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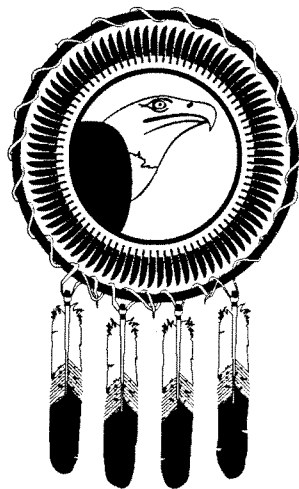
*The Tribal Judiciary: A Primer for Policy Development*  
*A Report to the following tribes: Pascua Yaqui, Gila River, Hopi, Navajo,*  
*White Mountain Apache, San Carlos Apache, and Tohono O'odham*

by

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# THE TRIBAL JUDICIARY: A PRIMER FOR POLICY DEVELOPMENT

## Executive Summary

This paper examines tribal judiciaries, their role in tribal governments, and the ways in which different judicial systems can serve tribal purposes. The main body of the paper contains discussion of tribal choices, while the appendices include charts which should facilitate decision making among those choices.

The ultimate goals for tribes who wish to strengthen and define their governmental organizations are retaining and, where possible, expanding their sovereign powers. The judiciary can play a critical role in achieving those goals. Tribes face many choices when they develop or revise their judicial systems. The range of options outlined in this paper is by no means exhaustive, but it attempts to cover most of the major issues.

Among these are: judicial selection, the appellate court, other legal institutions and offices such as the attorney general and solicitor, the judiciary committee, funding of the judiciary, and police.

The strength of any society is bottomed on an independent judiciary that interprets the laws promulgated by the legislative branch. The function of the judiciary is not limited, however, to interpreting codified law. A strong and independent judiciary should engage in the daily creation of law through judicial decision which results in the development of a body of case law that fills in the gaps in established codes and ensures that each tribal member be availed of substantial justice and fair play.

Tribes participating in this study include: Pascua Yaqui, Gila River, Hopi, Navajo, White Mountain Apache, San Carlos Apache, and Tohono O'odham.



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# THE JUDICIARY

## 0.0 INTRODUCTION

The purpose of this paper is to outline choices faced by tribes when they are developing or revising their judicial systems. The range of options outlined on the following pages are by no means exhaustive. Those options should, however, stimulate dialogue between tribal members and leaders involved in the process of change. Ultimately, the tribe must choose its own system, whether it is an amalgamation of the possibilities outlined below, use of traditional systems, or a combination of both.

If tribes now want to exercise their sovereignty to the fullest extent, they must take responsibility for the consequences of those actions. "Today Indian nations are realizing that the best way to prevent interference in their internal affairs is to take firm control of those governmental functions which are crucial to their continued survival."<sup>1</sup> Taking "firm control" may mean small changes in the governmental forms of the tribe, or it could mean massive revision. Whatever the decision, tribes should understand the importance of all their institutions, and of the interconnections among those institutions.

No political decisions are made in a vacuum. Changes made to the judiciary will have an effect on the council and the other institutions of the tribe. Therefore those changes must be considered carefully and thoughtfully. As Deloria and Lytle comment:

"Like most political communities, Indians have responded to reservation problems only after they have become apparent. The customary "band-aid" solution to political and legal problems inevitably takes precedence over planned action. This natural expediency has been true in the development of most tribal court systems from their inception. While awareness of a necessity for long-range

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<sup>1</sup> Kirke Kickingbird, Lynn Kickingbird, Charles J. Chibitty, and Curtis Berkey, Indian Sovereignty, Institute for the Development of Indian Law, 1977, p.37,

planning is always discussed, it seldom receives any real attention."<sup>2</sup>

By learning from others and from their own experiences, tribes and their governments will be able to take firm control of their governmental functions as well as make long-range judicial plans to prevent further erosion of their sovereignty.

## 0.1 SOVEREIGNTY

Mike Myers, a Seneca law consultant, describes sovereignty as follows:

Ideally, sovereignty is the unrestricted right of groups of people to organize themselves in political, social and cultural patterns that meet their needs. It is the right of a people to freely define ways in which to use land, resources and manpower for their common good. Above all, sovereignty is the right of people to exist without external exploitation or interference."<sup>3</sup>

Although eroded by time and the U.S. government, tribes still maintain sovereign powers. These governmental powers, "with some exceptions, are not delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereignty that have never been extinguished."<sup>4</sup> Among those powers are: power to establish a form of government, power to determine membership, police power, power to exclude persons from the reservation, power to charter business organizations, sovereign immunity, the power to administer justice,<sup>5</sup> and the power to tax.

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<sup>2</sup> Vine Deloria, Jr., and Clifford M. Lytle, American Indians, American Justice, University of Texas Press, 1983, p.138.

<sup>3</sup> Ibid., p. 2.

<sup>4</sup> American Indian Lawyer Training Program, Indian Tribes as Sovereign Governments, AIRI Press, 1988, p. 35.

<sup>5</sup> Ibid., p. 39.

## 0.2 THE JUDICIARY

Today, ideally, the judicial branch of a government administers justice for the tribe. The judiciary provides "for a tribal forum for redress of grievances and to settle disputes...A judicial article [in the constitution] is included to provide a constitutional basis for establishing an independent court system to deal with the tribe's judicial responsibilities."<sup>6</sup>

However, justice has taken many forms depending on culture and circumstances. As noted by Samuel J. Brakel,

"Historically, law, order, and justice in Indian societies were dispensed in widely varying ways, matching the wide variety in cultures and life-styles among the tribes. Much was left to private means of enforcement--appropriate action in many conflict situations being the responsibility of the family or clan. If resort to more public means was had, it might be to political (tribal) councils, soldier or hunter societies, secular or religious leaders, generally respected and/or elder individuals, or combinations of these. But there were no "courts" and "judges" in the sense of the "independent" and "exclusively adjudicative" institutions and personnel that Anglo-American ideals have them to be."<sup>7</sup>

Tribes today who are developing or revising their court systems are facing many choices; which points of Anglo law and court composition should be adopted, what traditions, such as marriage and property rights, can be retained or reinstated by the tribe, should the tribe accept jurisdiction over all possible areas, or accept only limited jurisdiction. Although the BIA and state and federal governments have encouraged adoption of pure anglo courts,

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<sup>6</sup> U.S. Department of the Interior, Developing and Reviewing Tribal Constitutions and Amendments, 1987, p. 3-11.

<sup>7</sup> Samuel J. Brakel, American Indian Tribal Courts, The Costs of Separate Justice, American Bar Foundation, 1978, p. 9.

"Federal law recognizes that Indian tribes may adopt whatever form of government best suits their own practical, cultural, or religious needs. Tribes are not required to adopt forms of government patterned after the forms of the United States government. Since Indian tribes are not limited by the United States Constitution, they are not subject to such principles as the separation of powers or the religious establishment clause."<sup>8</sup>

If the tribe does decide to adopt an essentially anglo court, they should consider very carefully the idea of separation of powers. An anglo court will function correctly only if it is able to make its decisions free from the constraints and influences of the legislative branch (the council), and the executive branch (the tribal chair).

Some tribal courts exercise judicial review to determine the constitutionality of actions taken by the council and chair. The courts, ideally, aid governmental stability and ensure that the main concepts of the government are upheld, and that any revision to the code and constitution are done with the consent of the people in a formal ratification process and are not instituted by default.

Important issues when designing a judicial system include; judicial selection, developing an appellate court, establishing other judicial institutions and offices, considering adoption of a council judiciary committee, funding, and relations with the police.

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<sup>8</sup> Op.Cit., American Indian Lawyer Training Program, p.36.

## 1. JUDICIAL SELECTION

Selection of the judiciary is one of the most important actions a tribe can take. Observers of the courts include federal, state, and county officials, as well as those reservation and non-reservation persons who come before the courts in criminal or civil cases. Therefore, judicial selection and requirements will help determine the success or failure of the judicial system.

The following chart surveys the selection criteria of seven tribal judiciaries.

## 1.0 JUDICIAL SELECTION

TRIBE	TERMS OF OFFICE	ELECTED, APPT'D	REVIEW, REMOVAL	NATIVE LANGUAGE FLUENCY	EXPERIENCE	TRAINING UPDATE	REQUIREMENTS IN CONST.
Pascua Yaqui	4 years  (X)	app't by council  (X)	by council	no	no--chief judge yes--associate judge (X)	no	those checked  (X)
Gila River	4 years	elected at-large	recall by community members	no	no	no	no  * See Note
Hopi	one-year probation, life	appt'd by chair, council confirms	by Council	no	no	no	no
Navajo	two-year probation, up to 70 years old	appt'd by chairman, council confirms	designated members of the three branches	yes	law-related experience	yes	no constitution
White Mount'n Apache	4 years	appt'd by council	general election, council	yes	no	no	no
San Carlos Apache	4 years	appt'd by council	council	yes	no	no	no
Tohono O'odham	6 years  (X)	Appt'd by Council  (X)	council, recall  (X)	no	no	yes--continue or begin training	those checked  (X)

\* The Gila River Indian Community currently has a revised constitution pending approval by the Secretary. If approved, terms of office, election, and removal procedures will be within the Constitution.

## 1.1 TERMS OF OFFICE

	TWO YEARS	FOUR YEARS	SIX YEARS	LIFE
<b>Positive Aspects</b>	Terms of poor judges could be allowed to lapse without significant effort from the Council.	Judges could, if elected, cycle with other elected officials, so election money would be saved.	Allows terms to cycle separately from elected officials--will aid in separation of powers.	After a selection and review period, judges are removed political pressures, which aids in separation between Council and Court.
<b>Negative Aspects</b>	With a short time horizon, judges are more likely to be influenced by political pressures. With a high turnover rate, Judicial training is much more expensive.	Judges are still under political pressures if appointed with every new council. Judicial impartiality is required if fair decisions are to be made by the Court.	If the judge is incompetent, greater effort is required to remove the judge. This power must be used infrequently and with great consideration.	If the judge proves incompetent after probation period, the life appointee must be removed from office. This may undermine confidence in judicial impartiality.

## 1.2 MODE OF SELECTION

	APPOINTMENT	ELECTION	COMBINATION
<b>Positive Aspects</b>	<p>A judiciary committee or the regular council may be much more informed about judicial qualifications and requirements than the voting public. Judges may avoid some political pressure.</p>	<p>Control of the selection of judges will be in the hands of the tribal members, not the council, which may aid in separation of powers.</p>	<p>After the judge has been appointed and has served out the term successfully, popular approval could be sought. The Tribe could acquire a competent judge through original selection, yet opinion could be expressed by, and power transferred to the people.</p>
<b>Negative Aspects</b>	<p>The council will have the final choice in judicial selection, and potentially large influence over decisions of the judiciary. This currently causes many breaches of judicial impartiality.</p>	<p>Tribal members may not understand about the skills and duties required of those in the judiciary. Selection then becomes political, and may undermine attempts to upgrade selection and training requirements.</p>	<p>While a real possibility, logistically there would be much work required, first to correctly outline procedures, then to explain the system clearly to all parties involved.</p>

### 1.3 REVIEW, REMOVAL

	REVIEW AND REMOVAL BY COUNCIL	RECALL	COMBINATION
<b>Positive Aspects</b>	<p>The judiciary committee or the council will generally have greater knowledge of the judge than the public.</p> <p>Checks between the court and the council are preserved.</p>	<p>When the public has the right to recall judges, as well as other public officials, they gain more control over tribal decision-making.</p>	<p>Checks and balances between the council, judiciary, and the public would exist. Ideally, a 2/3 vote would be required to remove any official from office.</p>
<b>Negative Aspects</b>	<p>Checks and balances can be easily tilted toward a strong institution.</p> <p>If the council is allowed, it will influence judicial decisions. Threat of removal from office is a strong lever against the judiciary.</p>	<p>Possible public outrage and a move toward recall over a controversial though correct decision may encourage judges to make non-controversial decisions.</p>	<p>Governments must ensure that removal of any public official be a difficult, though not impossible, procedure.</p> <p>Ease of removal will contribute to instability and frequent changes in leadership, already a major problem on many reservations.</p>

## 1.4 NATIVE LANGUAGE REQUIREMENT

	YES	NO	COMBINATION
<b>Positive Aspects</b>	The judge will tend to be more culturally sensitive if she/he speaks the language of the tribe. In some cases, tribal members may speak only their tribal language, so cases before the court could be conducted in that language.	If no language or residency requirements exist, emphasis during selection can be placed on competency and experience. If the tribe wishes, language can be an influencing factor in selection.	If the tribe has more than one judicial position, a percentage could be fluent. This will ease the hiring restrictions and improve the selection pool while preserving cultural integrity.
<b>Negative Aspects</b>	In many cases, judges with both experience and language fluency are difficult, if not impossible, to find. The tribe either hires a competent temporary judge and waives the language requirement, or hires a less competent judge.	On reservations where many speak only the native language, interpreters will have to be hired, which increases court costs and lengthens trials and hearings. Those who speak no English may feel the judiciary is not effectively serving them.	Priorities between language fluency, competency, and experience are developed by either the judiciary committee, the council, or the judiciary itself.

## 1.5 EXPERIENCE REQUIREMENTS

	YES	NO	COMBINATION
<b>Positive Aspects</b>	To preserve sovereignty, each tribe must ensure that a separate and respected judiciary exists for their members and those who deal with them. Experienced judges will assist in that goal.	The tribe may have members who are inexperienced, but with time will become excellent judges. The courts exist for the tribes, and ideally should have judges from those tribes.	A combination of those with and without experience is possible until a sufficient hiring base develops on the reservation.
<b>Negative Aspects</b>	Lack of funds may halt any attempts to hire those with experience. Courts are expensive to run properly, and those with experience will expect higher wages.	Training is expensive and requires time. Many tribes cannot afford this time because of pressures they face to develop a strong court quickly.	Those with training would spend valuable time with inexperienced members, decreasing court efficiency and possibly creating case backlogs.

## 1.6 TRAINING UPDATE

	YES	NO
<p><b>Positive Aspects</b></p>	<p>Because hiring experienced personnel may be beyond the funding capabilities of a tribe, training personnel after they are hired is a viable option. These requirements can be written into the contract, and a regular educational schedule developed. When extensive training is paid for by the tribe, the recipient should be required to stay at his/her job for a certain time period, or funding is wasted.</p>	<p>None.</p>
<p><b>Negative Aspects</b></p>	<p>Training is costly. Some tribes may be able to take advantage of their state's court officer/justice of the peace training programs, but not all tribes will have that option. Tribes may not be near a junior college that offers an AA in legal studies or a similar program. Shortcourses may not adequately address topics pertinent to the court.</p>	<p>Although training is expensive and budgets tight, the court and those within its jurisdiction deserve to have trained court personnel and judges. Anything less is a miscarriage of justice.</p>

## 1.7 JUDICIAL REQUIREMENTS PLACED IN CONSTITUTION

	YES	NO	COMBINATION
<b>Positive Aspects</b>	Requirements placed in a constitution are more difficult to change than those in a code. This allows for greater and more consistent separation of powers if the constitution is upheld.	Many pre-1970's constitutions do not mention the judiciary. Tribes thus are able to write their regulations into the tribal codes and can work more easily to perfect their systems.	Ideally, tribes use a combination of both constitutional and code regulations. Length of term, jurisdiction, and an outline of powers, (preferably complete separation of powers) should be included.
<b>Negative Aspects</b>	Tribes could write requirements into their constitutions that they are unable to follow. This compromises the legitimacy of the document every time guidelines are waived or ignored.	If codified but not constitutionalized, the powers of the judiciary can easily be appropriated by the council. Separation of powers is crucial to the maintenance of sovereignty.	Tribes may experience difficulty in deciding where to place each requirement, so several revisions may be necessary.

## 2. APPELLATE COURT

The appellate process is critical in any judiciary. This process allows litigants to resort to a superior court to review the decision of an inferior (trial) court. The appellate court reviews and revises the action of the inferior court, and unless the court is granted original jurisdiction or de novo review (where all evidence is presented again as before the trial court), rules only on points of law. This second hearing increases the chances that substantial fairness will be afforded the appellant by determining whether or not the trial court made proper application of case law or code to the facts of the case.

Chart 2.0 presents a sampling of tribal appellate process and procedure.

## 2.0 APPELLATE COURT

TRIBE	TERMS OF OFFICE	SELECTION	STANDING, AD HOC	NUMBER OF JUDGES	DE NOVO REVIEW	MEMBERSHIP REQUIREMENTS
Pascua Yaqui	2 years, staggered	council appoints	standing	3	no	no
Gila River	none	neighboring judges who are available	ad hoc	2	yes	no
Hopi	minimum 1 year	tribal chair appoints	standing	3	yes, if attorney requests	no
Navajo	2-year probation, up to 70 years old	appt'd by chair, council confirms	standing	3	no	yes
White Mount'n Apache	chief--life others by need	council	standing, ad hoc	3	yes	yes
San Carlos Apache	none	judges from other tribes	ad hoc	1	yes	no
Tohono O'odham	6 years	candidate list submitted to jud. comm.	ad hoc (pro temp)	3 judge panel	no	no

## 2.1 TERMS OF OFFICE

	NONE	TWO YEARS	FOUR YEARS	SIX YEARS	LIFE
<b>Positive Aspects</b>	Appellate trials are easier to schedule if a variety of judges are available. Prompt appellate hearings should be a goal of the court.	Since many appellate judges are not full-time, replacement of those who yield their appointments is simplified.	Appointment of judges can cycle with elections of officials.	Aids in separation of powers since terms do not correspond directly with those of elected officials.	After probationary period, threat of removal by council would be minimized. Goal of separation of powers is promoted.
<b>Negative Aspects</b>	Continuity of decisions is at risk, and familiarity with tribal codes is not guaranteed.	As in trial courts, a short time horizon may prove detrimental to judicial impartiality. Judges are more prone to political pressure.	Judicial impartiality may be compromised if political pressures interfere with or influence judicial decision-making.	Part-time or volunteer judges may want shorter terms.	Removal of incompetent judges is difficult, and frequency should be minimized. Part-time judges will tend to desire shorter terms.

## 2.2 APPELLATE COURT SELECTION

	APPOINTED BY COUNCIL	APPOINTED BY JUDICIAL COMM.	ELECTED	CHOSEN FROM TRIAL JUDGES	CHOSEN FROM NEIGHBORING JUDGES
<b>Positive Aspects</b>	The council is familiar with the requirements for the post, and also chooses the trial judges. This promotes consistency in selection.	The judiciary committee is more likely to have court experience, and can make informed decisions about candidates.	The people choose, and the influence of the council is lessened. This may assist in separation of powers.	If the tribe's own judges are used for appeals, they are conveniently available, and scheduling is simplified. They are also familiar with tribal code.	If an extensive candidate list is developed, schedule problems are minimized. If judges are used consistently, familiarity with the tribal code will develop.
<b>Negative Aspects</b>	Separation of powers is jeopardized if the council exercises too much power. If appointees do not live on the reservation, scheduling of trials is a problem.	The judiciary committee is in position to influence the makeup and decisions of the court, and may lessen court independence.	The general populace may not understand the duties and requirements of the judgeship, so selection becomes politicized.	The trial judges may be too closely involved to allow a fair appellate hearing.	Familiarity with the judicial codes may not be sufficient. Trained candidates from neighboring tribes may not exist.

## 2.3 STANDING, AD HOC COURT

	STANDING	AD HOC	COMBINATION
<b>Positive Aspects</b>	A standing appellate court will promote consistency in decision making, will simplify scheduling of trials, and will assure the judges are familiar with tribal codes.	Ad hoc (for this special purpose) appellate courts are ideal for those tribes with few appellate trials. There is less expense than with a standing court, but if the judges are trained well, decisions could be as consistent.	For those without the resources to maintain a standing appellate court, a combination is ideal. A standing list of candidates is approved, and judges are selected from that list. This minimizes scheduling problems by developing a pool of qualified candidates familiar with the tribal codes and constitution.
<b>Negative Aspects</b>	Many tribes do not have the funds to maintain a standing appellate court.	Scheduling of trials may become a tremendous problem, and those who are appealing deserve to have a timely hearing. Many courts with this system have huge trial backlogs. Judges may not have sufficient knowledge of tribal codes or familiarity with tribal customs.	Developing a sufficient pool may take a considerable amount of time, particularly if the tribe is isolated.

## 2.4 NUMBER OF APPELLATE JUDGES

	ONE	TWO	THREE	FOUR OR MORE
<b>Positive Aspects</b>	If only one judge is required to hear an appellate trial, scheduling problems are fewer.	Two judges can confer over the records of the lower court and decide if the law was properly interpreted and applied.	One of the three judges can serve as chief justice and handle the proceedings of the hearing. If the court has an odd number of judges, a majority opinion can be established.	Technically, the tribe could have as many judges hear a case as were available. However, the number should be kept to a manageable level. A greater number of opinions may standardize decisions.
<b>Negative Aspects</b>	Because an appellate court's function is to review points of law cited in the lower court trial, the opinions of more than one judge are preferable. Fairness is then better served.	With only two judges, no majority opinion can be developed. This complicates the final decision process. However, having two judges participate is preferable to having only one.	Funding of three judges is more expensive, and hearings are more difficult to schedule.	Funding, finding room for the hearings, and scheduling of hearings must be considered.

## 2.5 DE NOVO REVIEW

	YES	NO
<b>Positive Aspects</b>	<p>De novo review, a hearing that contemplates an entire trial in the same manner in which the matter was originally heard, has the advantage that the plaintiff has more than exhaustive remedy. He/she has ample opportunity to establish the facts of the case before each court.</p>	<p>Appellate hearings that only consider points of law (not the facts of the case), are shorter, less expensive, and easier to conduct because witnesses do not have to appear. Judges can utilize their time to review how the points of law cited in the original case were used, and how those uses support or challenge current tribal laws.</p>
<b>Negative Aspects</b>	<p>Because many courts are experiencing serious backlogs in trials and hearings, de novo review, by lengthening the hearing process, exacerbates the problem. Witnesses must be recalled, and the facts reestablished. Courts currently have difficulties in convincing witness to attend hearings, so doubling the hearings would cause even higher attrition.</p>	<p>If the facts were poorly presented in the lower court trial, there is no chance to reconsider the relevant facts.</p>

## 2.6 MEMBERSHIP REQUIREMENTS

	YES	NO
<b>Positive Aspects</b>	Judges will understand and be familiar with the tribe's code, case law, and customs.	There is a greater pool from which to choose judges. Experience and training, rather than membership, will be the overriding selection criteria. This serves not only the tribe and those involved in the trial by increasing the possibility of having experienced judges, but also serves the reputation of the court.
<b>Negative Aspects</b>	There may be no judges available that fulfill the membership requirement. Tribal members may not be able to achieve the impartiality necessary for fair decisions and a respected court.	Judges may not be directly involved with the tribe, and may be less sensitive to cultural considerations.

### 3. OTHER LEGAL INSTITUTIONS, OFFICES

Ideally, each tribe should provide for several types of legal counsel.

Many tribes have a lawyer or trained person in the position of attorney general, general counsel, or tribal attorney. This person advises the council and the tribe on legal matters, negotiates contracts, and will represent the council and/or tribe in court.

A second position is the office of prosecutor. The prosecutor generally handles the criminal cases of the court. All criminal cases are "crimes against the state," that is, unlike petty theft or contract disputes, the state itself (in this case the tribe) is considered to be the entity that was wronged. Therefore, unlike civil cases where the accuser is represented by his or her own attorney, the prosecutor represents the entity of the state in criminal cases.

A third position is that of solicitor. He or she advises the tribal courts, and would represent the court in suits or hearings against the council or others.

In small tribes, an attorney may serve in more than one capacity. This is fine unless a conflict of interest develops, or a case is brought by one of the branches of government against another branch.

### 3.0 OTHER LEGAL INSTITUTIONS, OFFICES

TRIBE	ATTORNEY GEN., GEN. COUNSEL, TRIBAL ATTORNEY	PROSECUTOR	SOLICITOR	GRAND JURY
Pascua Yaqui	general counsel	yes, part-time	no	no
Gila River	general counsel	yes--3	no	no
Hopi	general counsel	yes, chief and deputy prosecutors	no	no
Navajo	attorney general, staff, general counsel	yes	yes, plus staff	no
White Mount'n Apache	general counsel	yes	no	no
San Carlos Apache	tribal attorney, lay advocates	yes	no	no
Tohono O'odham	general counsel	yes	no	no

### 3.1 ATTORNEY GENERAL, GENERAL COUNSEL, TRIBAL ATTORNEY

	YES	NO
<b>Positive Aspects</b>	<p>The duties of the attorney general include serving as the chief legal advisor to the tribal government, investigating and prosecuting offenses against tribal law, representing the tribe in court cases, and possibly supervising the prison system. Without this post, there is no one to represent the tribe in matters such as tax evasion or contract violations.</p>	<p>If the tribe is small and as an institution has limited dealings with off-reservation companies or persons, a general counsel or attorney general may not be necessary. Many tribes hire off-reservation firms to represent them in law suits. These firms may have greater resources and expertise. If there is only an occasional tribal law suit, money may be saved in the long run.</p>
<b>Negative Aspects</b>	<p>The tribe may not be able to financially support an attorney general, or general counsel. There also may not be a trained attorney available to fill the post. Since the tribal attorney will be prosecuting cases against those who have experienced attorneys, the importance of having a trained, experienced tribal representative cannot be minimized.</p>	<p>An in-house attorney general or general counsel would be able to devote his/her time to tribal matters, while a hired firm will not. A tribe would probably not hire an expensive firm for smaller, though still important matters.</p>

### 3.2 PROSECUTOR

	YES	NO
<p><b>Positive Aspects</b></p>	<p>If the tribe has an attorney general, the prosecutor would serve under that person. He/she would take charge of a case and perform the function of trial lawyer for the people, as would a district or county attorney. In a large tribe, both offices may be required, particularly if the tribe has many dealings with off-reservation companies and individuals.</p>	<p>Each tribe must decide what the job entails. The tribe may need only one person serving as tribal attorney, and although terminology is not important, job description and duties are. If the tribe is small, they may not need a full-time attorney who represents the tribe in criminal prosecutions.</p>
<p><b>Negative Aspects</b></p>	<p>The tribe may not need both an attorney general and a prosecutor. Funding may be better used in other areas, or training for those currently serving may be supplemented. Or, off-reservation firms could possibly be utilized for less money.</p>	<p>Scheduling of hearings and prosecution of cases may be more efficient with on-reservation tribal representation.</p>

### 3.3 SOLICITOR

	YES	NO
<b>Positive Aspects</b>	<p>The duties of a solicitor include representing the judicial branch in its suits.</p> <p>Few tribes have this office, but if there are many dealings between the council and the courts, and if the judiciary is to be truly independent, an official serving in the solicitor's position may be necessary. If the court has few problems with acts of the council, an ad hoc representative is preferable to a full-time and expensive solicitor.</p>	<p>A tribe may find maintaining a solicitor's position expensive and unnecessary.</p> <p>In a suit called by the court against the council, the tribal attorney would probably represent the council, but a temporary advocate could represent the court.</p>
<b>Negative Aspects</b>	<p>The position of solicitor may not be required full-time, or if the court never has major disagreements with the council, may not be required at all.</p>	<p>Arrangements should be made to provide for the possibility of a suit against the council or chair. However, the representative does not have to be full-time.</p>

### 3.4 GRAND JURY

	YES	NO
<b>Positive Aspect</b>	<p>The duties of a grand jury include receiving complaints and accusations in criminal cases, hearing the evidence presented by the tribe's representative (generally the prosecutor or attorney general), and deciding if there is enough evidence so that a trial should be held.</p> <p>This added step serves the tribe because lengthy and expensive trials can be avoided in cases where not enough evidence exists.</p>	<p>The tribe may not have enough criminal cases to call for a grand jury. The selection and management of the jury may be more time- and resource-consuming than holding the actual trials without the intermediate decision of the grand jury.</p>
<b>Negative Aspects</b>	<p>The grand jury would require building space, and the time of the prosecutor or attorney general. Because of the Major Crimes Act, those cases usually held before grand juries will probably not be held in tribal court.</p>	<p>Time and money may be saved if the grand jury system exists. Off-reservation businessmen may feel more comfortable with dealing with the tribe if it has a grand jury system.</p>

#### 4. JUDICIARY COMMITTEE

A judiciary committee, or law and order committee, serves as an interface between the courts and the council and chair, and as a judicial oversight committee of the council.

The functions of certain tribal judiciary committees are detailed in the following charts.

## 4.0 JUDICIARY COMMITTEE

TRIBE	JUDICIARY COMMITTEE	NUMBER SERVING	SELECTION	LENGTH OF TERM	DUTIES
Pascua Yaqui	no				
Gila River	no				
Hopi	law and order committee	7+	villages choose 1 rep. each	cycles with council	oversight of court, rangers, legislation
Navajo	yes	6	selected by chairman	4 years	oversight, advise removal, selection, legislation
White Mount'n Apache	no, replaced by justice commissioner				
San Carlos Apache	yes	5	tribal chair	4 years, staggered	judicial complaints, funding legislation of ordinances
Tohono O'odham	yes	5	council	standing, 4 years	oversight, don't initiate, present to council

## 4.1 JUDICIARY COMMITTEE

	YES	NO
<p><b>Positive Aspects</b></p>	<p>A judiciary committee serves as an interface between the full council and the court. It oversees the operations of the courts. It should educate the council on matters of the court, fulfill budgetary duties, and recommend judicial appointments to the general council.</p>	<p>If the council and/or tribe is very small, a judiciary committee may be unnecessary and cumbersome.</p>
<p><b>Negative Aspects</b></p>	<p>The judiciary may become too involved in court matters, and may exert political influence on the court if allowed.</p>	<p>Without a committee, the chief judge (or designate) must come before the entire council to discuss court administrative matters. This uses valuable council time. Some council members may not understand the functions and duties of the court, and their education is also time-consuming.</p>

## 4.2 JUDICIARY COMMITTEE SELECTION

	CHOSEN BY CHAIR	CHOSEN BY FULL COUNCIL
<p><b>Positive Aspects</b></p>	<p>Appointment by the chairman is quick and easy. He/she should understand the importance of this committee, as well as the importance of appointing those with judicial or police experience.</p>	<p>If the whole council appoints the judiciary committee, the checks and balances between the executive, legislative, and judiciary are served. Since the executive usually has veto power over appointments, the council would retain some measure of control, aiding separation of powers.</p>
<p><b>Negative Aspects</b></p>	<p>In tribes where the chairman already wields a large amount of power, the council should have input into the selection of the judiciary committee. The chairman could conceivably "stack" the court if he/she chooses both the candidates and the judicial committee.</p>	<p>The full council may not understand the powers and duties of the judiciary committee. The committee should aid, not hinder, the court, and those with experience in court matters are more likely to assist in that.</p>

## 5. FUNDING THE JUDICIARY

Funding for the judiciary can be procured from several different sources. 638 funds (gained by contracting under the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638) provide inadequate monies to operate a sophisticated and competent judiciary. Tribes generally supplement their budgets by allocating other tribal funds, and occasionally by lobbying for extra funds or joint-venturing with the states.

The following states the purpose of the Indian Self-Determination and Education Assistance Act of 1975, PL 93-638:

"Through grants and contracts, the Act encourages tribes to assume administrative responsibility for federally funded programs administered by employees of the Bureau of Indian Affairs and the United States Indian Health Service."<sup>9</sup>

When contracting, tribes agree to perform specific functions and to accept certain restrictions placed on them by the U.S. government.

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<sup>9</sup> Op.Cit., American Indian Trial Lawyer's Association, p.15.

## 5.0 FUNDING THE JUDICIARY

TRIBE	638 FUNDS	DESIGNATE % OF TOTAL BUDGET	EXTRA FUNDS	% FROM TRIBAL FUNDS
Pascua Yaqui	yes	no	no	no
Gila River	yes	no	yes, through contracting	25%
Hopi	yes	no	no	no
Navajo	yes	no	no	60-80%
White Mount'n Apache	yes	no	no	no, except for building maintenance
San Carlos Apache	yes	no	no	no
Tohono O'odham	yes	no	yes-- lobbying, state-tribe joint ventures	75-80%

## 5.1 DESIGNATE PERCENTAGE OF TOTAL BUDGET TO COURTS

	YES	NO
<p><b>Positive Aspects</b></p>	<p>If a set percentage of all government grants is designated to the courts, either in the code or the constitution, the council cannot use the budgeting process as political leverage against the court. The head of the court will not have to come before the council to lobby for funds.</p>	<p>If the government is not bound by budgetary restrictions, it can distribute monies to best benefit the tribe, which may include increasing the budget for the judiciary.</p>
<p><b>Negative Aspects</b></p>	<p>Tribal councils may not want their discretionary hands tied. They would be giving up some authority in exchange for a more stable judicial budget.</p>	<p>With no directives, the council could conceivably cut funding to the courts with no political repercussions. Also, if the funding guidelines call only for a minimum, the council could increase the budget above the required level.</p>

## 5.2 EXTRA FUNDS

	YES	NO
<b>Positive Aspects</b>	<p>Current 638 funding levels are not sufficient to run a strong judicial system. By lobbying for and receiving extra funding, or joint-venturing with the state, the tribe has greater options—increasing salaries to attract experienced judges and personnel, funding building and library improvements, and increasing training funds and programs.</p>	<p>The lobbyist will spend a considerable amount of time searching for, defining, and, if successful, establishing these programs. The monies generally will be transferred to the tribe only when the receiving program has been clearly outlined and appears feasible. This process also takes time, and the granting agencies may not approve the proposed program. When the money is received, the grantors will serve in an oversight, so funding must be used as described in the proposal. The entire process is long, complex, and exacting.</p>
<b>Negative Aspects</b>	<p>Lobbying for extra funding, or creating joint ventures with the state or counties, is time-consuming, and the effort is not always profitable.</p>	<p>Tribes may be able to save money by decreasing duplication of services with the state, and by amalgamating training programs. Tribes can use joint ventures and monies to target specific areas.</p>

## 5.3 PERCENTAGE FROM TRIBAL FUNDS

	YES	NO
<p><b>Positive Aspects</b></p>	<p>638 funds are too small to run a competent, comprehensive judiciary. If the tribe can supplement those funds with general revenue, the chances of developing and maintaining a well-respected, well-run judiciary improve greatly.</p>	<p>Tribes must choose the funding areas they want to emphasize. By increasing funding to the tribal courts, the council has chosen to decrease funding to other areas such as economic development.</p>
<p><b>Negative Aspects</b></p>	<p>With a greater reliance on funds from the council, there may be an increase in political pressure placed on the judiciary.</p>	<p>Economic development, particularly with the assistance of off-reservation companies and individuals, is highly correlated with the success and respectability of the tribal courts. Without the option of a fair hearing in tribal court, many investors will stay off the reservation no matter what other incentives the tribe uses.</p>



## 6. POLICE

Those tribes that have assumed 638 contracting for the police have done so for several reasons: expanding control of and increasing jurisdiction over tribal members, tightening control over training, hiring, and firing of police, improving the efficiency of the police department, improving evidence-gathering and case management for and with the tribal court, and increasing tribal sovereignty.

When the tribe assumes police functions, it accepts responsibility for many areas, including decisions on funding and training requirements, relations with the state (in terms of cross-deputization and jurisdictional issues), and in some cases, the responsibilities of the special agency officers.

## 6.0 POLICE

TRIBE	638	TRAINING	CROSS-DEPUTIZATION	SPECIAL AGENCY OFFICERS
Pascua Yaqui	no			yes
Gila River	no			yes
Hopi	no, but has Rangers for fishing, hunting violations	police academy	yes--depends on duties of police	yes
Navajo	yes	yes, runs own training academy, certified in 3 states--NM, UT, AZ	not necessary--police state certified	no--since Jan., replaced by tribal crim. investigator--federally trained
White Mount'n Apache	yes	trained after hired, either BIA or state, prefer state	no--place people depending on training	yes
San Carlos Apache	yes	trained after hired, either BIA or state, prefer state	no, not if BIA-trained	yes
Tohono O'odham	yes	state-certified	not necessary if state-certified	no--contracted

## 6.1 638 POLICE

	YES	NO
<b>Positive Aspects</b>	<p>When the tribe assumes police functions, it gains greater control over the actions of the tribe. Familiarity with custom and usage is increased, since the new police are either from the tribe, or will spend a greater length of time with the tribal police force.</p>	<p>Small tribes with limited budgets may choose not to contract for police services. Like the judiciary, 638 funds are insufficient to operate a well-run and comprehensive police force. Therefore, tribes will be asked to supplement police budgets. A major reason to 638 police is to increase expertise and training, and if the tribe does not have the monies to hire experienced and trained police, or train them while they are on the force, one major goal is lost.</p>
<b>Negative Aspects</b>	<p>Monies and training are major considerations. Also, those police from the tribe may be susceptible to political pressures.</p>	<p>Tribes are seeking greater control over their reservations and actions. This is one of the first steps to do so.</p>

## 6.2 POLICE TRAINING

	STATE ACADEMY	BIA ACADEMY	BOTH
<b>Positive Aspects</b>	<p>If the officers are certified by the state academy, they will be able to serve in the same capacities as the state officers. Cross-deputization will then not be necessary. Time will be saved in investigations, since state officers will not have to be called in many circumstances.</p>	<p>The tribe does not have to pay when they send officers to train at the BIA academy. The officers are trained not only in regular police duties, but also receive cultural training, aiding in sensitization to the traditions of the tribes.</p>	<p>The police would have the benefit of both the cultural training from the BIA academy, as well as the arguably better police training at the state academy. Cross-deputization would not be necessary. Some officers could have one type of training, while others with different duties have the other.</p>
<b>Negative Aspects</b>	<p>If the officers are trained after they are hired, the tribe must pay the state for the training, but not for training at the BIA academy.</p>	<p>With the BIA academy's emphasis on culture, less emphasis may be placed on regular police functions.</p>	<p>Having the tribe pay for both programs would be expensive and time-consuming. Hiring those with the required experience may be difficult.</p>

## 6.3 CROSS-DEPUTIZATION

	YES	NO
<b>Positive Aspects</b>	<p>If the police are not state-certified, they are not able to perform some functions that those with state-certification can fulfill. BIA-trained officers who are faced with these situations (frequently those involving non-Indians committing crimes on reservation land) must call in state-certified or BIA special officers. Valuable time and evidence thus may be lost.</p>	<p>Tribes frequently face problems from states, their police, and citizens who question the authority of the tribal police to carry out the functions normally relegated to the state police.</p>
<b>Negative Aspects</b>	<p>Confusion between the state or local governments and the tribe may result.</p>	<p>Having either state-certified or cross-trained police affords the tribe another chance to reclaim sovereignty.</p>

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