

JUDICIAL BRANCH OF THE NAVAJO NATION

ADMINISTRATIVE OFFICES OF THE COURTS

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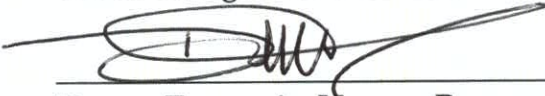


HONORABLE HERB YAZZIE
Chief Justice of the Navajo Nation

DARREN TUNGOVIA
Human Resources Director

MEMORANDUM

To: Jarvis Williams, Acting Executive Director
Office of Legislative Services

From: 
Darren Tungovia, Human Resources Director
Judicial Branch of the Navajo Nation

Date: September 22, 2011

Subject: Comments on Pending Legislation No. 0388-11
Amendments to 7 N.N.C. § 354(B)

I am submitting the below comments on proposed legislation No. 0388-11 in my capacity as the Human Resources Director for the Judicial Branch of the Navajo Nation, as the change in qualifications for incoming Supreme Court Justices directly impacts the responsibilities of my office.

Impact on Salary. The proposal that Supreme Court Justice applicants now be additionally required to have a J.D. and active state bar membership will require a higher salary than is presently allocated for Supreme Court Justice salaries. Presently, the salary for an Associate Justice position is \$79,684.80, which reflects the current qualifications. The attorney/law clerk salary at the Supreme Court level is 6.9% higher than this amount, reflecting the heightened qualification and experience needed for their positions. We are not budgeted to offer a higher salary for Justices commensurate with heightened qualifications; and if we do not offer a higher salary, we will get subpar applicants. Individuals who are best qualified would be able to command higher pay either within the branch or in a law firm if they choose to serve in attorney positions. Also, as attorneys, they would not have the added sensitive public exposure of serving on the appellate bench. The incoming Justices will need to receive a salary higher than the attorneys to reflect their status and qualifications.

Possibility of Few Qualified Applicants. While applicants for vacant Associate Justice positions are referred to the Law and Order Committee, the responsibility resides in my office to ensure that branch personnel meet the high service standards of the Supreme Court.

The Supreme Court very recently issued an opinion in *John Doe BF v. Diocese of Gallup* that brought it very positive national attention. Comments have included an observation from the renowned tribal jurist and law professor Matthew Fletcher that the opinion "demonstrates why the Navajo judicial system is a leader in tribal court adjudication." It was the independence of the Court in addressing the shortcomings of Federal Indian law as it has developed that was being celebrated. In this and other opinions, the Navajo Nation Supreme Court has resisted and provided lengthy commentary on federal common law rules that have become increasingly lopsided and unfair to tribal courts in relation to non-member jurisdiction. In so doing, this Court has applied Navajo laws and traditions in opinions to be read by the federal bench, raising our laws to the level of primary sovereign application. This is possible because the personnel who serve on the Court have knowledge of our traditions, language, and are willing to champion Dine' bedrock principles on our own terms rather than apply foreign standards. The concern is that the emphasis on state licenses will diminish the strong sense of sovereignty, on our Navajo Nation terms, that is now being championed.

The emphasis of our government in Title 7 is that Navajo sovereign laws be applied first and federal and state laws second. This means that candidates must be familiar with Navajo traditions, culture and language, and not have merely a passing familiarity. This remains true in the proposed legislation.

As Human Resources Director in the Judicial Branch, I have seen first-hand the enormous difficulty in getting qualified applicants to apply for district and Supreme Court jurist positions even under the present qualifications. I have contacted the Navajo Nation Bar Association (NNBA) for statistics on how many NNBA bar members speak Navajo and know our traditions and customs, and are also state barred, and am told that no such survey has ever been conducted.

I understand from the Navajo Nation Integrated Justice Information Sharing Project (NNIJISP) technical team members who have visited the Salt River Pima-Maricopa Indian Community that judge vacancies in that community remain unfilled for years because there are few enrolled members possessing their qualifications, which mirror those in our proposed legislation. I understand that the consequence has been near disastrous for that community.

Tribal Law and Order Act Does Not Require State Bar Membership of Any Tribal Jurist. The proposed legislation states that enhanced sentencing in criminal cases under the Tribal Law and Order Act of 2010 is possible if the "presiding judge" has sufficient legal training and is a licensed bar member of "any jurisdiction," including tribal bar memberships. There is no requirement for judges to possess state bar memberships. Additionally, Navajo criminal offenses arise under Navajo sovereign law, not state and federal law. The punishments and even some elements of offenses are unique to the Navajo Nation. I have reviewed and confirmed these requirements with branch attorneys in order for me to sufficiently advise the Administrative Offices of the Courts on the personnel-related component.

Federal Justices, Judges and Magistrates Are Not Required to Be State-Barred. I understand that there is no formal qualification that the federal bench, including the U.S. Supreme Court, possess active bar licenses or even have law degrees, and that the American Bar Association merely suggests minimum qualifications.

Recommendations.

1. I urge the Council to delay this legislation in order to provide an opportunity to the NNBA to survey its membership and find out exactly how many of its members would have the fully rounded qualifications under the proposed legislation to serve on the highest bench of our sovereign court, who must base its opinions under our sovereign laws, culture and traditions.
2. In order to ensure that the Court continues to issue nationally influential opinions championing tribal culture and traditions, the qualifications should be modified to permit at least one Justice to serve without a J.D. or state bar membership. This would ensure that individuals knowledgeable in sovereign culture put in an application.
3. The Judicial Branch presently gives its newly-hired attorneys up to 2 years to obtain state bar membership after they begin serving in branch attorney positions. The proposed legislation should provide the same opportunity to Supreme Court jurist applicants to ensure fairness and broaden the applicant pool.

Thank you for the opportunity to submit my comment on behalf of the Human Resources Office for the Judicial Branch of the Navajo Nation.