S. HRG. 107–605

IMPACT OF SUPREME COURT RULINGS ON LAW ENFORCEMENT IN INDIAN COUNTRY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

CONTEMPORARY TRIBAL GOVERNMENTS: CHALLENGES IN LAW ENFORCEMENT RELATED TO THE RULINGS OF THE U.S. SUPREME COURT

JULY 11, 2002
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THURSDAY, JULY 11, 2002

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

The committee met, pursuant to notice, at 10:00 a.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding

Present: Senators Inouye, Akaka, and Campbell.

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

The CHAIRMAN. The committee meets this morning to receive testimony on the challenges confronting contemporary tribal governments as they provide for the health, safety and welfare of those who reside on Indian reservations, both Indians and non-Indians.

Enforcing the law on Indian reservations has increasingly become frustrated by the complex pattern of jurisdictional authorities that have been engendered by rulings of the U.S. Supreme Court. Today, we will receive testimony on the results of studies conducted by Department of Justice, and we will learn about more recently gathered reports and statistics which are simply shocking. For instance, Justice Department reports indicate that American Indians are victims of violent crime at rates more than twice the national average, far exceeding any other ethnic group in the country. Nearly one out of every four Native Americans between the ages of 18 and 24 are victims of a violent crime—the highest per capita rate of violence of any racial group considered by age and representing 10 percent of the violent crimes prosecuted by the Justice Department.

Other alarming information instructs us that over a 5-year period, American Indian females were victimized by a spouse or intimate partner at rates which greatly exceed the comparable rates for any other ethnic group. Now, consider that the U.S. Supreme Court has ruled that tribal governments have lost their inherent authority to exercise criminal jurisdiction over non-Indians on the grounds that it is inconsistent with the domestic dependent status of Indian Nations and you can begin to understand the extent and nature of the devastating problems we are here to address.

The incidents of domestic abuse and domestic violence are high, yet if the abusing spouse is a non-Indian, tribal law enforcement officers are without jurisdiction to intervene. What other law en-

forcement presence is there on the vast majority of Indian reservations? The answer is none. Tribal law enforcement officers can call upon State or local authorities, but more often than not those enforcement authorities are reluctant to come on the reservation because the rulings of the Supreme Court have also rendered their jurisdiction unclear.

Federal law enforcement officers have criminal jurisdiction over felonies and other acts enumerated in the Major Crimes Act, but sadly we know that the Federal law enforcement effort is underfunded, understated, and simply not able to respond in a timely fashion when crimes are in the process of being committed.

Add to that the increased burdens placed on all of law enforcement—Federal, State, local, and tribal—in responding to the new climate of terrorism, additional responsibilities associated with homeland security and border security, and one could say that we may well have a crisis in law enforcement in Indian country.

It is not widely know, but many Bureau of Indian Affairs police have been drafted to serve as air marshals, and there are no replacements provided for those officers who are no longer providing protection in tribal communities. Some have suggested that the Justices of the Supreme Court knew what impact their rulings are having on the ability of tribal governments to provide for the health, safety and welfare of all their citizens because if they did, they would not have invalidated the intergovernmental agreements that many State and tribal governments have entered into in order to provide a seamless and comprehensive law enforcement framework, as the court did in the *Nevada* v. *Hicks* decision handed down last year.

This is just one of many dynamics that we are contending with when the legal experts tell us that the Supreme Court's rulings are having devastating impacts in Indian country. No where else in America does law enforcement jurisdiction depend on a determination of the race or ethnicity of the victim and the perpetrator of a crime. That in and of itself should signal to one and all that we need to bring some sense, some order and some clarity back to law enforcement in Indian country.

Mr. Vice Chairman.

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

Senator CAMPBELL. Thank you, Mr. Chairman.

This is the second hearing we have held where we are analyzing the impacts of recent Supreme Court decisions on Indian tribes and residents, both Indian and non-Indian, as you have mentioned. Dealing as it does with matters relating to law enforcement, today's hearing will hopefully shine some light on a very practical problem. I do not want to knock the Supreme Court, but I have to tell you in many cases they live a very insulated lifestyle in an insulated atmosphere, and they are simply not out in the field enough to see how their decisions impact people at the local level.

As the Justice Department continues to report to us, on many reservations crime is on the rise, as you mentioned, increasingly particularly violent crime, and that leads to both Indians and non-

Indians being victimized. High crime on Indian lands also creates the obvious disincentive for different businesses that might come on the reservations to invest or innovate or create jobs and income for depressed economies, in many cases. And the complicated system of jurisdictions—on some reservations there are nine jurisdictions, so there is no question that it complicates prosecutions. And although some innovations like cross-deputization has helped, there are still huge loopholes in the system of trying to bring people to justice as the perpetrators of crime.

Certainly, I think one of the most immediate concerns to me and to the Nation since 9–11 is homeland security and the need to collectively protect our borders and our citizens from people who mean to do us harm. Just as tribal law enforcement offices are often the first, and sometimes the only responders to crimes and other problems on Indian lands, in many areas of our Nation they are the first in the line of defense against those who would harm us. In some places on Indian reservations, there is a lag-time, a delay-time of when you actually call sometimes of one-half hour to an 1 hour of response time. That is not uncommon on reservations, unlike most urban areas where law enforcement has a response time of 5 or 6 minutes.

Certainly, tribes are on the front lines in our borders. The Tohono O'odham, the St. Regis Mohawks in Upper New York, the Blackfeet of Montana, the tribes along the California-Mexico border, and the tribes in the Seattle-Puget Sound area, to name a few. Against this backdrop, the Court has ruled that tribes do not have jurisdiction over non-Indians who commit crimes on Indian lands. I do not know where that leaves the enterprising terrorist, very frankly, if they infiltrate, come across the border on Indian lands from other countries. Since they are not Indian, that raises the question, do Indian law enforcement people have any control over potential terrorists? It really raises some obvious problems for tribes that are trying to arrest and prosecute offenders on their lands. I believe this is not just a tribal problem.

So certainly this is a time of war. We are in this together, and I think the faster we recognize that, the quicker we will try to work on a seamless web of Federal, State and tribal law enforcement.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Akaka.

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Mr. Chairman.

I share the concerns of my colleagues this morning regarding the impact of recent U.S. Supreme Court hearings and rulings on tribal sovereignty, specifically as they relate to law enforcement in Indian country and adjudication of cases in tribal courts. Tribal governments face unique challenges in law enforcement due to a number of issues, including inadequate funding and resources. I am disturbed by the statistics which reflect that the highest per capita rates of violence are experienced by residents on Indian reservations. I am even more concerned by reports that in some cases responding to situations in Indian country is considered too low a pri-

ority to warrant a response by local, State or Federal law enforcement.

All of this adversely impacts the health, safety, and the well-being of American citizens who deserve to live freely and safe from harm. We are faced with a difficult task of rectifying this situation. In doing so, we must ensure that tribal governments are afforded the right, their sovereign right, to be a part of the solution, to clarify criminal jurisdiction within government-to-government framework. We must be careful to preserve the fundamental authority of tribal governments. I am pleased to learn of efforts within Indian country to unify to protect these rights and I hope you continue to do that.

I therefore, Mr. Chairman, look forward to hearing from our distinguished witnesses this morning, and I look forward to working with all of you to preserve the inherent sovereignty of tribal governments and to address the law enforcement needs in Indian country.

Thank you very much, Mr. Chairman.

The CHAIRMAN. I thank you very much, Senator.

Our first witness is the Chairman of the Lummi Indian Business Council of Bellingham, Washington, Darrell Hillaire. Chairman Hillaire will be accompanied by Judge Theresa Pauley, Chief Judge of the Lummi Nation, and Gary James, Chief of Police, Lummi Nation.

Mr. Chairman, welcome sir.

STATEMENT OF DARRELL HILLAIRE, CHAIRMAN, LUMMI INDIAN BUSINESS COUNCIL

Mr. HILLAIRE. [Statement in native dialect.]

Good morning. With me I have the esteemed Chief Judge of the Lummi Court System, Theresa Pauley, and our Chief of Police Gary James.

We are really thankful for being given this opportunity to come and speak with you today. We felt at home at Lummi among our people that there seems to be this confusion in this relationship between the U.S. Government and the Lummi Nation. We felt the best way to clear up some of that confusion is to come here and speak with you one-on-one, eye-to-eye, and reiterate our understanding that we would be recognized as a government and respected as a people.

We had this opportunity a couple of weeks ago to meet with one of our Elders. He is 83 years old, World War II veteran, who as a young boy wanted to become the chief of police on our reservation when nobody wanted to come to our reservation. So when he came back from the war, our Elders got together and they voted him in, and he was our chief of police for over 20 years. He was given a badge and a pistol and some handcuffs. And they were from treaty-signing in 1855, and he was passing it on to me to keep, to make sure that I remember that we have always provided law and order on our reservation, and in those days for only our people because we were the only ones that lived there.

Today, under self-governance, self-determination, we have a law and order office of over 20 sworn officers. We have a court system that is autonomous from the Business Council. We have a relation-

ship with the county, with inter-local agreements with the Sheriff's Department and the welfare offices. We have a full faith and credit with the State court system and our court system.

Though these things are important to us, that we extend ourselves to other local governments and work hard with them to understand one another, it is here that we seem to recognize a lot of confusion. I would like to have Chief Judge Pauley say a few words, and Chief of Police Gary, if they would.

STATEMENT OF THERESA POULEY, CHIEF JUDGE, LUMMI TRIBAL COUNCIL

Ms. POULEY. Good morning, Senators. I am Theresa Pouley. I am the Chief Judge of the Lummi Nation.

I am here to talk to you a little bit today about contemporary tribal court and tribal judicial systems. Your honors, tribal judicial systems are poised to join the mosaic of State, local and Federal court systems to help provide solutions to all of the problems that Indian country experiences today, and that all of you have pointed out today. It is these problems that are facing our reservation that make it so important that Congress act.

Tribal courts, tribal nations are looking for respect and recognition of their governments. As part of that, we pledge to be responsible to provide justice for all the people of the reservation.

Chief.

STATEMENT OF GARY JAMES, CHIEF OF POLICE, LUMMI NATION

Mr. JAMES. Thank you.

Good morning. My name is Gary James. I am the Chief of Police, Lummi Nation.

We want to continue to lead and monitor a fair, just and safe law enforcement system on our reservation. We meet regularly with the Federal Bureau of Investigation [FBI] and other law enforcement agencies in our area. Because of this communication, we have an overwhelming response from tribal and non-tribal citizens wanting us to continue to do the work that we do within the boundaries of our reservation.

Thank you.

Mr. HILLAIRE. The number one priority at Lummi is healthy spirits—healthy spirits for our entire community, especially our children. What we mean by that is that there seems to be an epidemic of substance abuse on our reservation. We know that. We have hired an extra drug detective. We have set up a drug court. We are going to build a treatment center. We have doubled our youth activities—all of this to set a clear path of opportunity for our children, to make sure that the homes they live in are safe and they are healthy.

As was pointed out in opening remarks, it is of great concern to us because we have heard stories of our children where they are born to a tribal member and a non-tribal member. Perhaps the tribal member is gone and the non-tribal member is in care of the abuse of the child. And that is not acceptable to us, to stand there when substance abuse is going on and our children have to be abandoned for perhaps 3 days, and we do not have, as interpreted

by this Supreme Court, the authority to go in and take care of those kids. We cannot afford that jurisdictional confusion, and that happens on our reservation.

So we are going to extend ourselves to work real close with the local governments to make sure we understand one another going forward, but we need your help. We appreciate your help as we continue to work on recognition of each other as government and respect its people.

So I thank you for this opportunity and really welcome some questions perhaps or some comments on where we are at, and where we need to go.

So "heishka" to each and every one of you.

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

The CHAIRMAN. I thank you very much, Mr. Chairman. As noted by you, in order to better understand the problem, we have a few questions.

We have been advised that the Lummi Nation and the State of Washington has entered into an agreement where the Lummi Nation will be assuming primary responsibility for areas that were previously assumed by the State pursuant to Public Law 280. Will you describe the responsibilities that you have assumed?

Ms. POULEY. There are a variety of responsibilities that Lummi has assumed and will assume in the very near future. In particular, and it is hard to list because there are so many that have happened recently, Lummi provides virtually all the law enforcement on our reservation. Almost all of our officers are the ones who respond to crime. We are working very closely and carefully with the State to map out ways to enforce child support so that children of the reservation can be supported. We are working with Washington State and the Washington State Supreme Court to establish agreements so that we give full faith and credit to tribal court orders. We are working in virtually every area for natural resources to have an ability and to work with the State of Washington so that we can provide protection to those resources that are on the reservation.

So in virtually every area where the tribe lost jurisdiction under Public Law 280, the State of Washington and Lummi are willing to work and negotiate to give that jurisdiction and that authority back to the tribe.

The CHAIRMAN. May I ask the Chief of Police a few questions? In the year 2001, last year, how many incidents would you say that your police department responded to?

Mr. JAMES. In 2001, we responded to just a little over 4,700 incidents for service.

The CHAIRMAN. And of these incidents, how many involved non-Indians?

Mr. JAMES. My best guess would be between probably 30 percent to 35 percent of them.

The CHAIRMAN. Would your nation face any civil liability if a non-Indian is injured while being detained or arrested by the Lummi Nation?

Ms. POULEY. That would actually be an issue or question for the court system. We have as part of our jurisdiction the ability to provide due process to all members of the reservation. If a police offi-

cer in fact was found to have violated some responsibility to a citizen, the tribal court has both the responsibility and the authority to be able to resolve those disputes between non-Indians and tribal police.

The CHAIRMAN. The Vice Chairman spoke of terrorism, and your reservation includes coastline, I believe, of about 12 miles. Do you have any sort of security along that stretch?

Mr. JAMES. The security that we would be able to—the minimum security that we do have is our natural resource enforcement officers who do patrol the waters of Puget Sound and around our areas, and we do cover a majority of a day, as far as security, on the water.

The CHAIRMAN. Do you have any sort of assistance or advice from the Federal Government?

Mr. JAMES. Like I said, we meet with the FBI probably at least once or twice a week, and when issues do come up like that, we do get advice from them and work closely with them to resolve issues that do come up like that.

The CHAIRMAN. We have been advised that there are tribes who have entered into agreements with their respective States just like you have, but ever since the Supreme Court decision in *Nevada* v. *Hicks* was decided that they need not honor these agreements. Is that widespread in the United States?

Mr. HILLAIRE. Yes; we have not heard entirely, but it is our intention to go back to these local agencies and sit down with them and really just clarify what we are trying to do here, outside of what is the best way to afford safety for all citizens within the boundaries of our reservation, to make sure that every citizen, Indian and non-Indian can feel that way. That is our intent going forward. We have not gotten anything adverse back from the county government, city governments surrounding our reservation, or the State at this time.

The CHAIRMAN. So the State of Washington is willing to honor the agreement they have entered into with you, notwithstanding the *Nevada* decision?

Ms. POULEY. At this point in time, the way we have worked out full faith and credit with both the Washington State Supreme Court and the local Whatcom County Court systems, we still are engaged in an ongoing dialog for how to best solve problems in Indian country. The county courts are sort of in the position that local solutions to local problems are better, and that tribal courts are better situated to deal with issues that arise in Indian country. The problem is, as you have so aptly stated in your opening remarks, is that now the Supreme Court says they do not have to do that.

While Lummi is very, very fortunate to have good working relationships, lots of other tribes across the United States are not that fortunate. I have heard different individuals and attorneys speak at different gatherings of lawyers in the State of Washington where they believe that the Lummi Nation and all tribal courts may have no jurisdiction over non-Indians on the reservation—what a terrible, terrible message to send at a time when State and local governments really want to work with tribes to become part of the solution to the problems.

The CHAIRMAN. Thank you very much.

Mr. Vice Chairman.

Senator CAMPBELL. Thank you.

You are right. That is a bad message to send because basically it tells the potential bad guys it is open season, you can do what you want—a clearly bad message.

You mentioned, Gary, that the natural resources enforcement officers are the ones that really patrol your 12 miles of coastline. Do they have arrest authority and are they armed?

Mr. JAMES. Yes; they do. They have all the authority and have the same training as our regular law enforcement officers and all the officers in the State of Washington have. They have the same training.

Senator CAMPBELL. They do have.

Mr. Hillaire, in your opening statement you said you anticipated and expected to be included in the buildup of homeland defense. Have you been, with any State or Federal or local officials?

Mr. HILLAIRE. We did get invited to a meeting with Attorney General Ashcroft earlier in the year, but there has not been any contact since. We feel that is important that we do that. The protection services that we provide now are pertaining to natural resources, but being 15 minutes away from the border, I think we need to be included.

Senator CAMPBELL. So you have not gotten any direction at all, as many local communities have across America, about emergency preparation or anything of that nature that could be related to homeland defense?

Mr. HILLAIRE. Just that initial meeting with the Attorney General.

Senator CAMPBELL. And, last question, your treaty of 1855, when your ancestors entered that treaty, was the withdrawal of any of the tribe's rights to govern or police your own lands included in that?

Mr. HILLAIRE. No; it was not.

Senator CAMPBELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Your testimony requests congressional action, in consultation with the tribal governments. Your request is to address the erosion of tribal sovereignty. Have you developed a specific legislative recommendation and are those ready for the committee's consideration?

Mr. HILLAIRE. We have been working real close with the Tribal Sovereignty Initiative team under NCAI. We have been submitting our position on this legislation through that body, but if requested by you, Senator, we would gladly do that for the committee.

Senator AKAKA. What has happened, what has been the impact of the *Hicks* decision in terms of real-life situations for law enforcement in the Lummi Nation?

Mr. JAMES. As far as State officers coming onto the reservation and enforcement—is that what you are asking? We have a very, very good relationship with Whatcom County which is the county that our reservation sits in. They respect our court system and

come in and ask for our court's blessing before they come onto our reservation and serve their orders. They have been really good about doing that, so that has had very little impact on us—just because of the good relationship we do have with Whatcom County.

Ms. POULEY. It does, Senator, if I could respond to that question, it has a huge impact, real-life impact in tribal court. I cannot tell you how heavy my heart is when I have an Indian person who is married to a non-Indian person, come into my court with a black eye and with her tooth knocked out, just to find out that that non-Indian is not a resident of the reservation, so the court does not have any jurisdiction over them. It is extremely difficult for tribal courts to be able to protect not only their own people, but all residents of the reservation. Imagine if coming to Washington, DC if you were going through a 25-mile per hour school zone and every time a Washington, DC officer stopped you, that you said, "Oh, no, I am a citizen of the State of Washington, so I do not have to slow down." In Indian country, you do not have to slow down. So those are sort of the real life problems that I see as a tribal court judge every day.

Senator AKAKA. Thank you for your responses.

Thank you, Mr. Chairman.

The CHAIRMAN. But when you do have someone speeding in Lummi Nation, you can stop him, can't you?

Mr. JAMES. We do have an agreement with Whatcom County Sheriff's Office. We do have civil traffic jurisdiction over non-tribal members, and that process is that we are able to stop and detain and write out a citation and forward it on to the Sheriff's Office where they take action on the citation written by our officers.

The CHAIRMAN. And does the Sheriff's Office follow through and provide justice as it should be done?

Mr. JAMES. As far as the civil traffic, I think to the best they can, yes they do.

The CHAIRMAN. Would that procedure apply in all of the cases, including felonies?

Mr. JAMES. No; that only applies to civil traffic infractions. Anything criminal, we have to actually stop and detain the person and hold them for a Whatcom County deputy to come and respond.

The CHAIRMAN. But you do have the right to detain?

Mr. JAMES. Yes; we do.

The CHAIRMAN. I thank you all very much.

Ms. POULEY. Thank you.

The CHAIRMAN. And I can assure you that we are prepared to work with the National Congress of American Indians to come forth with something that should be a response to the Supreme Court.

Our next witness is the U.S. Attorney for the city of Minneapolis, Thomas B. Heffelfinger, and the director of the U.S. Department of Justice, Office of Tribal Justice, Tracy Toulou.

Mr. Heffelfinger.

STATEMENT OF THOMAS B. HEFFELFINGER, U.S. ATTORNEY, CITY OF MINNEAPOLIS

Mr. HEFFELFINGER. Mr. Chairman, Mr. Vice Chairman, members and staff of the committee, my name is Tom Heffelfinger. I am the

U.S. Attorney for the District of Minnesota, and chairman of the Attorney General's Advisory Committee, Subcommittee on Native American Issues.

The purpose of our subcommittee is to develop policies pertaining to effective law enforcement in Indian country, and among the top priorities that we have identified are terrorism and violent crime in Indian country.

The Federal Government bears a unique and crucial responsibility for addressing the problem of violent crime in this Nation's Indian communities. Since 1885, the U.S. attorneys, in collaboration with the various tribal governments have had primary responsibility for the prosecution of serious violent crime in Indian country, and that problem is a very significant one.

As you noted, Mr. Chairman, in your opening remarks, Native Americans are victimized at a rate of 2.5 times the national average in this country. In some areas of Indian country, that victimization is even higher. For example, in my own State of Minnesota, the residents of the Red Lake Indian Nation are currently suffering a rash of violent homicides unprecedented in that community's history. In the past 7 months, there have been 5 homicides in a community of 5,000 people. If one applied that rate to the city of Minneapolis, our State's largest city, Minneapolis would have had 382 homicides in 7 months. In fact, there have been 21.

The U.S. Attorney, the FBI, and the Government of Red Lake are working aggressively to solve this problem, but it is indicative of the fact that in some parts of Indian country violent crime is at an unprecedented high.

In our attempts to respond to violent crime, prosecutors and investigators face a confusing and frequently uncertain set of laws and judicial decisions regarding jurisdiction. First, there is confusion regarding who has personal jurisdiction over the subject. If one looks, for example, at a comparison of the Major Crimes Act and the General Crimes Act, under the Major Crimes Act, the United States has jurisdiction to prosecute certain serious offenses. However, that jurisdiction only extends to prosecution of Indians. Under the General Crimes Act, the United States has jurisdiction to prosecute all Federal offenses. However, that does not apply to Indian on Indian crimes.

In addition, there are a variety of statutes and decisions, some of which the chairman and vice chairman have already cited, that address situations such as who has jurisdiction when both the suspect and the victim are non-Indian; whether or not tribal courts have jurisdiction over non-member Indians or non–Indians; whether a person is an Indian for purposes of determination of jurisdiction; and whether or not jurisdiction is delegated to the State under laws such as Public Law 280.

If this seems confusing, let me assure you from a prosecutor's perspective, it is. Even once you get past the question of personal jurisdiction, then one has to address whether or not the crime occurred in Indian country, although that term is defined by statute, I need to assure you that in a particular or individualized case, the resolution of that can and does tie up litigation for months and sometimes years.

What all this means is that whenever a crime is committed in Indian country, in order to determine jurisdiction prosecutors must assess and investigators must investigate facts that would allow us to determine who has jurisdiction. This involves four factors: Whether the offense occurred within Indian country; whether the suspect is an Indian or a non-Indian; whether the victim is an Indian or a non-Indian; and what is the nature of the offense.

Depending on the answers to these questions, an offense can end up being prosecuted in tribal court, Federal Court, State Court or not at all. And when you have that kind of diversion and disparity, then you can end up with the kind of disparity in sentencing, which is one of the subject of the sentencing commission right now.

In addition, only once these questions are answered can prosecutors and investigators turn to the important question of sufficiency of evidence and guilt versus innocence. This confusion generally does not exist in the State system, and this confusion must be remedied.

Confusion over jurisdiction has another detrimental impact which was alluded to by the vice chairman, and that is homeland security. Now more than ever we are reliant upon cooperation between tribal, State and Federal authorities. Indian country is involved in the war on terrorism. More than 25 tribes govern land that is adjacent to borders, either directly or across the water. A conference was held by the border patrol earlier this year at which General Ashcroft "recognized that local law enforcement agencies play a crucial role in securing our Nation's borders, and tribal law enforcement agencies are no exception." Tribal governments have enthusiastically assumed this responsibility and have expressed their desire to work with the United States to provide for that security, but cooperation between local, Federal, and tribal agents is what is necessary in order to assure that protection.

Unfortunately, as the committee has already cited, there have been decisions that have undermined that cooperation in the recent past. The *Hicks* case, which the committee has already cited, has given law enforcement an opportunity at the local level, at least, to determine that they do not need that cooperation. So after years of coalition-building between State and tribal law enforcement officers, this interpretation has allowed for conflict between the agencies.

Now more than ever, members of the committee, we need the jurisdictional clarity in order to allow us to do our multiple functions within the Department of Justice.

Thank you for the opportunity to address the committee.

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

The CHAIRMAN. I thank you very much.

May I now recognize Mr. Toulou.

STATEMENT OF TRACY TOULOU, DIRECTOR, DEPARTMENT OF JUSTICE, OFFICE OF TRIBAL JUSTICE

Mr. TOULOU. Thank you.

Mr. Chairman, Mr. Vice Chairman, my name is Tracy Toulou and I am the director of the Office of Tribal Justice in the Department of Justice. Thank you for the opportunity to appear before you here today.

The Office of Tribal Justice spends a significant amount of time studying and addressing issues related to tribal law enforcement. My office serves to coordinate and focus the Department's policies and positions on American Indian and Alaska Native issues, and maintain liaison with federally recognized Indian tribes, particularly in the area of law enforcement.

In addition, we work closely with the U.S. Attorneys' offices that prosecute violent crime in Indian country. We also regularly communicate with tribal police departments, the FBI, the BIA, and other Federal law enforcement agencies operating in and around Indian country. Most recently, we have been working with the U.S. Border Patrol on Native American border security issues. In my experience as an assistant U.S. attorney in the State of Montana, I prosecuted major crimes acts violations on a number of reservations, as well as assisted the Northern Cheyenne Tribe in the development of a comprehensive law enforcement program.

Today, I would like to focus on three issues—first, the problem of violent crime in Indian country; second, the challenges facing tribal law enforcement; and third, issues that may result from *Nevada* v. *Hicks*.

First, the Department of Justice Bureau of Justice Statistics reports entitled American Indians and Crime and Violent Victimization and Race reveal that American Indians experience higher rates of violent crime than any other group. In November of last year, Attorney General Ashcroft remarked that these reports show American Indians are victims of violent crime at rates more than twice the national average, far exceeding any other ethnic group. Nearly one out of every four Native Americans between the ages of 18 and 24 is a victim of violent crime—the highest per capita rate of violence of any racial group considered by age. This accounts for nearly 10 percent of the violent crimes prosecuted by the Department of Justice. Indians fall victim to violent crime at about two-times the rates of African Americans, 2½ times the rates sustained by Caucasians, and 4½ times that experienced by Asian Americans.

Of particular concern is the problem of domestic violence and crimes against Indian women, which tragically exist to a high degree in Indian country. A recent National Institute of Justice survey revealed that one in three Native women reports being raped in her lifetime. That is one in three. American Indian females were victimized by an intimate partner at rates higher than any other group. That is 23 per 1,000 American Indian females as compared to 11 per 1,000 African American females, 8 per 1,000 white females, and 2 per 1,000 Asian American females—a substantial difference.

Now, I want to turn to Indian country law enforcement. As you know, tribal governments have limited law enforcement resources for addressing the high rates of crime in many reservation communities. Law enforcement in Indian country is generally either provided by local, tribal law enforcement, or BIA. The typical department serves an area the size of the State of Delaware, but with a population of only 10,000. It is often patrolled by no more than three police officers at one time, and sometimes as few as one officer.

In 1997, the Department reported that Indian country was served by only one-half as many police officers per capita as similarly situated rural communities. This provided the needed impetus for a significant increase in Department of Justice and BIA funding for tribal law enforcement. Since 1999, the Tribal Resources Grant Program within the Community Oriented Policing Services, COPS, program has provided targeted resources for tribal departments to hire officers or acquire critical equipment. Last summer, the Attorney General and the COPS office announced grants totaling $33.7 million which were awarded to 105 police departments in 23 States.

The efforts of the Department of Justice and tribal police departments are beginning to show results. Between 1998 and 2001, the number of inmates in custody at tribal facilities grew by 29 percent. The increase in tribal jail population would appear to be closely related to the law enforcement resources made available to tribes through the COPS program.

Finally, I know the committee is interested in the impact of the Supreme Court decision in *Nevada* v. *Hicks* on Indian country law enforcement. As with any single decision which moves the state of the law in a new direction, the *Hicks* decision cannot and does not cover every factual scenario that may be encountered by law enforcement. Until there are additional decisions or statutory clarification, there will be varying interpretations of the scope of this decision.

In the meantime, I am concerned that this ambiguity may become a source of tension between State and tribal law enforcement in some areas. Briefly, in some parts of the country, we have seen State law enforcement officers interpreting this case as a basis to assert jurisdiction over Indians who are on reservation lands. In at least one case, this has resulted in a confrontation between tribal and State law enforcement officers on Indian lands. These types of situations have the potential to become highly charged and obviously should be avoided. Our office works closely with the Department's Community Relations Service to mediate these conflicts. Further, we advocate and assist in the development of cross-deputization agreements and other types of cooperative agreements to foster better relations between tribal and State law enforcement communities.

In short, today's tribal governments face serious challenges in the area of law enforcement. The Department of Justice Office of Tribal Justice is working closely with tribal governments to assist in addressing high violent crime rates, limited law enforcement resources, and the unique challenges of Indian country jurisdiction.

Thank you for the opportunity to appear today. I would be happy to answer any questions you may have.

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

The CHAIRMAN. Mr. Toulou, would you describe the present situation as a result of the Supreme Court decision as a crisis or an emergency?

Mr. TOULOU. In *Nevada* v. *Hicks?* I do not know if at this point in time if I would say a crisis occurred. I think the potential for very serious ramifications exists.

The CHAIRMAN. But you would agree that something has to be done?

Mr. TOULOU. I would say that we need some further interpretation or we are going to have some bad situations potentially occurring, yes, sir.

The CHAIRMAN. Mr. U.S. Attorney, the Lummi Nation has advised us that the local FBI agents recently informed their tribal law enforcement officers that resources that were previously targeted to address organized crime on reservations are now being transferred to address national security matters. How much of the FBI's resources that were devoted to addressing issues in Indian country prior to September 11 are now being reallocated to address national security interests?

Mr. HEFFELFINGER. Mr. Chairman, members of the committee, our committee has met with representatives of the FBI and have been assured by individuals as high as Director Mueller himself that he is maintaining his commitment to Indian country and that staffing levels of agents directed towards violent crime in Indian country will remain static. I commend Director Mueller for that recognition at a time when his resources are being stretched very thin.

However, he also has advised us that there is significant discretion given to each special agent in charge to make permanent or temporary shifts within that special agent in charge's office to address local concerns. Issues of organized crime in Indian country may well, for example, I do not know the Washington situation, but may well be considered resources that are different from those that would be applied to violent crime. However, just looking at the numbers does not adequately address the problem of staffing of FBI agents, in particular BIA agents as well, in Indian country.

One needs to also consider the impact of the nature of the work and the frequently remote locations upon those agents. Quite candidly, members of the committee, there is a significant risk of burnout for those agents. If I could use my own reservation at Red Lake as an example, we have in our office determined that Red Lake represents approximately 25 percent of the total cases we receive from the FBI, and yet that work is done on an annual basis by three agents. Those three agents are dealing with murder, sexual assault, and some of the most heart-wrenching cases a law enforcement officer can face.

In addition, those agents have to travel five hours each way to get to court. We are quite frankly facing a serious problem with burn-out. I know in talking with Mr. Ecoffee from BIA that BIA faces the same challenges with agent burn-out. So when we consider staffing, we need to also consider what the impact of the nature of the work is and the need to be able to move those people around to protect, frankly, the mental health of those agents and their ability to do their job. But I do commend the FBI and I do commend BIA for maintaining their commitment to Indian country in this time where resources are diverted to other things.

The CHAIRMAN. From your response, staffing is inadequate. Has your agency made an attempt to increase the funding?

Mr. HEFFELFINGER. Frankly, unfortunately, Senator, the funding issues are not really within my purview. Our committee has fo-

cused on staffing, which is why we started out first of all to make sure we worked with the FBI to ensure that at least current levels would remain the same. I do know that the SACs around the country within the Bureau, I know that BIA and I know that the director are mindful of whether or not increases in staffing and funding will be necessary, and they may well be. Increases may be necessary in order to ensure that even if we keep the same levels of agents, that we are able to move those agents through there so that they are effectively being utilized, and so that they can be kept on the ground doing investigations instead of driving back and forth to court.

The CHAIRMAN. You identified four factors that a prosecutor must resolve to determine jurisdiction, and that reaching this determination of criminal jurisdiction is a complex analysis of sometimes amorphous factors. Do those same four factors need to be resolved by law enforcement officers before they respond to a call for assistance?

Mr. HEFFELFINGER. Mr. Chairman, members of the committee, in our experience an officer will respond to a crime as he or she should, to deal with the immediate public safety issue. However, almost immediately issues of jurisdiction become relevant. Instead of doing a follow-up investigation focus that would focus on issues like sufficiency of the evidence or guilt versus innocence, an agent will find himself focused on questions of whether or not the suspect is a member of the particular band or is an Indian; was the location of the crime within the confines of the reservation. These are not issues that a local law enforcement officer would face in responding to a murder in Minneapolis. So they become a distraction, if not at the initial response, prior to the issuance of an indictment or an information, and it becomes an incredible distraction and delay factor.

The CHAIRMAN. In your experience in Minneapolis, do tribal, State, local and Federal law enforcement officers have the requisite knowledge and expertise to make these types of determinations?

Mr. HEFFELFINGER. Mr. Chairman, members of the committee, within the FBI, yes, clearly the Minneapolis field office has the most agents of any field office assigned to Indian country, as that field office also covers the Dakotas. Minneapolis Police Department definitely not—they rarely deal with Indian communities. They deal frequently with urban Indian communities, but not with reservations. The local police offices that surround Indian country generally do not possess that requisite information.

Minnesota is an unusual jurisdiction. We have 11 tribal communities, 9 of which are under Public Law 280, 2 of which are Federal. So in some jurisdictions, the local police simply do not care because they do no need to care. In the Federal jurisdiction areas, the local law enforcement agencies do not care because it is not their responsibility. As we attempt to develop the cooperation necessary to deal with increases in crime, we need to have that cooperation. So we are teaching local police about jurisdictional issues from the ground-floor up. So cooperation is essential at this time. It is why the *Hicks* case, for example, is so problematic.

The CHAIRMAN. Both of you have suggested that there is confusion that should be clarified. Do you have any suggestions as to how this confusion can be clarified?

Mr. HEFFELFINGER. I will go first if you want, Tracy, and then—Mr. Chairman, members of the committee, my comments are that the confusion needs to be addressed, and I would suggest, and my committee is willing to support your committee in any way we can, that your committee undertake a comprehensive review of issues of jurisdiction, as clarification would be extremely important.

Of course, we will assist this committee if all you want to do is look at the *Hicks* case, but my concern is that just looking at the *Hicks* case will provide a solution or a fix to one part of the challenge, and not to the comprehensive challenge. There are no easy solutions to this issue because it requires a balancing of the interests of law enforcement, be that State or Federal, and tribal sovereignty, and State sovereignty. These are difficult issues. But what we need is a review of this issue from a comprehensive perspective, and not just an isolated *Hicks* fix.

The CHAIRMAN. I look forward to working with you and your organization. Do you have anything prepared at this moment that you can share with us that we can look at?

Mr. HEFFELFINGER. We have not, your honor—I'm sorry—it is my court background—Mr. Chairman, no, we have only as you know been in place for about 9 months now, but we are prepared to address this issue. Clearly, jurisdictional issues are one of our five priorities.

The CHAIRMAN. Mr. Toulou.

Mr. TOULOU. As Mr. Heffelfinger said, it is a very complex issue. We have looked at it within the Department, but I do not think we have reached any agreement as to where things should go. I think what is important preliminarily as we hear from tribal leaders and tribal law enforcement, and understand their perception and where they would like to see to go with this. Obviously, the committee is in a better position to do that than the Department. We do look forward to any comments we get from tribal leaders. We would be happy to help in any way we can and answer any written questions on this issue, but we are still in the formulation basis. It is a very complex and comprehensive issue, but there needs to be clarification, without a doubt.

The CHAIRMAN. On the matter that was brought up by the vice chairman, as a result of Supreme Court decisions, Indian law enforcement officials cannot exercise criminal jurisdiction over non–Indians. Now, the Department of Justice wants Indian law enforcement people to get involved in anti-terrorist activities, and most of the terrorists, I presume, are going to be non-Indians. What can be done to have the Indians play an effective role under those rules?

Mr. HEFFELFINGER. Mr. Chairman, members of the committee, this is an area where joint powers arrangements, cross-deputization and general cooperation are the only solution. One has to respect tribal sovereignty, at the same time there needs to be collaboration between the Border Patrol, the local sheriff's offices, and tribal law enforcement. My expectation is, because I know that the tribal leadership nationwide is committed to this problem, as are members of the Department of Justice and other agencies, as are

the sheriffs, to the extent that we have impediments to cooperation, and that is the fundamental concern as I see it, to the *Hicks* case—as long as we have impediments to that, we will have a difficult time achieving effective cooperation.

I cite my own State as an example. I have a tribe, the Grand Portage Band of Ojibwa, which borders the Canadian border. They are a Public Law 280. That requires cooperation between the State and the tribe. I also have the Red Lake Band of Ojibwa, which borders on Canada. That is a Federal reservation. That requires collaboration between the Border Patrol and the tribal police.

These are the kinds of diversity of issues that require that we cannot—there is no one single solution, but we have to develop a pattern of cooperation across Indian country and across the United States. The law must foster that.

The CHAIRMAN. I gather from your response you think the impediments should be taken away.

Mr. HEFFELFINGER. Mr. Chairman, members of the committee, as the committee considers solutions to this jurisdictional issue, I am confident that the solutions will address some of those impediments.

The CHAIRMAN. I have a few more questions, but Mr. Vice Chairman?

Senator CAMPBELL. Thank you, Mr. Chairman.

Let me start, Mr. Heffelfinger, maybe by asking you somewhat of a loaded question, because I have a pretty strong opinion on it. I live in Colorado, but if I go to California, I cannot vote in California. I do not pay taxes in California, but I am still in California therefore I am subject to California laws. If I go to a different city, I am subject to local ordinances. If I go to a foreign country, same thing. If I go to France I am not French, don't pay taxes, don't do anything there except visit. If I break the law, I am going to be subject to French justice.

So it seems to me it is really out of kilter that we should not expect the same kind of framework if non-Indians come onto the reservation. Tribes are pretty much semi-autonomous, as States are and as local jurisdictions are, and everybody knows you cannot go to a different city or a different State and get away with breaking the law. Basically what we have is a system in which the word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land.

Are there any other jurisdictions that you know in the United States where the same kind of logic applies? Most jurisdictions are based on geography. They do not care what color you are. You come in that jurisdiction and you break the law, that is it. The only one I know of is Indian reservations, and that is based on racial background more than geographic area. Is there anything other than that, like military bases—are they similar?

Mr. HEFFELFINGER. Mr. Vice Chairman, Mr. Chairman, off the top of my head, no. I cannot think of one. Even on military bases and the like, the statutes and the law are quite clear as to where our jurisdiction lies, and it is based on a geographic assessment of the boundaries and the confines of a military reserve.

Mr. Vice Chairman, your question sort of underlies, and some of the parts of your question, underlies some of the challenges faced

in Indian country, some of the inconsistencies and confusion associated with establishing jurisdiction in Indian country. In part the reason that I urge the committee to seek a solution to this confusion is that the confusion is not doing a service to anybody. It is not doing a service clearly to the tribes, as there is violent crime, and confusion creates a difficulty in solving that problem. It is also not doing any favors to the non-Indians who may wish to visit Indian country, as they have the same interest in safety; 10 days ago I was in the Navajo Nation as a visitor, and I had the same expectations of safety and security as a visitor to that community as did the people who live there. So I think the resolution of the confusion is in the Nation's best interest.

Senator CAMPBELL. If an Indian person from one reservation is visiting another reservation, he can be arrested by the tribal police, I guess, for committing a crime. Is that correct?

Mr. HEFFELFINGER. That is my understanding.

Senator CAMPBELL. Where is the line? For instance, there are some Indian people who are not a federally recognized or State recognized tribe, or they were terminated in the 1950's and they have not been reinstated, or something of that nature. Therefore, they do not have a census number, or they do not have some kind of identifying factor. How is that filtered through?

Mr. HEFFELFINGER. Mr. Vice Chairman, Mr. Chairman, as I indicated in my earlier remarks, one of the issues we have to address is whether or not an individual is considered an Indian for purposes of jurisdiction. That requires us to assess issues such as whether or not the tribe that they are affiliated with is a recognized tribe. These are unique issues we do not face in any other situation.

Senator CAMPBELL. Another question—in most jurisdictions, law enforcement officers, even when they are off duty, they carry an ID, carry a gun, still retain some police authority. How are tribal police treated? Are they the same? I remember one reservation years and years ago—it has been about 20 years ago, it may have changed since then, or 25 years ago—but I was told by one former tribal policeman, he quit because he only had law enforcement authority when he was on duty. He would arrest someone, another tribal member, but when the guy bailed out or got out, he would wait for him when he got off duty, wait for the tribal policeman when he got off duty, and then assault him when he was off duty.

Mr. HEFFELFINGER. Mr. Vice Chairman, Mr. Chairman, boy, you have raised a great question. I wish I had a simple answer for you. Clearly, if you are a post-certified law enforcement officer under State jurisdiction and you are off duty and you come across a crime, you have law enforcement authority. A tribal law enforcement officer on tribal land probably has the same right in tribal land, but I will tell you, I would not have the comfort that that law tribal law enforcement officer, if he or she leaves the reservation and goes into the neighboring community, non-Indian community, would have that same protection. That would be one of the issues one would try to address in a joint powers arrangement.

Senator CAMPBELL. Yes; speaking of homeland security, we have touched on that a couple of times, is there any plan to incorporate tribes into the border security and the so-called "seamless border"?

I understand in the case of some tribes like the Tohono O'odham, that they are undermanned because—you know, I used to be a police training officer years ago in a police academy, so I know a little bit about it, a little bit about law enforcement, a little bit about drug movement. I have always been convinced that drugs move to the source of least resistance. If you have an increase of law enforcement, increase of surveillance in one area, they are going to find another place where there is less surveillance. I mean, it is commonsense.

There seems to be a movement now, since we have more increased surveillance along our borders, and not so much on Indian reservations, that people who would elicit drug trafficking have moved more toward coming across Indian reservations where here is less surveillance. Do you have any comments about that? I understand that it is really taxing some tribes, so they are as a result unable to police some of the things they normally would do because they are trying to spend more time on the borders.

Mr. HEFFELFINGER. Mr. Vice Chairman, Mr. Chairman, I know that first of all that experience varies around the country, but I know communities like the Tohono O'odham of which you have cited are facing that very problem. In connection with the seamless border issue, both the subcommittee I chair, but I think even ahead of me, because he has gotten an advance lead on this issue, is Mr. Toulou, the Department of Justice identified this issue very early after the 11th as one that needed addressing. It is one of our committee's priorities, but it is also I know a priority of the larger Department of Justice and of the Office of Tribal Justice. Maybe Mr. Toulou could address that.

Mr. TOULOU. Yes; the Department is mindful of these issues and we consider tribes as we formulate policy. We try to make sure in the short term as policy is being developed that tribes are included in any discussions we have, and as a first matter make sure that they are involved in any communications we have between law enforcement and...

Senator CAMPBELL. Well, you are having some discussion with them, but what direction are you giving them in regards to somebody that they may arrest—potential terrorists, maybe not—who are not Indian?

Mr. TOULOU. It depends on the law enforcement jurisdiction on the given reservation. What we have asked is that the Border Patrol regional office communicate with their local tribes and develop a protocol for use in that area. I believe that has happened in most situation. A number of the tribes do have jurisdiction. In some of the areas we have gone in working with the BIA to ensure that the officers on duty are cross-deputized under BIA jurisdiction. Of course, that is on an office-by-officer basis and it is not a blanket arrangement. We try to patch the holes in security as we come across them.

Senator CAMPBELL. I see.

Mr. HEFFELFINGER. Mr. Vice Chairman, may I address that question as well?

Senator CAMPBELL. Yes; please.

Mr. HEFFELFINGER. The U.S. attorneys uniformly have been directed by the attorney general to engage in training of local law en-

forcement officers on issues of terrorism. In those of us who have Indian country that abuts the border, we have included tribal law enforcement in those trainings, and have also included the local sheriffs that may have responsibility in the Public Law 280, for example, areas in that training. But there still is much work that needs to be done, especially where joint powers arrangements or cross- deputization between the Border Patrol and tribal police needs to be completed.

Senator CAMPBELL. Thank you, Mr. Chairman, no further questions.

Thank you.

Mr. HEFFELFINGER. Thank you.

The CHAIRMAN. Many State law enforcement agencies have concluded as a result of Supreme Court decisions that they no longer need to cooperate with tribal authorities when serving search warrants or arrest warrants in Indian country regarding crimes that took place off-reservation. What States have taken this position?

Mr. HEFFELFINGER. I will let Mr. Toulou respond to that as well in a moment, but let me give you, from my committee's perspective, where we are seeing more of that. I think to some degree the Hicks decision has allowed that issue to become relevant in every State where there is some other irritant in the relationship between local law enforcement and the tribe. Let me use my State as an example, then I will get to the answer to your question more directly.

In Minnesota there is a longstanding history between local law enforcement and tribal law enforcement and as a result we have longstanding cross-deputization and that type of thing. However, we have one reservation, as an example, where there is a dispute going on between the sheriff and the tribal government. The sheriff has canceled the joint powers arrangement and refuses to renegotiate. That is a symptom of a larger problem. My experience has been that the issues that you asked of Mr. Chairman are of greatest prevalence in those parts of the country where there is some other irritant in the relationship between the tribe and the local community.

I do not think it is accidental that it is in California where we are seeing a lot of these issues arise. One must recognize that it is in California where tribal gaming is gaining a foothold for the first time. That does change the fundamental relationship between tribes and surrounding communities.

In areas like Minnesota where tribal gaming has been established and is an accepted part of our State structure, these irritants do not exist and the relationships between the tribes and the surrounding governments has not been significantly affected, other than the one experience I mentioned.

The CHAIRMAN. So there is no cut and dried answer.

Mr. HEFFELFINGER. I do not think there is a cut and dried answer. I think one has to look at the underlying relationship between the tribes and the State.

Mr. TOULOU. I am not aware of any specific States that have taken that position. I think it is, as Mr. Heffelfinger said, it is in individual communities with individual law enforcement, usually at the county level, that we have heard about a conflict. If you look at those places that I am aware of, and it is mostly from press ac-

counts that we are aware of these situations, they are places that have had problems in the past.

The CHAIRMAN. At this hearing, the members of the panels have cited the horrendous statistics on spousal abuse and such. Do you think Congress should delegate criminal jurisdictional authority over non-Indians to tribal governments so that they can address these problems?

Mr. HEFFELFINGER. Mr. Chairman and members of the committee, I think that is clearly an issue that this committee must address. Tribal governments have become much more engaged in the fabric of the States in which they are located, and tribal communities have done so. This means there is greater prevalent of non-Indians or non-tribal members living within tribal communities. It is impossible to address from any kind of comprehensive way, and I use the area of spousal abuse as an example, the need to stop that in order to break the generational cycle of violence. If we are going to address in a comprehensive way questions of violence in Indian country, we must not be hindered by our inability to prosecute one class of individual versus another. I would urge the committee to address this issue as part of a comprehensive solution, and we look forward to working with you on that.

The CHAIRMAN. My final question—as Chairman of this committee and as a member of this committee over many years—24, I believe—I have been honored by several nations with Indian names and honorary citizenship. Nations have the right to bestow citizenship on anyone they so desire, and even today certain nations have blood quantum requirements. What if a nation decided to make me a citizen? Am I looked upon as an Indian under your law?

Mr. HEFFELFINGER. Mr. Chairman, clearly if you were to come under the scrutiny of the Department of Justice and the issue was "are you an Indian," I would have to address that issue. I do not know that that is enough—the honorary membership.

The CHAIRMAN. No; I am talking about real citizenship.

Mr. HEFFELFINGER. I do not know the answer to that question, Mr. Chairman. It is an intriguing one.

The CHAIRMAN. So I may not have the protection of citizenship.

Mr. HEFFELFINGER. I simply do not know, and I would be happy to provide an answer to you, Mr. Chairman, in a written submission, to the extent that I can.

The CHAIRMAN. Certain tribes have suggested that I become a citizen. That would be interesting, wouldn't it? [Laughter.]

Mr. HEFFELFINGER. It would be very interesting.

Senator CAMPBELL. If I might ask, has that ever happened to your knowledge, or been tested in court? It has probably happened.

Mr. HEFFELFINGER. Mr. Vice Chairman, Mr. Chairman, I know there are many tribes who have bestowed a membership either honorary or otherwise on people for a number of reasons. I do not know that it has been tested. I am not familiar with the case law, but I would be happy to research it, if you would like.

Senator CAMPBELL. If you would, yes, I would be interested in knowing that, too, because some tribes—well, even some tribes enrolled by blood quantum and some by lineal descendence, and so as an example in the Cherokees, you could be 1/160th by blood and still be enrolled as a member of that tribe as a blue-eyed blond or

a redhead with freckles. It would be an interesting discussion about whose jurisdiction that redhead with freckles comes under if a law was broken, as a member. I mean, well—whether it is really based just on having a census number.

I know people that were from Osage tribes as an example who have inherited head rights that have not—were not born there, their parents were not born there—it just came down through head rights. They could not even find where the Osage live on the map because they live in California, as their fathers and grandfathers and so on had. And yet they still have head rights and an enrollment number. So if they did stumble across the reservation where their ancestors came from, whether they also would be subject to tribal law because they have a census number, when they have never, and their parents and maybe their grandparents have never had any connection with the tribe. There are really huge areas of gray in this whole dialog, isn't there?

Mr. HEFFELFINGER. Mr. Vice Chairman, as I believe this committee is aware, there is increasing attention being given to enrollment, for many, many reasons, including access to gaming dollars and the like. Tribes give great, great importance to that issue. I do believe that issues of enrollment and how that affects jurisdiction will only increase as we aggressively respond to the violent crime problem.

I am going to ask Mr. Toulou, who I think can remedy some of my ignorance with a better understanding of some of the jurisdiction issues and may be able to give some light to your question about membership.

Mr. TOULOU. I would like to respond more fully after I have had a chance to look at it, but I know of situations such, and I am sure you are aware, too, of the Seminole free men who are tribal members, but a number of those individuals do not have, or at least initially when the rolls were put up, were alleged not to have Native American blood, but were nonetheless seen as members of the tribe. Most situations that I am familiar with dealing with, there is some blood quantum involved, and that is usually a requirement of membership. We would be happy to look further into the situation.

Senator CAMPBELL. Well, I am going to recommend to any tribe that gives Senator Inouye full adoption and tribal rights, that he also get dispensation with that membership. [Laughter.]

Senator CAMPBELL. Thank you.

The CHAIRMAN. I thank you very much, sir.

We do have questions. May we submit them to you?

Mr. HEFFELFINGER. Absolutely, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you very much.

And our final witness is the tribal chairman of the Bishop Reservation of Bishop, CA, Monty J. Bengochia. Welcome, sir.

Mr. BENGOCHIA. Thank you.

The CHAIRMAN. Please proceed.

STATEMENT OF MONTY J. BENGOCHIA, TRIBAL CHAIRMAN, BISHOP RESERVATION

Mr. BENGOCHIA. Thank you for having me testify. For the record, I am a Northern Paiute, also known as the Potonowit Band of Pai-

ute-Hoopa, Paiute-Hoopa-Numa from the Owens Valley, Eastern Central California, a small reservation of Penn-Daw on the map, probably about a 600-plus voting membership with a 1,600-enrollment, headcount.

We got from probably 2 million acres of ancestral homeland, we have been cut down to 875 acres through historical genocide and trauma. That is probably the primary reason why we are kind of helpless in the area of law enforcement, whereas in ancestral times and prehistoric times before our European relatives came over into our country, we took care of our own law enforcement, because we were sober people, honorable people. My ancestors, they worked hard. They knew how to work with nature, live with nature. It is from atrocities of history that have put us into this situation where we have got to be harassed and sometimes beating our women, touched by law officers, and not having the ability to make a change is kind of very disheartening.

So I am glad I have got the opportunity to talk about some of that historical background that has put my people, my nation in this predicament, and hopefully find a solution to remedy this condition, not only for my tribe, but us Paiutes, we cover about Arizona, Northern Arizona, Utah, Southern Idaho, Southern Oregon, maybe one-half the State of Nevada, Eastern California, and we have our Mono Nation relatives on the west side of the Sierra Nevada Mountains.

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

The CHAIRMAN. You are here primarily because of a situation that occurred in March of 2000?

Mr. BENGOCHIA. Yes, when the Inyo County District Attorney and Sheriff came into our casino to obtain employee records that belonged to the tribe and proceeded with, I would say at gunpoint, to obtain those records and cut into our filing cabinets and took records not only of the three employees that they had a search warrant, but I think about 80 more that they took. From that result, we filed a lawsuit in the Federal Court, and lost at the District level, but appealed it and won at the Ninth Appellate.

The CHAIRMAN. Before the county sheriff and the county officials entered the casino—cut the bolt and everything else—did they serve you with their warrant? Did they give you a paper?

Mr. BENGOCHIA. No—you mean a warrant to ask to get permission?

The CHAIRMAN. To search.

Mr. BENGOCHIA. To search? I do not recollect that. I just remember that we were to get—I do not remember if it was paperwork, but I knew that they wanted to come in, and we told them if we get permission from the employees that it would be open. That is our policy that we operate on.

The CHAIRMAN. Did the county officials damage your casino?

Mr. BENGOCHIA. No; not probably other than—I would say no.

The CHAIRMAN. Have the county officials taken other actions that infringed upon your sovereignty?

Mr. BENGOCHIA. Besides the action that they took on that day?

The CHAIRMAN. Or any other time?

Mr. BENGOCHIA. I guess in the sense that for the purpose of this hearing that they have—because of Public Law 280, it has been an

invasive environment as a result of the county and State law preserves our—you know, physically present. To me, that is an invasion of our sovereignty.

The CHAIRMAN. You have indicated in your testimony that members of your tribe do not do much drinking, and so you have problems with non-Indians who drink and drive and engage in drug abuse. Have your members been injured as a result?

Mr. BENGOCHIA. Have we been injured from the—you said that our testimony is indicative that we do not party?

The CHAIRMAN. No, no—you frown upon it.

Mr. BENGOCHIA. Have we been injured from that lifestyle, that drug abuse—yes, sir.

The CHAIRMAN. Do you have any established procedures to handle complaints of police misconduct?

Mr. BENGOCHIA. No; we did—I would not say it is established. It has been adopted through tribal ordinance, but we do—we have taken complaints from members who have been, who have waged a complaint and we have compiled it, and we did submit that to the State Attorney General Bill Lockyer over 1 year ago, maybe 1½, and also to the sheriff's department, to the county sheriff. We have not received any kind of response from the county, and we did understand that they were to do an internal investigation and come up with findings of those allegations, and either deny them or discipline the officers or something, but to my knowledge nothing has been done.

The CHAIRMAN. In your prior communication with the committee, you mentioned that there is a very sacred site at Casa Diablo—some rock sites—and they have been vandalized. Have you had Federal law enforcement agencies investigating this sacred site vandalism?

Mr. BENGOCHIA. I believe that particular tract of land is a reservation that was established in 1912 by President Taft and then revoked in 1932 by another President, by President Hoover. That land is currently under the jurisdiction or control of the Bureau of Land Management. I do believe that they have looked into the matter and are probably doing what they can with their limited financial resources and personnel.

The CHAIRMAN. Thank you very much, Chief.

Mr. Vice Chairman.

Senator CAMPBELL. Mr. Chairman, you are from Bishop, is that right?

Mr. BENGOCHIA. Yes; sir.

Senator CAMPBELL. When your police get a call—your police department receives an emergency call—do they ask the person calling if they are Indian or non-Indian?

Mr. BENGOCHIA. No, sir; I do not think so. They might——

Senator CAMPBELL. They just go ahead and respond?

Mr. BENGOCHIA. I would say yes.

Senator CAMPBELL. If they did respond and the people they respond to are non–Indian, do they then have an agreement with the local deputy sheriff through some cross-deputization or something to address the caller's concerns?

Mr. BENGOCHIA. No; on racial—no, sir.

Senator CAMPBELL. What is the nearest town to the reservation that is not within the boundaries of the reservation?

Mr. BENGOCHIA. Bishop, California is off the reservation. It is not on the reservation. We are probably a couple of miles from the town, from the main street.

Senator CAMPBELL. There are literally thousands of non-Indians that visit Indian reservations every year, and a lot of reservations in fact have a pretty sizable population of non-Indians. I happen to live at Southern Ute, which is a checkerboarded reservation out of the original something like 600,000 acres that they got in the olden days, there were two times the Federal Government opened that reservation to homesteading because the Utes would not comply with some of the dictates of the Federal Government. So after that was open to homesteading, almost one-half of it was lost to private ownership. And so it is checkerboarded. You cannot tell who lives where unless you go into tribal headquarters and look at a map to see what land is owned by the tribe and what is not owned by the tribe. Is your reservation that way, too—checkerboarded?

Mr. BENGOCHIA. No, sir; we are one——

Senator CAMPBELL. You are solid—you own the whole thing, pretty much, yes?

Do you happen to know the percent of people that are on the reservation living there that are non-tribal members?

Mr. BENGOCHIA. I would guess 15 or 20 percent.

Senator CAMPBELL. And does the tribe provide any services at all to them?

Mr. BENGOCHIA. Sanitation services—that is about it.

Senator CAMPBELL. I think that I have no further questions, Mr. Chairman. Thank you.

The CHAIRMAN. Mr. Chairman, I thank you very much for your assistance today. I would like to thank all of the witnesses who participated in this hearing. We will most certainly study the testimony and we hope to come up with something.

With that, the hearing is adjourned.

[Whereupon, at 12 noon, the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Testimony of the Honorable Darrell Hillaire, Chairman of the Lummi Nation on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the U.S. Supreme Court Before the Senate Committee on Indian Affairs

July 11, 2002

Good Morning Chairman Inouye and Members of this Committee for the timely convening of this hearing on Law Enforcement Related to the Ruling of the United States Supreme Court. My name is Darrell Hillaire. I am the elected Chairman of the Lummi Nation of Washington State. I would also like to introduce Judge Theresa Pouley, the Chief Judge of the Lummi Nation and the Lummi Nation Chief of Police, Gary James. Together, we represent the Executive and the Judicial branches of the Lummi Nation Tribal Government. The third branch of our government is our Tribal Council. The Tribal Council is the legislative branch of our government.

Not very long ago I held the badge of the Lummi Chief of Police in my hand. To me it was a symbol of authority and responsibility for the welfare of our people that was handed down through the generations to us today. I was told the story of how John Kinley, uncle of our General Manager, Larry Kinley, was asked to come to a Council meeting by Norbert James, Lummi Chief of Police at that time. At the Council meeting Norbert James stated that it was about time that this young man started to work for the Tribe. There was a nod of approval from the old people who formed the Council. He was handed the badge and became the Chief of Police for the Tribe. There was no Bureau of Indian Affairs presence on the Lummi Reservation and the Sheriff of Whatcom County knew that he did not have jurisdiction. The badge was old and worn with the dullness that comes from many hands, hearts and tears. So our people, represented by our Council, took matters into their own hands. They got themselves a Chief of Police. The badge of the Lummi Nation Chief of Police is a symbol of authority and responsibility that was handed down through the generations and today we have the responsibility to remember our people.

I. Who Is The Lummi Nation?

The Lummi Nation is a party to the Point Elliot Treaty of 1855. Under this Treaty we understand that the Lummi Nation secured the protection of the United States of America and reserved the right to govern our own lands, people and the people who enter these lands voluntarily. The Lummi Nation is a federally recognized Indian tribal government located in what is now called the State of Washington. The Lummi Nation includes a population of nearly 5,000 people. The Lummi Nation land base includes over 12,500 upland acres and 5,000 acres of tidelands. The Lummis are a fishing people with fishing rights in the San Juan Islands and much of Puget Sound and its associated waterways extending for hundreds of miles. We come from families with a tradition of welcoming each other and caring for each other (Shelangen). We are sovereign people with a strong heritage and firm belief in our tradition (Snupt). Our elders and youth are first in our minds.

Self-Governing Status
The Lummi Nation is one of the first Self-Governance Tribes. Although many thought the Lummi Nation was seeking to establish a new relationship with the Federal government, we were really seeking to re-establish the relationship that our ancestors started in 1855 -- to affirm the government-to-government relationship that began back then and to reshape that relationship into one that fits today's realities, needs and goals. Each generation must continue the unbroken promise to take responsibility for the welfare of our people that began in the past and extends into the future.

Decreasing Federal Presence
Beginning in 1975, under P.L. 93-638, the Federal presence on reservations started to shrink. The Federal government no longer runs Indian reservations. The Tribal elected officials who represent the people who live on the reservations are responsible for governing the reservations on a day-to-day basis. An effective government, including law enforcement, is a daily service provided to all Lummi Reservation residents.

Reservations are Homelands
Reservations throughout the United States, like the Lummi Reservation, are home to a majority of the Native American U.S. population. Mothers, Fathers, Brothers and Sisters live in these areas under the jurisdiction of their Tribally elected representatives. They have friends, service people and professional service providers and relatives who live on and off reservation. Many reservations, like the Lummi Reservation, have substantial non-member Indian and non-Indian, and even non-U.S. citizen populations such as Canadians or Mexicans. However, we respect their rights and hold the responsibility to enforce their rights as sacred trusts, as we have always expected our rights to be enforced and supported.

European Impact on Tribalism
At the time of contact, the absence of BIA and other federal law officials did not concern the members of the Lummi Nation who did not lack law enforcement prior to European contact or afterwards. Since the time of contact, non-Indians have introduced the Lummi people to a level of lawlessness that they had never known before. Instead of bringing the rule of law, they essentially destroyed the rule of traditional law. They brought the Lummi Nation such a confusion of laws, jumbled values and selective patchwork enforcement that only now is the Lummi Nation re-gaining control.

Several years ago, County and Tribal deputies faced each other armed with opposing court orders, over the authority to drill for water on the Reservation. This standoff ended peacefully. Now, Tribal and County law enforcement officials meet regularly to avoid confrontations and to work on common law enforcement projects including the regional Drug Enforcement Coalition. Through this cooperative effort, the Lummi Nation is a vital partner in the process of stopping regional drug smuggling, sale and use.

The federal government ignored Tribal law, tradition and custom, but could not destroy it. Today, our people are longing for a return of their traditional customs modified by the realities of the 21st century.

II. The Lummi Nation Provides Responsible and Fair Governance

The Lummi Nation is now and has always provided good governance to all residents of the Lummi Reservation. In addition the Lummi Nation works effectively with local government to solve local problems. The Lummi Nation has agreements with the State of Washington in many service areas to re-assume the primary responsibility for areas previously assumed by the State under P.L. 280. Like any good government, we have developed and funded departments and programs to provide such fundamental governmental services as law enforcement, education, protection of children, and a court system to enforce our laws and provide a forum for dispute resolution.

Lummi Nation Courts are Independent and Fair
The Lummi Nation has a Tribal Court system that provides an unbiased forum, which protects the individual liberties of every person who comes before the Court. Statistics collected from Self-Governance Tribes operating Tribal Courts indicate that non-Indian defendants win slightly more than 50% of the cases tried in Tribal Court. Indians litigating in state courts are not treated with such fairness.

The Lummi Nation's Tribal Court system has grown in competence and resources over the past thirty years of its formal existence. The system includes a trial court and a court of appeals. The trial court is a court of general jurisdiction to enforce and interpret the Lummi Constitution and Code of Laws. The Lummi Nation has a comprehensive code of

laws that are published along with an annual supplement, all of which are accessible to the general public. The Offices and Officers of the Tribal Court are described below:

Tribal Judge – The Chief Judge of the Lummi Tribal Court is a Bar licensed attorney with over fifteen (15) years of law practice litigating a wide-range of both civil and criminal cases in federal, state and tribal courts. The Lummi Nation's Chief Judge is appointed to a six (6) year term, just like a Federal Magistrate.

Prosecutor's Office – The Lummi Nation employs two (2) attorneys in the prosecutor's office with over twelve (12) years of legal experience collectively. The office prosecutes violations of the criminal code of the Lummi Nation ranging from sexual offenses and drug crimes to theft and illegal dumping. It also prosecutes juvenile delinquencies for youth offenses.

Public Defender- The people of the Lummi Nation have demanded and the Council has responded with the funding for a public defender to assist Tribal members and others who are prosecuted by the Tribal Prosecutor for criminal violations. The Public Defender is a Bar licensed attorney. The Public Defender's office also contracts with other local attorneys for cases with multiple parties, or where there is a conflict of interest.

Probation Officers - The Tribe now has two (2) probation officers working with the Tribal Court defendants, who monitor their probation and accountability.

The Court system has developed innovative programs and services to address some of the most pressing problems in Indian Country:

Child Welfare – The Lummi Nation operates a Tribal Child Welfare System and provides all needed services to both the children and their families. The Tribe employs two (2) attorneys with over 10 years of collective experience to represent the tribe in its Indian Child Welfare cases. They appear in both Tribal and State courts working with attorneys and child welfare workers from Washington and other states. The Tribe also employs caseworkers to manage and provide services to families involved in dependency proceedings. In addition, the Lummi Nation has concluded negotiations with the State of Washington, which resulted in a process to transfer, to the Tribe, the responsibility for investigating child abuse and neglect cases over the next several years.

Drug Court – The Lummi Nation has been successful in obtaining three-year funding for both a juvenile and an adult drug court. The Lummi drug court model is based on traditional tribal and family dispute resolution processes. Traditionally, Lummi families meet as a group to address and resolve problems, each family member bringing a unique perspective to the gathering. The Lummi Drug Court operates in the same manner by bringing together the Judge,

Prosecutor, Public Defender and Probation officers. It also brings treatment professionals and law enforcement officials to the table so that there is true accountability for the drug court participant.

Community Panel Project - Juvenile offenders are diverted to a deferred prosecution program using a Community Panel. In this project a panel of Tribal Elders work with the offenders, the victims and their families to remedy the circumstances that brings the youth to court. This project has been highly successful- 83% of the juveniles completing the program have not re-offended within one year.

Domestic Violence Cases - The Tribal Court has developed and operates a consolidated domestic violence calendar specifically implementing federal legislation.

Washington State Court Full Faith and Credit for Tribal Court Orders
The Judges of Washington State have changed their rules recognizing the growing competence of Tribal Courts. Washington State Court Rules require that State courts, throughout the State, recognize the orders of Tribal Courts within the State of Washington. Our County, Whatcom County, is very good on the issue of full faith and credit. The success in Whatcom County is due in a large part to the open communication between members of the Tribal and State judiciaries. Courts in other states would do well to follow the example set by Washington, including the recent election of a long-term Tribal Court Judge to the Washington State Supreme Court.

Law Enforcement Services
The Lummi Nation employs seven (7) officers providing law enforcement services on a 24-hour/7-day week basis. In 2001 these officers responded to 4228 incidents. Incidents have increased by nearly 500 each year since 1997. The Lummi Nation has an agreement with the County Sheriff's Department that provides for the transfer of cases between each other based on jurisdiction. At a community meeting of Tribal member and non-member residents of the Lummi Reservation, many non-member residents praised the Lummi police force's professionalism and willingness to respond to any incident within the reservation without regard to whether the person in need of help was tribal or non-tribal. Several citizens have requested that Lummi Law and Order serve them in lieu of the County Sheriff's office. The Lummi Nation has an overriding interest in providing a safe community for all residents of the Lummi Reservation.

Comprehensive Education System
The Lummi Nation has established a comprehensive tribal education system from Head Start through the Northwest Indian College. The Lummi Tribal Schools (K-12) and the Ferndale School District have an agreement under which the Ferndale School District recognizes the credits that are awarded by the Tribal Schools. The Northwest Indian College provides post-secondary educational opportunities to members of Tribes throughout the Pacific Northwest and Alaska.

III. Challenges Impeding Tribal Governments

Perspective of the American People
Most Americans are not aware of the legal and jurisdictional complexities within Indian Country. Legal jurisdictional barriers and gray areas diminish the ability of tribal governments to deliver comprehensive services to their members and hinder development in this desperately needed area. The reality is that most Americans expect tribal governments to have and exercise all of the services and authorities in the same manner as other local and/or state governments. A recent poll, given much attention in Indian Country, indicates that 94% of Americans want and/or expect Indian Tribes to have jurisdiction over all persons who voluntarily enter their reservations. Recent Supreme Court decisions are contributing to the jurisdictional morass in Indian Country that is threatening to implode under its own weight. The decisions in Nevada v. Hicks and Atkinson Trading+ Company v. Shirley are the most recent examples.

Targeting of Tribal Areas By Organized Crime and Behavioral Disorders
Any decision of the U.S. Supreme Court that contributes to and supports the continuation of the current jurisdictional problems has far-reaching and, presumably, unintended negative effects. This jurisdictional morass supports the lifestyles of persons who are drug addicted, who engage in child sexual abuse and neglect, and domestic violence. Organized crime also exploits the creation of this morass by targeting residents and establishing operations in Indian County. The unfortunate reality is that people who engage in these kinds of criminal activities know that they stand a much better chance of not being caught, and an even less chance of being prosecuted, especially in areas of confused jurisdiction.

Re-Direction of Federal Law Enforcement
In the past Tribal and BIA Law Enforcement were supported by the Federal Bureau of Investigation. Local agents of the FBI have informed Lummi Law Enforcement Officers that resources, previously targeted to address the influx of organized crime on reservations prior to the events of 9/11/01, are now being transferred to address matters of anti-terrorism and national security issues. The activities of organized crime have not been altered by these events, and the need to support the development, capacities and abilities of Tribal Law Enforcement is of even greater significance.

Coastal Defense
The Lummi Reservation includes some 12 miles of coastline that is also the western border of the United States of America. The Lummi Nation anticipates and is expecting to be included in a manner, similar to other local governments in the build-up of homeland defense, that is now underway as a part of America's response to the terrorist attacks of September 11th. The jurisdictional confusion that currently exists in Indian Country means that it will be difficult to fully involve Indian Tribes in this national effort, which creates potential vulnerability for infiltration.

Safety of Law Enforcement Officers and Citizens
All people have the right to be safe within their community. The jurisdictional morass currently in existence creates the potential for both Tribal and non-Tribal law enforcement to respond to the same incident. All law enforcement officers must know when other law enforcement personnel are responding to a call and their location. Without close communication between all officers there is an increased likelihood that someone will be hurt. With the growing presence of organized crime and drug dealers, who are frequently armed, officers are required to employ all resources at their disposal, up to and including the use of deadly force. Multiple agency response in a non-coordinated manner, not only increases the risk for the officers, but the community as a whole.

Integrity of the Investigations and Related Law Enforcement Work
The confusion about control over the area for which the Lummi Nation is responsible impairs the ability of local Law Enforcement to conduct investigations and to perform ordinary law enforcement work. Quality law enforcement work is needed to address the complex issues such as drugs and organized crime.

IV. Congressional Action Essential to Affirm Tribal Government Authority

Tribal governments need recognition and respect as governments. Residents of and visitors to the Lummi Reservation need to know that there is a local government that meets their expectations for safety and protection. And, such is the case for Lummi members when they travel to the nearby towns of Ferndale or Bellingham. The Lummi Nation has the ability to provide law enforcement and to protect the rights of all who come within the boundaries of the Lummi Reservation. What we need from Congress is recognition of our governmental authority and our abilities to resolve local law enforcement issues.

Correct the Record
The decision in Nevada v. Hicks undermines the coordination of local Tribal and non-Tribal law enforcement. While courts may be restricted to the facts of a given case, Congress must see the big picture and provide legislative guidelines re-affirming the self-governance that Tribes reserved for themselves. Congress must take action to enable Tribal governments to solve local law enforcement problems.

Affirm the Proper Interpretation of the Indian Treaties
It is a principle of American jurisprudence that Treaties with the Indian Tribes are to be interpreted, as the Indians understood them. We are here today to let you know what we understood then and now about the Point Elliot Treaty of 1855 between the Lummi Nation and the United States of America. The Lummi Nation secured the protection of

the United States, which is a well-established precept of international law, while at the same time reserving its right to govern its own lands and people. We want our understanding of the Treaty affirmed.

Stop the Erosion of Tribal Sovereignty
We are requesting congressional action, in consultation with Tribal governments, to stop the erosion of tribal sovereignty and the potential creation of a no-mans land within Indian Country. Past decisions of the U.S. Supreme Court severely limiting the criminal jurisdiction of Tribal governments means chaos at the reservation level. Congress took action to partially correct the negative impact of these decisions when it passed the 1991 amendment to the Indian Civil Rights Act, recognizing that Indian tribes possess criminal authority over non-member Indians as part of their "inherent sovereignty". Tribes are again seeking to involve Congress in the development, enactment and implementation of legislation to correct the legal and jurisdictional confusion created by recent Supreme Court decisions. Even Supreme Court Justices are requesting Congress to act. The proposed legislation would recognize the legal basis for Tribal governments to assume full responsibility for all law enforcement and judicial services within the reservation boundaries.

In addition to Hicks, another recent U.S. Supreme Court decision, Atkinson Trading Post v. Shirley, creates a requirement that a tribe's taxing authority is limited to members or those who enter into consensual contractual relationships with tribes. No other local county, municipal, or state government would be able to meet this test. The effect of the decision is to unfairly transfer a disproportionate share of the costs for public services, such as fire and police protection, to the tribes while others continue to enjoy the benefits of government services without having to shoulder a fair share of the cost. We need legislation that will recognize the legal basis for Tribal governments to fairly tax those who benefit from Tribal governmental services.

V. Summary

American Indians and Alaskan Natives are unique when compared to how others perceive our traditions and culture. But, we see others in the very same light. Just as Norbert James saw that John Kinley had qualities that symbolized the authority and responsibility our people needed, we need Congress to recognize that now is the time to affirm our self-governing authority over our people and our land. These were reserved rights that Tribal Governments did not relinquish in the treaties that we negotiated with the United States.

Thank you again Members of this Committee for allowing me to provide oral testimony today.

STATEMENT OF THOMAS B. HEFFELFINGER
UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA

BEFORE THE

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Hearing on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court

July 11, 2002

Mr. Chairman, Mr. Vice-Chairman and members of the Committee, my name is Thomas B. Heffelfinger. I am the United States Attorney for the District of Minnesota. I am also the Chairman of the Attorney General Advisory Committee's Native American Issues Subcommittee. The membership of the Native American Issues Subcommittee consists of U.S. Attorneys from across the United States who have significant amounts of Indian country in their districts. The purpose of this body is to develop policies pertaining to the establishment and development of effective law enforcement in Indian country. In May of this year, the Native American Issues Subcommittee decided that its priorities in Indian country law enforcement would include addressing such issues as: terrorism (including border issues and the protection of critical infrastructure), violent crime (including drug offenses, firearms offenses, domestic violence, child abuse, and sexual abuse), gaming, and white collar crime.

Since 1885, when Congress passed the Major Crimes Act[1], United States Attorneys have had primary responsibility for the prosecution of serious violent crime in Indian country. Native Americans are victimized by violent crime at rate of about 2 ½ times the national average rate[2]; in some areas of Indian country that rate may be even higher. The Major Crimes Act gives the United States jurisdiction to prosecute offenses such as: murder, manslaughter, kidnapping, arson, burglary, robbery, and child sexual abuse. However, federal jurisdiction under this statute is limited to the prosecution of Indians only. The Indian Country Crimes Act[3], which is also known as the General Crimes Act, gives the United States jurisdiction to prosecute all federal offenses in Indian country except when the suspect and the victim are both Indian, where the suspect has already been convicted in tribal court, or in the case of offenses where exclusive jurisdiction over an offense has been retained by the tribe by way of treaty.

The United States Supreme Court has held that where the suspect and the victim are both non-Indian, then the state court has exclusive criminal jurisdiction[4]. Under the Indian Civil Rights Act, tribal courts have criminal jurisdiction over non-member

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[1]Now codified at 18 USC 1153.

[2]Bureau of Justice Statistics, US Department of Justice, American Indians and Crime (1999), at 2.

[3]18 USC 1152.

[4]Draper v. United States, 164 US 240 (1896); United States v. McBratney, 104 US 621 (1882).

Indians[5]; however, tribal court sentences are limited to misdemeanor punishments[6]. In the 1978 decision of Oliphant v. Suquamish Tribe[7], the United States Supreme Court decided that tribal courts could not exercise criminal jurisdiction over non-Indians.

Overlaying these legal principles is the question of whether or not the offense occurred in Indian country. Although "Indian country" is defined as land that is either: 1) within a reservation, 2) within a dependent Indian community, or 3) on an allotment[8], litigation over whether or not a particular crime scene is within Indian country can tie up litigation for years. For example, the Indian country status of certain lands within the Uintah and Ouray Ute Tribe's reservation in Utah was uncertain for approximately twenty years.[9] As a result, many violent crime convictions were thrown into doubt. These convictions were, however, eventually upheld.[10].

What all this means is that whenever a crime occurs in Indian country, in order to determine jurisdiction, prosecutors are forced to make a determination concerning who has jurisdiction by examining four factors: 1) whether the offense occurred within

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[5]25 USC 1301(2) & (4).

[6]25 USC 1302(7).

[7]435 US 191 (1978).

[8]18 USC 1151.

[9]Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), cert. denied, Duchesne County v. Ute Indian Tribe, 522 U.S. 1107 (1998), applying the decision of Hagen v. Utah, 510 U.S. 399, (1994), reh. denied, 511 U.S. 1047 (1994).

[10]US v. Cuch, 79 F.3d 987 (10th Cir. 1996).

"Indian country", 2) whether the suspect is an Indian or a non-Indian, 3) whether the victim is an Indian or a non-Indian (or whether the crime is a "victimless" one), and 4) what the nature of the offense is. Depending on the answer to these questions, an offense may end up being prosecuted in tribal court, federal court, or state court.

There is much confusion concerning jurisdiction over crimes committed in Indian country. Unlike jurisdiction over most state and federal criminal offenses, in which jurisdiction and/or venue is determined by the geographical location of a crime scene, the current state of the law requires that determination of criminal jurisdiction in Indian country be accomplished through a complex analysis of sometimes amorphous factors. Police, prosecutors, defense attorneys, and judges must deal with this jurisdictional maze in cases ranging from littering to homicide[11]. This confusion has made the investigation and prosecution of criminal conduct in Indian country much more difficult. A clarification of this confusion is needed. The effort put into dealing with jurisdictional questions could be better expended on providing tangible public safety benefits.

Last year, federal courts handed down a number of decisions adverse to Indian country law enforcement. In Nevada v. Hicks, 533 US 353 (2001) the Court made statements in dicta that have now led many state law enforcement agencies to conclude that they no longer need to cooperate with tribal authorities when serving search warrants

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[11]Recently the International Association of Chiefs of Police has called for law enforcement reform in Indian country, see, Improving Safety In Indian Country: Recommendations From The IACP 2001 Summit (2001).

or arrest warrants in Indian country regarding crimes that took place off-reservation. After years of coalition building between state and tribal law enforcement agencies, this interpretation has now led to conflict between many state and tribal law enforcement agencies. Other problematic decisions in 2001 include: Cabazon Band v. Smith, 249 F.3d 1001 (9th Cir. 2001) (holding that county sheriff's officers may stop and charge tribal police officers for having emergency light bars on their police cars)[12], United States v. Follett, 269 F.3d 996 (9th Cir. 2001) (holding that despite mandatory restitution laws, a federal court cannot order a convicted sex offender to make restitution to a tribally run crisis center that provided care and counseling to the victim), and United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001) (requiring the U.S. to prove a negative in cases arising under the General Crimes Act: non-Indian status of a defendant or victim).

Given that jurisdiction over most felonies in Indian country lies in federal court, the United States Attorneys are in a position of standing in the front line of prosecuting serious violent crime in Indian country. In recent years, Congress has provided both the Federal Bureau of Investigation and the United States Attorneys Offices with a number of new positions for the investigation and prosecution of violent crime in Indian country - this has been greatly appreciated. Since September 11th, America has been more conscious of public safety in our great nation and Indian country is no exception. There

[12]This opinion was later withdrawn and the case remanded back to the federal district court after the tribal police department apparently obtained federal law enforcement commissions through a cross-deputation agreement with the Bureau of Indian Affairs; Cabazon Band v. Smith, 271 F.3d 910 (9th Cir. 2001).

is Indian country on the border with Canada, there is Indian country on the border with Mexico, there is critical infrastructure in Indian country including dams, mines, power plants, schools, and government facilities. In an attempt to address mutual issues of security, the U.S. Border Patrol hosted a Native American Border Security Conference at which Attorney General John Ashcroft recognized that "local law enforcement agencies play a crucial role in securing our nation's borders, and tribal law enforcement agencies are no exception."[13] Federal and tribal law enforcement agencies, working together, will continue to play a pivotal role in making our borders safe and secure. Tribal governments have enthusiastically agreed to help ensure the safety of America's borders to the full extent that they are able to under the current jurisdictional scheme. While focusing on homeland security for America, we should not forget that human beings living in Indian country need protection from violent crime.

The United States Attorneys need the jurisdictional clarity necessary to properly do our job to provide security for all Americans including those who live, work, travel through, and recreate in Indian country. Thank you for the opportunity to address the committee. I look forward to answering any questions that you may have.

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[13]Attorney General John Ashcroft, Remarks at the U.S. Border Patrol - Native American Border Security Conference (Jan. 17, 2002). Transcript available at: www.usdoj.gov/ag/speeches/2002/011702agpreparedremarks.htm .

TESTIMONY OF
TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Hearing on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court

July 11, 2002

Mr. Chairman, Mr. Vice-Chairman and Members of the Committee, my name is Tracy Toulou and I am the Director of the Office of Tribal Justice in the United States Department of Justice. Thank you for the opportunity to appear before you today to testify on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court.

The Office of Tribal Justice (OTJ) spends a significant amount of time studying and addressing issues related to tribal law enforcement. My office serves to coordinate and focus the Department's policies and positions on American Indian and Alaska Native issues and maintain liaison with the federally recognized Indian tribes, particularly in the area of law enforcement. In addition, we work closely with the U.S. Attorney's offices that prosecute violent crime in Indian country. We also regularly communicate with tribal police departments, the Federal Bureau of Investigation, the Bureau of Indian Affairs'

Office of Law Enforcement Services and other Federal law enforcement agencies operating in and around Indian country. Most recently, we have been working with the U.S. Border Patrol on Native American border security issues. In my experience as an Assistant U.S. Attorney in the state of Montana, I prosecuted Major Crimes Act offenses on a number of Reservations, as well as assisted the Northern Cheyenne Tribe in developing a comprehensive law enforcement program.

Today, I would like to focus on three issues: (1) the problem of Indian country violent crime; (2) the challenges facing tribal law enforcement; and (3) issues that may result from *Nevada v. Hicks*.[1]

Indian Country Violent Crime

First, the Department of Justice, Bureau of Justice Statistics' reports entitled *American Indians and Crime*[2] and *Violent Victimization and Race*[3] reveal that American Indians experience higher rates of violent crime than any other group.

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[1]533 U.S. 353, 121 S.Ct. 2304 (2001)

[2]BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (NCJ 173386, 1999).

[3]BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-98 (NCJ 176354, 2001).

In November of last year Attorney General Ashcroft remarked that these reports show "American Indians are victims of violent crime at rates more than twice the national average - far exceeding any other ethnic group in the country."[4] Nearly one out of every four Native Americans between the ages of 18 and 24 is a victim of a violent crime - the highest per capita rate of violence of any racial group considered by age.[5] This accounts for nearly 10 percent of the violent crimes prosecuted by the Justice Department.[6] Indians fall victim to violent crime at about two times the rate of African Americans, two and one-half times that sustained by Caucasians, and four and one-half times that experienced by Asian Americans.[7]

Of particular concern is the problem of domestic violence and crimes against Indian women, which tragically exist to a high degree in Indian country. A recent National Institute of Justice survey revealed that one in three native women reported

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[4]Attorney General John Ashcroft, Remarks at the Native American Heritage Event (Nov. 28, 2001) (transcript available at the U.S. Department of Justice). *See also,* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, at v (NCJ 173386, 1999).

[5]*Id.* at v.

[6]Todd J. Araujo, *Office of Tribe Justice Coordinates Effort to Meet Needs of Indian Tribes,* THE POLICE CHIEF, Jan. 2002, at 31, 32.

[7]BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-98, at 1 (NCJ 176354, 2001).

being raped in her lifetime.[8] Between 1993 and 1998, American Indian females were victimized (e.g., subjected to domestic abuse) by an intimate partner (e.g., a current or former spouse) at rates higher than others -- 23 per 1,000 American Indians females as compared to 11 per 1,000 black females, 8 per 1,000 white females and 2 per 1,000 Asian females.[9]

Indian Country Law Enforcement

As you know, tribal governments have limited law enforcement resources for addressing the high rates of crime in many reservation communities. Law enforcement in Indian country is generally either provided by local tribal law enforcement or the Bureau of Indian Affairs. "The typical [tribal law enforcement] department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time."[10] In 1997, the *Final Report to the Attorney General and the Secretary of the Interior of the Executive*

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[8]BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE SURVEY, *noted in* Attorney General John Ashcroft, Remarks at the Native American Heritage Event (Nov. 28, 2001).

[9]BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-98, at 9 (NCJ 176354, 2001), *noted in* BUREAU OF JUSTICE STATISTICS, Press Release, *Differences in Rates of Violent Crime Experienced by Whites and Blacks Narrow - American Indians are the Most Victimized by Violence* (Mar. 18, 2001).

[10]STEWART WAKELING, MIRIAM JORGENSEN, SUSAN MICHAELSON AND MANLEY BEGAY, U.S. DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS, at vi (NCJ 188095, 2001).

Committee on Indian Law Enforcement Improvement found that Indian country was served by only half as many police officers per capita as similarly situated rural communities.[11] This provided the needed impetus for a significant increase in Department of Justice and Bureau of Indian Affairs funding for tribal law enforcement. Since 1999, the Tribal Resources Grant Program (TRGP) within the Community Oriented Policy Services (COPS) program has provided targeted resources for tribal departments to hire officers or acquire critical equipment. Last summer, the Attorney General and the COPS office announced grants totaling $33.7 million, which were awarded to 105 tribal police departments in 23 states.[12]

The efforts of the Department of Justice and tribal police departments have begun to show results. Between 1998 and 2001, the number of inmates in custody at tribal facilities grew by 29%.[13] The increase in the tribal jail population would appear to be closely related to law enforcement resources made available to Tribes through the COPS' Tribal Resource Grants Program. I would point out that the COPS/TRGP program was

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[11] CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND THE SECRETARY OF THE INTERIOR OF THE EXECUTIVE COMMITTEE ON INDIAN LAW ENFORCEMENT, at 6 (Oct. 1997).

[12] U.S. DEP'T OF JUSTICE, Press Release, *U.S. Dep't of Justice Awards $33.7 Million in Grants to Native-American Law Enforcement Agencies* (Aug. 30, 2001)

[13] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2001, at 1 (May 2002).

first funded by Congress through the Indian Country Law Enforcement Initiative in 1999 -- the same year that the number of tribal offenders in custody began to rise.

Finally, I know the Committee is interested in the impact of the Supreme Court's decision in *Nevada v. Hicks*[14] on Indian country law enforcement. As with any single decision which moves the state of the law in a new direction, the *Hicks* decision cannot, and does not, cover every factual scenario that may be encountered by law enforcement. Until there are additional decisions or statutory clarification, there will be varying interpretations of the scope of the decision. In the meantime, I am concerned this ambiguity may become a source of tension between state and tribal law enforcement in some areas. Briefly, in some parts of the country we have seen state law enforcement officers interpreting this case as a basis to assert jurisdiction over Indian people who are on Reservation lands. In at least one case, this resulted in a confrontation between tribal and state law enforcement officers on Indian lands. These types of situations have the potential to become highly charged, and obviously, should be avoided. Our office works closely with the Department's Community Relations Service to mediate conflicts like these. Further, we advocate and assist in the development of cross-deputization agreements and other types of cooperative arrangements to foster better relations between the tribal and state law enforcement communities.

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[14]*Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304 (2001).

In short, today's tribal governments face serious challenges in the area of law enforcement. The Department of Justice's Office of Tribal Justice is working closely with tribal governments to assist in addressing high violent crime rates, limited law enforcement resources, and the unique challenges of Indian country jurisdiction.

Thank you for the opportunity to appear today. I would be happy to answer any questions you may have.

BISHOP PAIUTE TRIBE

HEARING TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

**CONTEMPORARY TRIBAL GOVERNMENTS:
CHALLENGES IN LAW ENFORCEMENT RELATED TO THE RULINGS OF THE UNITED STATES SUPREME COURT**

JULY 11, 2002

I. INTRODUCTION.

My name is Monty Bengochia. I am the Chairman of the Bishop Paiute Tribal Council. I was born and raised on the Bishop Paiute Reservation, and I have lived on or near the Reservation most of my life.

I want to thank Chairman Inouye and the members of the Committee for inviting me to testify here today on important issues of tribal sovereignty and jurisdiction.

Our Reservation is located in the Owens Valley of East-Central California about 250 miles north of Los Angeles and 200 miles southeast of Reno. The Reservation consists of 875 acres adjacent to the town of Bishop. There are about 1600 members of the Bishop Paiute Tribe.

II. HISTORICAL SUMMARY.

Our Paiute people have occupied the Owens Valley and surrounding areas since time immemorial. We had been here, exercising full national sovereignty, for several thousand years when non-Indians first arrived. Although there was armed conflict between my people and whites, particularly after the acquisition of the Southwest by the United States under the 1848 Treaty of Guadalupe-Hidalgo, my people were never "conquered" by the United States. We do not have a ratified treaty with the United States, and we never ceded our land to the United States. We have continuously exercised our tribal sovereignty to the greatest extent allowed by your laws. As far as we are concerned, our sovereignty is inherent because it pre-existed the United States. It was not, and could not have been, granted to us by the United States or the Congress.

Thanks to the high Sierra Nevada mountains to the west of the Owens Valley, and the Great Basin Desert to the east, south and north, we survived the Spanish and Mexican occupations of California and the mission system that made slaves of California Indians near the coast. We also survived the Indian genocide of the Gold Rush period because of the geographical barriers and the fact that little or no gold was found in our area. We practiced irrigated agriculture in the Owens Valley from long

before our first contact with Europeans. We used the abundant water supply from Sierra Nevada runoff until the Los Angeles Department of Water and Power began appropriating our water in the early Twentieth Century. We have continued our traditional culture and lifeways to the present, although under ever-increasing pressure from non-Indians and the American government during the late Nineteenth and Twentieth Centuries.

The Bishop Paiute Tribe is virtually landless today. This is because our land rights were not respected by the United States, despite requirements to the contrary in the Treaty of Guadalupe-Hidalgo and under federal common law. The Indian Claims Commission found that our title was extinguished as of March 3, 1853, the deadline to file claims under the California Private Land Claims Act of 1851, because we didn't file a claim. Of course, at that time we knew little or nothing about the existence of the United States, much less that Congress had passed the 1851 Act. The constitutional due process of law issues raised by the fact that the 1851 Act did not actually require California Indians to file claims, and that we had no notice whatsoever of the Act or the need to file claims, were not considered or raised before the Indian Claims Commission.

In 1912 President Taft signed an Executive Order establishing a 67,164 acre Paiute Reservation on the Casa Diablo or Volcanic Tablelands tract. President Hoover revoked the Casa Diablo Reservation by Executive Order in 1932. However, we believe that President Hoover's revocation of the Casa Diablo Reservation was invalid. In addition to the Casa Diablo Reservation, we believe we have eight or more smaller unresolved land claims.

As a result of the seizure of our land and water by non-Indians, the federal government, and the Los Angeles Department of Water and Power, we have been deprived of economic opportunity for more than 100 years. One of the results of this economic deprivation is that we lack the financial resources required for a tribal law enforcement system, including a tribal court and a police force. We have no tribal police officers. We recently obtained a three-year grant from the Justice Department to establish a tribal court system and hire two police officers. We can only hope to find a way to continue to fund our tribal court and law enforcement program after the grant runs out. We do have a successful, small casino, but its revenues are insufficient to meet our many tribal governmental financial needs.

One of our land rights issues is Coso Hot Springs. It is a sacred site located on the China Lake U.S. Naval Ordinance Test Station. It is the place of our origin – the place of our creation. Coso Hot Springs has always provided the strongest healing powers that we know of. The federal government has leased that area for geothermal energy development. We are very saddened by the fact that geothermal development for private economic gain has changed the nature of the hot springs, probably forever, and denied us its healing benefits.

We also have sacred sites on the Casa Diablo Reservation tract that are not

being protected and are being steadily vandalized and destroyed by the public. These are our ancient rock art sites. People have shot at them and chipped and defaced them. In some cases they have actually chipped off slabs of rock that include the petroglyphs themselves so that they could steal them. One of the reasons we want to recover the Casa Diablo Reservation is so that we can adequately protect these sites.

III. TRIBAL SOVEREIGNTY, JURISDICTION AND LAW ENFORCEMENT ISSUES.

Mr. Chairman, I believe you may have invited me to testify at this hearing because of the importance of current federal litigation involving the Bishop Paiute Tribe. The 9th Circuit Court of Appeals recently decided the case of Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893 (rehearing en banc denied and opinion modified, May 20, 2002). The defendant, Inyo County, is now in the process of deciding whether to file a petition for certiorari to the Supreme Court

In March 2000 the Inyo County Attorney and the County Sheriff literally broke into our casino using deadbolt cutters to execute a warrant to search casino employee records as part of a welfare fraud investigation.[1] Although the warrant was for the limited purpose of obtaining payroll records for three tribal members being investigated, the County Attorney and the Sheriff also seized confidential records concerning 78 other tribal member casino employees who were not mentioned in the warrant. The following July, the County Attorney demanded personnel records for six additional tribal member casino employees. We filed the complaint in Bishop Paiute Tribe v. County of Inyo in federal district court on August 4, 2000. Our lawsuit seeks declaratory and injunctive relief against further violations of our tribal sovereignty by the County, and damages under 42 U.S.C. Sec. 1983 for violations of our civil rights by the County, the County Attorney and the Sheriff.

The Ninth Circuit's decision in Bishop Paiute Tribe was a resounding victory for our Tribe. The Court held that the County, the County Attorney and the Sheriff violated our tribal sovereign immunity when they obtained the search warrant and broke into our casino to execute the search warrant. The court also held that the County Attorney and the Sheriff were acting as county officers and that the County is subject to liability under 42 U.S.C. Sec. 1983. The Court further held that the Attorney and the Sheriff are not protected by qualified immunity because they violated well-established law.

In June of 2001, the United States Supreme Court decided Nevada v. Hicks, 533 U.S. 353. Hicks held that state and local law enforcement officers may execute a search warrant on Indian reservation lands without tribal consent for the purpose of the

[1] Criminal proceedings initiated against the three tribal member casino employees for welfare fraud have since been dismissed on the County's own motion for "lack of probable cause."

investigation and prosecution of state-law crimes committed by a reservation Indian off-reservation. By extension, this decision must mean that state and local law enforcement officers can enter Indian reservations without consent to investigate and prosecute state-law crimes committed by Indians or non-Indians on or off-reservation. The court held that there is a presumption against tribal court civil jurisdiction over non-members, regardless of whether the conduct took place on fee land within the reservation or on tribal trust land. That presumption can only be overcome by a showing that tribal interests in exercising such jurisdiction outweigh whatever state interests are at stake. This is, of course, a very difficult rule to apply because the outcome of the analysis depends entirely on the particular circumstances. In fact, the analysis will almost always be conducted ex post facto in the course of litigation as to the limits of tribal or state jurisdiction under the circumstances. This can only result in government by litigation, not government by rules of law knowable by all parties in advance. Few tribes can afford to protect their sovereignty and jurisdiction under these circumstances because whether or not tribal or state jurisdiction exists in any given situation can only be determined by lengthy and costly litigation.

Although the County argued in its motion before the Ninth Circuit for rehearing on banc in Bishop Paiute Tribe that the Hicks decision (which was handed down after the County's brief-in-chief was filed in the Ninth Circuit) is controlling and that tribal sovereign immunity is no bar to execution of the County's search warrant, the Ninth Circuit denied the County's motion. We believe that the Ninth Circuit's holding that we retain unimpaired tribal sovereign immunity is absolutely correct. We are concerned, however, about the potential outcome if the United States Supreme Court grants a County petition for a writ of certiorari. The Supreme Court could use an analysis similar to that in Hicks to subject our tribal government itself to state and local law enforcement jurisdiction. That would virtually destroy our sovereignty by making us subservient to state and local government for the first time in the history of the United States.

As Chairman Inouye noted in his opening statement at this Committee's February 28, 2002 hearing on Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of Indian Tribal Governments, the Court seems to be on a steady march to divest native governments of their sovereign governmental powers and authority. The fundamental principle that tribal governments have authority to exercise jurisdiction over their territory, just as other governments do, is being steadily eroded by the Court's rulings.

We have law enforcement problems in addition to those addressed in the Bishop Paiute Tribe case. The Supreme Court's 1978 decision in Oliphant v. Suquamish Tribe, 435 U.S. 191 deprived us of criminal jurisdiction over non-Indians who commit crimes on our Reservation. We have problems with non-Indian drunk driving and drug violations on the Reservation over which we have no control. California is a Public Law 280 state. State and local law enforcement agencies are empowered to enforce state law on our reservation. The situation might be tolerable if state and local law enforcement agencies simply provided us with badly needed law enforcement services. That is not the case, however.

Unfortunately, there is long-standing friction and hostility between our tribe and the Inyo County government, including the Inyo County Sheriff's office. The Bishop Paiute Tribe case itself is dramatic testimony to that fact. Our reservation has suffered for decades from unsatisfactory County law enforcement services. As a general matter, we feel that lack of respect from County law enforcement officers and the County Attorney is a serious problem. Law enforcement services provided by the County on our reservation are inadequate and the response time is very slow. State and federal drug enforcement on our Reservation is virtually nonexistent. Our single biggest law enforcement problem is unsolved homicides and other unresolved fatalities, numbering at least half a dozen over the last 10 or 15 years.

We feel that both County and state law enforcement agencies provide us with a level of services that is inequitable and unfair compared to the level of services provided to non-Indians and off-Reservation areas. For instance, Tyler Weaver, a young tribal member, was found dead alongside an off-Reservation County road about two years ago. The California Highway Patrol has been investigating, but has never completed their investigation. Tribal members and the family are extremely upset and frustrated that this matter is not been pushed toward a timely resolution.

My statements here today are not intended to be a blanket condemnation of all of the off-reservation law enforcement personnel that we deal with, however. We do have good relationships with many individual state, County and Bishop City law enforcement officers.

Moreover, a number of serious incidents of police misconduct by County law enforcement officers have occurred in the last few years. We filed a detailed written complaint with the County Sheriff's Department and the Attorney General of California over a year ago documenting a pattern and practice of repeated harassment of one of our tribal members by County law enforcement personnel, both on and off the Reservation. That complaint also documented two separate incidents of sexual harassment of young women tribal members by County law enforcement officers. Although the Sheriff's Department should have at least initiated an internal investigation of these serious incidents, we have heard nothing whatever back from the County.

IV. CONCLUSION.

The Bishop Paiute Tribe faces many difficult social and economic problems, including inadequate and unfair law enforcement. Our law enforcement problems are growing larger, not smaller, because of the steady erosion of our tribal sovereignty and jurisdiction. This is the direct result of a series of adverse United States Supreme Court decisions over the last 25 years, more or less beginning with the 1978 decision in Oliphant v. Suquamish Tribe and continuing through the Court's recent decision in Nevada v. Hicks. Now we are faced with the possible outright destruction of our tribal

sovereignty if the Supreme Court reviews and decides our own case, Bishop Paiute Tribe v. County of Inyo, in such a way as to diminish tribal sovereign immunity. We are hoping that this Committee will consider and report out legislation designed to restore exclusive tribal sovereignty and jurisdiction in relation to state and local governments over both Indians and non-Indians on tribal and allotted trust lands.

JUL 09 2002

Miccosukee Tribe of Indians
of Florida

Business Council Members
Billy Cypress, Chairman

Jasper Nelson, Ass't. Chairman
Max Billie, Treasurer

Andrew Bert Sr., Secretary
Jerry Cypress, Lawmaker

STATEMENT OF BILLY CYPRESS, CHAIRMAN,
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
TO THE SENATE COMMITTEE ON INDIAN AFFAIRS, OVERSIGHT HEARING ON
SUPREME COURT DECISIONS RELATING TO INDIAN TRIBAL AUTHORITY

JULY 11, 2002

Mr. Chairman, my name is Billy Cypress. I am Chairman of the General Council of the Miccosukee Tribe of Indians of Florida. Our tribe has always lived and governed itself within the present State of Florida. We have never accepted the view that we are not a distinct tribe of Indians with our own territory and a right to govern ourselves within that territory. We have followed closely that Tribal Sovereignty Protection Initiative since the Chairman of this Committee initiated it on September 11, 2001. We fully support the goals of the initiative. We understand that its primary goal is to achieve legislation clarifying and reaffirming the tribal authority of Indian nations within the United States in accordance with the fundamental principles of federal Indian law and the tribal self-determination policies of the Executive Branch and the Indian Self-Determination and Education Assistance Act of 1975.

I would like first to tell you a little about our Tribe and explain why the goals of the Initiative are so important to us. While we lived and governed ourselves in Florida before the United States moved in 1819, we have had problems over the years both with the federal government and with the state government. While in recent years many of these problems have been resolved, you need to understand our history in order to appreciate our support for tribal sovereignty protection.

First, the United States recognized our ownership, together with the Seminole Tribe, of most of the present State of Florida by the treaty of Moultrie Creek which was ratified by the Senate just like any other international treaty. 7 Stat.224. Later, the United States decided we would have to move out of Florida to make room for settlers. Although the Miccosukee Tribe never agreed to go, the United States sent an army against us and fought us from 1835 to 1842 in an effort to move all the Indians out of Florida. In the end the United States gave up on that goal,

P.O. Box 440021, Tamiami Station, Miami, Florida 33144, (305) 223-8380, fax (305) 223-1011
Constitution Approved by the Secretary of the Interior, January 11, 1962

which is why we are still in Florida.

Until the Everglades National Park was established our territory in the southern Everglades was not interfered with by the government. All through the 19th Century and in the early 20th Century we governed ourselves and lived under our own laws and customs. The state of Florida set aside a reservation for us in the southern Everglades. We had a pretty good life in that period and little contact with non-Indians. Then the federal government established the Everglades National Park and included our state reservation in it. While the federal law said it preserved our rights, the National Park Service told us we had to move north of the Park boundary. We didn't move, and in 1964 the Secretary of the Interior issued a permit to the Bureau of Indians Affairs that allowed us to have a community on the northern edge of the Park. In 1973 that permit was replaced by a permit to the same area issued directly to our Tribe.

The permit was not permanent, however, and the Park Service continued to impose restrictions on us, particularly interfering with our effort to improve our living conditions. In 1998 Congress, thanks in part to the support of this Committee, enacted the Miccosukee Reserved Area Act and we were given the permanent right to govern ourselves within the Reserved Area "as though the MRA were an Indian reservation." 16 U.S.C. § 410 note (2000).

We also own certain lands north of the Reserved Area over which we have governmental authority. These include a federal reservation provided to us by the State of Florida in return for the state reservation lands in Monroe County taken from us when the Park was set up and, in addition, lands perpetually leased to us by the state of Florida. We have had to engage in litigation with the state to enforce our rights in these lands.

In 1961, we reorganized our tribal government under federal law and we now govern ourselves in accordance with a Constitution and Bylaws adopted by our people and approved by the Secretary of the Interior. The Constitution preserves much of our tribal customary law and under it we exercise law enforcement authority within our lands and operate a tribal court with civil and criminal jurisdiction. It is important to us that the United States, including the federal courts, recognize and protect our right to govern ourselves and our own territory. That is why we support the Tribal Sovereignty Protection Initiative.

As we have followed the work of the Tribal Sovereignty Protection Initiative and reviewed the development of a concept paper developed by the Steering Committee and initial bill drafts, we have recognized that some parts of the legislative proposal are of particular importance to us. I will now review those provisions.

Public Law 280

First, there is our concern about state jurisdiction under Public Law 280. Within our Reserved Area the federal government recognized long ago that the state government had no jurisdiction over us. This was because the Reserved Area was within the Park over which the State had given up jurisdiction. This principle is now recognized in both federal and state law. However, in the lands north of the Reserved Area, our Alligator Alley Reservation and the leased area, we are told that Public Law 280 applies and that major offenses are subject to state law rather than tribal and federal law as in the Reserved Area. Our tribe never agreed to be placed under State jurisdiction under Public Law 280. When that act was passed in 1953 no one consulted the Miccosukee Tribe.

Exactly this sort of problems is addressed by one provision in the Steering Committee's legislative proposal. Tribes would be given the right to elect to reserve P.L. 280 jurisdiction and restore federal jurisdiction over major crimes. We think that this important matter should be subject to tribal choice, not state choice. The federal government has been recognized by the courts as the protector of tribes against the states, "often their bitterest enemies." U.S.v. Kagama, 118 U.S. 375 (1886). We have tried in recent years to get along with the State of Florida but we believe that it should be our choice whether federal or state law applies within our territory. P.L. 280 was passed in 1953, the high point of the so-called tribal termination era. It is not consistent with the federal policy of tribal self-determination which governs Indian policy today and has done so since 1975.

State Infringement on Tribal Self- Government

Secondly, we are concerned at state attempts to encroach on tribal authority in lands where Public Law 280 does not apply, such as the Miccosukee Reserved Area. In 2001, State authorities attempted to enter our Reserved Area to serve subpoenas on members of the Tribe without the approval of our tribal court. We barred the state officers from entering and the federal court upheld our right to do so. We are concerned at the possible impact on the authority of our tribal court in such cases by the Supreme Court's decision in Nevada v. Hicks, which is one of the targets of the Tribal Sovereignty Protection Initiative. In Hicks, the court's opinion denies that state intrusion into tribal territory to serve process on a tribal Indian without authority from the tribal court is an infringement of the right of tribes to self-government within tribal territory. Justice Scalia maintained that the right to regulate such intrusions is not "essential to tribal self-government".

First of all, we thing it makes no sense to assert that it is not an infringement of our right to self-government for an outside jurisdiction to send its officers within our lands (lands which we both "own" and have governmental jurisdiction over) without the consent of our government.

Secondly, we note with great concern that in this case the Court did not need to rule as it did. Tribal consent for the service of process by state officers was obtained in that case. The Court showed its colors by unnecessarily declaring that there was no need for the State to go to Tribal Court.

We understand that the Initiative is asking Congress to reaffirm the traditional doctrine of federal Indian law confirmed by the leading expert in the field, the late Felix Cohen, many years ago: In the first instance Indian tribes retain all the powers of any sovereign state. As a result of treaties with the United States they may lose the right to deal with foreign states but otherwise they retain all sovereign powers except as expressly given up by treaty or by act of Congress. The Congress has historically defined limitations on tribal powers. In this era, the Congress, by several important pieces of legislation, has reaffirmed and strengthened tribal authority. But the Supreme Court by what we understand they call the "implicit divestiture" doctrine has set to work to whittle down our authority. We Miccosukee are not prepared to accept any such implicit whittling away of our sovereign rights, and we call upon the Congress to reassert its authority in Indian Affairs and protect us form this run-away Supreme Court.

We also wish to support the proposal that each Indian tribe should have the right to choose whether the new sovereignty protection legislation should apply to it. The circumstances of tribes differ and some may not wish to take on the added responsibilities provided for in the proposal. We also support the provision that encourages intergovernmental agreements between tribes and states governments and subdivisions. We have resolved a number of difficult issues through agreements with the State and Metropolitan Dade County.

Thank you for the opportunity to express our view.

Billy Cypress
Chairman of the Miccosukee Tribe

COUNCIL ANNETTE ISLANDS RESERVE

METLAKATLA INDIAN COMMUNITY

VICTOR C. WELLINGTON, SR., MAYOR
JUDITH A. LAUTH, SECRETARY
OPAL J. HUDSON, TREASURER

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POST OFFICE BOX 8
METLAKATLA, ALASKA 99926
PHONE (907) 886-4441
FAX (907) 886-7997

STATEMENT OF THE HONORABLE VICTOR WELLINGTON, MAYOR, METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE TO THE SENATE COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARING ON SUPREME COURT DECISIONS

JULY 11, 2002

Mister Chairman, my name is Victor Wellington. I am the Mayor of the Metlakatla Indian Community of the Annette Islands Reserve. The Metlakatla Indian Community is a federally recognized Indian tribal government. It is located on and has jurisdiction over the Annette Islands Indian Reservation, which was established by Act of the Congress. It is the only Indian reservation in Alaska established by federal statute. Under specific provisions of federal law, the Community had the authority to exercise civil and criminal jurisdiction within the Reserve. The waters surrounding the Annette Islands were included in the Reserve by a Presidential Proclamation dated April 28, 1916. 39 Stat 1777. The Supreme Court has held that fishing within the waters of the Reserve is regulated by the federal government, not by the State of Alaska. Metlakatla v. Egan, 369 U.S. 45(1962). The maritime boundary of the Reserve was clarified by order of the Secretary of the Interior, dated September 26, 1945, and includes all waters within 3,000 feet of the Annette Island and certain adjacent islands.

The Community has been concerned with the erosion of tribal governmental authority over the past two decades as a result of certain court decisions. It has followed closely the tribal efforts to develop a legislative response to those decisions and it generally supports those efforts. During the very period when Presidential and Congressional acts have sought to strengthen tribal self-determination and self-governance, the Supreme Court (often affirmative in its attitude to tribal governments in the past) has made decisions that limit or question tribal authority.

In Oliphant v. Suquamish Tribe the Supreme Court decided that an individual who had endangered the lives and safety of reservation residents by violating traffic laws was not subject to tribal enforcement of those laws because he was not Indian. Not only did this decision prevent an Indian tribe from protecting itself in that specific instance, it also created a new doctrine that tribal powers may be lost by "implicit divestiture" when the court decides that a particular authority is not consistent with a tribe's "dependent status." This doctrine is contrary to earlier Supreme Court decisions and to the fundamental doctrines of federal Indian Law formulated by Felix Cohen, the nationally known expert and author of the Handbook on Federal Indian Law.

According to Cohen's authoritative treatise Indian tribes possess in the first instance all the attributes of sovereignty. As a result of their presence within the United States they are not entitled to engage in relations with foreign states and they are subject to limitations imposed explicitly by the federal government by statute. Congress has passed some laws limiting the authority of tribes. It has never, however, passed a law to withhold from tribes the right to arrest lawbreakers within their territory when the lawbreaker is not an Indian. According to Cohen tribal powers are "subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs of government."

Our Community occupies an island separated from other law enforcement agencies by substantial bodies of water. Usually travel to the Annette Island is by seaplane. Our Community police department is charged with maintaining law and order and protecting the lives and property of our members and other residents of the Reserve. We have a tribal court with authority over criminal offenses and civil suits. This is all in accordance with our Constitution and Bylaws adopted by referendum of our people and approved by the Secretary of the Interior.

I understand that the effects of implicit divestiture doctrine are being studied by the Tribal Sovereignty Protection Initiative Steering Community with the assistance of several distinguished academic experts in federal Indian law, including Professor Glen Wilkinson and Professor David Getches, and that the Steering Committee will be providing you with a remedial bill broadly supported by tribes across the country. At present there are three significant limitations on our governmental authority, which I wish to bring to your attention.

First, our law enforcement agency and court should have jurisdiction over all persons coming within our territory. Individuals should not be able to violate our laws with impunity just because they are not Indians. While we do have the authority to evict non-members from the Reserve, such exclusion may well not be an appropriate penalty for minor offenses. There should be an opportunity to punish by fine or limited confinement rather than leaving nothing between the extreme of banishment or no enforcement at all, especially in cases where a non-member has married into or otherwise formed a close relationship with our Community.

Our Reserve is currently subject to State jurisdiction under Public Law 280. As a result we look to state law enforcement authorities and State courts for the prosecution of major offenses rather than to the federal authorities. This system is working well at the present time and has been satisfactory since the Congress clarified in 1971 that our Community retains jurisdiction concurrently with the State notwithstanding Public Law 280. However, we think that the decision to transfer from federal jurisdiction to State jurisdiction (or the reverse) should be left to each tribe and not be determined, as under present law, by the State government alone.

Finally, we urge that the Congress give attention to the financial needs of Indian tribes to provide critical law enforcement and trust services. If tribes are to be encouraged to exercise self-determination and self-governance rights, it should not be automatically assumed that they have gaming or other revenue sufficient to finance these activities. Most tribes do not operate profitable casinos. Our tribe does not. In addition, we have for more then a decade been suffering from a major economic downturn due to the state of the two major pillars of our island economy. Federal policies with respect to the Tongass National Forest have closed our forest

products manufacturing plant, and the operations of the Annette Island Packing Company, the Community's 100 year old fish processing plant, have been severely curtailed.

The Community's law enforcement program, which is funded under its self-government agreement with the Bureau of Indian Affairs, is seriously underfunded. There are two areas where this underfunding has significantly impacted the Community's welfare. A U.S. Public Health Service review has revealed serious deficiencies in the Community's law enforcement facility but the BIA is unable to hold out any encouragement for funding to correct these problems. The survey states that "the Metlakatla holding facility should be completely renovated or replaced." While noting that the staff does a good job keeping the facility in the best condition possible, the survey notes serious damage to the roof, that the police, detention facility and court all operate in the same crowded building and that there is inadequate space for offices, record storage and that no shower facilities are available in the building and the heating systems needs significant work. It is clearly a major problem in carrying out an effective law enforcement program for the police department offices, the jail facilities and the courtroom to be located in the same inadequate facility. However, the Community has been unable to obtain financial assistance for the necessary work.

In addition, the Community' police department is charged with the responsibility to patrol the waters of the Reserve to prevent trespass and the violation of the Community's exclusive fishery by outsiders. We believe the United States has a fiduciary obligation to protect our lands and waters against invasion by those bent on exploiting our resources. In theory the United States discharges that obligation by funding our law enforcement contract through the BIA. The funding level needs to be increased by at least $ 150,000 in order to enable us to do an effective job in protecting our people and our resources.

We urge that the Congress enact legislation to provide (1) appropriate jurisdiction over minor offenses by non-Indians wherever the Indian tribe with jurisdiction elects to exercise such jurisdiction; (2) an option to tribes to determine whether jurisdiction under Public Law 280 will apply within their reservations or whether federal jurisdiction should be restored; and, (3) new authorizing legislation (followed up by appropriations) to provide necessary funding for tribal law enforcement programs, especially where personal safety and the protection of tribal resources are dependent on effective tribal law enforcement.

Thank you for your attention to our concerns.

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