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Protecting the Democratic Process in Indian Country Through Election Monitoring: A Solution to Tribal Election Disputes

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PROTECTING THE DEMOCRATIC PROCESS IN INDIAN COUNTRY THROUGH ELECTION MONITORING: A SOLUTION TO TRIBAL ELECTION DISPUTES

Derek H. Ross[*]

I. Introduction

Elections in America are prone to controversy. Each election cycle, it is common to see disputes litigated for weeks after the initial votes have been counted.[1] These controversies occur in all levels of elections, including those for state and local governments.[2] The media report extensively on these disputes. There is also a large amount of academic literature discussing the causes of and proposed solutions to these election problems, particularly since *Bush v. Gore*.[3] Because of the heightened levels of media and academic attention, many states adopted procedures aimed at preventing disruptions to the election process.[4] At the federal level, Congress passed the Help America Vote Act,[5] "which encourages states to update their voting systems, standardize their voting registration requirements, and otherwise improve their election processes."[6] While no system can ever be perfect, governments are at least attempting to find solutions for many of the most frequent problems.

American Indian tribal elections experience similar controversies. Each year, dozens of tribal election disputes are litigated in both tribal and federal courts. Some of this litigation lasts many years.[7] Unlike national and state elections, very little scholarship has been dedicated to finding solutions to tribal election issues. Several factors likely contribute to this lack of scholarship, including the relatively low number of participants in these elections, scant media coverage outside of Indian news publications,

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1. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000); Franken v. Pawlenty, 762 N.W.2d 558 (Minn. 2009).

2. *See generally* Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud: Learning From Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159 (2001).

3. Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 266 (2007) [hereinafter Huefner, *Election Wrongs*].

4. *Id.*

5. Pub. L. No. 107-252, 116 Stat. 1666 (2002).

6. Huefner, *Election Wrongs*, *supra* note 3, at 265.

7. *See generally* Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002).

and barriers to obtaining election information. Nevertheless, these elections, and the cases stemming from them, deserve both academic and public attention because their outcomes determine who will govern tribe members throughout the United States. Furthermore, the allocation and control of millions of dollars of federal and tribal funds can depend on the election disputes' outcomes.

Problem-solvers should investigate procedural solutions to tribal election disputes because election controversies lead to distrust and allegations of illegitimacy from inside and outside of the tribes. Legitimate governments "encourage[] citizens to feel secure in investing in the future of the community. At the same time . . . [they] inspire confidence in outsiders who interact with tribes through social, commercial, and legal dealings."[8] When governments are put in place following litigation, both tribal members and outsiders doubt the government's legitimacy.[9] Despite the importance of preventing these controversies, present remedies to tribal election disputes are insufficient. As one court lamented:

> The Court would like to believe that its decision will resolve, or at least be a positive step toward resolving the long-existing turmoil and contention that exists between the parties . . . . This, the Court fears, will not be the result. Rather, the Court is confident that, no matter what it decides, or for that matter what the Circuit Court may ultimately decide since it is inevitable that this case will be appealed, that internal rifts within [the tribe] and friction between the [tribe] and the [Department of the Interior] will continue. Nonetheless, despite this pessimism, the Court must try to fashion a remedy that addresses the dispute before it . . . .[10]

This comment considers election procedures, both in the United States and abroad, and attempts to find solutions to election controversies that can be applied to tribal election systems. First, it details the history of tribal elections and the roles that tribal courts, federal courts, and the Department of the Interior (DOI) play in resolving election disputes. The discussion will also include what remedies, if any, are available to the tribes to resolve these disputes.

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8. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1064 (2007).

9. *Id.*

10. *Norton*, 223 F. Supp. 2d at 147.

Next, this comment examines the remedies suggested for state and local governments to mitigate the increased attention resulting from the 2000 presidential election and the cases following it. Further, it looks at tribal election procedures to determine whether the suggestions for state and local government elections can be applied to tribal elections. The benefits of any possible solutions must always be balanced with tribal sovereignty and notions of self-governance.

This comment devotes a significant amount of attention to the 2011 Cherokee Nation Principal Chief election. This election controversy provides a good example of the typical problems that can arise in tribal elections. It also represents one of the few instances when a nongovernmental organization has been invited to observe a tribal election.

Finally, this comment suggests the best solution for tribal election disputes: creating an intergovernmental organization tasked with monitoring tribal elections. Member tribes could send representatives to act as election monitors for other tribes that opt into the organization. Similar organizations already exist for the purpose of monitoring and validating elections all over the world, and a tribal system could be modeled after these entities. This organization would provide much-needed transparency and legitimacy to tribal elections.

II. The Sources of Tribal Sovereignty and Self-Governance

"Before the coming of the Europeans, the tribes were self-governing sovereign political communities."[11] Sovereignty is an important part of any electoral process. Sovereignty includes the ability to decide how the government will be chosen and how disputes regarding the selection of government leaders will be settled. Before discussing remedies available to tribes, one must appreciate the nature of the powers that tribes possess. Although tribes are sovereign nations, they do not possess all of the traditional powers of a sovereign. Instead, tribes have limited powers that have developed through treaties, executive orders, legislation, and court decisions since the "discovery" of America. Because of this quasi-sovereign status, the federal government can only step in and help to resolve election disputes in limited circumstances. This concept of tribes as domestic dependent nations developed through a line of cases known as the Marshall Trilogy.[12] Despite Justice John Marshall's opinions regarding the

11. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

12. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

extinguishment of aboriginal rights and diminished tribal sovereignty, tribes remain "a separate people, with the power of regulating their internal and social relations."[13]

"The Marshall Trilogy remains important because it forms a historical starting point in understanding the diminished nature of inherent tribal sovereignty."[14] In *Johnson v. M'Intosh*, the Supreme Court held that per the doctrine of discovery, only the discovering sovereign can acquire title to newly discovered lands.[15] This meant that tribes could not sell their land to individuals, but instead only to the government of the discovering nation.[16] After the United States declared independence from Britain, the right of purchase transferred to the United States federal government and not to the individual colonies or states.[17] This limitation on the tribal lands' alienability imposed concomitant restrictions on tribal self-governance upon which Justice Marshall would expand in the subsequent cases.[18]

The next case in the trilogy, *Cherokee Nation v. Georgia*, established the trust doctrine, outlining the guardian-ward relationship between the United States and the tribes.[19] Justice Marshall wrote that tribes "look to our government for protection[,] rely upon its kindness and its power[,] appeal to it for relief to their wants[,] and address the President as their great father."[20] Instead of foreign nations, Justice Marshall characterized tribes as "domestic dependent nations," having lost many of their sovereign rights as a result of conquest and discovery.[21] "[T]he Court held that Indians retained tribal sovereignty but that Congress could limit such sovereignty by the simple reality of the tribes' dependent relationship with the American state."[22]

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13. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

14. Paul W. Shagen, *Safeguarding The Integrity of Tribal Elections Through Campaign Finance Regulation*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 103, 109 (2009).

15. *M'Intosh*, 21 U.S. at 544-45.

16. *Id.*

17. *Id.*

18. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 739 (2004).

19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831).

20. *Id.*

21. *Id.*

22. Anthony G. Gulig & Sidney L. Harring, *"An Indian Cannot Get A Morsel of Pork . . . ." A Retrospective on* Crow Dog, Lone Wolf, Blackbird, *Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87, 90 (2002).

Worcester v. Georgia established that tribal sovereignty and federal supremacy preempted any state laws purporting to regulate Indian affairs. Georgia passed laws restricting who could be present on Cherokee lands.[23] The Court held that Georgia could not pass laws regulating Indian lands, and that the Constitution reserved to the federal government the power to interact with Indian nations.[24]

Courts expanded upon this concept of tribal sovereignty in the 200 years since the Marshall Trilogy. Tribes can establish and exercise their own laws in Indian Country,[25] although Congress retains plenary power over the tribes due to the tribes' dependent nature.[26] Further, "Congress . . . has a right to determine for itself when the guardianship . . . shall cease[,]"[27] unrestricted by judicial oversight or treaty provisions.[28] States, however, generally do not have power over Indians in Indian Country. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[29]

A. Indian Reorganization Act

The Marshall Trilogy establishes the relationship between the tribes and the federal and state governments, but the cases do not touch on whether the tribes' limited sovereignty includes the power to choose forms of governments or government officials. Congressional intent regarding this issue can be found in the Indian Reorganization Act (IRA).[30] Indeed, "[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[31]

Under the IRA, tribes can, with the approval of the Secretary of the Interior, adopt a constitution, elect officials, and institute other bylaws for the benefit of the tribe.[32] The IRA shows a federal Indian policy "in favor of tribal self-determination and strong tribal government."[33]

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23. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832).

24. *Id.* at 520.

25. *See generally Ex parte* Crow Dog, 109 U.S. 556 (1883).

26. *See generally* United States v. Kagama, 118 U.S. 375 (1886).

27. *See* United States v. Sandoval, 231 U.S. 28, 46 (1913).

28. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

29. Williams v. Lee, 358 U.S. 217, 220 (1959).

30. Indian Reorganization Act § 16, ch. 576, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 476 (2006)).

31. Morton v. Mancari, 417 U.S. 535, 542 (1974).

32. Noreen C. Lennon, *Department of Interior Authorized to Review "Final" Decisions of Tribal Election Board and to Invalidate Tribal Election Based on Eligibility Disputes in*

The Secretary of the Interior has also established procedures for challenging elections. These procedures state that

> [a]ny qualified voter, within three days following the posting of the results of an election, may challenge the election results by filing with the Secretary through the officer in charge the grounds for the challenge, together with substantiating evidence. If in the opinion of the Secretary, the objections are valid and warrant a recount or new election, the Secretary shall order a recount or a new election. The results of the recount or new election shall be final.[34]

But this statute stops far short of explaining exactly what can happen when challenges to tribal elections enter federal courts. The effect of a challenge in federal court can only be found in case law, which will be discussed in Section III.

B. Indian Civil Rights Act

The Indian Civil Rights Act (ICRA)[35] introduced further limitations on tribal power. Passed in 1968, ICRA statutorily imposes on Indian tribes many of the limitations the Bill of Rights and Fourteenth Amendment impose on the federal and state governments.[36] "The express purpose of this legislation is to 'protect individual Indians from arbitrary and unjust actions of tribal governments' by placing 'limitations on an Indian tribe in the exercise of its powers of self-government.'"[37] Congress's authority to pass laws restricting tribal sovereignty stems from the Commerce Clause and the Supreme Court's determination in the Marshall Trilogy that tribes are domestic dependent nations.[38]

Remedies for ICRA violations are not necessarily available in federal courts. "Before [the] 1978 United States Supreme Court decision in *Santa*

Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 31 CREIGHTON L. REV. 527, 562-63 (1998).

33. *Id.* at 527.

34. 25 C.F.R. § 81.22 (2011).

35. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2006).

36. Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 85 (1990).

37. *Id.* at 85-86.

38. U.S. CONST. art. I, § 8, cl. 3 ("[Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."); *see also* United States v. Kagama, 118 U.S. 375, 378-82 (1886).

Clara Pueblo v. Martinez,[39] lower federal courts occasionally entertained actions to review the merits of tribal election disputes under ICRA."[40] In *Martinez*, the Court established that to avoid interfering with tribal self-governance and sovereignty, habeas corpus is the only available federal court remedy for ICRA violations.[41]

III. Existing Remedies to Election Disputes

A. Remedies in Federal Courts

Federal court remedies available for tribal election disputes depend on the type of election in dispute. Two types of elections occur in Indian Country.[42] First, general tribal elections determine positions within the government and establish tribal laws.[43] Second, secretarial elections occur when "the Secretary of the Interior conducts occasional elections under the Indian Reorganization Act for specific purposes governed by that act and its implementing regulations."[44] The only way to amend tribal constitutions adopted under the IRA is through a secretarial election.[45] Additionally, some tribal constitutions require tribes to hold secretarial elections for certain elections beyond those required by the IRA.[46] In secretarial elections, "federal involvement is the norm, rather than the exception."[47] Secretarial elections are considered federal instead of tribal elections, and are therefore governed by federal instead of tribal law.[48] As such, relief from secretarial election disputes is found in federal and not tribal courts.

Tribal law governs general tribal elections, and federal courts generally do not have jurisdiction over these matters. Although the federal government has established a strong policy against interfering with tribal governmental matters, there are times when the federal government is

39. 436 U.S. 49 (1978).

40. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 289 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

41. *Id.*

42. *Id.* at 285.

43. *Id.*

44. *Id.*

45. Indian Reorganization Act § 16, ch. 576, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 476 (2006)).

46. ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 513 (5th ed. 2005).

47. COHEN, *supra* note 40, at 292.

48. *Id.* at 293.

forced to intervene in tribal non-secretarial elections.[49] The federal government is often asked to decide an election's outcome, which may in turn decide who is the legitimate tribal representative for the purpose of interactions with the federal government.[50] But just as ICRA did not create jurisdiction for federal courts to hear violations of individual rights, it also did not create jurisdiction for federal courts to hear violations regarding tribal elections.[51]

Most tribes have some form of established process for disputing election results.[52] Indeed, this is usually the fact upon which most federally appealed cases are decided. For instance, *Wheeler v. United States Department of the Interior* asked whether the DOI had "[the] authority to interfere in a tribal election dispute when the tribe provides administrative and judicial procedures for contesting its elections."[53] A candidate protested the final election results for the Cherokee Nation's Principal Chief.[54] The candidate filed a motion with the Cherokee Tribal Election Committee.[55] In the motion, the candidate requested that the votes be recounted, that a runoff be held, and that the Federal Bureau of Investigation conduct an investigation for election fraud.[56] The requests were dismissed and the candidate went to the Cherokee Judicial Appeal Tribunal.[57] An appeal to the Tribunal led to a recount, which confirmed the existing vote totals.[58] The Tribunal refused the other requests of a revote or to stay the winner's certification.[59] The candidate then took his complaints to the Superintendent of the Bureau of Indian Affairs (BIA) and the DOI, both of which found that the "tribal government was functioning within the scope of its power and, thus, the Department was obligated to recognize the tribal court decisions rendered in [the] matter."[60]

On appeal, the Tenth Circuit found that the "established right to self-government limits the authority of the [DOI] to resolve tribal election

49. *Id.*
50. Wheeler v. U.S. Dep't of Interior, 811 F.2d 549, 552 (10th Cir. 1987).
51. Wheeler v. Swimmer, 835 F.2d 259, 261 (10th Cir. 1987).
52. COHEN, *supra* note 40, at 293.
53. Wheeler v. U.S. Dep't of Interior, 811 F.2d at 550.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

disputes."[61] The court further stated that the policy of the U.S. government encourages tribal self-governance, as evidenced in congressional actions.[62] The court qualified, however, that the DOI can take action in certain instances, including when "a tribe's constitution or its statutes call for the [DOI] to take an active role in lawmaking," or when federal law mandates that the DOI can intervene.[63] Because the DOI is tasked with interacting with Indian tribes, there may be times when it has to decide whether entities within a tribe are the legitimate representatives of the tribe.[64] The DOI's ultimate decision, though, must nonetheless comply with federal policies of tribal sovereignty and independence.[65] The court concluded that "when a tribal forum exists for resolving a tribal election dispute," the DOI cannot intervene without a federal statute granting authority.[66] The court, however, stopped short of stating that the DOI should intervene whenever there is no entity designated to resolve election issues.[67]

United States v. Pawnee Business Council[68] involved state court authority to decide tribal election disputes. This case arose when an ousted member of the Pawnee Business Council sought a declaratory judgment.[69] The ousted member brought suit in Oklahoma state court.[70] The tribal business council fought the state suit in federal district court, and the federal court found that state courts, like federal courts, "are without jurisdiction to entertain and decide internal Indian tribal affairs, matters or disputes."[71] The court maintained that Congress possesses the authority to intervene in these matters, and that Congress has given the Secretary of the Interior the authority to do so.[72]

Goodface v. Grassrope[73] asked whether a district court could properly review the BIA's decision to refuse recognition of a tribal council after an election. The Eighth Circuit found that pursuant to the Administrative

61. *Id.* at 550-51.
62. *Id.* at 551.
63. *Id.* at 551-52.
64. *Id.* at 552.
65. *Id.*
66. *Id.* at 553.
67. *Id.*
68. 382 F. Supp. 54 (N.D. Okla. 1974).
69. *Id.* at 57.
70. *Id.*
71. *Id.* at 58.
72. *Id.*
73. 708 F.2d 335, 338 (8th Cir. 1983).

Procedure Act,[74] federal courts could review the actions of agencies. The court held, however, that district courts cannot address the merits of an election dispute if adequate tribal remedies exist.[75] The federal court can order the BIA to conditionally recognize a legitimate entity to represent the tribe while tribal remedies are being sought within the structure of the tribal system,[76] but this can only be done "when it is necessary [in order for the BIA] to carry out its statutory and regulatory obligations."[77]

Controversies not only arise out of elections, but also out of referenda. Instead of voting for tribal candidates, a referendum is generally a vote to change a law or some other tribal policy.[78] One example can be found in *Seminole Nation of Oklahoma v. Norton*.[79] Here, a dispute arose out of a referendum election involving amendments to the Tribe's constitution.[80] Some of the amendments were aimed at excluding certain tribal members of African ancestry from tribal membership.[81] The DOI Assistant Secretary wrote a letter to the Tribe indicating that the federal government would not recognize any of the amendments creating the membership exclusion.[82] The Tribe filed suit against the DOI, alleging that the agency did not have the power to review amendments to the Tribe's constitution.[83] While this suit awaited judgment, the Tribe conducted elections for Principal Chief and Assistant Chief pursuant to the disputed constitutional amendments.[84] The district court issued a ruling stating that the DOI did indeed have "authority, pursuant to [the tribal constitution], to approve amendments" to the Tribe's constitution.[85]

Further, the DOI had been granted congressional authority to review amendments that would affect the determination of tribal chief.[86] Acting on the decision of the district court, the BIA refused to recognize the newly elected officials until those members that were denied citizenship by the

74. 5 U.S.C. § 701 (1982).

75. *Goodface*, 708 F.2d at 338.

76. *Id.* at 339.

77. Wheeler v. U.S. Dep't of Interior, 811 F.2d 549, 552 (10th Cir. 1987) (citing *Goodface*, 708 F.2d at 339).

78. Harjo v. Kleppe, 420 F. Supp. 1110, 1146 (D.D.C. 1976).

79. 223 F. Supp. 2d 122, 125 (D.D.C. 2002).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 126.

86. *Id.*; *see also* Principal Chief Act, Pub. L. No. 91-495, 84 Stat. 1091 (1970).

constitutional amendments were reinstated.[87] The BIA sent a letter to the Tribe stating that until the excluded members were added to the rolls and tribal positions were returned to their pre-election status, the BIA would not have a governmental relationship with the Tribe.[88]

The Tribe appealed this decision to the United States District Court for the District of Columbia.[89] The district court held that while concepts of self-governance and sovereignty must be respected, the DOI "'has the authority to interpret the tribal constitution in order to determine who will be recognized as the tribal representative for the purpose of carrying out federal relations.'"[90] Further, because Congress gives the BIA, as trustee, the duty of facilitating a government-to-government relationship with tribes, the BIA is obligated to review tribal constitutions.[91] Also, "the DOI has the authority and responsibility to ensure that the Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole."[92] Finally, district courts are allowed to set aside these findings by the DOI and BIA if they determine that the decisions of the department were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[93]

Ransom v. Babbitt[94] is another case arising out of a disputed referendum.[95] In this case, the Saint Regis Mohawk Tribe held an election to determine if the Tribe should adopt a constitution to replace the existing Three Chief form of government with a traditional democratic government composed of three branches, similar to the United States form of government.[96] The referendum failed by less than one percent of the vote, but the existing tribal government certified the election as having passed the constitutional amendments and installed the new form of government.[97] This controversial act led to a great deal of fighting within the tribe, and the litigation ultimately found its way to the United States District Court for the

87. *Seminole Nation*, 223 F. Supp. 2d at 126.
88. *Id.*
89. *Id.*
90. *Id.* at 132 (citation omitted).
91. *Id.* at 138 (citation omitted).
92. *Id.* at 140.
93. *Id.* at 147.
94. 69 F. Supp. 2d 141 (D.C.C. 1999).
95. *Id.*
96. *Id.* at 143.
97. *Id.*

District of Columbia, based on the BIA's refusal to acknowledge any government other than the form that existed before the initial referendum.[98]

Here again, the court applied the arbitrary and capricious standard.[99] This case also reinforced the idea that the BIA may review tribal constitutions to determine which party is the legitimate representative of the tribe.[100] The court stated, however, that "if the legitimate tribal institutions are no longer functioning or are no longer able to fulfill their duties, the power to make such important determinations for the tribe in question lies with the people of the tribe — not with the [federal] government."[101] Finally, the court ruled that the BIA should favor tribal self-governance, even when doing so would leave tribes with forms of government without constitutions.[102]

Tribal disputes have led to "[a]n enormous amount of litigation over the election of tribal officials . . . in tribal courts, and even occasionally in federal courts, despite the fact that federal courts almost never have jurisdiction over those suits."[103] While it is true that the federal government can step in and help resolve issues in limited circumstances, the notions of self-governance indicate that many solutions to electoral problems must come from within the tribes. Even when the courts have the power to intervene, the remedies they craft may not provide permanent solutions to tribal election disputes. These changes from within the tribes could take many forms, including amending tribal election procedures, adopting more efficient dispute resolution processes, or providing increased openness and transparency in the tribal election process.

B. Tribal Court Remedies for Election Disputes

While the federal court remedies for tribal election disputes are generally very limited, the potential tribal court remedies are diverse. Tribes often have their own statutes, customary law, or constitutions that lay out procedures for elections.[104] A majority of tribes have committees or judicial bodies that govern election operations.[105] These bodies are also generally tasked with addressing disputes arising within the election

98. *Id.* at 147 (quoting 5 U.S.C. § 706(2)(A) (2006)).
99. *Id.* at 149.
100. *Id.* at 151.
101. *Id.* at 150.
102. *Id.*
103. MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 271 (2011).
104. COHEN, *supra* note 40, at 286.
105. *Id.*

process.[106] Parties may seek appeal in the tribal court system once they have exhausted available election board remedies.[107] The remedies that are available to tribal courts are statutory and vary from tribe to tribe.[108] Under the tribal codes, there are many distinctions between the election boards' power and the scope of the tribal courts' judicial review authority.

Some tribal codes give almost no judicial review power to the tribal courts to resolve election disputes. In *Darden v. Chitimacha Election Board*, the Chitimacha Tribal Court of Appeals determined that it did not have jurisdiction to review a decision made by the tribal election board.[109] The tribal code stated that when election conflicts arise, "[t]he Election Board will hear the dispute and render a decision, and notify the Tribal Council. The Election Board is the final decision on appeals."[110] The appellate court affirmed the lower court's dismissal because it determined that the election board's ruling was final.[111] Many tribes make election board decisions final, but allow courts to intervene when there are "allegations of impropriety by the Election Board."[112] The rule adopted by the Eastern Band of Cherokees states that "election results are presumed valid."[113] Before the court may intervene, a challenger must show "that the alleged irregularities unfairly and improperly or illegally affected the actual outcome of the election or that, but for the alleged irregularities, the outcome of the election would have been different."[114] This "but for" standard is difficult to prove, and the court's hands are tied unless the challenger satisfies it.[115]

Burdens of proof in election litigation also vary among tribes.[116] The Cherokee Nation of Oklahoma requires that "election challengers bear the burden of establishing beyond a reasonable doubt that the alleged violations

106. *Id.*

107. FLETCHER, *supra* note 103, at 286 (citing Begay v. Navajo Nation Election Admin., N. SC-CV-27-02, 8 Navajo Rptr. 241 (Navajo July 31, 2002)).

108. COHEN, *supra* note 40, at 288.

109. FLETCHER, *supra* note 103, at 273 (citing Darden v. Chitimacha Election Bd., No. CV-00-0075, 28 Indian L. Rep. 6043 (Chitimacha Ct. App. Feb. 2, 2001)).

110. *Id.* at 272 (citing CHITIMACHA CODE tit. X, § 519 (2009)).

111. *Id.* (citing *Darden*, 28 Indian L. Rep. 6043).

112. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art VII, § 5(a)-(c).

113. FLETCHER, *supra* note 103, at 273.

114. CHEROKEE CODE § 161-16(d) (2010).

115. FLETCHER, *supra* note 103, at 273.

116. *Id.* at 273-74.

had a strong likelihood of affecting the outcome."[117] Other tribes impose a "clear and convincing evidence" standard.[118] Some tribal courts review election disputes *de novo*, but will not reexamine the election boards' findings of fact.[119] When tribal courts are required to show such deference to election boards, it can impair the courts' ability to grant relief.[120]

Even when tribal courts have the power to grant relief, the available remedies may differ among tribes.[121] Some of these remedies can be highly disruptive to the tribal government.[122] When new elections or recounts are ordered, it extends the amount of time that the previous leadership remains in power. This creates a holdover government, which may not be recognized by the federal government.

Chamberlain v. Peters[123] illustrates the problems caused by holdover governments. The case involved council elections for the Saginaw Chippewa Tribe of Michigan. Here, a ten-member council (the Chamberlain Council) took office in November, 1995.[124] As the Chamberlain Council's term approached its end, the Tribe held a new primary election in which only four members of the Chamberlain Council were retained.[125] For indeterminate reasons, the election results were disputed and the Chamberlain Council threw out the results.[126] The Tribe held a new election, which had similar results, and the Chamberlain Council again threw them out.[127] Following the second election, the Chamberlain Council's office term ended.[128] A two-year holdover period

117. *Id.* at 274 (citing Byrd v. Cherokee Nation Election Comm'n, 8 Okla. Trib. 172, 178 (Okla. Trib. 2003)).

118. *See, e.g.*, Bailey v. Grand Traverse Band Election Bd., No. 2008-1031-CV-CV, 2008 WL 6196206, at *4 (Grand Traverse Trib. Jud. Aug. 8, 2008).

119. FLETCHER, *supra* note 103, at 274; Yellow Bird v. Three Affiliated Tribes Tribal Election Bd., 29 Indian L. Rep. 6018, 6019 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct. Sept. 27, 2001).

120. FLETCHER, *supra* note 103, at 274.

121. *Compare Bailey*, 2008 WL 6196206, at *16 (new election ordered), *with* Ducheneaux v. Cheyenne River Sioux Tribe Election Bd., 26 Indian L. Rep. 6155 (Cheyenne River Sioux Tribal Ct. App. 1999) (injunction denied because remedies available through the election board were not exhausted). *See* FLETCHER, *supra* note 103, at 281.

122. FLETCHER, *supra* note 103, at 281.

123. Chamberlain v. Peters, 27 Indian L. Rep. 6085 (Saginaw Chippewa Tribe of Mich. Ct. App. Jan. 5, 2000); FLETCHER, *supra* note 103, at 308-17.

124. *Chamberlain*, 27 Indian L. Rep. at 6086.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

began, which involved litigation in the tribal courts and additional rounds of elections.[129] At one point, the BIA threatened that if valid elections were not held within a given time period, the federal government would no longer recognize the Chamberlain Council, and dealings with the Tribe would take place through another council that had won an off-reservation election during the holdover period.[130] The holdover council ignored this directive, and the BIA found itself in the awkward position of choosing the Tribe's properly elected representative.[131]

The *Chamberlain* case demonstrates the difficulties of applying tribal remedies to election disputes. The tribal entity charged with validating an election is often a participant in the election, creating conflicts of interest and the appearance of impropriety. There are many possible solutions tribes can adopt to prevent or remedy these election issues.

One solution is to analyze state or foreign election codes to identify potential changes to tribal codes that could help to prevent these problems. These election code changes could come from the tribes themselves, or Congress could mandate them. Because Congress retains plenary power over Indian tribes, it could force tribes to adopt a model election code that it deems best suited to address the problems causing election disputes. Congress could also take an approach similar to the Help American Vote Act by providing tribes with financial incentives to update their voting procedures to conform to some set standard. This, however, would go against Congress's stated policy of encouraging tribes to establish their own laws and forms of government.

IV. Models for Election Reform

A. Existing Procedural Remedies

Election disputes can arise in many ways. Some frequent causes are fraud, mistake, non-fraudulent misconduct, or extrinsic events.[132] To address these situations, governments have adopted various remedies, including recounts, adjusting vote totals, and holding new elections.

There are two types of recounts: automatic and requested.[133] Automatic recounts occur when final election results fall within a certain statutorily

129. *Id.*
130. *Id.* at 6087.
131. *Id.* at 6088.
132. Huefner, *Election Wrongs*, *supra* note 3, at 271-77.
133. *Id.* at 278.

defined margin. Requested recounts occur at the request of one of the candidates or some other statutorily defined individual.[134]

Recounts often involve the issue of how to determine voter intent when it is not clear from the ballot. In *Bush v. Gore*, for instance, the election's results turned on the standard used to determine which ballots should be included, applying the same standard across all counties in Florida.[135]

In a tribal election, it is necessary that the election code set out exactly which ballots should be included and which should be thrown out. This is particularly important if a tribe counts votes in more than one location, so that all ballots receive the same treatment. Even if a small tribe conducts voting in only one location, it must nevertheless establish clear, specific standards to determine which ballots are counted. This can quickly resolve disputes arising out of voter mistake and unreadable ballots, and it ensures that the same standards apply in all elections.

A similar issue arises when the total number of votes for a candidate is adjusted.[136] This adjustment can occur in two ways. First, when specific ballots are determined to be invalid.[137] Second, when the final totals are determined to be incorrect but no invalid ballots are found.[138] In the first case, the tainted ballots can simply be thrown out and the final results adjusted.[139] "[W]hen the tainted votes cannot be specifically identified . . . the proper remedy is less clear" and generally depends on whether the tainted total exceeds the margin of victory.[140] The remedies can include throwing out all absentee ballots, leaving out all ballots cast at the precinct in question, or holding a new election.[141] These remedies are often undesirable, however, because they have the effect of disenfranchising a particular group of voters.[142]

Like recounts, the critical factor for changing voting results is to have a strict set of standards governing these circumstances detailed in the tribal election code. This ensures that all votes and elections are carried out under the same rules and receive equal treatment. Applying the same standards

134. *Id.*
135. *Id.* at 290.
136. *Id.* at 279-80.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 281.
141. *Id.* at 281-82.
142. *Id.* at 282.

across multiple elections increases the perceived legitimacy of the process and prevents votes from being arbitrarily discounted.

When election results cannot be determined, courts are often forced to decide whether new elections should be held and whether courts have the authority to call new elections.[143] The courts' decisions in these circumstances may depend on whether the margin of victory exceeds the number of votes in question.[144]

In state election codes, there may be little guidance on when a new election can be called.[145] Tribal election codes are often similarly vague.[146] Some tribes give wide discretion to courts to establish procedures to settle these disputes. For instance, the Absentee Shawnee Code states:

> In the event that any person who is party to an election dispute or contest and that person is not satisfied with the Election Commissioner's decision, then that party may appeal the Election Commissioner's decision to the Tribal Court under such rules and regulations as the judicial branch may prescribe.[147]

Without specific guidelines to follow, the courts may be forced to make the rules up as they go along. Settling these disputes without established guidelines may create the appearance of impropriety. The criteria for runoffs, re-votes, and candidate disqualifications should be firmly decided at the outset of an election to prevent voter disenfranchisement and dissatisfaction.

When considering implementing new election procedures, one must weigh cost and efficiency.[148] One must balance any increased costs with the increase in legitimacy.[149] Further, one must also consider the length of time a given procedure might add to the voting or recount process.[150]

It can be difficult to implement changes to election procedures. "Institutional reform is an inherently difficult task."[151] Like other

143. *Id.* at 283.
144. *Id.* at 284.
145. *Id.* at 287; *see also* MO. REV. STAT. § 115.593 (2006).
146. *See, e.g.*, PAWNEE TRIBE OF OKLAHOMA LAW AND ORDER CODE tit. VIII (2005).
147. ABSENTEE SHAWNEE CODE art. XII § 4.
148. Huefner, *Election Wrongs*, *supra* note 3, at 293-94.
149. *Id.* at 294.
150. *Id.*
151. Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Haulapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 165 (2001-2002).

governments, Indian nations often unsuccessfully attempt to adopt reforms several times before the measures ultimately pass.[152] During this period, several elections may take place and elected officials spearheading the reform may be replaced. Indeed, these issues may not be seriously considered until there is an election crisis visible or controversial enough to push the reforms forward.[153]

B. Domestic Models for Reform

Tribes have already adopted many of the reforms adopted by state and local governments: "American Indian nations have made numerous constitutional revisions to their election procedures. One of the most frequent reforms has been to adopt primary elections . . . . Other areas of reform have focused on voter eligibility disputes arising out of the residency and enrollment status of tribal members."[154] But because many of the standard approaches to election dispute resolutions have been found undesirable, some scholars suggest that we look abroad for other alternatives.

Following *Bush v. Gore*, a large amount of scholarship focused on how local, state, and federal elections can avoid disputes. The suggestions found therein include standardized voter registration across all states, non-partisan election commissions, and encouraging courts to get involved in pre-election instead of post-election litigation.[155] Many of these suggestions are not viable for tribal elections because of inherent differences between tribal and non-tribal elections.

Regarding the first suggestion, tribes take varying approaches to voter registration. Some tribes have no registration process and allow any member of requisite age to participate in elections.[156] Others require registration with an election secretary or tribal registrar to be eligible to vote.[157] In comparison to non-tribal voting registration, tribal voting registration rarely entails residency issues. States differ in their requirements for registration, which can often lead to confusion for both voters and officials when voters have recently moved to a new state or

152. *Id.* at 166.

153. *Id.*

154. *Id.* at 164.

155. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 945 (2005).

156. *E.g.*, PAWNEE TRIBE OF OKLAHOMA LAW AND ORDER CODE tit. VIII, § 5(A) (2005).

157. *E.g.*, CHICKASAW NATION CODE § 8-302 (2012).

precinct.[158] Tribes generally do not experience the same voter registration problems because tribes have fewer polling places and the eligibility to vote is generally based on tribal membership and not residence.

One problem that may arise with tribal voter registration is when a tribe member does not realize that registration is a requirement for voting. Commenting on a recent tribal election, one election monitor observed that there are times when "citizens [do] not appear to understand that the process of voter registration and registration as a tribal citizen were two distinct processes."[159] If this is a recurring theme within a tribe, the tribal government may need to foster better education for its citizens regarding its voting laws and procedures.

As to the second suggestion, unbiased election commissions cannot necessarily prevent election disputes from initially occurring, but they can certainly provide more legitimacy to the process once the dispute arises. "To the extent possible, the people running [] elections should not have a vested interest in their outcome."[160]

Tribes do not have issues of partisanship in election commissions since tribes do not have political parties. But the lack of partisanship does not mean that the commissions are necessarily immune from bias. Tribes vary in the way election boards are determined; however, they are usually appointed either by a government body or an elected official.[161] Appointments can lead to perceived or actual bias in favor of those who appointed the election commission officials. It is possible that this may never be completely avoided. Nevertheless, there are ways to improve the process. One suggestion is for the executive branch to appoint the election officials who must then seek approval by a legislative super-majority.[162] This may not always be possible in some tribes because governmental structures vary greatly.

The third suggestion for preventing election disputes is to change the timing of the election-related litigation.[163] These changes are not always possible because some of the issues that create the disputes do not arise

158. Hasen, *supra* note 155, at 964-65.

159. Press Release, Carter Center, The Carter Center Congratulates the Cherokee Nation on the Completion of the Vote Counting Process (Oct. 14, 2011) [hereinafter Carter Press Release I], *available at* http://www.cartercenter.org/news/pr/cherokee-nation-101411.html.

160. Hasen, *supra* note 155, at 974.

161. *See, e.g.*, WHITE MOUNTAIN APACHE TRIBE ELECTION CODE ch. 2, § 2.1(A) (2001).

162. Hasen, *supra* note 155, at 983-84.

163. *Id.* at 991.

until the election is underway.[164] When possible, however, courts might be better served by involving themselves early in the election cycle process. "A court asked to decide a question of statutory or constitutional law that affects the outcome of an already held election is injected in the worst way into the political thicket."[165] The court interjection inevitably leads to the public and media alike questioning the court's motives and biases.[166] When the parties can settle issues before the election takes place, the problems of perceived impropriety may be avoided or substantially lessened.

There are many problems with the existing remedies available to tribes to settle election disputes. Some of them are not practical or necessary for tribes to adopt, and even those that are may still be inadequate. Most of the remedies do not necessarily prevent drawn-out legal battles. Indeed, remedies found in codes such as that of the Absentee Shawnee, discussed *supra*, send these disputes directly to the courts. The judicial process is not necessarily undesirable for dispute resolution, but prolonged litigation is expensive and may leave tribes without recognized leaders for extended periods. Even those remedies that tribes successfully adopt may only act to bolster the appearance of legitimacy and may not actually prevent the root of the controversy.

C. International Models

Since the middle of the twentieth century, the United States has played an important role in the global rise in democracy. In this process,"[w]e have tried to export U.S. election laws and procedures to just about every corner of the world, and . . . some of those countries do not appreciate that because they say we still have yet to figure it out."[167] Just as some other countries have found the American election model undesirable, tribes may wish to look beyond the United States' borders for models to resolve election disputes.

There is a great deal of diversity among the methods of election dispute resolution used internationally. Just as individual tribal governments vary greatly, governments across the world vary in their composition. As such,

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164. *Id.* at 993.

165. *Id.*

166. *Id.*

167. Steven F. Huefner, *What Can the United States Learn from Abroad About Resolving Disputed Elections?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 535-36 (2010) (quoting David Cardwell, Florida's former Director of Election Administration) [hereinafter Huefner, *Resolving Disputed Elections*].

no singular system may be best for all tribes as no singular system is best for every country.

The most noticeable difference between dispute resolution systems is which body holds the power to resolve the disputes. This authority may rest in one of four different groups, depending on the system: traditional courts, legislatures, special tribunals, or ad hoc bodies.[168]

Courts of general jurisdiction are a popular choice for resolving election disputes because they are perceived as neutral.[169] This neutrality, however, may not always be the case. In the tribal context, it would be necessary to consider how the court is appointed. If elected by the tribe at large, these judges may very well be neutral. But if tribal executives or legislatures appoint these judges, then from a neutrality standpoint, they may not be the best choice to settle election disputes because they could appear loyal to those candidates who appointed them.

Another approach is to allow legislatures to decide electoral disputes.[170] This is how ties in the Electoral College are decided in the United States.[171] This system is becoming less popular in democracies across the world because of neutrality concerns.[172] "This disfavor reflects concern about both the self-interest of the adjudicating legislators . . . and the fact that this approach simply lets the legislative majority pick the winners . . . rather than [reaching] a fair or neutral outcome."[173]

A third approach is to allow special electoral tribunals to adjudicate election disputes.[174] These bodies offer the same promises of neutrality as courts of general jurisdiction, but may provide increased perceptions of legitimacy because of their independence and experience in adjudicating election disputes.[175] An additional advantage is that these bodies prevent courts of general jurisdiction from becoming involved in political questions.[176] This system "permits the judges to have greater expertise," but may not be necessary unless there is a caseload large enough to require the court to be permanent.[177]

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168. *Id.* at 538.
169. *Id.* at 539.
170. *Id.* at 540.
171. U.S. CONST. art. II, § 1; *see also* U.S. CONST. amend. XII.
172. Huefner, *Resolving Disputed Elections*, *supra* note 167, at 540.
173. *Id.* at 545.
174. *Id.* at 541.
175. *Id.* at 547.
176. *Id.* at 548.
177. Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584, 587 (2004).

When possible, the special electoral tribunal approach appears to be the best choice for tribes. There are clear advantages of neutrality over the legislative model. Further, special electoral tribunals prevent courts of general jurisdiction from getting involved in political questions. If the members of these special tribunals can be chosen in a way that would prevent any actual or perceived allegiances to the parties involved in the election dispute, then this may very well be the best choice for tribal election dispute adjudication. Possible options to determine the composition of these groups include:

> appointment by a legislative supermajority of individuals meeting certain eligibility standards; joint appointments by executive and legislative officials; empaneling through a process akin to jury selection . . . ; or ad hoc appointments of a subset of the tribunal by the principal candidates, with the remainder of the tribunal to be constituted through the unanimous agreement of those already appointed.[178]

Even when tribes amend election codes and procedures to prevent disputes and appearances of biases, disputes can still arise. Because no system can ever prevent all election disputes, a better approach for governments may be to increase transparency and legitimacy in their election processes. To that end, large governments, unlike tribes, are at an advantage when these election disputes arise. The media, competing political parties, and other "watchdog" organizations already give attention to the elections in large governments.

To promote transparency, tribes may wish to explore another option that has become more popular in international elections over the last few decades: election monitoring. Foreign governments, some tribes, and even the federal government have used election monitoring, which may provide an adequate solution for piercing the veil of tribal election disputes.

V. Proposal for Tribal Election Reform Through Election Observation

Foreign election monitoring[179] has been around for over 150 years.[180] The practice expanded greatly after World War II, initially through the United Nations (UN).[181]

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178. Huefner, *Resolving Disputed Elections*, *supra* note 167, at 548.

179. While some researchers illustrate differences between election "monitoring" and election "observation," *see* ERIC C. BJORNLUND, BEYOND FREE AND FAIR: MONITORING

> As decolonization accelerated in the 1950-60s, so too did the UN's "first generation" involvement in founding elections to ensure they were free and fair. So-called "second generation" election monitoring missions are more comprehensive and have become more common with the end of the Cold War and the growing global consensus on the value of democracy.[182]

Today, many democracies participate in some form of election monitoring.[183]

Intergovernmental organizations (IGOs) and nongovernmental organizations (NGOs) engage in election monitoring.[184] Among the IGOs that actively monitor elections are the United Nations, the Organization of American States, the Commonwealth, and the Organization for Security and Cooperation of Europe.[185] Participating NGOs include the Carter Center, the International Human Rights Law Group, and the Washington Office on Latin America.[186]

Election observation plays an important role in the democratic process. In its guidelines, the Independent National Electoral Commission illustrates the importance of election monitoring. These guidelines state:

> Election observation is undertaken in order to provide an impartial and accurate assessment of the nature of election processes for the benefit of the population of the country where the election is held. It provides opportunity for constructive criticism and engagement of election process to ensure improved performance in future elections. It is an expression of interest in protecting and promoting of common democratic values by organisations and governments who provide Observers. . . . [Election observation] provides information on the bases of which an election process can be analyzed[,] beam[s] the

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ELECTIONS AND BUILDING DEMOCRACY 40-42 (2004), these terms are used interchangeably throughout this article.

180. Eric Brahm, *Election Monitoring*, BEYOND INTRACTABILITY (Sept. 2004), http://www.beyondintractability.org/node/2676.

181. *Id.*

182. *Id.*

183. SUSAN D. HYDE, THE PSEUDO-DEMOCRAT'S DILEMMA: WHY ELECTION OBSERVATION BECAME AN INTERNATIONAL NORM 206 (2011).

184. ARTURO SANTA-CRUZ, INTERNATIONAL ELECTION MONITORING, SOVEREIGNTY, AND THE WESTERN HEMISPHERE IDEA: THE EMERGENCE OF AN INTERNATIONAL NORM 1 (2005).

185. *Id.*

186. *Id.*

> spotlight on the electoral process and discourages malpractices[,] is a learning process and provides comparative information to assist other countries in improving their electoral process[,] helps the observed state to identify mistakes and recognise progress[,] reinforces common standards and universal benchmarks on what elections should be[,] and enhances transparency and reinforces the integrity and credibility of the election process.[187]

Moreover, studies show that the mere presence of election observers at polling stations can deter election fraud.[188] Election observation provides increased legitimacy and transparency, and increases the likelihood that the process is carried out in a democratic way.[189]

A. 2011 Cherokee Nation Principal Chief Election Case Study

An example of these aspects of election monitoring can be seen in the Carter Center's monitoring of the 2011 Cherokee Nation election.[190] The presence of a third party observer provided much-needed transparency in the election process. Through this observation, the Carter Center was also able to make recommendations for changes to the Cherokee Nation's election code that would make their election process more fair and efficient.

1. 2011 Cherokee Nation Election Dispute

On June 25, 2011, the Cherokee Nation held an election for Principal Chief.[191] This race pitted three-term incumbent Chad "Corntassel" Smith against three-term tribal council member Bill John Baker.[192] The unofficial results on election night showed Baker ahead by 11 votes out of 14,000 cast, but when the Cherokee Nation Election Commission certified the election the next day, it declared Smith the winner by seven votes.[193]

Ever present in this election was the issue of the enfranchisement of the Cherokee Freedmen, who are the descendants of former slaves owned by members of the Nation. "In March 2007, a referendum — in which only

187. *INEC Guidelines for Election Observation*, INDEP. NAT'L ELECTORAL COMM'N, 6, http://www.ng.undp.org/dgd/INEC-Guidelines-Observation.pdf (last visited Jan. 10, 2012).

188. HYDE, *supra* note 183, at 206.

189. BJORNLUND, *supra* note 179, at 32-33.

190. Carter Press Release I, *supra* note 159.

191. Brian Daffron, *Cherokee Elections Continue in Tribal Court*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (July 6, 2011), http://indiancountrytodaymedianetwork.com/2011/07/06/cherokee-elections-continue-in-tribal-court-41636.

192. *Id.*

193. *Id.*

8,700 ballots were cast — denied tribal citizenship to anyone who did not have at least one ancestor on the 1867 U.S. government's Dawes List of ethnic Cherokees. Most of the disenfranchised were the nearly 3,000 Cherokee Freedmen."[194]

A January 2011 decision by the District Court of the Cherokee Nation ruled that this referendum was invalid.[195] Because of this decision, the Freedmen were allowed to participate in the June election.

Meanwhile, on June 28, Baker filed an emergency injunction with the Cherokee Nation Supreme Court, and his campaign filed a petition for recount the next day.[196] A recount was initiated two days later, and the results showed Baker the winner by 266 votes.[197] This led Smith to file an emergency injunction against the election commission and request an additional recount.[198] Smith alleged that hundreds of ballots had not been counted and because of this, the previous recounts were flawed.[199] On July 5, the chair of the election commission resigned, "citing that media outlets [had] given him a negative public perception during the [] principal chief election controversy."[200]

The Cherokee Nation Supreme Court convened on July 8 to hear arguments from both campaigns.[201] On July 21, the court issued its opinion.[202] The court ruled that it was "impossible to determine the election result with mathematical certainty or to certify a successful candidate . . . ."[203] The results were thrown out, and a new election was ordered.[204]

During this time, the Cherokee Nation Speaker of the Council, Meredith Frailey, called a special session of the legislative council to discuss ways to

194. John Stremlau, *Black Cherokees Exercise Hard-Won Right to Vote*, CNN, http://www.cnn.com/2011/10/19/opinion/stremlau-cherokee-vote/index.html (last updated Oct. 19, 2011).

195. *See* Order at 3-4, Nash v. Cherokee Nation Registrar, CV-07-40 (Cherokee Dist. Ct. Jan. 14, 2011).

196. Daffron, *supra* note 191.

197. *Id.*

198. *Id.*

199. *Id.*

200. Will Chavez, *Election Commission Chairman Resigns Amid Controversy*, CHEROKEEPHOENIX.ORG (July 5, 2011, 2:35 PM), http://www.cherokeephoenix.org/Article/Index/5037.

201. Daffron, *supra* note 191.

202. Final Order at 1, *In re* 2011 General Election, No. SC-2011-06 (Cherokee Nation S. Ct. July 21, 2011).

203. *Id.*

204. *Id.*

prevent future election problems from arising.[205] One of the suggested solutions was to invite a third party to observe future elections.[206] The Cherokee Council special session met on July 12, and a resolution was proposed "calling upon the Cherokee Nation Election Commission to obtain an independent election service organization to observe future election processes."[207]

Candidate Baker, a member of the council, offered an amendment to the resolution to allow representatives from each campaign to view recounts in future elections.[208] This amendment passed.[209] The council then considered whether the BIA should be invited to observe future elections.[210] An amendment was suggested to specifically exclude the BIA from the list of possible groups to be invited to observe elections, but this amendment was determined to be too specific.[211] The final resolution passed 9-8, with Candidate Baker and Speaker Frailey, who initially called for the meeting, voting against its final passage.[212] It should be noted that at the time of this meeting, the Cherokee Nation Supreme Court had not yet invalidated the previous general election, so the council members could not be completely certain whether any rule changes they passed would affect the ongoing election dilemma.

Further changes to the election code were set to be considered at another session of the Cherokee Nation's council on August 5, but a quorum could not be obtained because six members of the council boycotted the meeting.[213] Among the boycotting members were Baker and Joe Crittenden.[214] A week later, Crittenden would be sworn in as Deputy Chief

205. *Cherokee Nation's Special Rules Committee to Meet to Discuss Smoother Elections*, NATIVE NEWS NETWORK (July 8, 2011, 1:30 PM), http://www.nativenewsnetwork.com/cherokee-nations-special-rules-committee-to-meet-to-discuss-smoother-elections.html.

206. *Id.*

207. Meeting Minutes, Council of the Cherokee Nation Rules Committee (July 12, 2011) (on file with author).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Christina Good Voice, *6 Councilors Boycott Special Tribal Council Meeting*, CHEROKEEPHOENIX.ORG (Aug. 5, 2011, 8:12 PM), http://www.cherokeephoenix.org/Article/Index/5399.

214. *Id.*

of the Nation, and would serve as acting Chief until the election dispute was settled and a new Chief elected.[215]

On the agenda was a change to the way that absentee ballots would be distributed in the upcoming revote between Baker and Smith, which by now had been ordered by the Cherokee Nation Supreme Court.[216] Instead of only going to those who requested the absentee ballots, they would be sent to all registered at-large citizens.[217] This change had been proposed at a Rules Committee meeting a week earlier, but failed to get the requisite votes.[218] "[T]he boycotting councilors called the meeting a desperate last act by Principal Chief Chad Smith to change election laws to 'move votes to his column.'"[219] Another action on the agenda that had to be tabled because of lack of quorum was adding a new member to the election commission.[220]

Citing the Cherokee people's right to define tribal citizenship, on August 22, the Cherokee Nation Supreme Court overturned the district court's January ruling that had allowed the Freedmen to participate in the general election.[221] Prior to this ruling, about 1,200 Freedmen descendants were registered to vote.[222] In response to this ruling, the Freedmen filed a preliminary injunction in the United States District Court for the District of Columbia.[223] The injunction asked the court to prevent the DOI from recognizing the results of any tribal elections in which the Freedmen were not allowed to participate.[224] As a result, "[t]he U.S. Department of Housing and Urban Development withheld a $33 million disbursement and the [BIA] said it would not recognize results of an upcoming election for

215. Will Chavez, *Elected leaders Sworn In at Inauguration Ceremony*, CHEROKEEPHOENIX.ORG (Aug. 17, 2001, 12:16 PM), http://www.cherokeephoenix.org/Article/Index/5423.

216. Good Voice, *supra* note 213.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Cherokee Nation Registrar v. Nash, No. SC-2011-02, at 9 (Cherokee Nation Sup. Ct. Aug. 22, 2011).

222. Lenzy Krehbiel-Burton, *Cherokee Freedmen Ask Court to Reinstate Rights*, TULSA WORLD (Sept. 4, 2011, 2:40 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110904_11_A22_TheChe818925.

223. *See generally* Plaintiffs' Motion for Preliminary Injunction, Vann v. Salazar, No. 1:03cv01711 (HHK), 2011 WL 4953030 (D.D.C. Sept. 2, 2011).

224. *Id.* at 1.

tribal principal chief because of the membership issue."[225] Meanwhile, the new election was scheduled for September 24, 2011.[226]

On September 20, acting Chief Crittenden entered into an agreement with the D.C. District Court and the representatives of the Freedmen to allow the Freedmen to participate in the new election.[227] This was incorporated into an injunction order and taken to Cherokee courts to be filed as a foreign judgment.[228] The injunction

> included amendments to the voters roll to reinstate eligible, registered Freedmen on the list; the mailing of absentee ballots to Freedmen voters; the addition of in-person voting days for Freedmen voters from Sept. 24-Oct. 8; and most significantly for election day, a delay of the vote counting process until the week of Oct. 9, 2011.[229]

The election period began as scheduled and ballot-counting for the second election began on October 9.[230] The next day, the Cherokee Nation Supreme Court announced that it would not recognize the federal injunction.[231] After the final votes were tallied, Baker was declared the winner by almost 1,600 votes.[232] Based on the Freedmen's participation and the extended voting period, Smith filed his final appeal in the Cherokee Nation Supreme Court, but it was dismissed on October 19.[233]

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225. Steve Olafson, *Cherokee Tribe Retreats from Effort to Oust Some Members*, REUTERS (Sept. 15, 2011, 2:26 PM), http://www.reuters.com/article/2011/09/15/us-usa-cherokees-idUSTRE78E5IX20110915.

226. Good Voice, *supra* note 213.

227. Order Striking Filing at 1, Vann v. Salazar, No. SC-11-07 (Cherokee Nation Sup. Ct. Oct. 11, 2011).

228. *Id.*

229. Press Release, Carter Center, Carter Center Commends Successful Cherokee Nation Voting Day and Highlights the Need for Patience and Transparency as Process Unfolds (Sept. 27, 2011) [hereinafter Carter Press Release II], *available at* http://www.cartercenter.org/news/pr/cherokee_nation-092711.html.

230. Linzy Krehbiel-Burton, *Smith Challenges Cherokee Election Results*, TULSA WORLD (Oct. 18, 2011, 2:26 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20111018_12_A1_CUTLIN13607.

231. Vann v. Salazar, No. 1:03cv01711 (HHK), 2011 WL 4953030, at *5 (D.D.C. Sept. 2, 2011).

232. Krehbiel-Burton, *supra* note 230.

233. Final Order at 1, *In re* 2011 General Election, No. SC-2011-06 (Cherokee Nation S. Ct. July 21, 2011).

2. Carter Center Observation

On September 14, 2011, the Carter Center issued a press release announcing that it had accepted an invitation from the Cherokee Nation Election Commission to observe the Principal Chief election on September 24.[234] The Carter Center is a nongovernmental organization founded by former President Jimmy Carter, and his wife, Rosalynn Carter.[235] Among its stated missions is monitoring elections in developing democracies across the globe.[236] The Carter Center had previously monitored the 1999 Cherokee elections.[237] The Carter Center stated that it "normally observe[s] elections only in politically troubled countries abroad but believe[d] that the contentiousness and fundamental voting rights issues at stake — and not just for the Cherokees — justified this exceptional mission."[238]

The Carter Center observed all aspects of the September 24 election. This included monitoring the precinct polling staff, overseeing voter registration and identification, appointing poll watchers for each candidate, implementing the extended voting period, and supervising the ballot counting.[239] The Carter Center released two reports of its observations. The first pertained to election day activities.[240] The second pertained to vote counting and the extended voting period.[241] There were no reports of major incidents.[242] The Carter Center also made a number of suggestions for future elections, including adopting a set of clear guidelines for the rejection of contested ballots.[243] Finally, and most importantly, the presence of the neutral third party provided legitimacy and transparency to the voting and vote-counting process.[244]

234. Press Release, Carter Center, Carter Center Announces Election Observation Mission to Cherokee Nation (Sept. 14, 2011) [hereinafter Carter Press Release III], *available at* http://www.cartercenter.org/news/pr/cherokee-nation-091411.html.

235. *The Carter Center has Observed 92 Elections in 37 Countries*, CARTER CENTER, http://www.cartercenter.org/peace/democracy/index.html (last visited Jan. 10, 2012).

236. *Id.*

237. Carter Press Release III, *supra* note 234.

238. Stremlau, *supra* note 194.

239. Carter Press Release II, *supra* note 229.

240. *Id.*

241. Carter Press Release I, *supra* note 159.

242. *Id.*

243. *Id.*

244. *Id.*

3. Cherokee Election Analyzed

Some of the roots of the Cherokee election dispute are problems that many tribes may face. They are also problems that can be addressed through constitutional or election code reforms. But even changes to these laws may not provide a palatable remedy to election disputes because of the nature of tribal governments.

One problem was that the initial vote-counting took place behind closed doors and without the level of transparency that leads to trust in the political system. Election codes can be amended to allow more access to candidates and their representatives. Transparency can also be achieved by allowing neutral third-party monitoring organizations more access to the ballot-counting process.

Another issue with the Cherokee election was the administrative roles that both candidates played in the election's execution and in determining the rules that would guide the election. As one figure at the Carter Center noted,

> In August, before the rerun, the Cherokee Supreme Court issued a second ruling, affirming that the March referendum was constitutional. Smith had championed the 2007 referendum and, not surprisingly, praised the affirmation of Supreme Court, whose members he had appointed. Because of that, many believed the court ruling was rooted more in political opportunism — to assure more votes for Smith over Baker — than legal principles.[245]

It also leads to the appearance of impropriety when election candidates propose and vote on procedural changes that would affect the election in which they are running, as with the special session held by the Cherokee Council.

The issues of perceived impropriety are more difficult to address. Tribes are given the difficult task of fielding a government large enough to ensure an appropriate balance of power and proper checks and balances out of a relatively small population. Even the Cherokee Tribe, which is one of the largest Indian tribes, must form a fully functioning government with roughly half the population of a United States congressional district. It may be impossible to avoid situations of apparent biases because of the nature of small governments. But the presence of neutral third-party observers may

245. Stremlau, *supra* note 194.

provide adequate reassurances to tribal members that no improper activities have occurred when these situations arise.

This transparency is precisely what the Carter Center provided by monitoring the Cherokee elections. Through its presence during the voting and vote-counting procedures, the Carter Center fostered a level of trust in the democratic process that was missing in the previous election. As the Carter Center affirmed, there were no instances of impropriety throughout the reelection.[246] But without the presence of the neutral third party, there would have been no way to verify that all votes were given equal treatment and that the tribal election code was applied evenly and accurately.

B. Election Observation as a Solution to Tribal Election Disputes

Election monitoring is the best option for tribes to remedy election disputes. Election monitoring provides a level of transparency and legitimacy that cannot be obtained with other modes of election reform. Allowing a neutral party to have access to the election procedures increases public trust in the voting process, deters election fraud, and allows the monitors to suggest further reforms to the election process to aid in future elections. Moreover, although the appearance of conflicts of interest and biases may be unavoidable because of the size and structure of tribal governments, the presence of a neutral third party to monitor the actions of the accused individuals may provide comfort to those concerned.

There are two options available to tribes wishing to invite a third party to observe their elections. The first is to allow observation from an already existing NGO. An example of this is the Carter Center's monitoring of the Cherokee elections. Generally, these NGOs will not monitor elections unless they have been invited by the government.

The second option is for tribes to establish their own election-monitoring IGO, composed of representatives from participating member tribes. The IGO could be created by an already existing tribal organization, such as the National Congress of American Indians, or it could be formed as a new entity structured only for the purposes of monitoring tribal elections and protecting the tribal democratic process.

A tribal election monitoring organization would allow tribes to establish the procedures for election monitoring that work best for tribal elections.

246. Press Release, Carter Center, Carter Center Commends Successful Cherokee Nation Voting Day and Highlights the Need for Patience and Transparency as Process Unfolds (Sept. 27, 2011) [hereinafter Carter Press Release IV], *available at* http://www.cartercenter.org/news/pr/cherokee_nation-092711.html.

The organization would maintain tribal sovereignty because the tribes would be the ones establishing the observation guidelines. What is more, sovereignty would be maintained because tribes would not be forced to join the organization or to allow election monitors, but would do so only on a voluntary basis.

Many election-monitoring entities have issued guidelines for how election monitoring should be conducted. The tribes could use these guidelines as models. For instance, in 2005 the United Nations issued the *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers*.[247] Twenty-one election-monitoring organizations endorsed the declaration at the time of its adoption.[248] Using these guidelines as models for establishing standards by which tribal elections should be monitored would ensure that these elections are carried out in accordance with internationally accepted democratic standards. Meeting these standards would lead to increased perceptions of legitimacy among the general public.

The makeup of a tribal election IGO could be determined in a number of ways. One possibility is for each member tribe to send a representative to the organization. The tribes could also recruit experienced academics or leaders in the field of election law to participate. This would create a diverse collection of individuals who could contribute ideas from their various backgrounds.

There are many additional benefits that would flow from tribal election monitoring. First, it would increase communication between tribes. This would allow the various participating tribes to discuss election problems they have faced in the past and to brainstorm remedies for these problems. It would also allow people with experience in election monitoring around the world to contribute to the dialogue. Including election law academics in the process would grant them access to the tribal election process, which, in the past, has been rare. There is currently very little research dedicated to the topic of tribal elections. More access would allow those researchers to analyze tribal elections and participate in fashioning models to improve the electoral system.

One important hurdle that a tribal election IGO may have to overcome is funding. Tribes may be forced to decide whether the IGO would foot the

247. *See generally* U.N. Electoral Assistance Div., *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers*, CARTER CENTER, http://www.cartercenter.org/documents/2231.pdf (last visited Jan. 10, 2012).

248. *Id.* at 2.

bill for each monitored election or whether each hosting tribe would pay. Monitoring elections is certainly not cheap, but such precautionary costs are far less substantial than the alternative remedial options, such as extended litigation related to elections and the cost of holding new elections when the winner of a previous contest cannot be determined.

Election monitoring is not a cure-all for election disputes. The causes of these disputes can certainly arise even with election observers present. Some of these causes can also be solved through other means, such as amending election codes. But the creation of a tribal election monitoring IGO would increase transparency and legitimacy in the election process, increase dialogue between tribes so they can learn from each other, lower the occurrence of extended litigation, and allow access from experienced outsiders who can participate in meaningful dialogue aimed at solving the problems of election disputes.

VI. Conclusion

Indian tribes are domestic dependent nations, and as such, Congress retains plenary power over them. Congress has, however, allowed tribes to exercise their sovereign power in determining tribal forms of government. Included in this determination is how to elect tribal leaders. Tribes, just like other governments across the world, are forced to deal with disputes concerning the democratic process. These problems are important to address because election disputes increase distrust in the election process, and lead to expensive and drawn-out litigation. Disputes can also create the perception that the ultimate winner is illegitimate.

Electoral systems around the world differ in how they remedy election disputes. Among the available remedies are recounts, throwing out a portion of the ballots, holding new elections, and various forms of injunctive relief. Governments differ in how they adjudicate these disputes. Some opt for courts of general jurisdiction. Others create special courts or allow legislatures to settle the disputes.

When election disputes arise in the tribal context, remedies can almost never be found in state or federal courts. Congress has left the power to settle these issues to tribal courts. At times, the BIA may be forced to determine the legitimate leader of a tribe, but the majority of election disputes remain in tribal courts.

Even within tribal courts, the remedies available may be limited. These courts are often limited by their tribes' constitutions. Tribal election board decisions may be final, or, alternatively, the challenger may be required to satisfy an elevated standard of proof to overturn an election board ruling.

Many of the typical problems associated with tribal elections can be seen in the 2011 Cherokee Nation Principal Chief election. This election went through numerous recounts, one re-vote, and various controversies associated with alleged conflicts of interest and biases. Midway through the process, the Nation invited the Carter Center to monitor the election. Allowing access to the neutral third party provided much-needed transparency to the election, and helped to ensure that the new election and vote-counting process complied with the Cherokee election code and international standards. It also allowed the Carter Center to observe all aspects of the voting and ballot-counting procedures so that it could recommend changes to the process that may help prevent future election disputes.

Election monitoring is the best option for tribes to prevent election disputes. While no change to the system can ever fix all problems that may arise in an election, creating a tribal IGO to monitor elections could increase transparency and legitimacy, deter election fraud, increase idea-sharing between tribes, and allow access to industry experts who can study tribal procedures and suggest possible reforms, with input and exchange from the member tribes' representatives. A tribal IGO would allow tribes to formulate methods of election monitoring that work best for tribal elections, while conforming to international standards to ensure that their citizens can properly exercise their democratic rights in a full and free manner.