

Tribal Justice

The Case for Strengthening Inherent Sovereignty

By Robert O. Saunooke

I was intrigued by an article entitled *Access to the Courts: Equal Justice for All*¹ written a few years ago by former ABA president Robert J. Grey Jr. The goal of the article was a noble one. President Grey set forth in great detail the obstacles and challenges to making courts more accessible and justice more obtainable for all people.

President Grey opined that the hope of every great nation was that conflicts between citizens, or between citizens and the state, could be addressed in a manner that was above undue influence, that was supported by an “authority over all the parties,” and that resulted in peaceful resolution. It was the belief of President Grey,

and indeed the belief of the ABA and all legal practitioners, that if this goal were to be accomplished, the courts would be the place to do it.²

In the United States, U.S. citizens are thought to enjoy an unparalleled system of justice which permits the resolution of conflicts by impartial arbiters. Even though we sometimes find our system lacking and we complain about the ethereal idea of “free access” to the courts, generally our system of justice has granted to citizens the opportunity to address grievances before an objective forum. However, after reading President Grey’s article I began to wonder if, in fact, one could find evidence of justice for all in practice in the courts of the United States or anywhere else in the world. Perhaps as members of the legal profession we had taken for granted the ease with which citizens in this country, as compared to citizens of other lands and nations, can address grievances, hire attorneys, file law suits, and move our leaders toward political resolution. Perhaps we had taken for granted that our system of justice was really providing equal treatment and access for all.

In an effort to find an answer to the question of whether justice for all could be found anywhere in the world, I decided to take a trip to another nation for a comparative view. I hoped to find various causal relationships between culture, government, and people that could explain why the concept of justice for all was so difficult to achieve. To be fair I sought a nation that shared similarities with the United States to avoid too drastic a contrast in dispute resolution and legal forums. I tried to find

a nation that spoke some English, even if it was spoken as a second language. I sought a nation that was easily accessible from the United States and one that regularly interacted with the United States.

With luck and a little adventure, I found a promising nation and spent time learning about its history and people prior to my journey. The trip was an amazing adventure of discovery. As I explored the nation’s laws, customs, government, and people, it became abundantly clear that the concept of justice for all, at least in this nation, was at most a very difficult proposition. I quickly recognized that there were vast differences in the quality of justice found there when compared to its next-door neighbor, the United States.

Of course there were the obvious differences in language, history, and culture that one would commonly find when visiting another nation. However, the differences I noticed were deeper and more pronounced; they affected all aspects of the native people’s daily lives, and they proved a major impediment to the nation’s hope for accomplishing true justice for all.

One in every three women in this nation were raped, sexually assaulted, or murdered. Young citizens had a suicide rate much higher than that found in the United States. Poverty, poor educational achievement, inadequate housing, and numerous diseases were still major concerns for the population.³ This was a place where even running water and electricity were often luxuries and unemployment rates were much higher than those of the United States. The free flow of ideas often



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found in the United States was restricted. The nation's newspaper, for example, was run by the government, which closely monitored its content and passed laws that restricted the free expression of thoughts and ideas, not to mention criticism of the ruling party. The nation's laws and the legal system were at best confusing and at worst totally inadequate.

In this nation, court-appointed counsel, freedom of religion, and the right to challenge the government for wrongs committed—basic rights that we take for granted in the United States—were not protected. As my visit ended, I found myself wondering, how could there be justice for all in such a place? How could such a place exist in this day and age?

Here was a nation so close to the United States, one regularly subsidized and aided by the U.S. government, yet traditional U.S. ideas of justice, equality, fair treatment, and protections of citizens' rights had never taken hold.

Where is this place? Why, it is in our own backyard. You have probably visited a similar place yourself; you have probably driven through one believing that you were still in a part of the United States. You probably enjoyed a certain quaintness there and a romantic idea of the place. There is a place like it in almost every state. Perhaps you know it by another name: "Indian reservation" or "Indian Country."

"Indian reservation" is a legal term which includes federally recognized rancherias, allotments, pueblos, communities, and villages. Whatever term is applied, they all are part of separate tribal governments and are considered separate "domestic dependent nations [that] retain sovereign powers. . . ."⁴ There are more than 500 Indian nations within the United States. Residing on reservations are tribal members, members of other tribes, foreign nationals, and non-Indians.⁵

"Indian Country," on the other hand, is a term applied informally to all Indian reservations. It is a phrase which connotes tribal lands, culture, traditions, practices, concepts, ideas—and people.

No one article can possibly cover the many access to justice issues facing Native Americans in the judicial arena. But the

lack of awareness and failure of the federal government to address these issues requires us to begin somewhere.

Tribal Sovereignty and Tribal Cultures: A Complex Mix

The concept of justice for all requires, among other things, an objective judiciary, adequate or court-appointed legal counsel, participation in drafting and passage of laws, funding for the courts or justice systems, and effective law enforcement. The same is true, of course, in Indian Country. However, in Native American communities, access to the courts and judicial process is further complicated by cultural differences and the complex and sometimes confusing cross-jurisdictional application of federal, state, and tribal law to actions occurring within Indian Country.

Native Americans face a number of unique scenarios when dealing with access to courts. In the criminal arena, an officer investigating a crime must ask such questions as who is the victim, who is the perpetrator, what is his or her race or nationality, where did the crime occur, what law can apply, and who wants to take jurisdiction over the case. In the civil realm, the questions are similar and they center on complex personal and subject matter jurisdictional issues that are still being litigated today.⁶

Add to this the fact that many tribes do not have the kind of formal court systems which are familiar to most U.S. citizens. Many tribes follow rules of justice that are based on tradition and customs handed down by word of mouth from generation to generation. They often rely on various levels of arbitration and panels of advisors or councils that rule on legal and criminal matters.

Further complicating access to courts in Indian Country is the fact that Native Americans share dual citizenship: they are citizens of their tribe nations as well as citizens of the United States. However, while acting and living within the boundary of the reservations, tribal members are not subject to or protected by the provisions of the United States Constitution. Even the most basic constitutional protections afforded outside the reservation

are not guaranteed on the reservation. Common terms such as "double jeopardy" and fair and equal treatment in the enforcement of laws are simply not a reality within the confines of the reservation. Even the right to counsel is not available to members of a tribe charged with a crime in a tribal court.⁷

More than four million people identify themselves as Native American or

There are currently 561 federally recognized tribes residing on more than 55 million acres of land.

part Native American.⁸ In recent years, interaction between this population and the states in which tribes are located, the federal government, businesses, and non-tribal citizens has increased exponentially. In addition, non-Indians have found themselves living and working more frequently within the boundary of Indian reservations due to increased gaming operations and other developing trades. Thus, in addition to economic benefits, this increased interaction has also brought increasing levels of criminal

activity, domestic violence, civil disputes, governmental corruption, and numerous other legal problems. Access to fair and impartial forums for resolution of these problems is often unavailable. If the United States is to achieve better and more equal access to courts for its citizens, it must first address the lack of justice for the people who trace their ancestry back to the first Americans—to a time before there was an America.

History of Tribal Dispute Resolution

No discussion regarding the problems facing Native Americans and their judicial systems can begin without some background and understanding of tribal dispute resolution and justice. Since the beginning of time, Native Americans have been keeping the peace and administering justice through their own laws, traditions, and customs. Most tribes resolved disputes and addressed criminal activity by consensus, not by the adversarial system of Anglo-Americans. While each tribe possesses inherent sovereignty and some method of dispute resolution, formal court institutions are a relatively recent development in Indian Country.

There are currently 561 federally recognized tribes residing on more than 55 million acres of land within the United States. In addition there are currently 245 non-federally recognized tribes seeking federal recognition. Almost every state contains trust land or allotments for federal and state Indian tribes. In Alaska alone, there are 223 Native American villages. Each tribe has its own cultural identity, its own government and system of justice, and its own unique way of dealing with conflict.

Early on, the United States recognized the inherent sovereignty of Indian nations to make their own laws and to be ruled by them. This recognition came from congressional action and treaties, as well as case law. Three cases decided by the U.S. Supreme Court during the term of Chief Justice John Marshall became known as the Marshall trilogy and defined the sovereign power of tribal government.⁹ Each tribe today is recognized as a sovereign nation and, as such, each has the inherent right to enact laws and govern itself in a manner

that each deems appropriate.¹⁰

Although there is evidence of judicial and dispute resolution systems in place throughout Indian Country prior even to Columbus, the development of tribal courts as they are now known can be traced to a case in the 1880s on what is now the Rosebud Sioux reservation in South Dakota.¹¹ A Lakota tribal member, Crow Dog, killed a fellow tribal member, Spotted Tail. At the time, there was no formal court system utilized by the Lakota people. Utilizing traditional methods of dispute resolution, the tribe required Crow Dog to provide restitution to Spotted Tail's family in the form of goods and pro-

There are approximately 291 tribal courts.

visions. Although the victim's family was satisfied with the resolution, in the eyes of the federal government, the tribal approach had not inflicted an appropriate punishment. As a consequence, the Department of the Interior, the federal agency responsible for directing Indian affairs, set up "Courts of Indian Offenses" to handle less serious criminal offenses and to resolve disputes between tribal members through the application, not of tribal law or custom, but of federal law and regulations.

It was not until 1934, with the passage of the Indian Reorganization Act, that tribes were encouraged by the federal government to enact their own laws and to establish their own justice systems. Due to limited financial resources, many tribes were not able to adopt their own codes at that time, but, rather, depended upon provisions of Title 25 of the Code of Federal Regulations (C.F.R.). Today many of the

smaller tribes still cannot afford to operate their own tribal courts, and they retain the C.F.R. courts operated by the Bureau of Indian Affairs. Of the 561 federally recognized tribes, approximately twenty-three have courts organized under Title 25 of the Code of Federal Regulations.¹²

There are also approximately 291 tribal courts operating under the control and direction of the tribes over which they sit and operate.¹³ While the C.F.R. courts operate under federal law and rules of procedure, many of the tribal courts operate under a unique hybrid of their own procedures and laws coupled with Anglo-Saxon standards for court systems.

For example, the Miccosukee Tribal Court in Florida has established a system of justice in which two judges sit and preside over cases. One judge is a traditional judge applying customs and traditions of the Miccosukee Tribe in the proceedings. The other judge applies more conventional legal process and law to the case before the court.

On each motion or objection, and throughout the case, both judges consult with one another prior to entering any ruling or decision. Both attorneys and lay representatives may be admitted to practice before the court. Admission to practice is done on a case-by-case basis and requires that the party representing the litigants file an application and take a test demonstrating knowledge and understanding of the tribe and its customs and traditions, as well as the law that will be applied. Tribal laws are not readily available to the general public and cases are rarely, if ever, reported or available for review or research.

In contrast, the court of the Eastern Band of Cherokee Indians in Cherokee, North Carolina, which started as a C.F.R. court and now operates as a tribal court, utilizes a codified set of ordinances and laws that can be found online by any person. The Eastern Cherokee have chosen to adopt the State of North Carolina's rules of procedure for civil cases but have developed their own rules of procedure for criminal cases heard by the court. Many of the issues that come before the court are decided using both tribal law and the guidance and direction of North Carolina state law.¹⁴

Like the Eastern Cherokee and Miccosukee, other tribes have prerequisites for attorneys and lay persons seeking to practice in the dispute forums. There are also judicial qualifications, binding judicial precedent,¹⁵ and appeals from lower dispute systems to some larger final appellate body. In Cherokee, the appellate system culminates in the Cherokee Supreme Court, where a panel of three judges considers all cases on appeal and issues written opinions that become binding on the tribe and its members.

Unlike the Miccosukee and Eastern Cherokee, the Seminole Tribe of Florida has chosen not to have any court system. Instead, tribal member disputes are heard by the Seminole Tribal Council, and other legal matters involving both members of the tribe and non-members are heard in the state and federal courts of Florida in accordance with the laws of the state and applicable federal Indian law and decisions. There is no appellate recourse for Tribal Council action other than to appear again before the Tribal Council.

With 561 federally recognized tribes, there are potentially 561 different dispute resolution systems in place and 561 methods for appearing in front of a tribunal. No one tribe is exactly like the other, and the ways they decide and deal with disputes and legal matters are as varied as the tribes themselves. The differences in judicial systems make it difficult for attorneys or others to deal with legal problems as they arise. This is true regardless of whether the conflict is civil or criminal in nature, and it is further complicated by the judicial and federally imposed jurisdictional restrictions on tribal action.

Jurisdictional Limitations: A Chilling Effect on Access to Justice

Regardless of whether the court is one established under the laws of the tribe, created and operated under Title 25, or simply a dispute resolution system, each acts within a scope of limited authority and jurisdiction. Historically, Indian tribes exercised full authority over every action that occurred within Indian Country.

The Constitution and many of the early Indian treaties expressly acknowledge tribal governments and their authority to mete out justice over any action occurring on Indian lands. As the United States expanded, federal policy began to disfavor tribal self-government in an effort to gain control of Indian lands and to destroy tribal governments. Legal matters within Indian Country, especially in cases involving non-Indians, became a federal or state concern.

Criminal Jurisdiction

Approximately thirty years ago the Supreme Court formalized the federal position on tribal dependency and the limitations for prosecution of non-Indians in *Oliphant v. Suquamish Indian Tribe*.¹⁶ The court in its evisceration of inherent tribal sovereignty determined that sovereign tribes were really “domestic dependent nations” and as such they did not possess the full measure of sovereignty enjoyed by states and the national government. This was particularly apparent in cases involving affairs of non-Indian citizens arising within Indian Country. Since *Oliphant*, the Supreme Court has continued to erode the foundation of what has traditionally been the most basic inherent sovereign right of self governance, that of authority over actions occurring within the sovereign territory itself. This decision meant that when a non-Indian committed a crime in Indian Country, federal or state prosecutors had to fill the jurisdictional void.

Further eroding tribal authority in 1990, the Court extended its *Oliphant* ruling so that particular tribes could not prosecute or otherwise deal with affairs involving members of other Indian tribes. Recognizing the problems such a ruling would cause, Congress quickly passed legislation which affirmed tribal authority over non-members.

For criminal cases, tribes are limited by federal law to only those cases that involve defendants who are enrolled members of a federally recognized tribe, and tribal punishment for any crime, regardless of the severity, must be limited to no more than one year in prison and a fine of \$5,000.¹⁷ To further complicate matters, some tribes are located in states operating under Public Law Number 280 (P.L. 280),¹⁸ a 1953 law which grants to the federal government concurrent jurisdic-

tion over all criminal actions regardless of whether the defendant is a tribal member.

P.L. 280 only added further confusion to a complex matrix of jurisdictional conflict that defined tribal governance at the end of the twentieth century. This confusion had, and continues to have, far-reaching and tragic consequences. The confusion over which law enforcement agency, prosecutor, U.S. attorney, or other justice system investigates, enforces, and brings to justice perpetrators of crimes in Indian Country has fueled a fire of criminal activity ranging from simple assaults and domestic violence to rape and murder throughout Indian Country that goes unreported and unpunished.

Approximately 150,000 American Indians and Alaska natives are victims of violent crimes each year. Representing only 0.9 percent of the U.S. population, these crimes represent more than 1.4 percent of the national total of violent crimes. The vast majority of these crimes, by some studies as high as 80 percent for sexual assault, are committed by non-Indians.¹⁹ But law enforcement and prosecuting attorneys in Indian Country regularly fall short of providing justice for all and protecting the rights of tribal citizens. Despite the horrific statistics of crimes committed in Indian Country against tribal members, prosecution and conviction of non-Indian offenders is rare.

The statistical incidence of domestic violence and other crimes against Native American women are the highest of any other group of people in the United States. One in three Native women will be raped, abused, or a victim of domestic violence. But the rate of prosecution for these crimes, which are believed to be committed primarily by non-Indians, is very low. The Department of Justice’s own records show that, in 2006, prosecutors filed only 606 criminal cases in all of Indian country. With more than 560 federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe. No other group of people in the United States has experienced such a shortfall in protection of its citizens.

Civil Jurisdiction

In civil matters, tribal members and tribal governments struggle as well. Tribal

courts have continued to deal with a very confusing body of law that has continued to shift unpredictably and to limit jurisdiction even as recently as this year. Starting with the Marshall trilogy and continuing through the most recent challenge to tribal court civil jurisdiction in the 2008 case of *Plains Commerce Bank v. Long Family Land and Cattle Co.*,²⁰ the authority of a tribe to exercise civil jurisdiction over non-members and non-native entities has been continually constricted—despite an ever-expanding sea of confusion over judicial and legislative authority.

Traditional jurisdictional questions such as minimum contacts and acts occurring within the jurisdiction have little application when they occur within the boundary of a

act in question occurred on our land, is this judicial body unable to hear the case because some other government has control over the act? These are questions that must be asked in every case occurring or arising out of a relationship with a tribe or tribal member. It affects members of tribes every single day and it continues to wreak havoc on any hope of justice for all tribal members.

Limitations on Actions against Tribal Government, or, What Price Sovereignty?

Many are unaware that the United States Constitution does not apply to members of federally recognized tribes residing within their reservations. The basic provisions contained in the Bill of Rights have little, if any,

series of hearings on the conduct of tribal governments and heard testimony regarding the abuses that some tribal members were enduring at the hands of sometimes corrupt, incompetent, or tyrannical tribal officials. In 1968, the Indian Civil Rights Act²³ (ICRA) was enacted in response to the revelations that ensued. ICRA was passed by Congress in an attempt to impose upon tribal governments certain restrictions and protections afforded by the U.S. Constitution. This represented a significant intrusion by the federal government into the internal affairs of tribes. Even so, as time went on, it proved to have little effect in permitting tribal members to challenge governmental action for what would clearly be violations of basic civil rights if they had occurred outside the reservation boundary.

Initially, ICRA was intended to give tribal members some forum or means to address such violations of individual rights as the taking of property and the arbitrary imposition of unfair and unjust laws by the ruling body of the tribe. For a period of roughly eight years, a number of suits were filed in federal courts seeking redress of wrongs and providing many members with the first opportunity they had ever had to challenge actions of their governing bodies. Nothing in ICRA gave away basic sovereign rights inherent to a tribe, but members could challenge tribal action—something previously unheard of in Indian Country.

By 1978, however, the Supreme Court dramatically limited the impact of ICRA on tribes in *Santa Clara Pueblo v. Martinez*.²⁴ *Martinez* dealt with issues of tribal membership and tribal law that prevented enrollment of minor children of female members but permitted enrollment of minor children of male members who married outside the tribe. The mother of one such child brought suit under ICRA claiming unequal application of the law and thus a violation of ICRA provisions. The court held that although ICRA did require tribes to adhere to many of its provisions, it was not the intent of Congress in passing ICRA to permit the federal courts to oversee compliance with ICRA except in matters of habeas corpus petitions.

In essence, the court decided that ICRA interpretations were better suited for resolu-

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reservation. The Supreme Court has carved out numerous exceptions to tribal jurisdiction when non-Indians are involved in a civil matter.²¹ After creating these exceptions, the Supreme Court periodically revisits issues once thought resolved and diminishes protections for tribal members' rights, including the right to petition courts of their own choosing for justice. The ability of tribes and their members to exercise jurisdiction over non-member activity continues to be a point of contention and an area of law that hinders the access that members of tribal nations have to fair dispute resolution.

Imagine if you can a system in the United States where the first question a judge or attorney must ask in representing a litigant is, What race are the parties? Or: Though the

application in Indian Country. The U.S. Supreme Court has long made clear that, although Indian tribes were subject to the dominant plenary power of Congress and the general provisions of the Constitution, tribes were nonetheless not bound by the guarantee of individual rights found in the Fifth Amendment. This dubious principal began in 1896 with *Talton v. Mayes*.²² Subsequent Supreme Court decisions have affirmed that (a) tribes are not acting as arms of the federal government when they punish tribal members for criminal acts and (b) Indian tribes are exempt from the requirement that they extend many of the constitutional protections governing the actions of state and federal governments.

In the 1960s, Congress sponsored a

tion and analysis in tribal courts and not in a forum created by the conquering government. In *Martinez*, the Court again took steps to protect tribal sovereignty, this time at the expense of the tribal members themselves. The Court disregarded the intent of ICRA, which was to give some basic protections and rights to tribal members when tribal governments exceeded their own laws and authority. The case protected tribal sovereignty at the expense of justice for all. What is a member of a tribe to do, for example, when there is no process by which he or she may challenge tribal action or inaction? What is a tribal member to do when the members of the governing body are all from one family—and he or she is not? Access to legal process in those situations is simply not available.

The congressionally created and judicially interpreted limitations on challenges to tribal actions are one of the major stumbling blocks to justice for all in Indian Country. Standing on the outside looking into Indian Country, one might wonder whether or not such a limitation on action against a tribe has any real consequence. In fact it does. Members of tribes have seen voting rights taken away and enrollment in the tribe dissolved as a means of controlling participation in the election of governing officials. Retroactive applications of punishments and loss of membership in a tribe have been regularly written into tribal codes as a means of eliminating members who oppose tribal action. Tribal culture and tradition, the unwritten law of the tribe, is regularly used to support action of political leaders even when no written proof of said “custom and tradition” can be found and instead is based upon unsubstantiated interpretations and fallible memory. Often the traditions once believed to be correct are removed in favor of those that support the actions of the majority or ruling class of the tribe. Is this justice for all?

Failure of the Feds

As the Supreme Court has noted, tribes are “dependent independent nations.”²⁵ Therefore a huge burden of policing and managing legal action within Indian country falls on the shoulders of the federal government. Yet the federal government has a difficult time meeting trust obligations and intervening in matters involving rights of

tribal members. As was recently observed in a federal decision involving U.S. trust responsibilities to Indian tribes, in practice the United States has failed miserably in its fiduciary and other treaty obligations to Indian tribes and their members.²⁶

dent has affirmed through executive order and declaration that all agencies of the U.S. government are to work with and involve tribes prior to the passage of any law, policy, or other mandate that might affect them. A policy of government-to-government con-

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Add to this breach of trust the fact that the federal government continually enacts legislation that affects Indian Country without any consideration of or consultation with the individuals affected—and you have a recipe for judicial disaster. It cannot be said that Congress does nothing to interfere with “sovereignty” throughout Indian Country. More accurately put: Congress fails to adequately consider Indian Country in its actions. Congressional action to date has continually miscalculated the effect legislation will have on Indian Country and the problems that this legislation will present to tribes and those residing within tribal boundaries.

Instead of taking action to correct abuses of basic rights, Congress repeatedly enacts sweeping legislation affecting Indian Country without sufficient consultation or consideration of the effect such actions might have. In 1975, President Nixon introduced the Indian Self-Determination and Education Assistance Act,²⁷ sweeping legislation that completed a fifteen-year policy reform. Nixon intended to create a policy of self-determination within Indian country and to commit the federal government to encourage “maximum Indian participation in the Government and education of the Indian people.”²⁸ This was to be achieved by working hand-in-hand with tribal governments on all legislative and policy matters.

Since the passage of the act, every presi-

sultation has been promoted and ordered by presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush. And from 1975 until 2007, there were no attempts by the Department of Justice or the Attorney General to conduct even one consultation with any Indian tribe or group of tribal members to deal with judicial, criminal, or other kinds of legal issues.

I am reminded of the story about the President who visited with the Chief of the great Sioux nation. The President did not feel that such a meeting was appropriate, as the Chief was not as great a man as the President in terms of power and authority. After all, the President had been educated at the finest universities and was the leader of the free world, while the Chief had no education and lived in a teepee.

The two met and decided to go fishing on a local lake. In the process of casting, the Chief’s line got tangled in some reeds close to the shore. To solve the problem, the Chief stood up in the boat and walked across the top of the lake to the reeds, untangled his line, and returned. The President was duly impressed, and when his line became entangled in the reeds, he too stood up and began to walk across the lake, at which time he promptly sank to the bottom.

After being pulled from the lake and back into the boat, the President remarked to the Chief that his opinion of the Chief had now changed. The Chief, said the President, must

truly be a wise and powerful man if he could walk on water. The Chief simply replied that he was not very powerful but that he simply knew where the rocks were in the lake.

The point is simple. Indians know how to govern themselves and to provide mechanisms for justice. Congress simply needs to consult with and include tribes and members in the process prior to enacting legislation because we know where the rocks are.

Federal Action Needed

Since *Martinez* it has been clear that, absent consultation with Indian tribes prior to

The need for a Native American presence on the federal bench has become all too apparent.

enacting congressional legislation, the ability of courts, members of tribes, or any other party to take any action against a tribe for abuses of basic human rights or to hope for access to any system of justice in Indian Country will fail. The idea of “sovereignty” in Indian Country has prevented, or better yet impeded, congressional attempts to set out basic provisions of law that would clarify much of the confusion and foster further development of dispute resolution within Indian Country.

It is clear that justice for all for tribal members will require an act of Congress that clarifies ICRA and its progeny. Additionally, Congress needs to once and for all take steps to overrule the Court’s holding in *Oliphant* and to increase the current sentencing constraints that tribes may impose on persons who commit violent acts in Indian Country. Who is better suited to provide for their needs, investigate crimes occurring within their boundaries, and punish the perpetrators than the tribes themselves?

Measures for Ensuring Justice for All in Indian Country

Since *Oliphant* and more recently in *Long Family Land and Cattle Co.*, the ability of any member of any tribe to have confidence that justice will be done has been greatly diminished. It is clear that if justice for all is something that we are going to strive for, it must be justice for all citizens of the United States, including the residents of Indian Country. Indian Country does present some specific, unique issues and problems, but none of these is irremediable.

Pass Federal Laws Permitting Tribal Members to Sue Tribal Governments

It would not be an intrusion on tribal sovereignty to enact legislation that would permit members of Indian tribes to pursue legal action against their tribal governments for abuses and violations of basic civil rights. Tribal governments regularly interact with the United States and receive numerous federal grants and other kinds of federal funding that require waivers of sovereign immunity and application of federal law. These requirements are prerequisite to receiving federal funding and a condition of doing business with the United States, and no one has maintained that these are infringements on sovereignty. To permit members to have a forum for redressing disputes involving tribal leaders and violations of tribal law would only empower and increase the strength of the tribal sovereign and further enhance confidence in tribes and their systems.

Appoint Native American Judges to the Federal Bench

Increasing a Native American presence on the federal judicial bench is a necessity that

has long been ignored. In the history of the federal court system, there have only been two Native American judges appointed to the federal bench. In contrast, there have been 151 African Americans, 16 Asian Americans, and 88 Hispanic Americans appointed as federal judges. There are currently no active judges who are Native American.²⁹

Almost every case involving Native Americans involves federal law and policy, and the Supreme Court hears more cases involving Native Americans than it does any other group. A diverse judiciary that includes Native Americans is essential to Native Americans’ confidence in courts as dispensers of equal justice.

Recently Justice Stephen Breyer and members of the House Judiciary Committee expressed concern over a lack of diversity on the federal bench. It was clear during the hearings on the judiciary that, unless more was done to increase diversity, the public would fast become convinced that courts are open only to the most privileged.³⁰ The fact that there is not even one Native American on the federal bench in any Article III court reinforces the idea that Native American people lack access to the courts and cannot obtain equal justice. This perception became abundantly clear in the recent arguments before the Supreme Court in the *Long Family Land and Cattle Co.* case. Justices Antonin Scalia and Anthony Kennedy, in questioning counsel for the appellant Plains Commerce Bank, inquired whether one could “incorporate under tribal law?” In response, counsel for the bank stated without reservation that “you cannot incorporate under tribal law.”³¹ Anyone familiar with Indian tribes and Indian Country would have answered the question much differently. There are an abundance of tribal governments that have adopted articles and laws for the incorporation of companies, partnerships, and limited liability corporations. The need for and importance of a Native American presence on the federal bench has become all too apparent.

Educate Judges and Attorneys about Native Americans’ Legal Status

Education of attorneys and judges as to the unique and diverse status of Native Americans in criminal and civil matters would further increase awareness and con-

confidence in the judicial process. Although almost every state in the union has a connection to a tribe and its members, only two states pose any questions on their bar exams regarding Native American issues. Few law schools offer classes regarding Native American legal process or legal history. And even fewer attorneys practice in the field of Indian law. Those who do are usually focused on legislative policy making or representation of Indian tribes and not on individual members.

The result of this lack of knowledge is that Native American issues fall through the cracks. Additionally, attorneys handling cases involving Native Americans miss unique legal issues and nuances of law that could strengthen their cases in important ways.

Education in the culturally sensitive areas of particular tribes is also a necessary component of law enforcement's ability to carry out its obligations and duties. Too often stories are told of the insensitivity and lack of understanding by federal and state investigators when investigating crimes occurring in Indian country.

Conclusion

As President Grey observed:

Real access to the courts is fundamental to the health and vitality of any democracy. It is the shield used by citizens to protect themselves against tyranny, abuses, and simple errors in judgment. Access to the courts is the lifeblood of the system because from it flow all other rights. It helps preserve order when conflict arises and keeps citizens actively participating in the proper use of their collective power.³²

Native Americans have few of the protections available to U.S. citizens off the reservation and little ability to challenge tyranny or abuses. If the culture and lifeblood of tribes and their people are to continue to exist, a new approach and attitude to methods of dispute resolution must be contemplated, and Congress must act to restore to the tribes the authority to govern the actions of those who voluntarily reside and act within Indian Country. After all: we know where the rocks are. ■

Endnotes

1. Robert J. Grey Jr., *Access to the Courts: Equal Justice for All*, EJOURNAL USA: ISSUES OF DEMOCRACY, Aug. 2004, <http://usinfo.state.gov/journals/itdhr/0804/jjde/grey.htm>.

2. *Id.*

3. U.S. COMMISSION ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

4. *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 8 L.Ed. 25 (1831).

5. See, e.g., Memorandum of the U.S. Attorney General on Indian Sovereignty (June 1, 1995), "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes," available at <http://www.usdoj.gov/ag/reading-room/sovereignty.htm>.

6. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008), involved a challenge to tribal jurisdiction over a bank that conducted business within the reservation but was not registered to do business there and its sole contact within the reservation involved former trust land that had been converted to fee simple land within the reservation. The Court ruled that the bank had not consented to jurisdiction by the tribe and that the tribal court had no jurisdiction over matters occurring within the reservation but on non-Indian land.

7. Indian Civil Rights Act, 25 U.S.C. 1301 et seq. (1968) (ICRA). Passed in 1968, the ICRA was created to give some measure of protection to members of Native American tribes. The act contained elements of the U.S. Bill of Rights, but notably absent were provisions for double jeopardy, establishment of religion, and right to counsel at governmental expense. Since passage, the Supreme Court has determined that the act does not permit members of a tribe to pursue legal action against the tribe for violating any provisions of the act. It is, in other words, a law without teeth.

8. See, e.g., United States Census 2000, American Indian and Alaska Native Tribes in the U.S.: 2000 (United States Census Bureau, 2000), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab001.pdf>.

9. Three cases from the early nineteenth century, all written by Chief Justice Marshall, provided a foundation for federal Indian law: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).

10. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987). Indian tribes retain attributes of sovereignty over both their members and their territory to the extent that sovereignty has not been withdrawn by federal statute or treaty.

11. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

12. 25 C.F.R. 11.100 (2007). A true and accurate figure of current courts is not available, as the Bureau of Indian Affairs and its parent agency, the Department of Interior, has been shut down and its operations severely curtailed due to pending litigation filed by a number of tribes for breach of trust obligations.

13. See National Tribal Justice Resource Center, www.tribalresourcecenter.org.

14. The laws and ordinances of the Eastern Band of Cherokee Indians are readily accessible at www.municode.com, and cases before its tribal court and the Cherokee Supreme Court are accessible through LexisNexis and the Tribal Court Clearinghouse website, <http://www.tribal-institute.org/>.

15. The Cherokee Court is bound by decisions of the U.S. Supreme Court, U.S. Court of Appeals for the Fourth Circuit, and acts of Congress. *Cherokee Tribal Code* §7-2(c).

16. 435 U.S. 191 (1978).

17. At least one court, the Cherokee Tribal Court, has attempted to expand criminal jurisdiction to include any foreign non-U.S. citizen and non-members who agree to have their criminal cases prosecuted in the tribal court. See *EBCI v. Torres*, 2005 NACE 0000007.

18. Public Law No. 83-280 is a 1953 federal law establishing "a method whereby States may assume jurisdiction over reservation Indians." Codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326, this law mandated a transfer of federal law enforcement authority within certain tribal nations to state governments in six states: California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except later the Menominee Reservation) and, upon its statehood, Alaska. Other states were allowed to elect similar transfers of power at the initiative of state residents. Since then, Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah have assumed some jurisdiction over crimes committed by tribal members on tribal lands.

19. Bureau of Justice Statistics, A BJS Statistical Profile, 1992–2002, American Indians and Crime (U.S. Dep't of Justice December 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>.

20. 128 S. Ct. 2709 (U.S. 2008).

21. *Montana v. United States*, 450 U.S. 544 (1980). Generally, jurisdiction over non-members in tribal courts was appropriate if there was (1) express congressional delegation, (2) taxation, licensing, or other means regulating the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements, or (3) conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

22. 163 U.S. 376 (1896). Individual rights protections applicable to federal and later state governments do not and cannot be applied to Indian tribes.

23. 25 U.S.C. § 1301 et seq.

24. 436 U.S. 39 (1978).

25. *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 8 L.Ed. 25 (1831).

26. *Cobell v. Kempthorne* (previously *Cobell v. Norton*), No. 96-1285 (D.C.D.C. 2008). Cobell sued to recover \$47 billion in missing funds owed

to various tribal members stretching back as far as the early 1900s. The case is believed to be the largest class action lawsuit against the United States and has resulted in numerous sanctions against the United States Secretaries of the Interior and the removal by the court of a federal judge who repeatedly ruled in favor of the Indians. The case is currently being considered for appeal.

27. Pub. L. No. 93-638 (1975), codified at 25 U.S.C. 14 (2007).

28. *Id.*

29. See statistics of the Federal Judicial Center, www.fjc.gov.

30. *Pay Hearing Raises Questions of Delinkage and Diversity in Federal Judiciary*, 39 THE THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS 5 (May 2007), available at <http://www.uscourts.gov/ttb/2007-05/pay/index.html>.

31. See Transcript of Oral Argument at 3, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008).

32. Robert J. Grey Jr., *Access to the Courts: Equal Justice for All*, EJOURNAL USA: ISSUES OF DEMOCRACY, Aug. 2004, <http://usinfo.state.gov/journals/itdhr/0804/ijde/grey.htm>.