

**TESTIMONY OF THE HONORABLE CHIEF JUSTICE
OF THE NAVAJO NATION
BEFORE THE UNITED STATES SENATE COMMITTEE
ON INDIAN AFFAIRS
REGARDING THE IMPACT AND AFFECT
OF THE RECENT SUPREME COURT DECISIONS
ON NAVAJO SOVEREIGNTY**

INTRODUCTION

Yá át tééh, my name is Robert Yazzie. I am the Chief Justice for the Navajo Nation.¹ I want to thank Senator Inouye and the honorable members of the U.S. Senate Committee on Indian Affairs for inviting me here to comment on the recent U.S. Supreme court rulings as they affect the powers and authority of Navajo Nation sovereignty. The impact of these decisions has been profoundly severe and adverse for all Indian nations and the Navajo Nation in particular. However, these impacts can only be understood against a backdrop of settled Native American sovereignty and a brief overview of the Navajo Nation's judicial system.

The foundation principles of federal Indian law, under which the sovereignty of the Navajo Nation is legally defined, have evolved for over more than two hundred years in treaties,

¹ The Navajo Nation is the largest Indian nation in the United States. The Nation covers more than 17 million acres (27,000 square miles) spanning across Arizona, New Mexico, and Utah forming nearly 36 percent of all that remains of Indian lands in the lower 48 states. In fact, the Navajo Nation has been compared in size to such States as West Virginia and South Carolina. The Navajo Nation is largely rural and has a population density of about six persons per square mile. And like most Indian reservations or other rural communities, it is greatly affected by problems associated with a seriously depressed economy and an alarming rate of crime. According to the most recent figures available, 56.1 percent of Navajo families live below poverty level and our unemployment rate is 36 percent to more than 50 percent, depending on the season. Our per capita income averages \$6,217.00 annually in comparison to the United States per capita income of \$28,542.00. The population growth of the Navajo Nation is double the national rate and the median age is 22.4 years old. More importantly, with a citizenship of almost 300,000 enrolled members the Navajo Nation courts provides services to almost thirteen percent of all the federally recognized Indians within the United States.

statutes, court decisions and actions of the Executive branch of the federal government. These principles operate to preserve tribal rights and tribal government authority in a legal system in which tribes have little political influence. In his seminal *Handbook of Federal Indian Law*, Felix Cohen noted that

1. tribes originally had all the powers of any sovereign state;
2. they then became subject to the legislative power of the United States; but
3. they retained all their powers of self-government except as expressly limited by treaties or acts of Congress.²

In order to interpret and apply Congressional limitations on Indian sovereignty, the U.S. Supreme Court established canons of construction, or special rules that were designed “to narrow interpretation of federal treaties, statutes and regulations that intrude upon Indian self-determination and to promote broad interpretations of provisions that benefit Indians.”³

The Court further developed the doctrines of reserved tribal rights (which states that many of the rights tribes possess were not granted to them but rather were reserved by them when they ceded lands to non-Indians by treaty); federal trust responsibility (which holds that the federal government has fiduciary obligations for the management of Indian trust lands, funds and resources); and the plenary power of Congress (under which Congress is said to be vested with very broad power over Indian affairs).

² FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1941).

³ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv.L.Rev. 381, 418, n. 158 (1993).

The application of these foundation principles had provided broad geographic sovereignty to Indian nations for 150 years until the U.S. Supreme Court's decision in *Montana v. United States*.⁴ This sovereignty was meant to be limited only by specific showings of Congressional intent. Beginning prior to *Montana*, with *Oliphant v. Suquamish Indian Tribe*,⁵ and continuing through *Montana* and its progeny—specifically *Strate v. A-1 Contractors*,⁶ *Nevada v. Hicks*,⁷ and *Atkinson Trading Company v. Shirley*⁸--the U.S. Supreme Court has single-handedly succeeded in undermining Congressional intent and seriously threatened Native America's political, economic, and cultural survival.

None of these recent Supreme Court cases reveal evidence that Congress has explicitly taken away a sovereign power of any Indian Nation. Rather, the Court has applied a rule it unilaterally created in *Oliphant* called "implicit divestiture" which theorizes that "Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers 'inconsistent with their status' [as domestic dependent nations]." Based on the aforementioned cases, Indian Nations are therefore implicitly divested of their civil jurisdiction over state process servers (*Hicks*), taxing authority over non-Indian hotel operators on private fee land located within our territorial boundaries (*Shirley*), criminal jurisdiction over non-Indians committing crimes within our reservation boundaries (*Oliphant*), regulatory power over hunting and fishing by non-Indians on private fee land within our

⁴ 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.")

⁵ 435 U.S. 191 (1978).

⁶ 520 U.S. 438 (1997).

⁷ 121 S.Ct. 2304 (2001).

⁸ 121 S.Ct. 1825 (2001).

territorial boundaries (*Montana*), and civil jurisdiction over non-Indians in cases arising on state rights-of-way crossing through our territorial boundaries (*Strate*).

In other words, there does not seem to be anything principled or doctrinally sound about the Court's recent jurisprudence in federal Indian law; rather, the Court's jurisprudence "seems based on [a] political expediency"⁹ that solely benefits non-Indians and state governments. The combined result, or impact as this Committee seeks to determine, is the inability of the Navajo Nation to maintain its "political integrity, economic security, or the health or welfare" of its people.¹⁰ In short, the Navajo Nation is faced with nothing less than a threat of cultural, economic, and political genocide.

In the end, we are talking about territorial integrity. We are talking about the ability of Indian nations to have effective control over *all* activities within their boundaries for the common welfare. At present, neither non-Indians nor Indians have a clear understanding of what happens when someone commits an act or causes harm within reservation boundaries. The jurisdictional confusion in criminal law caused by questions concerning inherent criminal jurisdiction over non-Indians and contested criminal jurisdiction over nonmember Indians leaves victims of crime unaided and helpless because of the failure of federal prosecutors to effectively prosecute crime.¹¹ Doubt over civil jurisdiction in either regulatory or adjudicative areas

⁹ N. Bruce Duthu and Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, Natural Resources & Environment (Fall 2001); quoting Alex Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L.J. 269, 303 (2000).

¹⁰ 450 U.S. at 565-566.

¹¹ The Navajo Nation must coordinate the prosecution of Major Crimes with the U.S. Attorney's Office within New Mexico, Arizona, and Utah. Each of which operates independently utilizing three separate prosecutorial guidelines.

multiplies litigation and frustrates legitimate governmental policies, such as imposing a hotel occupancy tax on *all* business within the Navajo Nation, as do the surrounding states.

As for Justice Souter's concerns about protecting the civil rights of non-members, the fact is that the wealthy are able to seek federal review in all-or-nothing disputes over jurisdiction, while ordinary people do not have that luxury. The concern expressed about the use of customary law is unreasonable, because the Navajo Nation jurisprudence in that field is clearly pro-individual rights.¹² The Indian legal community and the academic community is moving swiftly to make sense of Indian customary law for everyone through court opinions, law journal articles, and training programs that stress the superior advantages of Indian customary law. It should be noted that there are growing movements in American law (restorative justice, therapeutic jurisprudence, and polycentric law) that hold up Indian customary law as a model to be adopted by Americans in general.¹³ The limitations in the Indian Civil Rights Act identified by Justice Souter are negligible compared to the primary considerations of due process and equal protection that are required by the Act.

¹² See, for example, *Begay v. Navajo Nation*, N.L.R. Supp. 13, 16 (Nav. Sup. Ct. 1988)(Navajo court proceedings must comply with the Navajo Bill of Rights and the Indian Civil Rights Act, and as such, we must insure compliance with procedural and substantive due process before someone is deprived of their private property); *Navajo Nation v. Atcity*, 4 N.L.R. 76, 78 (Nav. Ct. App. 1983)(...due process protections [are] an important element in the jurisprudence dynamic found in the federal and state courts and is equally found within the mandates and procedures of the Courts of the Navajo Nation); *Mustache v. Navajo Bd. of Election Supervisor*, 5 N.L.R. 57, 59 (Nav. Sup. C 1987)(The Indian Civil Rights of 1968, 25 U.S.C.§1302(8), guarantees procedural due process in hearings before tribal administrative agencies).

¹³ recent accounts estimate around 300 restorative justice programs throughout the United States, and similar processes have long been observed in pre-modern and indigenous societies. Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, SENTENCING AND CORRECTIONS, September 1999, No. 3 (Magazine of the National Institute of Justice, U.S. Department of Justice), at 4.

Justice Souter’s concerns about the scope of the protection of individual rights are fully addressed in the Navajo Nation Bill of Rights.¹⁴ It adopts all provisions of the United States Bill of Rights, with the exception of the right to appointed counsel for indigents in criminal cases. That gap was closed with adoption of an indigence policy, which requires appointed counsel in all instances where there is a “likelihood of incarceration.” In addition, the Navajo Nation Bill of Rights guarantees the rights to life, liberty, and happiness, and also includes the right to gender equality (i.e., the Equal Rights Amendment) that is not a part of American Constitutional guarantees. It may be that Indian nations such as the Navajo Nation, which zealously promotes individual rights, should be given the first option for expanded criminal and civil jurisdiction.

SPECIFIC EXAMPLES OF NEGATIVE IMPACTS

The Supreme Court’s recent decisions have created confusion for the Navajo Nation. Business entities such as electric utilities and natural gas pipeline companies possessing right of way grants or leases on tribal lands have challenged the authority of the Navajo Nation. These companies have argued that their right of way grants or leases are the equivalent of fee lands under *Strate vs. A-1 Contractors*. They alleged that the Navajo Nation’s consent to their grants is not sufficient to retain jurisdiction. These challenges have adversely impacted the economic stability of the Navajo Nation government by jeopardizing future tax returns. The decreased revenues have a direct correlation on the level of essential governmental services that the Navajo government can or is able to provide to all residents and travelers of the Navajo Nation.

¹⁴ 1 NNC §§1-9.

The *Strate*, *Hicks*, and *Atkinson* decisions also adversely impact economic development within the Navajo Nation. Businesses located on fee land are able to avoid paying tribal taxes while businesses located on trust lands continue to pay. The fee land businesses, for all practical purposes receive, a free ride and the benefits of a civilized society that are assured by the provision of governmental services by the Navajo Nation.

Within the realm of criminal jurisdiction, the following are brief examples of how these decisions have impacted the ability of the Navajo Nation's provision of public safety services and assuring victim's rights.

In December 1997, Russell Means, an enrolled member of the Lakota Nation, was arrested for two counts of battery and one count of threatening. It is alleged that Mr. Means struck his former father-in-law, an enrolled member of the Omaha Nation, and spit in the face of his nephew, an enrolled member of the Navajo Nation. These incidents occurred within the territorial jurisdiction of the Navajo Nation. To date, however, neither the victims nor the Navajo Nation have had their day in court as the Navajo Nation has diverted its attention from the actual criminal prosecution to a lengthy battle over jurisdiction. Although the Nation is now hoping to go to trial soon with the Supreme Court's recent denial of *certiorari* in the matter of *United States vs. Michael Enas*, Mr. Means has an appeal pending in the 9th Circuit Court of Appeals.

In the mid 1990's, Bruce Williams, a non-Indian, raced through a community located within the territorial jurisdiction of the Navajo Nation just to demonstrate that the Navajo Nation did not have criminal jurisdiction over his activities.

In July 2001, an enrolled member of the Navajo Nation battered his spouse on tribal fee land (a HUD Indian Housing cluster), but due to the Supreme Court's recent decision in *Alaska vs. Native Village of Venetie*, neither the Navajo Nation nor the United States Attorney's Office had jurisdiction over the matter. More importantly, the State of New Mexico did not demonstrate any interest in pursuing a prosecution. We have prepared a flow chart demonstrating the Navajo Nation criminal justice system to enhance your understanding of the complexity of our criminal justice system. This flowchart is attached.

In November 2001, an enrolled member of the Hopi Nation was arrested for unlawful weapons, possession and distribution of liquor within the exterior boundaries of the Navajo Nation's territorial jurisdiction. Unfortunately, he was arrested on a right-of-way granted to the State of Arizona by the Navajo Nation. Since then, the Navajo Nation has been embroiled in a jurisdictional dispute, ala *Strate* that promises to evade the merits of the case at least as long as the ongoing issue with Russell Means.

Several years ago, a county police officer engaged in a high-speed chase on a right of way granted by the Navajo Nation to the State of Arizona. This high-speed chase sadly resulted in the death of at least one individual when their vehicle missed a curve. County police officers are now entering the Navajo Nation and confiscating State license plates from vehicles owned by Navajos without going through any tribal process. County police officers are now also entering the Navajo Nation and removing or attempting to remove Navajos for crimes committed outside the reservation without going through the Navajo Nation's codified extradition process.

In fact, calls are received regarding possible attempts by creditors to repossess property without going through Navajo Nation process. Pursuant to Navajo law, self-help remedies are illegal and creditors must seek and obtain an official order from the Navajo Courts to repossess property.

Recently a public outcry arose when a severely intoxicated Navajo man killed four people on a State highway outside the jurisdiction of the Navajo Nation. Regardless of the fact that the driver was a BIA employee driving a BIA vehicle, media attention focused on the fact that the driver had numerous tribal DUI convictions that went unreported to State authorities. The Navajo Nation struggled to explain that reporting agreements between the Navajo Nation and state law enforcement agencies have consistently broken down because state courts will not recognize tribal court judgments. Tribal judges, operating under the constraints of a jail-conditions consent decree for limited jail space, often confiscate a state driver's license when the driver is found guilty of DUI. Unfortunately, all those drivers have to do at the State's Department of Motor Vehicle is to claim a lost license to obtain a duplicate.

The Congress, in 1994, passed the Violence Against Women Act. The VAWA purports to protect all women throughout the United States from domestic violence. However, pursuant to the present federal statutory scheme in Indian country regarding jurisdiction, whenever a Navajo woman is beaten by a non-Indian spouse neither the State nor the Navajo Nation is presumed to have jurisdiction over the matter, only the federal government can prosecute. However, because of the status of the crime in Indian country being a misdemeanor, which occurred outside the presence of a federal agent, there is not an immediate arrest. More

importantly, if the victim is not severely injured or killed then the United States Attorney's Office will generally decline the matter. It is important to note here that at least one federal district has suggested that they will at least issue the perpetrator a citation from the Central Violations Bureau. For all intents and purposes, this is a meaningless gesture, because this process does not remove the perpetrator from the home or proximity of the victim. It is similar to a civil traffic citation demanding that the person appear in court on a certain date.

Some scholars have suggested that the Nation exercise its right to exclude. However, an exclusion order is no more effective against domestic violence than a protection order or the above-described Central Violations Bureau citation. How many women across the United States have been either injured or killed while under the purported protection of restraining orders.

THE NAVAJO JUDICIAL SYSTEM

The “implicit divesture” doctrine that has so ravaged tribal sovereignty was based on wholly unjustified and subjective opinions about the competency of Indian courts. The *Oliphant* Court stated that tribal courts’ attempts to exercise criminal jurisdiction over non-Indians was a “relatively new phenomenon” that lacked “any semblance to a formal court system,” where the “emphasis was on restitution rather than on punishment.”¹⁵ While American penal institutions

¹⁵ See generally, 435 U.S. 191 (1978). Navajo courts today are pressured to become mirror images of state courts. Despite that pressure, Navajo common law and statutory laws are the laws of preference in the Navajo Courts. Otherwise, applicable federal law is utilized. Lastly, state law may be applied. Navajo common law is the values and moral principles of the Navajo people, i.e., their traditional customs, usages, and ways of doing things. Lawyers and advocates regularly argue Navajo common law in the courts. Navajo common law is found in books and articles on Navajo culture and in Navajo Court opinions. Navajo elders and teachers of Navajo culture are also sources of Navajo common law. The choice of law statute of the Navajo Nation is found at 7 NNC §204 of the Navajo Nation Code. The Navajo courts also adopted various rules, which guide litigants through the courts,

are presently at overflow capacity, the merits of punishment versus restitution are beyond the scope of our discussion here. Rather, our emphasis must remain on the perceived lack of our courts' semblance to formal court systems.

In July 2001, U.S. Supreme Court Justices Sandra Day O'Connor and Steven Breyer joined a host of other federal and state judges at Window Rock, Navajo Nation; to acknowledge the vital role Indian courts play in Indian communities across the country. They discovered a sophisticated and competent Navajo judicial system that has existed since 1959 when, as an act of self-determination and an expression of tribal sovereignty, the Navajo Nation Council declared their right to create their own laws by abolishing the CFR court and replacing it with the Courts of the Navajo Nation.

The Navajo courts process roughly 90,000 cases annually. In fiscal year 2001, statistics illustrate that Navajo courts dealt with a caseload of 88,000 cases. Of these, 22,275 (25%) were criminal cases; 6,322 (7%) were criminal traffic cases; 27,980 (32%) were civil traffic cases; 5,150 (6%) were civil cases; 2,371 (3%) were family civil cases; 4,354 (5%) were domestic violence cases; 2,390 (3%) were delinquency cases; 489 (1%) were juvenile dependency cases; 988 (1%) were juvenile traffic cases; 13,400 (15%) were probation cases; 1,233 (2%) were peacemaking cases; and 168 (1%) were Supreme Court Cases.

A. Court Structure

The Navajo judicial system is a two-tiered system. There are seven district courts or trial courts located throughout the Navajo Nation. These courts generally have four divisions: 1)

including rules of pleadings and practice; criminal, civil, and appellate procedure; evidence; and domestic violence and probate procedures.

District Court; 2) Family Court; 3) Small Claims Court; and 4) the Peacemaker Division. Each judicial district has a district court and five of the seven districts have a separate family court. The courts located in Arizona are at: Tuba City, Kayenta, Chinle, and Window Rock. In New Mexico, they are located in Shiprock, Crownpoint, and Ramah. Two satellite courts under the Ramah district are located in New Mexico at To'Hajiilee and Alamo. Eighteen judges make up the Navajo judiciary.¹⁶ Fourteen are trial judges who preside in the district and family courts. In the districts, the trial judge supervises the court staff and administers the court with the help of the court administrator.¹⁷ Cases begin in the trial courts, and the decisions of these trial courts may be appealed to the Navajo Nation Supreme Court located in Window Rock, Arizona. The Supreme Court hears appeals from the trial courts on questions of law raised on the record and certain administrative agency decisions. Trial *de novo* is not allowed. Three appellate judges preside in the Supreme Court. One appellate judge is the Chief Justice and the other two are Associate Justices.¹⁸

B. Peacemaking

As mentioned earlier, the Navajo Nation employs two justice systems to resolve disputes: 1) the Anglo-American adversarial system of justice, and 2) the Navajo traditional justice system, or peacemaker division. The peacemaking division does not use judges, juries, lawyers, police officers, or jails. It is a system of court-annexed mediation and arbitration which draws on

¹⁶ Of the eighteen Navajo judges, three are law school trained. Seven judges (half the trial bench) are women.

¹⁷ The judicial branch employs approximately 140 persons, including court clerks, bailiffs, secretaries, probation and parole officers, and peacemaker liaisons. And there are five court staff attorneys the majority of who are Navajos.

¹⁸ The chief justice also prepares the budget, sets and implements policies, and oversees Judicial Branch operations. The Navajo Nation Judicial Branch operates on funds from the federal government and Navajo Nation general funds.

the traditional Navajo institutions of family, clan, community and traditional leaders who are selected on the basis of wisdom, stature, and ability to solve problems.¹⁹ The peacemaker is a persuasive leader who applies Navajo values to arrive at consensual solutions to disputes.

C. Judicial Code of Conduct

Judges carry out their duties and responsibilities guided by Title 7 of the Navajo Nation Code and the Code of Judicial Conduct that was adopted in 1991 and patterned after the ABA Model Code of Judicial Conduct.²⁰ An independent Judicial Conduct Commission reviews serious complaints of misconduct filed by the public against the Navajo Nation judges and can recommend removal of a judge to the Chief Justice. As their supervisor, the Chief Justice reviews minor complaints against all Navajo Nation judges. The Navajo Nation judicial system is structured to avoid abuses and non-legal attacks claiming that the court's decisions are unreasonable, biased, and motivated by political influence. The Code of Judicial Conduct, coupled with the authority of the Chief Justice to supervise the work of judges, reinforces the soundness of the decision-making process. In addition, members of the Navajo Nation Bar Association, the Judiciary Committee of the Navajo Nation Council and the Chief Justice evaluate Navajo Nation judges' judicial and administrative skills annually. These evaluations include independence in decision-making, knowledge of the law, courtroom demeanor, and staff

¹⁹ The Peacemaking system is also adaptable to other forms of culture, including principles of Christianity. The parties themselves have the right to select who they deem to be a respected leader from their own particular community to act as "peacemaker."

²⁰ Judicial branch employees who are not judges work under the Judicial Branch Personnel Policies and Procedures and the Employee Code of Ethics.

supervision. These evaluations are used to identify the judge's strengths, weaknesses and areas of training need.

D. Court of Record

Contrary to the position of the federal courts and the United States Attorneys Office, all Navajo courts are courts of record. All trial proceedings are recorded. The Navajo Supreme Court issues written opinions and the lower courts issue opinions involving cases of first impression.²¹

E. Bill of Rights

The Indian Civil Rights Act (a federal law) and the Navajo Nation Bill of Rights require the Navajo courts to safeguard the rights of individuals and to settle their claims fairly. Court proceedings are conducted in both the Navajo and English languages. Navajo court interpreters can be used to assure that litigants understand what is said in court proceedings. There are extensive court rules, which govern how cases are handled and decided. Court rules are designed to ensure fundamental fairness and impartiality. The Navajo courts apply criminal and civil laws of the Navajo Nation, including statutes and Navajo common law. Where no specific Navajo law exists, applicable federal or state law is often used.

Although individuals have the right to represent themselves, Navajo judges will appoint counsel for a person if the person is unable to afford counsel. One important right is the defendant has a right to a jury trial in criminal cases. There are other rights guaranteed to the

²¹ Twenty-three years ago, in 1969, the Navajo court of Appeals, now the Navajo Nation Supreme Court, issued its first written opinion. Today, all court opinions are reported in the Navajo Law Reporter, the Indian Law Reporter, and are made available for posting on www.tribalcourts.com.

criminal defendant by these laws. Indians have many civil rights; among them are protections in criminal proceedings. All persons, under the 1968 Indian Civil Rights Act; have a right to legal counsel in criminal cases at his or her own expense. Where appropriate, poor defendants have a right to appointed legal counsel. Members of the Navajo Nation Bar Association must represent poor defendants without charge. The Navajo Nation has no written constitution. A Bill of Rights is provided in the 1968 ICRA and the 1967 Navajo Bill of Rights. The Navajo Nation Bill of Rights provides for greater protection than the ICRA in the provisions of the Bill and the way Navajo Nation courts interpret it.

F. Appointment Process

The Navajo courts are independent from political influence and external pressures. Cases are decided using evidence properly admitted by the court and by applying applicable laws. To ensure that the Navajo courts will be free from political influence and bias, the Navajo nation Council in 1958, created a system for appointment (instead of election) of Navajo Nation judges. The Navajo Nation appoints its judges rather than elect them. When a judgeship vacancy occurs, Navajo candidates who meet the qualifications submit an application, which is reviewed and screened by the Navajo Judiciary Committee, a standing committee of the Navajo Nation Council. The committee evaluates each applicant based on educational attainment, professional experience, and knowledge of Navajo culture and the Navajo language. The top qualifying candidates are recommended to the Navajo Nation president. The president makes a final selection, which is submitted to the Navajo Nation Council for confirmation. Before permanent confirmation, each judge serves a two-year probationary period.

G. Navajo Nation Bar Association

The Navajo Nation Bar Association (NNBA) has several committees that operate the association. One committee is the disciplinary committee, which hears complaints against lawyers and advocates and disciplines when necessary. Only members of the NNBA can practice in the Navajo courts and before the several Navajo Nation administrative agencies that conduct hearings. To become a member, an applicant must have proper moral character and fitness and pass an examination. There are over 400 Indian and non-Indian members of the NNBA, attorneys (law school graduates) and lay advocates (non-law school graduates, but with legal training), who reside in Arizona, New Mexico, Utah, and Colorado. Some live in other states and foreign countries. To become a bar member, a person must pass an exacting bar examination.

H. Jury Trials

Jury trials are a matter of right in all criminal cases, but that is not an absolute right in civil cases. The jury consists of no less than six (6) jurors. Both Indians and non-Indians serve. They represent a fair cross-section of the community. Jurors are selected in accordance with court rules.

I. Jurisdiction

The Navajo trial courts have general civil jurisdiction and limited criminal jurisdiction.²² Navajo civil jurisdiction extends to all persons (Indian and non-Indian) who reside in Navajo

²² The Navajo family courts have jurisdiction over matters involving children, probate, name changes, quiet title, and domestic relations. Children's cases are handled with great care. The district courts have jurisdiction over all other matters that the family courts do not hear, including torts, contracts, and consumer transactions. The amount of

Indian Country or who have caused an action to occur in Navajo Indian Country. The Navajo Courts criminal jurisdiction extends to all crimes codified in the Navajo Nation Code along with its terms of punishment. However, the Navajo Nation is prohibited by Congress to impose any sanction greater than 365 days in jail and/or a \$5000 fine.²³ Serious offenses, such as those listed in the Major Crimes Act, are tried in both the Navajo and federal courts.

CONCLUSION

For the past twenty-five years, the United States Supreme Court has ruled in an increasing number of cases that tribes, including the Navajo Nation, under federal law, lack jurisdiction over non-members in Indian Country. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978) (tribes lack jurisdiction to prosecute and convict non-Indians); *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053 (1990) (tribes lack jurisdiction to prosecute and convict non-member Indians); *Montana v. United States*, 450 U.S. 544 (1981) (tribes may assert authority over non-members only where such non-members consent to tribal jurisdiction or where the non-member's activity threatens the political or economic integrity or health and welfare of the tribe); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (the tribal court lacks authority to adjudicate a suit between non-members regarding an accident that occurred on the

controversy is unlimited. More importantly, while it is presumed that there is no criminal jurisdiction over non-Indians, Navajo courts hear civil cases involving them. The Supreme Court has jurisdiction over appeals from final decisions of the trial courts and certain administrative agencies. The Supreme Court decides only on issues of law raised in the record of appeal.

²³ As a result of *Oliphant*, the Navajo Nation is prohibited from exercising criminal jurisdiction over non-Indians who commit crimes within Navajo Indian Country. Non-member Indians are also contesting the jurisdiction of the Navajo Nation raising issues of equal protection in that they are similarly situated as non-Indians.

reservation); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001) (tribe lacks authority to impose a hotel occupancy tax on non-member guests of a hotel on the reservation); and *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) (tribal court lacks authority over state officers serving process upon an Indian on a reservation and also to hear federal civil rights claims under 42 U.S.C. § 1983).

The challenge of the years to come regarding the powers of tribal governments will emanate primarily from the individuals and institutions that do not understand the unique positions Indian tribes occupy within the federal constitutional system. The most recent decisions by the United States Supreme Court add momentum to a jurisprudential trend advancing the sovereignty of states and the interests of nontribal members in Indian country at the expense of tribal rights to self-determination.... Congress has largely stood by as the Supreme Court has literally rewritten the law relating to the scope of inherent tribal sovereignty.²⁴

The Navajo Nation looks to Congress to assist in addressing the needs of Indian courts and in the development of laws to reinvigorate tribal self-determination and self-government. We look forward to working with this Committee to jointly address these issues.

²⁴ Supra Footnote 8.