

## **The Role of Tribal Courts in Promoting Safety, Justice, and Healing – A Tribal Justice Perspective**

Good morning. I am honored to be among you this morning, in this group with such long standing commitments to justice and promoting wellness throughout Indian country.

I have been asked to address the role of tribal courts in promoting safety, justice and healing. As I prepared my remarks, I reflected on the roles of tribal courts and the expectations on tribal judges. I reflected on the inside and outside pressures that surround the work of tribal courts. I also reflected on my own role in various tribal communities and on my discussions with other tribal judges.

In most of those conversations over the years, whether we refer to them as grumbling sessions between tribal judges, or conference-induced group therapy sessions, a consensus tends to emerge about what's the hardest thing about being a tribal judge.

First, that it's most difficult to be a judge in your own community rather than for another tribe, given the fact that you are so close to what's going on, and that your judicial decisions will invariably make enemies in your community, or even family.

And second, the hardest cases to preside over are those that deal with political hot button issues in your community, such as citizenship or enrollment issues, or power struggles between various constituencies, again, because your judicial decisions will invariably make enemies in your community, or family.

When I first became a tribal judge, it was for another tribe. I later became a judge in my own community. During the early part of my career, I tended to agree with the consensus I just mentioned. But as my years on the bench progressed, although I am still a spring chicken compared to many, I have come to the opposite conclusion.

The hot button political issues in your own community are the easy part. You've been put in your position as a tribal judge for a reason. You know what the law is. You know exactly what the response to your decision is going to be before you make it. You read and interpret the law to the best of your abilities, and setting personalities and power struggles aside, you make a decision based on legal realities. The chips fall where they may. You are still a part of that community and part of that healing process.

The hardest part of being a judge, is sitting in a community that is not your own, trying to learn the dynamics and initially having to relying only on your instincts and perceptions to guide you, particularly when you are first presented with violent crime scenario.

When a case is presented to you for the first time, you've never physically seen the parties involved, you know nothing of how this crime has impacted the family or the community involved. You know nothing of the situation that led to this outcome, not to mention what an appropriate solution for the community might be.

What do you do? This is the scenario that federal and state court judges find themselves in regularly. It's the scenario from our law school textbooks, and it's the scenario that modern mainstream judicial ethics standards hold up as the preferred norm.

State and federal judges are suppose to know very little about the parties involved, they are suppose to avoid seeking additional information about the parties and particularly in the criminal justice courtroom, judges are suppose to make their decisions based only on what is presented in that courtroom and admissible for consideration pursuant to appropriate rules of evidence. Some one is guilty or not guilty. A verdict is rendered and the judge never sees the parties again, absent the frequent recidivism that would land this party back before the same judge.

This could very well be the outcome, for the tribal judge sitting in another tribe's court, if tribal court follows the lead of, or mirrors their state and federal counterparts. Most tribal courts are different that state and federal courts and that's a truth we should embrace. It's where the role of tribal courts in promoting safety, justice and healing is unique. And the distinction lies in how the tribal court defines itself and how it proceeds.

When I refer to a tribal court, that doesn't just mean the building, the judge, the robe. It means the tribal court system as a whole and necessarily includes everyone involved in that system, the law enforcement, probation and correction officers, drug and alcohol programs, mental health counselors, victim advocates, health care professionals, peacemakers and the tribal judge.

It means that, although the judge is ultimately charged with ensuring the tribal laws are followed and that the defendant's civil rights are guaranteed, the tribal judge rarely acts independently in the final outcome of the case as a whole. At least not independently, in the sense of the word that suggests that one is acting entirely alone based on only that information submitted at trial.

Now, I've just mentioned two things that tends to raise eyebrows in certain settings and lends itself to stereotypes with respect to the outside legitimacy of tribal courts and tribal judges. The first being due process and civil rights and the other being the concept of judicial independence.

I had the pleasure of sharing my thoughts on some of these topics a few months ago with my colleagues at the National American Indian Tribal Court Judges Association (NAICJA). I noted then, as I remind us here today, that 2008 marks the 40 year anniversary of the passage of the Indian Civil Rights Act by Congress.

And the Indian Civil Rights Act was, as you all know, an act that was designed to provide legal protections for individuals who find themselves before tribal justice system or other tribal institutions. It was an act that had the consequence, unintended or otherwise, of moving forward the assimilation process, where outside forces pressed tribal courts to mirror their state and federal counterparts.

And I pose the question, in light of our current tribal justice systems, whether we are better off now than we were 40 years ago, when the act was pass and the fallout from the act was put in motion.

Forty years ago, our respective tribal courts and peacemaking efforts were, like today, in varying states of development or redevelopment. Many of our tribes had rich histories of tribal courts or other dispute resolution forums and I will mention a little bit about my own tribe because a case from our tribal courts is often cited as the reason why Congress passed the Indian Civil Rights Act in the first place.

I served a term on the Cherokee Nation Supreme Court that ended in 2006. That's the same judiciary that rendered a decision in Talton v. Mayes back in the late 1800s. Talton v. Mayes was a criminal law case in which one of our tribal citizens was convicted of murder and sentenced to death. At the tribal level, the proceedings were adversarial and mirrored what one might have found in a state or territorial court at that time. The defendant was afforded a grand jury prior to the indictment, he was represented by an attorney, had is case presented to a jury and was afforded post-conviction sentencing hearing. These proceedings were part of the extensive judicial records of the Cherokee Nation.

Following the conviction at the tribal trial court but before exhausting the Cherokee appellate process, the defendant sought habeas relief in a federal court, arguing that his United States constitutional rights had been violated because the Cherokee Nation grand jury only consisted of 5 people, where the United States constitution required 6 people to serve on a grand jury.

That case made it's way up to the United States Supreme Court as the second case from a tribal court following a tribal decision on the merits, the first being Crow Dog. Just like in Crow Dog, the United States properly ruled that the case should not be in federal court, and that the Defendant had no rights under the United States Constitution to protect against the exercise of tribal power.

Of course, the Defendant had multiple rights under Cherokee law, and there was never any allegations about the tribe treating the defendant unfairly during the course of the legal process. No allegation that the tribal court was unjust. His only gripe? There was one fewer people on his grand jury that led to his criminal case than he would have gotten had he been had it been a federal court case.

None the less, Talton v. Mayes, the US Supreme Court case, stands for the proposition that the United States Constitution does not apply to protect defendants in Indian country. That concept really scares folks on the outside, at least that's what they point to, and the case is used as the legal rationale for Congress passing the Indian Civil Rights Act -- An Act that was intended to extend due process protections to tribal court litigants, particularly in the criminal justice setting.

It still amazes me that the very case that is cited as the reason we needed Congress to pass an Indian civil rights act was a case is a tribal court case, in a court of record, where the defendant was represented by an attorney, that was tried before a jury, followed by a bifurcated sentencing process with the opportunity for full appellate review.

And to me, that boils down to one thing. Arrogance. The arrogance that allows Congress to pass a law to provide civil rights protections that have always existed in our communities. The arrogance to turn a blind eye to actual work of tribal institutions. The arrogance to assume that tribal institutions are less than their state and federal counterparts. And the arrogance to presume that an adversarial process is the only way to conduct a criminal justice system.

We saw it from Congress at the time of the passage of the Indian Civil Rights Act. And we have continued to see it, from the federal courts in a series of cases from Oliphant to the recent Long, the most recent US Supreme Court case to divest tribal courts of jurisdiction. And the arrogance of the federal courts is similar to the Congress with the Talton v. Mayes example.

One needs only read the recent Supreme Court cases to see what I am referring to: In the Oliphant decision, the Duro decision, the A-1 Contractors decision, and in the Hicks decision, and in the Lara decision, the Supreme Court justices employ language expressing their concerns about tribal courts. They presume that tribal courts are subpar. They presume that tribal judges are biased. They presume that defendants in tribal courts never have attorneys. They presume that tribal courts, because they are not bound by the text of the US Constitution, do not extend due process, basic civil rights or basic fairness to the people who appear before it. And on what evidence do they base these fears upon?

I ask that rhetorically because in Oliphant, Duro, A-1, Contractors, or Hicks, Lara, or in any case that has ever gone to the United States Supreme Court out of a tribal court, there has never been a single allegation in any of those cases where the Defendant has ever raised a due process concern about the way that things were handled by the tribal court.

The litigant's only argument to the federal courts was that the litigants didn't want the tribal court to have power over them or their conduct.

One of the other concerns that has been expressed by the Supreme Court justices is that the jury pool at tribal level would only be comprised of Indians, thus implying that a non-member could never get a fair shake in a tribal court. The only tribal court case since Talton v. Mayes that has made it's way up to the United States Supreme Court after a full trial on the merits in the tribal court was the recent Long case. A little known fact about that case, is what's actually in the tribal code with respect to jury selection, which the Supreme Court justices couldn't concern themselves with.

The tribal code actually had a provision that if one of the litigants is a non-member or non-Indian, they could make a motion to the judge and request that the jury pool include non-Indians. The attorneys in that case never made the motion to the tribal judge, and during the tribal jury selection process, they never once used a challenge to remove a single juror from service.

So again, the concerns expressed in these judicial opinions, not only are unsupported by empirical data of any type, but they are in fact rebutted by the experiences of the actual litigants in the cases that actually make it to the federal courts.  
So what's to be made of all this?

Forty years after the enactment of ICRA, where are we at?

I think there's two schools of thought.

One school of thought is that we are exercising a less extensive jurisdiction than what we did in 1968, because, the US Supreme Court, despite the protections in the ICRA, has consistently chipped away at our jurisdiction on the grounds that they don't still see us as equals.

The other school of thought, is, so what? So what if we have lost some cases dealing with non-Indians? How much has that really impacted what we do as tribal judges or peacemakers on a daily basis. How many of our cases, as tribal judges and peacemakers, really deal with these kind of cases that have made their way up to the supreme court?

Have our case loads declined as a result of these cases? No, our tribal court dockets have sky rocketed and the types of cases we are hearing diversifies significantly each year so that we are handling matters for ourselves today that we wouldn't have handled in 1968. And, since most of us had CFR courts, rather than tribal courts or perhaps no courts at all in 1968, hasn't the last 40 years meant an explosion of tribal decision making that has led to very good things in our communities?

In the 40 years after the ICRA? Many of our tribes have certainly taken steps to answer and address this issue of outside legitimacy. And, although we know that civil rights and due process have been guaranteed in our institutions forever, we have still amended our own tribal codes and sometimes constitutions to incorporate or copy verbatim the Indian Civil Rights Act provisions so that ever one on the outside can see what we have always known.

We go out of our way in the tribal courts to make a record for the outside world that we have preserved civil rights protections to everyone before us, sometime we go out of our way we make what I think is the mistake, which I am equally guilty of, of writing our opinions as much for the federal judges that might read them as for the parties to the case or the community members are appointed to serve.

If there's one thing that we might all learn from Cherokee example, where the Talton v. Mayes proceedings mirrored what might have happened in a federal or territorial court of that time, it's that no matter how much your tribal institutions might look like local microcosms of other institutions, in the eyes of Congress or the Supreme Court justices, it's still a tribal court.

And that's not to end on a sour note, but it's to put some context on the last 40 years and to remind us to keep our eye on the ball. We do not exist for the sake of outside inspection. We exist to make our own decisions and heal what's wrong in our communities. We do not need to change ourselves for their sake. Their impression of us is never going to change until they change.

But, what has happened on the ground, in a very positive way, over the last 40 years, that when Indian people come together in conference such as this, and share their stories and give some serious thought about what they really want for their communities, and in their justice systems, the very last thing they want is a tribal court that looks and acts like a mirror image of the federal and state counterparts contemplated in the Indian Civil Rights Act era.

Some tribes came to this epiphany early on and no tribe was left unharmed by the efforts of the federal government to impose western notions of justice in Indian country. Even the Navajo Nation, that many people look to as leaders in the Peacemaking process, have had their own long struggle where they had to shake off the controls of the CFR courts and start the move toward an evolution in their jurisprudence that is still on-going to this day.

Where we sit today, as we end these proceedings and go home to do our work, we get back to the question, are we better off now than we were 40 years ago?

I think the answer is a resounding yes.

It's when Indian people get together and think deeply about the issues in our communities we always find our solutions from within. We have to work hard sometimes to listen to ourselves, but the knowledge is there.

And one of our most prized piece of knowledge, a thing that other societies try to copy, is our peacemaking and, in a criminal justice context, our restorative justice and healing model.

And I think it's important to remember that it's got to be the peacemaking, as we define it and acknowledge that it's not always a warm and fuzzy thing that other jurisdictions perceive or want it to be, but that sometimes, like in the Talton example, our communities understand that peacemaking can mean having to come to a very hard conclusion, that our communities cannot have peace unless certain members of our community are removed, either thru death, long term incarceration for safety reasons, or the cultural death of banishment and exclusion.

If there's a lesson to be learned and employed in the next 40 years, I think it's simple: we need to spend less energy concerning ourselves with outside legitimacy and instead, concentrate the bulk of our energy internally.

And that kind of tireless energy, I feel is at a fever pitch in Indian country as most every community I've been involved with is focusing their energies on constructing a truly tribal responses to our common issues.

At the outset of my talk this morning, I mentioned how hard it is, to walk into a community that you know little about and attempt to sit as a judge when you know nothing of the parties involved, the solutions that might work, and the history that lead the parties to this critical situation. And I mentioned that the beauty of being a tribal judge, as opposed to a state or federal judge is that, I can rely on a more collaborative approach, where I can work together with others in the tribal court system, to find solutions. And I thought about how hard it must be for judges in other systems, where in the absence of a formal drug court setting, a judge must sit alone in judgment.

If there's an irony in any of the things I've discussed today, it's the current movement in state courts toward a restorative and therapeutic justice model. I think the trend is for other judges to see what we've known all along and if the federal court opinions don't bode well for how the outside world views the role of tribal courts, the reverse acculturation, certainly does.

We've have been coached by outsiders to make our tribal courts look more like federal and state courts as a way of promoting tribal sovereignty. Now state judges want their courts to look more like tribal courts. I think that's a start in the right direction.

In closing, I want to mention what I think is the emerging role of the tribal courts, in promoting safety, justice, and healing and that's to acknowledge that we cannot think of our role as limited to the reservation. We need to think of community in terms broader than the reservation boundaries. Many of our communities have a high rate of recidivism that includes offenses in the surrounding off-reservation communities.

This means that our community members find their way into surrounding state jurisdiction and the state criminal justice system, a system that is not addressing our communities' needs. The state communities are looking for answers and for the first time, we are seeing states reach out to tribes, particularly tribal courts, for help.

For those of you that did not attend the Walking on Common Ground conference at this facility the last two days, let me share a brief success story. In Minnesota, a PL280 state with a history of strained state-tribal relations, at a county-tribal level, the state and tribal judges have worked out a collaboration where they sit together on Fridays, presiding jointly over a healing to wellness court serving both Indians and non-Indians clients. They realized, just as many tribal court have realized, that you cannot address dysfunction in a vacuum.

We've got to think beyond the way we do things now and continue our progress. We need to think beyond reasons why this type of arrangement cannot happen in our community and decide simply to make it happen.

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