

**Testimony of the Honorable Thomas W. Weissmuller
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Former Chief Judge, Swimomish and Tulalip Tribal Nations

**Serving the National Criminal Justice Association, (NCJA)
On the Board of Directors and Advisory Council
And The
National American Indian Court Judges Association (NAICJA)
On the Board of Directors**

**Before the United States Senate Committee on Indian Affairs
Oversight Hearing to Examine Declinations of
Prosecutions in Indian Country**

Mr. Chairman and members of the Committee, thank you for holding a hearing about this critical issue in tribal communities. I appreciate the opportunity to offer examples of what can happen when federal prosecutors decline to pursue cases in Indian Country. In my written submission, I will touch upon the process of managing cases in tribal court when those cases are presented to the federal authorities for possible prosecution in federal court. I will limit my oral testimony to one current case, one memorable case, and some thoughts about the unique aspects of federal prosecutions of major crimes.

My experiences were formed while I served as a trial judge on a handful in Indian Reservations, including the Tulalip and Swimomish Reservations in Washington State between 1997 and January 1, 2005. At that time I returned to Connecticut to assume my current position as Chief Judge of the Mashantucket Pequot Tribal Nation.

My personal experiences have induced me to participate as a Board Member and Advisory Council Member for the *National Criminal Justice Association*, (NCJA) where we address, among other things, cross-jurisdictional challenges. I participate as a Board Member of the *National American Indian Court Judges' Association*, (NAICJA) where we work to assist tribal judges as they attempt to meet the challenges posed by their respective jurisdictions.

As we speak, a man is held at Tulalip under \$50,000.00 bond for allegedly raping a five (5) year old child. The matter was forwarded to federal authorities but there has been no word on whether the matter will be presented in federal court. Tulalip continues to hold the man in jail pending trial before the tribal court. At Tulalip that will be one (1)

year in prison and a five thousand dollar (\$5,000.00) fine for raping a child.

The Tulalip authorities would like to hold off on the local prosecution but they may not remain idle. DNA evidence must be preserved and produced to the defense; child psychological evaluations and forensic interviews must be conducted to allow the defendant an opportunity to meaningful confront his accuser. Physical barriers must be constructed so the child does not face her alleged assailant in open court, a forum that is inherently harmful to children without this added burden. This is all essential to allow the matter to go forward in Tulalip. It must be repeated, and the child must be subjected to it again, if the matter goes forward in federal court.

The alleged perpetrator in the current Tulalip example remains in jail, but not at the direction of a federal judge. No federal judge has yet considered this claim. In less well funded jurisdictions, the defendant would likely remain free. He might even remain in the same home as the alleged victim. I have presided over hundreds of child dependency matters. In more than I care to mention, this scenario has played out.

The current case at Tulalip is but one example of how tribal courts work to overcome the declination of cases by federal attorneys. I presided over the jury trial of another example. In this instance, the federal authorities were contacted and they did not prosecute. They did not formally decline and I believe the statute of limitations eventually ran. The significant thing about this case is that it was prosecuted successfully in tribal court. I will state my recollection of the testimony.

The case involved a young Native girl and her friend. As I recall, she had just turned thirteen and was belatedly celebrating her birthday with a girl of her own age. They were listening to music and having some soda. They were playing on a federal Indian Reservation.

A Native man in his mid to late twenties began to visit with them and share some of their root-beer. He invited them to listen to music at a friend's place. It was close to home and they agreed. It was alleged that the man laced the root-beer the girls were drinking with a root-beer flavored alcohol. After a time, one of the girls left. The other remained with the man. She drank more root-beer and eventually passed out. Two family members received a call that the girl had been seen with an adult man that the callers knew and identified by name. The relatives began to look for the girl.

As I recall, the relatives testified that they found the young girl after a short search. She was in a bedroom with the door closed. As they opened the door, the man, known to them, was pulling himself off of the girl. They testified that his pants were down. The girl was laid over a pile of blankets, face down so her bottom was elevated. Her pants and underclothes were pulled down to her ankles. Her sweater / shirt and bra were pulled unceremoniously over her head, hiding her face and her hair. As situated, the clothing served to hold her arms above her head. Her body was exposed from her ankles to her neck. She was unconscious. The witnesses called the police.

A team of cross-commissioned law enforcement officers, including a forensic nurse, utilized a forensic "rape kit" to recover fluid samples from inside and outside of the victim's body. The fluid was identified as semen. The chain of evidence revealed that the rape kit was properly logged into and out of each location, and that the samples were treated and tested to extract DNA and blood evidence. This was offered at trial. The eye witnesses recounted what they had seen. The victim testified to the events she could recall.

As indicated, defense counsel secured the suppression of the defendant's confession. The trial was managed pursuant to the federal rules of evidence and the tribal rules of procedure, which basically mirrored the federal rules. All witnesses were cross examined by defense counsel and the defense called supporting witnesses. The defendant did not testify.

When the jury issued the verdict, I set the matter on for sentencing. In a federal system, the defendant might have received 18 years. I heard argument on the benefits of utilizing the full one (1) year and five thousand dollars. I sentenced the defendant to the maximum but suspended \$1,000.00 on the condition that he register as a sex offender and undergo sex offender treatment.

In what can only be described as an ironic twist, the defendant was released from jail after serving only nine months pursuant to a federal order intended to alleviate prison overcrowding. It seems the jail identified him as having "nearly completed" his sentence, which was enough to warrant release under the order. After a discussion with the jail wherein the underlying charge was revealed, the facility readmitted him.

The multi-jurisdictional challenge: Reactive v. Investigative Cases

Every tribal judge is attuned to the multi-jurisdictional nature of the matters presented in tribal courtrooms. The perspective of tribal judges may assist you in this area of emerging law, for you hold sway over the federal component, may strengthen the tribal component, and may profoundly influence the state component in this equation.

The United States Supreme Court has decreed that tribes lack the jurisdiction necessary to prosecute non-Native people who have allegedly committed crimes on reservations. The United States Congress has decreed that tribes lack the ability to incarcerate Native people for more than one year on any given offense. As long as these decrees stand, innocent people will be asked to repeat their testimony in multiple jurisdictions.

What does this mean to a victim? With each new jurisdiction, a new set of strangers awaits to exercise another level of official discretion. Police exercise it; prosecutors exercise it; judges exercise it. When a case dove-tails into two jurisdictions, efforts are frequently duplicated and the several levels of discretion are revisited.

The discretion phenomenon is most pronounced in systems that handle what some United States Attorneys identify as "reactive" cases. Some justice systems are designed to handle reactive cases, some are not. When a case is initiated with a 911 call, someone must react. Lives are changed in the moments that follow. For Native Americans living on federal Indian reservations, lives become very complex.

On July 24, 2008, a United States Attorney testified before this committee, stating that Indian country work is "reactive" not "investigative" and frankly I agree. The Department of Justice (DOJ) is geared for investigations that may be protracted. It is not geared to react to street crime on a case by case basis. (Tribal and state police agencies are designed to do this.) The DOJ yields outstanding results from its investigations and subsequent prosecutions. When they take down a major drug ring, they help to stem the flow of drugs to the dependent populations that commit crimes in every jurisdiction, including tribal jurisdictions. We therefore applaud them. We are on the same team.

Reactive cases, however, like assault, disorderly conduct, and domestic violence, require a police force “on the ground.” They need an independent magistrate to conclude that the police officers’ allegation of probable cause exists to justify the arrest. Prosecutors then determine whether the matter will go forward. Judges may enter immediate orders to secure the attendance of the defendant and the protection of the victims. They can convene juries to decide the cases as needed. This is a reliable process that moves ahead with speed and impartiality. Most significantly, the collateral domestic cases (petitions for restraint, custody, dissolution, and child protection) may also proceed. When cases move forward, lives are made whole; justice is achieved.

The filter for an Indian case goes beyond the reduction of actual events to paper so a magistrate can formulate immediate protections. It passes in paper form from police officer to supervisor, to tribal prosecutor, and, in the instance of a major crime, a federal investigator.

The tribal prosecutor files a complaint and moves forward with the domestic case. The federal investigator meets with the Assistant United States Attorney Indian Law Liaison, who will in turn streamline the process and direct the matter internally at the Department of Justice to the appropriate section within the criminal division (e.g. the Organized Crime and Racketeering Division, the Child Exploitation and Obscenity Division, or the Gang Squad, to name a few) before it reaches the appropriate prosecutor for investigation, case analysis, and hopefully, presentation to a Grand Jury. This system is not designed to handle reactive cases.

This concludes my remarks today. Mr. Chairman, Senators, thank you for inviting me to speak. I am happy to entertain any questions that you have.