AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 21:2 (1997) 83–104

The Anomaly of Judicial Activism in Indian Country

JAMES J. LOPACH

INTRODUCTION

The judicial function is no stranger to Native Americans. Prior to their contact with Europeans, American Indian tribes had various procedures for settling conflict among members. The aggrieved could seek dispute resolution directly or be assisted by an elder, a war chief, or a member of the tribal council.[1] With the passage of time and altered circumstances, the judicial function became more formalized—for example, as an adjunct of the federal Indian agent or as a sovereign activity proceeding directly or indirectly from a constitution adopted by the tribe.

The power of emerging tribal courts has always been problematic, especially when the court was created by the tribal council pursuant to an authorization in an Indian Reorganization Act constitution.[2] Particularly troubling has been the question whether such a "legislative" tribal court has jurisdiction to hear cases involving the legality of tribal council actions. Lacking an explicit judicial-review authorization in the

James J. Lopach received his Ph.D. in Public Law and American Government from the University of Notre Dame. He is a professor in the University of Montana's Department of Political Science, coeditor of *Tribal Constitutions: Their Past—Their Future* and principal author of *Tribal Government Today: Politics on Montana Indian Reservations.*

court's enabling ordinance, a follow-up issue has been whether the court could legitimately claim for itself an inherent power of judicial review.

There are many good arguments for judicial review in Indian Country. Rationales such as checking a council acting clearly outside of its constitutional authority, ordering an election board to desist from corrupt practices, or protecting the constitutional rights of a minority faction can be as compelling for a tribal government as for any other political society that cherishes democratic principles. The desirability of judicial review, however, is not the focus of this article. What will be discussed is the proper vehicle for its adoption.

The above queries about the availability of judicial review are evocative of early United States political history. In the landmark case of *Marbury v. Madison*,[3] the United States Supreme Court under John Marshall, the "great chief justice," established through constitutional interpretation the power of judicial review and thereby gave the court the constitutional potential for coequal status with the presidency and the congress. Empowered with judicial review, the branch of government Alexander Hamilton called the "least dangerous"[4] ironically became in time a full and independent partner in American national politics.

Similar to Alexander Hamilton's view of the federal judiciary, the judicial branch in contemporary American Indian government often has a subordinate role and limited powers. Those wanting a stronger tribal judiciary have been frequently frustrated by the intractable democratic change processes of ordinance and constitutional amendment and have looked to the tribal court for the desired reform.[5] But should American Indian tribes rely on activist judicial interpretation of the tribal constitution as the vehicle for adopting judicial review? On the Flathead Reservation of the Confederated Salish and Kootenai Tribes, the opportunity to effect what was arguably a needed governmental change was too great a temptation for the tribal appellate court. The judicial-review holding in the 1995 case of *Moran v. The Council of the Confederated Salish and Kootenai Tribes*[6] amounted to judicial restructuring of the tribal government. Instead of explaining to the tribal membership the traditional roots of tribal politics and suggesting democratic procedures as the proper means for patriating the tribal government—that is, making it reflect the membership's values—the appellate court itself became the immediate agent of fundamental change.

THE *MORAN* CASE

An adage of the judicial process is that ordinary cases can be the stuff of radical legal pronouncements. So it was in *Moran*. In October 1992, Anthony Cross Guns, a Blackfeet tribal member, pleaded guilty before Chief Judge William Moran of the Salish and Kootenai trial court to domestic violence against his common-law wife, a Flathead tribal member. Judge Moran sentenced Cross Guns to tribal jail for three years after denying the public defender's request for leniency and sentence deferment for substance-abuse treatment. In November 1992, Cross Guns escaped from tribal custody. He was apprehended two years later and received an additional sentence of thirty days, to run concurrently with his original sentence. Following fruitless petitions for rehearing and appeal, Cross Guns' public defender asked the tribal council for clemency. On March 10, 1995, the council voted 5 to 3 to issue Cross Guns a "conditional Executive Order of Clemency," and the clemency order, which included a two-and-one-half-year period of banishment from the reservation, was signed and executed by the tribal chairman.[7] The council based the clemency order on its "inherent governmental powers as a sovereign nation" and on its "exclusionary powers."[8] These actions by the Flathead council and chairman set the stage for a protracted and heated council-court controversy played out in several arenas (including an unsuccessful recall petition, elections in which former Chief Judge Moran was elected to the tribal council, and an ongoing constitutional review committee), but principally in the tribal judiciary.

The *Moran* case's issue of broad consequence—whether the tribal court has the power of judicial review under the existing tribal constitution—was framed by the two parties when they appeared on several occasions before the Flathead tribal courts. Two days after the council chairman implemented the clemency order, the tribal prosecutor asked the Salish and Kootenai appellate court to strike the order because it was an unlawful invasion of the trial court's power.[9] The tribal council then fired the prosecutor and ordered the tribal attorney, now acting as the tribal prosecutor, to withdraw the former prosecutor's motion. On March 13, 1995, the tribal attorney moved to withdraw the motion to strike. At a continued appellate court hearing on March 23, the tribal attorney argued that "the Tribal Council in creating the Tribal Court and subsequent ordinances has not

granted Tribal Court the authority to judicially review its grants of Executive Clemency."[10] Meanwhile, Chief Judge Moran asked a judicial colleague on his own trial court for a declaration that the clemency order amounted to "political interference" by the council and for an *ex parte,* temporary restraining order against the council "to maintain the status quo and thereby prevent his removal as chief judge."[11] Chief Judge Moran had been appointed to his office by the tribal council.[12]

The tribal courts' responses to these petitions set the stage for the *Moran* ruling on judicial review. First, a majority of the Flathead appellate court decided that the tribal attorney could withdraw the prosecutor's motion; the appellate court, however, refused to comment on the separation-of-powers questions.[13] Then Chief Judge Moran received the restraining order against the council that he had requested. The council immediately appealed this ruling to the appellate court's civil panel, once again arguing that the tribal court lacked the power of judicial review. After the ten-day restraining order expired, the appellate court's civil panel declared that the council's appeal was moot. The council's next step was to fire Chief Judge Moran, who sought further injunctive relief in the trial court. The council responded by asking the full appellate court for a hearing on the separation-of-powers question. The Court of Appeals of the Confederated Salish and Kootenai Tribes stayed Moran's motion for a restraining order and on July 20, 1995, took up the "overriding question of whether the Tribal Court has the power of judicial review of tribal legislative and executive action"[14]—which was for the Flathead reservation a "case of first impression."[15]

On October 23, 1995, the five-judge Flathead appellate court ruled unanimously against the tribal council's position on separation of powers, holding that:

> the Tribal Court has the power to hear cases to review Tribal Council actions to determine if such comport with the Constitution and laws of the Tribes, and other applicable law, i.e., to determine if such actions are constitutional and otherwise lawful.[16]

Further, the appellate court found that Moran's request for a restraining order regarding his removal was deficient and remanded the question of the legality of the clemency order.[17] The membership of the Flathead appellate court consisted of

Chief Justice Robert M. Peregoy, an attorney with the Native American Rights Fund, who wrote the *Moran* opinion; Associate Justice Margery Hunter Brown, professor emeritus of the University of Montana Law School; Associate Justice James Wheelis, a former Montana district court judge; and Associate Justices Robert Gauthier and Margaret Hall, who are enrolled members of the Flathead tribes but are not lawyers.

The Flathead appellate court reasoned from provisions of Flathead constitutional and statutory law to decide the judicial review issue and reinforced its deductions with prior rulings of federal and other tribal courts. But, as United States Supreme Court Justice Oliver Wendell Holmes said, the "fallacy...is the notion that the only force at work in the development of the law is logic."[18] Judicial decision making is never an exact science. Always critical is how a court fills in the inevitable gaps and how it uses the residual discretion found in the pertinent law. The judging-as-art aspects of the *Moran* opinion were informed by a separation-of-powers philosophy that, while part of mainstream American civics education and jurisprudence, is absent from Flathead political tradition and governmental practice. The Flathead appellate court thereby behaved in opposite fashion to Chief Justice Marshall in the seminal judicial-review case of *Marbury v. Madison*. Instead of elucidating the basic tenets of the applicable government—Flathead tribal government in the *Moran* instance—the Flathead appellate court itself fashioned a new fundamental principle.

THE *MORAN* RATIONALE

The major premise of the Flathead appellate court's syllogism was the provision of the Flathead constitution that authorizes the tribal council to create a tribal court: "The Tribal Council shall have the power...to promulgate and enforce ordinances...providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court, and defining its powers and duties."[19] The minor premise in the appellate court's judicial-review argument was the council's implementation of its constitutional authority to establish a court:

> Pursuant to Ordinance 36B, the Tribal Council unequivocally "vested" the "judicial power" of the Tribes "in the Tribal

> Court." Therein, the Tribal Council granted civil jurisdiction to the Tribal Court over "all suits," and authorized the Tribal Court to exercise such jurisdiction to the "fullest extent possible." Further, Ordinance 36B authorizes the Tribal Court to exercise subject matter and personal jurisdiction to the "fullest extent possible not inconsistent with federal law." The grant expressly provides for tribal court jurisdiction over "[a]ll persons found within the Reservation." "Persons" is broadly defined as an "individual, organization, corporation, governmental subdivision or agency."[20]

The appellate court's conclusion was that the ordinance created a court of "general jurisdiction" and, as the "grant carves out no exceptions regarding cases and controversies involving the Tribal Council, ...vested the Tribal Court with the power of judicial review to hear suits to determine the lawfulness of acts of the Tribal Council and tribal officials."[21]

The Flathead appellate court bolstered this logic with the conclusions and reasoning of other courts.[22] The principal auxiliary theory was that tribal courts, even when created by ordinance, derive their authority from a tribe's "inherent sovereign judicial powers."[23] Supporting this position was a 1982 decision in a "closely analogous controversy"[24] involving the Puyallup tribe. In *Satiacum v. Sterud*[25] the Puyallup tribal court, which had been created by the tribal council and not the tribal constitution, said that "it was a court of general jurisdiction" and, "as an integral institution of the tribe, it properly exercised the tribe's inherent judicial powers."[26] The *Moran* court similarly relied on a 1976 observation by the federal Ninth Circuit Court of Appeals in *Quecham Tribe of Indians v. Rowe*[27] that "tribal courts derive their fundamental authority from the inherent sovereign power of respective tribes."[28]

Finally, the Flathead appellate court hammered home its point of inherent judicial power by using *Marbury v. Madison*, the case in which the United States Supreme Court established judicial review. No other United States Supreme Court case is better known to lawyers and school children alike. All American citizens, including tribal members, become imbued with the notion, derived from *Marbury*, that courts have the special role of securing rights by checking the other branches of government. Because of this pervasive theme of American civics and legal education, it is not surprising that the Moran court could slip so easily into the following argument:

> Among the most important functions of courts are constitutional interpretation and the closely connected power of determining whether laws and acts of the legislature comport with the provisions of the constitution. Courts were created to serve these purposes.... The Tribal Court of the Confederated Salish and Kootenai Tribes is no exception.[29]

AN ALTERNATIVE JURISPRUDENCE

There exists an alternative jurisprudence, however, that permits the argument that the Salish and Kootenai tribal court is an "exception." The grounding of such a jurisprudence is traditional tribal government and Flathead political practice. American Indian government in general and the Flathead tribal government in particular have special features which should have been determinative when the appellate court interpreted ambiguities in law and precedent. The crux of this more restrained interpretive approach is that American Indian governments tend to be democratic, that is, tied to tribal members by some kind of legitimizing popular process, and that judicial activism—judges basing their decisions on results they desire rather than on established legal doctrine or accepted tradition—is by nature oligarchic.

This alternative jurisprudence does not argue against the necessity of judicial interpretation. By their nature, constitutions and statutes tend to be unclear. The meaning of a legal document must often be determined, therefore, by going beyond its words. There are degrees of activism, and judges in their search for legal meaning should adhere to principles of interpretation to minimize activism—preferring broadly accepted political values to their own political values. Always available to inform the words of a legal document would be the people's sense of their political tradition.

The fact is that American Indian political culture has been characterized, both traditionally and today, by autonomy and respect for the individual's voice. It is difficult to escape the conclusions that "[a]boriginal North American society was in the main democratic,"[30] and that a defining quality of traditional American Indian government was its absence of oligarchy.[31] Tribal people worked out their common problems through shared power, broad participation, and consensus building. This set of political values manifested itself structurally through

council-dominated government. In pre-Columbian times, the council was the government when government was necessary. Vine Deloria, Jr., and Clifford M. Lytle have observed that the "council itself had to settle disputes.... [The] primary thrust of traditional government was more judicial than legislative in nature.... [and] the function of the council was a conciliatory-judicial one rather than an executive function as one might initially perceive."[32] The corollary to this observation about aboriginal tribal councils is not surprising: the "idea of separate governmental powers is a concept alien to Indian society."[33]

Through the years, tribal councils have generally continued to be synonymous with tribal government. This political arrangement has been the rule for the tribes of the Flathead reservation: the Salish, Kootenai, and Pend Oreilles. Although forced into an "artificial nation"[34] by the Hellgate Treaty of 1855, these formerly warring tribes had some traditions in common that served as a foundation for their new life together. All were "Plateau Indians," and the Salish and Pend Oreilles shared the same language.[35] Moreover, competition for food forced the Flathead tribes to hunt the northern plains for buffalo in the mid-nineteenth century, and the Flathead Indians subsequently "copied a tribal political structure common among Plains Indians."[36] So significant was the Flatheads' adoption of Plains Indian culture that "older Blackfeet consider the Flathead a Plains people."[37]

The resulting pre-reservation political structure of the Flathead Indians was a "council of headsmen to decide questions of general import"[38]—such as camping, sanitation, herding of horses, scouting, and positions in the camp circle. The council was comprised of a head chief, a subchief, and several lesser chiefs,[39] and offices were not hereditary but chosen through election.[40] The qualities that were the basis of the chiefs' selection were wisdom, truthfulness, wealth, generosity, and oratory.[41] Consequently, a consensus on the chiefs' character determined the respect and obedience shown them and their legitimacy as leaders. Still, governance "remained extremely flexible,"[42] and "each Flathead was a master of himself."[43] These norms of democracy and automomy made it absolutely necessary that no chief become an autocrat or even a chief executive and that consultation accompany the chiefs' actions on the council.[44]

The pre-reservation council's judicial function, for Plains Indians in general and the Flathead tribes in particular, was grounded in consensus—just as with the council's regulatory

function. Plains Indian chiefs approached disturbances "not as a punishing agency but as appeasers, trying to reconcile the parties."[45] They knew that a useful "deterrent from reprehensible actions lay in the tremendous power of public opinion."[46] Thus the council of chiefs "acted as group conscience":[47]

> ...in the old days, explained Arlee [the second, after Victor, United States government-recognized chief of the Flathead confederation], when an Indian killed another, the chiefs called together all the Indians, gave the killer's horses and property to the family of the victims, then told the killer not to do it again.[48]

The political world of the Flathead tribes was changed profoundly with the Hellgate Treaty of 1855 and the beginning of reservation life. For example, the Secretary of the Interior's establishment of courts of Indian offenses in 1882 "overnight diminished the chiefs' judicial function."[49] The council's regulatory function, too, was drastically changed, as it became a sounding board for the real power of the reservation, the Indian agent. The Flathead council, though, regained some of its former status under the tribes' Indian Reorganization Act constitution. The Flathead tribes were first in the nation to accept the Indian Reorganization Act, and they ratified their IRA constitution on October 4, 1935.[50]

The IRA constitutions were, for the most part, the handiwork of Interior Department staff,[51] "based on federal constitutional and common law notions rather than on tribal custom."[52] But a "major oversight by the federal drafters" was their omission of the principle of separation of powers.[53] As a result, the IRA constitutional "boilerplate"[54] made tribal courts "direct legislative creatures"[55] and provided no basis for a tribal court's finding of judicial review. For example, the 1935 Flathead constitution says in Article III, section 1 that "The governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation shall be the Tribal Council." Section 5 of the same article adds that the "Tribal Council...shall elect from within its own number a chairman." Article VI, section 1 gives the council the power of establishing "an Indian Court, and defining its powers and duties." The Salish and Kootenai constitution, therefore, "does not prescribe three true branches of government. The legislative-executive branch is one."[56]

In the early days under the IRA constitution, the Flathead tribal council clearly was the tribal government—to the degree that the phrase "tribal government" can be meaningfully applied to that period. The council

> ...functioned as a forum for hearing and discussing complaints about reservation life. The atmosphere of the council was informal, and there was immediacy in the relationship between councilmen and tribal members....the tribal chairman operated within the orbit of the council.[57]

Despite the fact that the council was not a policy-making body and that the Bureau of Indian Affairs was really running the reservation, the tribal membership manifested a "concern and watchfulness" about the activities of the council and chairman, "grounded in [the Flathead] traditions of individual autonomy and consensus politics."[58]

Today the Flathead tribal council is once again the tribal government. As the IRA constitution increasingly became the tribal constitution through usage, amendment, and refusal to amend,[59] the council increasingly became the people's representative and not the Indian agent's surrogate. The Flathead people, through a series of reforms, made their council more accountable and broadly representative. They adopted at-large representation in 1977 and a primary election in 1981, and they discarded the council's fractionating committee system in 1983.[60] At no time, however, did they alter the essential design of their government. Even during the initial hearings of the thirty-two-member constitutional review committee brought into existence after the *Moran* controversy, no interest was expressed in changing the traditional relationship between council and court. The committee members themselves "came to know after studying the tribal constitution that the council has ultimate authority and the power to overrule the court."[61]

The council's prominence has continued during the era of modern Flathead tribal government which began in 1984 with the council's adoption, after many hearings and widespread reservation discussion, of a controversial seventy-five-page executive reorganization plan.[62] The enabling resolution consolidated more than thirty existing departments into eight administrative units, and created a new chain of command with a full-time tribal chairman at the top and a chief administrative officer under the chairman. The chairman continued to

report directly to the council and, with the "responsibility of unifying and speaking for the council," the chairman assumed the role of *primus inter pares*.[63] This inauguration of the modern era was marked by the council's pursuit of such mainstream governmental values as administrative efficiency and effectiveness. But executive reorganization was fully respectful of the council's constitutional authority. It did not include the principle of separation of powers and thus left the constitutional scheme of council government undisturbed.

CORRECTING THE *MORAN* ERRORS

The Court of Appeals of the Confederated Salish and Kootenai Tribes made a number of errors in the *Moran* case, but the cardinal mistake was ignoring the just-discussed Flathead tradition of council government and declaring that the tribes' "inherent sovereign judicial powers" belonged inherently to the tribal court.[64] The radical and unilateral nature of the *Moran* holding regarding judicial review placed the Flathead appellate court among the minority of tribal courts. As has been discussed, most tribal constitutions make no mention of judicial review, and only a few tribal courts have chosen to exercise this power despite the lack of a constitutional authorization.[65]

It had been anticipated that the *Moran*-court type of judicial activism would lead to an immediate constitutional crisis,[66] and one suggested remedy was restraint in the tribal court's subsequent use of judicial review.[67] The problem with the *Moran* case, though, was the Flathead appellate court's initial activism. A legitimate alternative to activism was always available, a fact documented by a Ninth Circuit Court of Appeals decision. That federal court ruled in 1976 that it was altogether proper for tribal councils rather than tribal courts to have the final say about the meaning of tribal constitutions.[68]

The Flathead appellate court's activism possibly had a more subtle and corrosive effect than precipitating a constitutional crisis, that is, undermining the members' sense of political legitimacy. Even an advocate of implementing judicial review by way of tribal court fiat warns that "[t]he adoption of such an alien doctrine would appear to undermine the legitimacy of Indian tradition."[69] The issue of political legitimacy is a matter of tribal members themselves believing in and accepting their government. The questions of sovereignty and jurisdiction, in

contrast, are us-against-them propositions. The frequent turmoil of tribal politics, in which tribal agencies and officials are mired in a problem and no actor gives the action of the other any heed,[70] is an indication that tribal members can view their constitution as dispensable and their tribal government as a hindrance. The *Moran* controversy was accompanied by the council's firing of two top tribal officials, political use of the courts, a recall effort of doubtful legality, and vindictive candidacy and campaigning. Tribal court activism adds to the list of such political wilfulness.

The Flathead appellate court's error of ignoring the tribes' political tradition in *Moran* was the direct opposite of the United State Supreme Court's using separation-of-powers jurisprudence in *Marbury v. Madison*.[71] Chief Justice John Marshall's rationale in *Marbury* was both specific language in the United States Constitution and long accepted Western political philosophy. The American doctrine of separation of powers, and indirectly the doctrine of judicial review, "is embedded in the Constitution by the so-called 'distributing clauses' (the first clauses of Articles I, II, III) which allocate the powers of government to the three departments of government"[72] and make the supreme court, congress, and presidency genuine political opponents. For example, Article III, the judicial article, states that the "judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."[73] The United States Supreme Court and the other courts Congress establishes pursuant to the judicial article are called "constitutional courts" because their essential judicial power comes directly from the constitution.[74] Most state constitutions go even further, containing explicit requirements of separation of powers.[75] For example, the Constitution of the State of Montana says: "The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial."[76]

In contrast, the approach of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation is much different. There is no separation-of-powers requirement and no judicial article with a distributing clause, and Article VI, "Powers and Duties of the Tribal Council," authorizes the tribal council to establish the tribal court and to define its duties by ordinance. The United States Constitution creates a separation-of-powers system that

includes judicial review as one of its many checks and balances. The Flathead government under the present Flathead constitution is a single-branch government, and the tribal court is a "legislative court" formally subordinated to legislative supremacy.

The judicial review rationale of *Marbury v. Madison* was also rooted in Western political philosophy. Both advocates of judicial activism and advocates of judicial restraint have engaged in the practice of relying on political theory to determine the meaning of a difficult clause of the United States Constitution. "Thus even textualists concede that sometimes it is necessary to go behind the document to find the meaning of its words."[77] The critical question whether such a mode of interpretation is legitimate should be answered by the centrality of the material used to the constitutional tradition. It was legitimate for Chief Justice Marshall to use a strict separation-of-powers doctrine because it stemmed "from Plato, Aristotle, Polybius, Cicero, Machiavelli, Harrington, Locke, and Montesquieu."[78] On the other hand, as was previously discussed, "separate governmental powers is a concept alien to Indian society."[79] Therefore, it would have been equally legitimate for the Flathead appellate court to have looked to, for example, Dekanawideh and the Great Binding Law, the leadership style of Red Cloud and Chief Joseph, and the writings of Vine Deloria, Jr.—all of whom demonstrated the compatibility of effective contemporary government and respect for past tradition.

Even after setting aside political tradition and the issue of its centrality, Marshall's formulation of judicial review would still be more restrained and therefore more correct than the approach of the Flathead appellate court. Marshall "took steps to achieve an accommodation with the political branches of the government...."[80] He "acknowledged a sphere of political questions [matters committed to the discretion of the legislative and executive branches] arising under the Constitution,"[81] and he

> made no general assertion that a judicial decision regarding the constitutionality of an act of Congress was binding on the political branches. Nor did he contend that the interpretation of the judiciary was superior to or entitled to precedence over that of Congress or the executive.[82]

In contrast, the Flathead appellate court with great irony relied on the United States Supreme Court's opinion in *Baker v.*

Carr[83] for the point that the "'nonjusticiability of a political question is primarily a function of the separation of powers'"[84] and cited *Marbury v. Madison* for the point that courts singularly have the duty of interpreting constitutions and determining the legality of legislative actions.[85] Again, the cardinal error of the *Moran* justices was that they, themselves, rather than a constitutional commission or the tribal council, became the arbiter of the tribes' changing political culture and altered the tribes' fundamental law so that it included separation of powers and the tribal court's inherent possession of the power of judicial review.

The *Moran* court further obscured its activism by misreading Ordinance 36-B, the tribal council's judicial enabling measure. Instead of requiring clear proof that the tribal council had explicitly vested the tribal court with the power of judicial review, the appellate court, when interpreting the ordinance, treated the tribal council as if it were not the traditional and constitutional government of the tribes. Rather, the court equated the tribal council with an "individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity" living and doing business on the reservation.[86]

This language of Ordinance 36-B, which the appellate court relied upon, was part of an amendment adopted by the Salish and Kootenai tribal council on August 9, 1985. In its introduction to the amendment, the council stated its reason for acting. There was a "need to clarify the civil jurisdiction of the Tribes and Tribal Courts...in light of the United States Supreme Court's opinion in *Farmers Union v. Crow Tribe*.[87] In that case the Supreme Court had provided guidelines for determining whether a tribal court has civil jurisdiction over non-Indians:

> ...the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[88]

The amendment was an attempt by the Flathead tribal government to define its sovereignty as expansively as possible in order to maximize its civil jurisdiction over non-Indians.

Other language in the 1985 amendment to Ordinance 36-B demonstrates that the modification had nothing to do with the tribal court's exercise of judicial review over the tribal council. From the perspective of inclusion, the council gave examples of the "persons" who would be subject to the civil jurisdiction of the tribal court: all persons within the reservation who owned and used property, conducted business, injured tribal members, or damaged tribal property.[89] From the perspective of exclusion, the amendment stated: "Nothing in this Chapter waives any aspect of the Tribes' sovereign immunity or related privileges."[90] The traditional meaning of sovereign immunity was given by Alexander Hamilton in *The Federalist Papers*: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[91] The Salish and Kootenai tribal council, therefore, was not consenting to suit in its own court at the time it was attempting to expand the liability of "all persons" on the Flathead reservation.

Besides not paying attention to the Flathead tribes' political tradition when interpreting problematic language of the tribal constitution, the *Moran* court erred in ignoring the Flathead tribes' modern political practices—that is, the patterned actions of the council, court, and membership which come to represent an accepted interpretation of the constitution's plan of government. The appellate court justices argued, for example, that their finding of judicial review was necessary in order to "hold the Council accountable under CS&KT tribal law."[92] But the Flathead constitution in its provision for periodic elections, staggered terms, popular referendum, and constitutional amendment already had explicitly addressed the importance of accountability and the vehicles for its realization. Using these provisions, the Flathead tribes, similar to other American Indian governments, have been unmatched in the watchfulness and retribution that their tribal politics visit on the tribal council.[93] Salish and Kootenai voters have obviously interjected accountability into their government when measured by electoral competition, voter turnout, and turnover of officials.[94]

Given the absence of a clear textual basis in constitution or ordinance for judicial review, it would have been proper for the Flathead appeallate court to look to how the council and trial court had interpreted the plan of government through long-time usage. The appellate court, however, overlooked the tribal council's persisting practice of restraint with respect to the tribal judiciary and the good results that mutual deference has achieved.

Tribal officials strongly contend that the relationship between council and court on the Flathead reservation has not been marked by the meddling and outright usurpation that is so frequently observed on other reservations. The chairman explains that "while the constitution does not require separation of powers, we have had separation in fact."[95] The tribal attorney makes the same observation: "Due to the council's restraint in the use of its powers, a real balance of power has existed."[96] A tribal judge who has served on the tribal court for twenty-four years says that the Moran episode was the only occasion during her tenure when the tribal council interfered with the tribal court. The established relationship has been that "judges speak to the council only at budget time. The council never asks about a case, and the judges never volunteer anything."[97]

In addition to ignoring governmental usage as a source of constitutional meaning, the appellate court also erred in failing to take notice of the fact that tribal-council government on the Flathead reservation has been so successful.[98] Constantly under siege from strong outside forces—the state and federal governments, large corporations, and white supremacy groups—tribal-council government has allowed the Flathead tribes to confront political, economic, and legal challenges with a united front. The "consensus" mode of operation that has characterized the council-as-government plan might be replaced by inter-branch strife and deadlock under the separation-of-powers model read into the constitution by the appellate court.[99]

CONCLUSION

The problematic nature of judicial activism and not judicial review has been the topic of this discussion. Neither the Flathead tribes' constitution nor judicial enabling ordinance credibly provide for judicial review. Given this void in the law and given the tradition and practice of democratic council government on the Flathead reservation, the *Moran* court should have announced that its power did not include judicial review. The court's proper role, however, could have gone beyond such judicial restraint.

The Flathead appellate court, because of its high status, could have explained its decision not to act in such a way that the Flathead tribal membership would have gained a better understanding of their constitution and of their own political

role. As the sovereign people, tribal members are the guardians of their fundamental law, the tribal constitution. Such guardianship includes the initiation and ratification of change. Political culture evolves, and ideally a constitution should keep pace. Arguing at the extreme, Thomas Jefferson wrote in 1789 that a constitution naturally expires with the passing of each generation: "If it be enforced longer, it is an act of force and not of right."[100] Acting responsibly, the Flathead appellate court would have told the Flathead people that it was their place to alter the design of their government if circumstances called for a fundamental change.

Judicial activism as found in the *Moran* decision is undesirable because it is undemocratic. This conclusion is especially true for the Flathead tribal government whose political traditions and practices include effective representation, deliberation, consensus building, and accountability. Even when judicial review has a sound legal basis, judicial restraint is desirable. There are degrees of judicial activism, and in a democratic government the least is always the best. For example, the Flathead tribal constitution provides in Article III that the "Council shall consist of ten councilmen," and in Article VII that "cruel and unusual punishment shall not be imposed." A tribal court with a formal authorization for judicial review would not be activist to void a twelve-member council, and hardly more activist to accept the constitution's invitation to decide if a punishment was "cruel and unusual." But even a court with a clear judicial-review authorization would be activist if the judges themselves established new fundamental principles of government. This conclusion applies *a fortiori* to the *Moran* court.

Judicial restraint is especially pleasing and desirable in tribal government. It reinforces the message of rule of law in a society that is profoundly sick of arbitrary treatment. It reminds the tribal membership that their government belongs to them. It encourages patriation of the one-time suspect IRA constitution according to the people's design and pace.

NOTES

1. For example, see D'Arcy McNickle, "Tribal Government and the Indian Reorganization Act: Government by Consent" in *Tribal Constitutions: Their Past—Their Future* (Missoula, MT: University of Montana Bureau of Government Research, 1978), 6, and Bruce L. Benson, "Customary Indian Law:

Two Case Studies" in *Property Rights and Indian Economies* (Lanham, MD: Rowman and Littlefield, 1992), 34-36.

2. Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. sec. 461 et seq. Fredric Brandfon, in "Tradition and Judicial Review in the American Indian Tribal Court," 38 *UCLA Law Review* 991, 998-999 (1991), identifies four kinds of tribal courts of which an "IRA court" is one. The other three categories are "CFR courts," authorized under the Code of Federal Regulations, Title 25, sections 11.1 to 11.37; "traditional courts," which apply unwritten customary law and are principally found among tribes of the southwestern Pueblos; and the Navajo court, established by that tribe along the lines of the Anglo-American model.

3. *Marbury v. Madison*, 5 U.S. 137 (1803).

4. Alexander Hamilton, "No. 78" in *The Federalist Papers* (New York, NY: The New American Library, 1961), 465.

5. Ordinance and constitutional amendment are intractable but not impossible change processes. Any fundamental change in a government upsets the status quo and stirs up both internal and external opposition. For example, Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin, TX: University of Texas Press, 1983), at 102 and 105, discuss how external "secretarial approval" for constitutional amendments came to constitute "in effect a veto power" over desired reform. Indian tribes, however, have used both ordinance and constitutional amendment to achieve significant governmental reform. The Flathead tribes, as discussed below, adopted by ordinance a far-sweeping executive reorganization plan. And the Fort Belknap Indian Community, an IRA tribal government, recently used a constitutional amendment to change radically its form of governance. The Fort Belknap tribes (the Gros Ventre and the Assiniboine) adopted in 1993 a primary election, elected-at-large president, smaller council, and tribal-based voting. Interview with Charles "Jack" Plumage, former president of the Fort Belknap Indian Community, Montana, and member of the Fort Belknap Constitutional Review Committee, July 25, 1995. Still, the contrary argument has been made that tribal courts themselves are the proper architects of the power of judicial review. See Brandfon, supra note 2, at 1007.

6. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 22 ILR 6149 (1995).

7. Ibid., 6150.

8. Ibid., at footnote 2. Brandfon, supra note 2, at 995, argues that for many traditional Indian communities, "[o]stracism or expulsion from the group was the logical corollary of consensus." The *Constitution and Bylaws of the Confederated Salish & Kootenai Tribes of the Flathead Reservation*, Article VI, section 1(j), gives the council the power to "exclude from the restricted lands of the reservation persons not legally entitled to reside thereon, under ordinances which may be subject to review by the Secretary of the Interior." While it is true that both the inherent power and exclusionary power claims are problematic, such acknowledgement does not make any less suspect the appellate court's

finding of an inherent power of judicial review. The argument below will be that ordinance or constitutional amendment, not judicial activism, is the proper method for giving the tribal court the power of judicial review.

9. *Char-Koosta News* (the official news publication of the Flathead Indian Nation), May 12, 1995.

10. Ibid.

11. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 6151.

12. *The Law and Order Code of the Confederated Salish & Kootenai Indian Tribes of the Flathead Reservation, Montana* gives the tribal council broad discretion in the matter of judicial appointment and removal. Chapter I, section 3, "Appointment of Judges," provides that "Each Judge shall be selected and recommended for appointment by a confirmation vote of a quorum of the Tribal Council," and that "Each Judge shall hold office for a period of four years unless sooner removed under the provisions of Section 4 of this chapter...." Section 4, "Removal of Judges," provides for removal for cause ("malfeasance in office, corruption, neglect of duty or conviction of a felony or misdemeanor excluding minor traffic violations") of "[a]ny Judge whom a majority of the Tribal Council feels should be suspended, dismissed or removed...."

13. *Char-Koosta News*, May 19, 1995. The sole dissenting appellate court judge, Leslie Kallowat, was not restrained with respect to the separation-of-powers issue. She strongly expressed a fear of concentration of powers and a need for a practical check on council tyranny: "'[the council's action] states to the people they represent that they as Tribal Council have the authority to do anything they want, whenever they want, to who they want, for whatever reason, because of who they are....'" See *Missoulian* (Missoula, Montana), May 25, 1995.

14. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 6151.

15. Ibid., 6154.

16. Ibid., 6156.

17. Ibid., 6162.

18. Oliver Wendell Holmes, Jr., "The Path of the Law" in *The Mind and Faith of Justice Holmes* (New York, NY: The Modern Library, 1943), 79.

19. *Constitution and Bylaws of the Confederated Salish & Kootenai Tribes of the Flathead Reservation*, Article VI, sec. 1.

20. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 6154-6155, quoting from *The Law and Order Code of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana*, Ordinance 36B, Chapters I and II.

21. Ibid., 6155.

22. See Brandfon, supra note 2, at fn. 97, 1007, for a listing of cases in which tribal courts have exercised judicial review "despite the lack of specific support in their tribal constitutions." These jurisdictions include the Ute Indian tribe, the Hopi tribe, the Northern Cheyenne tribe, the Cheyenne River Sioux, the Oglala Sioux, and the Navajo.

23. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 6156.

24. Ibid., 6154.

25. *Satiacum v. Sterud,* 10 ILR 6013 (Puy. Tr. Ct., 1982).

26. *Moran v. The Council of the Confederated Salish and Kootenai Tribes,* 6154.

27. *Quecham Tribe of Indians v. Rowe,* 531 F.2d 408 (9th Cir. 1976).

28. *Moran v. The Council of the Confederated Salish and Kootenai Tribes,* 6155.

29. Ibid.

30. Robert H. Lowie, *Indians of the Plains* (Lincoln, NB: University of Nebraska Press, 1982), 112.

31. Ibid., 114. Similarly, D'Arcy McNickle, who was a member of the Confederated Salish and Kootenai Tribes, observed: "In societies where no individual, not even within the family, presumes to act or speak for another or to issue orders at large, formal government can exist only on a basis of group consensus." See supra note 2, at 7.

32. Deloria and Lytle, *American Indians, American Justice,* 89, 85.

33. Brandfon, supra note 2, at 1007.

34. John Fahey, *The Flathead Indians* (Norman, OK: University of Oklahoma Press, 1974), 94.

35. Ibid., x.

36. Ibid., 21.

37. Ibid.

38. Ibid.

39. James A. Teit and Franz Boas, *The Salishan Tribes of the Western Plateaus* (Seattle, WA: Shorey Book Store Facsimile Reproduction of the 45th B.A.E. Annual Report, 1927-1928, 1975), 374.

40. Ibid., 376.

41. Ibid.

42. Fahey, *The Flathead Indians,* 21.

43. Ibid., 22.

44. See Teit and Boas, *The Salishan Tribes of the Western Plateaus,* 374, and *A Brief History of the Flathead Tribes,* 2d ed. (St. Ignatius, MT: Flathead Cultural Committee, 1979), 4.

45. Lowie, *Indians of the Plains,* 114.

46. Ibid.

47. Fahey, *The Flathead Indians,* 22.

48. Ibid., 242.

49. Ibid.

50. James J. Lopach, Margery Hunter Brown, and Richmond L. Clow, *Tribal Government Today: Politics on Montana Indian Reservations* (Boulder, CO: Westview Press, 1990), 20.

51. See Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts," 56 *University of Chicago Law Review* 671, 712 (1989), and Alvin J. Ziontz, "After Martinez: Civil Rights under Tribal Government," 12 *UC Davis Law Review* 1, 13 (1979).

52. Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, VA: The Michie Company, 1982), 149.

53. Frank Pommersheim, "The Contextual Legitimacy of Adjudication in

Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay," 18 *New Mexico Law Review* 49, 66 (1988).

54. Cohen, *Handbook of Federal Indian Law*, 149.

55. Pommersheim, supra note 53, at 66.

56. Interview with Dan Decker, tribal attorney for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, August 28, 1995.

57. Lopach, *Tribal Government Today*, 159.

58. Ibid., 160.

59. In February 1985 the tribal council proposed a constitutional amendment that would have inserted into the Flathead constitution a reference to "separation of powers." The tribal electorate rejected the reform by a vote of 241 to 202. See *Char-Koosta News*, April 7, 1995, and interview with Dan Decker, supra note 56, January 9, 1997.

60. Lopach, *Tribal Government Today*, 163-165.

61. Interview with Velda Shelby, administrative assistant to the Flathead tribal chairwoman and member, Flathead Constitution Committee, October 11, 1996.

62. Ibid., 166.

63. Ibid., 166-167.

64. *Moran v. The Council of the Confederated Salish and Kootenai Tribes*, 6156.

65. Brandfon, supra note 2, at fn. 97, 1007, says that six tribal courts have adopted the power of judicial review "despite the lack of specific support in their tribal constitutions." See also supra note 22.

66. Ibid., 1009.

67. Ziontz, supra note 51, at 13.

68. *Howlett v. Salish & Kootenai Tribes*, 529 F2d 233, 240 (9th Cir. 1976).

69. Brandfon, supra note 2, at 1012.

70. See generally *Indian Country Today* (Rapid City, SD).

71. 5 U.S. 137 (1803).

72. Robert E. Cushman and Robert F. Cushman, *Cases in Constitutional Law* (New York, NY: Appleton-Century-Crofts, 1963), 58.

73. *Constitution of the United States*, Article III, section 1.

74. Henry J. Abraham, *The Judicial Process*, Sixth Edition (New York, NY: Oxford University Press, 1993), 143-144, 149-152, 153-169.

75. Kenneth Culp Davis, *Administrative Law*, Sixth Edition (St. Paul, MN: West Publishing Co., 1977), 28.

76. *Constitution of the State of Montana*, Article III, section 1.

77. Walter F. Murphy, James E. Fleming, and Sotirios A. Barber, *American Constitutional Interpretation*, Second Edition (Westbury, NY: The Foundation Press, 1995, 113.

78. Davis, *Administrative Law*, 28.

79. Brandfon, supra note 2, 1007.

80. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution*, Sixth Edition (New York, NY: W.W. Norton & Company, Inc., 1983), 176.

81. Ibid., 180.

82. Ibid., 180-181.

83. 369 U.S. 186 (1962).

84. *Moran v. The Council of the Confederated Salish and Kootenai Tribes,* 6158.

85. Ibid., 6155.

86. *The Law and Order Code of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana,* Chapter II, section 1.

87. Amendment No. 4 to Ordinance No. 36-B (adopted as Resolution No. 85-188 by the tribal council of the Confederated Salish and Kootenai Tribes on August 9, 1985), *The Law and Order Code of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana.*

88. *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845, 855 (1985).

89. Amendment No. 4 to Ordinance No. 36-B, section 2,a (1) and (2).

90. Ibid., section 2,b.

91. Alexander Hamilton, "No. 81" in *The Federalist Papers* (New York, NY: The New American Library, 1961), 487. In *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907), Justice Holmes presented for a unanimous United States Supreme Court a statement of the strict sovereign immunity doctrine: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

92. *Moran v. The Council of the Confederated Salish and Kootenai Tribes,* 6155.

93. See generally Lopach, *Tribal Government Today.*

94. Ibid., 153-176.

95. Interview with Rhonda Swaney, chairman of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, August 28, 1995.

96. Interview with Dan Decker, supra note 56, January 9, 1997. Tribal attorney Decker's observation is similar to Frank Pommersheim's judgment that a *de facto* separation of powers has come to characterize the operation of many tribal governments in order to offset the ever present temptation of council manipulation of the courts. See Pommersheim, supra note 53, at 66.

97. Interview with Louise Burke, chief judge for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, July 18, 1996. Judge Burke was strongly opposed, for reasons of law and policy, to the tribal council's granting of clemency to Anthony Cross Guns, and yet she acknowledges that the council under the present Flathead constitution is "our governing body and my boss."

98. Lopach, *Tribal Government Today,* 153-176.

99. Interview with Dan Decker, supra note 56, August 28, 1995.

100. Thomas Jefferson, "Letter to James Madison, September 6, 1789" in *The Portable Thomas Jefferson* (New York, NY: The Viking Press, 1975), 449.