
Tribal Court Opinions: Justice and Legitimacy

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The initial thoughts concerning the topic of this paper began with the first symposium when I was asked to be a commentator on a presentation given by Professor Frank Pommersheim entitled, "What Must be Done to Achieve the Vision of the Twenty-first Century Tribal Judiciary."¹ In preparing my comments, I considered the unique challenges for tribal judiciaries to incorporate the traditional practices of a tribe into an European/American model legal system. The challenges will vary from tribe to tribe, but some of the challenges are common to all of us who preside over tribal courts. The shared challenges arise from the initial creation of the tribal court. The challenges facing the creation of the tribal court system involve questions about who is creating the court and how. The creation of rules and procedural constructs for the tribal court also creates challenges. And one of the most challenging consideration is the use of tribal traditions and customs. How are tribal traditions and customs reflected in the tribal court system? I will address each of these areas individually.

First, the creation of a tribal court system may be a hurdle already jumped for some tribes. Many tribal courts were created by the tribes under the auspices of the Bureau of Indian Affairs as Courts of Indian Offenses.² After the passage of the Indian Reorganization Act of 1934, many tribal councils began to create tribal court systems.³ The history of tribal courts is too extensive for the purposes of this presentation. Suffice it to say that, today, most tribes do have existing tribal courts or are in the

process of formulating a tribal court system. The question arises in both contexts as to the legitimacy of that court as measured by who presides over the court. Simply put, does the tribal court judge have legal training or is he or she a lay judge. The legitimacy of the tribal court is measured in part by that simple question.

The training and background of the tribal judge or justice is connected to who is the creator of the tribal court. A tribe which has a tribal council that retains the authority over the judicial arm may select tribal court judges and justices by appointments.⁴ Such appointments may be made based on a variety of factors. Education may be a key factor in appointing the judge or justices. The tribal council may opt to utilize only law-trained individuals. It is apparent that the Winnebago Tribe of Nebraska appoints only law-trained judges to their lower and appellate courts. Such decisions are an attribute of tribal sovereignty and the tribe's inherent right to select the factors for their judicial officers. Other tribal councils may select only tribal members without requiring a law degree.⁵

Other tribes, such as the Ho-Chunk Nation, have created new tribal constitutions which establish separate branches of government.⁶ Where a tribal court is created as a separate

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judicial branch, certain judicial positions may require specific training. In our case, the justices are elected by the tribal membership and are required to be tribal members. On the other hand, the lower court judges are appointed by the tribal legislature. Of the five judicial positions within the Ho-Chunk Nation, only the Chief Judge of the trial court and the Chief Justice of the appellate court are required to possess a law degree.⁷ The other three judicial positions are held by non-lawyers.

It is easily comprehensible that the decisions and opinions rendered by the varying tribal courts create an impression of many differences rather than similarities. Yet, an overview of such decisions establishes the wealth of tribal court knowledge being created by many tribal decisions.⁸ Such an array of talent has initiated conversations on many fronts about the need for dissemination of opinions in a technologically advanced mode such as the Internet.⁹

So, which is better as the tribal court judge or justice, the lawyer or the non-lawyer? Who is better equipped to oversee the tribal judiciary? And should that judge or justice be a tribal member? Or, is it better if the tribal judge or justice does not come from the tribal membership but is a non-member, or even a non-Indian? Such questions are important.

How decisions will be reached and how they are written is based in part on the answers to those questions. For example, the question was raised last year by Professor Pommersheim. He asked, how does a tribal court conceive of the basic principle of judicial review?¹⁰ The way in which that principle is approached will vary depending on who is in that position.

Questions which arise purely as a legal

concept may be addressed by non-lawyers in an entirely different framework than a legal one. On the Ho-Chunk Nation Supreme Court, the tribal members have created an appellate court which requires two non-lawyer tribal members to sit as Associate Justices. It is my belief that their view is equal to, if not above, the views of the law-trained justice. It is my understanding that the judiciary could have been created in such away as to require only law-trained judges. Such was not the case. Tribal members wanted participation by tribal members in the judicial process. Therefore, the Associate Justices write decisions on a rotating basis with the law-trained Chief Justice. Their analysis of concepts such as tribal sovereign immunity may differ from the law trained Justice, but it is essential that their views are reflected in opinion writing. To do otherwise, does not respond to how tribal members decided that their judicial system would function.

Last year, I discussed the *Rave v. Reynolds*¹¹ case which is a decision that came out of the Winnebago Tribe of Nebraska Supreme Court. That decision had important ramifications in terms of establishing issues of first impression. My complaint about that decision was my concern that those who were most impacted by the decision, the tribal members, would not be able to comprehend the meaning of the decision. In no way do I mean to insult the intelligence of the Winnebago Tribe's membership. It is merely that the decision was written on such a scholarly level that a law professor speaking about the decision remarked on the length and depth of it!¹² My input on the decision was to implore the writer of the decision to prepare a summary of the decision to be included for clarification. Hopefully, the sum-

mary is a briefer and simpler explanation of what occurred in the actual decision. My point in mentioning this case is to state that whoever is selected for judicial positions will influence how decisions are written. In the *Rave* case, it is unlikely that anyone would question a decision penned by a well-known law professor. Yet, is that beneficial for the tribal membership? Or, should that be a consideration?

So, the questions of how a tribe selects its judicial officers are important. And, I do not intend to answer them in this paper. Such questions must be answered by each tribe within its own process of creating the tribal court and selecting who will preside. Tribes must factor in the benefits as well as the costs to the tribe if they select only lawyers or only tribal members. These are difficult questions and should be addressed seriously by tribes as we move into the next millennium.

Second, those who are selected affect the impact of rules and procedures in tribes. Some tribes have tribal codes which were created many years ago by, in many cases, private law firms. In many instances, the codes included the rules as well as the laws. Those tribal codes are somewhat generic in nature and may not address current or relevant issues for the tribal court. Therefore, it is important for those who are selected as judges and justices to address the gaps in tribal codes and work for the creation of necessary amendments.

Those tribes who are in the formative years as to tribal codes or who are actively working to rewrite tribal codes must also address such matters. The tribal judges and justices should bring their knowledge to such a discussion. In the non-Indian legal system, large committees of judges, justices, lawyers, and non-lawyers are created to address rulemaking and revising.

Perhaps tribes will not wish to stray down that path too far, but some effort should be made by tribes to revamp outdated or irrelevant tribal codes.

It is daunting to see a tribe with a membership of 3,000 have a two or three volume tribal code. In those instances, the judiciary usually works with only three or four sections of the code on a regular basis. What is the rest of the tribal code being used for by the judiciary? Is it relevant? How often is that probate section utilized? Perhaps it could be rewritten to fit the specific needs of the tribal community? Maybe it was needed twenty years ago, but is it still necessary? Tribal judges and justices have an obligation to bring such conversations to the fore. The tribal judge or justice may have to actually chair that committee or request the creation of such a committee to begin the arduous task of rule revisions and code revisions.

The political realities of tribal governments, of course, cannot be ignored. If the tribal council retains the authority to oversee such functions, it is obviously necessary, and perhaps life-saving, to work through the proper channels for such rule writing and/or code revisions. In other instances, the judiciary may be delegated the responsibility for such work. In either case, it is best to abide by tribal policies about such matters to ensure that the process is completed.

Finally, this paper will focus on what I consider the most challenging aspect of being a tribal justice. That is, the use of tribal traditions and custom in the tribal judge's decision making. The application of tribal tradition and custom or tribal common law, as some have named it, is an area which is approached warily by many tribal judges and justices. That wariness is more evident among those who are not mem-

bers of the tribe that they serve whether non-Indian or non-member. The wariness is understandable and has to be respected since even with the tribal member judge or justice, treading the waters of tradition and custom is intricate, if not actually complicated.

Many tribes today utilize their elders in elders circles or traditional courts.¹³ In such systems, it is useful to approach those charged with providing knowledge of traditions and customs with such questions. Unfortunately, there are tribal systems which do not have such readily available references. If they are available within a tribal court system, such consultations are necessary to establish the unique perspective of the particular tribe's customs and traditions. That perspective is one of the key elements supporting the need for tribal judiciaries.

As an example of utilizing tribal elders, I offer another example from the Ho-Chunk Nation Supreme Court.¹⁴ In that case, a Motion for Recusal had been filed to remove one of the appellate court justices. The appellate court justice was the sister-in-law to the lay advocate who was arguing the case. In addition, the same justice was the first cousin to the trial court judge who wrote the order which was on appeal. Relationships are more problematic in tribal settings due to the smaller population as well as due to tribal culture's concept of relatives. To assist the appellate court in considering the recusal motion, the appellate court requested the presence of two members of the Ho-Chunk Nation Traditional Court to appear at the oral argument on the matter. Rather than attempting to decide traditions based on the appellate court's own views, it was essential to be advised by those who have the requisite and

respected knowledge of tradition. Many of the Traditional Court members are also the clan leaders for their respective clans and, as such, are viewed as having vital information on tradition and custom. Such knowledge, as Professor Zuni stated last year, is not always written down.¹⁵ Therefore, it is critical to go to the proper source if it is available.

In that example, it is also important to note that nowhere is it more evident that the tribal court system is a unique one than when there is an appearance by respected elders who speak in their native language. Although it may have been disconcerting for the non-Indian court reporter, these elders' presence validated the importance of the creation of tribal court systems to reflect what is important to a particular tribe. The tribal elder stated that the justice understood her role within her culture and her tribe and, therefore, would be able to conduct herself in a fair manner. (It loses something in the translation.) So, the recusal motion was denied. In this scenario, the view of the traditional elders is as revered and respected as the previously mentioned well-known law professor.

The use of tradition and custom is more difficult when there is no traditional court or elders council readily available. Tribal traditions and customs are not neatly packaged in books and codes. So, the attempt to incorporate tribal traditions and customs is more difficult. That difficulty was faced recently when the Winnebago Tribe of Nebraska Supreme Court was drafting a decision interpreting the equal protection clause of the Winnebago Tribal Constitution.¹⁶ Although the tribe has a tribal historian, that individual had been utilized by the trial judge in one of the cases being

appealed. The Court had not invited a tribal elder to the oral argument for the purpose of consultation, although a tribal elder had been present to offer a prayer.

In deliberating on the matter, it was clear that tribal traditions and customs were relevant to the resolution of the questions raised concerning gender discrimination. The difficulty was how to make such considerations in the absence of specific tribal input where all of us on that appellate court are non-tribal members. In fact, two members of the appellate court are non-Indians. The dilemma facing us was how to incorporate tribal tradition and custom where we are not able to speak from authority.

We chose to utilize a text written by an anthropologist. Now, I grant you, this was not done without considerable thought and discussion due to the nature of the relationships between anthropologists and tribes. Yet, it was important to use a neutral source, albeit a somewhat controversial source. In addition, I voiced my personal views as a Ho-Chunk. Although I am not enrolled at the Winnebago Tribe of Nebraska, I am a member of the Ho-Chunk Nation which was formerly the Wisconsin Winnebago Nation. Although I am by no means an "expert" on Winnebago traditions, I have been raised as a Ho-Chunk, and I believe that I know my role as a female within my culture. Therefore, I had less hesitation about incorporating my views on female roles for purposes of deciding the issue of gender discrimination in that case.

Obviously, how a tribal court will use and incorporate tribal traditions and customs is up to each tribe and those whom the members select for their judicial officers. Yet, it is an aspect of tribal judiciaries which we must nurture and strengthen. It is a method of memori-

alizing our traditions and customs while dispensing justice. And the use of traditions and customs legitimates them for the world outside of our tribal judiciaries. Whether we consider that as important is not as relevant as whether we see the importance of drafting tribal court opinions which will be seen as legitimate and as fair dispensations of justice to both Indian and non-Indian alike.

Pi-na-gi-gi!

Notes

1. Frank Pommersheim, *What Must Be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary*, 7 KAN. J.L. & PUB. POL'Y 1, 8 (1997).
2. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998).
3. *Id.* at 292.
4. WINNEBAGO TRIBE OF NEBRASKA CONST.
5. THE MILLE LACS BAND OF OJIBWE INDIANS CONST. (1983).
6. HO-CHUNK NATION CONST. art. III, § 2 (1993).
7. *Id.* at art. VIV, § 8(a) (1993).
8. Newton, *supra* note 2, at 292.
9. Spokane, Washington panel at National Tribal Judges Conference, June 1998.
10. Pommersheim, *supra* note 1, at 9.
11. 22 ILR 6137 (Winn. Tr. Ct. 1995).
12. Professor Nell Jessup Newton at FBA Indian Law Conference, April 1997.
13. Anita Fineday and Mary Jo Hunter, *History of Tribal Courts in Minnesota*, Minnesota State Bar Association Millennium History Project, Unpublished text.
14. *In Re Rick McArthur*, 25 ILR 6133 (Ho-Chunk Nation S. Ct. 1998).
15. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 1, 17, 27 (1997).
16. *Winnebago Tribe of Nebraska v. Hugh Bigfire*, et. al., 97-03, 97-04 and 97-05 Consolidated (9/15/98).