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TRIBAL EMPLOYMENT SEPARATION: TRIBAL LAW ENIGMA, TRIBAL GOVERNANCE PARADOX, AND TRIBAL COURT CONUNDRUM

Matthew L.M. Fletcher*

*Each year, more and more people—Indians and non-Indians—are employed by Indian Tribes and Tribally-chartered organizations. However, as Tribal employment grows, so do the problems associated with personnel disputes. Tribal employment is different than traditional corporate or even government employment because Tribal communities are incredibly close-knit and Tribal governments are very accountable to their constituents. Because of this dynamic, employment separations can create excessive difficulty within a Tribe. Many Tribal courts apply the principles of the Supreme Court's decision in *Loudermill*, granting terminated employees the right to both an administrative and judicial hearing. However, these processes can often be incredibly painful for terminated employees and the administrative Tribal panels. They often undermine Tribal government operations and communities. To ameliorate some of these difficulties, Tribes should consider alternative ways to deal with employment separations. For example, Tribes might consider a separate court of employee claims, a Peacemaker Court model, or an automatic monetary remedy. Overall, any solution that rejects the dominant culture's model and accommodates the particular needs of Tribal communities would be an improvement.*

“External rules and interpretations do not apply to the internal matters of the tribe. Application of such is recognized as inappropriate in the law. It would destroy the unique traditional, cultural and community attributes of tribal communities. In addition, uniform application of external measurements would destroy the diversity that exists among the many tribal communities themselves.”¹

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Chi-megwetch to Kirsten Matoy Carlson for commenting on an earlier draft; Andrea Delgadillo, Jessica Margolin, and the editors of the *University of Michigan Journal of Law Reform* for excellent edits and suggestions; and to Wenona Singel as always.

1. *Raphael v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 90-01-001-CV, slip op. at 2-3 (Grand Traverse Band Tribal Ct. Apr. 16, 1996) (on file with University of Michigan Journal of Law Reform).

"The essence of sovereignty is the right of the people of a nation to decide what their body of jurisprudence shall be. In so doing, tribal courts and legislatures may view issues within the context of their community and not those of other sovereignties where social, cultural, economic and political forces not found in the tribal history are at work."²

"Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the Indian heritage."³

INTRODUCTION—BEAR TENZING'S FABLE

Listen.⁴ Imagine that Bear Tenzing is the son of a Nepalese immigrant man who is a steelworker, and a Michigan Ottawa woman who is a university administrator with a Master's Degree in Education. Although they were mostly employed throughout Bear's childhood in Grand Rapids, Michigan, Bear's parents are not wealthy. Bear is forced to pay his own way through college and graduate school at a small private school in northern Indiana. Saddled with considerable debt, he dedicates himself to working for the benefit of Indian Tribes. Like his mother, Bear is a member of a northern Michigan Ottawa Tribe that was federally recognized in the late 1980s. He works for several years with a small organization in northern Wisconsin that provides environmental services and consulting to Wisconsin Indian Tribes. He is paid very little by industry standards. The organization is entirely grant-funded and subject to constant threat of budget line-item elimination. After nearly ten years of employment with the organization, Bear is left unemployed when the federal agency funding dries up.

Within a few months, two Tribal Council Members from his own Tribe in northern Michigan contact him about a new job. He knows these Council Members from various conferences and meet-

2. *Frechette v. Menominee Tribal Enter.*, 24 Indian L. Rptr. 6082, 6083 (Menominee Tribal Ct. Nov. 19, 1995).

3. *In re The Sacred Arrows*, No. CNA-CRM-90-28, 1990 WL 656052 at *3 (Cheyenne-Arapaho Tribes Dist. Ct. July 11, 1990).

4. This fictional narrative is an amalgamation of circumstances surrounding several different employment separation cases litigated by the author in various tribal courts in Arizona, California, Washington, and Michigan.

ings he has attended over the years. Half-heartedly, the Council Members have often joked over the years about bringing Bear to the reservation to work for his own Tribe. This time, when these two Council Members contact Bear, they are serious about recruiting him to fill the Tribal Manager position within the Tribe. This would require Bear to be responsible for the entire Tribal Government operation and to report to the Tribal Council. They tell Bear that they have watched him for several years and have been impressed with the way he handles himself in meetings and conferences. A singular goal of the Tribal Government is to bring back as many Tribal Members as possible, especially those who are educated. As they know Bear has been underpaid working for the nonprofit organization in Wisconsin, they will pay him significantly more.

Bear brings back this news to his partner Emily and tells her that he is excited by the opportunity to return to Michigan. Emily is completing her doctorate in environmental remediation from home. Emily and Bear have been waiting to get married for several years because of the uncertainty of Bear's job at the nonprofit organization. A month later, Bear interviews with the nine members of the Tribal Council at the Tribal administration building. Two days later, the Tribal Council offers him the job as Tribal Manager. In the excitement, Bear and Emily get engaged. They move to northern Michigan to settle down.

Bear's first four months with the Tribe are the best four months of his professional career. He meets distant relatives for the first time and other people that knew him as a small child when his mother helped them through college in her job as a university administrator. The managers he supervises are mostly Tribal Members who get along very well with Bear. He enjoys the work immensely and looks forward to going to the office every morning. Emily meets the Tribe's environmental services director and the fisheries biologists. They help her with her research and take her out onto Lake Michigan to study and collect samples.

But the new job is not entirely fun. One of Bear's responsibilities is the personnel function. As the head of the Tribal Government, Bear must make the final decision when one of his managers recommends the discharge of an employee. Because the vast majority of Tribal Government employees are Tribal Members, these decisions affect many people in the community. Bear adopts a policy of standing in support of his managers and rarely overturns their decisions. Due to a Tribal Court ruling from the early 1990s, the

Tribal Council adopted an internal review board to administratively review all employment discharges. After a discharge, Bear and his manager must present their case to the review board, along with the discharged employee. The board consists of six employees elected by Tribal Government employees and five employees appointed by Bear as the Tribal Manager. Each year, the employees and the Tribal Manager select another panel of board members. At first, the new panelists are excited to be chosen, but the rigors of making decisions that affect such a fundamental part of their colleagues' lives becomes a tremendous burden. No one asks to be reappointed or reelected to the board.

Bear participates in two of these hearings in his first four months. While both of the discharged employees present strong and sometimes emotional defenses, these cases are resolved without much difficulty in favor of Bear and his managers. Neither employee chooses to appeal the decision to the Tribal Court, though each had the opportunity to do so under Tribal law. Bear is sorely shaken by these proceedings that, in his opinion, are unfair to the discharged employee and generally dehumanizing to everyone involved. He realizes how difficult it is for the board members to participate in the hearings and can only imagine how difficult it must be for the discharged employee.

In Bear's fifth month, a particularly nasty dispute erupts between one of his managers and an employee, named Linus Mitchell, who is a close relative of a Tribal Council Member. In fact, the dispute had been festering for several years between these two employees, long before Bear's tenure started. Bear attempts to mediate the dispute, which appears to be based entirely on differences in personality, but without a positive result. A few days after the attempted mediation, the manager approaches Bear with an allegation that the Linus had threatened to deface the manager's automobile. The manager wants permission to fire Linus. Bear again brings Linus in to face the manager. The employee grudgingly admits to making the threat, but states that he has a long history of making these kinds of threats. He states he has never been disciplined for it before and certainly has never carried out the threats. He asserts that people who know him well, including the manager, know that these are empty threats. He concludes by telling Bear that he has been employed with the Tribe since federal recognition in the late 1980s—almost twenty years. Bear points out that the Tribe's personnel policy includes a provision that the Tribe has a zero-tolerance policy regarding threats to person or property. He agrees with the manager that the employee should be discharged. The employee's

discharge is reviewed by the hearing panel and is upheld by a narrow six-to-five vote. The employee hires a major East Coast law firm and files suit in Tribal Court to appeal the decision. The Tribe's general counsel discusses the facts and the law with Bear and assures him that the Tribe has an excellent defense to the appeal although she is very concerned that a large, corporate law firm has taken such an active interest in a small Tribal employment case. Nevertheless, she expects to prevail in the Tribal Court litigation and compliments Bear on his professionalism and attention to procedure.

Shortly thereafter, three Tribal Council Members, including both council members that had recruited Bear to work for the Tribe and a close relative of the employee that Bear had most recently fired, approached Bear for a meeting. Bear is apprehensive about the meeting, but all three assure him that his decision was the correct one and that they will stand by him in the event of a political squabble. Bear relaxes and says that he appreciates their support.

In the sixth month of Bear's employment, a political dispute arises between the three Tribal Council Members who support Bear's work and the remainder of the Council. A few other Council Members argue that the only thing that Bear has accomplished has been the firing of Tribal Members. It is a rhetorical argument, but one that resonates within the Council. Moreover, several of the Council Members do not have college or high school degrees. These council members feel that, at times, Bear and other college-educated employees act condescendingly toward them. Bear learned years ago in his previous job that it is easy for the educated employees to talk over the heads of the less educated Council Members. While he attempts to keep Council Members involved in meetings on complicated policy and legal issues, Bear has noticed their continuing frustrations with him and his staff. At a closed session of the Tribal Council, although three Members argue vehemently for Bear, the remainder of the Council votes to discharge him.

Bear is devastated. He considers letting the issue go and finding another job, but in the six months he worked for the Tribe, he and Emily have developed a strong attachment to the community. They have bought a house, made many friends, and want to stay within the tribal community. Emily's time spent with the Tribal biologists has significantly improved her dissertation work. Bear has cultivated relationships with distant relatives who have vast knowledge about his family's past. Bear files an appeal with the internal review

board. The Tribal Council responds before the hearing with a letter stating that the board will not convene to hear Bear's appeal because Bear's discharge was a political decision not subject to review by the board. After a long discussion with Emily, Bear looks up an old friend who is an attorney in Grand Rapids and asks her to represent him in a Tribal Court lawsuit.

Five months later, Bear is still unemployed but he is considering an offer to move to Washington State to become a manager for an inter-tribal organization. He does not want to leave Michigan after nearly a year in the community, but his funds are nearly gone. His attorney, Veronica Hurst, is acting on a pro bono basis, hoping to win attorney fees from the court if Bear prevails. After Veronica files the complaint in Tribal Court, the Court grants the Tribe an extra sixty days to respond. For Bear, the wait is intolerable. The Tribe eventually responds with a motion to dismiss for failure to state a claim and asserts sovereign immunity as a defense. Bear and Veronica go to the Court for the hearing and, while waiting outside the courtroom for another hearing to end, Bear bumps into Linus Mitchell, who is dropping off a pleading of his own at the court.

After introduction rendered uncomfortable because of their previous professional dispute, Bear and Linus begin to talk. Linus says that his appeal hearing is scheduled for the following week. His case has been going on two months longer than Bear's case and his unemployment insurance has run out. Linus says that the Tribe offered to rehire him at a different job with a lower rate of pay if he would agree to drop the appeal. His big city attorneys withdrew from the case after the Tribal Court ruled that while Linus would be entitled to reinstatement if he won, he was not entitled to tort damages or back pay. Linus says he went through the same process seven years earlier when another Tribal Manager fired him. In that case, it took eleven months after filing the complaint before Linus received a decision from the Tribal Court. When Linus won, the Tribe appealed to the Tribal Court of Appeals. Linus had to wait another nine months before the Court of Appeals affirmed his victory. By then, the Tribe had to give him his job back and pay him twenty months back pay, benefits, and interest. Shortly thereafter, the Tribal Council changed the law to prohibit back pay awards. Although Linus eventually received a check for almost \$90,000, he was broke for two years. He lost his car, his house, and had to move in with his sister and her family. In the end, Linus had to go back to work for the man who fired him in the first place—the very same man who had just convinced Bear to fire Linus again a second time.

Bear's hearing went badly. He could tell that the court wasn't agreeing with any of Veronica's arguments about piercing the veil of sovereign immunity. Four months later, the judge issued a decision that while she agreed with Bear's attorney that the Tribe should not have denied him an appeal, she could not force the Tribe to act since it had asserted its sovereign immunity. By then, Bear had already relocated to Washington to work in Spokane, 2500 miles from home. He didn't want to face the people who had decided his fate, and he was sure they didn't want to face him either. He never heard whether Linus succeeded in being reinstated.

There is not a happy ending to this story, only a middling, unsatisfactory conclusion. The story serves to provide an overview of many of the issues that arise in employment discharges in Indian Country.⁵ As stated by the Grand Traverse Band Tribal Court, "The intent is not [to] be critical, but to provide a fair and objective analysis of how our tribal government really operates, in order for [Tribal policymakers] to make informed decisions that are consistent with reality."⁶

This Article discusses the difficulty of employment separations⁷ in Indian Country. The central premise of this Article is that Euro-American law and jurisprudence is uniquely unsuited to Indian Tribes and Tribal Courts. The result of the implementation of employment separation law and jurisprudence by Tribes and Tribal Courts is unnecessary litigation and emotional suffering. Part I of this Article describes the characteristics of employment with Indian Tribes and Tribal organizations. Tribes are usually close-knit communities that generally employ a significant percentage of Tribal Members. Part II describes the legal structures required by the Euro-American legal system as imposed on Indian Tribes and considers

5. Few legal commentators delve into this area of the law—Tribal employment law as applied in Tribal Courts. See, e.g., Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003); Kaighn Smith, Jr., *Civil Rights and Tribal Employment*, 47 FED. LAW. 34 (2000); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998). Only two articles focus exclusively on this area. See Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359 (1993); G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267 (1996).

6. *Adams v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Auth.*, No. 89-03-001-CV, slip op. at 4-5 (decision on motion to dismiss) (Grand Traverse Band Tribal Ct. June 18, 1992) (on file with University of Michigan Journal of Law Reform).

7. For purposes of this Article, the term "employment separation" includes involuntary termination of employment through discharge, constructive discharge, firing, and lay-off.

how these structures create significant legal problems for Tribes and social problems for Indian communities. Part III analyzes the Tribal law of sovereign immunity as it applies to lawsuits by discharged employees in Tribal Courts. Part IV proposes a number of solutions to reduce harms associated with employment separations. Since most Tribes have adopted significant portions of Euro-American law and jurisprudence, a blanket restructuring of Tribal legal systems would be extremely difficult. This proposal cuts through many of the problems associated with adjudicating Tribal employment separation disputes.

I. THE ENIGMA OF EMPLOYMENT WITHIN INDIAN TRIBES

Each year, more and more people are employed by Indian Tribes⁸ and Tribally-chartered organizations such as housing authorities,⁹ community colleges,¹⁰ health care centers,¹¹ utilities,¹² corporations,¹³ and business enterprises.¹⁴ Indians and non-Indians are increasingly operating businesses and employing individuals within Indian Country.¹⁵ Tribal governments may also delegate authority to employ individuals to subordinate organizations such as

8. See, e.g., *Callegos v. Jicarilla Apache Nation*, No. 02-2347, 2003 WL 22854632, at *3 (10th Cir. Nov. 28, 2003) (discussing Tribe's employment of police officer); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707 (1st Cir. 1999) (discussing Tribe's employment of nurse), *cert. denied*, 527 U.S. 1022 (1999).

9. See, e.g., *Equal Employ. Opp. Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1073-74 (9th Cir. 2001) (discussing Indian housing authority employment); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 119 F.3d 1123, 1124 (10th Cir. 1999) (discussing Indian housing authority chartered as state agency).

10. See, e.g., *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1042 (8th Cir. 2000) (discussing a tribally-chartered community college).

11. See, e.g., *NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995, 997 (9th Cir. 2003) (discussing an Indian health advisory board that operated an Indian health clinic); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 930 (7th Cir. 1989) (discussing a health care center owned and operated by a Tribe).

12. See, e.g., *Navajo Tribal Util. Auth. v. Ariz. Dept. of Revenue*, 608 F.2d 1228, 1229 (9th Cir. 1979) (discussing a utility owned by Tribe).

13. See, e.g., *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1105 (Ariz. 1989) (discussing a construction company incorporated under Tribal law).

14. See, e.g., *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1127 (11th Cir. 1999) (discussing a restaurant and entertainment facility owned by a Tribe); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 658 (9th Cir. 1989) (discussing a timber company owned by Tribe); *Indian Country U.S.A., Inc. v. State of Okla. ex rel. Okla. Tax Commission*, 829 F.2d 967, 970 (10th Cir. 1987) (discussing a Tribe's bingo operations); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 66 (Cal. Ct. App. 1999) (discussing a casino owned by Tribe).

15. See, e.g., *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1189 (10th Cir. 2002) (discussing a lumber company operated on lands leased from San Juan Pueblo).

housing authorities.¹⁶ There are over 560 federally recognized Indian Tribes and hundreds of Tribal organizations,¹⁷ each with varying governmental and enterprise structures.

As Tribal employment grows, so do the problems associated with personnel disputes.¹⁸ Since few, if any, state laws and regulations govern Tribal employment relationships,¹⁹ the Tribe must prepare its own statutory and regulatory structures. Tribal organizations typically prepare and adopt personnel guides, handbooks, manuals, policies, regulations, and statutes to govern employment relationships. If the Tribe is newly recognized or is chartering an organization, these documents must be prepared quickly.

In many ways, Tribal governments and organizations operate in ways similar to a non-tribal employer such as a local government or a privately held corporation. There is a hierarchical structure to most Tribal governments evidenced in the Tribal Constitutions, particularly those constitutions imposed upon the Tribes by the Department of the Interior. These so-called "IRA constitutions," were developed by the Department of the Interior when Tribes began to reorganize in accordance with the 1934 Indian Reorganization Act ("IRA").²⁰ Interior officials consciously developed the IRA constitutions to follow the model of a municipality with its concomitant limitations on governmental powers.²¹ However, the

16. See, e.g., *Grand Traverse Band of Ottawa & Chippewa Indians v. Grand Traverse Band Hous. Entity*, No. 98-07-238-CV, slip op. at 1-2 (decision on application for injunctive relief) (Grand Traverse Band Tribal Ct. Aug. 14, 1998) (on file with University of Michigan Journal of Law Reform).

17. See *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 68 Fed. Reg. 68180 (Dec. 5, 2003).

18. See *Limas*, *supra* note 5, at 359 (discussing the increase in employment suits in tribal courts); see also Lou Hirsh & Jim Sams, *Tribal Employment is Growing*, DESERT SUN (Las Vegas, Nev.), June 2, 2004, at E1, available at 2004 WL 64246924 (reporting that tribal employment was up nearly 17 percent).

19. See 42 U.S.C. § 2000e(b) (1964) (excluding Indian tribes from the Civil Rights Act of 1964); 42 U.S.C. 12111(5)(b)(1) (1990) (excluding Indian tribes from the Americans with Disabilities Act); *Equal Employ. Opp. Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) (interpreting the Age Discrimination in Employment Act to not apply to Indian tribes).

20. See *Wheeler-Howard Act* (Indian Reorganization Act), ch. 576, 48 Stat. 984 (1934).

21. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 90 (3rd ed., Southern Ill. Univ. Press 2002). Pevar explains:

The Secretary was directed by the [IRA] to approve constitutions that created a tribal council possessing the authority to employ legal counsel; negotiate contracts with federal, state, and local governments; and prevent the disposition of tribal property without the tribe's permission. The Secretary encouraged tribes, in addition, to give their councils the power to borrow money and pledge tribal property as security for loans; to levy and collect taxes and impose licenses; to establish a tribal court system and enact a criminal code; to remove from the reservation nonmembers whose

hierarchical structure imposed on the Tribes did not resemble the more traditional, non-hierarchical forms of government utilized by the Tribes at that time.²²

The IRA Constitutions focus on the Tribal Council as the leadership of the Tribe, much like a Board of Directors is the head of a corporation. Members of the Tribe are similar to shareholders in a corporation. Tribe Members have the power to vote for the leadership. In some Constitutions, the Members meet each year as a General Council with the authority to enact legislation. Usually, the Constitution provides for a Chief Executive Officer, such as a Chairman, a President, a Chief, or an Ogema. In most instances, the Constitutions create a separation of powers between the Chief Executive and the Legislature.²³ Generally, but not always, the Constitutions allow for the creation of a Tribal Court by the Tribal Council.²⁴ More recent Constitutions following the IRA model create a Tribal Court as a separate entity, similar to the United States Constitutional model.²⁵

Depending on the government model, personnel decisions fall into the hands of one of a number of tribal leaders. In Constitutional governments following the three-headed branch of government model, personnel decisions are an executive function. If there is a separation of powers between the Executive and the Legislative, then the Chairman or Ogema will make the final decisions on personnel questions. If there is no separation, then the

presence was injurious to the tribe; and to create subordinate tribal organizations for economic, educational, or other purposes.

Id. (footnote omitted).

22. See *id.* at 90–91. Pevar further explains:

[T]he IRA was enacted with little input from tribes, and those tribes that adopted IRA constitutions had to follow a model that created a government acceptable to non-Indian leaders in Washington. For many tribes, the IRA has resulted “in the concentration of power [in the hands of a few people] that had not previously existed” and in the adoption of a government that often ignores “the unique governing traditions and structures of the Indian nation.”

Id. (quoting Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL’Y 72, 84 (1997); Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL’Y 97, 98 (1999)).

23. See PEVAR, *supra* note 21, at 91.

24. Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 10–33 (1979).

25. See, e.g., GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS CONST. art. V (Tribal Judiciary), § 1 available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (on file with the University of Michigan Journal of Law Reform).

Tribal Council has the final say.²⁶ At some point, it is extremely likely that the elected members of the Tribal Executive and Legislative branches will make a decision to opt out of day-to-day personnel decisions. Most Tribes enact a statute or regulation providing for a clear line of authority as to personnel decisions. The Tribal policymakers might delegate their personnel authority to either the head employee, often called the Tribal Manager, or the personnel department manager.²⁷ Or they might not.

A. Employment of Tribal Members

The majority of employees working for Indian Tribes are often Tribal members.²⁸ In fact, Tribal member employment is often cited as a critical side-benefit to the Congressional and Presidential policy of self-determination for Indian tribes.²⁹ One example of the importance of Tribal employment to Tribal members is the Turtle Creek Casino:

In fiscal year 2001, Turtle Creek provided approximately 89% of the [Grand Traverse Band of Ottawa's gaming revenue. The casino now employs approximately 500 persons, approximately half of whom are tribal members. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region,

26. See generally Newton, *supra* note 5, at 346 ("Judicial review is a relatively new phenomenon in tribal courts." (footnote omitted)).

27. See, e.g., Hawkins v. Grand Traverse Band of Ottawa & Chippewa Indians, No. 98-14-148-CV, slip op. at 4 (decision on motion for summary disposition) (Grand Traverse Band Tribal Ct. Feb. 7, 2000) (on file with University of Michigan Journal of Law Reform).

28. See Brief of Amici Curiae Grand Traverse Band of Ottawa & Chippewa Indians et al. at 14-15, Taxpayers of Mich. Against Casinos v. State, 685 N.W.2d 221 (Mich. 2004) (No. 122830), available at <http://courts.michigan.gov/supremecourt/Clerk/03-04/122830/122830-Amicus-GrTraverse.pdf> (on file with University of Michigan Journal of Law Reform).

29. See generally WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 29-33 (4th ed. 2004).

and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans.³⁰

One reason that so many Tribal members work for Tribal employers is that federal law permits Indian Tribes to initiate Indian preference policies that allow Tribes to grant a hiring and employment preference to Indians.³¹ This preference extends to businesses operating on or near an Indian reservation.³² Many Tribes also extend a preference to Tribal Members over non-Member Indians.³³

More and more Tribal Members are entering college and professional schools and graduating with advanced degrees. Federal recognition of Indian Tribes and the enactment of statutes such as the 1975 Indian Self-Determination and Education Assistance Act³⁴ allow Indian Tribes to financially support Tribal Member pursuits in higher education. Affirmative action programs provide additional opportunities for Tribal Members to enroll in universities and graduate programs.³⁵ As such, many Tribal Members return to their own reservations with college and professional degrees. Still other Indians with degrees work for Indian Tribes that are not their own.³⁶ In the last few decades, there has been a dramatic upswing in the number of educated Indians, many of them working for Indian Tribes.³⁷

30. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Att'y for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

31. *See, e.g., Baldwin v. Ho-Chunk Nation*, No. CV 01-16, slip op. at 4-7 (Ho-Chunk Nation Trial Ct. Oct. 3, 2003) (stating Ho-Chunk Nation's preference policy), available at http://www.ho-chunknation.com/government/judicial/opinions/2003/CV%2001-16,%2019,%2021%20Order%20_Final%20Judgment_.pdf (on file with University of Michigan Journal of Law Reform); *DeSouza v. Mashantucket Pequot Tribe*, 31 Indian L. Rptr. 6015, 6015-16 (Mashantucket Pequot Tribal Ct. Dec. 29, 2003) (discussing Indian Preference Policy of Mashantucket Pequot Gaming Enterprise); *Smith v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rptr. 6256, 6257 (Confederated Salish & Kootenai Tribes of Flathead Reservation Ct. App. Aug. 8, 1996).

32. *See, e.g., Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1153 (9th Cir. 2002) (discussing Navajo Nation's tribal preference policy as applied to on-reservation, non-Indian owned entities).

33. *Id.*

34. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C.)

35. *See generally* Brief of Amici Curiae University of Michigan Asian Pacific American Law Students et. al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *reprinted in* 10 MICH. J. GENDER & L. 7 (2003).

36. *See generally* Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253 (2002-03).

37. *See* Tom Carr, *GT Band Applauds Diversity Ruling: Race-based policies have made difference*, TRAVERSE CITY RECORD-EAGLE, June 25, 2003, available at <http://www.gtherald.com/2003/jun/24band.htm> (on file with University of Michigan Journal of Law Reform).

Most Tribal Members employed by a Tribe are ingrained in the community. Many were born and raised in the community. They typically have several generations of relatives living in the area. The adult employees of a Tribe likely grew up with the members of the Tribal Council and may themselves be former or future Tribal Council Members. They know each other intimately: their strengths and weaknesses, their relations, and their "skeletons." In many ways, the situation is no different from a small town where the chief of city police is the wife of the vice-chairman of the city council and the first cousin of the town mayor.

There are incredible advantages to such close-knit circumstances. Tribal Members live and grow up together. They work together and they either stand or fall together. The Tribal Council and the front-line employees realize almost instantly the impact that their decisions have on the community. When a Tribal Member makes a decision, it is his or her neighbor that will ask for a justification the next day. Tribal policy-makers must make decisions concerning local issues such as sewage and snowplowing, economic development issues such as the viability of developing land for a casino or an industrial park, and big picture issues such as lobbying Congress to devote more funds to all Tribes and to strike down anti-Tribe legislation proposed yearly. It is likely that no other government with as much responsibility as a Tribal government is as accountable to its constituents.³⁸

Contrast a Tribal government employer to a large corporate board of directors. A Tribal government employer must continually justify itself to its employees, many of whom will vote periodically in Tribal Council elections. A corporate board of directors may have to respond to thousands of shareholders, but few of these shareholders will be able to successfully pierce the corporate veil or force a board to be more accountable.³⁹ Most often, members of a board of directors will not have to go home to the same neighborhood as their front-line employees, or even the same city or state if the corporation is large enough.⁴⁰ Tribes exist to provide a conduit

38. Cf. Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 975 (2000) (noting that tribal constituencies routinely confront tribal government on a variety of levels).

39. See generally JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 254 (5th ed. 2000) (describing the piercing of the corporate veil as "complex"); William O. Douglas & Carroll M. Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L. J. 193, 193 (1929) (noting that "the desire for limited liability has played its part in increasing the use of the corporate device").

40. See generally Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine at 33) (arguing that corporate executives must "act

for direct governmental services to Members, services such as housing, health care, education, social services, and even employment. Meanwhile, corporations exist to make a profit. The United States Congress enacted the Fair Labor Standards Act,⁴¹ the Indian Civil Rights Act of 1968,⁴² the National Labor Relations Act,⁴³ and other remedial pro-employee statutes because corporations and other employers are not accountable to their employees and cannot be trusted, on the whole, to treat employees fairly.⁴⁴ While some critics complain that Tribes do not have adequate labor laws or employment protection laws,⁴⁵ there is a remedy in place. If Tribal Council Members victimize employees, they can expect to be removed from the political process.⁴⁶

B. Employment of Non-Members

Indian Tribes also employ increasing numbers of non-Tribal Members.⁴⁷ Many of these non-Tribal Members are Indians from other Indian Tribes who have married into the community or who have become part of the community in some other way.⁴⁸ However, a significant number of these employees are non-Indians.⁴⁹ As tribal governments grow, fueled by federal and state grants and funding and by improving tribal business enterprises, many tribes

in some way that is not in the interest of his employees”), reprinted in CHOPER ET AL., *supra* note 39, at 37.

41. See 29 U.S.C. § 201 *et seq.* (2000).

42. See 25 U.S.C. § 1301 *et seq.* (2000).

43. See 29 U.S.C. § 151 *et seq.* (2000).

44. See, e.g., HOWARD ZINN, *THE POLITICS OF HISTORY* (Beacon Press 1970).

45. See Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought By Non-Native American Employees of Tribally Owned Businesses*, 25 FLA. ST. U. L. REV. 679 (1998).

46. E.g., *Kinslow v. Bus. Comm. of the Citizen Band Potawatomi Indian Tribe of Okla.*, 15 Indian L. Rptr. 6007, 6009 (Citizen Band Potawatomi Indian Tribe of Okla. Sup. Ct. Feb. 17, 1988) (discussing removal of Tribal Council Vice-Chairman for allegedly “intimidating a tribal security guard”); *In re Reyn Leno*, 27 Indian L. Rptr. 6213, 6213–14 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. May 12, 2000) (discussing Tribal Council Vice-Chairman’s removal from Council due to his intimidation, threatening, and coercing of Tribal employees).

47. See Brief of Amici Curiae Grand Traverse Band of Ottawa & Chippewa Indians et al. at 15–16, *Taxpayers of Mich. Against Casinos v. State*, 685 N.W.2d 221 (Mich. 2004) (No. 122830), available at <http://courts.michigan.gov/supremecourt/Clerk/03-04/122830/122830-Amicus-GrTraverse.pdf> (on file with University of Michigan Journal of Law Reform).

48. See L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 59 (1994).

49. E.g., *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Att’y for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004).

simply do not have enough Tribal Members to fill all of their employment slots.⁵⁰ Tribal government jobs are usually better jobs than those that private employers offer.⁵¹ In the author's experience, Tribal employees maintain better relationships with co-workers and the employer.

In spite of the generally positive working relationship between Tribal employers and their employees, the rise in non-Indian employment creates legal problems in the application of employment law such as jurisdiction, choice of law, and legal procedure. Tribes applying the law presented by the dominant society may create inequities. For example, federal law often treats Tribal Members, non-Tribal Members, and non-Indians differently.⁵² Some Tribal Courts have concerns that Tribes might treat non-Member or non-Indian employees differently than Tribal Member employees. One court wrote:

If we are to develop a good system for tribal members who are employees of the Tribe, the system must provide for all employees. Justice must be blind to the membership/non-membership, Indian/non-Indian identity status of those who apply to the tribal courts for relief.⁵³

C. Tribal Government Employment

Not only is it analogous in some ways to a corporate board of directors, but Tribal government employment also has many of the same characteristics of employment in federal, state, or local government. The chief similarity, for the purposes of this Article, is

50. See generally Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law*, THE BRIEF, Fall 2002, at 64.

51. See *Grand Traverse Band of Ottawa & Chippewa Indians*, 198 F. Supp. 2d at 924 ("The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans.").

52. See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding Bureau of Indian Affairs policy incorporating Indian preference in employment); *Livingston v. Ewing*, 455 F. Supp. 825 (D. N.M. 1978) (upholding state-owned museum policy of allowing tribal members to sell goods on the property while excluding all others), *aff'd*, 601 F.2d 1110 (10th Cir. 1979).

53. *Sliger v. Stalmack*, No. 99-10-490-CV, slip op. at 3 (decision on motion for summary disposition) (Grand Traverse Band Tribal Ct. Dec. 8, 1999) (on file with University of Michigan Journal of Law Reform), *withdrawn on reh'g*, No. 99-10-490-CV, slip op. at 4 (Grand Traverse Band Tribal Ct. Feb. 14, 2000) (on file with University of Michigan Journal of Law Reform).

that all four are governments subject to limitations in their ability to deprive an individual of property without due process. At the constitutional level, the Fifth Amendment constrains the federal government's ability to terminate an individual's employment,⁵⁴ and the Fourteenth Amendment constrains states and localities.⁵⁵ The Indian Civil Rights Act (ICRA)⁵⁶ and, often, Tribal constitutions constrain the Tribes. As such, Tribal government employees typically can be discharged only for "just cause."⁵⁷ "The term 'just cause' is broad, and it encompasses a wide range of employer justifications for adverse action."⁵⁸

D. Tribal Enterprise Employment

An exception to the general rule that Indian Tribe employees may only be dismissed for "just cause" is employment with an Indian Tribe's economic development arm. Because it needs to function effectively in the business world, the Tribal economic development corporation "must be able to make sound business decisions based solely upon business considerations."⁵⁹ Many tribal businesses will treat employees as "at will" employees, whereas most tribal governments treat employees as "just cause" employees.

While at least one Tribal Court has asserted in dicta that the failure to treat Tribal government employees and Tribal enterprise employees the same may constitute an equal protection violation,⁶⁰

54. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

55. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

56. 25 U.S.C. §§ 1301–31 (2000).

57. *E.g.*, *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No.95-067-048-CV, slip op. at 2 (Grand Traverse Band Tribal Ct. July 20, 2001) (on file with University of Michigan Journal of Law Reform) ("This Court finds that the Defendant had just cause to terminate the employment of the Plaintiff . . ."); *White v. Ho-Chunk Nation*, 24 Indian L. Rptr. 6182, 6185 (Ho-Chunk Nation Trial Ct. Oct. 14, 1996). *Cf.* *Safe Ride Services, Inc. v. Todachine*, 23 Indian L. Rptr. 6253, 6253–54 (Navajo Nation Sup. Ct. Aug. 28, 1996) (holding that termination of employment without just cause by an Arizona corporation doing business on the reservation violated Tribal law).

58. *Smith v. Red Mesa Unified School District No. 27*, 22 Indian L. Rptr. 6104, 6106 (Navajo Nation Sup. Ct. May 25, 1995). See also *Schwab v. CTEC*, 21 Indian L. Rptr. 6027, 6028 (Confederated Tribes of Colville Reservation Admin. Ct. Jan. 3, 1994) ("'For cause' must be a cause related to [the employee's] ability to perform his job or a reduction in force in order not to be arbitrary and capricious.").

59. *Adams v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Auth.*, No. 89-03-001-CV, slip op. at 1–2 (decision on motion to dismiss) (Grand Traverse Band Tribal Ct. June 18, 1992) (on file with University of Michigan Journal of Law Reform).

60. See *Rhode v. Garvin*, No. CV 00-39, slip op. at 17 (Ho-Chunk Nation Trial Ct. Aug. 24, 2001), available at <http://www.ho-chunknation.com/government/judicial/opinions/>

most Tribal courts view employment with a Tribal enterprise as substantially different from employment with a Tribal government. As such, following Tribal law, Tribal Courts will uphold the discharge of Tribal enterprise employees whenever there is a rational basis for the discharge.⁶¹

II. THE PARADOX OF ANGLO-AMERICAN STRUCTURES DESIGNED TO PROTECT TRIBAL EMPLOYEE RIGHTS

Tribal employment separation law develops differently in each Tribe and Tribal organization. The Constitution or other government documents, such as corporate charters, initiate the development of employment separation law. Tribes and Tribal organizations generally have several mechanisms in place, such as personnel policies, handbooks, and manuals—with widely varying provisions for employment within the different entities.⁶² These may or may not be expressly enacted or ratified by the Tribal Council or the board or commission that oversees a Tribally chartered organization. Some Tribal Courts may order the Tribal

Rhode%20vs.%20Garvin%20CV00-39.pdf (on file with University of Michigan Journal of Law Reform).

61. See *Olderman v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rptr. 6266, 6269 (Mashantucket Pequot Tribal Ct. Ap. 30, 1999); *Navarro v. Mashantucket Pequot Gaming Enter.*, 24 Indian L. Rptr. 6217, 6218–19 (Mashantucket Pequot Tribal Ct. May 7, 1996); *O'Neal v. Mashantucket Pequot Gaming Enter.*, 24 Indian L. Rptr. 6103, 6103–04 (Mashantucket Pequot Tribal Ct. Mar. 7, 1996); *Quattromani v. Brown*, 24 Indian L. Rptr. 6080, 6081 (Mashantucket Pequot Tribal Ct. July 31, 1995); *Romano v. Brown*, 24 Indian L. Rptr. 6082, 6082 (Mashantucket Pequot Tribal Ct. July 5, 1995); *Mitchell v. Brown*, 23 Indian L. Rptr. 6215, 6218 (Mashantucket Pequot Tribal Ct. July 5, 1995).

62. Cf., e.g., *Cholka v. Ho-Chunk Gaming Comm'n*, 23 Indian L. Rptr. 6075, 6078 (Ho-Chunk Nation Tribal Ct. Feb. 5, 1996) (ordering the gaming commission to distribute its gaming ordinance to gaming employees). Some Tribal Courts are agnostic on the subject of personnel manuals. One court wrote:

In order to serve this tribal community, the Court must be able to do justice, even when parties can not afford attorney representation. That goal is nowhere more apparent, than in cases like the instant one, where 'the deck may be stacked' in favor of the Tribe by its own design. The Tribe has drafted the Personnel Policy and always has attorney representation. Design principles of good government provide counter-balance through a system of 'checks and balances'. There must be protections against the abuse of power.

Sliger v. Stalmack, No. 99-10-490-CV, slip op. at 3 (decision on motion for summary disposition) (Grand Traverse Band Tribal Ct. Dec. 8, 1999) (on file with University of Michigan Journal of Law Reform), *withdrawn on reh'g*, No. 99-10-490-CV, slip op. at 4 (Grand Traverse Band Tribal Ct. Feb. 14, 2000) (on file with University of Michigan Journal of Law Reform).

government to publish a personnel handbook containing objective personnel policies.⁶³ Other Tribes may already have employment separation statutes enacted by the Tribe's legislature. Most Tribes have Tribal Courts, while some Tribes, generally very small ones, utilize the Tribal Council as the judicial decision-maker.

*A. Anglo-American Model of Government
Employee Separations*

Simply put, under federal law, due process requires notice and an opportunity to be heard.⁶⁴ The classic description of the factors that determine what process is due under the federal constitution is contained in *Mathews v. Eldridge*.⁶⁵

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest⁶⁶

The most critical and persuasive United States Supreme Court case in the area of government employee termination rights is *Cleveland Board of Education v. Loudermill*.⁶⁷ In *Loudermill*, the Supreme Court detailed the analysis for determining whether the termination process afforded a governmental employee was adequate. First, the Court held, the government employee must show that she had a reasonable expectation of continued employment such that the expectation could constitute a form of property.⁶⁸ Second, if there was a property interest, then the government "could not deprive [her] of this property without due process."⁶⁹ As the Court explained, the "root requirement" of due process is that

63. *E.g.*, *Strickland v. DeCouteau*, 31 Indian L. Rptr. 6021, 6021 (Turtle Mountain Tribal Ct. Nov. 25, 2003).

64. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1949).

65. 424 U.S. 319 (1976).

66. *Id.* at 335.

67. 470 U.S. 532 (1985).

68. *See id.* at 538.

69. *See id.* (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975)).

"an individual be given an opportunity for a hearing. . . ." ⁷⁰ What is adequate under this "pre-deprivation" or "pre-termination" hearing standard is unclear, only that "some kind of hearing" suitable to the circumstances be available. ⁷¹ As the Court wrote, "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." ⁷² This pre-termination hearing is required as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." ⁷³ Finally, the Court held that at the pre-termination hearing, each "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." ⁷⁴ As long as a post-termination forum is available, ⁷⁵ the *Loudermill* criteria are all that is required of the government employer prior to termination.

The *Loudermill* Court applied the *Mathews v. Eldridge* test and based its decision on numerous factors, weighing the interests of both the employee and the employer. In making its decision, the Court discussed several underlying factors and policy considerations. First, retention of employment is a critical right. "While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." ⁷⁶ Second, both the employee and the employer have an interest in ensuring that the factual predicate for the dismissal is valid. With an opportunity to tell her side of the story, an employee may compel the employer to reconsider "the appropriateness or necessity of the discharge." ⁷⁷ Third, the government has an interest in keeping a qualified employee on rather than training a new one. ⁷⁸ Finally, and perhaps most importantly for Tribal governments, "[a] governmental employer also has an interest in keeping citizens usefully employed

70. *Id.* at 542 (quoting *Boddie v. Conn.*, 401 U.S. 371, 379 (1971)).

71. *See id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972)).

72. *Id.* at 545 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)).

73. *Id.* (citing *Bell v. Burson*, 402 U.S. 535, 540 (1971)).

74. *Id.* at 546 (citing *Arnett v. Kennedy*, 416 U.S. 134, 170–71 (1974) (Powell, J.)).

75. *Loudermill*, 470 U.S. at 545–56. *See generally* *Gilbert v. Homar*, 520 U.S. 924, 935 (1997) (discussing need for post-deprivation hearing).

76. *Loudermill*, 470 U.S. at 543 (citing *Lefkowitz v. Turley*, 414 U.S. 70, 83–84 (1973)).

77. *Id.*

78. *Id.* at 544.

rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls."⁷⁹

B. Adopting the Loudermill Formulation

With few exceptions, Indian Tribes experience excessive difficulty with employment separations. Most Tribal governments are relatively new and inexperienced. In an early opinion of the fledgling Grand Traverse Band Tribal Court, long-time Chief Judge Michael Petoskey described the growth of the Grand Traverse Band:

It is particularly instructive at the beginning [of] this decision to reflect upon the general course of conduct by tribal government. . . . In fact, it is a product of the Tribal Constitution that was adopted by tribal membership early in 1988, which was only four years ago. The federal government ignored the sovereign status of the Tribe from the treaty days until federal recognition in May of 1980. After recognition in 1980 and prior to the 1988 Constitution, an interim Tribal Council carried out most governmental activity. Prior to May 1980 few community resources were available to fund governmental activity. These realities give substance to a backdrop that provides the appropriate context in which to view the facts that give rise to the matter in controversy here. That backdrop makes it clear that the government of the Grand Traverse Band is new and in the process of development. Our new government is much more reactive than proactive. It engages in activities that gain their primary priority because they are of immediate concern or consequence. Tribal government is in its earliest stages of development. It is incomplete and inexperienced. History has not yet provided many lessons. This is the context of the present case.⁸⁰

Judge Petoskey also had occasion to write about the even newer Tribal government at the Little Traverse Bay Bands of Odawa Indians:

79. *Id.*

80. *Adams v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Auth.*, No. 89-03-001-CV, slip op. at 2 (decision on motion to dismiss) (Grand Traverse Band Tribal Ct. June 18, 1992) (on file with University of Michigan Journal of Law Reform).

From the outset, it should be noted that the Little Traverse Bay Bands tribal government is in an early stage of development. During this early stage, there will be many challenges faced by the community and its government. Among such challenges are the following: the lack of a clear understanding and definition about the appropriate roles and authority of various governmental institutions; the lack of a fully-developed government and service infrastructure, including the express adoption of rules, policies and procedures; and the lack of experience and training of various officials and staff. These challenges, in particular, contribute to the community learning from its experiences, conflicts and mistakes. None of this should be unexpected. After all, this exercise of tribal self-government by the community is relatively new. It is said that "one who makes no mistakes is doing nothing" and that "the price of unwillingness to take any risk because there is fear of making a mistake is to do nothing." All of us must have empathy and patience for each other, as we engage in the development of tribal community and its government. We will make mistakes along the way. The important thing is that we strive to not make mistakes, and that we learn from them when they are made.⁸¹

Personnel decisions are extremely complicated in any context, but in a Tribal government and Tribal community context where so many people are related to each other and because tribal employers are relatively inexperienced in personnel decisionmaking, they are next to impossible to make faultlessly. Mistakes will be made. Personnel matters are a fundamental element of running a Tribal government and cannot be escaped entirely, only minimized. Consequently, personnel matters tend to appear again and again in Tribal Courts. Just as state courts are inundated with criminal drug cases and federal courts are inundated with prisoner tort cases and habeas petitions, Tribal Courts are inundated with personnel cases.

Many tribal courts adopt *Loudermill's* principles. As such, Tribal employment separation cases generally go through two stages—the administrative hearing stage and the Tribal Court stage. Part C discusses the procedures and issues involved with these two levels of review.

81. *Naganshe v. Little Traverse Bay Bands of Odawa Indians Election Bd.*, No. C-017-0599, slip op. at 1–2 (Little Traverse Bay Bands Tribal Ct. June 18, 1999) (on file with University of Michigan Journal of Law Reform).

C. Pre-Termination Hearing—Administrative Review

Mirroring federal and state public employment law, Tribal governments are constrained by due process protections and other constitutional rights protections.⁸² As such, prior to finalizing an employment termination, Tribal governments usually provide pre- or post-termination due process in the form of a hearing.⁸³ In some instances, the Tribal Court finds that the Indian Civil Rights Act requires a hearing.⁸⁴ In other instances, even where the Tribal government has eliminated any administrative review process, a Tribal Court might find that it must stand in the place of an administrative review panel.⁸⁵

82. See *Synowski v. Confederated Tribes of Grand Ronde*, No. C-00-11-003, slip op. at 5–6 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Oct. 3, 2001) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)), available at <http://www.grandronde.org/court/PublishedOpinions/SynLewRam.PDF> (on file with University of Michigan Journal of Law Reform), *aff'd*, No. A-01-10-001 (Confederated Tribes of Grand Ronde Cmty. of Or. Ct. App. Jan. 22, 2002), available at <http://www.grandronde.org/court/PublishedOpinions/SynowskiAppeal.PDF> (on file with University of Michigan Journal of Law Reform); *Baker v. Spirit Mountain Casino*, 28 Indian L. Rptr. 6079, 6080 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Sept. 28, 2000); *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶¶ 37, 42 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995), available at www.tribalresourcecenter.org/opinions/opfolder/1995.NAMP.0000026.htm (on file with University of Michigan Journal of Law Reform) (citing *Loudermill*, 470 U.S. at 538), *aff'd*, 25 Indian L. Rptr. 6011 (Mashantucket Pequot Ct. App. June 11, 1996).

83. *E.g.*, *McFall v. Victories Casino*, No. A-002-1102, slip op. at 1 (Little Traverse Bay Bands Ct. App. June 9, 2003) (on file with University of Michigan Journal of Law Reform) (discussing employee's recourse to the Victories Casino Grievance Panel); *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6004–05 (Hoopa Valley Ct. App. Sept. 27, 1993) (discussing employee's recourse to the Tribal Employee Rights Ordinance Commission); *Fall v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 03-04-308-CV, slip op. at 1 (ruling on motion to dismiss) (Grand Traverse Band Tribal Ct. June 26, 2003) (on file with University of Michigan Journal of Law Reform) (discussing employee's recourse to Administrative Appeals Board); *Baker v. Spirit Mountain Casino*, 28 Indian L. Rptr. 6079, 6080 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Sept. 28, 2000) (discussing employee's recourse to Internal Review Board); *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶ 14 (Mashantucket Pequot Tribal Ct., Dec. 11, 1995) (discussing employee's recourse to the "Board of Review").

84. *E.g.*, *Regan v. Funkbonner*, 21 Indian L. Rptr. 6026, 6026 (Nooksack Ct. App. Feb. 15, 1990). *Cf.* *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 3 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Aug. 31, 1996) (on file with University of Michigan Journal of Law Reform) (holding that the Tribe must provide "the complete administrative record, along with administrative structure and process documents" to the plaintiff and the court).

85. See *McFall v. Victories Casino*, No. A-002-1102, slip op. at 7–8 (Little Traverse Bay Bands Ct. App. June 9, 2003) (on file with University of Michigan Journal of Law Reform). *Cf.* *Baker v. Rosebud Sioux Headstart Program*, 25 Indian L. Rptr. 6150, 6151–52 (Rosebud Sioux Tribal Ct. Mar. 25, 1998) (holding that Tribal Court must sit as the administrative body for worker's compensation claims).

Typically, Tribal Courts require petitioners to exhaust any available administrative remedies. Tribal Courts desire the benefit of an administrative record and expertise. Exhaustion ensures judicial efficiency by making sure that managers can attempt to use their specialized skills to resolve the problem before a court considers the controversy.⁸⁶ Without a requirement of exhaustion, complainants would be encouraged "to concoct claims outside the [statute], in an attempt to circumvent the administrative process."⁸⁷ With those concerns in mind, some courts have adopted the requirement that the employee petitioner must exhaust her administrative remedies or else the "attendant waiver" rules kicks in.⁸⁸ Other courts have administered the principle by requiring exhaustion of administrative remedies as a prerequisite to a waiver of a Tribe's immunity.⁸⁹ However, where the Tribal government turns a "deaf

86. *Hawkins v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 98-04-148-CV, slip op. at 1 (decision on motion for summary disposition) (Grand Traverse Band Tribal Ct. Feb. 7, 2000) (on file with the University of Michigan Journal of Law Reform). *See also* *Charles v. Furniture Warehouse*, 21 Indian L. Rptr. 6103, 6104 (Navajo Nation Sup. Ct. July 12, 1994) (arguing that "judicial efficiency and economy" are significant factors); *Ponca Tribal Election Bd. v. Snake*, 17 Indian L. Rptr. 6085, 6091 (Court of Indian Appeals for Ponca Tribe Nov. 10, 1988) ("There are sound policy reasons for this requirement, namely the availability of an inexpensive and more speedy resolution of disputes for the parties, and the preservation of judicial resources where forums already exist to decide the case.").

87. *Charles*, 21 Indian L. Rptr. at 6104.

88. *E.g.*, *Grinnell v. Confederated Tribes of Grand Ronde*, No. C-02-11-002, at 1-2 (Confederated Tribes of Grand Ronde Tribal Ct. April 15, 2003), *available at* <http://www.grandronde.org/court/PublishedOpinions/Grinnell-041503.pdf> (on file with the University of Michigan Journal of Law Reform); *Charles*, 21 Indian L. Rptr. at 6103-04; *Hawkins*, No. 98-04-148-CV at 1; *Healy v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6069, 6069 (Mashantucket Pequot Tribal Ct. Sept. 3, 1998); *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 3 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 3, 1998) (on file with the University of Michigan Journal of Law Reform); *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95007-048-CV, slip op. at 2 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Aug. 31, 1996) (on file with the University of Michigan Journal of Law Reform); *Woods v. Gillette*, 25 Indian L. Rptr. 6035, 6036 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Sept. 23, 1997); *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6239 (Ho-Chunk Nation Tribal Ct. Aug. 29, 1996); *Horton v. Brown*, 24 Indian L. Rptr. 6151, 6151 (Mashantucket Pequot Tribal Ct. Mar. 28, 1996); *Kendall v. Brown*, 24 Indian L. Rptr. 6025, 6025 (Mashantucket Pequot Tribal Ct. May 1, 1995).

89. *E.g.*, *Raymond v. Navajo Ag. Prod. Indus.*, 22 Indian L. Rptr. 6100, 6100-01 (Navajo Nation Sup. Ct. July 20, 1995); *Henry v. Confederated Tribes of Grand Ronde Cmty. of Or.*, No. C-02-08-005, slip op. at 4-5 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. April 14, 2003), *available at* <http://www.grandronde.org/court/PublishedOpinions/Henry-TomOpinion04.PDF> (on file with the University of Michigan Journal of Law Reform); *Jones v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6129, 6131 (Mashantucket Pequot Tribal Ct. Aug. 4, 1998). *Cf.* *Weber v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rptr. 6026, 6027 (Mashantucket Pequot Tribal Ct. Aug. 27, 1998) (holding that Tribe's sovereign immunity precluded court from allowing employee to miss filing deadlines); *Jeffs v. Brown*, 25 Indian L. Rptr. 6009, 6010 (Mashantucket Pequot Tribal Ct. July 15, 1996).

ear" to an employee's attempts to utilize her administrative remedies, a Tribal Court will deem the requirement waived.⁹⁰

1. *Tribal Constitutional Protections and the Indian Civil Rights Act*—The Indian Civil Rights Act ("ICRA") requires that Tribal governments provide due process of law before taking a person's property.⁹¹ ICRA's "legislative history reflects that Congress carefully balanced the desire to protect the rights of Native Americans with the desire to avoid extensive interference with internal tribal affairs."⁹² Congress's intent in enacting ICRA was to require Indian tribes alone to determine "the purpose of the ICRA provisions, their definitions and how they apply to [the] tribe."⁹³ Many tribal courts, interpreting ICRA's due process clause in the context of the traditional, customary, and non-Indian concepts of due process, require Tribes to offer an administrative proceeding of varying detail to an employee about to be discharged or who has already been discharged.

In *Hoopla Valley Indian Housing Authority v. Gerstner*, for example, the court acknowledged that due process under the United States Constitution and due process under the Indian Civil Rights Act are "construed to be the same."⁹⁴ Other tribal courts allow for a differing interpretation of due process rights. One tribal court follows a principle that, only where no tribal "custom or tradition has been argued to be implicated. . . . [tribal courts] will look to general U.S. constitutional principles, as articulated by federal . . . courts, for guidance"⁹⁵

2. *Tribal Court Due Process Formulations*—Tribal Courts often follow the *Mathews v. Eldridge*⁹⁶ approach to due process analysis, which requires notice and an opportunity to be heard.

90. *E.g.*, *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6240 (Ho-Chunk Nation Tribal Ct. Aug. 29, 1996).

91. *See* 25 U.S.C. § 1302(8) (2000) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.").

92. *United States v. Doherty*, 126 F.3d 769, 779 (6th Cir. 1997), *cert. denied*, 524 U.S. 917 (1998).

93. *Palencia v. Pojoaque*, 28 Indian L. Rptr. 6149, 6152 (Pueblo of Pojoaque Tribal Ct. Apr. 17, 2001) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

94. *Hoopla Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopla Valley Ct. App. Sept. 27, 1993) (citing *Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1977)).

95. *Louchart v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rptr. 6176, 6179 (Mashantucket Pequot Tribal Ct. 1999).

96. 424 U.S. 319 (1976). *See also* *In re Leno*, 27 Indian L. Rptr. 6213, 6215 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. May 12, 2000); *Short v. Powell*, 26 Indian L. Rptr. 6098, 6099 (Hoopla Valley Tribal Ct. Aug. 28, 1996) (quoting *Mathews v. Eldridge* test).

The meaning of "notice" is well understood. "Due process only requires notice that gives sufficient detail to allow an opposing counsel to prepare a defense."⁹⁷ In *Smith v. Red Mesa Unified School District No. 27*,⁹⁸ the Navajo Nation Supreme Court expounded in great deal on the reasons for adequate notice:

The purposes of notice as an element of due process are to inform the individual of the basis for adverse action and to allow that person to pursue legal remedies with an understanding of what facts the employee must address. If the employee does not know why adverse action is taken, both due process and the [Navajo Preference in Employment] Act are violated. If, however, the employee knows the reasons for the employer's action, in either the notice under the Act or contemporaneous documents, then due process and the Act are satisfied. The employee must, at minimum, be able to point to written declarations by the employer which explain the reasons for the adverse action taken.⁹⁹

Tribal Courts characteristically require a "meaningful" opportunity to be heard.¹⁰⁰ As one court explained, this opportunity encompasses four minimum rights:

(1) adequate notice, (2) a hearing decision by [an] independent arbiter, (3) an initial burden of proof imposed on the employer, and (4) the right to confront and cross-examine those witnesses used against the employer.¹⁰¹

Following *Cleveland Board of Education v. Loudermill*,¹⁰² Tribal Courts may also require a pre-termination opportunity to present a defense.¹⁰³

97. *Contreras v. Confederated Tribes of Grand Ronde*, 28 Indian L. Rptr. 6140, 6141 (Confederated Tribes of Grand Ronde Cmty. of Or. Jan. 25, 2001) (citing *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992)).

98. 22 Indian L. Rptr. 6104 (Navajo Nation Sup. Ct. May 25, 1995).

99. *Id.* at 6105-06.

100. *E.g.*, *Garvin v. Ho-Chunk Nation*, No. CV 00-10, slip op. at 10 (Ho-Chunk Nation Trial Ct. Nov. 16, 2001), available at <http://www.ho-chunknation.com/government/judicial/opinions/2003/Garvin%20v.%20HCN%20et%20al.,%20CV00-10,%20-38.pdf> (on file with the University of Michigan Journal of Law Reform).

101. *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Ct. App., Sept. 27, 1993).

102. 470 U.S. 532 (1985).

103. *See Rhode v. Garvin*, No. CV 00-39, slip op. at 16 (Ho-Chunk Nation Trial Ct. Aug. 24, 2001) (citing *Loudermill*, 470 U.S. at 542), available at <http://www.ho-chunknation.com/>

Tribal Courts may take this notion of due process or leave it as they are free to interpret ICRA's due process clause in different ways. Influenced by *Loudermill*, many Tribal Courts view pre-termination hearings as critical for a variety of reasons. One Tribal Court stated:

The Court has noted a few of the factors underlying the necessity of a pre-termination hearing, namely immediate loss of income and the associated embarrassment and humiliation flowing from severe employment discipline. Other factors include: the greater potential for accuracy in the employment decision; the expected lapse of time before securing other employment possibilities; the effect a questionable work record has on future employment possibilities; the inability to fully commit to another employer during the pendency of the individual's grievance/case; the resulting disruption to an individual's personal and economic life; the time needed to ultimately resolve a grievance/complaint; and the potential inability to collect unemployment compensation due to the type of employment separation. [citations omitted]¹⁰⁴

Tribal Courts may also require the employer to explain, in the written notice of termination, the employee's rights to appeal the termination.¹⁰⁵

Other Tribal Courts have had the opportunity to articulate views of due process with other characteristics. In an administrative review context, the Grand Traverse Band Tribal Court stated:

Fairness can be instilled in the process by requiring that: (1) judicial discovery tools be made available to grievants; (2) grievants be advised that they may be represented by counsel at their own expense; and (3) grievants be given a

government/judicial/opinions/Rhode%20vs.%20Garvin%20CV00-39.pdf (on file with the University of Michigan Journal of Law Reform).

104. *Id.* at 18. See also *Miller v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6143, 6144 (Mashantucket Pequot Tribal Ct. Aug. 7, 1998) (quoting *Bartless v. Krause*, 209 Conn. 352, 372 (1988) (citing *Loudermill*, 470 U.S. at 542)); *Stone v. Swan*, 19 Indian L. Rptr. 6093, 6094 (Colville Confederated Tribes Indian Reservation Tribal Ct. Apr. 15, 1992) (citing *Loudermill*).

105. See *Gerstner*, 22 Indian L. Rptr. at 6005; *Mosqueda v. Colville Tribal Enter. Corp.*, 30 Indian L. Rptr. 6197, 6199 (Confederated Tribes of Colville Reservation Tribal Ct. Aug. 5, 2003); *Wood v. Mashantucket Pequot Gaming Enter.*, 25 Indian L. Rptr. 6015, 6017 (Mashantucket Pequot Tribal Ct. June 25, 1996).

reasonable amount of time to secure the services of counsel if they wish to be represented.¹⁰⁶

Since Tribes make mistakes, often Tribal Courts are asked to answer the question of whether a mistake constitutes reversible error. The Mashantucket Pequot Court of Appeals described the circumstances when a mistake will constitute reversible error:

Some errors, however, implicate "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." . . . Where the most basic fairness and integrity of the proceedings are involved, or where there has been a significant deviation from constitutional rule or a specific statutory requirement, plain error exists and reversal is automatic.¹⁰⁷

This court held that an employee has no particular right as to who makes the employment termination decision, even though the employer's personnel policies specifies that a vice president with no supervisory role over the employee must make the final decision.¹⁰⁸ Tribal Courts tend to follow a general rule: "Not all procedural irregularities, however, require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must first be shown."¹⁰⁹ Generally, errors made at the administrative, or pre-termination, hearing level can be "cured" by the subsequent post-termination hearing.¹¹⁰ In most cases, employees are given adequate notice of their impending dismissal.¹¹¹ One Tribal Court, for example, held that the failure of the Tribe to provide a pre-termination written evaluation did not constitute a violation of due process sufficient to justify reversal of the decision

106. *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 3 (ruling on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 3, 1998) (on file with the University of Michigan Journal of Law Reform).

107. *Grossi v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6112 (Mashantucket Pequot Ct. App. 1998) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967) and *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). See also *Louchart*, 27 Indian L. Rptr. at 6178 (citing *Grossi*, 26 Indian L. Rptr. at 6112).

108. See *Eldred v. Mashantucket Pequot Gaming Enter.*, 31 Indian L. Rptr. 6002, 6005 (Mashantucket Pequot Ct. App. Oct. 14, 2003).

109. *Fickett v. Brown*, 23 Indian L. Rptr. 6190, 6196 (Mashantucket Pequot Tribal Ct. Mar. 6, 1995) (citations omitted).

110. See *Thompson v. Cheyenne River Sioux Tribe Board of Police Comm'rs*, 23 Indian L. Rptr. 6045, 6052-53 (Cheyenne River Sioux Ct. App. Feb. 9, 1996).

111. See, e.g., *Creapeau v. Ho-Chunk Nation Rainbow Casino*, 23 Indian L. Rptr. 6078, 6080 (Ho-Chunk Nation Trial Ct. Mar. 13, 1996).

to discharge because the employee had actual notice of the reasons why the tribe terminated his employment.¹¹² Another Court found harmless error where an employer's mistake benefited the complaining employee.¹¹³

Nevertheless, Tribal Courts will reverse dismissals if the Tribal employer fails to give adequate notice of actions that could result in discharge.¹¹⁴ One Tribal Court awarded retroactive pay to an employee who had not received a personnel evaluation as required by the Tribal law.¹¹⁵ Another Tribal Court ruled in favor of an employee who had been discharged in accordance with a personnel manual that the Tribe had never distributed to him.¹¹⁶ Tribal Courts will not hesitate to reverse an employment discharge and reinstate an employee where the Tribal employer violated its policies concerning drug testing.¹¹⁷ Tribal Courts will reverse a lay-off

112. See *Short v. Hoopa Health Ass'n*, No. A-99-008, slip op. at 4-5 (Hoopa Valley Tribal Sup. Ct. Aug. 15, 2001) (on file with the University of Michigan Journal of Law Reform) (citing *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6005-07 (Hoopa Valley Ct. App. Sept. 27, 1993)).

113. See *Shippentower v. Confederated Tribes of the Umatilla Indian Res. of Or.*, 20 Indian L. Rptr. 6026, 6027 (Confederated Tribes of the Umatilla Indian Res. of Or. Tribal Ct. Jan. 27, 1993). Some Tribal Courts would extend the concept of due process beyond process to outcomes, believing that due process requires "fundamental fairness in all tribal actions. *Atcitty v. Dist. Ct. for the Judicial Dist. of Window Rock*, 24 Indian L. Rptr. 6013, 6014 (Navajo Nation Sup. Ct. Oct. 16, 1996) (citation omitted). The *Atcitty* Court noted that "[t]hese due process protections are similar to those applied by American courts and are concerned with equality in process and not of outcome." *Id.* However, in the area of government entitlements and benefits, "[t]raditional Navajo due process encompasses a wider zone of interest than general American due process. In cases concerning entitlement to governmental benefits, Navajo due process protections would extend to outcome, making it very relevant." *Id.* In *Atcitty*, sovereign immunity did not bar a suit by Tribal Members against the Tribe to preserve government entitlements because of their due process rights. *Id.* While it is unlikely that most Tribal Courts would adopt such a reading of their due process protections in an employment context, each Tribe may interpret its own due process protections.

114. See, e.g., *Brooks v. Yellow Cloud Residential Ctr.*, 23 Indian L. Rptr. 6035, 6035-36 (Colville Confederated Tribes Admin. Ct. Dec. 27, 1995); *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rptr. 6235, 6241 (Ho-Chunk Nation Tribal Ct. Aug. 29, 1996); *Oglala Sioux Tribal Pers. Bd. v. Red Shirt*, 16 Indian L. Rptr. 6054, 6054 (Oglala Sioux Ct. App. June 27, 1985).

115. *Frogg v. Ho-Chunk Casino*, 23 Indian L. Rptr. 6197, 6199 (Ho-Chunk Nation Tribal Trial Ct. Mar. 15, 1996).

116. *Schwab v. CTEC Construction*, 21 Indian L. Rptr. 6027, 6028 (Colville Confederated Tribes Admin. Ct. Jan. 3, 1994).

117. E.g., *Strickland v. Decouteau*, 31 Indian L. Rptr. 6021, 6021 (Turtle Mountain Tribal Ct. Nov. 25, 2003); *Gourd v. Robertson*, 28 Indian L. Rptr. 6047, 6049 (Spirit Lake Tribal Ct. Jan. 24, 2001); cf. *Tonasket v. Cipp*, 20 Indian L. Rptr. 6125, 6125 (Colville Confederated Tribes Admin. Ct. Nov. 29, 1992) (holding that employer's proper adherence to its drug policy to enhance worker safety outweighed employee's right to privacy).

where the Tribal employer based its decision on aspects of the employee's ability of which the employer had never notified her.¹¹⁸

One of the more interesting aspects of Tribal employment separation law is the adjudication of several novel defenses. One defense, presumably based on some sort of due process claim, is that an employee should be allowed a sort of "get out of jail free card" where other employees have not been punished for bad conduct and the appealing employee had been discharged. One Tribal Court dismissed that claim, noting that where an employer "tolerated some [poor] conduct in the past, that past benign neglect did not entitle [the employee] or anyone else to assume that policy (or lack of any policy) would continue."¹¹⁹ Another employee's defense turned on her supervisor's subjective state of mind at the time of the infraction as to its severity.¹²⁰

3. Different Systems and Elements of Administrative Review—Many Tribes use the administrative review panel as a mechanism to provide the initial process due to the employee about to be discharged. Typically, the Tribal Council adopts legislation creating the panel with a set of basic rules, *e.g.*, qualifications and number of panel members, standard of review of the decision, and so on. Often, the Tribal Council's legal department staff is required to draft and finalize specific rules and procedures that the panel and the parties must follow. Important provisions are discussed here.

a. Attorney Participation: Pros and Cons—Tribes and tribal courts struggle over the advantages and disadvantages of allowing employees to use outside attorneys in the administrative review setting. In the author's experience, most tribal employers view the addition of an outside attorney in an informal, administrative proceeding as increasing the likelihood of creating an ugly, adversarial dispute. Nevertheless, tribal courts are likely to find that denying an employee access to an attorney at the administrative review stage violates the tribe's constitution.

The presence of attorneys changes an administrative review hearing from an informal hearing to a more formal adjudicatory

118. See generally *Kelty v. Pettibone*, 27 Indian L. Rptr. 6006, 6007–08 (Ho-Chunk Nation Sup. Ct. July 27, 2000) (requiring notice of layoff factors to allow the employee to challenge the layoff).

119. *Robertson v. Confederated Tribes of Grand Ronde*, No. C-03-01-003, slip op. at 5 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. June 27, 2003), available at http://www.grandronde.org/court/PublishedOpinions/robertson_opinion.pdf (on file with the University of Michigan Journal of Law Reform).

120. *Appellant v. Holder*, 24 Indian L. Rptr. 6143, 6145 (Colville Confederated Tribes Admin. Ct. Feb. 27, 1997).

hearing, complete with argumentative exchanges, a perceptible feeling of intimidation for the non-lawyers in the room, and an increase in the time necessary to complete the hearing. Non-lawyers are often called upon to adjudicate employment separations, often at short notice. Times and dates are constantly changing to meet the scheduling demands of the lawyers involved, especially outside lawyers. Once the hearing does begin, the non-lawyer panel must decide often difficult evidentiary and procedural questions. The employer's lawyer, typically the individual who created the hearing procedure from scratch before it was approved by the employer, will be hard-pressed to remain silent in instances where the panel seems to be misinterpreting the procedure. The panel, not understanding the lawyer's conflict of interest, may seek a legal opinion from that lawyer on numerous questions. The employee's attorney may view the whole process as a sham.

In a typical hearing, the employee's attorney intimidates the panel, the Tribe's attorney intimidates the employee, and the witnesses sitting outside the room are scared to death. Very likely, the hearing will continue that way, with both attorneys wrangling with each other, fighting over who gets to have the most authority over the panel. Unfortunately, many employees do not have the money to hire an attorney and few private attorneys will work in Indian Country without a massive retainer. As such, many hearings in which attorneys may participate are completely lopsided, with the Tribe having its own attorney represent management and the employee sitting alone.

Some Tribes have procedural rules that limit these types of exchanges.¹²¹ Often, the Tribal Council restricts attorney participation because of complaints by panelists and employees that attorneys dominate the proceedings, make the hearing last too long, and turn the whole procedure into a shouting match. However, doing so may create serious due process concerns.¹²²

Often, employees are not comfortable standing up before a panel of decision-makers, their former supervisor, witnesses, and

121. See generally *Synowski v. Confederated Tribes of Grand Ronde*, No. A-01-10-001, slip op. at 5–8 (Confederated Tribes of Grand Ronde Cmty. of Or. Ct. App. Jan. 22, 2002) (discussing tribe's limitation on attorney participation), available at <http://www.grandronde.org/court/PublishedOpinions/SynowskiAppeal.PDF> (on file with the University of Michigan Journal of Law Reform).

122. E.g., *id.* at 8–9 (holding that the Tribe's prohibition on attorney representation violated the employee's due process rights as articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 3 (ruling on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 3, 1998) (holding that fairness requires the Tribal government to allow the employee to be represented by counsel) (on file with the University of Michigan Journal of Law Reform).

any person keeping the record—all of whom they may know from the community—to argue and defend themselves. This is why people hire a lawyer or ask a respected person from the community to speak for them. Non-lawyers are more likely to freeze up before an official, adjudicatory panel. And employees without a college degree may be less likely to be able to articulate their thoughts in an understandable manner. Usually, the Tribal Council restricts attorney participation because of complaints by panelists and employees that attorneys dominate the proceeding, make the hearing last too long, and turn the procedure into a shouting match. However, no matter how informal the hearing is supposed to be, it is an adversary system and the parties most often will want legal counsel.

Two Tribal court cases accurately capture the conflicting interests at stake in administrative hearings. In *Synowski v. Confederate Tribes of Grand Ronde*,¹²³ the Tribal Court strongly and persuasively argued that no prohibition against attorney representation in an administrative hearing can withstand constitutional attack. The *Synowski* Court focused first on the importance of attorney representation in the context of creating the administrative record:

[A] favorable record before the [administrative panel] . . . is critical to meaningful judicial review of the Tribe's employment decision. For many employees, creating such a record simply will not be possible without the guiding hand of counsel. Although the employee may retain an attorney once the matter goes to court, by that time the record has been made and there is little an attorney can do to change it. Given the limited scope of judicial review of the Tribe's employment decisions, the quality of the . . . record may in many instances determine the employee's success in the courts.¹²⁴

Likewise, in *Johnson v. Mashantucket Pequot Gaming Enterprise*, the Mashantucket Pequot Tribal Court noted that "[t]he creation of a favorable record would require a plaintiff to be personally well spoken, to have had the presence of mind to arrange, in advance of the hearing, witnesses in his or her behalf, and to cross-examine

123. *Synowski*, No. A-01-01-001 at 5–6.

124. *Id.* at 6. See also *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶ 47 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995), available at www.tribalresourcecenter.org/opinions/opfolder/1995.NAMP.0000026.htm ("[T]he establishment of a favorable record before the Board of Review is crucial to the success of the plaintiff's appeal.") (on file with the University of Michigan Journal of Law Reform), *aff'd*, 25 Indian L. Rptr. 6011 (Mashantucket Pequot Ct. App. June 11, 1996).

the [employer]’s representatives.”¹²⁵ The court doubted that many hourly employees could effectively communicate at such an advanced level.¹²⁶

The Tribe in *Synowski* claimed that it had sought to “level the playing field” for employees by keeping the attorneys out of the room. The *Synowski* court rejected that claim as well:

As for the Tribe’s desire to “provide a more level playing field” for employees, we disagree with its contention that the [administrative] hearing process is made more fair by reducing every employee to the level of greatest disadvantage—*i.e.*, proceeding without the assistance of counsel. . . . [T]he Tribe’s response—exclusion of all attorneys from [administrative review] hearings—hardly made it fairer for the employees as a whole; the new rule simply addressed the complaint of those employees who could not afford an attorney. It is easily argued that the better response to that complaint—in terms of overall fairness—would have been a rule prohibiting the participation of the Tribe’s attorneys in cases where the employee is unrepresented. In sum, we give little weight to the Tribe’s interest in leveling the playing field.¹²⁷

However, the *Synowski* Court’s suggestion to limit Tribal attorney participation to instances where the employee is represented may not be acceptable to many Tribal governments.¹²⁸

The Court also disposed of the argument that the presence of attorneys lengthens the hearings and renders them unnecessarily complex:

Finally, the Tribe does not argue, and we do not believe, that the participation of attorneys before the [administrative panel] necessarily would lengthen the hearings or make them more complex. In fact, attorneys may in many cases help to streamline the process by narrowing the issues and ensuring that only relevant evidence and argument are presented.¹²⁹

125. *Johnson*, No. MPTC-EA-95-136 at ¶ 49.

126. *Id.* at ¶ 50 (citation omitted).

127. *Synowski*, No. A-01-01-001 at 7.

128. In one instance, a Tribal government asserted that it had assigned a “coach” to assist the employee in preparing her for the administrative hearing, but the court was unable to reach a view of this novel solution because the evidence that such a “coach” was provided failed to reach the record on appeal. See *Baker v. Spirit Mountain Casino*, 28 Indian L. Rptr. 6079, 6081 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Sept. 28, 2000).

129. *Synowski*, No. A-01-01-001 at 8.

The *Johnson* Court similarly rejected such a claim, emphatically writing:

The defendant also complains that the Board of Review may be led astray by legal counsel. The Court finds this to be a specious argument. Juries, generally are wholly comprised of lay persons, yet American society trusts the jury to make the correct decision based on the evidence before it—despite being buffeted by the arguments of lawyers. Moreover, as Justice Stevens dissenting in *Walters* [*v. National Association of Radiation Survivors*, 473 U.S. 305 (1985)] contended “. . . there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the [Gaming Enterprise’s] work would be undermined by allowing counsel to participate whenever [an employee] is willing to pay for his [or her] services.” *Walters*, at 363. This Court, as well, “categorically reject[s] any such assumption.” *Id.*¹³⁰

Alternatively, tribes might allow for non-lawyer or lay advocates to represent employees at the administrative review stage. The reasoning behind this provision might be that non-lawyers are less likely to create the kind of adversarial exchanges that lawyers would while providing employees a voice for their position. Nevertheless, allowance for lay advocates in the rules for administrative hearings is not necessarily an improvement. One Tribal Court noted that a lay advocate’s commentary on the record before an administrative hearing panel consisted of “repeated use of leading questions, testifying by the spokesperson instead of through witnesses, [and] ‘editorializing’ . . . throughout the Transcript of Proceedings.”¹³¹

b. Hearing Officer—Some Tribes utilize a hearing officer.¹³² This person, usually a lawyer, acts as the chair of the administrative

130. *Johnson*, No. MPTC-EA-95-136 at ¶ 52.

131. *Hoopa Forest Indus. v. Jordan*, 25 Indian L. Rptr. 6159, 6160 n. 4 (Hoopa Valley Tribal Ct. Mar. 25, 1998).

132. See, e.g., *Short v. Hoopa Health Ass’n*, No. A-99-008, slip op. at 5 (Hoopa Valley Tribal Sup. Ct. Aug. 15, 2001) (discussing the role of the hearing officer is conducting a post-termination discharge hearing) (on file with the University of Michigan Journal of Law Reform); *Contreras v. Confederated Tribes of Grand Ronde*, 28 Indian L. Rptr. 6140, 6141

hearing panel and does not vote. The hearing officer handles all questions about procedure, makes the attorneys and parties quiet down when they become rowdy, and makes decisions about evidence and testimony. In other words, the hearing officer is like the administrative judge of the hearing panel. The presence of the hearing officer alleviates many of the problems with having a panel of non-lawyers. She keeps the decorum in the room constant and provides legal counsel as needed by the panel.¹³³

Unfortunately, the hearing officer creates a separate set of problems. Often the only lawyer the panel may rely upon, she is likely to exert an unusual amount of influence on the panel. She often may lengthen the amount of time the hearing will last.¹³⁴ Because she has the capacity to act too much like a trial judge, she might, for example, call a week-long recess of the proceedings to research and write an opinion on the admissibility of documents produced by the Tribe in its investigation of a sexual harassment complaint. Naturally, both sides will want a few weeks to write and file briefs on the question. The hearing languishes.

Moreover, the presence of a hearing officer may not resolve due process concerns. For example, in *Hoopa Forest Industries v. Jordan*, the presence of a hearing officer did nothing to prevent the admission of hearsay and irrelevant testimony.¹³⁵ Stating that it was the "responsibility of the Hearings Officer to rule on admissibility of evidence,"¹³⁶ the *Jordan* Court noted that "[t]he transcript is replete with irrelevant testimony as to how the alleged harassment effected [*sic*] plaintiff's or witnesses' spouses."¹³⁷ Thus, though Tribes that utilize hearing officers do so for the purpose of streamlining the process, the apparent result is that the provision of a hearing officer simply adds another involved party to the mix without improved efficiency.

c. Tribal Council or Employee Panel?—Most administrative hearing panels that decide issues arising out of employment separations are not composed of elected Tribal officials, but instead employees of the Tribal government. In fact, the elected officials typically create an administrative panel expressly to avoid having to decide em-

(Confederated Tribes of Grand Ronde Cmty. of Or. Jan. 25, 2001) (discussing role of hearing facilitator to limit arguments presented on federal law).

133. See *Short*, No. A-99-008 at 5 (affirming the discretion of the hearing officer to limit oral argument on a particular issue before the hearing panel).

134. See, e.g., *id.* ("The extensive [appeal review panel] hearings took place over the course of six days, with testimony from six witnesses.").

135. See *Hoopa Forest Indus.*, 25 Indian L. Rptr. at 6160 n. 5.

136. *Id.* at 6161.

137. *Id.* at 6160 n. 5.

ployee claims. In many Tribes, the early history of tribal governance is punctuated with clashes over employee separations.¹³⁸ At times, these clashes become political¹³⁹ and, consequently, arbitrary and capricious.¹⁴⁰ Tribal governments routinely deal with big picture questions such as land claims,¹⁴¹ treaty hunting and fishing rights,¹⁴² environmental protection initiatives,¹⁴³ criminal and civil jurisdictional boundaries,¹⁴⁴ regulatory, public safety, and law enforcement cooperation with local and state governments,¹⁴⁵ federal and state legislation and regulations that may undermine tribal initiatives,¹⁴⁶ and government revenue sources.¹⁴⁷ Personnel issues are day-to-day questions that should not occupy the time of tribal leaders who should be prioritizing important questions of tribal governance.

138. The Mashantucket Pequot Nation, a newly recognized tribe, see 25 U.S.C. § 1758, that operates the Foxwoods Casino and Resort in Connecticut, was forced to create a tribal legal system to handle the influx of employment disputes arising out of the operation of its casino. See *How law was born: Indian affairs*, THE ECONOMIST, April 15, 1995, at A27, available at 1995 WL 9568834. The Indian Law Reporter, which collects opinions from tribal courts nationwide, is inundated with employment dispute-related cases from the Mashantucket Pequot Tribal Court system. *E.g.*, *Procaccino v. Mashantucket Pequot Gaming Enter.*, 31 Indian L. Rptr. 6100 (Mashantucket Pequot Tribal Ct., July 15, 2004); *Barnes v. Mashantucket Pequot Gaming Enter.*, 31 Indian L. Rptr. 6096 (Mashantucket Pequot Tribal Ct. June 28, 2004); *Dambach v. Mashantucket Pequot Gaming Enter.*, 31 Indian L. Rptr. 6097 (Mashantucket Pequot Tribal Ct., June 28, 2004);

139. See, *e.g.*, *Hoopa Valley Tribal Council v. Risling*, 24 Indian L. Rptr. 6224, 6224-27 (Northwest Regional Tribal Sup. Ct. for the Hoopa Valley Ct. App. Feb. 20, 1996) (discussing claim by Tribal Council that former members of Tribal Council could not serve as administrative employee grievance review panelists).

140. *Cf.* *Yellowbank v. Chingwa*, No. C-018-0300, slip op. at 2 (Little Traverse Bay Bands Tribal Ct., June 19, 2000) ("[A]lthough the Court can ensure fairness in tribal law and its application, it cannot make politics fair.") (on file with the University of Michigan Journal of Law Reform).

141. *E.g.*, *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (discussing Tribal land claims).

142. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (discussing Tribal hunting and fishing rights); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (discussing Tribal fishing rights).

143. *E.g.*, *Montana v. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998) (discussing Tribal Clean Water Act regulations); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (discussing same).

144. *E.g.*, *United States v. Lara*, 541 U.S. 193 (2004) (discussing tribal court criminal jurisdiction); *Nevada v. Hicks*, 533 U.S. 353 (2001) (discussing tribal court civil jurisdiction).

145. *E.g.*, *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (discussing lack of cooperation between state law enforcement and tribal authorities).

146. *E.g.*, *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) (discussing state attempt to apply its land use regulations on reservation land), *cert. denied*, 538 U.S. 908 (2003).

147. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (discussing tribal tax); *Prairie Band of Potawatomi Indians v. Wagnon*, 276 F. Supp. 2d 1168 (D. Kan. 2003) (discussing tribal motor vehicle registration fees).

In some Tribes, particularly those that have been federally recognized in the last decade and those that are very small, the elected officials handle employee disputes as a function of their executive authority. As Tribes develop, they tend to move quickly toward an employee separation hearing mechanism that does not include the elected officials. However, within some Tribes, a body of elected officials may act as the review panel and is expected to create and follow a set of written rules and procedures for the hearing.¹⁴⁸ This legal structure has many problems and most tribal courts review the decisions of these bodies with increasing skepticism.

Regardless of the composition of the panel, conflicts of interest arise frequently. Employees, especially if they are Tribal Members or if they have married into the community, will be related in interconnecting ways to many individuals in the community. These individuals will invariably find themselves appointed or elected to an employee review panel. Tribal decision-makers must deal with questions as to how distant the relation must be before the panel member may participate. In many Tribes, aunts and uncles are like mothers and fathers, and second or third cousins are like siblings.¹⁴⁹ People may live together without the formal sanction of marriage. People may have grown up in the same house without being formally related. Determining the limits of potential nepotism and conflict of interest is extremely challenging for most Tribes.¹⁵⁰ Allowing parties to seek recusal by motion creates another layer of litigation.¹⁵¹ Either method generates rational and irrational questions about the legitimacy of the panel's decision.¹⁵²

148. *E.g.*, *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 4 (ruling on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 3, 1998) (urging the Tribal government to develop a handbook for future administrative hearings) (on file with the University of Michigan Journal of Law Reform).

149. Indian tribes are not only governments, but they are also a social and familial organization held together by strong extended family relationships. *See* JAMES M. MCCLURKEN, *GAH-BAEH-JHAGWAH-BUK; THE WAY IT HAPPENED* 112 (1991) (describing extended family relationships at the Little Traverse Bay Bands of Odawa Indians).

150. *E.g.*, *Dilkowski v. Marianito*, 1 Navajo Rptr. 385, 1978.NANN.0000018 (Navajo Nation App. Feb. 28, 1978), available at <http://www.tribal-institute.org/opinions/1978.NANN.0000018.htm> (on file with the University of Michigan Journal of Law Reform).

151. *See, e.g.*, *Greengrass v. Ho-Chunk Nation Election Board*, 26 Indian L. Rptr. 6185, 6186 (Ho-Chunk Nation Sup. Ct. May 21, 1999) ("If not for the time constraints facing this Court, I would request that in situations such as this [motion for recusal], that a separate hearing be held, during which both parties would present their reasons and facts in support of their belief that my relationship to Joan Greendeer-Lee renders me impartial."); *Thompson v. Hoof*, 27 Indian L. Rptr. 6190, 6191-92 (Duckwater Shoshone Tribal Ct. Dec. 28, 1999) (discussing motion to recuse tribal court judge).

152. *See, e.g.*, *Greengrass*, 26 Indian L. Rptr. at 6185 (discussing motion for recusal based on fact that judge and party were first cousins).

d. Discovery, Witnesses, and the Record—Tribal Courts may require the Tribal government to provide some form of limited discovery in order to ensure fairness in an administrative proceeding.¹⁵³ Discovery often consists of photocopying the discharged employee's personnel folder. For employees that have been working for the Tribe a long time, the personnel folder might contain a vast amount of irrelevant material. At this point, the Tribe must entrust the photocopying of only relevant material to a non-lawyer, usually a clerk in the personnel department. This employee might leave out relevant material or keep in irrelevant material that may be potentially inflammatory. It is likely that the employee will question the removal of some documents and the inclusion of others. The panel or its hearing officer will then have to delve into the task of deciding which documents are relevant. More time is wasted.

The right to call witnesses and to cross-examine adverse witnesses is generally required by Tribal Courts.¹⁵⁴ As the Hoopa Valley Court of Appeals stated:

In dealing with factual matters, the credibility and veracity of the witnesses and documents submitted into evidence must be determined by the decision maker. Simply because a document is submitted into evidence does not make all statements contained in that document 100 percent true. The basis for the statements may show that the statements were made under duress, or were based on inaccurate information. The same is true of the testimony of witnesses. Therefore, it is essential that the employee be afforded the opportunity to confront and cross-examine witnesses and evidence.¹⁵⁵

In *Johnson v. Mashantucket Pequot Gaming Enterprise*, the Court described in detail how the ability to cross-examine the Tribal government's witnesses might have affected the outcome of an administrative hearing where the review board refused to allow

153. *E.g.*, *Koon*, No. 95-07-048-CV at 3.

154. *E.g.*, *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-97-120 at ¶¶ 38, 59 (Mashantucket Pequot Tribal Ct. Jan. 21, 1998), available at www.tribal-institute.org/opinions/1998.NAMP.0000012.htm (on file with the University of Michigan Journal of Law Reform) (citations omitted).

155. *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6006 (Hoopa Valley Ct. App. Sept. 27, 1993). The *Gerstner* Court also quoted *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), for the proposition, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*

cross-examination and chose to believe the testimony of one witness over the other as the "sole factual basis" for its decision.¹⁵⁶

Witnesses nevertheless pose additional problems. Under a normative (*i.e.*, dominant culture) view of the adjudicatory process, only relevant evidence should be introduced.¹⁵⁷ If, for example, a manager discharged an employee for violating the employer's zero tolerance rule on workplace violence after the employee allegedly pushed another employee, then the only relevant witnesses should be the two employees and anyone else who may have seen the incident.

But in a Tribal administrative hearing, the normal rules of evidence do not necessarily apply. The panel may agree to hear testimony from the discharged employee's grandfather, an elder with a great deal of influence and respect in the community, who will testify that he does not believe his grandson would ever push another person. The panel may agree to hear testimony from another employee who claimed to have overheard the accusing employee make fun of the discharged employee, wrapping up with her theory that the accusing employee made fallacious allegations in a plot to have the discharged employee fired. Before long, both the employee and the Tribe are bringing forth a parade of witnesses without a shred of actual or eyewitness knowledge about the actual incident leading to the discharge. As noted earlier, these hearings can last for days. Panel members are placed in the difficult position of halting testimony from persons who are not witnesses to anything, character witnesses, and testimony from elders and others that they may respect a great deal. Many panels do not restrict the testimony, perhaps in order to avoid allegations of favoritism and corruption. Because the panel members are usually non-lawyers, they are not trained to make a distinction between relevant testimony and testimony that should be excluded.

Tribal governments must also create a structure to maintain an official record of the administrative proceeding. The administrative hearing panel is charged with creating and, at least initially, preserving the official record of the proceedings. Most often, the hearing must be tape-recorded by either a member of the panel or an employee sworn to confidentiality that acts as the panel's clerk. The panel may allow the introduction of paper evidence and must preserve the original copies. After the hearing, the permanent record of the proceedings must be preserved. If the Tribe has no permanent depository for confidential archival material—a likely

156. *Johnson*, No. MPTC-EA-97-120 at ¶ 48.

157. *See, e.g.*, FED. R. EVID. 401; MICH. R. EVID. 401.

event—then the Tribe's legal department often is tasked with preserving the files.

e. Standard of Review—Tribal governing bodies may choose to limit the discretion of the administrative hearing panel. Some Tribes choose to allow the panel to reverse the decision to discharge the employee only if "clear and convincing evidence" exists to justify a reversal.¹⁵⁸ Some Tribes allow for a "de novo" review of the employment decision.¹⁵⁹ Some allow for review on the administrative law basis of "abuse of discretion."¹⁶⁰

While the choice of a certain standard of review by the administrative hearing panel is intended to influence the proceedings on a basic level, this is rarely the result. Intuitively, the higher the standard for reversal of the decision to discharge, the less searching and thorough review and the less likelihood of reversal. However, the result often is that the administrative hearing panel searches more thoroughly regardless, and may be tempted to go beyond the bounds of the employment relationship and hear evidence on character, family relationships, tribal history, and virtually anything else to tip the scales one way or the other. Where tribal leadership intends a more searching review—a sort of *de novo* administrative review—the result is the same. Because of their legal inexperience, a hearing panel of non-lawyers might not know when to stop taking testimony and documentary evidence. The Indian community layperson's notion of due process may be that everyone gets to speak for as long as he wants. Lawyers believe their duty of zealous representation requires them to continue as long as they are able. The discharged employee has no motivation to stop arguing if she thinks she can talk the panel into reinstating her. Regardless of the standard of review established by the tribal leadership, the hearings grow lengthy and inefficient.

D. Unique Impacts on Tribal Governance

Employment hearing panels often become painful marathons of emotional, political, and sociological torment. One Tribal Court

158. See *infra* notes 187 and 245.

159. See *infra* notes 247.

160. See, e.g., Short v. Hoopa Health Ass'n, No. A-99-008, slip op. at 7 (Hoopa Valley Tribal Sup. Ct. Aug. 15, 2001) ("The decision of the [employee review panel] is upheld unless it is proven to be arbitrary, capricious, or not in accordance with law.") (on file with the University of Michigan Journal of Law Reform).

described a particularly difficult hearing where the Tribal government representatives employed a shotgun approach to indicting the performance of the employee:

The cases did not stay . . . simple Instead, the issues shifted and multiplied.

The hearings were relatively lengthy, unstructured, and undisciplined. In each hearing, the case against the [employee] was presented almost in a stream-of-consciousness fashion, with one accusation and criticism followed more-or-less randomly by another. By the conclusion of each hearing, any sense of orderly presentation of the issues was lost amid the myriad of additional claims that had been raised. The [employees] were not given adequate notice of plethora of claims that they would have to face at these hearings, and even the [administrative] panel members sometimes appear to have been confused about which issues were before them.

Apparently, anything that came to mind was considered fair game

[T]he employer seized on any complaint available or imaginable, whether related to the licensing policy, the problems of running the center, the quality of patient care, the keeping of files, attendance at meetings, graduate school transcripts, the choice of graduate school course work, etc. The danger of such an unconstrained and wide-ranging presentation at an [administrative] hearing is that the issues raised are likely to stray beyond those of which the [employee] has had any adequate, advance notice.¹⁶¹

161. *Synowski v. Confederated Tribes of Grand Ronde*, No. C-00-11-003, slip op. at 6-8 (remanding to Internal Review Board) (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal

Ct. Oct. 3, 2001), *available at* <http://www.grandronde.org/court/PublishedOpinions/SynLewRam.PDF> (on file with the University of Michigan Journal of Law Reform), *aff'd*, No. A-01-10-001 (Confederated Tribes of Grand Ronde Cmty. of Or. Ct. App. Jan. 22, 2002), *available at* <http://www.grandronde.org/court/PublishedOpinions/SynowskiAppeal.PDF> (on file with the University of Michigan Journal of Law Reform).

Other Tribal Courts have criticized the haphazard and even "unprofessional" manner in which administrative appeals may be handled by both parties. *E.g.*, *Van Pelt v. Umatilla Reservation Hous. Auth.*, 26 Indian L. Rptr. 6149, 6150 (Umatilla Tribal Ct. July 22, 1999) ("This whole matter was handled in a very unprofessional manner by both parties. No evidence, certification, or documentation was presented which established when notices or documents were served on the other The final administrative appeal requires a hearing

The discharged employee, the managers, the employee witnesses, and the elected representatives of the tribe may all get involved in one way or another. An employment discharge is a difficult matter. Anyone who has been fired or laid-off knows this intimately. Unlike federal, state, or local governments, which all routinely rely on separate and professional hearing panels featuring administrative judges or professional mediators, tribes with limited funds must rely on their limited source of employees. Other governments do not share the unique connections between players in the process.

A former Tribal employee who appears before the Tribe's administrative hearing panel suffers a particularly humiliating experience. The hearings are almost always closed, in a private room and with limited spectators, in order to preserve confidentiality and to meet due process considerations. However, the employee may be facing a group of Tribal employees on the panel that she has worked with for several years on different projects. These panelists may also be her neighbors in the Tribal community. She may have even grown up with the panelists. And she knows their foibles, their pet peeves, their prejudices, their strengths, and their weaknesses. One might expect that knowing one's panel so well would be a huge advantage, but nothing could be more difficult to face than a room full of your friends and acquaintances.

Perhaps just as difficult is the position of panel members. They are being asked to judge a friend, a fellow Tribal Member, a fellow employee, maybe even someone they have known for years. The discharging manager, the employee witnesses, and anyone else involved in the hearing is likely to have the same personal connection to the others in the room. Tribal law, dictated by federal law, forces these individuals to confront each other and to place their personal relationships on the line for an impersonal procedure.

An employee's decision to take her case to the Tribal Court offers even more exposure to the community. A former Tribal employee who believes that she has been wronged is forced to give up her veil of privacy in order to proceed with her claim pursuant to this legal structure. Tribes are typically insular, with small populations and numerous, interlocking family relationships. Speculation about a half-hidden event spreads quickly in small communities. Moreover, Tribal employees work closely together,

panel, which may be one person. Petitioner participated in this process but it was not handled in an artful manner.").

with much overlap and interaction. When a fellow employee has an accident, or has family problems, or gets into an argument, the other employees see these events. While the details of the employment discharge are confidential, the fact of the discharge or other employment decision is not confidential. That said, in an insular community with interlocking family relationships and an insular Tribal personnel network, it is nigh impossible to keep details confidential.¹⁶² Moreover, as soon as a tribal employee, such as Bear Tenzing, files his complaint in Tribal Court, his story loses its confidentiality. Tribal Court records are typically public records. In order for Bear to prevail on his side of the story, he has to open up his private life for public inspection. In an insular community, this fact chills the exercise of legal rights by wronged individuals.

Employment is a crucial factor in anyone's life. A job is one's livelihood. A steady paycheck allows one the resources and stability to afford a home, a lifestyle, and a family. Losing one's job creates an incomparable strain on the family. Mortgage payments and car payments cannot be paid. Personal property may be repossessed. Family stresses increase exponentially. Job loss galvanizes people to act, to file lawsuits, and to speak out against those they feel have wronged them.

In many ways, Tribal government exists to help Tribal Members when they have been wronged. But when the Tribal government is accused of wronging one of its employees, the legal structure created to ensure due process and to provide a remedy collides with the political structure created to serve the whole of the Tribal membership. In a state or local government or at a mid- or large-sized corporation, the governing bodies are large enough or diffuse enough to handle these stresses. In most Tribal governments, however, the stresses placed on the governing body nearly breaks down the government. A Tribal Member who has just been discharged has every right to complain to the Tribal Council; after all, Council members are the Tribal Member's elected representatives. The Tribal Council, having delegated day-to-day operations to the managers, may choose to intervene on behalf of the employee against the interests of the Tribe, even against the interests of the oath they swore to protect the Tribe. Or, more likely, a minority of

162. See *Ames v. Hoopa Valley Tribal Council*, 21 Indian L. Rptr. 6039, 6040 (Hoopa Valley Tribal Ct. App. Dec. 14, 1991) (Irvin, J., concurring) ("This jurist would take judicial notice of the fact that news travels fast on the reservation."). Cf. *In Re: Confederated Salish & Kootenai Tribes v. Cahoon*, 10 Indian L. Rptr. 6039 (Confederated Salish & Kootenai Tribes of the Flathead Reservation Ct. App. June 21, 1983) (holding that prospective jurors that are employees of the Tribes may be biased and therefore dismissed from service due to their employment relationship).

the Tribal Council may choose to intervene. In either case, the Tribal Council as a political body collides with the Tribal Council as employer. Without question, personnel questions have the capacity to destroy or seriously undermine Tribal governments.

III. THE CONUNDRUM OF LIMITED TRIBAL COURT REVIEW OF TRIBAL EMPLOYEE APPEALS.

In spite of the skepticism of critics, including several United States Supreme Court Justices,¹⁶³ Tribal Courts continue to develop and grow in a fundamentally positive way. As Connecticut Law School Dean Nell Jessup Newton noted a few years ago:

When tribal courts have been subjected to intense scrutiny, as they have been in the last fifteen years, they have survived the test. Even investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting that their weaknesses stem from lack of funding and not pervasive bias.¹⁶⁴

Tribal courts nonetheless encounter tremendous difficulty in reviewing tribal employment separations. Tribal sovereign immunity often severely restricts the jurisdiction of tribal courts to engage in such review, though the modern practice of tribes is to waive immunity to allow tribal court review.

After the final administrative determination that an employee must be discharged, both individuals and the Tribe usually may appeal to the Tribal Court.¹⁶⁵ Whether Tribal Court review follows is subject to a few limitations. First, it is possible that neither the Tribal Constitution nor a Tribal law will waive the sovereign immunity of the Tribe, prohibiting a suit in Tribal Court or anywhere else.¹⁶⁶ Second, the Tribe might not have a Tribal Court at all.¹⁶⁷ In

163. See *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

164. Newton, *supra* note 5, at 287–88 (footnotes omitted).

165. *E.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Comer*, No. 02-09-1351, slip op. at 3 (ruling on motions to dismiss) (Grand Traverse Band Tribal Ct. Feb. 25, 2003) (holding, on the basis of fundamental fairness, that the Tribe may appeal an adverse decision from the administrative hearing panel) (on file with the University of Michigan Journal of Law Reform).

166. *E.g.*, *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998); *Holmes v. St. Croix Casino*, 26 Indian L. Rptr. 6089 (St. Croix App. 1999).

167. *E.g.*, *Kreppele v. Prairie Island Indian Cmty.*, 125 F.3d 621 (8th Cir. 1997).

such an event, the Tribal Council is the final decision-maker and a discharged employee has no further recourse. However, fewer and fewer Tribes are without their own judiciary.¹⁶⁸ Therefore, this Article will focus on the larger issue of sovereign immunity.

Federal and state courts generally do not have jurisdiction to entertain a suit brought by a discharged employee against an Indian Tribe or its officers.¹⁶⁹ There is no federal statute allowing such a suit in federal court, diversity jurisdiction does not exist, and there is a strong federal policy against meddling in the internal affairs of a Tribal government.¹⁷⁰ Employment relations are a core element of the internal affairs of a Tribal government.¹⁷¹ In state courts, absent the agreement by both the Tribe and the state, the state courts will not have jurisdiction. As a general matter of federal law, state courts do not have jurisdiction over activities in Indian Country.¹⁷²

A. Tribal Sovereign Immunity in Tribal and Federal Law

As a matter of both Tribal and federal law, Indian Tribes possess sovereign immunity.¹⁷³ Only Congress or the Tribe in accordance

168. See generally B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WILLIAM MITCHELL L. REV. 457 (1998).

169. See *Gallegos v. Jicarilla Apache Nation*, No. 02-2347, 2003 WL 22854632 (10th Cir. Nov. 28, 2003); *Penobscot Nation v. Feller*, 164 F.3d 706 (1st Cir.), cert. denied, 527 U.S. 1022 (1999); *Shannon v. Houghton Band of Maliseet Indians*, 54 F. Supp. 2d 35 (D. Me. 1999); see also *Adams v. Grand Traverse Band Econ. Dev. Auth.*, No. 89-03-001-CV (APP), slip op. at 3 (Grand Traverse Band Ct. App. Aug. 19, 1993) ("The United States Constitution and federal laws consistently establish a strong rule that tribes must be left to handle their own actions involving economic development.") (on file with the University of Michigan Journal of Law Reform) (citing *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1734 (8th Cir. 1985)). Cf. *Loring v. Tribal Government*, 20 Indian L. Rptr. 6097, 6098 (1993) (*Penobscot Nation Ct. App.* May 26, 1992) (Cary, J., concurring) (refusing to applying Maine law to the tribe).

170. Cf. *Dubray v. Rosebud Sioux Hous. Auth.*, 12 Indian L. Rptr. 6015, 6016 (Rosebud Sioux Tribal Ct. Feb. 1, 1985) ("It is well settled that relations between Indians, while they are on their reservations, cannot be controlled or governed by the laws of the state within which the reservations are located.") (citing *Foster v. Pryor*, 189 U.S. 325 (1903)).

171. See *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001).

172. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

173. See *Shananaquet v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Corp.*, No. 00-05-299-CV, slip op. at 2 (Grand Traverse Band Ct. App. March 18, 2003) (on file with the University of Michigan Journal of Law Reform) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing in turn *Turner v. United States*, 248 U.S. 354, 358 (1919)); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172-73 (1977)); *Martin v. Hopi Tribe*, 25 Indian L. Rptr. 6185, 6187 (Hopi Tribe Ct. App. Mar. 29, 1996); *Francis v. Wilkinson*, 20 Indian L. Rptr. 6015, 6015 (Northern Plains Intertribal Ct. App. Jan. 21, 1993); *Pinnecoose v. Board of Commissioners*, 19 Indian L. Rptr. 6072, 6072 (Southwest

with Tribal law may waive the immunity.¹⁷⁴ The sovereign immunity of Indian tribes precludes suits against tribes for money damages or equitable relief¹⁷⁵ and also acts as “an entitlement not to stand trial.”¹⁷⁶ This immunity is absolute.¹⁷⁷ “When a tribe or its agencies are sued in tribal court, the scope, protection, and meaning of tribal sovereign immunity are governed primarily by tribal, rather than federal or state, law, although other bodies of doctrine may be looked to for guidance by analogy.”¹⁷⁸

Sovereign immunity is an important element to the efficient development of Tribal government and is “necessary to promote ‘tribal self-determination, economic development, and cultural autonomy.’”¹⁷⁹ As one Tribal Court wrote, “[S]overeign immunity [is] an essential attribute of Indian tribes and [is] to be highly supported unless clearly waived. It serves to avoid interruption of tribal government and agents in improper law suits and to protect public

Intertribal Ct. App. Jan. 23, 1992); Board of Trustees v. Wynde, 18 Indian L. Rptr. 6033, 60336 (1991) (Northern Plains Intertribal Ct. App., May 3, 1990); Wichita Tribe v. Bell, 18 Indian L. Rptr. 6041, 6042 (1991) (Court of Indian Appeals for Wichita & Affiliated Tribes Sept. 25, 1990) (citing Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rptr. 6085 (Court of Indian Appeals for Ponca Tribe Nov. 10, 1988), and McCormick v. Election Committee of the Sac & Fox Tribe, 1980 WL 128844 (Court of Indian Offenses for Sac & Fox Tribe Feb. 1, 1980)); Gwin v. Four Bears Casino and Lodge, 30 Indian L. Rptr. 6120, 6121 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Feb. 10, 2003); Lonchar v. Victories Casino, No. C-022-1200, slip op. at 1-2 (ruling on summary judgment) (Little Traverse Bay Bands Tribal Ct. Feb. 11, 2002) (on file with the University of Michigan Journal of Law Reform); Dubray v. Rosebud Sioux Hous. Auth., 12 Indian L. Rptr. 6015, 6015 (Rosebud Sioux Tribal Ct. Feb. 1, 1985).

174. See Hawkins v. Grand Traverse Band of Ottawa & Chippewa Indians, No. 98-04-148-CV, slip op. at 2 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 7, 2000) (“The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been expressly waived by either Congress or the particular tribal government.”) (on file with the University of Michigan Journal of Law Reform) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

175. Gwin, 30 Indian L. Rptr. at 6121 (citing Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation, 812 F. Supp. 1008, 1011 (D. N.D. 1992), *rev'd on other grounds*, 27 F.3d 1294 (8th Cir. 1994)).

176. Gwin, 30 Indian L. Rptr. at 6121 (citing Mitchell v. Forsyth, 472 U.S. 511 (1985)).

177. Colville Tribal Enter. Corp. v. Orr, 26 Indian L. Rptr. 6005, 6006 (Confederated Tribes of Colville Reservation Ct. App. Dec. 4, 1998) (citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940); American Indian Ag. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378-79 (8th Cir. 1985); Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1052 n. 6 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985)).

178. Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners, 23 Indian L. Rptr. 6045, 6046 (Cheyenne River Sioux Ct. App. Feb. 9, 1996).

179. Martin v. Hopi Tribe, 25 Indian L. Rptr. 6185, 6187 (Hopi Tribe Ct. App. Mar. 29, 1996) (quoting American Indian Ag. Credit v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985)).

funds from improper distribution under the Tribal Constitution.”¹⁸⁰ Sovereign immunity prevents depletion of valuable common resources and protects against litigation interfering with the operation of the Tribe.¹⁸¹ The influential Navajo Nation Supreme Court agreed:

The Navajo people are entitled to a representative and accountable Navajo tribal government. For this reason, important decisions having direct consequences on the Navajo tribal treasury should be made by the elected representatives of the Navajo people. If we hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo courts, we will be sanctioning an attack on the tribal treasury. Such decisions are best made by elected Navajo representatives after consultation with their constituents.

In addition, the funds of the Navajo Nation are not unlimited. Each year the funds maintained by the Navajo Nation for the operation of the Navajo tribal government are exceeded by the people's demand for more governmental services. ICRA suits which result in money damages against the Navajo Nation will only divert funds allocated for essential governmental services.¹⁸²

180. *DeVerney v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 96-10-201 CV, slip op. at 2 (Grand Traverse Band Ct. App. Nov. 22, 2000) (on file with the University of Michigan Journal of Law Reform). See also *Sturgeon Electric Co. v. AHA MACA Power Service*, 26 Indian L. Rptr. 6026, 6027-28 (Fort Mojave Indian Reservation Ct. App. Dec. 7, 1998) (“Immunity is a fundamental aspect of sovereignty which protects a government from suit to avoid undue intrusion on governmental functions or depletion of the government's assets without the government's consent.”).

181. *DeVerney*, No. 96-10-201 CV at 2 (amended order) (Grand Traverse Band Ct. App. Feb. 7, 2001) (on file with the University of Michigan Journal of Law Reform). See also *Guardipee v. Confederated Tribes of Grand Ronde Cmty. of Or.*, 19 Indian L. Rptr. 6111 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. June 11, 1992) (“Moreover, it has been held that tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources.”) (citing *Maryland Casualty Co. v. Citizens Nat'l Bank of N. Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966)).

182. *Johnson v. Navajo Nation*, 14 Indian L. Rptr. 6037, (Navajo Nation Sup. Ct. 1987). See also *Gonzales v. Allen*, 17 Indian L. Rptr. 6121, 6122 (Shoshone-Bannock Tribal Ct. Sept. 17, 1990) (“The legislative and executive branches of government have the responsibility for determining the purposes and the extent to which government funds will be utilized. Absent explicit waiver of such authority the courts do not usually have the authority to spend such funds. Nor do the courts have authority to waive sovereign immunity on behalf of the government.”). Cf. *Newton*, *supra* note 5, at 338 (“In the pithy words of Judge Quinn of the Ho-Chunk Tribal Court, . . . ‘It is not long ago that the only thing standing between the nation and bankruptcy was sovereign immunity.’”) (quoting *Kingsley v. Ho-Chunk Nation*, 23 Indian L. Rptr. 6113, 6117 n. 3 (Ho-Chunk Nation Trial Ct. 1996)).

Tribal Courts generally hold that the concept of sovereign immunity "does not defy Native American traditions. . . ." ¹⁸³

One Tribal Court pondered the dilemma posed to Tribal Courts about sovereign immunity under Tribal law and suggested that the Tribal government must deliberate carefully on its application:

Sovereign immunity is an English-law doctrine that "the king can do no wrong." One cannot sue the king. This ancient doctrine came to this country with the adoption of English law as the legal foundation for the development of law in the new United States. . . . Since that earlier time, many non-Native governments have waived their immunity in various areas to provide redress for government negligence and wrongdoing. Reasons for the various waivers might be generalized to say that the people of a representative democracy realize that "the king" can do wrong and does make mistakes. After all, government is a human institution and the maxim "to err is human" is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely in everyone's book. However on the other hand, governmental immunity ensures that no one can "break the bank" by a bank-breaking award of tribal assets. No one wants to see the government bankrupted. It seems reasonable to expect the Tribal Council to look at these various considerations and develop well-reasoned positions on immunity as it relates to this tribal community. After all, this is not England. We do give a lot of lip service to the fact that Indian communities are different hat those of dominant society. We point out that our 'judicial' and 'legal' systems need not be the mirror image of those of dominant society. If that is truly the case, why should tribal government adopt the Anglo-American concept of sovereign immunity? Rather, why shouldn't tribal sovereign

183. *Novak Construction Co. v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 00-09-423-APP, slip op. at 3 (Grand Traverse Band Ct. App. Dec. 2, 2001) (on file with the University of Michigan Journal of Law Reform). *See also* *Sulcer v. Barrett*, 17 Indian L. Rptr. 6138, 6139-40 (Citizen Band Potawatomi Indians of Okla. Sup. Ct. Sept. 5, 1990) (Rice, J., concurring) ("While the doctrine of sovereign immunity is admittedly of European origin, it is entirely consistent with the tribal constitution and common law . . ."). *Cf.* *O'Brien v. Fort Mojave Tribal Ct.*, 11 Indian L. Rptr. 6001, 6002 (Fort Mojave Tribal Ct. Dec. 8, 1983) (explicitly rejecting the doctrine of Tribal sovereign immunity).

immunity mirror tribal culture? It is difficult to imagine that an outdated English doctrine fits this tribe's needs.¹⁸⁴

As a general matter, unless properly waived, sovereign immunity will defeat a claim of wrongful termination in Tribal Courts.¹⁸⁵ Immunity may only be expressly waived, not impliedly waived.¹⁸⁶ One Tribal Court held that a plaintiff must demonstrate "by clear and convincing evidence" that a waiver exists.¹⁸⁷ Moreover, a Tribal official, "acting alone and without proper tribal legislative authority," may not waive the immunity of a Tribe.¹⁸⁸ However, a statute or Tribal charter containing a "sue or be sued" clause may be sufficient to effectuate a waiver.¹⁸⁹ Additionally, a personnel manual that states, "the Tribe shall agree to be a party to the suit" may also be sufficient to effectuate a waiver.¹⁹⁰

A Tribe may narrowly tailor its waiver of immunity.¹⁹¹ For example, one Tribal appellate court reversed a lower court ruling that required the Tribe to remove a written reprimand from an employee's personnel file because the Tribe's statutory waiver did not expressly allow for such an order.¹⁹² Another Tribal Court held that a waiver of immunity for personal injury actions against its gaming enterprise did not effectuate a waiver by the Tribe in an employment dispute.¹⁹³ Yet another Tribal Court held that the Tribe's waiver of immunity did not extend to claims of loss of

184. *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. C-006-0398, slip op. at 4-5 (ruling on motion to dismiss) (Little Traverse Bay Bands Tribal Ct. Feb. 22, 1999) (on file with the University of Michigan Journal of Law Reform) (emphasis omitted).

185. *See, e.g., McLean v. Rosebud Hous. Auth.*, 26 Indian L. Rptr. 6147, 6148-49 (Rosebud Sioux Tribal Ct. May 4, 1999); *Gonzales v. Allen*, 17 Indian L. Rptr. 6121, 6122 (Shoshone-Bannock Tribal Ct. Sept. 17, 1990).

186. *See Colville Tribal Enter. Corp. v. Orr*, 26 Indian L. Rptr. 6005, 6006 (Confederated Tribes of Colville Reservation Ct. App. Dec. 4, 1998) (citing *Naff v. Colville Confederated Tribes*, 22 Indian L. Rptr. 6032 (1995)); *Lovermi v. Miccosukee Tribe of Indians of Fla.*, 23 Indian L. Rptr. 6090, 6091 (Miccosukee Tribal Ct. Apr. 17, 1996).

187. *Ponca Tribal Election Bd. v. Snake*, 17 Indian L. Rptr. 6085, 6091 (Court of Indian Appeals for Ponca Tribe Nov. 10, 1988).

188. *Executive Comm. of the Wichita Tribe v. Bell*, 18 Indian L. Rptr. 6041, 6042 (Court of Indian Appeals for Wichita & Affiliated Tribes Sept. 25, 1990).

189. *See Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rptr. 6214, 6214 (Inter-Tribal Ct. App. of Nevada June 10, 1996) (holding that Tribal housing authority charter containing "sue and be sued" clause had waived its immunity).

190. *E.g., Martin v. Hopi Tribe*, 25 Indian L. Rptr. 6185, 6189 (Hopi Tribe Ct. App. Mar. 29, 1996).

191. *See generally Thompson v. Cheyenne River Sioux Tribe Board of Police Comm'rs*, 23 Indian L. Rptr. 6045, 6048-50 (Cheyenne River Sioux Ct. App. Feb. 9, 1996) (discussing the import of the scope of a tribe's waiver of immunity from suit).

192. *See Cloud v. Smith*, 25 Indian L. Rptr. 6030, 6031 (Ho-Chunk Nation Sup. Ct. Jan. 8, 1998).

193. *See Shourds v. Mashantucket Pequot Gaming Enter.*, 24 Indian L. Rptr. 6011, 6012 (Mashantucket Pequot Tribal Ct. Apr. 20, 1995).

consortium.¹⁹⁴ In more modern Tribal Constitutions, the drafters may include a narrow waiver for specific purposes, such as suing for injunctive relief or to protect constitutional rights. A Tribal Constitution may also prescribe the exact procedure to enact a waiver of immunity.¹⁹⁵ Some Tribes waive immunity only for a specific timeframe, thus building in a statute of limitations and a cap on damages and interest that cannot be waived by any party except the Tribal Council.¹⁹⁶ If a Tribe chooses to waive its immunity for purposes of allowing a former employee to seek judicial review of her discharge, the Tribe may narrowly tailor the waiver. As arms of Tribal government, Tribal subordinate organizations also enjoy immunity from suit.¹⁹⁷ This includes enterprises formed by Tribes for the purpose of economic development.¹⁹⁸ Subordinate organizations

194. See *Galardi v. Mashantucket Pequot Gaming Enter.*, 24 Indian L. Rptr. 6191, 6191 (Mashantucket Pequot Tribal Ct. Apr. 8, 1996).

195. *E.g.*, Grand Traverse Band of Ottawa & Chippewa Indians Const. art. XIII, § 1, available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (on file with the University of Michigan Journal of Law Reform).

196. See, *e.g.*, *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6243 (Ho-Chunk Nation Tribal Ct. Aug. 29, 1996) (discussing a two-thousand dollar cap on damages).

197. See *Wilson v. Grand Traverse Band of Ottawa & Chippewa Indians Hous. Auth.*, No. 01-06-375-CV, slip op. at 2 (ruling on summary disposition) (Grand Traverse Band Tribal Ct. March 12, 2002) (on file with the University of Michigan Journal of Law Reform) (citing *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *White Mountain Apache Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971)); *McLean v. Rosebud Hous. Auth.*, 26 Indian L. Rptr. 6147, 6148-49 (Rosebud Sioux Tribal Ct. May 4, 1999); *Lovermi*, 23 Indian L. Rptr. at 6091; *Defender v. Bear King*, 17 Indian L. Rptr. 6078, 6079 (Standing Rock Sioux Tribal Ct. Oct. 26, 1989). *Cf.* *DuPree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rptr. 6106, 6107 (Cheyenne River Sioux Ct. App. Aug. 19, 1988) (remanding to lower court determine whether "sue and be sued" clause contained in Tribal housing authority charter effectuated a waiver of immunity).

198. *E.g.*, *Shananaquet v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Corp.*, No. 00-05-299-CV, slip op. at 2 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Oct. 23, 2002) (on file with the University of Michigan Journal of Law Reform), *aff'd*, No. 00-05-299-CV (Grand Traverse Band Ct. App. March 18, 2003) (on file with the University of Michigan Journal of Law Reform); *Lonchar v. Victories Casino*, No. C-022-1200, slip op. at 2 (ruling on motion for summary judgment and dismissal) (Little Traverse Bay Bands Tribal Ct. Feb. 11, 2002) (on file with the University of Michigan Journal of Law Reform) (citing *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *Holmes v. St. Croix Casino*, 26 Indian L. Rptr. 6089, 6094 (St. Croix Ct. App. Jan. 4, 1999); *Sturgeon Electric Co. v. AHA MACA Power Service*, 26 Indian L. Rptr. 6026, 6027-28 (Fort Mojave Indian Reservation Ct. App. Dec. 7, 1998); *White Mountain Apache Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971)); *Lovermi*, 23 Indian L. Rptr. at 6092; *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶ 29 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995), available at www.tribalresourcecenter.org/opinions/opfolder/1995.NAMP.0000026.htm (on file with the University of Michigan Journal of Law Reform) (citation omitted), *aff'd*, 25 Indian L. Rptr. 6011 (Mashantucket Pequot Ct. App. June 11, 1996). *Cf.* *Eosso v. Foxwoods High Stakes Bingo & Casino*, 23 Indian L. Rptr. 6027, 6027-28 (Mashantucket Pequot Tribal Ct. Feb. 11, 1994)

are subject to suit where the Tribe chooses to waive its immunity. For example, entities chartered in a document containing a "sue or be sued" clause, such as many Section 17 corporations,¹⁹⁹ may be held to have waived their immunity.²⁰⁰ Moreover, at least one Tribal Court has held that a Tribally-chartered economic development enterprise is not entitled to raise the immunity defense where the Tribal constitution has waived the sovereign immunity of the Tribe.²⁰¹

Most Tribal Courts do not find that ICRA waives a Tribe's immunity.²⁰² Some Tribal Courts hold that the Tribal Constitutional due process provisions can trump the Tribe's sovereign immunity.²⁰³ One Tribal Court held that the Tribal Constitutional guarantee of the right to petition for action to redress grievances trumps Tribal sovereign immunity.²⁰⁴ Another Tribal Court also held that the enactment of an internal personnel policy providing for third party review of employment decisions waives the Tribe's immunity.²⁰⁵ Yet another Tribal Court held that the Tribe waives its immunity when it adopts an IRA constitution with a "sue and be sued" clause contained within.²⁰⁶ However, where the "sue and be

(holding that tribal Court did not have jurisdiction over tribal economic development enterprise).

199. See 25 U.S.C. § 477 (2000).

200. *E.g.*, *White Horse v. Four Bears Casino & Lodge*, 25 Indian L. Rptr. 6079, 6081 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Nov. 5., Dec. 11., and Dec. 29, 1997) (citing *Wells v. Fort Berthold Cmty. Coll.*, 24 Indian L. Rptr. 6157, 6157 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Mar. 31, 1997)).

201. See *Kakwich v. Menominee Tribal Enters.*, 21 Indian L. Rptr. 6112, 6113-14 (Menominee Sup. Ct. Aug. 9, 1994).

202. See, *e.g.*, *Bonacci v. Tribal Council of the Grand Traverse Band of Ottawa & Chipewewa Indians*, No. 00-04-176-CV, slip op. at 2-3 (ruling on motion to dismiss) (Grand Traverse Band Tribal Ct. Jan. 9, 2003) (adopting the analysis in *McCormick v. Election Comm. of the Sac & Fox Tribe*, 1 Okla. Trib. 8, 19, 1980 WL 128844 (Sac & Fox CIO, Feb. 1, 1980) (on file with the University of Michigan Journal of Law Reform); *Sliger v. Stamack*, No. 99-10-490-CV, slip op. at 2 (decision on motion for reconsideration) (Grand Traverse Band Tribal Ct. Feb. 14, 2000) (adopting *McCormick* analysis) (on file with the University of Michigan Journal of Law Reform). "The vast majority of both federal and tribal court cases have held that the Indian Civil Rights Act is not a waiver of tribal sovereign immunity." *Gonzales v. Allen*, 17 Indian L. Rptr. 6121, 6122 (Shoshone-Bannock Tribal Ct. Sept. 17, 1990). *But see* *Davis v. Keplin*, 18 Indian L. Rptr. 6148, 6150 (Turtle Mountain Tribal Ct. Sept. 6, 1991) ("[T]his court notes that the majority of tribal courts which have addressed this issue have held that ICRA violations are addressable in tribal court . . .").

203. *E.g.*, *Hudson v. Hoh Indian Tribe*, 21 Indian L. Rptr. 6045, 6046 (Hoh Ct. App. May 28, 1992). *Cf.* *McFall v. Victories Casino*, No. A-002-1102, slip op. at 3-7 (Little Traverse Bay Bands Ct. App., June 9, 2003) (arguing that the Tribal government cannot waive the due process rights of Tribal employees) (on file with the University of Michigan Journal of Law Reform).

204. See *Hudson*, 21 Indian L. Rptr. at 6046.

205. See *Gwin v. Four Bears Casino and Lodge*, 30 Indian L. Rptr. 6120, 6121 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Feb. 10, 2003).

206. See *Bd. of Trustees v. Wynde*, 18 Indian L. Rptr. 6033, 6036 (Northern Plains Intertribal Ct. App. May 3, 1990) (Godtdand, J., dissenting) (arguing that Tribe's "sue and be

sued" clause does not explicitly reference a personnel claim or employment contract claim, a Tribal Court may not find a waiver of immunity.²⁰⁷

Most questions of Tribal immunity are clear. Either the Tribe waived its immunity or not. If the Tribe could be forced to expend dollars or other resources and it has not waived its immunity, then the suit may not proceed. The analytical difficulties for tribal courts arise where tribal officials are sued in their official or individual capacities.

In the event that a Tribe has not waived its immunity, or in the event that a Tribe's waiver is too narrowly tailored to suit a potential plaintiff, the discharged employee may have no recourse but to attempt to invoke the *Ex parte Young* doctrine in Tribal Court and sue the individual Tribal Council officers or employees in their official and, occasionally, individual capacities for injunctive relief.²⁰⁸ A plaintiff might also sue the members of the appeals board. Whether the Tribe has waived the official immunity of individual Tribal officials and employees is a complex question. Whether individuals may be sued for money damages in their individual capacities is an even more difficult and important question, but is beyond the scope of this article.

B. Official Immunity of Tribal Officers

1. *Tribal Court Application of the Official Immunity Doctrine*—"Tribal officials, officers, employees and agents are immune from suit when acting in their representative capacities on behalf of a tribe or a tribal agency or arm of tribal government."²⁰⁹ As such,

sued" clause should constitute a waiver of immunity). *Cf. Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rptr. 6214, 6214 (Inter-Tribal Ct. App. of Nevada June 10, 1996) (holding that Tribal housing authority charter containing "sue and be sued" clause had waived its immunity). *See generally Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rptr. 6045, 6050 (Cheyenne River Sioux Ct. App. Feb. 9, 1996) (discussing Tribal and federal law relating to "sue and be sued" clauses in Tribal housing authority charters).

207. *See Dubray v. Rosebud Sioux Hous. Auth.*, 12 Indian L. Rptr. 6015, 6015 (Rosebud Sioux Tribal Ct. Feb. 1, 1985).

208. *E.g., Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rptr. 6235, 6241 (Ho-Chunk Nation Trial Ct. Aug. 29, 1996).

209. *Hayward v. Mashantucket Pequot Tribal Council*, 30 Indian L. Rptr. 6206, 6210 (Mashantucket Pequot Tribal Ct. Sept. 17, 2003) (citing *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F. Supp. 2d 271, 277-78 (D. Conn. 2002)); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff'd on other grounds*, 114 F.3d 15 (2nd Cir. 1997)). *See also Youvella v. Dallas*, 27 Indian L. Rptr. 6020, 6021 (2000) (Hopi Tribe Ct. App., Nov. 29, 1998). *But see Strickland v. DeCouteau*, 31 Indian L. Rptr. 6121, 6021

elected members of a Tribe's governmental body cannot be sued "[w]hen acting in their official capacity" ²¹⁰ However, Tribal officials may be sued for non-monetary, equitable relief if they have acted outside the scope of their authority. ²¹¹ As one Tribal Court explained, "[t]he standard to abrogate . . . qualified immunity as applied to public officials requires the plaintiff to allege and show that the officials' action exceeded their lawful authority and violated a law or statute that clearly established a right vested in the individual who was harmed." ²¹²

The initial question for tribal courts is whether the claim of immunity is made in accordance with federal legal authorities or Tribal legal authorities. ²¹³ If the Tribal legislature has enacted a statute that explicitly states who may have the benefit of immunity, the question is solely one of Tribal law. ²¹⁴ If, however, Tribal law is silent, then Tribal Courts generally will follow federal and state cases. ²¹⁵ Few Tribal Court decisions engage in a discussion of the difference between Tribal sovereign immunity and official qualified or absolute immunity. Where the Tribe is sued for damages or injunctive relief and has not waived its immunity, courts have no jurisdiction over the case. ²¹⁶ Moreover, where an individual is sued and the only relief requested would be paid by the Tribe, the court has no jurisdiction absent a waiver of Tribal sovereign immunity. ²¹⁷

(Turtle Mountain Tribal Ct. Nov. 25, 2003) (citing *Campbell v. Ark. Dept. of Corr.*, 155 F.3d 950, 962 (8th Cir. 1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

210. *Hayward*, 30 Indian L. Rptr. at 6210 (citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991)).

211. *E.g.*, *Decorah v. Whitewater*, 25 Indian L. Rptr. 6248, 6249 (Ho-Chunk Nation Sup. Ct. Oct. 26, 1998); *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rptr. 6045, 6047-49 (Cheyenne River Sioux Ct. App. Feb. 9, 1996); *GNS, Inc. v. Blackhawk*, 24 Indian L. Rptr. 6139, 6139 (Winnebago Tribal Ct. Sept. 26, 1996), *rev'd on other grounds*, 24 Indian L. Rptr. 6260 (1997) (Winnebago Sup. Ct. Oct. 9, 1997).

212. *Davis v. Keplin*, 18 Indian L. Rptr. 6148, 6150 (Turtle Mountain Tribal Ct. Sept. 6, 1991) (citing *Procunier v. Navarette*, 434 U.S. 555 (1978)).

213. *See Rave v. Reynolds*, 23 Indian L. Rptr. 6150, 6161-62 (Winnebago Tribe of Nebraska Sup. Ct. July 9, 1996).

214. *E.g.*, 6 Grand Traverse Band Code § 104(a) (2004) ("Members of the Tribal Council remain immune from suit for actions taken during the course and within the scope of their duties as members of the Tribal Council."), *available at* <http://doc.narf.org/nill/Codes/gtcode/travcode6immunity.htm> (on file with the University of Michigan Journal of Law Reform).

215. *See generally* Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J. L. & PUB. POL'Y 74 (Winter 1999).

216. *See Gwin v. Four Bears Casino and Lodge*, 30 Indian L. Rptr. 6120, 6120 (Three Affiliated Tribes of Fort Berthold Reservation Dist. Ct. Feb. 10, 2003) (citing *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040 (8th Cir. 2000)).

217. *E.g.*, *GNS, Inc. v. Blackhawk*, 24 Indian L. Rptr. 6260, 6262 (Winnebago Sup. Ct. Oct. 9, 1997) (denying claim on basis of sovereign immunity that would "reach the assets of the tribal treasury"). *See generally* *Sulcer v. Barrett*, 17 Indian L. Rptr. 6138, 6140 (Citizen Band Potawatomi Indians of Okla. Sup. Ct., Sept. 5, 1990) (Rice, J., concurring) ("It is black

However, what is less clear is where the defendants are Tribal officials or Tribal employees sued in their official *and* individual capacities. It is in this instance where the analysis of many Tribal Courts collapses.²¹⁸

Perhaps the best discussion of Tribal immunity and official immunity is contained in *Rave v. Reynolds*, a 1996 decision of the Winnebago Tribe of Nebraska Supreme Court.²¹⁹ In *Rave*, the plaintiffs brought a case against the Tribe and its elected officials contesting Tribal elections. The court held that the elected officials of the Tribe were entitled to official immunity because their actions did not exceed the scope of their authority,²²⁰ but that since Tribal law expressly allowed for the plaintiffs' request for injunctive and declaratory relief, the case could continue.²²¹ The court wisely chose to clearly demarcate the differences between the immunity of the Tribe and the immunity, if any, of elected officials and employees.²²² Utilizing the federal law of official immunity by analogy, the *Rave* court held that Tribal officials, unless they are judges, maintain a form of qualified official immunity,²²³ "limiting their damage exposure to those cases in which they acted in violation of a legal rule of which they knew or had reason to know."²²⁴

letter hornbook law that litigants cannot emasculate the doctrine of sovereign immunity by bringing court actions for relief against governmental agents acting on behalf of the sovereign. For the sovereign can act only through its agents, and when a judgment is entered against the sovereign agents, the judgment is a judgment against the sovereign although the judgment is nominally directed against the sovereign's agent.") (citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)).

218. One tribal court articulated two "recognized" exceptions to "the common law doctrine of sovereign immunity: (1) action by officers beyond statutory powers; and (2) exercise of powers that are unconstitutional or exercised in an unconstitutional manner." *Stone v. Swan*, 19 Indian L. Rptr. 6093, 6094 (Colville Confederated Tribes Indian Reservation Tribal Ct. Apr. 15, 1992) (citations omitted). Like some other tribal courts, see *Youvella v. Dallas*, 27 Indian L. Rptr. 6020, 6021-22 (Hopi Tribe Ct. App. Nov. 20, 1998), that Court blurred the separate doctrines of tribal sovereign immunity and qualified official immunity, creating doctrinal confusion. See, e.g., *Stone v. Somday*, 10 Indian L. Rptr. 6039, 6041 & n. 11 (1983) (Colville Tribal Ct. Jan. 13, 1983) (pointing to language in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), on whether a Tribal official is clothed with Tribal sovereign immunity as a "source of much debate and some confusion") (citing Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 6 (1979)).

219. 23 Indian L. Rptr. 6150 (Winnebago Tribe of Neb. Sup. Ct. July 9, 1996).

220. See *id.* at 6161.

221. See *id.* at 6164.

222. See *id.* at 6162 ("Clearly demarcating and separating the legal question of tribal sovereign immunity from the issue of tribal official immunity avoids this unfortunate consequence.").

223. See *id.* at 6164 ("Insofar as tribal officials have any immunity . . . , that immunity is an official immunity not a derivative sovereign immunity.").

224. *Id.* at 6162 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

The *Rave* court also identified the important problem in some Tribal Court decisions where the Court blurred the line between Tribal sovereign immunity and the official qualified immunity of Tribal officials. The Court discussed the two Tribal Court cases that mixed the doctrines, *Cleveland v. Blackhawk*²²⁵ and *Satiacum v. Sterud*.²²⁶ *Cleveland* held that Tribal sovereign immunity protected Tribal officials unless they acted outside the scope of their authority.²²⁷ The *Cleveland* court relied upon the *Satiacum* decision, which held that since an Indian tribe can act only through its officers, Tribal sovereign immunity extends to Tribal officials.²²⁸ *Rave* followed in time, if not in theory, *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*,²²⁹ which accurately analyzed the distinction between Tribal immunity and official immunity when it observed that a Tribe may extend its sovereign immunity to Tribal officials by express action.²³⁰ Other courts have taken alternative views of the official immunity doctrine, forming their own common law. For example, one Tribal Court has held that elected members of a Tribal government have legislative immunity for actions taken within the scope of their duties.²³¹ That court also found that employees of the Tribe have "good faith immunity," a notion equivalent to qualified, official immunity.²³²

Blurring these doctrines encourages plaintiffs' attorneys to sue individual employees and officers for money damages, especially if the Tribe has not waived its immunity to a lawsuit for money damages. Such a result hampers Tribal government operations in fundamental ways. Tribal employees would no longer be free to act in the best interests of the Tribe, only in their own interest of avoiding personal liability. Once local attorneys are aware of the Tribal Court's ambiguous immunity jurisprudence, they will line up to exploit it. The resulting litigation explosion may do irreparable harm to the Tribal community, as well as to employee morale and the Tribal asset base. As such, it is critical for Tribal Courts to properly understand and explain their immunity jurisprudence.

225. 22 Indian L. Rptr. 6090 (Winnebago Tribal Ct. July 7, 1995).

226. 10 Indian L. Rptr. 6013 (Puyallup Tribal Ct. Apr. 23, 1982).

227. *Cleveland*, 22 Indian L. Rptr. at 6091.

228. *See id.* (citing *Satiacum*, 10 Indian L. Rptr. at 6015).

229. 23 Indian L. Rptr. 6045 (Cheyenne River Sioux Ct. App. Feb. 9, 1996).

230. *See id.* at 6047-48.

231. *See Smith v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rptr. 6256, 6257 (Confederated Salish & Kootenai Tribes of Flathead Reservation Ct. App. Aug. 8, 1996) (citing *Tenny v. Brandhove*, 341 U.S. 367 (1951); *Chappell v. Robbins*, 73 F.3d 918 (9th Cir. 1996)).

232. *See id.*

2. *The Problem of the Arbitrary and Capricious Politician or Manager*—The *Rave* court identified the problem of the arbitrary and capricious Tribal politician or manager. At some point, most Tribal Courts will face a complaint brought by a discharged employee where the Tribe has not sufficiently waived its immunity and where the bad actor is a Tribal officer acting in her official capacity. At that point, the *Rave* court noted, Tribal Courts may feel compelled to find a waiver by bending the rules on sovereign or official immunity “merely to adjudicate legitimate claims against misguided tribal officials who seriously harm persons while acting within the scope of their authority.”²³³ Generally, however, most Tribal Courts will not “second-guess the motives of elected tribal officials Questioning the motives and politics of the business committee is a function of the electorate.”²³⁴

The Grand Traverse Band of Ottawa and Chippewa Indians Court of Appeals, in *Adams v. Grand Traverse Band Economic Development Authority*,²³⁵ crafted its own particular standard for determining when an individual may be personally liable to a wronged employee. The court acknowledged the official immunity of Tribal officials, holding “that the parties will have no personal liability if [the court] found that they were acting in their official capacities.”²³⁶ The *Adams* Court articulated an interesting standard for the lower court to determine when an individual could be personally liable for money damages: “We hold that the officers and managers could be personally liable if the trial court finds on the evidence that there is liability for actions that were entirely personal, clearly unauthorized by the parties’ duties, and having nothing to do with any party’s office.”²³⁷ The standard raises interesting questions of pleading and proofs.

Tribal Courts’ difficulty with this situation is understandable. Tribal sovereign immunity and its companion, official immunity, are not traditional or customary Tribal doctrine, but are rather grafted onto Tribal law. To broadly generalize Tribal customary law, when one individual harms another, the individual or her family must somehow repair the harm.²³⁸ Immunity often stands in the

233. *Rave*, 23 Indian L. Rptr. at 6162.

234. *Sulcer v. Barrett*, 17 Indian L. Rptr. 6138, 6141 (Citizen Band Potawatomi Indians of Okla. Sup. Ct. Sept. 5, 1990) (Rice, J., concurring).

235. No. 89-03-001-CV (APP) (Grand Traverse Band Ct. App. Aug. 19, 1993) (on file with the University of Michigan Journal of Law Reform).

236. *Id.* at 5.

237. *Id.*

238. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 551–52 (1998) (“We

way of this customary method of handling disputes and injuries by precluding tribal court jurisdiction to use its discretion to order or negotiate an alternative dispute resolution mechanism. The unfortunate result of the problem of the arbitrary and capricious Tribal official is that, often, immunity prevents the injured party from seeking a remedy. Perhaps Tribal Courts intentionally blur the lines between Tribal sovereign immunity and official immunity in order to come to a more correct result under Tribal custom.²³⁹

C. (In)Adequacy of Remedy

As a general matter, Tribal Courts award reinstatement and back pay in accordance with Tribal law to vindicated employees where Tribal law permits these remedies.²⁴⁰ Reinstatement may have its own inherent difficulties. Moreover, the issue of whether reinstatement to a comparable job is adequate creates fodder for additional litigation.²⁴¹ Despite the theoretical possibility of a remedy, a discharged employee may be confronted with the possibility of winning her case in Tribal Court, but receiving an inadequate remedy. Attorney fees may be unavailable to the winner. Tort or contract damages may be capped at a low threshold or may not be available at all. Reinstatement to the previously-held position or to

interviewed a Navajo who said that when someone harmed another in the old days, people would shun the injurer. The injurer's relatives would try to end the bad feeling by compensating the victim.").

239. *Cf. id.* at 563-64 ("On some reservations, custom is the 'underground' law of the courts, in the sense that it affects many decisions without being explicitly recognized or systematized in writing Tribal judges have the power to work their own social norms into the fabric of tribal law.").

240. *E.g.*, *White v. Ho-Chunk Nation Dept. of Pers.*, 24 Indian L. Rptr. 6182, 6188 (Ho-Chunk Nation Trial Ct. Oct. 14, 1996); *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6243 (Ho-Chunk Nation Trial Ct. Aug. 29, 1996); *Mitchell v. Brown*, 24 Indian L. Rptr. 6128, 6129-31 (Mashantucket Pequot Tribal Ct. Mar. 27, 1996); *Brooks v. Yellow Cloud Residential Ctr.*, 23 Indian L. Rptr. 6035, 6036 (1996) (Colville Confederated Tribes Admin. Ct., Dec. 27, 1995); *Frechette v. Menominee Tribal Enter.*, 24 Indian L. Rptr. 6082, 6083-84 (Menominee Tribal Ct. Nov. 19, 1995); *Office of Navajo Labor Relations v. West World*, 21 Indian L. Rptr. 6070, 6070 (Navajo Nation Sup. Ct. Apr. 18, 1994); *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6007 (Hoopa Valley Ct. App. Sept. 27, 1993); *Oglala Sioux Tribal Pers. Bd. v. Moore*, 16 Indian L. Rptr. 6051, 6051-52 (Oglala Sioux Ct. App. June 9, 1987); *One Feather v. Oglala Sioux Tribal Public Safety Comm'n*, 16 Indian L. Rptr. 6042, 6043 (Oglala Sioux Ct. App. Aug. 7, 1986).

241. *E.g.*, *Kingsley v. Ho-Chunk Nation Pers. Dep't*, 23 Indian L. Rptr. 6113, 6116-17 (Ho-Chunk Nation Tribal Trial Ct. Apr. 10, 1996).

a comparable job²⁴² may not be desirable or even advisable. The standard of judicial review, if it benefits the employer, might affect the likelihood of receiving a remedy. Finally, the adjudicatory process may have numerous difficulties and disadvantages. At some point, a plaintiff must decide whether it is worth proceeding with the action.

1. *Standard of Review and Form of Review*—The Tribal government has considerable discretion in determining how to proceed with crafting its statute. As with the administrative review, the statute may severely limit the discretion of the Tribal Court in reviewing the decisions of the Tribe to discharge an employee and the administrative review panel in upholding the discharge decision. Many Tribes choose to emulate the “arbitrary and capricious” or “abuse of discretion” standard of review adopted by federal courts in reviewing the final decisions of federal agencies.²⁴³

In contrast, tribal courts tend to adopt widely varying standards where tribal law is silent. For example, one Tribal Court adopted a

242. *E.g.*, *Smith v. Ho-Chunk Nation*, 26 Indian L. Rptr. 6121, 6123 (Ho-Chunk Nation Sup. Ct. June 7, 1999) (remanding to Tribal Court to determine definition of “comparable employment”).

243. *See, e.g.*, *Eldred v. Mashantucket Pequot Gaming Enter.*, 31 Indian L. Rptr. 6002, 6003 (Mashantucket Pequot Ct. App. Oct. 14, 2003) (discussing whether employment decision was arbitrary and capricious); *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002, 6007 (Hoopa Valley Ct. App. Sept. 27, 1993) (adopting concurring opinion in *Ames v. Hoopa Valley Tribal Council*, 21 Indian L. Rptr. 6039, 6040 (Hoopa Valley Ct. App. Nov. 14, 1991) (Irvin, J., concurring), that elucidated a “substantial evidence” test); *Stewart v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 02-01-784-CV, slip op. at 1 (ruling regarding de novo review) (Grand Traverse Band Tribal Ct. Oct. 21, 2002) (quoting Tribal personnel policy that allowed Tribal Court to rehear personnel case on the merits where plaintiff could show abuse of discretion, arbitrary and capricious acts or decisions, or noncompliance with applicable laws) (on file with the University of Michigan Journal of Law Reform); *Baker v. Spirit Mountain Casino*, 28 Indian L. Rptr. 6079, 6080 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Sept. 28, 2000) (“[T]he Court may remand or reverse a Final Employment Decision if it is arbitrary and capricious; or an abuse of discretion; or of the employees [sic] rights have been violated under the Tribal Constitution or other Tribal or Federal law.”) (citation omitted); *Smith v. Ho-Chunk Nation*, No. CV 98-66 & CV 99-04, slip. op. at 9-10 (Ho-Chunk Nation Trial Ct. Feb. 28, 2000) (finding that “[i]n reviewing employment decisions, the Court decides if the decision of the agency was arbitrary, capricious, or an abuse of discretion, giving deference to the agency’s decision”), available at <http://www.ho-chunknation.com/government/judicial/opinions/2003/Smith%20v.%20HCN%20et%20al.,%20CV98-66,%2099-04.pdf> (on file with the University of Michigan Journal of Law Reform); *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶ 27 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995), available at www.tribalresourcecenter.org/opinions/opfolder/1995.NAMP.0000026.htm (“Although the Court may not substitute its own conclusions for that of the CEO, the Court’s ultimate duty is to decide whether the CEO acted arbitrarily, capriciously or illegally.”) (citation omitted) (on file with the University of Michigan Journal of Law Reform), *aff’d*, 25 Indian L. Rptr. 6011 (Mashantucket Pequot Ct. App. June 11, 1996).

standard of review where it would not “disrupt findings of the [administrative panel] absent pretext or a haphazard or contradictory application of law.”²⁴⁴ Generally, the reviewing court is constrained to affirm the findings of fact of the hearing panel if substantial evidence supports the findings.²⁴⁵ Typically, the Tribal Court’s review is confined to the record.²⁴⁶ Other Tribes may choose a *de novo* review.²⁴⁷ Of course, the greater the weight given to the Tribe and the administrative review body, the less likely it is that the employee will prevail in Tribal Court.²⁴⁸

The Mashantucket Pequot employment code listed four factors for the Tribal Court to consider when determining if an employment decision was “arbitrary or capricious”:

- (1) there was a reasonable basis for concluding that the employee violated work rules, standards of conduct or other conditions of employment for the position held by the employee;
- (2) progressive discipline policies were followed in cases of minor infractions;
- (3) the employee received notice of the alleged infraction and was provided with an opportunity to contest the allegation and present mitigating circumstances; and

244. *Hiller v. Ho-Chunk Gaming Comm’n*, No. CV 99-72, slip op. at 16 (Ho-Chunk Nation Tribal Ct. July 5, 2000), available at <http://www.ho-chunknation.com/government/judicial/opinions/cv99-72c.pdf> (on file with the University of Michigan Journal of Law Reform).

245. See, e.g., *Short v. Hoopa Health Ass’n*, No. A-99-008, slip op. at 6 (Hoopa Valley Tribal Sup. Ct. Aug. 15, 2001) (finding that the “Appellate Court, in determining whether the . . . decision was arbitrary or capricious, must decide whether there was substantial evidence to support the termination decision”) (citing *Gerstner*, 22 Indian L. Rptr. at 6007) (on file with the University of Michigan Journal of Law Reform); *Hoopa Forest Indus. v. Jordan*, 25 Indian L. Rptr. 6159, 6160 (Hoopa Valley Tribal Ct. Mar. 25, 1998) (“The Court will grant relief from [an administrative] decision when the decision is not supported by evidence that is *substantial* when reviewed in light of the whole”); *Ames v. Hoopa Valley Tribal Council*, 21 Indian L. Rptr. 6039, 6040 (Hoopa Valley Ct. App. Nov. 14, 1991) (Irvin, J., concurring).

246. E.g., *Baker*, 28 Indian L. Rptr. at 6080 (“Pursuant to the Employment Action Review Ordinance this Court must limit and base its review on ‘the record,’ as submitted by the parties.”) (citation omitted).

247. E.g., *Van Pelt v. Umatilla Reservation Hous. Auth.*, 26 Indian L. Rptr. 6149, 6150 (Umatilla Tribal Ct. July 22, 1999).

248. See *Hitsman v. Confederated Tribes of Grand Ronde Cmty. of Or.*, No. C-03-01-002, slip op. at 2 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. June 30, 2003) (describing the standard of review as “a rather deferential one” and a “high bar” for a plaintiff to clear), available at http://www.grandronde.org/court/PublishedOpinions/hitsman_opinion.pdf (on file with the University of Michigan Journal of Law Reform).

- (4) the form of discipline was appropriate and did not constitute an abuse of discretion.²⁴⁹

Many petitions are disposed of quickly by Tribal Courts due to the application of the deferential "arbitrary and capricious" standard, especially where the employee merely presents the argument that the Tribe "should not" have discharged the employee rather than a more compelling argument that the Tribe "could not" discharge the employee.²⁵⁰ These Tribal Courts do not second-guess the discretion of the Tribal government.

Due process concerns may also affect the Tribal Court's determination of its authority to review the employment decision. At least one Tribal Court would require the tribal government to provide discovery tools before the administrative hearing and would allow the employee to be represented by counsel at that hearing or the Court would not constrain itself to a review of the record.²⁵¹

Most Tribes will also choose to restrict the Tribal Court's mode of review, just as a tribe might choose to waive its sovereign immunity only under very narrow circumstances, in order to preserve limited tribal assets. It is unlikely that, given the potentially extensive process provided the employee at the administrative hearing level that the Tribal statute will provide for a full-scale trial utilizing the rules of complex litigation. As such, most Tribal Courts are limited in their review to simply going over the administrative record.²⁵² However, some Tribes allow a Tribal Court to review the record and determine that there were fundamental flaws of some sort in the process.²⁵³ In that event, the Tribal Court may remand the case back to the administrative panel for a re-hearing or may order a hearing itself. In some circumstances, a Tribal Court may require a full trial or a hearing that mirrors the administrative proceeding.²⁵⁴

249. *Garry v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6186, 6188 (Mashantucket Pequot Tribal Ct. Aug. 18, 1998) (citations omitted).

250. *Whitaker v. Pierce*, No. C-02-09-005, slip op. at 3 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Apr. 29, 2003), available at <http://www.grandronde.org/court/PublishedOpinions/WhitakerA-030429.PDF> (on file with the University of Michigan Journal of Law Reform).

251. *E.g.*, *Koon v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 95-07-048-CV, slip op. at 3 (ruling on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 3, 1998) (on file with the University of Michigan Journal of Law Reform).

252. *See id.* But cf. Katherine J. Wise, *A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation*, 21 AM. INDIAN L. REV. 157, 165 (1997) (noting that the Navajo Nation appellate courts follow a de novo standard of review).

253. *See Koon*, No. 95-07-048-CV at 3.

254. *See id.*

2. *Contract and Tort Damages*—In the author's experience, Tribal Courts rarely award large damage awards to employee plaintiffs on a wrongful discharge theory. This results from the fact that Tribes guard their limited financial resources through the industrious use of the sovereign immunity defense. At least one Tribe has capped damage awards in employment disputes.²⁵⁵ As a general matter, however, unless the Tribe waives its immunity from suits bringing tort and contract claims, the claims will be barred.²⁵⁶

Some Tribal Courts may leave open the question of whether tort claims may be brought when the Tribal constitutional or statutory law is silent.²⁵⁷ For example, the *Adams* Court, apparently ignoring the doctrine of sovereign immunity altogether, wrote in dicta that it might allow contract and tort claims to proceed:

This court and the Tribal Court are both relatively newly established, so the court is attempting to avoid unneeded restrictions. The Tribal Court is the forum to determine the fair interpretation of the employment contract in light of the facts. It has the authority to review evidence and to fashion damages or declaratory relief as it determines proper if that court decides that there was an unjust breach [of contract]. The court must also decide whether libel or tortious interference could be included as claims in any contract breach.²⁵⁸

Other courts explicitly acknowledge that damages may not be available, for example, under the Tribal Constitution.²⁵⁹

255. *E.g.*, *Schmolke v. Ho-Chunk Nation*, No. CV 01-05, slip op. at 14-15 (Ho-Chunk Nation Trial Ct. Aug. 2, 2001) (discussing \$10,000 damage cap), available at <http://www.ho-chunknation.com/government/judicial/opinions/cv-01-05.pdf> (on file with the University of Michigan Journal of Law Reform), *aff'd*, 29 Indian L. Rptr. 6012 (Ho-Chunk Nation Sup. Ct. Dec. 8, 2001).

256. *E.g.*, *Long v. Mohegan Tribal Gaming Auth.*, 25 Indian L. Rptr. 6111, 6113-16 (Mohegan Gaming Disputes Trial Ct. Dec. 5, 1997).

257. *E.g.*, *Burnett v. Pioneer Chevrolet, Inc.*, 27 Indian L. Rptr. 6100, 6102 (Confederated Salish & Kootenai Tribes Ct. App. March 14, 2000); *Adams v. Grand Traverse Band Econ. Dev. Auth.*, No. 89-03-01-CV (APP) at 4-5 (Grand Traverse Band Ct. App. Aug. 19, 1993) (on file with the University of Michigan Journal of Law Reform).

258. *Adams*, No. 89-03-01-CV at 4-5.

259. *E.g.*, *Sliger v. Stamack*, No. 99-10-490-CV, slip op. at 3 (decision on motion for reconsideration) (Grand Traverse Band Tribal Ct. Feb. 14, 2000) ("Relief . . . is only available through a waiver of sovereign immunity adopted by tribal members through an amendment of the Tribal Constitution, or by Congress in the exercise of its plenary power over Indian tribes.") (on file with the University of Michigan Journal of Law Reform); *Hawkins v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 98-04-148-CV, slip op. at 3 (decision on summary disposition) (Grand Traverse Band Tribal Ct. Feb. 7, 2000) (on file with the University of Michigan Journal of Law Reform) (citing Grand Traverse Band Constitution art XIII, § 2(b), available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (on file with the University of Michigan Journal of Law Reform)).

3. *Attorney Fees and Costs*—Following the same logic as limitations in contract and tort damages, Tribes rarely provide for significant attorney fees for the victorious former employee. Unlike state and federal courts that may provide large attorney fees for civil rights litigators, Tribal Courts are usually limited in their discretion to award attorney fees and costs.²⁶⁰ Unfortunately, this situation makes it extremely difficult for a truly wronged former employee to seek legal representation. In many instances, lack of potential attorney fees is dispositive in a lawyer's choice to represent a former employee against her former Tribal employer. Lack of attorney representation often dooms an employee's Tribal Court appeal.²⁶¹

There are some Tribal Courts that would act to award attorney fees under exceptional circumstances.²⁶² In one case, *In re McSauby*,²⁶³ a court held that, in a case with certain important constitutional ramifications, the Tribal Court had authority not only to award attorney fees, but also to require the Tribal government to pay for the attorney up front. *McSauby* involved the potential removal of a sitting Grand Traverse Band Tribal Council Member. The respondent Council Member, the Court found, "was confused about how to defend against this removal action because there is another civil proceeding pending against him to rescind the land

260. *E.g.*, *Shomin v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 92-05-002-CV, slip op. at 3 (decision on costs and fees) (Grand Traverse Band Tribal Ct. July 7, 2000) (on file with the University of Michigan Journal of Law Reform); *Colvin v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rptr. 6126, 6219 (Mashantucket Pequot Tribal Ct. Jan. 4, 1999); *Johnson v. Mashantucket Pequot Gaming Enter.*, 26 Indian L. Rptr. 6070, 6071-72 (Mashantucket Pequot Tribal Ct. July 21, 1998). One court rejected a claim for attorney fees, noting, "Had the [Tribal] Legislature intended that a wronged employee be able to recover attorney or lay advocate fees, they would have specifically so stated." *Smith v. Beard*, 28 Indian L. Rptr. 6006, 6013 (Ho-Chunk Nation Tribal Ct. Aug. 10, 2000).

261. *See generally* *Moreland v. Spirit Mountain Casino*, 28 Indian L. Rptr. 6191, 6192 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. Mar. 7, 2001) (allowing *pro se* petitioner's wide latitude, but unable to discern more than very broad and vague challenges to his discharge) (citing *Akao v. Shimoda*, 832 F.2d 119, 120 (9th Cir. 1987)); *Colton v. Confederated Tribes of Grand Ronde Cmty. of Or.*, 27 Indian L. Rptr. 6163, 6164 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Ct. May 25, 2000) ("Petitioner appears *pro se* and, understandably, his claims therefore are not precisely linked to the Tribal Code provision describing this court's standard of review.").

262. *E.g.*, *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-95-136 at ¶ 54 (Mashantucket Pequot Tribal Ct. Dec. 11, 1995), available at www.tribalresourcecenter.org/opinions/opfolder/1995.NAMP.0000026.htm ("The Court concludes that in order for an employee to be entitled to an award of attorney fees, the employee must demonstrate that the Gaming Enterprise engaged in particularly egregious overreaching.") (on file with the University of Michigan Journal of Law Reform), *aff'd*, 25 Indian L. Rptr. 6011 (Mashantucket Pequot Ct. App. June 11, 1996).

263. No. 97-02-001-CV-JR (Grand Traverse Band Tribal Ct. July 27, 1997) (*en banc*) (on file with the University of Michigan Journal of Law Reform).

sale that is at the heart of the current land controversy.”²⁶⁴ The *McSauby* Court felt constrained by the respondent’s inability to handle the petitioner’s important constitutional action and feared that “the Court itself would have been forced by necessity to be pro-actively involved with guiding the case through the judicial process and, undoubtedly, guiding the defense if unrepresented to ensure fairness, due process, and to just get the appropriate legal arguments before the Court.”²⁶⁵ In order to avoid the appearance of impropriety and also to ensure the complete and uncompromised analysis of that very important question of Tribal law, the Court ordered the Tribe to pay for all attorney fees and expenses.²⁶⁶

4. *Reinstatement or Comparable Job*—As in non-Tribal settings, the typical remedy for a vindicated employee is reinstatement or placement in a job with comparable salary, responsibilities, and prestige. However, in a Tribal government setting, reinstatement is potentially disastrous. An employee with a poor working relationship with her supervisor or her coworkers is not likely to succeed after being reinstated in her previous position within a Tribe. Be it awkward family relationships, unpleasant personal relationships, or complex questions of competence, reinstatement of tribal employees often fails to solve the underlying problems between an employee, the supervisor, and coworkers. In many instances, the Tribe has no choice but to hire another employee to replace the discharged employee. This is most often the case where the administrative hearing decision upholds the discharge and the case has moved on to Tribal Court. No Tribe can afford to wait months or years for a final decision from the Court.

Additionally, placement in another position may also be very difficult. The smaller the Tribe, the less likely the Tribe can locate a comparable vacant position. Even if the Tribe does locate a comparable position, the position may be physically located very near the workplace of the previous position, thus creating difficulties of proximity to the former workplace.

5. *Length of Adjudicatory Process*—As with most adjudicatory systems, the length of time it takes to begin a process that results in the successful reversal of a decision to discharge an employee is substantial and very prejudicial to both the employee and the employer. The process leading up to the administrative hearing alone

264. *Id.* at 1.

265. *Id.* at 2.

266. *See id.* at 5.

may take weeks or even months.²⁶⁷ In one particular case involving the dismissal of the former emergency medical services coordinator for the Hoopa Valley Tribe's health clinic, it took nearly six years from the time of discharge until final disposition of the case by the Hoopa Valley Tribal Supreme Court to decide the matter.²⁶⁸ No fewer than three previous written opinions appeared over the six years as the case vacillated between the Hoopa Tribal Supreme Court, the Hoopa Valley Tribal Court, and the administrative hearing panel.²⁶⁹

In sum, there are no easy answers in order to create an effective remedy for vindicated Tribal employees. One Tribal Court attempted a novel approach by trying to circumvent the Tribe's immunity that prevented the award of back wages by ordering the Tribe to give the vindicated employee notice of all further vacancies and ordering the Tribe to give the employee preference over every other applicant, even Tribal Members and other Indians, for six months.²⁷⁰ The court further ordered that if the Tribe defied its other orders, the court would issue an order preventing the Tribe from hiring anyone ahead of the vindicated employee.²⁷¹ While the ultimate result of this attempted solution is unclear, it is very likely that these kinds of orders will not originate in many Tribal Courts in the face of the Tribe's sovereign immunity defense.

IV. WRAPPING UP: LEGISLATIVE PROPOSALS FOR TRIBAL GOVERNMENT

It is axiomatic that solutions to problems in Tribal government should take into account the Tribe's customs, traditions, and

267. *E.g.*, *Johnson v. Mashantucket Pequot Gaming Enter.*, No. MPTC-EA-97-120 at ¶ 44 (Mashantucket Pequot Tribal Ct. Jan. 21, 1998), *available at* www.tribal-institute.org/opinions/1998.NAMP.0000012.htm ("The laborious process of submitting and receiving written questions and answers can consume weeks, even months, all while the employee, if terminated, is out of a job.") (on file with the University of Michigan Journal of Law Reform).

268. *See Short v. Hoopa Health Ass'n*, No. A-99-008, slip op. at 3 (Hoopa Valley Tribal Sup. Ct. Aug. 15, 2001) (noting that the Tribe discharged the employee in October 1995) (on file with the University of Michigan Journal of Law Reform).

269. *See id.* at 3 nn.1 & 2, 4 n.3.

270. *See Gonzales v. Allen*, 17 Indian L. Rptr. 6121, 6124 (Shoshone-Bannock Tribal Ct. Sept. 17, 1990).

271. *See id.*

mores.²⁷² "Native nations concerned about these consequences may want to craft legal and political solutions that limit the application of individual rights so that internal tribal social dynamics are disrupted as little as possible."²⁷³ But what happens when the problems are created, in large part, by the forced imposition of Anglo-American law onto Tribal law?

As discussed, the most important factors to weigh in a Tribal employment separation dispute are as follows: (1) the employee's right to earn a living; (2) the Tribe's interest in employing good employees; (3) the employee's interest in being blacklisted or blackballed with future employers, including the Tribe itself; and (4) the Tribe's sovereign right to decide its own internal affairs. Adjudicating Tribal employment separation disputes in the general structure of a pre-termination administrative hearing followed by post-termination Tribal Court review imposes great disadvantages on the Tribal community, the Tribal employer, and the Tribal employee, including: (1) the administrative and attorney costs to both parties; (2) the delay in determining the outcome—a delay in which an important government position goes unfilled and an employee goes unpaid, and a delay that may result in substantial awards against the Tribal employer; (3) the sociological costs to the Tribe, the supervisors, the employee, and other Tribal employees who are involved in the process; and (4) the cost to the Tribe in settling its disputes in a non-customary and non-traditional method, a choice that amounts to adopting the ways of the dominant culture over the untested ways of the Tribal culture.

This Article describes several possible solutions that some Tribes have already selected, including a special court of employee claims²⁷⁴ and a peacemaker-style dispute resolution mechanism,²⁷⁵ and at least one that no Tribe (at least as far as the author is aware) has selected, a step to eliminate adversarial adjudication of employee appeals altogether while simultaneously providing an

272. See, e.g., *Hopi Indian Credit Ass'n v. Thomas*, 27 Indian L. Rptr. 6039, 6040–41 (Hopi Tribe Ct. App. Nov. 20, 1998) (remanding to trial court to determine whether "Hopi custom, traditions and culture" were relevant to the application of Arizona's statute of limitations); *Chatterson v. Confederated Tribes of Siletz Indians of Or.*, 24 Indian L. Rptr. 6231, 6232 (Confederated Tribes of Siletz Indians of Or. Ct. App. Oct. 9, 1997) ("There are instances, however, when tribal tradition, privileges or cultural beliefs should be considered by the trial court . . ."). Cf. *Fisher v. Pigeon*, 24 Indian L. Rptr. 6258, 6259 (Saginaw Chippewa Tribal Ct. Dec. 28, 1996) (discussing traditional Indian law in context of tribal elections). For a greater discussion of customary law, see Newton, *supra* note 5, at 304–14.

273. Goldberg, *supra* note 5, at 921.

274. See *infra* Part IV.A.

275. See *infra* Part IV.B.

automatic monetary remedy for discharged employees.²⁷⁶ This Article does not propose a solution based on any individual Tribal group's customs and traditions but rather a solution that simply rejects the dominant culture's solution to government employment separation. Of course, each Tribe must decide for itself based on its own customs and traditions how to proceed in the future.

A. Separate Court of Employee Claims

Many Tribes choose the federal and state government method of adjudicating the property rights of employees in the pre- and post-termination hearing review model approved by the United States Supreme Court in *Loudermill*. For some Tribes, nothing is likely to move them away from this model. For these Tribes, who are likely large Tribes with many hundreds or even thousands of employees, the advantages of this model may outweigh the disadvantages. It is doubtful that there are many Tribes in this category.

For those Tribes that find the *Loudermill* model necessary for political or other practical reasons, but find that the model still has serious deficiencies, the creation of a separate court of employee claims may alleviate some of those deficiencies. This modified structure would most likely follow an arbitration model. Because this court would hear nothing but employment disputes, the rules and the procedures can be streamlined, theoretically reducing the amount of time before a final decision is reached. If all disputes are funneled into this court and there is no further Tribal Court review granted, then the process is streamlined further. The adjudicator should be an expert in employment law and at least knowledgeable in Tribal law. Following this model, several Michigan Indian Tribes and the State of Michigan entered into an omnibus tax agreement in 2002 and 2003 with a provision requiring the use of an arbitration panel with specific expertise in tax law and Federal Indian law.²⁷⁷ In this situation, the Tribe would have to waive immunity to an extent necessary to enforce the arbitration decision.

There are many advantages to such a system. Tribal employees who were formerly conscripted to hear employment disputes

276. See *infra* Part IV.C.

277. E.g., Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan § XIV.C., Dec. 20, 2002, at www.michigan.gov/documents/LTBB_Agreement_58762_7.pdf (on file with the University of Michigan Journal of Law Reform)).

between their employer and their co-workers would avoid the personal difficulties of hearing and deciding these cases. The Tribe has the added advantage of increased productivity from not taking valued employees out of their regular duties to hear these cases.

Unfortunately, placing the adjudication of Tribal employment disputes in arbitration is relatively costly, requiring the creation of a new legal body to hear the disputes. Furthermore, as with any adjudication, there will be winners, losers, and distressed individuals.

B. Peacemakers Court-Style Dispute Resolution

Another method to alleviate many of the harms associated with the administrative and Tribal Court review of employment separations in Indian Country is to enact a form of the "Peacemaker Court model"²⁷⁸ of alternative dispute resolution. Many Indian Tribes are beginning to follow the Peacemaker Courts model adopted most famously by the Navajo Nation²⁷⁹ and the Seneca Nation.²⁸⁰ Peacemaker Courts avoid the total, all-out-war of adversarial adjudication. However, in highly emotional cases involving employment and potential civil rights claims, the Peacemaker Court model may break down. A Peacemaker Court, by definition, requires the consent of the parties to complete its function.²⁸¹ The model collapses if the parties do not reach a resolution and the parties may end up in litigation regardless of the efforts of the mediators and court officials. Additionally, non-Indians and non-Member Indians may strongly object to this form of dispute resolution and rarely, if ever, has it been utilized for "outsiders."²⁸²

278. The "Peacemaker court" model is a generic title for a system of tribal court adjudication excluding formal rules of court procedure involving family members to resolve disputes peaceably by consensus where all parties' concerns are addressed. See generally Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999).

279. See *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222, 1229 (D. N.M. 1999); Hon. Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185 (1994); James W. Zion, *Navajo Therapeutic Justice*, 18 *TOURO L. REV.* 563 (2002).

280. See *Bowen v. Doyle*, 230 F.3d 525, 526-27 (2nd Cir. 2000); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

281. See Goldberg, *supra* note 5, at 924 ("Because individuals must opt into [Peacemaker Court], any potential individual rights claims are waived.").

282. *Id.* ("Through such a system, tribal members can function within the framework of individual-collective relations that comports with the tribal worldview, while outsiders (including investors) can be assured a more familiar set of procedures and rights in the Western-style court.").

Similar to the Peacemaker Court model, some Tribes place a strong emphasis on “informal” resolution of employee-employer disputes. The Hoopa Valley Court of Appeals in *Hoopa Valley Indian Housing Authority v. Gerstner*²⁸³ described the policy and practice of the Hoopa Valley Tribe to resolve disputes in an “informal” matter before proceeding to an agency hearing followed by Tribal Court adjudication.²⁸⁴ The Court noted:

It is the established policy of the Hoopa Valley Tribe that before employee grievances escalate into formal proceedings, informal resolution should be attempted. This policy is incorporated in provisions requiring written evaluations at least annually, requiring unsatisfactory job performance be documented, requiring counseling on specific areas of poor job performance to have occurred prior to termination or demotion [citation omitted] and requiring the [administrative review panel] to seek an informal resolution prior to instituting formal procedures [citation omitted]. . . .

In most cases this is appropriate. Most cases involve employees disciplined by the executive director or agency head. The informal conference between the executive director, or the immediate supervisor, and the affected employee will preserve the working relationship of the affected individuals, and will correct the problem quickly, if informal resolution is achieved.²⁸⁵

However, this policy is merely that—a policy. Nothing stops the parties from refusing to resolve their differences in court. The mess of formal and complex adjudication continues.

C. Stop All Adjudication of Tribal Employment Separation Disputes

Another solution to the problem created by Tribal employment separation is to eliminate adjudication altogether and keep these cases out of Tribal Courts by providing an automatic monetary remedy, set by the Tribe’s governing body, similar to a severance

283. 22 Indian L. Rptr. 6002 (Hoopa Valley Ct. App. Sept. 27, 1993).

284. *Id.* at 6004–05.

285. *Id.* at 6004.

package in all cases of employment separation. Though this avoids the pain of formal adjudication, the limited amount of the automatic payment might be harsh on the employee. This is not to say that Tribal Courts are deficient in any way. In fact, it is impossible to imagine a future of strong and capable Tribal governments without a functioning and legitimate Tribal judiciary.²⁸⁶

This is perhaps the most radical proposal. This proposed solution would put a stop to the adjudication of Tribal employment separation disputes. Simply put, each final decision to discharge an employee would be accompanied by an up-front, lump sum payment to that employee in an amount equal to six months of salary or wages. The Tribe would fund this lump sum payment with a tax on Tribal employees sufficient to cover all payments and other costs.²⁸⁷ The Tribe must waive its immunity to the extent that a discharged employee can recover the payment, but that is all. Administrative and Tribal Court adjudication stops.

The primary and best advantage to this proposal is that the harsh, complicated, and grueling hearing process to decide who is right and who is wrong—an inherently unanswerable inquiry—ends. No more testimony from witnesses and employees terrified of retaliation and alienation. No more convening a tribunal of Tribal government and Tribal Court employees to spend hours and even days hearing and judging evidence and testimony. Every lawyer

286. See generally FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995). See also *Bd. of Trustees v. Wynde*, 18 Indian L. Rptr. 6033, 6036 (Northern Plains Intertribal Ct. App. May 3, 1990). The *Wynde* Court, sounding as if it were composed of non-Indians, wisely wrote that questions pertinent to a Tribe's culture and traditions should not be left to a court of law:

Most assuredly, it is not the cross we bear as an appellate court to right every alleged wrong, to predicate and postulate the redeeming righteousness of conduct we approve and abhor by deci[ding] the perceived unrighteousness of tribal conduct within a cultural setting that just may view issues in a manner foreign to our own sense of justice. Decisions predicated on cultural tradition and the need to preserve the very existence of the tribe are better left to tribal members as constituents, the tribal advocates, the tribal council and the elder statesmen of the tribe to be decided in the context of political and social change within their culture. Never to be decided on the basis of whim and fancy of an appellate court substituting its judgment on tradition and cultural values peculiar to but most assuredly, part of that very tribal culture.

Id.

287. Taxation of the employment of non-Indians is likely permissible under the theory that the non-Indian has consented to the jurisdiction of the Tribe by entering into an employment relationship with the Tribe. See, e.g., *Rodriguez v. Wong*, 82 P.3d 263, 266 (Wash. Ct. App. 2004) (holding that employment with an Indian Tribe "constitutes a 'consensual relationship' over which the tribe is presumed to retain authority.") (quoting *Cordova v. Holwegner*, 971 P.2d 531, 538 (Wash. Ct. App. 1999)).

who has participated in any fact-finding hearing knows that the facts that an impartial tribunal discovers never reveal the exact truth. There is no such thing as exactness in litigation. In a difficult situation where a supervisor and an employee cannot work together, both sides may be partially at fault. There is too much subjectivity in a process that requires an objective, yes-or-no answer. Tribal employment separation adjudication mixes the facts, policies, laws, emotions, livelihoods, reputations, Tribal government services and programs, and people into a blender and comes out with an imperfect and dehumanizing outcome, through no fault of any of the participants. Because Tribal communities cannot replicate the personal and emotional distance between jurors and parties, the Anglo-American finding of fact by a jury does not work for Tribes.

Due process is not ignored in such a system. Contrary to the model where an employee's property is taken without compensation whenever "just cause" is found, under this proposal, the employee's deprivation is *always* compensated. The deprivation of the employee's employment as property is similar to a taking of a real property owner's land, amounting to an eminent domain analysis instead of an individual rights analysis. As a result, the Tribe avoids expensive litigation that might result in massive tort awards against it, while discharged employees who are members of the Tribe may seek a political remedy.

A secondary, but still significant, advantage is the reduction of economic costs to both the Tribe and the discharged employee. Neither the Tribe nor the employee needs to allocate and pay for legal expenses. The Tribe saves the expenses from forming and maintaining an internal administrative body to hear numerous employment cases a year, with its attendant costs to productivity and morale.

Finally, resolution of the dispute is realized immediately. Whether the termination decision was right, wrong, arbitrary, capricious, justified, or necessary becomes irrelevant. The Tribes moves on and the employee moves on. The turmoil associated with the adjudication, the accusations, and the discontent of an adverse Tribal Court decision lingers and hopefully the healing process begins sooner.

Immediate relief is the best reason to choose this model. What Justice Thurgood Marshall wrote thirty years ago about federal government employees applies with equal validity to Tribal government employees:

Many employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the essentials of life—*e.g.*, to buy food, meet mortgage or rent payments, or procure medical services. [citation omitted] Government employees might have skills not readily marketable outside the Government, making it difficult for them to find temporary employment elsewhere to tide themselves over until the lawfulness of their dismissal is finally determined. In some instances, the likelihood of finding alternative employment may be further reduced by the presence on the employee's records of the very dismissal at issue. Moreover, few employers will be willing to hire and train a new employee knowing he will return to his former Government position if his appeal is successful. Finally, the loss of income may be 'temporary' in only the broadest sense of that word. Not infrequently, dismissed federal employees must wait several years before the wrongful nature of their dismissal is finally settled and their right to backpay established.²⁸⁸

CONCLUSION

This Article argues that non-Indian principles of law, individual rights, and justice imported into Tribal governments in the guise of administrative review panels and judicial review seriously undermine Tribal government operations and communities.

There are no easy answers to the problems associated with Tribal employment separation, just as there are no easy answers to employment separations in federal, state, and local governments, or in the private sector. Indian Tribes, however, have a unique opportunity to choose their own path. Tribal self-determination allows, even compels, Indian Tribes to seek innovative and culturally sensitive solutions.²⁸⁹ Whether those solutions follow a Euro-American litigation model or a Peacemaker Court model or some other

288. *Sampson v. Murray*, 415 U.S. 61, 101–02 (1974) (Marshall, J., dissenting) (citations omitted).

289. See Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM. RTS. L. REV. 1, 68 (2003) ("Every tribe is a laboratory of experimentation in favor of self-determination and the preservation of traditional tribal values, and no other governmental body is more capable than a tribe's own leadership.") (footnote omitted); Newton, *supra* note 5, at 293 ("These differences are a sign of creativity as tribal councils and courts balance variances among the tribes' traditions and present needs against the traditions and requirements of the dominant society's law.").

model not discussed here, it is advisable for Tribes to choose and try alternatives suitable to their unique situation and not necessarily follow non-Indian models that destabilize non-Indian tribal communities and erode Indian sovereignty. Resolution of disputes arising out of Tribal employment separation must be significantly modified to reduce the sociological, political, and emotional harms that follow from incorporating this doctrine of Anglo-American law onto Tribal communities.

If tribal employment separation disputes were taken out of the realm of formal, adjudicatory court forums and concluded with a lump-sum payment, then the troubled circumstances that Bear Tenzing faced both as a supervisor and as a discharged employee would have ended much sooner rather than drag on for months or years. Though such a crude mechanism might appear arbitrary, the non-monetary advantages to tribal governance and tribal societies to avoiding these often-destructive legal disputes more than justify this proposal.

