

INDEPENDENT REVIEW TEAM

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**ORAL TESTIMONY OF ELBRIDGE COOCHISE, CHIEF JUSTICE, RETIRED
INDEPENDENT TRIBAL COURTS REVIEW TEAM
BEFORE THE HOUSE INTERIOR, ENVIRONMENT AND RELATED AGENCIES APPROPRIATIONS
SUBCOMMITTEE FOR THE FISCAL YEAR 2014
BUREAU OF INDIAN AFFAIRS APPROPRIATIONS
April 25, 2013**

Thank you for the opportunity to testify today and to address the serious funding needs that have limited and continue to hinder the operations of Tribal judicial systems in Indian Country. I am the Lead Judge representing the Independent Tribal Court Review Team. We thank this Committee for the additional \$10.0 million funding in FY 2010. These funds were a blessing to Tribes. Even minimal increases were put to good use. It is the strong recommendation of the Independent Tribal Courts Review Team that the Federal Tribal Courts budget be substantially increased in FY 2014 to support the needs of Tribal judicial systems.

Budget Priorities, Requests and Recommendations

- 1. +\$10 Million Increase for Tribal Courts above the FY 2010 enacted level**
- 2. + \$58.4 Million authorized under the Indian Tribal Justice Act of 1993, P.L. 103-176, 25 USC 3601 and re-authorized in year 2000 P.L. 106-559 (no funds have been appropriated to date)**
- 3. Support the requests and recommendations of the National Congress of American Indians**

The increase will support:

- 1. Hiring and Training of Court Personnel**
- 2. Compliance with the Tribal Law and Order Act of 2010**
- 3. Compliance with the VAWA Act of 2013**
- 4. Salary Increases for Existing Judges and Court Personnel**
- 5. State-of-the-Art Technology for Tribal Courts**
- 6. Security and Security Systems to Protect Court Records and Privacy of Case Information**
- 7. Tribal Court Code Development**
- 8. Financial Code Development**

The Independent Court Review Team supports the proposed \$1.0 million increase in the FY 2014 President's Budget. The fight against crime and drugs has led to more arrests which is increasing the caseload in the Tribal Court System. The continuing implementation of the Tribal

Law and Order Act (TLOA) and the recent enactment of the Violence Against Women Act (VAWA), further strains the capacity of the Tribal Judicial System which is underfunded, understaffed and ill-equipped to function effectively and in a manner comparable to non-Indian government judicial systems. Tribal Courts are at a critical stage in terms of need.

Background:

The Bureau of Indian Affairs (BIA) within the Department of the Interior provides funding to Tribal governments to supplement their justice systems including courts. Tribal courts play a "vital role" in Tribal Self-Determination and Self-Governance as cited in long-standing federal policy and acts of Congress. Funding levels from BIA to support Tribal justice systems have not met the Federal obligations.

There is a great deal of variation in the types of Tribal courts and how they apply laws. Some Tribal courts resemble Western-style courts in that written laws and court procedures are applied. Others use traditional Native means of resolving disputes, such as peacemaking, elders' councils, and sentencing circles. Some Tribes have both types of courts. The Bureau of Indian Affairs (BIA) also manages a small number of CFR (Code of Federal Regulations) courts.

Since 1999, Bureau of Justice Assistance in the Department of Justice has administered the Tribal Courts Assistance Program, designed to provide funds for Tribes to plan, operate, and enhance Tribal judicial systems. They have made attempts to evaluate Tribal Courts but discovered their means of doing so was insensitive to American Indian and Alaska Native (AI/AN) people and unrealistic in the absence of elements that were key to Indian Country, such as: (1) the importance of Tribal culture and traditions; (2) the inability to apply state and local criminal justice initiatives to Tribal settings; (3) the lack of cooperation from non-Tribal entities; and, (4) the lack of available data on Tribal Justice.

The Independent Court Review Team has had more hands on success in reviewing Tribal Court Systems. For approximately seven (7) years, we have been traveling throughout Indian Country assessing how Tribal Courts are operating. During this time, we have completed 84 court reviews. We also completed 28 Corrective Actions. There is no one with more hands-on experience and knowledge regarding the current status of Tribal Courts than our Review Team.

Justification for Request:

- 1. Hiring and Training of Court Personnel** - Tribal Courts make do with underpaid staff, under-experienced staff and minimal training. (We have determined that hiring Tribal members limits the inclination of staff to move away; a poor excuse to underpay staff.)
- 2. Compliance with the Tribal Law & Order Act of 2010** – To provide Judges, Prosecutors, Public Defenders, who are attorneys and who are bared to do “enhanced sentencing” in Tribal courts
- 3. Compliance with the 2013 VAWA Act** – to provide Tribal Courts with the ability to provide non-Indians with all the rights under the U.S. Constitution in domestic violence actions in

Tribal courts (12 person juries, provide attorneys for non-Indians, provide attorneys in court personnel in domestic violence cases as in TLOA, etc.)

4. **Salary Increases for Existing Judges and Court Personnel** – Salaries should be comparable to local and State Court personnel to keep pace with the non-Tribal judicial systems and be competitive to maintain existing personnel.
5. **Tribal Courts Need State-of-the-Art Technology** - (software, computers, phone systems, tape recording machines.) Many Tribes cannot afford to purchase or upgrade existing court equipment unless they get a grant. This is accompanied by training expenses and licensing fees which do not last after the grant ends.
6. **Security and Security Systems to Protect Court Records and Privacy of Case Information** - Most Tribal Courts do not even have a full time Bailiff, much less a State-of-the-Art security system that uses locked doors and camera surveillance. This is a tragedy waiting to happen.
7. **Tribal Court Code Development** - Tribes cannot afford legal consultation. A small number of Tribes hire on-site staff attorneys. These staff attorneys generally become enmeshed in economic development and code development does not take priority. Tribes make do with under-developed Codes. The Adam Walsh Act created a hardship for Tribes who were forced to develop codes, without funding, or have the state assume jurisdiction. (States have never properly overseen law enforcement in a Tribal jurisdiction.)
8. **Financial Code Development** - We have rarely seen Tribes with developed financial policies. The process of paying a bond, for example, varies greatly from Tribe to Tribe. The usual process of who collects it, where it is collected and how much it is, is never consistent among Tribes.

Tribal Courts Review:

There are many positive aspects about Tribal Courts. It is clear that Tribal Courts and justice systems are vital and important to the communities where they are located. Tribes value and want to be proud of their Court systems. Tribes with even modest resources tend to allocate funding to Courts before other costs. After decades of existence, many Tribal Courts, despite minimal funding, have achieved a level of experience and sophistication approaching, and in some cases surpassing, local non-Indian Courts.

Tribal Courts, through the Indian Child Welfare Act, have mostly stopped the wholesale removal of Indian children from their families. Indian and Non-Indian Courts have developed formal and informal agreements regarding jurisdiction. Tribal governments have recognized the benefit of having law-trained Judges, without doing away with Judges who have cultural/traditional experience. Tribal Court systems have Appellate Courts, jury trials, well-cared-for Courthouses (even the poorer Tribes), and Tribal Bar listings and fees. Perhaps most importantly, Tribes recognize the benefit of an independent judiciary and have taken steps to insulate Courts and Judges from political pressure. No longer in Indian country are Judges automatically fired for decisions against the legislature.

Nationwide, there are 184 Tribes with Courts that received \$23.47 million in Federal funding in 2012. The Review Team's Assessments have indicated that the Bureau of Indian Affairs only

funds Tribal Courts at 26% of the funding needed to operate. Now BIA faces \$114 million in cuts and Tribal courts face 5% cuts plus .9% reduction due to the budget sequester/budget cuts. Tribes who have economic development generally subsidize their Tribal Courts. On the flip side, Tribes who cannot afford to assist in the financial operations of the Court are tasked with doing the best they can with what they have even at the expense of decreasing or eliminating services elsewhere. This while operating at a disadvantage with already overstrained resources and underserved needs of the Tribal citizens. The assessment suggests that the smaller Courts are both the busiest and most underfunded.

The grant funding in the DOJ is intended to be temporary, but instead it is used for permanent needs; such as funding a Drug Court Clerk who then is used as a Court Clerk with Drug Court duties. When the funding runs out, so does the permanent position. We have witnessed many failed Drug Courts, failed Court management software projects (due to training costs) and incomplete Code development projects. When the Justice funding runs out, so does the Project.

As a directive from the Office of Management and Budget in FY2005, our Reviews specifically examined how Tribes were using Federal funding. In the seven fiscal years through June of FY2011 there were only two isolated incidents of a questionable expenditure of Federal funds. It has been speculated that because of our limited resources, we compromise a person's due process and invoke "speedy trials" violations to save Tribal Courts money. Everyone who is processed through the Tribal judicial system is afforded their Constitutional civil liberties and civil rights.

We do not wish to leave an entirely negative impression about Tribal Courts. Tribal Courts need an immediate, sustained and increased level of funding. True. However, there are strong indications that the Courts will put such funding to good use.

There are several courts where the roofs leak when it rains and those court houses cannot be fixed due to lack of sufficient funds. The Team took pictures of those damaged ceilings for the BIA hoping to have additional funds for the Tribes to fix the damaged ceilings.

Tribal Courts have other serious needs. Tribal Appellate Court Judges are mostly Attorneys who dedicate their services for modest fees that barely cover costs for copying and transcription fees. Tribal Courts do offer Jury Trials. In many Courts, one sustained Jury Trial will deplete the available budget. The only place to minimize expenses is to fire staff. Many Tribal Courts have Defense Advocates. These advocates are generally not law trained and do a good job protecting an individual's rights (including assuring speedy trial limitations are not violated.) However, this is a large item in Court budgets and if the defense advocate, or Prosecutor, should leave, the replacement process is slow.

This Congress and this Administration can do something great. Put your money where your promises have been and support the Acts you have passed. Thank You.