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1997

## What Must Be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary

Frank Pommersheim, *University of South Dakota School of Law*



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# What Must be Done To Achieve The Vision of the Twenty-First Century Tribal Judiciary

Frank Pommersheim

The title of this speech is what must be done to achieve *the* vision of the twenty-first century tribal judiciary. This is not a title of my choosing and since it is rather imposing, I want to start off by offering a caveat. There is no single vision of the tribal judiciary for the twenty-first century. There is likely to be instead a unique vision that comes from each tribe about what it is struggling to accomplish within its judiciary in the twenty-first century. Each tribe works independently for the most part, yet, ultimately, there is going to be cross-fertilization and hybridization within and across tribal judiciaries. I want to address what I regard as some common threads that exist for all tribes and judiciaries as they seek to chart the future.

When tribal courts consider their mission, they face three broad issues: first, is the notion of gauging the future. That is, what is it that each tribal court anticipates regarding the future? What is it trying to accomplish? I think it is important for tribal courts to reflect about what it is they want to achieve. Second, they have to be concerned about protecting and preserving the present. That is, the accomplishments to date are at risk. Third, they need to recapture the past. What is it in the tribal historical and cultural past that tribal courts want to both rediscover and preserve and carry forth into the present and into the future. And although I say these in a linear fashion, in reality, they are just common intertwining strands in Indian country. Together, they make up the durable and inspirational reality that tribal judi-

ciaries confront on a daily basis.

In the local, reservation context, there are several things that tribal courts need to be cognizant of. One is the tribal judicial landscape and values. When we think about law, although it is ever more formalized and complex in our increasingly technological society, it always reduces to two things: values and power. This is a sublimely basic, yet accurate, notion of what any judiciary needs to be thinking about.

What are the values that tribes are trying to realize in their decision making? There are a number of levels on which such values are chosen. One is the level that is largely outside the purview of much scholarship and much reported decision making: the use by tribes of traditional structures and mechanisms both inside and outside of tribal courts to handle disputes that arise on a reservation. These traditional structures where they exist are ever more important. And it bears some reflection on what the use of traditional structures and mechanisms outside the judiciary on any reservation means in terms of the practices used and values realized.

Another level involves actual decision making in cases in which there is an adversarial hearing and a trial. What are the values that guide a tribal court when it makes decisions? There are certain kinds of decisions where this

*Frank Pommersheim is a law professor at the University of South Dakota School of Law and Chief of the Cheyenne River Sioux Tribe Court of Appeals.*



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## What Must be Done to Achieve the Vision

specifically comes into play. For example, tribes increasingly make decisions about what their constitutions mean. Tribal courts need to think long and hard about what are the values they want reflected in tribal constitutional decision making. There are cases decided in the first instance, such as cases from the Cheyenne River Sioux Tribal Court of Appeals and the Navaho Supreme Court about whether tribal courts have the right of judicial review. This may not be spelled out in a tribe's written constitution and it may not appear immediately discernible from a tribe's unwritten constitution, however, these are very primary and basic decisions for a tribal judiciary to make.

How does a tribal court conceive of the very basic principle of judicial review? Any such basic and primal decision will likely greatly affect the future. If you read the decisions that various tribal appellate courts have made about the principles of judicial review, they are most often very thoughtful and incredibly nuanced. Yet it is not a question whose answer is immediately apparent. It is something that resides with the tribal judiciary and it raises important questions about values and legal process. It is important to think of what those values are in the context of developing tribal jurisprudence.

Another example is when tribal courts interpret principles which are in the Indian Civil Rights Act of 1968 and any civil rights guarantees which exist as a matter of tribal constitutional or statutory law. How do tribal courts actually think about these guarantees? That is, how do tribal judges think about the principles of due process and equal protection? What do they mean in the tribal context?

We know that lower federal courts have held that even in the context of the Indian Civil

Rights Act there is no requirement that tribal courts interpret due process and equal protection just like federal courts. So there is a recognition within the federal system that tribal courts are not bound by the Anglo understandings of due process and equal protection. And if that is true, then tribal courts have the opportunity to fill in what due process and equal protection mean in the reservation context. One example is a case that I have written and talked about before, which comes from the Oglala Supreme Court, a case called *Bloomburg v. Dreamer*. In that case, there was an attempt by the tribal council to remove a non-Indian from the reservation in accordance with treaty guarantees. The issue the defendant was raising was that he was entitled to due process before he was removed from the reservation; that he was entitled to notice and a hearing. This strikes most of us as a conventional due process guarantee that you ought to be entitled to notice and an opportunity to be heard before you are removed. And that's what the court decided. But it also added that the notion of due process in the system of notice and the opportunity to be heard was not just an Anglo concept. It was a Lakota concept as well. In Lakota tradition, you hear a person out before you do anything regarding his or her future or status. To me, that is a small vignette or an example where a tribal court takes an Anglo concept, due process, which most of us subscribe to, but the court is insightful enough to refract the Anglo concept through its own cultural system. What does or what ought that concept mean in the context of Lakota values? This results in a very moving statement of what due process means in the Lakota context. This is a very important approach for tribal courts to use when they interpret phrases which for most

people are absolutely Anglo notions. If tribal courts too readily accept that, then they are missing a very important and significant opportunity to enact a kind of sovereignty. This is what tribal sovereignty is: it is the ability to decide, on its own terms, what legal terms mean in a particular cultural context. That is the notion of thinking about values in all their legal and cultural ramifications.

Not only are values involved when interpreting a tribal constitution, or in some cases a federal statute or a tribal enactment, there is also the complementary issue of power. Obviously, there are some limits that exist when a tribal judiciary interprets statutes, whether tribal or federal.

Tribal judiciaries are not free to say that a federal or tribal statute means whatever they think it ought to mean. There are some constraints on interpretation. As a general proposition, tribal courts are obligated to give meaning as the tribal legislature intended. Such an approach demonstrates cultural and jurisprudential respect to a coordinate branch of government. It will and has led to trouble in the past if a tribal judiciary assumes that it is not constrained in the slightest by what the tribal legislature has articulated. Conversely, the tribal legislative and executive branches are constrained by what is permissible under the tribal constitution. Such delicate issues, often issues of first impression, suggest the need for tribal courts to take a culturally thoughtful and jurisprudentially nuanced interpretive approach to these matters.

A second broad area where tribal values

come into play is when tribal courts are applying tradition and custom in the context of what has generally been referred to as tribal common law. That is, how do tribal courts think about realizing tribal common law in specified cases. There is no automatic answer, but tribal courts need to be and are increasingly sensitive to this developing process. If someone is arguing in a case that tribal tradition and custom applies, what kind of background understanding and empathy, what kind of traditional understanding does the court have as to the correctness of those assessments of what tradition and custom actually is. As some scholars such as Professor Gloria Valencia-Weber have written, such

claims may be contested.

Many of us assume that tradition and custom are uniform and agreed upon, but in some cases they are not and are likely to be controverted.

Tribal judges need to be very careful in their

analysis in such situations. This is an obvious place where values will come into play. Tribal judges need to be attuned to what exactly those values are. For example, a case from Rosebud that was just decided on jurisdictional grounds and is currently winding its way through the federal system, as is the Crazy Horse Malt Liquor case, in which the descendants of Crazy Horse are suing a brewing company. If that case is ever heard on the merits, there will be important issues of tribal tradition and custom that will need to be resolved because some of the causes of action asserted in the complaint — such as the knowing and willful tortious interference with customary rights of privacy and respect owed to a decedent and his family

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## What Must be Done to Achieve the Vision

— are bound up in tribal common law.

Also, there is likely opportunity to consider the appropriateness of traditional relief where the plaintiff, for example, asks for a braid of tobacco, a four point Pendelton blanket, and a racing horse for each and every state where the alleged defaming product is sold. Is this a bona fide claim for a kind of traditional relief? When and if the Rosebud Sioux tribal court (or any court for that matter) gets to hear this case on its merits, it will have to come to grips with this very important, very provocative issue.

Such issues are increasingly posed. More and more we are beginning to see these kinds of cases in tribal court because there are more and more attorneys and parties that look to tribal courts as appropriate forums. They apparently think, and I believe correctly so, that tribal courts are the preferred forums for certain kinds of claims to be heard because the court will understand them more fully in their cultural and legal context. They have some kind of understanding of the traditional values that may be at play in a particular case before a tribal court. Again, in the Crazy Horse case, the case probably could have been brought in federal court and/or state court as well, but the plaintiff chose tribal court. Probably because the estate of Crazy Horse felt that it was a knowledgeable forum. A lot of what we see is people coming to tribal court because they have a renewed and an increasing respect for what tribal courts are capable of and that is something that those of us who work in tribal courts ought to take a good deal of pride in. Yet it also ratchets up the expectations and (federal) scrutiny about what tribal courts can and should do. And so for every accomplishment, there is a new challenge. I think that is

one of the wonderful things that is happening in the ongoing development of tribal courts.

A third area where values come into play is when tribal courts address procedural issues that may not be addressed as existing tribal procedural rules. There may be a tendency to think that when you are just talking about procedure you are not talking about values. Yet, values are deeply implicated in procedure. Let me give two examples. One involves cases decided both by the Cheyenne River Sioux Tribal Court of Appeals and the Rosebud Supreme Court about something as mundane as whether a litigant may take an interlocutory appeal. An interlocutory appeal question does seem like some kind of dry husk, but such a decision involves a consideration of significant values such as fairness, regularity and efficient use of tribal judicial resources as well as any unique cultural values.

Second, some tribal judiciaries have rule-making powers and there are serious questions about values embedded in such rule-making authority. For example, there are some pending appellate rules before the Cheyenne River Sioux Tribal Court of Appeals that would call for, even at the appellate level, the necessity to have the parties try and reach a non-adversarial settlement. Such an approach, if required, would clearly reflect a unique commitment to certain values.

The coordinate to the issue of values is the issue of power. This is a very real issue, that has two halves. The first half is how does power work itself out in the tribal legal landscape? There are the other branches of government. What is the distribution of power and relationship among the different branches of tribal government? One of the things that is happening in Indian country is that we are in a



period where tribes are exercising a sovereignty in both new and old ways. One thing that happens in this context is not only the potential for conflict between the tribe and the state and the tribe and the federal government, but there is potential for conflict within the tribe as the various branches of tribal governments go forth in exercising their power. Often times tribal courts will be faced with the challenge of evaluating whether coordinate branches of tribal government have exceeded the bounds of their authority. This is a very significant legal and power issue. I think many tribal courts and tribal governments are trying to address the issue of what is the proper distribution and allocation of power within tribal governments regardless of how that tribal government is constituted. How are controversies about the exercise and distribution of that power resolved? These issues are going to continue to come to the fore as tribes go forward to (re)assert and (re)establish tribal sovereignty.

This issue is further complicated by the fact that many tribal constitutions that do exist as organic documents do not address this potential controversy between different branches of tribal government. Indeed, most tribal constitutions do not have any checks and balances or separation of powers provisions. Whose fault is that? It is generally the fault of the Bureau of Indian Affairs as the original drafters of mostly boilerplate tribal constitutions drafted pursuant to the Indian Reorganization Act. Nevertheless, tribes that have such constitutions have to deal with this textual inadequacy. One of the approaches is try to get in front of the issue and ask the question, how should tribal constitutions be framed, or amended to deal with the issue of the distribution and allocation of power and the concept

of checks and balances? I don't believe this question of separation of powers or distribution of power has to model the federal solution. There may be alternatives to the conventional separation of powers approach and that is fine. Yet I think it is an inevitable issue, and tribes are increasingly coming to grips with it.

A final concern in looking at the tribal judicial landscape is the issue of resources. This is the easiest issue. Tribes need more resources for their judiciary. They need more money to hire more people, both for the infrastructure of tribal courts as well as professional staff. They need more money for legal research, both the old kind of legal research using books and also the new types of electronic research. Tribes need more resources from the federal government, and where possible, they need additional resources from the tribal government. Resources are a real constraint. They are not absolute constraints because tribal courts have accomplished incredible things in the absence of adequate resources. Nevertheless, it is a nagging and consistent concern. And if tribes and the federal government are going to live up to their rhetoric of supporting tribal courts, they are going to have to put something behind their rhetoric. The best thing they can put behind the rhetoric is money, and hopefully we shall see more of this in the future.

People who want to know what tribal courts are like should read their decisions to get a sense for how various tribal courts think, reason, and apply legal and cultural values. Tribal court jurisprudence is a complex art. In the ideal, there are a number of things tribal courts think about. First of all, it is valuable to think of tribal court jurisprudence as craft. That is, it is written by judges who have to

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## What Must be Done to Achieve the Vision

deploy their legal analytical skills to demonstrate how they get from here to there in resolving a particular case. This is part of what all judges do and this attention to craft is absolutely essential in making lucid and thoughtful decisions.

Second, I think it is important to understand tribal court jurisprudence as narrative. Tribal court decisions both individually and collectively tell a story and tribal judges need to be cognizant of what story they are telling — such as an ongoing struggle to realize sovereignty and to vindicate particular values in unique human circumstances. We need to look at the narrative threads in both individual and groups of cases. This is a very valuable way to enter into the life of the law in order to discern what is actually happening in a case and what is its relationship to real life in Indian country.

Third, it is important to think of tribal court jurisprudence as an act of culture. That is, when we read tribal court decisions, how do they reflect the particular culture that they are a part of? Too often we see the law as a formal system that is outside our day to day life whether inside or outside of Indian country. In the tribal court system, judges need to remain cognizant of how their decisions reflect the culture that they are embedded in.

Fourth, tribal court jurisprudence needs to function as a literacy primer. That is, most people reading tribal court decisions need to be made literate. They are not literate when it comes to understanding Indian law and how it develops at the tribal level. Tribal courts do

not have the luxury of assuming that other judges who read their decisions are literate about what the tribal judges are saying. Tribal courts have to go that extra mile to explain what some of us already know as basic tribal law and values. Also, tribal judicial decisions provides a valuable opportunity to explain why some decisions of the United States Supreme Court and in the federal circuits are wrong. It provides both a challenge and an opportunity to say why they are wrong. This is an essential obligation. This must be done this in a very thoughtful and constructive way both analytically and culturally so as to develop and encourage ongoing judicial dialogue.

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Last, there is the question of what is or ought to be the relationship of tribal courts to the federal system? The Supreme Court has yet to fully articulate the relationship between federal courts and tribal

courts. There is currently no legally recognized paradigm with which to create or advance a meaningful relationship between tribal courts and federal courts as there is between state courts and the federal courts. There exists the “our federalism” model that establishes and reflects a largely respectful and deferential relationship between federal courts and state courts, but there is currently no such analogous relationship between tribal courts and federal courts.

It is only recently that federal courts have been confronted with this issue. This is a whole new element of Indian law jurisprudence. Courts seem to be looking at two potential models. One involves an extension of the

(congressional) plenary power doctrine from *Lone Wolf* into the judiciary in order to create something I have identified as a type of judicial plenary power. One of the things that is embedded in *National Farmers Union* and *A-1 Contractors* is the Supreme Court reaching into the dark morass of federal common law and saying that there is untrammelled authority for the Court to just say whether tribal courts have any particular power or not. This would seem to constitute nothing less than a kind of judicial plenary power, because there are no constitutional imperatives or federal statutes that purport to control what tribal courts can or cannot do in matters of civil jurisdiction. The Supreme Court has just matter of factly taken the vast power on as something it can inherently do. The competing model is also found in *National Farmers Union* and *Iowa Mutual*, and that is the notion of a kind of unique "our federalism" characterized by a deference and respect; a kind of enduring and substantial comity between tribal courts and federal courts. I think these are the two potential models that are suspended in these cases: judicial plenary power on the one hand, and deference, respect, comity, and a kind of new "our federalism" on the other.

We might think of this notion of deference, comity and respect as the velvet glove in these cases. And we might think of judicial plenary power as the fist in that velvet glove. Ultimately, the Court, I think, is going to have to choose between the velvet glove or the fist in the velvet glove. As a result, there is a tremendous challenge in the field to try to identify the dimensions and merits of these competing models, even though the Court itself appears unaware of the overarching issue. It is floundering in this area, but it will eventually

have to make a choice whether informed or otherwise. And it is incumbent upon us to try as judges and scholars to develop and to elaborate to the best of our ability what ought to be the relationship of tribal courts to federal courts.

Often times in federal Indian law people talk about the government-to-government relationship and we see this most readily in the context of the elected executive and legislative governing bodies in tribal government and the federal government. But what about the relationship of the tribal judiciary to the federal judiciary? What does the government-to-government relationship mean in the context of tribal courts and federal courts? I think (and I do not mean this in a presumptuous way) that the federal system and Supreme Court itself needs help in trying to think about this, because they are not going to meet the challenge adequately on their own. And if we have any kind of hope or optimism, we need to demonstrate that in the decisions that tribal courts make and in the elaborations of related scholarship that there is a viable, respectful model for the relationship of tribal courts to federal courts. If so, we can advance the necessary dialogue on this important issue.

I think *A-1 Contractors* is a very revealing and dispiriting case because it tilts towards a kind of judicial plenary power. The opinion itself closes on an eerie note, where Justice Ginzburg talks about how it is unfair to this non-resident, non-Indian defendant to be held answerable in "an unfamiliar court." This phrase is then footnoted to the federal removal section that permits a non-resident defendant subject to non-home state jurisdiction to remove the action to federal court. Is the Court suggesting here (even inadvertently) that there



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## What Must be Done to Achieve the Vision

might be a way to establish a more reciprocal kind of relationship? People in Indian law need to think about that. *A-1 Contractors* says tribal courts do not have jurisdiction over a run-of-the-mill car accident involving a non-resident on a state highway. But is the court suggesting in the footnote, that if there was some kind of removal potential to federal court using the diversity model, that maybe the federal government would be more comfortable, more respectful, more deferential to agreeing that this was a legitimate ambit of tribal court jurisdiction? If that is so, tribal judges have to think about that model. Would tribes agree with this as a theoretical possibility, as a practical matter?

In a related vein, how do tribal courts deal with the situation when a plaintiff comes in and asserts a tribal cause of action, but also appends to it a number of federal causes of action? What can the defendant do? There is a puzzle here. The defendant cannot remove it to federal court. When you look at the removal statutes, they just talk about removing state causes of action, they do not address the removal from tribal court to federal court. Inevitably in this situation, some defendant will eventually claim the right to remove it anyway. What will a federal court do when there is an attempted removal of a federal cause of action filed in tribal court into federal court? Indeed, how does the tribal court conceive of its jurisdiction over federal statutory causes of action? I would guess in most tribal courts that there is no statutory guidance from the tribal legislature about whether tribal courts do or do not have jurisdiction over federal causes of action.

To me this is a very provocative, thrilling question for tribal courts to think about.

Maybe some tribal courts have already confronted this issue about whether they have jurisdiction over a federal statutory cause of action. If so, what was the rationale used to accept or reject the claim that a tribal court has jurisdiction over a federal statutory cause of action, and how might the federal sovereign respond to that? Given the current situation where removal is unlikely, the federal sovereign may well find it impermissible to allow tribal courts to adjudicate federal causes of action. This issue also raises some important Article III claims. If you have a federal cause of action, in most cases, you have a right to a federal forum. But in the situation I just described that might not be the case. Tribal courts have to be able to think this through in terms of how exactly they conceive of their jurisdiction, not only in the context of tribal causes of action, but within the larger framework of pendent jurisdiction. This is all very complicated and very provocative. All these exciting issues redound to the growing confidence in tribal courts. People would not be bringing such innovative claims in tribal court unless they had confidence in their competence and integrity. I think tribal courts should take a substantial amount of pride as a result of these complicated and innovative issues being brought to them for resolution.

In their own way, such practical issues as removal and pendent jurisdiction in the tribal court context may be likened to preliminary blue prints for developing a new architecture to construct an attractive and enduring relationship between tribal courts and federal courts. Yet there are also the rudiments of more comprehensive models already beginning to appear and if either takes hold, it will have quite different results in Indian country. If the Court

actually articulates and adopts a kind of judicial plenary power, I think it will be a terrible blow. It would be a new *Lone Wolf* at the millennium, which is not a pleasant thing to think about. Or the Court might more fully adumbrate the notion of "our federalism" as a government-to-government judicial relationship grounded in parity and respect. As part of whatever limited input we might have as judges, scholars and practitioners in the field, we need to be increasingly cognizant of what is at risk and try to articulate the ethical and jurisprudential dangers and benefits of these diametrically opposed paradigms.

I have a great deal of confidence and enthusiasm for what is happening at the tribal court level and less so at the federal court level. Yet, I think if we are committed to notions of justice, respect, and common effort, we must continue to go forward in a spirit of thoughtfulness and dialogue. Part of what is at risk here is democracy itself. You can only have democracy when you have informed citizens. We cannot have democracy in Indian law right now because we do not have Indian law literacy. It is foolhardy to say the democratic process can really work in the context of Indian law at this time because we do not have enough literate people on the courts, in Congress, and in state legislatures. I am not saying this to disparage people, but rather as an accurate assessment of where people are in their current Indian law understanding. So one of the many things tribal courts can do is try to advance Indian law literacy. If we advance Indian law literacy, true democracy in the context of tribal-federal relations might actually flourish, might actually work for the first time in a way that is mutually respectful and agreeable to all involved. This then is the challenge and dream

that confronts us.

Thank you.