Indian Law and Order Commission

First Field Hearing: September 7, 2011 at Tulalip, WA

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Thank you for asking me to serve on this panel of Indian Law experts, it is a real honor. I am an attorney for the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and author of *Tribal Contracting: Understanding and Drafting Business Contracts with American Indian Tribes*. I have the honor of being a member of Attorney General Holder's Violence Against Women Federal and Tribal Prosecution Task Force where I am drafting a chapter on criminal jurisdiction for a trial practice manual on the federal prosecution of violence against women offenses in Indian Country. I was also part of the CTUIR team that diligently worked to achieve full compliance with the Adam Walsh Act, the first tribe in the nation to do so, and substantially contributed to the Model Tribal Sex Offender Registration Code. Prior to working for the CTUIR, I was the Assistant City Attorney for the City of Walla Walla where I regularly prosecuted criminal cases in the state system. Prior to that I was the lead prosecutor for the White Mountain Apache Tribe and served as a Special Assistant United States Attorney for Arizona in that capacity. I began my career first as a deputy and then program manager for the Confederated Tribes of the Colville Reservation's public defender office. In 2008 I had the honor of testifying before the Senate Committee on Indian Affairs regarding the Tribal Law and Order Act and federal declinations, and played an active role in pushing that Act forward as it moved through Congress.

Tribal governments, like all governments, have a moral duty to their citizens and guests to ensure the public's safety. They are also the most appropriate and capable government to ensure such safety – they employ the local police, they are the first responders, and understand the needs of their community better than all others. Unfortunately, the American legal system – through legislation and case law – has significantly hamstrung their ability to ensure safety in Indian country. The resultant framework has aptly been described by Professor Clinton as a maze. And, it is a difficult maze to traverse at that.

Jurisdiction is inexplicably shared between tribes, states, and the federal government. Who has jurisdiction can depend on where an incident occurs, the race of the suspect, the race of the victim, the type of crime alleged, treaty provisions, and various state and federal court decisions – which themselves are often either confused or confusing.

Las week, the Washington Supreme Court issued its THIRD decision in a single case that arose within the Lummi Nation's Indian country. A non-Indian was driving drunk on a state highway through the reservation. A tribal officer observed and pursued the vehicle from on-reservation to where it came to a stop off-reservation. The individual was detained off-reservation and handed over to county police. She moved to suppress all evidence claiming the tribal officer had no authority to arrest her.

At the state Supreme Court there was an initial decision finding the officer had authority to arrest in fresh pursuit of a crime that began on-reservation. It was later reconsidered and amended but sustained. Last week, it was reconsidered again and reversed. This alone shows the level and depth of confusion caused by the jurisdictional maze.

The effect of this confusion, and emasculation of tribal law enforcement, is palpable and dangerous. In its third decision, even the majority opinion of the Supreme Court recognized its decision could encourage Indians and non-Indians alike to ignore tribal law enforcement and flee for the border. This is dangerous for everyone.

This danger is borne out by the best available statistics on the issue. A 2004 Bureau of Justice Statistics report, reviewing data from 1992-2002, reveals that Indian country crime rates are significantly greater than the national average. A significant factor in this is the inability of tribes to hold non-Indians accountable for their crimes.

According to the study, 66% of violent crimes where the race of the perpetrator was reported, Indian victims indicated the offender was non-Indian. Over 85% of rape or sexual assault victims described the offender as non-Indian. 74% of victims of robbery, 68% of aggravated assault victims, and 64% of simple assault victims described the offender as non-Indian. While the study did not indicate whether a given crime arose in Indian country, it isn't an inappropriate stretch to assume many of the crimes reported by Indian victims arose in Indian country.

The jurisdictional maze has resulted in the prosecutorial and enforcement obligation for most non-Indian crime falling on the federal government. However, for whatever reason, national statistics reveal that crimes referred for federal prosecution out of Indian country are declined more often than they are prosecuted. Between October 1, 2002 and September 30, 2003, of the cases referred for federal prosecution from the Bureau of Indian Affairs, 58.8% were declined compared to the national average of 26.1%. Between October 1, 2003 and September 30, 2004 the declination rate for cases referred by the BIA dropped to 47.9%, but was still significantly higher than the national average of 21.5% for that same time period.

While statistics are not available, one can reasonably assume the declination rates for non-Indian crime are at least as high as the average declination rate for crimes referred by the BIA.

Anecdotal evidence suggests that non-Indian criminals often feel that they are untouchable in Indian country.

In the Oliphant case itself, Mark Oliphant, a non-Indian, was observed beating up patrons of Chief Seattle Days on the Port Madison Reservation. He was arrested and charged in tribal court. As you all know, he appealed that decision to the federal courts. What you may not know is that another case was appealed along with his, the Belgarde case. Belgarde was driving recklessly on the Port Madison Reservation several months after Mark Oliphant was arrested. Tribal police pursued him for some time to no avail. They ended up having to block his path, at which point he crashed into a tribal police vehicle. With Mr. Belgarde, in the front seat of the truck, was Mark Oliphant.

We need a fix to this mess, and the fix is relatively simple: empower tribes to have full jurisdiction, civil and criminal, over all who come within their Indian country borders. We know the success of tribal empowerment – self-determination has been the most effective and positive federal policy toward tribes in the United States' history. When tribes are given the tools and ability to govern their own affairs, they do it better than anyone else ever has. We need to extend this empowerment to the law and order context. With full jurisdiction tribes will be able to fulfill their moral obligations to their citizens and guests and make Indian country safe for all.

Having said this, a fix must be approached in an intelligent and limited, incremental, fashion. DOJ's recent proposal to allow limited prosecution of non-Indian perpetrators of domestic violence against Indian victims is the right approach. It is desperately needed to deal with the epidemic of domestic violence in Indian country, and ensures that the alleged perpetrators are afforded all of their constitutional rights and have an added right to appeal any decision to the federal district courts for review.

A careful approach is necessary because the United States Supreme Court in recent decades has been hostile to tribes. The *Oliphant* decision held that tribes did not have authority to prosecute non-Indians. Years later, the court held in *Duro* that tribes did not have authority to prosecute non-member Indians. Thankfully, Congress immediately saw the significant error in the *Duro* decision and the horrific impact it would have on public safety in Indian country. Within a year of the decision, Congress passed a fix by amending the Indian Civil Rights Act to make it clear that tribes had inherent authority to prosecute non-member Indians for crimes committed within their Indian country. A question remained after that fix as to whether Congress had the power to reverse the Supreme Court on this issue. In essence the question was whether the *Duro* decision was constitutional in nature or a reflection of court-created common law. In *Lara*, a majority of the Supreme Court resolved that issue finding the Supreme

Court's prior pronouncements were indeed grounded in the common law rather than the constitution. Unfortunately, *Lara* was a highly fractured decision with five in the majority, three concurring in the opinion (one of whom voted with the majority), and two dissenting. Only two of the Justices in the Lara majority remain on the bench. One of the dissenting Justices still remains. Two of the concurring opinions, while supporting the outcome, expressed skepticism about whether Congress had the power to fix *Duro* and both of those Justices remain on the bench.

While I believe Congress does have the constitutional power to adjust the metes and bounds of the inherent sovereign powers of tribes given the current state of federal Indian law, caution is nonetheless appropriate. In the event DOJ's proposal is enacted and a majority of the Supreme Court decides its prior pronouncements limit the ability of Congress to adopt DOJ's limited proposal, serious discussions about a constitutional amendment needs to be had. The current jurisdictional maze has proven to be confusing, unworkable, and dangerous. For the sake of public safety, it must be changed.