Testing U.S. Supreme Court Assumptions Regarding Tribal Courts

Bethany Berger
Assistant Professor, Wayne State University, Associate Professor Designate, University of Connecticut (bberger@wayne.edu)

I. Summary

Since deciding *Oliphant v. Suquamish Indian Tribe* in 1978, the United States Supreme Court has been whittling away tribal jurisdiction over both non-Indians and Indians who are not members of the tribe asserting jurisdiction. In an article published this year, *Justice and the Outsider: Jurisdiction Over Non-Members in Tribal Legal Systems*, 37 Ariz. St. L. J. 1047 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898011, I examined these decisions to show that they owe less to established Indian law doctrine than to the judges' assumptions about tribal courts and governments, and then contrasted these assumptions with an examination of the workings of actual tribal courts, focusing on the Navajo Nation appellate courts but looking at other courts as well. I hope to continue this study by looking as trial level workings of several other tribal courts.

II. The Project

Federal Indian Law scholars agree that U.S. Supreme Court decisions regarding tribal jurisdiction over non-members are not dictated by judicial precedent. I believe that these decisions are based instead on two assumptions:

- **First, the justices assume that nonmembers will be placed at a disadvantage in tribal courts, which they portray as unfamiliar, biased, and ultimately inferior places**. The justices, for example, repeatedly refer to "intrusions on personal liberties" if non-members are subject to tribal jurisdiction, the fact that nonmembers do not vote in tribal elections, that tribes are not fully bound by the U.S. Constitution, and that tribal law is "unfamiliar" and will be "unusually difficult for an outsider to sort out."
- **Second, the justices assume that jurisdiction over outsiders has little to do with tribal self-government**, because tribal self-government only concerns things that the justices think of as "uniquely tribal," such as hunting and fishing and traditional practices untouched by time. Taxation, zoning, criminal jurisdiction over non-Indians are all outside what the justices imagine really matters to tribes. In *Strate v. A-1 Contractors*, for example, the Court held that a tribe did not have jurisdiction over lawsuit arising from an accident on a highway running through the reservation saying that it was not crucial to tribal self government for the tribe to exercise jurisdiction over a "commonplace state highway accident claim." Tribal government, somehow, does not involve the "commonplace" stuff that all governments do.

A. Testing Assumption One: Are Tribal Courts Fair?

To begin to investigate the first assumption, that tribal courts are unfair to outsiders, I looked at all cases involving non-members decided by the Navajo appellate court between 1969 and 2004. This is what I found:

- **The court ruled in favor of non-Navajos about as often as it ruled in favor of Navajos.** Non-Navajos won 47.4 percent and lost 52.6 percent of the cases in which they

were pitted against Navajos over the last thirty five years. Until the last few years, when non-Navajos repeatedly challenged tribal jurisdiction over them and the court repeatedly rejected such challenges, the win-loss rate was exactly 50-50.

• **The text of the decisions also shows even evaluation of law and facts in cases involving non-members.** None of the cases appear to be tainted by a bias in favor of the Navajo litigant. In cases in which one could compare the results to those of non-tribal courts (as in cases interpreting federal or state consumer protection laws) the decisions were at least as favorable, and sometimes more favorable, to non-Indian businesses than those reached in non-tribal courts.

• **The general even-handedness continued across all categories of cases, including three that one might imagine to be particularly vulnerable to bias: child custody disputes between Navajo and non-Navajo parents, commercial disputes against non-Navajos, and cases involving Navajo customary or traditional law.** In custody cases, for example, the court appeared willing to cede jurisdiction and accord custody in order to protect the best interests of the children and rights of the parents involved. In cases involving customary law, the court used that law to ensure that equity was done even where Navajo statutory law did not require it.

• **Other tribal courts seem to show the same pattern.** More work needs to be done on other tribal courts. But decisions from other courts, as well as limited studies done by the U.S. Commission on Civil Rights and law professor Mark Rosen seem to show the same evenhandedness in other courts.

B. Testing the Second Assumption: Does Jurisdiction Over Non-Members Matter to Tribal Self-Government?

To try to address the second assumption, that tribal jurisdiction over non-members is not important to tribal self government, I looked at not only the Navajo cases, but also the history and contemporary situation of tribal governments. I concluded that cases involving non-members are crucial for tribal self-government in three ways:

• **First, they allow tribal courts to fulfill the most important role of courts, by creating a community forum to resolve issues to which community norms do not yet provide a resolution.** Both advocates and detractors often assume that the point of tribal courts is to recreate what the community already agrees is the right way to resolve a conflict. But where there is widespread community agreement on how a problem should solved, you don't need courts, because the community will resolve the problem on its own. Tribal courts are most necessary where there is not this agreement—where the parties include both members and non-members, or pit traditional versus western perspectives, or involve non-traditional issues like commercial disputes.

• **Second, jurisdiction over non-members is necessary to ensure that tribal courts can gain the respect of the tribal community.** Some segments of tribal communities believe tribal courts as illegitimate because of their history as tools of forced colonization of native nations. Others segments perceive them as inferior because of their differences from the courts of the dominant society. For both segments, jurisdiction over non-members is necessary to undermine perceptions of these courts as instruments of external control, good enough for Indians but not others.

• **Finally, jurisdiction over nonmembers is necessary to preserve the fairness of tribal courts.** I believe that the good track record of the Navajo courts is a function of its

sense of self-importance as the institution that must resolve the full range of conflicts affecting Navajo people in a way that expresses the ideals of Navajo culture. This institutional pride leads the judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role, and resist temptations to rule based on the status of the parties or political pressure. Denying the courts jurisdiction over outsiders and the issues they raise would radically diminish the judges' respect for the judicial role and the impetus to take an objective view of Navajo practices.

C. What More Needs to Be Done?

This project was limited because it focused only on one tribe, and only on the appellate decisions of that tribe. I hope to do a follow up study that looks at several different tribes and focuses on the trial level and the perceptions of those that interact with the courts. The only study to have done this comprehensively is a 1978 book written by Samuel Brakel for the American Bar Foundation. Brakel's study, despite the value of his methods, was impaired by his biased and negative perception of those courts. It may be just a coincidence that Brakel's book was published in the same year that the U.S. Supreme Court issued its devastating decision *Oliphant v. Suquamish Indian Tribe*. It is clear, however, that inaccurate assumptions and the lack of information regarding the workings of tribal courts plays into the hands of those that would judicially restrict tribal jurisdiction or prevent its legislative expansion. Filling this information gap may be a powerful tool in countering opponents to tribal jurisdiction. In my next project, I hope to begin to do this.

D. What Can Tribes Do?

The lesson that tribal leaders can take from this project is not that tribes should change what they are doing or how they structure their courts, but that they should make it easier for outsiders to see what is going on there. Non-tribal governments are taking away tribal jurisdiction because of their assumptions about tribal courts. I think these assumptions are wrong, but for many tribal courts it is hard to tell because their decisions and laws are not easily accessible. The reason I was able to do this study is that the Navajo Nation has put all its appellate written decisions since 1969 on line at www.versuslaw.com. Some other tribes are beginning to do this, but it is not yet common enough. I think when non-Indians can see for themselves what is going on in tribal courts across the nation, they will realize how inaccurate their biases are, and will be less afraid to litigate in "unfamiliar" tribal courts.