

September 8, 2018

Cherokee Nation Tribal Council
via email

Re: Cherokee Nation Supreme Court

Dear Council Members:

I am writing in my personal capacity as a Cherokee citizen. As most of you know, I have served as a Cherokee Supreme Court Justice, a law school dean, and as a judge on eight other courts. Based on these experiences, I respectfully submit my thoughts for your consideration as you deliberate on the current Supreme Court nomination.

I lend my voice in support of Shawna Baker. I do not personally know her. My support is based on her resume, her professional and legal experience, and my review of the Rules Committee meeting when her nomination was presented. She is well-qualified for the tasks that are required of Justices on the Cherokee Nation Supreme Court.

To be clear, I am not writing this letter simply because she is a woman. I write because the confirmation process of a qualified woman appears to be unraveling after an initial positive vote in Rules Committee. Historical backdrops are important and there is broader context that is important to share and to reflect upon.

Diane Hammons was the first woman to be presented as a Supreme Court nominee. After a positive vote in Rules Committee, her appointment was pulled prior to the Council meeting for lack of committed votes. She was deemed to be too political. She had been in the trenches for many years, serving as a lawyer and litigator in many courts, including representing the Cherokee Nation before the U.S. Supreme Court. Although judicial appointments, like elections, are inherently political, many would say that she was penalized for being someone we all knew too well. I'd be hard pressed to name a citizen that has more Cherokee legal experience than Diane. She admirably served as our first female General Counsel and later as our first ever Attorney General.

I was the second woman to be presented as a Supreme Court nominee. My first nomination ended very quickly. I was deemed to be too young and too inexperienced. Those were valid criticisms. Many Cherokee lawyers, including women like Diane Hammons, Tina Jordan, Susan Chapman Plumb, Melody McCoy, Meredith Frailey, Linda Epperley and countless others were worthy of nomination. They had more life experience and more legal experience than I did.

A few years later, Chief Chad Smith nominated me a second time. It was a difficult process. When I was confirmed, I was thirty years old, five years out of law school. I replaced Philip Viles after he served twenty-six years, the longest serving Justice in Cherokee Supreme Court history.

He was confirmed the year after he graduated law school. I have learned a great deal from him over the years and I was honored that he supported me by attending my swearing-in ceremony. Wilma Mankiller came to the Capital Building that day, where we had our first of several “real” conversations.

I won’t reveal all the confidences of that conversation, but those that knew her can easily predict the tone. She included a small dash of building me up, followed by a soliloquy on having a backbone and doing what you know is right, even if unpopular at the time. As a Cherokee girl watching her from afar, she socialized me to both the possibility and the normalcy of Cherokee women, as leaders and doers. A new crop of Cherokee girls and boys are watching us. The sustained absence of Cherokee women in certain roles sends a powerful message. Perhaps that message is more powerful than the message sent by the occasional and novel presence of Cherokee women in certain roles.

Angela Jones was the fourth woman presented as a Supreme Court nominee. She was confirmed in 2013 and it is with great sadness that the remaining years of her term are at issue now. I did not know her very well at the time, but I was honored to be present for her confirmation.

It should give everyone substantial pause that only two women have served as Supreme Court Justices, for a combined total of ten years. As a Nation, we need to get to the place where several women deliberate together in the Supreme Court chambers alongside our men. With our track record of nominating/confirming women, that seems like an exceedingly tall order.

I have personally observed the temperament and skills of most of our Justices. Some have been appointed with almost no legal experience. Others possessed years of state trial court experience with little or no Cherokee or other Indian law expertise. Some have lacked trial or appellate experience. Others have first-chaired capital murder cases. Some were long standing members of the Cherokee Bar, yet some were not. Some looked great on paper and others were of average academic credentials. Some have been the sons of well-connected Cherokee families and others have been nominated seemingly out of the blue with little or no prior service to the Cherokee Nation.

One thing is for sure, if God could afford all the prior justices just one hour together, where we could collectively deliberate on which bucket of expertise (or glaring lack thereof) we each carried to the bench at the time of our appointment, it would be fun to watch. Cherokee humor and self-deprecation would be on full display.

Over the years, our Justices have possessed a broad array of different legal subject matter experience. We have a better judiciary for it. We each form a special bond from the shared experience of the intellectual tug-of-war we engaged in with each other. We all tried to do our best with the tools available to us. We rendered decisions by interpreting the very narrow questions of law and facts presented to us at that moment in time. Without a doubt, each of us have relied on another’s toolbox.

Justices interpret the laws passed by the Council based on the plain language of the text and based on decisions rendered by prior Justices. Sometimes prior decisions are reversed. Sometimes cases of first impression arise that require lawyers that are critical thinkers, writers, and researchers.

Justices rarely approach an issue from the same starting point. When we reach unanimous decisions, it happens through a process that sometimes forces one or two justices to alter or abandon their starting point. When there is a split decision, we push each other to rethink, refine, reconsider. Each of us were very green to this uniquely Cherokee process when we started and each of us became better judges because of the sum of our whole. It is intentionally hard for five people to reach a decision as a group.

The Cherokee Nation Supreme Court, with very limited exceptions, is an appellate court. Extensive trial experience is not relevant in most cases. It is very helpful to have justices with years of evidentiary experience under their belt. It is also helpful to have skilled contract reviewers and lawyers that are experienced with business transactions. Scholars are a plus. We need it all.

The primary audiences for Cherokee judicial opinions are the parties before the Court, the Cherokee citizenry and Cherokee officials. Whether we like it or not, the outside world is also an audience that will pass judgment on the legitimacy of our institutions and the objective quality of our judges. That's the awesome power (and burden) that comes with being the Cherokee Nation.

Like every Cherokee Justice before her, Shawna Baker has flaws. She is a political outsider. I find that to be simultaneously refreshing and frightening. For reasons that are personal to her, she has not engaged in the Cherokee politics. That is true for the overwhelming majority of our citizens, including some of our past Justices. Those Justices ended up serving us very well, perhaps in small part, because of this.

As you continue to consider her nomination in advance of the vote, I urge you to focus on two key questions that will predict success or a failure on the bench:

Does she have the capacity to be fair and impartial?

Is she smart enough to become an expert in Cherokee law and judicial process quickly?

Ms. Baker has been a lawyer for over fifteen years and she has the strongest academic record of any judicial nominee ever presented to the Cherokee Nation Council. She certainly appears to possess enthusiasm and grit. She is intelligent and a diligent hard worker.

It takes a special person with the right instincts to start from Westville schools and navigate the world as a first-generation college student and earn a joint graduate degree while completing

law school with high honors. A nominee with post-graduate law degrees from both Columbia and NYU is remarkable. She certainly has deficiencies that you will need to consider in light of the big imperfect Cherokee picture.

I ask that you give her the same benefit of the doubt afforded to the Justices who have honorably served our Supreme Court in the past. I ask for your mindfulness to ensure that she is not held to a higher standard, just an equal one. I ask for your mindfulness that she is not compared to other Cherokee women lawyers that hypothetically could, but almost never are, nominated and confirmed to our Supreme Court. I ask you to acknowledge the severe gender imbalance in our Supreme Court, past and present. If you acknowledge that imbalance, please take proactive steps to help us get to a healthier place.

No disrespect is intended with this letter. It is never fun to take a stand, publicly, in direct opposition to friends you love and respect. I am asking each of my friends on the Council and those of you that I do not know, to support this nomination.

Respectfully submitted,

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