



Hualapai Judiciary

Chief Judge Joseph Thomas Flies-Away

Hualapai Nation
Post Office Box 275
Peach Springs, AZ 86434
Telephone: 928-769-2338
Facsimile: 928-769-2736

July 22, 2008

**Testimony of
Chief Judge Joseph Thomas Flies-Away
Hualapai Judiciary**

**United States Senate – Committee on Indian Affairs
Concerning Tribal Courts & ‘Tribal Law and Order Act of 2008’**

Mr. Chairperson, Madame Vice-Chairperson and Members of the Committee, Gamyu:je,

I am honored to be invited to testify before the Senate Committee on Indian Affairs on Tribal Court Systems and the proposed Tribal Law and Order Act of 2008. Unfortunately, the timeframe for preparation did not give me the ability to fully articulate all of the prevalent issues that come to mind though I will attempt to address some of the most important issues as I and our Tribal Council sees them. Below I describe a few of these issues and comment briefly on specific sections of the Act.

First however, let me let me briefly introduce myself to you. I am a Hualapai Tribal Member and the Chief Judge of the Hualapai Judiciary. I have served as a Tribal Council Member and Planner for my Tribe in recent years. I have also served as a judge for the past 12 years and in total sat in 9 tribal courts throughout Indian Country and serve currently as a pro tem judge, visiting judge, and appellate justice for various tribal courts as well as consult with tribes when I have time. I have been privileged to work with many other tribal courts throughout the country, including native villages of Alaska, to help develop their judicial systems and infrastructures, perform evaluations, draft and review codes, and provide other technical assistance to Courts and tribal government. I have also taught at the university level in Indigenous Community & Nation Building and Federal Indian Law. In my travels and efforts throughout Indian Country I see a strong commitment and dedication from tribes/villages to continue to rebuild their nations taking the best of their past and culture and mingling with the advantages and innovations of the present. I see indigenous peoples take what little resources they

may have and make the best of it even though the community and nation building journey is difficult and frustrating much, if not all the time.

Below is a short description of the topics that I believe are important for the Committee to hear and take into consideration in your legislating efforts. Unfortunately, as the time given to each witness for verbal testimony is only five (5) minutes, my comments to the Committee will be limited at that proceeding. I will do my best to articulate what I think is most important in the little time that I have. I imagine that there may be questions for the witnesses by the Senators on the Committee. With your questions I hope I will be able to stress other areas that require federal intervention and assistance that I do not mention in my direct comments and in this written testimony.

As requested by Senator Dorgan the primary purpose for my testimony is to discuss Tribal Courts in general and comment on the proposed Tribal Law and Order Act of 2008. Below I highlight various issues regarding tribal courts that I think are relevant, which I have written about previously and discuss with tribal folks at every opportunity. I am sure you will hear similar remarks from the other witnesses who I am honored to be sitting before you today. Of course what our tribal leaders wanted me to emphasize up front is the need for more funding for tribal courts and the areas that support its work. Funds are required so that the need for culturally accordant conflict resolution for our Tribe and others can be accomplished more thoroughly and for benefit of those persons under our jurisdiction. The other issue my Council directed me to emphasize is the need for detention and rehabilitation resources that allow the Court to address the criminal and other negative behavior that hampers our Tribe's progress.

My final statements here regard the proposed Tribal Law and Order Act of 2008. Below I have highlighted a few sections in the Bill that our Tribe and I both have questions and/or concerns.

I will begin with general comments about Tribal Systems:

Tribal Court System (Tribal Justice System):

*** Critical Component of Tribal Government**

Tribal Courts and Tribal Court systems are critical components of tribal government. All governments must provide a means for conflict resolution for its polity, its people. Without such a forum disputes and disagreements of all sorts would negate the ability of the *people to gather, ground, and grow* (i.e. build and rebuild communities and nations). Prior to Anglo intervention in the Americas indigenous peoples practiced various forms of conflict and dispute resolution. While the practices may not have resembled those of Western Culture the ability of tribal members to participate in debate and defend their points of view was not just allowed, but expected (i.e. due process). Unfortunately, because tribal ways did not resemble European practices, they were thought to be savage, backward, and uncivilized. Suffice it to say the forums for indigenous people worked for native folks then as much as the methods worked for other peoples around the world.

Tribal Courts/Systems currently are the tribal forums that attempt to resolve various controversy and conflict that Tribal peoples, our governments, and other persons face. Many systems rely on written law (constitutions and codes) to direct the settlement of disputes and conflicts. Others apply customary processes, procedures, and laws to address controversy. In all the tribes/villages that I have visited thus far their Tribal Court systems were thought to be critical to the success of their governmental function to serve the needs of the people. Or, if the systems were in development tribal staff and officials would state that they wanted their Court System to provide a fundamental service that would benefit the community/nation as a whole. As are many nations around the world, each tribal or village government is at a different period of development of a justice system. Some are quite advanced, while others are just beginning to develop a judicial system under the conditions and circumstances they may face in their part of the United States. Despite the various places these tribes may be in their development journey, they each need the resources, support, and encouragement to continue to develop the best practice judicial system they can to bolster their overall governing system.

*** Requires the Cooperation & Collaboration of Various Sectors (Departments and Programs) of Tribal Government**

As a judicial system is an important and critical part of tribal government, it cannot function all alone and unto itself. A system to resolve conflict and dispute for any polity must include or collaborate with

a number of various agencies, programs, and people of their government. A true full compliment of a judicial system, though to many it is not as clear, does not only consist of a judge, clerk, probation officer, jury members, advocates, and bailiff. To fully move towards resolution or conciliation of criminal, civil, juvenile, family, and other issues brought to Court there are many others who contribute to a beneficial end; to peace.

This is not to say that Separation of Powers is not an important and necessary characteristic of good government. Separation of Power is essential to keep various branches of government from interfering with each others work. Nevertheless, there is considerable contribution and cooperation that must exist between the branches or departments that must be present in order for resolution/concord to be reached. Individual court users, practitioners, and staff including the citizenry of a nation must be trained and provided insight of how this separation works and how parts of government must also work together.

* **Expression and Exercise of Tribal Sovereignty**

The existence and administration of a Tribal Court – Judicial Branch is an expression and exercise of Tribal Sovereignty. As mentioned above the provision of conflict and dispute resolution is an important part of a government. Because conflict resolution is a necessary service that the Tribe must provide, the provision of such a service demonstrates the government’s sovereign responsibility to address and fix its own problems, controversy, and other conflict. As a tribal court confronts conflict and listens to the parties regarding the issues raised it must develop a understanding and ruling of the law, wholly applicable to that matter and to that sovereign. The creation and development of law is unique to that nation. This practice contributes to the individuality and sovereignty of that nation. As a tribal court continues to resolve conflict, develop standards and precedent for litigants to apply, the more the Tribe is expressing and exercising its sovereignty.

* **Contributes to Economic Possibility**

Tribal Courts further support an environment of impartiality and fair play. In doing so individuals, corporations, and others believe they can safely engage in commerce and business with the Tribe and tribal members with the assurance that wrong doing can be challenged, addressed, and corrected. Economic development and possibility become more achievable when there is a forum for legitimate

legal issues to be brought and remedies sought. Whether the matter concerns a promise/contract issue of a small amount of money between tribal members or a multi million dollar claim between a corporation and vendor, Tribal Courts can provide a competent and transparent forum for resolution.

Many tribes, however, are still developing Courts where business matters can be brought. Outside business entities are weary of tribal law and processes, which may not resemble a U.C.C. or other commercial code. Overtime, however, with greater resources and further development, tribal courts will provide the necessary components and legal procedures as does any state or federal court hearing such cases. Hopefully, however, Tribes will not adopt other jurisdiction's laws full sail without assuring its efficacy for their nation. Tribes who have developed in this area can be supportive and helpful to others in their development.

* **Manifestation of Tribal Culture (i.e. culturally accordant conflict resolution/peacemaking)**

Tribal judicial systems can be fashioned into culturally accordant tribal institutions that reflect the culture and history of the tribal people it serves. Tribal Courts over the years have been grappling with the nature of the adversarial system that was more or less imposed upon them. While some tribes find the adversarial system adequate and useful, other tribes desire to develop courts that reflect more of a restorative nature that tribal people traditionally practiced. Unfortunately, because the adversarial system is deeply ingrained in tribal court personnel, as that is what they were taught, and 'outsiders' bring to the Court, it is difficult for some to reclaim the traditional method and move forward with it. Some tribes, however, have been successful at this development and produced peacemaking processes or other traditional means of bringing people to peace, and the practices are greatly appreciated by their people as they feel familiar and are comfortable with it. Tribes must be allowed to develop these processes, perhaps allow for various tracks for court users to choose from so that the greatest appreciation can be solicited.

* **Uphold and Protect Constitutional Rights (including due process)**

Tribal Courts serve to uphold and defend the rights of all persons, not just members, who are within its jurisdiction. Individual rights as defined in tribal constitutions, codes, and federal statutes such as the Indian Civil Rights Act are best adjudicated in the Tribal forum where the tribal court judge can

articulate what the law means in that jurisdiction. This is even a more important when the tribal judge is a member of the tribe who can also apply or be open to applying tribal custom and tradition.

Tribes throughout the United States are actively pursuing or considering revising and amending their constitutions to articulate a more tribal perspective, rather than applying the constitutions that were basically written for them or modeled after B.I.A. documents. What may be at issue as tribal courts continue to develop and revise their constitutions, are conflicts between rights as articulated in their constitutions and tribal government (and their subordinate entities) claims to sovereign immunity? If a tribal government does not afford due process to a person under their jurisdiction, and or change the law on an individual after the matter was brought to Court, when the Constitution articulates various rights, does sovereign immunity completely shield the Tribe from what might be illegal or unconstitutional conduct? These claims will be brought before tribal courts and have been slowing reaching the courts of late, and outcomes may be telling as to the future of tribal sovereignty.

* **Requires Adequate Funding & Resources (facilities & program support)**

All Tribal Courts, including the Hualapai Tribal Court, require the funding to fully meet the judicial needs of their constituents. While some tribes, such as Hualapai, have been able to put some of their own general funds into Court development, the amount is not enough to fully satisfy the need the growth the Tribe has had over the years. Hualapai, and I am sure others, require adequate facilities and space to perform its function and purpose for our people. Many tribal courts are housed in older buildings and required to hear cases in makeshift court rooms while at the same time endeavoring to demand the respect of Court users and others who come to Court. Offices are small and hearings sometimes must be held in them as there may be only be one court room. Funding issues, of course, are always an issue for tribal governments, but it appears that given judicial services is a primary and critical function of government that federal funding would rise to the level of support that such a need requires.

* **Necessitates Consistent Availability of Detention & Rehabilitation Resources**

Lastly, more funds are required for both detention and rehabilitation resources. The Hualapai Tribe has put some of its own funding into building a state of the art juvenile detention facility only to have it sitting unused for almost a year. The B.I.A. is unable to provide the funding for staffing and

operating the facility and the Tribe cannot assume the responsibility alone. The Tribe initially intended to provide resources in the facility to address rehabilitation issues, however, again B.I.A. funds do not serve this function and I.H.S. is also unable to assist in the goals the Tribe set out to accomplish. Over time, perhaps, after many years of economic develop for us and others, the Tribe(s) may be able to cover various costs for this operation, however, at this very moment, the need is huge for our young people to be not only disciplined but provided the healing services they need to someday be positive contributors to our tribal society.

Other

There is a Federal Law that prevents B.I.A. & I.H.S. employees from being brought to Tribal Court via a subpoena as well as denies the Court the ability to issue Order to Show Cause orders to B.I.A. detention staff for failure to provide adequate detention services (see below).

Tribal Law and Order Act of 2008

Sec. 303 – Access to National Criminal Information Databases

While criminal data collection is important in order to analyze criminal behavior and trends, this act will allow tribal law enforcement officials to enter criminal data into a national data base, presumably regarding tribal members. One question is how will the criminal information be utilized by federal, state, and tribal jurisdictions? Will it be used to augment sentencing orders in each jurisdiction? Tribal leaders in the past have been wary of sharing criminal information as it is thought to infringe on tribal sovereignty. Do tribal leaders need to approve the sharing of information in a manner and form that they prefer or is the federal government to do so for them?

Sec. 304 – Tribal Court Sentencing Authority

Section 304 of the Act provides for increased Tribal Court sentencing authority for one charge from 1 year/\$5,000.00 to 3 years/\$15,000.00. Though this provision to strengthen Tribal Court sentencing power is positive, capacity issues and shortfalls for most Tribal or B.I.A. detention facilities must be addressed and remedied. Many Tribes simply do not have jails and rely on the B.I.A. to provide

detention services. The supply of bed space does not meet the demand, which creates an inconsistent detention system allowing for release of inmates for lack of space, medical ailments, and swapping of more dangerous inmates for lesser dangerous ones. The need for more detention funds (both facility construction and programmatic) is required. Not only must more detention facilities on tribal lands be constructed, Tribes must have resources to staff the jails and provide treatment (healing & restoration) to tribal inmates. Though the Act states the possibility of housing tribal inmates in Federal detention facilities, the preference for tribes may be to house their tribal and native community members in a tribal detention facility.

Sec. 603 - Testimony by Federal Employees in Cases of Rape and Sexual Assault

Section 603 of the Act will allow federal employees in rape and sexual assault cases to testify in tribal court. The Hualapai Tribal Court has received two letters from both Bureau and I.H.S. officials citing 45 C.F.R. Part 2, which states that federal employees are prohibited from giving testimony unless the appropriate Director approves. How does Section 603 mesh with 45 C.F.R. Part 2?

A Hualapai Tribal Court Order to Show Cause on B.I.A. Detention Supervisor for failure to assure that a Defendant (father) was transported to a custody Hearing, upon proper notice to him in the detention facility, caused a U.S. Solicitor to threaten the arrest of any Tribal Judge who interferes with the federal officer's duties. The Tribal Court merely issued the OSC to the B.I.A. Supervisor for failure to perform his trust responsibility to the Tribe by bringing the inmate to Court.

A Hualapai Tribal Court Order requesting the attendance of an I.H.S. Community Health Nurse to a hearing to develop a service plan for a Child in Need of Care was denied as the Order needed to be approved by a senior official in the area. Again a letter to the Court citing 45 C.F.R. Part 2 was sent to the Court stating the Nurse cannot provide testimony to the Court. The hearing, however, was scheduled only to solicit the input of service providers, include the Community Health Nurse, to develop a plan to provide services to the Minor Child and family to meet his needs. The Nurse was not requested to provide testimony to prove innocence or guilt in any way.

● Page 9

If the Act is to promote cooperation between federal agencies and the Tribes, then this area must be reviewed so that the Tribal Court's request for federal assistance is honored and any trust responsibility honored.

Please accept this testimony to the record for the Hearing.

Hankyu, C.J. Flies-Away