
I am very much pleased that the inquiry of this committee is under way, and that I have this opportunity to present the views of the Interior Department and my own views early in the proceedings. I wish Secretary Udall could be here, as he very much wanted to be.

As I present the Department's comments on the committee's questionnaire, I will try to tell you the reasons or reasoning behind the particular situation. But I want to assure you that we do not regard every answer as "frozen". I am not here to justify, rationalize, or defend—this subject is far too close to the hearts of all of us for that.

As the Assistant Secretary responsible for the proper functioning of the Bureau of Indian Affairs, I have had occasion many times in the months I have been in the Department to probe into the complex of relationships between the citizen of Indian extraction and government, whether tribal government, State Government, or Federal Government. Secretary of the Interior Stewart Udall also has concerned himself closely with this matter. As you know, he brought with him into the Department a vast knowledge of and a deep insight into the subject-matter, coupled with a sensitivity to human rights which is an example for all of us.

As will appear in my comments on some of the specific items in the committee's questionnaire, the "rule-book" isn't always the same for the Indian and his non-Indian neighbor. The rule book I refer to, of course, is the body of laws, rules, regulations, and judicial decisions which are applicable to Indians
because they reside on reservations, because they are members of tribal organizations authorized by law, because they have an interest in land held in a restricted or trust status, or, in some instances, simply because they are Indians.

At the very outset, I would like to express a personal thought. Any element of "separateness"—whether it may seem to favor or to prejudice the Indian—militates in some degree against the full legal equality without which constitutional or civil rights are naked words. I am not referring only to the elements of separateness which are found in the law and order system, the regulations on devolution of property, or in court decisions upholding tribal infringement of freedoms of religion, speech, or assembly. Separateness equally erosive can be found in different rules for taxability of land or other property, different eligibility standards for State or municipal welfare services, and special provisions for Indians in other government programs at State and local, as well as federal, levels.

I've learned—indeed I've been taught in the hard school of testifying before Congressional committees on Indian legislation—that the field is complex, that there are no easy answers, and that most every idea has been tried before in the 125 years we've had an Indian Service.

So I'll have to rely upon the staff with me, many of whom were invited to appear in their own right, and on their own well-earned reputations for special knowledge.

So, I can start with the first item in the questionnaire, which reads:

"1. Under Federal law, a Yakima Indian can bequeath his interest in real property held in trust to his heirs provided that they are one-fourth
Yakima. In instances where the heirs are not one-fourth Yakima, the property reverts to the Tribe. (60 Stat. 968)"

This statement accurately reflects the provisions of the statute cited. The effect of the law may be to alter substantially the usual ranking of entitlement to inherit. Brothers and sisters, nieces and nephews, or even more distant collateral kindred may be entitled to inherit, to the exclusion of children of the decedent. A bill to change this provision of the law is presently before the Congress. Although the Yakima tribe has been strongly opposed to the change, our Departmental report on HR 2581 says in part:

"Such a pattern of inheritance and denial of the right of the spouse, children, and others to share in the estate of the decedent is the result solely of Federal legislation and is not to be found in the laws relating to other Indian tribes or to non-Indians. In our opinion, the record presented clearly establishes the injustice imposed by the existing provision of law and its strong justification for its repeal."

"2. Under certain circumstances, an Indian cannot bequeath his property to his heirs, i.e. "...no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will..." (25 CFR 11.32)"

It might be more accurate to say that an Indian may be unreasonably limited in making bequests. The quoted regulation is limited in its application to unrestricted personal property located on reservations. It was designed to
recognize the tribal authority over the probate of such unrestricted property. The courts have recognized this authority. Jones vs. Mechan, 175 U. S. l.

"3. The Secretary of the Interior is empowered to approve or disapprove wills made by Indians owning restricted lands, and as stated in Federal Indian Law (Dept. of Interior, 1958, p. 77) "... a determination made by the Secretary under applicable law is 'final and conclusive' and not subject to collateral attack or court review in the absence of showing of fraud, error of law, or gross mistake of fact."

The quoted language which appears on page 78 of Federal Indian Law relates to the Secretary's determination of heirs in cases of intestate succession and not to the Secretary's actions on Indian wills. In Homovich v. Chapman, 191 F. (2d) 761, 764 (1951), it was expressly observed that the statutory language which made final the Secretary's determination of heirs was not extended by the Congress to orders approving or disapproving wills.

"4. Where there are tribal courts, an Indian can be refused legal counsel and does not have a right of appeal to any State or Federal court."

Most tribal law and order codes do not permit professional lawyers to practice in their courts. However, the tribal codes generally provide that a defendant in the tribal courts has the right to have a member of the tribe represent him and in the event he has no such representation, the court may appoint a representative. In 1924 when the Departmental law and order regulations were given careful scrutiny and revision by a committee appointed by the
Commissioner of Indian Affairs, a revision of the regulations provided that professional attorneys should not appear before the Court of Indian Offenses unless rules of court were adopted prescribing conditions governing admission and practice before the court. The committee felt that professional attorneys "would tend to formalize and complicate a procedure most effective when informal and simple and since their superior knowledge of the law might easily produce an unwarranted control over the court." Where Indians are accustomed to and desire the services of lawyers, the committee felt that the general rule could easily be relaxed. Most tribes have a provision similar to the regulation in their tribal codes.

There is no appeal from the judgment of an Indian court to a State or Federal court. Legislation to permit court review of the decisions of Indian courts has been and is being considered.

"5. An Indian convicted by a tribal court can be transferred to the County jail to serve sentence even though the Tribal Court may not be legally recognized by the State."

In some locations, Indians convicted in Indian courts serve sentences in county jails. These arrangements are necessary because there is not always a jail on the reservation. Recognition of an Indian court by the State is not involved. The county provides jail service on a contractual basis.

It might, of course, be preferable to house Indian court prisoners in Indian jails. A District Court in New Mexico held in 1959 that the statutes did not authorize their sheriffs to accept and hold prisoners committed by Indian courts. The New Mexico Legislature thereafter passed a statute, requiring the
sheriff of each county to receive and hold custody of Indian prisoners committed in conformity with process issued by any Indian tribe, band or pueblo in New Mexico.

"6. A group of Indians living on a reservation were restricted from conducting a religious ceremony by a tribal ordinance. They appealed to a Federal court (Native American Church v. Navajo Tribal Council, 1959) maintaining that this action violated their rights under the Constitution. The courts held that the First Amendment to the Constitution does not restrict the actions of an Indian tribe unless that tribe's powers have been limited by an Act of Congress."

The United States Court of Appeals so held. The court added, however, that it was within the authority of the United States to restrict or limit the powers of an Indian tribe and to confer on the courts jurisdiction over matters involving the exercise of tribal self-government.

"7. Another case concerned a group of Indians of the Protestant faith. Their complaint to the Court was that the Tribe refused them the right to bury their dead in the community cemetery; would not allow them to build a church on tribal land; refused to let them use their homes for religious meetings; and would not allow Protestant missionaries to enter the tribal area. The United States District Court dismissed the case (Toledo, et al v. Pueblo De Jemez, 1954) on the grounds that they had no jurisdiction over tribal actions."

This is also an accurate statement of the holding of a United States District Court. The court concluded that the governmental powers of Indian tribes do not derive from the States and that the exercise of such powers is subject to the paramount authority of the Congress.
"8. The Fund for the Republic study, A Program for Indian Citizens, published in January, 1961, stated: "Neither Congress nor the States may infringe upon the basic civil rights of Indians, for they enjoy the same protection in respect to these government as all other American citizens. But the Federal Judiciary has determined that the guarantees of freedom of worship, speech, and the press, the right to assemble and petition the government, and due process do not restrict tribal action ... No government of whatever kind should have the authority to infringe upon fundamental civil liberties; government itself must ever be subject to law. Freedom of religion, utterance, and assembly, the right to be protected in one's life, liberty, and property against arbitrary government action and to be immune from double jeopardy and bills of attainder, and the guarantee of a fair trial are not privileges; they are minimum conditions which all Americans should enjoy. For any tribe to override any of them violates the very assumptions on which our free society was established."

I agree with the statement. Tribal members should be accorded the protection of the United States Constitution in the same manner as non-Indian citizens and as the Fund for the Republic recommends, the federal law should explicitly require that tribal actions must safeguard basic civil rights.

At the same time, however, I should call your attention to the fact that insistence upon strict application in the Indian courts as they are now constituted and will continue to be constituted for some time, of the same procedural safeguards that apply in the non-Indian judicial system, would result in the destruction of the Indian court system and would leave the Indian people, in a great many instances, without any protection.
To rely upon a transfer to State courts to achieve the necessary protection is not the immediate answer either. Subsequent to the enactment of Public Law 280 in 1953, the Indian people have expressed almost unanimous preference to retain the present system of having federal and Indian court jurisdiction on their reservations rather than agreeing to the extension of State jurisdiction. Indian groups have vigorously resisted the extension of State civil and criminal law to their reservations under the permissive provisions of Public Law 280. They express themselves as fearful of hostile local and State attitudes, discrimination, their own lack of education and understanding of laws and systems to which they would be subjected, and say they believe that adoption of State law and jurisdiction would be a step toward unilateral termination of federal protections and special services.

The Task Force on Indian Affairs, in its recent report to the Secretary, recognized that Indian courts are transitional courts between social system of yesterday and tomorrow. It also recognized that protection of life and property, preservation of civil rights, and development of clearly defined civil and criminal codes are essential to the rapid economic growth in the Indian country and in turn to the rapid rise of the standard of living on the reservations. The Task Force recommended that programs be developed with the tribes and State governments looking to a revision of the tribal codes and reorganizing of tribal courts to bring them as nearly as possible into accord with the State system in which they are located. The Task Force recommended that the Department insist upon constitutional guarantees of civil rights in the Indian courts existing under Departmental regulations.
"9. The Report of July 10, 1961 to the Secretary of the Interior by the Task Force on Indian Affairs, stated, "that Indians had complained to them about tribal courts maintaining that there were insufficient law enforcement officers, inadequately prepared judges, no professional attorneys allowed, inadequate appellate provisions, favoritism, and denial of civil rights."

The Task Force Report, in its summary of Indian views on law and order (page 28) reads:

"The protection of life and property under each of these three types of jurisdiction is inadequate in one or more respects, according to testimony of witnesses at the various Task Force hearings. Thus, under the Courts of Indian Offenses some witnesses complained of insufficient law enforcement officers, inadequately prepared judges, the absence of attorneys, non-use of the courts in civil actions, and inadequate appellate provisions. Under tribal courts, witnesses complained of all the above-mentioned inadequacies and recited numerous instances of favoritism, denial of civil rights, outmoded detention facilities, and absence of proper facilities for female and juvenile offenders. Even the States granted jurisdiction by Public Law 83-280 did not escape criticism on some of these counts."

This summary of Task Force findings is based on the testimony of Indian leaders at hearings which the Bureau of Indian Affairs has excerpted and which I would like to submit for the record if the committee desires to receive it.

The Task Force recommended that the Secretary of the Interior examine the regulations which govern the courts of Indian offenses within his jurisdiction.
It also recommended that the Bureau of Indian Affairs work with the tribal governments to improve the protection of constitutional rights by the enactment of their own ordinances.

It also recommended step-by-step transfer of jurisdiction to the States after negotiation with State and tribal governments with respect to selected areas of civil and criminal action, beginning with juvenile offenses, commitments and domestic relations.

These recommendations seem sound to me.

Since the Indian Citizenship Act of 1924, all Indians born in the territorial limits of the United States have been citizens of the United States. By virtue of the Fourteenth Amendment of the Constitution, they are also all citizens of the States in which they reside. All citizens are entitled to the same rights and privileges of citizenship.

In the earliest years of the republic, Indian tribes were recognized and dealt with as "distinct, independent, political communities" qualified to exercise the powers of self-government. (Worcester v. Georgia, 6 Pet. 515, 559, 1832). The courts found that powers of self-government of an Indian tribe do not derive from a delegation to the tribe by the Federal government, but rather are powers which a tribe has inherently by reason of its original tribal sovereignty. Thus, treaties between the United States and Indian tribes and statutes enacted by the Congress were not delegations of authority, but rather limitations on existing tribal powers. (Federal Indian Law, p. 396). When Congress decreed in 1871 (16 Stat. 544) that Indian tribes would no longer be recognized as sovereign nations with whom the United States would make treaties and declared that thereafter the affairs of the Indians would be governed by statutes enacted by the
Congress, the legal philosophy that a tribe constituted an autonomous dependent group for other purposes remained unchanged.

Since State laws were held not to apply to Indians on their reservations because they are entitled to exercise their own inherent powers and since there were no federal criminal laws especially applicable to Indians, crimes committed by Indians on their reservations until 1884 were solely within the jurisdiction of the tribes themselves. Beginning in 1885, the Congress took action to vest in the Federal courts jurisdiction over the so-called ten major crimes. At the present time, there is a limited amount of federal jurisdiction exercised by the federal courts in relation to crimes on the reservations and, except as the Congress has acted to extend the jurisdiction of the State to the reservation, the tribal court remains vested with jurisdiction in a large field of crime.

Where the State does not assume jurisdiction over crimes and offenses by Indians on their reservations, law and order is administered by two types of Indian courts. One is the tribal court, established by action of a tribe. The other is a court of Indian offenses established pursuant to Departmental regulations. The Departmental regulations declare the purpose to provide adequate machinery for law enforcement for those tribes in which the traditional agencies for the enforcement of tribal law and custom have broken down and for which no adequate substitute has been provided by federal or State law. A majority of the Indian courts that operate today are tribal courts established by appropriate tribal action.

The validity of Indian courts has been attacked from time to time on the ground that there was no legal basis for their existence. Judicial decisions
uphold the validity of Indian courts. *Iron Crow et al v. Oglala Sioux Tribe*, et al, 231 F. 2d 89, including both Courts of Indian Offenses as well as tribal courts.

Many Indian courts are unable for a variety of reasons to do an effective job in the overall administration of justice on the reservation. Some of those who are elected or appointed as Indian judges lack educational qualifications. In some instances tribes employ outside or non-member Indians as judges and in some cases, they have employed attorneys or judges who reside near the reservation to preside over the Indian courts. The inadequacies of the facilities, services, and resources available to the Indian courts have become increasingly apparent in recent years. In the area of juvenile dependency and delinquency, for example, many Indian courts do not have available to them the same services available to state and federal courts in the treatment and rehabilitation of juveniles.

It has been suggested that Indian law and order should be abolished and the Indians made subject to the same State laws as non-Indian citizens. This is by no means a new or novel idea. The General Allotment Act of 1887 contained provisions that Indians who receive allotments of land under the Act would become subject to the civil and criminal jurisdiction of the States in which they reside. The 1887 statute was amended in 1906 to provide that allottees would become subject to State jurisdiction only after the trust period had expired on the allotments and the Indians had received the land in fee simple. Subsequently several acts of Congress conferred upon the States civil or criminal jurisdiction or both over particular reservations. Public Law 280 has already been discussed, along with the difficulties arising from the attitude of Indians toward it.

Efforts have been made by the Bureau to encourage tribes to pattern their laws and court systems after those of the States in which they reside. Some
improvement has been made, but not much. Two tribes have seen fit to amend their tribal codes to permit the appearance of professional lawyers in their courts, and as indicated above, other tribes have employed professional lawyers or judges of outside courts to preside over Indian courts. Some tribes have included a Bill of Rights in their Constitutions.

This committee is to be commended for getting into this subject-matter. Its staff has done an excellent job of opening up various aspects of the problem for analysis and review.

But the basic anomaly, really, is that we have never made real, nation-wide progress in securing a climate of understanding and mutual respect between Indians and their tribal organizations on the one hand and State and local governments, and the officials of these governmental entities, on the other hand.

If Indian tribal organizations are essentially municipal in their functions, and I think they are, to some degree there has been a short-circuiting of the intermediate governmental levels, as the tribal political entities are supervised and protected by the Congress and the federal government directly.

The answer is not to remove the supervision and the protection--rather the answer is, as I have tried to point out, to bring the two systems into step with each other so a transition can be made without violent and disruptive change.

This is a separate problem from assuring the Indians their constitutional rights--with this goal there can be no compromise, and we intend to see that there is none.

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