JUDICIAL BRANCH OF THE NAVAJO NATION

HERB YAZZIE
Chief Justice of the Navajo Nation

Eleanor Shirley, Associate Justice

Supreme Court

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MEMORANDUM

To: Jarvis Williams, Acting Executive Director
Office of Legislative Services

Fr: Herb Yazzie, *Chief Justice*

Date: September 23, 2011

Re: Pending Legislation No. 0388-11; Amendments to 7 N.N.C. § 354(B)

Below are my comments regarding the proposal that Navajo Nation Supreme Court Justices be required to have an active state law license and graduate from a law school. While such requirements may seem calculated to ensure competence in the Court, I submit that they will achieve the opposite. In our struggle to create a unique tribal jurisprudence, we have sought to distinguish ourselves from the state and federal systems. More and more, we have relied on our unique sovereign perspectives on dispute resolution, law and public order. We oversee a living tribal justice system reflecting the importance of our tribal community, not a borrowed state or federal system in which our culture is merely anthropological speculation.

Firstly, I would add my concurrence to the recommendation of our Judicial Branch Human Resources Director that this legislation be delayed until the Navajo Nation Bar Association has completed a survey of its members to determine how many speak the Diné language; have knowledge of Diné traditions, customs and culture sufficient to base a unique Navajo jurisprudence on that knowledge; and are state-licensed practicing attorneys. I concur for the reasons he has set forth in his comment.

Secondly, I strongly question reliance on the Tribal Law and Order Act of 2010 that was used as support for the proposed change in Supreme Court qualifications. The Judicial Branch was part of an inter-tribal workgroup on the TLOA invited to make recommendations to the Senate drafters. Many of our recommendations were adopted in the final Act. *See* http://www.navajocourts.org/restorativejustice.htm. As a leading participant

in this group, I can attest that an initial desire by the drafters that tribal judges be state bar-licensed was abandoned in recognition that tribal bar memberships such as the NNBA are sufficient. The acknowledgement of bar licenses in "all jurisdictions"flows from the treatment of tribes as sovereign entities exercising sovereign powers in keeping with the Congressional policy of Indian Self-Determination. Furthermore, the "legal training" in the TLOA refers to the competency of the "presiding judge" in the application of our own sovereign criminal laws.

In short, there is no TLOA requirement that a tribal judge at any level be state-barred or possess a J.D. In fact, the emphasis is on the exercise of inherent sovereign authority.

In his comments, our Human Resources Director pointed out the positive reception by legal scholars to our recent opinion in *John Doe BF v. Diocese of Gallup,* including an affirmation that this Court continues to fulfill its leadership role in the area of tribal court adjudication. This Court takes seriously its gatekeeping role and has not tolerated the constantly shifting and erratic manner with which federal common law has curtailed our inherent sovereign authority, criminal and civil, over matters arising on our own land. We have also held our own government including ourselves to account for the Diné people and future generations.

I would note that members of the federal bench are not required by the U.S. Constitution to have a state bar license, and such a formal requirement may well conflict with federalism notions. I understand that the American Bar Association "suggests" that the U.S. Supreme Court and federal judges and magistrates meet certain minimum requirements that include a law degree, and good moral and practice standing in an active legal practice.

Federal judges must be well-versed in the laws that primarily apply in their jurisdictions, mainly the U.S. Constitution and federal laws. On the Navajo Nation, the laws of primary application are our sovereign tribal laws. Therefore, our judges need firstly to be well-versed in our Diné laws, traditions and customs, which are the basis of the Diné Fundamental Law and our common law. I would submit that the proposed legislation would create a candidate pool leaning toward expertise in external laws, diminished expertise in our sovereign laws, with the consequence that any line between state and tribal jurisdictions would be obfuscated. This would clearly send the wrong message to both our courts and to external jurisdictions.

We have a heightened duty to safeguard the sovereign entity of the Navajo Nation and maintain our people as a cohesive cultural group. We have a duty to ensure that the policy of tribal sovereign authority on our own terms in the Indian Self-Determination and Education Assistance Act of 1975, is sustained. The Self-Determination Act assumes that tribes will take the opportunity to develop unique tribal laws and government, based on our own terms. The branch addressed this responsibility in our 2007 Strategic Plan whereby, pursuant to Goal 4 of the plan, "we will develop a judicial system in accordance with Diné bi beenahaz' áanii that fully incorporates Navajo values and processes."

It bears reminding that most contemporary tribal courts, including the Navajo Nation, trace our roots ironically to a federal program designed to eliminate tribalism. Modern tribal justice systems had their genesis in the Courts of Indian Offenses, established in the late nineteenth century as a part of the Bureau of Indian Affairs' assimilationist program for reservations. *See* Vine Deloria, Jr. & Clifford Lytle, American Indians, American Justice 111, 112, 113-116 (1983). The colonialist objective of these courts is made clear in the description by a nineteenth century federal judge.

In 2010, the Navajo Nation Supreme Court in *EXC v. Kayenta District Court* described the importance of upholding our tribal laws, because they are "American domestic laws" that are "not only a Navajo heritage, but a heritage of the American people." No. SC-CV-07-10, slip op. at 22 (Nav. Sup. Ct. September 15, 2010). We stated:

> In this day and age, the Navajo People are proud American citizens, having served in several wars, swearing oaths of loyalty to the United States in our schools, and leaving the reservation to participate in state and federal governments or take other important roles in mainstream society . . . Our laws, although indigenous and extra-Constitutional, are American domestic laws that will endure for future generations through the Federal policy of Indian self-determination. Our laws reflect our indigenous cultures and practices. They are vital to the survival of our culture, which is not only a Navajo heritage, but a heritage of the American people.

There is no doubt that the cultural approach in tribal court systems throughout the United States has been eroded and largely replaced by non-Indian jurisprudence. We, as leaders in the area of tribal court adjudication, cannot be part of that erosion.

To quote from a legal commentator:

> Today, a call for cultural renewal and resurgence can be heard clearly within the court systems of American Indian tribes. Weaving strands from native culture, tribal law, Western culture, and Anglo-American law, tribal judges are producing distinct tapestries of jurisprudence. Tribal court opinions reveal efforts by their authors to imbue the evolving law with cultural meaning. As the Chief Justice of the Ho-Chunk Nation Supreme Court put it, the use of tribal traditions and customs "is an aspect of tribal judiciaries which we must nurture and strengthen. It is a method of memorializing our traditions and customs while dispensing justice. And the use of traditions and customs legitimates them for the world outside of our tribal judiciaries."[1]

I thank you for the opportunity to comment.

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[1] Barbara Ann Atwood, "Tribal Jurisprudence and Cultural Meanings of the Family," 79 Neb.. L. Rev. 577 (2000).