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Written Testimony of Joseph Myers for the Indian Law and Order Commission for its field hearing in Palm Springs, California on February 16, 2012.

Good afternoon. My name is Joseph Myers and I am the executive director of the National Indian Justice Center which is headquartered at 5250 Aero Drive in Santa Rosa, California. Thank you for allowing me to comment on the operation of tribal courts. I hope that my comments will be helpful to you.

Background

While I was a law student at Boalt Hall School of Law at U.C. Berkeley, I worked as a law clerk and administrator for California Indian Legal Services (CILS) in Oakland, California. From my work at CILS I began to appreciate the legal issues that confronted the communities of Indian country. Upon graduation from law school in 1975, I was recruited by the American Indian Lawyer Training Program (AILTP). Mr. Richard Trudell, the executive director of AILTP, convinced me that I could do innovative things to improve justice in Indian country by coming to work at AILTP. I took him up on his offer and I have spent the last 37 years working to improve justice for the people of Indian country.

My first task at AILTP was to work on a tribal court survey. At that time there were approximately 100 tribal courts of various sizes and compositions. They ranged from large systems like the Navajo Judiciary to small part-time tribal courts that had caseloads that did not require a full time judicial system. The survey examined the scope of tribal court jurisdiction, the status of tribal court facilities, the experience and training of the personnel, the federal and tribal budget commitments, the independence of tribal court decision making, correctional alternatives, and other needs of tribal courts in the 1970's. This was a time when tribal courts were considered by many to have major flaws and it was pre-Oliphant (a U.S. Supreme Court decision that ruled that tribal courts had no inherent criminal jurisdiction over non-Indians). It was a time when tribal leaders showed little interest in improving tribal courts. Governmental infrastructure problems remain today, including separation of powers.

Early in my work with AILTP I established a tribal court advocates training program for those who practiced in tribal courts as counselors and prosecutors, who were primarily paralegals. There was no organized training program at that time for tribal court advocates but there was training for the tribal court clerks and judges offered by the National American Indian Court Judges Association (NAICJA) through a contract with the Bureau of Indian Affairs (BIA). Tribal court judges at that time usually were not law school trained. In fact the majority were lay judges. Today, the profile of tribal court judges includes many law school trained individuals who are Native American.

The National Indian Justice Center (NIJC)

In early 1983, the Bureau of Indian Affairs, the National American Indian Court Judges Association, and the American Indian Lawyer Training Program met and deliberated about the future of training for tribal court personnel. In that meeting it was decided that a new organization should be created with the mission of providing training services to the justice systems of Indian country. In May 1983, the National Indian Justice Center was launched and I was its executive director. Over the years, the training and technical services of NIJC have expanded beyond tribal justice systems to tribal governance issues, tribal transportation and many other tribal community concerns. Today, a host of organizations and colleges offer training to tribal court personnel.

The Chronic Operational Issues of Tribal Courts

IRA constitutions – The federal Indian policy prior to the Indian Reorganization Act of 1934 (IRA) called for the assimilation of Native people into the mainstream through a private land ownership modeling that used in the General Allotment Act of 1887 which operated pursuant to the premise that all Indians could become successful agrarians even under negative conditions such as farming lands that were not meant to be farmed. The Indian assimilation effort failed miserably.

The results of the General Allotment Act were chronicled in the Meriam Report published in 1928 by the Brookings Institute that described appalling conditions in Indian country: abject poverty, dismal health, inferior education, and dilapidated housing. In 1934, Congress enacted the IRA, the intent of which was to reverse these deplorable conditions in Indian country and restore some order to Indian communities. Before the IRA, the "courts of

Indian offenses" had been imposed on Indian reservations – not to render justice to Indian communities but to draw them away from traditional forums and to educate them in a limited fashion about the ways of the white man.

The IRA provided for constitutional governments for those tribes that organized under it. The IRA constitutions promoted one dimensional governments premised upon **absolute** political power in the tribal council. It authorized the creation of tribal courts but not as a co-equal branch of government with independent decision making power free from tribal council influence. There is no known evidence that the IRA constitutional template was given deliberately to the tribes for the purpose of compromising the possibility of good government in Indian country but certainly some IRA constitutional governments have fallen prey to an environment of corruption because of the nature of these IRA constitutions. All the governing power is vested in the tribal council.

If political influence prevents a tribal court from deciding cases based upon the evidence presented to it at a hearing, then the fairness of the system is significantly compromised. Tribal court judges should not serve at the pleasure of the tribal council that directs the decision making of the court. Such a scenario only leads to corruption.

The branch of judicial services was created at BIA headquarters in the late 1970's and was designated as such until the Tribal Law and Order Act of 2010 (TLOA). It is now designated as the Office of Tribal Justice. Historically, the BIA took no effective steps to raise the performance standards of tribal justice systems beyond various training programs. The Department of Justice (DOJ) is a relatively new resource for the justice issues of Indian country. Historically, the BIA was the primary federal resource.

The **correctional facilities** of Indian country are substandard on many reservations. Several tribal jails have been condemned but are still in use. DOJ has initiated a tribal jails improvement project that seeks to transform these negative tribal correctional facilities into positive environments. The project includes renovation of existing facilities and the construction of new facilities where appropriate. In many instances the jails that exist in Indian country are remnants of the old LEAA jail projects of the 1970's.

Today, there are several tribal correctional facilities that are state of the art, including the judicial and corrections complex at the Gila River Reservation. The accomplishments at Gila

River took time, commitment and leadership. Governor Rhodes, the former chief judge of their tribal court, was the leader who made it happen.

In the 1970's and 1980's the Bureau of Indian Affairs funded a national training program that utilized Indian organizations to deliver the training for tribal court personnel. Today, although there are many American Indian community colleges, DOJ seems to award the bulk of its training and technical assistance programs for Indian country to Fox Valley Technical College in Wisconsin. There are capable, competent college institutions of Indian country that can deliver these services. American Indian organizations and colleges have a stake in raising the standards in tribal justice. It would be appropriate to let them have a chance to deliver training and technical assistance competitively.

In 1978, the U.S. Supreme Court ruled in the Oliphant case that tribal courts possessed no inherent **criminal jurisdiction over non-Indians**. That remains the law today. As an Indian man, if I was accused of committing a minor criminal offense in San Francisco and the next day appeared before a judge in a San Francisco court for arraignment, I could not defend the charge by informing the judge that "I am an American Indian who lives on tribal lands and therefore you cannot exercise criminal jurisdiction over me." However a non-Indian can contest the jurisdiction of a tribal court on similar grounds and the tribal court judge would be obliged to release him if the judge finds him to be non-Indian.

An emerging issue of tribal court operations is the presence of several non-Indian law professors and their students who are using **tribal appellate courts** as clinics for law student activities. Not only does this practice slow down the appeals process it may not intersect well with the cultural integrity of the local tribal community in resolving disputes. Tribal governments should hire Indian attorneys as appellate court judges. They have a stake in improving the quality of justice that flows from the tribal courts. Non-Indian law professors and their students are not similarly obligated.

An operational issue that does not generate a lot of debate is the **Major Crimes Act** jurisdiction shared by the federal and tribal governments. Although tribal courts must apply only sentencing appropriate to misdemeanor crimes, they are not prevented from exercising criminal jurisdiction over major crimes perpetrated by Indians.

Historically, the Major Crimes Act jurisdiction has encountered enforcement problems. The prosecution of major crimes by U.S. Attorneys has been inconsistent. Rape cases involving Indian women and other violent assaults have gone unprosecuted in some cases. The new Tribal Law and Order Act seeks to address this issue by requiring written declarations by the U.S. Attorneys to tribal officials when cases are declined and the development of more resources to prosecute major crimes on Indian reservations. However, the law is new and standards have not been set and compliance has yet to be effectively measured. Moreover, attitudes must change in the federal arena so that FBI agents and Assistant U.S. Attorneys are willing to prosecute these cases that are destructive to the quality of life in Indian country.

Additionally, crime and punishment in Indian country should be the province of tribal justice systems. The role of the federal government should be to assist tribal justice systems to improve the administration of justice on the reservations not to intervene and assign tasks to the states and local law enforcement. Public Law 280 is still here to impede the realization of fair and equitable justice in Indian country.

Public Law 280 (PL 280) is a federal statute that served as the trigger for Indian termination policies during the Eisenhower administration. It is what set in motion the effort by the federal government to destroy Indian country and the indigenous communities that populate it. The older generation of Indians of that era (the 1950's and 1960's) went to their graves not understanding why they were not Indians any longer. The federal policy makers had no interest in explaining termination to my grandparents' generation.

In the early 1970's President Nixon rejected "termination" and called for a policy of self-determination for Indian country. Congress followed in 1975 with the Indian Self-Determination and Education Assistance Act of 1975. The "termination era" was over. Since PL 280 was part of the "termination" package, why is it still law today? Why not repeal it? Do we need it for law school purposes? The law has never accomplished its ostensible purpose of quelling lawlessness in Indian country. In existing PL 280 states, TLOA will not accomplish anything by throwing money to state and local law enforcement. Those agencies are being paid large sums of money by gaming tribes to do what they are already obligated to do under PL 280 since 1953.

A chronic problem in tribal justice systems is the inability to collect **data** and to deliver it to the appropriate agencies for analysis. At a recent training session I was informed by a

participant that she submits statistics to the regional office of the BIA and information seems to die there. At least this individual was collecting data. Often data is not collected and analyzed at the tribal level for its own purposes. Too often in Indian country data is collected for purposes not relevant for improving local conditions. Researchers often seek information in Indian country to satisfy research needs of their own. Researchers fail to share the data, the results, or any analysis that could benefit Indian country.

Under the TLOA, an employee of the Indian Health Services (physicians or nurses) may request from his/her supervisor permission not to honor a **tribal court subpoena or summons**. I do not believe that there is a similar exemption for federal court.

Many tribes invoke **traditional law** in matters that impact cultural integrity. For example, a tribal court judge once described to me a matter brought before her for adjudication. A young adult tribal member was being mentored by his uncle to assume the uncle's spiritual duties once the uncle had passed on. The young man had trained with him for two years prior to his uncle's death. His uncle told him to enter his house and remove regalia and religious materials when the uncle died. The young man followed his uncle's instructions and removed these items from his house. Other family members went to the tribal prosecutor and filed a criminal complaint accusing the young man of burglary. The prosecutor presented the complaint to the tribal court. The judge was thoroughly knowledgeable about the tribe's traditions and dismissed the case based upon her interpretation of the tradition and not the obvious elements of the tribe's burglary statute. The question that needs to be addressed here is whether or not important tribal traditions can survive the movement toward law school trained tribal court judges and advocates and away from lay persons of wisdom and strong reputations in the communities of Indian country who are knowledgeable about custom and tradition. This may amount to a community trust issue that should be resolved by making room to allow tribal lay persons to continue to function as service providers in tribal justice systems as judges, public defenders, prosecutors or probation officers.

NIJC MANAGEMENT EVALUATIONS

Since its inception, NIJC has conducted management evaluations for tribal courts that request them. The goal of these evaluations is to improve the administration of justice in Indian country. We make certain that the tribal government understands our position – we do not do

"witch hunts". We examine the strengths and weaknesses of the system for the purpose of improving the administration of justice on their reservation.

When we begin each site visit for an evaluation, we meet with the court personnel to give them a briefing of the process. During the site visit, we interview the tribal court personnel individually, the personnel working in related tribal government agencies, the personnel of surrounding jurisdictions, and members of the public who may have complaints about court operations.

The interviews and the examination of operational procedures are conducted using the trial court performance standards (developed by the National Center for State Courts) as a measuring guide to determine the strengths and weaknesses of the tribal justice system. Those standards include: Access to Justice, Expedition and Timeliness; Equality, Fairness, and Integrity; Independence and Accountability; and finally Public Trust and Confidence.

Access to Justice

Public proceedings are an issue in tribal courts to the extent that public seating is often limited and the availability of a bailiff is inconsistent in smaller systems. Courtroom safety is often compromised for both the public and the staff of the court. Since many tribal courtrooms have been designed for other purposes and the space is turned over to court for judicial purposes, there are no safety measures built into the facility. The feeling of safety is not there in some instances.

Another access issue involves that lack of careful management of the caseload. Clerks may not view access as an important consideration. This connects with another access issue: courtesy and responsiveness. This issue can be addressed through effective training internally or externally.

Expedition and Timeliness

These are issues that burden most judiciaries including tribal courts. At the tribal level delays are often tactical moves by advocates who may need more time to prepare or they may feel that the passage of time reduces the drama of a case. Often tribal court appeals seem to consume excessive time before a decision is rendered. This is due in part to the reliance upon

outside resources. This problem can be corrected by using on or near reservation resource individuals who are given an adequate timeframe to produce a decision.

Equality, Fairness, and Integrity

This performance area for some tribal courts is heavily burdened by the lack of separation of powers in many tribal constitutions. When some tribal council members openly challenge the decision making of the court, the affected community questions the integrity and fairness of the judicial system. Whether or not such criticism is warranted, the community fallout can be irreparable.

Independence and Accountability

This performance area is of grave concern. Unlike the federal and state governments, there is no tripartite system in most of Indian country. The tribal council wields absolute political power in most instances. On most Indian reservations there is no separation of powers provision in the constitution or in the law and order code. With no formal separation of powers, any tribal council member can intervene in the decision making of the tribal court. Under current circumstances the due process and equal protection protections of the Indian Civil Rights Act of 1968 are compromised. This is a serious flaw in the tribal governance practices of tribal sovereignty.

Public Trust and Confidence

Those tribal courts that operate effectively with healthy community support are lead by judges who are committed to their service to the people. They have the appropriate credentials and the willingness to do good through the law.

If each tribal court used these performance standards and measuring system as internal tools to improve capacity, many of the chronic operational impediments could be eliminated and Indian communities better served.

RECOMMENDATIONS

- Encourage tribal courts to engage in self-evaluation on an annual basis and to hire an outside, skilled evaluator to render a report on the strengths and weaknesses of the system at least every four (4) years.

- Encourage tribal governments to assure (legislatively) an environment of independent decision making for the court. A "separation of powers" can be accomplished by amending the tribal constitution or by enacting a statute declaring the separation of powers in the law and order code.
- Advocate for the repeal of Public Law 280. This law was an integral part of the "Indian termination" legislative package. It has no utility for Indian country today. Its premise was to destroy tribal sovereignty.
- The Tribal Law and Order Act seems to rely upon a flawed team approach to justice in Indian country. The emphasis should be on promoting **exclusivity** to the tribal governments that have a commitment to separation of powers and the independent decision making of their courts. The team leaders should be the federally recognized tribes that can do the job, not the federal government. Paternalism has not worked in Indian country.
- If the federal/tribal trust relationship is to continue indefinitely, the policy makers should consider developing the services to improving justice in Indian country into "categories of service" that is delivered along demographic types. The chronic one size fits all distribution of federal funds and services have wasted money and energy. There must be a better way.
- Encourage the improvement of court facilities in Indian country. Respect for the judiciary may begin with whether or not the physical plant is presentable. A run down building may not solicit from the community any measure of respect.
- Encourage tribal governments to review and update their law and order codes.

If you need further commentary, please contact me at 707-579-5507 or email me at josephmyers@nijc.org.

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