

Testimony for the Indian Law & Order Commission

Tulalip Field Hearing

September 7, 2011

Mark W. Pouley, Chief Judge & Court Administrator Swinomish Tribal Court; Chief Judge Sauk-Suiattle Tribal Court

Chairman Eid, Commissioners, welcome to Tulalip and thank you for taking on this important work. I also want to thank you for coming to Indian Country to do that work. I'm honored to have this opportunity to offer testimony for you to consider in making your recommendations to Congress and the President.

I am Mark Pouley and I'm the Chief Judge and Court Administrator for Swinomish Tribal Court. The Swinomish Tribe is located near La Conner, Washington in Skagit County. The reservation comprises approximately 7,500 acres including coast line and waters. The total reservation population is approximately 4,700 with approximately 1000 total natives living and working within the boundaries with nearly 800 tribal members on and off the reservation. The reservation also hosts many thousands of visitors annually to enjoy our recreation, to conduct business and to visit our casino.

I am also the Chief Judge for the Sauk-Suiattle Tribe near Darrington, Washington. Sauk-Suiattle is much smaller in geography and population. I've also been on the Board of Directors of the National American Indian Court Judge's Association.

When I'm asked about my court and my work I often include a description of what the court is not. That is, our tribal court is not just an extension or branch of Skagit County District Court or Superior Court. While there are many similarities, tribal courts are uniquely tribal, and they are developed in line with the culture, knowledge and values of the tribal community in which they are situated. It is for this reason that I believe tribal courts, and tribal justice systems, are best suited to deal with on reservation crime and social issues related to crime. It is no coincidence that tribes with strong and viable justice systems, such as Tulalip and Swinomish, are starting to see success in reducing the rates of violent crime, reduce the incidents of domestic violence and tackle the alarming rates of reservation drug and alcohol abuse.

Even tribes that have successfully built justice systems and are seeing success, must rely on federal and state law enforcement or court systems to fully address criminal activity on reservation. There has been a great deal of discussion as of late how to make these outside systems more responsive to tribal needs. Frankly, trying to make those outside systems work better for the tribes is a little like trying to make a hammer a better screw driver. No matter how hard you try, or how close to success you come, you are still left with the wrong tool. In fear of pushing the metaphor to far, I admit that there are times that we need a hammer, and we should make sure we have one that works, but really what we need are more good screw drivers placed in the hands of the people best suited to use them.

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As we move forward with any discussions about helping tribes develop vital justice systems, the most important thing we can do is keep sight of what makes tribal justice systems successful; it is their unique nature that is tied to the community in which they are located. We must avoid trying to create a “one-size-fits-all” solution whether that is saying tribal courts must look and function more like state or federal courts, or even that all tribal courts must function like some particular model tribal court. Any guidelines or solutions that are proscribed must allow tribal justice systems to develop, build and thrive in their own community. Tribes must be allowed to build systems that work for them and reflect their unique culture and history and which address their unique needs and issues.

One thing that disturbs me when I read court opinions or hear arguments calling for the limitation of the authority of tribal justice systems, beyond the legal arguments themselves, is that often these opinions appear to be based on a misinformed understandings of these systems, or worse, an ethnically or racially prejudiced point of view. We must acknowledge that.

Justice Owens mentioned a recent Washington Supreme Court case (*State v. Eriksen*) in which the court reheard the case three times and just now reversed its previous rulings, holding that tribal police do not have authority to pursue DUI suspects off the reservation and detain them until local law enforcement can arrive to the scene. What Justice Owens didn't share is that the the author of the current majority opinion, when previously writing for the dissent, acknowledged that the result is, in her words “ludicrous”, but she felt the state of the law left her with no other choice. I would agree, that the current state of the law is a mess, and that often leaves tribes and tribal people with ludicrous results.

The recent history of court opinions have given us a crazy quilt of law regarding the nature of tribes, tribal authority, and tribal jurisdiction. We know one thing is abundantly clear, even though the reasoning is often murky, tribes do not currently have authority to regulate or enforce the laws within their territories equally among all individuals that come within their territory.

It helps to look at this from the perspective of the tribes, and I will use the Swinomish Tribe as an example. The city of La Conner lies across the channel from the Swinomish Reservation. The town heavily relies on tourists and visitors for economic survival. A visitor from Canada or Oregon is expected to abide by and is subject to the laws and criminal justice systems of the city, county and state. These visitors can't vote for the mayor, state representative or governor and they have no say in the laws and system to which they are being subjected. The Canadian visitor may even live under a different “constitution” with entirely different notions of “due process” and “defendant's rights.” All this is true, but there is absolutely no question by anyone that the visitors are subject to the laws of the territory they entered as a guest.

Why should this be any different in Indian Country? The Swinomish Tribe's and many other tribes' economic development relies heavily on visitors to the Reservation and tribal businesses. More significantly there are non-Indians that live, work, marry, and raise children within our boundaries. These non-Indians all enjoy the many benefits of the tribal government and culture, but none of them are subject to the rules and laws of the tribe.

As has been discussed in much of the other testimony this situation makes no practical sense, but does create a very real and dramatic problem for the tribes. While I strongly disagree with the law that has brought us to this point, I simply can't deny the reality of where we are.

As scholars we can get into some very lively debates about the decisions of the US Supreme Court and other federal and state courts that directly impact the development and implementation of tribal governments and tribal justice systems. We can have those debates, and must still argue the points before these courts. We may also debate whether it is proper or necessary for Congress to pass legislation defining tribal court jurisdiction, or other aspects of tribal justice systems. Even in light of the arguments and debates, we must acknowledge the reality of where the law stands, and we must find solutions to these very difficult problems in light of this unfortunate reality.

With that understanding, I believe we need and the commission should recommend a broad legislative solution. That solution may include the following points:

1. There should be a congressional "Oliphant fix" that returns full criminal jurisdiction to tribal courts. The current recommendations from the Department of Justice for an incremental fix in the case of domestic violence and similar cases is a good start and should be supported, but a long term full fix is necessary.
2. It is acceptable to consider the addition of due process guidelines such as those provided for in the Tribal Law and Order Act to extend the sentencing authority of tribal courts. This should be done with caution, however, so that the guidelines respect the character and nature of tribal courts and tribal justice systems. Any rules or guidelines must ENCOURAGE not DISCOURAGE the creative and unique development of tribal justice systems.
3. It will be controversial, but we should at least consider and discuss the concept of some form of limited federal court review of tribal court decisions. Such review would be very limited and subject to clear standards of review. Obviously this recommendation raises concerns about the preservation of tribal sovereignty and I recognize that concern and believe that there are valid legal arguments supporting that position. I'm again brought to consider the reality of the situation and the fact that federal review already

exists. The problem with current federal review is that it is unpredictable and often ends with very disruptive results. It is possible that limited federal review under recognized standards, standards that the tribes help develop, would actually better respect tribal sovereignty in the long run, especially if it means full authority of the tribal justice systems.

4. Provide for direct funding of tribal courts. Currently the majority of federal funds available to tribes for tribal justice systems come through a competitive grant structure. This structure is broken.
 - a. Competitive grants reward grant writing skills and don't necessarily recognize the need of the tribes or the quality of the program. Not all tribes have grant writers and this puts them at a disadvantage.
 - b. Tribes should not be forced to compete with each other to fund critical government systems. This is a trust obligation that should be funded and all tribes must be funded.
 - c. The grant structure favors program creation, but not necessarily sustained department operations. The grant structure favors "flavor of the month" programs, or programs addressing issues that are perceived to be important at the moment, methamphetamines for instance. While that is indeed a serious problem in much of Indian Country, it isn't necessarily a problem for all tribes, but it may be favored in awarding grants over simply running a court or other serious problems.
 - d. Grants are temporary. Typically grants run for one to three years and then tribes must find another source of funding if they hope to keep programs going. This is most problematic when employee salary is being paid by a grant and tribes risk losing crucial personnel because of a lack of funds. It is impossible to truly build and sustain a justice system if you are constantly chasing grant funds to keep the system operational.
 - e. Grants often contain restrictions that prevent best use of the funds and sometimes make little sense. For instance, most grants from DOJ for court improvement do not allow for building construction. I can offer two examples how this restriction can impact tribes. A court can buy hundreds of thousands of dollars of equipment and computers to run a state of the art court, but may be forced to house the equipment in a single wide trailer that leaks, because Tribal Court Enhancement funds may not be used to build even a modest structure. The Swinomish Tribe received a substantial grant under the recently released economic stimulus package to develop a domestic

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violence shelter for victims and their families. Unfortunately, the grant prohibited use of any funds for the new construction of a building. Through a lot of hard work, the involvement of several tribal departments and investment of other funds, the tribe was able to utilize the funds and has opened a DV shelter. The unreasonable restrictions on these funds, however, made the job much more difficult than it should have been and likely may have prevented many other tribes from being able to achieve the same result.

I think we can look to the direct funding for tribal child support programs and use of tribal self governance funds as a model and example of how this might work. I think these programs have proven to be generally successful in setting minimum guidelines, but allowing tribes to develop programs that best suit the culture and character of the tribe. Such direct funding for tribal justice systems would allow tribes to receive the funding they need, but give them the flexibility to develop their own unique justice systems.

Finally, any such changes should be “opt-in” for tribes. Not all tribes will want or possibly need these changes. Not all tribes will be immediately able to adopt such changes. Tribes must be able to choose their own path and choose to opt-in to such a change at their own pace.

The bottom line is that any solution must give tribes the ability to develop their own justice systems to address their own unique culture and issues.