S. HRG. 106–233

TRIBAL JUSTICE SYSTEMS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 1508

TO PROVIDE TECHNICAL AND LEGAL ASSISTANCE TO TRIBAL JUSTICE SYSTEMS AND MEMBERS OF INDIAN TRIBES

SEPTEMBER 29, 1999
WASHINGTON, DC

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TRIBAL JUSTICE SYSTEMS

WEDNESDAY, SEPTEMBER 29, 1999

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Thomas, Inouye, and Wellstone.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. The committee will come to order.

Today we will receive testimony on a bill I introduced on August 5 to provide technical assistance to strengthen tribal justice systems. As the members know, for 3 years we have held hearings on the problems of crime in Indian communities. The administration and Congress responded appropriately by devoting more resources to law enforcement in these communities.

At the same time, the commitment to civil and criminal legal assistance has been lacking. More importantly, for tribes we should focus on and strengthen the capacity of tribal courts and justice systems so that they can handle the growing caseloads, civil as well as criminal matters, that they are faced with.

This legislation is modest and will help Indian legal services providers, tribal judges, court personnel and tribes to arm themselves to build the kind of legal environments that generate confidence in Indians, non–Indians and the business community as well.

Building stronger justice systems is not a novel idea. The United States has recognized that strong justice systems are not just an end in themselves, but lay the groundwork for economic development. From 1992 to 1998, Congress provided $970 million in "Rule of Law" assistance to developing nations, and I am hopeful that this Congress realizes that there are also developing nations right here at home in America, and they are called Indian tribes.

There are three basic areas targeted for attention in this bill: training for judicial personnel, legal assistance for civil matters and legal assistance for criminal matters.

As I indicated, when I introduced the bill, S. 1508 is not intended to supplant or substitute the 1993 Indian Tribal Justice Support Act. The bill is intended to complement that act and make sure that the tribal justice systems and the people that administer them

are equipped to handle the growing burdens tribal courts are being asked to shoulder.

[Text of S. 1508 follows:]

II

106TH CONGRESS
1ST SESSION

S. 1508

To provide technical and legal assistance to tribal justice systems and members of Indian tribes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 5, 1999

Mr. CAMPBELL introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To provide technical and legal assistance to tribal justice systems and members of Indian tribes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Indian Tribal Justice
5 Technical and Legal Assistance Act of 1999".

6 **SEC. 2. FINDINGS.**

7 The Congress finds and declares that—
8 (1) there is a government-to-government rela-
9 tionship between the United States and Indian
10 tribes;

1 (2) Indian tribes are sovereign entities and are
2 responsible for exercising governmental authority
3 over Indian lands;
4 (3) the rate of violent crime committed in In-
5 dian country is approximately twice the rate of vio-
6 lent crime committed in the United States as a
7 whole;
8 (4) in any community, a high rate of violent
9 crime is a major obstacle to investment, job creation
10 and economic growth;
11 (5) tribal justice systems are an essential part
12 of tribal governments and serve as important forums
13 for ensuring the health and safety and the political
14 integrity of tribal governments;
15 (6) Congress and the Federal courts have re-
16 peatedly recognized tribal justice systems as the
17 most appropriate forums for the adjudication of dis-
18 putes affecting personal and property rights on Na-
19 tive lands;
20 (7) enhancing tribal court systems and improv-
21 ing access to those systems serves the dual Federal
22 goals of tribal political self-determination and eco-
23 nomic self-sufficiency;
24 (8) there is both inadequate funding and an in-
25 adequate coordinating mechanism to meet the tech-

nical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation;

(9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems;

(10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and

(11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.

SEC. 3. PURPOSES.

The purposes of this Act are as follows:

(1) to carry out the responsibility of the United States to Indian tribes and members of Indian tribes by ensuring access to quality technical and legal assistance.

(2) To strengthen and improve the capacity of tribal court systems that address civil and criminal

1 causes of action under the jurisdiction of Indian
2 tribes.

3 (3) To strengthen tribal governments and the
4 economies of Indian tribes through the enhancement
5 and, where appropriate, development of tribal court
6 systems for the administration of justice in Indian
7 country by providing technical and legal assistance
8 services.

9 (4) To encourage collaborative efforts between
10 national or regional membership organizations and
11 associations whose membership consists of judicial
12 system personnel within tribal justice systems; non-
13 profit entities which provide legal assistance services
14 for Indian tribes, members of Indian tribes, and/or
15 tribal justice systems.

16 (5) To assist in the development of tribal judi-
17 cial systems by supplementing prior Congressional
18 efforts such as the Indian Tribal Justice Act (Public
19 Law 103–176).

20 **SEC. 4. DEFINITIONS.**

21 For purposes of this Act:

22 (1) ATTORNEY GENERAL.—The term "Attorney
23 General" means the Attorney General of the United
24 States.

1 (2) INDIAN LANDS.—The term "Indian lands"
2 shall include lands within the definition of "Indian
3 country", as defined in 18 U.S.C. 1151; or "Indian
4 reservations", as defined in section 3(d) of the In-
5 dian Financing Act of 1974, 25 U.S.C. 1452(d), or
6 section 4(10) of the Indian Child Welfare Act, 25
7 U.S.C. 1903(10). For purposes of the preceding sen-
8 tence, such section 3(d) of the Indian Financing Act
9 shall be applied by treating the term "former Indian
10 reservations in Oklahoma" as including only lands
11 which are within the jurisdictional area of an Okla-
12 homa Indian Tribe (as determined by the Secretary
13 of Interior) and are recognized by such Secretary as
14 eligible for trust land status under 25 CFR part 151
15 (as in effect on the date of enactment of this sen-
16 tence).
17 (3) INDIAN TRIBE.—The term "Indian tribe"
18 means any Indian tribe, band, nation, pueblo, or
19 other organized group or community, including any
20 Alaska Native entity, which administers justice or
21 plans to administer justice under its inherent au-
22 thority or the authority of the United States and
23 which is recognized as eligible for the special pro-
24 grams and services provided by the United States
25 to Indian tribes because of their status as Indians.

1 (4) JUDICIAL PERSONNEL.—The term "judicial
2 personnel" means any judge, magistrate, court coun-
3 selor, court clerk, court administrator, bailiff, proba-
4 tion officer, officer of the court, dispute resolution
5 facilitator, or other official, employee, or volunteer
6 within the tribal judicial system.
7 (5) NON-PROFIT ENTITIES.—The term "non-
8 profit entity" or "non-profit entities" has the mean-
9 ing given that term in section 501(c)(3) of the Inter-
10 nal Revenue Code.
11 (6) OFFICE OF TRIBAL JUSTICE.—The term
12 "Office of Tribal Justice" means the Office of Tribal
13 Justice in the United States Department of Justice.
14 (7) TRIBAL JUSTICE SYSTEM.—The term "trib-
15 al court", "tribal court system", or "tribal justice
16 system" means the entire judicial branch, and em-
17 ployees thereof, of an Indian tribe, including, but
18 not limited to, traditional methods and fora for dis-
19 pute resolution, trial courts, appellate courts, includ-
20 ing inter-tribal appellate courts, alternative dispute
21 resolution systems, and circuit rider systems, estab-
22 lished by inherent tribunal authority whether or not
23 they constitute a court of record.

TITLE I—TRAINING AND TECHNICAL ASSISTANCE, CIVIL AND CRIMINAL LEGAL ASSISTANCE GRANTS

SEC. 101. TRIBAL JUSTICE TRAINING AND TECHNICAL ASSISTANCE GRANTS.

Subject to the availability of appropriations, the Attorney General, in consultation with the Office of Tribal Justice, shall award grants to national or regional membership organizations and associations whose membership consists of judicial system personnel within tribal justice systems which submit an application to the Attorney General in such form and manner as the Attorney General may prescribe to provide training and technical assistance for the development, enrichment, enhancement of tribal justice systems, or other purposes consistent with this Act.

SEC. 102. TRIBAL CIVIL LEGAL ASSISTANCE GRANTS.

Subject to the availability of appropriations, the Attorney General, in consultation with the Office of Tribal Justice, shall award grants to non-profit entities, as defined under section 501(c)(3) of the Internal Revenue Code, which provide legal assistance services for Indian tribes, members of Indian tribes, or tribal justice systems pursuant to federal poverty guidelines that submit an application to the Attorney General in such form and man-

1 ner as the Attorney General may prescribe for the provi-
2 sion of civil legal assistance to members of Indian tribes
3 and tribal justice systems, and/or other purposes consist-
4 ent with this Act.

5 **SEC. 103. TRIBAL CRIMINAL ASSISTANCE GRANTS.**

6 Subject to the availability of appropriations, the At-
7 torney General, in consultation with the Office of Tribal
8 Justice, shall award grants to non-profit entities, as de-
9 fined by section 501(c)(3) of the Internal Revenue Code,
10 which provide legal assistance services for Indian tribes,
11 members of Indian tribes, or tribal justice systems pursu-
12 ant to federal poverty guidelines that submit an applica-
13 tion to the Attorney General in such form and manner
14 as the Attorney General may prescribe for the provision
15 of criminal legal assistance to members of Indian tribes
16 and tribal justice systems, and/or other purposes consist-
17 ent with this Act. Funding under this title may apply to
18 programs, procedures, or proceedings involving adult
19 criminal actions, juvenile delinquency actions, and/or
20 guardian-ad-litem appointments arising out of criminal or
21 delinquency acts.

22 **SEC. 104. NO OFFSET.**

23 No Federal agency shall offset funds made available
24 pursuant to this Act for Indian tribal court membership
25 organizations or Indian legal services organizations

1 against other funds otherwise available for use in connec-
2 tion with technical or legal assistance to tribal justice sys-
3 tems or members of Indian tribes.

4 **SEC. 105. TRIBAL AUTHORITY.**

5 Nothing in this Act shall be construed to—

6 (1) encroach upon or diminish in any way the
7 inherent sovereign authority of each tribal govern-
8 ment to determine the role of the tribal justice sys-
9 tem within the tribal government or to enact and en-
10 force tribal laws;

11 (2) diminish in any way the authority of tribal
12 governments to appoint personnel;

13 (3) impair the rights of each tribal government
14 to determine the nature of its own legal system or
15 the appointment of authority within the tribal gov-
16 ernment;

17 (4) alter in any way any tribal traditional dis-
18 pute resolution fora;

19 (5) imply that any tribal justice system is an
20 instrumentality of the United States; or

21 (6) diminish the trust responsibility of the
22 United States to Indian tribal governments and trib-
23 al justice systems of such governments.

1 **SEC. 106. AUTHORIZATION OF APPROPRIATIONS.**

2 For purposes of carrying out the activities under this
3 Act, there are authorized to be appropriated such sums
4 as are necessary for fiscal years 2000 through 2004.

○

The CHAIRMAN. I would ask Senator Inouye if he has an opening comment?

Senator INOUYE. I yield to Senator Wellstone.

The CHAIRMAN. Senator Wellstone.

STATEMENT OF HON. PAUL WELLSTONE, U.S. SENATOR FROM MINNESOTA

Senator WELLSTONE. Let me thank Senator Inouye.

Mr. Chairman, I'll just associate myself with your remarks, as I always do——

The CHAIRMAN. Always?

Senator WELLSTONE. Well, not always. [Laughter.]

And, I think, in particular, the importance of tribal courts and the emphasis on getting the technical assistance to professionalize is very important.

The only thing that I wanted to highlight, which is why I asked Senator Inouye if I could just take 1 minute, is I also—having for, I guess, really almost all the time I've been in Minnesota, worked closely with legal services. I am very interested in also this connection that we are now making, an extension of legal services, which I think is going to be very, very important in Indian country. So I think this is a very important initiative, and I fully support it.

The CHAIRMAN. Thank you.

Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Mr. Chairman, I commend you for scheduling this hearing on a matter that has long been a matter of great concern to all of us who recognize the importance of tribal judicial systems.

The court systems of this country are for many people the first, and, sometimes the only, contact they have with the government—be it a State, county or tribal government. The manner in which they are treated in those courts, whether they are afforded the due process guaranteed by our Constitution, shapes the impression they have of the government as a whole.

Unless they live in a reservation community, most non-Indians do not have reason to come into contact with a tribal government. Their exposure to a tribal court, thus, is their only means of assessing tribal government. What we know about the courts that serve Indian country is that they are woefully, tragically underfunded, and lacking in the resources necessary to function as all courts should be able to do.

A number of years ago, the committee held a hearing on the status of tribal courts and the chief judge of the 10th circuit, John McKay, shared his views with us on this matter, and I think we should go back and think about that. He has had extensive experience in working with the tribal judges, and he told this committee that they are some of the brightest and finest people with whom he has had the privilege of working. He has read their rulings, discussed the law with them and he believes that they merit the highest regard and respect. But he also described the pitiful state of support that the tribal courts receive and compared the funding of

the tribal justice systems with those made available to State and Federal courts.

It is a comparison that is, well, simply, a terrible shame, and, Mr. Chairman, as you noted, we seem to provide greater aid to Third World countries than we do to our Indian tribes.

Over the years, we have debated how best to address the problem. We enacted the Tribal Justice Act into law and authorized the appropriation of $50 million for the support of tribal justice systems. Nonetheless, the tribal courts continued to be a poor stepchild in the Bureau of Indian Affairs [BIA] because only minimal funding ever found its way into the President's budget request.

So we talked about transferring some of the responsibility for supporting the tribal courts to the Department of Justice, and there their fate was a little better, but the truth is that the administration does not request, and the Congress does not provide, the funding that is so critical to the effective functioning of tribal courts.

So today, Mr. Chairman, as we explore another route to the support of tribal justice systems, let's pray that this is the one that works.

Thank you very much, sir.

The CHAIRMAN. Thank you, Senator Inouye.

Senator Thomas, do you have an opening statement?

Senator THOMAS. Thank you, Mr. Chairman.

I met with our Joint Tribal Counsel in Wyoming at the end of August, and talked some about this. Their emphasis was mostly on juvenile detention at that point, however, but I am very interested in this. So I will withhold a statement and wait for the witnesses.

The CHAIRMAN. All right, we thank you.

We'll now proceed with our witnesses. The first panel will be John McKay, president of Legal Services Corporation in Washington, DC; Mark Van Norman, Director of the Office of Tribal Justice, Department of Justice, Washington, DC.

I will tell all the witnesses that we normally use the light system in here. When that red one goes off, it means we need to share time with the next speakers but your complete written testimony will be included in the record and studied copiously.

With that, if you would, please proceed, Mr. McKay.

STATEMENT OF JOHN McKAY, PRESIDENT, LEGAL SERVICES CORPORATION, WASHINGTON, DC

Mr. McKAY. Thank you, Senator Campbell, Mr. Chairman, members of the committee.

It's my great honor and privilege to be here today to speak on behalf of, and in favor, of the Indian Tribal Justice System Technical and Legal Assistance Act of 1999. I serve, as you indicated, Mr. Chairman, as president of Legal Services Corporation, and because this is my first opportunity to speak to the committee, I want to very briefly describe to you the Legal Services Corporation.

We are a private, not-for-profit corporation funded by the Congress of the United States. It is our statutory duty under the LSC Act to provide legal services in every State, every county and territory of the United States. It is also our duty to provide legal serv-

ices in Indian country, and we do that through the administration of over 30 programs within our nationwide grant system.

I believe the comments made by senators this morning are very accurate in the description of the serious under-funding of tribal courts and civil legal representation. The Legal Services Corporation, of course, handles only civil legal matters for low-income people in the United States, not criminal matters, but we have a special obligation in Indian country to make certain that tribal courts and tribal systems have the capacity to engage in the statutory mission that we are provided, which is to provide civil legal assistance to low-income people.

We are headed by an 11-member bipartisan board appointed by the president of the United States and confirmed by the Senate. The Board retains my services as the president of the corporation, and it's been my privilege to serve in that capacity now in excess of 2 years.

In real life, I was a private practice lawyer in the State of Washington. It's been my privilege to come and serve in this organization to help give our message in the Congress that we are a bipartisan organization. I happen to be a Republican by background, and it's been my privilege to serve with many, many public-spirited lawyers, volunteers and staff people around the United States.

We strongly support S. 1508, and this particular effort to build the kind of infrastructure that will assist our programs in Indian country. We provide legal services by statute to over 300 tribes within the boundaries of the United States including Alaska Natives and Native Hawaiians.

Our resources are stretched so very thin that we often have one or two attorneys handling multiple demands, both in terms of multiple tribes in many cases, and often times multiple duties within particular geographic areas in Indian country. We have, I think, heroic people doing the very best they can to help build the kind of infrastructure that this bill seeks to encourage, and I think our goals at the Legal Services Corporation match very directly with the stated goals of this bill, and they are, of course, to assist low-income individuals, to get away from public assistance, to build the kind of infrastructure within tribes that help people to address their critical civil legal needs including commercial fraud, child support, and domestic violence. These are problems which are not limited to one particular place within the United States and clearly are problems where we have under-funded tribal court systems.

So it is my privilege, actually, to be here today to support this bill and to indicate to the committee and to you, Mr. Chairman, that we believe that this bill is consistent with the objectives of our statutory mission. We appreciate the opportunity to help support additional funding directly to Indian country in the form of grants administered by the Department of Justice. It certainly is my privilege to be here. I am available to answer any questions that you may have, and I thank you so much, Mr. Chairman, for this opportunity.

Thank you.

[Prepared statement of Mr. McKay appears in appendix.]

The CHAIRMAN. Thank you.

Before we ask questions we'll hear from Mr. Van Norman.

STATEMENT OF MARK VAN NORMAN, DIRECTOR, OFFICE OF TRIBAL JUSTICE, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. VAN NORMAN. Thank you, Mr. Chairman.

I'm Mark Van Norman, Director of the Office of Tribal Justice. Thank you for inviting me to testify on behalf of the Department of Justice.

S. 1508 would complement our Indian Law Enforcement Improvement Initiative. It would promote the development of tribal justice systems by increasing resources for training in technical assistance. It would provide civil legal assistance to poor tribal members. It would enhance criminal legal assistance to indigent Indian defendants and impoverished families and young people in the tribal justice systems. Improving assistance to Indian communities in these areas would improve the administration of justice in tribal courts.

I should emphasize that at the Department of Justice we work with tribes on a government-to-government basis, and under the Federal trust responsibility and Federal statutes, the United States has a responsibility to preserve public safety in Indian country. The U.S. Attorneys prosecute felony crimes such as murder, rape, robbery, and serious assault by or against Indians in most of Indian country.

Tribal police serve as first responders to Indian country crimes and assist the FBI and the BIA in responding to and investigating felony crimes. Tribal courts and prosecutors try and punish misdemeanor crimes. Thus, an effective tribal criminal justice system is essential to effective Federal law enforcement in Indian country. While crime rates have fallen around the nation, violent crimes in Indian country have risen. American Indians have the highest, violent crime victimization rates of any group in the Nation, and violence against Indian women is severe. Child abuse is also a serious problem, and violent crime by Indian youths and gangs is on the rise.

In 1997, recognizing these problems, the president directed the Attorney General and the Secretary to develop a plan to improve public safety in Indian country. They recommended increasing law enforcement assistance to tribes.

In fiscal year 1999, the Justice Department received $89 million in grants for tribes for police, detention centers, juvenile justice and tribal courts and more FBI agents. For fiscal year 2000, the administration has requested $124 million for the Justice Department under this initiative, including $5 million for tribal courts.

The Indian Civil Rights Act affirms tribal court criminal jurisdiction over crimes by Indians. Tribal courts also have recognized authority over civil matters, such as domestic relations, probate, torts, housing, debt collection, environmental regulation, business activity on Indian lands, management of Indian lands and natural resources and other matters.

Under the Indian self-determination policy, tribal courts have been expanding rapidly. In 1978 there were about 120 tribal courts; today, there are over 250 tribal courts, and their dockets are increasing dramatically.

The Justice Department has pledged to assist Indian tribes in the development of their law enforcement systems and tribal courts, and the Department is working to promote cooperation between the Federal, tribal and State court systems. The Justice Department has also worked to include tribal courts in general programs, like the drug courts program. In planning our Indian country law enforcement initiative, we recognized that the influx of funding for tribal police would inevitably increase tribal court caseloads. So we included a tribal court grant program as an essential part of the overall initiative—to fight violent crime.

For fiscal year 1999, Congress appropriated $5 million under this program to assist tribal governments in the development, enhancement and continuing operations of tribal justice systems. Demonstrating the need for this program, 181 tribes have submitted applications for funding and the Department is awarding 15 large tribal court enhancement grants of up to $100,000; 15 small grants of up to $50,000; and a number of tribal court planning grants and tribal court technical assistance grants.

For fiscal year 2000, we, again, request $5 million for this program, and we view this program as a significant component of the overall justice interior initiative to improve Indian law enforcement and justice systems.

S. 1508 would complement that initiative, and we have a few specific comments:

In regard to section 101, we recommend that associations of Indian tribes and tribal colleges be eligible to receive grants. In section 102, Indian tribes and tribal colleges, again, should be eligible as grantees and similar changes should be made to section 103.

We are available to work with the committee staff on these issues, if that would be of assistance.

In conclusion, American Indian communities face serious problems of violent crime, including violence against women, gang activity, juvenile delinquency and child abuse. We have undertaken the Indian law enforcement improvement initiative to address these problems, and your bill would complement that initiative. The bill would also enhance the development of tribal courts, which promotes the long-term goal of economic self-sufficiency for Indian communities.

Thank you for inviting me to testify.

[Prepared statement of Mr. Van Norman appears in appendix.]

The CHAIRMAN. Thank you for your testimony. We're doing pretty good. I haven't had this much positive testimony for some of my bills to help Indian people in the last couple of months, particularly in this Administration, but thank you very much. You're both absolutely right—the amount of crimes on reservations in many cases has skyrocketed.

While you were talking, Mr. Van Norman, I was thinking of the last time I was up home in Montana. I went by to see an old friend and his lights were out. I went by the next day evening and his lights were still out. I saw him downtown at the agency at the store the next day and I told him that I had come back, and he said, yes, he was home, and I said, "Well the lights were out and I assumed you weren't home," and he said, "No, I'm afraid to turn the lights on because if I have the lights on people will know I'm

home and I'll be robbed or beaten." That's how desperate it is in some places when elders are even afraid to turn their lights on for fear somebody will just drive in and rob them right in their own home. It's pretty bad, so thank you for both of your testimony.

Mr. McKay, John, I understand the Legal Services receives about $6.9 million annually from the LSC for its activities, and you did mention some of the services you provide.

Do you know off-hand what percent of that goes to help Indian country?

Mr. MCKAY. Well, about 2.5 percent of our total appropriation goes to Indian country and that is a figure of around $7 million.

The CHAIRMAN. I see, that's the 2.25 percent, about $7 million.

Mr. MCKAY. That's correct.

The CHAIRMAN. What other sources of funding do you have?

Mr. MCKAY. Well, our programs nationally leverage our Federal dollars with State funding, with private sources of funding, everything from United Way to efforts to privately fund raise among attorneys. IOLTA, which is Interest on Lawyer Trust Accounts, an issue recently taken up by the United States Supreme Court may in the future, be in doubt. But significant funding does come from additional sources.

One of the problems I think we find in Indian country is that while there are multiple sources of funding for legal services programs nationally, sometimes within State systems the programs within Indian country simply are left out or left behind.

The CHAIRMAN. They automatically assume somebody else is doing it, the Federal Government in many cases.

Mr. MCKAY. I think that's exactly right. In part, to counter that, we conducted, through Legal Services, the first conference on Native American programs and representation in Indian country in May of this year.

The CHAIRMAN. Who attended that? Did State officials attend that?

Mr. MCKAY. Well, the key note speech was given by the counsel of this committee, Mr. Moorehead, who ably represented the committee, but——

The CHAIRMAN. He's pretty good.

Mr. MCKAY. He was pretty good, I would have to say myself, Mr. Chairman.

We had representatives from all 30 of our programs there, and the purpose was to bring the program directors in Indian country together with our staff to help us at LSC focus on the unique problems in Indian country, many of which have already been commented on this morning. Our hope is that not only the Federal dollars administered through the Legal Services Corporation, but through other Federal agencies and through the alternative funding sources that I mentioned a moment ago, will be increased in Indian country. It's been my privilege to be in places like Gamble, Alaska on St. Lorens Island, and the St. Philippe Pueblo in New Mexico. I've worked closely with DNA, which is our program serving the Navajo in three States.

It's clear to me that the purpose behind this bill is to try and build the kind of infrastructure which is lacking in so many places, and so it is one of my priorities, as President of the Corporation

and I know for the Board of Directors, to continue to lead in this way and to try and bring additional resources in. The stretching by folks who do this work is really phenomenal because you end up trying to build infrastructure within tribes, try to take on individual representation.

I began my career as a prosecutor, and so I think I see the connection between crime on Indian reservations and the lack of civil justice that people experience in their lives, and so I think that the bill is wise in creating a system of technical assistance grants that attempt to build infrastructure on both of those significant issues.

The CHAIRMAN. Well, S. 1508 seems to reflect the current philosophy of the Legal Services Corporation, and I would appreciate any suggestions as we try to move the bill along.

Let me ask you a specific question. The LSC provides about $25,000 for two attorneys for tribes in my State, the Southern Ute and the Ute Mountain Ute over by Towaco, CO.

Can you describe the kind of work that the lawyers do for those tribes?

Mr. MCKAY. Yes, I can, Senator.

I think, first of all, the fact that there are two attorneys, I believe, in Durango, CO, under the auspices of Colorado Rural Legal Services, they provide assistance to the Southern Ute and the Ute Mountain Ute. I think—just an indication, I managed a law firm in one of my prior lives and trying to provide services over the areas that you just mentioned with about $20,000 is in itself very challenging, but when I mentioned to you a moment ago what I think are the heroic activities of lawyers, and staff and volunteers in Indian country, this is a very good example because while on the one hand the Southern Ute apparently have—I haven't been there, but I understand that the resources in the tribal court system are significantly greater than those in the Ute Mountain Ute, and the work done in both places is extraordinary. The domestic violence program that was begun by the CRLS attorneys serving the Ute Mountain Ute is, I think, an example where an effort was made to leverage what are meager Federal resources with resources that the tribe may have on its own and which may be brought in to deal with the problems of domestic violence.

There are also severe problems, as I understand it, in both of those tribes and on the reservation with relation to commercial fraud. You have situations where some commercial folks—retailers, really prey on people with high interest rates who really don't have at that location other alternatives.

The CHAIRMAN. Do you mean like downtown merchants or something, or who? Who's preying on them?

Mr. MCKAY. Well, I don't think in this forum I would want to name them, and, frankly, I don't know them, but I understand that like other places in America, there are people who engage in substantial consumer fraud, and often for low-income people the only place they can turn is the local legal aid office. I think the problem is exacerbated in Indian country because our resources are stretched more thinly there than anywhere else in our system, so the opportunity for someone living on a reservation to actually speak to a lawyer who can help them if they think they've been defrauded is—it pains me to say this, but it's extremely remote. And

so the opportunity to come here today and advocate for the work of our lawyers and staff in Southern Ute and Ute Mountain Ute is a privilege for me because I think they are doing some wonderful things.

The problems are similar with consumer fraud, with fraud against the elderly, with domestic violence and those are the programs that, I think, have been administered very well in those two places.

The CHAIRMAN. Tell me, when the LSC provides a service through an attorney, the attorney—the actual attorney that does the work, is he contracted, is that contracted with a local law firm or something? Who actually does the work?

Mr. MCKAY. Not in this case, Senator. In fact, I think in most cases because of the overlay of Indian law, if you will, that is very specific, that is actually, as you know, a very specialized legal resource. And so the services provided in Indian country under the auspices of the Legal Services Corporation are typically undertaken by staff attorneys who are trained specifically to understand the tribal court system and the unique law—and, in particular, NCRLS under the two tribes that you mentioned—those are staff attorneys out of Durango who are trained in Indian law but, as I indicated, $20,000 per year to provide services in those two places is very tough.

The CHAIRMAN. Yes; I understand.

Mr. Van Norman, S. 1508 proposes grants to assist tribal justice systems. Would the Department of Justice support large scale contracting out to tribes for law enforcement for tribal courts and other programs, pursuant to the Indian Self-Determination Act? They do that already to some degree.

Mr. VAN NORMAN. Well, right now our grant programs are more or less underwriting direct services to tribal governments. They're competitive grant programs because we're not funded at a level that enables us to commit an ongoing amount of resources each year to particular tribes.

I would think that it would be appropriate to examine the Department's current authority and take a look at where it needs to be improved.

The CHAIRMAN. Well, there seems to be a lot of programs available to tribes through the Department of Justice, and that's been the direction under the intent of the Self-Determination Act, and I'm very gratified that it's moving that way.

Do you have within the Department of Justice—is there a sort of a coordinating agency, and, if it's not in your office, who should coordinate these activities?

Mr. VAN NORMAN. Well, our office was created by the Attorney General to coordinate policy on Indian affairs throughout the Department, both with litigating divisions and with Office of Justice Programs, and we also promote government-to-government relations.

Within the Office of Justice Programs, there's been established an American Indian-Alaska Native desk to coordinate programs within that division, and that's kind of our departmental grant arm, although we also have the Community Oriented Policing Service [COPS] in addition to the office of Justice Programs.

Norena Henry is here, and she's from the Navajo Nation, and she's the Director of our American Indian-Alaska Native desk.

We are working to streamline our grant processes, and we have a CIRCLE project, which includes the Northern Cheyenne, Oglala Sioux and Zuni Pueblo, which puts together our tribal justice grants, and we're doing that as a pilot project to streamline our programs. The Office of Justice Programs has a reorganization plan pending that would result in the creation of regional desks and include an Indian country desk to streamline grant administration.

The CHAIRMAN. Sounds fine.

Senator Inouye, do you have questions of these witnesses?

Senator INOUYE. Yes.

Based upon the commerce clause of the Constitution, and also based upon the 800 treaties that we entered into with Indian nations, albeit 430 were never ratified, and based upon Supreme Court decisions and other laws of this land, and also the fact that the Constitution of the United States guarantees due process to all citizens and inhabitants of this land, do you believe that the provisions of adequate funds to support a judicial system is necessary to guarantee civil rights for Indians; or, put another way, does the denial of adequate funding, which all of us agree—your testimony so says—and everyone that has come before us says that it is woefully lacking—do you think that denial is tantamount to denial of civil rights to Indians?

Mr. MCKAY. Senator, I do. I believe that one cannot read the Constitution of the United States—I don't believe that one can read the important documents surrounding the creation of our country without understanding that the establishment of justice, the establishment of due process, is an essential aspect of this country, and with the respect to the government-to-government relationship that we have with Indian tribes in this country and with Alaska Natives and Native Hawaiians, I believe that there is a very strong Federal priority to adequately fund civil legal services—and I know the Department would comment and others would comment, and I certainly believe a criminal justice system, which adequately serves its citizens—I believe the Government's responsibility as a government minimalist, if you will, personally, I believe that if the government wasn't created to establish justice systems for all who will live within our borders, then I think that we have left out one of the very most important purposes for this country, and I hope I am not being overly dramatic. I believe that when we're talking about civil legal justice for low-income people in this country and for people living in Indian country, our country loses its meaning when someone stays in their home with the lights off for fear that they're going to be robbed, or that they know that they are living in a state of violence or fear, or they're trying to protect their children because they can't turn to their Government for that kind of justice. I think that is a minimal view of our Government, and I think it is an important responsibility at all levels of government and in the private sector to ensure that that occurs.

Senator INOUYE. Mr. Van Norman, do you agree that the denial of adequate funding is a denial of civil rights when one considers that there is a specific and unique trust relationship?

Mr. VAN NORMAN. Well, I think the Civil Rights Division wouldn't let me comment on precisely that point, but I do agree and it's the Department's position that the Department has a trust responsibility to Indian tribes that includes a duty to promote public safety. I do think that tribal courts are essential to fight crime and promote public safety, and also to build the governmental infrastructure necessary for economic development. We've been working with other agencies to promote economic development in Indian country because we recognize the crime problems that come with the lack of economic development. We have great problems with alcohol and substance abuse, and alcohol in particular is very much related to violent crime. So funding these programs is very essential, I think, to honor the treaty obligations to make Indian reservations livable homelands for tribal peoples.

Senator INOUYE. During the 1960's when we were going through the pain of desegregation and civil rights battles throughout this land, fighting the Ku Klux Klan and some of the court systems, we found it necessary to employ provisions in our law to sue States and courts for denying their citizens their civil rights.

Do you think the Indians have sufficient cause to sue the Government of the United States for denial of civil rights, Mr. McKay?

Mr. MCKAY. I'm not sure I would be prepared to comment on that Senator. The issue of whether Indians have litigation or lawsuits is one really for the clients at this point in time. Our objective at the Legal Services Corporation is to provide the ability for the clients to exercise their legal rights. They may indeed have such legal rights, and our role, I think, at the Legal Services Corporation is to advocate for the opportunity to seek justice in lives. So I think it is a question of capacity and ability to meaningfully exercise those rights. We leave that to the attorneys and to the clients.

I appreciate the sentiment of your remarks, and I think my earlier comments about lack of capacity make the question of exercising those rights a virtual impossibility, whether a legal cause of action exists or not. So my goal, and I think my statutory responsibility is to promote the development of such capacities, and I, for one, very much appreciate the partnership that we are enjoying with the Department of Justice, and this bill clearly is an opportunity for us to work in partnership with the Department, and we appreciate very much the opportunity to do that. So those individuals who may have legal rights that they cannot exercise will have the opportunity to seek justice.

Senator INOUYE. I would like to add another dimension to my question, and maybe Mr. Van Norman is aware of this.

There is a serious drive at this moment to reduce the number of U.S. Attorneys offices, and, by coincidence or otherwise, most of these U.S. Attorneys offices are in areas that serve Indian reservations and Indian tribes. If the move is successful to do away with these U.S. Attorneys offices who are supposed to serve Indians, would that be a denial of civil rights, Mr. Van Norman?

Mr. VAN NORMAN. Well, again, I don't think the Civil Rights Division would let me comment on that kind of thing without consulting with them first, but I would say that we do have a Department of Justice policy on Indian sovereignty and government-to-govern-

ment relations, and, perhaps, I could ask that that be made part of the record.

What we have been doing, and it reflects that in this policy, is trying to get more Assistant U.S. Attorneys out to Indian country because it is an important priority of the Department to provide public safety in Indian country. Reducing the number of Assistant U.S. Attorneys in Indian country would certainly reduce the Justice Department's ability to deal with the growing problems of violent crime.

Senator INOUYE. It is the closing of U.S. Attorneys' Offices—that is what is being advocated now, not just reduction. There is general reduction of personnel, plus the closing of offices and it just happens that most of the offices that are scheduled for closing are in Indian country. Would that be a denial?

Mr. VAN NORMAN. It's very much contrary to the Department's efforts. We've been making efforts to try and get better service to Indian country and increase the number of, not only Assistant U.S. Attorneys but also FBI agents and support staff, to deal with violent crimes in Indian country, which, if it's dealt with now, is certainly going to be better than if these crime problems are allowed to grow further. It's certainly more cost-effective to try and deal with them now. So it would be very much against our efforts to deal with this violent crime problem.

Senator INOUYE. Thank you, sir.

The CHAIRMAN. We thank the witnesses for appearing today and appreciate it very much.

Without objection, we'll also submit the testimony that was provided by Under Secretary Kevin Gover in support of the bill.

Mr. VAN NORMAN. Mr. Chairman, could I ask that our——

The CHAIRMAN. Your complete testimony will be included in the record.

Mr. VAN NORMAN. And our Department policy.

The CHAIRMAN. And your Department policy, you bet.

Mr. VAN NORMAN. Thank you.

The CHAIRMAN. Thank you very much.

We will now go to the second panel, Taylor McKenzie, the vice president of the Navajo Nation; Mary T. Wynne, president of the National American Indian Court Judges Association; our old friend, Peterson Zah, a board member of the People's Legal Services, Window Rock, AZ, on behalf of the National Association of the Indian Legal Services; and, Eric Eberhard, former minority staff director here from our committee, now with Dorsey and Whitney.

We'll proceed in that order with Taylor McKenzie beginning—go ahead, Mr. McKenzie.

STATEMENT OF HON. TAYLOR McKENZIE, VICE PRESIDENT, THE NAVAJO NATION, WINDOW ROCK, AZ

Mr. MCKENZIE. Good morning, Mr. Chairman, the committee, vice chairman, Senator Inouye. I'm Taylor McKenzie, vice president of the Navajo Nation, and I want to present this statement on behalf of the Navajo Nation and wish to thank you and the committee for inviting us to speak to S. 1508 today.

My comments are briefly summarized, the Navajo Nation's written statement, as approved by the Counsel's Intergovernmental Re-

lations. First of all, I would like to commend the Senator on an excellent introductory speech regarding S. 1508 on August 5, 1999. The Navajo Nation supports S. 1508.

While we understand the bill is intended to complement the Indian Tribal Justice Act, Public Law 103–176, the Navajo Nation also supports the reauthorization of Public Law 103–176, which we understand expires 2 days hence, and also to make a note that pursuant to that bill not one cent was appropriated to the Indian nations. Section 101 provides resources for tribal justice training and technical assistance grants, and we support that. We believe that eligibility of resources should be exclusive to membership organizations, which are comprised of tribal judges and judicial personnel or information from organizations other than these primary individuals or groups have not been funded.

We know that academic institutions with Boards comprised of such members, tribal judges and judicial personnel should receive limited eligibility for funding. All too often academic programs seek grant funding under the guise of aiding Indian country programs, but the grant funds are used for organization and grandiose, and not to serve Indian country particularly.

Section 102 provides tribal legal assistance grants, and we support that. The scope of civil legal assistance is not defined, and we propose that the United State Department of Justice creates flexibility and innovation when determining criteria for these grants—what we mean is that these criteria should not be devised in Washington, but rather out in local Indian country.

Aside from individual legal representation, programs such as DNA Legal Services on the Navajo Nation perform other valuable services. Just as an aside maybe of interest or not, I was a member of the founding Board for the DNA Legal Services Program, and was president when Chairman Peterson Zah was its executive director.

For example, DNA conducts clinics, which assist individuals to prepare paperwork for their own civil cases. DNA has also undertaken public consumer education programs and works with merchants to promote Navajo peacemaking as an alternative for consumers with complaints.

Indian Legal Service programs need to be involved in the design of these grant programs. We support the intent of section 103, as it will tribal criminal assistance grants, and we believe that early intervention to help children is the key to crime prevention.

In conclusion, I strongly encourage the committee to exam the infrastructure needs of tribal courts—perhaps, a visit to Indian court systems would be helpful. While we support the intent to create additional grants available to the Navajo Nation by this bill, we ask the committee to further exam the infrastructure needs of our courts. This can be addressed by reauthorizing Public Law 103–176, and, more importantly, by providing appropriations for this purpose, as authorized by this statute.

We wish to greatly thank the Chairman of this committee for his commitment and leadership in addressing tribal justice needs by sponsoring S. 1508, and we also want to thank Senator John McKay for his assistance to address our court needs.

Thank you for your attention.

[Prepared statement of Mr. McKenzie appears in appendix.]

STATEMENT OF MARY T. WYNNE, PRESIDENT, NATIONAL AMERICAN INDIAN COURT, JUDGES ASSOCIATION, NESPELEM, WA.

Ms. WYNNE. Good morning, on behalf of the American Indian Court Judge Association, where I am the president, Mr. Chairman and members of the committee, I would like to extend you greetings and thank you for the opportunity to address you concerning S. 1508.

I have given you my written testimony, and in that written testimony I point out two basic reasons for the passage of S. 1508, and I give them to you based upon my experience as a sitting tribal court judge in five tribal courts located throughout the Northwest, and on my experience spanning over 20 years of sitting on tribal court benches or practicing in tribal courts. I have done that in over 33 tribal courts spanning half the continent.

The reasons—I'm not going into and I'm not going to read that testimony—I'm just going to say there's two of them. One of them is based on need, and I would like to go into that a little bit more and build on the comments of the Senator concerning that need. The second one is that it's just a very smart thing to do with regard to money itself.

The Tribal Judges Association, The National Tribal Judges Association is comprised of representatives who are elected out of eight regional tribal court judges associations, and both the National and the Regional Associations have been providing technical assistance and support, the basic and fundamental tool that those tribal court judges need for about 30 years. I have attached to my testimony a couple of agendas, one for the Northwest Tribal Court Judges Association and one for the last annual meeting of the National Judges Association to sort of give you a feel for the types of tools that we do provide the judges, and on there you will see that these associations bring in speakers to cover some of the basic tools that all judges need to adjudicate fairly, such as the U.S. Attorney's Office comes in and presents basics of search and seizure. We go to law firms and at every meeting we try to update tribal court judges on Federal legislation and Federal case law that affects the administration of their cases, and because we have been doing this as a membership organization for very small amounts of money—I think the annual dues for the Northwest Association is $35 a year—it would be economically very smart to use those existing sources that have credibility within the tribal court judicial systems throughout the nation for any sums of money that you might make available to support those tribal courts, and the other thing I would point out is it also makes sense in terms of the economic development of those reservations.

I am enrolled, born and raised, on the Rosebud Indian Reservation and have spent substantially all of my life living on reservations and can tell you both from a personal and a professional point of view, sitting on those tribal court benches, that the perception of credibility of the tribal justice system directly affects the economic development of those reservations. It affects how lenders decide whether or not they're going to lend on reservations, it affects

developers' decisions on whether or not they're going to develop—I mean, you name it. From the basic and the fundamental blocks forward the tribal court system, it's perception is in fact evaluated before people decide to do business on reservations.

Now, not contained in the written testimony are a couple of things I do want to very quickly point out to you. I want to direct your attention to the last time I spoke to you, which was about 2 years ago—and, by the way, I've been working steadfastly for 2 years to try to say very important things in 5 minutes ever since then, so let me try here.

The first thing I want to point out to you is that what bothers me in listening to this testimony is the perception that this bill could be perceived as special interest legislation. It is not special interest legislation. I want to direct your attention to the statistics that I pulled for you the last time I was in front of you 2 years ago. At that time I pulled the cases from the Colville Tribal Court, and I told you that they were handling about 4,000 cases a year—I think that was in 1997—and of those 4,000 cases, about a third of those involved non-Indian litigants, one party or another party was non-Indian. This is one tribal court system out of the 250 that Mr. Van Norman talked to you about—keep that in mind. Of those, one-third of that civil case load—that's civil case load, not criminal, about 70 percent were civil. Of the one-third, the non-Indians were winning a little bit over one-half of the time, so I'm not worried about the fundamental fairness of that system; I'm worried about the perception that goes out with a system that is so—I believe the Senator put it—woefully and tragically under-funded, and I want to tell you what also is not in my testimony is that there is an increasing needs for these funds. These organizations are voluntary organizations.

I serve as the president of the National Association and the former president of the Northwest Association frequently out of money out of my own pocket, and the judges come to those meetings by clearing their docket and convincing the tribe to kick in enough money for travel budgets that will get them to the training, and the reason why their successful is because they're regional membership organizations. The training topics are determined by the judges who are voluntary members, and they get the money from their tribes to attend.

When I was preparing for this testimony, I called other judges in the Northwest and I said to them, "If you had this one opportunity in 5 minutes to say as much as you could say as fast as you could say it to this committee, what would you say," and they said, "I would tell them that I have zero travel funds this year." They won't be even be able to get to the four meetings per year that are put on by these associations to give them the one update that they're going to get on the search and seizure laws this year because of the cuts in funds that have been coming down from the Federal Government. The tribes are unable to kick in the added money that they need for those travel funds.

That's what they said was one of the most important things to let you know, with regard to this pending legislation.

And, finally, I want to tell you a story, and I still have time—that thing is green—and this story has to do with this woeful need.

Oh, darn, you're going to miss my story. Do I have your permission, Mr. Chairman?

The CHAIRMAN. Sure.

Ms. WYNNE. When I first was elected as president of the Northwest Judges Association, it was about 5 years ago, and I served for 4 years. At that time I was just out of the Federal system—I had been an assistant U.S. attorney in South Dakota, and I was full of beans and spitting vinegar, which you are when you are in the Federal system, present company excluded, of course. I organized this very grand agenda for the first meeting, and one of the things that I did was I did a presentation on basic fundamentals of opinion writing, and I did a hard copy that showed how to do findings of facts and conclusions of law and the order for judgment and did a presentation, an oral presentation, on why this was important within the court system and I handed out disks with this little model that they could plug that into and gave them a number of some voluntary associations to call with help in opinion writing.

I got done—and I had Federal case law, I had the Federal statutes, I had some updates on Indian law, and I had enough copies for all of the judges. We get about 30 to 35 judges out of 44 court systems in the Northwest, and I handed out copies to everybody, and I was so proud of myself. After that meeting the Board of Directors met and I really caught it because I had spent over two-thirds of the annual copying cost budget, over two-thirds of the annual available funds for the Northwest Tribal Court Judges Association.

So when the Senator says that this is an area that is woefully and tragically under-funded, he is talking in terms of what it means for due process. When I presented in front of the Ninth Circuit—one of the Chief Justices from the Supreme Court was there, Sandra Day O'Connor—and she said every individual in this country has the right to a well- reasoned, written decision on cases that come in front of courts. Without the support of this committee for all of the types of funding that ought to be available to these tribal courts and to build that legal infrastructure, that fundamental right is not being met in Indian country.

Thank you.

[Prepared statement of Ms. Wynne appears in appendix.]

The CHAIRMAN. Thank you.

Eric, would you like to proceed.

STATEMENT OF ERIC D. EBERHARD, ESQUIRE, DORSEY AND WHITNEY, LLP, SEATTLE, WA

Mr. EBERHARD. Thank you, Mr. Chairman, and members of the committee.

Do you have my statement for the record?

The CHAIRMAN. It will be included in the record.

Mr. EBERHARD. Thank you, and I would just note that it's more personal in tone than I would ordinarily be in a proceeding of this nature, but I wanted to make it personal because I think the problems that Indian legal services experience are truly unique. Having worked in Indian legal services for a number of years, I thought the point of view that I could bring to the legislation you're considering might be helpful to the committee.

I also focused on DNA and the Navajo Nation because that happened to be where I worked, but I think as the committee knows, the situation that you encounter in the Navajo Nation really is not that much different than you encounter with any of the land-based tribes that are located in the more remote areas of the nation, and the problems in providing legal services to the citizens of those reservations are virtually identical everywhere you go. The costs are extremely high, the practical difficulties are often insurmountable and the resources available are all too often either non-existent or inadequate, and those are the points I wanted to try to emphasize in just a few moments here.

I think S. 1508 moves this process in the right direction. It creates another way for the Indian programs to obtain the kind of financial assistance they need to do the job they've been asked to do, and I would commend the Chairman and the committee. It's a rare occurrence in the time I've practiced Indian law to see the Legal Services Corporation, the Department of Justice and the Department of the Interior agree with the position that the committee is advancing. I think that's very commendable.

The CHAIRMAN. It doesn't happen all the time, that's for sure.

Mr. EBERHARD. If I might, Mr. Chairman, I just would like to make just one further personal comment, and that's about my friend and leader, Mr. Zah. DNA has succeeded in the Navajo Nation for a whole lot of reasons. It's had a lot of excellent people work in it, and I've given you some examples in my statement, but more than any reason it has succeeded because Peterson Zah infused it with a spirit of community service during his time as an employee and then during his time as the Director of the program, which spanned a period of 15 to 16 years. After he left it and became the chairman of the Navajo Nation, the program continued on and did very well. Some measure of his leadership, though, is that he's now back involved in the program as the Honorary Chairman of the Board, and continues to provide leadership to it.

The program is tied very closely to the communities it serves. It has survived every effort you can imagine to shut it down by the Federal Government, the State Government, private citizens who live off reservation, merchants who are exploiting the Navajo population, you name it, and it survived because it had the spirit that it needed to survive, and that's a credit to Mr. Zah.

Thank you.

[Prepared statement of Mr. Eberhard appears in appendix.]

The CHAIRMAN. Well, that's a pretty nice introduction for our old friend and former president of the Navajo Nation, welcome to the committee. Peterson, if you would, please proceed.

STATEMENT OF PETERSON ZAH, HONORARY CHAIRMAN, DNA-PEOPLE'S LEGAL SERVICES, WINDOW ROCK, AZ, ON BEHALF OF THE NATIONAL ASSOCIATION OF INDIAN LEGAL SERVICES [NAILS]

Mr. ZAH. Thank you very much. I guess, Mr. Chairman, I'm living proof that there is life after presidency and after being a chairman of the largest Indian nation. Laughter.]

The CHAIRMAN. You look terrific, so it must be a good life.

Mr. ZAH. I wanted to simply echo some of the comments that other people have made, and that is that I don't think we can get away from the fact that resources are needed if you want to do more. Legal Service Program, the Department of Justice, they have moneys to do specific things, but if you want to stretch the imagination and if you really, really want to get at the core of the problems on Indian reservations, you have to do other things. Certainly, at DNA People's Legal Services we were confronted with that early on where when you went into the tribal court, you really didn't have a system, a system that was manageable and workable; a system where you have a prosecutor in a tribal court and a system where you have defendants being represented by a legal aid program. When I came back to the Navajo Nation, I saw a void and our job was to fulfill that void and be able to run those programs so that you can have a complete system in place.

So what that means is that once you have those experienced attorneys that go to DNA People's Legal Services, if they work in, let's say, a commercial setting, or if they are working in education law, or if they're working on natural resources, they become the experts in those fields, and they always end up helping the tribal government to develop those codes. For example, the lawyer that was working in the area of education ended up having to draft a children's code for the Navajo Nation's government to pass that legislation because that's where you build expertise, and so you have to use your imagination and be able to do those things that are necessary.

What it really amounts to is building a structure within the tribal system so that people, any people, who come to the Navajo Nation, whether they be non-Indians or Indians, feel comfortable with the fact that you have a system there that they can trust. That's very, very important—a system that they can trust, and I think the Navajo courts have done that. It's something that I believe other Indian tribes really need to do more of, and if there are any voids out there among Indian country, it's where Indian tribes are not picking up some of those same kinds that have developed that we have experienced on Navajo. That's when you have a lot of controversy.

So our charge right from the beginning was why don't we do other things besides just basically offering legal representation to the poor. We can help Indian tribes, we can help local groups, whether they be education groups or economic development groups. We can certainly help them because we have built up the capacity to help them.

The last one that I want to leave with you is when I came back to the Navajo Nation, we only had one Navajo lawyer. Out of the 100,000 Navajo people living on that reservation, we had one Navajo lawyer, so the challenge to us was for the DNA people to go out into the communities and to meet with the schools, and meet with the young people and instill into the young people that they could be whatever they want to be. If they want to become lawyers, doctors and engineers, they have the mind, they have the capacity to do that. Our job was to have our own Navajo lawyers to be able to go to law school and get their degree and come back to the Navajo Nation and be able to work for DNA People's Legal Services.

That's building capacity within the tribe, so, basically, we did that kind of work.

Now, Legal Services Corporation didn't tell us to do that kind of work, but we knew that there was a need. There was a need to do that, and S. 1508 really has given a hand, a helping hand in that direction where you have another resource from another department that you can utilize to do the things that you want to do. I'm very honored to be invited back to this committee, and I think I remember the last time I appeared here was when the Navajo Nation donated that Navajo rug that's hanging right in back of you.

The CHAIRMAN. We're very proud of that rug.

Mr. ZAH. It makes me feel strong to sit here——

The CHAIRMAN. You don't get it back. [Laughter.]

Mr. ZAH. If we don't pass this bill, we might take it back. [Laughter.]

The CHAIRMAN. We're working on it.

Mr. ZAH. Thank you.

[Prepared statement of Mr. Zah appears in appendix.]

The CHAIRMAN. Well, thank you, all of you, for appearing.

Peterson, would you just go through that once more? The Navajo people are about, what, 270,000 people? You said you have one lawyer—what was that, one Navajo who has graduated from law school and is a practicing attorney?

Mr. ZAH. Yes; that was back in the late 1960's.

The CHAIRMAN. When you took over the presidency, after that or before that?

Mr. ZAH. Now we have more than we want. [Laughter.]

The CHAIRMAN. Yes; that's the way it is with attorneys. I live near the town of Durango, and there's only 13,000 people but we have 85 lawyers—about one for every 1,500 people. So they propagate.

You also mentioned the breadth that I hope that this bill takes, and Judge Wynne said there may be some people who see this bill as special interest legislation. Well, I guess maybe in one respect it is. It's designed to try to help Indian people, but, from a broader sense, the goal is to try to stabilize tribal government, which, in turn, builds confidence of outside people who may want to invest or do some cooperative agreements to provide jobs, and, from that standpoint, I think it's a good government bill. It doesn't just help Indian people; it helps everybody who would have interaction with the tribe.

Judge Wynne, you mentioned that resources are not adequate enough for many of the tribal judges to be able to attend three or four times a year or less the different seminars that they should go to to keep up with latest developments in the tribal courts.

Is there any movement to offset that by trying to provide the information from those seminars over the Internet directly to the judges if they can't get there? It's not as good as having them go—I know that—but is there some system now where they can keep abreast if they can't attend these seminars?

Ms. WYNNE. There's no system now, and I'm glad you asked that question. It's a very good question, Senator.

The National Association—I would say there's movement, though. The National Association has been attempting to solicit

funds to set up exactly that type of a system. It also approached Interior on assistance in that direction, and has approached the Attorney General asking for assistance from the Department of Justice. So we are certainly trying.

You do run into some problems in the area of telephone lines. There are some courts that don't have adequate telephone lines to hook up to the Internet.

The CHAIRMAN. Well, with Senator Inouye's approval, I'm going to ask staff to look into how we get some resources into that, into the kind of technology that would be required to provide a system where tribal judges can keep up when they can't actually attend.

Ms. WYNNE. Thank you.

The CHAIRMAN. But we also need to put more resources into the tribal court too.

Let me ask Dr. McKenzie—and, by the way, congratulations on being the first surgeon from the Navajo Nation. We're all very, very proud of that.

In your testimony, I take it that you were not particularly pleased that this bill did not authorize academic grants—that's what I gained from your testimony, and I was looking at section 101, and, you're absolutely right, it provides to those membership organizations whose memberships consists of judicial system personnel within tribal systems, but that was done by design. We thought there were many places where we need to expand grants that go to educational programs, but we were worried that if we did that in this bill, it might just dilute it so much that we wouldn't have the resources to put into the central program that we need, which is strengthening the tribal courts and the judicial system. We are aware of that, and many of us, including Senator Inouye and I, have worked very hard to try to improve the grant system and educational institutions.

Let me ask Mary Wynne again, since the implementation of the Department of Justice law enforcement initiative, what burdens have been placed on tribal court systems to handle greater case loads?

Ms. WYNNE. Senator, as pointed out by the prior president Jill Shibles, the result of the additional funds into law enforcement, which were very much needed—I don't want to in any way take away from that—but the obvious result of putting so many more offices on the street is an increase in the case load coming through tribal courts, and maybe my testimony should have been more specific on that. The case loads at the tribal courts are increasing by the hundred percentiles every year in almost every tribe that I know about, and the money to add the judges, the law clerks, the ability to do research and the training funds is not increasing; as a matter of fact, it's decreasing. The result, of course, is that an already terribly stressed court system is even more stressed, and, that, of course, results in longer waiting time, much more difficulty getting those emergency cases through to the judge when someone comes in for, say, a restraining order because they're being assaulted by an intimate family member.

The CHAIRMAN. As I understand from Dr. McKenzie's testimony, he recommends that the funding should be block granted to tribes.

Do you agree it should be done that way instead of filtered through the Department of Justice, whenever we can block grant it?

Ms. WYNNE. I would like to defer to a later time on that question. I really have not given it enough thought to give you an intelligent answer on that.

The CHAIRMAN. Well, this is not the center of the earth of intelligence, you know, Washington, DC. We welcome any comments, so don't feel shy about giving us your opinion, but that's okay, you can do it at a later date.

Peterson, do you believe that this bill will help Indian country tap into other resources to strengthen tribal courts.

Mr. ZAH. I really believe so, and it's something that I think we needed for many years, and I think it's going to go a long way in bringing in other kinds of help that the legal services people are looking for.

The CHAIRMAN. When the DNA Legal Services first started, how did they begin to—how was the interaction done, the first interaction with the tribal courts?

Mr. ZAH. The tribal courts was looking for help. They were —

The CHAIRMAN. So it was welcomed.

Mr. ZAH. There were looking for resources, and we just happened to be another kid right across the street who was able to come in and help them, and so they embraced us in working with them.

The CHAIRMAN. Eric, your testimony that translation of DNA into English from Navajo is, quote, "lawyers working for the economic revitalization of the people."

Has Peterson been giving you Navajo lessons?

Mr. EBERHARD. I should let him answer that. He would not vouch for my Navajo, I can guarantee that. [Laughter.]

The CHAIRMAN. All right.

Senator Inouye, do you have some questions?

Senator INOUYE. Yes; I have a few. May I start with Judge Wynne?

The CHAIRMAN. Sure.

Senator INOUYE. In your written testimony, you cite an example which asserted that "a Federal Court handling the caseload of a tribal court would find it necessary to spend $15.8 million."

My question is how much does the tribal court spend for itself for that same caseload?

Ms. WYNNE. Thank you, Senator, for that question. In preparation for the testimony to be given to this committee, I did in fact check and cross-check the amount being spent by tribal courts. The $15 million quoted in my written testimony was for one tribal court caseload alone, and that was the Colville Tribal Court out of Washington State.

The Colville Tribal Court spends about $50 per case to adjudicate those cases. The nearest Federal District Court spends about $3,800 out of their base core budget. That doesn't include, say, the other infrastructure resources that are available to Federal judges that come out of other budgets; for instance, a different fund is used for court- appointed attorneys. If you look at the Colville Tribe, the same court fund is used, that same $50 has to pay for the attorney as well. So it's astronomically different, Senator.

Senator INOUYE. After having served in the Congress now for many years, I have been forced to become a realist, and one of the realities suggests to me that no matter how much we try, and threaten and coerce, we will not secure adequate funding.

Mr. Eberhard, who has a unique insight into problems here, has been here many times, and he knows the in's and out's of problems. You have maintained in your written testimony that basic training is lacking. If the funds are going to be limited, where would you put the priorities? What type of basic training would you suggest we should be focused on?

You know, we would like to provide all the moneys you need—$15 million for one caseload, if that is possible, but it is not going to happen—you know that, unless we sue the Government of the United States. Do you think it is a good idea to sue the Government?

Mr. EBERHARD. Well, I don't think the courts would be inclined to compel the Congress to appropriate the money either, and it would take a lot of resources just to bring the litigation, as much fun as it might be.

Senator that really is the key question—the resources are very limited. One of the things that this bill does is, obviously, create a new pool of resources for one piece of the infrastructure. I think it would be helpful if there was an opportunity for people like Judge Wynne, Peterson Zah and Vice President McKenzie to come before the committee with no agenda—a blank piece of paper, as Senator Evans used to say when he was talking about consultation—and let's talk about a system of priorities for funding. We all realize that we can't put all the money into the courts and starve the rest of the system, we can't put all the money into law enforcement and starve the courts, we can't put all the money into legal services and starve law enforcement and the courts. There has to be a way to systematically build the legal infrastructure.

The committee made an attempt to do that 5 years ago with the Tribal Justice Act. It has not been appropriated—for whatever reason, the funds haven't been requested, the appropriators haven't provided it when it was requested, any number of reasons. But that was a priority of the tribes at that time. I believe it is still a priority.

If there is an interest in trying to figure out how to unravel the problem of developing an adequate legal infrastructure—and I believe there is in this committee—then a process of consultation with the tribes might lead to the development of a consensus that would allow the political process here in the Congress to work—lobbying the appropriations committees, both from Indian country and from the members of this committee, lobbying the administration. These are our priorities for the next five years, and this is what it will cost.

We haven't really done it in that systematic fashion, and, perhaps, that's what's going to be needed to address this problem.

The CHAIRMAN. If I might interject, you probably know, Eric, that Senator Inouye and I both serve on the Appropriations Committee and have historically supported additional funding for a variety of Indian programs. We're not the only ones on the committee,

unfortunately, as you know, but we certainly do our best. So when you start that lobbying, you don't need to lobby us anymore.

Mr. Eberhard. Mr. Chairman, I do know that I think Indian country is grateful for the support of you and Senator Inouye, any number of folks over the years—Representative Yates is legendary in his support and battles for funding for all of the Indian programs, including justice systems. The problem we've had is that when we have good friends like the two of you in one place, we don't have enough friends in another place and we can't get it done.

Senator INOUYE. Well, to say the least, it has been frustrating, but we will not give up.

President Zah, I note in your testimony that you have had many successes. Have you shared your successes with other tribes?

Mr. ZAH. With other tribes? I think to some degree we did——

Senator INOUYE. In other words, for example, you have helped tribal governments to develop codes.

Have you set up model codes that can be shared with other tribes?

Mr. ZAH. I think on a limited basis we communicate with other American Indian Legal Services programs, in terms of how that was all developed and how it was done, but I believe that because of the limited resources, we never had a chance to go to as many of those Indian tribes as we want to.

Senator INOUYE. Judge, do you want to say something?

Ms. WYNNE. I do, Senator.

The Navajo Nation has provided solid support to other tribes through the National American Indian Court Judges Association, and they do bring their model codes, their published rules of court procedures. They bring all sorts of hands-on tools to those meetings and make them available to tribes throughout the nation through that Association. I did want to add my gratitude in that respect.

Senator INOUYE. Eric, I will ask you this question because I do not want to ask the leaders of Indian country—it might be embarrassing.

When I first assumed the chairmanship of this committee, it was very evident that the tribal court systems were not a matter of high priority in Indian nations. There were too many problems, just the problem of living itself, getting shelter and food, and so the court systems had to take a lower priority.

Has that situation changed? Is it still a low priority among tribal leaders?

Mr. EBERHARD. I think it has changed, Mr. Vice Chairman. I think it's changed dramatically. I think a number of things have occurred in the last 15 to 30 years on the reservations that have created a climate that have allowed court systems and other parts of the legal infrastructure that's necessary for civil societies and economic opportunities to develop.

Is that universal? No, it is not, but one of the changes that has occurred is that people like Judge Wynne, Dr. McKenzie, Peterson Zah have had the opportunity to be educated in the universities, in the law schools, in the medical schools. They've gone home and they've taken that education and applied it in their communities in very loving and caring ways, I might add, and sometimes through great frustration and obstacles. And another generation has come

along behind them with even more skill and is going back home and applying all of that, so there has been a change that's very fundamental, but, at the same time, the resources available are frighteningly scarce. You heard Judge Wynne say that Colville Tribes can afford to provide $50 per case. The Colville Tribes, relatively speaking—and I'm sure if the chair of the Business Committee was here he might take issue with me, but the Colville Tribes—relatively speaking is a resource-rich tribe. They have more resources than many tribes, and I believe they are committed to an adequate system of justice. That's what they believe they can afford to provide their court system.

There is any number of competing needs. When people aren't adequately fed, when they don't have adequate health care, adequate education, clothes, shoes to wear to school, those priorities are going to take precedence, and that is still the case in much of Indian country. Poverty is rampant.

We look at Indian country today—many people do—and they say, "Indian country is on the move, it's wealthy, things have changed." You see Indian people here in Washington, DC, doing things that representatives of wealthy corporations do, so the perception becomes Indian country has changed, and these problems don't exist anymore—incorrect. The gap has grown wider. Indian children have not participated generally in the wealth that has exploded in this country in the last 20 years. They have not had access to the information explosion, they still don't have access to it and the gap between non–Indian America and Indian America, I believe, today is wider than it has ever been. More resources are needed to close that gap—that's the bottom line.

The CHAIRMAN. If my friend would yield for a moment, Eric, you're absolutely right. If it comes to building a new tribal justice center and feeding your children, I mean, you know which is going to have to take the priority. But, you are also absolutely right that those tribes who have some resources have moved forward to strengthen their courts and develop better systems.

I notice Howard Richards, a councilman from the Southern Ute Tribe here where I live, is a good friend of mine, and they've just completed a wonderful tribal justice center, pretty much at their own expense too, and I believe they put about $4 million of tribal money into developing that tribal justice center. It's just a state-of-the-art center and they did that through their own initiative. So I know those courts that have the opportunity and have the resources, they want to move that way.

Excuse me, Senator.

Senator INOUYE. Several days ago, I had occasion to visit with members of your organization, Judge, and spent 2 days at their conference. During that time, I had the opportunity to carry on discussions with members, and many of them were rather frustrated. They said,

> I'm a graduate of Harvard, I'm a graduate of Stanford, I'm a graduate of this school, but then when I get back to the reservation, some of the things that I learned may be rather irrelevant because the facilities are not there, the support services are not there, and I was hoping that we would get some sort of training that would be relevant to the real world in which we will be working.

So, Dr. McKenzie, there are some of us who have been advocating for a long time an Indian university of the Indians, an Indian

university, within which we would have a medical school that can specialize in medical problems of Indian reservations and such, and the same thing with law schools.

Do you think it is a good idea to have a university? I cite this because it is a policy of the United States to support African Americans and we have Howard University where we spent approximately $35,000 per person, per student. In a tribal college system we spend less than $3,000 per Indian.

Mr. MCKENZIE. Thank you, Senator. I appreciate very much that question because, in my experience, maybe a decade and a half ago, the Navajo Nation embarked on an initiative just as that, the American Indian School of Medicine—you may remember that—and I was given by the tribal leadership the lead road to take this on, this initiative, and we worked it through the Indian Health Care Improvement Act. The very first resolution that came out called for a feasibility study to determine whether there was a need and whether it could be done, and the conclusion of that feasibility study, authorized by that bill, was that it was needed, it could be done and that there could be funds made available.

The problem there was that the Federal Government, who would play a key role in it, as well as the private sector, who would play a key role in it, kind of looked at each other, looking to see who would move first, and just about that time the National Government entered a period of austerity and at that point the project kind of fizzled out.

The feasibility study had been done, the program had been laid out, the basic science would be provided at Northern Arizona University, the clinic campus would occur in the Phoenix area and the 4th year of medical school would occur throughout Indian country at the various Indian hospitals, but that did not materialize.

In my estimation, and the reason I entered that arena, was that the medical schools needed to be rendered culturally relevant and sensitive, to include Native healing sciences so that the Native healing scientists could be included in the treatment regiment for the entire Indian country. There would be in this school a Department of Native Healing Science, in addition to anatomy, medicine of whatever school curriculum holds.

I very much support the idea, it really is needed and I think it should be done—the same with an institute of legal education, Senator.

Thank you for the question.

Senator INOUYE. Thank you.

Finally, Judge Wynne, what is the average pay of a judge in the Indian court system?

Ms. WYNNE. That's a very good question, and this is my personal opinion, Senator. I would estimate that that average pay is going to be around $18,000 to $22,000 a year——

Senator INOUYE. How much?

Ms. WYNNE. $18,000 to $22,000——

Senator INOUYE. $18,000? 1–8?

Ms. WYNNE. $18,000 to $22,000 a year.

There are—some of the larger court systems have in fact raised the pay of judges so that in some of the bigger court systems you are seeing $65,000 a year, and I do know of one court system that

is paying $90,000 a year. But most of the judges are going to be far lower than that, and they're going to average out those larger statistics.

So I don't mean to say that all tribal court judges are funded on that level, but the majority are going to be funded under that level, and, as a consequence, I think you're going to get an average of $18,000 to $22,000 a year, if you could get all of the averages together.

Senator INOUYE. If I am not mistaken, Federal district court judges receive $140,000 now.

Ms. WYNNE. And I have to add that jurisdiction is a narrower scope—I just have to tell you that.

Senator INOUYE. $18,000 to $22,000?

Ms. WYNNE. I think that would be a fair estimate, Senator.

Senator INOUYE. I do not think I will be an Indian judge. [Laughter.]

Ms. WYNNE. My job is safe.

The CHAIRMAN. I wonder if we shouldn't factor in tribal judges when we have our cost of living increases that go to our Federal judges.

Senator INOUYE. I think we should.

The CHAIRMAN. Perhaps we ought to also—we can look into that, Senator.

Well, I thank this panel for being here. It was a very interesting dialog, and I know that the two professions that have the most difficulty when you talk about working on Indian reservations are medicine and law, and I know also that the Navajo Nation certainly has been on the forefront in finding some kind of a middle ground. It's not easy to fit—what is still called in some circles "white man's law"—it's not easy to fit that into a traditional forum of conflict resolution, and the Navajos have been very, very good at trying to find that middle ground, and, of course, a lot of that was under the leadership of former President Zah. The same might be said of a medicine doctor. I know I have many, many friends in the Navajo Nation, and some of them are very strong, spiritual people and still do their own healing ceremonies, and I know that that must be very difficult as a surgeon—how you find the area where you are doing the best for the modern-day technology to help somebody heal an organic problem, broken arm, or whatever it is, and, at the same time, being able to satisfy the traditional belief of how you heal. Those two professions have been tough to network in traditional Indian culture, but it's something that's being done very well by some tribes, and, certainly, the Navajos have done, in my view, and have been the leading advocates of finding that middle ground.

I would tell the committee that we may wish to ask some further questions in writing, if you could answer them in writing, and I appreciate your being here. The record will stay open an additional 15 days, and thank you so much for your testimony.

With that, this hearing is adjourned.

[Whereupon, at 11:09 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JOHN MCKAY, PRESIDENT, LEGAL SERVICES CORPORATION, WASHINGTON, DC

Good morning, Chairman Campbell and distinguished members of the Senate Indian Affairs Committee. Thank you very much for the opportunity to testify on S. 1508, the Indian Tribal Justice System Technical and Legal Assistance Act of 1999. The Legal Services Corporation ("LSC" or "the Corporation") appreciates your invitation to offer our comments on this legislation.

Because this opportunity to appear before the Senate Indian Affairs Committee is a unique opportunity for the Corporation, let me provide the Committee with some background on LSC.

The Legal Services Corporation is a private, non-profit corporation established by Congress in 1974 to seek to ensure equal access to justice under the law for all Americans. Our mission is to promote access to our system of justice to improve opportunities for low-income people throughout the United States by providing high quality civil legal representation to those who otherwise be unable to afford it. The Corporation provides grants to local legal services programs to address critical legal problems for eligible clients and their families in every state and county in the United States.

LSC is headed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. By law, the Board is bipartisan: no more than six members may be of the same political party. Local programs are governed by their own Boards of Directors, which set priorities and determine the types of cases that will be handled by the program, subject to restrictions set by Congress. A majority of each local Board is appointed by local bar associations. One-third of each local Board is composed of client representatives appointed by client groups. Programs may supplement their LSC grants with additional funds from state and local governments, IOLTA (Interest on Lawyer Trust Accounts) programs, other Federal agencies, bar associations, United Way and other charitable organizations, foundations and corporations, and individual donors. They further leverage Federal funds by involving private attorneys in the delivery of legal services for the poor, mostly through volunteer pro bono work. LSC-funded programs do not handle criminal cases, nor do they accept fee-generating cases that private attorneys are willing to accept on a contingency basis.

I should note that, pursuant to congressional direction in 1996, LSC funded programs are prohibited from engaging in class actions, challenges to welfare reform, collection of court-awarded attorneys' fees, many types of lobbying, litigation on behalf of prisoners, and representation of undocumented and other categories of aliens.

The Legal Services Corporation strongly supports S. 1508, legislation recently introduced by Chairman Campbell. This bill would authorize the Attorney General to award grants to national or regional tribal justice system organizations or non-profit entities that provide legal assistance services for tribes and tribal members for the purpose of improving tribal judicial systems through training, technical assistance, and civil legal and criminal assistance. LSC appreciates that the 30 Indian Legal

Services (ILS) programs that receive LSC funding are specifically included as eligible entities to whom the Attorney General may award grants for civil legal and criminal assistance programs under Sections 102 and 103 of the bill.

Since 1968, ILS programs have been performing essential capacity building services to many tribal courts across the country, and have provided representation of Indian individuals in those courts. ILS programs have assisted tribes in such activities as the development of tribal courts, development of written tribal codes, and training of tribal judges and lay advocates, as well as provided legal representation to individual Native people and, in some cases, where permitted under the LSC Act and governing regulations, to tribal governments themselves.

An important theme of the Senate Indian Affairs Committee this year has been the facilitation and enhancement of strong tribal government, reservation infrastructure and economic opportunities for American Indians, Alaska Natives and Native Hawaiians. Just as the staggering poverty and unemployment statistics of many tribal reservations are an anomaly to the glowing reports of the economic health of America, so too the lack of equal access to the courts for many poor, small, rural and/or tribal communities undermines the overall level of confidence in our justice system. Without the full participation of the individuals in these communities and all others who must rely on our justice system to access the rights guaranteed to them through the Constitution, our Nation's promise of "equal justice under law" is illusory.

Whether greater confidence in tribal courts is achieved through the provision of training or through technical or civil legal assistance, the broad goal of ensuring equal access to justice through equipping tribal justice system personnel with additional skills and tools will benefit individuals, local businesses, contractors of various services, school districts, and local governments—in short, these steps will benefit entire communities, Native and non-Native.

The legislation's goal is also consistent with the intent of the Committee in a number of bills it has considered this year to maximize resources and to encourage partnerships, LSC recognizes that its funding alone is not sufficient to meet the vast unmet legal needs of low-income people in this Nation, particularly in the Native American community. Any additional sources of funding can only benefit the ability of ILS programs to serve eligible Indian tribes and individuals who cannot afford legal assistance. LSC views the additional direct tie between LSC Indian Legal Services programs and the Department of Justice that would be authorized under this act as an exciting opportunity to strengthen legal assistance to Native Americans.

On behalf of LSC, thank you for this opportunity to comment on S. 1508. The Corporation supports this initiative, and urges the Committee to take favorable action on the bill in the near future.

PREPARED STATEMENT OF ERIC EBERHARD, ESQUIRE, DORSEY AND WHITNEY LLP, SEATTLE, WA

Chairman Campbell, Vice Chairman Inouye and members of the committee:

My name is Eric Eberhard. I am a partner in the Seattle office of Dorsey and Whitney LLP. My practice is centered on the representation of Indian tribes, tribal organizations and entities doing business with Indian tribes throughout the country. The Indian Law practice group at Dorsey and Whitney is comprised of 13 attorneys and two non-attorney professionals who work out of offices in Washington, DC, Minneapolis, MN, Orange County, CA, and Seattle, WA. Of our group 10 members are Indian.

I thank the committee for inviting me to be here today to testify on S. 1508, the Indian Tribal Justice and Legal Assistance Act. Among the clients whom I have the privilege to serve is the National Association of Indian Legal Services [NAHS], which has been a pro bono client of the firm since 1995. We are pleased to be able to make the resources of the firm available to the programs funded by the Legal Services Corporation which comprise NAILS.

I am here today to speak in support of S. 1508. I commend Chairman Campbell and the committee staff for their work in developing this bill and I am hopeful that it will receive prompt consideration here in the Congress. If enacted, the bill will authorize the Attorney General to make grants to: (1) non-profit entities which provide civil or criminal legal assistance to Indian tribes, members of Indian tribes or tribal justice systems pursuant to Federal poverty guidelines and (2) to national or regional membership organizations and associations whose members consist of tribal justice system personnel to provide for training and technical assistance for the development of tribal justice systems.

Based on my experience in the practice of Federal Indian law, I am confident that S. 1508 would assist in the process of developing and strengthening the institutions of tribal justice and creating the legal infrastructure on the reservations which will allow for sustained economic opportunity and growth.

From 1972 through 1978, I worked in legal services. From 1972 to 1973 I worked for the Legal Aid Society of Cincinnati where I was assigned to cases involving landlord/tenant disputes and the problems that were then being encountered by the low income participants in federally subsidized mortgage programs. My work there involved litigation in the State and Federal courts as well as the development of new building and landlord/tenant laws for the city of Cincinnati. My caseload at any time consisted of approximately 600 open files. There were 18 attorneys working in the office who all had similar caseloads. There was little doubt that the services of the office were in great demand by the low income community in Cincinnati.

In 1973, I moved to the Navajo Reservation and went to work for DNA-Peoples Legal Services as a staff attorney in the Window Rock office. I was immediately struck by the contrast in my living conditions. My modest, but comfortable apartment in the city was a thing of the past. No longer were the amenities of running water and electricity available in the small cabin I was able to rent from a Navajo family.

No longer was I engaged in the urban practice of poverty law. The libraries, courthouses, law firms, law enforcement, electricity, telephones and fax machines that were so readily available and which had been taken for granted in my practice a few weeks earlier were either gone, in scant supply or only available at great distances. The easiest of tasks became something to be planned well in advance. Contacting a client to prepare for a hearing in court now required weeks and months instead of a few phone calls. Interpreters were necessary for working with most of the clients, for whom Navajo was the first and only language. Conducting basic legal research eventually became possible at the office as the program increased its library resources, but the need to travel several hundred miles to conduct extensive research was a constant during the 5 years I worked at DNA.

The nearest state court was a 60-mile round trip over a stretch of highway that had more fatalities per year than any other rural road in the United States. The nearest Federal district court was about 200 miles away. The nearest Federal court of appeals was 1,900 miles away. The tribal court was more accessible geographically, but was still very much a developing institution. It had only been 7 years since tribal law had been codified. Decisions of the courts were not generally reported. Tribal judges had only recently been able to shed their dual roles as prosecutors and judges in criminal cases. Interpreters were needed in any court—Federal, State or tribal—in order to be able to present a case involving most of our clients.

In 1973, DNA had been on the reservation for 6 years. It had been one of the very first programs to be started on a reservation by the Office of Economic Opportunity [OEO]. One of the first obstacles the founders of DNA had to overcome was the natural suspicion with which the Navajo people regarded lawyers. The term "lawyer" literally translated into the Navajo language as "one who argues." Being known for being argumentative was not a desirable thing in the world of the Navajos. The name DNA is an acronym for a Navajo phrase which was intended to overcome this problem. The phrase means "lawyers working for the economic revitalization of the People." In order to add meaning to the phrase, DNA attorneys were very aggressive in asserting the rights of Navajo consumers against the operators of the trading posts on the reservation through litigation and through successful efforts to convince the Bureau of Indian Affairs to rewrite the regulations governing the licensing of traders. These efforts helped to move the Navajo economy out of the era of barter and pawn and into the era of wages. DNA attorneys were also instrumental in the development of successful economic enterprises which continue to operate today, such as the Crownpoint Rug Weavers Cooperative. This business, which is owned and operated by the weavers themselves, succeeded in creating a way to market Navajo rugs which results in 100 percent of the profit going to the weaver. Most weavers who are not participants in the cooperative realize less than 50 percent of the profit from their artistry.

The job of getting DNA established in the larger reservation communities was still underway in 1973. Opening an office always meant more than renting space, buying furniture and equipment and hiring staff. Most often it meant that program staff and community volunteers had to build a building to house the program, train community members in everything from legal secretary skills to the skills necessary for effective lay advocacy including: Legal research and writing, case preparation, basic trial skills, negotiation skills, the law of evidence and procedure. The resources to accomplish these tasks did not exist on or near the reservation. We had to develop them at the same time that we provided a full array of civil legal assistance and

some criminal defense assistance to our clients. The compensation DNA was able to pay was not great. My entry level salary as a third-year attorney was about $9,000.00. Five years later I was making $10,000.00. Things have not improved in any measurable way when it comes to compensation today.

Over time, DNA has contributed to the development of a sophisticated legal infrastructure in the Navajo Nation. The courts are now courts of record with reported and published decisions. Navajo law is fully codified and annotated to make it readily accessible and more predictable. The Navajo Nation is a leader among all governments in alternative dispute resolution systems with its Peacemaker Courts which draw on Navajo custom and tradition for the non-adversarial resolution of disputes.

Former employees of DNA have gone on to become prosecutors, judges—including the current and former Chief Justice and both sitting Associate Justices of the Navajo Nation Supreme Court—members of the tribal council, attorneys in the tribe's Department of Justice-including two who have served as the Attorney General of the Navajo Nation, and the former President of the Navajo Nation as well as the current Vice President. There is now a Navajo Nation Bar Association and a thriving private sector among the licensed members of the Bar. The impact of DNA has not been limited to the reservation. Former employees have gone on to become assistant attorneys general in several states. At least one is an Attorney General. A few serve in the state judicial systems. Several have served on the staff of the Congress or in the departments of the executive branch. Several have become law professors or have continued to practice Indian law with public interest law firms. Many have gone to work as in-house counsel for tribes around the Nation. Many more have gone on to become successful in the private practice of law where they continue to contribute to the development of the law both on and off of the reservations. Each year several young Navajos complete college and continue on to law school. And, each year a few young Navajos finish law school and return home to play a role in one of the institutions which comprise the legal infrastructure being built on the reservation.

In short, DNA and the people who have comprised its family since 1967 has been a major catalyst for constructive change in the Navajo Nation and elsewhere. However, much remains to be done. Unemployment and the poverty which accompanies it still afflicts the great majority of reservation residents. At the same time that DNA has been helping the people of the Navajo Nation to settle disputes and build the legal infrastructure necessary for economic growth, the world around the reservation has been changing at an accelerating rate. We have seen an incredible increase in wealth and information in our country in the past thirty years. Even with all of the progress that has been made in the Navajo Nation, the gap between what is available on the reservation and what is available off of the reservation has grown wider.

It is still very difficult and relatively expensive to access the most basic services on the reservation. In my practice, I now take it for granted that I can use my computer to download the most recent decision from almost any court in the Federal or state system in a matter of seconds or minutes. The same is true with Federal and State statutes. The hardware and software available to me allows me to represent my clients more efficiently and effectively than ever. The access to all types of information and the ability to present it in ways which demonstrate a point or document a need is unparalleled. Unfortunately much of this capability is absent or not consistently available to legal services programs and justice systems operating on reservations. Seventy percent of homes in the Navajo Nation still do not have telephones, much less access to the hardware and software necessary to access the digital world and its wealth of information.

The institutions of justice still lack sufficient numbers of trained personnel. This problem exists at all levels-from law enforcement, to the courts, to the legislature, to the executive branch and in the private sector. Basic skill training is needed at all levels.

The institutions of justice still lack the basic physical resources. Jails are dilapidated and overcrowded. Courts are operating out of trailers or substandard facilities. Libraries, computers, files, record keeping, docketing and other basic tools of the modem judiciary and law offices are not adequate or are not present in some instances.

S. 1508 is needed to help close the gap and help to create the certainty and social stability which flows from a well developed legal infrastructure.

I hope that my testimony is helpful as the committee and the Congress consider this legislation. I appreciate the opportunity to be here today and will be happy to be of any further assistance the committee may deem appropriate.

PREPARED STATEMENT OF ASSISTANT SECRETARY FOR INDIAN AFFAIRS, KEVIN GOVER, DEPARTMENT OF THE INTERIOR WASHINGTON, DC

Mr. Chairman and members of the committee, I am pleased to submit the following statement for the record concerning S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999. The Department of the Interior supports S. 1508. I have outlined a few issues for your consideration within my statement.

Tribal justice systems are an essential component of tribal governments. They provide the means to enforce public safety laws in Indian Country, provide for the welfare and safety of Indian children and other tribal community members; and safeguard the political integrity of tribal governments. The tribal justice systems also ensure that economic development and self-determination efforts of a particular tribe are viable and trustworthy. In today's modem society with the need to promote tribal self-sufficiency while preserving cultural values, the tribal justice systems help bridge the gap between what are sometimes seen as competing interests and provide the balance that is part of the historical and traditional concepts of a tribal lifestyle through peacemaking efforts and alternative dispute resolution notions. However, the resources to assist tribes in the development of these concepts is sorely lacking.

Currently, there are over 250 tribal courts throughout Indian Country. The Bureau of Indian Affairs [BIA] has received inquiries from other tribes and tribal consortiums who want to establish new court systems or improve existing justice systems. Although the BIA provides base funding to all of these tribal justice systems, it is clear that tribal justice systems still need to reach the degree of competence and sophistication necessary to handle the types of cases currently being brought in Indian Country.

Violent crime is increasing in Indian Country at an alarming rate. In February of this year the Department of Justice, Bureau of Justice Statistics released the results of a survey of crime in Indian Country and found that American Indians are victimized by violent crime at a rate of more than twice the general population in America. Violence against Indian women is especially appalling where seven out of every 1,000 American Indian women are raped or sexually assaulted each year. This number is over three times the sexual assaults suffered by white women in this country and two times the number suffered by black women. This statistic is even more appalling when you consider that the 2.3 million American Indian population of the United States represents just under 1 percent of the total population of this country. The BIA Annual Law Enforcement Report also indicates an increase in forcible rape cases from 1997 to 1998 of 19 percent and an overall increase of violent crime in Indian Country of 56 percent. Although the Major Crimes Act mandates that most violent crimes are characterized as felonies and are to be handled in Federal court by the United States Attorneys Office; tribal communities must still be on the forefront of addressing causes and explore solutions for this type of behavior. The prevalence of violent crime presents obstacles to job creation, investment and economic growth in tribal communities and the stated purpose of the Act to strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indians will certainly assist tribal communities through their justice systems to take affirmative steps to deter this type of activity from occurring in their communities.

Alcohol and substance abuse related criminal activity is also up in Indian Country and has been the bane of Indian existence since its introduction into tribal communities. According to the Bureau of Justice Statistics, 55 percent of the violent crimes committed against American Indians were committed by an offender who was under the influence of alcohol, drugs or both. The report includes data on an increase in DWI cases of 56.8 percent from 1997 to 1998 in Indian Country, with 10,180 DWI offenses in 1997 and 15, 967 DWI cases in 1998. Tribal justice systems are the natural conduit for monitoring this type of activity within the communities and for the coordination of efforts among the various community service providers who professionally address this type of behavior.

Juvenile crime and delinquency is on the rise as well as child abuse and neglect cases in Indian Country. The National Child Abuse and Neglect Data System of the Department of Health and Human Services reports that between the years 1992 to 1995, American Indian children were subjected to abuse and neglect an average of 3 times that among Asians. These two ethnic groups experienced increases in child abuse and neglect cases for children under the age of 15. Gang related activities on Indian reservations are on the increase and reports from the FBI, BIA and tribal law enforcement agencies indicate that overall violent crime on many Indian reservations are worse than the national average.

Section 2: Findings. We are in complete agreement with the Congressional findings. These findings have been relevant and applicable since the development of tribal justice systems. Tribes have used BIA base funding for all tribal governments, special funds for tribal court projects, and funds from other Federal agencies that offer tribal justice funding on a competitive grant basis to fund their Tribal courts over the years.

Section 101: Tribal Justice Training and Technical Assistance Grants. The BIA supports the award of grants described in this section to national or regional membership organizations whose membership consists of judicial system personnel. These organizations will most likely consist of tribal court judges and other tribal justice personnel who will have knowledge of the current issues facing tribal justice systems and will be in an excellent position to develop the type of specialized training and technical assistance that will enrich, improve and enhance tribal justice systems.

Section 102: Tribal Civil Legal Assistance Grant, and Section 103: Tribal Criminal Assistance Grants. These two sections will help to promote the concept of equal and fair justice in Indian Country by promoting grant awards to non-profit organizations that provide legal services to Indian tribes, members of tribes and tribal justice systems as provided in Sections 102 and 103 of the bill. The notion of basing accessibility on these services pursuant to Federal poverty guidelines will address the need for competent representation for people who cannot otherwise afford legal representation.

Section 104: No Offset and Section 105: Tribal Authority. The BIA is in full support of these sections. Section 105, in particular, tracks the mission statement of the Department and the BIA's obligations to Indian Tribes. It also clearly recognizes the unique status of Indian tribal governments and the desire of the Federal Government to support ongoing tribal efforts to improve their existing tribal justice systems.

Last year, the Department of Justice, as part of the President's Initiative on Law Enforcement in Indian Country, offered two types of grant awards to tribal courts. These awards totaled $5 million. These awards were designed to address the areas of development and enhancement of Tribal Courts; providing technical assistance for tribal courts and the development of a national tribal court resource center. Any non-profit organization, unit of government, tribal government, court, tribal judicial system or academic institution could apply for these awards. The awards are based on grant periods from 18 to 24 months and range from a minimum of $50,000 for continuing operation and enhancement grants to a maximum of $500,000 for the creation of a national tribal court resource center. Tribes are eager to be funded through these grants.

With the anticipated increase in criminal caseloads in tribal courts resulting from the President's Initiative on Law Enforcement in Indian Country, the proposed legislation will help Tribes in meeting the increased caseloads to develop and fund programs designed to address the causes of criminal behavior and develop solutions to prevent such activity from occurring in Indian communities. We recommend the inclusion of Tribal Justice systems as eligible applicants for receipt of awards to non-profit organizations. Tribal Justice systems should be on the forefront of the list of eligible grantees since they are not only confronting the issues facing their communities, but are struggling to develop solutions to address these issues.

The BIA has been working in a cooperative effort with DOJ since the President's Initiative on Law Enforcement in Indian Country to assist tribes in obtaining law enforcement equipment and personnel. The BIA has also provided technical assistance to tribal justice systems through DOJ's Office of Tribal Justice by providing tribal court program reviews and followup where necessary as well as providing assistance in the development of criteria for the grant award process for both the tribal court and juvenile justice initiatives sponsored through DOJ. The BIA will continue to provide this type of technical assistance to DOJ and welcomes the additional challenge of working with other Federal agencies or non-governmental offices in their efforts to assist tribal justice systems.

Thank you, Mr. Chairman, for the opportunity to provide this statement on S. 1508. I look forward to working with you and the committee on further discussions concerning this important piece of legislation for Indian Tribal Justice systems.

Department of Justice

STATEMENT

OF

MARK C. VAN NORMAN
DIRECTOR
OFFICE OF TRIBAL JUSTICE

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 1508, TECHNICAL AND LEGAL ASSISTANCE TO TRIBAL JUSTICE SYSTEMS AND MEMBERS OF INDIAN TRIBES

PRESENTED ON

SEPTEMBER 29, 1999

Good morning, Mr. Chairman and Members of the Committee. I am Mark Van Norman, Director, Office of Tribal Justice, Department of Justice. Thank you for inviting me to testify on S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999.

In our view, S. 1508 would complement the joint Justice-Interior Indian Law Enforcement Improvement Initiative. The bill would promote the development of sound tribal justice systems by increasing resources for training and technical assistance. In addition, the bill would provide adjunct civil legal assistance to impoverished tribal members which would be significant in relation to civil rights, child custody matters, housing, social services, and other areas. Tribal members are often underserved in these areas. The bill would enhance criminal legal assistance to indigent Indian defendants and impoverished families and young people in the tribal justice systems, which, in addition to being desperately needed now, seems only fair in view of the increases in funding for tribal law enforcement. In our view, improving assistance to Indian communities in these areas would improve the administration of justice in tribal courts and enhance our overall efforts to improve tribal law enforcement and justice systems.

I. Government-to-Government Relations

Let me begin by emphasizing the fundamental principles that guide the work of the Department of Justice with Indian tribes, before discussing the problems of violent crime among American Indians, and our current efforts to assist tribal courts and justice systems.

Congress and the Executive Branch acknowledge the importance of working with Indian tribes within the framework of government-to-government relations when tribal self-government, tribal land and resources, treaty rights, or other tribal rights are concerned. Federal Government-to-government relations with tribal governments are rooted in historical treaty relations and the ongoing trust responsibility of the United States. President Clinton recently affirmed that:

> Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.[1]

Similarly, Congress has declared that the Federal trust responsibility "includes the protection of the sovereignty of each tribal government."[2]

II. Violent Crime and Law Enforcement in Indian Country

In addition to the Federal Government's trust relationship with Indian tribes, the United States' basic responsibility to preserve public safety for residents of Indian communities derives from federal statutes, such as the Indian Major Crimes Act and the General Crimes Act,[3] that provide for federal jurisdiction over felony crimes, such as murder, rape, robbery, and serious assaults by or against Indians in Indian country. The U.S. Attorneys prosecute such felony crimes in most of Indian country. Tribal police and law enforcement agencies serve as first responders to Indian country crimes and assist the FBI and the BIA in responding to and investigating felony crimes. Tribal courts and prosecutors try and punish misdemeanor Indian crimes. Thus, an effective tribal criminal justice system is an essential adjunct to effective

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[1] Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (1998); 63 Fed. Reg. 27655 (1998).

[2] 25 U.S.C. sec. 3601.

[3] 18 U.S.C. secs. 1152 and 1153.

Federal law enforcement in Indian country.[4]

While crime rates have fallen throughout the Nation, federal and tribal law enforcement agencies report that violent crime in Indian country is rising. The Bureau of Justice Statistics (B.J.S.) explained in its report, American Indians and Crime (1999), that American Indians have the highest violent crime victimization rates of any group in the Nation. From 1992-1996, the violent victimization rate for American Indians (124 violent crimes per 1,000) was more than twice the rate for the Nation as a whole (50 per 1,000).[5] Violence against American Indian women is severe.[6] American Indians suffer 7 rapes or sexual assaults per 1,000 compared to 3 per 1,000 among Blacks, 2 per 1,000 among whites, and 1 per 1,000 among Asians. Child abuse and neglect are also serious problems among American Indians. The National Child Abuse and Neglect Data System of the Department of Health and Human Services reports that the rate of substantiated child abuse and neglect among American Indian children was the highest of any

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[4] Under Public Law No. 83-280, the Congress delegated to some states criminal jurisdiction over Indians in Indian country, and in those states, Indian tribes retain inherent authority over misdemeanor crimes by Indian offenders and often serve as the first responders to Indian country crime.

[5] Alcohol use is strongly associated with crime among American Indians. In 55% of violent crimes against American Indians, the victims report that the offender was under the influence of alcohol, drugs, or both. In addition, the 1996 arrest rate for alcohol related offenses (driving under the influence, liquor violations, etc.) among American Indians and Alaska Natives was more than double that of the general population.

[6] The BJS report details violence among victims age 12 and over. In addition, BJS statistics are derived from American Indian households throughout the Nation, in reservation and off-reservation settings. Reports from the FBI, BIA, and tribal law enforcement agencies indicate that the violent crime problems on many of the large western Indian reservations may be worse than these overall national rates.

group in 1995 (the most recent year for which statistics were available).[7]

Violent crime by juvenile offenders and Indian youth gangs is on the rise in many Indian communities. The number of Indian youth in Bureau of Prisons (BOP) custody has increased by 50% since 1994. Demographics contribute to the growing problem of juvenile delinquency and violence in Indian country. Throughout the Nation, the median age of American Indians is 24.2 years compared with 32.9 years for other Americans. On many Indian reservations, roughly half of the population is under 18 years of age.

In 1997, recognizing the severity of violent crime problems in Indian country, the President directed the Attorney General and the Secretary of the Interior to develop a plan to improve public safety and criminal justice in Indian communities. The DOJ/DOI Executive Committee on Indian Country Law Enforcement Improvements found that tribal police and criminal justice systems face severe shortages among police, criminal investigators, detention, and court staff and resources. Tribal law enforcement agencies also lack basic communications and information equipment and technology. The Navajo Nation, the largest land based Indian tribe with 17 million acres of land, has 0.9 police officers per 1,000 compared with 2.3 officer per 1,000 in off-reservation communities. The Attorney General and the Secretary approved the Executive Committee's findings and recommendation to increase law enforcement assistance to tribal governments. In response, the Administration established the Indian Law Enforcement Improvement Initiative. In Fiscal Year 1999, Congress appropriated $89 million for the Justice Department for grants to Indian tribes for tribal law enforcement officers, equipment, detention

[7] Rates were calculated on the number of children age 14 or younger because they account for at least 80% of the victims of child abuse and neglect.

centers, juvenile justice programs, and tribal courts, and for more FBI agents in Indian country. For Fiscal Year 2000, the Administration has requested $124 million for the Justice Department for the Indian Law Enforcement Improvement Initiative, including $5 million for tribal courts.

III. Tribal Courts, Criminal and Civil Justice

Under the longstanding Federal policy promoting self-government for Indian tribes, the United States has consistently promoted the development of tribal courts. Under the Indian Reorganization Act of 1934, for example, Congress encouraged Indian tribes to develop and ratify written constitutions and in assisting Indian tribes under the Act, the Secretary of the Interior encouraged tribal governments to develop tribal courts.[8] Similarly, the Indian Civil Rights Act affirms tribal court jurisdiction over crimes by Indians in tribal territory.[9] Tribal courts also have recognized authority over civil matters, such as domestic relations,[10] probate,[11]

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[8] 25 U.S.C. sec. 476. For example, the Constitution of the Hopi Tribe provides that the Hopi Tribal Council shall have the power to: "set up courts for the settlement of claims and disputes, and for the trial and punishment of Indians within the jurisdiction charged with offenses against [tribal] ordinances." Hopi Tribe Const. Art. VI, sec. 1(g). Before the Indian Reorganization Act a few Indian tribes had established tribal courts based on the Anglo-American model, see Talton v. Mayes, 163 U.S. 376 (1896) (determinations as to the meaning of Cherokee law on grand jury proceedings "were matters solely within the jurisdiction of the courts of that nation"), while other Indian tribes had Courts of Indian Offenses operated by the Department of the Interior, 25 C.F.R. part 11, or traditional dispute resolution systems. K. Llewelyn & E. Hoebel, The Cheyenne Way (1987) at 111-113 (describing traditional Cheyenne law).

[9] 25 U.S.C. sec. 1301 ("'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial [including] the inherent power of Indian tribes to . . . exercise criminal jurisdiction over all Indians").

[10] Fisher v. District Court, 424 U.S. 382 (1976); United States v. Quiver, 241 U.S. 602, 603 (1916); cf. John v. Baker, 982 P.2d 738 (Ak 1999) (Although Alaska Native Claims Settlement Act lands are not "Indian country" for 18 U.S.C. sec. 1151 purposes, Alaska Native villages are federally recognized Indian tribes with concurrent jurisdiction over tribal members).

[11] 25 U.S.C. sec. 2205.

torts,[12] housing,[13] debt collection,[14] environmental regulation,[15] business activities on Indian lands,[16] management of Indian lands and natural resources,[17] and other matters. Congress has declared that tribal courts are "appropriate forums for the adjudication of disputes affecting personal and property rights" and "for ensuring public health and safety and the political integrity of tribal governments."[18]

Recognizing the evolving role of tribal courts within our Federalist system, the Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court, has written:

> Today, in the United States we have three types of sovereign entities–the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. . . . The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation.[19]

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[12] Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995).

[13] Northwest Production Credit Association v. Smith, 784 F.2d 323 (1986).

[14] Williams v. Lee, 358 U.S. 217 (1959).

[15] Montana v. EPA, 137 F.3d 1135 (9th Cir.) cert. denied, 119 S. Ct. 275 (1998).

[16] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee v. Navajo Tribe, 471 U.S. 195 (1985).

[17] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[18] 25 U.S.C. sec. 3601.

[19] Hon. Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, "Lessons from the Third Sovereign: Indian Tribal Courts," The Tribal Court Record (1996) at 12, 14.

Under the Indian Self-Determination Policy, tribal court systems have been rapidly expanding to serve their communities. In 1978, there were "71 tribal courts, 32 CFR courts, and 16 traditional courts."[20] Today, there are over 250 tribal courts, including intertribal court systems like the Nevada Intertribal Court of Appeals, which serves 24 Indian tribes. Tribal court dockets are increasing dramatically. In 1996, the Honorable William C. Canby, Jr., Senior Circuit Judge, United States Court of Appeals wrote that:

> The tribal courts are doing a huge business, and we in the federal and state judiciary could not do without them. The courts of the Navajo Nation this year will decide about 25,000 civil and criminal cases, and this figure does not include traffic offenses, juvenile matters, alternative traditional court proceedings, or appeals. The smaller Gila River Indian Community Court decided 3,200 cases last year. A disappearance of the tribal court system would be a major disaster, not just for the tribes and their courts, but for our whole national system of civil and criminal justice.[21]

In our policy on government-to-government relations with Indian tribes, the Justice Department has pledged to "support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems." See 61 Fed. Reg. 29424 (1996). In 1995, the Justice Department helped to coordinate an academic conference and an articles symposium on tribal courts, and the Attorney General explained:

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[20] U.S. Civil Rights Commission, The Indian Civil Rights Act (1991) at 29.

[21] Hon. W.C. Canby, Jr., "Tribal Courts, Viewed From A Federal Judge's Perspective," The Tribal Court Record (1996) at 16-17.

> While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. . . .
>
> Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members. . . . The integrity of and respect for tribal courts are critical for encouraging economic development and investment on the reservations by Indians and non-Indians alike.
>
> Tribal courts are also important vehicles for helping to resolve family problems. They can bring families together and hold parents and children accountable to themselves, each other, and the community.[22]

The Justice Department supports the BIA's efforts to provide assistance to tribal courts, and with our departmental mission of strengthening and assisting state, local, and tribal law enforcement and justice systems, we have begun complementary efforts to support and assist tribal courts and justice systems throughout the Nation. The Justice Department is working to promote cooperation between the Federal, tribal, and state court systems. For example, the Justice Department has sponsored Federal-Tribal judicial training on child sexual abuse cases, and the Office for Victims of Crime (OVC) is working with the University of North Dakota to fund

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[22] Hon. J. Reno, Attorney General of the United States, "A federal commitment to tribal justice systems," 79 Judicature 113, 114 (1995).

scholarships for tribal judges to attend OVC training workshops on other issues related to crime victims. The National Judicial College, which provides training courses for Federal and state judges, is developing a special curriculum for tribal court judges under a Justice Department grant. Similarly, recognizing the significance of traditional tribal justice systems, the Office of Juvenile Justice and Delinquency Prevention will sponsor a workshop on traditional tribal justice at the Mississippi Band of Choctaw's tribal headquarters in November 1999.

The Justice Department has also included a number of tribal courts in grant programs generally available to state, local, and tribal justice systems, like the Drug Courts Program (DCP). For example, the Hualapai Tribal Court of Arizona used a DCP grant to establish a "Wellness Court" to assist tribal members who are chronically involved in the criminal justice system due to non-violent alcohol-related offenses. Several Alaska Native villages, which suffer from high levels of alcohol abuse, have initiated similar DCP efforts. For Fiscal Year 1999, the Drug Courts Program has made 7 planning grants and 2 implementation grants to Indian tribes, totaling $506,448 out of its $40 million national program.[23]

In addition, when planning the Indian Law Enforcement Improvement Initiative, tribal courts were facing rapidly increasing caseloads and we recognized that the influx of funding for tribal police officers would inevitably increase tribal court caseloads further. So, the Justice Department included a tribal court program as an essential part of the overall initiative to fight violent crime and promote public safety. For Fiscal Year 1999, Congress appropriated $5

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[23] In Fiscal Year 1998, DCP awarded Indian tribes13 planning grants and 8 implementation grants totaling $2,321,000 out of a $30 million national program, and in Fiscal Year 1997, DCP awarded Indian tribes13 planning grants and 9 implementation grants totaling $1,000,000 out of a $30 million national program.

million under the Justice Department Tribal Court program "to assist tribal governments in the development, enhancement, and continuing operations of tribal justice systems." Demonstrating the high level of need for this program, 181 Indian tribes submitted applications for funding under this program. From among these applications, on behalf of the Office of Justice Programs, the Bureau of Justice Assistance (BJA) is awarding 15 large tribal court enhancement grants ranging up to $100,0000, 15 small tribal court enhancement grants ranging up to $50,000, and a number of tribal court planning grants of up to $30,000. In addition, BJA will award substantial tribal court technical assistance grants and one or more tribal court technical assistance providers.

As noted above, for Fiscal Year 2000, the Justice Department has requested $5,000,000 for the Tribal Court Program. We recognize that "tribal courts play a vital role in tribal self-government,"[24] and we view the Department's Tribal Court program as a very significant component of the overall joint Justice-Interior initiative to improve tribal law enforcement and justice systems to address violent crime in Indian communities.

The Bureau of Indian Affairs provides baseline funding for tribal courts through the Indian Self-Determination Act. In FY 1999, the BIA had just over $11 million for tribal courts through this program and the Administration has requested nearly $14 million for FY 2000.[25]

IV. S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999

As noted above, in our view, S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999, would complement the joint Justice-Interior Indian Law Enforcement

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[24] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

[25] Due to program cuts and reprogramming, BIA funding for Tribal Courts has declined from just over $15 million in FY 1995 to just over $11 million in FY 1999.

Improvement Initiative, and we have several specific comments in relation to the provisions of the bill.

In regard to the findings, we suggest that finding (3) be redrafted as follows: "the rate of violent crime victimizations committed against American Indians is more than twice the national rate of violent crime victimizations." This will ensure that the finding better reflects the results of the BJS Report on American Indians and Crime (1999). In regard to tribal self-sufficiency, we recognize that many Indian tribes suffer high unemployment rates and economic deprivation and sound tribal court systems are an essential part of the tribal governmental infrastructure necessary to attract business to Indian communities. Addressing the White House Conference on Building Economic Self-Determination in Indian Communities on August 5, 1998, the Attorney General said: "[I]t is important . . . to focus attention on tribal courts and . . . to give them the resources necessary to do the job."

In regard to Section 101, Tribal Justice Training and Technical Assistance Grants, we recommend that Indian tribes be among the membership of national or regional membership organizations and associations receiving grants hereunder. For example, the National Congress of American Indians (NCAI) is a national membership organization consisting of Indian tribes, and NCAI may well be an appropriate technical assistance provider for tribal justice training.

In regard to Section 102, we recommend inserting Indian tribes as eligible grantees because some Indian tribes are developing legal advocacy offices for tribal members in the area of violence against women and other areas. Consistent with the principle of government-to-government relations, Indian tribes should also be included to provide governmental and community services to Indian communities under their jurisdiction. In addition, to avoid

duplication in the provision of services to Indian communities, we recommend that non-profit entities be required to submit a statement of support from the tribal government with jurisdiction over the Indian community or communities to be served, or a statement demonstrating that there is no duplication of or conflict with existing tribal government services in the area.

In regard to Section 103, similar changes should be made to promote consistency with the principle of government-to-government relations and to avoid duplication of services. Moreover, where there is funding for the public defense of indigent defendants in the Federal courts under the Criminal Justice Act, tribal courts are not receiving funding under that Act. Accordingly, it would be appropriate to ensure that funding under this section is primarily directed to enhancing the public defense of indigent defendants in tribal courts. We are available to work with the Committee's staff on these issues, if that would be of assistance.

V. Conclusion

In conclusion, American Indian communities face serious problems of rising violent crime, including violence against women, gang activity, juvenile delinquency, and child abuse. Federal and tribal law enforcement officials in the field report that poverty and alcohol abuse are substantial contributing factors to these problems. Justice and Interior have undertaken the Indian Law Enforcement Improvement Initiative to address these crime problems. S. 1508 would complement our overall initiative.

Tribal courts are also an important part of the tribal governmental infrastructure necessary to build economic self-sufficiency in Indian communities. This bill would enhance the development of strong tribal courts, and thereby, promote the long-term goal of economic self-sufficiency for Indian communities.

Office of the Attorney General
Washington, D. C. 20530

DEPARTMENT OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES

PURPOSE: To reaffirm the Department's recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations and to reaffirm adherence to the principles of government-to-government relations; to inform Department personnel, other federal agencies, federally recognized Indian tribes, and the public of the Department's working relationships with federally recognized Indian tribes; and to guide the Department in its work in the field of Indian affairs.

I. INTRODUCTION

From its earliest days, the United States has recognized the sovereign status of Indian tribes as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Our Constitution recognizes Indian sovereignty by classing Indian treaties among the "supreme Law of the land," and establishes Indian affairs as a unique area of federal concern. In early Indian treaties, the United States pledged to "protect" Indian tribes, thereby establishing one of the bases for the federal trust responsibility in our government-to-government relations with Indian tribes. These principles continue to guide our national policy towards Indian tribes.

A. THE EXECUTIVE MEMORANDUM ON GOVERNMENT-TO-GOVERNMENT RELATIONS BETWEEN THE UNITED STATES AND INDIAN TRIBES

On April 29, 1994, at a historic meeting with the heads of tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American tribal governments" and issued a directive to all executive departments and agencies of the Federal Government that:

> As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

President Clinton's directive requires that in all activities relating to or affecting the government or treaty rights of Indian tribes, the executive branch shall:

1) operate within a government-to-government relationship with federally recognized Indian tribes;

2) consult, to the greatest extent practicable and permitted by law, with Indian tribal governments before taking actions

that affect federally recognized Indian tribes;

3) assess the impact of agency activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;

4) remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of the tribes; and

5) work cooperatively with other agencies to accomplish these goals established by the President.

The Department of Justice is reviewing programs and procedures to ensure that we adhere to principles of respect for Indian tribal governments and honor our Nation's trust responsibility to Indian tribes. Within the Department, the Office of Tribal Justice has been formed to coordinate policy towards Indian tribes both within the Department and with other agencies of the Federal Government, and to assist Indian tribes as domestic dependent nations within the federal system.

B. FEDERAL INDIAN SELF-DETERMINATION POLICY

President Clinton's executive memorandum builds on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents affirmed the fundamental policy of federal respect for tribal self-government. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian tribes and reaffirmed "the government-to-government basis" for dealing with Indian tribes. President Bush recognized that the Federal Government's "efforts to increase tribal self-governance have brought a renewed sense of pride and empowerment to this country's native peoples."

II. PRINCIPLES OF INDIAN SOVEREIGNTY AND THE TRUST RESPONSIBILITY

Though generalizations are difficult, a few basic principles provide important guidance in the field of Indian affairs: 1) the Constitution vests Congress with plenary power over Indian affairs; 2) Indian tribes retain important sovereign powers over "their members and their territory," subject to the plenary power of Congress; and 3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where Congress has provided otherwise.

III. DEPARTMENT OF JUSTICE RECOGNITION OF INDIAN SOVEREIGNTY AND THE FEDERAL TRUST RESPONSIBILITY

The Department resolves that the following principles will guide its interactions with the Indian tribes.

A. THE SOVEREIGNTY OF INDIAN TRIBES

The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the United States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance.

The Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes. For example, the Department reviews proposed legislation, administers funds that are available to tribes to build their capacity to address crime and crime-related problems in Indian country, and in conjunction with the Bureau of Indian Affairs and tribal police, provides essential law enforcement in Indian country. The Department represents the United States, in coordination with other federal agencies, in litigation brought for the benefit of Indian tribes and individuals, as well as in litigation by Indian tribes or individuals against the United States or its agencies. In litigation as in other matters, the Department may take actions and positions affecting Indian tribes with which one or more tribes may disagree. In all situations, the Department will carry out its responsibilities consistent with the law and this policy statement.

B. GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS WITH INDIAN TRIBES

In accord with the status of Indian tribes as domestic dependent nations, the Department is committed to operating on the basis of government-to-government relations with Indian tribes.

Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes. Each component will conduct such consultation in light of its mission. In addition, the Department has initiated national and regional listening conferences and has created the Office of Tribal Justice to improve communications with Indian tribes. In the Offices of the United States Attorneys with substantial areas of Indian country within their purview, the Department encourages designation of Assistant U.S. Attorneys to serve as tribal liaisons.

In order to fulfill its mission, the Department of Justice endeavors to forge strong partnerships between the Indian tribal governments and the Department. These partnerships will enable the Department to better serve the needs of Indian tribes, Indian people, and the public at large.

C. SELF-DETERMINATION AND SELF-GOVERNANCE

The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

D. TRUST RESPONSIBILITY

The Department acknowledges the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. In a broad sense, the trust responsibility relates to the United States' unique legal and political relationship with Indian tribes. Congress, with plenary power over Indian affairs, plays a primary role in defining the trust responsibility, and Congress recently declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601.

The term "trust responsibility" is also used in a narrower sense to define the precise legal duties of the United States in managing property and resources of Indian tribes and, at times, of individual Indians.

The trust responsibility, in both senses, will guide the Department in litigation, enforcement, policymaking and proposals for legislation affecting Indian country, when appropriate to the circumstances. As used in its narrower sense, the federal trust responsibility may be justiciable in some circumstances, while in its broader sense the definition and implementation of the trust responsibility is committed to Congress and the Executive Branch.

E. PROTECTION OF CIVIL RIGHTS

Federal law prohibits discrimination based on race or national origin by the federal, state and local governments, or individuals against American Indians in such areas as voting,

education, housing, credit, public accommodations and facilities, employment, and in certain federally funded programs and facilities. Various federal criminal civil rights statutes also preserve personal liberties and safety. The existence of the federal trust responsibility towards Indian tribes does not diminish the obligation of state and local governments to respect the civil rights of Indian people.

Through the Indian Civil Rights Act, Congress selectively has derived essential civil rights protections from the Bill of Rights and applied them to Indian tribes. 25 U.S.C. § 1301. The Indian Civil Rights Act is to be interpreted with respect for Indian sovereignty. The primary responsibility for enforcement of the Act is invested in the tribal courts and other tribal fora. In the criminal law context, federal courts have authority to decide habeas corpus petitions after tribal remedies are exhausted.

The Department of Justice is fully committed to safeguarding the constitutional and statutory rights of American Indians, as well as all other Americans.

F. PROTECTION OF TRIBAL RELIGION AND CULTURE

The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. The Department seeks to ensure that American Indians are protected in the observance of their faiths. Decisions regarding the activities of the Department that have the potential to substantially interfere with the exercise of Indian religions will be guided by the First Amendment of the United States Constitution, as well as by statutes which protect the exercise of religion such as the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

The Department also recognizes the significant federal interest in aiding tribes in the preservation of their tribal customs and traditions. In performing its duties in Indian country, the Department will respect and seek to preserve tribal cultures.

IV. DIRECTIVE TO ALL COMPONENTS OF THE DEPARTMENT OF JUSTICE

The principles set out here must be interpreted by each component of the Department of Justice in light of its respective mission. Therefore, each component head shall make all reasonable efforts to ensure that the component's activities are consistent with the above sovereignty and trust principles. The component heads shall circulate this policy to all attorneys in the Department to inform them of their responsibilities. Where the activities and internal procedures of the components can be

reformed to ensure greater consistency with this Policy, the component head shall undertake to do so. If tensions arise between these principles and other principles which guide the component in carrying out its mission, components will develop, as necessary, a mechanism for resolving such tensions to ensure that tribal interests are given due consideration. Finally, component heads will appoint a contact person to work with the Office of Tribal Justice in addressing Indian issues within the component.

V. DISCLAIMER

This policy is intended only to improve the internal management of the Department and is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.

Janet Reno
Attorney General

Date: June 1, 1995

COMMENTS ON S. 1508, "INDIAN TRIBAL JUSTICE TECHNICAL AND LEGAL ASSISTANCE ACT OF 1999"

SUBMITTED TO THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

BY THE NAVAJO NATION

SEPTEMBER 29, 1999

GENERAL CONCLUSIONS

The general thrust of this bill, as outlined in Senator Campbell's August 5, 1999 introduction speech, is excellent. The 30 Indian Legal Services ("ILS") organizations the senator mentions are vital to justice in Indian country. DNA-People's Legal Services has had a central role in introducing the concept of the rule of law to the Navajo Nation, and many Navajo leaders have worked for DNA in one capacity or other. It can be said to be one of the major training grounds for law and democracy in the Navajo Nation. DNA has maintained a long-lasting and fruitful partnership with the Courts of the Navajo Nation and the Navajo Nation Bar Association.

The three areas targeted for assistance are (1) training for Indian nation judicial personnel, (2) civil legal assistance within Indian nation justice systems, and (3) criminal assistance within Indian nation justice systems. All three are badly needed, as will be discussed below.

RELATIONSHIP TO THE INDIAN TRIBAL JUSTICE ACT OF 1993

While Senator Campbell said, "I want to be clear: the legislation I am introducing today is intended to complement, not substitute for, the 1993 [Indian Tribal Justice] Act," unfortunately, S. 1508 would not complement that Act at all. Its authorization provisions for funding Indian nation justice systems will expire on October 1, 1999, two days after the upcoming hearing on S. 1508.

The Indian Tribal Justice Act has gone through its entire short life without Congress appropriating one *cent* for Indian nation judicial systems. While surely some blame for a lack of support can be laid at the doors of the Bureau of Indian Affairs, we must ask why it is, that if there was congressional will to support of Indian justice systems, that will did not bear fruit in the form of appropriations.

The Indian Tribal Justice Act became law in December 1993. According to Government Accounting Office Report No. GAO/NSIAD-99-158, Congress appropriated $970 million for foreign "rule of law" programs between FY 1993 and 1998. $74.2 million (21.3%) was set aside for foreign judicial and court operations. The "rule of law" which concerns most observers of Indian nation courts is the Indian Civil Rights Act of 1968. As the various federal reports since

then indicate, Congress has never given Indian nation courts the funding they need to implement that foundation of the rule of law concept.

If S. 1508 is designed to supplement the Indian Tribal Justice Act, then there should be an amendment which re-authorizes spending under the 1993 statute, and at far higher levels to accommodate the many new Indian justice systems which have come on line or are about to come on line.

SECTION 101: TRIBAL JUSTICE TRAINING AND TECHNICAL ASSISTANCE GRANTS:

There are two concerns with this section: The first is that while the Attorney General has the authority to define training and technical assistance programs and consider applications from "national or regional membership organizations and associations whose membership consists of judicial system personnel within tribal justice systems," there are no standards for what those programs or organizations. The second problem is that there are organizations which are not directly affiliated with Indian nation governments which may attempt to get the funding.

To be to the point on this, in 1982, the Bureau of Indian Affairs terminated funding for the National American Indian Court Judges Association. It conducted excellent training and education programs, and it promoted the Indian judiciary by allowing Indian nation judges to come together to discuss policy questions of mutual interest. Similarly, regional associations of judges and judicial conferences such as the Navajo Nation Judicial Conference could benefit from the receipt of grants under this section. However, there are academic-based organizations which could claim that they have judicial system personnel members on a board, and they should not benefit from such a grant. Too often, academic programs seek grant funding under the guise of aiding Indian country programs, but the grant funds are used for organizational aggrandizement and not to serve Indian country.

At minimum, there should be language in a report on the bill, if passed, which makes it clear that eligible organizations must be *membership* organizations of judges and judicial personnel, and academic institutions with boards comprised of such members would not be eligible for this funding.

SECTION 102: CIVIL LEGAL ASSISTANCE GRANTS

Here too, the scope of civil legal assistance is not defined, and this should not be left to the discretion of the Attorney General. Aside from individual legal representation, programs such as DNA-People's Legal Services are performing other valuable services. For example, DNA has a pro se clinic which assists individuals in preparing the paperwork for their own civil case. DNA

The U.S. Justice Department's "Tribal Courts Project" received $5 million for Indian nation courts (.75 million of which was taken off the top for non-court programs) in FY 1999, but a similar appropriation was defeated for FY 2000, because (1) there is no statute authorizing that program, and (2) the program has no definition.

has undertaken public consumer education programs and worked with merchants to promote Navajo peacemaking as an alternative for consumers with complaints. Grants under this section should encourage a maximum in flexibility and encourage innovation. The grant programs should not be designed in Washington - they should be designed by Indian legal service programs.

SECTION 103: TRIBAL CRIMINAL ASSISTANCE GRANTS

Innovation and local definition should be encouraged. Of particular interest to the Navajo Nation Judicial Branch is the fact that the Navajo Nation age cohort of children under age 9 (1990 Census) is 25% of the Navajo Nation population. Studies of crime show that if a child is abused or neglected, that child is equally likely to enter the cycle of violence as a teen. Therefore, early intervention to help children is a key to crime prevention. ILSP contributions using these grant monies could have a major impact.

FINAL RECOMMENDATION

The Senate Committee on Indian Affairs should hold an oversight hearing to find out what happened with the Indian Tribal Justice Act of 1993 and to review U.S. Justice Department programs for Indian country. The glaring inadequacy is the fact that while Indian nation judicial systems are offered competitive grants, of limited duration, for pilot project programs, they do not receive funding for basic *infrastructure* needs. Indian nation courts need basic facilities, equipment, and personnel, not the justice fad *du jour*. They need a foundation before attempting innovations.

As Senator Campbell noted, "crime, particularly violent crime, is rampant on Indian lands." Crime can be addressed in many ways, including innovative civil remedies. New ways of addressing crime, such as "therapeutic justice" and the traditional Indian justice which it mirrors, do require judicial education. However, there are those would attempt to design programs in Washington rather than reward innovation, and there are those who would take monies aimed at Indian country and keep them outside of Indian country. This bill does not authorize a gravy train. It authorizes some basic programs within Indian country. The grants should be designed in Indian country, and the grant monies should remain in Indian country. The Senate Committee on Indian Affairs should hold an oversight hearing to get at the question of what programs are and are not funded and what is happening with Justice Department funding.

* * *

We thank Associate Justice Gene Franchini of the New Mexico Supreme Court for this phrase.

Statement of the
NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION
Mary T. Wynne, President

before the
Senate Indian Affairs Committee
on S. 1508
The Indian Tribal Justice System Technical and Legal Assistance Act of 1999

September 29, 1999

INTRODUCTION

Good morning, Chairman Campbell and distinguished members of the Senate Indian Affairs Committee. Thank you for the invitation to come before you this morning to talk about a topic that is a key to continued growth and maturation of the judiciary in Indian Country.

My name is Mary Wynne. I am an enrolled member of the Rosebud Sioux Tribe. I sit on numerous tribal benches and I am an attorney licensed in the states of Washington, North Dakota, and South Dakota. I am current President of the National American Indian Court Judges Association, and the immediate past-president of the Northwest Tribal Court Judges Association.

THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

The National American Indian Court Judges Association, commonly referred to as NIJA, is a voluntary national representative membership association. It is the sole national voice of tribal court judges, and its membership is comprised of current and former tribal court judges throughout the United States. For thirty years, NIJA has provided quality training, albeit underfunded, and technical assistance services for tribal justice systems.

While I am here today in my official capacity as president of the NIJA, I am also here professionally as a Tribal Court Judge and Appellate Court Justice. During my career in Indian country, I have sat on the bench for 17 tribal courts at the trial level and for 11 tribes at their "Supreme Court". I can tell you, from sitting in many small, underfunded, and geographically remote tribal courts, that tribal court membership associations are generally the primary source of information and technical assistance for the numerous tribal justice systems who, in Indian country, stand at the front line of individual and fundamental rights for both Indians and non-Indians. These organizations are frequently the sole available source for fundamental tools courts need to fairly and independently adjudicate matters that come before their respective benches. I strongly believe that S. 1508, the Indian Tribal Justice System Technical and Legal Assistance Act of 1999, has the potential to provide tribal court personnel associations with the funding

needed to ensure future crucial technical assistance in a manner that keeps pace with the rapidly expanding caseloads they are now facing.

TECHNICAL ASSISTANCE BY TRIBAL COURT MEMBERSHIP ORGANIZATIONS

Culturally relevant training and technical assistance for Tribal Courts is difficult, if not impossible to find. As you can see from the attached agendas of both a national and a regional s associations, we provide this assistance on budgets that can be referred to as shoestring, at best. For instance, the annual dues of $35 per member for the Northwest Tribal Court Judges Association and the meeting fee of $50.00 covers only meeting rooms costs for judges to hear what is may times the only presentation the will hear on such things as rules of evidence, fundamentals in opinion writing, search and seizure law, and other topics. Topics such as these are critical to every judge, and regular updates and study is needed to provide the solid foundation of legal training and understanding of legal theory needed by every judge to adjudicate their cases in a manner consistent with due process.

Tribes have limited resources. Tribal legislators can only provide what they have. Hence, these membership meetings and association training sessions are frequently the only training available to the people sitting on a tribal bench. Professional CLE courses, required by most state bar associations are typically out of the financial reach of tribal judges and justices, even though required of the attorneys who practice before them.

I am able to come before you today and support this bill because of the first-hand experience I have had working with and being an officer for the very national and regional organizations that would be affected by this bill. I have helped develop and implement training programs to assist tribal judges, while at the same time keeping a close eye on the limited funds available for such things as the copying of documents to provide judges with reference materials they can take with them back to their courts. I can honestly say to you that the meager funds of tribal court organizations have, in the past, been spent effectively for programs that judges themselves request so they can competently handle their docket. These Associations then seek expert trainers and presenters who volunteer time and cover their own travel expenses. However, when a topic is requested by the judges, and volunteers cannot be found, or travel expenses need to be paid, the subject has to be crossed off the list of training topics.

SUPPORTING TRIBAL COURTS IS COST EFFECTIVE

The benefits of funding S.1508 are not limited to meeting a gapping need in Indian country. They extend to the Federal justice system as a whole. I would like to illustrate this with a story. Tomorrow morning we rise from our beds to find tribal courts no longer exist. Matters that arise out of the 500 plus tribes in the United States, whether they be juvenile, civil, criminal, domestic relations, cases of domestic violence, mortgage foreclosures, traffic infractions,

probates or any of the vast panorama of cases handled by tribal courts, from "dog at large" to complex commercial litigation, are then adjudicated in the Federal District Courts. Just one Federal court handling the caseload of a single tribal court such as the Colville Tribal Court would experience budget shortfalls in excess of $15.8 million. If the cases from this tribal court, only one of the 150 such courts, were transferred to the local state district or superior court, they must come accompanied by a check for nearly $1 million per year. So, when considering for the first time directing money to regional and national associations that support tribal courts, consider not only that these organizations make continuation of due process and fair adjudication of disputes possible. You must also look at the direct benefits to all of your constituents.

LEGAL INFRASTRUCTURE AND ECONOMIC DEVELOPMENT

Another affect that must be examined is the role of legal infrastructure in economic development. A technically proficient and legally competent judiciary is as much a requirement in the infrastructure foundation supporting economic growth as are roads, water, telephones or electricity. As reservation economies expand, an evolving legal environment will come hand in hand. More and more cases involving commercial litigation, financing and banks, development contracts and their attendant real property disputes, zoning and environmental challenges and the broad spectrum of challenges presented by a growing and healthy economy will make their way through tribal court house doors. The $35 annual dues paid into a regional judges association will not be sufficient to provide the resources necessary for presenting tribal court staff with the continuing legal education required to remain current with the changing legal environment. If the goal of a self-sustaining economy is to be achieved in Indian country, all infrastructure requirements must be in place lest we leave the reservations with weak foundations that are programmed for failure.

THE INDIAN TRIBAL COURTS FUND

NAICJA also requests that this Committee consider technical problems related to the Department of Justice's Indian Tribal Courts Fund. Established in FY1999 as part of the Indian Country Law Enforcement Initiative, $172 million in proposed funding under the Indian Country Law Enforcement Initiative was requested to provide direct law enforcement funding. The predictable increase in tribal court caseloads was not met. Congress appropriated most of the FY 1999 funding requested for the Indian Country Law Enforcement Initiative, but only $5 million for the Indian Tribal Courts Fund. For FY 2000, the Senate has appropriated the same $5 million as FY 1999, but the House has again provided for zero funding of this critical Indian Tribal Courts Fund. Moreover, NAICJA is disturbed to learn that the House has apparently based this zero funding upon their contention that the Indian Tribal Courts Fund has not been formally authorized. We would request that the Committee review this issue and, if necessary, consider amending S. 1508 to add on a formal authorization of the Indian Tribal Courts Fund.

CONCLUSION

For all of the above reasons, the National American Indian Tribal Court Judge's Association urges passage of S.1508. We urge support of the volunteer tribal personnel membership organizations that provide ongoing technical assistance and resources to the tribal judiciaries who woman the trenches of due process and fundamental fairness for all citizens of Indian country.

30 Years of Strengthening and Enhancing Tribal Judicial Systems Through Education

1999 NATIONAL TRIBAL JUDICIAL CONFERENCE

AGENDA

SUNDAY, MARCH 21, 1999
(Grand Hyatt Washington)

12:00 - 4:00 p.m. **Registration** *(Grand Hyatt Washington)*

1:00 - 4:00 p.m. **NAICJA Annual Meeting** *(Grand Hyatt Washington)*
Judge Jill E. Shibles, President
National American Indian Court Judges Association

4:00 - 6:00 p.m. **Reception** *(Grand Hyatt Washington)*
(Sponsored by Mashantucket Pequot Tribal Nation and Mohegan Tribe)

MONDAY, MARCH 22, 1999
(385 Russell Senate Office Building)

8:00 a.m. **Registration** (Coffee and Muffins)
(Sponsored by Forest County Potawatomi Tribe)

9:00 a.m. **Honor Guard, Welcome, Conference Overview**
- Judge Jill E. Shibles, President
  National American Indian Court Judges Association
- Honor Guard, Vietnam Era Veterans
  Inter-Tribal Association

Tribute to the Four Surviving Members of the NAICJA Founding Board of Directors
- Hon. Betty Laverdure (Turtle Mountain Chippewa)
- Hon. Josephine D. Neuman (Salish and Kootenai)
- Hon. Cranston Hawley (Confederated Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation)
- Hon. Virgil L. Kirk (Navajo)

MONDAY, MARCH 22, 1999 (Continued)

(385 Russell Senate Office Building)

9:30 a.m. **Activities of the Congressional Native American Caucus**
U. S. Representative Dale Kildee, Chair
Congressional Native American Caucus

10:00 p.m. **The Congressional Legislative Process**
Phillip Baker-Shenk, Esq.
Dorsey and Whitney, LLP

10:30 p.m. *Break*
(Refreshments Sponsored by Mohegan Tribe)

11:00 p.m. **Setting Goals and Addressing Challenges in the 106th United States Congress**
Senator Daniel Inouye, Vice Chairman
U.S. Senate Committee on Indian Affairs

11:30 p.m. **Congressional Update**
- Patricia Zell, Esq., Minority Staff Director and Chief Counsel, Senate Committee on Indian Affairs
- Paul G. Moorehead, Esq., Majority Staff Director and Chief Counsel, Senate Committee on Indian Affairs

12:00 p.m. *Lunch* [On Your Own]

1:00 p.m. **Federal Indian Law, Tribal Sovereignty, and Tribal Jurisdiction**
Professor S. James Anaya
Professor of Law, University of Iowa

2:00 p.m. **Developing Tribal Common Law**
Hon. Robert Yazzie, Chief Justice
Navajo Nation Supreme Court

MONDAY, MARCH 22, 1999 (Continued)
(385 Russell Senate Office Building)

3:30 p.m. **Judicial Update**
Don Wharton, Esq., Staff Attorney
Native American Rights Fund (NARF)

4:30 p.m. **Roundtable Discussion**
Strength in Unity: NCAI, NARF, and NAICJA
- Hon. Mary T. Wynne, Moderator
- Hon. Jill E. Shibles, President, NAICJA
- W. Ron Allen, President
  National Congress of American Indians (NCAI)
- Don Wharton, Esq., Staff Attorney
  Native American Rights Fund (NARF)
- Ada Pecos Melton, Administrator, National Association of
  Tribal Court Personnel (NATCP)

5:30 p.m. *Recess*

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TUESDAY, MARCH 23, 1999
(385 Russell Senate Office Building)

8:30 a.m. **Coffee & Rolls**
(Sponsored by Forest County Potawatomi Tribe)

9:00 a.m. **Native American Lending Study**
James Berg, Director, Native American Lending Study
Community Development Financial Institutions Fund
(CDFI), U.S. Department of the Treasury

9:15 a.m. **Indian Housing Law Developments**
Jacqueline Johnson, Deputy Assistant Secretary
Native American Programs, U.S. Department of
Housing and Urban Development

10:15 a.m. **Federal Support for Tribal Justice Systems**
Hon. Janet Reno, United States Attorney General

TUESDAY, MARCH 23, 1999 (Continued)

(385 Russell Senate Office Building)

11:00 a.m. **Bureau of Indian Affairs (BIA) Funding and Assistance for Tribal Justice Systems**

- Hon. Kevin Gover, Assistant Secretary
  U.S. Department of the Interior
- Jim T. James, Chief, Branch of Judicial Services,
  Bureau of Indian Affairs,
  U. S. Department of the Interior

12:00 p.m. *Lunch* [On Your Own]

1:15 p.m. **1999 Tribal Judicial Education Projects**
Mitch Wright, Esq., National Judicial College

2:00 p.m. **U. S. Department of Justice Indian Country Initiatives**
Hon. Thomas LeClaire, Director
Office of Tribal Justice, U. S. Justice Department

3:00 p.m. **U. S. Justice Department**
Funding Opportunities for Tribal Justice Systems

- Norena Henry, Office of Justice Programs (OJP),
  American Indian and Alaska Native Affairs Office
- Terri Henry, OJP, Violence Against Women Office
- Jeannie Gregori, OJP, Office for Victims of Crime
- Martin Kamen, OJP, Bureau of Justice Assistance
- Lori Sherrod, OJP, Drug Courts Program Office
- Chryl Andrews, OJP, Office of Juvenile Justice and
  Delinquency Prevention
- Steven Amos, OJP, Corrections Program Office
- June Kress, Community Oriented Policing Services

5:00 p.m. *Recess*

WEDNESDAY, MARCH 24, 1999

(385 Russell Senate Office Building)

8:30 a.m. **Coffee & Rolls**
(Sponsored by Muskogee (Creek) Judicial Branch)

9:00 a.m. **Update on Drug Courts in Indian Country**
- Lori Sherrod, Drug Courts Program Office
- Jerry Gardner, Tribal Law and Policy Institute
- Janna Walker, National Association of Drug Court Professionals(NADCP)
- Caroline Cooper, American University Justice Programs Office Drug Courts Clearinghouse
- Hon. Joseph Flies-Away, Hualapai Tribal Court

10:30 a.m. **Indian Child Welfare and Safe Families Acts**
Jack Trope, Attorney/Consultant
Native Indian Child Welfare Association

11:15 a.m. **Protecting Indian Children Through Tribal Court Appointed Special Advocate (CASA) Programs**
- Michael Piraino, Chief Executive Officer National Court Appointed Special Advocate (CASA) Association
- Jerry Gardner, Tribal Law and Policy Institute

12:00 p.m. *Lunch* [On Your Own]

1:00 p.m. **The Violence Against Women Act (VAWA) Plenary Remarks and Overview**
Terri Henry, OJP, Violence Against Women Office

1:15 p.m. **The Violence Against Women Act (VAWA): Full Faith and Credit**
(385 Russell Senate Office Building)
Hon. Mary T. Wynne, Tribal Court Judge

Jurisdiction: Navigating the Complexities of Jurisdiction While Responding to Safety Needs of Battered Women
- Hon. Mary T. Wynne, Tribal Court Judge
- Michelle Paquin, Battered Women's Legal Advocacy Project
- Donovan D. Brown Sr., Navajo Nation Acting Chief Prosecutor

WEDNESDAY, MARCH 24, 1999 (Continued)

(385 Russell Senate Office Building

1:15 p.m. **A Framework for Understanding Battering: Power and Control** *(485 Russell Senate Office Building)*

- Don Chapin, Domestic Abuse Consultant
- Genevieve James, Domestic Abuse Consultant

Power and Control Tactics in the Courtroom
Don Chapin, Domestic Abuse Consultant

3:00 p.m. *Break*

3:15 p.m. **The Violence Against Women Act (VAWA): Full Faith and Credit**
(385 Russell Senate Office Building)
Hon. Mary T. Wynne, Tribal Court Judge

Jurisdiction: Navigating the Complexities of Jurisdiction While Responding to Safety Needs of Battered Women

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Power and Control Tactics in the Courtroom
Don Chapin, Domestic Abuse Consultant

5:00 p.m. **Awarding of Participation Certificates and Closing Remarks**

5:30 p.m. *Adjournment*

Thank you very much for coming and we wish you a safe journey home!

Northwest Tribal Court Judges Association

Quarterly Meeting - November 13th & 14th, 1998

Foster Center, Yakama Tribal Government Building (1 Block South of Heritage Center)
Toppenish, WA

Agenda

Friday, November 13th

8:00 - 9:00	Dues & Registration: Dues: $35 per person per year Registration: $50.00 per participant	Continental Breakfast
9:00 - 9:15	Opening Remarks & Prayer	
9:15 - 10:30	**Training:** Developing processes to protect separation of powers: Perspectives of a tribal legislator	Mervin Wright (confirmed) *Tribal Chairman* *Pyramid Lake Paiute*
10:30 -10:45	Break	
10:45 -12:00	**Training:** Indian Civil Rights Act: Case Law Update	Robert McCarthy (confirmed) *Northwest Justice Project*
12:00 - 1:30	**Working Lunch:**	
	Legislative Update:	Mary Wynne
	Keynote Speaker:	Cynthia Imbrogno (confirmed) *Honorable Magistrate Judge* *Eastern District*
	Update on Case Law:	Bruce Didisch *Asst. US Attorney* *Eastern WA District*
1:30 - 2:00	**Funding Updates:**	
	BIA:	Nick Longley (confirmed) *BIA - Portland Area Office*
	VAWA, DOJ, BJA	Mary Wynne *President*
2:00 - 2:45	**Report:** Inside the 9th Circuit Court	Debbie Borerro *Former 9th Circuit Staff Attorney*
2:45 - 3:00	Break	

3:00 - 5:00	**Committee Reports:**	
	WA Sup. CT. & Juv. Law Comm	Julian Pinkham
	VAWA Training Project	Katherine Eldemar
	Bench Book Project	Lorintha Warwick
	National Indian Court Judges Assoc.	Mary Wynne
5:00	Naye	

Saturday, November 14th

8:30 - 9:00	Continental Breakfast	
9:00 - 9:30	Opening Remarks Questions/Answers for Day One	Mary T. Wynne *President*
9:30 - 10:00	**Business Meeting:** Minutes from Previous Meeting Membership & Dues Treasurer's Report	Michelle Demmert *Secretary/Treasurer*
10:00 - 10:15	**President's Report**	Mary T. Wynne *President*
10:15 - 10:30	Break	
10:30 - 11:00	**Old Business:** Motions on Committee Reports	
11:00 - 11:45	**New Business:** Election of Officers: President Vice President Secretary/Treasurer Board of Directors (2) NAICJA Board Members (2) NAICJA Steering Committee Members (2) Setting training topics and meeting dates for 1999	Mary T. Wynne *President*
11:45	Closing Remarks	
12:00	Naye	

Board of Director's Meeting

TESTIMONY OF PETERSON ZAH ON BEHALF OF THE NATIONAL ASSOCIATION OF INDIAN LEGAL SERVICES TO THE SENATE COMMITTEE ON INDIAN AFFAIRS REGARDING S. 1508 ON SEPTEMBER 29, 1999

INTRODUCTION

Chairman Campbell, Vice Chairman Inouye and distinguished members of the Committee, my name is Peterson Zah, I am a member of the Navajo Nation, and I am presently working as a special advisor to the President of Arizona State University in Tempe, Arizona. I am honored to be invited to testify on S. 1508, the "Indian Tribal Justice System Technical and Legal Assistance Act of 1999." My testimony is on behalf of the National Association of Indian Legal Services (NAILS) and in support of this bill.

As some of you may know, prior to my years as President of the Navajo Nation, I served as the Executive Director of DNA Peoples Legal Services on the Navajo Reservation. I know first-hand the importance of the work of Indian legal services in the lives of Indian people and in the development of tribal law and judicial systems. That is why I am always eager to have the opportunity to speak up for Indian legal services and why I am pleased to be here in support of this bill.

Let me begin by providing some background on these 30 small Indian legal services organizations that are out there everyday helping individuals and developing the foundation for modern tribal jurisprudence.

Indian legal services programs were first created out of the legal arm of the Office of Economic Opportunity in the mid-1960's. Eight programs were established in the 1960's, and approximately 25 more in the 1970's. Funding was shifted to the Legal Services Corporation (LSC) with its creation in 1974. To

recognize the significance of this fact, it was the first real time in the 225-year history of this country that Native American people had any *meaningful* access to legal representation by other than government attorneys in a few, random cases. Today, these small programs, funded primarily by LSC, continue to provide fundamental, bread-and-butter legal representation to individual Indian people, and small tribes, throughout the United States.

The importance of Indian legal services programs has been recognized before by this Committee. In a June 1981 Report, 97th Congress, First Session, entitled "Analysis of the Budget Pertaining to Indian Affairs Fiscal Year 1982," at page 22, this Committee reported that the ILS programs provide *"exceptional services,"* to Indian Country, and that attorneys working with ILS programs had become *". . . an integral part of the tribal legal and judicial processes. . ."and ". . . contributed greatly to the development of the on-reservation judicial systems."* [Emphasis added.]

For over thirty years, these programs have been providing nationwide essential, basic legal services to individual Native Americans and tribes whose members fall within the federal poverty guidelines. A cornerstone of the work of ILS programs over these three decades has been assisting tribes in the development and evolution of tribal justice systems, including tribal courts. This work has included, to name but a few of the various general categories: the development of written codes on tribal law, written codes on practice and procedure in tribal courts, selection and training of tribal judges, tribal-state court judge training on common legal areas of interest, development of tribal court lay advocate programs and the training of lay advocates to staff those programs, and the development of tribal peacemaking (traditional alternative dispute resolution)

courts and systems.

For a more in-depth, comprehensive look at the history and work of Indian legal services programs, we will be submitting for the record copies of a study entitled "*Legal Needs and Services in Indian Country: 1998 Report to the Legal Services Corporation*," by Eric Dahlstrom, Esq. and Randolph Barnhouse, Esq.

As that Report will demonstrate, Indian legal services organizations are all too often the only game in town, the only organizations available on the reservations themselves, on a daily basis, to provide independent, community based legal assistance to individuals and tribal court systems. Allow me to give you a very small sampling of what I mean.

DNA Legal Services of Arizona, New Mexico and Utah

Back in my home country on the Navajo Reservation DNA has continued its history of contributing to the evolution of tribal court systems within its service area through code development and judicial and law enforcement training. In 1993 the Navajo Nation Council passed the Domestic Abuse Protection Act (DAPA). A DNA attorney drafted the DAPA and guided it through the tribal legislative process. The Act allows victims of domestic abuse to apply to the courts *pro se* for protection from their abuser, possession of any home, child custody and support, and a broad range of other remedies. In 1995, DNA established its Native American Family Violence Prevention Project (NAFV Project), with the initial goal of educating Navajo Nation courts, legal practitioners and others about the DAPA. The NAFV Project conducted trainings for judges, court personnel, prosecutors, law enforcement, and social services across the Navajo Nation in three states. In 1996, DNA also drafted and secured passage of

the Hopi Nation's domestic abuse prevention act which contains provisions similar to the Navajo Nation law.

DNA's Youth Law Project (YL Project) has also been actively working to help Navajo and Hopi communities deal with violence and to improve the legal system's response to that violence. DNA has taken a leadership role in a broad based coalition working on these issues. The coalition has been invited to comment on revisions to the Navajo Nation Children's Code. In the future, the coalition hopes to pursue funding to develop a criminal code for the Navajo Nation dealing with youth violence, and to train courts, prosecutors, law enforcement, social services, and other legal personnel on the code and on how to respond to crimes committed by youths.

In the past, the YL Project has conducted a Street Law program at Navajo high schools, developing a Street Law curricula, and bringing DNA lawyers and others from the community into the high schools to give students a hands-on view of how the law affects their lives. More recently, the YL Project has assisted the Window Rock and Tuba City, Arizona communities to institute Teen Courts. These types of innovative, community based programs are responsive to critical local needs, and they help create a healthy and stable environment which is then attractive to business and other community development.

Finally, DNA has also worked with the courts of the smaller tribes such as Hualapai, Havasupai, and Yavapai Apache to provide lay advocate training for the more efficient operation of their tribal court systems.

CONCLUSION

Mr. Chairman and members of the Committee, unfortunately I do not have

time today to talk about the fine work of other Indian legal services programs with tribal courts and tribal communities. I have, however, included a few detailed descriptions at the end of my testimony. I hope I have not done a disservice to these and all the other Indian legal services programs by giving you such a limited snapshot of some of the work they have done in recent years. I simply wanted to give you, very briefly, some sense of the vital role these offices play in the development and provision of legal services on the reservations.

It is this type of committed, on-site work, done day-in and day-out that creates a climate of trust in our tribal judicial systems. In that environment of trust and confidence our Indian communities can grow and thrive.

This modest bill, S. 1508, will help contribute to that growth by expanding the opportunities for Indian legal services and tribal court membership organizations to contribute to the work the tribes themselves are doing in this area. It is essential that such organizations, outside of tribal government but committed to tribal justice, continue to help shape the development of our tribal justice systems. It makes our systems healthy and responsive, and that is good capacity building.

Before I close, I want to mention briefly the support for Indian legal services that comes from tribal governments, intertribal organizations and tribal judiciaries. I will do that by referring you to the letters of support that were attached to the NAILS testimony presented to this Committee as part of the record of your Hearing on June 3, 1998, on the Initiative on Law Enforcement in Indian Country.

Although these letters and Resolutions of support were presented to the Committee in the context of that initiative, their general theme is germane to S.

1508. That theme is one of encouragement and support for Congress to create the opportunity for supplemental funding for ILS in order to enhance the capacity of tribal courts in a meaningful, low cost way. I urge you to go back and see the strong words of those Resolutions and letters.

As Chairman Campbell stated in introducing S. 1508, this bill is intended to complement, not substitute direct federal support for tribal governments in the area of tribal justice. The bill would authorize the Attorney General to award grants to national or regional tribal justice system organizations and associations and to non-profit entities which provide legal assistance services for tribes and tribal members for the purpose of improving tribal judicial systems through training, technical assistance and civil legal and criminal assistance. The bill specifically includes our 30 Indian legal services programs as eligible entities to whom the Attorney General may award grants for civil legal and criminal assistance programs by the references to non-profit entities which provide legal services pursuant to federal poverty guidelines. The bill provides that these grants would be conditioned on the availability of appropriations. As you may know, Indian Legal Services programs have been very mindful about not competing with tribal courts for operating funding, and so we appreciate the Committee's intent in the bill that the Attorney General would, subject to available appropriations, provide funds for these grants from within existing Department of Justice programs and outside of the tribal courts program.

I hope I have given you good indication of why that is right, and how it occurs. I commend the Committee on its foresight in appreciating how these organizations are key parts of our judicial development. By moving this bill into law you will, in a modest way, be contributing to a healthy jurisprudence in Indian

Country; and that, as you well know, is good for everyone.

Thank you again for this opportunity to speak to you today. I am happy to respond to any questions you might have.

EXAMPLES OF THE TRIBAL COURT WORK OF OTHER SELECTED INDIAN LEGAL SERVICES PROGRAMS

Indian Pueblo Legal Services of New Mexico

Indian Pueblo Legal Services (IPLS) has been assisting the Pueblos in the development of tribal domestic violence codes. They have organized working groups within the Pueblos which are responsible for identifying the substantive code provisions and procedures to be enacted by each Pueblo, given the unique nature of each tribal government and tribal court. IPLS has facilitated the discussions and drafted the codes. IPLS provided this technical assistance to eight Pueblos under a contract with the Eight Northern Indian Pueblos Council and to three Pueblos under a Violence Against Women Act grant. The working groups within the Pueblos are responsible for ensuring that the Tribal Council considers and adopts the codes.

Michigan Indian Legal Services

Michigan Indian Legal Services (MILS) has represented several Michigan tribes in securing federal recognition. MILS' work with these tribes did not stop there, however. For many years, MILS has been actively engaged in the assistance of the tribes in the development of their tribal court systems, including code development and training of tribal judicial personnel. Two recent projects include drafting of a juvenile code and a peacemaking code for the Little River Band of

Ottawa Indians.

Dakota Plains Legal Services of South Dakota

Dakota Plains Legal Services (DPLS) staff has met with tribal court judges and court personnel from throughout South Dakota to establish court procedures, improve working relationships, discuss code revisions and do-it-yourself kits for simple procedures such as non-contested divorces. DPLS staff has also been involved in peer mediation training with the tribal courts in their service area.

North Dakota Legal Services

Since its beginning in 1971, North Dakota Legal Services has provided representation to low income Native Americans in the Fort Berthold Tribal Court. NDLS has handled a wide variety of cases, attempting to feature a high volume of routine cases together with three or four impact cases each year. Included among those thousands of cases were impact decisions in the area of domestic violence jurisdiction *(Stretches v. Stretches),* individual Tribal members rights *(Bordeaux v. Wilkinson),* tenants rights *(Chase v. Fort Berthold Housing Authority),* juvenile detention and tribal jails *(Fitzsimmons on behalf of KMR),* and repossession protection, debtors rights, criminal due process and Tribal Court jurisdiction.

Wisconsin Judicare

Between 1996 and 1998 Wisconsin Judicare was actively involved in a statewide Tribal Lay Advocate Training Project. This project resulted in 20 tribal individuals receiving a certification from the Wisconsin Tribal Judges Association (WTJA). With this certification, advocates may apply to practice in one or more tribal courts in Wisconsin. The impetus for this project came from the fact that

while the tribal courts are expanding in their scope of services, there has been no similar increase in the availability of attorneys to represent individuals in those growing courts.

When two new tribal courts opened their doors in Wisconsin in 1996, Judicare's Indian Law Office, at the request of the tribal courts, presented a seminar for state and tribal court judges entitled, "Tribal/State Legal Relations: What Judges Need to Know." The Wisconsin Department of Justice co-sponsored the event. The purpose was to establish a good, cooperative understanding and working relationship between the state and tribal courts so justice would flow evenly for everyone with a minimum of jurisdictional problems. Approximately 30 state and tribal court judges attended the session which covered a variety of jurisdictional issues. The seminar received high marks in the concluding evaluation, with judges consistently suggesting that similar events be presented in the future.

Idaho Legal Aid Services

Idaho Legal Aid Services (ILAS) was instrumental in creating the Nez Perce Peacemaker/Access to Justice Project, which worked in conjunction with the Nez Perce Tribal Court to provide mediation services and *pro se* pleading forms to individuals bringing actions in the Tribal Court. Law students and Tribal elders engaged in intensive cross-cultural mediation training and then collaborated in mediation of selected tribal court disputes. In addition, ILAS staff drafted legal codes for several other Idaho tribes and contributed to the development of jurisprudence in the tribal courts by actively engaging in representation of individual tribal members in those court systems.

Native American Program of Oregon Legal Services

The Native American Program of Oregon Legal Services (NAPOLS) has done a substantial amount of Tribal Court development work over the past decade. For instance, NAPOLS assisted the Confederated Tribes of Grand Ronde Tribe in establishing their Tribal Court, which has been up and running since 1991. NAPOLS drafted the Tribal Court Ordinance, conducted workshops for the Tribal Council, assisted in the hiring of a tribal court judge, did lay advocate training, did training for the Tribal Social Services department on court procedures, and drafted court forms for use by the Tribal Court. Most recently NAPOLS assisted the Tribal Court judge in creating computerized form court orders that complied with PL 96-272, to ensure the payment of foster care maintenance monies for Tribal foster care providers. NAPOLS has also appeared numerous times in the Grand Ronde Tribal Court.

NAPOLS has done very similar work for the Coquille Indian Tribe. The Coquille Tribe was restored in 1989. Their Constitution, which NAPOLS assisted in drafting, was adopted in 1991 and required the establishment of a tribal court. NAPOLS has conducted a series of tribal court workshops for the Tribal Council, presented a workshop that involved local county judges and child protective services workers on the ICWA and tribal courts, drafted the Tribal Court Ordinance, assisted in the hiring of a judge, drafted substantive ordinances that will be applied by the Court. The Court officially convened for the first time in May of 1998.

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September 22, 1999

The Honorable Ben Nighthorse Campbell
Chairman, United States Senate Committee on Indian Affairs
Attention: Committee Clerk, Eleanor McComber
United States Senate SH-838
Washington, DC 20510

Re: Hearing Regarding S. 1508

Dear Chairman Campbell,

I am writing to express my appreciation to you for your invitation to attend and present testimony at the hearing on S.1508, a bill to provide technical and legal assistance to tribal justice systems and members of Indian tribes, on Wednesday, September 29, 1999. I will be unable to attend because of prior commitments however I would like to go on record as supporting the bill.

DNA- People's Legal Services has been providing free legal services to low income persons and families since 1967. In it's early history DNA assisted primarily members of the Navajo and Hopi Nations but in recent years DNA has provided services to the Walapai, Havasupai, and Yavapai Apache Tribes in Arizona, and the Jicarillo Apache Tribe in New Mexico. DNA also serves non-Indians from our off-reservation offices in Flagstaff, Arizona and Farmington, New Mexico. DNA has helped tens-of-thousands of low-income people solve legal problems that threatened them, their families and their communities.

Over the years DNA has done much more than provide legal services to individuals, DNA has played a vital role in the development of tribal sovereignty. Promoting tribal sovereignty has always been one of DNA's highest priorities; strong tribal governments, including strong tribal judicial systems is the best hope for ending the despair and poverty found on most Indian reservations. DNA has been directly involved in tribal law development, for example, DNA provided assistance in the development of tribal written codes, has provided training to court personnel on practice and procedure, and has helped in the development of tribal court lay advocate programs and in the training of advocates.

S. 1508 will help contribute to the development of tribal justice systems by expanding opportunities for legal service programs such as DNA to continue the work they do. Programs such as DNA, outside the tribal government, but nevertheless committed to tribal sovereignty and tribal justice systems, help to develop systems that are truly responsive to the needs of communities and help empower communities to become self-sufficient and self-sustaining.

We greatly appreciate your support and your introduction of S. 1508. Thank you again for the invitation to comment on the bill.

Sincerely,

Claudeen Bates Arthur

Claudeen Bates Arthur
Legal Director

LEGAL NEEDS AND SERVICES IN INDIAN COUNTRY

1998 Report to the Legal Services Corporation

Final • January 1999 • Eric Dahlstrom, Esq. • Randolph Barnhouse, Esq.

I am a listener, said the American Indian.
The White Man does not ask Me what I think.
The White Man thinks he's always right.
No chei nu ca bache coo Whace.
Let every American Indian make it clear.
We are not interested in being made over as White Men or White Women.
Nor of the White Race.
We are what we are.
Being Indians and members of the American Nations.
And as citizens we are seeking justice
within the law of our American Nation.

WA WA CALACHAW BONITA NUNEZ, "SPIRIT WOMAN,"
QUOTED IN SPIDER WOMAN'S GRANDDAUGHTERS:
TRADITIONAL TALES AND CONTEMPORARY WRITING
BY NATIVE AMERICAN WOMEN, (PAULA GUNN ALLEN, ED. 1989).

I. PURPOSE OF REPORT

For close to 35 years, the federal government has annually appropriated approximately 2% of the national legal services budget for programs and components serving Native Americans. In 1996, however, funding was cut by 30% to $6 million dollars causing a major financial setback for Indian Legal Services offices. Because the Legal Services Corporation (LSC) has relied upon ongoing analysis of the need to fund specialized legal services for Native Americans in its planning decisions, the Corporation funded this study of the Legal Needs of Native Americans. This Report will examine the role of the federal government in the provision of legal services to low-income Native Americans and tribes. It will describe the unique legal needs of Native Americans and the special difficulty of meeting those needs.

Were funding not a limitation, it would have been valuable to collect more specific data on Indian legal needs via nation-wide sampling of tribes and tribal communities. The American Bar Association, for example, secured major funding to produce a large-scale national survey of the legal needs of Americans in two decades. While research and analysis of such areas as the under-utilization of basic field programs by Native Americans in areas with substantial Native American populations may have been helpful, it was beyond the scope of this project. Yet, with a significantly less expansive approach, this Report was able to capture findings on some of the successes that access to Indian Legal Services has provided a people living amidst often brutal economic realities. Moreover, it sets out the challenges ahead in devising a less costly and more efficient mechanism for ensuring that the U.S. government honors its solemn trust responsibility to protect the legal rights of Indian tribes and its moral obligation to ensure equal access to justice for the most vulnerable of America's poor.

II. EXECUTIVE SUMMARY

For well over a quarter century, Legal Services Corporation has provided access to justice for dozens of small, low-income Indian tribes and thousands of individual Native Americans. Annual appropriations from Congress since 1966 have funded the work of Indian Legal Services offices throughout the United States, principally in Midwestern and western states. Some of the stories that can be told by impoverished tribes seeking legal services help are uniquely impressive and defy written description when one recalls their starting point and the lack of resources available to them.

Consider, for example, the case of the Confederated Tribes of the Grand Ronde Community of Grand Ronde, Oregon. Fourteen years, ago the Grand Ronde were a "terminated" tribe whose tribal members each had been given the grand sum of $32 when tribal lands were sold upon severance by the federal government, unilaterally, of their trust relationship. Today, the Grand Ronde, whose federal recognition was restored in 1983 with the assistance of a small Indian Legal Services office, has a new tribal health center, its own tribal court and a charitable foundation which recently made a sizeable donation to the Oregon Museum of Science and Industry.

Such success has been made possible by the U.S. Congress' consistent funding the past 34 years of legal services for Indian and Alaskan Native tribes and individuals. This Report is a study of the history of federal funding of the Indian Legal Services programs and components, and gives insight on the rationale for the federal government's continued commitment. The following are some of the highlights of this Report.

A. THE UNITED STATES GOVERNMENT HAS A SPECIAL OBLIGATION TO PROVIDE NATIVE AMERICANS WITH MEANINGFUL ACCESS TO THE LEGAL SYSTEM.

The relationship between Indian nations and the United States is unique in a number of respects. Indians are one of the political groups identified in the U.S. constitution. The U.S. Supreme Court has noted that the distinction is "political rather than racial in nature."[1] The federal Indian relationship is one of the most important concepts underlying federal Indian law and the constitutional powers of Congress to ratify treaties and regulate commerce with Indian tribes provide the legal basis for its role as trustee. As the United States began to represent tribal interests through the U.S. Attorney as land titleholder and trustee, it adopted laws extending its authority to control the legal interests of Indians and Indian tribes. It also delegated to a number of federal agencies, including the Legal Services Corporation, special duties relating to Indian affairs at the same time.

B. NATIVE AMERICANS HAVE UNIQUE LEGAL NEEDS THAT ARE BEST MET BY SPECIALIZED LEGAL PRACTITIONERS.

The special legal needs of Native Americans do not arise out of an economic or racial classification. Rather, they derive from the unique legal status of Native Americans and tribal governments' structure. Their experience in America for the past half-millennia has been one of struggle to maintain a separate identity, to remain Native peoples, communities and cultures, yet at the same time to seek justice within the law. This desire of Native peoples and tribes to remain distinct and autonomous has driven the unique mission of Indian Legal Services programs. The very nature and complexity of Indian legal services makes it extremely difficult and professionally dangerous for the legal generalist to accept a case with Indian law implications.

C. NATIVE AMERICANS FACE A NUMBER OF BARRIERS WHEN SEEKING ACCESS TO JUSTICE.

Poverty among tribal communities continues to be a factor in adding to a plethora of legal issues faced by Native Americans. Continued language and geographic barriers are problems, as is the dif-

ficulty of recruiting and retaining culturally-sensitive attorneys who are able to understand and interact within another culture. And, even though other parts of the country are seeing an increased private bar involvement, this continues to be sorely lacking in reservations and their tribal communities.

D. OVER THE PAST THIRTY YEARS, THE UNITED STATES HAS CONSISTENTLY RENEWED ITS COMMITMENT TO PROVIDING LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS.

The history and mission of the Indian Legal Services programs is distinctive for one primary, overarching reason: the history of Indian tribes and Indian peoples in the geographic area now occupied by the United States is unique among all minority populations in America. Indian people and tribes enjoy a distinct political status within the federal governmental structure. Since 1966, Congress has identified specific funds to help meet the legal needs of Native Americans. Indeed, the LSC Act of 1974 acknowledged the *unique* and complex issues confronting Native American clients and the federal government's obligations to earmark specific funding for Indian legal services in addition to basic field grants.[2]

E. THE NATIVE AMERICAN PROGRAMS FUNDED BY THE LEGAL SERVICES CORPORATION PROVIDE LOW-COST AND EFFECTIVE ACCESS TO LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS WHO MAINTAIN A CONNECTION TO INDIAN COUNTRY OR THEIR TRIBAL GOVERNMENT.

Indian Legal Services programs have established themselves as effective advocates for Indian people in their struggle for cultural and economic survival. Significant achievements have been made in the protection of the sovereign status of Indian tribes and in the preservation of their natural resources, treaty rights, and family structures. By coincidence, these programs came into existence at about the same time the new and long-awaited policy of Indian self-determination and the reaffirmation of the federal trust responsibility were announced. The successes of Indian Legal Services programs are truly remarkable given the modest level of funding.

F. THERE ARE SIGNIFICANT UNMET LEGAL NEEDS IN INDIAN COUNTRY.

Because their lives are so heavily regulated by a maze of federal laws, executive orders, treaties, administrative and court rulings, the political and legal problems of Indian people create a laundry list of unmet needs that continues to grow, rather than disappear. In the current federal Indian policy era known as the "Self-determination Era", tribes have been called upon to do more for themselves in all aspects of their social and political lives. The dramatic increase in tribal government responsibility has not been matched by increased funding.

G. FEDERAL FUNDING OF NATIVE AMERICAN LEGAL SERVICES IS NECESSARY TO MAINTAIN ACCESS TO JUSTICE FOR NATIVE AMERICANS.

The conflict of power between states and tribes as sovereigns creates a hostile environment for any expectation that block grant funding to states would be awarded to tribes. Gaming revenues are not a resource because not all tribes have gaming operations, the majority of gaming operations have produced modest returns, and gaming income has only touched the surface of funding critical tribal infrastructure needs, such as water and sewer lines, Headstart, Meals on Wheels, medical and dental clinics, etc. Through the efforts of Indian Legal Services programs, major strides have been made in achieving recognition and protection of the unique rights of Native Americans conferred by federal law.

SUMMARY OF FINDINGS

1. The United States government has a special obligation as trustee to provide Native Americans meaningful access to the legal system.

2. The United States government should maintain the current level of commitment to funding legal services for low-income Native Americans.

3. The unique specialized legal needs of Native Americans cannot be met except by specialized legal practitioners.

4. The Native American programs funded by the Legal Services Corporation provide low-cost and effective access to legal services for low-income Native Americans who maintain a connection to Indian country or tribal government.

5. Over the past 30 years, the United States has maintained a small, but effective commitment to providing legal services for low-income Native Americans.

6. Continued funding of Indian Legal Services at 2 1/4% of the national commitment is needed to maintain minimal access.

III. DISCUSSION OF FINDINGS

A. THE UNITED STATES GOVERNMENT HAS A SPECIAL OBLIGATION TO PROVIDE NATIVE AMERICANS MEANINGFUL ACCESS TO THE LEGAL SYSTEM.

1. In general.

Federal law has created the unique legal status of Native Americans and tribes. Federal Indian law permeates the legal rights and responsibilities of Native Americans, and, thus, the lawyer's task of representing Native Americans and Indian tribes. The difference between Native Americans and non-Native Americans is a difference created in federal law that:

(a) adds to the frequency and complexity of the legal disputes which affect Native Americans, and which are absent from the lives of non-Indians; and

(b) prevents lawyers from giving minimally competent legal advice to Native Americans or tribes on most matters if they do not have specific expertise in tribal and federal Indian law.

The legal principles underlying federal Indian law today have a long history developed in tandem with the earliest colonization and nation building in North America. Federal Indian law grew out of the legal, moral, and religious doctrines used to justify the Age of Discovery, the Law of Nations, Imperialism, and Manifest Destiny.[3] The religious and political doctrines that were developed during the Crusades, and refined during the Renaissance, were then applied to justify European settlement and dominion over the native societies in the colonies in North America. This rationale found its way into the most fundamental legal doctrines adopted in North America. The Colonial governments first, and then the United States government, obtained possession of lands previously under the domain of Native Americans, mostly through the application of law which was used to legitimize the process of "discovery." Discovery was then followed by annexation of Indian lands. The law, much more than military strength, was the most effective mechanism used to gain control of Indian land resources.[4]

The earliest enactment of the Continental Congress in 1783, and later the Northwest Ordinance of 1787, established the national policy on dealing with Indian tribes. The national policy declared Indian property, rights, and liberty were inviolate to unconsented invasions or disturbances. From the earliest date, the Constitutional Convention also established that it was a matter of national policy that the power to regulate commerce with the Indian tribes belongs to the federal government. The early debates in the Constitutional Convention covered the most fundamental legal issues of the new nation, including the development of property and contract law in the colonies, as well as the relationships between tribes, state government, and the federal government. The debates at the Convention resulted in three Constitutional provisions concerning Indian affairs: Article 1, Section 2, which refers to Indians not taxed; the Indian Commerce Clause; and the Treaty Making Clause.

The Constitution assigned relations with Indian tribes to the list of national tasks, both expressly in the Indian Commerce Clause and implicitly in the Treaty Clause. In one of its earliest acts, Congress adopted the Indian Trade and Intercourse Act of 1790,[5] which required federal approval for any sale, or purchase of Indian lands. The Act was designed to end the practice of state governments maintaining diplomatic relations with, or purchasing land from, tribal governments. The federal government had a fundamental need to establish title in lands that had largely been acquired from Indian tribes. Thus, *Fletcher v. Peck*, 10 U.S. (6 Branch) 87 (1810) first established the legal principles which allowed the court to declare that the rights of the colonists over Indian land were superior to the rights of Indian tribes, the original occupiers. Shortly thereafter, *Johnson*

v. Macintosh, 21 U.S. (8 Wheat.) 543 (1823), extended the doctrines from *Fletcher* into three interwoven principles of federal Indian law: the existence of Indian occupancy title, the "discovering" nation's exclusive right of extinguishing Indian title, and the requirement of Indian consent for such extinguishment to be effective.

These early federal law doctrines still recognized substantial legal rights in Native American tribes as governments and as landowners. In time, however, the relationship between tribes and the U.S. government changed from one of co-equal sovereigns into a relationship of trustee over "dependent domestic" nations. That transition was accomplished in the courts, or was at least legitimated by the courts. Federal law seemingly protected the property rights of Indian tribes against encroachment by non-Indians; but at the same time the courts could not, as a practical matter, provide any effective remedy to prevent encroachment. Thus, when Chief Justice Marshall declared illegal the taking of vast tracts of Cherokee land in Georgia, President Andrew Jackson hotly responded, "Now let him enforce his judgement." The painful and arduous removal of Cherokee from their homelands following Jackson's pronouncement is known today as the *Trail of Tears.* [6]

Throughout the 18th and 19th centuries, and continuing well into the 20th century, Native Americans were neither federal nor state citizens. Without ever being conquered, in fact, tribes were conquered *de jure* by a simple declaration of the Supreme Court of the United States. In the late 19th century, Indian tribes were declared by the Court to be subject to the "*plenary power*" of Congress. "The *plenary power* over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Kagama v. United States*, 118 U.S. 375 (1886). By this simple statement, Indian tribes were simultaneously made subject to the political exigencies of Congress and were denied access to the courts for protection against any excesses by Congress. The "*plenary power* doctrine" dominated federal Indian law through the late 19th and the early 20th centuries. From the time of Kagama through the 1920's, Indian tribes lost hundreds of millions of acres of land and the sovereign authority of Indian tribes and Indian tribal courts was severely diminished. This was not accomplished by warfare, but through actions of the political departments, sanctioned afterwards by the courts.

The modern reassertion of tribal sovereignty was contemporaneous with the publication of Professor Cohen's 1942 Handbook of Federal Indian Law in which he commented:

> "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."

Cohen recognized and reaffirmed three fundamental principles of federal Indian law:

(1) Every Indian tribe possesses, in the first instance, all the powers of a sovereign state;

(2) Conquest has rendered the tribes subject to the legislative power of the United States and, in substance, terminates the tribe's external sovereignty, for example, its power to enter into treaties with foreign nations, but does not by itself affect the tribes' internal sovereignty, that is, the powers of self-government; and

(3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save those expressly qualified, full powers of internal sovereignty are vested in the Indian tribe and in their duly constituted organs of government. In the 19th century, law was a principle tool of genocidal extermination. In the 20th century, law became the major weapon in the preservation and extension of Native culture and history.

The legal status of Native Americans today remains unique. Congress continues to exercise significant power over Native Americans and Indian lands. Indian tribes continue to exercise powers of self-government and frequently exercise delegated federal power. Entire volumes of the United States Code [25 U.S.C.] and Code of Federal Regulations (25 C.F.R.) are dedicated to the regulation of Indians, a distinction not shared by any other ethnic or political group in this country.[7] A lawyer cannot understand, and certainly cannot adequately advise or represent, a Native American concerning almost any legal right or dispute that arises on or near Indian land without a good working understanding of this complex federal Indian law.

2. The federal government has a long history of regulating Native Americans' access to justice. As Native Americans and tribes were absorbed into the federal framework, the federal government — as part of its dominance over tribes — unilaterally took control over lawyers representing Native Americans and tribes. The United States controlled lawyers serving Indians for many generations before the U.S. government began to view "access to justice" as a federal responsibility for non-Indians.

In the earliest court cases of the Colonial and Constitutional days, the tribes were represented by their own private attorneys. However, as the United States asserted its control over Native American resources, it began to directly represent tribal interests through the U.S. Attorney as land titleholder and as trustee for Indian tribes and individual tribal members. In 1893, the United States adopted what is now codified at 25 U.S.C. § 175, enabling the United States Attorney to assert rights on behalf of tribes, with or without specific tribal consent. This law followed the enactment of legislation in 1871 by which Congress outlawed any further treaties with Indian tribes. 25 U.S.C Section 71 (Repealed May 21, 1934). Thereafter, many important property and liberty rights of Indian tribes and Indians were prosecuted or defended by the U.S. Attorney.

That the United States had the authority to act on behalf of tribes in the most important matters of tribal natural resources was confirmed in court cases. Yet, tribes were unable to force the U.S. government to fulfill any duty on their behalf, even in cases of gross conflict of interest between the interests of the Indian tribe and other interests of the United States. The U.S. appeared to have unfettered authority and discretion over Indian affairs. While the role of the United States as trustee for tribes is often viewed as a benefit to Indians, it has also justified vast powers in the United States that have been exercised to benefit the federal government or non-Indians to the detriment of Indians. The authority of the U.S. to control the legal interests of Indians and Indian tribes continues today and can create significant conflicts of interest between the rights and interests of individual tribal members, the rights and interests of tribes, and the competing rights and interests of the United States. This conflict is not new and is, in fact, a source of ongoing controversy.

The federal government continues to exercise pervasive control over Indian land, other tribal natural resources, individual tribal members, and the lawyers representing tribes. For example, a transfer of Indian land without federal consent is void. 25 U.S.C. §81 (1958). A person who enters into such a contract may commit a federal crime. 18 U.S.C. § 438 (1994). Lawyers for tribes are also subject to federal control. 25 U.S.C. §476 (1994) and 25 C.F.R., §89 (1982). It is a federal crime to represent an Indian tribe without the prior approval of the United States. 18 U.S.C. §438 (1994). The selection of counsel and the terms of a contract with an attorney are regulated closely by the United States government. 25 C.F.R. §89. Federal authority over attorneys who seek to represent Indians or Indian tribes can be abused, especially when the subject matter of the representation involves asserting positions adverse to those maintained by the United States.

3. Legal representation provided by the federal government is often inadequate. The U.S. government was the source of legal representation in Indian country for over 100 years before the creation of the Office of Economic Opportunity (OEO) or the Legal Services Corporation. Unfortunately, reliance on the federal government for legal representation has proven inadequate for tribes of a number of reasons:

(1) The U.S. often does not actively participate in all parts of the case; [8]

(2) The U.S. often has potential or actual conflicts of interest; [9]

(3) The U.S. cannot represent all tribes when the tribes' positions are in conflict;[10]

(4) The U.S. has limited resources; [11]

(5) Other federal agencies may have conflicts with tribes;[12]

(6) The U.S. is not held to a fiduciary standard in asserting the claims of Indians and Indian tribes on whose behalf it appears in a trust capacity. [13]

In recent times, tribes have claimed that the United States has exercised its pervasive control over legal representation of Indian tribes more for its own benefit than to protect the interests of Indian tribes. The federal government has now at least attempted to address the conflict of interest by establishing the Office of Federal Trust Responsibility in the Department of Interior. A conflict of interest is also an express ground for the United States to justify funding separate attorneys for an Indian tribe in Indian water rights matters.[14]

B. NATIVE AMERICANS HAVE UNIQUE LEGAL NEEDS THAT ARE BEST MET BY SPECIALIZED LEGAL PRACTITIONERS.

1. In general.

The legal needs of Native Americans are frequently grouped with other disadvantaged groups who have "special needs," including ethnic and racial minorities, the elderly, veterans, and migrants. At a certain level, low-income Native Americans have legal problems similar to all low-income people, and, as a result, have a need for programs using basic field funding from LSC. In addition, however, low-income Native Americans have a host of legal needs unique to their political status as tribal members. Such legal needs are not based upon the fact that Native Americans are "especially needy," although Native Americans as a class are the poorest demo-graphic group in the United States, and this extreme poverty exacerbates their legal problems. Nor do the special legal needs of Native Americans arise out of an economic or racial classification. Rather, they derive from the unique legal status of Native Americans and tribal governments.

The need for specialized legal services also flows from the unique nature of the body of law commonly referred to as Indian law. Arising from the landmark cases of *Cherokee Nation*[15] and *Worcester v. Georgia*, the field of Indian law is a nearly two-hundred year chronology of legal anomaly, exception, and deviation from general norms applied to a class of entities that the Supreme Court continues to recognize as "domestic dependent nations."[16] Indian law is an independent and complex field, based on treaties, and myriad federal statutes, as well as the rules of law of the various sovereign tribes. Special expertise is almost always necessary to provide competent representation to Indian clients. Because of the small number of Indian clients they serve, legal service offices, as a whole, are unable to develop the expertise in Indian law to provide adequate representation.

Moreover, Indian law focuses on the evolution of relationships between Native Americans and the United States, the sovereign states, local and municipal governments, private landowners, regulators, businesses, and individuals who either do business in Indian country, engage in activities that directly affect rights reserved by Indian tribes under treaty or through executive order, or otherwise have interests in land, resources, property or relationships (familial, legal, personal) that are or may be subject to the regulation or control of a federally recognized Indian tribe. The nature and complexity of Indian legal issues make it very difficult and professionally dangerous, for the legal gener-

alist (whether a private attorney or publicly funded legal services attorney) to undertake representation of any interested party in a case which implicates Indian issues. Hence, the need for specialized practitioners schooled in the nuances of Indian law. This is true both for those who can afford to retain legal counsel, as well as those who cannot.

C. NATIVE AMERICANS FACE A NUMBER OF BARRIERS WHEN SEEKING ACCESS TO JUSTICE.

From the inception of LSC, there has been a recognition that American Indian and Alaskan Native individual tribes have exceptional need for legal services due to a variety of factors, some of which Congress itemized in section 1007 (h) of the Legal Services Act. Such factors included barriers described below, which still exist today:

1. Poverty.

A significant barrier to justice for Indians flows from the depth and breadth of poverty in Indian country. By all indicators, Native Americans are among the poorest and most disaffected of all groups tracked by the Census Department. Several reservation counties—such as Shannon County on the Pine Ridge Reservation, Buffalo County on the Crow Creek Reservation, Ziebach County on the Cheyenne River Reservation, and Todd County on the Rosebud Reservation—are among the poorest in the United States; indeed, the poorest county in the United States is Shannon County, the home of the Pine Ridge Reservation. (Bureau of the Census, U.S. Department of Commerce, PRD 9 Capital, 1979 County Per Capita Income Figures, 1980 Census.) According to the 1995 Census Bureau Report on Status of American Indians' Housing on Reservations:

- About one in five American Indian households on reservations lacked complete plumbing facilities in their homes—hot and cold piped water, a flush toilet, and a bathtub or shower. This compared with less than 1% of all households nationally. About six of every 10 American Indian homeowners on the Navajo Reservation did not have complete plumbing.
- About 18% of American Indian households on reservations in 1990 did not have complete kitchens, i.e., a sink with piped water, a range or cookstove, and a refrigerator. In 1950, about 20% of all U.S. households lacked complete kitchens. By 1990, only 1% of households nationally was without one or more of these amenities.
- The majority of American Indian homes on reservations (53%) did not have a telephone. This was true for only 5% of all households nationally
- When it comes to motor vehicles, 22% of American Indian households on reservations did not have one in 1990. Nationally, 12% of all U.S. households were without a vehicle.
- Although rarely used nationally, wood was used to heat one out of every three American Indian homes on reservations in 1990. Bottled, tank, or LP gas and electricity, at 22% and 19% respectively, were the next most commonly used fuels. In 1940, 23% of U.S. households used wood as fuel, but since 1950, wood fuel has been used very little at the national level.

Whether measured by per capita income, school dropout rates, infant mortality, suicide rates, or any other indicator, the fact is that life in Indian country —particularly for Indian youth—continues to be marked by poverty, rural isolation, cultural isolation, and high degrees of social and political disaffection.

In 1992, the University of Minnesota released a report, "The State of Native American Youth Health", sponsored by the Indian Health Service and the Maternal and Child Health Bureau, which surveyed nearly 14,000 American Indian and Alaskan Native youth, 12-17 years of age, from 50 different tribes located in rural/reservation areas in 15 states. Among the report's findings, published in the March 25, 1992, issue of the Journal of the *American Medical Association* were:

- Nearly one in six of those surveyed had attempted suicide—a rate four times higher than adolescents in the general U.S. population. Suicide rates for 10-14 year olds are approximately four times higher than that for all races.
- The death rate for American Indian/Alaskan Native adolescents is twice that of adolescents

of other racial/ethnic backgrounds. Unintentional injuries and suicide account for nearly 75% of the total death rate.

- 18% of the total sample reported that they have been a victim of physical or sexual abuse or both types of abuse, with 26% of the female population reporting being physically and/or sexually abused.
- 24% reported being obese, often a precursor to diabetes. 15% of the high school students reported smoking cigarettes daily, and one in six boys use smokeless tobacco daily.

In terms of general statistics, the report provided comparative data extracted from the *American Journal of Clinical Nutrition*, (Vol. 53) 15:35-42, June 1991, and U.S. Congress, Office of Technology Assessment, *Indian Adolescent Mental Health*, Washington, D.C. U.S. Government Printing Office, 1990:

- Over twice as many American Indian/Alaskan Natives fall below the poverty line compared to the U.S. All Races while the proportion graduating from high school or college is less than half all other groups.
- A decade ago, the median household income for Native Americans was $11,471 compared with $16,841 for all races. There is no evidence that over the last decade the gap has narrowed.
- Alcohol abuse and alcoholism with its entire sequel are legend. Today, Native Americans have a rate of alcoholism six times that of all races in America.

This high incidence of poverty and social isolation necessarily gives rise to higher than average needs for social and legal intervention. Such needs coupled with the unique legal context within which they rise, provide ample reason for singling out Native people and Indian tribal governments for highly focused and specialized legal assistance.

Poverty is not limited to individual Native people. To the contrary, and despite some very notable exceptions, the vast majority of Indian tribes are extremely poor, rely on federal governmental subsidies for basic operating expenses, and are unable to provide the essential infrastructure necessary to stimulate critical tribal economic development initiatives

These factors cause an exponential increase in legal problems to levels substantially beyond what one would expect in a comparable population elsewhere. This associated demand for legal representation occurs in divorce and other domestic relations problems, defense against criminal charges in tribal court, probate, credit and related consumer matters, and public entitlements.

2. Lack of Private Bar.
Historically, only tribes with valuable land claims against the United States, or those who could pay for lawyers from revenues derived from natural resource development, had access to legal counsel and representation. Attorneys in small towns bordering Indian reservations usually represented interests inimical to those of the tribe and its membership, and thus were unavailable to represent tribes. Until the late 1960's, there were almost no Indian people trained as attorneys in the United States. Individual Indian people simply went without legal representation in their dealings with the world outside the reservation boundary, and, indeed, within the reservations, too.

3 Language.
Many clients served by legal services programs are non-English speaking, but among the Indian service population, there is a major difference: there are many tribal languages spoken, which are not taught in schools. Rare is the attorney who is fluent in the clients' language on Indian reservations. As a result, additional staff must be employed to bridge the language barrier in each client community. In some service areas, interpreters in each language are required because there is no commonality among the languages. For example, a bilingual Hopi employee is not able to interpret for a Navajo client. Translation is usually done by bilingual staff who have other primary responsi-

bilities (such as legal secretaries, receptionists and tribal court advocates). As a consequence of the time consumed in interpreting, programs must hire additional staff so other support functions can be effectively accomplished.

The essential effect of the language barrier is that even routine matters involve considerably greater time expenditure than in other legal services contexts. That, in turn, requires a larger staff and associated personnel costs. Moreover, each of the Native languages is typically oral and exceedingly complex. As a matter of illustration, Navajo were used in World War II as "Code Talkers" to send top secret messages in the Navajo language between American units in Asia. It was a code that was never broken. Finally, from a linguistic viewpoint, there are no similar elements between Indian languages and English. Very few English legal or other concepts are easily translated. Imagine, for example, an Anglo attorney attempting to explain to a Navajo client, through an interpreter, the implications of the federal Truth in Lending Act. Attorneys frequently experience long delays in client and witness interviews while the interpreter valiantly tries to convey what, from an Anglo point of view, seems to be a relatively simple matter.

4. Cultural Barriers.
Reaching a basic cultural knowledge base is essential in the attorney-client relationship so that there is no misunderstanding about the client's objective and the attorney's legal approach. There are no analogs in Anglo-American jurisprudence for Native American principles of land ownership, dispute resolution and scores of other legal concepts. It simply takes an attorney more time to gain a fundamental sense of these ideas to enable her/him to effectively represent the client's interests and explain the parameters of available legal remedies.

David Getches, the founding director of the *Native American Rights Fund*, has spoken from personal experience:

> "Probably the most difficult problem for attorneys in their representation of Indians is understanding Indian cultural values and translating them into legal action. The lawyer must turn his tools to achieving Indian objectives in a non-Indian legal system - the same system which has produced laws and practices which conflict with traditional values . . . What may appear to be simply a taking of land or deprivation of fishing rights assumes greater importance when it is seen in the context of the Indians' struggle to retain their culture. A land base is essential to maintenance of social structures, religious beliefs, and traditional practices . . . Likewise; the ability to continue traditional occupations such as hunting, fishing and gathering foods may be the only means of preserving a vestige of their culture. When Indians fight for these rights . . . they are fighting for their existence as Indian people... In order to comprehend the dimensions of Indian cases, attorneys must appreciate their importance to the client." [17]

Noted author and professor, N. Scott Momaday (Kiowa) spoke eloquently to the same thought in an article, "Native American Attitudes to the Environment," in *On Nature*, page 115:

"*You cannot understand how the Indian thinks of himself in relation to the world around him* unless you understand his conception of what is appropriate, particularly what is morally appropriate within the context of that relationship. The Native American ethic with respect to the physical world is a matter of reciprocal appropriation, appropriations in which man invests himself in the landscape, and at the same time incorporates the landscape into his own most fundamental experience...This appropriation is primarily a matter of imagination which is moral in kind; I mean to say that we are all, I suppose, what we imagine ourselves to be. And that is certainly true of the American Indian. (The Indian) is someone who thinks of himself in a particular way and his idea comprehends his relationship in the physical world. He imagines himself in terms of that relationship and others. And it is that act of imagination, that moral act of imagination, which constitutes his understanding of the physical world."

Against this backdrop, then, with the stakes so enormously high, it is easy to understand the challenge of gaining and keeping the trust and confidence of individual Indian and tribal clients. That trust and understanding is a very precious commodity which when damaged is not easily restored.

5. Geographic Barriers.
Clients, as well as witnesses, often live in very isolated areas of the reservation, a long distance from the nearest town and far removed from paved roads and without access to telephones or transportation. Their legal counselors are frequently compelled to travel more than 100 miles to contact clients and witnesses over roads, which might be impassable due to mud or snow. If, as is often the case, the client or witness does not speak English, an interpreter must accompany the attorney. Whereas acquiring the needed information might be a five-minute office visit in other environments, for Indian Legal Services programs it can consume a full day on the part of two staff members.

In addition, distance considerations dramatically increase the cost of cases for other reasons. Court appearances, no matter how abbreviated, are time-consuming events. For example, the federal court in Utah is located in Salt Lake City which is some 550 miles from one Indian Legal Services office in Mexican Hat, Utah. Because there is no available air transportation, the trip must be made by vehicle and can mean a three-day trip of 1,100 miles. Aside from the extra expenditure of attorney time and energy, expenses for mileage, per diem and lodging commonly can exceed a modest travel budget.

The State of Alaska presents striking problems. There, Native people occupy 225 villages that are mainly located along the coastline or near the Yukon and Kuskokwim rivers. These villages are not connected to roadways, and service to the village-based clients is always by airplane or boat. In order for lawyers and clients to attend judicial and administrative hearings, travel distances often exceed several hundred miles. A single office of Alaska Legal Services may serve an area of 25,000 square miles. The daily work of providing food for the family table is a highly-regulated activity for Alaska Natives. The extensive federal enclaves created for wildlife protection, national forests, and national park development encompass most of the traditional hunting and fishing sites.

Moreover, required research materials are often only available at law schools located in major metropolitan areas. Trips to these locations are necessary to conduct essential research and use telefax and phones. As with court appearances in these locations, one hour of research can take as much as three days of attorney time and program expense. Finally, adequate legal supervision requires managers to spend many days throughout the year traveling to branch offices to oversee legal work.

As a result, it is not at all uncommon for an Indian Legal Services attorney to log more than 10,000 business miles annually in the course of representing clients, resulting in direct personnel and travel expense, which is extraordinary, compared to costs elsewhere. Although telephones are used whenever practical to reduce travel costs, the net result can be an annual expense, which substantially exceeds the communications costs in other practice situations. To further compound these logistical problems, many Indian Legal Services clients have no phone and no nearby access to public phones.

6. Other barriers.
For programs representing either individual Indians or tribes, there are additional challenges. Foremost among these is the unpopularity of representing Indian rights against established interests in the dominant society. Nowhere is this better demonstrated than in the treaty fishing rights cases in Washington, Michigan and Wisconsin, beginning in the 1970's and continuing today, involving the competition between Indian fishers and non-Indian commercial and sports fishers.

D. OVER THE PAST 30+ YEARS, THE UNITED STATES HAS CONSISTENTLY RENEWED ITS COMMITMENT TO PROVIDING LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS.

1. Congress recognizes unique legal needs of Native Americans.
Congress' recognition of the need for specialized civil legal services to Indians and Indian tribes is consistent with a history of addressing unique needs that arise from the legal and political status of Indians. Legislation singling out and providing specialized or unique human and social services to Native Americans is the norm rather than the exception. Thus, specialized programs have been developed for educational assistance, income assistance, food and nutrition assistance, tribal government operational assistance, tribal court development, child welfare services, health services, natural resource development, and a host of other related concerns affecting the quality of life in Indian country.[22]

On top of these basic issue areas, however, are another layer of Indian law issues affecting the lives of individual Indian people. These include tracts of Indian allotted land on reservations, enforcement of the federal trust responsibility to individuals, Indian child custody cases, Indian Health Services, Indian Education and Housing benefits, protection of religious sites and access to sacred materials such as eagle feathers and peyote, all of which involve the knowledge of a complex tangle of federal statutes and regulatory schemes. Whereas fifteen or twenty years ago it was thought possible for one lawyer to keep abreast of the full body of what is considered "Indian law," today the task is nigh impossible. The late Justice Felix Frankfurter referred to it as "the vast hodgepodge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, confusions and injustices of the law governing Indians lay concealed."

In recognition of these additional legal needs, studies were conducted at the direction of LSC to explore these circumstances and recommend solutions for addressing these needs. As a result of such studies and other needs assessments, funding for Indian Legal Services has historically proceeded under a different formula than funding for basic field programs.[18] LSC boards have also come to recognize and appreciate the role and purpose of Indian Legal Services programs by focusing regulatory attention on uniquely Indian issues. For example, 1007 (h) of the LSC Act allows criminal representation in tribal courts and 1010 (c) of the Act permits specified expenditure of funds received from tribes or foundations designed to benefit Indians. Finally, LSC regulations provide exceptions for representing Canadian Indians who have a unique citizen relationship with the United States.[19]

2. History of Indian Legal Services.
When the first Indian legal services programs were funded by the federal OEO office, it was the first time that low-income Native Americans had any significant experience being represented by private, non-government lawyers. During its first year, OEO funded four Indian Legal Services programs as part of the initial effort to create local programs: the Cheyenne River and Rosebud programs in South Dakota, the Zuni program in New Mexico, and the DNA-People's Legal Services program serving the Navajo reservation in Arizona, New Mexico, and Utah. Three more programs were created in 1967 (Leech Lake in Minnesota, Choctaw in Mississippi, and Papago in Arizona), and one, California Indian Legal Services, in 1968. Two more were created in 1971: Wind River in Wyoming and Fort Berthold in North Dakota. The Indian Law Support Center, part of the Native American Rights Fund, was created in 1971 to provide backup support and research for ILS offices across the country.

In 1972, OEO estimated that, at most, 10% of the client-eligible Native American population was being served by these programs. However, with the creation of LSC in 1974 came new opportunities for the expansion of the Indian Legal Services community. The LSC Act was adopted with special provisions concerning Indian Legal Services:

- Indian Legal Services programs may represent criminal defendants in tribal court;
- Indian Legal Services programs may use tribal funds for any purpose for which they are appropriated.

- Prior client board membership reflecting Native American communities is"grandfathered";
- 1007H Study of Special Legal Needs of Native Americans and other groups are mandated.

In 1975, Michigan Indian Legal Services was created, and, that same year, pursuant to the mandate of Congress in Section 1007 (h) of the LSC Act, a study was commissioned by Legal Services Corporation to assess the unique legal and access needs of Native Americans. Prepared by the law firm of Getches and Green, Boulder, Colorado, the *Tosco Report*, as it was later known, concluded, in part that:

a) Legal services for Native Americans should encompass all native or aboriginal people including "unrecognized" or "terminated" tribes;

b) The field of federal Indian law is complex and based upon the unique relationshipwhich exists between the federal government and tribes and individual Indians. That relationship is characterized by quasi-sovereign tribes with a government-to-government relationship between tribes and the federal government;

c) The relationship is further defined by treaties between tribes and the United States from the 19th century. From this background a multitude of legal precepts are derived which result in the complexity and uniqueness of Indian law;

d) The status of Indians and tribes is further colored by unique cultural, economic, and religious institutions which affect how Indians live and relate to the non-Indian society, particularly the Anglo-American system of justice;

e) Providing effective legal services to Indians and tribes costs more than in an urban or non-Indian rural setting. The complexity of typical Indian law litigation and theextreme geographical isolation of Indian clients both contribute to higher costs.[20]

In September of 1976, a study, "American Indians, Their Need for Legal Services," was completed by consultant Joan Lieberman. Two months later, Lieberman was hired as a management specialist in the Denver Regional office and asked to do additional research on Indian issues. In a letter to the Zuni Legal Aid program director dated November 8, 1976, Lieberman explained that her original report had been commissioned because the Corporation staff in Washington felt that they had "little or no information on which to make budget determinations for Indian programs now or in the future." Her report found there were over 185 Indian reservations without any substantial access to legal services and recommended a major expansion of funding for Indian Legal Services to cover the unserved tribes, as well as funding for representation to unrecognized and terminated tribes. The study also recommended funds to serve the urban Indian population by pointing to the problems in capturing a true picture of Indian clients served:

> "I am not certain how many non-Indian low-income people you may be assisting because they reside on or near the reservations or communities you serve, or how many of your clients may consider themselves Indians, but are not enrolled in a tribe and thus would not show up in BIA population estimates. Nor can I tell you how many clients may travel from other areas to seek your assistance because there is no legal services program on their reservation."[21]

By the end of 1976, the Corporation had created an Indian desk responsible for the administration of the unique circumstances and needs of Indian programs. This office found that the perceived higher costs of Indian Legal Services was accounted for by such circumstances as:

- "More than 370 treaties, 500 federal laws, and 5,000 federal regulations apply to only Indians." with the result that Indian programs were "...averaging five or more open cases at any one time per client family."
- "Having to argue in five forums...requires programs to purchase and maintain extensive state, federal, administrative and Indian law libraries."

The Indian desk managed the creation of the remainder of the Indian component programs in a plan "to cover all remaining reservations in two years (1978 and 1979)..." However well-intentioned, this plan did not see its goals reach fruition.[22]

The year 1980 was the high water mark of federal funding for Native American legal services. There were now 176 attorneys and advocates in Indian Legal Services programs. But, by 1981 funding of Indian Legal Services was reduced by 12.5 % across the board as a result of general federal cutbacks. In the report of the Select Committee on Indian Affairs of the United States Senate, June, 1981, 97th Congress 1st Session, "Analysis of the Budget Pertaining to Indian Affairs Fiscal Year 1982: at page 22, the Senate Committee not only reported that the Indian Legal Services programs provide "*exceptional services*", but that the historic problem of providing a fair level of services to Indian communities surfaced whenever federal funds were block-granted to states. The Report also documented that attorneys working with Indian Legal Services programs had become "***...an integral part of the tribal legal and judicial processes...***" and "***...contributed greatly to the development of the on-reservation judicial systems.***"

By 1984, there were at least 78 tribes that still had no access to Indian legal services, and by the following year, some Indian Legal Services offices were struggling to keep the doors open. While the Native American population eligible for legal services was estimated at 560,000 out of a total population in excess of one million, the total staff of Native American programs—-as a result of the federal cut backs—was reduced more than 20%, a cut from 316 employees in 1981 to approximately 250 in 1985. Among those to take note was Congressman Morris Udall who stated that the Native American Rights Fund's Indian Law Support Center provided "*...effective assistance for Native American Legal Services programs.*"

During the last decade of the twentieth century, Indian Legal Services programs were singled out by other notable legislators, such as Senator John McCain, for making a "*major contribution*" to the development of the legal system in Indian country. Despite such recognition, funding for Indian Legal Services programs was cut in 1996 by over three million dollars as part of general LSC budget reduction. The vital support and research of services of the Indian Law Support Center were eliminated along with other support centers serving the legal services community. The cuts caused a major reduction in the number of attorneys available to represent low-income clients, not just individual Indians, but also a number of small, low-income tribes, which rely on Indian Legal Services for legal representation.

3. Indian Legal Services Today

American Indian tribes and Alaska Native tribes and individuals represent a sizeable group in contemporary American society. In the United States today, there are believed to be more than 2,000,000 people claiming Native American ancestry and membership in a tribe. These 2 million plus people belong to 319 tribes in 32 of the "lower 48" American states, and there are another 223 tribal and village governments in existence as functioning cultural and social entities, though not recognized by the United States in a formal, political sense. This number includes tribes whose political status was "terminated" by Congress in the 1950's and never restored. There are also approximately 200,000 client-eligible people of Native Hawaiian ancestry in the Hawaiian archipelago.

During the three decades since free legal services have been made available to tribal governments, the tribes have, for the most part, been attempting to overcome the effects of racial and religious discrimination, alcoholism, ill-health and inadequate housing, high unemployment, and the oppressive weight of a federal bureaucracy that has little willingness to give more than lip-service to tribal self-determination. A good number of tribes have made significant progress despite the shifting and inconsistent federal commitment to economic self-sufficiency for Indian people. Some tribes have progressed slower than others due to factors such as geographic isolation, protracted litigation of complex issues of tribal status (especially regarding the Alaskan tribes and the Native Hawaiians), and simply because the need for Indian legal services far outstrips the resources of existing programs.

The 1988 *American Indian and Legal Services*, Kickingbird and Sepulvado report to the Legal Services Corporation correctly noted a disparity in funding levels among the various Native American programs and components. There are a number of historical reasons for this disparity, the most significant being LSC's expansion funding policies. There were different LSC policies in place at different points in time affecting LSC's Native American expansion efforts. The consequences of these differences in LSC expansion policies coupled with subsequent LSC and Congressional actions resulted in the current situation wherein programs and components created after 1978 continue to be funded at a lower level than other Native American LSC programs and components created prior to 1978.

E. THE NATIVE AMERICAN PROGRAMS FUNDED BY THE LEGAL SERVICES CORPORATION PROVIDE LOW-COST AND EFFECTIVE ACCESS TO LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS WHO MAINTAIN A CONNECTION TO INDIAN COUNTRY OR THEIR TRIBAL GOVERNMENTS.

I. Delivery Issues.

To appreciate the effectiveness of Indian Legal Services programs, it is helpful to understand the circumstances and environment in which such programs operate. Like other legal services programs, each Indian Legal Services provider sets priorities as required by the Legal Services Corporation. A board with Native American representation, including, in some cases, representation from the Native American bar, define community needs and expectations and advise on allocation of limited resources in the face of infinite demand for services. Programs range in size from the million-dollar DNA program to small components such as the Indian project at Legal Aid Society in Omaha, Nebraska. Some programs and components only represent Indian tribes; others only represent individual members of tribes and not the tribal governments themselves, and some programs represent both tribal governments and individual members.

For programs representing individual Indian people, the responsibility brings substantial challenges. Indian people were first made citizens of the United States by Congress in 1924. As citizens, they have the rights of any other citizen under the laws of the United States, including the right of access to a host of state and federal programs benefiting other Americans, such as the various Social Security programs. They, of course, have the usual legal needs of other Americans in areas involving domestic relations, housing, education, general health, mental health, and the special concerns of seniors and youth, among others. But because Indian legal services programs are, in many instances, the only attorneys available to people—Indian, or, non-Indian—on reservations, these programs often are faced with providing legal representation in traditionally "basic field" areas of specialization.

For programs and components representing client-eligible tribes, the challenges of providing general legal counsel are enormous. As noted earlier, Indian tribes are governments with a full array of responsibilities and obligations to the reservation communities they serve. Attorneys representing tribal governments must wear a number of hats simultaneously in order to advise their clients at any time on a plethora of legal issues. Local issues include local government law, police powers, administrative and regulatory authority, land use planning and environmental regulation and enforcement, and the development of tribal courts. "External" issues included relationships with state and federal governments, their executive, legislative, and judicial branches, enforcement of the federal "trust" responsibility, protection of the sovereign rights of tribes expressed in treaties, executive orders, and other federal enactments, and water rights and other natural resource protection challenges.

For historic reasons, tribes are not as wealthy as states and, yet, serve populations with far greater percentage levels of unemployment and poverty. The financial demands now facing tribes, coupled with limited tax and other revenue, make it virtually impossible for tribes to offer tribal members services beyond what can be provided with federal funding.

Indian legal services lawyers who represent tribal governments also confront issues arising out of the inherent tension between States' rights and the sovereignty of Indian tribes under federal law. Such issues arise most frequently in federal litigation seeking to affirm the exercise of jurisdiction and authority that is the sovereign prerogative of tribal governments. As more precise case-by-case distinctions are drawn by the courts, the resolution of these conflicts depends less on established principles of Indian law than on the ability of tribes, through the assistance of competent legal counsel, to develop effective regulatory mechanisms and a comprehensive legal framework for tribal economic initiatives. All of this effort is ultimately directed to the dual, and related, goals of tribal economic self-sufficiency and self-government.

For those legal services lawyers who work both for individual Indians and small Indian tribal governments, the difficulty lies in the conflicts that can arise when any government asserts regulatory authority over its citizens, and those citizens object to or rebel against the hand of authority.

Because of the remote and rural areas in which most Indian Legal Services programs are located, recruitment of qualified attorneys is difficult. Staff must have good transportation, and often are faced with unforeseen car repairs because of the bad roads. Unlike legal services attorneys working in the inner city who can escape to a comfortable home in the evening, Indian Legal Services staff do not have nearby access to the usual cultural accoutrements they may have had before moving to the reservation. Lawyers with Indian programs generally become a part of the community in which they live because of the distance between it and the nearest town. The attorney not only lives in and becomes a part of the community, but his or her family lives there, and his or her children are educated in the community. Educational opportunities on reservations are notoriously inadequate, although, in some places, there has been some improvement. Additionally, the lack of housing and job opportunities on reservations for the non-attorney spouse married to the legal services attorney present other hardships in recruiting and retaining attorneys.

2. Effectiveness of Indian Legal Services programs.

Federally-funded Indian legal services providers have been critical to the ability of both tribes and individual Native Americans to assert and enforce a broad range of civil legal rights and prerogatives, many of which exists solely as a consequence of their status as Native people and sovereign Native governments. Examples include:

- Allowing Alaska's Native people to protect subsistence hunting and fishing rights.
- Asserting the rights of Indian purchasers to rehabilitation of poorly constructed federally subsidized housing.
- Protecting the right of disabled and elder tribal members to receive federal SSI benefits without first having to forfeit income from trust property.
- Assisting tribes develop welfare reform and child support codes and other mechanisms for implementation.
- Asserting the right of tribes to protect tribal cultural artifacts, burial sites and their freedom of religion.
- Obtaining federal recognition for "terminated tribes" and developing tribal infrastructure, including tribal codes and ordinances.
- Ensuring entitlement to specialized health and social services, which were inappropriately denied by the Bureau of Indian Affairs.
- Securing enrollment in individual Indians' tribes of origin.
- Assisting in the start-up of domestic violence programs through the writing of codes and representation of families, including youth who are victims of it.
- Protecting the integrity of Indian families and tribal rights under the Indian Child Welfare Act.

In 1985, the Senate (Select) Committee on Indian Affairs of the United States formally recognized the LSC Native American line as an "*outstanding*" and "*essential service*" to America's aboriginal peoples. This Committee found:

- The Indian Legal Services component of the Legal Services Corporation provides an exceptional service within the Indian country. The bulk of the Indian population serviced by Indian Legal Services programs and components reside in isolated rural settings on reservations; a large percentage of the service population has English as a second language or is non-English speaking.
- On many of the reservations, there is no access to a private bar; the cultural distinctiveness of the service population, their societal institutions and the complex nature of Indian law require special skills and sensitivities not available elsewhere.
- It (the Native American line) is a cost-effective program performing an essential service with no practical alternative available. Indian Legal Services programs must be maintained.[23]

An important, but often overlooked role performed by Indian legal services, is that which they provide within the Native American community of encouraging tribal members to consider a degree in the field of law. Only fifteen years ago, there were only a handful of Indian law practitioners. Today, there are several hundred, many of whom started in an Indian legal services program and moved on to work for tribal governments, federal agencies and private law firms.

F. THERE ARE SIGNIFICANT UNMET LEGAL NEEDS IN INDIAN COUNTRY.

This Report describes the work of Indian Legal Services in Indian country throughout the United States. This work has been and continues to be profoundly important in the development of Indian law and the provision of legal assistance to client-eligible tribes and individuals. However, these 29 underfunded and understaffed programs cannot meet the enormous legal needs of the low-income tribes and individuals.

Additionally, while no one has had the luxury to undertake a comprehensive assessment of the unmet legal needs, it is safe to say that all the Indian Legal Services programs and components turn away deserving cases due to lack of resources. The following list describes some of the factors that result in significant unmet legal needs in Indian country:

- In the current federal Indian policy era known as the "Self-Determination Era," tribes are called upon to do more for themselves in all aspects of their social and political lives. This dramatic increase in tribal government responsibility has not been matched by an equivalent growth in available legal counsel.
- The uniquely high rates of unemployment and underemployment on Indian reservations create an unabated demand for individual representation of low-income Native Americans.
- The vast majority of Indian tribes are in remote or rural areas with no significant economic development opportunities, nor uniform commercial codes to encourage business enterprise initiatives on the reservation.
- Indian Legal Services attorneys are typically " the only game in town" in these rural areas. If there are other attorneys in the area, they are often the county attorneys with adverse or conflicting interests or they may be culturally disinterested or professionally uncomfortable with the field of Indian law.
- There are numerous Indian tribes who, after having been "terminated" by the federal government in earlier eras, have had their "federal recognition" status restored within the past twenty years. These tribes and their members continue to struggle with the rebuilding of their legal infrastructures and the panoply of legal rights and responsibilities.

- Tribal courts are in an unprecedented growth phase throughout much of Indian country (due, in part, to the Self-Determination policy) and the growing sophistication of tribal governments. However, as the tribal courts grow, there is no parallel growth in the number of available attorneys in those reservation communities. Indian Legal Services attorneys have creatively sought to help by assisting with the drafting of legal codes and procedures, and by training and providing back-up support to lay advocates for the courts. However, at the current staffing and funding levels, access to legal representation is not keeping pace with the growth of tribal courts. The result is that many individuals go to tribal court without representation.
- In those tribal communities where there has been both development of a tribal court system and modest economic development, there are emerging areas of tribal law that have increased the need for legal representation within the tribe. Examples include tribal employment law, business law, and housing law.
- Vast geography compounds the problem of underserved tribes and their members. For example, in Nebraska the Indian Legal Services office has historically been staffed by a single attorney whose area included three Indian reservations—one of them being over a hundred miles away. In recent years, a fourth tribe was added when its federal recognition was restored. This resulted in the reconstruction of a new tribal government and an influx of Indian people returning to rebuild their tribe. There was no increase in the Indian Legal Services budget.
- Due to recently passed federal legislation, there is now a legal mechanism for the reciprocal enforcement of child support orders between tribal courts and state courts. While this is a positive development, it puts increased demand on tribal courts and requires that tribal members make use of these interjurisdictional enforcement mechanisms. Indian Legal Service attorneys, with already overflowing caseloads, simply do not have the resources to devote to making this well-conceived system work as it was intended.
- Tribal courts that exercise criminal jurisdiction over Indian people typically have one or more prosecutors. It is equally typical that they do not have a public defender to represent the accused. Some Indian Legal Services offices have taken on the role of serving as defense counsel for indigent Native Americans in tribal courts—at least to the extent their budgets and other case priorities allow. Where Indian Legal Services offices have kept their priorities focused on civil legal matters, it is common for criminal defendants to go to tribal court with no legal representation at all.
- Recently-enacted federal legislation in areas of family domestic violence—Violence Against Women Act; Victims of Crime Act—recognize the mutual enforcement of tribal and state court orders. While such laws have been favorably received by tribes, they have placed significant demand upon tribal courts, which are not budgeted to hire attorneys general to do this work.
- In Alaska, a remnant of the "Termination Era" survived legally until 1971. Some 3,000 Native Allotments are still unresolved throughout the state. These parcels of land represent the last chance for individual ownership of traditional food gathering sites. Because these lands are held in trust by the federal government, the Bureau of Indian Affairs provides limited funding for the legal services program to be the sole provider of legal representation.

The above list is not intended to be comprehensive in the description of unmet legal needs in Indian country. It simply presents some of the factors and conditions that indicate the scope of the problem that Indian Legal Services offices struggle with while attempting to provide access to justice. The unmet need is so overwhelming that Indian Legal Services offices, in setting their local priorities, must make hard choices, which invariably result in many worthy cases going unassisted.

G. FEDERAL FUNDING OF NATIVE AMERICAN LEGAL SERVICES IS NECESSARY TO MAINTAIN ACCESS TO JUSTICE FOR NATIVE AMERICANS.

1. State funding mechanisms cannot be relied upon to support legal services for Native Americans. Indian people have historically been underserved by both federal and state-administered programs. However, in recent history the failure of state-administered programs to provide services to Indian people has been particularly egregious. Under a state block grant administration with limited federal oversight provisions, it is likely that this historical hostility by some state governments to their Indian citizens would continue, and that individual Native Americans would be discriminated against, ignored and/or neglected. Additionally, states may be tempted to use tribal access to block grant funds as leverage to persuade tribes to negotiate away other rights and interests that they and their members have, placing an unrelated and politically-motivated price on access to federal funds that no other recipients are required to pay.

States have repeatedly failed to provide services to on-reservation Native Americans while at the same time receiving federal funds based on population estimates that include tribal members and reservation residents. To a large extent, the states' refusal to provide services expresses an unwillingness to utilize scarce resources on a people they do not consider to be eligible for state benefits. For example, in a case brought by DNA against the State of Utah to compel Utah to provide schools for children on the reservation, the state argued that "its lack of power on the reservation counsels against finding any duty on its part to provide education services on the reservation."[24] Another example is the failure of both Arizona and Utah to provide child support enforcement services to residents of the Navajo Nation.

Even when states do not purposefully discriminate against Native Americans, their insensitivity to and lack of awareness of the unique economic and cultural conditions which exist in Native American communities exacerbates each state's inability to properly implement block grants for people living on reservations. For instance, the unemployment rate on the Navajo Nation is much higher, and results from different factors, than the unemployment rate in off reservation areas. Fifty-eight percent of the potential labor force on the Navajo Nation in Arizona is unemployed and only twenty-seven percent of all Navajos in Arizona earn more than $7,000 a year according to the Indian Service Population and Labor Force Estimates, 1993 Report, Bureau of Indian Affairs (BIA). This high unemployment rate results from a combination of factors including lack of commercial businesses on the reservation, cultural ties that bind Navajos to rural and remote areas, education and language barriers, and logistical factors.

Arizona recently demonstrated this states' insensitivity to Native American issues when it requested the AFDC requirements for an experiment which included a 24-hour cap on benefits. The U.S. Department of Health and Human Services expressed its concern that the waiver, as written, would inappropriately terminate the benefits of Native Americans without high school diplomas, living without transportation in inaccessible, rural areas of reservations. In response, Arizona stated that individuals can choose where they reside and that its proposal was consistent with "America's practice of moving in order to secure or retain employment." Arizona chose to ignore centuries of history, culture, and tradition that tie Native Americans to their homelands, and to ignore a whole segment of Americans with values other than those expressed by the state.

Because states consistently have demonstrated an inability or unwillingness to meet and understand the needs of their Native American citizens—and, in some instances, have been openly hostile to supporting tribal justice where it would conflict with their own interests—giving states block grants or funds for legal services will fail to ensure that the unique needs of Native Americans are met.

2. Gaming Revenues cannot be relied upon to fund Indian Legal Services.
Gaming has been a blessing and a curse for Native Americans. Although a few, smaller tribes have profited from gaming enterprises: the majority of gaming operations have produced modest returns, not all tribes have adopted gaming as a resource development tool, and funds from gaming have only scratched the surface of the poverty facing most Native Americans. "Survey of Grant Giving by

American Indian Foundations and Organizations," a report recently released by Native Americans in Philanthropy, notes that gaming on Indian reservations has yet to significantly lower the high levels of poverty endemic to Indian people nationwide. Indeed, poverty among Native Americans remains four times higher than the national average. The report found that poverty among Indians has actually risen during the past decade of the gaming boom and, now, more than half of all reservation Indians live below the poverty level. According to the report, among the reasons for disparity between perception and reality is that "the big success stories in gaming are the exceptions rather than the rule." Of the more than 200 tribes with gaming establishments in 1993, two tribes accounted for almost a third of the $2.6 billion in gaming revenues. The 100 tribes with the smallest casinos and bingo halls averaged less than $5 million each in 1993. Small tribes located near major urban areas have benefited the most from the gaming boom. For many of them, gaming has reduced or eliminated unemployment and has provided a substitute for shrinking federal funds. However, the combined population of the three most successful gaming reservations is less than 500. Nine of the ten largest reservations (where half—218,000 of the 437,000—reservation Indians live) have seen an increase in poverty during the 1980's.

For the country as a whole, the percentage of Indians living on reservation who live below the poverty rate has increased from 45% of the population in 1980 to 51% today. The isolation of many Native communities precludes viable gaming operations. The Philanthropy report also noted that the needs of reservation Indians are so great that, "even if, for the sake of argument, all the Indian gaming revenue in the country could be divided equally among all the Indians in the country, the amount distributed ($3,000 per person) would still not be enough to raise Indian per-capita income (currently $4,500) to anywhere near the national average of $14,400."

Furthermore, gaming revenues are not a true indicator of wealth because "gaming revenues represent gross income; while some Indian gaming operations are spectacularly successful, with a profit margin of up to 40% of revenues, most are only marginally profitable." And, it is difficult for the two tribes with extremely successful operations to act as "financial saviors" to other tribes for a number of reasons, including the long-term probability that gaming revenues will cease to meet current levels. Even if tribal governments were structurally organized to be grantmakers, the priority on meeting local needs, the huge level of demand, the limited number of successful tribes, and the same systemic challenges that have kept the federal government, with its billions of dollars of resources, from lifting its poorest citizens, on-reservation Indians, out of the crushing poverty with which they live, have all combined to limit the scope of gaming's economic benefits to this country's Native people. It is unrealistic to expect tribes to budget funding for legal services for tribal members at a point when re-building tribal infrastructure—water and sewer lines, health services, Headstart, Meals on Wheels, even libraries—are critical priorities.

3. Tribal Block Grants would not be an effective funding mechanism for Indian legal services. Because of the unique and distinct nature of the 500 plus tribes in the United States, the extent to which each tribe could or should be involved in the delivery of legal services differs dramatically. There is no way that Congress can legislate for all of the different tribes or guarantee that individual Native Americans and Alaskan Natives receive services regardless of which governmental entity actually administers the services.

Although tribal involvement in the delivery of legal services is important, it exists under the current funding mechanism for Indian Legal Services, and varies greatly according to the particular tribe and its government, its population, its land base, its resources and wealth, and its culture and traditions. For example, the Navajo Nation and Hopi Tribes have complex governmental infrastructures that administer services to individual tribal members, yet each supports funding of an independent non-profit legal services program to serve its members. There are smaller tribes that rely on independent programs for tribal representation. And, there are multiple tribes served by a single component program whose larger funding base permits more effective and efficient administration of service. Between these two extremes are an entire spectrum of tribes that have developed close working relationships with locally-controlled programs based on unique factors inherent to each tribe and its people.

Finally, people must have access to legal counsel independent of state and tribal government to ensure that both governments treat individuals in a lawful, fair, and efficient fashion. These are only a few examples of how complicated defining service areas and service populations could be for purposes of tribal block grant funding.

4. Federally-funded Indian Legal Services is the single most viable approach.
If the three approaches discussed above can not meet the challenge of funding Indian Legal Services, the question arises whether or not there is an approach that would meet the need without requiring prohibitive sums of money. Quite simply, the single best model for providing meaningful legal assistance to low-income tribes and Indian people may be the current system of federally-funded Indian Legal Services. This delivery system, with its 34-year track record of unprecedented accomplishments, works well—except for being drastically underfunded.

It works well because it has the flexibility to focus on the most pressing legal needs in each tribal community. Local boards of directors and experienced staff make flexibility possible. A major ingredient in this system is the independence of these offices. By virtue of receiving their primary funding through the Legal Services Corporation, they can operate independent of state political interests (which may well be contrary to tribal interests) and tribal politics (which also may be self-serving in ways that are not consistent with the fundamental principle of access to justice). The relatively deep federal pocket, besides having a legal and moral nexus through the federal trust relationship, is, by virtue of its depth, a much more stable funding source than the tribal treasuries.

The currently-designed Indian Legal Services offices possess the Indian law expertise, the institutional memory and the cultural sensitivity to provide access to justice in Indian country. The biggest drawbacks to the current system are the historic underfunding of legal services and the periodic budgetary and regulatory attacks by Congress. Nonetheless, these offices have survived. If supplemental funding can be found to further support their work, Indian Legal Services can continue to provide a major contribution of justice in the increasingly complex world of Native America.

IV. CONCLUSION

The ability of Indian Legal Services programs and their employees to deliver effective and meaningful legal representation to Indian people and tribal clients in the environment described above - indeed to have *succeeded* at it for over 30 years, against all odds - is one of the truly remarkable achievements in the entirety of the history of the Legal Services movement in America. The final measurement of the success of these lawyers and advocates can only be whether Native peoples and tribes in America are given the right to be free to remain distinct people, culturally and politically, and to seek to secure their sense of justice within the American system of government. The question for policy makers is whether it is possible to provide access to meaningful legal services in Indian country without funding Indian Legal services.

An estimated 40 percent of this country's Native American population of over 2 million persons is eligible for services from Indian Legal Services programs. And, unlike urban areas in America where there is a private bar which can assist in meeting the legal needs of the poor, there is simply no private bar resource in Indian country. In the past 30 years, Indian Legal Services has become an integral part of the promise of equal access to justice. Given the historical special obligation of the United States to this unique political and minority group, it is unacceptable, and a violation of the United States' trust duty to Native American people, to consider at this point in our history the elimination, or diminishment, of Indian people's most reliable access to the American system of justice, paticularly given the momentum building among tribes today to become economically viable in the American societal promise of equity and justice for all.

It remains vitally important that Indian Legal Services be funded with a healthy and specific portion of the Legal Services Corporation budget. The current reduced Legal Services Corporation budget should be increased to more realistically match the legal needs of low-income groups and individuals. Additionally, exploration of supplemental funding from other federal sources, as well as independent private or foundation sources, is encouraged to continue this most basic attribute of a civilized society—access to justice.

As America grows and matures, it must attend to all its citizens—not least of which are the culturally diverse and politically unique Native Americans for whom the provision of legal assistance is a vital component of tribal and individual integrity.

V. LEGAL SERVICES CORPORATION FUNDED INDIAN PROGRAMS AND COMPONENTS AS OF MAY 1997

1. Alaska Legal Services
2. Pinal & Gila Counties Legal Aid Society (Arizona)
3. Community Legal Services, Inc. (Arizona)
4. Papago Legal Services, Inc. (Arizona)
5. Southern Arizona Legal Aid, Inc.
6. DNA-People's Legal Services, Inc.
7. California Indian Legal Services, Inc.
8. Colorado Rural Legal Services, Inc.
9. Native Hawaiian Legal Corporation
10. Idaho Legal Aid Services, Inc.
11. Pine Tree Legal Assistance, Inc. (Maine)
12. Michigan Indian Legal Services, Inc.
13. Anishinabe Legal Services, Inc. (Minnesota)
14. Montana Legal Services Association
15. Legal Services of North Carolina, Inc.
16. Legal Assistance of North Dakota, Inc.
17. North Dakota Legal Services, Inc.
18. Legal Aid Society, Inc. (Nebraska)
19. Southern New Mexico Legal Services, Inc.
20. Indian Pueblo Legal Services, Inc. (New Mexico)
21. Nevada Legal Services, Inc.
22. Oklahoma Indian Legal Services, Inc.
23. Oregon Legal Services Corporation
24. Dakota Plains Legal Services, Inc.
25. Texas Rural Legal Aid, Inc.
26. Utah Legal Services, Inc.
27. Northwest Justice Project (Washington)
28. Wisconsin Judicare, Inc.
29. Wind River Legal Services, Inc. (Wyoming)

FOOTNOTES

1. Morton v. Mancari, 535 (1974).

2. 42 U.S. 2996 et seq.

3. Robert A. Williams, "The American Indian in Western Legal Thought" (1990).

4. Frank Pommersheim, "Braid of Feathers: American Indian Law and Contemporary Tribal Life" (1995).

5. Petra T. Shattuck and Jill Norgren, "Partial Justice: Federal Indian Law in a Liberal Constitutional System," at 28-29 (1990).

6. Robert N. Clinton, Tribal Courts in the Federal Union, 26 Willamette L. Rev. 841, 855-856 n. 41 (1990).

7. Indeed, Indians have their own Civil Rights Acts, 25 USC Sections 1301-1326, and the Child Welfare Act, 25 USC 1901-1963.

8 That the United States has not been anxious to assert the interests of tribes in cases where the relief requested might significantly interfere with the interests of non-Indian private property holders is best demonstrated in the case of east coast tribal land claims, most notably the claims of the Oneida Indians of New York (see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 611 (1974) (private counsel files suit to assert tribal claims for trespass on federally protected land)), and the Passamaquoddy and Penobscot Indians of Maine. In fact, it was an LSC-funded program (Pine Tree Legal Assistance) that was forced to sue not the trespassing private property.

9. This reticence to assert and enforce Indian property rights does not apply only to cases involving tribal claims. It occurs with frequency in the case of individual Native lands. For example, Washington States' LSC grantee, the Northwest Justice Project, currently represents individual Native Americans in an effort to protect trust property from continuing trespass by non-Indians. Demand has been made upon the United States to appear and defend the integrity of the NJP client's right to use the land free from trespass. To date, the United States has not appeared. *Folk v. Bureau of Indian Affairs* (administrative demand made upon BIA to protect trust lands from continuous trespass by the public and private parties, and to seek appropriate damages).

10. Substantial opportunity exists for inter-tribal disputes on critical issues. Washington State has a large number of Indian allotments that remain in the control o f individual allottees and their heirs. Cases involving the unauthorized use, occupancy, trespass, appropriation, and destruction of such land are not rare, and the presence, of the United States as "trustee" cannot adequately insure that all such interests are effectively represented, particularly in cases where the interests of tribes and individual members are at odds. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987) (LSC-funded legal services program forced to sue the Unites States to protect the property interests of individual Indians claiming fractional ownership shares of previously allotted lands which, under the Indian Lands Consolidation Act, were to escheat to the tribe without compensation.)

11. The United States does not always have the resources to meet the needs of all small, poor tribes. It has sometimes been necessary for legal services staff to begin the research and investigation of a potential claim before the Justice Department will become involved. And, in some cases as noted above, the United States declines ever to take a position, forcing the tribes to rely on legal service representation if the matters are to be adjudicated at all. Even when the United States has a "commonality of interest...in the proceeding or on the issue", it may not have the resources or interest to advance the tribe's position, and the tribe will be left to its own devices to ensure effective assertion of its claim.

12. *Mountain Village Residents' Homebuyers' Committee, et al., v avcp Housing Authority and HUD*, (D. Alaska No. A-0046 Cia).

13. For a number of years, an Evergreen Legal Services attorney has worked with the Senate Indian Affairs Committee to insure meaningful and appropriate protection of income earned from Indian trust property form being considered in determining eligibility for Social Security Disability and SIS benefits.

14. Chilkat Indian Village V. Johnson, 870 F. 2nd 1469 (9th Cuit 1989), on remand Nos. J-84-024, A-085 Cia. (Federal District Court); Chilkat Indian Village, IRA v. Johnson, 20 Ind. L. Rptr. 6127 (Calcite Indian Village Tribal Court Nov. 3, 1993).

15. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831).

16. *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832).

17. Getches, David H., "Difficult Beginnings for Indian Legal Services," 1972, National Indian Law Library, Boulder, CO.

18. Native American Expansion Funding Guidelines, 44 Fed. Reg.74, 946 (1979).

19. Congressional Reg H.R. 3480, Reauthorization, June 17, 1981 debate.

20. Tosco Foundation, Getches and Greene, "Legal Services Corporation: American Indian Population Study, October 1978.

21. Lieberman, Joan C., Legal Services Corporation, "American Indians: Their Need for Legal Services," September, 1976.

22. Senate Select Committee on Indian Affairs, 99th Congress, First Session, "Federal Programs of Assistance to American Indians," Committee Printing 1985.

23. In the 1996 Budget, Congress required "equalization" for most programs and services, but continued to use historic funding levels to determine grants for Native American programs. Still, total funding for the Legal Services Corporation was not based on a formal or any other objective criteria.

24. Eight-two percent of Navajo Nation residents speak Navajo as their primary language, and eight and one half percent of all members of the Navajo Nation do not speak any English. [See 1990 Census, Population and Housing Characteristics of the Navajo Nation].