

**Testimony of Honorable Theresa M. Pouley
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Before the United States Senate Committee on Indian Affairs

**The Tribal Law and Order Act One Year Later:
Have We Improved Public Safety and Justice throughout Indian
Country?**

September 22, 2011

Mr. Chairman and members of the committee, I appreciate the opportunity to provide testimony on the vital role that tribal courts play in the effective administration of justice in Indian Country, to address the changes we have seen with the passage of the Tribal Law and Order Act and to discuss the measures that should be taken to build on this foundation. I speak from my experience as a long time Judge serving tribes in the Northwest, the President of the Northwest Tribal Court Judges Association and a member of the Indian Law and Order Commission. Currently I serve as the Chief Judge of the Tulalip Tribal Court and Northwest Inter-Tribal Court System (NICS) and an Associate Justice of the Colville Court of Appeals. The tribes I have had the honor to serve in Washington State range from urban to rural, and vary in size from small communities with a greatly diminished land base, to tribes with expansive reservations. Although the governmental services and needs vary for these tribes, I have found they all share a core commitment to fairness and justice for their communities. No government has a greater stake in effective criminal justice systems in Indian Country than the tribes themselves.

I was honored to testify before this body in July 2008 to support the legislation that would become the Tribal Law and Order Act. In 2008, this body was considering measures that could be taken to address the alarming rates of violent crime occurring in Indian Country. At that time, the reports and studies that were being compiled and released confirmed what we in Indian Country already knew to be the tragic reality. I will not restate those statistics here, as they have been repeated frequently by many

sources. Thankfully, there does not appear to be any further debate or dispute that Indian Country faces a crisis of violent crime. We are relieved and encouraged that the discussion has now turned to the more fundamental question of how we can reverse this trend and make Tribal lands safe for all of its citizens and visitors. I would also take this opportunity to thank the Congress and the President for the passage of the Tribal Law and Order Act, and the Administration for its remarkable steps to address this issue. The efforts to implement the Act are commendable, particularly the efforts of Attorney General Holder and the Department of Justice.

The Tulalip Tribes & Justice System Background

The Tulalip Tribes consists of a confederation of several Coast Salish Tribes and is a signatory to the 1855 Treaty of Point Elliott. Today, the Tulalip community is located on a 22,000 acre Reservation bordering the Puget Sound 40 miles north of Seattle. This area has experienced rapid population growth and development. Tulalip has 4000 enrolled members, but the majority of Reservation residents are non-Indian. A history of allotments on the Reservation created a checkerboard of Indian and non-Indian land ownership that is common to most Reservations in Washington State. The Tribe has in recent years re-acquired a great deal of its Reservation land, and today the Tribe or Tribal members hold approximately 60% of the Reservation lands with the balance held in non-Indian ownership.

With great effort, the Tulalip Tribe retroceded criminal jurisdiction in 2001. Since then the Tribe has taken on the responsibility to build its own criminal justice system. In the last decade the Tulalip Tribal Justice system has made great strides, developing a full service police department and court system as well as a strong support system of prosecutors, probation officers and public defenders. In that time crime rates have dropped and the quality of life in the community has improved. During the same period of time, the Tribe underwent substantial economic development. The Tribes incorporated Quil Ceda Village to promote Reservation based business development including a casino, retail outlet mall, and most recently, a 400-room resort hotel. The success of this development has created thousands of new jobs, brought in millions of

new visitors to the Reservation and provided much needed revenues to the Tribal Government.

Retrocession of the Tulalip Tribes' criminal jurisdiction from the State of Washington was critical to establishing a substantial increase in public safety on the Tulalip Reservation. In Washington State retrocession of criminal jurisdiction is provided by state statute. There is a draft bill in Washington that would allow individual tribes to "opt in" to taking full jurisdiction within their boundaries and the Tulalip Tribes supports every tribe's ability to decide the exercise of its own authority and jurisdiction.

Tribal Efforts

In 2008 I testified before this body that the Tulalip Tribe was eager to continue to develop its tribal justice system and continue to provide the critical services needed by its population. We then supported passage of the Tribal Law and Order Act and, in particular, asked Congress to authorize enhanced sentencing authority to the Tribes. The Act was signed in July 2010 and I would like to update the Committee on the efforts that are being taken at Tulalip in response to passage of the Act.

Since the Act passed I have had the opportunity to meet with many tribal leaders and federal and state government officials interested in the development of tribal justice systems. Congress should be encouraged that Tribes are patiently and methodically taking measured and reasoned steps toward exercising the additional sentencing authority granted by the TLOA. It is important that we not misinterpret the tribes' lack of immediate implementation of this authority as a sign that the problems are not as bad as stated or that tribes do not care to exercise this authority. We must understand that the TLOA, while offering only an incremental step to improving tribal justice, presents tribes with a substantial change in the way they operate their courts. This change presents risks and costs that the tribes are measuring carefully before simply jumping forward.

The wisdom of the "opt in" provisions of the TLOA is evident as some tribes may judge the changes in TLOA coming at too high a cost to their sovereignty and independence. It is perceived that some of the requirements in TLOA, presumably adopted to protect defendants' due process, will push tribal courts to be more like federal

courts, and this is not typically a welcomed push. At Tulalip we have had to carefully study ways to implement the provisions of TLOA while still retaining our tribal identity and balancing extended punishment philosophies with the holistic programs and methods that have been successful over the years. This has not been easy and it has required careful planning and cooperation of all the key players in our justice system.

When tribes take a realistic look at the provisions of TLOA, it is clear that exercising enhanced sentencing authority will require additional financial obligations. While the Act offers tribes a method to exercise enhanced sentencing authority, it came with no new sources of funding and failed to address the substantial economic challenges tribes are already facing in providing fundamental public services to their communities such as police and courts. Tribes that wish to build their own justice system are generally left to fund that system with only tribal resources. Like the federal and state systems, tribal resources are limited, and tribes must make balanced decisions on where and how they will invest those resources. The Committee should be encouraged by the time invested by tribes to ensure that the decisions they make are right today and right for the future of the tribe.

Enhanced Sentencing Authority Requirements

The Tribal Law and Order Act still leaves the tribes reliant upon federal prosecution of many crimes, and the U.S. Attorney will still decline to prosecute some major offenses. In situations where the U. S. Attorney's Office chooses not to prosecute, expanded authority gives tribal courts the capacity to more appropriately sentence violent offenders. As I acknowledged in 2008 although crimes requiring long-term jail sentences are not a common occurrence at Tulalip, in those situations where the court is faced with prosecuting serious violent crimes, it is important for the Tribal Court to have appropriate sentencing authority. At Tulalip, our focus is on alternatives to incarceration aimed at promoting positive personal changes, healing and preventing recidivism. There are, however, times when the Tribal Court is faced with violent offenders in which longer incarceration periods are necessary and vitally important. Because we are mindful that expanded sentencing authority comes with increased infrastructure demands and

incarceration expenses we are carefully reviewing and amending our tribal code to apply the expanded authority to only the most serious of offenses.

The expense of incarceration may be the highest hurdle for tribal courts to clear before expanded sentencing will be imposed. The GAO Report on Indian Country Criminal Justice, published in February 2011, confirmed that detention space and the cost of detention are major issues for all surveyed tribes. Unless the incarceration costs are assumed or reimbursed by the federal government, few tribes will be able to bear that expense. Regionally, non-tribal governments spend over 70% of their general fund resources on law and justice expenses, and jails are the largest line item in that budget. Few tribes will be willing or able to divert those types of resources from funding sources desperately needed for housing, education, and healthcare. While the federal Bureau of Prisons pilot project to house tribal inmates is notable, it is unlikely to offer a viable long-term solution for all tribes to address this significant expense.

At Tulalip, we are also mindful that cases in which a defendant may face up to three years in custody will carry the expectation that a defendant will receive even more robust prosecution and defense services. This will increase the costs of running the court, as the trials will be longer, requiring more time of the judges and court staff. Defense costs will also likely increase as the need for experts and other special trial preparation increases. Although the commitment to protecting defendant rights is a shared value throughout Indian Country, the ability to provide sufficient funding to justice systems varies greatly from tribe to tribe. Many Indian tribes have extremely limited governmental budgets and sufficient tribal funds are not always available for many essential government functions. If serious public safety issues on many reservations are going to be addressed, the federal government must fulfill its trust obligation by providing funding, or funding mechanisms to provide for public defenders in Indian Country.

Tulalip has found creative ways to support outstanding public defense services for the accused. It has done so by creating a partnership with the University of Washington

Law School and establishing a trial practice clinic at Tulalip Tribal Court. Through this partnership, the University of Washington Tribal Defense Clinic provides the first line of public defense services that are managed by two highly experienced and highly regarded former state public defenders. They, in turn, supervise law students at all phases of the criminal case. In cases where there are conflicts, the Court has a panel of counsel to assign to defendants who meet the financial criteria for a public defender. Success in meeting demands such as public defense will require support from the federal government and creative planning such has been done at Tulalip.

I believe Indian Country is well positioned to exercise the expanded sentencing authority extended by the Tribal Law and Order Act. Some communities will be able to act quickly to amend their practices and laws as needed to implement the Act; others will take years. During that time, significant consultation with and assistance from the federal government will be needed.

Jurisdiction and Authority

Although the Tulalip Tribes supported the changes brought by the Tribal Law and Order Act, those changes are realistically only a good first step to solving the major impediments to the development of vital and fully functioning tribal justice systems. When we recognize the alarming level of violent crime in Indian Country, we must not forget that the majority of perpetrators of violent crime against Indians are non-Indian. Tribes have been stripped of jurisdiction over non-Indian offenders. Tribes seek the assistance of federal law enforcement to address these crimes, but given the few federal law enforcement officers assigned to Indian Country, many of these crimes go unpunished.

The 2010 declination report from DOJ confirmed what those of us in Indian Country have reported for years; the federal government is prosecuting only a very small fraction of major crimes and crimes that are committed by non-Indians that are committed in Indian Country. There are many reasons for this disturbing fact, some more innocent than others, but one fact appears to be true and is most relevant to the discussion today. The federal government is not an appropriate or effective tool for local law

enforcement. The very structure of the federal system makes it better suited to address issues of national security and nation-wide crime. The lack of local resources and lack of understanding and connection to tribal culture, conditions and concerns render the federal system ill suited to effectuate truly meaningful and long-term public safety results. True change can only be achieved when tribal governments and tribal justice systems are given the ability to address the safety of their own communities.

Currently tribes have the ability to detain non-Indian perpetrators for a brief time and turn them over to state or federal authorities for prosecution. The tribe may also exclude the offender from its territory, but the tribe cannot prosecute non-Indians for crimes. We support the proposed VAWA amendments that will recognize tribal authority over non-Indian perpetrators of domestic and sexual violence against Indian women occurring within the physical jurisdiction of the Tribe. Additionally we are pleased that VAWA amendments address the tribe's civil jurisdiction over non-Indians who violate protection orders. We appreciate the Department of Justice's willingness to consult with Tribes on this issue and we greatly appreciate Associate Attorney General Perrelli's testimony in support of the amendments. But that is not enough. The Supreme Court's decision in *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191 (1978) left open the possibility that Congress could change the presumptive rule that tribal governments possess no criminal jurisdiction over non-Indians. The VAWA 2000 amendments, however, did not do so as they addressed only tribal civil jurisdiction and did not discuss tribal criminal jurisdiction. While Congress didn't address it then, it is time to do so now.

While *Oliphant* is one of the most notable court decisions impacting tribal jurisdiction and authority, there are innumerable additional Supreme Court, federal and state court decisions that have thrown the question of tribal authority into a constant state of confusion. In Washington State, for instance, there have been a number of Supreme Court decisions relating to Indian Country which send conflicting messages. Even if the reasoning of the decisions correctly interprets the law, the unpredictable nature of the decisions is disruptive and dangerous.

In September of 2011 the Washington Supreme Court issued its third decision in the case of *State v. Eriksen*. In the first two decisions in 2009 and 2010 the court

affirmed the authority of tribal police to pursue a non-Indian DUI suspect driving on a Reservation road off the Reservation and to stop and detain the suspect until state authorities can arrive on the scene. This decision followed an earlier opinion that authorized tribal police to stop and detain non-Indian criminal suspects on Reservation and turn them over to the state authorities for prosecution. In September of 2011, after a change of Supreme Court justices, the *Eriksen* decision was reconsidered and this time reversed. With this decision, tribal police are powerless to stop criminal suspects that successfully flee beyond the Reservation boundaries.

The *Eriksen* majority noted that tribal officers that successfully complete comprehensive state training, in addition to required federal or tribal training, may be cross-deputized and therefore gain state law enforcement authority to pursue non-Indian perpetrators off-Reservation. Unfortunately, this solution ignores tribal officers' inherent authority under tribal law and discounts their already considerable qualifications. It also creates a dangerous situation. The message to non-Indian offenders is that tribal police have no authority to arrest and if you commit a crime on Reservation you should race to the border to escape prosecution. Even in cases where the tribal police have been cross-deputized, this ruling creates an unacceptable risk. Perpetrators are unlikely to know, or consider, whether officers are cross-deputized. In their mind the risk of prosecution now far outweighs the risk of fleeing. Today it is the best defense to run from all tribal police. This creates a dangerous situation for the perpetrator, the police and the community.

The *Eriksen* case is only one example of the type of confusion that exists regarding tribal jurisdiction and authority and the type of danger that this confusion creates in our communities. The time has come for a comprehensive legislative statement that resolves this confusion and affirms the complete and inherent authority of tribes to regulate and police the public safety threats that occur within the Reservation boundaries.

Juvenile Justice:

The number of American Indian and Alaska Native youth involved in the criminal Justice system remains largely unaddressed and unresolved under the Tribal Law and Order Act. The June 2011 Bureau of Justice Statistics report entitled "Summary: Tribal

Youth in the Federal Justice System” presents a tragic picture of the overrepresentation of tribal youth in the federal justice system. The report notes that tribal youth comprised nearly half of juveniles handled by the federal courts in 2008. It also notes that in 2008, tribal youth served an average of 26 months under federal jurisdiction, which is more than double the tribal justice system maximum sentence at that time. Even more tragic is the fact that the vast majority of tribal youth committing crimes were previously abused and neglected children.

In Washington State, the Center for Court research provided statistics to the Commission on Children in Foster Care which dramatically demonstrated that the more extensive the involvement of youth in the child welfare system, the more likely they will become juvenile offenders. The report noted that over one-half of all native youth involved in the child welfare system will end up with a new offender referral and of those, Native American youth are more likely than any other race (79%) to commit another offense within 24 months.

The intersection of juvenile criminal behavior and child welfare involvement cannot be ignored. The notice provisions of the Indian Child Welfare Act must be enforced and strengthened. As recommended by the National Indian Child Welfare Association, Tribes need a stronger voice and larger presence in state and federal delinquency proceedings. The same practices that are employed in child welfare cases can and should be used to create better solutions for Indian children in delinquency proceedings.

Funding:

In 2008, I testified that tribal courts were the most effective administrators of justice in Indian Country and that Tulalip Tribal Court demonstrated that effective funding results in substantial public safety gains; a principle the federal government agreed with by the passage of the Tribal Law and Order Act. In the last two years the DOJ has stepped up efforts to more effectively meet its prosecutorial duties; it has commissioned numerous studies and reports that have provided very useful data; and Attorney General Holder, his immediate deputies and many DOJ staff have dedicated innumerable hours to consultation with the tribes. All of these measures are greatly

appreciated by the Tribes. Unfortunately, in the last three years, while the Act gives tribal courts the responsibilities and requirements of its state and federal counterparts, one thing has not changed – there has been no increase in base funding for tribal courts.

It is impossible to discuss the subject of the development of tribal justice systems without the subject of inadequate funding and lack of resources taking a central role in the analysis of all problems and solutions. The GAO confirmed in its February 2011 report that all tribes rely on federal funding for justice systems, but for the majority federal funding is a fraction of their total budget. The GAO found that the lack of resources forces tribes to make critical trade-offs in services. Lack of funding prevents tribal courts from maintaining adequate staffing and prevents them from recruiting and maintaining quality and experienced staff. Given the economic and budgetary realities of all governments (federal, state, and tribal), it is unrealistic and unreasonable to simply assert that there needs to be more funding. Although more money would be welcome in Indian Country, we must instead explore more creative and productive methods of distributing the funding that exists and to open doors for the tribes to find and generate new revenue streams so that they can deliver vital services to their own communities.

Although the federal government has fallen short in addressing the critical public safety problems in Indian Country, Tulalip and other Indian tribes fortunate enough in recent years to raise revenues through gaming and new business enterprises have taken on the primary role of law enforcement on the Reservation. Since shouldering this responsibility, Tulalip and other Northwest Tribes have seen crime rates begin to drop, and the quality of life on the Reservation improve. Taking a lead role in criminal justice has gone hand in hand with steady gains in economic development and employment opportunities on the Reservation. Tulalip recognizes, however, that these gains are fragile, because tribes lack reliable revenue sources that traditionally fund government justice systems.

One change that could afford a near immediate infusion of tribal court funding without requiring additional appropriations has already been championed to the Senate. It seems like a simple idea, but one that has yet to be adopted by any legislators or policy-makers; tribal courts should be considered in the same light as all federal, state and local

courts for funding resources. Some state court systems are beginning to recognize that tribal courts can be and should be important partners in the administration of justice in this country. Instead of appearing as strange and foreign bodies, tribal courts are being recognized for their often innovative and effective operations. Even so, tribal courts are often excluded from federal and state planning and budgeting. Tribal justice systems should be included in funding streams provided to their federal and state court counterparts. Judge Raquel Montoya-Lewis and Judge Patricia Martin, President of the National Council of Juvenile and Family Court Judges, testified jointly before the Senate Finance Committee that tribal courts should be eligible for federal court improvement funds available to other court systems. Funding of all court systems must be equal to assure equal results.

I encourage the Committee to identify measures to support and fund strong Tribal law enforcement and court operations. More direct funding to tribal courts is drastically needed. In addition to federal funding, Congress has a role to play in authorizing an expansion of Tribal government authority to raise revenues for tribal justice systems – justice systems that benefit both Indians and non-Indians who reside in and around Reservation communities. Because tribal justice systems are the most effective means of addressing the public safety problems on Reservations, federal funds used to support tribal justice systems are funds well spent. Tulalip has demonstrated that if sufficient resources are dedicated to tribal justice systems, real gains can be made in addressing the serious public safety problems in Indian Country. We urge the Committee to authorize increased federal funding to what works best – building quality tribal justice systems.

Tribal Justice systems and tribal solutions are the best and most effective method to deal with public safety issues in Indian Country. Passage of the Tribal Law and Order Act and the Administration's superb efforts to see effective implementation of the Act are long-overdue, but greatly welcomed major steps toward this goal. But we must not be satisfied with our current achievements. There is a much longer road to journey before we can truly find success. We encourage this Committee to make the hard decisions and make the right recommendations that will take us down that road. We look forward to

the opportunity to work with you on changes to strengthen the effectiveness of our justice systems.