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"WATCH YOUR SIX": AN INDIAN NATION JUDGE'S VIEW OF 25 YEARS OF INDIAN LAW, WHERE WE ARE AND WHERE WE ARE GOING

*The Honorable Robert Yazzie**

Introduction: "Watch Your Six"

A friend from Rutgers University writes us and often concludes a letter with this advice: "Watch your six." That is police slang for watching out at six o'clock in military directions. In other words, "Watch your tail — cover your behind." That is the lesson for Indian nation judges for 25 years of the decline of Indian law. Now, I want to review the dangers we face, given recent defeats in the courts and legislature. I also want to identify some of the bright spots and possibilities for the future which can come from a few positive developments.

How We Got There: Another View

Recently, there was a front-page article in *USA Today* about the power of law clerks in the U.S. Supreme Court. It mentioned a book that came out a while back — *The Brethren* by Bob Woodward and Scott Armstrong. It was an insider's view of the workings of the U.S. Supreme Court and it tells the story of the beginning of a twenty-five-year decline in Indian nation powers.

The story goes that Justice Rehnquist was kind of a "dean" for the law clerks. One year, during a Christmas party, the clerks put on a skit which mocked President Ford's difficulty choosing a successor to Justice Douglas. Chief Justice Burger was not amused. He gave Justice Rehnquist an Indian case as punishment. This is what Woodward and Armstrong said about it:

Rehnquist had nothing but contempt for Indian cases. Traditionally, Douglas had done more than his share. He had been the Court's expert. With his own Arizona background, Rehnquist was the logical replacement, but, he suspected that the assignment was Burger's way of telling him what he really thought of the Christmas party. Never one to let an opportunity pass, Rehnquist turned an opinion that was in favor of Indians into an opinion that indicated that in most cases they would lose. It wiped away decades of Douglas's opinions.

That opinion was *Moe v. Confederated Salish-Kootenai* — the cigarette tax case. It has been downhill for Indian Nations ever since.

*Chief Justice, Navajo Nation.

I found out something else which is quite interesting. A few years ago, when Navajo Nation Chief Justice Tom Tso went to Washington to work on Indian court enhancement legislation, he was invited to a meeting of Capitol Hill lawyers on the "Duro-fix" legislation. During the meeting, one Indian Affairs Committee staffer called down to the Justice Department to get its views on the bill. She laughed when she got off the phone, saying, "They had their usual position: all Indian legislation is unconstitutional because it is race-based." When asked whom she spoke with in the Justice Department, she replied that it was someone in the Office of the General Counsel. That is the most powerful and influential division of Justice; it is the "lawyer for the lawyers." What is even more interesting is the fact that Chief Justice Rehnquist and Associate Justice Scalia were both assistant attorneys general in charge of the Office of the General Counsel.

We know that there have been several distinct phases in Indian affairs law, from first contact, through various attempts to assimilate Indians and their nations, to today's attacks on the basic powers of Indian nations. However, to understand today's Indian law, we must look back about one hundred years. That is, up through at least 1883, Indian nations were considered to be "nations." There were few intrusions on their jurisdiction and powers. If there was a surrender of authority, it was usually done through a treaty. The "Indian Nonintercourse Acts" meant what they said: the states were to keep their hands off of Indian policy and affairs.

However, starting with the *Crow Dog* case in 1883, the U.S. Congress and Supreme Court began a process of intensive intrusion. *Crow Dog* prompted the Major Crimes Act of 1885, and the Dawes or General Allotment Act of 1887 was a major push toward assimilation. The Dawes Act checkerboarded our nations and created many of the problems we see today. Challenges to federal legislation led to the plenary power doctrine and the notion that Congress could override an Indian nation treaty whenever it felt like it.

Let's take a closer look at what was really going on. Shortly before Congress decided to intentionally intrude into Indian nation affairs and the Supreme Court upheld it, a man by the name of Herbert Spencer came to the United States. Spencer was a British railroad engineer who looked at Charles Darwin's theory of evolution and did something with it. Spencer is the person who coined the term, "survival of the fittest." Spencer said that some humans are superior to others; that some folks are just naturally better than others. Who were the "superiors" who were said to be better than the others? Primarily white, Protestant males were superior. "Irish need not apply." Indians, of course, were "savages." (You actually see that kind of language in the court opinions of the day; read *Crow Dog* as one example.)

The name for Spencer's theories is "Social Darwinism," and it is a thoroughly racist doctrine. It led to Nazi atrocities. Unfortunately, Spencer's books were best-sellers in the United States and had a great deal of influence on law and policy, including Indian law.

There was another follower of Herbert Spencer from around the same period. His name was John Austin. Austin was a failed lawyer who was a friend of an English philosopher. This philosopher got Austin the first chair in legal philosophy at a university. After studying legal theory in *Germany* for several years, he returned to England to teach *English* legal philosophy. His lectures were a flop. The reason we know Austin today is that his wife published his works after his death.

Austin developed what we know as "legal positivism." It is the legal version of social Darwinism and "survival of the fittest." That is, Austin said something is not "law" unless it is made by one in authority. Who is that? According to Austin, it was the British Parliament. Again, you have the racist notion that a small and privileged class has the sole power to make law. If you look closely at the philosophy of the right wing U.S. Supreme Court, where Justice O'Connor is the "moderate," you will see social Darwinism, legal positivism and parliamentary supremacy at play.

We know that Indian affairs law began as a struggle between the states and the central government. Following a failed experiment under the Articles of Confederation, of shared Continental Congress and colonial authority to make Indian policy, the U.S. Constitution has the sole authority. The idea was that the Indian nations would be protected from the states. That is not how things worked out.

Until the appointment of Justice Rehnquist to the U.S. Supreme Court, there was a general principle that the states had no authority in Indian Country. However, the Rehnquist Court pulled a rabbit out of the hat. This rabbit was the new trick that somehow the Supreme Court can "imply" that Indian nations have lost certain powers. That is, Indian nations have no "inherent" jurisdiction over non-Indians or nonmember Indians because somehow that is "implied." Isn't it strange that if Congress is the primary source of Indian affairs policy (and we know that these days, Congress can do no wrong), then the courts, and not Congress, get to "imply" that Indian nations lost their power?

Sovereignty is only a "backdrop" these days — whatever that means. Isn't it strange that the Supreme Court is striking down Indian nation powers under a vague doctrine that can be abused, yet talking about congressional plenary power and the separation of powers at the same time? What we are actually seeing is a states' rights agenda and the federal players are M.I.A. (missing in action).

There is something else which is quite interesting: While there is a general movement away from civil rights enforcement in the United States, there is a movement toward it in the corporate world. Today, it is the corporate lawyers who raise the banner of civil rights to attach Indian nation authority. For example, in the recent Ninth Circuit Court of Appeals decision, *Wilson v. Marchington*, the court says that comity is the rule of recognition in the Ninth Circuit. Thus, a federal court there need not recognize an Indian nation court

decision if its judges are politically controlled by a council. That gives mere ammunition to use against Indian nation courts and judges.

So here we are: Every time I sit on a jurisdiction case, I've got to watch my six.

Looking Over Your Shoulder

These days, an Indian nation judge has to indeed cover his or her six. If you look over one shoulder, there is the anti-Indian mob. Who are its members? First, there are the state attorneys general. We are horrified by Senator Slade Gorton and his anti-Indian legislation. But remember that he is a former state attorney general and there are a lot of others who think like him. Then there are the corporation lawyers, who represent interests that want to exploit Indians and Indian Country without regulation and control. Finally, there are the actual members of anti-Indian hate groups — an interesting association of the hate groups, the corporate giants and politicians. Most of the hate group members are people who own fee land in Indian Country, and their fears of Indian government are fueled by absentee Indian Country landlords. Their battle cry is "No taxation without representation," and they cry a lot of tears about "corrupt" Indian councils and courts. They have a lot of money for litigation and, of course, that is why Senator Gorton wants to waive Indian nation sovereign immunity and send cases against Indian nations into state courts.

Who is over the other shoulder? We have to be very careful. Every time an Indian nation council interferes in the operations of Indian courts, it is used by non-Indians as a tool for attack. For example, several years ago, Chief Justice Tso terminated one of our probationary judges for insubordination. In November 1991, that terminated judge was called as a star witness to attack the Navajo Nation during Indian court enhancement hearings.

Similarly, last year, when Senator Gorton had a hearing on his move to abolish sovereign immunity, he asked the lawyer for an anti-Indian hate group to get anti-Navajo Nation testimony from a corporation that was in litigation with the Navajo Nation. Fortunately, the corporation saw that it was not in its best interest to cooperate. Every time a council does something to its own court or its own judges, that may be used in litigation or in testimony for legislation which is hurtful.

It is difficult being a judge when you have to watch your rear to make certain that those folks do not push you into something that can be the basis for review of one of your decisions by a federal court, or meat for testimony in Congress about how bad your court may be.

Some Bright Spots

It is not all gloom and doom. On March 12 and 13, something very nice happened. Chief Justice Zlacket of the Arizona Supreme Court invited me, Chief Justice Francini of the New Mexico Supreme Court, and Chief Justice

Zimmerman of the Utah Supreme Court to sit down and talk informally about mutual concerns and interests. I was delighted to find that the justices were interested in the Navajo Nation courts, traditional Navajo law, peacemaking, who we are and what we do. I told the justices a story which applies to this discussion.

In 1994, the Navajo Nation Supreme Court sat at the Stanford University Law School in California. After the oral argument, there was a reception. One of the members of the law school faculty talked about how complex Indian jurisdiction law is and asked how we dealt with such problems. A member of our group said, "Simple — we make friends!" The professor did not quite know how to take that, but it is true. At one point, a litigant before the Arizona Supreme Court was bashing me and my decisions, and a justice told him to stop it, saying, "I know Judge Yazzie personally."

The lesson for me is that if I am to do a good job watching my six, I need friends. I find that most state judges do not know what an Indian court looks like. They do not know how we operate. They do not know us. Recently, we have been meeting with the state judges in northern Arizona and we find that as we make friends with them, we are getting things done. We find that state judges share our desire to solve problems, to stop family violence, to collect child support, to teach each other, and to share resources.

Another lesson is that Indian nations should return to their traditional law. The Navajo Nation Supreme Court has ruled that Navajo common law is the law of preference in the Navajo Nation and it is often used in our decisions. Our Navajo peacemaking program is successful and people visit us from around the world to learn about it. After all, if we apply state law in our courts, someone is always going to come back and say, "They got it wrong." I remember one decision written by our Associate Justice Raymond D. Austin. A law professor wrote about the case and said its decision was wrong under principles of contract law, although the result was correct. Of course, Justice Austin was not pleased with the article. When you make a ruling using traditional Indian law or have a traditional process which is based on consensus, then the outside cannot criticize it.

There are a lot of agonizing law review articles coming out these days about what a mess Indian law happens to be. Do the state and federal judges read them? Probably not. If they do, then ignore them. Charles Wilkinson once wrote that while Indian nations were losing in the courts, they were winning in Congress. Is that true today?

Recently, when the Senate Indian Affairs Committee held the first hearing on the Gorton Bill to abolish Indian nation sovereign immunity, there was a lot of talk about Indian nations refusing to collect cigarette tax and other taxes. Nobody questioned the stupidity of a store owner in Indian Country having to collect a tax on the basis of someone's identity as an Indian or not. It is a bad policy. It is an unworkable policy. Despite that, we see no moves in Congress to push state taxation out of Indian Country. Instead, Indian nations get the

blame for not collecting taxes for the states. On top of that, many Indian leaders will tell you that while the state counts Indian noses to get block grants, they do not share those funds with Indian nations, for the most part. Few people know that Indians actually do pay state taxes, usually sales and excise taxes, and a lot of money goes to the states, with little return for the Indians who pay the taxes.

The law journal articles are read by few and Congress is unresponsive. What do we do about that? There is one major area where we are falling down. We are not getting the word out. We are not putting our case before the American people. A few years ago, they said that since "Dances with Wolves" was so popular, Indians could get anything they wanted. That was not true because we did not know how to use the opportunity. When I get attacked or my court gets attacked, I cannot say anything because of judicial ethics. Courts do not do business by press release. Who is going to speak for us? Who will advocate our position? We know that the *Minneapolis Tribune* and the *Arizona Republic* ran a series of negative articles on Indian courts and social problems in Indian Country. When are we going to get some positive press? I think that we need to think about how to educate the American public on the legitimacy of Indian nation courts and the fact that we do have outstanding judges.

Conclusion

There are frightening times. As an Indian judge, I need to be creative and work with my fellow judges. You will remember that in the 1978 *Oliphant* decision, the Supreme Court said that Indian nations have no inherent jurisdiction over non-Indians in criminal cases. They said the same thing about nonmember Indians in the 1990 *Duro* decision. How closely do we read the law? In *Oliphant* and *Duro* the Supreme Court did not say that we have "no" jurisdiction over those people. They have an "adoption" exception. In 1996, the Navajo Nation Supreme Court looked closely at *Oliphant* and *Duro* and ruled that in some instances, such as when a non-Indian marries into the Navajo Nation, we will exercise criminal jurisdiction. We used Navajo common law to meet the "adoption" exception. More recently, we are getting several challenges to our personal injury jurisdiction under the *Strate v. A-I Contractors* and the Ninth Circuit *Wilson v. Marchington* decisions. What are we doing about that? We are dusting off the Navajo Nation Treaty of 1868 with the United States and reading it closely.

It may be a losing battle. I may end up hearing traffic ticket appeals, or presiding over an enrollment case or two. It may get so bad that if I am to participate in making decisions about my people and activities on my Nation's lands, I will have to run for Justice of the Peace in Arizona or New Mexico. At least I will get paid more than I get now.

However, I am not ready to give up. I am going to try to play the cards as they are dealt to me. I am also going to try to make friends, use my Nation's original law, and get the word out that the justices, judges, and courts of the

Navajo Nation are competent and legitimate organs of government. I am going to thumb my nose at the anti-Indian hate mob and try to point out that Indian governments and courts do serve legitimate interests that should be honored. While doing that, I am going to watch my six.

