dissenting), *rev'd on other grounds*, 435 U.S. 191 (1978). The judge in this Ninth Circuit dissent was future U.S. Supreme Court Justice Anthony M. Kennedy.

13. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(3)(c)(iv)(A), at 263 (Nell Jessup Newton *et al.* eds., 2012) [hereinafter COHEN]; *see, e.g., Breann Nu'uhiwa, "Language Is Never About Language": Eliminating Language Bias in Federal Education Law to Further Indigenous Rights*, 37 U. HAW. L. REV. 381, 400 (2015) (discussing Native Islanders' traditional laws/edicts under the Hawaiian legal concept of “kanawai”).

Therefore, due to lack of funding, the tribal court system generally is the least developed branch of tribal governments.¹⁴

In 1883, the BIA created the original version of the Court of Indian Offenses (“CFR Courts”).¹⁵ This blueprint, which was used for later expansions of CFR Courts to other tribes implementing new infant justice systems, will be discussed in greater detail in the next Section of this Article.¹⁶ For basic background purposes, it is important to know that from the 1880s until the late 1960s, the tribal court system focused on civilizing and/or assimilating Native Americans into Washington, D.C.’s notion of acceptable behavior and culture, instead of promoting justice by focusing on legal disputes in Indian Country.¹⁷

Unfortunately, the early Court of Indian Offenses saw local Indian agents appointing themselves or close friends as “judges,” which created clear conflicts of interest because the Indian agents had monetary interests in

14. COHEN, *supra* note 13, § 4.04(3)(c)(iv)(A), at 263; *accord* Jesse Sixkiller, Note, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*, 26 ARIZ. J. INT’L. & COMP. L. 779, 805 (2009). Consider tribal appellate courts to be similar to the various U.S. circuit courts. While co-existing, various courts can address the exact same issue and reach different conclusions.

15. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 404 (6th ed. 2011) (citing Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 51 (1988)).

16. The Bureau of Indian Affairs’ Southern Plains Regional Office, in Oklahoma, describes the history of their branch of the Court of Indian Offenses as follows:

The first Court of Indian Offenses in the area that was to become the State of Oklahoma was originally established prior to statehood in the Indian Territory in 1886. The original Court of Indian Offenses was created to provide law enforcement for the Kiowa, Comanche, and Apache (KCA) reservation. Several prominent tribal leaders served as judges of the court including Quannah Parker (Comanche), Lone Wolf (Kiowa) and several others. An Indian police force provided the law enforcement for the KCA, Cheyenne-Arapaho, and other reservations. Thus, the Court of Indian Offenses pre-dates Oklahoma state courts by several decades.

Southern Plains Region: Court of Indian Offenses, U.S. DEP’T OF THE INTERIOR: INDIAN AFF., <https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses> (last visited June 13, 2020).

17. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018); *County of Yakima v. Conf. Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 251–52 (1992); GETCHES, *supra* note 15, at 404–05; STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 88 (4th ed. 2012); *see also* *Estate of Komaquaptewa*, 4 Am. Tribal Law 432, 443 n.15 (Hopi App. 2000).

most civil actions argued before the early courts.¹⁸ Eventually, to promote fundamental fairness and reduce perceived bias, the BIA began appointing CFR Court judges with the input and approval from tribes.¹⁹ Thus, respect for both CFR Courts and tribal courts have increased over time because judicial appointments are now often law-trained and the tribes enjoy input into selecting judges.²⁰

According to the United States Code, an “Indian court” is “any tribal court or court of Indian offense.”²¹ Self-determination and self-government concepts promote the intentional and inherent congressional drafting preference that Native American tribes create their own tribal courts. This means that CFR Courts are being replaced, by design, with tribal courts created and overseen by the tribes themselves.²² By the early 1990s, approximately 140 tribes²³ had created their own court system, and all but twenty-five of those tribal governments established stand-alone tribal trial courts apart from the preexisting (or stop-gap) CFR Court system.²⁴ Today, there are over 500 Native American tribes, between 250 and 300 tribal trial courts, and 150 tribal appellate courts.²⁵ Due to tribes converting their judicial systems from CFR Courts to tribal courts, there are now only

18. Pommersheim, *supra* note 15, at 51; *accord* United States v. Clapox, 35 Fed. 575, 577 (D. Or. 1888); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 21 (5th ed. 2009).

19. COHEN, *supra* note 13, § 4.04(3)(c)(iv)(B), at 266.

20. *See, e.g.*, Cole v. Kaw Hous. Auth., 4 Okla. Trib. 281, 291 (Kaw Dist. Ct. 1995), 1995 WL 1073446, at *3 (praising CFR Court insight); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 779 (2014).

21. 25 U.S.C. § 1301(3) (2018); *accord* United States v. Curnew, 788 F.2d 1335, 1338 (8th Cir. 1986); State v. Mooney, 2004 UT 49, ¶ 6, 98 P.3d 420 (Utah 2004); Schmasow v. Nat. Am. Ctr., 1999 MT 49, ¶ 20, 978 P.2d 304 (Mont. 1999). The term “Indian” can be a fluid term under the U.S. Code and caselaw. *See* Rice v. Cayetano, 528 U.S. 495, 507, 513–19 (2000); United States v. Loera, 952 F. Supp. 2d 862, 867 (D. Ariz. 2013).

22. The primary author, besides serving on the Court of Indian Appeals, is the Chief Justice of the Pawnee Nation Supreme Court, which replaced a CFR Court of Indian Appeals with the Tribe’s own court system. *Compare* Pawnee Tribe of Okla. v. Franseen, 2 Okla. Trib. 291 (Pawnee Ct. Indian App. 1991), 1991 WL 733408, with *In re* L.C.M., 9 Okla. Trib. 6 (Pawnee Sup. Ct. 2005), 2005 WL 6234618.

23. *See* Frank’s Landing Indian Cmty. v. Nat’l Indian Gaming Comm’n, 918 F.3d 610, 613 (9th Cir. 2019) (defining Indian tribe).

24. SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 203–04 (1989).

25. Gregory D. Smith, *Native American Tribal Appellate Courts: Underestimated and Overlooked*, 19 J. APP. PRAC. & PROCESS 25, 25–26 (2018). While each tribe is unique, the basic laws, ordinances, and procedures, especially in the area of criminal law, are often similar across tribal nations. Misdemeanor criminal litigation coming before tribal courts and CFR Courts would often remind one of a state small claims court trial.

nineteen Native American tribes that use the Court of Indian Offenses.²⁶ Those nineteen trial level courts utilize one of five Court of Indian Appeals.²⁷ It is both anticipated, and congressionally encouraged, that Native American tribal governments²⁸ continue the trend of replacing CFR Courts with self-sufficient tribal courts.²⁹ This Article will now discuss the current state of the Court of Indian Offenses.

26. 25 C.F.R. § 11.100(a), (b) (2020). For an updated list of CFR Courts, see *Court of Indian Offenses*, U.S. DEP'T OF THE INTERIOR: INDIAN AFF., <http://www.bia.gov/CFRCourts> (last visited June 14, 2020).

27. The regional Courts of Indian Appeals are as follows: Miami Agency, Western Region Agency, Ute Agency, Albuquerque Agency, and Southern Plains Agency. The Miami Agency Court of Indian Appeals handles cases originating from the Seneca-Cayuga Nation, the Shawnee Tribe of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, Peoria Tribe of Oklahoma, Ottawa Tribe of Oklahoma, and the Modoc Tribe of Oklahoma. The Miami Agency Court of Indian Appeals will also handle the Albuquerque/Santa Fe Indian School Region appeals. The Western Region Court of Indian Appeals handles cases from Skull Valley Band of Goshutes Indians (Utah), the Te-Moak Band of Western Shoshone Indians (Nevada), and Winnemucca Indian Tribe. The Ute Mountain Ute Tribe handles their own appeals, The Southern Plains Agency, a second Court of Indian Appeals based in Oklahoma, handles appeals for the Apache Tribe of Oklahoma, Caddo Nation of Oklahoma, Comanche Nation, Delaware Nation, Fort Sill Apache Tribe of Oklahoma, Kiowa Indian Tribe of Oklahoma, Otoe-Missouria Tribe of Indians, and the Wichita and Affiliated Tribe of Indians. See 25 C.F.R. § 11.100. Some Native American tribal courts have appellate brokerage programs similar in application to the Court of Indian Appeals. See, e.g., INTERTRIBAL CT. OF S. CAL., <http://www.sciljc.org/home.html> (last visited June 13, 2020); NPICA, <https://npica-com.doodlekit.com/home> (last visited June 13, 2020) (Northern Plains Intertribal Court of Appeals).

28. See *Chickasaw Nation v. United States*, 208 F.3d 871, 878 (10th Cir. 2000) (defining tribal governments).

29. CANBY, *supra* note 18, at 70; accord *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987). To promote further entanglement between Native American court systems and the federal court system by creating a U.S. Court of Appeals for Indian Cases or an American Indian Supreme Court that is run by the United States, seems counter-productive to the Department of the Interior's stated policy of self-determination of the American Indian. See, e.g., *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1232 (10th Cir. 2018). Keep in mind that in the United States of America, people are turning to courts and government regulation to manipulate everything from how real estate developers create subdivisions, to the amount of trans-fat found in Oreo cookies; therefore, many Native American tribes may prefer *reduced* federal supervision, instead of a greater federal government entanglement. See, e.g., *City of Knoxville v. Ambrister*, 263 S.W.2d 528, 529–30 (Tenn. 1953); Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 947 (2009).

III. The Court of Indian Offenses (What's in a Name?)

In 1883, the Office for Indian Affairs—which would become the Bureau of Indian Affairs—promulgated a regulatory code that created the Court of Indian Offenses to control the behavior and morals of Native Americans through criminal misdemeanor charges and civil jurisdiction.³⁰ This new court enforced culturally oppressive laws that banned several Native American traditions that were viewed with disdain or considered threatening by non-Indians, including polygamy and the “Ghost Dance.”³¹ The Court of Indian Offenses first heard cases in the Oklahoma Indian Territory in 1886, but the court fell into disuse after Oklahoma became a state in 1907 according to the current Southern Plains Court of Indian Offenses website.³² Courts of Indian Offenses reestablished themselves in the 1970s, following a series of federal court decisions holding that tribal nations still had tribal and judicial sovereignty over tribal lands in Indian Country.³³ Revived tribal sovereignty led to a resurgence of the necessity and utility of the Court of Indian Offenses, which today is recognized by both state and federal courts as a federal court,³⁴ even though no formal or

30. CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 38–39 (2d ed. 2015); *see also* Learned v. Cheyenne-Arapaho Tribe, 596 F. Supp. 537, 538 (W.D. Okla. 1984).

31. GARROW & DEER, *supra* note 30, at 40; Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 788–91 (1997) (discussing the United States’ policies on Native American religions); *see also* Estate of Komaquaptewa, 4 Am. Tribal Law 432, 443 n.15 (Hopi App. 2000). The original nineteenth century version of the Court of Indian Offenses failed to account for Indian traditions or culture when rendering decisions. This regrettable fact has been corrected in the twenty-first century version of the Court of Indian Offenses. *See generally* Adam Creppelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 27–28, 28 n.179 (2018).

32. *Southern Plains Region: Court of Indian Offenses*, *supra* note 16. Oklahoma became a part of the United States of America in 1907. *Oklahoma*, HISTORY, <http://www.history.com/topics/us-states/oklahoma> (last visited June 13, 2020).

33. *See, e.g.*, United States v. Long, 324 F.3d 475, 477 (7th Cir. 2003); United States v. Long, 183 F. Supp. 2d 1106, 1108 (E.D. Wis. 2002).

34. *See* Duro v. Reina, 495 U.S. 676, 691 (1990); Caddo Nation of Okla. v. Wichita & Affiliated Tribes, 877 F.3d 1171, 1174 (10th Cir. 2017); Jackson County *ex rel.* Jackson v. Swayney, 352 S.E.2d 413, 418 (N.C. 1987); WASH. REV. CODE ANN. § 13.38.040(15) (West 2019). *But see* Application of Denetclaw, 320 P.2d 697, 701 (Ariz. 1958) (providing an example of a pre-*Duro* state case holding that Courts of Indian Appeals were not federal courts). Appellate courts of pre-*Duro* yesteryear sometimes took a harsh view of the competency and sincerity of CFR Courts. *See, e.g.*, State *ex rel.* Peterson v. Dist. Court of Ninth Judicial Dist., 617 P.2d 1056, 1070–72 (Wyo. 1980) (Raper, C.J., concurring).

specific congressional statute created the Court of Indian Offenses.³⁵ The United States Department of the Interior (“D.O.I.”) created the Court of Indian Offenses’ jurisdiction through federal Executive Branch regulation in the Code of Federal Regulations (“C.F.R.”).³⁶ As proof that Congress approves the creation of the Court of Indian Offenses, 25 U.S.C. § 3621(g) is a statute that specifically funds training for judges of this court.³⁷ While a Court of Indian Offenses addresses tribal matters, the records of the court are federal property, not tribal property.³⁸

Cases coming before the present version of the Court of Indian Offenses are generally heard at trial by a single magistrate,³⁹ who can hear misdemeanor and some felony cases⁴⁰ and a variety of civil matters⁴¹ involving Native Americans facing divorce, custody, tort, personal injury, and land disputes.⁴² The Bureau of Indian Affairs’ Southern Plains Region explains the court setup and criminal jurisdiction in Indian Country as follows:

The CFR Court is a trial court and parties present their cases before a Magistrate. Appeals may be taken from the trial court to the Court of Indian Appeals.

35. *Tillett v. Hodel*, 730 F. Supp. 381, 382–83 (W. D. Okla. 1990) (discussing the congressional delegation of plenary power to the Department of the Interior to establish the Court of Indian Offenses); *cf.* *C’Hair v. Dist. Court of Ninth Judicial Dist.*, 2015 WY 116, ¶ 40 n.3, 357 P.3d 723, 736 n.3 (Wyo. 2015).

36. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 n.17 (1978); *Dry v. United States*, 235 F.3d 1249, 1254 (10th Cir. 2000); *Hebah v. United States*, 456 F.2d 696, 706 (Ct. Cl. 1972); *Takes Gun v. Crow Tribe of Indians*, 448 F. Supp. 1222, 1225 n.4 (D. Mont. 1978); *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, ¶ 12 n.11, 230 P.3d 488, 492 n.11 (Okla. 2009); *see also* *United States v. Enas*, 255 F.3d 662, 668 (9th Cir. 2001).

37. *See also* 25 U.S.C. § 1311 (2012) (example of Congress enabling the funding for training of judges of the Court of Indian Offenses).

38. *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383–84 (8th Cir. 1987); *United States v. Story Cty., Iowa*, 28 F. Supp. 3d 861, 870 (S.D. Iowa 2014).

39. CFR magistrates are also called “judge” or “magistrate judge” in caselaw. *See, e.g.*, *Auto Owners Ins. Co. v. Saunooke*, 54 F. Supp. 2d 585, 586 (W.D.N.C. 1999); *Standing v. Hadden*, 1 Okla. Trib. 127, 131 (Wichita & Affiliated Tribes Ct. Indian App. 1987), 1987 WL 382997, at *1; *Daingkau v. Lujan*, 10 Okla. Trib. 561, 563 (Kiowa Ct. Indian App. 2007), 2007 WL 9192746, at *1.

40. *Alvarez v. Lopez*, 835 F.3d 1024, 1035 (9th Cir. 2016) (O’Scannlin, J., concurring).

41. *Learned v. Cheyenne-Arapaho Tribe*, 596 F. Supp. 537, 538 (W.D. Okla. 1984).

42. *Id.*; *see also In re Absher Children*, 750 N.E.2d 188, 191–92 (Ohio Ct. App. 2001); *Southern Plains Region: Court of Indian Offenses*, *supra* note 16.

Criminal misdemeanor cases involving Indians in Indian country must be heard in tribal courts or the CFR Courts, since criminal cases involving Indians within Indian country are not within the state's jurisdiction. Cross deputization of state and tribal police officers provides for needed law enforcement cooperation, especially in areas where Indian land parcels are mixed in with non-Indian lands under state jurisdiction.⁴³

Generally, a Court of Indian Offenses cannot hear inter-tribal government challenges⁴⁴ or cases where a non-Indian refuses to consent to a tribal court's civil jurisdiction.⁴⁵ Likewise, federal courts are reluctant to step into cases that are before the Court of Indian Offenses.⁴⁶ Full faith and credit will often, but not universally, be employed to case judgments rendered by the Court of Indian Offenses in state or other federal courts.⁴⁷ On the other hand, The Court of Indian Offenses differs from most state general jurisdiction courts because a Court of Indian Offenses can only hear cases such as governmental breach of contracts or tribal worker's compensation matters against a Native American tribe, to the extent that the tribe waives sovereign immunity.⁴⁸ This limit on jurisdiction for CFR Courts is similar

43. *Southern Plains Region: Court of Indian Offenses*, *supra* note 16.

44. *See, e.g.*, *Sahmaunt v. Horse*, 593 F. Supp. 162, 165 (W.D. Okla. 1984); *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1066 (Cal. Ct. App. 2005).

45. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001); *Hot Oil Serv., Inc. v. Hall*, 366 F.2d 295, 298 n.2 (9th Cir. 1966); *State ex rel. Peterson v. Dist. Court of Ninth Judicial Dist.*, 617 P.2d 1056, 1059 (Wyo. 1980).

46. *See, e.g.*, *Dry v. CFR Court of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999); *Turner v. McGee*, 681 F.3d 1215, 1217 n.3, 1219 (10th Cir. 2012).

47. *See, e.g.*, *Spurr v. Pope*, 936 F.3d 478, 488 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 850 (2020); *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); *Wildcatt v. Smith*, 316 S.E.2d 870, 877 n.15 (N.C. App. 1984). *Compare* *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997), *with* *Coeur d'Alene Tribe v. Johnson*, 405 P.3d 13, 16–17 (Idaho 2017).

48. *Whiteco Metrocom Div. of Whiteco Indus., Inc. v. Yankton Sioux Tribe*, 902 F. Supp. 199, 201–02 (D.S.D. 1995). This case also established that if a tribe wishes to argue that subject matter jurisdiction of a preexisting Court of Indian Offenses has been preempted by a tribal court, but the Code of Federal Regulations still lists the validity of a Court of Indian Offenses, it is the tribe's burden to prove the tribal court has replaced the jurisdiction of the Court of Indian Offenses. *Id.* In an interesting twist to sovereign immunity issues, tribal sovereign immunity can override the U.S. Bankruptcy Code if the tribe has not waived its sovereign immunity. *See, e.g., In re Greektown Holdings, LLC*, 532 B.R. 680, 682 (Bankr. E.D. Mich. 2015).

to federal question jurisdiction limits on federal district courts under 28 U.S.C. § 1331.⁴⁹

The Court of Indian Offenses has a trial level and an appellate division.⁵⁰ The name “Court of Indian Offenses” is deceiving given the court’s scope today, but the name traces back to the original purpose and intent, which was to use the Code of Federal Regulations as a lever to prod Native Americans into assimilating with the majority white culture in America through policies such as the Indian boarding school motto, “*save the man, kill the Indian*.”⁵¹ CFR Courts are “now viewed as a vehicle for the exercise of tribal jurisdiction.”⁵² The Ponca Tribe’s Court of Indian Appeals described the unique position Court of Indian Offenses serve as follows:

[I]t is also well established in this and other jurisdictions that the Court of Indian Offenses (“CFR Court”) is not a federal court in the classic sense, nor is it an administrative tribunal. Rather, the twenty or more Courts of Indian Offenses . . . function primarily as tribal courts, exercising the inherent sovereignty of the Indian tribe.⁵³

The delegation of power by Congress that allows the United States Department of the Interior, an Executive Branch of government, to create CFR Courts on Indian reservations has been upheld by several United States Circuit Courts of Appeals.⁵⁴

Cohen’s Handbook of Federal Indian Law describes today’s version of the Court of Indian Offenses as follows:

The jurisdiction of Courts of Indian Offenses is limited. Criminal jurisdiction is confined to Indians, while civil jurisdiction extends to situations in which the defendant is an Indian or “at

49. See generally *Colo. Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 917–18 (1976) (Brennan, dissenting from the denial of cert.); *Shaffer v. Clinton*, 54 F. Supp. 2d 1014, 1020–21 (D. Colo. 1999).

50. 25 C.F.R. § 11.200(a) (2008).

51. *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451, 455 (Creek Dist. Ct. 2004), 2004 WL 5744828, at *1; accord *Maddie Blackhawk, Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1831, 1844 (2019).

52. COHEN, *supra* note 13, § 4.04(3)(c)(iv)(B), at 226.

53. *Ponca Tribal Election Bd. v. Snake*, 1 Okla. Trib. 209, 227 (Ponca Ct. Indian App. 1998), 1988 WL 521355, at *5.

54. See *Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991); *Colliflower v. Garland*, 342 F.2d 369, 373 (9th Cir. 1965). For a discussion on Congress’ power to perform regulatory functions in Indian Country, see Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 148 (1989).

least one party is an Indian.” In addition, CFR Courts may not generally adjudicate internal tribal disputes, including election disputes, or hear cases against a tribe absent an explicit waiver of sovereign immunity. These and other limitations prevent CFR Courts from carrying out significant judicial responsibilities on most reservations, although the CFR Courts have the advantage of being funded by the BIA [Bureau of Indian Affairs of the U.S. Department of the Interior].⁵⁵

One reason a Native American tribe may elect to establish a procedure for legal redress through a CFR Court instead of immediately establishing a more expensive, but sovereignty-supporting tribal court, is to “provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country . . . where tribal courts have not been established to exercise that jurisdiction.”⁵⁶ Stated another way, CFR Courts are a “bare bones” stop-gap measure allowing a tribe to have a judicial branch until that tribe elects to create its own court system.⁵⁷

In 2008, Congress expanded the jurisdictional authority of the Court of Indian Offenses by increasing certain penalties, criminalizing drug offenses, addressing domestic violence, and giving the Court of Indian Offenses flexibility in jury trials by including some felony jurisdiction, such as allowing tribes to contract with the United States government to enforce federal laws in Indian Country under the Indian Law Enforcement Act.⁵⁸ Financial support for the Court of Indian Offenses comes from congressional funding, funneling through the BIA’s Tribal Justice Support Office.⁵⁹ When constitutional attacks on CFR Courts occur through *habeas*

55. COHEN, *supra* note 13, § 4.04(3)(c)(iv), at 266–67 (footnotes omitted); *accord* Calvello v. Yankton Sioux Tribe, 1998 SD 107, ¶ 22 n.6, 584 N.W.2d 108, 116 n.6 (S.D. 1998) (noting that tribes decide their own internal political disputes unless the tribe specifically passes a resolution allowing a CFR Court to hear cases such as election disputes). Allowing different courts to reach different decisions on similar facts or law is a “bedrock principle” of American law. *Liuksila v. Turner*, 351 F. Supp. 3d 166, 185 (D.D.C. 2018); *cf.* *Kodekey Elecs., Inc. v. Mechanex Corp.*, 486 F.2d 449, 456 n.6 (10th Cir. 1973).

56. 25 C.F.R. § 11.102 (2008). CFR Courts, like other federal courts, emphasize that the “special customs and practical limitations” of tribes and tribal courts must be respected. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1141–42 (9th Cir. 2001).

57. *MacArthur v. San Juan Cty.*, 391 F. Supp. 2d 895, 966 (D. Utah 2005).

58. COHEN, *supra* note 13, § 22.07[1][d][i], at 1450–51 n.25; *see also* *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp 2d 1067, 1077 (N.D. Cal. 2004).

59. *See id.* at 1450; *see also* 25 U.S.C. § 1311(4) (2018); *accord* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 441 (2013–2014); Mary K. Mullen,

corpus challenges in federal district and circuit courts, those courts consistently uphold the U.S. Department of the Interior's authority to establish CFR Courts.⁶⁰

IV. Overview of the Court of Indian Appeals

The Court of Indian Appeals is the appellate division of the Court of Indian Offenses.⁶¹ The official title for judges of this court are "appellate magistrates,"⁶² but these jurists, like their Court of Indian Offenses counterparts, are often simply called "judges."⁶³ Each Court of Indian Appeals judge is appointed by the Assistant Secretary of the BIA, with the approval of the tribes that fall within the jurisdiction of the specific Court of Indian Appeals.⁶⁴ A tribe can also implement certain requirements for the appointed judges, such as tribal affiliation or knowledge and honor of tribal traditions.⁶⁵ In the unlikely event that a Court of Indian Appeals judge heard any of the trial portion of a case, perhaps via interchange due to necessity or a recusal, that judge may not sit as one of the three members of a Court of Indian Appeals appellate panel reviewing the same decision.⁶⁶ Each Court of Indian Appeals has a Chief Judge, who is responsible for administrative and supervisory duties associated with court operations.⁶⁷

Comment, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 828 n.150 (2017).

60. See, e.g., *Turner v. McGee*, 681 F.3d 1215, 1217 n.3 (10th Cir. 2012); *Tillett v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991); *accord* *Tillett v. Hodel*, 730 F. Supp. 381, 382–84 (D. Okla. 1990).

61. See 25 C.F.R. § 11.200(a) (2008).

62. *Id.* § 11.200(c).

63. See 25 U.S.C. § 1311(4) (2018); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 n.17 (1978); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 n.6 (1987); *United States v. Tepiew*, 859 F.3d 452, 458 (7th Cir. 2017); *Turner v. McGee*, 681 F.3d 1215 (10th Cir. 2012); *U.S. Bancorp v. Ike*, 171 F. Supp. 2d 1122, 1125 (D. Nev. 2001); *Conroy v. Frizzell*, 429 F. Supp. 918, 922 (D.S.D. 1977); *Fournier v. Roed*, 161 N.W.2d 458, 477 (N.D. 1968) (Knudson, J., concurring); *Wakefield v. Little Light*, 347 A.2d 228, 238 (Md. 1975); *Manning v. Abeita*, 10 Am. Tribal Law 49, 53–56 (Navajo Sup. Ct. 2011) (pt. III).

64. See 25 C.F.R. § 11.201(a) (2008).

65. See *id.* § 11.201(e); see, e.g., *MacArthur v. San Juan Cty.*, 391 F. Supp. 2d 895, 966 (D. Utah 2005); *In re Howard*, 1 Am. Tribal Law 438, 442–43 (Navajo Sup. Ct. 1997) (noting that the Navajo Court of Indian Offenses applied Navajo tribal traditions as early as 1892).

66. See 25 C.F.R. § 11.200(c) (2008). See generally Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 965 (2002).

67. See 25 C.F.R. § 11.200(b) (2008).

Title 25 C.F.R. § 11.200(d) firmly establishes that the Court of Indian Appeals is not merely a promulgated administrative board or commission,⁶⁸ but instead is a fully independent court, by declaring the following: “Decisions of the appellate division [of the Court of Indian Offenses] are final and are not subject to administrative appeals within the Department of the Interior.”⁶⁹ Each Court of Indian Appeals has a designated court clerk who is appointed by the Chief Judge of the Court of Indian Offenses and is subject to the approval of the BIA superintendent.⁷⁰

Judges of the Court of Indian Appeals serve as part-time judges for four-year appointment terms that are subject to reappointment.⁷¹ The appointed judge must pass a background check and is subject to removal from the position as a judge “for cause.”⁷² Appeals are normally decided using a three-judge panel and an appellate record from the Court of Indian Offenses.⁷³ The appellate record may include transcripts of evidence from both bench and jury trials.⁷⁴ The Court Clerk for the Court of Indian Appeals is responsible for assembling and filing the appellate record.⁷⁵

Appellate procedures in the Court of Indian Appeals are similar to other appellate courts in the United States.⁷⁶ While criminal appeals coming before the Court of Indian Appeals mandate oral arguments if requested, the

68. Examples are the Board of Indian Appeals or the Board of Indian Contracts, which are both administrative bodies. *See* 25 C.F.R. § 11.200(d) (2008); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393 (9th Cir. 1993) (discussing the Interior Board of Indian Appeals); *Kaw Nation v. Norton*, 405 F.3d 1317, 1321 (Fed. Cir. 2005) (discussing the Interior Board of Contract Appeals).

69. 25 C.F.R. § 11.200(d); *see also* Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve?*, 36 *TULSA L.J.* 381, 391 (2000).

70. *See* 25 C.F.R. § 11.203(a) (2008).

71. *See id.* § 11.201(b).

72. *See id.* §§ 11.201(c), (d), 11.202.

73. *See id.* § 11.206 (criminal); *id.* § 11.800 (civil/catch-all); *id.* § 11.911 (juvenile). Most Court of Indian Appeals have approximately ten judges that rotate cases and panel make-up. Traditionally, if a case is remanded and re-appealed, the Chief Judge will assign the same panel that heard the earlier appeal to consider the second appeal.

74. *See, e.g., id.* § 11.314 (criminal jury trials); *Standing v. Hadden*, 1 Okla. Trib. 127, 131 (Wichita & Affiliated Tribes Ct. Indian App. 1987), 1987 WL 382997, at *1 (discussing a statement of the evidence).

75. *See id.* § 11.803.

76. *See id.* §§ 11.800, 11.801, 11.804 (stating that rules such as waiver of appellate issues due to the failure of a litigant to preserve error, for example, apply to both sets of courts); *Hicks v. Aldridge*, No. ITCN/AC.CV.04-005, 2004 WL 5748555, at *2 (Nev. Inter-Tribal Ct. App. Aug. 25, 2004).

granting of oral arguments in civil appeals remains within the court's discretion.⁷⁷ The Chief Judge can set specific court rules that include application dictates for court dockets and the time/manner of argument.⁷⁸ Using this discretion, the Miami Agency Court of Indian Appeals recently created a *pro se* litigant guide for presenting appeals to the court because many civil court litigants in Indian Country cannot afford a lawyer and the Court of Indian Appeals strives to guaranty all persons a fair opportunity to have their case heard on the merits.

The Court of Indian Appeals can hear issues as varied as most other appellate courts. Potential matters that come before the court include criminal, domestic, divorce, probate, and personal injury.⁷⁹ Courts from non-Indian jurisdictions have cited and honored decisions from the Court of Indian Appeals.⁸⁰ This Article will now turn to some of the unique issues heard by Court of Indian Appeals jurists, such as the situation in the Choctaw Nation of Oklahoma in 1983 where tribal residents specifically rejected expanding pre-existing tribal court's jurisdiction to replace CFR Court subject matter jurisdiction in the areas of civil, criminal, and probate matters.⁸¹

Legal disputes in Indian Country address intellectually challenging questions⁸² that are not commonly found in most other court systems. For

77. See 25 C.F.R. § 11.805 (2008).

78. See *id.* § 11.806; *In re* Administrative Order Adopting Appellate Rules of the Southern Plains Court to Govern Appeals from Other CFR Courts in the Absence of Adopted United Appellate Rules, No. 2016-03 (S. Plains Region Ct. Indian Offenses, App. Div. Oct 9, 2015), <https://www.bia.gov/sites/bia.gov/files/assets/bia/soplreg/07032018124418.pdf>; accord Gregory D. Smith, *A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants*, 4 AM. INDIAN L.J. 27, 47 (2015), <https://digitalcommons.law.seattleu.edu/ailj/vol4/iss1/4/>.

79. See generally 25 C.F.R. § 11.800; *Kaulaity v. Bear*, 9 Okla. Trib. 186 (Kiowa Ct. Indian App. 2006), 2006 WL 6122523. The Court of Indian Offenses follows a concept called the "vacuum test," which grants the court jurisdiction over any tribal matter not specifically excluded, but not within the purview of a tribal, state or federal court. *Standing*, 1 Okla. Trib. at 135–36, 1987 WL 382997, at * 3; *Kiowa Election Bd. v. Lujan*, 1 Okla. Trib. 140, 152 (Kiowa Ct. Indian App. 1987), 1987 WL 382994, at * 4.

80. See, e.g., *Learned v. Cheyenne-Arapaho Tribe*, 596 F. Supp. 537, 538, 540 (W.D. Okla. 1984); *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164, 171 (N.D. 1990); *Wells Fargo Bank, Nat'l Ass'n v. Apache Tribe of Okla.*, 360 P.3d 1243, 1257 n.15 (Okla. Civ. App. 2014); *In re Freud's Estate*, 66 P. 476, 477 (Cal. 1901).

81. *Dry v. Court of Indian Offenses for the Choctaw Nation*, 5 Okla. Trib. 307, 310–11 (Choctaw Ct. Indian App. 1997), 1997 WL 1146308, at *1.

82. See, e.g., *Holder v. Hunter*, 2 Okla. Trib. 269, 274 (Delaware Ct. Indian App. 1991) (discussing the "law of the case" doctrine), 1991 WL 733410, at *2.

example, where else could an appellate jurist intertwine the federal mobster RICO statute⁸³ with an 1850s treaty between the United States and an Indian tribe?⁸⁴ Other courts, outside Indian Country, seldom address the ancient western Native American tradition of “eel hooking”⁸⁵ as a constitutional religious or traditional right.⁸⁶ Custom and tradition play a huge part of Native American identity.⁸⁷ Important cases addressing religion, family, and culture, couple with million-dollar legal issues stemming from Native American casino gambling.⁸⁸ The Court of Indian Appeals has addressed racial issues such as the disenfranchisement and disenrollment of former slave freedman “Black Seminole” Indians.⁸⁹ The Court of Indian Appeals has also addressed the interplay between pre-U.S. Constitution treaty relations and the 1968 Indian Civil Rights Act (ICRA),⁹⁰

83. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2018).

84. *See* Seminole Nation Dev. Auth. v. Morris, 7 Okla. Trib. 67, 71 (Creek Dist. Ct. 2000), 2000 WL 33976514, at *1 (stating that the case started in the Court of Indian Offenses); 18 U.S.C. § 1962. With the United States Supreme Court’s decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the issue of enforcing ancient treaties between Native Americans and the United States will be a major focal point in future litigation in Indian Country. The Supreme Court’s opening in the *McGirt* opinion declared, “Today we are asked whether the land . . . treaties promised remains an Indian reservation Because Congress has not said otherwise, we hold the government to its word.” *Id.* at 2459. Expect to see that quote in legal briefs related to Native Americans for years to come.

85. Eel hooking is a type of sport fishing. *See* Brian, *How to Catch Eels*, GEARWEARE (May 12, 2020), <https://www.gearwear.com/how-to-catch-eels/>.

86. *See* Yurok Tribe v. Oliver, Nos. 95–017, 95–018, 95–023, 1996 WL 34573149, at *1, 4–5 (Yurok Ct. Indian Offenses May 24, 1996).

87. *Large v. Fremont Cty.*, Wyo., 709 F. Supp. 2d 1176, 1199 (D. Wyo. 2010); *United States v. Boyll*, 774 F. Supp. 1333, 1336–37 (D.N.M. 1991); *E. Band of Cherokee Indians v. Torres*, 4 Cher. Rep. 9 (E. Band Cherokee Ct. Indian App. 2005), 2005 WL 6437828, at *7.

88. *See, e.g.*, *Captain v. Ross*, 4 Okla. Trib. 306, 313–14 (E. Shawnee Ct. Indian Offenses 1995), 1995 WL 1073436, at *2.

89. *Bus. & Corp. Regulatory Comm’n v. Haney*, 8 Okla. Trib. 619 (Seminole Ct. Indian Offenses, App. Div. 2002), 2002 WL 34504131. This case was dismissed as an internal tribal matter.

90. 25 U.S.C. § 1302(a) (2018). The U.S. Constitution does not apply to Native Americans because tribal governments’ inherent sovereignty pre-existed the United States of America. *See* *Kelsey v. Pope*, 809 F.3d 849, 855 (6th Cir. 2016); *United States v. Wadena*, 152 F.3d 831, 857–59 (8th Cir. 1998) (Beam, J., dissenting). In a note of irony, the most recent decision to confirm this theory is *Spurr v. Pope*, 936 F.3d 478, 480 (6th Cir. 2019). The reason this is ironic is that the *Spurr* decision affirms the validity of a decision of the Nottawaseppi Huron Band of the Potawatomi Indians Supreme Court, a tribal appellate court where the primary author of this Article currently serves as Chief Justice. *See Haney*, 8 Okla. Trib. 619; *Dbaknegéwen Tribal Court*, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, <https://www.nhbpi.org/tribal-court/> (last visited June 13, 2020). For a discussion on the

where there appears to be a judicial vacuum of jurisdiction.⁹¹ In rare situations, such as the situation discussed earlier in this article where the citizens of the Choctaw Nation elected to withhold some potential jurisdiction from a tribal court in favor of a CFR Court,⁹² a tribe may be judicially served by both a tribal court and CFR Court acting simultaneously.⁹³

The general civil jurisdiction of CFR Courts regarding Native American tribal members is unlimited, except to the extent that the tribes themselves limit the court's subject matter jurisdiction by ordinance or resolution.⁹⁴ In contrast, the criminal jurisdiction of the Court of Indian Offenses is normally set by the U.S. Code, the Code of Federal Regulations, or tribal ordinance.⁹⁵ The Court of Indian Offenses, which includes the Court of

inter-play of treaty rights and public policy issues in Indian Country, see Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 400–05 (1998).

91. See *Ponca Tribal Election Bd. v. Snake*, 1 Okla. Trib. 209, 226–29, 241 (Ponca Ct. Indian App. 1998), 1988 WL 521355, at *5–6, *14; *Standing v. Hadden*, 1 Okla. Trib. 127 (Wichita & Affiliated Tribes Ct. Indian App. 1987), 1987 WL 382997; *Rogers v. Todd*, 9 Okla. Trib. 462, 470–71 (Chickasaw Sup. Ct. 2006), 2006 WL 6122525, at *4; *Combrink v. Allen*, 3 Okla. Trib. 46 (Tonkawa Ct. Indian App. 1993), 1993 WL 831921.

92. See *supra* note 81.

93. See, e.g., *In re A.W.*, 8 Okla. Trib. 609 (Chickasaw Ct. Indian Offenses 2001), 2001 WL 36209783 (addressing grandparent visitation issues, which the tribal court cannot consider). The Te-Moak Tribe once had a CFR Court that used a commercial tribal appellate broker, the Nevada Inter-Tribal Court of Appeals, to handle appellate matters pursuant to 25 C.F.R. § 11.800 (2008). See *McDade v. Garcia*, No. SF-CV-005-97, 1997 WL 34704353, at *1 (Nev. Inter-Tribal Ct. App. Sept. 11, 1997).

94. For examples of tribes specifically withholding subject matter jurisdiction from a CFR Court, see *Parker v. Saupitty*, 1 Okla. Trib. 1, 5–6 (Comanche Ct. Indian App. 1979), 1979 WL 50343, at *2–3; *Leyva v. Hyeoma*, No. ITCN/AC.CV.03-003, 2003 WL 25856876, at *1–2 (Nev. Inter-Tribal Ct. App. Aug. 15, 2003); 24th Bus. Comm. of Cheyenne-Arapahoe Tribes of Okla. v. *Swallow*, 1 Okla. Trib. 74, 78 (Cheyenne-Arapahoe Ct. Indian App. 1986), 1986 WL 326957. See, e.g., *B.G.Y. v. Comanche Tribal Children's Court*, 1 Okla. Trib. 194, 197–99 (Comanche Ct. Indian App. 1988), 1988 WL 521354, at *2.

95. See, e.g., *Stevens v. Te-Moak Tribe of W. Shoshone Indians*, No. ITCN/AC. CR. 03-016, 2003 WL 25856844, at *1 (Nev. Inter-Tribal Ct. App. Nov. 18, 2003) (discussing disorderly conduct); *Temoke v. Te-Moak Tribe of W. Shoshone Indians*, No. ITCN/AC. CR. 03-004, 2003 WL 25856875, at *2 (Nev. Inter-Tribal Ct. App. Aug. 5, 2003) (discussing criminal jurisdiction generally). The Te-Moak Tribe reverted back to a CFR Court judiciary from their tribal court in mid-February 2017. See generally Toni Milano, *Te-Moak Court Closed*, ELKO DAILY (Elko, Nev.) (Feb. 1, 2017), https://elkodaily.com/news/local/te-moak-court-closed/article_1df4789f-6d80-5500-bde2-dd48a77c36ff.html. The Nevada Inter-Tribal Court of Appeals usually handles traditional tribal court appeals. See INTER-TRIBAL COUNCIL

Indian Appeals, is a court of limited jurisdiction,⁹⁶ and therefore, CFR Courts are not at liberty to waive subject matter jurisdiction.⁹⁷ One CFR Court, discussing the policy of non-intervention in internal tribal political disputes, declared the following: “Until or unless the KIC [tribal governing council] **explicitly** passes a resolution, ordinance, or referendum granting this court jurisdiction . . . the CFR is without subject matter jurisdiction to hear this matter.”⁹⁸ Simply put, the Court of Indian Appeals will apply due process and equal protection principles to cases coming before it.⁹⁹ Neither CFR Courts, nor tribal governments, can flippantly use “sovereign immunity” as an excuse for undermining constitutional due process, even if a litigant facing a sovereign immunity defense begs to differ and cries foul.¹⁰⁰

CFR Courts address litigation involving grandparent visitation rights,¹⁰¹ injunctions,¹⁰² termination of parental rights cases,¹⁰³ employment issues,¹⁰⁴

OF NEV., <https://itcn.org> (last visited June 13, 2020); Anne Bruno, *Views from a Tribal Court: How the Indian Civil Rights Act Led to Civil Rights Violations*, 19 TRIBAL L.J. 9, 20 (2019), <http://lawschool.unm.edu/tlj/common/docs/volumes/vol19/anne-bruno-views-from-a-tribal-court-vol-19.pdf>.

96. *Wright v. Cannedy*, 2 Okla. Trib. 363, 372 (Wichita Ct. Indian App. 1992), 1992 WL 752144, at *4.

97. *Apache Election Bd. v. Chalepah*, 10 Okla. Trib. 556 (Apache Ct. Indian App. 2007), 2007 WL 9192755; *see also* *Grant v. Grievance Comm.*, 1 Okla. Trib. 34, 44 (Sac & Fox Ct. Indian App. 1981), 1981 WL 165245, at *2; *Ponca Tribal Election Bd. v. Simpson*, 11 Okla. Trib. 522, 525 (Ponca Ct. Indian App. 2009), 2009 WL 10271461, at *2 (discussing 25 C.F.R. § 11.118).

98. *Tofpi v. Otipoby*, 11 Okla. Trib. 422, 427 (Kiowa Ct. Indian Offenses, App. Div. 2009), 2009 WL 10269230, at *3.

99. *Enyart v. E. Shawnee Election Bd.*, 9 Okla. Trib. 290, 294–97 (E. Shawnee Ct. Indian App. 2006), 2006 WL 6122749, at *2–3. The Chickasaw tribal courts have addressed cases, such as divorces, that originally were filed in a CFR Court, and then the divorces were transferred to a tribal court upon subject matter jurisdiction being established. *See, e.g., Rogers v. Todd*, 9 Okla. Trib. 462, 465–66 (Chickasaw Sup. Ct. 2006), 2006 WL 6122525, at *1.

100. *McDade v. Individual Members of the Te-Moak Council*, No. SF-CV-004-99, 2000 WL 35782656, at *1 (Nev. Inter-Tribal Ct. App. Mar. 8, 2000); *see also* Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 381–85 (1993) (discussing Due Process/Equal Protection applications in CFR Courts and tribal governments). Few litigants barred from litigation by a claim of sovereign immunity (and some jurists) find the application of the doctrine “just.” *See, e.g., Taylor v. U.S. Dep’t of Labor*, 440 F.3d 1, 6 (1st Cir. 2005); *Splendour Shipping Enter., Co., Inc. v. Bd. of Com’rs of Port of New Orleans*, 477 F.2d 122, 122 (5th Cir. 1973).

101. *In re C.D.S.*, 1 Okla. Trib. 200, 203, 206 (Del. Ct. Indian App. 1988), 1988 WL 521353, at *1, *3; *In re A.W.*, 8 Okla. Trib. 609, 610 (Chickasaw Ct. Indian Offenses 2001), 2001 WL 36209783, at *1.

and contract/corporation issues.¹⁰⁵ Courts of Indian Appeals have addressed equal protection issues,¹⁰⁶ interlocutory appeals,¹⁰⁷ constitutional powers issues,¹⁰⁸ and administrative court procedures (such as the manner of addressing oral arguments or settlement conferences).¹⁰⁹ Finally, another interesting twist that CFR Courts frequently address, and that other appellate courts seldom see, is the transfer of jurisdiction from CFR Courts back to tribal courts¹¹⁰ and occasionally from tribal courts to CFR Courts.¹¹¹

102. *Bointy v. Palmer*, 10 Okla. Trib. 628, 629–30 (Kiowa Ct. Indian App. 2001), 2001 WL 36951411, at *1.

103. *Rosas v. Comanche Nation Children's Court*, 11 Okla. Trib. 84, 87 (Comanche Ct. Indian App. 2008), 2008 WL 10676370, at *1.

104. *Bointy v. Tsatoke*, 10 Okla. Trib. 624, 625–26 (Kiowa Ct. Indian App. 2001), 2001 WL 36951408, at *1.

105. *Seminole Nation Dev. Auth. v. Morris*, 7 Okla. Trib. 67, 73–75 (Creek Dist. Ct. 2000), 2000 WL 33976514, at *3.

106. *Garcia v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, No. SF–CV–006–98, 1999 WL 34996178, at *1 (Nev. Inter-Tribal Ct. App. June 30, 1999); accord Leah Jurss, *Halting the "Slide Down the Sovereignty Slope": Creative Remedies for Tribes Extending Civil Infraction Systems Over Non-Indians*, 16 RUTGERS RACE & L. REV. 39, 46–47 (2015).

107. *Bus. Comm. v. Burgess*, 9 Okla. Trib. 96, 98–99 (Comanche Ct. Indian Offenses, App. Div. 2005), 2005 WL 6218641, at *1. *But see* *Wahkinney v. Wahkinney*, 2 Okla. Trib. 11, 18–19 (Comanche Ct. Indian App. 1990), 1990 WL 655887, at *3 (discouraging interlocutory appeals); *Kerchee v. Kerchee*, 2 Okla. Trib. 132, 134–35 (Comanche Ct. Indian App. 1990) (same), 1990 WL 655886, at *1.

108. *In re Veto Power of Chief of E. Shawnee Tribe of Okla.*, 11 Okla. Trib. 167, 169 (E. Shawnee Ct. Indian Offenses, App. Div. 2008), 2008 WL 10676349, at *1. For a recent discussion on Due Process and other constitutional issues in tribal courts, see Brenna P. Riley, Comment, *Protecting All Women: Tribal Protection Orders and Required Enforcement Under VAWA*, 24 ROGER WILLIAMS U. L. REV. 209, 217–18 (2019).

109. *Summerfield v. Byrd*, No. LPT–CV–93–011, 1998 WL 35297266, at *1 (Nev. Inter-Tribal Ct. App. Nov. 13, 1998); *Tallbird v. Election Bd.*, 1 Okla. Trib. 169, 171–73 (Cheyenne-Arapaho Ct. Indian App. 1987), 1987 WL 382992, at *1–2.

110. *In re Ford*, 4 Okla. Trib. 459, 464–65 (Chickasaw Sup. Ct. 1995), 1995 WL 1074100, at *2; *McCormick v. Election Comm.*, 1 Okla. Trib. 8, 16–17, 20 (Sac & Fox Ct. Indian App. 1980), 1980 WL 128844, at *3–4, *6; *cf.* *Smith v. Watty*, Nos. CV–87–100, CV–91–651, 2007 WL 7080184, at *1 (E. Band Cherokee Dist. Ct. Oct. 11, 2007) (finishing an estate motion filed in a CFR Court twenty-five years before). *See generally* Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 258 (2016–2017) (discussing the transition from CFR Courts to tribal courts in America).

111. *In re Removal of McCauley*, 8 Okla. Trib. 31, 47 n.10 (Kaw Sup. Ct. 2003), 2003 WL 24313571, at *5 n.10 (discussing a tribe returning jurisdiction from a tribal court to a CFR Court). This reverse transfer of jurisdiction process is done by CFR resolution initiated by the tribe. *See, e.g.*, Law & Order on Indian Reservations, 68 Fed. Reg. 22,728-01 (Apr.

The Court of Indian Appeals enjoys many similarities to other federal appellate courts, but the court also employs unique differences that deserve a comparative review. The differences between the Court of Indian Appeals and other federal appellate courts likely contribute to the overall absence of knowledge and discussions regarding Indian appeals courts. By addressing the differences, as well as the similarities, one can see the benefit of using and expanding on the current structure.

V. Comparison of the Court of Indian Appeals with Other American Federal Appellate Courts

Congress has the authority to create “inferior federal courts,” which carry judicial powers separate from the U.S. Supreme Court.¹¹² The due process duties of a judge on the Court of Indian Appeals are virtually identical to the work obligations and expectations of a jurist serving on one of the U.S. Court of Appeals, or some other appellate judgeship, even though the tribal courts apply the Indian Civil Rights Act instead of the Fifth, Sixth, or Fourteenth Amendments of the U.S. Constitution.¹¹³ There are, however, some significant differences as to how the two judicial positions and roles are viewed by the public. For clarity, this comparison will refer to a judge serving on a federal appellate court as a “federal judge” and a jurist serving on the Court of Indian Appeals as a “CFR judge.”

15, 2003). In late 2017, the Wind River Indian Reservation Tribal Council elected to disband their tribal court in favor of reverting to the Court of Indian Offenses. *See* Addition of the Wind River Indian Reservation to the List of Courts of Indian Offenses, 82 Fed. Reg. 61448-01 (Dec. 28, 2017).

112. *Stern v. Marshall*, 564 U.S. 462, 482 (2011); *see also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 315 (1816) (acknowledging generally that Congress “*must* establish a supreme court,” but Congress “*may* establish inferior courts”).

113. *See, e.g.,* *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1138 (9th Cir. 2001); *Settler v. Yakima Tribal Court*, 419 F.2d 486, 488 (9th Cir. 1969) (discussing the distinction between a CFR Court and a traditional Native American tribal court). Similar due process rules apply between Indian Country courts and American state courts. *See, e.g.,* *St. Germaine v. Chapman*, 505 N.W.2d 450, 451 (Wis. Ct. App. 1993). The Indian Civil Rights Act contains the Indian Country version of the U.S. Constitution’s Due Process Clause. *See* 25 U.S.C. § 1302(a)(8) (2018). For a general discussion on the Indian Civil Rights Act in the twenty-first century, *see ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1718–28 (2016). For examples of the U.S. Supreme Court (in a military case) and state courts acknowledging their duty to protect a litigant’s Due Process rights, *see* *Burns v. Wilson*, 346 U.S. 137, 142 (1953); *Skelton v. State*, 655 S.W.2d 302, 304 (Tex. Ct. App. 1983).

An obvious difference between the two positions is that a CFR judge, who is appointed under a variant of Article I of the United States Constitution,¹¹⁴ serves a renewable four-year term,¹¹⁵ while someone who is appointed under Article III¹¹⁶ (district court judges, circuit court judges, and Supreme Court justices), enjoys a lifetime appointment.¹¹⁷ Article I judges are not guaranteed lifetime appointments;¹¹⁸ Congress has the power to create these judgeships with term limits and mandatory retirement ages.¹¹⁹ The prestige associated with being an Article III judge outweighs that of a CFR Court appointment.¹²⁰ A district, circuit, or U.S. Supreme Court

114. Article I of the U.S. Constitution states, “The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court” U.S. CONST. art. I, § 8, cl. 9. When the U.S. Constitution has not enumerated the jurisdiction or powers of a court, Congress has the discretion to designate the jurisdiction of a court as Congress deems fit. *Osborn v. Bank of the United States*, 22 U.S. (9 Whet.) 738, 820–21 (1824).

115. 25 C.F.R. § 11.201(b) (2008). Other Article I, Section 8 federal judgeships serve renewable fixed-term appointments, such as the eight-year term a U.S. magistrate judge enjoys, 28 U.S.C. § 631(e) (2018), and the fourteen-year appointments for U.S. Bankruptcy Court judges, 28 U.S.C. § 152(a)(1) (2018). Judges of the U.S. Court of Appeals for the Armed Services serve a fifteen-year term. 10 U.S.C. § 942(b)(2) (2018). Likewise, U.S. Tax Court judges serve a fifteen-year term. 26 U.S.C. § 7443(e) (2018).

116.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

117. *See* U.S. CONST. art. III, § 1; *see also* *Adams v. Comm’r*, 841 F.2d 62, 64 (3d Cir. 1988).

118. *See* *Glidden Co. v. Zdanok*, 370 U.S. 530, 593 (1962) (Douglas, J., dissenting).

119. *See, e.g., In re Rivers*, 19 B.R. 438, 442 (Bankr. E.D. Tenn. 1982), *rev’d on other grounds*, 714 F.2d 142 (6th Cir. 1983).

120. *Compare* *Pedreira v. Sunrise Children’s Servs., Inc.*, 802 F.3d 865, 871 (6th Cir. 2015) *with In re Michael*, 836 N.W.2d 753, 765 (Minn. 2013) (attorney disrespecting tribal court). Other federal judgeships, such as military judges, struggle with enjoying the respect shown to Article III federal judges. *See* *Courtney v. Williams*, 1 M.J. 267, 272 (C.M.A. 1976) (Ferguson, J., concurring) (stating that military judges should enjoy the equal respect and prestige that other federal judges enjoy); *see also* Mary Hopler, *The Fourth Amendment Implications of “U.S. Imitation Judges,”* 104 MINN. L. REV. 1275, 1336–37 n. 356 (2020); Nicholas A. Kahn-Fogel, *Manson and its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. REV. 175, 208–09 (2012).

judgeship is a full-time job¹²¹—limited solely to fulfilling judicial duties¹²²—while a CFR judgeship is usually a part-time obligation.¹²³ Each federal judge has a full-time staff that generally includes a secretary and two law clerks in addition to the staff associated with the clerk of the court's office.¹²⁴ A CFR judge has the clerk of court that services the entire court but no designated staff.¹²⁵ A federal judge is paid a set salary,¹²⁶ while a CFR judge is paid by the hour.¹²⁷ Salary or funding disparity between different types of federal judges, (Article III versus Article I judgeships), is not exclusive to CFR Courts.¹²⁸ There are several other less glaring differences in the judicial roles such as CFR Court judges are often trained through the Bureau of Justice Assistance (“BJA”) (a branch of the United States Department of Justice),¹²⁹ while most other federal judges train through the Federal Judicial Center.¹³⁰

Since CFR judges often serve as judges on other tribal courts¹³¹ or have a private law practice in addition to their Court of Indian Appeals duties, a

121. See, e.g., *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 815 (4th Cir. 2004) (voting to rehear appeal en banc). An Article III federal judge can go on semi-retirement, called “senior status” as a part-time judge, if the retired judge served on the federal bench at least a decade or more. See 28 U.S.C. § 371 (2018). There are some part-time U.S. magistrate judges. See Chris Guthrie, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787 n.45 (2001).

122. See *United States v. Landers*, 690 F. Supp. 615, 623 (W.D. Tenn. 1988).

123. See, e.g., *Cole v. Kaw Hous. Auth.*, 4 Okla. Trib. 281, 289, 292 (Kaw Dist. Ct. 1995), 1995 WL 1073446, at *2, *4 (discussing how part-time tribal judges also juggle a private law practice).

124. See Steven I. Friedland, *Expert Testimony on the Law: Excludable or Justifiable?*, 37 U. MIAMI L. REV. 451, 454 n.29 (1983).

125. 25 C.F.R. § 11.203(b) (2008).

126. See *Judicial Compensation*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited on June 13, 2020) (listing Article III federal judges' salaries).

127. See generally Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 8–9 (2012).

128. See *In re AWTR Liquidation Inc.*, 547 B.R. 831, 840–41 (Bankr. C.D. Cal. 2016).

129. *About*, U.S. DEP'T OF JUSTICE: BJA, <https://www.bja.ojp.gov/about> (last visited June 15, 2020).

130. *Education*, FED. JUD. CTR., <https://www.fjc.gov/education> (last visited June 15, 2020).

131. Cf. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 721 n.44 (2006) (noting that some federal courts have part-time U.S. magistrate judges assigned solely to handle arraignment and preliminary matters in remote parts of Indian Country).

CFR judge is generally not prone to judicial haughtiness.¹³² For a CFR judge, excessive arrogance could justify an immediate dismissal from the bench “for cause.”¹³³ On the other hand, Article III federal judges can only be removed from office via impeachment of a two-thirds vote of the U.S. Senate.¹³⁴ The fact that a CFR judge is not insulated from the rest of society is advantageous in avoiding the air of superiority sometimes associated with life-tenured judges.¹³⁵ Even some Article III federal judges have noted the attitude contrast and conflict that potentially exists between life-time appointed judgeships and elected (or term-dictated) judgeships.¹³⁶

One of the key differences between courts in Indian Country and other court systems is how the law is reviewed and applied in Indian Country. Most non-Indian courts apply recent case law on a topic appearing before the court¹³⁷ or follow an existing statute or rule.¹³⁸ Both CFR Courts and tribal courts must apply extremely diverse and intertwined laws,

132. *Cf.* Alvarez v. Tracy, 773 F.3d 1011, 1024 (9th Cir. 2014) (Kozinski, J., dissenting) (giving a tribal court an unflattering comparison to a “tribunal run by marsupials”). This same judge later resigned the bench shortly thereafter because former law clerks accused him of arrogance and other inappropriate behavior towards staff members. *See* Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

133. *See* 25 C.F.R. § 11.202 (2008); *cf.* Summerfield v. Byrd, No. LPT-CV-93-011, 1998 WL 35297266, at *1, *2 (Nev. Inter-Tribal Ct. App. Nov. 13, 1998); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1198 n.79 (2016).

134. *See, e.g.*, Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 67–69 (2016); Hastings v. United States, 837 F. Supp. 3, 4 n.2 (D.D.C. 1993).

135. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 938–39 (1991) (discussing how the “district judge – insulated by life tenure and irreducible salary – is waiting in the wings, fully able to correct errors” of any lowly U.S. magistrate judge “who is susceptible to outside pressures”); *cf.* Butler v. McKellar, 494 U.S. 407, 427 n.8 (1990) (Brennan, J., dissenting) (for similar views being expressed about state court judges being subject to political pressure that U.S. District Judges avoid). U.S. President Harry S. Truman once sarcastically commented, “Whenever you put a man on the Supreme Court, he ceases to be your friend, you can be sure of that.” THE WIT AND WISDOM OF HARRY S. TRUMAN 146 (Alex Ayres ed., 1998). President Truman nominated four Justices to the U.S. Supreme Court, Chief Justice Fred M. Vinson and Associate Justices Tom C. Clark, Harold H. Burton, and Sherman Minton. Mary McMurray, *Truman’s Supreme Court Justices*, TRUMAN LIBR. INST. (Mar. 16, 2016), <https://www.trumanlibraryinstitute.org/tru-history-scotus/>.

136. *See, e.g.*, Bradley v. Ind. State Election Bd., 797 F. Supp. 694, 697 (S.D. Ind. 1992).

137. *See, e.g.*, Latta v. State, 88 S.W.3d 833, 841–42 (Ark. 2002) (Brown, J., dissenting).

138. *See, e.g.*, State v. Olsen, 399 P.3d 1141, 1150 (Wash. 2017) (Fairhurst, C.J., dissenting).

regulations, ordinances, and traditions.¹³⁹ Courts hearing cases involving federal Indian law must also apply treaties, some of which are older than the United States.¹⁴⁰ One federal Indian law scholar explained this quandary as follows:

Presently, tribal courts are as diverse in structure and practice as the cultures they serve. Some tribes, most notably the Iroquois and the Pueblos, have retained traditional forms of dispute resolution that are conducted in privacy. Little detail is known or divulged about these proceedings. Other tribes have kept CFR Courts. Still others have established new court systems that attempt to blend the required portions of Anglo-American procedural safeguards with traditional cultural beliefs and practices . . . Tribal courts are here to stay, and as they have increased in number and strength, the friction between tribal, state, and federal courts has grown.¹⁴¹

Even within the Courts of Indian Offenses, judges must juggle federal statutory laws, the Code of Federal Regulations, tribal ordinances, and tribal customs that vary greatly between tribes.¹⁴² *Stare decisis* is not as consistent in application in Courts of Indian Offenses as in other federal courts.¹⁴³ Justice Raymond D. Austin, a retired Navajo Nation Supreme Court Justice, references a congressional report,¹⁴⁴ noting that since the 1930s, “In all civil cases the Court of Indian Offenses shall apply . . . any ordinances or customs of the tribe, not prohibited by . . . Federal laws.”¹⁴⁵ This premise makes uniformity of case law in Indian Country difficult.¹⁴⁶

139. See Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 *YALE L. & POL’Y REV.* 351, 365–67 (2016).

140. See, e.g., *Oneida Indian Nation of N.Y. v. New York*, 520 F. Supp. 1278, 1286 (N.D.N.Y. 1981) (applying the Treaty of Fort Stanwix from 1768).

141. Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 *ARIZ. ST. L. J.* 705, 712 (1997).

142. Aila Hoss, *A Framework for Tribal Public Health*, 20 *NEV. L.J.* 113, 126 (2019).

143. See, e.g., *Auto Owners Ins. Co. v. Saunooke*, 54 F. Supp. 2d 585, 586 (W.D.N.C. 1999).

144. 25 C.F.R. § 161.23 (1938).

145. Raymond D. Austin, *American Customary Law in the Modern Courts of American Indian Nations*, 11 *WYO. L. REV.* 351, 358 (2011) (alterations in original).

146. See generally *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F. 2d 1055, 1058 (9th Cir. 1988) (discussing the “need for simplification and uniformity in the administration of Indian law”).

Stare decisis is predicated on the presumption that similar laws, being applied to similar facts, create similar results.¹⁴⁷ The late U.S. Supreme Court Justice Lewis F. Powell, Jr., described the theory of *stare decisis* as follows:

Stare decisis is premised on three basic concepts: (1) it facilitates the judicial task by obviating the need to revisit each issue every time it comes before the courts; (2) it enhances the stability in the law and establishes a predictable set of rules on which the public may rely in shaping its behavior; and (3) it legitimates the judiciary in the eyes of the public because it shows that the courts are not composed of unelected judges free to place their policy views in the law.¹⁴⁸

The problem with applying *stare decisis* to Indian law is that the court must commingle statutes with ancient treaties that must be read from the viewpoint of Native Americans who entered into them over a century ago, while still applying today's evolving legal standards.¹⁴⁹

Tribal courts sometimes blur the application of *stare decisis* further because tribal courts are not required to adopt or apply decisions from a preexisting CFR Court that heard cases from the relevant tribe, but those preexisting CFR Court decisions are often persuasive authority for a newly created tribal appellate court.¹⁵⁰ This does not mean that tribal judges may casually disregard precedent. Instead, it is an acknowledgement that tribal courts are “almost vehemently aware of their ability to differ at their own discretion to protect cultural traditions and tribal sovereignty.”¹⁵¹ Since many tribal courts are relatively new, legal disputes coming before them are often matters of first impression, so the tribal court has a “clean slate” to establish new precedent—a luxury which most state and federal courts do

147. See generally *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

148. *Joy v. Penn Harris Madison Sch. Corp.*, 212 F.3d 1052, 1066 n.10 (7th Cir. 2000); accord *People v. Maracle*, 973 N.E.2d 1272, 1275 (N.Y. 2012).

149. See *Dennison v. Topeka Chambers Indus. Dev. Corp.*, 527 F. Supp. 611, 615, 621 (D. Kan. 1981).

150. See *Bullcoming v. Election Bd.*, 9 Okla. Trib. 682, 685 (Cheyenne-Arapaho Dist. Ct. 2004), 2004 WL 5644723, at *1 & n.1; cf. Taylor Reinhard, Comment, *Advancing Tribal Law Through “Treatment as a State” Under the Obama Administration: American Indians May Also Find Help from Their Legal Relative Louisiana – No Blood Quantum Necessary*, 23 TUL. ENVTL. L.J. 537, 554–55 (2010).

151. Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 864 (1997).

not enjoy.¹⁵² As a result, legislation and judicial decisions are often inconsistent regarding federal Indian law issues.¹⁵³ This legislative drafting flaw works against determining clear-cut legislative or precedential intent in CFR Courts and tribal courts because congressional statutes are often vague in federal Indian law.

The Court of Indian Appeals hears cases from various tribes, so these decisions can provide a uniform body of procedural law for issues across tribal boundaries, while allowing each tribe to maintain its own unique ordinances and traditions. This procedure could provide uniform, or even binding, guidance for various tribes in areas like appellate standards of review or evidentiary questions. On the other hand, tribal ordinances, usually drafted by the individual Native American tribes themselves, can cater to the unique customs and traditions of each specific tribe.¹⁵⁴ This dual precedent scheme would not undermine tribal sovereignty or identity because the uniformity of decisions would be in *procedure*, not *substance* of individual tribal laws. As a result, each individual tribe could still establish its own body of substantive case law.

Another unique hurdle that judges on the Court of Indian Appeals face is that many Native Americans have an inherent, and sadly justified, distrust of American government.¹⁵⁵ U.S. President Harry S. Truman gave America a “Zero minus” grade for its historic treatment of Native Americans.¹⁵⁶ The reason for Truman’s unflattering fundamental fairness grade can be explained by the following quote from the 1869 Presidential Commission Report on Indians made to President U.S. Grant:

152. 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, 275 (2002).

153. See, e.g., Angela R. Hoelt, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. 203, 253 (1995); Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 455.

154. See, e.g., Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J. L. & PUB. POL’Y 357, 360–62 (2006) (discussing the tension between Native American tribal codes and the non-tribal Uniform Commercial Code (UCC)).

155. See, e.g., *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1018 (8th Cir. 1999); *Osage Nation of Indians v. United States*, 97 F. Supp. 381, 407 (Ct. Cl. 1951); *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 133 (Nev. 2012); cf. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1032 (D.S.D. 2004) (discussing the lack of interaction between Indian and non-Indian communities feeding into distrust between the two groups).

156. THE WIT AND WISDOM OF HARRY S. TRUMAN, *supra* note 135, at 102.

[T]he United States, in the general terms and temper of its legislation, has evinced a desire to deal generously with the Indians, [but] it must be admitted that the actual treatment they have received has been unjust and iniquitous beyond the power of words to express. Taught by the government that they had rights entitled to respect; [but] . . . [t]he history of the government connections with the Indians is a shameful record of broken treaties and unfulfilled promises.¹⁵⁷

Court cases bridging between the 1820s through the twenty-first century, (and lawyers in some of those cases), have referred to the treatment of Native Americans by the “white man government” with terms such as “a legacy of injustice to Indians”¹⁵⁸ where “promises and treaties were repeatedly broken or ignored as Indians were swept from their lands and homes.”¹⁵⁹ Instead of following Plato’s “Noble Lie,”¹⁶⁰ judges of the Court of Indian Appeals should be totally forthright in their dealings with all litigants—especially Native American litigants who have endured so many “Noble Lies” from the American government that those lies fail to appear “Noble” anymore.¹⁶¹ Although CFR Courts are federal courts, they are generally considered “vehicles for the exercise of tribal jurisdiction,” but questions persist as to whether CFR Courts can act as an arm of federal or

157. *United States v. Michigan*, 471 F. Supp. 192, 201 (W.D. Mich. 1979) (quoting REPORT OF THE BOARD OF INDIAN COMMISSIONERS 7 (Washington, D.C., Gov’t Printing Office, 1870)) (alteration added).

158. *See, e.g., Nw. Band of Shoshone Indians v. United States*, 324 U.S. 335, 692 (1945) (discussing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)); *Blackfeet & Gros Ventre Tribes of Indians v. United States*, 119 F. Supp. 161, 168 (Ct. Cl. 1954) (Madden, J., dissenting); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1149 (9th Cir. 2001) (discussing a tribe’s argument regarding the legacy of injustices done to Native Americans).

159. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

160. Plato’s “Noble Lie” declared that because the ruling leaders of a country were so much wiser and better informed than the ignorant masses, to avoid panic revolts the leaders would tell happy “lies” (fairy tales) that everything was always great in the society. The theory is that an ignorant society is a happy society. The quote “You want the truth? You can’t handle the truth!” from the movie *A Few Good Men*, is a Hollywood example of Plato’s Noble Lie. *A FEW GOOD MEN* (Castle Rock Entertainment 1992). Often, the lip service of “What you don’t know, won’t hurt you” actually plays out, “What you don’t know, won’t hurt ME.” For a discussion on Plato’s Noble Lie, see Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911, 958–59 (2018).

161. For this reason, CFR Courts were called “largely unloved” by one tribal appellate court. *See Flyingman v. Wilson*, 10 Okla. Trib. 33, 38 (Cheyenne-Arapaho Sup. Ct. 2007), 2007 WL 9193026, at *2.

tribal governments.¹⁶² For sovereignty purposes, it is helpful to consider CFR Courts as a branch of tribal governmental authority as opposed to federal governmental authority.¹⁶³

A final area where the Court of Indian Appeals takes a different path from other American federal courts—a road less traveled—is in the area of case research and case citation. While most state and federal courts have a formal court decision reporter system, such as the *Southwestern Reporters* or the *United States Bankruptcy Reporters*, very few tribal courts, including the Court of Indian Appeals, have decisions published in book form.¹⁶⁴ Decisions from tribal courts and the Court of Indian Offenses are spread out among multiple commercial internet website reporting services such as Westlaw, Lexis, or Casemaker. Some tribal appellate decisions are reported in the *Indian Law Reporter*¹⁶⁵—a loose-leaf periodical—and some tribal appellate decisions are reported on the individual tribal court website;¹⁶⁶ other tribal appellate decisions are intentionally not publicly reported at all.¹⁶⁷ Sometimes, the Native American court decision reporter system is incomplete and does not offer all of a tribal court's relevant opinions.¹⁶⁸ The ever-shifting appellate court landscape in Indian Country contrasts

162. COHEN, *supra* note 13, § 4.04[3][c][iv][B], at 266.

163. *See id.* But see 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, 551 n.97 (1997).

164. Probably the best-known, book-bound, published Indian court reporter system is the *Navajo Reporter*. *See Navajo Reporter, Volume 1 - 9*, NAVAJO NATION JUD. BRANCH, <http://www.navajocourts.org/NavRep.htm> (last visited June 13, 2020). It is noteworthy that the Navajo Nation is approximately the size of West Virginia, so it makes sense why the Navajo Nation may have a more advanced, and better funded, court reports system. *See Navajo Nation*, INDIAN HEALTH SERV., <https://www.ihs.gov/navajo/navajonation/> (last visited June 13, 2020); Drew Kraniak, Note, *Conserving Endangered Species in Indian Country: The Success and Struggles of Joint Secretarial Order 3206 Nineteen Years On*, 26 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 321, 333 (2015).

165. *See* INDIAN LAW REP., <http://indianlawreporter.org/> (last visited June 13, 2020).

166. *See, e.g.,* *Dbaknegéwen Tribal Court*, *supra* note 90.

167. *See, e.g.,* *Tribal Court Home*, BISHOP PAIUTE TRIBE, <http://bishoppaiutetribe.com/tribal-court.html> (last visited June 13, 2020).

168. Two different internet reporting services publish Creek Nation Supreme Court appellate decisions. *See* CASEMAKER, <https://casemakerlegal.com/home.aspx> (after logging in, follow “Tribal Courts” tab on the “Browse” ribbon, then follow “Muscogee (Creek) Nation Supreme Court” hyperlink) (last visited June 13, 2020) (via subscription); *see also Orders and Opinions*, SUPREME COURT: MUSKOGEE (CREEK) NATION, <http://www.creek.supremecourt.com/case-law/> (last visited June 13, 2020). The two referenced reporter services have different cases included from different dates, but also include some duplicate cases at other parts of the reports.

significantly with the relatively entrenched federal court appellate system associated with more traditional Article III circuit courts and Article I appellate courts,¹⁶⁹ such as the District of Columbia Court of Appeals¹⁷⁰ or the United States Court of Veterans Appeals.¹⁷¹ Since there is no “right way” for the various courts in Indian Country to make their decisions public, researching federal Indian law is cumbersome and difficult.

VI. Conclusion

The Court of Indian Appeals is a viable and valuable federal appellate court that provides a judicial forum for tribes that either do not wish to create their own tribal appeals system or do not have the economic resources to support such. The Court of Indian Appeals allows tribes to enjoy a judicial forum outside of the threat of tribal council retribution for unpopular decisions,¹⁷² (such as a tribe allegedly firing a tribal judge for a ruling adverse to the tribe),¹⁷³ and the lack of stress and expense of supporting the infrastructure of teaching, training, and funding judges/clerks, when the Bureau of Indian Affairs offers this service to tribes free of charge.¹⁷⁴ Tribes retain a voice in the running of CFR Courts because tribes are consulted on the selection of judges for the Court of Indian Appeals pursuant to 25 C.F.R. § 11.200.

When discussing federal appeals courts, one should not forget to include the U.S. Department of the Interior's Court of Indian Appeals. This hybrid

169. Tribal governments in Indian Country frequently create or modify appeals court structures. *See, e.g.,* Smith, *supra* note 25, at 28 n.15 (discussing the creation of the Bishop Paiute Tribal Court of Appeals in 2017). The most recent change in the federal U.S. Circuit Courts of Appeals system occurred in 1981, when the old U.S. Court of Appeals for the Fifth Circuit split into the current Fifth Circuit and Eleventh Circuit. *See* Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).

170. The District of Columbia Court of Appeals (not to be confused with the United States Court of Appeals for the D.C. Circuit) is an Article I court. *See* Cmty. Credit Union Servs., Inc. v. Fed. Exp. Servs., Corp., 534 A.2d 331, 333 (D.C. 1987).

171. *See* Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994).

172. *See* Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 100 n.155 (1990).

173. *See, e.g.,* Nooksack Tribal Court Judge Says She Was Unfairly Fired, LAW360 (Apr. 25, 2016), <https://www.law360.com/articles/788459/nooksack-tribal-court-judge-says-she-was-unfairly-fired>.

174. 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, 459 n.5, 472 (1998).

appellate court, with one foot in Washington, D.C., and the other foot in Indian Country, is a viable and reliable option for tribal appeals. As Robert Frost noted in his poem “The Road Not Taken,”¹⁷⁵ the less-traveled path should not be mistaken as inferior to the more familiar avenue. Many tribes do not have the staff, funding, or inclination to develop, support, or sustain their own tribal court of appeals system. The Court of Indian Appeals is a logical avenue for ensuring appellate review for tribal courts. The U.S. Department of the Interior’s Court of Indian Appeals offers its own unique and worthwhile federal judicial challenges, which should be utilized and not overlooked merely because the court is a “road less travelled.” The preferred option is always for tribes to establish their own appellate court, but the next option should remain the Court of Indian Appeals, even if the court’s role is eventually expanded.

175. ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 9, 9 (1916), <https://archive.org/details/mountaininterv00frosrich/page/n13/mode/2up>.

Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;

Then took the other, just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,

And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.

Id.