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# ADDRESS TO THE NINTH ANNUAL COMING TOGETHER OF THE PEOPLES CONFERENCE OF THE INDIGENOUS LAW STUDENTS ASSOCIATION: WHERE SHOULD LAWYERS BE WHEN THE PEOPLE COME TOGETHER?

*Hon. Robert Yazzie\**

It is a pleasure to be with you today. Before I get into my talk, I want to tell you a couple of court secrets. First, I use invitations such as this to develop Navajo Nation court policy. I use the time and effort to get ready for a talk like this to think out where my courts and its people should go. So, today, I'm going to set Navajo Nation court policy on the role of lawyers. My second secret is that I love questions! I find that it is easier to understand something when you ask them. I like to get down to the basics; to ask "What's it all about?" That is Navajo legal thinking, where we get to the bottom of things.

I ask: "Where should lawyers be when the people come together?" I ask, because that is the theme of this conference. Before I can get to it, I have a few more questions: What *is* a "lawyer"? Why should Indians become lawyers? Why did I go to law school, anyway? Why are *you* going to law school? When you're done, how do you fit in your communities - the place where "the people come together"? That's plenty to think about!

What *is* a "lawyer"? It is supposed to be someone who serves others; someone who presents a client's case to a court or gives good advice to others. What is the reality? Before the 1870s, anyone could be a lawyer without going to law school. You could "read law" then take and pass the bar examination. We remember Abraham Lincoln as a great president. People forget that before he became president, he was considered to be one of America's best trial lawyers. He never went to law school. In around 1870, lawyers felt neglected. Most universities considered the law school to be a trade school; something like a school for plumbers or electricians. So, the law professors of the time started upgrading courses and came up with the idea of law as a "science." They started writing the great hornbooks, like *Thayer on Evidence*. Professor Thayer of Harvard was one of the "friends of the Indian" who helped make Indian policy - without ever involving Indians, of course. Something else happened at the same time. The legal profession upgraded itself and founded the American Bar Association. The A.B.A. asked, "How can we get better lawyers?" The answer: "higher standards!" What did that mean? First, it meant that now everyone had to go to law

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\* Chief Justice, Navajo Nation. This address was delivered at the University of Wisconsin Law School.

school; you couldn't read law any more. It meant that you had to go to college before entering law school. It used to be that you went straight from high school into law school. It meant that you had to pass a rigid bar examination. Finally, it meant -and it means- that you have to go to an "American Bar Association-approved" law school to be a lawyer.

What does that mean for Indians? Well, in the 19th century, everyone said that there had to be "law for Indians." That meant BIA-imposed codes and the Court of Indian Offenses, with Indian judges. The thinking of the time was that they would educate and prepare Indians to assimilate into society. They even encouraged Indians to be lawyers. Who was the first American Indian lawyer? (I know that a Pueblo member was a lawyer in New Mexico under the Spanish, but that was a long time ago.) The first *American* Indian lawyer was Thomas Jefferson McDonald, of the Choctaw Nation of Mississippi. The head of the Bureau of Indian Affairs hired McDonald in 1818. After a few years, McDonald was sent to study law in Ohio. When BIA head Thomas McKenney told McDonald of the plan, he was afraid and said, "*I am an Indian.*" McDonald's brother, an army officer, wrote saying he could do one of two things: "either throw away all that belonged to the white race; or quit being an Indian and turn white man." The brother continued in his letter: "*The first you can do; the last, it is not in your power to do.* The white man hates the Indian, and will never permit him to come into close fellowship with him."

McDonald got his license to practice law in Mississippi and went to Washington in 1824 as part of the Choctaw delegation. He made the Choctaw address to Congress on February 18, 1825. He told Congress: "However qualified by education we may be, we are neither permitted to hold offices, nor to give our testimony in courts of justice, although our dearest rights may be at stake. Can this be a correct policy? Is it just? Is it humane?" Those were powerful words, in a time when Indians were not "citizens" and could not testify against a white person in court.

How did McDonald end up? Torn by the warning his brother gave, McDonald took to drinking and eventually committed suicide. He did not learn how to combine his Indian ways with his legal training and it tore him apart.

Who was the first Indian woman to become a lawyer? It was Lyda Burton Conley of the Wyandotte Nation of Kansas. She became a member of the Kansas bar in 1910. Why did she decide to go to law school? In 1844, Conley's mother and three hundred Wyandottes died in a smallpox epidemic. The victims were buried in an Indian cemetery in Huron Park, outside Kansas City. In 1904, Conley and her sister, Lena, learned that the Secretary of the Interior approved removing the Indian cemetery for commercial development. The two sisters decided to act. They went into the cemetery and put signs on the graves of their relatives which said, "Trespassers Beware!" They built a shack on the cemetery grounds, looking over it, and waited. A magazine

reported: "They loaded their guns and took up their abode in that city of the dead, and the word went out that the first man to turn a dos over one of those graves would either turn another for the Conley sisters, or have some other person perform a like service for himself." The papers called the hut "Fort Conley," and the two sisters held the developers off for years. Lyda also decided to arm herself another way. As she sat in the shack with her gun, she studied law. She decided she would bring a suit against the Secretary of the Interior. Before she became a member of the bar, she filed suit in the U.S. District Court in Topeka, Kansas to enjoin the federal government from removing bodies and selling the land. (You can see that graves repatriation and the sanctity of Indian graves has been a legal issue for a long time.) Conley lost and sent a sixty-nine page brief to the U.S. Supreme Court. The Court refused to act. The sisters sat in the graveyard for forty years more. Lyda Conley continued to watch over it while taking cases. A friend said of her law practice, "as a lawyer, she almost starved to death. She wouldn't prosecute anybody and she wouldn't defend anybody guilty except an Indian. So she didn't have many cases."

Paul Harvey recently attended the Navajo Nation inauguration ceremony, and like he says, there is a "rest of the story." Despite Lyda Burton Conley's efforts to save the graveyard, I understand that today it is a tribal casino! I wonder what she would think of that?

These are two examples of Indian lawyers: One who spoke strongly for his people but couldn't handle the conflict. Another who had a specific purpose in mind but obviously really didn't like the law. They had their own problems answering the question: "What is a lawyer?"

It took many years for Indians to get into law school. The academic qualifications and "higher standards" I mentioned made it hard for Indians to get into law school in the first place. It is still hard today. It was not until the 1970s that we got programs to help us get into law school and the law schools started admitting Indians. When we finally got through the law school doors, what did we learn?

We've all read Felix S. Cohen's *Handbook of Federal Indian Law*. Cohen wrote it when he worked for the Interior Department. What did he do when he got out of the Interior Department? He started a law firm in Washington, DC that specialized in Indian cases and Indian claims. The Indian Claims Commission Act was a piece of termination legislation. It sought to finally terminate Indian rights to their traditional lands by having Congress pay for them. What was the fee for representing an Indian nation on a claim? It was fifteen per cent of the total recovery. Claims were paid at the market value of the land at the time of taking (that is, often in the 1870s or 80s), minus credits to the government for things like treaty payments, commodities or beef rations. Fifteen per cent of millions is a lot of money, and many of the Anglo law firms back East got a lot of money from Indian claims. They also made

large fees from Indian nations. Those firms were in Indian law for the money, and I want to warn you -as Indians- about that.

Why did you go to law school? Is it the money? Is it power? Is it that a law degree opens doors to get into the statehouse, Congress or a tribal chairmanship? Those goals are good -as far as they go. But they can be dangerous. If the love of money is too strong, you will forget the people. If you want power too much, you will not listen to the people. If you are more interested in a big name than humility, you will fail. Too often, people forget that humility is a basic Indian value.

Why should Indians become lawyers? Many tell me that they want to "serve the people." That is something I agree with wholeheartedly. What do they learn in law school? The official American Bar Association name for Indian law is "Indian affairs law." It is *not* "Indian law." That is, it is not the law of Indians. It is the law of white people, used to control Indians. Do they teach traditional law in law school? Are your elders and religious leaders visiting professors? Do you learn your Indian values in law school so you can put them to work when you get out? Do law school classes prepare you to go home to serve your communities? I sometimes ask law professors: "Has the American bar forgotten the people?"

Law is values. What is a "value"? It's a feeling that people share about what is right; about what the right thing to do happens to be. Here is one: Think of "law" as a circle. Imagine that in this room, we sit in a circle to talk about our values; what we feel about things; what we should do. In a circle, there is no beginning and no end. There is no start or finish. A circle is unbroken. In it, no person is above the other - they are all equals. The traditional "talking circle" is the place where everyone has a say and when the talking is done, there is agreement. It is the place of equals where everyone is equal and part of the whole.

That is what I mean when I ask, "Where should lawyers be when the people come together?" I mean that very literally. They should be in the circle. It is made up of the peoples, and that is how they come together. There is a special place for lawyers, to share the knowledge they learned. In a circle, no one person is better than anyone else. It is where you talk, but you also listen. Too often lawyers -both Anglo and Indian- think they know everything, so they forget how to listen. They listen to know how better to share their knowledge. A circle is not about money, but about the good of all. It is not about power; it is about community. It is not about pride and holding high office, but about working together. The very act of coming together means that we all work for each other's future and that of our communities.

Two of the sub-themes of this conference are: "Where is Indian country today?" -and- "Where will Indian country be in the future?" Today, we are reorganizing. Indian law is split into time periods, and some say we have just ended the "period of self-determination." Where are we going? Some say we are now in the "period of self-governance." Perhaps. Others fear that as

Congress eliminates social programs and returns the money in state block grants, Indians will lose out. That is a legitimate fear.

The future depends upon what I do. It will depend upon what you do with your law degree. We can be fearful or we can have hope. I have hope -and confidence- that if you remember why you went to law school and what it means for an Indian to be a lawyer, we will go on. To me, being a lawyer and a judge means that I know what it means when the peoples come together. Many elders close their prayer saying, "All my relations." That tells us to remember. Navajos often close their prayer saying, "*Hozho nahasdlii*." That means, "By this, the way we act with each other, we are in good relations; we have achieved *hozho* or the state of being where we act in good relations and respect." That is our traditional law, which they don't teach in class. (At least they didn't teach it when I was in law school.)

What is why peoples come together and that is why you are in law school.

#### APPENDIX: SOURCES

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