

Hearing  
Before the  
United States  
Commission on Civil Rights

**ENFORCEMENT OF THE  
INDIAN CIVIL RIGHTS ACT**

**HEARING HELD IN  
RAPID CITY, SOUTH DAKOTA**

**July 31-August 1, and August 21, 1986**

HEARING  
BEFORE THE  
UNITED STATES  
COMMISSION ON CIVIL RIGHTS

## Enforcement of the Indian Civil Rights Act

Testimony

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July 31-August 1, August 21, 1986

## U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;

Submit reports, findings, and recommendations to the President and the Congress.

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# Enforcement of the Indian Civil Rights Act

The U.S. Commission on Civil Rights convened at 9 a.m., Thursday, July 31, 1986, in the Rushmore Plaza Civic Center, Rapid City, South Dakota, Chairman Clarence M. Pendleton, Jr., presiding.

Present: Chairman Clarence M. Pendleton; Commissioner Robert A. Destro; Acting General Counsel William Howard; Assistant General Counsel Michael McGoings; Michael Gilman, special assistant to the General Counsel; and Neil McDonald and Debra Miller, staff attorneys.

## PROCEEDINGS

CHAIRMAN PENDLETON: First I'd like to find out if there is anyone in here who is hearing impaired. If so, we have a person that can help us with these deliberations. If there is no one here who is hearing impaired, then she can rest until someone comes who is hearing impaired.

Thank you very much.

The first order of business this morning is to swear in the clerks.

[The clerks, Rhonda Sowers and Arnetta LaGrone, were sworn.]

CHAIRMAN PENDLETON: Good morning. I am Clarence M. Pendleton, Jr., Chairman of the U.S. Commission on Civil Rights. With me today are Commissioner Robert Destro, Acting General Counsel William J. Howard, Assistant General Counsel Michael C. McGoings, Staff Attorneys Debra Miller and Neil McDonald, and Michael Gilman, who is special assistant to the General Counsel.

The purpose of the hearing today and tomorrow is to examine tribal court enforcement of the Indian Civil Rights Act of 1968. To my knowledge, this is the first time since the enactment of the ICRA that a Federal agency has held hearings focused exclusively on enforcement of the act. This is surprising to me in view of the numerous hearings that take place on enforcement of other major civil rights laws.



We will hear testimony today and tomorrow concerning the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Oglala Sioux Tribe on the Pine Ridge Indian Reservation.

It should be noted that the Cheyenne River and the Rosebud tribal councils requested, by resolutions passed by these councils, that the Commission hold hearings on civil rights violations on their reservations. Both tribal councils, according to these resolutions, believed that their members should have the opportunity to give testimony before the Commission. These resolutions will be made a part of the record.

The task before us today and tomorrow is without a doubt an ambitious one. Thirty-five witnesses are scheduled to testify, and I beg your indulgence if at times I appear to rule with an iron gavel. If so, it is in the interest of ensuring that all of our witnesses are heard from.

The ICRA includes several protections that we want to focus on. They are:

- \* The right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures.

- \* The requirement that the issuance of search and arrest warrants be based upon probable cause, supported by oath or affirmation, describing the place to be searched and the person or thing to be seized.

- \* The prohibition against double jeopardy.

- \* The right of a person criminally accused not to be a witness against himself.

- \* The right of a person criminally accused to a speedy and public trial, to be informed of the nature and cause of the accusation, to confront the witnesses against him, to subpoena his own witnesses, and to obtain counsel at his expense.

- \* The prohibition of excessive bail or fines, cruel and unusual punishment, and the limitations of \$500 or 6 months on sentencing.

- \* The prohibition against denying to any person within its jurisdiction the equal protection of its laws or due process in their application.

\* And, finally, for the purposes of this hearing, the right of a person criminally accused to a trial by jury.

At the conclusion of our panel discussions, there will be an open session. The purpose of the open session, which begins tomorrow at 3 p.m., is to receive testimony from individuals wishing to make statements relevant to the subject matter of this hearing. If there is anyone here who wishes to speak during the open session, please give your name to one of our clerks in the Commission staff room across the hallway from this hearing room. The record of this hearing will remain open for 30 days for inclusion of materials sent to the Commission subsequent to this hearing.

Since the ICRA obligates tribal governments to respect the civil rights of persons within their jurisdiction, this hearing will necessarily elicit criticism of the performance of tribal organizations and officials. Civil Rights Commission hearings commonly involve a critical evaluation of how public officials are performing their duties. Therefore, this hearing is not unique in that respect.

I wish to caution the witnesses, however, that the Commission is most interested, not in the performance of particular individuals but in the performance of tribal institutions, such as the tribal court system and the tribal council's oversight committees. We are not interested, and will not permit, the hearing to be used as a public forum for personal attacks on the character of tribal officials past or present, nor will we permit anyone testifying today or tomorrow to allege criminal misconduct by any person. Such allegations, if made, will be stricken from the record. Several of our witnesses are tribal officials, and they will have full opportunity to respond to criticisms of their performance both at this hearing and subsequently, if necessary.

The second matter I am obliged to refer to concerns 18 United States Code, section 1505, a criminal statute which prohibits individuals from in any way interfering with the testimony of witnesses who will be appearing at this hearing, or retaliating against those witnesses for their testimony. The maximum penalty for a violation of that statute is a fine of \$250,000 or 5 years' imprisonment or both. Mr. Hogen, the United States Attorney for South Dakota, has asked me to assure all witnesses testifying today and tomorrow that he will actively investigate and, if necessary, prosecute any violations of this law. In the event that any witness believes that he or she has been retaliated against for his or her

testimony, please telephone the Commission at area code (202) 376-8351.

And now I am pleased to turn to my colleague, Commissioner Robert Destro, for his welcoming comments.

COMMISSIONER DESTRO: Thank you, Mr. Chairman. I am very pleased to be here this morning, and for my own comments, I just want to make a couple of them.

The issue of Indian civil rights generally is an important and complex issue that the Commission doesn't often get into. It reaches far beyond the issues of the enforcement of the ICRA into things as diverse as administration of justice generally and in the Federal courts, employment and other kinds of discrimination, and the special status of Indian tribes in American law.

I want to assure those who are participating in the hearing and those who are going to be watching over the next couple of days that the Commission is aware of the sensitivity of these issues and the concerns that there may be an agenda beyond that which is the subject matter of the hearing today. Let me assure those with concerns that we are here to listen and to learn, and we do not come with preconceived notions of any of the issues that are going to be talked about today.

This will not be the first contact that you have with the Commissioners but hopefully only the beginning of an ongoing relationship which will culminate in the publication of a report to Congress and the President. So I urge the witnesses to keep in touch, to add whatever they feel needs to be added to flesh out the record--because the record really is yours, not ours; we are here to listen to you and to learn from you--and that you keep in touch with the Commissioners and the staff of the Commission as this process is ongoing.

So my own concern, then, is that we learn as much as possible about the actual operations of the ICRA and that we present our findings in a context which will accurately capture the relationship of the ICRA issues to many of the other Indian civil rights issues that hopefully will be future issues for Commission concern.

Thank you, Mr. Chairman.

CHAIRMAN PENDLETON: Thank you, Commissioner Destro.

And now we will hear from State Advisory Committee Chairperson Francis White Bird.

Welcoming Statement, Francis White Bird, Chair, South Dakota Advisory Committee to the U.S. Commission on Civil Rights

MR. WHITE BIRD: Thank you, Commissioner. Good morning. I am Francis White Bird, Chairman of the South Dakota Advisory Committee to the United States Commission on Civil Rights. On behalf of the South Dakota State Advisory Committee, I would like to welcome the Commissioners and the Washington staff to our State and to welcome my fellow South Dakota citizens who have come to participate in or observe these proceedings.

The purpose of this hearing is to examine tribal court enforcement of the Indian Civil Rights Act of 1968. This is a subject our advisory group is very much interested in, so we have actively encouraged the Commission to include South Dakota in its study of this issue. The Commission has long been known for accuracy and responsibility in the projects it undertakes, and we are confident, therefore, that every effort will be made to ensure that information gathered at this hearing is accurate and comprehensive.

I would like to elaborate just a little on the role of our South Dakota Advisory Committee. Nationwide, there are 51 such advisory committees, each charged with assisting the United States Commission on Civil Rights by providing information on issues relating to the rights of minorities and women. Our South Dakota Advisory Committee is composed of 11 individuals who represent diverse racial, ethnic, and religious groups, including four Native American members. What our committee members all have in common is a shared commitment to civil rights, justice, and equal opportunity.

This commitment is illustrated by the projects in which the South Dakota State Advisory Committee has been involved in previous years. We have, for example, conducted an investigation of criminal justice for Native Americans in off-reservation situations, resulting in a report entitled Liberty and Justice For All. We published another study entitled Native American Participation in South Dakota's Political System. Currently, we are completing a study on the status of women in South Dakota.

Part of our advisory committee responsibility is to monitor civil rights developments. In that regard, we have recently been involved in monitoring the implementation of the minority

business enterprise provision of the Surface Transportation Act of 1982, and have conducted two public forums to seek information on this subject.

In all of its activities, the South Dakota State Advisory Committee works with regional office staff in Denver. In preparation for this hearing on tribal court enforcement of the Indian Civil Rights Act, Advisory Committee members and regional staff assisted the Commission by suggesting issues and resources.

I would like to say how much I appreciate the help and cooperation provided to the Commission by tribal leaders in planning this hearing.

CHAIRMAN PENDLETON: Thank you very much, Mr. Chairman.

We will now call up the first panel. For those of you who may not have a scorecard or program in the back, I'll just call the names out: Mr. Hogen, Ms. Remerowski, Mr. Pommersheim, and Mr. Pechota.

I just want to say I thank the persons who brought the youngsters in today. It is always encouraging to see young people come to visit these kinds of proceedings, not that they understand it all, but I do think it's just great to have them. Thank you who brought them. That's a personal note, not so much a Commission note. Again, I want to thank you very much.

If you would please raise your hands, I will swear you in.

[Philip N. Hogen, Terry Pechota, Frank Pommersheim, and Anita Remerowski were sworn.]

#### AN OVERVIEW

Testimony of Philip N. Hogen, U.S. Attorney, South Dakota; Terry Pechota, Attorney, Finch & Viken, Rapid City, South Dakota; Frank Pommersheim, Associate Professor of Law, University of South Dakota Law School; and Anita Remerowski, Former Director, Dakota Plains Legal Services

CHAIRMAN PENDLETON: I will now turn this part of the hearing over to our Acting General Counsel, Mr. Howard.

MR. HOWARD: Thank you, Mr. Chairman.

I would like to ask each of the witnesses, beginning with Mr. Hogen, please, to state their names, their occupations, and their addresses for the record. Mr. Hogen.

MR. HOGEN: My name is Philip Hogen. I'm United States Attorney for the District of South Dakota. I live in Sioux Falls, South Dakota.

MR. POMMERSHEIM: My name is Frank Pommersheim, and I teach at the University of South Dakota Law School, and I live in Vermillion, South Dakota.

MS. REMEROWSKI: My name is Anita Remerowski. I'm an attorney in South Dakota, currently this year going to medical school in Chicago. My address is Rapid City.

MR. PECHOTA: My name is Terry Pechota. I'm an attorney in Rapid City, South Dakota. My address is in Rapid City also.

MR. HOWARD: Thank you. Mr. Hogen, if we could begin with you, how long have you been U.S. Attorney for South Dakota?

MR. HOGEN: I was appointed by the court in October of 1981 and appointed by the President in December of 1981 and have been serving since that time.

MR. HOWARD: Could you please tell us, in your experience as U.S. attorney, what sorts of ICRA allegations have been brought to your attention?

MR. HOGEN: Yes. I think I might attempt to put that in the context in which those allegations come to us.

The United States Attorney's Office in the District of South Dakota has a lot of involvement with Indian people and Indian communities, primarily by virtue of the fact that we are responsible for prosecuting violations of the Major Crimes Act, that is, felonies that are committed in Indian country either by or against Indian people. So for that reason we are involved on a day-to-day basis in the administration of justice on the criminal side on Indian reservations.

We necessarily need to be aware of what else is happening there on the Indian reservations as far as the administration of justice goes, and that is what the tribal courts are doing in the misdemeanor area of the administration of criminal justice. We have to either decide to prosecute or decline prosecution on allegations that come to us, and those cases that we decline prosecution on often are declined so that prosecution can go forward in the tribal court system.

Consequently, we have to be aware of what is happening in the tribal prosecutors' offices and in the tribal courts themselves. Hopefully, when a case is appropriate for prosecution, it will be prosecuted either at the Federal level as a felony or as a misdemeanor by the tribal courts. And, of course, the tribal courts' jurisdiction is limited to misdemeanor jurisdiction. The maximum penalty they can impose for violation of tribal codes is a fine of not more than \$500 or incarceration for not more than 6 months.

We hear allegations that, first of all, we aren't doing our job, that there are offenses that are committed there in Indian country that should be prosecuted as felonies in Federal court. We are not surprised by that criticism. I'm sure all prosecutors make certain decisions that make some victims, or people who believe they are victims, unhappy and so forth; and there are a variety of reasons why we necessarily decline prosecution--maybe because the evidence isn't there, but often in this category of offenses, it's because we don't feel the case is severe enough to merit felony prosecution, and we then hope the prosecution will go forward at the tribal level. Sometimes we receive criticism that there isn't prosecution of offenses that are committed in Indian country that we decline, that we more or less expect are going to be prosecuted in tribal courts.

So we are involved on the criminal side very significantly.

We also, because of our involvement in Indian country as Federal prosecutor, and because we represent Federal agencies when they sue somebody or get sued, have kind of a high profile in Indian country in that regard. That is, if the the Bureau of Indian Affairs superintendent or area director or the Assistant Secretary for Indian Affairs gets sued by a tribe or by a tribal member or Indians in Federal court, we do that litigation. We defend those officers of the United States. And when the BIA or Indian Health Service, an agency like that, has to bring an action against someone involving a matter in Indian country, we are the counsel for the government or those government agencies or offices in Federal court. So we see a lot of tribes and Indians in that regard.

For that reason, members of the Indian community come to our office when they feel that there is some grievance that needs to be redressed that they apparently haven't found a forum for on their reservation. We have people come to our office who contend that they didn't get or are not getting justice in the tribal court system, or justice by means of things that the tribal councils have done.

These kinds of things would include election disputes, domestic affairs that tribal courts rule upon--a very wide range of those kinds of things. For the most part, our response to the allegations of that nature is, according to the Martinez decision and the Indian Civil Rights Act, we don't have a role. That is, the United States attorney's office of the Federal Government doesn't play a part in solving those problems but rather that is left to be resolved internally within the particular Indian tribe.

MR. HOWARD: How often do these allegations come to your attention?

MR. HOGEN: I would have to admit that we have not kept a running scorecard in that regard. The United States attorney's office here in South Dakota consists of my headquarters office in Sioux Falls where my office is, and I have a staff branch office in Pierre where I have three assistant United States attorneys, and another one here in Rapid City. For the most part, the Rapid City office services the Pine Ridge Reservation and the Oglala Sioux tribe, and the Pierre office services the largest number of reservations, starting with Standing Rock in the north, and then Cheyenne River, Lower Brule, Crow Creek, and Rosebud. And then in Sioux Falls, cases from the Yankton Reservation and Sisseton and Flandreau are handled from that office.

So it is with some regularity that we will be contacted by telephone or having people visit our office with concerns of this nature. But to put a number on those or to be able to categorize them, it would be somewhat speculation on my part, since they do come in to assistant United States attorneys in various offices. But I would say not a month goes by without contact from one reservation or another along these lines. Sometimes the contact is merely being asked where they can go or they are asking for information, and we attempt to either direct them to tribal courts or perhaps Federal agencies such as the Bureau of Indian Affairs.

But these things are also, in my experience, cyclical in nature. That is, if there are particular political problems on a reservation, we may hear a large number of complaints from that reservation, and then when the government changes or there is some development there, we don't hear anything from that reservation for an extended period of time.

So I would say it is quite frequent that concerns are expressed. I don't mean to say I am prejudging all of those



complaints as being accurate or viable, but at least the concerns are expressed to us.

MR. HOWARD: Do you have an opinion as to whether the tribal courts are effectively enforcing the Indian Civil Rights Act?

MR. HOGAN: I want to make it clear that what I'm going to be telling you in this regard is my opinion based on my experience not only as the United States attorney since 1981, but prior to that time I was an attorney practicing out near the Pine Ridge Reservation. I was a State prosecutor there. I also served for a time as an appellate judge on the Rosebud Sioux Court of Appeals, and I'm an enrolled member of the Oglala Sioux Tribe. But I do not speak for the Department of Justice, and I am not proposing legislation or anything like that on their behalf.

I believe the most commonly voiced concern that I hear and that I perceive as a problem is the lack of independence that most of the tribal courts have or appear to have. We don't have, within the tribal constitutions that I am familiar with, the kind of separation of powers that exist in our State and Federal system.

I come, of course, from a common law background and Anglo-Saxon system of justice and don't know that the separation of powers thing is necessarily compatible with some of the traditional approaches and values that exist in Indian country, but that's what I have been schooled in and that is the system I practice in, and I perceive that structure as being the most ideal for resolution of disputes such as those I have been mentioning.

There are reported cases, cases that my office becomes involved in because the Bureau of Indian Affairs gets sued to resolve a civil rights complaint because it is established, pursuant to the Martinez decision, that one Indian faction can't successfully bring action against the tribe or another Indian faction; you've got to get the Federal entity in there to get jurisdiction. And the Runs After case and Goodface v. Grassroper are a couple of examples of those cases not too long ago decided here in the Eighth Circuit or here in South Dakota where those kinds of disputes arose.

I believe if you had a separation of powers system and more independence for your judiciary, many of the problems that I hear about or that I perceive would be resolved. I think that you also need a workable appellate court system. And we have

several different systems, I guess, working or proposed within the reservations in South Dakota.

A difficulty I perceive is that with some tribes, perhaps all of the tribes in South Dakota, we are really talking about a population that is so limited that it is difficult to have all of the machinery that may be in the perfect system you could otherwise have and fund and afford. That is, if you have a reservation that has around a thousand members or population, it is pretty difficult to have just within that reservation an active trial court, an appellate system, and so forth, all by itself.

I would like to see a more viable, smoother running appellate system in Indian country to make sure that the judicial branch, if it were a separate branch, were viable, respected, and could do what needed to be done in that regard.

When you talk about the criminal justice system in Indian country, in addition to having the policemen out there, you have to have a corrections system that is viable. You have to have jails that are safe and so forth. And there is concern that, because again of the small populations that we have, it is difficult to have a viable working system funded there at those reservation levels that will serve all of those needs.

I have heard proposals that the jurisdiction of tribal courts in misdemeanor areas should be expanded, for example, beyond the 6-month maximum incarceration period. If you are going to do that, you'd better at the same time look at what kind of jail system or correction system you have and so forth.

So those are some of the concerns that I have and some of the suggestions, I guess, that I would attempt to implement were I called upon to have some input in that regard.

MR. HOWARD: Thank you, Mr. Hogen.

Mr. Neil McDonald is now going to address some questions to Ms. Remerowski.

MR. McDONALD: Ms. Remerowski, what do you see as the major issues confronting Indian tribal courts and their efforts to enforce the Indian Civil Rights Act?

MS. REMEROWSKI: That's a pretty broad question, but I would agree with Mr. Hogen that one of the big issues is the independence of the judiciary. When you talk about the importance, for instance, of seeing that there is a viable

appellate system, and yet there is no assurance that when an appellate decision comes down and that is supposedly the final word on a case, or the final order, that that order will be honored by a tribal council. Then essentially what we have here on many important issues that face an individual on the reservation is essentially a sham.

So I think that the biggest problem--I would start with number one and talk about the independence of the judiciary, and ask the Commission when it studies this matter to take a look perhaps at some tribes who have attempted, through constitutional revision--and I believe the Sisseton Tribe has through constitutional revision adopted a constitution that provides for separation of powers--and see how things are going there.

Also, some of the newly recognized tribes--I was trying to remember which--but the Ute Tribe, which is a newly recognized tribe in Utah, informed me, when I was an attorney at the Native American Rights Fund, that their constitution that they would adopt would provide for a separation of powers, and also a provision allowing for civil suits against the tribe in tribal court in matters that would not harm the tribal fisc, that their suits would be allowed for declaratory and equitable relief in tribal court in civil rights matters. That is another option that tribes have in terms of constitutional revision.

So I think that would be an interesting study as an adjunct to this hearing to see what's been going on.

I guess really I've talked about two things now. I've talked about the independence of the judiciary and also the provision of a remedy for people to sue in tribal court. Because you have to remember, when people would attempt to enforce civil rights in tribal court, there is a difference of opinion among tribal judges if in fact the tribe can be sued in tribal court, if the Indian Civil Rights Act or the tribe's own constitution essentially provides a waiver of sovereign immunity.

The other thing I think is important in terms of an issue--and this is a tricky issue--is the commitment of the United States to tribal government. And I think this is an issue we dance around and the reason that there hasn't been a hearing on Indian civil rights since the enactment of the act. And I was thinking in my own mind, in terms of my experience in Legal Services, that it was only a year ago that we had even a training session on the Indian Civil Rights Act. And that

would have meant that it was 10 years since a national training session including the subject matter of Indian civil rights had come up. And that was because of Martinez. The whole concept just wears you down.

I can remember when the Martinez decision came down in Indian Legal Services at that time in South Dakota, 40 percent of our caseload involved Indian Civil Rights Act violations. There went 40 percent of the caseload, right or wrong, whether we should have been involved in these matters, but that was a substantial caseload, a substantial amount of complaints coming from clients.

I think it is important that the government decide what its commitment is to tribal government. If it believes there should be a tribal government and a reservation system, then it should give the funding, provide the means, for that court system to operate like any other court system. And when you think of a county court system and a city court system, we are talking about big reservations. Rosebud is a big reservation; Pine Ridge is a big reservation. I would wager, if you compared the amount of money that goes into their court systems with a town in South Dakota of comparable size and population, not to mention problems--the caseload in those systems is much higher, I'm sure, than in a town of comparable size--I think you would find the budgets wanting severely.

And just to give you an example, in 1980 the Rosebud Sioux Tribe ran out of money for their juvenile court system--literally ran out of money. We're talking about no phones and no phone service, no ability to adjudicate juvenile cases, period. So we'd be talking about children who would be left in foster care or children who wouldn't be able to be placed or kids with problems with the law. Now, that would never happen, never be permitted to happen anywhere else.

MR. McDONALD: Excuse me. Is the funding for the tribal courts necessarily earmarked as such, or is the tribal council given some discretion over how much of the tribe's budget is allocated to tribal courts?

MS. REMEROWSKI: I believe the tribal council sets priorities, but the allocation to the court system by and large is probably maximized to the greatest extent by the tribal council in its allocation. I think that the tribal council gives all that it can give to its court system.

MR. McDONALD: Like Rosebud?

MS. REMEROWSKI: My experience with Rosebud was that there was an honest attempt to provide all the funding that was possible for the court. Of course, then too there were justice funds for special projects in tribal court, including the juvenile justice system at that time, earmarked, for instance, for juvenile justice.

But let me give you an example. I almost hate to admit it because this is somewhat bizarre, but when they ran out of that money the tribe came to Legal Services at that time and said, "This is the situation." Legal Services for a period of 60 days became the tribal court--a bizarre situation. We had been the advocates in tribal court a few days before, and we became the court system, divvying up responsibilities between advocacy, judges, and clerks of the court. It was almost like playschool, but it was important.

We went through all the records of the court system at that time and found things that only happen when there is lack of funding and lack of training.

MR. McDONALD: This was some years ago.

MS. REMEROWSKI: Yes, that was in 1980.

MR. McDONALD: I understand the situation is much improved now.

MS. REMEROWSKI: Oh, I would hope so. But there is no assurance that that can't happen again with the kind of funding and the low funding tribal courts get.

MR. McDONALD: You mentioned enforcement of judgments. Is there a mechanism for enforcement of judgments in tribal court once a plaintiff obtains a judgment? What is the enforcement mechanism?

MS. REMEROWSKI: Well, for your ordinary civil proceedings, the enforcement mechanisms are much like they are in any other court system. For a proceeding against the tribe regarding civil rights, there is no enforcement mechanism.

Assuming somehow that an appellate court has found there to be jurisdiction for the action against the tribe, and assuming it has adjudicated the matter against the tribe, and the tribal council decides that it will not follow that order, there is no enforcement mechanism.

MR. McDONALD: But in general in the administration of justice, for example, at Rosebud, the police forces, the BIA police--do they go out and enforce that judgment? I know the sheriff doesn't do it.

MS. REMEROWSKI: Well, the enforcement would be done through the tribal police department, and they would follow the court's order.

MR. McDONALD: I have no further questions, Mr. Chairman.

MR. GILMAN: I guess we'll go to Mr. Pommersheim. Could you start by describing for us your background in Indian tribal justice?

MR. POMMERSHEIM: Yes. I worked on the Rosebud Reservation for 10 years from 1973 to 1983. For 7 of those years I taught at a community college there in the area in Indian law and criminal justice. For 3 years I was the director of Dakota Plains Legal Services, and for the past 2 years I have been teaching at the University of South Dakota Law School.

MR. GILMAN: Can you give us an estimate or an idea of the number of suits that have been filed in tribal courts in South Dakota alleging ICRA violations? Do you have any feeling for the frequency of that?

MR. POMMERSHEIM: I don't have any sort of very reliable numbers. I think over the years there have been a substantial number of suits filed and a substantial number of people who have talked about filing suits but believe it would be sort of fruitless to do so.

MR. GILMAN: Could you make a comparison pre-Martinez to post-Martinez? Do you think perhaps the number has risen or fallen or stayed about the same in tribal courts?

MR. POMMERSHEIM: This would be, I think, a guess for sure. I think in some ways, partially as a result of Martinez itself and just general education, I think there tends to be a growing awareness of individual rights on the reservation as a general matter, particularly in the context of the Indian Civil Rights Act. So I believe that more and more people are aware of rights that they believe they have under the Indian Civil Rights Act, and when they feel these rights have been infringed, they are, I believe, more and more interested in obtaining redress.

MR. GILMAN: Give us an idea of the frequency that you think cases alleging ICRA violations are heard on their merits in tribal courts?

MR. POMMERSHEIM: Well, drawing from my own experience at Rosebud, I would say that very, very few cases actually get to the merits.

MR. GILMAN: And on what grounds are they disposed of generally?

MR. POMMERSHEIM: This is somewhat simplifying it, but I think largely on two grounds. One, I think oftentimes they are simply deterred as a matter of politics, that it's not very politic to continue to pursue; and generally on the grounds of sovereign immunity, that you simply cannot sue a tribe.

MR. GILMAN: But sovereign immunity, I take it, is always at least the pretense for the political excuse? I mean, politics is never in and of itself a bar to suit; is it?

MR. POMMERSHEIM: Oh, in the real world it is. To me--and I don't know if my colleagues would agree or disagree--I think sometimes it's just a political reality that it's made clear that a lawsuit shouldn't be filed or should be simply dropped by the plaintiff.

MR. GILMAN: In general, what has been the policy of the tribes in regard to their immunity from suits under the ICRA in South Dakota?

MR. POMMERSHEIM: Well, I think generally they take the position--and I don't often think it's a well-thought-out policy decision--that they simply believe that sovereign immunity is a defense, and they often receive this advice from counsel and they assert that defense.

MR. GILMAN: Do you have any feeling for how that compares to the national scene, reservations across the country as opposed to just in South Dakota?

MR. POMMERSHEIM: I don't. My guess would be that it is exerted with relatively the same degree of regularity here in South Dakota as elsewhere, unless there are specific limitations that appear in tribal constitutions.

MR. GILMAN: If a tribe does claim complete immunity from suit, what ramifications does it have in terms of individual Indian rights on the reservations under the ICRA?

MR. POMMERSHEIM: Well, I think for all practical purposes that puts an end to it, with the exception of the available remedy of habeas corpus, which only really surfaces when a person has actually been detained. But for all other civil rights remedies, if a tribe is allowed to assert complete sovereign immunity, in every single instance, it seems to me the conclusion is there almost never can be redress on the merits for an individual ICRA lawsuit filed in tribal court.

MR. GILMAN: Do you believe that Congress or the Supreme Court intended that that be the case, particularly vis-a-vis the Martinez decision?

MR. POMMERSHEIM: I don't think so. My own view is Congress is generally not well-informed on Indian matters and continues to be unable to think through this issue. I think it is an issue which should have been addressed in the original legislation, which clearly it isn't in the legislation itself, and any examination of the legislative history also indicates that this issue was not addressed even in the legislative history, much less in the final enactment of the statute.

Even in the Martinez decision, it is not really directly addressed. It is my understanding of the case is simply that at some point in the opinion, there is language that says these matters can be litigated and that there is redress available in tribal court. But there is no language that specifically addresses the issue of sovereign immunity in tribal courts. And I think that's why that particular problem continues because you can read Martinez in any number of ways about the availability of sovereign immunity in tribal court action. And I think the number of problems we are talking about go back to the Indian Civil Rights Act itself and Congress' inability to construct a statute and think through what its actual ramifications should be in Indian country.

MR. GILMAN: Generally, you are asserting either a lack of capability or a lack of interest or something that prevented them from constructing an effective mechanism for protecting Indian civil rights. Why do you think that that initially came about and persists today?

MR. POMMERSHEIM: Well, I think there are two things. One, I think again when you look at the legislative history, when people in Congress start thinking about individual rights, they think of them as non-Indians enjoy individual rights in the State or Federal context. And it is clear that cannot completely work in the tribal context, and there was some



accommodation in the final enactment in terms of certain rights that clearly would not work. But in my belief there is not an adequate understanding of how individual rights exist in Indian country.

Second, there is no understanding of the interaction and the interrelationship between the Federal court system and the tribal court system.

And lastly, and I think one of the most difficult questions and problems, is the fact that tribal courts are fledgling institutions. In almost every case they are less than 50 years old. And part of the issue is the issue of institutional developments, that a court system that is essentially that young in most cases is going to find it very difficult to implement complex Federal and/or tribal enactments in a way that is going to be measured against Federal standards. Now, to an individual litigant, this kind of analysis doesn't hold much water, and justifiably so. But I think it is a reality that what we are witnessing in terms of tribal courts is the issue of institutional development.

MR. GILMAN: That being the case, do you think there are mechanisms available to encourage tribes to move in the direction of better enforcement of the ICRA?

MR. POMMERSHEIM: Yes, I do.

MR. GILMAN: What would those be?

MR. POMMERSHEIM: Well, one is that I think there is a middle course between saying that sovereign immunity is a complete bar and the tribes don't have to worry about the Indian Civil Rights Act, and the other extreme saying that they are mandated to enforce the Indian Civil Rights Act essentially like the Bill of Rights and the Constitution, exactly along those lines.

One, I think there can be a middle road--and actually some decisions prior to Martinez indicated this--that tribal courts ought to be free to determine the specific content of the rights contained in the Indian Civil Rights Act, that they don't have to, in terms of content, parallel what is in the Bill of Rights and other Federal enactments.

Two, I think it would be very helpful for tribes, perhaps with Federal direction, to frame tribal ordinances that spell out the limits of sovereign immunity in this particular area and the kinds of relief that will be available. I think a

justifiable fear sometimes of a tribal council, putting self-interest aside, is that tribal courts--if they can fashion any remedy that they see fit, they can bankrupt the tribe; they can bring the tribe to a halt. And I think, in some cases at least, this is a justifiable concern.

So the kinds of relief that is going to be available in tribal court I think should be spelled out, and I believe initially the kind of relief should be quite modest. For instance, I believe there should be a sharp limit on any financial judgments, perhaps very reasonable limitations on the kind of injunctive relief that is available. So I think a modest tribal ordinance, with some Federal support and direction about how to actually move forward in implementing the Indian Civil Rights Act in tribal court, I believe is a step in the right direction.

Also, there is a continuing need for resources to support tribal institutional development. There is a need for--and I believe it has increased in my time in Indian country--the expertise of judges in tribal court, a continued need for education, and a meaningful system of review of tribal court judgments, whether it's a tribal appellate court or a statewide tribal appellate system. I think that is also very seriously needed.

Also, because I believe it continues to be very unclear what the exact relationship is of tribal courts and tribal court judgments to the Federal system, I believe that that has to be clarified. For instance, if a person pursues an action in tribal court, under what circumstances, if any, may that judgment ultimately be reviewed in the Federal court system?

MR. GILMAN: Do you have any thoughts on under what circumstances it might be reasonable for that to happen?

MR. POMMERSHEIM: Well, again, I think that initially tribes should--and do in many cases--take some leadership in trying to set out the parameters for the relationship of tribal court judgments to the Federal system. And I think one of the very helpful things the Commission might do is to ultimately, based on hearings and your own investigation, is to make some suggestions along that line. Because I think more and more, with the growing knowledge and understanding of individual rights, I believe there is going to be continued growth in litigation in tribal courts. It is going to become more and more important, not only for individual litigants but the tribes as viable governmental institutions, to be able to understand and lead the policy discussion about what kind of

relationship they should have to the Federal system in general, but particularly between tribal courts and the Federal courts.

Because overriding this--I mean one can make sort of a simplified analysis saying they should just sort of plug in and the Feds should provide a new statute to tell them what to do. But here I think you run into serious problems of incursions into legitimate tribal sovereignty.

MR. GILMAN: So more or less, do you think the tribes are going to move in this direction by themselves with just government leadership or, I take it, because you don't seem to give the Federal courts any significant involvement in these cases, that you think the tribes more or less are going to be able to do this on their own initiative?

MR. POMMERSHEIM: I think so--if there is adequate Federal support, not only some policy suggestions but also the kind of financial support that is going to be necessary to implement these changes.

As Anita has mentioned, finances continue to be a very, very severe problem for almost all tribes, and without some access to meaningful funding to implement some of these changes that sometimes we somewhat glibly talk about--they cost money and they take time and they take education, and most tribes are not going to be able to generate that kind of money for these, over time, fairly massive changes.

MR. GILMAN: What about an addition of expenses for representation, at the expense of the government, of defendants in tribal courts, which isn't presently in the ICRA?

MR. POMMERSHEIM: I think that would be very helpful.

MR. HOWARD: Mr. McDonald.

MR. McDONALD: Mr. Pechota, do you see a need for greater separation of powers between the judiciary and the tribal council?

MR. PECHOTA: Yes, I do. Just from what has been said by the people on this panel, and certainly from my background and experience in this area, I don't feel there probably can be much dispute but that there is a separation of powers that needs to be explored by those tribes that don't have it at the present time.

MR. McDONALD: How would you suggest implementing that?

MR. PECHOTA: Well, I suppose you probably could impose it unilaterally on tribes by Federal statutes, but the chances of getting something like that passed by Congress probably would be very slim. I think in order to do that you are going to have to work with the tribal councils, and you're going to have to show them it's going to be an educational experience for them. You're going to have to show them how their tribal court and their present situation is benefited by that.

I think when you look at this problem with tribal courts that we have--and I think there is a problem here that needs to be addressed--it is very divisive. I think it holds back development of tribes.

For instance, when you look at it particularly from the viewpoint of the individual Indian on the reservation, if people don't have a good attitude about their court system, they don't have a good attitude about their tribal government. They tend to be pessimistic, and the reputation of that particular tribe and the tribal government is not very good.

This gets out into the off-reservation areas, and if the Indian people are saying this about their court systems, then the non-Indians who perhaps want to invest money in Indian reservations, contribute to their economic development, certainly have the same kind of viewpoint. Consequently, the major problems, like 80 percent unemployment, lack of finances because of no tax revenue, because of no development--those kinds of problems just tend to be aggravated, and it's kind of a vicious circle.

MR. McDONALD: Does the defense of sovereign immunity in effect deny individual members of the tribe the right to have their civil liberties enforced?

MR. PECHOTA: I don't think that there could be any doubt about that. When people get elected to the tribal council, I think there is an attitude that tribal rights, the right of this tribe as opposed to the right of the individual, is paramount. And probably that view is a good one because if it wasn't, tribal governments probably would not have existed up to the present time. But at the same time, that particular kind of attitude can be very counterproductive because of the reasons I set out and because it does deprive people of the right to have their cases heard on the merits in tribal court.

MR. McDONALD: If the ICRA were amended to require the tribe to provide lawyers for criminal defendants at no expense

to the individuals, would this ensure more respect for the ICRA, or would it add to the professionalism of the tribal court?

MR. PECHOTA: I think it would contribute to the development of tribal courts because I think that the more lawyers you have representing particular individuals, I think the more circumspect the court is in protecting the rights because the deprivations are being brought to their attention. I think just the independence and the vigorousness with which an attorney represents his client would be healthy and ensure that particular violations do not occur.

Once you have an attorney involved in a particular case, especially in defense of a criminal defendant, I think there is nothing that is going to stop the progressive development of a court system that would have that kind of resource available to it.

MR. McDONALD: Under the Indian Reorganization Act of 1934, a tribe may obtain a corporate charter from the Department of the Interior so that it may separate its corporate functions from its governmental duties. Such charters have a "sue and be sued" clause. However, the tribes have created subentities to carry out some of their functions and now assert that those subentities enjoy sovereign immunity from suit. Can you reconcile these two concepts?

MR. PECHOTA: The treatment of a corporate entity under the Indian Reorganization Act as opposed to the treatment of a governmental entity is very complex. And if you read the cases in that area, I think courts have trouble with that. When you have a corporate charter and that particular corporate charter deals with, for instance, economic development types of issues, and it has a "sue and be sued" clause in it, I think courts, if they can draw the distinction between the corporate charter and the governmental charter, which they haven't been able to do without a great deal of difficulty, have been willing to hold that that means what it says, and that's a waiver of sovereign immunity.

But a lot of times the distinction between the corporate and the governmental entity under the Indian Reorganization Act is not very clear because the tribal government involves themselves in something and really doesn't address the issue of whether or not they want to deal with having this entity be a corporate entity with that "sue and be sued" clause, or whether or not it's a governmental entity. It is a difficult kind of thing to reconcile.

MR. McDONALD: Well, assuming that it's a corporate entity, what is the theory?

MR. PECHOTA: I think if it's a corporate entity and they indicate they want it to be a corporate entity under the Indian Reorganization Act, then the "sue and be sued" clause is viable, and that corporate entity can be sued under that clause.

MR. McDONALD: Thank you. And what is the status of the sovereign immunity defense now at Rosebud? Are you familiar with it?

MR. PECHOTA: Well, the sovereign immunity defense is strong at Rosebud.

MR. McDONALD: There is a case, I believe, before the court of appeals.

MR. PECHOTA: I am not aware of that particular case.

MR. McDONALD: It's Dubray v. Rosebud Housing Authority.

MR. PECHOTA: I'm not aware of that particular case.

MR. McDONALD: You don't represent the tribe?

MR. PECHOTA: I'm not representing the tribe, the housing authority, on that particular case.

CHAIRMAN PENDLETON: Are you through, gentlemen?

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: Mr. Destro, you have a couple of questions? I have one or two.

COMMISSIONER DESTRO: I have just one general question. All the witnesses have spoken about the changes that could be made and the role the Commission might play in all of this. In my opening remarks I commented that I'm interested in this issue, not only for itself but in the context of the general question of Indian civil rights.

How would the witnesses, anyone who cares to comment, talk about how this fits generally into the question of Indian civil rights, if we were going to be making suggestions to Congress and the President as to how to approach the question in general?

When I listened to Mr. Pommersheim's comments, the message I was getting was Congress really hadn't thought this through, they thought about it in the context of civil rights generally. How would you suggest we put it in context?

MR. HOGEN: Commissioner Destro, I'm not sure this will be exactly responsive to your question, but it seems to me that throughout the whole American system there is nowhere else where the control of the local unit of government has more direct or sweeping impact on the people of that community than in Indian country. That is, when we have a change in tribal government on a particular reservation, that very well may mean a change in the employment for a majority of the people that are employed there. Consequently, how that government deals with the civil rights of its citizens is more important there perhaps than anywhere else.

When the government came out to the Indian people in 1934 with the Indian Reorganization Act and proposed these model constitutions, I guess, in my opinion, they didn't think through this business about protecting those civil rights as they should. They didn't think about separation of powers as they should. And they maybe stuffed down the throats of the tribes the systems that we now see in place.

Now we, the government, are going to go back to them and tell them how to straighten it out, I guess. I do think it needs some straightening out, and I do think that the White dissent in the Martinez case that basically said the very institution that we need to protect the people from that we are leaving it in the hands of is a valid criticism and a valid question.

I think Congress needs to be aware of the way things are working in Indian country with respect to how pervasive the impact of tribal government and tribal courts is on the people of those communities, and that they need to be sensitized to the problems that exist. Exactly how or what that message ought to be, I'm hopeful the Commission will figure that out and communicate that to Congress.

MR. POMMERSHEIM: If I might to give one example that I'm thinking of, because I think every one of us--we're not saying anything new about this notion of separation of powers. My concern is that it tends to be bandied about like a panacea, that if you in fact have separation of powers, everything is going to be fine, and I simply don't believe that is the case. Because arguably, if you have separation of powers, if I were to be the devil's advocate, you are arguably shifting power

away from the tribal council to the tribal courts where they could abuse it, and we basically would have the same problem.

So if the Commission, after hearing testimony, thinks that separation of powers is a concept that should be pursued, hopefully it could be pursued with some content in it in terms of how tribes might look at this and how the Feds might actually look at this. For instance, if you're going to have separation of powers, what, if any, limitations are there going to be on tribal courts? Are they going to have full access to injunctive relief that arguably will bring the tribe to a standstill?

So I think the separation of powers is an important concept, but I worry a little bit that it becomes a panacea, that everyone thinks as soon as a tribe has separation of powers, everything will be corrected. And I can foresee almost the exact opposite.

So I think when we think and talk about separation of powers beyond the action as a constitutional element, we have to think of it as a matter of policy and how these institutions are going to function and improve the situation, as Terry suggested, both for the tribe and for individual tribal members.

So I think when we think about the separation of powers, we have to think a lot more carefully about exactly what we have in mind because, for most of us, I think we think of it the way it exists in the Federal system after 200 years at it where it seems to work reasonably well, but that is certainly not the case at the tribal level. I would hate to see, myself, the Commission recommend separation of powers with no suggestions to some of the nuances that I believe, and I think others believe, are actually involved in this whole area.

COMMISSIONER DESTRO: Let me just see if I can refine the question a little bit, and please feel free to make whatever comment you want.

The sense that I am picking up is we are dealing with a rather unique structure, and not very many people outside of Indian country really understand it. It seems to me that after Martinez the court says you have these rights, but unfortunately some of the people who are supposed to enforce them are the ones who are left to do it for you.

My sense is that we have to have a sensitivity or begin to convey a sensitivity or a context of all this to Congress and the President, so the rights can be taken seriously both inside



Indian country and outside Indian country. We can talk in terms of separation of powers, but I think the basic lack of understanding is how these rights work in practice and how they are perceived both inside and outside.

MS. REMEROWSKI: I believe that a lot of the uniqueness of tribal government was taken into consideration in terms of the limitation of the kinds of rights that would be enforced under the Bill of Rights.

Now, if you take that sensitivity--and let's assume for the benefit of the doubt that there was that sensitivity--and then you look at the complicated matters that tribal courts are to address now--we are not talking about family disputes or necessarily disputes between neighbors, and we are not talking about disputes that may have been appropriate for a more informal judicial system.

We are talking now about very complicated land matters, for instance. Rosebud has a potentially powerful land organization, Tribal Land Enterprises, that essentially is a corporate entity that issues shares in land. It is extremely complicated, and questions in terms of property come in there.

Indian child welfare is a complicated statute to enforce.

Tribes have lost housing money to build houses on the reservation because of an inability to get in motion to collect rents and to enforce housing regulations and enforce repairs on the housing authority, and whatnot.

So we are talking about a system, regardless of the cultural uniqueness, for instance, in terms of disputes between individuals, religious connotations, that really covers some ground that is in some ways much more complex than what the usual county judge will see over in Winner, South Dakota.

It is unique, but let's not make it unique simple. This is unique complex. So we are not talking about unique sacred--I'm trying to get to my point--something you have to tiptoe around. This is unique complex. This is a system that is dealing with issues that would boggle the minds of most of the judges in this State.

So when you're talking, too, about, for instance, providing the right to counsel, think what that will do first of all to the tribal budget. Also, if that right, let's say, is enforced by Congress without thought to if you're going to have some full-time attorneys there, without the money for full-time

judges, without the judges to handle the caseload that, for instance, hopefully attorneys will be able to handle, again we are just creating more problems.

Just one other thing I want to mention, too, in terms of your perspective, when you go back with this, in terms of Indian civil rights. Congress has to understand, I think, and appreciate the importance of being firm on this issue and not being timid. Whatever has to be done has to be done with firmness, not timidity, about harming tribal government.

This system, these violations of civil rights--and let's say if we can't tick off the violations, we know there isn't a system to enforce civil rights. That is going to be the undoing of tribal government, and we already see it's an undoing in the sense of people's confidence in their tribal governments.

Land claims money has come to individuals. If people had confidence in a tribal government in enforcement of their property rights, we might be seeing more cooperative activity with people pooling monies, giving them to the tribe to manage as a cooperative group. We don't see that.

I heard someone from the Blackfeet Tribe in Montana talking about the lack of confidence people have in their tribe and tribal court and wishing that they would have that confidence and be able to pool some of these oil monies, claims monies, coal monies. So it can be the undoing.

And the other thing is to remember that the individual Indian person does not have a lobby in Washington. There is no NAACP for Indian people. There is a Native American Rights Fund that primarily represents tribes. The lobby in D.C. is a tribal lobby.

And also consider the press on the reservations. I urge you to look at that. Where are the watchdogs of civil liberties that you have in most places? There really aren't the watchdogs there on the reservation, and I think that is important to look at in the context of your approach.

CHAIRMAN PENDLETON: Just let me ask a couple of questions that probably are not as detailed or as technical to the point as the discussion has been. Do you really think Congress gives a damn about the ICRA?

MR. POMMERSHEIM: No.

CHAIRMAN PENDLETON: I just want to know. I hear this ICRA, and we are supposed to go back and do something. Do you really think it gives a damn about the ICRA?

MR. PECHOTA: No, I don't think it does because of what Anita was talking about, the lobby in Washington. There is not a lobby there.

CHAIRMAN PENDLETON: There is no real serious Indian civil rights committee or select committee on tribal justice; there is none of that?

MS. REMEROWSKI: There is a tribal lobby in D.C., not an individual lobby.

CHAIRMAN PENDLETON: But do they come out here to talk to you about going back there? Just a lobby in Washington, D.C.?

MR. PECHOTA: No.

CHAIRMAN PENDLETON: Thank you. When was the last time a Congressman has been to one of these shows, dog and pony shows, if you want to call it that? Has anybody been here to ask how people feel? There are junkets every year at the end of a session. They go all over the world to see how conditions are. Has anybody been to the Indian reservations, anywhere you know of, any Congressman who says, "Here are the conditions, and I want to go back and do something about this"?

MS. REMEROWSKI: They come to the reservations, and there are a lot of big problems on the reservations that make rights seem kind of ethereal. When you're worried about putting food on the table when the Congressman comes, you're talking about the food on your table and employment, and civil rights are probably the last thing on your list.

Let's face it. Congress has been timid. Congress does not want to offend tribes. And no one here at this table wants to necessarily feel that they would be responsible in any way for the downfall of tribal government, for the Congress to look at this whole situation and just throw up its hands and say, "This is hopeless," or "This is too expensive to have a working judicial system on the reservation, and therefore we won't have a reservation anymore; we won't have tribal government."

That is a real fear, and that's why you see the timidity of Congress and tiptoeing around this whole problem.

MR. HOGEN: That is the nature of our system to a degree, and in my view civil rights are rights that individuals need protection from their government in connection with. And it is the tribal governments that have the high profile in Washington that seek funding to build hospitals and run school systems and run law enforcement entities and so forth. But the individuals don't have their spokesmen there to talk about their individual rights.

Fortunately, the forefathers of the national republic felt that the Bill of Rights was the threshold, and that was there to start with. Now we've got the tribal systems, and we've got the Indian Civil Rights Act on the books; we really don't have a valid forum in which to enforce those, in my view.

CHAIRMAN PENDLETON: Let me ask just one more question for the sake of time, and I think, Mr. Pommersheim, this might come in your area. Certainly others are allowed to respond.

I am trying to get some understanding here now. In a city government there is the city council and there's the court system, and there's the planning commission, and in my town there is the port commission, and then the State comes along with some other commissions and what have you.

I understand the tribal council serves all those purposes in one council. Does it have committees to do certain kind of things? Is that correct or not correct?

MR. POMMERSHEIM: Generally, within the council, like any legislative body, they have their own committees. And then certain functions that the tribe provides--usually because of certain Federal requirements and Federal funding, there are semi- or quasi-independent organizations, like there's a housing authority on the reservation.

CHAIRMAN PENDLETON: Is that independent of the tribal council? There are housing authorities in towns that are independent of city councils. Port commissions are usually independent of the influence--they are appointed by a city council, certainly, or that may be a single-purpose district--it's a multipurpose activity but a single-purpose district where you appoint people to do a specific function. But you're saying that those are not independent or quasi-independent groups at all?

MR. POMMERSHEIM: No, the housing authority is.

CHAIRMAN PENDLETON: It's independent of the tribal council?

MR. POMMERSHEIM: Yes.

CHAIRMAN PENDLETON: Now the reason why I ask that: What is the impact of the tribal council system on the economy or economic development of a reservation? That is, if the tribal council is the planning council--the planning commission as well as the tribal council--and there is a piece of land that you want to develop--I see downstairs in this building there is the small business office. Land in most places is equity, or in a sense you can borrow money against that land and do certain kinds of things with it. Can that be done here? Who grants the permission to use the land as equity? How does that begin to impact upon reducing the unemployment, or I should say increasing the employment rate of people? How does that move toward self-sufficiency? Is the system an impediment to self-sufficiency, or does it help with self-sufficiency?

MR. POMMERSHEIM: I think there are several questions there.

CHAIRMAN PENDLETON: I hoped there would be. I was trying to make it not too convoluted.

MR. POMMERSHEIM: In terms of land on the reservation, this is somewhat simplified but I think accurate, is a double-edged sword. There are generally substantial amounts of land available on reservation owned both by the tribe and individual people. The problem when you raise the question about equity, that land is held in trust by the Federal Government, and as a general matter it is impossible to borrow against because the borrower, as a general matter, cannot foreclose on that property. So many times both the tribe and particularly individual tribal members will have land. If they are interested in starting a particular venture, they cannot simply go to the bank and say, "I have 160 acres. I want to borrow on that."

The bank says, "Well, this is in trust. I can't really foreclose on it. It's not meaningful collateral. You go elsewhere."

And then people are forced generally to come back into the Federal system to try to get money, which has tended to be difficult.

CHAIRMAN PENDLETON: I guess that leads to a second question. What you're saying is that the very government that

wants to protect the civil rights in a sense and wants to help create opportunity on the one hand, takes it away on the other hand. Is that an accurate assessment of what you're saying?

MR. POMMERSHEIM: In many cases, yes. I think the problem is that the Federal Government does not now and has never understood what its responsibilities or obligations to Indian people as individuals are or to Indian tribes. One only has to look at the broad outlines of Federal policy throughout our history to see that that has been very dramatically the case.

And for myself, I just offer a cautionary note in making recommendations, that recommendations flow from some understanding of this history because, as Anita and other people have indicated, it is a complex history of the Federal relationship to Indian tribes, on the one hand, and the Federal relationship to individual Indians, on the other hand, and thirdly, the relationship of the tribe itself to its own tribal members. And that whole relationship is foreign to most non-Indians wherever you find them, whether you find them in Winner, South Dakota, or you find them in Washington, D.C. They simply do not understand that relationship because it is not in their educational experience.

CHAIRMAN PENDLETON: So if it were arranged to bring some Defense Department operation to a reservation and you had to have some land to build a plant, it would be very difficult to build a plant--not just from a Federal point of view, but what I hear Mr. Pechota saying, it is how the tribal council begins to see how that is going to work. Am I right or am I wrong?

MR. PECHOTA: Yes, I think you're right.

CHAIRMAN PENDLETON: You see where I'm going.

MR. PECHOTA: I sense your question was: Does the tribal council make all the major decisions for the government of the tribe?

CHAIRMAN PENDLETON: Right.

MR. PECHOTA: And I think without a doubt that is right. For instance, the example that you gave, if there was a major defense--or there was somebody who was interested in doing some investment on the reservation and needed some land, the tribe is powerful enough so that they could go and they would find the land to do it if they felt that that was a good deal for tribal government.

CHAIRMAN PENDLETON: What about Mr. Pommersheim's comment that the land is in trust and you have to ask the government? Can you get it untrusted or detrusted or something?

MR. PECHOTA: I don't think tribes would ever take land out of trust. That is almost a bigger taboo than waiving their sovereign immunity. They would go to the Bureau and they would say, "We need this land." And the Bureau most of the time hops when a tribe says they want to do something. So essentially they would try to work with the tribe to free up any land that they wanted.

CHAIRMAN PENDLETON: So then the "we" in this case would mean that the beneficiary of that kind of an operation would be the tribal council and not the individual who might want to start a business. Are you saying to me that because of this operation, that that is an impediment to self-sufficiency?

MR. PECHOTA: No, I don't think you can say the benefits would only flow to the tribal council. I don't think that is true at all. The benefits would flow to--anything that would help alleviate an 80 percent unemployment rate is going to benefit the tribe as a whole.

CHAIRMAN PENDLETON: If any of you would like to take whatever comments I have made and extend the remarks at some point and give us a comment on it, we certainly appreciate it. I'm just trying to find out how you do some things that move this off ground zero to some other point down the line. We keep going around and around and around with the problems, but are there any solutions?

Thank you very much.

We'll take a break for a couple of minutes, and if we could assemble the next panel, that involves Krista Clark, Elma Winters, Robert Brown, and Jerry Matthews.

[Recess.]

CHAIRMAN PENDLETON: May we please reassemble so we can start the second panel.

[Robert Brown, Jerry Matthews, and Elma Winters were sworn.]

CHAIRMAN PENDLETON: Ms. Miller.

MS. MILLER: Mr. Chairman, perhaps we should wait for Krista Clark.

CHAIRMAN PENDLETON: When she comes, I'll swear her in. Oh, she is coming now.

[Krista Clark was sworn.]

ADVOCATES

Testimony of Robert Brown, Public Defender, Rosebud Reservation; Krista Clark, Attorney, Dakota Plains Legal Services; Jerry Matthews, Counsel, Pine Ridge Public Safety Commission, and Former Chief Judge, Pine Ridge Tribal Court; and Elma Winters, Lay Advocate, Pine Ridge Reservation

MS. MILLER: I would like to start by asking each panelist to state their name, occupation, and address.

MR. MATTHEWS: My name is Jerry Matthews. I am an attorney in private practice at Pine Ridge, South Dakota.

MR. BROWN: My name is Robert Brown. I'm the public defender for the Rosebud Sioux Tribe, and my address is Rosebud, South Dakota.

MS. WINTERS: My name is Elma Winters, and I'm a tribal advocate for the court at Pine Ridge.

CHAIRMAN PENDLETON: Could you please bring your microphone a little closer to you so they can hear in the rear of the room.

MS. CLARK: My name is Krista Clark. I'm the managing attorney of the Office of Dakota Plains Legal Services in Eagle Butte, South Dakota.

CHAIRMAN PENDLETON: Thank you.

MS. MILLER: Let's start with Ms. Clark. If you could just give us a little description of your background and the extent of your experience in the tribal court at Cheyenne River Reservation.

MS. CLARK: I have practiced law on the Cheyenne River Reservation since 1979. After I graduated from law school at the University of Iowa, I went to the Cheyenne River Reservation.

Our program is a legal services program funded by the Legal Services Corporation, and our practice involves work with



low-income persons on the reservations, primarily Indian people. We practice in tribal court and deal with members of the Cheyenne River Sioux Tribe where I work on a daily basis. We also practice in State and Federal court and have an administrative practice.

I would say that, of the work that I do, between 50 and 75 percent of that work is in tribal court and probably 90 to 95 percent of the work is with members of the Cheyenne River Sioux Tribe, and then members of other tribes who come within the jurisdiction of the Cheyenne River Sioux tribal court.

MS. MILLER: How long have you been there?

MS. CLARK: Seven years.

MS. MILLER: Ms. Clark, could you just start by maybe giving us a general opinion about whether you think the tribal courts at Cheyenne River are providing effective enforcement of the Indian Civil Rights Act provisions.

MS. CLARK: The tribal court system, to give you a little bit of an overview of how it works on Cheyenne River--I really do want to emphasize that the discussion that I will participate in here today only pertains to the Cheyenne River Reservation, and that each of the reservations in South Dakota has their own tribal constitution and their own law and order codes which they enforce separately. I am not familiar with the details of the law and order codes and the constitutions on other reservations, and they are dealt with separately, although sometimes when you're dealing with courts of appeals you have some interaction, but that is not always the case.

On the Cheyenne River Reservation, the court system is divided on the lower level into three areas: the civil court, the juvenile court, and the criminal court. The Cheyenne River Sioux tribal court also has a court of appeals which is strictly intended to hear appeals from those three areas of the lower court.

It is very difficult to generalize about the tribal courts. In the 7 years that I have been there, I have been through three or four tribal administrations. As was discussed in the previous panel, when tribal administrations change, it is very common that everything in tribal government changes, including the tribal courts. And that's what's happened at Cheyenne River. The judges have changed. The appellate court, although it has been codified that it's necessary, has been in existence only part of the time that I have worked on Cheyenne

River. Part of the time the Cheyenne River tribal court has been part of what in South Dakota is known as the Intertribal Court of Appeals. They withdrew from that for complicated reasons and now have their own appellate court system.

My perception of the way the Indian Civil Rights Act is viewed on the Cheyenne River Reservation is that the tribal appellate court has a very clear idea of what the law is. Two of the appellate court judges are law trained. They are members of Indian tribes in South Dakota and are very knowledgeable of the act and what it means. The third member of the appellate court is not law trained.

All of the lower court judges on Cheyenne River--none of them are law trained, and in my experience there has never been a law-trained judge. And when I say that, I mean someone who has had extensive background, either because they have a law degree or have spent considerable time studying the law. They are not law trained. And my perception is that the lower court judges really do not have any idea what the Indian Civil Rights Act means. The provisions of the act are generally codified into tribal law, which the judges have general ideas of how they are expected to enforce those provisions, but I don't think when a matter comes before them that they really understand the Indian Civil Rights Act is a Federal law which they may have some duty to enforce.

The primary area on Cheyenne River where we have a problem, I believe, with the Indian Civil Rights Act is there are widespread violations of people's rights to due process of law under the Indian Civil Rights Act resulting in some equal protection problems, but it is primarily a due process problem. That also involves problems with what was discussed in the previous panel about separation of powers and how the powers of the tribal court are either ignored or invaded by the tribal government when it feels as though it is its prerogative to get involved in a matter.

MS. MILLER: Would you say the lack of due process, then, is the major systemic problem in terms of civil rights violations on the reservation?

MS. CLARK: Within the experience that I have, it is important to emphasize that our program is a program that is funded primarily to deal with civil problems, and on the Cheyenne River Reservation the tribe has seen fit in the last 3 to 4 years to not even fund the public defender's office. Therefore, unless an individual has funding of their own, they are many times--I would say in at least 50 percent of the

cases, if not more--without someone to assist them in criminal matters. So there may be very widespread criminal problems. I suspect that there are. But our office has very limited contact with that.

MS. MILLER: If we could just look at the civil side right now, could you describe a few examples, perhaps, of the kinds of problems you have seen on the civil side, civil rights violations?

MS. CLARK: The major kinds of problems that come to our attention are situations where--well, a hearing may be held. Petitions would have been filed. Parties would have been notified. A hearing may be held. Parties will know the outcome of that decision. The disgruntled party may go to another tribal judge on the same level--again you have the criminal court, the juvenile court, and the civil court. They may go from the juvenile court to the civil court and ask the judge to review that decision. It is not uncommon for that to happen and have a judge issue a new order, fully invalidating the order that had been issued by the first judge who had held a full hearing and heard all the facts and heard all the witnesses and knew the circumstances.

MS. MILLER: When hearings are held, will they be full hearings with both parties present?

MS. CLARK: Well, it's very difficult to generalize. There are many instances in which that doesn't happen. The way our program gets involved is when someone feels as though--for example, if a hearing were to have been held and a party was not notified, but the court somehow believed that that person should have been in court and wasn't there for whatever reason, the injured party will then contact us and want us to assist them in having an order vacated or having a new hearing obtained, or appealing the decision if that's all that is available to do.

MS. MILLER: How often would you say that ex parte orders are granted in civil court?

MS. CLARK: It depends on what kind of situation you're talking about. It's a very, very common practice in Cheyenne River for persons to come to the tribal court, either the juvenile court or the civil court, in cases involving custody of children. And even though the tribal code requires that there be sworn statements or affidavits before custody issues are determined, it is very common for a party to ask a judge to issue an order granting custody of the child or children and

have the police then be instructed to go and remove the child from one person's custody and place the child in another person's custody. That happens very frequently.

In other instances, it is not uncommon for a party to come to one of the judges--and it isn't necessarily defined as to which judge they would come to--to plead their case before the judge without any affidavits or sworn statements, put their claim to the judge, and the judge to be convinced that something needs to be done, that there is perhaps immediate and irreparable harm, and to issue an order that will have a major impact on the person's rights or their property because the judge finds that's the case. And in most instances, in my experience, that is in violation of what is in the tribal law and order code, which is authorized by the tribal constitution.

To say how commonly that happens--people will contact us when they feel as though they have been deprived of a right in circumstances such as that. And I would say that maybe once every week, couple of weeks, that might happen. It might happen more frequently.

Our position is that we examine the circumstances and figure out what we can do to assist them to bring things back to the status quo.

CHAIRMAN PENDLETON: Could you please use your microphones some more. The people would like to hear what you are saying. If you have difficulty in the back, please raise your hand and we will ask the speakers to use their microphones.

MS. MILLER: Can everyone hear?

MS. CLARK: I'll try to speak up, Mr. Chairman.

CHAIRMAN PENDLETON: Into the microphone, if you can, please.

MS. MILLER: Ms. Clark, do parties who believe that they haven't gotten justice in tribal courts ever go to the council for relief?

MS. CLARK: That is a very common practice. It happens in several ways. One situation would be where people would initially go to the tribal council with a problem that we may view would be something that would be more appropriate to be in the tribal court, and they would plead their case to the tribal council and ask the council for relief. And sometimes--well, many times, it is granted, I would say, because they tend to be

quite sympathetic to persons who come to them initially and plead their case. It is not uncommon, and it is very acceptable for persons to come and appear before the tribal council when it meets on a monthly basis to discuss whatever problem that they might have.

Another way the tribal council hears matters that deal with the tribal courts is an aggrieved party that has had a full hearing in the tribal court will often, if they don't have faith in the court system--if they have lost, for example, in the civil court--will take their case before the tribal council and ask the court to either suspend the decision or reverse the decision. The tribal council has done that in the past. I wouldn't say it's a terribly common practice. I say that only because it is not done very frequently. But my experience has been that when people go to the tribal council and ask them to assist in helping them achieve a remedy which is more similar to what they had requested in the court, the council is very receptive to that.

Another circumstance in which the tribal council hears cases is that it is also possible and has happened that the tribal appellate court has had its decisions reversed by the tribal council. The particular instance which I am thinking of is one in which the tribal appellate court had ruled that under the Indian Civil Rights Act, the tribal government was not immune from injunctive and declaratory relief in tribal court, and the response of the tribal council to that decision was to in effect--well, the language they used was that they were going to wipe out that decision.

While I am mentioning that, I will make known to the Commission that when our office became aware of that fact, we were particularly interested in whether or not individuals can sue under the act in tribal court. I contacted the tribal appellate court to ask the appellate court what it thought about what the tribal council had done so we could have some sense of how we should advise individuals as to whether or not it would be a wise use of our program's resources to continue to pursue matters of that nature in tribal court.

And the tribal appellate court would not respond. And there hasn't been anything subsequent to that to give us any idea as to whether or not the tribe still believes there is no injunctive or declaratory relief in the Cheyenne River Sioux tribal court.

MS. MILLER: How recent was this overruling of the appellate court decision?

MS. CLARK: It was in August of 1985, I believe.

MS. MILLER: Within the community, is everyone aware that they have this right to appeal to the council? Or is there only a select few? Or what percentage of the community has that?

MS. CLARK: Oh, I think everyone is aware of it. My experience on the Cheyenne River Reservation is that almost everyone is very astute about tribal courts. They know how it works. They know who has the power to help them achieve what they want to achieve. They know that if they can't get what they want in tribal court or if it's not an efficient or expeditious way to get what they want, there are other remedies that they can seek. It is something that everyone knows, not necessarily juveniles, but everyone who is an adult who has had some experience in tribal government.

MS. MILLER: Let me ask you a question about the criminal process. You have had some experience on the criminal side as well as civil. What problems do you see on the criminal side?

MS. CLARK: Under Federal law, under the regulations that govern the Legal Services Corporation--again, our program is primarily funded to provide civil assistance to low-income people, although the regulations that govern the Legal Services Corporation specifically exempt programs from the requirement that they be appointed to assist people in tribal court. Nevertheless, for the most part our program has taken the position, because of our limited resources and the number of people that need assistance on reservations, that we not help people in tribal court unless we either have a contract with the tribe or are appointed to do it.

Mr. Brown is a public defender in Rosebud. Many of the reservations have public defender systems. In Cheyenne River, in the 7 years that I have been there, they have had several public defenders, but within the last 3 or 4 years, primarily because of funding problems, the tribe has chosen not to have a public defender. So the way it works, as I understand it, is that people will either contact our office personally or ask the court to appoint us to assist them or ask a lay advocate to assist them in tribal court.

One of the commonest ways that we have contact with the tribal criminal court is that someone will call us up--and this happens, I would say, at least once every 2 weeks and maybe more frequently than that--will call us up and say that they

have just gotten in contact with a friend or family member or just gotten to a telephone, and they have been incarcerated in the tribal jail for sometimes as many as 2 weeks, sometimes less, but as much as that. They don't know why they are there; they have never seen any piece of paper which shows them why they were picked up. It might have been on something which is codified in the tribal law of the Cheyenne River Reservation as a temporary commitment. But they don't know what that means. They have never appeared before a judge, and they want us to assist them in dealing with that problem.

What we frequently do is call up the tribal prosecutor and say, "What's going on? Do you know who this person is? Do you know why they are there?"

The prosecutor will call back 10 minutes later and say, "We don't have anything on this person. We'll let him go."

That's all we can do. There is no remedy beyond that. We have tried to deal with these kinds of problems with the tribal law and order committee, which is a committee of the tribal council which is responsible for dealing with the administration of the tribal police department and the tribal criminal court system. We have tried in the past to work with them to see that these kinds of things don't happen, but they continue to happen.

We also had a contact within the last couple of weeks with a juvenile matter, and I think that this is even much more egregious and outrageous. It was an instance in which the mother of a child had contacted a tribal official, it was either the tribal police officer or tribal prosecutor, and asked that a juvenile individual, a 15-year-old juvenile who the mother was having trouble with, be incarcerated for--it was supposed to be for a couple of days or perhaps over the weekend. The mother for unexplained reasons never got back to the persons who had been responsible for incarcerating this 15-year-old, and she sat in the tribal jail for 10 days. There was never any piece of paper that was filed in that matter. She never appeared before anyone.

The juvenile judge didn't know why she was there. The criminal judge didn't know why she was there. She finally was released after a police officer, who was aware of the fact that she was incarcerated, finally explored the matter and found out this person had been more or less abandoned in the jail and got the criminal judge to release the juvenile to his custody. As far as I know, this individual is still in the custody of the officer.

That is a situation where nobody would bother to contact us about it so that we might assist in that situation, and the juvenile--I don't know; either didn't know what to do, accepted her fate--I don't know.

But in my experience it is not a terribly uncommon thing to occur when parents, for whatever reason, feel as though they don't have control over a juvenile.

By the way, there aren't any facilities for juveniles on the Cheyenne River Reservation that can deal with those kinds of problems, and we have been in litigation in Federal court to try to do something about that for a period of years and still haven't had it resolved.

MS. MILLER: To what extent does Legal Services litigate ICRA issues, or in what context would you do that?

MS. CLARK: Well, I think primarily they have to do with due process problems. One thing that I would like to mention to the Commission is that, particularly on the Cheyenne River Reservation, within the last 4 or 5 years there have been very, very serious problems, I believe, of people's civil rights being violated in the context of elections and political disputes. And our program has a policy whereby we are not allowed under our program's rules, and also under Federal regulations, to be involved in those kinds of matters. My experience has been that many people who find themselves having their civil rights violated by tribal governments in political and election dispute types of problems, who are low income, find themselves completely at the mercy of the tribal governments in very outrageous circumstances, where our program is absolutely prohibited from assisting them and where there really are no remedies.

The Runs After case was mentioned on the last panel. That was a case that came out of the Cheyenne River Reservation. The case was finally resolved, but the facts were not such that the civil rights problems that exist were not ever appropriately addressed either in tribal court or by the tribal council. And my belief would be that it would be very possible for the circumstances which brought about that case, where individuals who were never given an opportunity to respond to charges brought against them by the tribal council, who were barred for life from participating in tribal affairs or holding tribal jobs--those civil rights problems were never properly addressed by any tribal forum or any Federal forum.



And as I say, although I did not participate in that matter, my belief is that there is no reason to think that those kinds of circumstances will not arise again. And they have arisen on other reservations.

I would like to add at this point, what Mr. Hogen was saying about the Martinez decision, the fact that people are asked or are mandated under that decision and under the interpretation of the act to go back to the very people who have violated their rights and ask them not to do it is absolutely ludicrous. It doesn't make any sense at all.

Some very serious things have gone on in reservations, and I think the Commission and Congress need to address those matters. I really don't think the Supreme Court knew what kinds of things could arise on some of these reservations when they made that decision.

MS. MILLER: Thank you. I'm going to end my questioning right now. I do have more questions, though, if there is more time later on. Thank you.

CHAIRMAN PENDLETON: Thank you. Mr. Howard.

MR. HOWARD: Mr. McDonald.

MR. McDONALD: Thank you. The next panelist is Elma Winters, a lay advocate from Pine Ridge. We will begin by asking Ms. Winters how she became a lay advocate and what a lay advocate is or lay attorney.

MS. WINTERS: Well, the way I interpret a lay advocate is myself. I represent people who can't afford an attorney, and it is not that I am smarter than the people, but I guess I am able to talk for them and get their point across in court. That is my definition of a lay advocate.

MR. McDONALD: I see. Did you ever feel at a disadvantage because of any lack of legal training?

MS. WINTERS: Definitely. But the only thing I can do is my best in the courtroom. But it is a great disadvantage because I am not trained as a lawyer.

MR. McDONALD: And there are no public defenders now?

MS. WINTERS: No, there is not a public defender in the courts of Pine Ridge.

MR. McDONALD: Can you tell us the reputation of the police in your community?

MS. WINTERS: Well, working with the court in the last 14 months, I have many complaints from clients that I have represented, and there are still some cases that have not gone to court. Well, I might as well say there is very little respect for the police officers in Pine Ridge, and it is due to lack of training and lack of--well, you might say they don't know how to go about investigating matters.

There is police brutality. They are prejudiced. Some people go to jail. And if you're friends with them, you don't go to jail. And the very indigent are thrown in jail all the time for DC. The major crimes are never investigated. Nothing ever comes to court.

MR. McDONALD: What is DC?

MS. WINTERS: Disorderly conduct. People get 30 days for DC in the Pine Ridge court.

CHAIRMAN PENDLETON: What do you do to get a DC? What is that like? Excuse me, Mr. McDonald.

MS. WINTERS: Oh, you might be drunk on the street or in a fight, you know. But usually it's just being drunk that's disorderly conduct. The reports on these DCs are always "slurred speech," "staggering," and these people are sometimes incarcerated for 30 days for that.

Some of the people complain about the police officers picking them up one day, and the next day being drunk themselves somewhere where people see them drink. Also, people are complaining that the evidence is taken from them; it is never turned in to the evidence room; it is never brought into the courtroom.

MR. McDONALD: Is this contraband liquor violations?

MS. WINTERS: Yes, yes.

MR. McDONALD: The alcohol-related violations, then, play a major role in the criminal court?

MS. WINTERS: Yes; yes, they do.

MR. McDONALD: What percentage, for example, of your clients are involved in alcohol-related offenses?

MS. WINTERS: I would say about 85 percent.

MR. McDONALD: Please continue.

MS. WINTERS: Also, I have had clients tell me that the police officers take confiscated goods--for instance, I will give you one example. They take confiscated bikes and give them to their immediate family. Also, I was told by a client that police officers were involved in a murder case and that records were destroyed in this one particular district, and when the cops found out that these people knew about it, the pressure was put on them to the extent where they were kind of ousted off of a couple of boards in that district. One was the review board and the other was the commission.

MR. McDONALD: What about service of process for your clients' witnesses? Can you tell us about that?

MS. WINTERS: It is very poor. Half the time people don't get served subpoenas that they are supposed to appear in court. I have one that I have been to the courtroom six times, and each time we have to wait because one person wasn't served.

I guess it's the police officer's responsibility to serve these subpoenas to the people, but that service is very inadequate, and it is an expense on people to have to come back to that court six times in a row and still we have to go again because one person was not served the subpoena.

MR. McDONALD: Getting back to the alcohol-related offenses, is a breathalyzer test used by the police?

MS. WINTERS: Yes, it is. It is used by anyone. I believe that there are certified people that are supposed to be handling it, but I recently found out that anyone can use that breathalyzer or perform the breathalyzer test. And I have had people tell me, who have worked in the court or in the jail, that they are tampered with, and they will say, "Just give him a 9," "Give him an 8," or whatever they want, so that person will get convicted of DWI [driving while intoxicated].

MR. McDONALD: Do you cross-examine the officer who administered the tests?

MS. WINTERS: Well, I have about five pending cases. I only had one, and I lost it on account of the breathalyzer because I guess whatever it reads, you're guilty. So I lost that one.

And I have had one case where a client--the case I lost, the client--the passenger was given a breathalyzer, and the driver was not given the breathalyzer, but she was convicted of DWI.

MR. McDONALD: What about falsification of complaints?

MS. WINTERS: Their complaints are the same every time. I know they make up their complaints to their advantage because they have to have a quota per month. They have to have so many arrests per month. And I truly believe that my clients are telling me the truth because I ask them to please tell me the truth. And most of the time they say on those reports, "That's not so; that isn't the way it is; those officers are lying."

MR. McDONALD: The officers?

MS. WINTERS: Police officers.

MR. McDONALD: Do those officers ever testify using the police reports for offenses which they did not make themselves?

MS. WINTERS: Yes.

MR. McDONALD: Can you explain that?

MS. WINTERS: Well, in one instance it was a bootlegging case, and the officer, the arresting officer, didn't show up. So it was continued, and the next time we came to both--yes, the arresting officer didn't show up. So what they did was they had another officer copy down the report of the arresting officer, and they were going to have this other officer come in and testify to the fact that these people were bootlegging, when the arresting officer no longer worked for the police department. But in the end we plea bargained on it, and it was thrown out of court.

But these are the type of things that are happening that are in violation of people's rights.

They give verbal search warrants, and the verbal search warrants are never backed up by documented--by their statements documented by the judges. They don't document them. They don't certify them. You never see those in court. But I never realized that that was needed until recently when I started reading that over, that any time you give a verbal search warrant, the judge that makes the verbal search warrant should have it documented so that when you go to court, they should be able to present that to you, whoever is defending the client.

MR. McDONALD: Is that in the tribal code?

MS. WINTERS: Yes, it is.

The cops are beating women up. I have three clients that they beat up. They have kicked doors down; they have walked into homes and literally drug all the people that were in there and tossed them all in jail for DC.

These are complaints that are from people that I have represented in the last 14 months.

MR. McDONALD: Thank you very much. Mr. Gilman has a couple of questions.

MR. GILMAN: I have a couple of more technical questions just for the bit of a denouement to this testimony.

The first is: What sort of a fee do you or the lay attorneys generally charge clients?

MS. WINTERS: Well, there's a kind of a schedule of what you can charge, but like on child custodies my fee is \$50. Sometimes I don't charge anybody at all if they don't have any money. I just represent them for nothing.

MR. GILMAN: If I may break out of form just a minute to ask Mr. Matthews how the fees of the lay attorneys generally compare with licensed attorneys.

MR. MATTHEWS: Well, I'm the only licensed attorney in private practice. I scale mine slightly higher than theirs. She is saying \$50 for child custody. I'd probably charge \$75 for it. But I turn most of those down.

MR. GILMAN: The other question I had was: Does the court ever appoint lay attorneys to represent criminal defendants before the court if they don't have representation?

MS. WINTERS: I don't know. I think there is one attorney that is there all the time that more or less gets them because he sits in the courtroom all the time.

MR. GILMAN: He is a lay attorney?

MS. WINTERS: Yes, he is.

MR. GILMAN: And he just approaches the clients by himself more or less?

MS. WINTERS: Yes, yes. He finds his work for himself.

MR. McDONALD: Excuse me. You said the court appoints that attorney?

MS. WINTERS: Not really. The court doesn't. Usually when they read them their rights, they tell them there is no public defender; they have right to counsel.

MR. McDONALD: At their own expense?

MS. WINTERS: At their own expense, right.

MR. McDONALD: Thank you.

MR. HOWARD: If I could ask just a few more questions of Ms. Winters. How many lay advocates are there at Pine Ridge?

MS. WINTERS: I think there's about five.

MR. HOWARD: And how does one become a lay advocate?

MS. WINTERS: All you have to do is pay \$50 and you become a lay advocate.

MR. HOWARD: I see. And have you personally as a lay advocate, have you personally prosecuted appeals to the court of appeals?

MS. WINTERS: No, no. I have never done that.

MR. HOWARD: But the other lay advocates have?

MS. WINTERS: I don't know.

MR. HOWARD: Mr. Gilman, did you want to turn to Mr. Brown.

MR. GILMAN: Yes. Mr. Brown, could you start off by just filling us in a little bit on your background.

MR. BROWN: My legal experience primarily started when I became a police officer in San Jose, California. I was a police officer there for approximately 10 years. Prior to that I had been a college student. I had dropped out to become a police officer. After resigning there, my legal education was

at St. Mary's College in Moraga, California, where I received 1 year's paralegal training. After that time, I was employed at the Rosebud Sioux tribal court.

MR. GILMAN: When did you start at the Rosebud Sioux tribal court?

MR. BROWN: That was in April of 1984. I was hired as a presenting officer. In essence, I was prosecuting child neglect and abuse cases in children's court.

At the beginning of this year, I was appointed the public defender, and I am still in that same capacity.

MR. GILMAN: Could you briefly take us through the process of your representing a defendant in tribal court from the time you first see their file through the conclusion of a trial?

MR. BROWN: My first contact is prior to arraignments. Prior to arraignments, the complaints come to my desk as well as the prosecutor's desk. The prosecutor may decline some cases. After he makes his decisions on those cases, I receive the complaints. I go over the complaints. I make some decisions in my own mind on the face of the complaint as to specific recommendations I may make to the defendants. After I have gone over the complaints, I address all the defendants in a group in the courtroom, prior to arraignments, advising them as to the maximum penalties of their offenses that are charged, their constitutional and statutory rights, and in certain cases in which I feel the complaint may be one that I may have a chance at at trial, I will make recommendations for them to plead not guilty.

I also, as a general policy, advise all people that may be facing jail time to plead not guilty.

MR. GILMAN: On the presumption they could always change their plea later?

MR. BROWN: That is correct.

MR. GILMAN: Continue with the processing.

MR. BROWN: There are some defendants on which I will make no recommendation. I will leave that decision to them. Those are your 50-50 cases in which it could go either way. I let them make their own decision on those types of cases.

After going through this procedure, then arraignments occur. I do advise that any client who wishes me to represent them should contact me as soon as possible after arraignments, preferably the following week. At the present time, trials normally occur 5 to 6 weeks after arraignments.

I do have some problems with the police serving summonses for witnesses, so that is one of the reasons I advise them to contact me as soon as possible, because it may take 3 or 4 weeks for a service to be accomplished.

MR. GILMAN: Do the postponements ever present problems in terms of people perhaps sitting in jail waiting for their trial to come about, or is that relatively infrequent?

MR. BROWN: Well, in Rosebud we adopted a new law and order code in October of last year, in which all criminal offenses were categorized as A, B, or C, A being the more serious crime, with the maximum penalty of \$500 or 6 months in jail. Even in class A crimes of a nonviolent nature, they will usually be--in most cases they will be released on their own personal recognizance.

For crimes such as rape or something violent in nature, there will be a cash bond set. There have been only a few cases I know where a person actually had to sit the whole time waiting for trial.

MR. GILMAN: They also get some sort of monetary credit for each day that they sit in the jail so that eventually adds up to their bond and they are released?

MR. BROWN: If a person is sitting in jail waiting for the trial, or even for arraignment, there are occasions on arraignments that a person will be given credit for time served at a rate of \$20 per day, applying it to the fine, as well as some offenses as well.

MR. GILMAN: Given that Rosebud is the only one of the reservations being focused on at this hearing with a public defender, what feeling do you have for the difference that makes in terms of individuals' rights under the ICRA? In other words, what difference do you feel that the role of public defender makes in terms of their understanding their rights and their receiving their rights?

MR. BROWN: I think it makes a great difference because many people are totally ignorant of their legal alternatives prior to arraignments. I think many of them are working on



past perceptions of the way the court works. It has been my observation that many people or many defendants will simply plead guilty because they feel that they can get out of jail that day and be given time to pay their fines. And they will plead to crimes which they are probably innocent of. And that is one situation that I attempt to get at prior to arraignments, as to their actual feelings, if they feel they are guilty or innocent.

MR. GILMAN: And the fact that they might actually be in jail rather than out on the street right after the arraignment?

MR. BROWN: I think many defendants--I try to make this clear to them, that in most cases they will be released that day regardless of how they plead. I think many defendants feel that if they plead guilty, at least they will get out of jail that day, regardless of how they feel, if they are innocent or guilty.

CHAIRMAN PENDLETON: Excuse me, Mr. Gilman. Who hires you to be the public defender? The council or the court or who? From where do you get your cash?

MR. BROWN: The tribe pays my check.

MR. GILMAN: But strictly, in the budget, your salary is provided for under the court's budget?

MR. BROWN: Under the court's budget, yes.

MR. GILMAN: And at Rosebud the chief judge also happens to be the court administrator?

MR. BROWN: That's correct.

MR. GILMAN: Do you feel that that perhaps puts you under any obligation? Does it influence your behavior in any way or has it tended to influence your behavior in any way?

MR. BROWN: No, not at all. In fact, as a public defender I feel quite completely autonomous from the chief judge, as well as in his capacity also as administrator of the court. He has never applied any pressure directly or indirectly upon me.

MR. GILMAN: Can you give us a feeling for the percentage of the defendants that come before the court that you represent, perhaps give a breakdown of how many just sort of plead guilty and representation isn't involved, and how many plead not guilty?

MR. BROWN: After arraignments, there will always be changes of plea, but I would say roughly at least 60 to 65 percent, maybe 70, will plead not guilty at arraignments.

MR. GILMAN: Initially?

MR. BROWN: Yes.

MR. GILMAN: And what percentage of those who have pleaded not guilty will you wind up representing, do you think?

MR. BROWN: A very small portion, probably roughly 15 to 20 percent. Many of them I do not even see until the day of trial.

MR. GILMAN: Do those who aren't represented by you have other representation, or are they by and large going unrepresented?

MR. BROWN: Well, there is one lay advocate that I am aware of that does take some cases, but not very many; probably less than 1 percent of all criminal trials. Besides that, it is very rare that a private attorney represents anybody in a criminal matter. Even though I may not have any prior contact with a defendant before the day of trial, if time allows I will represent them at a trial or facilitate a plea bargain or change of plea. But I do not turn down anyone that comes to my office on the day of the trial even though I have had no prior contact.

MR. GILMAN: So if you are representing about 15 to 20 percent, and there is a lay advocate who does maybe 1 percent, and professional attorneys again an insignificant amount, then perhaps 80 percent go unrepresented?

MR. BROWN: No, I'm not saying that. I'm saying that 15 to 20 percent of the people that--that is the percentage of people that come to me and ask me to represent them, in which I have time to prepare for trial. But the other percentage simply do not come in prior to trial but wait until the day of trial. I will represent them then.

CHAIRMAN PENDLETON: Excuse me. Is there an income level of the defendant that you can't exceed in terms of being public defender? What might that be?

MR. BROWN: There is no scale on that. Whoever wants to come to my office to ask for my assistance, I will provide it.

CHAIRMAN PENDLETON: It doesn't matter how much money they have or don't have? They don't have to be a low-income person versus a higher income person?

MR. BROWN: That is correct; there is no scale.

CHAIRMAN PENDLETON: There's no scale?

MR. BROWN: No.

MR. GILMAN: So generally, while only this 15 to 20 percent come to you to actually prepare a case for them, a significant number will sort of come in the day of the trial and say, "Can you help me?"

MR. BROWN: That's about what it comes down to, yes.

MR. GILMAN: Is that the balance of the rest of the people, or is there still a significant percentage that go unrepresented? I'm just trying to get the feel for it.

MR. BROWN: Since I have been a public defender, no one has gone to trial unrepresented. I became a public defender the first of this year, and prior to that time most of my experience or my involvement was in children's court. I am not really aware if defendants went unrepresented at trials before that time.

MR. GILMAN: Okay. Let me ask you about the police at Rosebud: (a) under what authority they serve, and (b) what your opinion is in terms of their training and capability.

MR. BROWN: You're asking me who their supervisor is?

MR. GILMAN: Well, are they tribal police, BIA police?

MR. BROWN: Yes, they are BIA police officers. At the present time we have, I think, around eight to nine uniformed police officers, two criminal investigators, and an agency special officer who supervises the captain of police as well as the two criminal investigators.

I think if anybody in this room that has ever been a prosecuting attorney is aware that in most jurisdictions--and this is what I'm used to, as when I was a police officer in California--is that the police agency presents the whole case, the whole package, to the prosecuting attorney. At that time he decides if he will prosecute or not.

At Rosebud we don't have that luxury. Many of the police officers, when they are on the scene of a crime, and when there is actual probable cause existing for an arrest, they simply don't make it and they refer the victim or any witness to the prosecutor. It is in the tribal prosecutor's job description to take these complaints as apparently mandated by the tribal council.

I feel the prosecutor is at a definite disadvantage because he is only hearing one side of the story when that victim comes in, and I think that's a most significant problem, when it could be avoided if there was a full police investigation before that complaint was filed. And I feel the police officers simply don't make these investigations when they do have probable cause to make arrests and file reports and gather evidence and so forth.

MR. GILMAN: Do you have a feeling for why that is?

MR. BROWN: I feel some officers are well-intentioned. I think they simply don't know any better. This is the way it's been done over the years. I am not sure it's due to just laziness, either, but it seems that many times when they could make a probable cause arrest, they simply refer the person to the prosecutor. Or they may make a report and forward it to the criminal investigator. Then it's up to him if he wants to investigate it.

MR. GILMAN: Let me ask you finally to give us an estimate, if you will, on the percentage of criminal cases that may be dismissed due to lack of evidence, just flowing from these sorts of problems?

MR. BROWN: It would be difficult to even give you a rough estimate.

MR. GILMAN: Seldom? Often?

MR. BROWN: Probably 30 to 40 percent of the time.

MR. GILMAN: So it's frequently, I would say.

MR. BROWN: Yes.

MR. GILMAN: I don't have any other questions for Mr. Brown.

MR. HOWARD: Mr. McDonald:

MR. McDONALD: Mr. Matthews, first of all, you were once the public defender of Pine Ridge. Why was that position abolished?

MR. MATTHEWS: I first started working at Pine Ridge about 10 years ago after I graduated from law school in California. I worked for the tribe as public defender for about 9 months to a year and worked for Legal Services for about 6 months, and then went back to work for the tribe.

I think the position was eventually merged. I became general counsel for the tribe, and they just ran out of money. And the needs of tribal government for counsel became more pressing than the needs of individuals for representation in the tribal court.

For example, one of the things that happened was a number of audits were held concerning the allowability of costs, for example, on the old CETA [Comprehensive Employment and Training Act] program. And you get into very technical, detailed questions about income, guidelines, prior service in CETA, and at one point there was an audit which questioned over \$2 million in expenditures for the tribe that they were then going to take away from the next CETA funds for the tribe.

Those CETA funds are the only source of employment for a number of individuals. They needed their legal resources to look after their overall programs, the employment-type programs, rather than things like criminal defense and tribal court. It simply became more pressing in other areas.

MR. McDONALD: So this was a policy question for the council?

MR. MATTHEWS: It wasn't really addressed by the council. I don't think it ever got to the council. It was sort of an inhouse determination by the legal office that those needs were more important.

MR. McDONALD: I see. Then the public defender was not directly hired to work for the court at Pine Ridge--

MR. MATTHEWS: No, not when I did it.

MR. McDONALD: --as Mr. Brown has described Rosebud.

MR. MATTHEWS: Right.

MR. McDONALD: It was a different arrangement.

MR. MATTHEWS: It was a different arrangement when I was the public defender. Subsequently, when I was chief judge, I hired an attorney to be the public defender, and he was, I believe, selected by the personnel board then and wasn't a tribal council appointment. He was selected by the personnel board.

MR. McDONALD: But the decision whether to have one there or not, who has made that decision now?

MR. MATTHEWS: The decision not to have--I don't know that there was a sit-down decision--"We are not going to have a public defender"--at any point in time. When the last public defender left, he joined the Marine Corps, and there was no other attorney available that was interested in doing it, and because of Reaganomics and the continuing funding cutbacks of tribal court, there simply wasn't funds to fill that position again.

MR. McDONALD: I understood Mr. Zephier was transferred over from public defender to work for the tribe as an attorney, and he was the last public defender. Is that not the case?

MR. MATTHEWS: I don't remember Mr. Zephier ever really being a public defender as such. Mike Swallow was the last public defender that I recall. Mr. Zephier may have been funded that way for a while, but I think the last official one was Swallow.

MR. McDONALD: Thank you. Does the system of lay attorneys or lay advocates in your opinion provide adequate representation in the tribal court?

MR. MATTHEWS: I think they can. You have heard Elma, who certainly is not afraid to speak her mind here or anyplace else, and a lot of times simply bringing to the attention of the judge their side is what happens in a courtroom, not just in Pine Ridge but anyplace else. I think the biggest problem is the one she talked about, and that is the lack of training that is available, the lack of resources. For example, how do you use a law library. Where is a law library? How do you get access to it? Those kinds of things. How do you even get into a training program?

Mr. Brown was in San Jose and went to Moraga to attend a college in California. There isn't a paralegal training program on Pine Ridge. We had participated in a program funded through CETA at Antioch Law School in Washington some years

ago, and we trained six paralegals to try to pave their slots, and those lay attorneys are very good. They'd give anybody a run for their money, and do, in tribal court.

MR. McDONALD: If a person did want to hire a professional attorney, wouldn't he have trouble finding one at Pine Ridge?

MR. MATTHEWS: On a criminal case he has a lot of trouble finding one. I can't do any because I'm general counsel for the police department. Mr. Zephier and Mr. Amiotte and Mr. Gonzales are all employed full time by the tribe. And the next nearest attorney who is licensed to practice is in Martin, South Dakota, about 50 miles away. There's another one in Hot Springs that's about 60 miles away. And then it's here in Rapid City, a little over 100 miles away, before you get to another attorney licensed to practice in tribal court.

MR. McDONALD: Thank you. Could you explain the election case dispute that resulted in the removal of the tribal judge previous to you?

MR. MATTHEWS: I have never viewed that as an election dispute only. The election dispute was kind of the straw that broke the camel's back. You heard some earlier discussion about separation of powers, and I think the one concern about bankrupting the tribal court or putting limits on tribal courts is a valid concern because, with lay judges without extensive training, there is a tendency to want to do more than is normally considered a judicial role. You want to assess a bunch of damages for this individual. The sympathies are with the individuals. So you want to award a bunch of damages. Or you think they are not running a program the way it ought to be run, so there is a tendency to direct that program somehow.

What happened on that particular case was a nonenrolled member of the tribe wanted to run for tribal presidency, and he hadn't followed at that point the enrollment process to become enrolled. The judge said, "Well, if he followed that process, he would be eligible to be enrolled, and therefore I am going to order him on the ballot." That wasn't acceptable by the tribal government.

The judge then went farther than that, though, and began arresting people and throwing them in jail without hearings or notice or process, and at that point he was suspended from office while charges were filed. After the charges were filed, he had a hearing, and then the removal vote, and he was removed from office.

I think it is similar to what you're going through with your Federal judge who is sitting in a prison on a tax-evasion charge.

MR. McDONALD: Going back to: Was there a debatable legal question initially as to the qualifications or the procedures to be followed? In other words, could you argue it either way?

MR. MATTHEWS: On the particular matter before the court?

MR. McDONALD: Yes.

MR. MATTHEWS: I don't believe so, because that particular individual took his complaint to Federal court. He filed for a temporary restraining order against the election. It was dismissed. After the election, he filed again and took his complaint all the way to the U.S. Supreme Court, who said his complaint had no merit and dismissed it. There was no Federal cause of action; his civil rights weren't violated.

You have to remember, I was one of the people thrown in jail, so I don't think he had a legitimate case.

MR. McDONALD: But it went all the way to the Supreme Court?

MR. MATTHEWS: But it went all the way to the Supreme Court.

CHAIRMAN PENDLETON: Excuse me. How did it get there?

MR. MATTHEWS: Well, it was dismissed from the district court for failure to state a Federal cause of action. He appealed it to the Eighth Circuit. They affirmed it. Then he asked for certiorari, and certiorari was denied.

MR. McDONALD: Now, I understand there is now a code of ethics at Pine Ridge that governs judicial behavior and removal?

MR. MATTHEWS: There were previous code provisions regarding removal and grounds for it. What they have enacted in, I believe, the last 2 years was a much more formalized statement of a code of judicial ethics, which parallels the ABA code of judicial ethics, I think.

MR. McDONALD: Can you explain for us--and I understand you represent the Public Safety Commission, which is the police organization at Pine Ridge--can you explain to us the organization of the police at Pine Ridge?



MR. MATTHEWS: That is a complex organization. I think everybody involved in it has a different view of it, and there is a lot of confusion about the relationships.

Prior to the tribe taking over the police department--and you have heard one complaint about police brutality. There were a lot more complaints prior to the tribe taking over the police department. I recall, when I started working there in 1976, an arraignment at which an individual sat there in a T-shirt soaked with blood and his face just covered with blood from being beat with a flashlight when he was being arrested.

We filed a complaint with the superintendent there, and the officer was reprimanded and suspended for, I believe, 3 days--not for beating the individual but for unauthorized use of a flashlight. He should have used his nightstick is what they told him.

So the police brutality, while there may still be charges and complaints regarding the force used in an arrest, particularly when the arrest is resisted--the level of those has gone down.

To deal with that problem of police complaints and how do you discipline an officer who misuses his force, they set up one large overall body they called the public safety commission, and then in nine geographical areas, they established subentities called local review boards. And some of the authority that you would normally see centralized in a police commission was decentralized to these local boards, so the local board hires and fires and takes other disciplinary action against the officer within their geographic area.

MR. McDONALD: So you're getting down to very small communities.

MR. MATTHEWS: Well, some are small and some are fairly large. Pine Ridge Village is about 4,000 people. Some of them are probably 500 to 600 people. But that's the size of it.

The local review board then has five members on it, who then are to oversee the operation of basic law enforcement delivery in that area.

MR. McDONALD: Getting back temporarily to the flashlight case. In a case like that, if that was under the BIA, then the plaintiff would have an action against the Federal Government in that case, would he not, as opposed to currently under the tribal police? It's not so clear. Is that so?

MR. MATTHEWS: No, I disagree. Well, they would have a Federal tort. Under the 638 regulations, which govern the operational contract, one of those regulations--and it's been interpreted that way when I was judge, and I think subsequently as well--is that the tribe has to agree to be sued to the same extent that the Bureau would, and they are also required to have insurance.

Now, currently pending before the commission in some fashion are two complaints relating to telephone verbal search warrants. One complaint is set for trial sometime in September or October regarding a complaint that police should have arrested an individual who later killed his wife, and it's on behalf of the minor children of that estate. And that is set for trial in September or October.

MR. McDONALD: But sovereign immunity is not a defense in that case?

MR. MATTHEWS: Sovereign immunity has not been raised as a defense in that case.

MR. McDONALD: But it can't because of the 638 contract, in your opinion?

MR. MATTHEWS: No. I think it's because at Pine Ridge--I can't recall--sovereign immunity gets raised as a defense, but it has never prevented the hearing of a case on the merits at Pine Ridge. We have heard election disputes on the merits and ruled on them. We have had cases against tribal entities, cases against tribal officials, cases against tribal programs, and all of them get heard eventually on the merits.

MR. McDONALD: And the appeals court also has ruled against sovereign immunity in some cases, hasn't it?

MR. MATTHEWS: Yes, they have, and they awarded or affirmed sizable judgments against tribal programs.

MR. McDONALD: Getting back to the decentralized police force, do you hear reports of favoritism or nepotism because some of the communities are so small that there is a reluctance on the part of the police perhaps to arrest their relatives, or a board member or council member from that district?

MR. MATTHEWS: I hear those complaints about the tribal police and I hear it about the small towns bordering the reservation where there is a large number of Indians living,

that the prosecutor's son or the mayor's son didn't get arrested at a party when all the other kids who were drinking did. So I get the same complaints both at the tribal level and off reservation.

MR. McDONALD: What about the power of the police chief? Is his authority significantly lessened because of this decentralized police organization?

MR. MATTHEWS: Yes, I believe it is.

MR. McDONALD: Can you describe briefly the facts in the Xerox case and the tribal court's rulings concerning sovereign immunity?

MR. MATTHEWS: The Xerox case--I am representing the Xerox Corporation against both the tribe directly and some tribal programs to pay for maintenance services performed and to pay for machines they bought and have sitting in their basement now that they never made the monthly installment payments they were to make.

When that was filed, a motion to dismiss based on sovereign immunity was filed. The chief judge of the tribal court, who is a law school graduate, ruled against the tribe on the issue. It went to the appellate court, and the appellate court, while it is less clear exactly what they meant, they said it was not a final appealable order, and ordered a trial on the merits, which I think is in fact a waiver of sovereign immunity. If you've got sovereign immunity, you never have a trial on the merits.

So I think that decision is the latest in a series saying that tribal programs are not exempt from review in the tribal court.

MR. McDONALD: Have you observed problems with service of process in tribal court, service of process by the police?

MR. MATTHEWS: Oh, yes, I saw problems when I was judge, and problems now that I have been in private practice, and sometimes even calling up the chief of the police and saying, "Please get this guy served" doesn't help. When I was chief judge, it went to the point where we had--early on we had money and had somebody just to serve process in town to make sure that the people across the street, for example, got served.

That is almost a standard defense tactic at times, to plead not guilty and hope that after a number of attempts to serve,

all unsuccessfully, the prosecutor will get tired of the case, it will be stale, or the complaining witness will drop it, or if it's a husband and wife domestic dispute, that they will resolve their differences and drop the case. So pleading not guilty and everybody knowing the service of process problem, it's a tactic to hopefully have their case dismissed.

MR. McDONALD: I understand the code requires personal service in all instances. I understand also that you are active in recompilation of the code. Do you ever make recommendations for changes in the law and, if so, have you made any recommendations with regard to the service of process problems?

MR. MATTHEWS: We have made a number of efforts to deal with the service of process issue. One of them--one way that this is dealt with in the juvenile code regarding parental rights, for example, and people not answering the door and not picking up their mail to get certified mail, is to publish in the newspaper for 30 days. So we have commenced publication of notice in the newspaper, the summons, and a failure to appear, then we just proceed without them.

But there hasn't been in the last 3 or 4 years a concerted effort to do more than compile what is already there. There have been three recompilations of the code, bringing the ordinances together in one volume, since about 1980 or '81. And there was one effort to improve and upgrade the code that simply never got out of the law and order committee to be presented to the council.

So we have suggested a number of changes, but they are not a pressing priority, I guess.

MR. McDONALD: I understand there are standing orders to police for vehicle searches on holidays for the purpose of finding liquor violations. I understand you represent the police, so can you give us your analysis of that as far as its legality?

MR. MATTHEWS: Well, I don't like it, because the way it's been used--the way it was phrased was as a petition for a writ of mandamus to order police to check for mechanical and safety violations on cars. What it ended up doing was being a roadblock at the reservation line at which cars were searched for alcohol, because alcohol is illegal on the reservation, even to the point of having people open their trunks and search through it.

What bothers me about it, first of all, is I don't think you can have a standing order that amounts to a search warrant on vehicles; but secondly, representing the police department, I don't want to get sued by somebody for stopping and searching their trunk and preventing them from going about their lawful business, even if it is for a brief period of time. I have problems with that, particularly when a probable cause determination to open a trunk I don't think should be the basis of a standing order; it ought to be on an individual determination. Yet, the standing order, issued as a writ of mandamus, commanded the police and the first order was issued right around New Year's Eve. The last one was issued the 3rd of July. And the order isn't limited just to that holiday, but it is reissued just before the holiday ordering that done.

MR. McDONALD: Was this on the court's own motion?

MR. MATTHEWS: No, what the prosecutor did was file a petition against the police department for this writ of mandamus, and then the judge issued it, and that was it--all done on the same day.

MR. McDONALD: Finally, are there are any current tribal court practices which may infringe on the Indian Civil Rights Act?

MR. MATTHEWS: I think the thing that Krista talked about earlier--you know, the pretrial procedure is the greatest area of concern to people practicing in tribal court. If you get to a trial, I think tribal court judges, even though they are complex issues--how do you divide up property with mortgages when the wife didn't sign and the husband did, and what does that mean to a lien creditor? You get into some fairly complex issues there.

You get a fair trial and the judge thinks it through, and they give you a fair decision on the merits.

The problem is the pretrial stuff where, on one particular case I heard about the other day, there were eight separate orders taking a child from this one--let's just take an example: taken from the mother because the father says she is not taking care of it. And then the father has custody. And then the mother's parents come in and say, "Well, he is no better than her." And then the other grandparents come in and say, "Well, we'll do better than that."

The judge bounces from correcting one injustice to then trying to correct the last one, until the child looks like a ping-pong ball.

MR. McDONALD: Do they go to different judges to countermand the previous judicial order?

MR. MATTHEWS: Sometimes. Sometimes they do that. Sometimes they will have a trial in the juvenile court, and the chief judge can modify that order so the losing side will go into the chief judge to try and get it changed, or go to the appellate court. But it is not at all unusual to see different judges, or even the same judge sometimes, issue these countermanding and countervailing orders.

And that's the biggest problem. If you can ever get all those people in one room, you can get a fair hearing and probably a good determination on where the child ought to be. The problem is getting them all there in that room at the same time.

MR. McDONALD: Thank you. I think Mr. Gilman has a question.

CHAIRMAN PENDLETON: How much more time do you need?

MR. GILMAN: Just a minute.

CHAIRMAN PENDLETON: And you need more time, Debra?

MS. MILLER: I would appreciate more time.

CHAIRMAN PENDLETON: Well, why don't you go ahead, Michael.

MR. HOWARD: Why don't we go ahead and let the Commissioners ask their questions.

CHAIRMAN PENDLETON: Do you have some questions, Bob?

COMMISSIONER DESTRO: Why don't you go ahead, and then I'll follow you.

CHAIRMAN PENDLETON: It's a good thing I have questions.

This is the second panel from whom we have heard discussion about the separation of powers. Anybody can answer this if they'd like to, but how would you advise the Commission on developing a policy recommendation to the Congress on the issue of the separation of powers process? What is it that we should be telling Congress about this issue, as it pertains to civil rights especially?

If you don't want to tell us now, I think it would be important to tell us at some point down the line. When the record shows considerable discussion about separation of powers, and there is no guidance to us to do that from the panelists or, for that matter, from the public witnesses, then we are unfortunately left to our own devices about what to recommend. Since we don't live on reservations, I think it would be inappropriate for us to recommend how that process should take place, because certainly it involves many other things other than just separation of powers.

So if you have some ideas about that, I'd appreciate it later on, if you don't mind.

MS. CLARK: I have some things I'd be happy to share with the Commission.

CHAIRMAN PENDLETON: Sure, go ahead.

MS. CLARK: One of the things that I think was mentioned in the first panel--maybe this wasn't--but one of the things I have perceived in my experience on the reservation is that there are many people, especially older, more traditional Indian people, people perhaps who are not as familiar with the legal systems with which attorneys and people who have experience with the law are familiar, who view the tribal council, the chosen representatives of the people, to be the people who ought to have the final say. Many, many people feel very strongly about that.

Although there are many people on the Cheyenne River Reservation, as an example, who see a crying necessity that there be a division between the legislative and the judicial branches, there are also many people who are outraged at the idea that perhaps unelected people, or people who they don't see as representing them the way their council representatives would, would have the power to make decisions that would perhaps be contrary to the will of the chosen group.

It hasn't really been talked about, and I am not an Indian, but I know that consensus is a very important concept in Indian culture in South Dakota. So when you have this notion that someone is going to issue a ruling which is perhaps contrary to the will of the chosen leaders, you really have a problem.

On the other hand, one thing that I wanted to say about the idea of separation of powers--Debra and I had discussed this--in thinking about how to deal with remedies to civil rights problems under the act, whether there ought to be

perhaps a Federal remedy or whether or not there was some way to mandate separation of powers, my view concerning that, which I would like to express, is that if you still have people that are not law trained or people who are making decisions because of political pressure or whatever, you are not going to have a judiciary that is any more effective than it is now on reservations where there are problems.

So it is a very, very difficult problem.

CHAIRMAN PENDLETON: That leads to my second question.

Ms. Winters and Mr. Brown, I just need to remind you, in case you didn't hear in the beginning my opening statement--we have copies for you--that you have given some testimony here today that in some cases we recognize could be at some point detrimental to you and what you do in the future. We want it known very clearly--we aren't looking for retribution against the things you are saying here today. I will have copies of my opening statement made, and we want to know in case anything like that does come up. We are very concerned about it because you have been very open with us.

In that connection, isn't there an Indian law training center program that trains judges or lawyers for the reservations? Is there some program like that, in cooperation with the Judicial Division of BIA?

MS. CLARK: The branch in the Bureau that I am familiar with has lost a good bit of its funding. I think that that's correct. In Aberdeen they have lost a great part of their funding since the Reagan administration began.

There are other places in the United States. The American Indian Lawyers Training Association in Oakland, California, and the Native American Rights Fund, and our program all assist in training personnel in tribal court.

But, again, it depends on the specific circumstances. On Cheyenne River, for example, we have people who absolutely refuse to get training because they don't see a necessity for it. The tribal council in its wisdom chooses not to do anything about that.

MR. MATTHEWS: The other problem is, and I think the National Indian Justice Center at one time was founded to help train the judges, it is expensive to go to these workshops that may be conducted in Phoenix or Tucson. And if you send all the judges down there, and you send all the prosecutors, or all the



advocates, who is running your court while they're gone? The problem of training needs to be localized. You need to get the training down at the reservation.

CHAIRMAN PENDLETON: I was coming to that point. Wouldn't it be appropriate and just plain nice if people like Ms. Winters, who is interested in what she is doing, could at least have some correspondence training or some training on the site to help her be as effective as she wants to be in handling her clients? It seems to me that that should at least be made available, and at some point that might be one of the kinds of recommendations we might want to consider to the administering agency as well as to the Congress.

MR. MATTHEWS: I think funding such a program through the Native American community colleges would be helpful. The community college at Pine Ridge has a number of classes but one on Indian laws, treaties, and government, in which some basic principles are set forth. But I think funding could be made available for a training program, a vocational-type training program, through these colleges. And I think all the reservations in South Dakota have these community colleges through which they could fund such a program, and it would be helpful.

CHAIRMAN PENDLETON: The last point is I know that there are concerns about Reagan budget cuts, but there are three guys up on the Hill now who just got another part of their bill squared away--Gramm, Rudman, and Hollings. And it looks like that's a reality, more so than presidential budgets, that certainly are approved in the Congress. It does seem like there needs to be some understanding of what that is and how that relates to the Federal appropriations as it comes to reservations. I just give you that as a word of caution.

MR. MATTHEWS: Could I just say something about budgets because I heard it earlier. When I was chief judge, I went back and took a funding proposal back, and we took a similar State court circuit that had a similar geographic area, similar population, and similar caseload. Their budget was over a million dollars to fund that, for judges, prosecutors, clerks of court--all those functions--just the straight judicial functions, and public defenders.

The tribal court budget was at that time about \$300,000. And we were expected to do the same things, follow the same basic procedures, give them the same rights, have the jury trials that we need, with about a third of the budget. And you're going to have problems.

MR. HOWARD: What was the source of the budget for the circuit court?

MR. MATTHEWS: The State tax base sends the money out by circuits, and that was the essential source of the funds. The county, I think, pays for the public defenders, but the State funds basically the circuit court system.

MR. HOWARD: I see. As opposed to the Pine Ridge tribal court, which is funded by Federal revenues?

MR. MATTHEWS: Yes. We had a combination of funds at one point. We had five funding sources to get that money together.

MR. HOWARD: All Federal?

MR. MATTHEWS: All Federal.

MR. HOWARD: I see.

COMMISSIONER DESTRO: Was there a training component in the State budget, and is there one in the tribal court budget?

MR. MATTHEWS: I doubt if there's one in the tribal court budget now, and I think the State court approves a judge to go to one seminar every year. They get to choose one that they go to. And they have their annual get-togethers with the supreme court, the circuit judges. So I think the State has more training funds available generally, yes.

COMMISSIONER DESTRO: Have State sources of funding or State sources of cooperation, such as bar associations and the universities, been explored to help train the private advocates or the lay advocates? It would seem to me that those would be functions that, in the absence of Federal dollars to do it, could be performed on a service basis at least to fill some of the gap by local bar associations or State bar association. Has that been done at all?

MR. MATTHEWS: Well, there really is no local bar association on the Pine Ridge Reservation.

COMMISSIONER DESTRO: No, what I mean is when you're talking about big areas like this, you're really talking more about the State bar association, the South Dakota State Bar or the North Dakota State Bar, or Wyoming. And it would seem to me also that the State courts would have an interest, even though they don't have jurisdiction on the reservation, in

seeing that justice generally is administered fairly, that they might be able to free up somebody to provide technical assistance. Has there been any organized effort to tap into those potential sources?

MR. MATTHEWS: Cooperation with the State of South Dakota hasn't been good in the last 10 years. So, no.

COMMISSIONER DESTRO: Why would you say that is? That is something that we need to be aware of as well. Why is that?

MR. MATTHEWS: I think that comes from the attitude of the officials in Pierre, particularly now Governor Janklow.

CHAIRMAN PENDLETON: Tell us some more about that.

MR. MATTHEWS: Mr. Janklow had his problems at Rosebud with the tribal court and was disbarred from the tribal court down there. I wasn't involved in that. That was before I got here. But Mr. Janklow doesn't have a high opinion of tribal courts and has been antagonistic towards tribal courts, or to tribes, at least, over the years.

COMMISSIONER DESTRO: Is that a jurisdictional dispute--

CHAIRMAN PENDLETON: It sounds personal to me.

COMMISSIONER DESTRO: --or just personal dispute? If it's personal, why wouldn't he want to get his fingers in there and make it better rather than just being antagonistic?

MR. MATTHEWS: You'd have to ask Mr. Janklow that.

CHAIRMAN PENDLETON: We just might.

MS. CLARK: There are constant jurisdictional disputes between the State and all of the tribes. The Rosebud Tribe recently sued the State in Federal court concerning an issue that had some profound impact on all the reservations concerning who has the jurisdiction to prosecute alleged Indian criminal defendants, whether it should be in tribal court or State court. It's a very complex and complicated issue.

There is something I wanted to say about the State bar specifically. My experience has been that the State has been quite hostile, at this point in history, to the attempts by the tribal court to exercise the full extent of its jurisdiction.

I am aware of a situation on Cheyenne River where private attorneys, people licensed in South Dakota, who are only allowed to practice in tribal court because of their South Dakota licenses, who do things which--the facts that I am aware of--would be considered unethical. The South Dakota State Bar absolutely refuses to take a look at anything they do on the reservations, which in my opinion undermines the abilities of the courts to function properly and to give people confidence in the way the court functions.

The State bar's opinion is that they don't have jurisdiction to address those problems. I think that they are wrong in that respect because it is their license that gives those people the right to be there, and in my view they are then turning around and abusing Indian people because they know they can do it and get away with things in tribal court.

CHAIRMAN PENDLETON: We're coming in to some other good questions I guess. And I know Bob might have a couple of more. Is that because of cultural naiveness on the part of the State bar?

MS. CLARK: Oh, no. Oh, no. It's a can of worms. It's a can of worms. Anybody who has ever had anything to do with tribal courts in South Dakota knows that it's very, very complex and very difficult. You don't know what you're getting into if you're not there. Even if you are there, you never quite know what's going to happen. And my opinion is that the last thing the State bar wants to do is to poke into what goes on up there or down there, wherever it might be.

What they said was that when private attorneys do things that people have questions about on reservations, it's up to the tribes to do something about that. Well, again, if you're talking about political problems or election disputes, where maybe it's the tribal government that's working with these individuals, there is no remedy for people that are abused by private practitioners who know better and who would not dare do those things in either State or Federal court.

CHAIRMAN PENDLETON: Bob.

COMMISSIONER DESTRO: Let me ask a question that goes to another big government agency that plays a big role in this. We have talked about the possibility that the public defender or the lay advocate might be retaliated against by the tribal council or the tribal court.

What is the relationship between the tribal courts, tribal councils, and the BIA? If the tribal council gets out of hand, is there some way that the BIA can put their thumb on things and make life difficult? Because what I was hearing is the lack of training of the BIA police, for example. It sounds outrageous. That's the Federal agency that's doing this. Nonetheless, you have people beating up people with flashlights.

Do you understand the question that I'm getting at here? What recommendations would you make to Congress or want us to make to Congress or the President to clarify the relationship between the BIA and the judicial systems of the reservations?

MR. MATTHEWS: The BIA always says they are not subject to tribal court jurisdiction. They are probably harder to get along with in terms of enforcing an order than tribal government. For example, you can get into a child who is abused or neglected and you need some services for it. State welfare provides some services, but for a delinquent child they don't, but the Bureau is supposed to.

When you try to enforce an order telling the Bureau of Indian Affairs to get this child some services, get it into a hospital, get it into a juvenile program, they will tell you that they don't have to do it; they've got cases that say they don't have to do it. They call the solicitor from Minneapolis to tell you they don't have to do it. And, in fact, have refused sometimes to do it, until the last time that came up I was guardian ad litem about a month ago, the superintendent said he didn't have money to do it, and I said, "Fine, I'm just exhausting all my local remedies here at the tribal court before I go to Federal court."

He said, "Yes, but wait a minute; I think I can give you 10 days in this facility or something."

So when you really get down to pushing it, saying, "We are going to go get an order compelling you to follow your Code of Federal Regulations and provide the service," you have to rely on that stick that you are going to take the superintendent to Federal court to compel him to do it.

But the Bureau of Indian Affairs is as bad or worse than tribal government in terms of complying with tribal court orders, and I think that where the tribal court enters an order in certain areas, for example, provision of services to children, the Bureau should be bound to follow it.

COMMISSIONER DESTRO: Would you go so far as to suggest, for example, that tribal court orders with respect to things in Federal regulations, or even beyond that, be given full faith and credit in the Federal court?

MR. MATTHEWS: You bet.

COMMISSIONER DESTRO: Ms. Clark, what do you think?

MS. CLARK: Oh, absolutely, yes.

CHAIRMAN PENDLETON: Ms. Clark, let's go over this again. I can't get out of my mind a comment you made earlier. How do cultural factors enter into all we are talking about here? We could have training of advocates and training of paralegals and training of lawyers or training of judges and all kinds of good things, but there are those people who have some problem with the culture. How did you weave that all together?

MS. CLARK: Well, not being a member of any of the tribes, I'm not sure I'm the best person to talk about that, but in certain ways I have knowledge that many other people wouldn't have because I'm one of the outsiders who on a daily basis is confronted by cultural problems, and I am always confused about what someone really wants or what their intentions are.

I think there are many people who know how to manipulate the system to use the things you might call cultural when it is to their advantage to do that. That happens sometimes. But there are many people also, I think, that still believe very strongly that pre-IRA [Indian Reorganization Act] types of Indian tribal organizations and leadership are what are the roots and heritage of the tribe, and that those things are very important. It just makes it very, very difficult to reach a consensus, which again is important to them. They kind of get to a point where you can get people to agree to do things. Almost anything the tribal government does, dealing with the tribal courts or in any area, it is very, very difficult to get them to come to conclusions about things. They're listening to what everyone says. And so it weaves in the entire history of people depending upon what they know.

I don't know if I'm addressing what you asked me or not.

CHAIRMAN PENDLETON: Yes. Thank you.

Debra, you have a couple of minutes left.

MS. MILLER: Thank you, Mr. Chairman. Actually, you have touched on a couple of the areas I wanted to get into, so that helps.

CHAIRMAN PENDLETON: Thank you. I'm impressed.

MS. MILLER: Just a couple more questions for Krista Clark. You've spoken favorably of the appellate court at Cheyenne River. Is the appellate court precedent respected by the lower courts there?

MS. CLARK: My experience has been that--the appellate court that sits now in Cheyenne River has sat for 2 to 3 years. As I said, it's made up of three persons. Two are Indian lawyers, and one is a member of the tribe. The appellate court does a very good job. When I say that, I mean they behave like other courts that I have had experience with.

I don't have any reason to believe at all that when they issue their decisions they are read by the lower court judges. I don't know of any mechanism whereby opinions are transferred to lower court judges or that their information is conveyed to them, that they have a duty or responsibility to read those opinions whether they have the capability of doing so or not. I'm not even sure of that, whether they'd understand things, because they are not law trained. They don't deal with case law like the appellate court does.

I have had experience with the appellate court issuing decisions directly to lower court judges, and the lower court judges, probably because they didn't understand what they were supposed to do, completely ignoring what the appellate court said for them to do, and repeating the exact same errors.

I don't think that precedent means anything. So what that results in, therefore, is you have the same matters being litigated over and over and over again. Perhaps that is acceptable to them, but it is very, very inefficient, and doesn't help when you try to advise people that we can get something resolved because we can tell the court that this is what precedent is and expect the judges to follow it. That isn't something that you can say will always happen. Sometimes it might, but there is nothing that mandates that that will be the case.

MS. MILLER: What do you think would help correct that situation? More training for judges?

MS. CLARK: Well, education certainly. I'm a very, very firm believer that judges should be law trained. I think it is absurd to have lower court judges that are not law trained so that people are put through the indignity of going through months and sometimes years of litigation before they can actually get to a point where people can understand the complex legal issues that they face, which is the case when a case finally reaches the appellate court.

The appellate court in Cheyenne River, because of very difficult funding circumstances there now, only meets once every 4 months, and it is not uncommon for cases to linger a couple of years before they can get a decision back. So if you have a bizarre decision from the lower court, which happens a lot, you can wait for tremendous periods of time. And people don't understand that. Many of them people live in very isolated rural communities. Their education is not what a person would have in Rapid City. It is very difficult to deal with that kind of a circumstance.

So although you have a very effective appellate court, the effectiveness is reduced dramatically when the lower court doesn't match up to it.

MS. MILLER: You have described instances where people do go to the council for remedies when the tribal court system fails to provide a remedy in their view. Can you describe the type of hearing that might be conducted by the council in these situations?

MS. CLARK: Again, I think this maybe touches on the issue of culture and what the tribes have decided or at least what the Cheyenne River Sioux Tribe has decided is the appropriate way to deal with problems that people have, and I think that's the way they would view it, not necessarily legal problems but just problems. You can go through an entire legal process where you would be afforded hearings and notice and due process and all of that. And even though that's written in law and people understand that, when a matter comes to the tribal council--you are not dealing with people who have any law training and don't pay any attention to tribal law--there is no requirement that there be notice of hearing or that you even hear two sides of the story. So it is really most of the time a very ad hoc proceeding unless you have people that have representatives or attorneys assisting them before the tribal council.

I am convinced that the tribal councilmen think that is perfectly all right, and that is part of the reason they were



elected to the position that they have, is that they are there to remedy problems when they don't think the court has dealt with the problem the way perhaps the person wants and the way the tribal people perhaps understand the problem should be resolved.

So it is not a legal proceeding at all, but yet it can have profound legal ramifications--the kinds of decisions they make, such as this one to wipe out the decision of the tribal appellate court that the tribe is not immune from suit. There was some discussion about that, but the appellate judges weren't asked to come in and explain what they did. There was no opportunity for people, other than the councilmen, to discuss the implications of that, and it was a fairly quick decision and I think probably not made in the best of judgment, but nevertheless made.

MS. MILLER: How often would you say that happens, where judicial rulings are actually overruled by the council?

MS. CLARK: Oh, not very often, but they are not asked to overrule them very often either.

MS. MILLER: I am interested in this issue of ex parte orders and hearings. Would you say that many of those ex parte orders could be arguably justified as some sort of temporary restraining order where, say, there are affidavits or other proof of some sort of exigent circumstances?

MS. CLARK: In some instances, ex parte orders are in fact TROs. The problem that exists there for many people is that in State and Federal proceedings, for example, when you go to a judge and ask for a temporary restraining order, there are a half-dozen pieces of paper, usually, at a minimum that have to be filed to show there is immediate and irreparable harm liable to occur or that sort of thing. And that almost never happens in tribal court. If you have an affidavit or any kind of a sworn statement or a pleading, that is the maximum, if you've got that.

Part of the problem is that the tribal code is not developed as a State and Federal law to have the same requirements, and the judges aren't experienced in that area anyway. They wouldn't, in their view, think those things were necessary in order for them to issue a temporary restraining order.

MS. MILLER: Apart from the problems of proof and so on when there are temporary restraining order conditions present,

what percentage do you think actually could be justified on TRO grounds? Is that the majority, or would you say that most of the ex parte orders don't involve emergency conditions?

MS. CLARK: I'd say probably not very many of them do. Not very many of them would meet the standards that would be required in other places at the State and Federal level. But you're talking about a system that operates entirely on its own and makes its own rules, so it is hard to say whether or not that is sufficient.

MS. MILLER: Just one more area I'd like you to talk a little more about, and that is the extent of involvement of Legal Services in actually pressing ICRA claims or perhaps in raising objections in the context of other cases when there are due process problems and so on. You have talked about Legal Services not being able to get involved in election cases or political issues. What about the rest of the areas?

MS. CLARK: Usually what we do is when a person raises a problem, and it's primarily due process types of problems, we will contact the parties involved, sometimes call up a judge and try to figure out what is actually going on, or call the prosecutor or the lay advocate involved. Sometimes we can sort things out informally. Other times we will petition for rehearings, ask the court to vacate a judgment so that a party will have an opportunity to come in. Other times, if that is not successful, we can appeal a decision.

I have advised people myself--and this is kind of bizarre when I think about--I've advised them to go to the tribal council because that is the most efficient and the quickest way to get what they would consider to be fairness or due process to remedy the problem they have.

MS. MILLER: When you raise these issues with tribal judges, are you generally able to get the problem remedied, the due process problem remedied, by holding another hearing or something?

MS. CLARK: Yes, that frequently happens.

MS. MILLER: What about appeals to the appellate court? Are those usually successful in remedying due process problems?

MS. CLARK: I would say so, yes. Again, the problem, as I said earlier, is if you have an inexperienced or casual lower court, which is frequently the case, then you have a lot of time and expense and work that is involved in trying to sort

out that problem if you're going to go up on an appeal, and if of course you have to go up a couple of times, it just adds to that same problem.

MS. MILLER: What about actually filing suits against the tribe or some part of the tribe under the ICRA? Do you do that very often? Do you run into sovereign immunity problems?

MS. CLARK: We do occasionally. Speaking about that, we sued the housing authority last winter, and the case that was mentioned in Rosebud, the same people represent them down there that represent them up in Cheyenne River, and they believe they are immune from suit. And considering the tribal council's action to throw out the only decision of the appellate court that said the tribe was not immune from suit, they probably are, it's probably a fairly fruitless exercise to try to sue that particular agency or any of the rest of the tribal agencies or the government itself in tribal court at this point.

MS. MILLER: It sounds like what you're saying is if somebody has a lawyer from Legal Services, you can remedy some of these problems. What about people who don't have access to lawyers or what about people who have lay advocate representatives when they confront ICRA violations?

MS. CLARK: They would probably try to do the same kinds of things. One of the things they can also do is seek out assistance from members of the tribal council who can sometimes help them. The tribal law and order committee, which is directly above the entire judicial system, can sometimes sort out problems. That happens quite frequently.

MS. MILLER: I guess what I'm getting at is: Do a lot of people fall between the cracks?

MS. CLARK: Oh, I think so.

MS. MILLER: Would you say to a large extent?

MS. CLARK: It is really difficult to generalize. Lots of people don't contact us, so I don't know. It's hard to say.

MS. MILLER: I have no further questions.

CHAIRMAN PENDLETON: Thank you. I want to thank the panel and those who came this morning. These proceedings are recessed until 1:30 p.m.

[Recess.]

AFTERNOON SESSION

CHAIRMAN PENDLETON: I just want to swear the next panel in and bring this session out of recess into operation again.

[Imogene High Elk, Ray Springer, and Edna Thompson were sworn.]

Chairman Pendleton: Counsel.

COMMUNITY MEMBERS

Testimony of Imogene High Elk, Cheyenne River Reservation; Ray Springer, Cheyenne River Reservation; and Edna Thompson, Cheyenne River Reservation

MS. MILLER: First, what I would like to do is ask each of the panelists to state your name, address, and your tribal affiliation. We will start with you, Ms. High Elk.

MS. HIGH ELK: My name is Imogene High Elk, Dupree South Dakota. I'm a Cheyenne River Sioux tribal member.

MR. SPRINGER: My name is Ray Springer. I work for the Bureau of Indian Affairs, and my address is Eagle Butte, South Dakota.

MS. THOMPSON: Edna Thompson, Dupree, South Dakota, Cheyenne River Sioux Tribe.

MS. MILLER: Thank you. We'll start with Imogene High Elk.

Ms. High Elk, could you just tell us about your experiences with the police at Cheyenne River Reservation.

MS. HIGH ELK: The first experience?

MS. MILLER: Start with the first experience and then just go right through.

MS. HIGH ELK: Well, my husband was a BIA police officer for Crow Creek Reservation. We moved back in 1973, and since then Cheyenne River Sioux tribal police have harassed us in several ways. And I have reported it and I can't get anywhere. No one would help me, and I even got thrown in jail one time with no complaint.

MS. MILLER: Would you tell us about that time.

MS. HIGH ELK: My boy--his older sister was pregnant, and he took her to town to get groceries, and this tribal cop stopped him because he said my son was driving a brand new pickup and was acting good. He stopped in the middle of the street and he threw my daughter, who was 9 months' pregnant, in the back seat of the police car.

He made my son get out and park the pickup, and he was going to march him all the way back up 13 miles up to where I lived, but the city cop come along and took him. He said, "Don't do that to the little boy," and he made him park it and took the keys.

So the next day my husband asked for the keys from the tribal police because they were down in our community, and he pulled a gun on him and said, "You are under arrest."

He said, "For what?"

He said, "Just get in the police car."

And my husband was a police officer before so he knew that he didn't do anything. He refused. So he pulled a gun on him, and my husband turned around and walked away.

My sister then came and told me, so I went home and stopped the police car. He jumped out and hit me first, so I grabbed him, and we fought for almost an hour, and the other cop was standing there. He didn't help me. And the city sheriff come along and he stopped us.

So I went in to the chairman the next day and reported them. He said, "Oh, yes, we knew you were coming. Go right over to the jail and the chief of police will help you."

I went over there, and the chief of police was waiting for me at the door. He twisted my arm back and threw me in a cell and told me to think about what I did. I spent 8 hours in jail and nobody knew where I was. The Dupree city cop came and bailed me out.

So the next day I went right over to the FBI office in Pierre and reported this. And he made a call to the Cheyenne River Sioux tribal chairman, and he said nothing like this ever happened.

MS. MILLER: Were you told of any charges against you when you were thrown in jail?

MS. HIGH ELK: No.

MS. MILLER: Were you ever told of any charges?

MS. HIGH ELK: No.

MS. MILLER: Do you know why?

MS. HIGH ELK: Nothing ever came about.

MS. MILLER: Why do you think you were thrown into jail?

CHAIRMAN PENDLETON: Debra, you sort of dropped your voice at the end there. Will you put the microphone a little closer to you?

MS. MILLER: All right. I was asking why do you think you were thrown into jail?

MS. HIGH ELK: I tried to find out later and they just had me go around in circles and they never told me. Up to this day I don't know why they threw me in jail.

MS. MILLER: When was this? What year was this, do you remember?

MS. HIGH ELK: This was in--

CHAIRMAN PENDLETON: Approximately is okay.

MS. HIGH ELK: Okay. Sometime in '78 or '79.

MS. MILLER: Did you have any subsequent dealings with the police at Cheyenne River?

MS. HIGH ELK: Well, before that, this police officer that I got into a fight with and he pulled a gun on my husband had a grudge against us. He was trying to take our range unit away. People signed a petition to move us out of our headquarters, but we never bothered anybody so we didn't think we should move out. And it just went on and on.

MS. MILLER: What about after that time? Were there any other incidents?

MS. HIGH ELK: Yes, a couple of the cops almost ran me off into the ditch, and I reported it, but no one ever done nothing about it.

MS. MILLER: Did your daughter have some involvement with the police that you are aware of?

MS. HIGH ELK: Which? The pregnant daughter? After she had her baby, she went to be a prosecutor's secretary for the tribe, and, I don't know, they blamed her--every time something happened in that jail, they blamed her. She was a real quiet girl. Then she started going with this police officer. They had a policemen's ball and she was selling tickets for the dance. I don't know what happened there. They said she got into a quarrel with her boyfriend--that was the police--and she ran out and got in the car and started to go. And her boyfriend went and told the chief of police and all the other cops that they should chase this car.

So my other daughter ran out to see what was going on, and she jumped in with her, and they chased them down the main street of Eagle Butte, 12 miles west of Eagle Butte, the chief of police and four other police officers, and they hit them from the rear and my daughter got killed instantly. That was September 20 of 1980. And I was never heard in tribal court, and I went through two lawyers. I'm on my third one.

MS. MILLER: Excuse me. Let me just back you up for a moment. When this happened with your daughter, what actions did you take after your daughter was killed?

MS. HIGH ELK: I went to the tribal law and order committee.

MS. MILLER: And what happened there?

MS. HIGH ELK: Some of the relatives were involved. They were on the committee. And I wasn't getting anywhere. So I went and got a tribal lawyer because I knew that I would never get anywhere because I'm nobody. And I lost a daughter, but nobody would hear me out. And I tried to go to tribal court, and he threw me out. I never had a hearing in tribal court until a month ago. I was just on my third lawyer. They told us to go in for 5 minutes. We had a meeting there, and he just said, "Put a claim in insurance and they'll pay it." So I still haven't been heard in court anywhere.

MS. MILLER: So you have been attempting to file a lawsuit against the police department?

MS. HIGH ELK: Yes.

MS. MILLER: Because of what happened with your daughter?

MS. HIGH ELK: Yes.

MS. MILLER: And you have been claiming what? Money damages? Is that what you are interested in?

MS. HIGH ELK: Well, that's all they could come up with. I don't care, either way I could go. I went to tribal council I don't know how many times, and they are more for their police officers. All I want is to be referred back to the tribal court so I could start some action there.

MS. MILLER: Did you appear before council?

MS. HIGH ELK: Six times.

MS. MILLER: What did you ask for when you went before council?

MS. HIGH ELK: I asked them what I could do because it happened on the reservation, and the lawyer said, "I can't do nothing unless the tribal council okayed it to reinstate it back in tribal court."

MS. MILLER: So you were asking for the council to waive sovereign immunity; is that correct?

MS. HIGH ELK: Once someone from Washington, D.C., came out to give their opinion, and they gave their opinion in the Martinez case. But the very next morning I understand that tribal judge rescinded that resolution, and they just ignored me after that.

MS. MILLER: So the tribe is not allowing you to sue the police department?

MS. HIGH ELK: No.

MS. MILLER: Was there a time prior to the death of your daughter when she was arrested?

MS. HIGH ELK: Oh, yes. Two months before my daughter was killed, some girls got into a fight in the city of Dupree, and a tribal cop went to break them up, and he picked up my daughter, and there was a pitchfork in the back of the police car. So she got it and she scared the police officer with it,



and she just threw the pitchfork aside and said, "You shouldn't be feeding your horses with the tribal police."

So he handcuffed her and threw her in the back, and he took her back to the jail, and him and his brother-in-law took the handcuffs off of her in the tribal jail and beat her up and threw her in a cell. She was only 17 years old.

I looked for her for 3 days and no one knew where she was. And this trustee lady sent a note home with a friend saying that my daughter was in there all beaten up.

So I went in there and forced my way back to the cell, and there she was. She had bruises all over her. So when I was trying to get her out, this juvenile judge and the chief of police came up and their brother-in-laws, and he said, "She almost got my son with a pitchfork. What are you going to do about it?"

I said, "Well, he had no business with that pitchfork in the back of a police car."

And he said, "Well, you just remember, lady, if I can't send" --the juvenile judge at the time said, "If I can't send her to reform school right now, we'll take care of her." And the chief of police said, "Remember, she beat up my son and I'll take care of her."

Two months later, that's the same guy that killed her, and up to now--brother-in-law's on the council--and every time I bring it up in council--I don't know what he probably has over the other guys, but I can't do nothing.

MS. MILLER: Subsequent to your daughter's death, was there anything that happened to a son of yours?

MS. HIGH ELK: Okay, my daughter got killed September 20, 1980. February 28 of 1982, my 16-year-old boy--they claimed he hit a bridge and burned up. But the coroner told me that they had suspicions of somebody. He said, "There's no way I can prove it, no one can prove it, but somebody must have killed him. But we can't prove it. He burned up and died."

So I lost my son and daughter a year and a half of each other.

MS. MILLER: Are you aware of similar kinds of police abuse--

MS. HIGH ELK: Yes, a lot of them.

MS. MILLER: --happening to other people at Cheyenne River?

MS. HIGH ELK: Yes.

MS. MILLER: What do you think people in general think about the police department there?

MS. HIGH ELK: They want it changed. They are always talking about it. But who do we go to anymore? I myself--last time I was in council, they made me feel like I'm not a member of the tribe.

MS. MILLER: So you don't feel that you can get justice from the council either?

MS. HIGH ELK: No. I know for testifying here I'm in trouble now.

CHAIRMAN PENDLETON: I think that we'd like to know if you do have trouble from this testimony. The U.S. attorney has promised prompt action in this matter, and I would ask you to stay in touch with our staff people, and if there is trouble, we really would like to know that. Nobody who comes to testify before this Commission is going to be treated that way. That's the law, and I think I speak for my colleague and for the staff. We'll see that the law is carried out.

I think you have been courageous to come and spend time with us. It must be awfully painful for you, and certainly the kind of testimony you have given us will allow us to look at that and see what kind of recommendations we make in the future.

Do you have any more questions?

MS. MILLER: No, no more questions for you, Imogene.

CHAIRMAN PENDLETON: Thank you so much. If you want to leave, you don't have to stay, but if you want to stay you can do so. Thank you very much.

Counsel.

MS. MILLER: Thank you. Let's move to Edna Thompson now if we can. Can I just ask you to launch right in and tell us about your recent experiences with the tribal courts at Cheyenne River?

MS. THOMPSON: In August of 1984 I was arrested, and I was put in jail, and I asked what the charges were. There were no charges. And the police came and drug me out of the back seat of a car. So after I got put in jail, I couldn't get up the next morning because my head and my back hurt. So I kept telling the jailer I wanted to go to the hospital. He said, "Okay, we'll take you to the hospital," but they never did.

Finally, I called this lay advocate, and he came and he got me out of jail, and that was a \$500 PR bond. The judge came in and said, "There are three charges on you, one for criminal mischief, one for obstruction of governmental function, and one for disorderly."

I said, "They didn't have these charges on me when they brought me in."

So the judge said, "There's a commitment on you to stay in jail until Tuesday." This was on a Saturday morning.

So we talked to him, and he finally let me out on a \$500 PR bond.

So I went home and I took a bath and laid down and I couldn't get back up. So the ambulance had to come and get me. I went to the hospital. They said that all the muscles in my back were pulled. I stayed in the hospital for 3 days.

And I turned around and filed a police brutality on the two police officers. To this day I have never heard anything on that complaint. I called the judge; I called the clerk of court. They never tell me anything, "Well, it's being processed." I have never gone to court on that incident.

COMMISSIONER DESTRO: What date was that?

MS. THOMPSON: That was August of 1984. And I still have my \$500 PR bond. When I went to court for my arraignment on these three charges, the prosecutor came out and she said, "What are you doing here?" So I showed her my PR bond. She said, "We don't even have a copy of this. We don't even have the original." So I never went to court on that.

MS. MILLER: Can I just stop you for just a minute. Can you describe how the arrest occurred in that case?

MS. THOMPSON: I was driving down the street. This police officer pulled up behind me with his red lights on. He told me to park my car. He followed me back to the house. I parked

the car. My mother and them were leaving so I got in the back seat of their car. We went downtown Dupree. She parked outside the bar. The police officer pulled up, came over, and he was going to open the back seat of the car. He said, "Come on, you're under arrest."

I said, "What is the arrest for?"

But he was going to open that door, so I locked it.

I said, "Tell me what the charges are and then I'll go with you." I said, "I haven't done anything." I said, "You made me park the car so the car is parked."

But he just would not let go; he just kept pulling on the door. My mother got out, and said, "Leave her alone. She hasn't done anything."

In the meantime--my husband was a police officer. He pulled up from the other side, opened that door on the other side, and drug me out by my hair and put me in his police car.

This other police officer turned around and grabbed my mother and said, "You're going to jail for interfering." So she had to go to jail, too, that night. And there were no charges, no nothing, until the next day there were three charges on me. They said those were three class A offenses. So that's why they let me out on \$500 PR bond.

MS. MILLER: Have you tried to find out what the status of your case is?

MS. THOMPSON: Sure. I've always called them.

MS. MILLER: Who have you called?

MS. THOMPSON: The prosecutor, the judges, the chief of police.

MS. MILLER: And what response do you get?

MS. THOMPSON: They say, "We're still working on them." Finally, it's nothing now.

MS. MILLER: And how long has it been?

MS. THOMPSON: Since August of 1984.

MS. MILLER: So you have no idea what the status of that case against you is?

MS. THOMPSON: No.

CHAIRMAN PENDLETON: Excuse me. You mentioned a \$500 PR bond.

MS. THOMPSON: Right.

CHAIRMAN PENDLETON: What happens to the \$500? Or was some part of the \$500 paid? Which was it? You had to put up \$500?

MS. THOMPSON: No.

CHAIRMAN PENDLETON: How much did you put up?

MS. THOMPSON: I didn't put anything up. It's a personal recognizance bond.

CHAIRMAN PENDLETON: I see; okay. I just wanted to make sure we knew what that was. It might look in the record as if you put up \$500 and didn't get it back. I just wanted to make that clear. Thank you.

MS. MILLER: What about your police brutality complaint?

MS. THOMPSON: I have never heard anything on that either.

MS. MILLER: Have you asked questions about what happened to that?

MS. THOMPSON: Yes.

MS. MILLER: What response have you gotten?

MS. THOMPSON: They say, "Well, we'll have to investigate this. We're still looking into it."

CHAIRMAN PENDLETON: Excuse me. I want to make sure we are clear here. Who dragged you out by your hair from the car?

MS. THOMPSON: My husband. He was a police officer.

CHAIRMAN PENDLETON: And who are the brutality charges against?

MS. THOMPSON: Both of them; both of the police officers.

CHAIRMAN PENDLETON: Your husband dragged you out by your hair, and the other policeman dragged your mother?

MS. THOMPSON: Yes, there were two police cars.

CHAIRMAN PENDLETON: So you have brutality charges against your husband and against another police officer; is that correct?

MS. THOMPSON: Right. Both of them are police officers.

MS. MILLER: You have now described an experience you have had in criminal court and with the police. Do you also have something to tell us about an experience in civil court?

MS. THOMPSON: Right. January 7, 1986, I filed a complaint in the civil court. I bought a car from my sister, who bought it from this other woman. I bought this car, and I was supposed to get the title for it. So I waited 9 months and I never got the title. I found out the title was sitting at a credit union because the woman had already borrowed money on it and that was her collateral.

I went in there and I said, "I don't want the car anymore, but I want my money back." So I filed this complaint.

COMMISSIONER DESTRO: Excuse me a minute. Which woman had borrowed money on it? The original owner?

MS. THOMPSON: Yes. And she sold the car to my sister.

COMMISSIONER DESTRO: And your sister never had taken the title either?

MS. THOMPSON: No. When she sold me the car, she said, "I'll have the title to you Friday," so I assumed she had the title. When it came down to it, the title was sitting at a credit union because she borrowed money on it, the first owner.

COMMISSIONER DESTRO: And you had paid for it already?

MS. THOMPSON: Yes. So I filed a complaint that I wanted my money back. It never went to court. So I kept calling the clerk of court, and she said, "Okay, we'll get you a court date."

Finally, one day she called me and she said, "Well, your sister filed a complaint on you because your car is sitting outside her house, and she is filing storage fee on you."

So I said, "Okay, I need to get a subpoena for that."

So the day the court was supposed to be on April 4 at 9 o'clock in the morning. Two days before then I called and I talked to the judge. I said, "I need a subpoena."

He said, "Okay, you come in and you sign a subpoena. We'll postpone this for you."

MS. MILLER: Are you speaking of a witness subpoena; you wanted to bring witnesses?

MS. THOMPSON: Right. So that Friday afternoon I found out my sister had gone to court. So I called the clerk of court, and she said, "Yes, we had court without you. Your car was awarded to your sister."

I said, "Well, the judge postponed this for me." And I said, "He told me to come in Monday and sign the subpoena and he would give me a new court date."

She said, "Well, the car was already awarded."

She said, "Talk to the judge."

So I talked to him. He said, "Oh, I forgot. Come in Monday. Sign your subpoena and we'll give you a new court date."

I said, "Well, you call my sister and tell her not to touch that car."

He said, "What's her number?" So I gave him my sister's phone number.

So Monday I went in, and I have two more complaints in there, one for support from my husband and a court order to get that car back from my sister because he was the one who authorized my sister to take the car.

CHAIRMAN PENDLETON: Just a second. I want to make sure we are really clear about this record. Support for what from your husband?

MS. THOMPSON: He was working at the time. And when I went to get general assistance from the tribe, the BIA, they denied me because I was married to him. They said, "You are legally married to him. He has to support you. So you file this civil complaint to get support money from him."

So those were the two complaints that were in there. So the day I went in there and signed my subpoenas and asked about my other two complaints, she said, "No, we are not processing those. We are holding those because your husband filed for his divorce."

I said, "What has my complaint got to do with the divorce?"

She said, "Well, I will have to call him and talk to him."

In the meantime, my sister turned around and she sold the car engine out of this car. So I went back to the judge and I said, "You were supposed to give me a new court date. I lost the car already. She sold the engine." I said, "I want to see the disposition." There was no disposition.

He said, "Well, I don't know what to do now." He told the clerk of court, "Do something. She lost her car. They are taking parts off of it."

I said, "It's your fault. You postponed it. You told me you'd give me a court date. You gave the car away. You still told me to sign the subpoenas. I did everything you told me to do. And now the engine is out of that car and the tires are gone."

In the meantime, while all this was happening, the first complaint I signed to get my money back, they are still sitting on that complaint. The clerk of court said, "Well, I have the title to that car now."

I said, "It's too late for that. I already signed my complaint. I wanted my money back. I waited 9 months for that."

She said, "Well, we'll give you a new court date."

And to this date I have never heard anything on that. So I went to the law and order committee, and I told them what happened, and the law and order committee chairman said, "Oh, this is beyond me. I don't know what to do. Give her a new court date."

Here is the superior judge sitting there and says, "Give her a court date. Make sure she has a fair trial." So I said, "Okay, that's what we'll do."



So I turned around and I filed an affidavit of prejudice against two judges. The third judge couldn't hear my cases because he's my uncle.

So then when all of this came down and I told the law and order committee, they told me, "Go in front of council." So I went in front of council, and there was no results out of that.

MS. MILLER: Why not?

MS. THOMPSON: My husband was sergeant-at-arms. And I was told when I went into council that I could request that he be out of the room when I went in to talk to council. Then the chairman said, "No, he has to stay in here."

The first time I started talking, that man jumped up. He screamed and yelled at me. He practically hit me in that room, pointing his finger at me. He had the most dirty things to say to me right there in front of council. Council was out of order, and still they let him go on. So I just walked out of there.

MS. MILLER: Did you request that council go into executive session so you could present your claims?

MS. THOMPSON: Yes.

MS. MILLER: What happened?

MS. THOMPSON: That's what it was. An executive session. Everybody was told to leave the council room. So we went in and they told me I could request the sergeant-at-arms be out of the room also. But once I requested that, the chairman said no. So when I started talking, the sergeant-at-arms starts screaming and yelling and pointing his finger at me and calling me a liar. I didn't even get to talk. What I went in there for, they never heard me out.

CHAIRMAN PENDLETON: Excuse me. You were on the record when your husband said mean things to you; is that correct?

MS. THOMPSON: Yes.

CHAIRMAN PENDLETON: I hate to ask, but is there a record of whatever was said, or they don't keep records?

MS. THOMPSON: From what I understand, executive session is not on record.

CHAIRMAN PENDLETON: This was in open or executive session?

MS. THOMPSON: This was executive session where everybody in the council room is asked to leave other than the council members.

CHAIRMAN PENDLETON: So his comments about you were made in executive session, not in open session?

MS. THOMPSON: Yes, it was in executive session.

CHAIRMAN PENDLETON: I see.

MS. THOMPSON: So then in the end they never heard what I had to say.

MS. MILLER: So what is the status of this now?

MS. THOMPSON: Council finished with saying they would appoint me a new judge, someone to hear my court cases. In the meantime, all my court cases went through court without me, and I am finding out who won my car. I got one disposition. So I took it to council and I showed them. I said, "I didn't even go to court. There is a disposition put out on this."

COMMISSIONER DESTRO: Excuse me. Which case did you get a disposition on?

MS. THOMPSON: On the support and the court order to have my car brought back to me.

COMMISSIONER DESTRO: That's two cases, then?

MS. THOMPSON: Yes.

COMMISSIONER DESTRO: And you didn't participate in either of them?

MS. THOMPSON: No, I have never been to court. I haven't been to court, and I lost my car.

COMMISSIONER DESTRO: Which judge ruled on your case? You don't need to give the name.

MS. THOMPSON: The superior judge.

COMMISSIONER DESTRO: And that was one of the judges you had filed an affidavit of disqualification?

MS. THOMPSON: Yes. So when I went back, I had one disposition, and I received that in the mail on June 11. That disposition was dated June 13. So I took it into council and I showed it to them.

So we turned around and we got this lay advocate to represent me. He called the clerk of court and said, "Why is this disposition dated the 13th when today is only the 11th?" They didn't even have a copy of it. The clerk of court's name was on there, and the superior judge's name was on there, and they didn't even have a copy of it up at the judge's chambers. So we made a copy and we took it over to them.

So when I went in front of council, they said, "Well, we will appoint you a judge to hear your cases."

So it turns out that the man that was representing me, the lay advocate, they offered him the position as judge. I said, "How could you possibly be the judge when you're representing me?"

He turned around and he called the clerk of court and he refused one of my cases because he was representing me.

Well, a couple of weeks ago I called up there to find out about my divorce, and they said, "Well, it's scheduled, and your lay advocate is hearing that case." She said, "He called and he didn't want one of your cases because he is representing you, but he is hearing this divorce case." She said, "That's what you call a conflict of interest."

I said, "In that case, I won't be in court." So I didn't go to court for my divorce, and that was finalized last Friday.

MS. MILLER: Why didn't you go to court?

MS. THOMPSON: I didn't feel it was right. Everything the way that it was happening--I mean, I lost faith in that whole tribal court system.

MS. MILLER: So what is the status now on your divorce?

MS. THOMPSON: It's finalized.

CHAIRMAN PENDLETON: It's final; right?

MS. THOMPSON: Yes.

COMMISSIONER DESTRO: Did you complain to the judge or to the tribal council or to anyone about appointing your advocate as your judge?

MS. THOMPSON: I feel like when I went in to council, I had a couple of these council representatives tell me what I can and can't do if I go to council. And every time I've done everything they've said that I can and can't do, then they turn their backs on me. Even my lay advocate--here he is representing me, and he told me, "Go to council. We're all behind you. We'll help you."

So I get in there and he says, "I can't stand this. Those people, I can't stand them. I can't be here. You have to do it on your own." And he walked out on me.

So there I was, walked into council, and get screamed and yelled at. So I just left. It's got to the point where I don't know what to do anymore. I lost my car. All my court cases have been heard, and I have never been to court. I even went up there to look at my folders, and the summons that they were supposed to serve me, the return service was never signed by a police officer. Yet, they went to court without me.

So I went to the BIA superintendent, and I told him what was going on. He said, "Appeal it to the appellate court."

So when I started looking into that, they said, "No, you can't go into the appellate court because you do not have a disposition. Until you have a disposition on these court cases, you can't get into the appellate court."

COMMISSIONER DESTRO: I thought you said you had dispositions.

MS. THOMPSON: I only had one.

MS. MILLER: Did you ever complain to BIA about this?

MS. THOMPSON: Yes, I have.

MS. MILLER: What happened?

MS. THOMPSON: I gave him a full report on what went on, and he was going to turn it over to the special officer.

MS. MILLER: Who did you give the report to? The superintendent?

MS. THOMPSON: Yes. He was going to give it to the special officer to investigate it. He said, "If your civil rights are violated, this could go into Federal court." And that's the last I heard about it.

COMMISSIONER DESTRO: I just want to make something clear. I want to make sure that the numbers are the same. You had said that you had one disposition, but earlier you said you had a support disposition and the other disposition with respect to getting your money back for the car.

MS. THOMPSON: The one disposition I got was the one that came from an attorney's office in Pierre.

COMMISSIONER DESTRO: That wasn't from the court?

MS. THOMPSON: No. But it was signed by the superior judge and the clerk of court. But when we called them, they had no copy of it; they didn't know anything about it. So I made a copy and I took it over there.

COMMISSIONER DESTRO: And that one was on which case?

MS. THOMPSON: I think it had to do with the car.

COMMISSIONER DESTRO: And that was the one that they ruled in your favor?

MS. THOMPSON: No.

COMMISSIONER DESTRO: They didn't rule in your favor?

MS. THOMPSON: I lost everything. I never went to court. I lost everything. I lost all my court cases.

COMMISSIONER DESTRO: They just ruled in favor of your sister?

MS. THOMPSON: Right.

COMMISSIONER DESTRO: What about the support--when you said they had ruled on that one too?

MS. THOMPSON: I wasn't in court on that one, but what I understand is that I could not get no support money from him, and he said the car was mine so that he couldn't bring it back to me.

CHAIRMAN PENDLETON: Excuse me. What happened to the engine in the car?

MS. THOMPSON: My sister sold that engine off the car. So the engine was taken out of the car.

CHAIRMAN PENDLETON: But what did you get back when you got the car back?

MS. THOMPSON: I didn't get the car back.

CHAIRMAN PENDLETON: Where is the car today?

MS. THOMPSON: The car today--there is no engine in it; there's no tires on it, and it is parked outside my sister's house.

CHAIRMAN PENDLETON: I see.

COMMISSIONER DESTRO: And then they used the fact that you still owned the car to deny you support?

MS. THOMPSON: That's right.

CHAIRMAN PENDLETON: So the car is some kind of collateral, is that right, for something?

MS. THOMPSON: The other thing, too, is I went in to get a copy of my divorce papers when they first told me: "We're sitting on all your complaints because your divorce papers are filed." I walked in and I asked the clerk of court for a copy of it, and she said, "I don't have it."

I said, "You're going on hearsay." I said, "You're sitting on my complaints because there is a divorce filed, and you don't have no papers."

So I went in to see the judge, and he said, "Well, I'm going to tell you something. You're not divorced from your first husband."

I said, "We were in this court. We got our divorce from this court."

He said, "Well, bring me that folder. I'll show you there is no final divorce decree in that folder."

So the clerk of the court went out of the room and she came back and she said, "That whole folder is missing."

The judge said, "I had that folder last week and there was no final decree in there."

I said, "There is a final decree."

He said, "Well, bring me the folder."

She said, "It's gone; the whole folder is missing."

I said, "Are you telling me I'm still married to my first husband?"

He said, "Well, I had the folder here. It's gone."

I said, "I'll call my ex-husband out in California and have him send out the final decree that he's got out there."

And he said, "Well, it's not here, and your whole folder is gone."

I said, "You guys don't even have a record of me being divorced, huh?"

He said, "No."

CHAIRMAN PENDLETON: I got in your way a little bit here.

MS. MILLER: That's perfectly all right.

Just one last question. What has happened to your attitude about the court system there?

MS. THOMPSON: I don't have no faith in that court system. I'm really bitter towards them right now.

MS. MILLER: Do you think that other people in the community share your opinion?

MS. THOMPSON: Yes.

MS. MILLER: I have no more questions.

CHAIRMAN PENDLETON: Mr. Springer, you're not going to make this better, are you?

MR. SPRINGER: It gets better.

CHAIRMAN PENDLETON: It gets better. I thought so.

[Laughter.]

CHAIRMAN PENDLETON: Counsel.

MS. MILLER: Mr. Springer, I guess we could start off by asking you how you feel about the court system at Cheyenne River.

CHAIRMAN PENDLETON: That's a good place to start.

MR. SPRINGER: I feel the whole court system really needs to be revamped. It has been infiltrated, and a lot of these decisions that happened to this young lady and as to this they get swept to the wayside because there are things much more important right now. The reservation is in a financial crisis and has been in one for several years since Reaganomics has come. And everybody is using their political structure for a means of survival.

So, therefore, the little people in between are just literally getting hammered. There's not too much concern on what happens to either one of these individuals, that their rights have been abused, that they have been totally walked over, because they don't have any political power to come back and set this right. So, therefore, they are just trampled under the feed and the hay because they have bigger fish to fry.

MS. MILLER: Let me back up for a minute and ask you to tell us something about your background.

MR. SPRINGER: When I got out of the service, I came back to the reservation. I worked construction for a while. Then I obtained a job working for the Sioux Youth Development. After that I was public defender. After that I worked for South Dakota Legal Services. After that I was a police officer for 3 years on the reservation. Since then I worked construction again, and now I'm working for the Bureau of Indian Affairs.

MS. MILLER: Did you also work as a police officer for the city of Eagle Butte at one point?

MR. SPRINGER: Yes, that's where I received my certification to the State of South Dakota.

MS. MILLER: Do you have a personal experience with the tribal court system you can share with us?



MR. SPRINGER: Yes, Springer v. Woods. That's where I was arrested and thrown in jail as a police officer for violation of someone else's civil rights, which Federal Judge Porter ruled on and said that I didn't violate this person's civil rights, and in fact, in the process of mine, they violated seven out of the eight of mine in the process of it. I've got a standing decision on that from Judge Porter, and he ordered my record destroyed and admonished and everything else.

MS. MILLER: What type of violations occurred in your case? Do you remember? How was the trial handled?

MR. SPRINGER: Oh, I was forced to testify against myself. I was not allowed counsel. I was not allowed a trial by jury. A whole list of things like this. I put in a motion for a stay of execution pending appeal after these atrocities, and I cited in my court case to the judge that, "By you forcing me to testify, you are violating my civil rights," and made a note of issue in the court that, based on this, I'd like a stay of execution pending the appeal of this.

Well, there was no active appellate court. Council wouldn't listen to me and whatever. And I exhausted what tribal remedies there were. I called an attorney. He represented me and took it into Federal court.

MS. MILLER: How exactly did you get into Federal court then?

MR. SPRINGER: On a writ of habeas corpus was the only way because I was actually incarcerated.

MS. MILLER: Based on your background as a police officer, can you give an opinion about whether the police department is operating in accordance with the Indian Civil Rights Act?

MR. SPRINGER: The police force in the past and when I was on it, and still from time to time, has hired ex-felons, people that have been convicted of the 13 Major Crimes Act to act as police officers. Other officers are totally untrained. Many officers who want to better themselves and learn how to do things right request training and it is denied. They get paid for 8 hours. They work 16 to 20. If they make any gripes about it to the Labor Board or on 638 contract in the Federal rules, they are terminated.

In each drawer up there, when I was up there, you had a stack of warrants--whoever the weekend judge was, you had a stack of signed warrants over here and a stack of signed search

warrants over here, and whenever you needed one you just went and got one and kicked in the door or whatever, and you didn't have to worry about it because you went back and filled the thing out after you got back. You filled in the appropriate charges and the appropriate affidavit to go with it. It was already signed. And up to 6 months ago, the last time I checked, they are still stacking each drawer.

If there was an influential person that they wanted to control, but yet no judge wanted him to have his name on there because the political pendulum would swing back, and he could probably lose his job or his political power position, there was warrants that were put out that we were ordered by the sergeant or the lieutenant or the chief of police. And on several occasions--I was really popular at one time because of some of my arrests--I was ordered to arrest these people and serve these warrants or I would be terminated. So being the warrant was only as legal as having the person's name on it, I went up and I handed it to him and I said, "Hey, they've got this warrant for you," and I turned around and walked away. That's as official as I served it, because it wasn't even signed by a judge. And, of course, I got in trouble for that.

MS. MILLER: You have knowledge that this still happens within the police department?

MR. SPRINGER: Oh, yes. Up to 2 weeks ago, I talked to one of the sergeants of police who has been trained by the Bureau of Indian Affairs out in Utah, and he goes to great pains trying to keep his tail out of trouble so he doesn't wind up some day in Federal court because he says, "Someday this has got to come to an end, and I don't want to be at the bottom of the pile when it comes crashing down on us."

MS. MILLER: Are you aware of other instances where other violations have occurred, other problems with the police department, in dealing with community members?

MR. SPRINGER: Oh, yes. We have had standing orders to remove people from the reservation without hearings, to escort them, both Indian and non-Indian.

CHAIRMAN PENDLETON: Where do they go when they leave the reservation? Just someplace, or just off the reservation?

MR. SPRINGER: Well, you get them in their car and you get them headed in the right direction and you take them to the border.

CHAIRMAN PENDLETON: That's it?

MR. SPRINGER: That's it.

[Laughter.]

MS. MILLER: How would you describe general community sentiment towards the court system and the police department?

MR. SPRINGER: Depending on if you are politically in, you're probably all right, but it runs right between fear to horror to just total awe in the people, of the atrocities that have happened to them and to their families at different times, depending on the political swing of what faction is in, is depending on what happens to you. If you don't belong to either one, boy, you're going to get clubbed all the way along. And that's what happens to a lot of people.

COMMISSIONER DESTRO: May I interject here?

MS. MILLER: I have no further questions at this point.

COMMISSIONER DESTRO: You talked about the political dimensions of this. Did you feel as a police officer that you were in, or do you still have to be in, in an additional way in order to be free of some of the harassment?

MR. SPRINGER: If you want to be a long-standing police officer in the Cheyenne River Sioux Tribe, you'd better take a good assessment of the political surroundings that you are going to be working in, and then you take great pains to stay away from those things that are going to bite you.

CHAIRMAN PENDLETON: Great pains.

MR. SPRINGER: Like looking the other way if you absolutely have to.

CHAIRMAN PENDLETON: Did you have a question?

COMMISSIONER DESTRO: I wanted to ask Ms. Thompson a question. You mentioned you had gone to the BIA, and they had advised you that if your civil rights had been violated, you could go to Federal court. What else did they tell you in that vein? Did they suggest that you see an attorney or what?

MS. THOMPSON: No, all he said was he was going to turn my report over to the special officer and that he would investigate.

COMMISSIONER DESTRO: At BIA?

MS. THOMPSON: Yes.

COMMISSIONER DESTRO: And you have not heard anything from them either?

MS. THOMPSON: No.

CHAIRMAN PENDLETON: That's a good point.

Let me ask this. Any of you can answer this question. It does seem like a thread runs through the testimony of everybody here, that not only is there a procedure problem in how you follow the process that the citizens figure is going to be followed in the justice system, but there also appears to be a recordkeeping and filing system problem, and that problem tends to work in the favor of the court system and not--of the courts, but not in favor of the petitioners. Is that the right term, Bob?

COMMISSIONER DESTRO: Yes.

CHAIRMAN PENDLETON: You have all looked for records saying, "Where is this?" and "Where is that?" Either there is no record when you go--you are arrested for no reason and there is no record there. If you go to look for the record, there is no record there, which allows this kind of, if I can use the term, kind of, if not physical, a kind of a verbal harassment, if you will, that continues to whipsaw you back between pillar and post to find out what you can do. And because of the lack of records and the lack of a filing system, you have nowhere to turn to. Is that an accurate assessment of the situation?

MR. SPRINGER: That is correct. You have virtually nowhere to go. You are stuck.

CHAIRMAN PENDLETON: So what we are saying now is that this is a system without a system.

MR. SPRINGER: Yes. The Indian Civil Rights Act is a paper tiger.

COMMISSIONER DESTRO: Ms. High Elk. I think I had a--

MS. HIGH ELK: I forgot to tell you that on my deceased daughter's police record, our first lawyer went to check out her records and they had disappeared.

MR. HOWARD: Could you pull your microphone closer, please.

MS. HIGH ELK: On my deceased daughter's police record, when we got our first lawyer, he went to see her records and they all disappeared. Also, 2 months before she died, she was beaten up in jail, and we got the doctor's statement. He went up to the hospital to look at the doctor's statements, and they were gone.

So our second lawyer had just--we dropped our first lawyer because he was going to be a tribal lawyer, so we got another, second lawyer, and he wanted the doctor's statements on that, too, and he just was lucky he caught the doctor before he left the country. So he made another statement and put it in her record.

MR. HOWARD: So you have now dropped your second lawyer; is that right?

MS. HIGH ELK: Yes. We are on our third lawyer.

MR. HOWARD: And why did you drop your second lawyer?

MS. HIGH ELK: Why?

MR. HOWARD: Yes.

MS. HIGH ELK: Because we found out--you know, the girls had a brand new car when they got killed. They were both working. And they had liability insurance on it. Well, all these things going on, we forgot about that liability insurance, and our second lawyer had collected it, and it had to the payment of Leslie High Elk's estate, the \$15,000 check. Well, he took it and forged it. So we went to the South Dakota State Bar Association trying to get the money back, and they were in favor of him. So we lost out there too. So we just dropped him and got our third lawyer.

COMMISSIONER DESTRO: Do you have a question?

CHAIRMAN PENDLETON: No. I just have to admit that I am speechless.

MS. HIGH ELK: I'm on my third lawyer, and he refused to talk to me because he only talks to us when we call him once a month. Now he says I can't talk to him because the tribe won't even talk to me, so he will only talk to my husband.

COMMISSIONER DESTRO: Was your second lawyer a tribal lawyer too?

MS. HIGH ELK: He was once. And I understand he had just let that tribal lawyer position go when this accident happened. We didn't know it. But then when our first lawyer was put in for the tribal attorney, we just dropped him and got this other one. He used to be a tribal lawyer. I never was involved with lawyers before. But the South Dakota State Bar Association has no use for Indians. They collected \$2,000 for us out of \$15,000, and that isn't much.

COMMISSIONER DESTRO: They got \$2,000 from the lawyer out of \$15,000?

MS. HIGH ELK: Yes. In fact, it was \$1,900 and some. The second lawyer said the rest was his because he worked on our case. Well, he never solved the case.

COMMISSIONER DESTRO: Let me just ask a question to Mr. Springer about the Bureau of Indian Affairs. What was the relationship between the reservation police department and the BIA when you were on the force?

MR. SPRINGER: The relationship between the Bureau of Indian Affairs--well, you have to understand there is a special officer out there and he controls it. He has the Federal authority.

There's many things, like I've seen a crime scene murder investigation that took less than 15 minutes to get the body in the morgue. And I'm a trained police officer. I know how long it takes to do a crime scene investigation of a murder. Well, it got called a suicide before it was all over with and everything, and that's the way it was.

In her case, I do know of the incident sometime after this. I was a police officer, and I happened to be in the right place at the wrong time or whatever, but I do know some records were carried out to the car in reference to her case that never came back into the police department. They were in the hands of a police officer, and that was the last they were ever seen.

CHAIRMAN PENDLETON: In Ms. High Elk's case, you're saying?

MR. SPRINGER: Yes, that was the last they were seen. They were being taken out of the police department on investigation supposedly for review because the special officer wanted to see

them, and I know that nobody seen the papers after that police officer took them out.

MR. HOWARD: Did you see the records carried out?

MR. SPRINGER: I seen the records carried out.

COMMISSIONER DESTRO: The special officer of the BIA?

MR. SPRINGER: Yes. Supposedly. I asked, "Well, where is he going with that file?"

They said, "He's taking it up because the special officer wants to see it."

I don't know if it ever got there, if it got lost in that office. I don't know that, but I did see the record. I didn't know the file. I said, "What does that have to do with?" They said, "That has to do with the High Elk case."

CHAIRMAN PENDLETON: In other words, there is some implication that it went to the BIA officer, but you don't know that that's the case?

MR. SPRINGER: No, I just know the records haven't been seen after that.

COMMISSIONER DESTRO: Let me explore this a little bit further, though, with respect to the BIA. The special officer--is he basically the person in charge of the reservation police department? He is the one who gives all the orders?

MR. SPRINGER: He handles anything in the 13 major. He is supposed to assist in counseling, training, and overseeing the functions of the 638 contract that the police department functions under, with the exception of the chief of police who is directly hired by the tribal council. He answers directly to the tribal council. He does not answer to the special officer; he answers to the council. But all the other 638 employees underneath that are supposed to receive direction, training, and supervision by the special officer on the reservation on each particular reservation.

COMMISSIONER DESTRO: So all your training, then, is supposed to come from and through BIA?

MR. SPRINGER: There is a line item set up in the 638 contract for training, but it never does happen. I think in the 7 years that I have been affiliated in and out of the court system, I think they probably trained less than a dozen officers, but they have a terrible turnover.

CHAIRMAN PENDLETON: Under which one of those functions of the BIA would the recordkeeping review process take place in Ms. High Elk's case? In other words if, as you say, the records were--if the indication is they would go someplace else, under which one of those functions of the BIA would they go to the BIA? You mentioned training and oversight.

MR. SPRINGER: Well, her particular thing would come under--at that particular time they were trying to say that there would be manslaughter involved, but also the two people that were involved at this time, you've got to remember that it was a father and son. The father was the chief of police. The son that was involved in this and the other police officer was also a son of his. The chief was the father, and both sons were involved in this high-speed chase.

CHAIRMAN PENDLETON: So as a criminal violation, this goes over to the Federal court, so therefore that would give some reason for review by the BIA?

MR. SPRINGER: Yes.

CHAIRMAN PENDLETON: And they would decide whether it should go or not go?

MR. SPRINGER: Right.

MR. GILMAN: Typically, I think that the BIA's special officer is in charge of reviewing all alleged major crimes on the reservation, and then he is responsible for forwarding his investigation recommendations to the Federal prosecutor. That is perhaps why this file would go to him.

CHAIRMAN PENDLETON: Let me stay with it for just one more question maybe. If there are no more records, then where is the major crime? I'm not trying to play Perry Mason or somebody, but if there are no records--she's got nothing; the lawyer got the insurance money and he forged that, and she has no records, and there are no records in the police department; what are we talking about?



COMMISSIONER DESTRO: Is it also true, to follow up this, that the special agent basically is supposed to have custody of all records dealing with major crimes, right?

MR. GILMAN: I would imagine that he is supposed to keep them. I hesitate to offer any definitive answer, but I would imagine that he has some responsibility to keep some records. That is just his function. He is supposed to investigate and forward cases to the Federal prosecutor under the Major Crimes Act.

CHAIRMAN PENDLETON: But we are trying to establish a record. We are trying to establish a record that, as it is reviewed by us at the Commission, that it has the elements it has to have in it. If there are no records, then why is it a major crime? Or it lost its identity once that record got in transport?

COMMISSIONER DESTRO: Not only that, but it seems to me, in line with the recordkeeping question that the Chairman is raising, that if there are no records, you can't prove the crime. If you can't prove the crime, you can't prove that there was a major violation of anybody's civil rights, and then we are back to square one about are we really dealing with a civil rights question or an administration of justice question.

CHAIRMAN PENDLETON: That's the point I was trying to make.

COMMISSIONER DESTRO: And we've got parts of both prongs of our jurisdiction, if you will, involved in this, and I'm trying to find out where all this fits. This is all hooked together, and it's a question of staking it out on the record.

CHAIRMAN PENDLETON: You understand what we're saying here. There are two jurisdictional components we are dealing with right now. One is our role in the administration of justice, in terms of equal protection surrounding that, as well as our responsibility for the monitoring of the Indian Civil Rights Act.

MR. SPRINGER: Correct.

CHAIRMAN PENDLETON: So what Commissioner Destro is talking about here now is that he is trying to find out whether this fits both those components or one of those components, and what I hear him saying is it really fits both of these components because what we are talking about now is that the administration of justice is not adequate in this case.

COMMISSIONER DESTRO: That has been one of the complaints consistently in some of the media commentary about the scope of the hearing. People have complained that the hearing is too narrow. But what we are finding here is the complaints have been in part about the tribal courts and the tribal police departments, but also there may be the hand of the BIA runs through all of this as well.

CHAIRMAN PENDLETON: Correct.

COMMISSIONER DESTRO: And I think we would do everybody a favor if we could talk about that as much on the record as we can, too, because that is a direct Federal agency. You don't have the cross-sovereignty problems in making congressional recommendations to deal with the BIA that you would with the tribal courts.

CHAIRMAN PENDLETON: Ms. High Elk.

MS. HIGH ELK: Yes. My daughter's records disappeared, but the funny thing is five of the police officers have done that. Four gave statements saying it was their negligence. They admitted it. But the council is the one that is sitting on it. They won't refer us to the tribal court. So the police officer, the chief and three of the police officers, have admitted it was their fault.

MR. HOWARD: What was their fault?

CHAIRMAN PENDLETON: The death was their fault?

MS. HIGH ELK: Yes, the death was their fault.

CHAIRMAN PENDLETON: The death of your daughter was their fault?

MS. HIGH ELK: Yes, they admitted it was their negligence.

CHAIRMAN PENDLETON: And what about your son?

MS. HIGH ELK: No, nobody.

CHAIRMAN PENDLETON: Nobody. Only your daughter.

MS. HIGH ELK: Only my daughter. We never did anything. I'm going to tell something about that. One of the police officers that made a statement--this is where we found out maybe this is why the police department has been harassing us--one of the police officers said, "This chief of police of

ours that we are working with said that him and my husband were always fighting because they were always both in police training and they're jealous of each other so they fight a lot. Maybe that's why he killed our daughter."

Well, we didn't know that another man was fighting my husband over police training they got. This was news to us. We didn't know that. Maybe this is the reason the police officers are always bothering us. That was new to us. Our lawyer told us when one of the police officers made the statement.

CHAIRMAN PENDLETON: Well, panelists, we want to thank you for an enlightening session. Please let us know if there is any discussion with you back on the reservation once this is over.

Thank you very much for coming. We really appreciate your time.

Our next panel will be Marvin Stoldt, Trudell Guerue, and Kelly Jones.

I just need to add a note for the record. We have an excerpt from the Indian Law Reporter of September 1985.

MR. HOWARD: The decision was September 24, 1984.

CHAIRMAN PENDLETON: Yes, a September 24, 1984, decision in Springer v. Woods et al. And we are going to enter this into the record.

[Trudell Guerue, Calvin Paul Jones, Sr., and Martin Stoldt were sworn.]

#### COMMUNITY MEMBERS

Testimony of Trudell Guerue, Former Chief Judge, Rosebud Tribal Court; Kelly Jones, Rosebud Reservation; and Marvin Stoldt, Pine Ridge Reservation

MR. HOWARD: Mr. McDonald.

MR. McDONALD: I'd like to ask the panelists to give their names, occupations, and addresses for the record, starting with Mr. Kelly Jones.

MR. JONES: My name is Calvin Paul Jones, Sr. The nickname is Kelly. My mailing address is Rosebud, South Dakota, Box 116, 57570.

MR. McDONALD: And your occupation?

MR. JONES: My occupation--I am presently working on a ranch. I had been a former councilman for quite some time, at least six or eight terms.

MR. McDONALD: Thank you.

Mr. Stoldt.

MR. STOLDT: My name is Marvin Stoldt. I'm a social service representative for the Bureau of Indian Affairs at Pine Ridge Agency, Pine Ridge, South Dakota. I have 7 years as a social service representative, 9 years prior as police officer.

MR. McDONALD: Thank you.

Mr. Guerue.

MR. GUERUE: My name is Trudell Guerue, Jr. I was for 4 years the chief judge of the Rosebud Sioux Tribe. I am now a law student at the University of Notre Dame and hopefully I won't be there much longer. My address is 517 Napoleon Road, South Bend, Indiana 46617.

MR. McDONALD: Mr. Stoldt, will you tell us, if you will, about your experience of being arrested by tribal police while over the border in Nebraska?

MR. STOLDT: Yes. On May 30 I was arrested by tribal police in Whiteclay, Nebraska, outside of a tavern there. The charge against me was driving while intoxicated, eluding a police officer, and reckless driving. My wife was also with me at the time. She, too, was arrested. She has never been arrested before. She has never been incarcerated. She has no prior record of ever being involved in anything with the law.

We had gone there--we had planned to go fishing that day, and we had gone out to Whiteclay. We had two cans of beer apiece prior. That's all we had. We got to Whiteclay, and we were there approximately 10 minutes outside this tavern. She went in to write a check to purchase some beer to take along on our fishing trip. We were there at least 10 minutes when three patrol units pulled in, the tribal police. They walked up to my pickup and asked me to get out, which I did. They asked me to take a field sobriety test, which I complied with.

We were there at least, like I say, 10 minutes. And as they were placing me under arrest, my wife came out and she asked them what was going on and why I was being arrested. And they used some real foul language against her and they told her to shut her mouth or she'd be arrested too for interfering with a police officer. They were getting real rough with me. They slammed me up against the back of the police car and twisted my arms and they handcuffed me.

I was suffering from a back injury that had occurred on the job about 2 weeks prior, and I was on medication. And my wife said, "Don't be so rough with him. He's been hurt."

They said, "In that case, lady, you're going too." And they arrested her too.

They took us back to Pine Ridge. But en route, back to Pine Ridge, just 2 miles, they had the cuffs on me so tight that I was complaining that if they could loosen the cuffs or take them off because I hadn't resisted arrest or anything, and I wasn't being charged with a violent crime. But they just left them on me. And they tossed us in jail. I spent the night in a drunk tank, and so did my wife.

They released her next morning. Evidently, they were out of food at the jail to feed the people, and they just started releasing some of them, and she was one of the ones that was released. After she got out, she went out and wrote a check and got hold of one of the prosecutors, the assistant prosecutor, and posted bond so I could get out.

But I went to the Indian Health Service there and I talked to a doctor, and he made a statement, you know, that there was abrasions and bruises on my knee where they slammed me up against the car, and also abrasions on my wrists as a result of those handcuffs being on me too tight.

I made a statement to the review board which sits over the tribal police. I also attached a statement from the doctor about my wrists, and nothing was ever done about it. I never heard anything and am still waiting.

I hired an attorney to represent me, and we were supposed to go to court on July 22. We did. The judge didn't show up. And the police officer that brought the charges against me didn't show either. So evidently it's been postponed until further notice. I haven't received any notice of when the court date is.

COMMISSIONER DESTRO: May I interject and just ask a quick question.

MR. McDONALD: Surely.

COMMISSIONER DESTRO: Maybe counsel can help and the witnesses too. What is the jurisdiction of the tribal police off the reservation?

MR. McDONALD: That's going to be the next question.

COMMISSIONER DESTRO: All right; okay. Go ahead.

MR. McDONALD: He's got the answer.

CHAIRMAN PENDLETON: I thought if they took you to the end of the reservation and put you out that they couldn't go out there to get you, according to Mr. Springer.

MR. STOLDT: I failed to mention that at the time they arrested me they also confiscated my beer, which is legal in the State of Nebraska.

MR. McDONALD: What is the jurisdiction of the tribal police in Whiteclay, Nebraska?

MR. STOLDT: They have no jurisdiction, except in a hot pursuit. But generally, having experience as a former officer myself, we usually radioed ahead to the Nebraska police and asked them to either stop the vehicle we were in pursuit of and let them handle the situation, that if they were going to be charged, be charged by authorities in Nebraska. But in this case, the tribal police arrested me in Nebraska and transported me back.

MR. McDONALD: You mentioned three vehicles. How many officers were there?

MR. STOLDT: Six. There were six officers involved.

MR. McDONALD: Do you know which district they were from?

MR. STOLDT: Well, one was a criminal investigator. As far as I know, there were two officers from Pine Ridge and two officers from the Wahpeton district, and I don't know where the other ones were from.

COMMISSIONER DESTRO: Do the tribal police make it a practice to patrol around outside the reservation, to your knowledge?

MR. STOLDT: Well, I've heard rumors to the effect that they oftentimes go into Nebraska and they observe people buying beer, and they wait until they cross back into the reservation boundaries and arrest them and confiscate the beer and then they consume it themselves.

COMMISSIONER DESTRO: I was going to say that sounds like the Virginia police too, but I don't know that they consume it themselves.

CHAIRMAN PENDLETON: It must be good beer.

MR. McDONALD: What is the reputation of the police on the reservation, and particularly with respect to alcohol-related offenses?

MR. STOLDT: Well, I know some of the police officers, perhaps not the ones that are serving now, but I know some of them have been charged with violent crimes. Some have been convicted felons. But in order to qualify to be a police officer, all the tribal court requires is that they had no misdemeanor arrests over a period of a year, and that's about it, you know, the GED--that's about it. In fact, I served with officers that weren't able to read or write, and their wives used to make out their arrest reports for them.

CHAIRMAN PENDLETON: They were not able to read or write?

MR. STOLDT: That's right.

MR. McDONALD: What about abuse of drunken females? Can you relate that to us?

MR. STOLDT: Yes, sir. I've seen it happen. I've seen a lot of repeat offenders--you know, they're just street people. But they purposely pick them up and incarcerate them and then release them so they could serve as trustees--you know, this cuts back on salaries for cooks. They assist the cooks. They clean up the jail and so forth. But you see the same people in, continuously, night after night, you know.

MR. McDONALD: Do you know of instances involving females who had passed out?

MR. STOLDT: Yes, sir. A neighbor that lives across the street from my mother-in-law--she was arrested several days after I had been arrested. She was asleep. And two of the officers, I understand, kicked in a door, went into her bedroom and took indecent liberties with her before they placed her under arrest. When she woke up, they told her she was being arrested and they hauled her off to jail. She, too, filed a complaint against these officers with the review board, but I don't know what the end result was.

CHAIRMAN PENDLETON: Excuse me. How many people does the jail accommodate on the reservation?

MR. STOLDT: It is my understanding this new jail should only accommodate comfortably 38 people, but at the time we were in jail, I and my wife, there was 100 of us in there. There was no place to sleep. It's concrete. We slept on the floors. Some were fortunate to get hold of a mat or something like that to lay down on.

MR. McDONALD: Do you have knowledge of bootleggers and drug dealers on the reservation?

MR. STOLDT: Yes, I do, but they don't bother them. Periodically they will make a raid, but they are warned in advance. So when they do make a raid on the bootleggers, they maybe confiscate a case of beer and maybe a case of wine, and that's about it, and they are fined and they let them go. A lot of them are repeat offenders, but they don't do anything about it.

MR. McDONALD: Do a lot of people post cash bond? And if so, is that ordinarily returned?

MR. STOLDT: It's supposed to be, you know, but in a lot of cases it isn't. There's no record of it. And that was one of the things that I and my wife were concerned about. We retained our receipt so in the event they wouldn't give me my cash bond back, so we had something of proof. But there are a lot of cases where people post bonds and they never hear what happened to their bond money.

MR. McDONALD: Are professional attorneys available at Pine Ridge for the defense of criminal cases?

MR. STOLDT: No, no. There is some in existence, but we are not allowed to use them. If we are, I have never heard of it happening.



MR. McDONALD: Is this because of conflicts of interest?

MR. STOLDT: Right, because they are professionals. They've gone through the bar exam and so forth, and they are professional attorneys in the tribal court. And the judges themselves--a lot of the judges, you know, really don't have a heck of a lot of background in law.

MR. McDONALD: But all of them work for the tribe in one way or another; is that the case?

MR. STOLDT: Yes. Most of the attorneys that are practicing there are either practicing on their own or through the tribe.

MR. McDONALD: Mr. Howard has a couple of questions.

MR. HOWARD: Just a few questions for you, Mr. Stoldt, if I could refer back to the circumstances of your arrest. You say you and your wife went to the tavern in Whiteclay, Nebraska. Is that right?

MR. STOLDT: Yes, sir.

MR. HOWARD: And you were there for about 10 minutes before the three police cars arrived?

MR. STOLDT: Yes, sir.

MR. HOWARD: Did the police go directly to you when they left their cars? Did they appear to know who they were looking for?

MR. STOLDT: Yes, sir, they did.

MR. HOWARD: Was it your impression that they came looking for you?

MR. STOLDT: Right. They claimed a hot pursuit, that I was trying to elude them. And as evidence I took my pickup to court because that's what I was driving. I was going to have the judge drive it because you can't drive that pickup over 40 miles an hour.

[Laughter.]

MR. STOLDT: In fact I just traded it in. The front end was ready to fall off. And they claimed to be in pursuit of me with sirens and red lights, which they didn't.

MR. HOWARD: And we can assume that their cars will go faster than 40 miles an hour?

MR. STOLDT: I sure hope so.

[Laughter.]

MR. HOWARD: How far is Whiteclay from the border?

MR. STOLDT: Two miles, sir.

MR. HOWARD: Two miles. And when you were given the sobriety test, did you pass the test?

MR. STOLDT: I don't know. He said I failed it.

MR. HOWARD: I see. What sort of sobriety test was it?

MR. STOLDT: Just a field sobriety test.

MR. HOWARD: Where you walked a straight line?

MR. STOLDT: Right.

MR. HOWARD: But you think you passed it?

MR. STOLDT: I feel like I passed it.

MR. HOWARD: And at no time did you resist arrest?

MR. STOLDT: No.

MR. HOWARD: Okay. Thank you.

COMMISSIONER DESTRO: I have a couple of questions. These questions go down a slightly different line.

I see in your background that you have worked with BIA as a social worker; am I right?

MR. STOLDT: Yes, sir.

COMMISSIONER DESTRO: What did you do with them? What kind of social work did you practice with them?

MR. STOLDT: With who, sir?

COMMISSIONER DESTRO: With BIA.

MR. STOLDT: Primarily--we don't do any counseling; all we do is paperwork, welfare checks.

COMMISSIONER DESTRO: Welfare checks. Do you do any information and referral kind of work, getting people in touch with resources other than welfare?

MR. STOLDT: We tried to, but there is no jobs on the reservation. We just had to make a few referrals to other agencies for help and so forth.

CHAIRMAN PENDLETON: Are the referrals limited to the reservation or anywhere there might be a job for welfare clients?

MR. STOLDT: No. No, if we hear of a job in another State--sometimes we do get information that there may be jobs in Colorado, you know--we try to assist them.

COMMISSIONER DESTRO: What I am getting at is whether or not, if individuals like our prior witnesses, who are having a lot of difficulties with the legal system, had come to you as a social worker, would you have been able to help them out any as a social worker for BIA?

MR. STOLDT: No.

COMMISSIONER DESTRO: No?

MR. STOLDT: No.

COMMISSIONER DESTRO: Why?

MR. STOLDT: My job would probably be on the line. If I in any way interfered with something that had to do with the tribe, some of the council representatives would probably get together and petition me out of there, you know. I'm so limited in what I can do. I'm limited in what I can say.

COMMISSIONER DESTRO: If somebody came to you and said, "I've got a problem with the way the tribal court is dealing with things; can you give me some advice or help me get a lawyer?" and you did that, you would be putting your job on the line?

MR. STOLDT: Right.

COMMISSIONER DESTRO: And BIA would just cooperate with the tribe and can you? How would that process work?

MR. STOLDT: Okay. If some of the council members got word that I was making referrals which they felt that I shouldn't be making, they could put pressure on my supervisor or my boss over him to get rid of me. I have seen it happen.

COMMISSIONER DESTRO: Okay, so in other words, the tribal council can pressure the BIA to basically do what it wants?

MR. STOLDT: Right. They can also pressure the court to do what they want, you know. There is still the executive board that sits over the tribal judge.

COMMISSIONER DESTRO: Sure, but ultimately the BIA isn't as responsible to the council technically as the tribal court is; is it?

MR. STOLDT: It's hard to say.

COMMISSIONER DESTRO: That is a problem. Okay; thank you.

MR. McDONALD: I have one other question, Mr. Stoldt. If you had been given a choice of whether to be tried in the Nebraska court or in the tribal court at Pine Ridge, which choice would you have made?

MR. STOLDT: I'd have preferred to face charges in Nebraska because I feel I would probably get justice there.

MR. McDONALD: I have no other questions.

MR. HOWARD: Mr. Gilman.

MR. GILMAN: Why don't we go on to Mr. Guerue.

MR. GUERUE: Yes, sir.

MR. GILMAN: Would you please first go over your background as it pertains to the Indian tribal courts.

MR. GUERUE: Well, I guess it begins from a temporary appointment in October of '80 for 2 weeks while the judges were, I think, all under suspension. When they came back and were put back in office for 1 day, the chief judge resigned the next day, and I was put back in as a temporary until later in the month when the tribal council appointed me as permanent chief judge.

I had spent 1 year in law school before. I think probably the only reason I was hired was basically because nobody knew me even though I'd grown up on the reservation. I had been gone for the past 16 years, either at school or in the service. I had been retired as an Army captain. Having a good war record counts as an Indian more than any other place; that is what got me on the bench.

The first 2 weeks we had--this will astound you--we had 84 jury trials scheduled in 1 week--84 jury trials. I got my clerk to call in all the parties. We had what I termed pretrial conferences, and we had four trials that week. Everything else was taken care of because nobody evermade these people sit down and talk. They resolved their differences just by sitting down.

My college background is in Russian studies, so that doesn't apply to the legal world, and I suppose my being on both sides on courts martial meant something to the tribal council. My background up until that time was pretty sparse. I like to think it isn't now, though. Four years on the bench, getting some decent training--at one point there was a lot of training available. I had a chance to spend some time at the National Judicial College in Reno, Nevada, which was really good. The 1 year at Notre Dame helped tremendously. And I guess the rest of it just comes from learning how to essentially CYA, the old Army trick of covering your--

CHAIRMAN PENDLETON: --whatever.

MR. GILMAN: Let me ask you two questions based on what you said. First of all, what were the facts surrounding the suspension of the judges when you first were asked to sit on the bench? Do you remember?

MR. GUERUE: I believe two of the judges were gone, and they had left one in charge, and for some reason he didn't show up for work. The judiciary committee had been not very pleased with this group anyway, and they just wanted a change, I guess.

MR. GILMAN: The other thing I wanted to ask is that you said at one point there was a lot of money for training. First of all, I am curious as to precisely when that was and where the money came from and who did it go to.

MR. GUERUE: I believe most of the money came from the Bureau of Indian Affairs. It went through the National Tribal Court Judges Association, which at one point I was a board member, the last 2 years of my time on the bench. They put

together some inexpensive and fairly cursory training all around the country. They would hold it for one area or they would invite tribal staff, the judges or the clerks or whoever, from all around the country. It was very effective. But the Bureau of Indian Affairs again stopped that and started something called the National Indian Justice Center, and they have real ritzy training sessions, but nobody goes because nobody can afford it.

COMMISSIONER DESTRO: Could I just interject one second? What do you mean the BIA stopped that?

MR. GUERUE: There were two organizations that competed for the training monies to train Indian court staffs around the country. One is called AILTP--American Indian Lawyer Training Program, I think is what it means.

The other is NAICJA, National American Indian Court Judges Association. At the end of that, AILTP had the BIA's ear and they got the contracts for the training.

MR. HOWARD: When was this, approximately?

MR. GUERUE: I'd say late '82 or early '83.

COMMISSIONER DESTRO: Which organization sponsored the training sessions at the National Judicial Center?

MR. GUERUE: That would be through the NAICJA, the National American Indian Court Judges Association.

COMMISSIONER DESTRO: And are the others--I can't remember the acronym--put on under the auspices of BIA? That's where the money comes from for those?

MR. GUERUE: The money comes from them. I don't know if they are accountable in any way to them, but they have to meet their standards, whatever they happen to be.

COMMISSIONER DESTRO: Okay. And do they put those on in conjunction with like the National Judicial Center or the Conference of State Courts or any of the formal judicial training centers?

MR. GUERUE: I don't believe so, sir. I think they have their own training staff, and they just select places around the country to hold their sessions.

COMMISSIONER DESTRO: So it's all inhouse?

MR. GUERUE: Right--I believe so.

MR. HOWARD: Do those sessions include any sort of training on the Indian Civil Rights Act?

MR. GUERUE: You know, it's been 2 years since I've had any contact with this. I don't know what they are doing now. They were doing basically nuts and bolts things--how to run a courthouse. The Indian Civil Rights Act has been the topic of a number of training sessions around the country through various organizations, including both AILTP and NAICJA. I've attended one or two myself.

MR. GILMAN: Let me get back to your experience as a judge at Rosebud. Based on your experiences there, can you describe for us the extent to which the judiciary is independent of the tribal council?

MR. GUERUE: I think the better way--listening to the intellectual side of it this morning and then hearing the real thing from this last panel gives you a good view of it. If I use my own personal example, being retired from the Army means that I get a pension. And if it hadn't been for that, I probably--yes, I would have stayed; I'm pretty stubborn. A lot of pressure was put on me to leave because I had been a real pain in the tribal council's butt--not because I wanted to do that but because I believe there is a way to get things done, a legal way to get things done, and as long as somebody doesn't stay within it, they shouldn't do it.

I started out on a salary of \$23,000 a year. At one point that was moved down to \$18,000 because I chose to. We needed to have the money to pay for the process server. And it was either that or not have any court. I later had it moved down to \$15,000 for the same reason.

About that time, I had a problem with the tribal council and I enjoined their election; and it was right and I still think it is. They suspended me. I was out for 5 months, and they recalled me for 10 days, with 10 days' notice, for a hearing. This was to be my impeachment hearing, which was an experience.

After that, when they failed to get the needed two-thirds vote, the judiciary committee put me on at \$200 a day. This was 1 day a week. And my two associates were in for--I can't remember what their salaries were now, but they were in every day. And one week I said, "Well, I'm not going to go in. I'll do my 1 day and just see what happens."

We went 4 days without a judge. And I thought, "Well, I've got nothing else to do." You can go and shoot prairie dogs and just wander around the country because it's beautiful country. But you get tired of doing that, and besides that they had a court that was falling apart, and as long as I was sitting there as chief judge, I was going to be held responsible by anybody, not just the tribal council. So I ended up doing 4 days' work for nothing, on my own. And I'm glad I did it.

But one of my cousins--actually, it's a shirttail relative, but one of my cousins--was on the judiciary committee at the time. And another guy who grew up in that same town where I grew up, a little town called Parmelee, a few years before me, was the chairman.

After I had continued to work for a couple of months and just didn't leave like they were hoping I would, he told my cousin--he knew I had been in the Army; he knew I had been to Nam; he knew I had been retired from the Army, but he didn't know for what. So he said to my cousin, "He must sure get a damn good pension in order to stay on. We are trying to get rid of him and he won't go."

That's how it is. At one point I knew practically every Indian judge in the country. There are some very good men there, very good women. They are lawyers, they are nonlawyers, competent people, ethical people, people who want to give real justice--not just a legal sense of justice but real moral justice, not right and wrong kind of thing. But these people aren't allowed to.

If you make a decision that somebody on the council or a chairman disagrees with politically, you will probably be out the door immediately. If you're not out the door, they will do things like lower your salaries, and all kinds of things, to force you out. And if you do make this decision, they will get somebody else to do another one.

MR. GILMAN: Let me back up briefly just to get this on the record. What were the precise circumstances under which the conflict began between you and the council, the election conflict?

MR. GUERUE: Two guys came into my office one day. It was before the 1981 election. They said they wanted to file a complaint, but they wanted to talk about it first. I said, "I don't want to see it. If it's about the election, you go find



yourself an attorney. You do it your way. Get your documentation together first, and then come and file it that way."

Frankly, I was hoping they wouldn't bring it in because I was enjoying what I was doing and I didn't feel like leaving.

They came in a few days later. It was the day before the election. They came in with a well-written complaint. They came in with very well-written supporting affidavits by people who were involved in some of the things that were taking place. And I issued the injunction.

MR. GILMAN: What were the nature of the complaints?

MR. GUERUE: For lack of a better word, just call it vote fraud, buying and selling of votes, keeping people off voters lists, adding people who shouldn't be there.

Anyway, that night I got a phone call from the superintendent.

MR. GILMAN: This is the BIA superintendent?

MR. GUERUE: The BIA superintendent. Rosebud has a BIA police force. He said that at that point he would enforce my injunction. And a little while later I got another phone call saying that he had just gotten word from the agency's special officer that a warrant had been issued for my arrest by my associate judge. It's crazy.

So I went down in the morning to see the superintendent, and he had decided--along with this warrant was a suspension from the judiciary committee. Two councilmen had held a meeting at a private residence with the campaign manager of one of the candidates. Another councilman was present--they did not have a quorum--and he forged the chairman of the judiciary committee member's name to this suspension. And that is how they got my associate in.

COMMISSIONER DESTRO: Can I ask a question? I want to ask the judge what he did. Did you have a hearing on the injunction, or was it a TRO situation, or did you have a hearing where you brought in the opposing parties before you issued your injunction?

MR. GUERUE: It took place--it was some weeks afterwards, I believe. It took a long time. The election was held, and I can't remember how long it was.

COMMISSIONER DESTRO: What I mean is: Before you issued the injunction, before you signed off on the injunction--

MR. GUERUE: Was this an ex parte proceeding?

COMMISSIONER DESTRO: Yes.

MR. GUERUE: Yes, it was.

COMMISSIONER DESTRO: Why?

MR. GUERUE: Because of the complaint. After this is over I will be submitting a paper to you, and I will include this as an exhibit along with a lot of other things.

That is something I've had to think about a long time. Frankly, what it came down to was lack of time. It was the afternoon--probably something like 4 o'clock, 3:30 or 4 o'clock--when they came in with their complaint.

COMMISSIONER DESTRO: And the election was the next day?

MR. GUERUE: The next day.

COMMISSIONER DESTRO: Oh, all right; I understand.

I didn't understand what the time frame was. That's why I asked whether or not it was more like a temporary restraining order. You called it an injunction; in effect it is the same thing.

MR. GUERUE: Yes, I'm sure you're aware that it's pretty hard to distinguish between a TRO and an injunction.

COMMISSIONER DESTRO: That's right.

MR. GUERUE: I don't understand it myself yet, which may have an effect on the bar next year.

COMMISSIONER DESTRO: Not that much. Thank you.

MR. GILMAN: You claimed in this series of articles that appeared in the Washington Post that the police misused their arrest powers at Rosebud while you were in office. Could you, first of all, describe the character of this abuse, what you meant in the article, and do you have any information as to the present situation, what sort of behavior is going on now?

MR. GUERUE: First of all, I don't have the information about the present situation. I have been gone from the country for a year, and I'll be back down at the reservation tomorrow and I'll find out something, I'm sure.

But I would find out when the public defenders would come up in front of me and say, "Look, this man is in jail, and there are no charges filed against him. What do we do?"

And our tribal code was very specific about that. I'm not sure what the code is now, but a defendant was to appear at the next scheduled arraignment--for us that is every other day--Monday, Wednesday, and Friday, and at one point we were doing it on Saturdays too.

I hadn't realized how drastic this problem was until one time I was doing a report for the court administrator, and I was comparing our docket numbers, our criminal docket, how many people were coming before us--I think we had to give some sort of justification for some money. And at the same time--I can't remember if somebody pointed it out to me or I just happened onto it; I think somebody pointed it out to me--I got a copy of the police arrest reports for that very same period. And it was horrendous. In a matter of maybe 4 or 5 months, we had over 300 people who had been arrested, never brought to court--they were taken to jail, but they were never brought to court. There were no charges filed. We had people who'd stay in jail for 10 days without charges being filed. And I can include those if you like. I'll send you a copy.

MR. GILMAN: Yes, I think all of these things can be submitted to the record.

COMMISSIONER DESTRO: Can I interject something to clear up one thing for the record? You indicated in answer to some previous questions that Rosebud has a BIA police department. Would you explain what that means for the record? Because I don't understand whether or not it's the tribe that runs the department or the BIA, because I want to know who is doing this.

MR. GUERUE: The distinction between a BIA police department and a tribal police department is that in a tribal police department, the police department is answerable to the tribal government. In a Bureau of Indian Affairs police department, they are to apply the tribal code if there is one, but they are answerable to their own chain of command.

COMMISSIONER DESTRO: In other words, they are a Federal police department?

MR. GUERUE: Right.

COMMISSIONER DESTRO: And Rosebud has the latter, the Federal police department?

MR. GUERUE: Right.

COMMISSIONER DESTRO: So if there are any violations of rights going on, it's being done by the Federal Government, not the tribe.

MR. GUERUE: When the U.S. attorney was speaking this morning, I recall sending him a letter about these 300-plus and the fact that it was continuing, people getting--I hope these people are still there when I get out of law school. If I remember correctly, the Federal tort claim limit for false imprisonment is something like \$15,000. You multiply that by 300 and that's a lot of money. And these people were putting the government in that jeopardy.

COMMISSIONER DESTRO: In other words, just for the record now, the answer is that if there are violations of civil rights going on, either generally or under the Indian Civil Rights Act, it's being done by the Federal Government itself, not by the tribe.

MR. GUERUE: Yes, I understand what you're getting at now. You either get in Federal court if you go to jail or if you are the object of some Federal action. And it is surprising nobody has done it yet; nobody has gone directly to the Bureau. Actually, there have been a few. I didn't, because I was too busy. But it could get worse. I am hoping that the people out there on the reservation, the people who really have had their Federal rights violated by a Federal organization, will go somewhere, find themselves an attorney who will take these things.

The key to all this stuff that we're talking about is accountability. And who accounts for this poor group of people who are just sitting there? Nobody. Nobody answers them. The Federal Government says, "Oh, that's an Indian problem." The State government says, "It's an Indian problem." The tribal government says, "Hey, you can't get us." The Bureau says, "That's a tribal thing." Who accounts for it? Nobody. Nobody answers for it.

The Indian Civil Rights Act--this may not be nice to say, but you get more use out of a roll of toilet paper. That is

nothing. It means nothing. It is an intellectual dishonesty, and it's just not right.

MR. HOWARD: If you could sum up, could you tell us why again you think the Indian Civil Rights Act is an intellectual dishonesty; sovereign immunity, separation of powers?

MR. GUERUE: Earlier one of you commented on how there was a problem of giving the enforcement ability to the entity that was actually doing the abuse. I suppose this is that "Physician, heal thyself" kind of arrangement, but it's not going to work. And it's never going to work as long as it stays the way it is. If you have to go to jail--if that's the only thing that you have a right about, you don't have any rights. And as long as the Federal Government, as long as the tribal governments say, "We are immune; you can't touch us," you're going to continue to have these abuses. You are going to continue to have these abuses as long as you have the governmental situations that tribal governments have now.

Look at our own government. We have had great examples these past 20 years. Look what happened to Richard Nixon or Justice Fortas or some of the Congressmen or Senators who have had to leave office. The system works. Hell, we're Americans, too. Why can't we have the same system?

You know, the usual thing that somebody says, "Well, we have our Indian traditional governments." That's a lot of baloney too. These governments were imposed on us.

I was telling some friends earlier, my grandmother raised me, and she was a little old lady, the first generation to be born and raised on the reservation. She understood the system. Every time you find somebody who says, "Well, geez, we don't want to interfere with the Indian government"--hell, they do it every day.

What is the big deal about making it all the way and say, "You will have a separation of powers." And what that really means--everybody says "separation of powers"; nobody ever explains to people that means you have a division of the powers of government so that you don't have a tyranny. That's what the Founding Fathers did, set it up that way. They had checks and balances so that no one arm can take over on everything.

Our government works that way. All we have to do is look at it. Right now when you have Congress and the administration working well together; they work. Things get done. We don't have that as Indians. How come? What's wrong with us? Why do

we deserve this? Or why do we not deserve the American way? I don't understand that.

If I were to say to all of you one recommendation to take back--the American government has interfered with Indians from the very first day. Make it all the way. Instead of giving us the defective copies that we have been given, correct the defects. Give us a completely American system of government where our courts can enforce justice so it will stay, not so that somebody can run to their councilman and get it undone. That's the key to all of this.

MR. HOWARD: Do you think a separation of powers would have some effect on reservation economies as well?

MR. GUERUE: When I was at Rosebud on the bench, the chairman of the judiciary committee and another judiciary committee member both were the objects of some civil actions. One was the impoundment of a vehicle, and the other was nonpayment of a debt from some loan agency.

With the vehicle, the judiciary committee instructed the court administrator to put out a memo to the prosecutor saying that this court--not the prosecutor--does not have jurisdiction in civil actions of this type.

The credit agency gave me a call and said, "This man says he is not going to pay, and when we said we'll take him to your tribal court through a small claims procedure, he said, 'Well, I've got friends up there.'"

And these were my two associate judges. Unfortunately, he never did bring it up while I was there. I don't know what's happened to it since.

If you have people in authority not willing to carry out their contracts, how can you get any kind of real economic development if you can't enforce a contract? Who is going to come in and invest? Nobody. I wouldn't. I would work with people in my tribe, individuals, but I would not make any kind of business arrangement with my tribal government, because I don't trust them. They won't hold up their end. And until you get that going, until you have a place where you can enforce a contract, you are not going to get any economic development. And without that, things will be just like they have been. They won't change.

More than that, the easy thing to say is, "We'll just terminate the tribes and let them work under the States."

No, I don't think that's necessary, either. Not only do I think we can, but I think we have a right to our own reservations, to our own tribal governments. Being an Indian with a reservation and being an American are not exclusive. You can be both.

CHAIRMAN PENDLETON: Mr. Guerue, I am impressed by your testimony and your candor. I am always impressed by candor.

Is there some jealousy that you have been able to walk in both worlds? That is, you have been able to say that you are an American and also an Indian, and why should we have to have two separate systems to work.

MR. GUERUE: Okay.

CHAIRMAN PENDLETON: Is there some real jealousy, that you have been able to experience that and to feel that, or did you have to leave to feel it or what? How do you feel about that? It seems as though there is some concern that you have been able to mesh those two together.

MR. GUERUE: I'm sure that there is, that there are people I have grown up with who have been envious of me. And I'm sure there are people who are resentful of some of the chances I have been given. But that's okay; I can understand that. You find it everywhere.

I've had just as much coming from the other side as I have as an American. People say, "Well geez, you guys don't have to pay taxes, and you guys have free educations." I wish they would see my student accounts right now.

That may be so, sir, but it doesn't matter.

I am so frightened of giving you all the wrong impression because I want my reservation to stay as long as this country stays. And I'm so afraid that somebody will try to take that away from me. Because I have a right to it. I have a right to stay as an Indian. And just because I stay as an Indian doesn't mean I'm going to stop being an American.

Thank God, I don't have the choice that the southern officers had to make, or all of the Americans had to make, when they resigned their commissions and left to fight for something else and just left behind their flag. I don't have to do that.

And that, I think, is an impression I get often from people who think that because you are an American, and because you are

an Indian, somehow you are always going to choose being an Indian over being an American. We are the Americans, and I don't see why--it doesn't bother me. I hope it doesn't bother anybody else.

CHAIRMAN PENDLETON: Obviously, it does, and I can understand it, too.

Let me just make one other point here. I do think that what you are saying is that the Indian Civil Rights Act has been an impediment to civil rights and not an asset; is that correct?

MR. GUERUE: Sir, some day I really may understand why the Supreme Court came out with Martinez. I have an inkling of why they did it. They say that this is within Congress' area. But all they've done is made it impossible for an individual Indian, or for that matter a non-Indian if it's in some sort of a civil action, to get any kind of redress against a tribe if the tribe insists on not being fair or not being legal.

MR. McDONALD: I have a question I'd like to ask.

CHAIRMAN PENDLETON: We have to go to Mr. Jones.

MR. HOWARD: Mr. Gilman, go right ahead.

MR. GILMAN: Mr. Jones, can you briefly go over your background in tribal government with us?

MR. JONES: Before we start, I would like to ask for your patience and understanding. I may ask you to repeat a question. The reason for that, I left my hearing aid home today, and I just have one side here that I can hear out of. It's a little tough for me and I turn sideways.

MR. GILMAN: That's all right. Can you please go over briefly your background in tribal government for us?

MR. JONES: I believe I became involved in tribal government somewhere back in the sixties, around '64. I had come from a family of politicians and also married into a family of politicians, and I just by chance at one time ran for office and won and was surprised.

However, I became very interested because I could see that people did not read laws and try to understand them and implement new policies for the tribe. It was just one of those things of collect the paycheck.



From the sixties I served, I think, a couple of terms, and in the seventies I served, and in the eighties I served another term. I had always been involved in two areas in every one of those years I served. One is in the finance area of the tribe, and the other is in the law and order. They were the two key areas that I wanted to be involved in to try to hold expenditures of the tribe down and to try and keep the courts functioning without interference from tribal government and outside people.

MR. GILMAN: When did you last serve as councilman?

MR. JONES: 1984-85.

MR. GILMAN: In your opinion, do the people on Rosebud generally have confidence in the tribal court system, that the courts will fairly decide the cases before them?

MR. JONES: I suppose there are several ways to answer that. I will try to do the best I can.

First of all, your reservation is broken down into quite a few categories of blood degree. If you are a full-blooded member of the tribe and you're going before a non-Indian as a judge, people will say that, "He's a nonmember; he doesn't know our system, our culture, our heritage; he doesn't understand the Indian." There is no confidence.

If you are a breed pretty much on the white side, so to speak, and you are going before an Indian judge, they will say, "He's an Indian judge; he is not educated; he doesn't have a law degree." Therefore, there is no confidence.

And a little more explanation: If the two, however, are prosecuted in, say, Valentine, Nebraska, which is about 39 miles away, or Winner, South Dakota, which is 50 miles away, they will not question the system. If they are prosecuted for DWI, they will pay the \$250 fine, come home, and no questions.

But in tribal court, the court system is hindered due to the fact that the losing side will always go to a tribal council member and try to get the decision reversed.

MR. GILMAN: So, in effect, what you are asserting is that lack of confidence in the court system is basically the result of this--I don't want to call it sour grapes, but it is not a substantive sort of thing, that people will just say that the judge, because he is of a different background--

MR. JONES: What Judge Guerue was saying here--I wished I could have kind of cut in on him a little bit--but depending on what administration is in in tribal government at the time, you always have probably 900 to 1,100 people that will take court decisions and go right to that administration. And I think Judge Guerue would testify to the fact also that that is where your interference comes and a lot of influence goes into the court system that way.

MR. GILMAN: The people just perceive this as a perfectly acceptable method of receiving justice, to go over the courts to the tribal council?

MR. JONES: It seems to run that way every 2 years. And it is not to say that all Indian people do not have confidence in the court system.

MR. GILMAN: Yes.

MR. JONES: There are plenty of Indian people that lose a case, and they still have confidence in that system. I think it's a lack of understanding of what the court system is really about.

MR. GILMAN: Can you go ahead and describe for us your employment dispute with the tribe?

MR. JONES: I could probably put together--there is put together about 6 inches of information on that particular case. However, the tribe, under all their 638 contracts and other grants and contracts coming out of Washington, they must have attached special conditions to those, policies and procedures with a grievance procedure set in.

In 1984, when the president of the tribe came in, he terminated, I believe, something like 27 positions, put them up for advertisement, due to administrative change. And on December 7, those individuals all received a personnel action for termination. I was given mine at 3 in the afternoon, effective at 5 o'clock.

Under the policies and procedures, I asked for an administrative hearing, which I was denied. Following the set procedures, I then appealed to the grievance committee. The grievance committee set a hearing, at which both sides provided evidence, and a few days later the grievance committee's decision was in my favor.

I'm cutting things down as short as I can.

However, the president of the tribe did not recognize that decision. I was given a second termination, and it stated "for cause." I was supposed to have signed some checks for \$17,500, and my name was not on the checks.

The second termination, I then went back to the grievance committee, and again the grievance committee found in my favor. The president of the tribe then refused to recognize that.

I then went to the tribal courts and got a temporary court order to be placed back into my position within 10 days and have a hearing.

I reported to the tribal chairman. He was served a copy of the court order. I went to my position, and the following day I was escorted to the door by a Federal officer. The tribal chairman had a Federal officer come up and remove me.

I asked the courts to get the tribal chairman for not following the court order, which is a violation of a court order, I guess. The judge then refused, and just about the following day she resigned.

I had to then go to another judge, a tribal judge. We got another court order, and we did have a hearing, I believe in about 9 days. The tribal chairman came in, and he was under pressure from the tribal council then, and I went back to work. However, we filed an action in tribal court due to the fact that there was backpay that was involved that was given to me by the grievance board. When they reinstated me, I also got my backpay.

The chairman and the people that were involved--we had hearings and postponements of hearings, and things just continued on and on and on.

MR. GILMAN: Let me interrupt. You sued the people who you felt were responsible for the backpay? What were the hearings concerned with that went on and on and on?

MR. JONES: Well, the people that were involved were the chairman--there is a signed affidavit on a conspiracy that went on at his place involving just our reinstatements.

MR. GILMAN: But this was a suit against the responsible parties to get backpay?

MR. JONES: I never got the backpay. In fact, it was ordered by the tribal council for the chairman to settle it outside of court and he never has. It was even instructed by the courts. I never got it.

And as these things went along, to make a long story short, we were in court and had hearings, and finally in 1983 I filed in court, due to what they call an ordinance 7509. That gave me the right to file against any officer of the tribe if they stepped out of the scope of their authority, which the president of the tribe did. And in 1983 the chairman of the tribe went to tribal council and had them pass a resolution, 8331, which prohibited me from taking any of them into tribal court. We were already into tribal court, except that the councilman started bringing up questions about 8331, and the people involved being past council representatives, and the chairman; they started pressuring the question, and finally the court said, "Well, we will make a determination about resolution 8331."

It took about 9 months, almost 10 months, for them to make that decision. The decision was that in my case they had no jurisdiction over any of the tribal officers or tribal council members. The case was dismissed from court. I had no place else to go.

Going to the appellate court, there were cases that came out of the appellate court almost the same as mine that found in favor of the individual, but the tribal council doesn't recognize those things.

MR. GILMAN: Can you give me an idea of the frequency with which these types of employment disputes occur? Was your case an unusual one?

MR. JONES: I guess it's part of our culture. Every 2 years it used to go on.

[Laughter.]

MR. JONES: Every time a new administrator would come in, as high as 100 people would go out, except prior to those days--March 31, 1978, we were then under policies and procedures as instructed by the Federal Government. Prior to that, we didn't have any, except what they called an old community action program. But every two years it would happen.

Out of all the people that were terminated, at least 10 took their case to the tribal council. Today I am the only one that is left that has stayed with it this long. All the rest of them have either gone back to work and dropped their case, but I'm just the only one out of all those that had been terminated at that time.

MR. GILMAN: So none of you have received satisfaction or had your day in court, so to speak?

MR. JONES: At least one person has. I can't mention his name, but when they put him back to work, they gave him a nice little raise which took in the backpay issue that he was fighting.

MR. GILMAN: Do you have any idea about why he was the exception?

MR. JONES: The president at that time, for some reason, called me a professional politician, for several reasons I suppose. I was always a good friend and always have been and always will be of the former Bob Burnette. And Mr. Burnette did not get along with the chairman at that time. And, of course, I have always been the kind of individual that addressed issues directly rather than let them go by the wayside.

MR. GILMAN: Can you describe for us the events surrounding Mr. Burnette's banning from the political process at Rosebud?

MR. JONES: That is Mr. Burnette's case from being--I have the records, the court action at that time on that case, as to the conditions that were found, reinstating Mr. Burnette to be eligible to run for office. Prior to that, Mr. Burnette was charged with misconduct, I believe involving \$400, and it was a piece of equipment. The same man that charged Mr. Robert Burnette at a later point in time admitted to the grand jury that he accepted a bribe for \$14,000. And he was never charged.

But Mr. Burnette always had been the kind of individual that had a knack for digging up corruption, embezzlement, whatever. Not only tribal agencies but also Federal disliked Mr. Burnette for his outspokenness. He was a man that stood up for his own rights as well as the rights of individuals, and he'd take a case no matter what day or night.

I have a mailgram that went to the Honorable Jimmy Carter. In this mailgram, Mr. Burnette pointed out the mismanagement of Federal dollars, interfund transfers involving millions. As

far as I know, nothing ever happened. But the moccasin telegraph are not only worn by Indians. All the way from Washington, the Bureau system plays ball with the local system down below. They, in turn, inform the local people down here, and by these type of things Mr. Burnette had to be kept from ever running for tribal office again. He had to be silenced. The only way they could do that was to drum up some little charge against him, get him charged with misconduct. And, believe me, any tribal chairman that runs for office always has the majority of the voting on that council. There is no man that would ever run and hold that office that does not. He would probably resign and get out.

So Mr. Burnette, on a \$400 camper, was charged with misconduct. And the charges held. For years Mr. Burnette tried to have hearings in tribal council chambers.

They were denied. He tried to get in court. The judiciary committee at that time happened to be the chairman of the tribe's supporters, some of the same members Judge Guerue was talking about. Before that Mr. Burnette for years was held from getting a fair shake.

But those are just some of the things, and I have one of those documents with me, that mailgram that Mr. Burnette--and there are others--that he had mailed to Jimmy Carter. It all points out, and it shows them by contract, by grant, by dollar figure, involving the American Indian National Bank in Washington, D.C. And there's computer printouts to back this up. There's other correspondence, photographs, that the American Indian National Bank, down to the tribal treasurer's office, show tribal council members telephoning in and making \$1,800 to \$200,000 transfers--not the tribal treasury, but tribal council members who don't have that right. All done by telephone.

Now, after you have seen the information, you would then know why Mr. Burnette had to be silenced.

MR. GILMAN: Given that we are short on time, we have to move on. Any documents that you now have with you we will certainly be glad to accept into the record, and any additional documents that you might want to submit, just forward to us.

CHAIRMAN PENDLETON: Thank you very much. I want to thank the panel very much, and we'll take a short break and assemble the next panel.

[Recess.]

COUNCIL MEMBERS

Testimony of Duane Brewer, Council Member and Chairman, Law and Order Committee, Oglala Sioux Tribe, Pine Ridge Reservation; Bertha Chasing Hawk and Joan LeBeau, Council Members, Cheyenne River Sioux Tribe; and Gilbert LeBeau, Council Member and Vice Chair, Law and Order Committee, Cheyenne River Sioux Tribe

CHAIRMAN PENDLETON: The next panel is Joan LeBeau, Gilbert LeBeau, Bertha Chasing Hawk, and Duane Brewer.

[Bertha Chasing Hawk, Duane Brewer, Joan LeBeau, and Gilbert LeBeau were sworn.]

CHAIRMAN PENDLETON: Thank you. Counsel.

MS. MILLER: Thank you, Mr. Chairman. First I'd like to ask each member of the panel to state their name, address, and tribal affiliation, starting with you, Joan.

MS. LeBEAU: My name is Joan LeBeau. My mailing address is Star Route 3, Box 85, Gettysburg, South Dakota 57442. I am a retired BIA employee and presently serving on the Cheyenne River Sioux Tribal Council from district no. 6.

MR. GILBERT LeBEAU: My name is Gilbert LeBeau. Address, Eagle Butte, Box 610, Eagle Butte, South Dakota.

I'm a member of the tribal council and have recently been installed as the vice chairman of the law and order committee for the Cheyenne River Sioux Tribe.

MS. CHASING HAWK: My name is Bertha Chasing Hawk, and I'm a member of the Cheyenne River Sioux Tribal Council. My address is Box 697, Eagle Butte, South Dakota.

MR. BREWER: My name is Duane Brewer. My address is Box 141, Pine Ridge, 57770, and I'm on the Oglala Sioux Tribal Council and chairman of the law and order committee.

MS. MILLER: We'll start the questioning with Joan LeBeau. Can I just ask you to make sure that you have the mike close to you when you talk, having been admonished earlier for not doing that myself.

CHAIRMAN PENDLETON: It's not an admonishment. It's one way to help you to be heard--not that you need help. I mean assistance.

MS. MILLER: Joan, let me just ask you to start in on telling us the story of the election dispute and the litigation that you were involved in over that at Cheyenne River, and we will try and get through the whole story.

MS. JOAN LeBEAU: This starts back in 1981, working up to the present day. As a result, I found it necessary, in order to have some sort of order in my story, that I had to do notes, and I am going to be referring to my notes as I go along here.

On June 2, 1981, I, in my official capacity as district 6 council representative, introduced a resolution requesting the tribal council to rescind resolution 77-74-CR and to restore the 13 traditional districts as set out in our constitution and bylaws. The resolution failed by a vote of 7 for, 6 against, 1 not voting, and 1 absent.

I think I need to explain there is more votes for than against. The tribal council operates on a simple majority rule, and there was 14 present that day. Therefore, it would have required 8 votes.

On October 9, 1981, a petition of over 300 qualified voters was submitted to the tribal secretary and then to the council, pursuant to article 7 of the constitution, which demanded a referendum election on the resolution.

On November 6, 1981, the tribal council approved a motion that an election be held on the referendum question on December 18, 1981. The result of that election was a vote of more than 2 to 1 in favor.

In all fairness to those opposing the election, the election was carried out upon the advice of our tribal attorneys, citing Clausterman v. March and Glass v. Smith.

April 14, 1982, I presented the redistricting report to the tribal council. This report contained two redistricting plans, a short introduction, historical background, explanation of plans, and conclusions.

April 28, 1982, the tribal council approved a resolution, 96-82-CR, adopting plan no. 2.

On May 18, 1982, the tribal council rescinded the resolution adopting the plan.



On May 21, 1982, the election board, by letter, notified the Bureau of Indian Affairs, Aberdeen area director, regarding their action declaring the referendum election of December 18 null and void.

On May 25, 1982, myself and three other enrolled members of the tribe initiated a lawsuit in tribal court against the election board and the tribal council for injunctive relief.

MS. MILLER: Joan, can I just stop you for a minute and see if we can summarize this portion of your testimony. What you are saying is that you attempted to and succeeded in getting a referendum vote on the issue of redistricting from 6 to 13 districts as provided for in the constitution?

MS. JOAN LeBEAU: Constitution and bylaws.

MS. MILLER: All right. And what happened was that the council rejected that referendum vote or refused to implement it; is that right?

MS. JOAN LeBEAU: Yes.

MS. MILLER: What did the constitution say about what the council should do when there is a referendum vote? Was this something the council was obliged to implement?

MS. JOAN LeBEAU: Yes, they were. Article 7, section 1, states that once the resolution is referred and the people vote for it, the results of that election are conclusive and binding on the tribal council.

MS. MILLER: And this is what you alleged in your lawsuit, then, when you asked for injunctive relief, that the council failed to abide by the constitution; is that right?

MS. JOAN LeBEAU: Not really, because the tribal council then decided to move forward with the election for 6 districts as opposed to the 13 districts. And it was the election that I--

MS. MILLER: I see. So you were suing to enjoin the election on the six districts.

MS. JOAN LeBEAU: Yes.

MS. MILLER: Did you go before council to request any sort of waiver of sovereign immunity in order to file that lawsuit?

MS. JOAN LeBEAU: Subsequent to the TRO, yes, I did. I introduced a draft resolution requesting their consent to be sued in tribal court. It failed.

MS. MILLER: So there were two types of legal action that you sought to take. First, there was the injunctive relief; you were seeking to enjoin the election. And then later on you sought to file another lawsuit?

MS. JOAN LeBEAU: Then I filed the complaint, yes.

MS. MILLER: And what were you alleging in that complaint?

MS. JOAN LeBEAU: That the people of our reservation had voted to have an election for 13 districts, and according to our constitution and bylaws, the tribal council was bound to carry it out. It was a class-action suit. Four of us filed in tribal court, and the judge ruled in our favor.

MS. MILLER: All right. And held that the council had violated the constitution?

MS. JOAN LeBEAU: Had violated it.

MS. MILLER: And then what happened? The tribal court judge found in your favor?

MS. JOAN LeBEAU: Yes.

MS. MILLER: Did anything happen to that judge?

MS. JOAN LeBEAU: Oh, yes. The judge was fired for doing so.

MS. MILLER: And then what happened? Did the judge do anything?

MS. JOAN LeBEAU: The judge filed both criminal and civil complaints in tribal court on nine council members.

MS. MILLER: Yes.

MS. JOAN LeBEAU: Correction; eight.

MS. MILLER: And what was the upshot of that?

MS. JOAN LeBEAU: On that particular day, the council called an emergency or a special session. And on that particular day he was reaffirming their action in firing him.

They proceeded to declare null and void the TRO, the decision of the tribal court. It seemed like there were a couple of other court order decrees that had been overruled by the tribal council.

MS. MILLER: Was the criminal judge involved in this process at all?

MS. JOAN LeBEAU: In this instance--the junior judge, the criminal judge.

MS. MILLER: The criminal judge.

MS. JOAN LeBEAU: We have a superior and a junior and the junior handles criminal. Yes, sometime later he also was fired for merely accepting the complaints and signing them. He, too, was terminated.

MS. MILLER: You are referring to the complaints against the council members initiated by the first judge who was fired?

MS. JOAN LeBEAU: Yes. Also terminated was the manpower director and the tribal health director because they were plaintiffs in the lawsuit that was filed.

MS. MILLER: What happened after that? Was there a time later when you sought election to the tribal council?

MS. JOAN LeBEAU: After my lawsuit that I filed in Federal district court?

MS. MILLER: Well, you have talked about the referendum dispute, and maybe you could tell us what happened then, after the firing of the two judges.

MS. JOAN LeBEAU: Oh, then I appealed it to the Bureau of Indian Affairs.

MS. MILLER: And what happened? What was the response?

MS. JOAN LeBEAU: At first there was a memorandum from Washington. For some reason, this particular incident or whatever you want to call it was handled directly from the Washington, D.C., office, as opposed to what generally is required at the local level through the area office.

Everything was handled directly with the Washington, D.C., office. And at first they put the tribal council on notice that they failed to carry out the provisions of that referendum

election. They were running the risk of having the election not recognized.

As a result of that, when that particular election came up, a lot of people did not participate in it because the Bureau had given us the understanding that they would not recognize the results. People didn't file for office; people didn't vote for candidates. These letters that I was writing, my appeals, letters to the congressional delegation, protesting about what was going on--because in the meantime the tribal council was moving forward with the six-district election.

MS. MILLER: Did BIA hold firm on that?

MS. JOAN LeBEAU: Yes, that was their stance until after the election was held. It all culminated on September 30, 1982, when the Bureau reneged or backed off on their stance. Another real important fact in here. The day everybody was fired and court orders were overruled, a new judge was installed that day. The tribal council directed him to issue an opinion on the referendum election, which he did. Of course, it was favorable to the tribal council. And the Bureau of Indian Affairs based their stance on that opinion rendered by the new judge that was hired.

MS. MILLER: So, ultimately, BIA's position was not to require a new election?

MS. JOAN LeBEAU: Yes.

MS. MILLER: All right.

MS. JOAN LeBEAU: Then I filed in Federal district court. And it was a whole year later that the Federal district court dismissed the lawsuit for lack of jurisdiction.

MS. MILLER: If we could move into the second part of your story involving the time that you ran for election, if you could you tell that part of the story.

MS. JOAN LeBEAU: Well, we didn't appeal that decision. We just didn't have the money. I had raised \$7,000 for it and just could not bring myself to go back out and raise more money. As suggested a number of times by BIA officials and yes, even the courts, that this was an intratribal dispute and subject to forums to correct it, and it could be settled politically--so, as suggested, I decided I would settle it that way.

I waited until the next election and filed my nominating petition and was certified eligible to run in the primary election, which I did.

MS. MILLER: Can I just back you up for a minute? I don't think you have described resolution 190.

MS. JOAN LeBEAU: This came after the primary.

MS. MILLER: Okay.

MS. JOAN LeBEAU: I was certified eligible to run in the primary election. I was the top vote getter down there.

July 12, 1984, which was subsequent to the primary election, is when the tribal council took the action barring myself, Mr. LeBeau, and Mr. Woods.

MS. MILLER: So the tribal council adopted a resolution barring three vote getters in the primary from holding elected office with the tribe?

MS. JOAN LeBEAU: Mr. LeBeau and myself garnered enough votes to run in the general election. Mr. Woods did not.

MS. MILLER: Okay.

MS. JOAN LeBEAU: And there were other ulterior motives for--

MS. MILLER: What exactly did the tribal council resolution say?

MS. JOAN LeBEAU: It said that they barred us because of past misconduct, conduct in tribal office, and for filing frivolous lawsuits. I guess that one was directed at me.

MS. MILLER: And what did that mean?

MS. JOAN LeBEAU: That I was forever barred. And they took our names off the ballot for the September general election.

MS. MILLER: The alleged misconduct that the council referred to meant what conduct?

MS. JOAN LeBEAU: I have no idea. We weren't notified of this pending action of the tribal council, and although I was present in the room that day, I was never requested to get up and answer any charges. They didn't have any charges. It just

said "misconduct." I don't know. To this day I don't know what it is.

MS. MILLER: Do you believe it was related to your earlier lawsuit against the tribe?

MS. JOAN LeBEAU: If they mean "frivolous lawsuits," yes, it probably did mean that.

MS. MILLER: What happened then, after you were barred from holding elective office? What did you do?

MS. JOAN LeBEAU: We filed another lawsuit.

MS. MILLER: Where?

MS. JOAN LeBEAU: In Federal district court.

MS. MILLER: And what happened?

MS. JOAN LeBEAU: It was dismissed because they lacked jurisdiction and because they said we had not exhausted our local administrative remedies.

We appealed it to the Eighth Circuit Court, asking again for a temporary restraining order. And they, too, denied the TRO but would hear the merits of the case.

MS. MILLER: Was there any sort of action on the part of the council, then, around this time for a declaratory judgment in the case?

MS. JOAN LeBEAU: No, not that time. That came later because our lawsuit was making its way through court.

MS. MILLER: What happened next, then, after you had gone to Federal court?

MS. JOAN LeBEAU: Then the Bureau of Indian Affairs, after they went ahead with this election--I wish I had gone by my notes; I know I'm confusing you people.

CHAIRMAN PENDLETON: No, no, take your time. It's all right. You're okay.

MS. MILLER: It's a complicated story.

MS. JOAN LeBEAU: Yes, it is.

CHAIRMAN PENDLETON: If you want to refer to your notes, go right ahead.

MS. JOAN LeBEAU: Well, I skipped something very important to make this thing all gel, that after they went ahead with the general election, the Bureau of Indian Affairs did write a memo and told them--the four that were elected in the positions that we should have all been elected in--would not be recognized by the Bureau of Indian Affairs on any matters that were subject to the review of the superintendent. Therefore, the council operated on that premise, that they could vote on internal things, but anything that had to go to the superintendent, those four individuals could not vote.

In the meantime, our lawsuit is going along.

Then on February 20, 1985, I was informed--which was prompted, I suppose, because it required them--you know, every council session, all of them must be there if they were going to get any business done, and by then all these guys had been elected and were so enthused about doing this and that for the people, were beginning to not show up for council, and a lot of times they could not transact business.

So on that day, February 20, 1985, I was informed that some members of the tribal council wanted to negotiate with us to resolve the dispute. We met with some members of the tribal council, and we drew up an agreement which they rejected. In the end we came to terms with the conditions of their settlement agreement.

MS. MILLER: What did the agreement provide for?

MS. JOAN LeBEAU: It provided for, among other things--I guess the main thing is that we would drop our lawsuits and they would hold this election.

MS. MILLER: Did it provide for a new election?

MS. JOAN LeBEAU: Yes, and provided for a new election, which was scheduled for April 16.

MS. CHASING HAWK: June.

MS. JOAN LeBEAU: No, April 16. Excuse me. One of the council representatives, one in my district, then filed in tribal court to stop this first date they set, April 16, 1985. The chief judge first granted it and then, for no apparent reason, withdrew it. So the election board met and rescheduled--I don't know why--the election then for June 15, 1985.

The council representative from my district then appealed that to the tribe's appellate court, and the appellate court ruled in our favor, that the election board could indeed reschedule this election and hold these elections.

MS. MILLER: Are you referring to the decision in LeCompte v. Jewett?

MS. JOAN LeBEAU: LeCompte v. Jewett, the election board. Yes, Mr. Jewett being the chairman of the election board.

Then defendants in the Runs After case--that's our case; that is still making its way through court. Then they filed a restraining order in tribal court.

MS. MILLER: Who is "they"?

MS. JOAN LeBEAU: The defendants in Runs After, being the other council members that were also named as defendants in our lawsuit, those council members that voted to bar us. They filed in tribal court.

Again, I am overlooking something very important. What the appellate court said, and also said in LeCompte v. Jewett, was that sovereign immunity--I can't find it now. I'd really have to look.

MS. MILLER: Are you trying to get at the point that sovereign immunity would not be a bar to the Indian Civil Rights Act claims?

MS. JOAN LeBEAU: The Indian Civil Rights Act. Yes. I would have gotten it in that way. Therefore, the chief judge--it opened the door for him to do what he did, which was stop the election.

So we are still moving along with our lawsuit then, after everything was stopped because of that.

Ironically, what brought this whole matter to a head, starting in late 1985 and the early part of 1986, was the death



of two councilmen, the indictments of two other councilmen, and subsequent convictions, plus the fact that the Bureau wasn't recognizing those four anyway. The tribal council then found themselves faced without a duly elected quorum to do business, and but for that I guess that turned it around.

MS. MILLER: So elections were finally held, then?

MS. JOAN LeBEAU: The elections were finally held.

MS. MILLER: And is that how you were elected to the council seat that you presently hold?

MS. JOAN LeBEAU: They just picked up with the primary election. All the top vote getters in the primary elections would be placed on the ballot for this special general election.

MS. MILLER: When you filed your lawsuit in Federal court over the resolution 190 which barred you from holding elected office, did you make any civil rights claims in that lawsuit?

MS. JOAN LeBEAU: That we--

MS. MILLER: Due process.

MS. JOAN LeBEAU: Due process, that we were never given a hearing, among other things. I mean, we alleged a lot of things, but yes.

MS. MILLER: So you made these due process claims and was there ever a remedy for you? Did you find a remedy in Federal court?

MS. JOAN LeBEAU: No, not in Federal court. The only remedy was that two died and two were convicted.

CHAIRMAN PENDLETON: That was a rather natural remedy.

[Laughter.]

MS. MILLER: What I'm getting at is: You found yourself in the middle of this election dispute of not getting due process.

MS. JOAN LeBEAU: Yes. And furthermore, I know at some point in time, although we did go back, and even after we filed in district court we did appeal to the Bureau of Indian Affairs because we were sure that somewhere along the line it would be said again that we failed to exhaust our local remedies. But we didn't even try to go to tribal court because the chief

judge was the son of the chairman, and he had been before the tribal council and already made it perfectly clear how he felt about all of this. So we didn't even try. And even if we had and he ruled against us, if we had appealed it to the appellate court, with the feeling of the tribal council, we probably would have got them all fired anyway. So we just went into Federal court.

MS. MILLER: In light of the fact that you found no remedy in Federal court and you thought it would be futile to file in tribal court, do you feel that this sort of thing could happen again in the future?

MS. JOAN LeBEAU: Yes, it could happen. It could very easily happen again.

MS. MILLER: Okay. I'd like to move on to the next witness.

CHAIRMAN PENDLETON: Before you move on, we'd like to enter into the record the Indian Law Reporter of June 1985, the Cheyenne River Sioux Court of Appeals, LeCompte v. Jewett decision, which was handed down on May 30, 1985.

(The excerpt from the Indian Law Reporter of June 1985, LeCompte v. Jewett, was entered into the record.)

CHAIRMAN PENDLETON: Thank you. Go right ahead.

MS. MILLER: Let's move on to Gilbert LeBeau. Could you maybe talk a little more than you did earlier about your background.

MR. GILBERT LeBEAU: I was a councilman from 1960 to '66. Prior to that I was ranching, blacksmithing, welder, World War II veteran, combat veteran in the U.S. Navy aboard a man-of-war, seeing action all the time.

In 1975 I was approached by the chairman to test a case. They were having a dispute on the Cheyenne River Reservation where there were guns involved, and they wanted that settled. So he asked me if I would take it. I said, "I'll go talk to them." And in a week's time we had it resolved, taken care of.

The next thing he asked me if I'd sit in there as a judge, a superior judge, for a 90-day period. They were contemplating at that time, he told me, having a law-trained judge enter into the picture, which I agreed to. I said I thought we needed law-trained people in that judicial system, law and order department, and we needed qualified personnel. Because I felt

that this reservation--the backbone of this reservation is our judicial department, law and order. Without that, we have nothing.

So I agreed to take it, and after 90 days he came back and said, "Well, we haven't been able to promote any funds for a law-trained judge. We'll just install you permanently for a certain length of time."

I said, well, that was all right with me. That was in 1975 that I took the judge job, in October.

MS. MILLER: That was chief judge?

MR. GILBERT LeBEAU: Pardon?

MS. MILLER: Were you working as chief judge?

MR. GILBERT LeBEAU: Yes, I took the reins of the bench of the chief judge at the time. I stayed there for almost 7 years until I was fired on June 15, 1982.

But we upgraded the system to where we had recognition through the American Indian Court Judges Association. We had recognition from the area director complimenting our court system. We have letters to that effect, documentation. If it wasn't one of the best, it was the best in the northern area of the United States.

And we were real proud of that. But when this deal come about and the referendum was denied and Ms. LeBeau--she is no blood relation here; she is married to a cousin of mine--they filed in court because the council had thrown out the referendum.

So I got to looking at the papers, and under the direction of the tribal attorneys in Washington, D.C., any election dispute was to be settled in tribal court. That was the directive we had. I've got documentation to that.

So I followed that, and I accepted the application. And we set up the date for a hearing and everything was set.

The day of the hearing one council member of the defendants appeared, and he was there for about 15 or 20 minutes and then he left. We went on with the hearing, and a default judgment was entered. My opinion was that under the constitution the tribal council was, like she stated--the referendum was binding on the tribal council, and that was the people's right. By a

two to one margin, the people had voted to have 13 districts, in whatever fashion was determined by the tribal council. So that was my ruling. I had to go along with the constitution. I knew the minute I made the decision where I was going--out the door.

I accepted that; being it's the people's government, I accepted that.

From then on I was without a job. That didn't hurt me because I felt that it was the people's wish. If the people didn't want to support their constitution and bylaws, the ruining of the court system, it was their baby under the law granted by Congress.

When this came about--when '84 came around, I was nominated from my particular district to run as representative. I accepted the nomination again to run for council, although I swore in '66 I wouldn't sit as a councilman anymore. But I accepted that, seeing the conditions that were going on. And then come resolution 190. After the primary election we seen who prevailed in the primary election, like Joan just told you who prevailed, and they were victims of resolution 190, barred forever.

When that complaint was filed by the attorney, he filed under conspiracy. And when we got to checking this out, we found out that there was a result from what the previous panel talked about, that man being barred forever down there, wasn't able to run, Mr. Burnette. Bob Burnette.

So we find that the conspiracy act, which was in our government up there, was looking for ways to bar us--I knew why, and that will come later.

But that is where we come from, and we did get elected. And I come into the tribal council in the February election. We were sworn in in March, and since then we have been on the tribal council. So we haven't had too much time on there. We've been deprived legally of about a year and 6 months or so of representing the people who wanted us to set in as council people.

I was just recently installed as vice chairman to the law and order group, for the fact we are not getting anywhere with our law and order department.

MS. MILLER: Mr. LeBeau, what ability does the law and order committee of the council have to remedy problems of civil rights violations?

MR. GILBERT LeBEAU: They make their recommendations to the tribal council. That is the extent that we have to go. We investigate the allegations, the complaints, what have you, and anything new--any development that might be available. We look at these things and make suggestions and recommendations to the tribal council. But being that I was a victim of resolution 190 and a past judge, I have not been able to hold a meeting. The past month we have set up 2 meeting days, and we have not been able to get anything done under law and order. I don't know why it is.

CHAIRMAN PENDLETON: Excuse me. You mean you have a committee that meets at the direction of the chairman of the council, not on your own?

MR. GILBERT LeBEAU: Yes. I set the meetings now as vice chairman because the chairman of the law and order committee, he is not calling meetings. So they have selected me to sit as the vice chairman, to set the meetings, hear the complaints, make suggestions to the tribal council relating to law and order--recommendations, whatever it may be--to better the organization. The end results are that the tribal council has the last say whether or not to accept the recommendations that we submit. It would be their prerogative.

MS. MILLER: What has happened whenever you have scheduled dates for meetings for the law and order committee?

MR. GILBERT LeBEAU: There's no personnel showing.

MS. MILLER: So you have no quorum?

MR. GILBERT LeBEAU: To get a quorum.

MS. MILLER: Do people bring complaints to the law and order committee of civil rights violations?

MR. GILBERT LeBEAU: Yes, they do.

MS. MILLER: And what action do you take?

MR. GILBERT LeBEAU: We review these complaints, make an investigation to hear the other side. If we hear one side, we must hear the other side. And from this we make a recommendation to the tribal council of what to do with it.

MS. MILLER: So even though you haven't had meetings, as individual members of the committee, you have been acting on these complaints?

MR. GILBERT LeBEAU: I've been reading and checking out a lot of these complaints, making investigations. The only recourse we have now is to lay it on the floor before the tribal council.

MS. MILLER: Based on this experience you have been having, and also your prior experience, are you aware of recent instances in which there have been civil rights violations?

MR. GILBERT LeBEAU: Yes, I have.

MS. MILLER: Could you maybe give us just a couple of broad examples?

MR. GILBERT LeBEAU: Well, I have a complaint in my briefcase at the present time where there's been police brutality extended to one individual, to where the man was hospitalized and had two operations, one right after the other. All his nerves in his one arm was severed by the beating he got. And he's an ex-police officer.

When he was approached by the police department, two officers, they told him they wanted to take him in. And he being an ex-police officer he is well aware of the fact that you must have a warrant, a complaint, or an order from the court to haul you in. He asked for that, and they had none. He said, "Well, when you get one, I'll go with you." And he left.

They commenced to chase him in a car, bumping into him. They did this for a little bit, and the next thing he headed back to try to go back to his house and they run him in a ditch and got his vehicle stuck in the mud. So he got out of the vehicle and tried to evade them--he wanted to run away from them. They caught him and they beat him up, put handcuffs on him and hauled him in.

Halfway back--that was about 50 miles from where the jail is--they transferred him into another unit where there was three other officers, and one of the officers was standing by watching this go on. They put handcuffs on him so tight that his hands were numb; he couldn't move his hands.

They got him back to the jail and then they transferred him to the hospital, and from there he went to Pierre for surgery on his arm.

CHAIRMAN PENDLETON: Mr. LeBeau, if you could oblige us, would you furnish us with a copy of that complaint for the record to give us some example of what goes on in this process? Is that all right with you?

MR. GILBERT LeBEAU: Yes. I'll probably have to send that to you. I left it in my briefcase and it's at the house.

CHAIRMAN PENDLETON: Fine; thank you.

MS. MILLER: Do you ever hear about problems in civil courts?

MR. GILBERT LeBEAU: Oh, yes. There's been quite a number of problems. There is one recent incident there where one lady filed. She had paid some money on a car to be repaired, and somehow or another the guy got off the reservation and he was apprehended someplace, and he was in jail and she had already paid him some money. His wife takes the car and removes the motor, so she files in civil court for action to try to get the money or the motor.

And as I am told--she filed this complaint with me--the judge told her that she was filing on the wrong individual; she had to file on this woman's husband. But the woman is the subject of removing the motor from the car, and there is nothing being done about it. Forty dollars or \$50 is a lot of money for some of those people out there that are going to need transportation.

That's what she had in it. She told me that the judge had refused to take any action, that if she was to file on the woman's husband, well, he would take action on that. But the woman's husband is already incarcerated somewhere, and it wouldn't be applicable. He's out of the jurisdiction of that court, so it would be useless for her.

CHAIRMAN PENDLETON: Excuse me. I think we'd like to know if you are familiar with Ms. High Elk's case and Mr. Springer's case.

MR. GILBERT LeBEAU: To some extent.

CHAIRMAN PENDLETON: Could you shed any more light on what you may have heard them say today, on what we have been able to hear and know already?

MR. GILBERT LeBEAU: Not really. The only thing I know--I still don't know how he got into a writ of habeas corpus, but I guess he was incarcerated. I didn't see that, anything of that nature. But I was in the courtroom when the judge intimidated the individual and know the grounds on which he was reprimanded. Our chief judge was reprimanded by the Federal judge for the way he conducted the hearing.

CHAIRMAN PENDLETON: Now, Ms. High Elk indicated that she is probably going to have some trouble when she gets back and you are a council member. What happens to that once she gets back to the reservation? Are her fears grounded or not grounded?

MR. GILBERT LeBEAU: Well, these are the things that happen, and being a single councilman, one man on that council, you're pretty much a minority. Because that was my reason for saying I'd never serve on the council again in 1966 when I left there, because being a councilman and you're fighting 13 or 14 other heads, trying to get them to see the rights that people are due. But I'll continue to fight for the rights of the people, and under the Civil Rights Act, any way I possibly can. But as we go down the road here, we are only one in council. If we have an idea that is prevalent to the rights of people, then we have to fight to get that action.

COMMISSIONER DESTRO: Mr. LeBeau, let me just interject here, though, I think what the Chairman was getting at--he can correct me if I'm wrong--is: Do you feel that her fears of some kind of retribution or ill effect are well-founded? And, if so, then what do you think she could expect to face when she gets back?

MR. GILBERT LeBEAU: Well, I can see this because it has been done already. You see all the write-ups in these papers concerning these things. We had one of our top clerks on the Cheyenne River Reservation--she was a court administrator, very concerned, very dedicated to her job. She got the can for that, same thing, for making a statement that it was a circus in our court system. And the people took offense to that and they fired her. They found cause to fire her. They created cause to fire her.

MS. JOAN LeBEAU: Subtle, very subtle. Subtle harassment.

CHAIRMAN PENDLETON: Ms. LeBeau, are you going to say something about that?

MS. JOAN LeBEAU: The subtle harassment is there.



CHAIRMAN PENDLETON: Ms. Chasing Hawk, do you have something to say about that? You are members of that council--three members sitting here out of how many?

MS. CHASING HAWK: Fifteen. What I was going to say concerning her case is that she did come before us in an executive session. She requested that we waive our sovereign immunity so she could take the insurance company to court or these people to court. I guess our action was that we didn't have an attorney at that time, and I don't know anything about sovereign immunity. I have an idea about what it is, but I would sure like to have an attorney with me when I make a decision. And that's the decision that we made. I wasn't here when she was up here, but --

CHAIRMAN PENDLETON: I guess the point I'm getting at is that she really feels as though, having come here today to testify, in spite of our notice to the public about retribution to people who testified--she has some strong feelings that when she gets back to the reservation, she is going to be punished.

MS. CHASING HAWK: As far as I am concerned, Mr. Pendleton, not from us. I don't think we would do that. Maybe somebody else.

CHAIRMAN PENDLETON: I didn't mean you, but you say you're 3 out of 15.

MS. JOAN LeBEAU: I don't think it would be any member of the tribal council, Mr. Chairman.

MR. GILBERT LeBEAU: It could be your other officials. It might be some of your other officials.

CHAIRMAN PENDLETON: Some lesser official?

MR. GILBERT LeBEAU: With some more authority than that, handling the funds and distribution of monies and what have you; relief orders, and such as this. They'll just chop your head off by cutting you off there.

CHAIRMAN PENDLETON: I think it's safe to say that this Commission will look very unkindly upon that, and we will look very carefully to see if something does happen to her or Mr. Springer or to Ms. Thompson. I think I can say without hesitation or reservation we found that rather shocking testimony on the system. I guess it makes one wonder whether or not, in my own vernacular, there is ever going to be a

do-right tribal justice system. It sounds like what we are hearing here today, it sounds like the do-right part of this thing is all do-wrong, and it's right in the eye of the beholder or whatever may be expedient. But I think, as Mr. Guerue said, why should not one be able to expect the same kind of justice any other American gets, even though there are some ethnic differences.

MS. JOAN LeBEAU: Mr. Chairman, I feel real bad about those situations. When I was on the outside, I could see these things happening and, okay, I get on the tribal council. Unfortunately, it's politics. I know what needs to be done. No one needs to tell me how that situation should be corrected. I could place a motion on the floor and it would get nowhere. It is up to us. It's our responsibility now to correct that situation, but it boils down to politics.

CHAIRMAN PENDLETON: I guess my question is: Why does it have to be this way?

MS. JOAN LeBEAU: Why--that's a good question?

CHAIRMAN PENDLETON: I mean, it could just as easily be the other way. But why does it have to be this way?

MR. GILBERT LeBEAU: Control.

CHAIRMAN PENDLETON: Why do people's lives have to be controlled like this? Maybe I get a little emotional about it. I am concerned as part of a government-designated minority like the rest of us in this room, however you want to figure that out. But it is clear to me that it doesn't have to be this way, and it never was intended to be this way. And what is it about this ICRA that doesn't work?

Congress is not always in its right mind, in its right wisdom when it does things. I think there was a sincere intent to do something, and obviously there needs to be some correction made here in some capacity. But it just seems to me if there is ever going to be some solidarity for protection and for production, a lot of things--I just don't see it. All I've heard since I've been sitting here today is everything that is wrong. And it looks like everything is wrong. And what does it take? We've had everybody we possibly could get at the table today. We have heard from council people, ex-judges, and we have some in the room who are just observing, I guess. What the hell is going on? Can somebody tell us?

MR. GILBERT LeBEAU: Hunger for power. Control.

CHAIRMAN PENDLETON: How do you get power with 60 percent unemployment--

MR. GILBERT LeBEAU: When they get that authority of administering--

CHAIRMAN PENDLETON: --80 percent unemployment? How do you get power with 80 percent unemployment?

MS. CHASING HAWK: Mr. Chairman, on our reservation we give what they call food relief or cash relief, it may be \$20 or \$30. And that's a lot. When somebody complains to the administration or to the judge or to whomever, they cut that \$20 or \$30.

CHAIRMAN PENDLETON: That's power. That is power.

MS. JOAN LeBEAU: They control their lives.

CHAIRMAN PENDLETON: It amazes me that our government--and I say this in all sincerity, irrespective of my own conservative leanings. Our government has been described by Milton Friedman that if you pay people to be poor, you have a lot of poor people.\* It doesn't matter what race or ethnic group, if you pay people to be poor, you're going to have a lot of them. And people are going to look for power among the poor.

I guess you're right, Bob, that is power.

COMMISSIONER DESTRO: Well, not only that, we have been talking a lot about separation of powers, and politics will tend to gravitate, especially if you don't have any check on it--we haven't really decided, and I think the witnesses this morning said that separation of powers really isn't the answer. There are a lot of answers because there are lot of questions. But one of the ways that you confine the political power is that you divvy it up. And that's what they did at the Federal level, and that is what is not happening. Politics reigns supreme. And back when they wrote the Federalist Papers, they said you don't want to do that.

MR. HOWARD: My recollection of the expression in the Federalist Papers was that if men were angels, we wouldn't need such a separation of powers, but since they are not, we do.

COMMISSIONER DESTRO: Yes.

CHAIRMAN PENDLETON: I guess we've come pretty far today and I guess some of us have been hearing, but we need to hear some more from counsel.

MS. MILLER: Mr. Chairman, I think what we might want to do at this point, since we are running late, is to continue now with the other witnesses, but maybe at some point later on it might be useful to get some opinions from these council members about the solutions that they think might be viable.

But right now let me move on to Bertha Chasing Hawk, and if I could ask you to just talk about your background a little bit for us.

MS. CHASING HAWK: I guess I never meant to get into politics.

CHAIRMAN PENDLETON: Join the club.

MS. CHASING HAWK: Right. I worked in a tribal planning office for quite a few years, and I really enjoyed it, and then my brother became tribal chairman, and then that is how I got involved. They kind of put me into it.

Since politics involves that you can get a job whenever you're in favor with the administration, whichever administration is holding power then, when my brother went out, I went out. So I became a lay advocate.

It was really hard financially. I charged \$25 for criminal cases and \$50 for civil cases. Most of the time I didn't get paid.

But I started out with a training session by Dakota Plains Legal Services, and for that I am really grateful. I've had about five training sessions with them, and I guess I learned a lot. Then I worked in Legal Services for one summer, and since then I have been able to go in there and use their typewriter and their paper and their expertise whenever I need to do a paper or something. If I didn't know how, I'd ask them and they'd show me how.

But I guess the other thing was I was in that Runs After lawsuit also, so I know how it is to be trampled by government.

Last year was really bad. One of the council persons had died, so Mr. LeBeau and I ran for his seat. Well, there were seven of us. He and I came out to be the top vote getters, and the council did everything they could--the chairman, I guess,

did everything in his power--the chairman and his father, the judge, did everything in their power to keep us from getting to the general election, special general election. It was kind of fun because we fought hard. And every time they came up with a court order or something, we'd do an appeal, and we'd get right back to them. I guess that was because Mr. LeBeau and I were lay advocates and we kind of knew the system, we knew the justice system there.

So in the end I won by one vote over Mr. LeBeau and I got on council.

Then, too, the chairman kept saying--well, in the meantime, my brother--he's a blood brother, but for some reason we don't get along--kept having the judge issue orders not to have the election, against the election board and all this. Tradition has had it that the election board has--I guess it is in our ordinance that the election board has the final authority on who wins an election, but because they said that that was never accepted by council, I was never accepted legally by the council. They always had a question on me. And I was never on any committees. So I just didn't do anything. I did vote and everything.

Finally, like Mr. LeBeau and Mrs. LeBeau said, we finally had another election in February, and that's how we came to be.

I spoke with Debra Miller, and I guess I am to speak on some of the violations of the Indian Civil Rights Act that I have seen when I was a lay advocate, and I still see it now.

There were some ex parte hearings. One girl--her husband went and spoke with an alcoholic counselor, saying that his wife needed treatment, so the alcoholism counselor agreed. Then the director of that alcoholism program, who was the girl's mother, went to the judge, and the judge signed an order ordering this girl to go to Sheridan for treatment for 30 days. This girl--I guess everybody involved in that room, in administration right there, they told her that she had to go to treatment for 30 days, and she said, "No way," and she threw that paper down.

And the chief of police was there too. So then the chairman's sister, who had no business, who wasn't an employee or anything, was there, and she said, "Well, if you don't go to Sheridan for treatment, you go to jail for 30 days."

So she picked up her paper and she looked at it. Sure enough it had "or 30 days in jail."

She resisted. She did not believe, and I don't believe, she was an alcoholic, and I don't believe she needed counseling.

So she stuck it out, and in the end they took her to jail. I think she stayed there for about 6 hours, 4 to 6 hours, and she finally got to make a phone call to the judge, the superior judge. And the minute she got on the phone, her mother was there and she could hear her mother and she was talking to the superior judge, and she got out eventually that afternoon.

And I guess she wanted to speak to Ms. Miller, but she was on travel status the time that Debbie was there.

So this other guy that I represented--he was an invalid, and so I was more or less dealing with his daughter. It was a divorce case, and there was a car and some insurance and some property involved. I think it was on a Friday morning, but that Thursday this daughter called me and said that she talked to the chief judge, and the chief judge said, "Don't come tomorrow for the hearing. I'll postpone it."

So the next day the lens of my glasses fell out so I couldn't get to the court at 9. I got there at 5 after 9, and they had already had the hearing, and they awarded everything to the wife.

I was just speaking to Ms. Miller--last Friday I was walking through the halls of the tribal office, and this man's daughter came along and asked me if I had any gas money. She said, "I don't know why, but we are having another divorce hearing." I was trying to find out what that was about. I don't know what it was about, but they had had a divorce hearing last year and now they're going to have another one. Maybe it was appealed; I don't know.

Then one of the things that I saw was that I went to court representing somebody, and this was during arraignment. There was this drunk there--a wino, I guess, indigent, whatever. They gave him two charges--I don't know; I can't remember what they were. He pleaded guilty.

So then the prosecutor said, "Judge, I'd like to add three more charges on it."

So they did. They added three more charges to that guy.

COMMISSIONER DESTRO: Let me just understand what you just said. They added three more charges during the trial?

MS. CHASING HAWK: The arraignment. And he pled guilty to all five.

COMMISSIONER DESTRO: But he didn't have any notice they were going to add them beforehand?

MS. CHASING HAWK: No, no, no. I just walked out.

Then there were documents of the chief judge vacating orders of other judges, such as this one girl--she went before the juvenile court, and I guess they had a full hearing, and the juvenile judge found that the father had to support their child at \$150 a month, and it was to be through a payroll deduction thing. So then this girl went to the court that next week, come payday, to get that money, at least half of it--it would be half of it every 2 weeks. There was an order from the chief judge saying that the man didn't have to, and the chief judge had also given their baby the mother's name without a hearing. It had the father's last name, and he reduced the money, the child support, down to \$25 a month.

COMMISSIONER DESTRO: Was this without a hearing, too?

MS. CHASING HAWK: Right. The girl didn't know. She went to pick up the money at the judge's chambers and then she got this paper.

CHAIRMAN PENDLETON: The judge was the dispenser of the support money?

MS. CHASING HAWK: Right. So it went to the appellate court. If I remember right, they are having another hearing in juvenile court where it was in the first place and it should have stayed.

But there is evidence of goings-on like that.

CHAIRMAN PENDLETON: How often does the council meet?

MS. CHASING HAWK: Once a month. The first Tuesday of each month is our constitutional meeting.

CHAIRMAN PENDLETON: You meet once a month?

MS. CHASING HAWK: Well, we can go as long as we want to. But we are able to call a special session with seven members of the council, or the chairman can call a special meeting, or 100 members of the tribe can call a special meeting.

CHAIRMAN PENDLETON: What happens other days of the month?

MS. CHASING HAWK: The administration is supposed to administer, which is the chairman.

CHAIRMAN PENDLETON: Oh, the chairman is the chief administrative officer of the city?

MS. CHASING HAWK: Right.

COMMISSIONER DESTRO: And he appoints all the administrators?

MS. CHASING HAWK: Well, he does the hiring. He says he doesn't have an influence in hiring, but he does. There is a hiring board and they hire.

CHAIRMAN PENDLETON: A hiring board? But what does the patronage come out of? With him or with the board? Does he appoint the board, too?

MS. CHASING HAWK: No. The board was already appointed when we got on council.

CHAIRMAN PENDLETON: Who appoints the hiring board?

MS. JOAN LeBEAU: It's appointed by the tribal council.

CHAIRMAN PENDLETON: The tribal council appoints the hiring board?

MS. JOAN LeBEAU: It's not so much named individuals; it's the personnel director, the administrative director, somebody from BIA social services, and the department in question that is hiring, the director of that department.

CHAIRMAN PENDLETON: But who appoints those directors?

MS. CHASING HAWK: The tribal council appoints the directors, but the lesser employees the hiring board hires.

CHAIRMAN PENDLETON: I'll wait a while. I'm kind of confused. If you've got a chief executive officer, does he hire the people who work in the departments themselves?

MS. CHASING HAWK: Right.



CHAIRMAN PENDLETON: And some of those persons form a hiring council?

MS. CHASING HAWK: Right; hiring board.

CHAIRMAN PENDLETON: But he's the initial hiring party?

MS. JOAN LeBEAU: Mr. Chairman, the directors of all the programs are hired by the tribal council. The chairman can recommend and the council can go along with it.

CHAIRMAN PENDLETON: That's the same thing, then.

MS. JOAN LeBEAU: Yes.

CHAIRMAN PENDLETON: Okay.

MS. CHASING HAWK: I guess one other thing I'd like to point out is the Bureau of Indian Affairs--I believe they can enforce compliance of the Indian Civil Rights Act, but they don't, such as the case of resolution 190 or the redistricting referendum issue.

Also, I had a police brutality case about a couple of years ago, and I talked to everybody on my list--the superintendent, the special officer, the chairman, chairman of the law and order committee, the council, and the chief of police--and nothing could be done. There was a complaint signed and everything. They just said they couldn't do anything, and I can't remember some of their other reasons.

Then we got this other superintendent, the present superintendent, and we were talking, and he said that if there was a complaint, it's in the C.F.R. to suspend a police officer until a hearing is held on a specific incident.

I guess the point that I am trying to make is that they can enforce compliance with the Indian Civil Rights Act, but they don't. The superintendent also told me that if there is police brutality and the tribe is operating under a 638 contract, and nothing is being done to correct this situation of police brutality and other civil rights violations or whatever, the Bureau can withdraw that contract, take that contract back until they come into compliance. But, see, the Bureau doesn't do it.

The same way with resolution 190. Had they withdrawn their contracts back in 1984, the tribe would not have spent about \$300,000 in lawyers' fees fighting our case, the Runs After case. The \$500,000 could have done more for something else.

MS. MILLER: Excuse me. Can I just interrupt you for a minute and ask you just a couple of real quick questions for the record. I want to ask you why you think, based on your experience as a lay advocate, there are so few jury trials.

MS. CHASING HAWK: I have had one jury trial, and I was a lay advocate since 1981. I did ask for some before, but they always said there was no money to pay the jurors and to pay witness fees and all this and that. And to my knowledge, there were two other jury trials.

Most of the time, I guess, the lay advocate would present the other option, which is to file an affidavit of prejudice against the judge. And sometimes it's a hard fight, but we usually get an affidavit of prejudice on the judge.

The jury trial--the jury has not been extensively used in our court system.

MS. MILLER: Are you aware of instances recently where people have asked for jury trials and have been denied?

MS. CHASING HAWK: Well, the person that I talked to said he has asked for about three of them. But basically it's the client who doesn't want to go through all that process, I guess, because they'd would have had to wait so many days and all this.

MS. MILLER: So you think a lot of people don't choose to have jury trials. Are there instances where people ask and want jury trials and then are refused? Has that ever happened?

MS. CHASING HAWK: I know it has happened to me a couple of times, but I don't know of any other lay advocates. But their reason was that there was no money to pay for it.

MS. MILLER: The one jury trial that you handled--do you remember that as being difficult to get a jury trial at that time?

MS. CHASING HAWK: Yes. They had me do a lot of paperwork--submit a brief and all this. Then they finally agreed. Then we went through a jury trial. What happened there was the prosecutor--she's been a prosecutor for about 8 years now--or I don't know how many years she has been a prosecutor--but she should have known better, but she went and presented physical evidence during the closing argument. As a result, I had six clients for that one jury trial, and they were all convicted.

But we did go to appellate court, and the appellate court overturned it. That was fun.

MS. MILLER: When was that?

MS. CHASING HAWK: That was in 1983, I think.

MS. MILLER: Have there been any jury trials since then that you know of?

MS. CHASING HAWK: I haven't heard of any jury trials.

MS. MILLER: I wanted to ask you, too, about lay advocates and how they become certified at Cheyenne River.

MS. CHASING HAWK: I guess all we do is we go to the judge and we get sworn in. We sign an oath of office, and that is our entry into being a lay advocate.

We also talked about some things that could be done. There was so much I wanted to do when I got on the tribal council, and it is really difficult.

First, I allege that the chairman has picked the law and order committee to suit his politics, I guess. So now we have an ineffective tribal law and order committee, and we still have all these civil rights and criminal violations that we hear about, that people talk to us about, and we can't do anything--I can't.

I did have some things that I wanted to bring up. What I suggested was that maybe we develop a kind of a bar exam for lay advocates, that they know their tribal law and order code, that they know the constitution, that they know the procedures in civil court and criminal court. Basically, that's what I learned when I went to Dakota Plains training sessions.

The other thing was more education and information to the tribal members. They don't know if their rights were violated or not. They don't know the process.

MS. MILLER: Do most people get representation?

MS. CHASING HAWK: I don't know. I have been in court where--well, say I go to court with somebody, and then somebody else comes in while I am there at the jail where the tribal court is, they ask me if I can represent them. So it's like maybe 15 minutes' preparation time.

But I really have no idea.

MS. MILLER: I have no more questions.

MR. McDONALD: Mr. Chairman, last but not least, we have the Honorable Duane Brewer, chairman of the law and order committee.

CHAIRMAN PENDLETON: We've discussed the law and order committee, but not with the chairman.

MR. McDONALD: He's the chairman at Pine Ridge, the chairman of Oglala Sioux Tribe's law and order committee of the tribal council. I know he has been here every minute of the day today.

First of all, Mr. Brewer, could you explain the police organization at Pine Ridge, including the public safety commission and review boards over which your committee has jurisdiction?

MR. BREWER: Sure. Thank you. Our law and order system right now is the only law and order that is chartered through the tribe, which means that they have free run of the program. And our present system is actually supposed to be responsible to the tribe. Every decision they make that affects that program affects the tribe.

They haven't been responsible to the tribe. So we have really been having problems with it.

I ran for council because I wanted to make a change in this program. The government didn't give us \$1.6 million for a self-determination program. It was set aside for law and order. They've given us self-determination programs in prairie dog killing and all these other things, but this one program here is a uniform program that is to provide protection and to serve the people. And it's worse than the Keystone Cops.

I was an officer for 6 years, before Wounded Knee, during and after. And before Wounded Knee, we were contracted; it was tribe. But just before Wounded Knee, we went BIA. So the majority of my 6 years was with the Bureau. So I thought that that was a working program.

The difference I see between the Bureau and the present program is the Bureau had standards. This program here has none.

COMMISSIONER DESTRO: Can I ask a question just to make sure I understand you. Are you describing three different ways of organizing it--Bureau, contract, and then what you have? Or is it just two--Bureau and contract, and the kind that Pine Ridge has now is contract?

MR. BREWER: Yes, it's two.

COMMISSIONER DESTRO: It's two; okay.

MR. BREWER: Like I say, the difference in those two programs, Bureau and what we have now, is standards. You know, whenever you have uniformed men out there, you have to have the respect of the people. You can't just hire anybody. Like I say, a self-determination program for prairie dog killing, yes, it's all right to hire anybody you want. But when you put a uniform on a man and he's going to go out there and protect your life, you want somebody you can depend on.

We have officers out there who are drinking on duty. We have some who have been arrested for DWI in a police car, off the reservation, but yet are still working. But that is due to review boards.

I feel the problem with this public safety program is we passed a resolution, 7612, giving the authority to administer this program to review board people. Now, you have five review board members in each district, nine districts, plus you have one commissioner that runs this program. So that's six people in nine districts or six families that are immune from the law.

Now, any time one of these officers goes out and arrests a member of a review board family, then he gets fired.

COMMISSIONER DESTRO: Can I ask a question about this? What control does BIA have over this kind of activity? Could it revoke the contract if it found out that this kind of stuff was going on?

MR. BREWER: Well, right now I know this program is under investigation, because the FBI has pulled all of the books, and we don't know the outcome of this investigation yet. But I feel right now is a perfect time to make some changes.

MR. HOWARD: The program at Pine Ridge is under investigation by the FBI?

MR. BREWER: Yes.

MR. HOWARD: What prompted that? A chain of events or one thing in particular?

MR. BREWER: Well, I think that we had an individual run this program for at least 7 years, I think, and he formed this program the way he wanted it to. All the decisionmakers--like I say, we passed 7612, this resolution, giving the authority to individual review board members in each district to hire, fire, and discipline. And in that 7612, we give the commissioners the authority to hire and fire and control the administrative people.

And the BIA, I don't think, has had a contract officer that has come in and really rode this program. They give it to the tribe. The tribe gives it to a chartered organization and just let it go.

And now I'm trying to deal with it. We've got a problem with--like the person who had the program for 7 years, he programmed all of these people in there to believe that they are not responsible to the tribe, that any decision they make, the council can't say anything about it.

COMMISSIONER DESTRO: In other words, if I can summarize it--and correct me if I say anything that's wrong here--the money comes from BIA; it is done by contract with the tribe. There's a BIA contract officer who is supposed to oversee it, but they don't. But if they did and control it like they do BIA officers, you might have a better police department.

MR. BREWER: Yes, like last year they were \$105,000 in the red.

CHAIRMAN PENDLETON: How do you get in the red? Do you run a budget deficit in your council?

MR. BREWER: It's not council; it's this program alone.

CHAIRMAN PENDLETON: But who makes up the deficit?

MR. BREWER: Apparently, the tribal council is responsible for this program. They haven't had to pay that \$105,000 back yet.

COMMISSIONER DESTRO: Where do they get it from to pay it in the first place? You don't know?

MR. BREWER: Like I say, they don't feel they are responsible to the tribe.

CHAIRMAN PENDLETON: Does the BIA just kick in the extra \$105,000 then? It comes out of somebody's pocket, doesn't it?

MR. BREWER: It must, but I'm saying we still owe the \$105,000 from last year. And this year, right now we are looking at \$70,000 already in the hole.

I worked when there were 24 police officers, with probably a \$300,000 budget. That's during real hard times. I can't see no problem why \$1.6 million won't provide the protection and everything--

CHAIRMAN PENDLETON: How many people?

MR. BREWER: I guess 18,000 people.

CHAIRMAN PENDLETON: A million how much?

MR. BREWER: \$1.6 million is what the budget is.

CHAIRMAN PENDLETON: For 18,000 people.

MR. BREWER: Yes. It's hard to believe. We have, I think, right now, 62 uniformed men and 53 civilians involved in this program. Our committee has been trying to work with them, but like I said, they have been programmed to believe that they are not responsible to the tribe, and no law and order committee is going to tell them what to do. They make every decision they want on their own, without even listening to anything we say.

Myself, I feel that I am glad there's a lot of heat on this program now because it's going to be easier to change. From the time I got in up to now, you know that anytime you want to make a change in a program, everybody is going to oppose it, especially when you have, like I said, 53 civilians and 62 uniformed men involved in this.

COMMISSIONER DESTRO: Let me just ask another question. Mr. LeBeau, would you agree that that is basically the way the committee and the police operate at Cheyenne River? Is it the same basic story?

MR. GILBERT LeBEAU: Well, it sounds a little bit worse.

[Laughter.]

MR. GILBERT LeBEAU: No, this is bad. This is the whole thing about it, actually, that the people on our reservation--this is all new to them, this law. At one time, back before--the Indian Civil Rights Act--what is it?--the ICRA came in, everybody got along. They had one or two officers that rode the reservation.

CHAIRMAN PENDLETON: I've been waiting for this answer all day.

MR. GILBERT LeBEAU: And this is what happened now. Your politics come in here, your constitution and bylaws come in, and that has divided the people.

COMMISSIONER DESTRO: What kind of budget does your committee have?

MR. GILBERT LeBEAU: They are under a 638 contract from the Bureau.

MS. JOAN LeBEAU: \$500,000.

COMMISSIONER DESTRO: \$500,000?

CHAIRMAN PENDLETON: For how many people?

MS. JOAN LeBEAU: About 50, 60 officers. Oh no, he means to service. About 5,000 residing. We have about 8,000 or 9,000 enrolled.

COMMISSIONER DESTRO: About the same proportion.

MR. GILBERT LeBEAU: That's what I'm saying. This is what we are facing, and there is no respect for the law. If we can get our people to respect the law one time, and get more of them to respect what the law is, we are going to see some changes.

COMMISSIONER DESTRO: Mr. Brewer, yours is a 638 contract, too? Is that what they call it?

MR. BREWER: I think just before John Wayne died, he had something to do with this. He had to. This is a different program; I've never seen anything like it.

Like I told you, I was an officer for 6 years and worked with 24 officers--this was during Wounded Knee, during rough times. And now 62 uniformed men. I think with that many men and that type of a budget, you should have the best law



enforcement in the world. But we've got civilian people making decisions, and that is the problem. But with that resolution 7612 that we passed back in '76, that made the big difference.

MR. McDONALD: Will you explain the details of that organization now, the way the review boards and the police commission is set up?

MR. BREWER: Okay. Well, right now it is a mess because, like I said before, the commissioners are in charge of the administrative portion, hiring and firing of the people that run the program up top. Individual review boards in a district get to pick their own officers.

MR. McDONALD: And how many districts are there?

MR. BREWER: There are nine districts. So you've got six people that can hire and fire in that district.

COMMISSIONER DESTRO: Police officers?

MR. BREWER: Six civilians.

COMMISSIONER DESTRO: Right, who hire and fire police officers.

MR. BREWER: Hire and fire.

COMMISSIONER DESTRO: So actually, each district is its own little--

CHAIRMAN PENDLETON: --Chicago.

COMMISSIONER DESTRO: Right.

[Laughter.]

MR. BREWER: There you go; you're right.

MR. McDONALD: Well, are you saying that you favor returning the police to the BIA police?

MR. BREWER: Well, I say if you want law and order, and you want to get out of politics, and you want to have standards, the Bureau can give it to you. It's not political. The chain of command is set up so the uniformed men respond to the highest ranking uniformed man. That's the way it should be. The way it is now, these officers in the district are

responsible to six people. That means that six families in your district are immune from the law. And it's true. It goes on.

CHAIRMAN PENDLETON: Tell me something. Just one other thing. Mr. LeBeau, you hit on something I've been trying to get to all day without encouraging too much. Was it better before the ICRA than after?

MR. GILBERT LeBEAU: We had better public relations.

CHAIRMAN PENDLETON: So the ICRA, you think, divided the Indian community on the reservations?

MR. GILBERT LeBEAU: This voting deal, this voting for chairman, voting for this, and voting for that. Everything became politics, even to your law and order.

MR. McDONALD: Excuse me, Mr. Chairman. I think he is referring to the IRA, Indian Reorganization Act.

CHAIRMAN PENDLETON: The IRA, the '34 act you're talking about.

MR. GILBERT LeBEAU: Yes.

CHAIRMAN PENDLETON: Not the '68 act, but the IRA.

MR. GILBERT LeBEAU: I like the '68 act.

CHAIRMAN PENDLETON: But not the '34 act.

MR. GILBERT LeBEAU: No.

CHAIRMAN PENDLETON: Okay. Thank you.

MR. McDONALD: One more subject. I believe you wanted to mention verbal search warrants at Pine Ridge.

MR. BREWER: We have been having a problem with them. Anytime an officer in a district feels that he has need for a search warrant, rather than go through the proper procedures and apply for it and go in front of a judge and get it, they have been calling in--and I have a scanner at home so I hear it all the time--call in for a verbal search warrant to go into a house. Lot of times it's harassment is all they want to use it for. They see some guy carrying a six-pack of Budweiser into his house, and they go and say, "That's illegal." And that's what they do.

We didn't have a priority list set up for chief judge or whoever--usually it's the chief judge they got hold of. He never questioned, "Why are you getting a verbal search warrant? Is it a matter of life and death?" There was just no priority. Once they asked for it, he would say, "Go ahead; go for it." So it became a problem.

COMMISSIONER DESTRO: Basically they get these verbal search warrants over the radio?

MR. BREWER: Yes, sir, very easily.

COMMISSIONER DESTRO: Could you record one for us one night and send it in for the record?

MR. BREWER: I have an example of one where an incident revolved around one of these verbal search warrants, and it created a lot of problems. I can get that to you. But like I say, there was no priority, even though I know that these things aren't legal, that they were used to harass people.

We also got into trunk searches, another thing--set up a roadblock and say, "I have permission to search your trunk. Do you mind giving me the key?"

COMMISSIONER DESTRO: These were the standing orders they spoke about earlier to search cars coming onto the reservation?

MR. BREWER: Yes.

MR. McDONALD: I have no further questions.

COMMISSIONER DESTRO: Let me ask one last question. You had suggested giving the police back to BIA because at least there would be some standards. Is there a sense that BIA is more responsible and, if so, who are they responsible to, in your judgment?

MR. BREWER: I would say that they were responsible, and I'd say that they are responsible to the people that they serve and to probably the superintendent that they are working for on an individual reservation.

COMMISSIONER DESTRO: Mr. LeBeau, what do you think about turning the police back to BIA?

MR. GILBERT LeBEAU: I believe as long as you've got personnel that are concerned and dedicated to law and order,

that the tribal council has to adhere to that. I feel that that is the source of--because when you go to the Bureau, they are hanging their hat on the self-determination act, and they will not step in. I was just up there talking about the action of some of these Bureau people that we have that we know about, talking to the superintendent. And he said, "Well, it is self-determination. You guys have a 638 contract and you administer."

But I said, "Where is your monitoring team here?"

Under the act for a 638 contract, they are supposed to be monitoring the programs, and they're not doing that."

And he admits to that. So what do we do? Where do we go? That's where we are standing.

COMMISSIONER DESTRO: Why the admitting, though, to the lack of monitoring; is that part of self-determination too or what?

MR. GILBERT LeBEAU: Well, he has to get out of his rocking chair, that's all. And it amazes me, because the taxpayer pays their wages, and the taxpayer is not monitoring their dollars spent either.

COMMISSIONER DESTRO: Ms. Chasing Hawk, you seemed to want to make a comment. I don't want to not recognize that.

MS. CHASING HAWK: Well, what I was going to say was that in spite of all our problems and all our concerns, the things that are going on, we are--all of the reservations, I guess--are still developing. We need to get more sophisticated, and I would see that we do not turn our law and order department to the Bureau. It has always been a tribal police department. And I see it that way.

COMMISSIONER DESTRO: What about the other step, going in the other direction, which would be going back pre--not so much the IRA or the ICRA, but pre the Martinez case, where if things aren't working out, you can at least go and complain to a Federal judge. Would that be abdicating some of the self-determination as well, do you think?

MS. CHASING HAWK: Well, I don't know. I had to speak to Debra on that. If the Bureau does what it is supposed to do concerning trust responsibility, we wouldn't have some of these problems. And that resolution 190--we had nowhere to go. Mrs. LeBeau failed to mention that we did approach the tribal

council, I was telling you about, asking for a special session, by a petition of at least 100 members of the tribe. We got 186 signatures in one night. And guess who showed up? Five councilmen showed up for that special session.

On August 27, they finally had council. So we went before council, and they rescinded resolution 190.

But the reason I was in there, myself and this other guy, they took us off the general election ballot because of nonresidency, they claimed. But, again, there was no due process there. Then the chief judge came before council and said what the tribal courts were going to do. So what choice did we have but to go into Federal court? And even then it was dismissed because Martinez case said "intratribal affairs."

That's what brought us down. That Martinez decision was probably good on principle, but it doesn't apply to every reservation. It does not.

MS. JOAN LeBEAU: It just wiped out the 1968--

COMMISSIONER DESTRO: It wiped out the control, the ultimate appeal plays.

MS. JOAN LeBEAU: It is not worth the paper it is written on.

MS. CHASING HAWK: What I spoke to Debra about--concerning some type of Federal review. One of the former judges was there, and he spoke against such a program because he said, "If I were a judge, I would not want to have someone looking over my shoulder over every decision I make."

But at the same time, we learned a lot from resolution 190, and we have nowhere to go, and we couldn't even go into Federal court.

And the Bureau of Indian Affairs--we appealed administratively in November, and I don't think to this day they have even given us an answer.

MS. JOAN LeBEAU: No they didn't. It took them a whole year.

MS. CHASING HAWK: Yes. But in the meantime, we lost 18 months from being members of the council. And what I would suggest is that a Federal review court system be set up, but only to qualify cases such as our case. We didn't go through tribal court, but it was useless to go to tribal court.

COMMISSIONER DESTRO: You mean certain classes of cases, certain types of cases, should have Federal review?

MS. CHASING HAWK: Right. Like if I went through the tribal court and I was not satisfied, I would go to the appellate court. And I like that appellate court. There have been some very fair decisions made on that. But for some reason, if that was unsatisfactory to me, my only choice then would be to go to the tribal council. But if the tribal council had done the injustice to me, then I could not go before the tribal council. So if there was something else in place, rather than Judge Porter--[laughter]--I think at least we'd have a chance for someone else to hear our problems or our situation.

COMMISSIONER DESTRO: Thank you.

CHAIRMAN PENDLETON: We want to thank everybody for their patience. And Claire thanks you for not talking anymore today. These proceedings are recessed until in the morning.

Thank you very much.

[At 6:04 p.m. the hearing was recessed.]

PROCEEDINGSSession of August 1, 1986

CHAIRMAN PENDLETON: Would the panelists here please assemble, panel VI, the first panel of the morning: Duston Whiting, and Vincent Brewer, Sr. If you gentlemen will please stand, I will swear you in and then turn to my opening statement.

[Vincent Brewer, Sr., and Duston Whiting were sworn.]

CHAIRMAN PENDLETON: Before I read my opening statement, there is some indication that there will be an absence of persons from the Cheyenne River Tribe to testify today. The officials that we hoped would come to provide the other part of the testimony we heard yesterday apparently are not here and are not coming. We have not decided how to handle that matter yet. But I must say that we are dismayed that we will not have everybody here today, and we will again decide a little later how to handle this matter.

We intend to have testimony from these officials, the responsible persons, and we will be getting back to the public with a decision about that probably before the day is out.

Do you have any comments about that, Commissioner Destro?

COMMISSIONER DESTRO: I don't have any problems with taking their testimony, whether we have to go to the reservation to get it from them or not. But we have asked them to come, and if we have to back it up with a subpoena, then I think we should do that.

CHAIRMAN PENDLETON: They agreed to come--this is the point we are trying to make--and therefore, we did not issue subpoenas for attendance. Commissioner Destro and I are in agreement that if we have to issue subpoenas to get the testimony, wherever that might be, we will issue subpoenas and we will get the testimony.

That is not to cast any disparaging remarks at you gentlemen at all. It was nice of you for coming.

Before we begin this second day of hearings, I want to refer again to that portion of my opening statement concerning 18 U.S.C. section 1505, a criminal statute which prohibits individuals from in any way interfering with the testimony of witnesses who will be appearing at this hearing, or retaliating against those witnesses for their testimony.

The maximum penalty for a violation of that statute is a fine of \$250,000 or 5 years' imprisonment or both. Mr. Hogen, the United States Attorney for South Dakota, has asked me to assure all witnesses testifying today, and for that matter yesterday, that he will actively investigate and, if necessary, prosecute any violations of this law.

In the event any witness believes that he or she has been retaliated against for his or her testimony, please telephone the Commission in Washington, D.C., at area code (202) 376-8351.

I also want to reiterate my statement of yesterday, that witnesses must avoid giving testimony that defames, degrades, or incriminates any person. And as I said yesterday, the Commission is most interested in the performance of tribal organizations such as tribal courts and the tribal councils' oversight committees. We are not interested in and will not permit these hearings to be used as a public forum for personal attacks on the character of tribal officials past or present, nor will we permit anyone testifying today to allege criminal misconduct by any person. Allegations of criminal wrongdoing will be stricken from the record, as will attacks on the character of tribal officials.

Several of our witnesses are tribal officials, and they will have a full opportunity to respond to criticisms of their performance, both at this hearing and subsequently, if necessary.

I may also add that the record will be kept open for at least 30 days after today, and those persons wishing to present testimony or information to the Commission can do so. Our staff persons will be glad to give you the address and the person to whom you should send that testimony.

I might add, Commissioner Destro, we are still concerned over today's lack of witnesses based upon the testimony we heard yesterday, and I think we can readily assume there is some connection between the content of that testimony and the nonappearances today--of Cheyenne River Tribe persons only, not anyone else.

Do you have anything to add, Mr. Destro?

COMMISSIONER DESTRO: No, I don't, Mr. Chairman.

CHAIRMAN PENDLETON: With that, we will turn to counsel to begin this morning's session.



MR. McDONALD: Thank you, Mr. Chairman.

LAW ENFORCEMENT

Testimony of Vincent Brewer, Sr., Chief Prosecutor, Oglala Sioux Tribal Court, Pine Ridge Reservation; and Duston Whiting, Acting Agency Special Officer, Rosebud Reservation

MR. McDONALD: We will begin by asking the witnesses to state their names, occupations, and addresses for the record, beginning with Mr. Whiting.

MR. WHITING: My name is Duston Whiting. I live in Rosebud, South Dakota. I'm presently the Acting Agency Special Officer for the Bureau of Indian Affairs at Rosebud.

That position is analogous to the chief of police. I have been in that position since February of this year.

I have worked for the BIA as a criminal investigator since January of 1984. Prior to that, I was a special agent with the Defense Investigative Service from 1981 to 1984; prior to that, a uniformed patrol officer with the Bureau of Indian Affairs.

I will be receiving a bachelor's degree in a couple of weeks. I have an associate degree in police science. I have attended the Federal Law Enforcement Training Center course for criminal investigators, numerous State courses here in South Dakota, and over the years I have received a number of commendations and awards.

I'd like to qualify my remarks by saying that I have been asked to talk about some problems within the tribal government and court system, and problems with relation to reservation law enforcement. I would like to say that all of the problems are not within the tribal system.

MR. McDONALD: We're getting ahead of ourselves, Mr. Whiting. We just wanted for the record your name, occupation, and address. So we'll go to Mr. Brewer, and then we'll get right back to you.

MR. BREWER: My name is Vincent Brewer. I'm the chief prosecutor for the Oglala Sioux Tribe in Pine Ridge, South Dakota.

MR. McDONALD: Thank you. Go ahead, Mr. Whiting.

MR. WHITING: All of the problems are not within the tribal court. There are a lot of problems within the administration.

MR. McDONALD: Excuse me. If you will save this for the end of the presentation, it will be appreciated. We'll give you a chance to make recommendations, but we have a format that we try to follow, which is essentially a question and answer format.

MR. WHITING: I understand that, but I want to qualify my answers by saying we are looking at a very specific set of problems today, not the entire picture.

MR. McDONALD: Surely; thank you.

Mr. Whiting, is there undue influence or interference by council members or others as to either the police or the tribal court at Rosebud?

MR. WHITING: Yes, there is.

MR. McDONALD: Can you give some specific instances?

MR. WHITING: I can discuss an instance in the spring of 1984 where the tribal council at Rosebud passed a resolution requesting the removal of the then agency special officer and the then captain of police. Such removal request did not specify the wrongdoings or allegations against these officers, and they were subsequently removed by the BIA to different assignments. What I am trying to express there is a valid threat of removal by the tribal council.

During this past year, as the chief of police at Rosebud, I have attended judiciary committee meetings where one of their very direct requests was that I remove our captain of police. I told them that I would remove our captain of police when they gave me some specific allegations about wrongdoing, which I would then investigate. Up until last week, that is still their position. They would like our captain to receive a failing performance appraisal and be removed before his probationary period ends this month.

In February of 1984 I received a telephone call from my tribal councilman following the investigation of a suicide at Rosebud. That tribal councilman asked me to change the report to reflect an accidental death. It is my understanding that this asked change was so that the family could collect on an insurance policy. That individual is still a member of the tribal council.

I think there is undue influence in the court system by the tribal council. Our present judiciary committee has two members who participated in the selection of two of their immediate family members to become court employees. The way I read the nepotism regulations, that would be in direct violation to them.

In January of this year I was involved in the arrest of the former judiciary committee chairman and former tribal councilman on a variety of charges, including possession of a controlled substance, possession of an unlawful firearm. We had about six charges against this individual. That was on January 31 of this year. To date, we have not had a preliminary hearing in tribal court, 6 months later.

I can discuss a particular case which happened in 1985 when an individual was brought up on a couple of tribal charges following an investigation I conducted. The individual failed to appear for required court appearances on three separate occasions, yet no bench warrant was issued for his arrest. On the fourth scheduled appearance, he entered a plea-bargaining agreement with the tribal court.

MR. McDONALD: Thank you.

Beyond the interference question, are you aware of any court practices or any procedural irregularities that hinder the administration of justice at Rosebud?

MR. WHITING: I think the procedural irregularities cover these cases that never come to court. We make the arrests. They make an initial appearance, and they never appear; they never have a subsequent trial.

MR. McDONALD: Does this involve the loss of any documents?

MR. WHITING: I am aware of allegations of losses of documents by the tribal court personnel. I have offered my services to the tribal prosecutor's office in the form of having him or his staff submit to polygraph examinations if he thought that was necessary, and he did not feel that was necessary.

MR. McDONALD: Rosebud has a tribal court but uses a BIA police force. Does this police force function well and, if not, what in your opinion are some of the shortcomings?

MR. WHITING: I think the fundamental problem with the inadequate functioning of our police force is inadequate funding and staffing.

In 1975 there was a task force report on the Indian criminal justice system. Part of that task force's analysis was to devise a formula around which law enforcement programs should be built. Utilizing their figures--I realize now that the study was done in '75 and the recommendations were made in '77, and the target was fiscal 1979 that these figures and formulas should be implemented.

In 1979 the Rosebud police department, according to this formula, should have been staffed with 45 people. In 1986 we are presently at a staff of 23 people. We are less than 50 percent what we should have been 7 years ago.

CHAIRMAN PENDLETON: Excuse me, counsel. What is the budget for your office?

MR. WHITING: This year it is \$665,000.

CHAIRMAN PENDLETON: And you have how many officers?

MR. WHITING: Right now we have eight uniformed patrol officers.

CHAIRMAN PENDLETON: And you've got \$600,000, right?

MR. WHITING: Yes.

CHAIRMAN PENDLETON: And has that number been static or has it changed?

MR. WHITING: We have actually seen a slight increase in the years I have been there. Our fiscal '87 budget is \$715,000 proposed.

CHAIRMAN PENDLETON: What is the average salary of a police person on the reservation?

MR. WHITING: The average salary for a policeman is probably about \$17,000, \$18,000.

CHAIRMAN PENDLETON: So it's \$18,000 and you have eight policemen?

MR. WHITING: That's correct.

CHAIRMAN PENDLETON: That's around \$100,000 and change, almost, for salaries?

MR. WHITING: A couple of hundred thousand, yes.

CHAIRMAN PENDLETON: Not quite a couple of hundred but we'll say \$100,000 and some. What do you do with the rest of the money?

MR. WHITING: Quite a bit of it is eaten up by our GSA contracts for our vehicles. A few years ago we had to switch over from buying our vehicles to leasing them from GSA. We had a number of budget costs that were forced upon our department.

CHAIRMAN PENDLETON: Give me an example of the budget costs forced upon your department.

MR. WHITING: To give you an example, this past summer the tribal judiciary committee selected the agency special officer, which I think is another impropriety, and he was supposed to move here at a cost to our budget of approximately \$17,000.

CHAIRMAN PENDLETON: Move here from where?

MR. WHITING: From Browning, Montana.

CHAIRMAN PENDLETON: So his moving costs were close to \$18,000 to move--

MR. WHITING: \$7,000 to move, plus salary for the rest of the fiscal year.

CHAIRMAN PENDLETON: I see. Are you saying that you don't handle your budget for law enforcement on the reservation, that it is handled by the committee?

MR. WHITING: In part, yes. I don't have control over my budget.

CHAIRMAN PENDLETON: So if the judiciary committee wants to spend money out of your budget for judiciary purposes, they would just do that?

MR. WHITING: In the fall of 1984, the Bureau of Indian Affairs transferred \$27,000 from the police department to the tribal court.

CHAIRMAN PENDLETON: So you have enforcement money going to the litigation process, to the court process; is that right?

MR. WHITING: That's correct.

CHAIRMAN PENDLETON: Does the court itself have money?

MR. WHITING: Yes, they do.

CHAIRMAN PENDLETON: And that's BIA money?

MR. WHITING: That's correct. They have contracted the judicial program.

CHAIRMAN PENDLETON: Are you also saying to us that BIA has control over the money it gives you?

MR. WHITING: That's correct.

CHAIRMAN PENDLETON: Any questions, Mr. Destro?

COMMISSIONER DESTRO: What input does BIA have into, the superintendent, have into how this interfund transfer that takes place? Is there ever any question? Does the tribal council make the request and the money gets transferred, or are there negotiations? What is the process that goes into this transfer of funds from one account to another?

MR. WHITING: In the fall of '84 we had this \$80,000 shortfall for which we received supplemental funding, and it was not with my knowledge until approximately 6 months later that \$27,000 of that had gone to the tribal court. That change was made by a person within the BIA, I would imagine with the superintendent's approval.

COMMISSIONER DESTRO: So you weren't involved in the process, and you really couldn't testify as to how that process went on.

MR. WHITING: I found out about it by accident.

COMMISSIONER DESTRO: That the transfer had been made?

MR. WHITING: Yes.

COMMISSIONER DESTRO: Do you know who we might talk to--if the Commission wanted to find out about the way this process works, other than talking to members of the council, who in BIA would you suggest that we talk to, by way of position rather than name?

MR. WHITING: Our former superintendent and our administrative officer at that time.

COMMISSIONER DESTRO: Okay.

CHAIRMAN PENDLETON: Counsel.

MR. McDONALD: Thank you. Mr. Whiting, is there reluctance on the part of the BIA police at Rosebud to make arrests for crimes not committed in their presence?

MR. WHITING: Yes, there is.

MR. McDONALD: And to what do you attribute that reluctance?

MR. WHITING: We attribute that to a breakdown between what our regulations say and what the people want.

I have to correct myself from my interview of a couple of weeks ago. The '68 BIAM does not authorize us to effect a misdemeanor arrest unless it is committed in our presence.

CHAIRMAN PENDLETON: What's a BIAM?

MR. WHITING: That's our law enforcement manual, Bureau of Indian Affairs Manual.

MR. McDONALD: I see.

MR. WHITING: The tribal code does authorize us to make those arrests. Our regulations do not. And if you read the affidavit that the tribal prosecutor's office uses, they want us to personally observe the infraction.

MR. McDONALD: Are there any other reasons that you can think of, why the officers wouldn't want to make such arrests?

MR. WHITING: No--only allegations.

COMMISSIONER DESTRO: Excuse me, counsel. Let me ask a quick question. You say that you have a BIA police department on Pine Ridge, right?

MR. WHITING: Rosebud.

COMMISSIONER DESTRO: Oh, Rosebud; I'm sorry. Do the BIA regulations cover contracted police departments as well, to your knowledge? Are contracted police departments supposed to follow the same kinds of rules?

If you don't know the answer, that's perfectly okay, but I thought this might be a good time to ask it.

CHAIRMAN PENDLETON: Mr. Brewer, do you know?

MR. BREWER: Yes, they follow the same rules. I think the question was: without being present at the time of the arrest?

COMMISSIONER DESTRO: Yes. Basically, what I want to know is what rules and regulations govern the contracted police department as opposed to the BIA.

MR. BREWER: Same as the BIA.

COMMISSIONER DESTRO: Same as the BIA?

MR. BREWER: Yes.

COMMISSIONER DESTRO: Okay.

MR. McDONALD: Mr. Whiting, will you explain the prosecutorial gap which exists between the tribal court jurisdiction and Federal prosecution, if any?

MR. WHITING: In 1985 we had approximately 448 felonies reported to our dispatchers in the police department. Of those 448 alleged felonies, our criminal investigators initiated investigation into about 170 of those incidents. About 40 of those 170 were prosecuted in the Federal court system, approximately. Those were 40 of the most severe instances. There were a lot of cases that fall, that are referred back to the tribal court, and yet we are in a weak position; because only having two investigators on the reservation, we don't have time to follow up on this other couple, three hundred felonies that were left out.

An example would be if an individual is beaten and hospitalized temporarily or released without any kind of surgery and that type of thing, that's a case that would normally be declined for prosecution by the U.S. attorney's office and referred back to the tribal court. There we put the burden of the investigation on the patrol officer who may or may not complete the job. The incident may or may not be prosecuted in tribal court.

COMMISSIONER DESTRO: For the record, why does the U.S. attorney's office decline prosecution, to your knowledge, in those cases?



MR. WHITING: They have set up a priority system where they want to deal with only the most severe crimes with respect to their budget and manpower limitations.

COMMISSIONER DESTRO: But those crimes are technically under the U.S. attorney's jurisdiction, though; correct? Or not?

MR. WHITING: I discussed an incident in my report where an individual was shot at, it would be in my reports, between six or eight times, and the only reason he wasn't hit was because the guy who was shooting at him was a bad shot. We had a number of witnesses to this incident and we recovered the weapon. That particular case was declined by the U.S. attorney's office, then feeling that it could best be handled in the tribal court.

We have a lot of incidents similar to that where people are threatened or actually assaulted with weapons, either handguns or baseball bats, and certainly not all of those make it into the Federal court system. By far the majority are referred back to tribal court.

COMMISSIONER DESTRO: Okay, thank you.

MR. McDONALD: Was there another case in which an individual had been drinking and there was some problem with legal interpretation?

MR. WHITING: The U.S. attorney's office, from my experience, put some emphasis on whether or not we can prove an individual's intent in a particular case. And if they had been drinking and would allege that they could not remember what happened, I would think that the U.S. attorney's office would interpret that as a weak case for them to prosecute, having difficulty proving that person's intent.

MR. McDONALD: That's not the law, is it, as far as you know?

MR. WHITING: I'm not an attorney.

CHAIRMAN PENDLETON: As far as you know, is that the law?

MR. WHITING: It's not a good situation for our crime prosecution. Probably 90 percent of our personal crimes are alcohol related.

MR. McDONALD: Thank you. Do you think that the criminal jurisdiction of the tribal court should be expanded? And why or why not?

MR. WHITING: I'm going to give you a yes and a no answer. I thought about this quite late last night.

Yes, the jurisdiction should be expanded in some respects. One of our biggest problems is that the State of South Dakota does not recognize our tribal warrants, nor does the tribe recognize State warrants. We have a situation where you can be an Indian, commit a crime on the reservation, have a tribal warrant issued for you, get off the reservation, and you cannot be arrested. I as an Indian can go to Tripp County, South Dakota, commit a crime, come back on the reservation, and there may be a valid State warrant issued for my arrest, but yet I cannot be arrested.

There should be some expansion of their authority in the area with regard to respect of each other's warrants.

But on the other hand, I don't think an expansion of tribal court power would necessarily be beneficial. I think such an expansion might cause the U.S. attorney's office to prosecute even fewer cases, saying that more of these should better be handled in tribal court. And I think until we can remove some of the undue influence and improprieties in the tribal court, the use of the tribal court's full authority that they have now--a 6-months' jail sentence is the maximum penalty--until we can start using that to its fullest extent and really determine what deterrent effect it has, if any, then we should address whether or not we need to expand their authority to a year in jail or what have you. I don't think we are fully utilizing our resources now.

MR. McDONALD: Thank you. Getting back to the question of the warrants, is there an extradition statute or ordinance at Rosebud, and wouldn't this play a role in that situation?

MR. WHITING: What kind of a statute?

MR. McDONALD: Extradition.

MR. WHITING: There was one in the old tribal code, and I'm not sure if there is in the new code. In my experience, this extradition statute or procedure has never been utilized.

MR. McDONALD: Were there ever cases where the State attempted to use that procedure, to your knowledge?

MR. WHITING: Not to my knowledge.

MR. McDONALD: Thank you. I have no other questions for Mr. Whiting.

CHAIRMAN PENDLETON: I have some questions to ask, but I'll wait until Mr. Brewer has a chance to speak. Go ahead, counsel.

MR. McDONALD: Mr. Brewer, what in your opinion are some of the shortcomings and the needs of the police and court systems at Pine Ridge?

MR. BREWER: I think when we discussed this before, the real need is the lack of financing. He talked about \$17,000 for the BIA policemen. Our tribe took the contract, and so much of it goes to the tribe. The police got a raise here recently, and they're paying \$12,000. They were paying around \$10,000 just around a year ago. Now, that isn't adequate to get decent people to working. The police are demoralized. And besides that, in this contract we created nine police departments on the Pine Ridge Indian Reservation.

CHAIRMAN PENDLETON: You had nine separate police departments?

MR. BREWER: We have nine districts with nine review boards who do the hiring, who do the firing. Plus we have the central police commission who are supposed to have the overall say. So we are dealing with: how do you get subpoenas from one district to the next if they don't want to take them? Because who has the supervision over these police officers?

COMMISSIONER DESTRO: Mr. Brewer, let me interject for a minute and ask a couple of questions based on what you just said. First of all, let me understand why is it that your policemen are paid an average of \$6,000 less than --

MR. BREWER: That's the contract. It's in the contract.

COMMISSIONER DESTRO: Okay. Now, the contract--but where does the contract--tell me about the genesis of--how does the contract come about?

MR. BREWER: The tribe took a contract, took the police department away from the Bureau. According to the contract, they are supposed to pay similar to the BIA or the police departments in local surrounding areas. But we are not doing it.

CHAIRMAN PENDLETON: Why?

MR. BREWER: I don't know.

CHAIRMAN PENDLETON: Who decides why? The council?

MR. BREWER: The council and the public safety commission.

CHAIRMAN PENDLETON: Is that the commission that oversees all nine departments?

MR. BREWER: Yes.

COMMISSIONER DESTRO: How do the salaries on Pine Ridge compare with the others in the area? Is that far below everybody else's too?

MR. BREWER: We're next to Rosebud. He's paying \$17,000, and our men are being paid \$12,000.

CHAIRMAN PENDLETON: I guess our question is this: why is there a difference in the salaries of policemen when you have the same funding agency and they're doing similar work, irrespective of the reservation?

MR. BREWER: I'm a retired criminal investigator for the Bureau, too. Whenever the tribe is contracted from the Bureau, they will say, "Well, you'll take this amount, what the Bureau police are getting, and we'll give it to you." But it comes out of Aberdeen and it never fits.

CHAIRMAN PENDLETON: Let me back at it another way. Do you know whether or not there is a salary range for BIA police persons?

MR. BREWER: Yes, there is.

MR. WHITING: Mr. Chairman, I would offer that that salary difference we are talking about is due in the most part to civil service regulations. Our guys are established at a certain GS salary, and there is no way we can modify that. They put a certain time in a grade and they advance through the steps.

CHAIRMAN PENDLETON: I'm agreeing with you; I understand that part. I'm trying to find out in a basic way, if you have a contract with BIA, you use BIA police persons or you use your

own police persons. Is there a starting salary for police persons on the reservation, whether they're BIA or tribal police?

MR. WHITING: Our starting salary at the low level is probably \$11,000 or \$12,000.

CHAIRMAN PENDLETON: \$11,000 or \$12,000?

MR. WHITING: Yes,

CHAIRMAN PENDLETON: If you're next to him, how come you're at \$17,000 and he's at \$12,000?

MR. WHITING: Our youngest member of the department probably has 3 years' experience, which puts him up to nearly \$17,000.

CHAIRMAN PENDLETON: How about yours?

MR. BREWER: We have experienced men, too, but they're all sitting around \$12,000 or maybe \$13,000. From what I understand, it's mostly \$12,000.

COMMISSIONER DESTRO: So the contracts don't incorporate the GS levels?

MR. BREWER: My understanding is that they are supposed to. If you take a contract from the BIA, the funding is supposed to stay the same, but we have always found that the funding is always reduced. There are problems with cars, vehicles.

CHAIRMAN PENDLETON: If we take Mr. Whiting's testimony, what we are saying is that if you don't control your budget, you don't know why the salaries are different, right?

MR. BREWER: That's right.

CHAIRMAN PENDLETON: Now, if we don't know why the salaries are different, then I guess we can assume that there is a strong policy connection between what the tribal council wants and what the BIA wants with respect to law enforcement on the reservation. And they can decide either the contracting way to go or the salary way to go; is that correct?

MR. BREWER: Evidently.

MR. WHITING: I would say that is one of the plus benefits the tribe talks about when they talk about contracting. They're going to take our budget, and instead of dividing it by 17, they'll divide it by 10 and hire that many more officers to improve response time and police patrol.

CHAIRMAN PENDLETON: Has the response time improved?

MR. WHITING: I don't know. They didn't do that to us yet. That's something that somebody should study before and after the contracting of the program.

CHAIRMAN PENDLETON: Who would study that? BIA?

MR. WHITING: Somebody should study that.

CHAIRMAN PENDLETON: Well, if the BIA is the problem, how can they be the solution?

COMMISSIONER DESTRO: He said somebody should study that, not necessarily the BIA.

CHAIRMAN PENDLETON: Oh.

COMMISSIONER DESTRO: Let me go back and ask another couple of questions. In effect, then, what you're saying is that you have nine police departments on the reservation then, not one.

MR. BREWER: That's what it amounts to.

COMMISSIONER DESTRO: And the chief of police is really not the chief of police then, right?

MR. BREWER: That's right. The police and the captain sits over in the central office. I don't know where the authority starts and where it ends.

COMMISSIONER DESTRO: Where would you suspect that it starts and ends?

MR. BREWER: It's right there in their office. They don't seem to have any authority.

COMMISSIONER DESTRO: Who does, though?

MR. BREWER: The lieutenants in these districts.

COMMISSIONER DESTRO: And they report to the commissioners in their districts?

MR. BREWER: Yes.

MR. WHITING: Mr. Destro, I would offer that the chief of police does not have control over the police department, even as far as personnel selection. I can recall an instance where I refused to hire an individual. The on-leave captain at that time was called back and signed the hiring papers.

COMMISSIONER DESTRO: The on-leave captain?

MR. WHITING: Yes.

COMMISSIONER DESTRO: Even though you were the chief?

MR. WHITING: I was the captain at the time.

COMMISSIONER DESTRO: Oh, you were the captain? Okay. So they just called in another captain?

MR. WHITING: I refused to sign it, and they called him back from leave, and he signed that transfer authorization.

CHAIRMAN PENDLETON: How did you get to be the chief with the attitude you have about trying to do things right?

[Laughter.]

MR. WHITING: You asked a question that I'm really happy that you did. This past summer I had received a temporary promotion between February and June to my present position. There were eight or nine applicants for the permanent selection. The tribal judiciary committee selected another individual other than myself. The superintendent went along with that selection, and that individual was to be transferred here from Browning, Montana. I am not going to be the chief of police if this judiciary committee has their way.

CHAIRMAN PENDLETON: Let me ask one more time: what happens to you after testifying here today?

MR. WHITING: I don't know. My heart is beating about 100 beats a minute right now. I may be calling you.

COMMISSIONER DESTRO: Let me ask you another question along those lines. Have you ever gone and spoken with the superintendent about the goings-on?

MR. WHITING: At length. We have had some very heated discussions.

COMMISSIONER DESTRO: Why heated?

MR. WHITING: Because we didn't agree.

COMMISSIONER DESTRO: Basically, what is it that you didn't agree on?

MR. WHITING: The bottom line probably would be that the tribal judiciary committee and the council in the background have too much influence and sway over the operations of the police department. That would be my position. His position would be that the tribal government and the people do have a valid interest in the operation of the department. And I'm not going to fault him for that; I understand that. But until we put a responsible person in there who won't bend to these favors and overlooking certain things, we are going to have an inadequate law enforcement system.

COMMISSIONER DESTRO: I don't want to put words in your mouth--the superintendent prefers to defer to the tribal council? Is that the way to sum it up?

MR. WHITING: I would think the tribal council's opinion or position on a particular issue carries a great deal of weight with the superintendent's decisions.

In response to your question, Mr. Chairman, I would attribute this refusal on my part to remove our captain without due process as directly affecting my nonselection as the permanent agency special officer. In turn, another individual was selected, and I am put on the back burner for the time being.

CHAIRMAN PENDLETON: Counsel.

MR. McDONALD: Mr. Brewer, first of all, Mr. Chairman, I believe we had testimony yesterday to the effect that at Pine Ridge, because of the low morale, there is therefore a high turnover, and that would tend to lower the experience level of the average policeman, and therefore possibly account for the lower salary level.

CHAIRMAN PENDLETON: Counsel, is there anywhere we can get--without having to have names--the positions and the salaries at both places, just for discussion purposes?

Is that possible?



MR. HOWARD: Of the police department?

CHAIRMAN PENDLETON: Yes.

MR. McDONALD: I think we do have some material on that.

CHAIRMAN PENDLETON: Maybe we ought to look at that for the record when we begin to put something together. It might be an interesting comparison to see how this all takes place if we can identify anything from what we already have assembled.

MR. McDONALD: Thank you. Mr. Brewer, are the numbers adequate in terms of the number of police officers at Pine Ridge?

MR. BREWER: Yes. We have a pretty big budget, and we have about the same amount of police in each district. We have quite a few police. We have about 40--some police, which is adequate, if they're under one--the chief of police or the captain and we can assign them.

MR. McDONALD: Are there problems with the distribution of the police?

MR. BREWER: Yes, that's the whole problem right there. We have one district out there that has hardly any people with the same number of police as, say, the Wakpam district. The distribution isn't right.

MR. McDONALD: What do you attribute that to?

MR. BREWER: Well, just cutting the pie into equal shares, nine shares, nine pieces with everybody having the same share, the same amount.

MR. McDONALD: That is a policy question, then.

MR. BREWER: Right.

MR. McDONALD: Thank you. You have indicated problems with service of process. Could you elaborate on that?

MR. BREWER: Well, I mentioned before we have these districts. You have these nine districts with different police departments, and the Pine Ridge boundary district of Pine Ridge don't serve their subpoenas in other districts. And you go across the reservation. We have 100 miles there that we have to distribute these things to different police departments and hope that they get served.

We have been asking for a number of years, since the Public Safety took off, that we need a public defender and also a process server. But because of the funding, we can't.

We feel that if our budget was--well, our court budget was cut again, as usual, but we were looking forward to an increase this year, hopefully so that we can get a process server that would do just that. Because of this lack of service, we have trouble with our court cases. People come in for 100 miles for a court case. They're served, but the other side isn't served, and we take the blame for it.

We need a process server, or we need some change in that system to get better services for the court.

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: Excuse me, counsel. Let me ask a question.

You're talking about process servers. I'm looking here at the statistics on criminal charges at Pine Ridge for April, May, and June of 1986. We've got 1,601 criminal charges, the total number of criminal charges. Of that number, 1,128 are disorderly conduct--drunk. Is that the bulk of the work on the reservation, handling the drunks?

MR. BREWER: Just about.

CHAIRMAN PENDLETON: So on whom do you do the serving?

MR. BREWER: We have many other crimes. Assault and battery--a lot of assault and batteries, referrals back from the Federal court. But because we have this criminal charge of disorderly conduct on the reservation, it's a crime on the reservation and we have to deal with it.

CHAIRMAN PENDLETON: For these 3 months, I don't see any more than 25 charges here for assault and battery.

MR. BREWER: If you don't get 25 taken care of this month, next month you've got 50.

CHAIRMAN PENDLETON: For January, February, and March, if I'm reading correctly here, you have 17 assault and battery cases here. This is class A through E and they involve assault and battery. Maybe there's a few more down here, class B. But there are not 50 cases here for the months of January,

February, and March, and certainly not 50 cases here for the rest of the time.

MR. BREWER: But they add up. You know, if you don't get the subpoenas served, you reschedule them. And how long do you have to reschedule them before we have to dispose of them?

CHAIRMAN PENDLETON: What would happen on the reservation if you decriminalized being drunk?

MR. BREWER: If we had the facilities, it would be fine. We need it.

MR. WHITING: In Rosebud, being drunk is not a crime. We have a protective custody statute that allows us to hold an individual for 24 hours to sober him up.

CHAIRMAN PENDLETON: Does that save you money?

MR. BREWER: I think in most cases it's 8 hours and they turn them loose.

CHAIRMAN PENDLETON: But decriminalizing drunkenness, does that save money?

MR. WHITING: I don't know if it saves us money. I'm sure it lightens the burden on the court, because we're not prosecuting them for anything.

MR. BREWER: It might save you a little money because you're saving it on food. If you keep them for 24 hours, you have three meals you have to serve them. If it's 8 hours, if they come in at the right time, you can probably get by with one meal.

CHAIRMAN PENDLETON: You get a meal and a half like we do sometimes. If we work less than 10 hours, we get half the per diem.

MR. BREWER: We have nothing for juveniles.

CHAIRMAN PENDLETON: So if you're juvenile and drunk, that's just it.

MR. BREWER: You look for the judge and he'll send you home with your parents.

CHAIRMAN PENDLETON: If you don't have any groceries over there, you just don't eat, right?

MR. BREWER: That's right. We have no juvenile detention center. We keep them there until the parents get there, and that's about all.

CHAIRMAN PENDLETON: Counsel.

MR. McDONALD: Is there actually a law against being intoxicated in private at Pine Ridge?

MR. BREWER: Sure is, 74(g).

MR. McDONALD: What is your assessment of that? Do you have any recommendations in that regard?

MR. BREWER: Well, I think just what we're talking about. We'd like to have it decriminalized and just hold them for 8 hours, sober them up, and let them go.

MR. McDONALD: A public-private distinction.

MR. BREWER: Yes, but it's on the books and it's a law and we have to live with it. We can decline prosecution, which we do in more simple matters, if there's no disturbance. We try to get rid of them as soon as possible. Otherwise, we get into this process serving again.

MR. McDONALD: Mr. Brewer, is there political interference with the police or with your function as prosecutor?

MR. BREWER: Not to the extent that they have at Rosebud. We have a section in our code that keeps that pretty much at bay. But it's still like any other jurisdiction in the State, counties, or whatever--there's still that political. It will never change, I guess.

MR. McDONALD: How many jury trials, criminal trials, have been conducted in tribal court during your time in the prosecutor's office?

MR. BREWER: I think we've had about, not more than four or five.

MR. McDONALD: Why are there so few trials?

MR. BREWER: Most of these jury trials on the reservation--they're misdemeanors to start with. We will select a jury and then have a plea bargain at the time where the guy will change his plea. They very seldom want to go to court on a jury trial on the reservation.

MR. McDONALD: What about representation? Do you see a need for a public defender?

MR. BREWER: Definitely. Our code says you are entitled to an attorney at your expense, but we feel there's a real need for a public defender there. We have to deal with people as public defenders as well as being prosecutor because of this problem. They can't afford to hire one. And I think we are violating their rights.

MR. McDONALD: You mean they come to you for legal advice though you are the prosecutor?

MR. BREWER: Every day, all day long. That's why we need a public defender, someone to send them to.

CHAIRMAN PENDLETON: Maybe you have to ask the tribal court to reprogram the budget to get you a public defender. Would they do that?

MR. BREWER: No, we're short of funds now. We have no supplies now. They cut us again.

CHAIRMAN PENDLETON: Who cut you again?

MR. BREWER: The Bureau. They cut us by about 25 percent. I think the chief judge is here.

CHAIRMAN PENDLETON: Twenty-five percent they cut you back?

MR. BREWER: This year, yes.

CHAIRMAN PENDLETON: Have you been bad boys or something; you did something right?

[Laughter.]

MR. BREWER: I don't know. The chief was probably a bad boy this year.

MR. HOWARD: Do you have any idea why your budget was cut 25 percent?

MR. BREWER: I have no idea. I think the chief judge will be on the next panel and he can answer that.

CHAIRMAN PENDLETON: Any more questions?

MR. McDONALD: With respect to the defendants and the service-of-process question, do many defendants take advantage of their right to have service of process for their witnesses?

MR. BREWER: Yes, yes. I think most of the people are aware of what their rights are, their right to subpoena their witnesses, and if they don't, at the time the first hearing is set up, if they forgot some witness that we think is essential, we will postpone a case and give him a chance to subpoena that witness, hoping it gets served.

MR. McDONALD: And if service of process is a problem, does this result in some dismissals of cases?

MR. BREWER: Well, up to a certain time we do. It just loses everything.

MR. McDONALD: So that is based on the right to a speedy trial or lack of prosecution witnesses?

MR. BREWER: Right. If the witnesses don't show up, are served and don't show--after so many times in that big area, it's expensive as it is to get to trial, and they just give up after a while, and we have to dismiss them. And I think the court rules that if they were served and they don't show, we dismiss it.

MR. McDONALD: You mentioned the area. Just how big is the reservation, for the record, so we can put these difficulties into perspective?

MR. BREWER: About 90 wide and 100 long.

MR. McDONALD: Miles?

MR. BREWER: Yes.

MR. McDONALD: So transportation is a major factor in the court system?

MR. BREWER: Yes.

MR. McDONALD: How about the vehicles that are available to the police. Would you elaborate on that?

MR. BREWER: We have difficulty--I know the Public Safety has difficulty with their cars, getting them replaced. I think they deal with GSA also. And we're short of cars right now because of that. I guess it's just lack of funding on their

part--too much budget for the review boards and the tribal cut. It all takes effect, and some people suffer for it.

MR. McDONALD: Did it work any better under the BIA?

MR. BREWER: Oh, yes. We always--we had good cars.

CHAIRMAN PENDLETON: Mr. Brewer, we heard about a hot pursuit case yesterday. Do you know about that case Mr. Stoldt told us about yesterday?

MR. BREWER: We have quite a few of them. Which one?

MR. McDONALD: Excuse me, Mr. Chairman, first of all, I don't know if that case is still pending or whether it's been tried.

CHAIRMAN PENDLETON: Oh, I'm sorry. Strike that from the record.

MR. McDONALD: I'm not certain. It may well have been already tried--Mr. Marvin Stoldt's case. Do you know if it was postponed or tried?

MR. BREWER: I think Marvin's was postponed. I don't think it came up yet.

CHAIRMAN PENDLETON: We won't get into that one yet. He's got a fast car, though.

MR. BREWER: Right.

[Laughter.]

MR. WHITING: Mr. Chairman, I had a note here to discuss our crime rate briefly. In 1985 I did a study for our college concerning our violent crime rate. Murder, rape, and aggravated assault occur on the Rosebud Indian Reservation at nearly five and a half times the rate of the State of South Dakota. Property crime is two and a half times the South Dakota rate and 35 percent above the national rate.

In 1983 our murder rate was 34 times the rate of the State of South Dakota. Our murder rate was higher than that of Miami, Florida, in 1983.

Traffic fatalities occur in Todd County at seven times the frequency they do in the surrounding counties. Eighty-five percent of those are alcohol related.

Completed suicides occur at three times the rate of the surrounding counties, and our attempted suicide rate is more than nine times the rate of the surrounding counties.

CHAIRMAN PENDLETON: We'll add those percentages to the figures you have submitted, and we can submit these for the record. The judicial system of the Rosebud Sioux Tribe--there are some figures here about caseload and so forth. We'll submit those for the record.

MR. WHITING: Are those the tribal court figures or the BIA figures?

MR. HOWARD: These are the BIA figures, I believe.

CHAIRMAN PENDLETON: We'll take yours, too.

MR. HOWARD: The most recent figures we have from the BIA are for 1983.

MR. WHITING: I'd be happy to make you a copy of this study.

CHAIRMAN PENDLETON: We'd love to have that, sir.

MR. McDONALD: Thank you very much.

I have no further questions, Mr. Chairman.

CHAIRMAN PENDLETON: Gentlemen, thank you very much for testifying. We wish you well in the process and in the future.

We'll take a short break. We have a couple of things to discuss here with respect to people who may or may not be attending today.

[Recess.]

CHAIRMAN PENDLETON: We promised that we would not give you the full load, Mr. Justice, if you are the only one that's here. We will not burden you in that way at all. Are there people in the hallway at all?

MR. McDONALD: Excuse me, Mr. Chairman. We do have another judge here this morning, Judge Patrick Lee from Pine Ridge, who, as I understand, it is a special judge who sits in cases in which one of the judges has to recuse himself or in special situations of conflict of interests. He is a member of the bar, and he was planning to make a statement at 3 o'clock in



open session, but because he is here and is knowledgeable, he has asked if he could join this panel, in view of the fact that a lot of the other witnesses are not here this morning.

CHAIRMAN PENDLETON: I think that would be appropriate and the request of counsel is granted. Will you join us, Judge?

I want to add that Melvin Garreau and Nancy Condon are members of the Cheyenne River Tribe and are not present, and we understand they will not be present, based upon yesterday's discussions, I guess.

We have decided that we will issue subpoenas to get the testimony of those persons in Cheyenne River and other people who have not appeared to date and who may not appear this afternoon. It is our intent to make this record as complete as we can to hear both sides of the issues being discussed here, and those subpoenas will have a date to be determined. It does mean that we may have to return to this particular area because of the conditions of our subpoena authority, but let me assure the public that we will do exactly that.

Commissioner Destro, do you have any comments to make?

COMMISSIONER DESTRO: No, Mr. Chairman, I don't. I second your comments entirely.

CHAIRMAN PENDLETON: I have just been presented an affidavit from Mr. LeBeau from yesterday, a Mr. Collin Jewett. We talked about that yesterday in his testimony, so he brought me this written affidavit to be submitted for the record.

CHAIRMAN PENDLETON: Would you please raise your hands, gentlemen.

[Robert Fast Horse and Patrick Lee were sworn.]

CHAIRMAN PENDLETON: Mr. Fast Horse, I must say, Judge, that I was impressed with your petition at the conference in Phoenix, and I guess so much so, I remembered having seen you there, and welcome here again today.

MR. FAST HORSE: Thank you.

CHAIRMAN PENDLETON: Counsel.

JUDGESTestimony of Robert Fast Horse, Chief Judge, Pine Ridge Tribal Court, and Patrick Lee, Special Judge, Pine Ridge Tribal Court

MR. McDONALD: We'll begin by asking the panelists to state their names, occupations, and addresses for the record.

JUDGE FAST HORSE: My name is Robert Fast Horse. I'm an attorney at law, licensed to practice in the State of South Dakota. I'm also the chief judge of the Oglala Sioux Tribe. My residence is in Pine Ridge, South Dakota, in the actual village of Pine Ridge.

MR. McDONALD: Judge Lee.

JUDGE LEE: My name is Patrick Lee. I'm the chairman of the Lakota Studies Department at Oglala Lakota College, and I serve as a special judge for the Oglala Tribal Court. I'm a tribal member and a member of the State bar. I reside here in Rapid City.

MR. McDONALD: Thank you. Perhaps we could alter our format also so that after Judge Fast Horse answers each question, Judge Lee could be given an opportunity to comment as we go.

CHAIRMAN PENDLETON: We will also abbreviate the time a little bit. I think it's not fair to subject the witnesses to the total amount of time that was left for four or five witnesses. We intend to talk to those witnesses later, at any rate. So here we are. Go right ahead, Counsel.

MR. McDONALD: Judge Fast Horse, in your opinion, are the prosecutors and public defenders at Pine Ridge more or less evenly matched in terms of their knowledge of substantive and procedural law?

JUDGE FAST HORSE: We don't have a public defender system at Pine Ridge. Therefore, the inequity exists just by default.

MR. McDONALD: Do you have any recommendations in that regard?

JUDGE FAST HORSE: Yes. I have been actively involved with the tribal council in attempting to establish what would be known as the Oglala Sioux Tribe legal clinic.

I believe several years ago, when I was the executive director for the Oglala Sioux Tribe, I drafted an ordinance establishing an attorney general's office and also a public defender's office. However, due to lack of funding for either situation, it didn't become a reality.

What we are presently doing, since the Indian Civil Rights Act itself does not provide for attorneys for indigent defendants, is attempting to organize the lay advocates and maybe some professional attorneys into a bar association where they would have an ethical duty to provide legal representation to indigent defendants as best they could, possibly on a pro bono basis.

I did convince the Court of Claims legal services to begin representation by court appointment in guardian ad litem situations and cases involving mental incompetence and involuntary commitment proceedings.

There is a high rate of criminal defendants who virtually go unrepresented because they don't have the money to pay even the basic lawyer's fees to the lay advocates. Lay advocates sometimes only charge \$10 a case. We have to look into the background of Pine Ridge. The U.S. Census categorized Shannon County, which is encompassed by the Pine Ridge Indian Reservation, as the poorest county in the entire Nation, the lowest income per capita. And I think the impoverishment of the situation kind of omits the possibility of people getting adequate representation. Most professional attorneys charge a minimum of \$50 an hour, and in something like a DC arrest or something else, it's just not worth their time apparently to provide that type of representation.

But that's the current activity we are pursuing now. We are trying to organize those people who are licensed to practice in tribal court to begin some type of legal clinic. And the possibility still exists where we could have tribal government provide some funding in that area. It won't take care of the entire caseload.

MR. McDONALD: Thank you. In your opinion, is the Oglala Sioux Tribal Court actively applying the provisions of the Indian Civil Rights Act?

JUDGE FAST HORSE: As best we can. It is distressing to me a number of times when I see failures in the Indian Civil Rights Act when it comes to jury trials. We just do not have the money to provide jury trials. When I first became

appointed several years ago, there were 33 backlog cases where people had requested jury trials. I looked into the tribal court budget, and we just didn't have the money to provide jury trials. So I put the burden on tribal government and I scheduled them anyway. Thirty of the defendants, at the time of the voir dire selection, entered a plea of guilty because they didn't want to go through with the jury trial. And at that time we had three jury trials, and they all resulted in convictions.

MR. McDONALD: So they were aware of the problems and attempted to use that in their own defensive maneuvers?

JUDGE FAST HORSE: Yes. I believe from the prosecution's perspective, it was simply regarded as a delaying tactic, and I guess as such it would work. But it still distresses me that we don't have the money to provide jury trials.

MR. HOWARD: Did you say that 30 of the defendants did not want jury trials?

JUDGE FAST HORSE: When we assembled the jurors, they entered a plea of guilty.

MR. HOWARD: Do you know why that is, generally? Was there some predominant reason why they decided to not have a jury trial?

JUDGE FAST HORSE: I'm not a clairvoyant so I can't really read the minds of those people who entered the plea of guilty, but from the prosecution's perspective, it was simply regarded as a delay tactic, going to trial.

MR. McDONALD: The Indian Civil Rights Act application to tribal court--does this include the enforcement of the right to equal protection of the law in all matters of employment by the tribe?

JUDGE FAST HORSE: Yes.

MR. McDONALD: Can you tell us of any specific cases that have gone through the court system and the results, involving employment questions and the right to equal protection?

JUDGE FAST HORSE: The tribal council adopted what is called the Oglala Sioux Tribe merit system, governing personnel situations--hiring, firing, promotions, etc. We pretty much delegate that authority to a personnel board, which is comprised of representatives from each of the nine political

districts on Pine Ridge. They conduct what I consider administrative hearings. And if a person is dissatisfied with the result of that administrative hearing, that's the only time we get a chance to hear the case. And it would be basically judicial review of administrative action.

What we try to determine is whether or not the record is adequate, whether or not the actions are arbitrary or capricious--your technical administrative review types of questions.

MR. McDONALD: What about the sovereign immunity defense?

JUDGE FAST HORSE: Our law and order code, which was adopted by the council, doesn't have a sovereign immunity provision. It does have an exhaustion of remedies requirement. It states that before the Oglala Sioux Tribe or any of its employees or agencies, acting in an official capacity, can be sued, there has to be an exhaustion of tribal remedies, which means that a complainant will have to take their issue before the executive board of the Oglala Sioux Tribe. If they act adversely against the complainant, that person has a right to come to court. And if they don't act on the complaint within 30 days of the filing of the complaint, then the court has jurisdiction to hear the case.

The way the court has interpreted it--and it's been upheld by our appellate court--is that sovereign immunity applies to those situations where State courts attempt to gain jurisdiction or Federal courts attempt to gain jurisdiction over matters that are entirely domestic.

So we hear issues against tribal government and tribal employees, etc., acting in their official capacity.

MR. McDONALD: So sovereign immunity is not a valid defense in situations which you describe, which involve members of the tribe bringing actions against tribal entities?

JUDGE FAST HORSE: Yes.

MR. McDONALD: Judge Lee, if you have any comments, feel free to make them.

JUDGE LEE: As an example of what Judge Fast Horse is talking about with respect to sovereign immunity, there is a case that I would like to mention for the record. It was Clyde Red Shirt who was terminated from the police force a couple of years ago. About 1 year ago the court awarded him backpay. The court determined that his termination was unlawful and that he was entitled to backpay--he didn't want reinstatement. It went through the appellate court and back to the lower court. And 1 year later the Public Safety hadn't paid him, so he brought it back to court again. And at that point Judge Fast Horse assigned it to me.

So what we did was we conducted another hearing. Public Safety was represented by their attorney, alleging lack of funds. The amount was not so astronomical that it would have bankrupted the program. So we went ahead and issued another order, a show-cause order, why they should not be held in contempt if they did not pay him. So in that situation the individual's civil rights were virtually ordered by the court. So with respect to sovereign immunity, I would say it's dead on Pine Ridge.

I believe section 19 was also mentioned. We do have a code provision which prohibits any political member of the tribe or any council member or administrator from attempting to influence decisions of the court. And they are all well aware of that provision.

MR. McDONALD: Thank you. I think Mr. Howard has a question.

MR. HOWARD: I have a few more questions on sovereign immunity. When did the tribal council adopt the section 19 permitting or denying this defense of sovereign immunity?

MR. McDONALD: Excuse me. I believe section 19 prevents interference by council members with the court.

JUDGE FAST HORSE: I believe that was adopted in 1971.

MR. HOWARD: In 1971. Do you have any estimate of the cost to the tribe as a result of having waived your sovereign immunity in terms of money damages, say in the last 5 years?

JUDGE LEE: The largest single amount I am aware of is in excess of \$50,000 for one judgment. The smallest amount I am aware of is a little over \$2,000. But keep in mind that I serve on special assigned cases; I am not a full-time employee of the court. So I think Judge Fast Horse should address those questions.

MR. McDONALD: Is it section 21 that prevents interference?

JUDGE FAST HORSE: Section 19.

JUDGE LEE: Section 20 is the exhaustion.

MR. McDONALD: Thank you.

MR. HOWARD: Could you please respond to my question?

JUDGE FAST HORSE: If we could consider projected income, the appellate court system in Pine Ridge overruled what was called the occupation income tax. People who were employed had to pay a percentage based on the amount of their salary. I believe some revenue was lost there. There was also a land-use tax that was declared unconstitutional by the appellate court system, which had some more revenue. I think both combined would be about a quarter of a million dollars. But I think in both instances the appellate court left the door open and gave the tribal government the opportunity to correct the defects that they saw in these ordinances concerning taxation.

So there have been some decisions which I think might be considered losses to tribal government. However, there have been doors left open where they could be corrected.

MR. HOWARD: I have a copy of your memorandum opinion regarding the Oglala Sioux Tribe sovereign immunity in the Xerox case. In that memorandum you quote, I think, from White v. Pueblo San Juan. Let me quote it:

"If access is denied, it is likely that non-Indian contractors, business people, or potential agents who refuse to do business for fear of having no remedy, and further if access is denied by the Oglala Sioux tribal court, as held in White v. Pueblo San Juan, the tribal remedy must be shown to be nonexistent by an actual attempt before a Federal court will have jurisdiction."

The question I have is: Even though there may be some losses if you waive your sovereign immunity, are there also gains in terms of non-Indian contractors or businesses willing to do business on the reservation that would help your reservation economy?

JUDGE FAST HORSE: Yes.

MR. HOWARD: Have you seen such gains?

JUDGE FAST HORSE: I believe in the everyday situation, involving tribal members as well, the sovereign immunity question might very well involve tribal members going off the reservation and purchasing vehicles or household appliances, etc. There has been an historic fear among merchants in the borderline areas, that are fearful of selling to Indian consumers because they feel this is a separate, almost a buckskin curtain type of situation where they wouldn't have a remedy.

The tribe is in the process of establishing what is called a commercial code, where consumers would have a remedy. So there are definite gains to be seen by that.

I think in certain instances, though, the tribe does have to have sovereign immunity. I don't think it should be an absolute situation.

MR. HOWARD: What about in the ICRA context?

JUDGE FAST HORSE: I feel that that element of sovereign should be maintained. I believe that we are smart enough and sophisticated enough to enact our own rules and regulations and be governed by them. That has been, I believe, the downfall of the Federal Government in the past, that they have forced certain types of laws down the throats of Indian people, and as a result we don't identify with it the same way that people who made efforts to have the Magna Carta or the U.S. Constitution passed. They can identify with these situation and say, "This is our own law. We created it based upon our beliefs of democracy and equality," etc. When the Indian Reorganization Act and the Indian Civil Rights Act were all passed, they were good in concept, but we need something that we can create and allow ourselves to be governed by it.

I think that the greatest failure in the teaching of history in this country is that we as American Indians were probably the most democratic people on the face of the earth at the time the U.S. Constitution was even thought about. And we governed ourselves for eons upon eons. We didn't have monarchs or serfs or feudal lords or even types of situations you found in Europe at the time your forefathers came to this country. In fact, we taught this United States Government what it means to be democratic.

MR. HOWARD: If I could ask you this: So while you would favor waiving sovereign immunity in some circumstances and permitting money damages, you would not in the ICRA context.



But would you permit the waiver of sovereign immunity, say, to the extent of permitting injunctive or declaratory relief?

JUDGE FAST HORSE: I look at it as a situation such as this. I feel there are elements of international law involving Indian nations today. We are still a quasi-sovereign nation. It would be the same as the United States Government imposing civil rights standards upon Mexico or Canada. I believe the concept of civil rights is good, but we should be able to promulgate our own authority. I would encourage the adoption of the Indian Civil Rights Act but on our terms. Our people are very vocal about civil rights, about treaty rights, and human rights. If we had the opportunity to have a constitutional convention--there are movements in that area. In fact, our constitution was amended this last administration.

But I believe that if our tribal council and our statesmen were to meet together and develop our own human rights issues, it would be something that we could identify with and feel patriotic about, rather than having Federal laws being imposed upon us once again.

That's the whole problem with the system of government the way it is now, the Indian Reorganization Act. Some historian or Indian expert back in Washington, D.C., came up with a model constitution and bylaws, and our constitution and bylaws is almost verbatim the same as Rosebud's or Cheyenne River's or the other Indian Reorganization Act tribes. It is something we don't really identify with. We don't have the sense of patriotism concerning our constitution and bylaws that we should because it's not something that we created on our own.

MR. HOWARD: It is my understanding that you do favor greater judicial independence from the council, a greater separation of powers. Is that true?

JUDGE FAST HORSE: In concept, yes. But I believe absolute power corrupts absolutely. I believe if the judges were given complete autonomy and not accountable to anyone, the limitations might be exceeded concerning due process and civil rights.

MR. HOWARD: It would seem to me that because of this belief of yours, that absolute power corrupts absolutely, you might favor a separation of powers. The argument could be made both ways.

JUDGE FAST HORSE: Oh, yes. Yes, I favor independent judgments by tribal courts, being free from influence of political decisions.

MR. HOWARD: But do you see that as contrary to this international law of Indians that you spoke about?

JUDGE FAST HORSE: No. I believe that we taught the American Government separation of powers.

MR. HOWARD: I see.

COMMISSIONER DESTRO: Do you mind if I ask a question on this?

When you say "in concept," how would your view of separation of powers--if I am hearing you correctly, it's you want to maintain the check on the judges--

JUDGE FAST HORSE: Yes.

COMMISSIONER DESTRO: --how would you accomplish that while making them independent of the tribal council?

JUDGE FAST HORSE: Well, I believe that the practice will probably not meet the theory or the ideal. I believe there are going to be nuts and bolts type of problems in every situation. How is it done in State courts or Federal courts, the accountability of judges?

I believe that the language alone, that there be a separate judiciary, created branch of government, might be sufficient for the time being, the same as it is in the U.S. Constitution. I know Justice Marshall had some difficulties with the same question some 100 or so years ago.

MR. McDONALD: Judge Lee, would you have a comment on these separation of powers questions?

JUDGE LEE: Yes. I don't see any problem in my experience with the judicial powers being separate from the legislative, the executive. What I do see a problem in is in the people who are within the institution. The system can be no better than the people who run it, and from what I have seen the mechanism is there. The mechanism for a good judicial program separate from the legislative and the executive branches is present. We've got, as we said, code provisions; we've got court precedents that have defined the separation--the absence of sovereign immunity. The rights of tribal members are spelled out in the code, procedurally, at least. And the appellate court is functioning.

But, as I say, in many instances there is just a breakdown within the personnel. We get some miscarriages of justice in some situations, and it is not because of the system. It's because of the people who are in it.

And I'm not bothered too much by the separation of powers at Pine Ridge as it is. I listened to the testimony yesterday, and there are some real problems throughout Indian country. But I think at Pine Ridge that separation of powers is not the big problem that it may be elsewhere.

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: You said you listened to testimony yesterday?

JUDGE LEE: Yes.

CHAIRMAN PENDLETON: And there are other problems.

JUDGE LEE: Yes.

CHAIRMAN PENDLETON: Would you want to specifically cite some other problems that we might not have heard about?

JUDGE LEE: Well, everything that I heard was from the audience, the testimony given here, instances where judges were fired simply for receiving a complaint--things like that. We don't have that kind of situation down at Pine Ridge. That's the point I'm making.

MR. McDONALD: Judge Fast Horse, will you explain the use of verbal search warrants by the police at Pine Ridge?

JUDGE FAST HORSE: We have the authority to issue search warrants by radio, telephone, or by some other means not in the presence of a judge. It is also provided for in the Federal Rules of Criminal Procedure. In fact, it's almost the same language.

My problem with issuing verbal search warrants is it places me in a Catch-22 situation. We often have situations where there is a potential life or death situation in somebody's home, and this will be after the court hours, sometimes as early in the morning as 2 or 3 o'clock in the morning or on weekends. And the officers have reasonable suspicion that a crime has been committed, and the defendant or the subject is in somebody's house, and entry is being denied by someone. They don't know if it's voluntary or involuntary. And I very

often discuss it over the radio or over the telephone with the dispatcher and the officer, trying to get the relevant information.

The problem I have seen is that the officers don't do their paperwork. The procedure is almost the same as the Federal Rules of Criminal Procedure. They are authorized to use my signature and serve the occupant of the household with an actual written warrant. The only difference between a verbal search warrant and a regular search warrant is that they are authorized to use my signature. The same type of study is put into the situation.

But I think that the officers who request them think a verbal search warrant is just that; it's just verbal. And it's not. So very often they don't do their paperwork, and it results in a distressing situation.

There are some officers who do a very good job. And I have approached the chief of police and the captain of police and even their instructors on training their officers on requiring verbal search warrants.

I've had situations where there's been a stabbing, a person seen hanging by an officer from the rafters in someone's home. They were denied entry by the owner of the household. In my opinion, that is an exigent situation, and they probably don't need a search warrant. But somehow these officers want to feel doubly safe and take some extra time, instead of going in and cutting the guy down, to get a verbal search warrant. That puts me in a Catch-22 situation if I deny it and say, "You probably have exigent reasons." It kind of disqualifies me from any other situation involving in that case. And I don't want to put myself in doing so. So I will very often grant it.

But I have approached the public safety commission about training in that area. If they don't do the paperwork, it's an invasion of privacy. It's a civil rights violation, is what it is. And somehow I'm involved in it makes me very uncomfortable. If I deny it, I might have prevented someone's life from being saved.

MR. McDONALD: So it is your testimony that only serious cases--

JUDGE FAST HORSE: No, not just serious cases. Because my experience with the tribal court--we talked about DC arrests being the predominant arrests. There was a situation several years ago where there wasn't such an austere attitude about DC

arrests. It's just a DC arrest. After all, the guy has just had a couple of drinks, etc.

We had a situation where a person was warned and even taken home three times in one night. And this was the attitude back then. These are simple DC arrests. The guy ended up beating his spouse to death.

MR. McDONALD: But I'm referring to the verbal search warrants. Are they only used in serious situations?

JUDGE FAST HORSE: I used it in one situation involving a councilman in the recent past because I had heard facts leading me to believe that he was going to begin bootlegging. And bootlegging is not allowed on Pine Ridge. So I authorized a verbal search warrant. It didn't have to be used because the subject voluntarily allowed the officers to come into his household. There were three subjects taken from the house that ended up cutting an officer's throat with knives. And those were simple DC arrests. But they turned into something very serious.

Now, you have heard testimony concerning Rosebud Reservation being a violent hotbed of incidents. We'll compare our record to Rosebud's any day concerning the degree of violence. And that's why simple DCs just cannot be looked at as just simple DCs. There's a potential for extreme situations.

MR. McDONALD: While we are on that subject, I believe you prepared some statistical figures with respect to cases in the court. Do you have a breakdown on what types of offenses are tried at tribal court?

JUDGE FAST HORSE: Off the top of my head, there were something like 9,000 DC arrests last year at Pine Ridge.

MR. HOWARD: Disorderly conduct arrests?

JUDGE FAST HORSE: Yes. The council did pass an ordinance attempting to decriminalize it. However, they did put a provision in there for a certified detoxification center, and that's one thing we don't have.

MR. HOWARD: Nine thousand disorderly conduct, public intoxication arrests?

JUDGE FAST HORSE: Yes.

MR. HOWARD: For a population of roughly 18,000?

JUDGE FAST HORSE: Yes.

MR. McDONALD: With respect to the relationship with the Federal prosecutions, going back to the major crimes, how is that functioning?

JUDGE FAST HORSE: I believe that there is need for improvement now. As I understand it, the FBI and Justice Department also have your funding problems, and I think this has reduced the rate of activity in investigating and prosecuting crimes that may have been committed on the Indian reservations.

I think statistically--in fact, your Commission's findings back in 1978 said something like 10 out of 100 were actually followed through. I think that rate has probably been reduced since then, and that places the burden back upon tribal courts and tribal prosecutors to handle more cases.

The problem I see now is that there is some miscommunication involved with who is going to take which case, which results in delays, and in some instances, the lack of proper investigation as to who is taking which case.

What I have recommended to the tribal council, which was defeated, was establishing a prosecutorial chain of command in which all offenses would be simultaneously reported to the tribal prosecutor and to the U.S. Attorney General, and that there be a consultation process between the tribal prosecutors and the U.S. Attorney General at specific times and places, where they could sit down and determine which cases were going to be handled by which office. I think that would alleviate a lot of the problem.

Right now, as I see it, the officers at Pine Ridge have a duty to report almost every incident to the U.S. Attorney General's office. And very often the tribal prosecutor is bypassed.

MR. McDONALD: The U.S. Attorney's office for South Dakota?

JUDGE FAST HORSE: Yes.

MR. McDONALD: Can you discuss the case of U.S. v. Wheeler and the impact it has had on prosecution of child molestation cases at Pine Ridge?

JUDGE FAST HORSE: As I understand U.S. v. Wheeler, it gives the tribe and the Federal Government concurrent jurisdiction, without double jeopardy, to try and prosecute and get conviction. Whether one finds a person not guilty or guilty, there are independent situations. That is my understanding of U.S. v. Wheeler.

For instance, if a person is found not guilty in Federal court, he may likely be found guilty in tribal court--the same offense, the same set of facts, the same type of charge.

I have discussed the matter with the department of State social services, who has jurisdiction to investigate and to take emergency care of children who are in these types of situations. Their representative told me that they had the duty to report all of these offenses to the U.S. Attorney General's office and he felt very comfortable about doing that. And I told him they have budget problems too. They are not going to be handling all these cases that you're taking up there. And the result is children are being denied protection.

MR. McDONALD: And why aren't they prosecuted in the tribal court right off the bat?

JUDGE FAST HORSE: The same reasons I've stated before. These offense reports go to the U.S. attorney's office, and for some reason people take comfort thinking the FBI is going to be handling all these cases.

MR. McDONALD: Are complaints not filed in tribal court simultaneously?

JUDGE FAST HORSE: Not to my knowledge, no.

MR. McDONALD: And if they are, what is the disposition?

JUDGE FAST HORSE: What do you mean? It's a case-by-case situation. We haven't actually seen that many. I sentenced one individual to 6 months. I don't know if he ever served the time.

COMMISSIONER DESTRO: May I ask a question? You said the assumption is that the U.S. attorney's office will take care of it. It is just that Social Services won't file the cases with the tribal court? The social services department would be the one that would file the cases with the tribal court.

JUDGE FAST HORSE: No, they wouldn't, but they would have the duty to report.

COMMISSIONER DESTRO: Who would actually file the cases?

JUDGE FAST HORSE: Well, I believe the tribal prosecutor would.

COMMISSIONER DESTRO: Oh, I see; okay. But the tribal prosecutor never finds out about it; is that it?

JUDGE FAST HORSE: Well, he finds out about it, but very often they need further investigation. They need some type of medical evidence, maybe a psychiatric profile, some type of corroborative evidence or testimony.

A while back the Public Safety tried to correct this by hiring two female criminal investigators to work with victims and to try to get this type of information and evidence. Their budget problems caused a reduction in force, and those are the two individuals who weren't approved in the original budget. So we handed the situation over to another criminal investigator, who has since been laid off. And so these reports are still sitting somewhere within the public safety department.

COMMISSIONER DESTRO: What percentage of the cases that are reported to Social Services and which go to the U.S. attorney's office also get reported to your office?

JUDGE FAST HORSE: It's hard to tell. I just have no idea. I know that there are at least 400 that have been reported to me. I have only seen 70 or 80 actual reports. And it's like I said, the result is there are children being denied protection.

MR. McDONALD: Do you agree or disagree with U.S. v. Wheeler?

JUDGE FAST HORSE: I agree to a certain point, but I believe this: If a person is tried for a criminal offense in tribal court--let's say, for instance, a serious type of assault and battery or a serious offense where the penalty may be much more than 6 months or a \$500 fine in Federal court--that they should be properly advised that they may have to talk with the FBI and may be subject to Federal prosecution.

MR. McDONALD: In fact, they are so advised?

JUDGE FAST HORSE: We try to. We don't know which cases will go Federal and which ones won't.



MR. McDONALD: But is the effect tantamount to delaying tribal court prosecution while awaiting a determination by the Federal prosecutor?

JUDGE FAST HORSE: I believe so. I've seen delays, and very often the tribal prosecutor will follow suit. If there is a declination by the Federal prosecutor not to take a case, very often the tribal prosecutor will follow suit and say, "We're not taking it either. If it's not good enough for the Feds, it's not good enough for us."

MR. HOWARD: Is that decision made based upon a close review of the evidence, or is it just sort of a cursory, "Well, if they don't want it, we don't want it, either"?

JUDGE FAST HORSE: It's a matter of correspondence. I believe that the FBI or the Federal prosecutors write to the tribal prosecutor and say, "We have declined this case because of such and such." "Mutual combat" or some other type of language is used.

In other words, if I am assaulted and I defend myself, it may very well be interpreted as mutual combat, so I'd better let myself get beaten to a pulp, and in that way I'm assured of Federal prosecution in this matter.

MR. HOWARD: We heard from the U.S. attorney yesterday that his office will sometimes receive allegations of violations of the Indian Civil Rights Act, or perhaps other crimes over which they do have jurisdiction, and they will decline to prosecute and send it back to tribal court. The person who made the original allegation will then come back to the U.S. attorney's office and claim that the tribal prosecutor never followed up on their complaint. Do you think that's the case?

JUDGE FAST HORSE: I think there is a horrendous mixup as to who is going to take which case, and there needs to be some kind of clear line of authority and clear consultation provisions between the two offices in order to correct that problem. And I think it is correctable. For the most part, I believe that the FBI should be present on Pine Ridge and the U.S. Attorney General should be present in the prosecution of Federal crimes that may have been committed there. And I applaud their efforts for the most part.

However, there are areas that need to be corrected. And we have met with the U.S. Attorney General and the FBI and the Public Safety Commission. However, the tribal council has not agreed to our recommendations.

MR. HOWARD: What were your recommendations?

JUDGE FAST HORSE: To establish a prosecutorial chain of command, establishing consultations between tribal prosecutors and Federal prosecutors, and to require simultaneous reporting of all offenses.

CHAIRMAN PENDLETON: Do you have another question, Bill?

MR. HOWARD: Go right ahead, please.

CHAIRMAN PENDLETON: I want to move on to a couple of other areas that are of interest to me rather than technical court processes.

According to what I see here, you have an FY '87 budget of approximately \$307,000--some odd to operate. That's the personnel summary of your budget. Do you control all the appointees to the court?

JUDGE FAST HORSE: No, I don't. Since I have been chief judge, there have been 3 new employees out of the 28 that were there, and those are two bailiffs and a court administrator. And all three personnel were chosen by the personnel board.

CHAIRMAN PENDLETON: Who comprises the personnel board?

JUDGE FAST HORSE: Members are elected by members of their districts. There are nine personnel board members from each of the political districts of Pine Ridge.

CHAIRMAN PENDLETON: So they pick and choose? They trade off until they get who they want where they want?

JUDGE FAST HORSE: I wouldn't say trade off. They have a rating system. They interview employees and they select them based on their rating system.

CHAIRMAN PENDLETON: So there is no patronage in this process at all.

JUDGE FAST HORSE: Well, I don't know.

CHAIRMAN PENDLETON: You don't? Okay.

JUDGE FAST HORSE: I don't know how you gentlemen became members of the Commission either.

CHAIRMAN PENDLETON: Oh, I'm a political appointee.

[Laughter.]

CHAIRMAN PENDLETON: I know. I thought maybe as chief judge you might know, but I understand.

Let me move on to another area. Yesterday morning in our first panel we were talking about contracts and economic development and unemployment and so forth. Our numbers say it's something like 60 percent unemployment on reservations.

JUDGE FAST HORSE: I believe our situation is 83 percent.

CHAIRMAN PENDLETON: Eighty-three percent?

JUDGE FAST HORSE: Yes.

CHAIRMAN PENDLETON: In that context, it seems to me that--let me back up again. The land is equity for economic development. Economic development creates jobs. We were told yesterday that since the land is in trust and owned by the U.S. Government, it is very difficult to do any economic development, that is, that would benefit individual members of a tribe or reservation, and it might add to some degree of self-sufficiency. And we talk about bootstraps and what have you in this country.

But it seems to me that there may be a denial of a person's right to be self-sufficient if the people like the U.S. Government, if you will, control your land, and you can't use that land for collateral to build some buildings. Therefore, you can't get any money on the reservation. Am I concocting or developing the right scenario or not?

JUDGE FAST HORSE: No, you're not.

CHAIRMAN PENDLETON: Well, help me out.

JUDGE FAST HORSE: I believe the trust responsibility is a guarantee against the alienation of land. In fact, before the restrictions, we lost very much of the original reservation that was established. But again, the Federal Government is probably largely responsible for that. Sometimes the left hand doesn't know what the right hand is doing.

CHAIRMAN PENDLETON: Most of the time.

JUDGE FAST HORSE: But there are advantages to having trust property. For one, it's not taxed; it's difficult to lienate. And very often, if you have a poverty situation, people might be willing to sell land for less than the fair market value. At least there are fair market value requirements at this point. The land is mortgageable. In fact, there are something like 400,000 or 500,000 acres now being--

CHAIRMAN PENDLETON: How is it mortgageable?

JUDGE FAST HORSE: Under the U.S. Code.

CHAIRMAN PENDLETON: By the tribe or by individuals?

JUDGE FAST HORSE: By individuals. The tribe is prevented from putting any of their land holdings in mortgage. It is mortgageable.

I think you are on the right track by saying that there is a problem with the land base. The problem I see with the land base is fractionated ownership. Before I exchanged my land with the tribal council, I owned an interest in land at Hisle, an interest in land at Wanblee, an interest in land at Porcupine. It was all undivided and it was based in the hundredths. I couldn't use it as an individual. I don't even know where the land would be located. It's never been partitioned.

You have a situation since the creation of the reservation. Each head of household was given something like 180 acres; each dependent was given something like 90 acres. Several generations have passed since then without wills or the concept of primogeniture, where the eldest son might take the entire land holdings and take care of the rest of the family members. Land has been lost through the simple process of people living and dying and leaving their land in equal shares to 7 or 8 or 9 or 10 children. And now we're in the seventh generation, and you have land holdings that are in the hundredths of percentages. It's fractionated ownership.

The solution I see is to exchange your interest with a parcel of land that is usable. I did that myself. It took me 2 years to do it, and I am a licensed attorney.

Now, I understand some people might have language barriers and procedural inarticulation. It takes them something like 10 to 12 years to do something like that. But it's a simple procedure of filling out an application and going before the land committee and getting it approved by the Bureau of Indian Affairs. But it took me 2 years to do it.

CHAIRMAN PENDLETON: Let me try something else here, then. If you own land and you wanted to start a plant on your land, you're saying you can use that land for equity to get a loan?

JUDGE FAST HORSE: There is a method of doing so, yes.

CHAIRMAN PENDLETON: In your court, would the tribal court honor a contract between some outside of the reservation party who wanted to invest, like a savings and loan or a bank might want to invest in a business you might want to start? There seems to be some hesitancy on the part of the lending institutions to come to the reservations to lend because there's a belief that in tribal court, if something goes wrong, they cannot receive justice.

JUDGE FAST HORSE: I think it's a much more practical situation than that. If I were a banker and I wanted to be located at Pine Ridge, who would I loan money to? Who's working? How would they repay it?

CHAIRMAN PENDLETON: If I have a good enough package and I can create a good enough plant that makes a good enough product, and I can make enough profit to repay that loan, that is how any business got started in this country. It seems to me if that were a viable alternative to unemployment, we might be able to solve part of the problem.

I guess what I'm trying to get at is if we are going to solve a problem of access to opportunity--I think Commissioner Destro and I understand the word "access" more so than the word "result." If you're going to have access, you can't deny people access.

JUDGE FAST HORSE: I think our commercial code would probably address much of that, and it is patterned after the Uniform Commercial Code.

CHAIRMAN PENDLETON: Well, tell me now. In a sense, I'm a banker, and I see some land here and I want to invest; I want to make money. You are in a sense denying my civil rights to be able to invest with somebody who wants to invest their time with me, because if something goes wrong with the deal, I can't come to the tribal court and get justice.

But it does seem to me part of the answer is opening up the access to opportunity rather than to limit it. Do you have any comments on that? Do you understand what I'm saying at all? Am I being confusing?

JUDGE FAST HORSE: I understand what you're saying, and like a banker you are probably thinking of the end result more than you would be--

CHAIRMAN PENDLETON: There's no question in my mind about it, but I can't make any money unless you make some money. I don't want to lose.

JUDGE FAST HORSE: But I think there is a method to mortgage land and hold it for collateral. That is probably what people are looking at. I think there are remedies available. The tribal council did pass an ordinance giving our tribal court the jurisdiction of authority to handle mortgage situations involving trust property.

CHAIRMAN PENDLETON: What we heard yesterday was that if they don't like the decision you make, they void your decision and I'm out of my money. That's just the way it goes.

MR. HOWARD: Judge Fast Horse, is that the case at Pine Ridge?

JUDGE FAST HORSE: If they are dissatisfied with the tribal court decisions?

MR. HOWARD: Yes.

JUDGE FAST HORSE: Is this a non-Indian?

MR. HOWARD: Yes.

JUDGE FAST HORSE: I don't think so. The practical situation I have seen is that--well, we don't have a situation that I could really base an opinion on. Our tribe banks off the reservation. We don't have a bank. We should have a bank. That would solve a lot of situations. If there was an Indian-owned and operated bank, it would solve a lot of our situations. But we don't. There are enough flow-through cash monies so I think a bank would be the beginning of economic development.

CHAIRMAN PENDLETON: And so do I. I think the same thing you think, chief judge.

JUDGE FAST HORSE: It would be the foundation of the start of an infrastructure.

CHAIRMAN PENDLETON: Do you have a comment about it?

JUDGE LEE: Yes. I was just going to say that an investor's reluctance to invest on the reservation is not so much tied to the land, the land being in trust, or it's not so much an insecure feeling with the court so much as it is with the general character or attitude, the prevailing--there's a poverty spirit on the reservation. You can't pin it on one thing. If you bring a factory in there, you might have to import some workers for a while.

It's not just because of the court system. There is a lot of alcoholism on the reservation. It seems to run through the whole gamut. We're talking about untrained police personnel; we're talking about police brutality. You've heard all kinds of things that would affect a decision whether or not to invest on the reservation. It's a social environment.

CHAIRMAN PENDLETON: I guess one of my question is: Who is willing to take the risk because business and job opportunities require taking a risk? And who on reservations is willing to take the kinds of risk to make the opportunities happen?

What I have been hearing in the last 2 days is that not many people want to take that risk. I mean it's not that white people suddenly are the only risk takers in America. There are a lot of people who take risks. You cannot say that the Vietnamese or the Indochinese who came to this country came here and had to hire somebody else to run the businesses that they run. They took a risk and took a chance and did some things, although they did have some talent.

But how do you break this cycle? We're sitting here talking about the Indian Civil Rights Act in a way, but there are some very serious social and economic problems out there that are not going to be solved by the act. What I am concerned about is how is it that you begin to generate a population that talks about taking interest and puts pieces together to take interest rather than, as Bob said yesterday, the power is over who controls the \$20 welfare check.

JUDGE FAST HORSE: Well, I'm a registered Republican for a simple reason. It's only been the Republicans who have passed Indian legislation. Mr. Reagan came up with an economic development policy for Indian reservations. If he put a little bit of money and some technical assistance behind it, maybe we could get someplace.

CHAIRMAN PENDLETON: Well, I'm not so sure that isn't available to you. The point I'm trying to find out who on the other side wants to take that kind of a risk. Land is no good

unless it does something. And I think it can be whatever you want it to be. But if you want it to produce jobs, you've got to use that land to produce the kind of climate that produces the kinds of opportunities that may minimize some of the social problems.

But what we are hearing here is that there is a lot of push and pull.

JUDGE FAST HORSE: We are willing to do whatever we can to promote economic development on the reservations. We have heard the complaint that it's because of the tribal court and the lack of commercial laws. So we have gone to the bull pen with the commercial code. We've tried to establish a consumer protection agency that would both be a liaison for consumers and merchants both.

CHAIRMAN PENDLETON: Can I get a copy of that code?

JUDGE FAST HORSE: Yes, I can get you a copy. It hasn't been adopted yet.

CHAIRMAN PENDLETON: When it's adopted, I'd like to see it.

JUDGE FAST HORSE: It's like Judge Lee said, you don't have one simple solution to this complex problem.

CHAIRMAN PENDLETON: That's true.

JUDGE FAST HORSE: I believe when the United States declared war on Japan and Germany, they took great efforts to restore those nations. Now, when the United States declared war on Indian people, they never took any type of steps to restore our nations to what we once were. Our land holdings are very strict. If you will talk to a regular farmer or rancher from Pine Ridge, he'll tell you you need at least 20,000 acres of land to have one simple farm and ranch operation that would be able to survive and stay afloat. We don't have enough acres to sustain our entire population. But that is what our biggest industry is going to be.

We need our Black Hills back. We don't see any poverty here in the Black Hills area, from the landowners in this area, for people who have access to tourism and to different types of lumber and the gold mine situation. We were stripped of our wealth, and we remain stripped of our wealth. And until we are restored, much the same way the United States Government sought to restore Germany and Japan by pouring billions of dollars into those countries, because they felt bad about using



military power on them, or the bomb--the same type of devastation took place in this country, and we have never had our Nuremberg trials. We have never had any type of legislation restoring the Indian nations to the wealth and dignity that we once had. It involves land and it involves the land that we used to have, that we still have a legal claim to.

CHAIRMAN PENDLETON: I have no more questions. Do you have further questions?

MR. HOWARD: Chief Judge Fast Horse, we heard testimony this morning from Vincent Brewer who had some comments on the police department. Do you have any responses to some of his points?

JUDGE FAST HORSE: There's been a pendulum. Back in the early seventies, when Pine Ridge became somewhat notorious because of the Wounded Knee occupation, there was a great movement on Pine Ridge to take police authority away from the Bureau of Indian Affairs and place it in the hands of the community. That's what you have today. You have something like 48 patrolmen and 54 review board members and commissioners. That means each patrolman has a boss and a half to answer to. You tell me what type of mistakes they can make and not get away with it, 54-1/2 bosses over 48 patrolmen.

The hands of the community are now deeply involved with law enforcement at Pine Ridge. And now I'm seeing a movement away from getting it out of the hands of the community and back into the Bureau of Indian Affairs.

Well, there are reasons for that. I think the gentleman from Rosebud said they had something like 18 patrolmen. We have 48. And in my opinion, it's still not enough, because I see officers pulling double and triple shifts, from one 8-hour shift right into the next. They are not compensated enough. They're not even getting comp time or overtime or any type of fringe benefits. What happens if an officer dies in the line of duty? What's going to happen to his family? They are not being paid, and they are being overworked.

Now, law enforcement and courts are just about as popular as lawyers are in this country. We are not in a popularity contest. I am not in a popularity contest being the chief judge. I have difficult decisions to make on an everyday basis. And so do the law enforcement people at Pine Ridge. They arrest people for violating the law. And very often it's those very same people who will come before hearing groups and say, "My civil rights were violated." It's not a popular issue.

But I commend the Public Safety Commission of Pine Ridge. I only encourage them in the area of more training--and this involves money--and probably periodic evaluations during the course of their training, specialized training in the area of search warrants or offense reporting, or testifying in court, conducting proper arrests.

You know, the base salary, I think, is \$9,000 per patrolman, and they work their way up to \$12,000. Very often many of our patrolmen are on food stamps or receiving commodities or some other type of subsidy. They don't have enough to sustain themselves, and they take their lives in their hands on a daily basis when they go out and try to protect and promote law and order on Pine Ridge.

So now I see the pendulum swinging back where there are certain advocates who are trying to say, "Put it back in the hands of the Bureau of Indian Affairs." That would greatly reduce the size of the police force. It might include a GS rating for the officers and get them some better benefits, which I would encourage. But I'm seeing the pendulum swinging.

MR. HOWARD: We did hear testimony yesterday--I'm not sure if you were here for that--that the reason that the police ought to go back under BIA again is because there is an absence of standards in the police force for now, and that you have a great deal of nepotism and immunity from prosecution by family members of these citizens in each of these nine districts. How would you respond to those comments?

JUDGE FAST HORSE: From my experience, I have seen family members of review board members get arrested. And I have seen members of the community bring complaints against officers. In fact, when I was practicing law in Pine Ridge before I was chief judge, I represented several officers.

What I noticed was that review board members were very courteous and polite to remove themselves from the decisionmaking process and allow the other review board members who weren't related to that individual to make the decision. That has been my experience.

Maybe there are instances. And we always hear rumors and situations that are isolated where people will not bring out specifics and say, "This officer did this," and, "This review board member did this."

I haven't seen any specific situations. In fact, very often it is the guy who is arrested who says, "I'm taking this officer to the review board." And to me an officer has to walk a very tight line in Pine Ridge. You're walking on thin ice. It's like I said, if you're an officer in Pine Ridge, you have a boss and a half to answer to on a daily basis. You have 9 commissioners and 54 review board members who have hiring and firing authority over you.

MR. HOWARD: What about your jail conditions? We heard testimony yesterday that Mr. and Mrs. Stoldt, I believe, spent some time in your jail, and there were 100 people in there with them in a jail that is supposed to accommodate 30 or maybe 40.

JUDGE FAST HORSE: I came 5 minutes away from closing the jail at Pine Ridge, and it's caused a panic between the Indian Health Service, the Bureau of Indian Affairs superintendent, and our tribal president.

But I did convince them to take a tour with me to the Pine Ridge jail. The result is we found four types of body parasites. We had to fumigate. We ordered them to burn the mattresses, provide towels and linen and soap and access to laundry for the prisoners.

This is a distressing situation because Public Safety does hire a jailer. The jailer joined me in these complaints and showed me the memoranda he had written.

MR. HOWARD: Do you have those memorandums or could you submit them to us?

JUDGE FAST HORSE: Yes, I could. It's the Bureau of Indian Affairs' responsibility. Of course, the superintendent said, "We have a proposal in the making to construct a new jail," because the present facility we have at Pine Ridge is not a jail; it's a holding facility.

There are certain safety hazards in that jail. There are suicide attempts because there are open pipes in the windows where people can hang themselves. The plumbing doesn't work. The ventilation system was shut down. It's inadequately heated during the winter months.

We don't have that situation at the Kyle jail, because they did receive construction and renovation monies. In fact, the Kyle jail is probably one of the best jails in the country, and Pine Ridge jail is probably one of the worst.

MR. HOWARD: Service of process. Can you discuss that?

JUDGE FAST HORSE: Service of process is the responsibility of the public safety commission. It is one of the five deliverable contract items in their budget expenditures. They are supposed to serve our warrants, issue our subpoenas, serve our subpoenas, and service notice of hearings on individuals.

We don't have an organized method to do that, and that's what I see as the downfall. We need certain people delegated within Public Safety to take this responsibility on themselves. Very often I've seen officers for the day where they are very busy. They make ambulance calls; they take medicine to people. They very often have to transport elderly individuals to and from the hospital. Their caseload is very intense. And when it comes time to serving papers, that's probably one of the lowest priorities on their list of exigent circumstances, let's say.

Say you have a heart patient needing to come in from Wounded Knee to the Pine Ridge to the hospital. Who do they rely on if they don't have family members or nobody has gas in order to come in? They rely on the public safety commission. And they're very good at doing that. They provide that type of service in our community. They provide rides to and from the hospital, make sure that the children are well kept in situations where a parent might have been arrested. They deal with cardiac patients on a day-to-day basis.

I think that there needs to be some delineated percentage of the budget allocated specifically for service of process. Because I sympathize, and it's like Mr. Brewer said this morning, some people live 100 miles away and some people live right there in the village who wasn't served, but the individual 100 miles away was served. And the heat falls upon me as the chief judge, saying, "Why can't we have this case?" And I have to go through the code and say, "I can't have a hearing unless both parties are served. It's basic due process."

MR. HOWARD: I do have a couple of quick questions.

CHAIRMAN PENDLETON: We are running out of time. We promised we wouldn't take the whole time.

MR. HOWARD: We can do it in writing, I think, or talk to you over the telephone.

CHAIRMAN PENDLETON: The record is still open. I'm trying to be a Simon Legree here and get some things done and get people back on proper time.

MR. HOWARD: Let me note that one of the areas I want to explore with you is the budget situation at your court, so I'll be talking to you about that. Thank you.

CHAIRMAN PENDLETON: These proceedings are recessed until 1 o'clock.

[Recess.]

#### AFTERNOON SESSION

CHAIRMAN PENDLETON: We'd like to assemble the appellate judges panel: Mario Gonzalez, Johnson Holy Rock, and Lorraine Rousseau. Are all of those persons here, or just two?

Mr. Sambroak, do you want to join us on this panel since you were not here this morning? Is he here?

MR. HOWARD: He's right outside the door.

JUDGE SAMBROAK: I'm sorry for being late. I got stuck overnight in Denver.

CHAIRMAN PENDLETON: We understand.

JUDGE SAMBROAK: Good.

CHAIRMAN PENDLETON: We'd like to swear you in.

Judge Rousseau, welcome again to the Commission. You have another go-around with us, and we appreciate you're coming.

Will you raise your right hands, please.

[Mario Gonzalez, Lorraine Rousseau, and Robert Sambroak, Jr. were sworn.]

#### APPELLATE JUDGES

Testimony of Mario Gonzalez, Appellate Judge, Cheyenne River Reservation; Lorraine Rousseau, Appellate Judge, Inter-Tribal Court of Appeals; and Robert Sambroak, Jr., Chief Judge, Rosebud Tribal Court

MR. HOWARD: Thank you. Could I ask each of you, beginning with Mr. Gonzalez, to state your name, title, and address for the record, please.

JUDGE GONZALEZ: My name is Mario Gonzalez, spelled with a "z" on the end. My address is P.O. Box 114, Batesland, South Dakota 57716.

I am an enrolled member of the Oglala Sioux Tribe. I currently serve as general counsel to the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, and I also serve in the capacity of appellate judge for the Cheyenne River Sioux Tribe of the Cheyenne River Indian Reservation, Eagle Butte, South Dakota.

JUDGE ROUSSEAU: My name is Judge Lorraine Rousseau. I am chief judge of the Sisseton-Wahpeton Sioux Tribe. I also serve as an appellate judge for the Inter-Tribal Court of Appeals.

JUDGE SAMBROAK: My name is Robert Sambroak. I'm chief judge of the Rosebud Sioux Tribal Court and an attorney at law practicing in this State.

MR. HOWARD: Thank you. I'd like to begin with Judge Rousseau, please.

Judge Rousseau, we are glad to have you before us. Let me for the record state that you appeared before the Commission at its February 1986 briefing on Indian tribal justice, and we are glad you could be with us again.

In connection with your briefing, I looked back through that transcript, and I found something that I wanted to read to you and ask if you could clarify.

You commented at the Commission briefing in February that the Plains Tribal Judges Association believed that Rosebud should be a site where the Commission should hold a hearing. To quote from your testimony, "We feel, and Rosebud feels, that everything started there from the Washington Post article, and they'd like to see it finish there."

Could you elaborate on that, please?

JUDGE ROUSSEAU: The reason I made that comment--and it's Northern Plains Tribal Judges Association, by the way--is Alex Lunderman, who was newly elected president of that tribe, had submitted a resolution to the Commission asking for those hearings there.

MR. HOWARD: Yes.

JUDGE ROUSSEAU: I was also aware of what was going on at the Rosebud Reservation during the period of time when Judge Garreau was the chief judge. And that comment came to me from Judge Garreau, former Judge Garreau.

MR. HOWARD: I see. All right. I understand there is an Inter-Tribal Court of Appeals decision that addresses the sovereign immunity issue; is that right?

JUDGE ROUSSEAU: That's correct.

MR. HOWARD: Could you tell us about that, please?

JUDGE ROUSSEAU: That decision hasn't been rendered yet. We heard it in July of '85. I was the only Indian appellate judge that sat on that case. There were no oral arguments, so we were trying to reach a decision based on the record and the briefs.

We briefly discussed it--the other appellate judges, who were all non-Indian, said, "This is a simple case. The Rosebud Housing Authority has a 'sue or be sued' clause; therefore, they don't enjoy sovereign immunity."

But the decision hasn't been written yet because I ran into some problems. The Inter-Tribal Court of Appeals has always had funding problems from its very inception, and from October 1 of every fiscal year through approximately March, and sometimes later than that, we don't get any funding. So during that period of time we are dependent on funding from the tribes. And the tribes, having not paid any money in, we were not able to get together to hold any sessions since last July.

I had run into some problems in writing the decision because, as someone mentioned here yesterday, some of the issues that we as tribal judges face sitting on the bench are much more complex than what a State court judge might run into. For that reason, I needed more guidance from the other appellate judges in order to write that decision. After I got into it, I knew we had to sit down again.

So we had a meeting down here on the 30th, 2 days ago, and we will be having a session in Aberdeen on the 18th and 19th of August, and at that time I'm sure that the decision will be written.

MR. HOWARD: If I could back up a little bit, could you give us some background for the record on the Inter-Tribal Court of Appeals. When did it begin, and how many tribes belong to it, and what do you see as its future?

JUDGE ROUSSEAU: The Inter-Tribal Court of Appeals began in 1980. We didn't hear any cases, however, until early in 1982. I became the chief judge of my tribe on October 1 of 1981, so I was on the ground floor, and being one of the appellate judges to hear the very first cases that came before us.

It started with Crow Creek and Lower Brule. I believe it was the Rosebud Sioux Tribe. Cheyenne River joined, and then Sisseton joined. And it was funded through LEAA funds.

MR. HOWARD: What does that mean, please, LEAA?

JUDGE ROUSSEAU: Law Enforcement Assistance Act, I believe. When that went out of existence, then the Bureau of Indian Affairs gave us some discretionary monies that they had up in Washington, D.C., and we have been funded that way ever since.

MR. HOWARD: But that funding generally carries you through March, and that's it?

JUDGE ROUSSEAU: No, there's no funding from October 1 through March because, as you know--maybe you don't know this, but under the 638 contracts we don't get our final allocation until about March of every year.

MR. HOWARD: Oh, I see.

JUDGE ROUSSEAU: So the Inter-Tribal Court of Appeals gets their money out of the discretionary funds under Judicial Services in Washington. So they have to allocate all their money out first to see if they're going to have any. And then we are funded at a very low level of \$25,000.

From October 1 through March, we are dependent on the tribes kicking in their shares based on the caseload from the previous fiscal year. And if the tribes don't pay their money in, the Inter-Tribal Court of Appeals has no money.

MR. HOWARD: Has there ever been any concern on your part that some of the tribes may not give you the funding that they'd ordinarily give you because of the decisions that you are considering?



JUDGE ROUSSEAU: I hadn't even thought about that.

MR. HOWARD: You have seen no possible relationship?

JUDGE ROUSSEAU: Well, I don't believe there is any relationship there. We have had a problem collecting from Rosebud, but Alex Lunderman is the new chairman, and we have been assured that they will pay their share of the costs that they owe the Inter-Tribal Court of Appeals.

Cheyenne River withdrew and Lower Brule had withdrawn, but presently there are eight tribes that belong. Lower Brule, after a change of leadership, rejoined. The Fort Berthold Tribe of North Dakota joined us. The Flandreau Santee Tribe joined us, and just recently the Winnebago Tribe in Nebraska, and the Omaha Tribe joined us a little over a year ago, I believe.

So we presently have eight member tribes. So our caseload is going to increase.

MR. HOWARD: Why do you think it's in the tribes' interest to join the Inter-Tribal Court of Appeals as opposed to having their own appellate court systems?

JUDGE ROUSSEAU: First of all, there are political pressures on the reservation level. If Rosebud brought in a case and it's a hot political issue, such as an election dispute--and we did handle one of their election disputes; I am the one who wrote that opinion. I do not live on Rosebud. There can be no retaliation against me. And I have been writing Rosebud decisions, by the way, because, me being the only Indian judge on that panel at that time, it was felt that Rosebud would accept it better if it came from an Indian judge. And I can get no political harassment; there can be no retaliation against me because I do not live on that reservation.

I believe it's a fair, objective forum, totally competent to review the tribal court decisions of the member reservations, the member tribes.

I don't know what else to tell you except that I do believe that it's based on the record, it's based on issues of law, it's based on the merits of the case, and it has nothing to do with personalities whatsoever. And I cannot get fired if I render a decision for one of the other member tribes.

MR. HOWARD: To what extent have you talked with other tribes about participating in the Inter-Tribal Court of Appeals?

JUDGE ROUSSEAU: I haven't really been involved in doing anything like that. I did go up to Fort Berthold because there was an attorney who was attempting to get that tribe to withdraw. And I went up there with the clerk of court's court administrator, and we met with the judicial committee and that attorney, and they stayed in.

But other than that, I have had no dealings with the other tribes, only with the judges.

MR. HOWARD: I take it that what you would like to see is participation in the Inter-Tribal Court of Appeals by all tribal courts in the Nation; is that correct?

JUDGE ROUSSEAU: I would like to see similar appellate court systems set up. However, if a tribe has a good appellate system and it's working well, such as Pine Ridge, I see no reason to change that. Apparently the Pine Ridge people accept the decisions that are coming down from their appellate court system. And if it's working, why take it away? However, if tribes do not have appellate systems set up or they are just calling judges whenever they have cases, I believe it's better if they did set up a similar system throughout Indian country.

MR. HOWARD: You mentioned at the Commission briefing in February that perhaps there could be a Supreme Court of Indian Law someday in the future. Could you elaborate on that?

JUDGE ROUSSEAU: That is one of my dreams.

MR. HOWARD: Yes.

JUDGE ROUSSEAU: I feel that we need another appeals level. I don't believe it should be in the Federal courts. I don't believe it should go on to the Supreme Court. I don't know if any of the Commissioners are aware of the case of Dakota v. District County Court that came out of our reservation whereby we lost our boundaries. If you'd read the history, you'd see how the Supreme Court has vacillated from this extreme to the other extreme in deciding Indian cases. And that changes as the years go along. Cheyenne River was in litigation for a period of 70 years.

I believe the Indian people can do a better job of reviewing what the lower courts have done, and for that reason, if this ever came about with other appellate systems such as ours, the chief judge of each appellate system could sit as the Supreme Court of the Indian Nations. And that I would like to see come about, rather than us having to go up through the Federal system. Because I don't believe that the Supreme Court has ever understood what's going on in reservations.

MR. HOWARD: Have you had any problems with any of your member tribes following decisions of the Inter-Tribal Court of Appeals? And, if so, what sort of enforcement mechanism would you have for enforcing the decisions?

JUDGE ROUSSEAU: Let me answer that question this way: I am no longer the chief appellate judge. My term of office was up September 30 of 1985. During that period of time, no cases were ever brought to my attention by the clerk, when we remanded a case or reversed it or whatever, that we had any problems with it. So to my knowledge, I do not know from that time to the present if we've had any problems with the lower courts following our instructions.

MR. HOWARD: Could you describe for the record the Sisseton-Wahpeton's method of creating its separation of powers?

JUDGE ROUSSEAU: In 1978 it was felt by our people that there needed to be an independent branch of government. There were four district chairpersons. We are divided up into seven political districts. Four of the chairpersons of those districts--each district has its own little independent government, so those chairpersons asked council for a referendum vote to the people to separate the council's branch of government, the legislative branch of government, from the judiciary branch of government, and it went out to a referendum vote to the people. And that is how our constitution was changed. The people said yes. And they passed a revision to our constitution and bylaws that says something to the effect that there shall be a separate branch of government, and then it goes on from there.

The only problem with our setup is that the operations of the court are not in the constitution. They are in what we call ordinance 1. It spells out the operations of the court. And that ordinance 1 can be changed by

two-thirds vote of the council. That bothers me. However, we do have a referendum vote going to the people on this fall's election ballot where we are asking if our constitution should be revised. And most of our people, I'm sure, are going to vote yes. We have outgrown the constitution and bylaws that we are presently operating under.

MR. HOWARD: You expect that ordinance 1 will be made a part of the constitution?

JUDGE ROUSSEAU: I expect that ordinance 1 will be made part of that constitution.

MR. HOWARD: Would you favor its inclusion in the constitution as it is presently worded? I'm not sure exactly how it reads. Does it provide for removal of judges?

JUDGE ROUSSEAU: It provides all of the procedures for removal of judges through impeachment or recall. The impeachment process, I believe, is a fair one because council doesn't directly remove the judges. If someone has complaints that I am not doing my job, they can take their testimony, their documents, or whatever to the next regular council meeting. The council would look at the documents, hear the testimony or affidavits, and then they would decide if there is enough there for an impeachment proceeding to occur.

If they decide that this is so, what they would do is follow the impeachment procedure, and that would be, one, make a motion that this judge should go in front of an impeachment proceeding. And if they vote on that, then they would appoint an outside attorney Indian judge that knows none of the parties to come down, and then the impeachment proceedings would be held in front of that judge. And then all the due process kicks in--the notice of hearing, the right to counsel--just like in a regular civil action.

And that is where our protection comes in, because we then have the right to have an attorney there--the tribe's attorney would be representing us, by the way--and cross-examination and the whole bit.

If that judge's opinion is that those charges have been substantiated, that judge, by his written opinion or his ruling from the bench on that day, is immediately

impeached from office. And if the charges are unsubstantiated, the judge is put back on the bench and given backpay for all the time that he or she has been suspended.

I feel comfortable with that procedure. It is very easy for anyone to kick it into place. But judges can't be removed because a council person doesn't like you, because there's a personality conflict, or whatever. You are given all the protections that everyone else is given or should be given under the Indian Civil Rights Act.

MR. HOWARD: Returning to the Inter-Tribal Court of Appeals, I understand Cheyenne River withdrew from the Inter-Tribal Court of Appeals.

JUDGE ROUSSEAU: That is correct.

MR. HOWARD: Why was that? Why did they withdraw?

JUDGE ROUSSEAU: Well, I've kept in contact with Gib LeBeau and Walter Woods, who were two of the judges who were fired up there. My husband is from that reservation, so I have some idea of what's been happening. And this is just my opinion, but my opinion is that Cheyenne River withdrew because they didn't want anybody else to know what was going on up there with the firing of the judges and everything else that you heard about yesterday.

MR. HOWARD: I believe I saw you here most of yesterday; is that correct?

JUDGE ROUSSEAU: That's correct.

MR. HOWARD: Could you tell us what your reaction is to what you heard in the hearing so far?

JUDGE ROUSSEAU: I was horrified.

MR. HOWARD: Why?

JUDGE ROUSSEAU: That these things were happening on a reservation because they are not happening on most of the reservations that I know of. I have a lot of contact with most of the judges throughout the country. I am the president of the Northern Plains Tribal Court Judges Association. I'm in contact with the new organization, the Great Lakes Judges Association, coming out of Michigan and Wisconsin. I'm in contact with the Southwestern

Judges Association and the Northwestern Judges Association. And I know these things aren't happening on a lot of these reservations.

I think what is happening at Cheyenne River is not the run-of-the-mill kind of thing. That's why I was horrified. Because you might hear of an isolated case on each reservation, because things slip through the cracks. Someone might forget somebody is back there in jail or whatever. But these are isolated incidents, and it's not an everyday occurrence, and it doesn't go on and on and on. The problems are corrected once a situation arises like that. I know that happens on my reservation.

So I was horrified at the conduct of the judges that I heard about yesterday, and the police officers, because I don't feel that is happening on my reservation.

CHAIRMAN PENDLETON: Ms. Rousseau, let me interject here that we, too, are horrified. I think adding to our being horrified is that those were just a few of the people that our staff reviewed, and for the sake of time they were, as I understood it, the more articulate persons that would come before us. But we could probably bring up other cases like that at Cheyenne River.

What is even more disturbing and gets to the heart of this hearing is the tribal justice system that permits these kinds of things to happen, if that is the case, but even more appalling is the fact that the officials would not show up this morning to testify when all of this is under oath. I find that reprehensible, and I would just hope that better heads would have prevailed in this circumstance. We are not here to hear only one side of a story. This Commission, as long as I have been sitting, has made great attempts to be balanced in its hearings and its work. But we will leave here today with the testimony of Ms. Thompson and Ms. High Elk and Mr. Springer, and that's all that we have.

It is very, very interesting. I would hope that you, too, would find it interesting that those officials would not come and testify this morning. And as I said this morning, we will issue subpoenas at a date that we know is appropriate, to come back under the conditions of our subpoena executing process. But we are just horrified.

Mr. Destro, do you want to make a comment?

COMMISSIONER DESTRO: No.

MR. HOWARD: One more question.

If it is your belief that Cheyenne River is really an exception to what you think is general enforcement of the ICRA by tribal courts, do you have any recommendations, then, that we ought to be making to Congress or the President, or do you think we should leave here not making any recommendation but just recognizing that Cheyenne River has severe problems?

JUDGE ROUSSEAU: First of all, have the Commissioners ever read this book, Indian Courts and the Future, put out by the National American Indian Court Judge Association?

MR. HOWARD: I have not seen it.

JUDGE ROUSSEAU: Okay. May I suggest you get a copy of this from the Bureau of Indian Affairs. In this book it described from the very beginning of tribal courts and the inadequate funding that we have always been faced with. And the recommendations are in this book. There are a lot of recommendations in here, and I agree with these recommendations.

So I would suggest that this would give the Commissioners a better understanding, too, of what has been happening with the evolving of all these tribal court systems.

Funding is the number one problem, and I don't know what you're going to do with that. We cannot operate efficient, effective court systems on the kind of money we get now. As a matter of fact, I was talking to Joe Little, who is head of Judicial Services in Washington, D.C., this morning, and I brought it to his attention that this coming fiscal year my court is going to be \$20,000 short, and I am barely operating on the kind of budget I have now.

CHAIRMAN PENDLETON: You should not expect to receive more because all of us are going to get a lot less.

JUDGE ROUSSEAU: That's right. That is one problem, as I think I mentioned to the Commissioners in Washington in February.

Two is the lack of independence of the judiciary. I see that as one area that needs to be addressed. How? I don't have any recommendations. I did tell the Commissioners back in February that I felt we were going through growing pains, that tribes themselves would and could do this. To my understanding, Cheyenne River is moving in that direction, from visiting with Joan LeBeau this morning. A new chairman coming in--you know, changes can come about.

Whether or not there should be a recommendation to Congress mandating a separation of powers, I would not want to give an opinion on that because I'm not that wise.

I believe that those are the two problem areas as I see them.

MR. HOWARD: Funding and separation of powers?

JUDGE ROUSSEAU: Funding and separation of powers.

COMMISSIONER DESTRO: I just have one question and it goes somewhat to the Chairman's comments. A concern I have for not only this hearing but the ones we are going to be doing on this topic in the future is: What would your suggestions be, after having heard the parade of horrors that we heard yesterday, that we don't fall into the trap of giving the wrong impression about what is actually going on in the tribal court systems? What kind of a perspective would you suggest that we have as we start to work with this transcript and put together another set of hearings for later in the year in Phoenix? What would you suggest our approach ought to be?

Because the more I hear of the testimony, the more I am convinced that the situation is far broader than just the Indian Civil Rights Act by itself. And being involved in all of this, what would you suggest to us, in terms of a mind set or perspective as we go forward in this? Because none of us want to do any harm while we are doing this, and that has been the suggestion that has been made by a number of people that I have talked to is that, "Whatever you do," their suggestion was, "be careful."

Well, that is a nice general admonition. Do you think you could help us by way of some concrete suggestion as to what that would mean?



CHAIRMAN PENDLETON: Just as you answer, let me say that we don't intend to take this transcript and write a report that would be transmitted to the administration and the Congress that this is the problem, based on one geographical visit and hearing. It is our intent to visit the Phoenix area if things work out the way we think they can in terms of our funding, and there will probably be some other elements that will go into a final report.

And as I told some other people here, we in no way would make recommendations about the operational policies of BIA. We'd make some general policy recommendations on the Indian Civil Rights Act. There may be some questions about BIA that could be answered another way or some other agencies that have responsibilities. But the public should disabuse itself of the fact that come Monday morning you will see a signed, sealed, and delivered transcript or report that will be out in Washington, D.C., under circulation. That is not the way this is going to happen. And I think that if all goes well, several months will pass before you will see some kind of final report.

What I must say to you, though, is that there are people in other regions of the country among the Indian community in the broad sense that don't want us to look at anything, that have said, "Leave us alone. You're interfering. This is political. You work for Ronald Reagan, and Ronald Reagan wants to do bad things to us." We've heard all kinds of comments.

This project was planned as far back as January 1984, and it's just this budget year we were able to crank it in.

But I say that in terms of your answer. There is no immediacy to anything about this. We want to make certain we do have the best document we can put together to go forward as policy guidance to both the administration and to the Congress.

JUDGE ROUSSEAU: Commissioner Destro, I am very glad that you asked me that question.

Yesterday, in listening to all the horror stories, it bothered me, because I thought, "Now the Commissioners are going to think this is the way it is on all of the reservations." I understand you are going to other sites to hear testimony, and I'm sure at these other sites you are going to hear some good things about tribal courts and their appellate systems.

What I wanted to say here today was coming from a positive vein, that we are doing things, we are trying to get our people trained, educated. And it's a slow process. It doesn't happen overnight, as I told you in February.

All I would ask the Commissioners to do is to continue to keep an open mind that there are some positive things that are going on in Indian country regarding the judicial system.

Thank you.

CHAIRMAN PENDLETON: Mr. Gonzalez is waiting to say something, I guess.

JUDGE GONZALEZ: Mr. Chairman and members of the Commission, thank you for allowing me to be here today. But I think that this Commission is a little out of order in asking a judge, who doesn't deal with Cheyenne River, questions about Cheyenne River when I'm sitting here. And I sit on the appeals court. I'm knowledgeable about Cheyenne River.

I can understand your chagrin about the fact that there are members that didn't show up today, but I'm here. If you want to know about Cheyenne River, ask me questions.

MR. HOWARD: Our procedure here was to deal with Judge Rousseau first and then to turn to you. I was just going to ask Mr. McDonald to begin directing his questions to you.

JUDGE GONZALEZ: I understand that, but you're asking questions about Cheyenne River.

MR. HOWARD: I understand.

JUDGE GONZALEZ: I'm the judge from Cheyenne River, and if you want to know about Cheyenne River, I'm here and I'll be pleased to answer any questions you may have about Cheyenne River.

CHAIRMAN PENDLETON: We did not mean to be violative of your territory, sir. What we are saying is we have been asking questions of other reservations of other people, and if you are offended, please accept our

apologies. We would in no way take Judge Rousseau's comments as being the final word about Cheyenne River.

JUDGE GONZALEZ: I'm a little offended, in view of the fact that we are Indian nations, and there are international issues present here as well as domestic issues. This Commission seems to be focusing on the civil rights violations of tribal courts, but there is also the issue of self-determination of Indian tribes in their sovereign capacities. And it's very intrusive of anybody to go interfering with the internal matters of another nation. And you're asking one judge representing one nation to comment about the internal affairs of another nation, and we take a little offense at that.

CHAIRMAN PENDLETON: For the second time, I'm giving you an apology. Do you want a third one?

JUDGE GONZALEZ: Your second apology is accepted, Mr. Commissioner.

CHAIRMAN PENDLETON: I'll give you a third one or a fourth if you need it if it makes you a little more comfortable about where we are. I'll give you whatever you need to have just so that we can move on.

JUDGE GONZALEZ: If you are truly truth seekers, I was just trying to give you some truths so you can make a fair decision.

COMMISSIONER DESTRO: We understand the international issues as well. My own impression has been that it is certainly something that Congress has never quite made up its mind exactly what the status of the tribes vis-a-vis Congress is, much less each other. And those are all sensitivities. I mean your answer and your comments now I take as part of the answer to the question that I asked Judge Rousseau, which is: What does it mean to be careful? You know, when people tell us to be careful, you have certainly provided an eloquent answer to what part of that means.

JUDGE GONZALEZ: I think there are international issues involved here--the right to self-determination as enunciated in the human rights covenants. In fact, even the Helsinki Accords specify that the rights of self-determination of the Indian people should be respected. And I think the representative to the United Nations at the Helsinki Accords indicated the United

States is doing everything it can to guarantee rights of self-determination to Indian tribes. That is external. And I think internal we should try to implement that as fully as possible.

CHAIRMAN PENDLETON: Counsel.

MR. McDONALD: Yes. First of all, I would like to point out that staff, Judge Rousseau, has a copy of the report on Indian Courts and the Future, and that certainly will be considered, together with all the other background information that we can gather, and we welcome any other sources of information which you may have.

I turn to Judge Gonzalez. Are you a member of the Cheyenne River Sioux Tribe?

JUDGE GONZALEZ: No, I'm not. I'm a member of the Oglala Sioux Tribe, Pine Ridge, South Dakota.

MR. McDONALD: How long have you served on the Cheyenne River Court of Appeals?

JUDGE GONZALEZ: I think approximately 2-1/2 years, going on 3 years.

MR. McDONALD: And how were you elected and how long is your appointment for?

JUDGE GONZALEZ: I was appointed by the tribal council. And in the initial appointment process, it was my recommendation to them that they at least have one tribal member who would be sensitive to the needs of the tribe. And at that time, they were talking about three professional attorneys, and I felt that one tribal member, even though he be a lay advocate, would be more preferable to law-trained other people.

So council took that advice and they appointed Jim Garrett, who is a tribal member but not legally trained; myself--I am a law graduate; I have been in practice now for approximately 13 years, practicing primarily in the Federal courts of the United States, specializing in Federal Indian law. At that time they had a non-Indian female who was appointed as a judge. She resigned and they appointed a Rosebud Sioux tribal member who is currently serving with me, Judge Reeves.

MR. McDONALD: Thank you. What are the grounds for removing an appellate judge from office?

JUDGE GONZALEZ: I didn't fully respond to your previous question. There is no specified term for us. We were just appointed without a definite term. The council has the authority to remove us for cause.

MR. McDONALD: Are those grounds specified?

JUDGE GONZALEZ: I believe they are, sir, in the tribal code.

MR. McDONALD: Has your court decided Indian Civil Rights Act cases?

JUDGE GONZALEZ: Yes, a substantial number of cases involving civil rights issues have come before us over the past 2-1/2 or 3 years.

MR. McDONALD: Do you have any numbers that come to mind?

JUDGE GONZALEZ: When we first began serving in our capacity as judges, the docket was fairly small, but over the course of time it has increased to the extent that I think it is now about 28 cases per year coming before us.

MR. McDONALD: Can you describe for us your court's decision in LeCompte v. Jewett on the extent of a tribe's immunity under the ICRA?

JUDGE GONZALEZ: Yes, I can. The LeCompte case involved several issues, including the issue of separation of powers. In that particular case, the court decided that the court of appeals does have judicial review over actions of the tribal council under the 1968 Indian Civil Rights Act, as a matter of Federal law, and under the tribe's constitution as a matter of tribal law, but that the waiver of sovereign immunity was only to the extent of a waiver for equitable relief but not for monetary damages.

MR. McDONALD: How did the tribal council react to that decision?

JUDGE GONZALEZ: The tribal council as a whole, I believe, has respected that decision. There were some problems in that there were a few individuals on the council who were opposed to the court's final decision. And based on the advice of a Washington attorney who was representing the tribe, the council did pass action more

or less stating its position, that they felt that they had the last say over judicial matters. But that resolution has never come before the court.

MR. McDONALD: So how do matters stand?

JUDGE GONZALEZ: Well, I think that our ruling was adhered to, but one aspect of it concerned certain members of the council. They contacted their Washington counsel to see if our decision was legal. And that attorney gave them advice that he felt under the tribe's constitution the council had the final authority over judicial matters. So he drafted a resolution for them and advised them to pass it, and they did so.

I think if that attorney had said, "Respect this tribal court's decision," they would have done so.

I did direct our clerk of court to write him a letter indicating to him that he would be held in contempt of court, and that we were considering contempt proceedings against him. He responded, indicating he didn't feel he was in contempt.

We had a subsequent meeting. I told him my concern. He asked me, "What would you do in the situation?"

I said, "I would follow the law, petition for rehearing. If you don't like our decision, give us a chance to look at the issues you're raising. If we agree, we might rule in your favor, and if we don't, we will affirm our decision."

He apologized and indicated he felt maybe he was out of order, and that is where the issue stands.

I think if somebody wanted to challenge the council's action in terms of the resolution if it came before us, we could consider it. But I think as the matter stands now, our decision is the final decision and it is being respected.

There are individuals who were involved in that particular case, like Joan LeBeau, and we expressly held that her rights were violated under the Civil Rights Act, and she couldn't get such a remedy in the Federal courts or anywhere else. But in our court she got it. She was subject to a council resolution barring her from ever running for tribal office again. The council rescinded

that action. Our court affirmed that her rights were violated. And she is sitting on the council now.

So I think that our court had been fair. We have the respect on the reservation. It is my belief that the Cheyenne River Sioux Tribal Appeals Court is one of the best appeals courts in the Nation, if not the best. And I think our record is attested to. If you just pick up the Indian Law Reporter and start reading the decisions, you can see the complexity of the issues we decide are very complex, just as complex as any federal court decision you can read in the Federal Reporter or Federal Supplement. And we do attempt to be fair.

MR. McDONALD: Thank you very much.

I have no further questions of Judge Gonzalez.

CHAIRMAN PENDLETON: I think what we'd like to do--we've combined a couple of things here, and let's spend a little time with Judge Sambroak since he couldn't be here this morning. I'm sure he wants to be on the record.

MR. McDONALD: Judge Sambroak, in your opinion are the prosecutors and public defenders at Rosebud more or less evenly matched in terms of their knowledge of substantive law and procedural law?

JUDGE SAMBROAK: No, one is law trained and the other one isn't. If you look at it that way, just as far as education goes, we have a law-trained prosecutor and the public defender isn't law trained. But as far as ability goes, I'd say they are more than matched.

MR. McDONALD: As a judge, do you feel it is necessary to compensate for any shortcomings of the prosecutor or public defender in order to ensure a fair trial?

JUDGE SAMBROAK: Sometimes. I think it just depends on the case. You know, you always want to listen to both sides, and if they are not asking the questions that you think should be asked, I have to ask them to get to the bottom of it. But I don't know if you would want to call that compensating or not.

MR. McDONALD: Okay. Can you describe the extent to which there is a separation of powers between the tribal court and the tribal council at Rosebud?

JUDGE SAMBROAK: Today?

MR. McDONALD: Today.

JUDGE SAMBROAK: Technically, I don't think there is any, but right now, as a practical matter, I think the Rosebud Sioux Tribe is moving that way, but only because of the personalities who are in the tribal government right now. I think on Rosebud at this time you've got a tribal chairman and a judiciary committee that are very supportive of the court and are doing everything they can not to interfere.

I think that could change any time if the personalities change because the system isn't there for separation. But in my experience in the past year, with the new administration and the new committee, we have a de facto separation, though the system isn't there for it. That could change any minute when you change the personalities.

MR. McDONALD: Would it be a good idea to move in that direction--I'm not saying how to move in that direction--as some of the other tribes? We heard that Sisseton-Wahpeton moved that way through a referendum, amended its constitution. If that were done at Rosebud, would that be a healthy development from the court's point of view in terms of ensuring long term independence of the judiciary?

JUDGE SAMBROAK: Are you asking me if I think separation of powers--moving that way--would be a good thing?

MR. McDONALD: Yes.

JUDGE SAMBROAK: Absolutely. I don't see how anybody could argue with that.

MR. McDONALD: Thank you. Have you decided ICRA suits as a judge?

JUDGE SAMBROAK: One. I think the one I decided is the one you alluded to when you were talking to Judge Rousseau, the Dubray v. Rosebud Housing Authority case. That is the only one that has come before the Rosebud Sioux Tribal Court in the past 2 or 3 years.



MR. McDONALD: What was your holding?

JUDGE SAMBROAK: My holding was that in that particular case the Rosebud Housing Authority was immune from suit because the Indian Civil Rights Act didn't apply. So I held for the defendants.

That was subsequently appealed to the Inter-Tribal Court of Appeals where we are still waiting for the decision.

MR. McDONALD: Does the tribal council's power to hire and fire court personnel interfere with the performance in any way at the court?

JUDGE SAMBROAK: Theoretically it could, but practically it hasn't in the past year or two, because of the support that we have been getting. I don't know how else to answer that. Anything is possible.

MR. McDONALD: In other words, the situation today is not the same as it was a few years ago as we heard testimony yesterday concerning the past?

JUDGE SAMBROAK: I don't know what you were told yesterday, but I have had experience--well, before I became tribal judge and administrator of the court 3 or 4 years ago, I practiced in that court, and there is no question that there is a tremendous difference now. I mean there's been vast improvement. It's not the same court now as it was then.

MR. McDONALD: Do you believe the ICRA should be amended to allow private right of action in Federal court?

JUDGE SAMBROAK: Yes.

MR. McDONALD: I have no more questions.

CHAIRMAN PENDLETON: Commissioner Destro.

COMMISSIONER DESTRO: Judge Gonzalez, what do you think about that? Do you think there should be a private right of action in Federal court?

JUDGE GONZALEZ: That is a hard question to answer. As a private attorney, I have filed a lot of suits in Federal court.

COMMISSIONER DESTRO: Could you speak into your microphone, please.

JUDGE GONZALEZ: Yes. It really is difficult for me to answer that question at this point in time. As a private attorney, I filed many suits under the Indian Civil Rights Act in Federal court before the Martinez decision. I felt if there was a law on the books and an individual is entitled to the protection of the law, then I should utilize it. But at the same time, I always had the feeling that tribal sovereignty should be protected to the fullest extent possible.

I think the solution isn't really to amend the Civil Rights Act to allow a cause of action in the Federal court but to improve the existing judiciary systems on the reservations. They are very inadequately funded presently. I feel the tribes have made tremendous strides, if you can step back and look at it from an historical perspective. We have only been in existence since 1934, a period of 50 years, and we have westernized our systems to make them more acceptable to the dominant society.

And we are improving our systems. But we are under tremendous pressures from the outside because the people want the courts to be on the same level as the Federal court or State court, but we don't have the funding. And if you truly want to protect the rights of an individual, I think we have to put more money into the court systems and tribal government as a whole to make them better, and you'll get better qualified people. You'll have better equipment, better buildings. I think if this occurs, people's rights will be protected in terms of the Civil Rights Act.

So I guess at this point in time I would say I don't think the Civil Rights Act should be amended. I think the focus should be on improving existing systems to make them acceptable, not only to the non-Indians but to the reservation people.

COMMISSIONER DESTRO: What about amendments to the Civil Rights Act which would indicate clearly that tribal courts have the authority to issue declaratory or injunctive relief against the tribal council for violations of the Civil Rights Act--not monetary damages but declaratory and injunctive relief--to make it clear that those kinds of decisions can't be trifled with.

JUDGE GONZALEZ: Well, that's our holding in LeCompte, of course, that the Indian Civil Rights Act does waive sovereign immunity in tribal courts for equitable relief, and I guess your question is should that be clarified in the Civil Rights Act.

Perhaps it should. I don't know of any existing decision which expressly states that tribal immunity is waived in tribal court. And I don't know if an amendment would be the solution or let each tribe make that determination.

I think some tribal courts have held--including our own--that there is such a waiver. But with other tribes, it's ambiguous. And I think on those reservations it has to be clarified.

CHAIRMAN PENDLETON: I just have one question. Would you be better off without the Indian Civil Rights Act than you are with it?

JUDGE GONZALEZ: Sir, at this point in time I think people have an expectation of having certain rights enumerated in the Civil Rights Act. If this question came about maybe--

CHAIRMAN PENDLETON: --50 years ago.

JUDGE GONZALEZ: --prior to 1968, I would say the answer would be, no, we don't want it. We want our tribal sovereignty protected. But over the course of time, people believe they should have these rights and it would be hard to take them away at this time. But I think the real issue is that the tribal court should be allowed to develop and grow with very little intrusion by the Federal Government.

We do have a special act dealing with the Sioux Tribes in western South Dakota, the 1877 act, which says that the Sioux Tribes are hereby promised an orderly government. And that was interpreted in the Crow Dog case, and the Iron Crow v. Oglala Sioux Tribe has given us authority to develop our own government and courts. And I think that is a proper approach. You can help us improve these systems rather than impose standards.

You know, without the money it is very difficult. You can order these tribal courts to do these things, but without the money it's very difficult.

CHAIRMAN PENDLETON: We have the same trouble on the other side of the discussion. The Federal Government orders State governments and county governments to do certain kinds of things, and it keeps bucking down the line, but nobody brings any cash to implement some of these public policies that they say are mandated policies. So I think we understand what it is you mean.

Do you have any more questions, Mr. Destro?

COMMISSIONER DESTRO: I have one more question and it's about money. It's not so much about the amount of money but how the money is transmitted.

My understanding is that the money comes first through BIA, then to the tribe, then to the court.

Would it be preferable, in your judgment--and anyone on the panel can address this--to have the money for tribal courts contained as a line in the general Justice Department appropriations for courts? Because what I have heard all along is the notion that when an attorney will write a letter saying, "You don't have to pay any attention," that sounds to me like they're not taking the court very seriously.

And I just wonder whether or not any steps should be taken so that everybody treats the courts as courts, from the appropriation level all the way through the enforcement. And I've asked other witnesses about full faith and credit requirements and those types of things--that we start treating tribal courts as real courts as opposed to not knowing precisely what they are.

JUDGE GONZALEZ: I'd like to respond. In section 16 of the Indian Reorganization Act--and most of the tribes in this State have adopted a constitution and bylaws under that section--it expressly states that the tribe will meet with the Secretary of the Interior each year to go over the budget estimates that will be necessary. I don't think that has ever been fully implemented. The Bureau does have a band analysis, but what was really intended was that the tribe would submit the court budget, and the Secretary would go and advocate what the tribal needs actually were and try to get the money.

COMMISSIONER DESTRO: I guess my question really is: Why should you be going to the Secretary of the Interior to discuss justice matters? Wouldn't it make more sense to plead that case to the Attorney General, who might be a little more conversant with questions of the needs of courts and that type of thing?

JUDGE SAMBROAK: All you're doing there is trading one bureaucracy for another. How does that solve anything?

The Attorney General can be just as ignorant as the Secretary of the Interior when it comes to these matters. I don't see how that would solve it.

CHAIRMAN PENDLETON: I guess our point is a lot of hands handle the check and there must be a processing fee for handling the check, and it seems to me by the time it gets to you the processing fee may outweigh what you get. Is that a concern to you or not a concern to you?

JUDGE SAMBROAK: As Mr. Destro says, the money goes from the BIA to the tribe to the court. And the process fee is taken by the tribe in the form of indirect costs.

CHAIRMAN PENDLETON: Is this indirect costs percentage per tribe, or is this indirect cost in general negotiated with BIA?

JUDGE GONZALEZ: Because we deal with so many Federal agencies, it's negotiated.

CHAIRMAN PENDLETON: By contract?

JUDGE GONZALEZ: Yes. The tribe sits down with the Bureau and negotiates a rate that would apply to all Federal agencies involving the tribe.

CHAIRMAN PENDLETON: Do you know what the Cheyenne River indirect cost recovery is?

JUDGE GONZALEZ: I do not know what Cheyenne River is. I think Pine Ridge is approximately 22 percent.

CHAIRMAN PENDLETON: Maybe some of the chairmen can tell us when they come up.

JUDGE ROUSSEAU: Sisseton's is 21 percent, or is going to be. But it's going to cut into our direct services to the tune of \$3,000. When the money comes down like that

through the band analysis on down to the agency level, tribal courts are always in danger of getting cut, simply because the tribe itself is the one that sets the priorities under the band analysis.

On our reservation, we went from no. 4 priority to no. 5. So that gives us less money to operate on. We can't even give our staff raises because we're getting the same level of funding we did last year, and then deduct that \$3,000 for indirect costs.

CHAIRMAN PENDLETON: I will shock you. There is a school that I know of that used to get indirect cost recovery of 125 percent on the salaries--I don't mean on the whole--125 percent on the salaries.

JUDGE ROUSSEAU: May I make another statement?

COMMISSIONER DESTRO: Go ahead.

JUDGE ROUSSEAU: As far as the tribal courts getting funding, we are not ever going to get adequate funding the way the system is now. And the explanation will be in this book, if the Commissioners will take time to read it, of how we get funded.

I see the Commissioners being helpful in this way, that if the tribal courts could get direct funding with a mandate the tribes not touch it, maybe we could begin to resolve our problems.

CHAIRMAN PENDLETON: I think that is a nice idea we ought to think about, but I'm not so certain we can go that far into the recommendation process. That is more operation than it would be policy. And if we did it for the courts, then who would do it for the other kinds of activities that tribal councils have contracts for? It's difficult to say that, that you have to bypass it though.

JUDGE ROUSSEAU: This bothers me, Mr. Chairman, that we run across the same problems with our tribal councils, making the same kind of statement you did. You are putting us in the same category as a program. We're not a program. On our reservation we're another branch of government. We are the backbone of our tribe's sovereignty status.

CHAIRMAN PENDLETON: That's why I said what I did, hoping you would say what you would say.

[Laughter.]

JUDGE ROUSSEAU: You upset me.

COMMISSIONER DESTRO: That, I think, is the point.

CHAIRMAN PENDLETON: You are not a program; you are unit of government.

JUDGE ROUSSEAU: That's right.

CHAIRMAN PENDLETON: That's right, absolutely correct.

Do you have a question, counsel?

MR. McDONALD: Yesterday we heard testimony from a former judge, Trudell Guerue from Rosebud. He expressed the idea that all Indians are American citizens and have been such for quite some time now, and that in his opinion they were entitled to the full protection of the Federal Government, whether on or off the reservation. And he pointed out that the individual's rights are sometimes in conflict with those of the governing body, as expressed through the councils.

My question is: Do you think that is a legitimate concern, that each Indian be accorded the same constitutional rights as all other American citizens, whether on or off the reservation?

JUDGE GONZALEZ: I think, to begin with--I would have to go back to Justice Marshall's opinion in Johnson v. McIntosh, 1823, wherein he stated, I think, a basic policy of the United States in terms of Indian people. And in that decision he made a statement that the policy of the government--and he was treating Indian tribes as conquered people--was that at some point of time in the future the two peoples would merge into one people, but until that time occurred, there was a duty to protect the institutions and the culture of the Indian people. And I think that's the ultimate goal of the United States Government.

The Indian Citizenship Act wasn't designed, I don't think, to further assimilation. It was because Indian people served so well in the wars, World War I especially, that the Congress felt that they would give them the status of citizen. So in 1924 Indians became citizens of

the United States. There are some exceptions to that, of course.

I think when you're on a reservation, it is very important for people to respect the sovereignty of the tribe and its citizens. We are citizens of our Indian nations. When we are off the reservation, I feel we should be accorded the full protection of the Constitution and the laws of the United States. On the reservation, when we are dealing with the Federal Government, the Bureau of Indian Affairs, certainly, we should be afforded those protections.

But I don't think you should destroy tribal governments in the name of citizenship. I have serious questions about Indian citizenship. I don't think it's constitutional.

You know, the black people were classified as property and we were classified as totally separate governments. They got a constitutional amendment changing their status, and we got an Act of Congress. How do you change the status of Indians constitutionally?

So there is to this day a question of the constitutionality of the 1924 act. But most Indian people, because we are realistic and we are living within the territory of the U.S. and we served honorably in the wars and we value that Federal citizenship, we don't want people using it to destroy us as Indian people. And I don't think it should be used for that. So I disagree.

CHAIRMAN PENDLETON: Do you have any comments? We have to move on.

[No response.]

CHAIRMAN PENDLETON: Thank you very much, panel, for being with us.

We will now convene the next panel, which is the council chairmen: Joe American Horse, Alex Lunderman, Morgan Garreau.

I might add that we do have Ms. LaGrone, who is sitting behind us here. If there are public witnesses, we'd ask that you sign up to be public witnesses. I will caution you in the beginning that the testimony that you might give us would last no more than 5 minutes. There is



not debate on the matters. If you have material you want to send to us in writing, that is perfectly acceptable. It will be included in the record. This record is kept open for 30 days beyond this hearing date, and we gladly accept anything anyone may wish to send forward.

Are the gentlemen's names whom I called present?

VOICE: No one is here at the present time.

CHAIRMAN PENDLETON: Then we will take a break and assume that someone will soon be present.

[Recess.]

### PUBLIC SESSION

CHAIRMAN PENDLETON: We are going to convene the public session a little earlier than scheduled.

We will take first Judge Ronald Hodge. Please tell me which tribe this is. Sioux and what else?

JUDGE HODGE: Assiniboine and Sioux is the one I represent.

CHAIRMAN PENDLETON: Fine. Would you take a seat, please.

JUDGE HODGE: Thank you.

CHAIRMAN PENDLETON: I will have to swear you in, sir.

[Ronald Hodge was sworn.]

CHAIRMAN PENDLETON: I must remind the witnesses that we will allow you just 5 minutes to say what you'd like to say. If you have some statement, you may summarize that and give us a statement. If you want to give us a statement and say something else, that's perfectly all right, too. You can get two bites of this apple.

### Testimony of Ronald Hodge, Judge, Fort Peck Indian Reservation

JUDGE HODGE: Thank you, Mr. Chairman. My name is Ronald Hodge. I'm a Massantucket Pequot tribal member. I have 18 years' experience in Indian law, and I have

represented clients from the north slope of Alaska to various tribes in the southern parts of the United States. Furthermore, I also have a private law practice, dealing with corporation law and taxation on or about Indian reservations. I am presently chief judge on a part-time basis of the Fort Peck Indian Reservation and have held that position since about the 1st of April 1986 and am very familiar with the Indian Civil Rights Act.

I also would like to state, Mr. Chairman, that your statements this morning concerning economic development as it pertains, sir, to Indian reservations is rather simplistic. I have followed the economic development of blacks from the HUP Corporation of 1968 until the present time, and the Indian situation is quite obviously different.

In addition to that, the experiences that we found on the Indian Civil Rights Act on the Fort Peck Indian Reservation, the most difficulties we have is dealing with Federal employees on the Indian reservations. From about 1852 to the present time, we have had the Bureau of Indian Affairs on these Indian reservations, and their role has been more than paternalistic; it's been dictatorial on many occasions.

So at the present time, in running a court system, we are attempting to utilize court orders and court procedures. Furthermore, we are stopped more often than not by Federal employees and a Solicitor General's letter stating that Federal employees do not have to follow tribal court orders. Therefore, the tribal judicial system will break down rather rapidly when you have Federal employees telling you they do not have to follow your orders.

A recent example--we were trying to get a particular person from our Fort Peck Indian Reservation returned to the reservation, and I was told personally by a Federal employee that they were not going to follow my court order, and furthermore, if I wanted to appeal their decision, I had 5 days in which to appeal it.

It does not seem appropriate, nor does it follow judicial etiquette, that a tribal court would have to appeal some administrative decision made by a Federal agency.

In addition to that, we have a bifurcated system with the Bureau of Indian Affairs running the police force and the court system as being separate. Those two separate entities create legal problems of monumental effects. Number one, Federal employees then use the term "Federal preemption" when they don't wish to follow a tribal court order, or when you start analyzing a due process question, Federal employees will generally state that they do not wish to appear, and so are being provided the opportunity by their Solicitor General of not appearing.

Furthermore, on the issue of the United States attorney, the United States attorney sometimes accepts and sometimes rejects decisions and cases under the Major Crimes Act. We do not know what criteria the United States uses. We do not know at which time he decides to take a case, and we do not know when he is going to decline. Therefore, we have criminal procedure questions involving the speedy trial provisions that we cannot maintain because the United States attorney takes those cases for long spans of time.

In addition, most of the conversation this morning that I've heard, and early this afternoon, has all talked about funding. If this Commission is attempting to hold Indian tribes accountable for the Indian Civil Rights Act, it should be borne in mind that every other governmental agency that is to be held accountable for civil rights violations, including States, counties, and other municipalities--they all have a revenue base from which they deal with it. It may be a use tax; it may be a sales tax; an ad valorem tax, but they do have a revenue base. And all we've heard today is discussions concerning funding, sometimes appropriations, and going begging to the Federal Government in order to run a judicial branch of government.

In addition to that, the tribes are in fact sovereign entities and are in fact sovereign nations, and it goes back to 1823, as provided in the testimony earlier. And members of this Commission do not seem to understand or appreciate the ramifications of Indian law. It's an extremely complex area of law that deals with Federal procedure, Federal jurisdiction, Federal diversity jurisdiction, and questions of law and fact as to whether they are Federal questions.

Someone on this committee should become an expert in Indian law in order to deal with and understand the

difficulties in making a decision. A simple criminal fact pattern or a simple civil fact pattern in a non-Indian setting is very easily adjudicated.

In an Indian situation, you must determine, number one, jurisdiction; you must determine, number two, the parties, what is the status of the parties, the long-arm statutes of all the parties, and so forth. Each decision, then, becomes a very, very difficult, time-consuming decision.

As far as the tribal concerns, at Fort Peck we have a professional staff on board at the present time, and we have a staff that understands Indian law. We are according, to the best of our ability, all due process rights. However, there have been instances in the past where due process has not been enforced properly, and we have rectified those situations on the Fort Peck Indian Reservation.

Lastly, it seems appropriate here to find out in a very definitive manner what is the statutory and what is the regulatory role of the Bureau of Indian Affairs or the Indian Health Service on these reservations. If the tribes are in fact sovereign, then they must operate, and people on those reservations must comply with court orders. To date, that has been the most difficult part of enforcing a tribal court order.

In addition, this full faith and credit must be looked at with specificity, meaning that most full faith and credit issues by State courts are not accorded to tribal courts and are not given full faith and credit when a tribal court order is issued to other State and county courts.

Thank you.

CHAIRMAN PENDLETON: Mr. Hodge, we have your written testimony here. It will become a part of the permanent record. Let me just assure you, once again, that none of our remarks are to be taken in such a way as to be disparaging in any way at all to any nation. I guess we are here to learn as much as anything else, and we do the best we can with the jurisdiction that we have.

JUDGE HODGE: Thank you, Mr. Chairman.

CHAIRMAN PENDLETON: Are there other members of the tribe who want to speak? I have some other names here. Do you want to speak, or does Mr. Hodge speak for you?

Are you Mr. Headdress, sir?

MR. HEADDRESS: Yes, I am.

CHAIRMAN PENDLETON: Come right ahead.

Mr. Lavell, Caleb Shields, Ms. Daniels, and Ms. Ahneman, if you'd like to come forward and share in this, please feel free to do so.

Mr. Headdress, sir, go right ahead.

Testimony of Arlyn Headdress, Council Member, Fort Peck Indian Reservation

MR. HEADDRESS: Thank you, Mr. Chairman, members of the Commission. My name is Arlyn Headdress. I'm a member of the Assiniboine Sioux Tribe of the Fort Peck Indian Reservation in Montana. I am also on the tribal council, chairman of the reservation safety committee that oversees the law and order on our reservation.

I am happy to speak to you today because I am proud of the Fort Peck tribal government, and I think that it has a very good record regarding individual civil rights which suggests some general truths about tribal governments and Indian civil rights.

As you know, Congress in the Indian Civil Rights Act, or ICRA, entrusted tribes with the duty of providing due process and equal protection guarantees similar to those in the Bill of Rights in the United States Constitution. Ten years later, in Santa Clara Pueblo v. Martinez, the Supreme Court made it clear that Congress intended tribal governmental systems to be the principal forums for defining and enforcing these rights--not Federal courts.

The ICRA's reliance on tribal institutions is appropriate because each tribe has distinct culture and elements of sovereignty, and the United States has repeatedly recognized these things as worth preserving. Only the tribe can infuse its own cultural values into the protection of individual rights. Our courts must at times be familiar with tribal kinship systems and tribal religion in making decisions, areas where Federal or State forums cannot expect to be sensitive.

No one can pretend that all tribes today are models of perfect due process. But then, again, neither are all State and local governments--or every member of the Federal bench, for that matter. Any system of government will furnish abundant examples of less than perfect functioning.

The point is to not overreact to extreme about isolated examples of bad governmental conduct. Tribal courts--tribal governments generally--have an extremely important role to play in the provision of Indian civil rights and of the general benefits of government. No other institution is even remotely as qualified to define and protect the rights of individuals in the context of tribal sovereignty and cultural values.

These tribal courts should be strengthened as institutions, not undermined and limited. In the long range, surely they will be more efficient providers of judicial services on reservations than Federal or State systems could ever be. I urge this Commission to think in big-picture, long-range terms about incentives and conditions that will allow tribal judicial systems to emerge as vibrant, respected agencies of justice--equal partners with State and Federal courts.

Please understand that we have no desire to perpetuate unjust or arbitrary actions of tribal government. American Indian tribes may have a distinct identity, but we are not so different from non-Indians that we prefer injustice to justice. We can be trusted to work toward this goal in tribal government because it affects us, directly and immediately, every day.

Fort Peck has responded to the challenges of the ICRA and Martinez with real vitality. I would especially like to share with you some specific actions we've taken in regard to our Code of Justice and our judicial branch.

We began a comprehensive process of revision of our Code of Justice in the late 1970s. Our law and order committee worked closely with the tribal attorneys to incorporate into tribal law a variety of provisions for due process, equal protection, and other guarantees of the ICRA.

We have taken concrete steps to make sure that these rights and procedures, now a matter of tribal as well as Federal law, do more than just exist on paper, but are actually provided every day in our tribal court.

CHAIRMAN PENDLETON: Excuse me a second. What we have is what you're reading, and you might want to summarize it, and

this can go into the record as it is, and we'll give it to the reporter. This will be a part of the permanent record. So if there are some other things you want to mention in that 5-minute time allotment, please do.

[The balance of Mr. Headdress' statement is as follows:]

"Specifically, we have hired a lawyer-judge who is formally trained in law and intimately familiar with the requirements of the ICRA and our Code of Justice. The lawyer-judge prescribes rules of court and supervises and trains all court personnel, in addition to handling the difficult cases.

"In the past few months the lawyer-judge has updated and improved all court procedures. He systematically researches any complaints of civil rights violations and makes quarterly reports to the executive board on the subject of civil rights.

"We also require all lay advocates and attorneys to pass a bar exam before practicing before our courts. The exam ensures that all participants in the Fort Peck judicial process are familiar with the requirements of the ICRA and the Code of Justice.

"We have also established the right of appeal in our judicial system. The right is absolute in the criminal area and may be obtained by petition in civil cases. Appeal procedures are spelled out very clearly in the code and administered uniformly. The chief justice of our court of appeals is also a lawyer and very well-respected in the surrounding community.

"Procedures in the criminal area are established in Title II of our Code of Justice. This title establishes the requirement of Miranda-type warnings, careful controls on search warrants, an exclusionary rule, and various procedural rights during arraignment and before a guilty plea is entered. The full rights of a criminal defendant are spelled out, reflecting the language of the ICRA. I have attached Title II of our Code of Justice to the printed copies of my statement.

"The code provides for release on bond pending an appeal. If the prosecution does eventually result in final conviction, the prisoner's rights--including that to medical care--are protected in Title XII, chapter 3 of the code, which governs treatment of prisoners.

"Our code also establishes due process procedures in the civil area. Title IV establishes orderly procedures for filing

a complaint, notice to the opposing party, and hearings in court.

"Some experts feel that some of separation of powers system is the most stable and just form of government. Others point out the difficulties in establishing a full separation of powers in tiny, tightly interconnected communities like most tribes. The Fort Peck Tribes have come up with an approach that works well for us. Our code establishes that interference with tribal court decisions by an executive board member is an impeachable offense. (See Title I, section 505.) I have observed firsthand that this provision really does deter members of the tribe's executive branch from interfering with judicial process.

"This progress must be allowed to continue, and for this we ask your help. An obvious starting point is increased educational and technical assistance. When it enacted the ICRA, Congress to some extent recognized that simply being given new trust and responsibility is not enough to undo centuries of hostility and condescension--together with severe educational and economic deprivation. Guidelines, training, and technical assistance are also essential. Congress, therefore, included, in Title III of the ICRA, a provision for the creation of a model code and for training and technical assistance for courts of Indian offenses. This very small step was later intended to be supplemented by 638 self-determination grants for strengthening tribal government.

"Plainly, the provisions for assistance to C.F.R. courts hardly scratch the surface. In the almost 20 years since the ICRA was first passed, tribes have never received training or funding sufficient to implement the act. And, as you know, 638 money is being slashed more and more. The need for such funds is urgent. The Fort Peck tribes, for example, would very much like to hire a lawyer-prosecutor, and maybe one or two investigators for sexual abuse cases. But we simply do not have the money to make these plans real.

"The other major problem we encounter in providing civil rights, aside from lack of funds and training, is lack of respect, particularly from the Bureau of Indian Affairs. I firmly believe that competence and responsibility are at least in part a result of being treated as competent and responsible, of being entrusted with important duties, treated with respect. Some people make this point about State courts. I think the idea is also an important part of the scheme of the Indian Civil Rights Act or ICRA of 1968. We find it difficult to get the job done when our court's decisions are ignored or



circumvented by the Bureau of Indian Affairs employees. There is a real need for greater teamwork in this respect.

"We would all like to see the promise of the ICRA realized. I ask the Commission also to work as a team with American Indian tribes toward that goal."

MR. HEADDRESS: We do have our chief lawyer-judge who we have just hired and who you have just heard from, and we are very proud of the fact that the Fort Peck Indian Reservation has taken these steps to protect individual rights which hasn't always been the case, but we are doing the best we can with what funding we do have. Again, we speak of funding. The Federal Government has provided us with grants and such, but we also at Fort Peck Indian Reservation have put a lot of our own tribal money into it, specifically in the law enforcement services to protect our own people where the BIA has failed to do so.

So at this time I will cease my testimony here and turn some time over to Mr. Shields who would like to enter into the record our comprehensive Code of Justice.

CHAIRMAN PENDLETON: Excuse me just one second. I'm a little bit ahead of myself. In an ex post facto way, if you will, after the fact, I'd like to swear all of you in. I'd make a darn poor judge, wouldn't I?

[Laughter.]

[Donna Ahneman, Terry Daniels, Arlyn Headdress, and Caleb Shields were sworn.]

Testimony of Caleb Shields, Council Member, Fort Peck Indian Reservation

CHAIRMAN PENDLETON: Do you have something you want to submit for the record, Mr. Shields?

MR. SHIELDS: Yes.

CHAIRMAN PENDLETON: Go right ahead.

MR. SHIELDS: I have been a tribal council member up in Fort Peck for the last 11 years, and in those 11 years I can recall back, when you're talking about funding levels of the Federal Government to the tribes for tribal courts and enforcement--in 1975, for instance, the Bureau of Indian Affairs had allocated only \$25,000 for the tribal courts. They

had \$100,000 for law enforcement, for a reservation of 2 million acres of land, an Indian population of 8,500.

There wasn't much being done to comply with the Indian Civil Rights Act back in '75, but over the years, in the last 11 years, each year the tribe has taken certain steps to get us where we are at now. We do have a comprehensive Code of Justice that was adopted in January of 1985, and we also have amendments to the code that are presently being typeset to be printed and inserted into our code.

As I said, the funding level at Fort Peck for courts and law enforcement 10 or 11 years ago was \$125,000. But each year, through the efforts of the tribe, the law and order committee, we were able to acquire a little bit more and more funding. It was a hard fight each step of the way. Presently, we have law enforcement funding of \$644,000 and tribal funding of \$407,000, in order to provide adequate enforcement on the reservation and to comply with the Indian Civil Rights Act.

All these things have not been easy to do over the 11 years, but each time a problem came up the tribe, the law and order committee of that reservation, met and they met on the problems, and they took steps to ensure that these types of things would be a thing of the past.

As I said, our code was finally approved in January of '85. And I would like, Mr. Chairman, to submit this for the record to the Commission. We have in this binder here--everything in here is in compliance with the Indian Civil Rights Act. It is a comprehensive Code of Justice. I would leave this here for the Commission.

Also, we have our recent amendments to the code that would be printed and inserted into this. This would be for your review. We feel that this code, as it stands today, answers and addresses all of the issues of the courts. You were talking earlier today about the separation of powers--those things are addressed in our code. We feel it's adequate. There may be other things that come up later that the tribe may have to address on that. It talks about the judges, their role with the courts, possible removal processes that are in there that would comply with the rights of individuals and judges.

Our most recent things that we have done in our code--and we really addressed the issue--was the issue of child abuse. We have with us today a couple of ladies from the reservation, members of our tribe, a group of ladies under the name of Voices for Children. They have had a lot of meetings on the

reservation with the people and the tribe, and we have incorporated that into our code. They are here today to tell about their role, what they have done on the issue of child abuse on the reservation. But those things have been addressed. We have made provisions in there.

And, like I say, we are pleased with the effort of what the Fort Peck Tribe has done in the last at least 10 to 15 years. It's been a long, hard struggle. But I think that unless the Federal Government, through the BIA, provides funding levels adequate to ensure that these things can be carried out by the tribes--here you're talking about a decade of work that we have finally put together [indicating document]. And without funding, which many tribes do not have--we were fortunate in the last few years, because of some of the natural resources of the tribe, in being able to do these things. But many tribes aren't able to do it because of lack of funds. And if the Federal Government doesn't fulfill its responsibility, these things aren't going to get done.

I'd be happy to answer any question you may have on parts of our code, if you'd like. But I'd like to turn this over to the ladies who have accompanied us from Fort Peck.

CHAIRMAN PENDLETON: Thank you, Mr. Shields.

The documents you have given us will be entered into the record, and we appreciate your taking the time to give them to us, and we will certainly have staff make certain that they maintain contact with you. If there are any questions, they will be sure and ask you.

Testimony of Terry Daniels, Voices for Children, Fort Peck Indian Reservation

CHAIRMAN PENDLETON: Who is first? Ms. Daniels or Ms. Ahneman?

MS. DANIELS: Terry Daniels.

CHAIRMAN PENDLETON: Ms. Daniels, how are you?

MS. DANIELS: Fine; thank you.

I am one of the ladies from our Voices for Children group. We are a grassroots group, and we are part of the community glue. We try to keep the interests of our families and our mothers particularly at heart.

We were very concerned a while back at the lack of civil rights for children that was contained in our courts and our codes. We began working on efforts and awareness, particularly public awareness, because we realized that grassroots folks like us are very important in pushing to solving problems. We all got together. They asked people that were active in our communities, and we were all committed to working at various problems. And this was something that we all had to heart.

We saw that some of the cases, the child abusers, were not at all given as strong penalties as we thought they should have. So we began working on this. And we found that if we were very reasonable--our executive board and our court systems have responded very well to our requests. They have met with us. They have listened to us. And they have even let us know that they are quite grateful for our support and our digging at our level, our pushing, our gathering of statistics. And we had to face our problems in the first place. We began to label many of the offenses that are not contained in our tribal code. So, of course, the courts couldn't push any cases if they weren't specifically addressed. Well, we knew that we had to do those things.

We made a kitchen list, as an attorney advised us, and we took it to the tribal board, and they were very accepting of it. They treated us with very good respect and consideration. There have been other groups that have asked for help as well, and they have also been helpful in bringing these things into public awareness in our tribe.

We have known that we have had problems with child abuse particularly, and we have dreams to help more, like the battered spouse and all. But we are very grateful and hopeful with these last amendments that were passed.

We made 30 suggestions as to what we wanted included in the law and order code that weren't there yet. We sent it to our attorneys for our tribe, and they had nice good hearings for us. We attended them, and we find that if we work with our executive board and our court systems, they are open to help, suggestions, and communication.

Now, one of the things that we have had problems with are the programs and agencies cooperating with each other. And they get cases shuffled and passing the buck all the time.

Well, we find--now it's been a year and a half since we have been putting public pressure and public awareness to the fore--that they are now cooperating better. The information is

going amongst the agencies. They are just talking better; they are beginning to pick up a little more of their responsibilities. They are not quite as afraid to come forth with some of these things.

It has also given a lot of local people at other than the political level experience with our government. I think that our government and our court system are malleable, that they are workable. We have put in changes to this law and order code. And we are just ladies and moms. There are a lot of us that are professionals in our group. We have the support of businessmen. Our members include professionals as well as mothers, teachers--all kinds of walks of life--counselors, ministers. We have all kinds of people supporting this, and we work well with our executive board.

I wanted people to know that I think we can work our problems through very well with what we have. I think we are a maturing government. And our law and order code is maturing, and we are just really pleased and happy that just the other day we had the final amendments put in to help our children.

And I'll give 5 minutes to Donna.

Testimony of Donna Ahneman, Voices for Children, Fort Peck Indian Reservation

CHAIRMAN PENDLETON: Ms. Ahneman.

MS. AHNEMAN: I'd like to thank this Commission for the opportunity to speak today. I also am a member of Voices for Children, and through my working with this group, I have had the opportunity to work with the tribal board and the chairman, and we have received a lot of cooperation from them. We have had several members attend our meetings and our seminars, the most recent of which was held in April of this year.

I agree with Terry that it takes cooperation from all branches. We can't have one group running off this way and the other group running off that way. And we are making headway.

I was totally appalled when I learned of our serious child abuse problem, and it took a lot to get involved, but now that I am I can see that we are making progress with our amendments. That was a great hurdle that we just went through, and there are more hurdles to come. But I feel as long as we work together, we can have some long-term goals reached.

Thank you.

CHAIRMAN PENDLETON: Thank you very much.

Mr. Headdress, do you want to say something else?

MR. HEADDRESS: Just in closing I'd like to say, when the Commission does review our law and order code--I heard a lot of testimony this morning on interference from the tribal council into their tribal court. I feel proud and confident that this won't happen at Fort Peck. We have a specific section there, 505, that deals specifically with that, that if we do interfere, we are not to interfere, and it's grounds for impeachment. And I feel very confident that our new chief lawyer-judge will uphold us on that.

I say that in closing; thank you.

CHAIRMAN PENDLETON: Thank you.

I just want to say it is refreshing to hear some testimony that, in a sense, balances off the testimony from yesterday, in terms of good things that are happening on the reservation. And I think that if there are persons from the public here who write about this, they should give this as much attention as you give other things. I think it's good that you came, and it looks like you have things well under control.

MR. HEADDRESS: Thank you.

CHAIRMAN PENDLETON: Thank you very much for coming.

Next we will have Mr. Larry Cournoyer from the Yankton Sioux Tribe. He's the former chairman. You have someone with you whom you may identify, sir.

MR. COURNOYER: Yes. She has a statement from Agnes Gullickson, who is the former treasurer as well.

CHAIRMAN PENDLETON: She cannot be here; is that correct?

VOICE: I'm speaking in her behalf.

MR. COURNOYER: That's her mother. Agnes Gullickson is on the list, I think no. 11, but since you've taken them by tribes, I thought I'd bring her in now.

CHAIRMAN PENDLETON: Okay.

[Larry Cournoyer and Yvette Gullickson were sworn.]

Testimony of Larry Cournoyer, Former Chairman, Yankton Sioux Tribe, and Yvette Gullickson, Yankton Sioux Tribe

MR. COURNOYER: I'll go first.

I want to thank the Commission and the staff for the opportunity to appear before you today. I've got a lot of documents and information that I have drafted. I've got copies of court orders, and copies of memoranda from the Bureau of Indian Affairs that I will summarize, and of course I'll leave these for your information so that you people can verify what I'm saying.

My problem basically started in 1983. I was the chairman of the Yankton Sioux Tribe from 1977 until 1983.

CHAIRMAN PENDLETON: Excuse me. Where is Yankton?

MR. COURNOYER: The Yankton Sioux Tribe is located in the far southeast corner of South Dakota, about 300 miles from here.

CHAIRMAN PENDLETON: Just for the record. Thank you.

MR. COURNOYER: Anyway, we had some political turmoil down there, and it started over our court system. We had a very weak court system, and we had a very weak law enforcement system, and our council refused to do anything about it. I was the chairman of the tribe, and I heard complaint after complaint after complaint about it, so I felt the proper thing to do was to present that issue to the people. And I took it to the membership by petition and asked for a referendum vote.

In the referendum vote, the people voted to turn the tribal court and the tribal police back to the Bureau of Indian Affairs. And to those that holler about tribal sovereignty all the time, you know, we're giving up a little bit of tribal sovereignty, but on the other hand we are dissatisfied with the way they were treating our membership. It was they who voted it back by a vote of about two to one in that referendum vote. So the tribal council had to adhere to that.

In the process, the tribal council then, and the judicial system that was still in place because the Bureau took about a month to get all this transacted--the court system and the police overthrew me as the chairman of the tribe. They put a restraining order on me. The chief judge of the tribe put a restraining order on me so I couldn't go back to the tribal office, and the police enforced that. So these people that

were removed really by the membership had this official document. And I thought, "Well, as soon as the Bureau takes over, this will kind of disappear, disintegrate, and there won't be any problem."

But in the meantime, they were getting into the records, and they were starting to sell tribal assets, and they were contacting other agencies, saying, "We've thrown Larry Cournoyer out as the chairman of the tribe," and they were spending tribal assets. It was getting into large amounts of money.

Anyway, to shorten the thing up, we finally got the C.F.R. court in, which is the Court of Indian Offenses. It's a BIA administrative court. And for the whole summer of '83 they didn't do anything about it. They issued a few orders, but then they didn't do anything about the orders. They had no effect, really.

So everybody said, "Well, there's an election coming in September. That will resolve this issue."

Well, in September, it did resolve the issue, but financially I was in no position to compete with these people because they had expended probably a million dollars in tribal assets, and I was living on welfare by that time. They defeated me by some 80 votes.

And then it went on into 1985, 2 years later. I felt that, well, I'll wait 2 years, and I'll just give these people their chance. I gave them their chance, and I waited 2 years. And then in March, before the election in '85, they passed a resolution because most of that faction that got me out--they passed a resolution disenfranchising me from running for tribal political office for 15 years, which brings me to the Indian Civil Rights Act complaint that I've got.

Since the passage of that particular resolution, 8571, I have been unable to find a forum that would resolve it. I took it back to the membership in an emergency session. The Bureau turned around and they overruled that. And of course, they always say they are not going to get involved in the internal affairs of the tribe, but they overruled that. We threw it out in emergency session by 95 to nothing, I believe, saying they couldn't disenfranchise me. And then they turned around and said, "Well, you can't call an emergency meeting unless you've got a quorum of the officers." And they already have a ruling on record from the top of the Bureau that says by petition and one officer you can call a meeting. That's the way it was done.



COMMISSIONER DESTRO: Excuse me a minute. Who is "they"? Is it the Bureau or the current officers?

MR. COURNOYER: I'm talking now about the tribal council that is presently in office. What I'm saying is--when I refer to "they," I'm referring to the tribal council that is in office. Their attempts to keep me from running from office, you know, have filtered over into such strong political things--they get to the Bureau and they stop them from taking any action. The C.F.R. court is a Bureau court.

So the Bureau ruled in June of '85 that the court couldn't hear the matter. And I went ahead on July 8 and I filed an Indian civil rights action in our court down there, and they dismissed it for lack of jurisdiction. And since that time, we have just kind of been beating our heads up against the wall. No matter what we do, there doesn't seem to be any resolve of this kind of a problem. There is no basis for the action other than the fact that my political opponents are going to ensure, now that they are in office, that I don't get back in office.

I have contacted the Justice Department, and there's a copy of a letter from the Justice Department in Washington in here. In there they indicate that, due to Santa Clara Pueblo v. Martinez, the Attorney General no longer pursues enforcement of the ICRA. And even the American Civil Liberties Union said, "We have tackled this issue before and we have lost. We are not willing to do it anymore." We've contacted local attorneys and it's the same thing.

So I haven't got a forum to go to, and we can't get to Federal court. The tribal election ordinance states in it that if the election board violates your rights, you can take that to tribal court, meaning the C.F.R. Court of Indian Offenses.

Well, under that section of the election ordinance, I took the election board to the court, and that is what the Bureau said you can't do. They won't hear it. And, of course, the court threw it out for lack of jurisdiction.

But clearly the tribal ordinance gave me the authority to do that. The Bureau intervened long before the judge even made a decision. So when the judge went to make a decision, he was compelled to make a decision based on the Bureau intervention. That's his bosses.

So basically the Indian Civil Rights Act, as far as I'm concerned--well, the decision, anyway, that came down from the

Supreme Court, really has put Indian people, individual Indian people, without any rights.

CHAIRMAN PENDLETON: I can only say to you, sir, that this, too, is not one of the forums where you can get resolution. It is a forum where we can identify a problem, but not being able to resolve matters. I think it's important that we have that for the record as a citation of the kinds of things that do prevail.

But in terms of resolution, please do not expect one from us because we cannot do that. But we appreciate your testimony, and I'm certain when my staff reviews what you have, they will be able to give you some guidance about what they think should or could not happen.

MR. COURNOYER: Well, on the other hand, I think you people have got referral authority to other agencies.

CHAIRMAN PENDLETON: We would do that. And you are absolutely right, but we could not resolve it ourselves. We have no statutory authority to resolve it at all. But we would refer that to the appropriate agencies.

COMMISSIONER DESTRO: The other difficulty is that the Martinez decision may well stop the other appropriate agencies that you might normally refer such things to. That's why what we are really looking into here is what recommendations can we make that might start to address the problems that you have. We don't know, without looking at your materials, whether or not there is anything that can be done. It just may be one of those situations that there just isn't a remedy at this point in time, and the only thing we can do is use your case as an illustration of what's going on.

MR. COURNOYER: I've got a copy of the election ordinance and the constitution and bylaws, and I'll also submit those, and I have outlined in red those parts that are pertinent to what I'm talking about, especially when it talks about the C.F.R. authority of that court, and maybe you can pass that on to BIA as well.

CHAIRMAN PENDLETON: Fine.

COMMISSIONER DESTRO: Thank you.

CHAIRMAN PENDLETON: Identify yourself for the record, please.

MS. GULLICKSON: Yvette Gullickson, speaking on behalf of Agnes Gullickson, former tribal treasurer of the Yankton Sioux Tribe.

One point she would like to have made is when her and the past council tried to have higher levels of the government, the BIA, to intervene between the political dispute down in the Yankton Sioux Reservation--

CHAIRMAN PENDLETON: Take your time.

MS. GULLICKSON: I'm nervous. I've never done this before.

The BIA, Aberdeen area, said they could not intervene in local tribal disputes between two factions. And this refers to the time of March 1983 to August 1983 only. Any appeal to progress the Yankton Sioux Tribe in the right direction was either distorted or overlooked by the faction, the members of the present council, who then spread allegations of wrongdoing.

People in authority, local BIA in the Aberdeen area office, either looked away or ignored the political dispute in general. Records have been burned, stolen, transferred, or manipulated for one faction's benefit, members of the present council.

I, Agnes Gullickson, tried to protect records, but somehow my power and authority was overlooked or overruled. Remaining records are now kept in various parts of the current tribal hall at Marty, South Dakota. A letter regarding this matter will be included with report being sent to you.

Another point I would like to discuss concerns timberland I own by the Missouri River. This had been trespassed by current tribal woodchoppers and transferred many loads of wood for elderly program, some of which was sold to various parties and some which was given away. I have sought financial settlements from local superintendent and realty officer at the BIA, but it was of to no avail. At one instance I was told reimbursement would be paid for, would be taken, then referred to Aberdeen area office director. Director said something would be done. Now he said that Agnes would have to go through tribal judge and law officers, and then in turn would go to Federal court. But nothing has been done yet.

Another point is that someone had tried to banish me, Agnes Hart Gullickson, from the Yankton Sioux tribal role. Another point is that the latest office of inspector general audit's main person, the contracting officer, happens to be his son.

In audit worksheets, most of wrongdoing of financial ledgers were referred only to Larry Cournoyer's time of office. The audit also covered '83, '84, '85 fiscal years. Such referrals are in worksheets as "Cournoyer's side," "other party," etc. This audit could not prove Larry Cournoyer of any wrongdoing but reflects the fall of the Yankton Sioux Tribe government as a whole in 1983, 1984, and 1985. This proves instability of the present Yankton Sioux Tribe government and only further inhibits the Yankton Sioux Tribe of obtaining grants needed to secure the people's needs.

The nonpresence of the BIA monitor that was duly appointed but retired by the Yankton Sioux Tribe caused only more financial confusion, such as a poor bookkeeping system, manipulating Federal grants to run tribal operations, and needless shutdowns of various supportive programs.

A resolution was drawn to transfer the BIA superintendent because of poor management skills and also his bias against certain tribal members. We feel he is not a neutral figure for this BIA area's needs for the Yankton Sioux Tribe.

In conclusion, I would like to see justice carried through and integrity restored to the Yankton Sioux Tribe.

CHAIRMAN PENDLETON: Thank you very much for testifying.

MS. GULLICKSON: Would we have to submit the letters and everything?

CHAIRMAN PENDLETON: I don't know.

MR. HOWARD: If you have materials that you think are relevant to your testimony--

MS. GULLICKSON: Yes, we do.

MR. HOWARD: --then we would like to look at them and perhaps include them. Please send them to us.

MS. GULLICKSON: Okay.

CHAIRMAN PENDLETON: Jerry Spotted Tail. Is he here? Tim Murray?

MR. OLIVER: I came up with Jerry Spotted Tail. I was representing him in tribal court.

CHAIRMAN PENDLETON: What is your name, sir?

OLIVER: My name is Gerald Oliver. I'm from Rosebud. I am with Jerry Spotted Tail.

MR. HOWARD: But he is not here now?

MR. OLIVER: He's out in the hall.

CHAIRMAN PENDLETON: Would you bring him in, please?

[Gerald Oliver and Jerry Spotted Tail were sworn.]

CHAIRMAN PENDLETON: Mr. Oliver.

Testimony of Gerald Oliver and Jerry Spotted Tail, Rosebud Reservation

MR. OLIVER: Jerry filed for a divorce in 1982, and at the time he filed the tribal court did say that they would serve notice on the other party.

After 60 days, he went back, and the tribal court did tell him that they didn't have any money to do it. So that kind of killed it there. Then he refiled again in 1983. In 1983 the opposing party was served notice, summons, and complaint.

Since then, Jerry Spotted Tail has requested another judge to be brought in. He went to the judiciary committee on several occasions, and he did go to the tribal council too. He believed that the two judges at that time could not give him a fair hearing. Since then, he has requested on several occasions for another judge to be brought in to hear the case.

Just recently, the Dakota Plains Legal Services filed another divorce complaint, and they also filed a motion to dismiss the divorce complaint of '83. This is no fault of Jerry Spotted Tail, but rather the judiciary committee and the judges--well, really it's the judiciary committee at this time. They said at one time they would get him a judge.

So right now we are still in the process of trying to get a hearing for his divorce.

CHAIRMAN PENDLETON: Well, we appreciate your testimony but we don't know how far we can go with this one, but at least it becomes a part of this record.

MR. OLIVER: Yes, that was our intent, sir.

CHAIRMAN PENDLETON: Thank you very much, sir.

MR. OLIVER: Sir, I have a couple of other cases that I would like to state for the record.

One is a criminal case. The defendant was jailed. He was arraigned. He was not given bond, not because of the seriousness of the crime, but rather because he was from another reservation, another State.

CHAIRMAN PENDLETON: Okay. And the other one?

MR. OLIVER: Another case involves two issues. It was a misjoinder. One was a custody case and a restraining order. It was a misjoinder in that the custody and the restraining orders have separate procedures with separate remedies, but nevertheless the custody and the restraining orders, the two hearings, were joined, and the restraining order was dismissed and custody was given to a daughter.

Now, the custody was for an elder man. He was 66 years old. His wife was 59. And you know, they did not prove the wife to be incompetent in any manner. They are legally married. Nevertheless, the judge did give custody to the daughter. So that upset a marriage for 15 years.

CHAIRMAN PENDLETON: Thank you, sir.

MR. OLIVER: Thank you.

CHAIRMAN PENDLETON: Next we have Paul Valendra, who is the former chairman of the Rosebud law and order committee. Is that correct, Mr. Valendra?

MR. VALENDRA: Yes.

[Paul Valendra was sworn.]

CHAIRMAN PENDLETON: Thank you, sir.

Testimony of Paul Valendra, Former Chairman, Law and Order Committee, Rosebud Reservation

MR. VALENDRA: I was at Rapid City for a couple of days, and I got home this morning and I saw in the paper, the Rapid City Journal, all the atrocities that the Pine Ridge police department had allegedly done. Then on the news this morning, I got wind of this hearing. The media stated that some of the

violations that you were looking into was the 15-year-old girl in Rosebud that had been jailed illegally for 10 days with no charges filed and stuff.

CHAIRMAN PENDLETON: Let me be clear. It's not so much that we are looking into violations. We are taking testimony with respect to the Indian Civil Rights Act. But we are not conducting an investigation into any violations at all. But this becomes a matter of record as we begin to, at some point in the future, develop policy recommendations to the administration and to the Congress with respect to the Indian Civil Rights Act.

MR. VALENDRA: Yes, sir. And after being here at the hearing this afternoon, you know, I'm glad that the Commission is as openminded and stuff, and I'm glad that there were some appropriate tribal people here to articulate the response.

Anyway, what I am getting at, I guess, is that that tends to happen to us with the media quite a bit. The Washington Post articles have been referred to. I supplied a lot of information for Mr. Ben Weiser. I was chairman of the law and order at Rosebud at the time that he was there, and none of the positive aspects seemed to come out in the article.

The reason I am here to testify, since I'm here, is I just want to get a few things clarified as far as the testimony that you had previously taken.

Number one, last year the Rosebud indirect cost was 28 percent. And the Bureau of Indian Affairs, through the central office and the area office, takes quite a bit of the banded monies. The Rosebud tribal court ended up with about \$180,000 last year. But the tribe, with their 28 percent indirect costs--it's not their fault. It's not that they are there to get 28 percent of the program.

As Judge Rousseau pointed out, it shouldn't be like a tribal program; it is an entity of the government, a separate entity.

This indirect cost rate is established by the inspector general's office, and the tribe financial department, they sit down and take the tribal income, all the programs that they handle, and this is the rate they come up with.

My suggestion would be to put a limit of 5 or 10 percent on these types of monies coming down that can be taken by the tribe, and in that way the tribe won't be penalized for under-recovery or over-recovery.

The tribe is in a bind. They don't want to take the 28 percent, but if they don't take it, in the audit they get penalized.

CHAIRMAN PENDLETON: Let me be clear so the public understands.

The 28 percent figure in dollar amounts of money means that can come off the top. If you don't spend all of the grant, you must return that portion of the 28 percent that you got in the beginning because you didn't expend all of the grant money; is that correct?

MR. VALENDRA: Well, a better example might be the tribal court or the criminal justice is a 638 program through the Bureau. The Bureau responsibility, they contract it to the tribe. You take Headstart--now, Headstart has a 10 percent maximum that they will let the tribe capture for indirect costs. What I am suggesting is that maybe this same type cap ought to be put on these crucial programs, such as criminal justice.

CHAIRMAN PENDLETON: Well, I can't comment.

Go ahead.

MR. VALENDRA: Also, the judge referred this morning to the LEAA, and in 1981 the Rosebud Tribal Court budget was \$400,000, and the band analysis, the tribe sat down with the Bureau of Indian Affairs and they had these monies from the other grants, so they only needed about \$126,000 from the Bureau. Consequently, LEAA was taken away, disbanded by the administration, and there was a void or a vacuum left there. The tribal court went from a funding level of \$400,000 to \$126,000. That is why the tribal courts are in such bad shape today because these monies are cut every year.

Also, I'd like to make comments about a lot of these civil rights cases that you have talked about and heard today. You should understand that most of them are initiated by lay attorneys in the tribal court. So, you see, people really have a good interaction with their court. They have ready access to their court.

Also, the comment about the prosecutor being law trained and the public defender lay. Well, they were the same two individuals that 6 months ago, their jobs were inverted. So I think that's pretty healthy, too, when you take the prosecutor and make him the public defender for a while.



Getting around and speaking to some Federal court judges and U.S. attorneys through these seminars about justice in Indian country and stuff, they always mention that there is a lot of trivial matters that come before the Federal courts. And I guess, as far as my civil rights testimony here today, I'd just like to put on the record that I and a few others are of the opinion that maybe the Indian Civil Rights Act has stifled tribal court because in there you have the limitation of 6 months and \$500. That is a maximum penalty that they can levy. No matter what the tribal law, such as rape, child abuse, whatever, the maximum penalty they can impose is 6 months or \$500.

I'm saying this is bad. We have to rely on the Federal system to prosecute our major crimes and stuff, and they are underbudgeted, understaffed, insensitive, and 100 miles away. I know that didn't come up today, but I sure didn't want you to leave town without imprinting that on you.

Not to mention that the community knows the social mores and standards and problems, and they know who the people who need to go to jail are and who aren't. Once you take these people out of the community and take them up into the Federal system and prosecute them, there tends to be no justice.

It looks like the tribal court, the tribal judicial system, gets blamed for a lot of the injustices in Indian country that it's not responsible for. You have the Bureau of Indian Affairs police and you have the U.S. attorney's office. They do a good job in a lot of instances, but most of the time they are understaffed and underbudgeted. And it gets right back to not only should the tribal courts be given more money to come up to an appropriate operating level, but they should also have more funding put in so they can take more crimes under their umbrella.

And some of the good things about tribal court are that people--you know, they get to come up here and air their grievances and stuff like they have done today, and that opportunity is certainly afforded to them in tribal court. They've got the tribal judiciary committee; they've got the judge; they've got the council. And I think it's really a unique system of justice, that even though it's a little bit different than the western courts, the people do have a lot of interaction in it.

I guess that's all I've got to say.

CHAIRMAN PENDLETON: It is very thoughtful testimony. Thank you very much.

Mr. Lavell, tribal attorney for the Colorado River Indian Tribes.

[William Lavell was sworn.]

CHAIRMAN PENDLETON: Thank you, sir. Go right ahead.

Testimony of William Lavell, Tribal Attorney, Colorado River Indian Tribes

MR. LAVELL: Thank you for this opportunity, Mr. Chairman. You have raised an issue several times here that I would like to respond to on the record.

I would point out that the Colorado River Indian Tribes will take advantage of your kind offer to submit written testimony for the record. In addition, we are--and there are representatives of other Arizona tribes here--we are meeting with the Inter-Tribal Council of Arizona Monday afternoon in Phoenix to discuss this hearing and plans of the various tribes in Arizona, and I'm sure some of them will want to submit some comments for the record.

I have been practicing law for 35 years, 21 years in Indian law in various capacities.

You raised some questions to the effect that perhaps the trust status of Indian lands may interfere with its alienation, and therefore interfere with the economic development on the reservation, thereby, of course, disadvantaging the people of the reservation; and, secondly, that perhaps the doctrine of sovereign immunity may discourage economic development in the same kind of way, and thereby in the same way disadvantage the people of the reservation.

I would just like to point out, first, concerning the trust status of the land, that there are, of course, several statuses of lands on Indian reservations. There's allotted land of which the beneficial right is in the individual, and then there is tribal land with the beneficial right in the tribe. Either one can be leased, and the leasehold can be mortgaged, and that is the usual device in raising money for some kind of development.

You asked the question: If I put together a good deal involving a piece of Indian land, can I get it financed? The

answer is yes. There are a lot of ways. There's the recent Indian Tribal Tax Status Act which authorizes Indian tribes to issue bonds for a number of purposes, and the interest on those bonds is tax free. That is a form of borrowing. That is usually a project, of course.

On the Colorado River Indian Reservation, we recently leased some property for a gypsum mine, and another piece of property for a wallboard plant to use that gypsum. It's going to be a \$10 or \$12 million investment.

I will now jump to the sovereign immunity problem. That is dealt with in each case as the particular transaction requires it. In that transaction, in dealing with the other party, it was sufficient we waive our immunity for declaratory relief and in relation to certain matters we submit to arbitration, certain limited matters, declaratory and injunctive relief.

So what I'm saying is that we have enough tools now to deal with sovereign immunity to satisfy most--I would say all--reasonable people who want to come in and do business on varying bases.

So to deal in terms of, "Well, is it an impediment?" it is more of a protection than an impediment, and a necessary protection at this stage of development of tribal governments. Each tribe can waive or not waive as it sees fit any particular transaction before it.

Going back to the trust status of land, I don't think there is a tribe in the country that would want anybody to even think about dealing with that. As I say, it is not an impediment to financing because you can create a leasehold up to 99 years, and you can mortgage the leasehold where that is necessary in any given transaction.

I would have one third point I would like to make. I would urge you to have a transcript of this proceeding made as soon as possible. A number of things have been said. I am referring particularly to the testimony of the first panel that was here yesterday morning. I'm sure that a number of tribes would have a great deal to say about some of that testimony, of ideas as to what should or should not be done. I think you should get as broad a base of those ideas as you can. I would urge you to have the transcript sent to all tribes and give them a substantial period of time in which to add to the record of this hearing.

Since you may not be having--I understand you have a problem. You probably will be having other hearings, but we will respond in writing. If you have a hearing in Phoenix, we, of course, will appear at that hearing.

That's it.

CHAIRMAN PENDLETON: Thank you, sir. Let me make some closing remarks here.

We have a problem. Two of our chairmen are here and we need to show for the record that we can do something, but we can't do all we want to do. You must understand there has to be a respect for time. Commissioner Destro did have to leave for other matters.

This is called a minihearing. It's an experiment on the part of this Commission, to have two Commissioners present at a hearing in order to divide it up so we can probably have more than one hearing on a subject.

As our rules say, those Commissioners have to be from different parties or from one party and probably from no party. It can be a Republican and a Democrat, or a Republican and an Independent, or a Democrat and an Independent. We do not have that person here.

I make that announcement because if there is some question about those who stick to the rules, we want to see what we can do with this one.

Counsel has persuaded me that we should have some open session with Mr. Lunderman. Begrudgingly, I allowed that request, and if Mr. Lunderman will come forward, we will swear him in and have some brief testimony.

Let the record show that Mr. American Horse was here, and we will discuss things with him later, but we will take you today, sir, if you don't mind.

[Alex Lunderman was sworn.]

CHAIRMAN PENDLETON: Thank you, sir. Have a seat.

MR. HOWARD: I'd like to add to the record also that both Mr. American Horse and Mr. Lunderman agreed to appear before the Commission when we come to South Dakota again to hear testimony from the Cheyenne River officials who did not appear today. Mr. American Horse would just as soon appear at that

time than give a statement in the open session today. Mr. Lunderman would like to do both. So we would be glad to hear your statement in this open session, but we look forward to speaking with you when we come back.

Testimony of Alex Lunderman, President, Tribal Council, Rosebud Sioux Tribe

MR. LUNDERMAN: I want to thank the Chairman of the Commission and the Commissioners for this opportunity to speak. I explained to Mr. Howard out in the hallway why we were delayed. However, I was here yesterday all afternoon also. We were at the Howard Johnson.

I think we are talking about the Civil Rights Act. Also, for the record--and I'm willing to bring documents back the next time, and between now and then I would like to send some documents to you. I am not here to defend anything. I am a new chairman that took office November 4. I have been involved in this system since 1980; I have been what they call an urban Indian for 30 years. I left the reservation when I was 17 years old and I came back in 1977.

I have seen things also. That's why I'm where I'm at today. But to change the system, you need to get in a leadership role. And that is what is happening today.

So for the record, I want to enter the 1934 Indian Reorganization Act and all the amendments. They are very important. That is a very important document for the Rosebud Sioux and the Sioux Nation and all Indian organizations.

I also want to enter some documents that I will send to you on our treaties. Those are very important. When we talk about civil rights violations, I believe the tribes have been violated for 51 years, because we live under an IRA act. And who has violated us civilly, criminally? It wasn't ourselves.

So these are the things that I'm going to present. That's why I want them on record. I want all acts on record, and I will present them, all Supreme Court decisions on record, and we'll see who was violated or who is violating who. If this Commission has any authority at all, I would like for them to look at these things that are going to be presented the next time around, or before that, and make those changes.

It is too bad we have to sit up here and listen to each other complain about each other, but it's good. I'm glad it's that way. Because it was meant to be that way. That is why I

have no fear. I'm fearless. But it is a sad day, the last 2 days. I knew what was going to happen here, and I welcome that opportunity to sit here and enter into the record what I just said.

I want to enter other documents.

I have been involved in that court system since 1980 when I became a tribal councilman and a vice-president and now a president. I know what's going on. There's many factors that affect our tribe. It's us not understanding who we are. And that is the problem.

That is really all I have to say. I'm not here to defend Alex Lunderman and the Rosebud Sioux Tribe. We know what the problem is. It's up to that tribal council, and it's up to the Interior Department to carry out the directions and the ordinances and resolutions of that council. That's the problem.

The Civil Rights Act for that period of time, it was good. I heard the Martinez act. That's good, too. Why is that such a big issue? Why do they want to make race a big issue?

I heard the Governor say that a couple of weeks ago--race. Is that the issue? On our reservation we assumed jurisdiction over other Indians. My wife is an Oglala. She throws this at me, too, sometimes. So do others. I said, "I don't care. On this reservation we have jurisdiction. I don't care where you're enrolled at."

And we will do it until somebody stops us.

Is the purpose for State jurisdiction over our court systems? I don't know. It appears that way to myself. Or is it some other type of changes that are needed? The changes have to come from within, not from out there. Each one of us has something. We have a conscience within this body in our mind. You know yourself what is right or wrong, yes or no. We all have a conscience.

So I don't want to take up too much more time. I'm not here to complain about anything. I just want to enter what I said for the record and more testimony that I will develop.

So I want to thank you again very much, and I will be glad to come back any time. Thank you.

CHAIRMAN PENDLETON: Thank you, sir.

Before we finally close out--is Mr. LeBeau here?

MR. HOWARD: Joan LeBeau is here.

CHAIRMAN PENDLETON: Joan LeBeau is here. Did you want to make some concluding statement to these proceedings? I don't have to swear you in again. You're still under oath until these are all over anyway.

Testimony of Joan LeBeau, Council Member, Cheyenne River Reservation

CHAIRMAN PENDLETON: Ms. LeBeau, did you want to come talk to us again? Name's not necessary; I think we know. Thank you very much.

MS. LeBEAU: Mr. Chairman, I was asked this morning why I thought our people didn't show up. Yesterday we talked to you a little bit about control. Unfortunately, it has been my experience with some of the individuals that didn't show up today, if they are put into a situation where they don't have control, then they are more apt not to participate.

I called back and asked why they didn't show up, and I have a feeling that perhaps the chief of police and the prosecutor were advised not to come. I was hoping they would come because you people need to hear both sides. It is important if we are going to ascertain our problems at home, which are serious.

The matter of the statement made by our appellate court judge, that decision was thrown out by the tribal council. I happened to be sitting in council that day--I wasn't on the council then--and members of the tribal council were really upset about it. A motion was made to fire the appellate court. Then they withdrew the motion and wiped out the decision. The declaratory judgment, on the advice of the tribe's attorneys, was the next thing they did, which more or less wiped out the appellate court's decision too.

There is one other statement I want to make. There has been a lot of talk here about funding and the indirect costs. I don't know how familiar you are with the 638 contracts, but the 638 contracts--part of the law says that we must have a centralized accounting system. And the indirect costs that we get off of the contracts, including law and order--yes, the tribal council takes that to run the centralized accounting system because we keep the books for law and order or any other program. We take care of their salaries. So that's where the indirect cost money goes, rather than to pay the staff.

CHAIRMAN PENDLETON: Oh, I think we are well aware, those of us who understand nonprofit corporation accounting and operations, that it is not just some money to do with what you want to do with, but it's designed for program administration. I take Ms. Rousseau's statement seriously that a court is not a program; it is a branch of government.

Mr. LeBeau.

Testimony of Gilbert LeBeau, Council Member, Cheyenne River Indian Reservation

MR. GILBERT LeBEAU: I really don't have too much to say after she has explained this, but there have been some statements made, "Leave us alone." People are saying, "Leave us alone; let us do our thing." And looking at the situation, as I review the history, the Indian people are still captive. We have never been released from that.

And like I told some gentleman this morning, the Federal Government has the authority to terminate the treaties. They have done this. They have taken our land, the Indian land that was supposed to be ours. They have done this. With a snap of the pen they can write us off and turn us back out into the dominant society. This can be done. The Federal Government has that authority to do that, so I'm told. They are the ultimate decisionmakers as far as we are concerned.

They have given us the privilege of having a reservation. They have taken and put us on that reservation, and they have given us the privilege of self-determination.

Now, we have been in session some almost 2 years. I'm worried--both Joan and I and another friend of mine, another veteran, are subject to resolution 190. When you are barred, you are barred. Within an Indian reservation, when that tribal council makes a decision, they will hold to it. And they held us to that for almost 2 years. We could not get a job; we could not be a part of the tribal council. They had us in that position.

The thing that bothers me is this, that I am a veteran, a combat veteran. I made that remark yesterday. I laid my life on the line in World War II--so did my other buddy--to defend the Constitution of the United States, the freedom that we enjoy today, thereby making it possible that they can draft resolutions and discriminate the way they have done to the three of us on this reservation.



Now, we defended the Constitution of the United States; yet, we could not get justice, no place.

Mr. Cournoyer was just up here today. He's looking for the same thing--justice.

Where does an Indian go? That's my question. We voluntarily enlisted in the service and laid our lives on the line, and many of our boys are gone because of that reason, to defend that Constitution of the United States for the freedom of what we enjoy today.

We made it possible for those people to take that kind of action against us. And it bothers me, for the fact that there are other Indians coming behind that this same thing might happen to them. And I don't want to see that.

We had no recourse, no place to go.

And that's about what I've got to say. And I do know that our tribe hangs their hat on sovereignty, which is bestowed on our government. But there is a certain amount of sovereignty that is jeopardizing the lives of some people.

That's about all I've got to say. Thank you.

CHAIRMAN PENDLETON: Do you have a question, counsel?

MR. HOWARD: Just one question for Joan LeBeau. You mentioned that you had hoped the chief of police and the prosecutor would be here today, but that they were told not to come?

MS. JOAN LeBEAU: I rather suspect they were told not to come because they knew they were supposed to be here. And when the chief judge and the chairman didn't show up, I imagine that is what has happened. Because one them is on annual leave and the other one was there and he--

MR. HOWARD: Was where?

MS. JOAN LeBEAU: At work. The chief of police was there. And our chairman isn't there today, either, not in the office anyway. I talked to the acting chairman, Mr. Eaglestaff. And he said that the chief of police had told him that he didn't know that he had to come. And I said, "I don't think that's so. I think he did know."

But like I said before, I'm sorry they are not here. Their side needed to be heard.

CHAIRMAN PENDLETON: I think you're right. Just let me say in some summary that the record will be kept open for longer than 30 days because of this situation. And we have some reason to suspect retaliation against yesterday's witnesses. We have some reason to say to the public that the nonappearance of people who were to testify today cannot be considered a successful boycott of these proceedings. It is our intention that we hear the other side in public testimony. And we will take all the steps within our power to make sure that comes off. And we think the other side needs to be heard.

I want to thank all of you that came from short and long distances. For Commissioner Destro and for me, I do want to give our staff a tremendous vote of thanks and confidence and all of that. It is probably one of the best hearing sessions that I've been to. The questions were good; the witnesses were good; the proceedings went along very well. I think it's nothing but a tribute to the work of the staff of the U.S. Commission on Civil Rights. I'm just happy to have been a part of it, and my job was made easy.

MS. JOAN LeBEAU: Mr. Chairman, I would like to assure you, Mr. LeBeau and I and Ms. Chasing Hawk, who was here yesterday, retribution will not come from us. I cannot guarantee--the subtle things--

CHAIRMAN PENDLETON: I'm not saying that, but I'm saying we have some suspicion of retribution or retaliation, but I take your comments very seriously. The fact that you are here shows you have concern for your reservation, a very genuine concern. That, too, was my other remark. And we appreciate the fact that you even want to come back and tell us how you feel about things. Ms. LeBeau, I think you make sense. There's a lot of wisdom in that.

Thank you all for coming, and these proceedings are recessed, and the final record shall be kept open for longer than 30 days. I will ask my colleagues how long they should be kept open. Thank you.

[At 4:10 p.m. the hearing was recessed.]

PROCEEDINGS

Session of August 21, 1986

CHAIRMAN PENDLETON: Good morning. This hearing on enforcement of the Indian Civil Rights Act is now reconvened. I am Clarence M. Pendleton, Jr., Chairman of the United States Commission on Civil Rights. With me today are Commissioner Robert A. Destro; Francis White Bird, Chairman of our South Dakota State Advisory Committee; Acting Deputy Staff Director James Mann; Acting General Counsel William J. Howard; Assistant General Counsel Michael C. McGoings; and Staff Attorneys Debra Miller and Neil McDonald.

Our purpose today is to conclude the Commission's first hearing on enforcement of the Indian Civil Rights Act of 1968. We will hear testimony from officials and members of the Cheyenne River, Rosebud, and Oglala Sioux Tribes. At about 5 p.m., there will be an open session. Anyone wishing to make a 5 minute statement relevant to the subject matter of this hearing during the open session must give his or her name to Commission staff as soon as possible.

As I made clear earlier, we will not permit testimony which tends to defame, degrade, or incriminate any person. Since we are examining enforcement of the Indian Civil Rights Act, it is natural to expect that allegations of ICRA violations will be made. Our focus here, however, is not on the performance of specific tribal officials, but on the performance of tribal governmental institutions. We will not permit this hearing to be used as a public forum for attacks on a person's character. Nor will we permit allegations of criminal misconduct to be made about specified persons.

I am obliged also to refer to section 1505 of Title 18 of the United States Code. This criminal statute prohibits individuals from interfering with the testimony of witnesses appearing before the Commission and from retaliating against those witnesses for their testimony. The maximum penalties are 5 years in prison and a \$250,000 fine. Mr. Philip Hogen, the U.S. Attorney for South Dakota, has assured me that he will actively investigate and prosecute any violations of this statute.

I will remark for the record that Ms. Imogene High Elk was assaulted a week after her July 31 testimony before this subcommittee. The Commission asked Mr. Hogen to investigate whether the assault was in retaliation for her testimony. Mr. Hogen acted promptly, and I understand the FBI is now

conducting an investigation. Given that the investigation is pending, I will only say at this time that my colleague and I take the matter of retaliation against anyone for anything they say before this Commission very seriously.

We thank you all for coming today. Before we begin, let me emphasize that no one is on trial today. We are not here to litigate allegations. The Commission does not hold trials. It finds facts. These facts provide the basis for legislative or executive action. We are here to examine the extent to which, from a systematic standpoint, the Indian Civil Rights Act of 1968 is being enforced, so that Congress may act in the manner it sees fit, with the benefit of the Commission's investigation.

Let us begin.

I'm sorry. Excuse me just a second. Let me swear you in, and then Mr. Destro will make a statement.

[Bertha C. Two Bulls was sworn.]

CHAIRMAN PENDLETON: Commissioner Destro.

COMMISSIONER DESTRO: I will be very brief. Thank you, Mr. Chairman.

I would like to, for my own part and certainly on the part of the Commission, if I am authorized to do so, thank the witnesses for coming today. Although you didn't come the last time, I certainly have no objection to coming back, and I hope if there have been misunderstandings about our purpose here, either they have been cleared up or they will be cleared up.

I won't recount the Chairman's comments with respect to the purpose of the hearing. That has already been made clear. But I want the witnesses to understand today, given the scenario, that I don't begin this hearing--and I didn't begin the last one--with any preconceived notions about the way things are. I came here to learn.

I would have to say, though, that I was most distressed when I got back to Washington to learn that the Washington Post had some preconceived notions about the way this hearing went and the issues that we were describing. And I single out the newspaper because the newspapers here and the newspaper in Minneapolis, I thought, did a very good job of recounting the scenario.

But I think that raises a point which we should all keep in mind as we look into the question of the Indian Civil Rights Act, which is how little Washington, D.C., really cares about the fate of the Indian nations in this country. It seems to me the controversy the Washington Post noted was the typical Washington-area controversy over politics. Controversy, in my mind, is certainly essential in a democratic society, but it is important to keep in mind what this hearing is really all about. It's not a trial of anybody. It's not an investigation with the intent of proving anything about tribal courts, about tribal justice, about tribal sovereignty, or the entire system by which Congress deals with the Indian nations.

I consider myself privileged to be on the Commission, and I see the Commission as one of the few agencies that can start to raise the question of what's going on, not only here but in other places in the country, with respect to the Indian nations--and not just the negative things. Too often the press and this Commission itself is focused solely on the negative things--what's bad, rather than about what is also good.

So the watchword I came here with, not only a few weeks ago but today, is to be careful in both my questions and in my understanding about what's going on. I am well aware that there are many more than two sides to every single one of the questions that we are dealing with here today, and I have no intent, and I'm sure the rest of the Commission has no intent, to be political in the negative sense of that term, because the issue here in my mind is not sovereignty versus civil rights, but it's sovereignty with civil rights.

With that, I give up my time back to the Chairman and our witness. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON: You should have kept going. You sounded good. I'll turn now to counsel.

Testimony of Bertha C. Two Bulls, Associate Judge, Pine Ridge Tribal Court

MR. McDONALD: Judge Two Bulls, would you please state your name, occupation, and address for the record.

JUDGE TWO BULLS: My name is Bertha C. Two Bulls, and I'm an associate judge for the Oglala Sioux Tribe in Pine Ridge, South Dakota, and my box number is 280.

MR. McDONALD: Thank you. Would you please explain section 4 of the tribal code which waives sovereign immunity for some subsidiary boards of the tribal government?

JUDGE TWO BULLS: Section 4 of the Oglala Sioux Tribe--it waives sovereign immunity, but section 21 of the Oglala Sioux Tribal Code says that we could bring boards to court, but they have to exhaust tribal remedies.

MR. McDONALD: Thank you. Will you tell us about your experience in enforcing the court's judgment against the Oglala Sioux Construction Board?

JUDGE TWO BULLS: The Oglala Sioux Construction Board went to court, and in lower court they won the decision. When it went to the appeals court, the appeals court reversed the decision. And at the time when the order was to be enforced, the board at that time felt that the order didn't mean anything, so the case was assigned to me to see that the appellate court order was issued. But it took bringing the board members three times into tribal court and threatening them with 90 days in jail and a \$180 fine before they obeyed the court order.

MR. McDONALD: And what happened? Was there a check presented for payment?

JUDGE TWO BULLS: Yes. And during that time, they obeyed the court order, and then they stopped payment on the check. They wrote the check and signed the check like the court order told them to do, but they called the bank and then they stopped the check. So that was the second time that they had to be brought back to the court, in the appellate court, and I had to enforce the order.

MR. McDONALD: Thank you. You mentioned the doctrine of exhaustion of administrative remedies. Could you tell how that works at Pine Ridge?

JUDGE TWO BULLS: Well, they have a grievance committee. If you have a grievance, you have a right to a hearing. And if your grievance is denied or granted, then you have the right after that to go to tribal court, but you have to go through a process.

MR. McDONALD: How many levels are there to that process, for example, a complaint against a policeman?

JUDGE TWO BULLS: Okay. That starts from the review board to the grievance committee to the commissioners, so it goes through about three or four processes before it finally gets to the tribal court.

MR. McDONALD: Does the system work well?

JUDGE TWO BULLS: No, it doesn't.

MR. McDONALD: In what way doesn't it work?

JUDGE TWO BULLS: Because of the same people being on the review boards and the grievance board, and they are also commissioners. So by the time--the people, you know, just give up after the first hearing because it takes so long, and they have to just continually face the same people. They are all the same--they are the grievance committee, and then they are the commissioners.

MR. McDONALD: Can you explain what happened to the halfway house program at Pine Ridge?

JUDGE TWO BULLS: We utilized the halfway house, and it was a resource for our alcohol problem on the reservation, and the funding was lost due to embezzlement. And Washington was going to fund it again if the tribal president prosecuted or brought charges against the director at that time, which charges were never brought against her, so then our halfway house was closed.

MR. McDONALD: Have other programs been lost in that manner?

JUDGE TWO BULLS: Well, upon information and belief but at the time of--you know, certain programs have been lost, and it is my understanding that they were lost because of embezzlement, and the people were never properly prosecuted, so those programs were lost, yes.

MR. McDONALD: Was one of them dealing with the prisoners working on a farm? What was that one called?

JUDGE TWO BULLS: Yes, the honor farm. That was lost through politics and through many people having their hands in the operation. And that was also a good resource, you know, for our prisoners who were sentenced to long periods of time, say 6-month sentences and 30-day sentences. That program was also folded because of embezzlement.

MR. McDONALD: What are the facilities for juvenile offenders at the Pine Ridge detention facility?

JUDGE TWO BULLS: We have absolutely no facilities at all for juveniles. They are treated just like an adult. They are thrown in jail just like--it doesn't make any difference what age they are, they are thrown in jail with the adults.

MR. McDONALD: Do you think that the Indian Civil Rights Act provisions should be enforceable through an action in the Federal court as they were before the Martinez case?

JUDGE TWO BULLS: Well, I think that the Indian Civil Rights Act should be applied and that it should be enforced, but in a lot of cases it applies to some and then it doesn't apply to anybody at all.

MR. McDONALD: So your answer is it should be?

JUDGE TWO BULLS: Yes, that it should be enforced.

MR. McDONALD: A cause of action?

JUDGE TWO BULLS: Yes.

MR. McDONALD: Thank you. We have lots of other questions, but I think it's time for me to turn it over to the Commissioners.

CHAIRMAN PENDLETON: Commissioner Destro, do you have some questions?

COMMISSIONER DESTRO: I just want to clarify your answer to the last question. You said that you believe that the act should be enforced. Would you like to see it primarily enforced in tribal courts so that the decisions of the tribal courts stick, or would you prefer to see it so that if you can't get what you need out of the tribal court or the tribal council you can go to Federal court? I don't think the answer was clear.

JUDGE TWO BULLS: I believe that the Indian Civil Rights Act should be enforced, and I think that if it is enforced in the court system, I think our court would be honored more.

COMMISSIONER DESTRO: The tribal court.

JUDGE TWO BULLS: Yes.

COMMISSIONER DESTRO: So what you'd like to see is a strengthening of the act as it relates to tribal court



enforcement, and not have anybody be able to ignore its judgments?

JUDGE TWO BULLS: Yes, sir.

COMMISSIONER DESTRO: With respect to the cases that you mentioned, why, to your knowledge--and if you don't know, please just say so--weren't prosecutions brought in the cases that you mentioned?

JUDGE TWO BULLS: In the case of the halfway house, my sister was the director after the director that caused the loss of the halfway house. Well, my sister is deceased at the present time. But she received a letter, and it was a letter from Washington stating that, if that person that embezzled the funds from the halfway house was prosecuted. So when she took the letter to the president of the tribe, he stated to her, "I don't want to prosecute that lady because she really backed me up in my campaign." That was her answer.

COMMISSIONER DESTRO: Now, would you tell us what the relationship of the tribal prosecutor is to the tribal court and the tribal council? I mean who actually brings the actions? It's not the council itself, is it?

JUDGE TWO BULLS: Are you talking about, say, embezzlement?

COMMISSIONER DESTRO: Right.

JUDGE TWO BULLS: Okay. It would be the president of the tribe that would bring the charges, yes.

COMMISSIONER DESTRO: So he would file the charges?

JUDGE TWO BULLS: The charges. He would be the complaining witness.

COMMISSIONER DESTRO: All right.

CHAIRMAN PENDLETON: If we could just stick to that a little bit longer. On Commissioner Destro's question on who brings the charges, suppose the prosecutor had evidence of that. What could the prosecutor do? Are you saying the prosecutor requires clearance from the tribal council before there can be an action? Is that what you mean?

JUDGE TWO BULLS: You see, in an amount of money like that, all the tribal president would have to do would be to refer it to a criminal investigator, and it would come directly to

Federal court on any large sum of money. So it would just bypass the tribal court.

CHAIRMAN PENDLETON: Are you also saying protection of the embezzler was more important in this case than providing the halfway house services?

JUDGE TWO BULLS: Yes.

CHAIRMAN PENDLETON: Counsel.

MR. HOWARD: Could you please tell us, Judge Two Bulls, how well informed are your tribal members about the Indian Civil Rights Act.

JUDGE TWO BULLS: Well, I don't feel that they even really care until they have an encounterment with the law. I have never really heard it being discussed amongst the people, or at meetings it's never really an issue. The only time I have ever really talked about it was with the other judges and with the law and order committee. But the people in general, I don't think they even realize about the Indian civil rights.

MR. HOWARD: But are they apprised of their rights during an arraignment, certain rights that are contained in the Indian Civil Rights Act?

JUDGE TWO BULLS: Yes, they are.

MR. HOWARD: Could you tell us how that is done?

JUDGE TWO BULLS: The people are arrested on sight if they are seen drunk. There's no charges; they are just arrested upon probable cause or information and belief. They are incarcerated, and then the following day, if it's during the week, the charges are filed. The police officers review the complaints, and they send them to the prosecutor. The prosecutor reviews the complaints. They are given to the complaints clerk, and then they are brought over for arraignment. Then there is an arraignment sheet attached to the complaints. Then you read them their rights.

So I feel that they have to prove their innocence; that they are already guilty, the way they are arrested. The process--I think it's backward. So they are already guilty, and then after they are already arrested and after they are already incarcerated and after they are in jail so many hours, then we read them their rights.

MR. HOWARD: How would you recommend that be changed?

JUDGE TWO BULLS: I think if we could get together as a tribe, the law and order committee and judges, and have a lot of input from, say, professional attorneys to change that system of arresting on sight--because I really feel it is a violation of their rights to be thrown in jail for it. And most of the time when they do go to jail, a lot of them are the victims. They are the ones that are going to the police and reporting these incidents, and then they end up in jail. So I would like to see a change in the complaint process of how people are arrested.

CHAIRMAN PENDLETON: Just one more question. From what you're saying this morning--and I hope I'm not putting words into your mouth, and if you don't want to answer I understand--are you really saying that the Indian Civil Rights Act really has no place in the tribal justice system?

JUDGE TWO BULLS: Well, it has a place.

CHAIRMAN PENDLETON: I mean an active place.

JUDGE TWO BULLS: It has an active place but, like I said, I feel like it's backward. We are putting them in jail, and then after we already have them in jail and incarcerated and in for so many hours, then we are reading them these rights.

CHAIRMAN PENDLETON: But if you say they are guilty before they are innocent, then what you are saying is it doesn't really apply in the process.

JUDGE TWO BULLS: Yes. I mean, to me it doesn't apply because they are arrested, and then their rights are read to them after they are already incarcerated and arrested. They are detained. They know absolutely nothing of their rights up until they come before the judge, but that's already after they have been in jail. Sometimes they might be in jail for 72 hours, through the whole weekend, before their rights are read to them.

CHAIRMAN PENDLETON: Thank you very much.

Any more questions?

MR. McDONALD: Well, we had a question about the lay advocates. Can you explain the lay advocate system and whether you feel they are doing an adequate job and if there is a need for some more training of those advocates?

JUDGE TWO BULLS: The tribal advocates, which are very few--it takes a lot of courage not to have any law background and to try to defend people in their rights. They really do a superb job. But if they had further training or if there was a program or, say, like a bar association or some type of training for them, it would make the tribal court system better. But they do do an outstanding job, most of them, and with more training they would be an asset to the tribal courts.

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: Thank you very much.

We will now hear from Johnson Holy Rock, appellate judge from the Pine Ridge Tribal Court. Is he here?

[Johnson Holy Rock was sworn.]

CHAIRMAN PENDLETON: Counsel.

Testimony of Johnson Holy Rock, Appellate Judge, Pine Ridge Tribal Court

MR. McDONALD: Judge Holy Rock, would you please state your name and occupation and address for the record, please.

JUDGE HOLY ROCK: My name is Johnson Holy Rock, and I am presently on the Oglala Sioux Tribal Court of Appeals panel as an alternate judge, taking the place of one of the associate judges serving on the panel, who is incapacitated at the present time.

MR. McDONALD: Since you have been on the court of appeals, what types of civil rights violations, if any, have you taken note of?

JUDGE HOLY ROCK: Well, in the short time I have had an opportunity to serve on the appellate court, we had two cases, one of which was referred to just previously by the witness preceding me, in reference to a seeming tendency to deny due process, the tendency to remove individuals from responsible positions without a hearing, without charges, without having an opportunity to face the issues in administrative hearings before being removed. It has been done arbitrarily. And consequently, in pursuing the quest for redress of the grievance, the question came before the judicial system and finally made its way to the appellate court at the time I came on duty as one of the appellate judges.

MR. McDONALD: Are civil liberties scrupulously observed by the tribal government when Federal funds are used?

JUDGE HOLY ROCK: Will you repeat that question, please?

MR. McDONALD: Does the tribal government observe personal liberties when Federal funds are used? You have made a statement, I believe, in our interview, concerning your views of the duty of the tribal government when Federal funds are involved.

JUDGE HOLY ROCK: I think that the tribal governments--I don't know about other reservations but on Pine Ridge--have a tendency to still exercise the traditional tribal governmental processes, although since 1935 a constitution and bylaws being adopted by vote of the people at large is in existence, in which the constitution and bylaws has placed certain limitations on the powers of tribal governments.

But heretofore, prior to 1968, individual rights were not accorded recognition--more a recognition of the rights of the people as a whole, and the legislative actions of the tribal government reflect that. Because there were no individual rights prior to 1968, the courts were unable to, without an existent basis of individual rights and freedoms at that time, could not legally or judicially accord recognition of those individual rights until the Indian Civil Rights Act was enacted.

Since then, at times there is a conflict between the legislative body and individuals or organizations in regard to the individual rights and freedoms, as required by the Indian Civil Rights Act, have not been viewed in all its entirety and consequently ended up in the tribal judicial system.

MR. McDONALD: The appellate court at Pine Ridge is made up of tribal elders. Is this a requirement of the tribal code, or is it a custom based on tribal traditions?

JUDGE HOLY ROCK: The reflective actions that emanate from administration of tribal government have a tendency to reflect traditional tribal organizational processes that existed in earlier days, in which individual rights and freedoms did not exist. Under tribal law, the rights of individuals only existed insofar as the people as a whole were concerned, and the tribal law was vested in the chief. And whatever the chief decided was going to take place, everyone had to conform. There was no room for dissent. And if there was dissent to the point where it began to have effect on the control and

administration of the chief's function, that individual or individuals were asked to quietly desist from creating dissension in the tribe. And if they didn't stop, then they were banished. There were no jails; there was no place of detention. So the only way a dissident was gotten rid of was through banishment.

Because of this, there was a tendency, even today, to require conformity. Hence, the individual rights, as incorporated in the Indian Civil Rights Act, are overlooked because of this tendency to practice something, sometimes subconsciously or unconsciously, by a process that existed in earlier days.

MR. McDONALD: Thank you very much. Does the fact that tribal elders are accorded great respect allow the appellate court to act as a lightning rod for the tribal council in reaching decisions which, for political reasons, the council could not reach? For example, cases involving the denial of sovereign immunity to the tribe?

JUDGE HOLY ROCK: I think the sovereignty of tribal government is, I would say, in a state of confused viewpoint, depending upon whether it's the Federal Government, State government, or local government. The sovereignty that vests in the traditional tribal government has changed from that to the now-existing constitutional form of government. And under the constitutional form of government, it has more or less, you might say, watered down the sovereignty as it was known back at the time when treaties were formally entered into between Indian tribes and the Government of the United States.

And although in a weaker position, you might say, there is a tendency to assume that we still have all the attributes of sovereignty and therefore should be immune from legal or judicial processes, except with consent either by tribal governments or by the Congress of the United States as protectorate or trustee. We still feel that we have all the attributes, and therefore constantly come into conflict with the judicial processes as established under the constitutional form as now exists.

MR. McDONALD: Is the tribal court working well, in your opinion?

JUDGE HOLY ROCK: Pardon?

MR. McDONALD: Is your appellate court working well at Pine Ridge?

JUDGE HOLY ROCK: Yes.

MR. McDONALD: Thank you. I have no other questions.

CHAIRMAN PENDLETON: Commissioner Destro.

COMMISSIONER DESTRO: Judge Holy Rock, would you go a little further? You made some very interesting comments with respect to the traditional way of doing things and the way that things are done now. Would you compare for us the way the tribal government was set up before 1935 and now? What is the difference, when you say there is a difference between the old way of doing things and now the new way, that there was more sovereignty then than there is now. What would be the main differences between the old way and this way?

JUDGE HOLY ROCK: The big difference is that in the traditional government much importance was placed upon face, and hence it was unthinkable for anyone to go and plead someone's case before the council or before a chief in regard to something that they would disagree with as far as the chief or the council was concerned. And it was simply not part of the process. You either conformed or you were banished. The problem was not allowed to exist.

The reason for it was to maintain the existence of Indian tribes, to exist as a society and to be cohesive. And to allow dissent in the traditional tribal organization would have been a disaster because then tribal organization would be weakened to the point where they would become susceptible to attacks from neighboring tribes that didn't agree with the existence of such tribes.

And the chief was the law, once you were selected and appointed, and the conditions that were made had to be conformed to. The warrior society was used as the police, and they maintained order. And whatever the chief said was carried out.

If a person or a family was banished, they were made to strike their tepees and move out. They didn't care where. And naturally, a lone family wandering around on the prairie was easy prey for roving enemy war parties, and they were either eliminated or taken prisoner.

So the end result of dissension was effectively removed, where today you have the courts, you have the judges, you have attorneys, and you must prove a case beyond a reasonable doubt

before any further action takes place in regard to the detainment of individuals or their release. But they are allowed to remain in that society, and they can criticize and they can voice their opinions or disagreements and still remain a part of Indian tribal society, whereas in earlier days that was completely not allowed.

COMMISSIONER DESTRO: Do you think yourself that the provision of stronger tribal courts that could effectively deal almost as equals, as an equal branch of government, with the tribal council, would be a positive step toward reinforcing tribal sovereignty? Or do you think that would be a negative step and cut back on tribal sovereignty?

JUDGE HOLY ROCK: Tribal sovereignty pretty much rests with the Federal Government, with the United States Government. Today sovereignty rests on the decisions of Congress or appointed agencies to either maintain and protect our sovereignty before courts of competent jurisdiction, as they are often referred to, which is Federal court, a State court.

In tribal court, presently it's in a gray area. At present the tribal courts, based upon the decision rendered by the Supreme Court in Martinez v. Santa Clara--a part of the decision decided that the place for adjudication of questions in Indian country was in their own forum, and presently our courts are assuming jurisdiction in regard to questions arising out of administration of tribal government, which consequently are bringing sovereignty into play.

It has yet to be determined with some degree of finality whether the courts of the tribe are properly assuming jurisdiction over that sovereignty, or whether at some later point in time that position may be reversed by the Federal courts.

But at this point, it is being put into practice, and it remains to be seen what the initial outcome would be.

COMMISSIONER DESTRO: Do you think that the strengthening of the tribal courts--assuming that all of this is put into place, and that the Federal courts are still kept out of it, as they are after Martinez--do you think that is really a threat to tribal sovereignty as long as the Federal courts are kept out of the enforcement?

Let me rephrase the question. Do the tribal councils, in your view, really have anything to fear by way of Indian sovereignty from the tribal courts?



JUDGE HOLY ROCK: If the tribal courts are the forum for the settlement of tribal questions, and is strengthened to that degree, the sovereignty of the tribe really is not threatened as it would be in a court of competent jurisdiction. There it brings the Federal Government into play. But in their own forum, I don't believe that the tribal government should divorce themselves from their own judicial forums, and hence the position that has been taken to date on that. And as I said, it remains to be seen as to whether that decision would be viewed as a valid position or not at some point in time later.

COMMISSIONER DESTRO: Thank you.

CHAIRMAN PENDLETON: I have just one question. Having given us an excellent analysis of the period prior to and after the Indian Civil Rights Act, which system would you prefer?

JUDGE HOLY ROCK: Will you repeat that, please?

CHAIRMAN PENDLETON: Would you prefer the system before the ICRA or the system after the ICRA and the IRA?

Let me back up just a second. You have outlined very carefully for us something that I think we were waiting to hear, the differences in the systems of administering justice before the IRA and before the ICRA. I am wondering, in your mind, what is the most efficient system for administering tribal justice? The one before or the one after?

JUDGE HOLY ROCK: Presently, under the constitutional form that our tribe is involved in, I would say that the ICRA has to be applied, because then individuals have a voice, with certain rights and privileges; whereas before, prior to 1968--as late as that--decisions in tribal courts did not accord the same rights and privileges as understood elsewhere, because it still was related to prior to the IRA, that tendency to regard the freedoms as a whole, not as individuals.

CHAIRMAN PENDLETON: I guess my last question, then, is this: What do you believe we need to tell the Congress about the ICRA and its enforcement?

JUDGE HOLY ROCK: Will you repeat that, please?

CHAIRMAN PENDLETON: What shall we tell the Congress or the administration about the enforcement of the ICRA? What needs to be strengthened? What needs to make the act more operable?

JUDGE HOLY ROCK: Presently, I would say that basically the ICRA, I think, is sufficient to provide individual rights and freedoms as incorporated in that act. And at present I don't feel that any further amendments or changing of the act should be done until a putative time is given for application of that.

As I stated, presently the tribal court is scratching the surface as far as the full implementation of the act as regards an individual that comes before the judicial forum, and has not really received the full application and result of the act. Although some time has expired since the act, we are just now applying the principles. And I think time would have to be permitted to determine whether, over a period of time, there are positive or negative parts of the ICRA.

CHAIRMAN PENDLETON: Thank you very much for your very enlightening and illuminating testimony.

JUDGE HOLY ROCK: You are welcome.

CHAIRMAN PENDLETON: I will now call on Joe American Horse, president of the Pine Ridge Tribal Council.

Good morning. I will swear you in, if I may, please.

[Joe American Horse was sworn.]

CHAIRMAN PENDLETON: Counsel.

Testimony of Joe American Horse, President, Pine Ridge Tribal Council

MR. McDONALD: Mr. American Horse, would you please state your name and position and address for the record.

MR. AMERICAN HORSE: My name is Joe American Horse. I'm president of the Oglala Sioux Tribe, Pine Ridge Indian Reservation.

MR. McDONALD: Thank you. Have there been recent improvements in the administration of justice in the tribal court at Pine Ridge?

MR. AMERICAN HORSE: Let me read you my statement, and then from there we can go on. Is that permissible?

MR. McDONALD: I'll ask the Chairman.

CHAIRMAN PENDLETON: Well, I think we can submit the statement. What we are trying to get on the record is some answers to some questions that may not be in your statement. But the Chair certainly accepts your complete statement for inclusion in the record and for distribution when the record comes out. Why don't you read it and then we can ask questions following your statement.

MR. AMERICAN HORSE: I want to express my appreciation for giving me this opportunity to address the Commission on the enforcement of the 1968 Indian Civil Rights Act on Indian reservations.

I am the president of the second largest Indian tribe in the United States. It is the Tribe of Chief Red Cloud, Crazy Horse, and American Horse. We call ourselves Lakotas. From time immemorial, the members of the Oglala Sioux Tribe have exercised powers of local self-government, regulating domestic problems, and conducting foreign affairs, including in later years the negotiation of treaties and agreements with the United States.

The most important treaties entered into between the Oglala Sioux Tribe and the United States Government were the 1851 and 1868 Fort Laramie Treaties. These treaties recognized vast land areas as Sioux territory and established essentially all of present western South Dakota as the Great Sioux Reservation.

In 1877 Congress passed an act which confiscated the Black Hills area of the Great Sioux Reservation in violation of the fifth amendment to the United States Constitution, as well as all Sioux territory and hunting rights outside of western South Dakota. In exchange for taking away the Sioux people's affluence and means of subsistence, the Federal Government made many promises.

The 1877 act provides in article 8 that, "Congress shall, by appropriate legislation, secure to them an orderly government." The Supreme Court has interpreted the phrase as follows:

"The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize them, was the highest

and best of all, that of self-government, the regulation of themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs."

Thus, our self-government is precious and something we have always had. It is expressly recognized and guaranteed by the United States Government.

Since 1936 the Oglala Sioux people have operated their tribal government under the 1934 Indian Reorganization Act. We have adopted a constitution and bylaws under section 16 of that act and now have an elected tribal council and a westernized-type court system.

In 1968 Congress passed the Indian Civil Rights Act, which requires the tribal governments to guarantee certain civil rights found in the United States Bill of Rights. Although our governments are relatively new and have been inadequately funded by the Federal Government, we have strived to comply with the 1968 Indian Civil Rights Act. I believe the Oglala Sioux people have one of the most stable governing bodies and court systems in the United States.

Although we have had many problems with our police department in recent years due to the Federal budget cuts, I would like to point out that the tribal police were under the supervision and control of the Bureau of Indian Affairs until the mid-1970s. There were constant complaints from tribal members of police abuse when the police were under the Bureau of Indian Affairs. In 1976, however, the Oglala Sioux Tribe contracted with the Bureau of Indian Affairs under the 1975 Indian Self-Determination Act to assume control of the reservation police force. Although we still get some complaints of police misconduct, the reservation police force has significantly improved under tribal control and we are now much better off than we were when the Federal Government was in charge of policing the reservation.

One of the specific things I would like to mention is that in our revised Code of Oglala Sioux Tribe, which is a court system, there is a section 19, wherein the tribal chairman or the tribal council cannot interfere with the decision of a tribal judge, whether it be chief judge or appellate judge or whatever. There is a section 19 of the revised code. We have Mr. Robert Fast Horse, our chief judge, here, and also my attorney is here.

Are there any questions you want to ask?

CHAIRMAN PENDLETON: Thank you. You went through that rather rapidly, and we'd enjoy having that for the record, especially for our recorder.

MR. AMERICAN HORSE: Yes, thank you.

MR. McDONALD: Mr. American Horse, what has been the impact of recent cases allowing suits against the tribal organizations? Are the organizations now more careful to consider the due process requirement of the Indian Civil Rights Act as a result?

MR. AMERICAN HORSE: Although I never heard of any lawsuits against the court--

MR. McDONALD: I'm sorry. I refer, for example, to the Oglala Sioux Construction Board case. As a result of that case, for example, and its being appealed and the enforcement of it, do you feel that as a result of that now the other tribal units of government are more likely to observe the due process requirements of the Indian Civil Rights Act? In other words, that was a successful enforcement of the Indian Civil Rights Act?

MR. AMERICAN HORSE: Distinguished members, let me reiterate something. I got elected as tribal chairman in April of 1986, and this incident you are talking about happened back in October, and I have no control of it. But the way I understand from the court is that the appellate court, you might say, reversed the decision of the lower court, the tribal court, and enforcement was there. But as far as from April until this day, there is no knowledge of ever a violation of Indian civil rights.

MR. McDONALD: All right. Do you think there should be more judicial independence or less, in other words, a constitutional separation of powers for the tribal court judiciary, or should the current system suffice in your opinion?

MR. AMERICAN HORSE: I think the current system will suffice in that the Indian Reorganization Act of 1934 mentioned that we are supposed to establish our own court system. And under the Oglala Sioux Tribe, I think we have this distinct tribal government, that if we at this time let the tribal court be on an independent basis, there will be all kinds of lawsuits, and we will be overrun by all kinds of State laws.

MR. McDONALD: Does the Oglala Sioux Tribal Council feel that it can review the decisions of the tribal court and overturn them if need be?

MR. AMERICAN HORSE: No, we cannot do that. Under section 19 of the revised code, the tribal council or the tribal chairman cannot intervene in any decision made by the court, whether it be the appellate court or regular tribal court.

MR. McDONALD: Do you have any suggestions for improvement of the tribal justice system?

MR. AMERICAN HORSE: I think we need more funding for our court system. If a complaint is signed by an individual to another member of the tribe, there should be money available for investigation of the allegation to make sure the complaint is correct before it can go to the court.

CHAIRMAN PENDLETON: I have a question. Mr. American Horse, is Mr. Brewer your chief prosecutor, or what is he?

MR. AMERICAN HORSE: Yes, he is.

CHAIRMAN PENDLETON: You indicated you don't have enough money for investigations and so forth. But is it my understanding you have nine separate police districts, and that those districts control a certain amount of money, and the ratio of police to the districts seems to be a little disproportionate--from what we heard. I guess what I'm getting at is: It seems from what we heard in previous testimony that the bureaucracy is so involved that the allocation of resources for the kinds of things that need to go on just doesn't happen.

I'd like to know how you feel about that as president of the tribe.

MR. AMERICAN HORSE: We do have--I'd like to point out that what Mr. Brewer said is true, in that if you remember, like drunkenness, alcoholism, even in the State of South Dakota, they consider that as a disease; it's not a criminal thing anymore. In Pine Ridge Reservation or any Indian reservation, anybody's drinking is still a violation of the code, and they have to process it in that way. Regular complaints are read before the judge giving him rights to whatever it is or rights to appoint an attorney and stuff.

Now, when you're talking about the police force, in 1976 we contracted the BIA police under the Indian Self-Determination Act. But the Pine Ridge Indian Reservation, as I mentioned

before, is the second largest Indian reservation. We have nine political districts. We have policemen that have to be on duty, not all the time like 8 hours, like you have an 8-hour shift; you have policemen coming and going. We have policemen on duty all the time. But what I'm saying is they are working 8 hours at a time. They don't work the whole full day or anything. So we need the staff as far as prosecutors to investigate some of these allegations.

If a complaint is signed, it should be processed. If it's just one of those domestic man and wife fighting and they file a complaint against each other, and later on they change their minds and want to make up and all that--you know, every complaint has to come through the prosecutor to make sure that it is properly signed with dates and times and everything before it can be processed to the court.

CHAIRMAN PENDLETON: That's not quite the answer to my question. Let me ask it another way. Do you have a public defender in your tribe?

MR. AMERICAN HORSE: We do not. I think at the present time we are working on public defenders. Like I mentioned before, we have limited funds to run the tribal court so, you know, we need investigators; we need public defenders. We have two courts in the Pine Ridge Indian Reservation.

CHAIRMAN PENDLETON: Just one more question. Does it require funding to give people freedom of speech, protected by the Indian Civil Rights Act, or is that just a human decency that might not require money?

MR. AMERICAN HORSE: Never in my knowledge did I have anybody denied his freedom of speech. They can appeal to our office for any kind of misconduct by the police or the court system or the judge. Within the tribal government we have a law and order committee, just like the national government. They do the investigating. If there is a violation of a tribal judge, it can come before the council for termination of employment.

MR. McDONALD: You mentioned alcohol-related offenses. Do you feel that sometimes bonds are set so high that they unnecessarily force people to stay in jail for drunk and disorderly violations?

MR. AMERICAN HORSE: Well, to my knowledge, usually after a person gets arrested on Saturday or Friday night--sometimes a judge would come down on weekends to release prisoners if it's

overcrowded, overcrowding in the jail, but other times we have to wait until Monday morning. And at that time--if the person violates the code two or three times within a week, you have to have some type of control. At least one of the things we are trying to do is get this person, if it's just for drinking, some type of treatment. But we need the funding to do this.

MR. McDONALD: Well, what about the setting of the bond?

MR. AMERICAN HORSE: Well, like on one day the attorneys can appeal the bond, and the chief judge has to make the determination to reduce the bond.

MR. McDONALD: And do you feel that the consequences of the setting of the bond occasionally might deny a person his right to due process?

MR. AMERICAN HORSE: I don't know. One of the provisions in the Indian Civil Rights Act is that if a person cannot get out on bond because of the specific charges, then he is entitled to a speedy trial.

MR. McDONALD: I guess another way of putting it is: Do you think the bonds for alcohol-related offenses at Pine Ridge are usually reasonable?

MR. AMERICAN HORSE: I don't have the specifics right now. I don't have the court personnel right now here with me. Mr. Brewer could very well answer that. But from what I understand, the first offense is like a \$20 cash bond or something, and after a day or so if the person cannot put up the \$20 in cash bond, two bondsmen or two reliable persons can sign a paper for this gentleman to get out of jail until the court hearing.

MR. McDONALD: I see. Thank you. I have no other questions.

CHAIRMAN PENDLETON: Thank you very much.

MR. AMERICAN HORSE: Thank you very much.

CHAIRMAN PENDLETON: We will next hear from Mr. Alex Lunderman, president of the Rosebud Tribal Council.

MR. LUNDERMAN: Do I need to take the oath again?

CHAIRMAN PENDLETON: I think not, sir.



Testimony of Alex Lunderman, President, Rosebud Tribal Council

MR. LUNDERMAN: I was here last time, and I also got a subpoena, so I feel good about it.

As I stated the last time, I wanted some treaty issues entered into the record for civil rights violations. Also, the 1934 Indian Reorganization Act. That should clarify a lot of matters today if we follow procedure. And for me to testify, I need about 4-1/2 hours to explain a lot of things. But for the record, here is the Black Hills issue.

CHAIRMAN PENDLETON: It is so entered, without objection.

CHAIRMAN PENDLETON: Counsel.

MR. LUNDERMAN: May I go ahead and speak, or are you going to ask questions?

CHAIRMAN PENDLETON: Questions.

MR. McDONALD: Mr. Lunderman, are you in favor of using the doctrine of sovereign immunity as a defense against lawsuits against the tribe arising from ICRA violations?

MR. LUNDERMAN: Well, in the first place, there is no ICRA violations on the Rosebud Reservation or throughout the Sioux Nation. And we are sovereign. And any changes that come have to come from the people--not myself, not the council. Does that answer your question? I didn't mean to stump you, but--

MR. McDONALD: No, you didn't stump me. I'm just thinking of Montana v. United States, 450 U.S. 544 (1981), and the United States Supreme Court's thoughts on that subject.

MR. LUNDERMAN: Remember, I asked that last time, that treaties and Supreme Court decisions be entered as part of the record.

MR. McDONALD: Right. Can you describe the benefits of membership in the Inter-Tribal Court of Appeals?

MR. LUNDERMAN: Well, to myself, in 1980 I was on the judicial committee, and we met with the Lower Brule tribal judicial committee to establish an Inter-Tribal Court of Appeals. Because we are sovereign, the intent for myself back then, and the judicial committee, was to establish eventually a supreme court of the Sioux Nation and other tribes. So I fully support the Inter-Tribal Court of Appeals concept.

However, the Bureau of Indian Affairs don't seem to realize--or maybe they do realize--the importance of what we were trying to do and are still trying to do. They had a meeting in Aberdeen the 18th--I believe it was Monday and Tuesday--concerning funding for the Inter-Tribal Court of Appeals.

MR. McDONALD: Would your opinion of the Inter-Tribal Court of Appeals change if that court rules that the tribe can be sued for Indian civil rights violations in tribal court?

MR. LUNDERMAN: Would my opinion change?

MR. McDONALD: Yes, sir.

MR. LUNDERMAN: Provided everything is in place, I see nothing wrong, if properly handled. I have no problems with the Inter-Tribal Court of Appeals judges. In fact, I've lost a couple of cases there and I've won quite a few myself. And I personally--in my opinion, I don't see nothing wrong with a supreme court of all tribes.

MR. McDONALD: Does Rosebud support the Inter-Tribal Court of Appeals financially, and could the withholding of financial support to that court be construed as an attempt to influence an important pending case called Dubray v. Rosebud Housing Authority, which deals with the subject of tribal sovereign immunity?

MR. LUNDERMAN: There's been other cases before that, where it has been upheld by the Inter-Tribal Court of Appeals. They have overturned the lower court's decision.

I am not familiar with the Dubray case, to tell you the truth, but I have no fear myself of whatever comes out of there.

MR. McDONALD: Even if it's not to your personal liking, you respect the court and will enforce its decisions?

MR. LUNDERMAN: I respect all life. I respect the people sitting on this panel. That's why I'm here. And if we set up a system as a tribe, then we should respect that system.

MR. McDONALD: What traditional notions of Indian justice would you incorporate in a revised tribal code?

MR. LUNDERMAN: Well, our own tribal code--I'll go back to that. There was a contract that was issued, I think in 1983--I

was out of office by that time while I was in college. However, I had some concerns about that, too, because after reviewing it, I could have sat down and got \$35,000 myself--in fact, I did ask for that contract--and typed a state code and present it to the tribe. And I will allude to section 19--it has always been in our tribal code since 1978--and that is council interference with tribal courts. The penalty is quite severe. It's 6 months and a \$500 fine if found guilty.

MR. McDONALD: I guess what I'm asking is: You disagree with having the residual law to be applied in tribal court as being the South Dakota State law. I'm only asking what traditional concepts would you have inserted into the code in order to overcome those sections with which you have expressed disagreement.

MR. LUNDERMAN: Well, I believe personally, my own self, after being involved in this system, the traditional values--we would need arbitrators. And many of our problems are not really--they are domestic, and it's an antisocial problem. They are domestic problems.

But being as how the present system is in place, what I said before--and this was back in 1980, 1981--is that a commission should be established--and I'm still recommending that to our tribal council--maybe one tribal council person sitting on that commission. Because I'm not here to condemn anything; I'm just trying to resolve something with my own tribe. Police officers need a place to go, too, for redress.

I have written down some things here.

If a person feels they are violated, the procedure on the BIA side is to go to the captain, the agency special officer, and then the superintendent.

On the tribal side, they go to the judicial committee, and that is where I see any changes that the people want go through that judicial committee, and they recommend to the tribal council.

Should we have a referendum vote for a separation of powers? There is a forum, there is a procedure set out for that.

MR. McDONALD: Thank you. Rosebud has a tribal court and BIA police. Can you tell us about some recent developments regarding the BIA police enforcement of judgments for the tribal court?

MR. LUNDERMAN: Well, I went to D.C. on the 12th, and that's where I got a hold of some articles, too, in the paper, from Ben Weiser. However, let me get back to that enforcement. I mentioned that the last time I was here.

Article 4, section (k) is another one in the act: "to promulgate and enforce ordinances providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

That's done by ordinance.

And I mention something else in here. This is on page 11 of our constitution and bylaws: "All officers and employees of the Interior Department are ordered to abide by the provisions of said constitution and bylaws."

When I was in D.C., I explained that, that back in 1980 or '81 we had a problem with the police officers enforcing civil actions, civil court orders. In fact, back then we got in quite an argument with the agency's special officer and the superintendent. And they came down with an opinion 2 weeks ago--well, the 12th I was in D.C., and Monday or Tuesday I got a change of orders--it's on my desk now--saying that they will abide by what's in this book. They are going to enforce all orders of the tribal court. I don't know if my testimony had anything to do with that change, but it's the act itself that's here that we have to live by. And if we want to change it, the people change it; I don't.

MR. McDONALD: Thank you. Is that a local decision?

MR. LUNDERMAN: It's been a problem.

MR. McDONALD: Is that restricted to Rosebud or is that a general BIA policy that wherever there are BIA police, they will enforce the judgments of the tribal court?

MR. LUNDERMAN: It's all over. They said that memo was sent out a month ago, but I informed them I didn't get mine, so I got a special copy.

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: Mr. Lunderman, is Mr. Whiting still the acting agency special officer?

MR. LUNDERMAN: As far as I know, yes, he is.

CHAIRMAN PENDLETON: Is there some indication that the tribal council or whoever recommends him for that job has recommended him but BIA has refused? Is that some problem?

MR. LUNDERMAN: Well, you've got to understand, we only have recommending authority.

CHAIRMAN PENDLETON: But how does that fit in with your notion of tribal sovereignty?

MR. LUNDERMAN: You've got to understand, these recommendations that you're talking about did not come from the tribal council. They came from a judicial committee who recommends to the tribal council. It hasn't reached the council point yet.

CHAIRMAN PENDLETON: I see.

MR. LUNDERMAN: And they have no authority.

CHAIRMAN PENDLETON: I'm trying to understand--as you say "understand"--I'm trying to understand what BIA's role is. If the judicial committee recommends to the tribal council, and there is this so-called separation of powers here, how does BIA tell you who to hire?

MR. LUNDERMAN: What would happen, if the judicial committee ever brought that on the council floor and recommended them, then that would be up to the body to go with that recommendation. If so, then I'm sure it would be carried out.

CHAIRMAN PENDLETON: Would there be any punitive actions by BIA?

MR. LUNDERMAN: I don't see any.

CHAIRMAN PENDLETON: Just let me ask one other question. You mentioned earlier that you asked for the contract to write whatever that was. What kind of code was that you could write?

MR. LUNDERMAN: The law and order code.

CHAIRMAN PENDLETON: Is that a proper role for the president of the tribe to write a policy like that and then also have to enforce it?

MR. LUNDERMAN: No, you see, I was at that time--

CHAIRMAN PENDLETON: You were not president at that time; is that right?

MR. LUNDERMAN: No, I just got in office on November 4 of '85.

CHAIRMAN PENDLETON: I just wanted to clear up the fact that the way you were saying that it didn't come out right, and I was sure you could clear it up.

MR. LUNDERMAN: Well, I just got in office myself.

CHAIRMAN PENDLETON: Commissioner Destro.

COMMISSIONER DESTRO: I wanted to ask a couple of questions about BIA as well. Is BIA supportive of the Inter-Tribal Court of Appeals or the notion of a supreme court of the tribes?

MR. LUNDERMAN: I don't know. I'm just going by what the act says. By ordinance, they are directed to carry it out of the Interior Department.

COMMISSIONER DESTRO: What I mean, though, is you said there was a meeting in Aberdeen--

MR. LUNDERMAN: --on the Inter-Tribal Court of Appeals.

COMMISSIONER DESTRO: Right. And is BIA supportive of the idea?

MR. LUNDERMAN: Yes, they say they are.

COMMISSIONER DESTRO: But you seem to have some doubt. Am I reading you wrong when you say, "They say they are," as opposed to do you have a strong feeling whether they really are?

MR. LUNDERMAN: Well, when they throw the Gramm-Rudman Act at you, then that tells me they're not, and that's a lame duck excuse.

CHAIRMAN PENDLETON: It might be a lame duck excuse, but when the money comes out, it won't be lame duck.

MR. LUNDERMAN: There you go.

COMMISSIONER DESTRO: As far as the tribal sovereignty issue goes, because this is really what I was told by colleagues and people that I talked to about the Commission getting into this issue, the general concern was to be careful that you don't go in like a bull in a china shop and destroy that which has been built already very carefully after many, many years.

If you had your ideal, if you were going to suggest to us what it was that you'd like to see Congress do, is there anything you think the Congress could do to strengthen the notion of the Indian Court of Appeals or the Indian judicial system in a way which would be consistent with tribal sovereignty?

MR. LUNDERMAN: Yes. I'd like to see on the United States Supreme Court an Indian justice person. That would be consistent.

CHAIRMAN PENDLETON: With what?

MR. LUNDERMAN: Our sovereign immunity. I'm a tribal president. We're a nation.

COMMISSIONER DESTRO: Let me just step back and run through this and make sure I understand.

The money for the tribal courts basically comes from BIA to the council, then to the court; is that right?

MR. LUNDERMAN: Yes. We have a 638 contract for tribal courts.

COMMISSIONER DESTRO: Can you explain to me what exactly is a 638 contract?

MR. LUNDERMAN: I'm confused, too, what a 638 contract is because of the conflicts in it. One is the indirect cost rate that is associated with a 638 contract, and we are having quite a problem with that now, the over-recovery and under-recovery. That conflicts with other acts of Congress.

COMMISSIONER DESTRO: How so?

MR. LUNDERMAN: They say it's a self-determination grant, but--

COMMISSIONER DESTRO: But there's not a whole lot of self-determination in it?

MR. LUNDERMAN: No, there isn't.

COMMISSIONER DESTRO: The reason I'm asking you all these questions is so you will understand where I'm going and can correct me if I'm wrong. Throughout all the testimony when we were here last time, and through most of your testimony today, I see the hand, the not-so-subtle hand, of the Bureau of Indian Affairs. And it seems to me like the tribes can't do much of anything without the Bureau of Indian Affairs being involved in it. Is that a correct understanding?

MR. LUNDERMAN: Well, in our own constitution and bylaws, no. We have the authority to wipe out certain approval by the superintendent or the Secretary of the Interior. On August 27 of 1985 we did that in our constitution and bylaws--the people, by referendum, wiped certain things out. It's allowable.

CHAIRMAN PENDLETON: Excuse me. I think what we are getting at here is we heard a lot of testimony last time--for example, the differences in allocation of resources for police. One tribe might contract for the police; one takes the BIA police. There's a difference in salaries and those kinds of things. Maybe that's because of the whole issue of the 638 contract and so forth.

I think what my colleague is getting to here is that we are hearing a lot of talk about the not-so-subtle hand of BIA, and I want to know, too, what impact the subtle hand of BIA has upon tribal sovereignty. Because if that's a problem, we need to have that on the record.

MR. LUNDERMAN: It's a problem, if that's what you're getting to, yes. We are dealing with funding through the Interior Department, and the Bureau of Indian Affairs is a part of that system underneath.

COMMISSIONER DESTRO: The reason I ask the question--the Chairman has put his finger on exactly where I was going.

CHAIRMAN PENDLETON: I'm sorry.

COMMISSIONER DESTRO: No, I think that's fine, because when we deal with other sovereignties in the United States--the States--the States would never put up for a minute with having to clear everything they do with a bureau of State affairs. They'd say, "Look, this is inconsistent with the notion of a State being a separate sovereign."



MR. LUNDERMAN: The State really isn't sovereign either.

COMMISSIONER DESTRO: Not anymore, not the way it used to be.

MR. LUNDERMAN: No, they are not, and we know that.

COMMISSIONER DESTRO: But do you think it would give you more flexibility in terms of the administration of justice through the tribal court system if Congress were basically to earmark money in the budget that is sent down from Washington for use by tribal courts, and then that money be transferred directly to the tribe?

MR. LUNDERMAN: Yes, I'm in favor of direct funding. I think we can handle it now. We are sophisticated enough to handle it.

COMMISSIONER DESTRO: Because what I hear through all of this is that somebody else is basically handling the change for you, and there seems to be a notion that you are really not sovereign if you can't control your own checkbook. I'm trying to understand how the money flows through and whether or not the tribal council really does in fact have control of the money that comes through.

MR. LUNDERMAN: Congress does.

COMMISSIONER DESTRO: Congress does as the originating source, but when it gets to you, it has already been filtered through BIA.

MR. LUNDERMAN: We get 20 percent, approximately, of the millions that are spent. That's why I was saying I'm for direct funding myself. We can request that all we want, but it's up to Congress to recognize that.

COMMISSIONER DESTRO: Let me just proceed with this one step further. During the last hearing I had some conversations with various witnesses. Would you like to see the Indian supreme court that you envision as your hope for some day be ranked as a court of equal stature with a State supreme court, so if there were going to be an appeal from that court, it would be directly to the United States Supreme Court and not to anybody else?

MR. LUNDERMAN: Are you comparing us to a State? Is that what you're saying?

COMMISSIONER DESTRO: Essentially that's what--

MR. LUNDERMAN: We are higher than a State; we are a nation.

COMMISSIONER DESTRO: That's right. So the question I have is: Would you want to see no appeal from the Indian supreme court, which would be the way you would deal with a sovereign nation, or would you want to see an appeal where the Indian nations collectively with their supreme court are treated as a State would be treated?

MR. LUNDERMAN: Well, I don't see any appeal going to the United States Supreme Court on this unless we had a voice or a person sitting on that, and that's your Indian Civil Rights Act again, to be judged by your peers. That's the way I see it, just like a jury.

COMMISSIONER DESTRO: I understand your point about the representation.

MR. LUNDERMAN: In other words, can we appeal to the United States Supreme Court? I'd rather deal with the nation supreme court of all Indians equally, to have equal status, but where else are you going to go--that their decision should be final.

COMMISSIONER DESTRO: Their decision should be final?

MR. LUNDERMAN: Right.

COMMISSIONER DESTRO: I certainly understand that. I'm just trying to understand because you have the notion of what you'd like to see.

MR. LUNDERMAN: Well, it's coming, and it's going to happen. This is one step towards that supreme goal. I understand that.

CHAIRMAN PENDLETON: Thank you very much, Mr. Lunderman. Thank you for coming to testify.

Mr. White Bird, do you have a statement you want to make before we break or do you want to make it later?

MR. WHITE BIRD: Later.

MR. LUNDERMAN: Could I say some more things?

CHAIRMAN PENDLETON: We're out of time. Do you have a statement for the record? We can put that in, but we don't have any more time than we gave anyone else for the testimony this morning.

MR. LUNDERMAN: Can I come back later this afternoon when it's open?

CHAIRMAN PENDLETON: For open session, sure, you can.

MR. LUNDERMAN: Okay. That sounds great, because I'm not finished.

CHAIRMAN PENDLETON: We didn't think you would be, but we're saying we are out of time for now.

MR. LUNDERMAN: Okay. Thank you very much.

CHAIRMAN PENDLETON: Thank you.

[Recess.]

#### AFTERNOON SESSION

CHAIRMAN PENDLETON: At this point, we will have a brief statement from our South Dakota State Advisory Committee Chairman, Mr. White Bird, who wants to make a statement on behalf of the advisory council. Now is the time to do that.

#### Statement of Francis White Bird, Chair, South Dakota Advisory Committee to the U.S. Commission on Civil Rights

MR. WHITE BIRD: Thank you. First, I would like to welcome the Commissioners back and all the staff attorneys.

The Rosebud Sioux Tribe and Cheyenne River Sioux Tribe passed intertribal resolutions asking to hold hearings on each of the reservations. So the tribal councils have passed resolutions to that effect.

I'd also like to note that the South Dakota State advisory group in the beginning, about a year and a half ago, after the Commissioners had expressed their stand on holding hearings on the 1968 Indian Civil Rights Act, had asked to participate in the holding of the hearings, and they have asked the Commission to come out to South Dakota to hold these hearings.

So with that, I want to say I welcome the Commissioners back, and I think this is an opportune time for everyone to tell the Commission what you would perceive as recommendations

to improve--and I think there is room for a lot of improvement--and whether or not anything can come of these hearings really would reflect upon the people participating in that. So there has to be a followup on these in terms of writing to people who hold hearings on funding or within the Bureau of Indian Affairs so the system can be improved.

That's all I want to say. Thank you.

CHAIRMAN PENDLETON: Thank you very much, Mr. Chairman.

We will now have our first afternoon witness, Vickie Woods, a community member from the Cheyenne River Reservation.

Ms. Woods, I want to swear you in first, and then we want to have a statement from our staff attorney, Ms. Miller.

[Vickie Woods was sworn.]

Testimony of Vickie Woods, Community Member, Cheyenne River Reservation

MS. MILLER: Thank you, Mr. Chairman. We have been alerted this morning that part of the testimony that Vickie was going to give may involve a case that is pending before the tribal appellate court at Cheyenne River, and so in order to avoid any appearance of impropriety involving this case, Ms. Woods is going to limit her testimony to matters not involving that case. But as an additional precaution at this time, we would like to ask that the appellate tribal court judge, Mario Gonzalez, leave the room during Vickie's testimony, and in addition we would ask that the appellate court clerk, Dixie LeCompte, also leave the room during the testimony.

CHAIRMAN PENDLETON: With those ministerial tasks accomplished, counsel.

MS. MILLER: Thank you, Mr. Chairman.

Vickie, to begin, could you just repeat your name and tell us your address and tribal affiliation.

MS. WOODS: Vickie Woods, Cheyenne River Reservation.

MS. MILLER: What is your address?

MS. WOODS: Eagle Butte.

MS. MILLER: South Dakota?

MS. WOODS: Yes.

MS. MILLER: Vickie, if could you just tell us now, avoiding any reference to any pending cases, some of your recent experiences involving the tribal court at Cheyenne River.

MS. WOODS: In August of '82 I went through a divorce. The divorce was final in August of '82. I then regained at that hearing full custody of my two daughters. Ten months later my ex-husband went to a juvenile judge and told the judge that I did not want my daughters. The judge then issued a custody order to the father, without a hearing, without my knowledge, and he took my kids.

I found out an hour later. I went to the judge and I said, "What's going on?"

He said, "The father came in and said you didn't want your kids."

I said, "I want a hearing."

I was given a hearing a week later. The hearing was set up with a juvenile probation officer, the prosecutor, and the judge. After that hearing I was given my kids back.

MS. MILLER: When the initial order was granted, awarding custody to the father and taking full custody away from you, were you ever given notice of that hearing?

MS. WOODS: No, not to this date. I have never seen that paper.

MS. MILLER: Do you think this might happen again?

MS. WOODS: Yes, it can happen anytime.

MS. MILLER: Are you aware of similar experiences that other people have had with custody cases before the tribal court?

MS. WOODS: Yes, I am.

MS. MILLER: Vickie, you were invited to testify at the last hearing that the Commission held here. Why didn't you come?

MS. WOODS: On that day I was to testify, I was being harassed by another member of the tribe, and I feel that a tribal official put this person up to it, although I don't have no proof of that. But that is my belief--because of my testifying at this hearing.

MS. MILLER: When did the harassment take place?

MS. WOODS: The 31st of July.

MS. MILLER: Was that the day of the hearing?

MS. WOODS: Yes.

MS. MILLER: And that's why you didn't show last time?

MS. WOODS: Yes. That happened that morning before I was to leave.

MS. MILLER: Are you concerned that any sort of harassment might happen as a result of your coming today?

MS. WOODS: Yes.

MS. MILLER: I have no more questions.

CHAIRMAN PENDLETON: Mr. Destro, do you have any questions?

COMMISSIONER DESTRO: In what way were you harassed the morning that you were supposed to come and testify?

MS. WOODS: This person had a written document to my director, my boss at work, saying that I was using tactics and harassment against her. And I didn't do anything against her. I have no idea where she is getting her motives or whatever she's using.

COMMISSIONER DESTRO: In other words, there was some trouble made at work?

MS. WOODS: Yes.

COMMISSIONER DESTRO: And that caused you to miss the hearing then?

MS. WOODS: Yes.

MS. MILLER: You had to clean up that problem before you felt you could come here?

MS. WOODS: This type of harassment really bothers me, especially when it's unfounded. I felt I didn't do anything to deserve it, and it really bothered me that day.

COMMISSIONER DESTRO: And it happened that morning?

MS. WOODS: Yes.

COMMISSIONER DESTRO: Thank you.

CHAIRMAN PENDLETON: Just one other question. Do you have some idea what form the harassment might take once you have testified here today?

MS. WOODS: Bodily injury maybe.

CHAIRMAN PENDLETON: I have no other questions. Thank you very much for your time.

I'd like to announce if there are public witnesses, you can come and sign up with the lady behind us, and that session will start at 4 p.m. If there are public witnesses who have not signed up and you wish to make a public statement, please sign up with us now.

Our next witness is Marvin LeCompte, police chief from the Cheyenne River Reservation.

[Marvin LeCompte was sworn.]

CHAIRMAN PENDLETON: Counsel.

MS. MILLER: Thank you, Mr. Chairman.

Testimony of Marvin LeCompte, Police Chief, Cheyenne River Reservation

MS. MILLER: Mr. LeCompte, could you please give us your address for the record.

MR. LeCOMPTE: Box 1092, Eagle Butte, South Dakota.

MS. MILLER: Could you just give us a little rundown of your background.

MR. LeCOMPTE: Okay. All my training come from North Dakota where I was a police officer with the BIA up there.

That was right at junior college in Bismarck. Most of the other training that I had was through the FBI, inservice training.

MS. MILLER: How long have you worked as a police officer?

MR. LeCOMPTE: Going on 9 years.

MS. MILLER: And how much of that time was at Cheyenne River Police Department?

MR. LeCOMPTE: About six.

MS. MILLER: Could you maybe talk to us a little more about the training programs you have completed?

MR. LeCOMPTE: I completed basic. Also basic North Dakota State, which involved all the procedures of police work. Then also through the FBI inservice training, before I went to work for the BIA, I went through the tribe. That also mostly was on procedures of police work.

MS. MILLER: Was any of this BIA training?

MR. LeCOMPTE: Yes, it was.

MS. MILLER: Mr. LeCompte, since we are talking about training, maybe I can ask a question about the training received by other police officers at the police department at Cheyenne River. Can you tell us what type of training and extent of training is received by police officers there?

MR. LeCOMPTE: When they are hired on, within that year they are to be sent off to school. We have two options--to send them down to Marana, Arizona, or down to the State school in Pierre, South Dakota.

MS. MILLER: How many officers, first of all, are there on the police force now?

MR. LeCOMPTE: Fifteen police officers, and we have four sergeants.

MS. MILLER: And how many of those have received this training?

MR. LeCOMPTE: They all did but about five of them--five or six.



MS. MILLER: And have the officers received any training on the Indian Civil Rights Act?

MR. LeCOMPTE: Yes, they do. When they are in those schools, it's part of the training.

MS. MILLER: The ICRA is part of the training received in the State training or the BIA training?

MR. LeCOMPTE: Yes, it is.

MS. MILLER: Could you tell us what are the qualifications necessary for becoming a police officer at Cheyenne River?

MR. LeCOMPTE: For a police officer, it is if you are certified preferable, but mostly if you are a member. That's the way it reads. If you try to hire someone that is qualified that ain't from the reservation, they won't put them on.

MS. MILLER: Who hires police officers?

MR. LeCOMPTE: We have a hiring board. It consists of myself, the personnel officer, and one from Social Services.

MS. MILLER: Does the hiring board then make recommendations to the council, or how does it work?

MR. LeCOMPTE: It all depends on who it is and when they hear about it, whether you hire a nonmember or not.

MS. MILLER: Could you explain that? What do you mean by it depends on who it is and how they hear about it? You mean sometimes it goes through the hiring board and sometimes it doesn't?

MR. LeCOMPTE: Once in a while, yes.

MS. MILLER: When it doesn't go through the hiring board, who makes the hiring decision?

MR. LeCOMPTE: Well, the law and order committee more or less recommends it.

MS. MILLER: The council makes the ultimate decisions on hiring, then?

MR. LeCOMPTE: Yes.

MS. MILLER: How is the police force funded at Cheyenne River?

MR. LeCOMPTE: 638.

MS. MILLER: What is that?

MR. LeCOMPTE: It's Federal funds. It comes out of Washington.

MS. MILLER: Is the police department there, then, considered a BIA police force or is it tribal?

MR. LeCOMPTE: Tribal.

MS. MILLER: Who hires and fires the police chief?

MR. LeCOMPTE: The council.

MS. MILLER: Is there a high turnover rate among the police officers?

MR. LeCOMPTE: Yes, there is.

MS. MILLER: Why do you think that is?

MR. LeCOMPTE: Political influence because of--you arrest someone, and whoever you arrest, they run and say they're going to go to the council. Well, in fact, they do, and they say they are going to get them fired. This sticks in the back of the police officers' minds.

MS. MILLER: So you think the high turnover rate is related to--

MR. LeCOMPTE: --political influence.

MS. MILLER: Is it intimidation of police officers? Or what is it? Do you think it is just the frustration of the police officers in dealing with the politics of the tribe?

MR. LeCOMPTE: Yes, plus the officers, they work a lot of hours, you know, and they are tired, plus they got this in the back of their mind, you know, that they're going to get fired.

MS. MILLER: About how much do police officers earn as police officers?

MR. LeCOMPTE: The top salary is \$6.02 an hour.

MS. MILLER: So it's an hourly rate?

MR. LeCOMPTE: Yes, it is.

MS. MILLER: Do they get paid overtime?

MR. LeCOMPTE: Just 8 hours.

MS. MILLER: They are only paid 8 hours a day; no overtime?

MR. LeCOMPTE: Eight hours biweekly.

MS. MILLER: So it's 8 hours of overtime per week?

MR. LeCOMPTE: Biweekly.

MS. MILLER: Every 2 weeks.

MR. LeCOMPTE: Yes. So instead of 80 hours it would be 88.

MS. MILLER: Could you describe the procedures followed in the department for taking criminal complaints and for obtaining arrest and search warrants?

MR. LeCOMPTE: Okay. When they get down there, they get the complaint. If the subject or the person that committed the crime is still in the vicinity or still at the house, they will act on that complaint if they think the guy is still going to be raising Cain there at that place. And they will arrest him on that. But if it occurs the day before and they get there and they accept a complaint, the complaint is brought back and turned over to the prosecutor's office, where they will, in turn, issue a warrant or a summons for the guy that the complaint is signed on.

MS. MILLER: So what is the determining factor over whether a written warrant is required for arrest? Is it in the discretion of the police officers?

MR. LeCOMPTE: Well, you're talking about if we've got to get a search warrant?

MS. MILLER: An arrest warrant.

MR. LeCOMPTE: An arrest warrant. It all depends on how serious the crime is. If the guy is not there on the scene and it's a serious crime where the victim was hurt pretty bad, or if there was a gun involved, then they would go through the procedure of requesting a warrant from the prosecutor or the judge, to get a warrant to arrest this person.

MS. MILLER: Is this what the code provides?

MR. LeCOMPTE: I'd say so.

MS. MILLER: Have there been any problems that you are aware of with police service of hearing notices, witness subpoenas, or other court papers?

MR. LeCOMPTE: No, not any more. When I first come over, there was a problem with it.

MS. MILLER: It doesn't exist any more?

MR. LeCOMPTE: No.

CHAIRMAN PENDLETON: Excuse me. How long have you been police chief?

MR. LeCOMPTE: The 28th will be a year.

MS. MILLER: What caused the change? What was the remedy for the problems involving police service of process? You said there was a problem and it's not a problem anymore. What changed?

MR. LeCOMPTE: They just weren't serving them, that's all.

MS. MILLER: Why not?

MR. LeCOMPTE: I don't know. That's the way it was before I took over.

MS. MILLER: Did you insist, then, that papers be served?

MR. LeCOMPTE: Yes.

MS. MILLER: Is that what made the difference?

MR. LeCOMPTE: They started serving papers.

MS. MILLER: How are arrested persons informed of the charges against them?

MR. LeCOMPTE: If they are arrested on the scene wherever they're at, they are told why they are arrested. Like if he's arrested for disorderly conduct, you tell the person that he is being arrested for disorderly conduct and he'll have to come along wherever he's being arrested.

MS. MILLER: So it would be at the time the person is picked up?

MR. LeCOMPTE: They are informed why they are being arrested, yes.

MS. MILLER: And do you think that always happens?

MR. LeCOMPTE: I can't talk for all of them, but the ones that I have been around, when they were arrested, they were informed.

MS. MILLER: Have you heard of any complaints about the police department within the community, involving things like police brutality or the failure of police officers to inform people of the charges against them, or that kind of thing?

MR. LeCOMPTE: Police brutality, yes. But what was that other question about serving papers? But police brutality, yes. There was complaints.

MS. MILLER: And what has happened to those complaints?

MR. LeCOMPTE: They were investigated by the FBI. We do not investigate our own civil rights violations or police brutality.

MS. MILLER: Was this one instance or is this regular?

MR. LeCOMPTE: It is not a regular ordeal, if that's what you mean, like on an everyday basis.

MS. MILLER: It's more than once, though, since you've been there?

MR. LeCOMPTE: Well, since I've been there, I remember twice.

MS. MILLER: One more question and then I'll finish for now. Are you aware of any complaints disappearing after police officers have turned them over to the prosecutor's office?

MR. LeCOMPTE: Yes.

MS. MILLER: Could you tell us about that?

MR. LeCOMPTE: Well, there was some that I thought was missing, but since then they have been taken care of as far as the complaints. So they were never really displaced.

MS. MILLER: How many times did complaints disappear?

MR. LeCOMPTE: I remember once that I know of; once.

MS. MILLER: What finally happened in that case?

MR. LeCOMPTE: I don't know. I didn't follow through it that well.

MS. MILLER: Do the police make copies of complaints?

MR. LeCOMPTE: We do now, yes.

MS. MILLER: In that instance did you have a copy of the complaint?

MR. LeCOMPTE: Yes, I got a copy of that complaint; yes.

MS. MILLER: So that case went forward?

MR. LeCOMPTE: Went--?

MS. MILLER: The complaint in which the complaint disappeared in the prosecutor's office?

MR. LeCOMPTE: Yes, I took a copy of that complaint, and it was forwarded up there, but since then it was located.

MS. MILLER: I have no more questions.

CHAIRMAN PENDLETON: Mr. LeCompte, we heard some rather illuminating testimony from Cheyenne River residents the last time we were here for a hearing. After that time Ms. Imogene High Elk was assaulted after her testimony here, and we have asked the U.S. attorney to investigate. And I understand now that investigation has been turned over to the FBI. Were you aware that she was assaulted?

MR. LeCOMPTE: Yes, there was a fight down in Thunder Butte where she is from, yes, and the FBI did come up to investigate it.

CHAIRMAN PENDLETON: How do you feel about that?

MR. LeCOMPTE: Well, being assaulted for testifying, you mean?

CHAIRMAN PENDLETON: Yes.

MR. LeCOMPTE: Well, the same way I feel by me testifying here.

CHAIRMAN PENDLETON: Well, how do you feel about that? Do you feel that you will be assaulted when you go back?

MR. LeCOMPTE: No, I feel I probably won't have a job when I get back.

CHAIRMAN PENDLETON: You echo the sentiments of Mr. Whiting from Rosebud. You feel from your testimony here that there will be retaliation against you? He felt the same way testifying here last time.

MR. LeCOMPTE: Yes. If I could read something that occurred last week--

CHAIRMAN PENDLETON: Why is that the case? Why is it that people don't feel free to testify? I mean, is it that they don't feel that their rights to testify are protected by the tribal council or the court system?

MR. LeCOMPTE: This is a political position that I'm in and, you know, they made decisions for the court and council.

CHAIRMAN PENDLETON: You mentioned about the hiring being political, and you mentioned some other things about the politics involved with enforcement. Do you think these things are done so that the Indian Civil Rights Act will not be enforced on the reservations?

MR. LeCOMPTE: The Indian Civil Rights Act not be enforced, you say?

CHAIRMAN PENDLETON: Do you think these things are being done in this kind of situation because there is not a desire to enforce the Indian Civil Rights Act?

MR. LeCOMPTE: All the civil rights that were brought on us as a violation were never ever taken to court, you know. We have all the letters saying there was really no violation, and the charges were done away with.

CHAIRMAN PENDLETON: How are charges done away with? We heard testimony last time about records missing and so forth.

MR. LeCOMPTE: I get a letter and it's channeled to the FBI in Pierre and the U.S. attorney's office, and they inform us that the investigation has been completed. They come up and

interview everybody that is involved in these civil rights, and they will in turn take--when the investigation is complete, they write a letter that the investigation is complete and that there is no kind of violation; after their investigation is complete, that is.

CHAIRMAN PENDLETON: Are you saying to us that you believe that after this investigation of Ms. High Elk's incident or assault is over, you will get a letter saying there was no civil rights violation?

MR. LeCOMPTE: I ain't saying that. I'm saying that the police officers--

CHAIRMAN PENDLETON: I don't quite understand.

MR. LeCOMPTE: You're talking about Ms. High Elk. I'm talking about police officers.

COMMISSIONER DESTRO: You mean police officers who were charged with brutality and that type of thing?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: Is that what you're talking about, brutality?

MR. LeCOMPTE: Yes.

CHAIRMAN PENDLETON: You're saying the U.S. attorney's office and FBI write back and say there was no violation of civil rights perpetrated by the police department on the reservation?

MR. LeCOMPTE: When the investigation is completed.

CHAIRMAN PENDLETON: Yes. Do you suppose that will be the case this time too? Is that your experience with these kinds of cases?

MR. LeCOMPTE: I don't know.

CHAIRMAN PENDLETON: Mr. Destro.

COMMISSIONER DESTRO: You had mentioned that you wanted to tell us something about what happened last week. Why don't I let you go ahead and tell us that, and then I want to ask you some questions about the kinds of problems that you have on behalf of the people who work for you, more of the detailed



problems. Coming from a policeman's family, I think I have somewhat of an appreciation of what some of this looks like from a policeman's point of view, and I might get into some of those kinds of questions with you. But you said you had something you wanted to tell us about what happened last week.

MR. LeCOMPTE: Yes. You was talking about why I felt like my job was on the line because I testified.

COMMISSIONER DESTRO: Go ahead.

MR. LeCOMPTE: On 8/14/86, council made a motion to reinstate another person as chief of police and to go up and suspend me on complaints and allegations made, in which I don't even know what the complaints and allegations were. And what did they do? Throw my civil rights out? Do I got any?

That's what I'm talking about.

COMMISSIONER DESTRO: Did you have anything else you wanted to say about that? Because I was going to ask you some questions about that as we went along. Do you want me to just ask some questions and you can just--

MR. LeCOMPTE: Go ahead.

COMMISSIONER DESTRO: Tell me about what you just said. As I say, coming from a policeman's family myself, many times the police don't feel like they have a forum where their complaints about how they are treated can be heard. Speaking as the chief, now that you have been chief for about a year, is there some place where you feel you could go, if you felt your officers were being treated badly, to complain? Where would you go to try and protect the officers' civil rights?

MR. LeCOMPTE: No place, really.

COMMISSIONER DESTRO: Now, do I understand that the complaints about police brutality always go through the U.S. attorney's office? Is that where they are investigated?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: Do you do any kind of internal investigation of the facts of those claims?

MR. LeCOMPTE: We don't investigate our own civil rights. When there is a civil rights complaint or there is a complaint signed against one of the police officers, we inform a BIA

special officer. From there he will get in contact with the FBI, and within 2 or 3 days, or a day later, they will be up to interview everybody that is involved in that.

COMMISSIONER DESTRO: Now, when you're talking about a civil rights complaint now, so that the record is clear, are you talking mainly about police brutality claims against the police and not claims like the police didn't inform them of their civil rights when they were arrested? Is it really more the first kind that you get investigated by the U.S. attorney's office, the brutality complaints, the assault complaints, against the police?

Do I understand you correctly that those are the kind that get investigated by the U.S. attorney's office, or do other kinds, too?

MR. LeCOMPTE: Any kind of civil rights that I know about are investigated by the FBI.

COMMISSIONER DESTRO: Okay. Where would you take a complaint if one of your officers was assaulted by someone on the reservation?

MR. LeCOMPTE: Tribal court.

COMMISSIONER DESTRO: Has that ever been done, to your knowledge?

MR. LeCOMPTE: I have had officers assaulted, yes.

COMMISSIONER DESTRO: Have they taken their complaints to tribal court?

MR. LeCOMPTE: Yes, charged the person who assaulted them with aggravated assault, simple assault, whatever.

COMMISSIONER DESTRO: Have any of the police complaints of assault been upheld by the tribal court?

MR. LeCOMPTE: Not that I know of, no. Do you mean when the officer filed charges against someone for assault?

COMMISSIONER DESTRO: Right; right.

MR. LeCOMPTE: Okay, yes. There were some that were taken to tribal court when the officer was assaulted, yes, and they were charged with it.

COMMISSIONER DESTRO: Did the complaint hold up that the officer was found to have been assaulted, to your knowledge?

MR. LeCOMPTE: To my knowledge, I'd say most of them were, yes.

COMMISSIONER DESTRO: So the officer was basically found to have been the innocent party in that case?

MR. LeCOMPTE: Well, if he was assaulted, yes.

CHAIRMAN PENDLETON: Excuse me. I just want to go back to a question my colleague asked. Do I understand that on the 14th of this month you were fired?

MR. LeCOMPTE: No.

CHAIRMAN PENDLETON: You were suspended?

MR. LeCOMPTE: No.

CHAIRMAN PENDLETON: What were you?

MR. LeCOMPTE: There was a motion to suspend me.

CHAIRMAN PENDLETON: There was a motion to suspend you. What happened to that motion?

MR. LeCOMPTE: It died--lack of a vote.

CHAIRMAN PENDLETON: Lack of a vote. And why was the motion introduced?

MR. LeCOMPTE: Based on complaints and allegations made.

CHAIRMAN PENDLETON: Is that matter all disposed of now? You are still the police chief, or is that going to come up again? Do you feel it might come up again?

MR. LeCOMPTE: Oh, it will probably come up again.

CHAIRMAN PENDLETON: Will it come up again based on what happens here today?

MR. LeCOMPTE: I'd say so, yes.

CHAIRMAN PENDLETON: So because you testify here today, there is a high probability that a motion to suspend or something more drastic could come up?

MR. LeCOMPTE: Probably, yes.

CHAIRMAN PENDLETON: And how do you feel about that?

MR. LeCOMPTE: Well, I was subpoenaed to come and testify so I had to come and testify. If that's going to cost me my job, I guess that's what it's going to do.

MR. HOWARD: If I could follow up, sir. You mentioned that the motion to suspend you or to discharge you was based on allegations and complaints that were made. Are you referring to the allegations and complaints that were made before the Commission here on July 31 and August 1?

MR. LeCOMPTE: No.

MR. HOWARD: I see.

MR. LeCOMPTE: I don't know what the complaints were. I was never told of any complaints or allegations that were made. They don't say who they are made against or what against.

CHAIRMAN PENDLETON: I'm sorry, Commissioner. You have a few more minutes left.

COMMISSIONER DESTRO: No, that's fine.

How often, to your recollection, do your officers have to work more than 88 hours in 2 weeks?

MR. LeCOMPTE: How often?

COMMISSIONER DESTRO: Yes, how often?

MR. LeCOMPTE: They all put in more than 88 hours every pay period.

COMMISSIONER DESTRO: So all the time?

MR. LeCOMPTE: All the time, yes.

COMMISSIONER DESTRO: And they only get paid for 88?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: So--correct me if I'm wrong--almost all of your officers are working a fair amount of hours and they're not getting paid for them; right?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: How many hours would you say they go over their 88 on the average in two weeks?

MR. LeCOMPTE: On the average about 16.

COMMISSIONER DESTRO: So they are really working like 104 hours every 2 weeks?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: And they're only getting paid for 88?

MR. LeCOMPTE: Yes.

COMMISSIONER DESTRO: What would you say is the biggest complaint the officers have about the way the system works? Not your complaint as the police chief now, but the complaint of the officers to you. If they wanted to make the system better, how would they make it better, aside from getting them paid for the amount of time they work?

MR. LeCOMPTE: You're talking about the system--the police department system?

COMMISSIONER DESTRO: Well, the administration of justice in the system. How would the officers make it better? That's about as far as I can go without giving a specific example.

MR. LeCOMPTE: Their biggest complaint is their 88 hours.

COMMISSIONER DESTRO: All right; thank you.

CHAIRMAN PENDLETON: Can we move on?

MS. MILLER: Yes.

CHAIRMAN PENDLETON: Thank you very much. We'd like to know, if that's possible, of what actions might be taken against you for testifying here when it's all over.

Our next witness will be Kathy Spotted Bear, the prosecutor at Cheyenne River Reservation.

[Kathy Spotted Bear was sworn.]

CHAIRMAN PENDLETON: Counsel.

Testimony of Kathy Spotted Bear, Prosecutor, Cheyenne River  
Reservation

MS. MILLER: Thank you, Mr. Chairman.

Could you please state your address for the record.

MS. SPOTTED BEAR: Post Office Box 737, Eagle Butte, South Dakota.

MS. MILLER: Thank you. And could you tell us a little about your background.

MS. SPOTTED BEAR: I have been the tribal prosecutor since January 4, 1979. I have had training.

Okay. How far do you want to go back? I could start from when I was that age when I knew right from wrong. My father was a police officer for most of my growing-up years. My mother worked in the courts. I believe it was back in '73 that I moved to Nevada, and I worked for the Nevada Indian Legal Services as a legal secretary. I moved on as a paralegal, and I came back to Cheyenne River and went to work for South Dakota Legal Services as a paralegal. And I went in '79 as the prosecutor.

I have trained under the American Indian Lawyers Training program and also the Indian Justice Center. I have had the Indian Civil Rights Act, juvenile justice system, basic and advanced criminal law, search and seizure, civil court, torts, contracts, evidence and objections, the Indian Child Welfare Act--did I mention that?--the Indian Child Welfare Act.

MS. MILLER: Have you had all this training since you have been in the position of prosecutor?

MS. SPOTTED BEAR: Most of it, except for the first one, the one under civil contracts and torts. I did that when I worked for Legal Aid in South Dakota.

MS. MILLER: How recent is this legal training? Have you had any training within the last year or 2 years?

MS. SPOTTED BEAR: I went to Billings for the juvenile justice system in June of this year.

MS. MILLER: Who pays for this training?

MS. SPOTTED BEAR: My contract will pay for the travel and per diem. I went with this one to the Justice Center. They paid a tuition. BIA will pay that. And I pay for the rest of it.

MS. MILLER: What is your contract? Are you speaking of the 638 contract?

MS. SPOTTED BEAR: Yes.

CHAIRMAN PENDLETON: Excuse me. Is that 38 or 28?

MS. MILLER: 638, I believe.

CHAIRMAN PENDLETON: Is there a difference between 638 and 628?

MS. SPOTTED BEAR: I have always known it to be 638, self-determination.

CHAIRMAN PENDLETON: I heard the wrong number, then; excuse me.

MS. MILLER: Ms. Spotted Bear, just to try and clear up this funding issue, you are the prosecutor and you are funded by 638 funds.

MS. SPOTTED BEAR: Yes.

MS. MILLER: What other part of the tribal court system is funded by those funds, and which part is funded by the tribe?

MS. SPOTTED BEAR: The juvenile court is. The juvenile judge and his clerk are funded by a 638 contract; my office, myself, my secretary.

MS. MILLER: And the police department?

MS. SPOTTED BEAR: And the police department.

The superior court judge, the junior judge, and his clerks are funded by the tribe.

MS. MILLER: Have you ever been fired or suspended by the council because of your prosecution of a council member?

MS. SPOTTED BEAR: Yes.

MS. MILLER: Can you tell us about that?

MS. SPOTTED BEAR: I will try to put this all together because there have been so many times that I have been fired.

MS. MILLER: How many times have you been fired?

MS. SPOTTED BEAR: Eight.

MS. MILLER: How many times have you been suspended, if any?

MS. SPOTTED BEAR: Approximately five times. There have been several incidents, and it wasn't so much a councilman. One happened to be just an officer, you know, of the executive committee. There was a complaint filed, and I went along with it. And because he was my supervisor, we didn't get along, and it ended up with my being terminated.

CHAIRMAN PENDLETON: Excuse me, counsel. You have been fired this many times as prosecutor or fired in other capacities?

MS. SPOTTED BEAR: As prosecutor.

MS. MILLER: Who does the firing?

MS. SPOTTED BEAR: Tribal council.

MS. MILLER: How about if there was a time you were fired or suspended as a result of your prosecuting a council member. Can you tell us about that?

MS. SPOTTED BEAR: All right. It wasn't an immediate termination. It was maybe a month down the line after. There was one time that one of the judges was fired, and they filed several charges against certain councilmen--there were maybe seven of them. So the complaints, I looked them over, and there was a violation according to our code, and I processed them and they went through.

They were taken to the judge, and that judge is since deceased, but he issued warrants for their arrest. I believe it was on a Saturday, if I remember right, two councilmen were arrested, and those warrants were executed. And that following Monday there was a special session of council, and there came a resolution from them saying they did away with the complaints, everything.



It was down the line that I was terminated. But that is really hard to say because I don't know --it happened, I would say, a good 30 days down the line.

MS. MILLER: Do you believe it was a result of your taking those complaints in that case?

MS. SPOTTED BEAR: Yes.

MS. MILLER: What about those persons, the council members, who were arrested? What kinds of bond did they get? Do you remember?

MS. SPOTTED BEAR: I know one of the charges was a class A. I just can't be sure. It could have been two bondsmen. I just can't remember.

MS. MILLER: Overall, why do you think that you have been fired or suspended so many times?

MS. SPOTTED BEAR: My position is very political. It is very easy for me to make a decision, file a complaint, and certain persons don't like this. I am constantly being intimidated by getting calls saying, "We're going to take you to the law and order committee," or "I'm going to take you to council." It's just a constant thing. So most of the time you never know. A lot of times, like the chief was saying, there are allegations made and nothing is ever in writing, and nobody has ever contacted us for us to defend ourselves, to tell our side of the story, or even an investigation. A lot of times it's just done on a whim.

For example, we had one councilwoman. Her son was also working as the probation officer, and it was her sister who had been raising hell. So it got to the court, part of it. Complaints were filed. And the judge ordered a presentence investigation. And I guess when the probation officer went down there to do this, he got cussed out because of that.

I think it was maybe the same day I got a call from the front office saying, "You have been terminated."

I guess what the whole thing was about is that she was upset that I would order a presentence investigation, which I didn't. It was up to the judge to do that. I can request; I can recommend; but I don't order anybody to do it. It's whatever happens at the time, you know. It never seems like there's a procedure, and just like that you could be gone.

MS. MILLER: Overall, is it your position, then, that you have problems doing your job as prosecutor because of interference by the council and by individual council members?

MS. SPOTTED BEAR: Yes, I would say so. And I've got an example that took place just on August 15, last Friday. Over the weekend, Saturday night, this man had assaulted this woman. She filed a complaint. She came in Monday morning, and it was very serious. She ended up going to the hospital.

Immediately, come Monday morning, that was one of the first complaints I went through. I processed the complaint, and I requested a warrant. The warrant was issued. Somehow or another he found out there was this warrant. He came in and turned himself in. It was serious enough that the FBI was notified.

They came down that day, and they talked to the witnesses and talked to several people and said that they were done with him.

So I took this information to the judge, and there were several people waiting to see what his bond would be. So the judge gave him two bondsmen, and he was released. It was like \$500 or two bondsmen. He got his two bondsmen.

Later on that day we had a call from the victim--or I guess maybe it was 2 or 3 days down the line, last Friday--and she said, "What about the restraining order? I had a restraining order on this guy?"

So the the judge was sitting in my office, and she explained to her, "I didn't know about the restraining order when I bonded this guy." She got really upset with the judge.

So after that, the judge issued a warrant for contempt of court on the civil restraining order.

After we were done with that, she didn't feel right about doing it because she asked that woman to come in and file a complaint to back up this warrant, and nothing ever happened. She issued the warrant anyway.

Pretty soon we had a call from a councilman, and he wanted to talk to me. So I got on the phone, and he wanted to know what was happening with this defendant. So I explained everything that we had done up to that point, and I explained to him that we had gotten this call from the victim, and he said, "Well, he's done this before, and I think he should be kept in jail."

I said, "Are you suggesting that we hold this man without bond? He does have a right to bond."

And he said, "Well, yes, he's a dangerous man."

But the warrant was already issued, and the man was picked up, I believe, Saturday morning and brought in, and he was set on bond because he did have a right to bond; he was already on another bond. We did satisfy, I believe, the councilman by issuing the warrant, but we also were looking after that man's rights by allowing him to post bail.

MS. MILLER: So this is an example of council interference with your job?

MS. SPOTTED BEAR: Yes.

MS. MILLER: Do you feel that you have to respond to the wishes of council members when they call you like this?

MS. SPOTTED BEAR: It depends on what they are asking; I mean, what they are suggesting or whatever.

MS. MILLER: Let me just move on to a couple of other questions. Time is running short.

Have you heard about any complaints that persons have been arrested or searched without the production of a written warrant or that people have been jailed without being told of charges against them?

MS. SPOTTED BEAR: You ought to break that up. One was about the warrant?

MS. MILLER: Yes.

MS. SPOTTED BEAR: That has never happened, as far as I know.

Going to our code, a warrant is with the police this warrant, and as soon as they are brought to the jail they have to produce that warrant.

MS. MILLER: And you believe that happens as a matter of course, that warrants are presented to people when they come to the jail?

MS. SPOTTED BEAR: To the best of my knowledge, yes.

MS. MILLER: What about the second part of the question? Have you heard complaints about persons being jailed without being told the charges against them?

MS. SPOTTED BEAR: I guess the only thing I would say that I know that this has happened would be over the weekends. And I know this has happened to a couple of judges. When I checked it out, I found out that when the judges went out to do their bond setting on the weekends, the paperwork was not done with; so consequently the judge did not get to bond that person.

MS. MILLER: So do you hear complaints on Mondays from people who have been jailed over the weekend who don't know what they have been charged with?

MS. SPOTTED BEAR: Yes.

MS. MILLER: Does that happen regularly?

MS. SPOTTED BEAR: No.

MS. MILLER: How often?

MS. SPOTTED BEAR: I guess in the last 2 weeks, once.

MS. MILLER: You think it happens about once every 2 weeks?

MS. SPOTTED BEAR: Yes.

MS. MILLER: Have you experienced any difficulties with police service of process?

MS. SPOTTED BEAR: There used to be. I'd say in the last 4 months we are getting our papers served, but now the people aren't showing up.

MS. MILLER: You don't think there's a problem with service of process anymore?

MS. SPOTTED BEAR: Not anymore.

MS. MILLER: All the papers are being served by the police these days?

MS. SPOTTED BEAR: Yes.

MS. MILLER: What happened in the past when there were problems, when witnesses were not served? What would happen in court?

MS. SPOTTED BEAR: They were usually postponed. Most were postponed.

MS. MILLER: What about the others? Were there some that were not postponed?

MS. SPOTTED BEAR: Lots of times attorneys would file for dismissal, and usually the grounds for that would be the tribe had plenty of time to serve these papers and that their client showed up, and most of the time the judge went along with them.

MS. MILLER: Why do you think so few people have attorneys or have legal representation in criminal matters?

MS. SPOTTED BEAR: I don't know.

MS. MILLER: Do you have any idea? Can you speculate?

MS. SPOTTED BEAR: Well, the excuses that I have been hearing the last month or so is that they have tried but that they couldn't afford a lay attorney. So I told them, "Why didn't you try Legal Aid?"

And they said they went down there, but they didn't go down there soon enough for them to help them prepare a defense.

MS. MILLER: Do you think the tribe needs a public defender?

MS. SPOTTED BEAR: Yes.

MS. MILLER: Has the tribe ever had one?

MS. SPOTTED BEAR: Yes, they did, a couple of years ago.

MS. MILLER: Why isn't there one now?

MS. SPOTTED BEAR: I don't know.

MS. MILLER: What about jury trials? Why are there so few jury trials, do you think?

MS. SPOTTED BEAR: I can't even speculate on that.

MS. MILLER: Do people request jury trials?

MS. SPOTTED BEAR: We've had three.

MS. MILLER: Three requests?

MS. SPOTTED BEAR: No, three jury trials.

MS. MILLER: Since when?

MS. SPOTTED BEAR: Since I've been there.

MS. MILLER: And that's been how many years?

MS. SPOTTED BEAR: Seven years and 8 months.

MS. MILLER: When you're in the courtroom, do defendants request jury trials?

MS. SPOTTED BEAR: They don't do it all the time, but I have had people request jury trials on arraignment.

MS. MILLER: When people request jury trials, do they regularly get them?

MS. SPOTTED BEAR: Yes.

MS. MILLER: So three people have requested jury trials in the 7 years you have been there?

MS. SPOTTED BEAR: Yes.

MS. MILLER: I will suspend my questioning for the moment.

CHAIRMAN PENDLETON: I don't have any questions.

Thank you very much.

We will now move to Melvin Garreau, chief judge, Cheyenne River Reservation.

[Melvin Garreau was sworn.]

CHAIRMAN PENDLETON: Counsel.

Testimony of Melvin Garreau, Chief Judge, Cheyenne River Reservation

JUDGE GARREAU: Mr. Chairman, if it please the panel, can I make my comments, and then have the questioning afterwards?

CHAIRMAN PENDLETON: As long as it's a brief comment, certainly, sir.

MS. MILLER: Before you do that, could you give us your address for the record.

JUDGE GARREAU: My address is Post Office Box 641, Eagle Butte. Then I've got another one. It's 122-B, Rural Route, Gettysburg. I've got two addresses.

Mr. Chairman and the panel, I am indeed very happy to be here, but I'd like to make a comment which I think might ease the tension of the crowd a little bit. That is, maybe this is the way a person feels a little before or after he dies and he's in purgatory and he's got all these witnesses sitting over here. That's about what I think every one of us feels when we come up here.

The other is--I'm getting to be an old man now at 59 years old, and I can relate back to a lot of history, as the gentlemen before me from Pine Ridge and Rosebud reiterated here, on the treaty issues, on the customs, the traditions, the language, and even up to our own religion. It is quite different, and maybe this is the reason why the Commission is awed at times. And in your own words--you were in the newspaper, you were quoted, and I think that without knowing what really is happening on these Indian reservations, I probably, without that kind of knowledge, would have taken the same position.

Sir, if I may say so, there is much unrest on these Indian reservations, coupled with many, many things that are going on out there that the average city individuals and people coming from the metropolitan areas could not possibly understand.

We have abject poverty; we have high crime rates; we have frustrations leading to suicides in our youth. We have youth, eight in a row, that killed themselves on the Wind River Reservation. We have had suicides on Cheyenne River and on literally every reservation in South Dakota.

Now, we sit here and try to find fault with someone and find fault with the system that has been perpetrated upon us by the Federal Government itself.

So when we go to addressing these issues, the question that we ought to ask ourselves is: Are we really doing right by these Indian people? If you have any authority whatever, sir, in Washington, the legislative bodies appropriately should get this message across, that this thing cannot continue as it is, that many things have got to change. And one of those that

need to change in our area is that separation of powers because we have vested in a constitution the right for 15 councilmen to have all of the authority.

This is the problem we have on the reservation.

Now, it has also been said that the people can change it by the route of referendum. Yes, they can. But sometimes referendums have a way of getting lost. The same 15 can mandate that it doesn't happen, because the language in the constitution says it must have council approval. It goes right back to running a grinder and not getting anywhere.

So, sir, I think that once these things are over with, we are going to have to get a little more going than just what we are about to tell you here. So with that, Mr. Chairman, I'll answer the questions as they might be put to me, to the best of my ability.

Thank you, sir.

CHAIRMAN PENDLETON: Thank you.

Mr. Garreau, let me just say that the problems you outline on reservations are not problems unknown to members of this Commission, though they do not take place in our life on reservations and we are not a part of reservation life. I think what you are talking about is a microcosm of a lot of what is happening in America's inner cities, in America's major cities for that matter, and what might happen in some American suburban areas.

This Commission is not here to find fault. This Commission is here to gather a set of facts in a very narrow way with respect to the Indian Civil Rights Act, over which this Commission has jurisdiction. And that is our only purpose. Other purposes have been attributed to us, but I can repeat that is not our purpose. We have no other motives other than within our jurisdiction to gather facts, to make recommendations to the Congress and to the administration with respect to policy changes that may be required under the ICRA.

So I guess I would differ with you on the point that we are here to do something to somebody. I hope what we are here for, if we can agree, sir, is to do something with someone and not for someone. And as we gather these facts and assemble them at this site and other sites, hopefully it will be of some guidance and some value in the future.



My comments are sincere comments. I am as shocked about what happens in America's inner cities as I was shocked by the testimony I heard here a month or so ago. And I guess what is shocking is the kinds of revelations that come forth and one doesn't hear about; one is shocked and amazed at that point. I make no apologies for that and other kinds of expressions. Some have been misinterpreted, but most are accurate.

So I would hope in the spirit of factfinding you understand why we are conducting these hearings. I repeat again, to be redundant, it is for factfinding and for no other purpose. We have no jurisdiction, as I mentioned to some people this morning, over Federal budgets, over legislation. That is out of our jurisdiction. We might be able to pass this information on to other agencies, and it might be of some guidance to them, but in no way can we recommend from a jurisdictional point of view things that are outside of the ICRA, and certainly gathering things outside of that impact on what we want to collect and disseminate. But again, I think our jurisdiction with respect to reservations is a very, very narrow one.

Counsel.

MS. MILLER: Thank you, Mr. Chairman.

Judge Garreau, before we start, perhaps you could tell us a little about your background.

JUDGE GARREAU: All right. Just making it briefly, in 1982--I believe it was June 2 or 4, somewhere in that date--I was at the council chambers. I had gone in for some hay permits because I'm a rancher. I was sitting in a crowd that day, and Mr. LeBeau, who was one of the individuals who invited the Civil Rights Commission out here by letter, was the chief judge at the time. He was having his difficulties at the time with the council, unbeknownst to me. I had nothing to do with that. But he subsequently had made a decision, I guess, that was upsetting to the council. So some of the stuff you are hearing that the councils are upset are certainly correct because it happened to him and it led to his firing.

Well, at that time I was in the crowd, and there was a councilman--I don't remember which one it was--who said, "There's a man in the crowd who can replace Judge LeBeau," and the chairman at that time asked who that might be, and I didn't know they were talking about me. There were a lot of fellows I was sitting with. They called my name to stand up. So I did. They said, "Would you accept the position should we offer it to you on a temporary basis?"

Well, needing a job, I said, "Yes, I guess I could."

So then the vote was taken, and I was installed, temporarily. That is how I got to become judge, and I'm still there. It's been 4 years this past June that I've been there.

MS. MILLER: Were you previously superior court judge?

JUDGE GARREAU: I don't remember what year that was. That was temporary. That was quite a few years back, in 1970-71, back in those years.

MS. MILLER: Did you also serve on the council at one time?

JUDGE GARREAU: Yes, I was councilman; district 5, I believe it was.

MS. MILLER: This was in the 1970s?

JUDGE GARREAU: Yes.

MS. MILLER: Were you also a chairman of the council?

JUDGE GARREAU: I was chairman for a year and a half, yes.

MS. MILLER: Judge Garreau, could you describe the relationship between the tribal courts and the council.

JUDGE GARREAU: Of course, the tribal council takes its direction on these cases, and that is the sovereignty question that was hashed out here pretty well earlier, and that is in our code also. The judge, in making decisions, has to always refer or remand cases that tend to have to have council action or something that council should have before we get it.

I have done that. I have referred cases back on land issues, and I don't remember what the other one was.

MS. MILLER: Excuse me. Referred cases back to the council?

JUDGE GARREAU: Back to the council, once they were filed. They were filed with us, but knowing that they had not went to the council to get their permission to proceed in the court--because the cases would be against the tribal council. Those kinds of cases had to be sent back to the council to see if they would waive that person's right to come into court against them.

MS. MILLER: So your testimony is when there are cases filed against the tribe or the council or part of the tribe, the council has to take a vote to decide whether to waive sovereign immunity before you will hear the case?

JUDGE GARREAU: That's right. That's exactly right. That's the way it is.

MS. MILLER: Have there been instances, though, where the council in other ways has interfered with judicial autonomy?

JUDGE GARREAU: Not directly, but they can make it awfully uncomfortable for you.

MS. MILLER: Could you explain what you mean by that?

JUDGE GARREAU: Well, the threat that the chief of police said here is very much there. You'd better be doing your job according to the way they want you to do it or else you're gone. And I'm not a bit fearful of mine because I have been a martyr many times on that reservation, and I guess one more time isn't going to kill me.

But this is the way it is. If you are going to rule against that tribal council, then you'd better wait for some repercussions.

MS. MILLER: Does the council fire judges sometimes?

JUDGE GARREAU: Well, they have. They fired my predecessor. So far I haven't gotten the axe, but I probably will.

MS. MILLER: You have never been fired or suspended?

JUDGE GARREAU: No, no.

MS. MILLER: How do you think separation of powers will change that relationship?

JUDGE GARREAU: Separation of powers--and there must also be some safety valves in the constitution of our tribe so that the power distribution is more even amongst all officials rather than be vested in a certain group of people as it is now.

MS. MILLER: It's vested in the council now?

JUDGE GARREAU: Yes, especially the council.

MS. MILLER: So are you in favor of the separation of powers?

JUDGE GARREAU: I'm in favor of the separation of powers, yes.

COMMISSIONER DESTRO: Excuse me, counsel. Let me clarify something for the record. You say the council, but then you say a group of people, especially the council.

JUDGE GARREAU: That's the one I'm talking about.

COMMISSIONER DESTRO: The council is who you're talking about?

JUDGE GARREAU: Yes, exactly.

MS. MILLER: Judge Garreau, under what circumstances would you as chief judge of the superior court conduct ex parte hearings or grant ex parte orders?

JUDGE GARREAU: I think any judge serving on any bench, when he sees imminent dangers--that lady witness who came here, the first one who testified from our area--if such a case had existed without any stopgaps for her protection, if there was an order that could not be issued and she is in imminent danger, she has to have a remedy of some sort, then ex parte orders are very necessary to protect her well-being. She feared physical abuse. She could get a restraining order, and that would stop that threat. But if it did happen, then a warrant could be issued. But ex parte orders in that area are very necessary.

MS. MILLER: So your testimony is that the standard is imminent danger?

JUDGE GARREAU: Imminent danger of physical harm. It's when you should have some order, and the code already says that in our code, that where there is imminent danger, an ex parte order can be issued.

MS. MILLER: And have you ever issued ex parte orders or held ex parte hearings in instances where there was no imminent danger of physical harm?

JUDGE GARREAU: Ex parte? Well, on divorce issues, those could be considered hearings on an ex parte basis. Where the persons are all served for a divorce hearing, and the prevailing party is there, the moving party is there, and the

party that it is against decides or wishes not to contest it and does not appear, then you can give a default judgment of divorce. In some sense that is an ex parte hearing.

MS. MILLER: What about the example where there is a child custody matter?

CHAIRMAN PENDLETON: Just a second.

MR. HOWARD: Earlier we had the issue raised as to whether Judge Gonzalez should be in the room while certain issues were being discussed. Judge Gonzalez, is it your opinion that perhaps you ought not to hear certain testimony about certain procedures at Cheyenne River in light of cases that are pending before you?

JUDGE GONZALEZ: If they involve particular cases, probably. But I don't think he has testified to any particular case at this point.

CHAIRMAN PENDLETON: But it is the Chairman's point that there may be a link between what is being said now and with the first witness. I don't want that to be a problem. Either we should dispense with this line of questioning, or we should ask Judge Gonzalez if he would excuse himself.

JUDGE GONZALEZ: I will excuse myself.

CHAIRMAN PENDLETON: Thank you.

MR. HOWARD: And the clerk also. Who is the clerk?

MS. MILLER: Dixie LeCompte was the clerk.

MR. HOWARD: Is Dixie LeCompte here?

VOICE: She's outside.

MR. HOWARD: All right. Thank you.

CHAIRMAN PENDLETON: I'm sorry, counsel, I was just being sensitive to my previous admonition.

MS. MILLER: That's quite all right.

If we could continue now, I was just curious, following up on this question, if it were a situation, say, where there was a custody matter and where there wasn't any testimony or any indication that children would be harmed physically in any way

or anything like that, would you consider issuing any sort of ex parte order or holding a hearing without both parties there in those instances?

JUDGE GARREAU: Well, again it boils down to one thing, and that is, for instance, a lady through a divorce action got custody of the children, and the husband does not have custody; she has custody. Now, this is a hypothetical case I'm telling you about.

MS. MILLER: I understand.

JUDGE GARREAU: I'm just trying to reiterate this into what would happen and how we would do this.

So the judgment is awarded, and the custody of the children is to the lady. The man is violent. The man comes along and he seizes the children, threatens her bodily harm. Yes, I would issue an ex parte order to prevent injury and danger coming to those children.

MS. MILLER: What I'm getting at is a situation where there were no indications present of any bodily harm or anything like that.

JUDGE GARREAU: Then I wouldn't issue anything in those cases.

MS. MILLER: So you would not issue ex parte orders in a case not involving bodily harm?

JUDGE GARREAU: No, not at all. There are circumstances and the judge can pretty well see those.

MS. MILLER: In your opinion, does the Indian Civil Rights Act waive sovereign immunity to allow civil rights claims to be brought in tribal court?

JUDGE GARREAU: No. Since the Martinez decision is in effect, the only forum for which adjudication of such cases can be made is in tribal court. And the Eighth Circuit Court of Appeals, in one of our cases remanded back to the tribal court, expressly stated that there are forums that can be had in the tribal court. So I would say that--I lost my train of thought there.

MS. MILLER: What I was asking, though, was whether the Indian Civil Rights Act, whether those claims can be brought in tribal court.

JUDGE GARREAU: Okay. You got me back on track. I tend to drift off whenever they get to be pretty complicated on what we are talking about.

Anyway, civil rights cases are cases that before Martinez was never addressed after Martinez. I know it literally tore it apart in many respects, and the difficulties other cases might have in reaching Federal court. The only ones that can now get to Federal court would be the habeas corpus cases.

MS. MILLER: If I can just interrupt you for a minute and maybe clarify my question. The question is whether the Indian Civil Rights Act claims--whether in your opinion those claims can be brought in tribal court or whether sovereign immunity is any bar to those claims.

JUDGE GARREAU: They can be brought if the tribal council consents to those being heard in tribal court.

MS. MILLER: So the tribal council has to waive sovereign immunity to allow ICRA claims to be brought?

JUDGE GARREAU: I'll have to say it has to follow that because the law is there and judges can't change it.

MS. MILLER: And this would apply even in cases where it wasn't the tribe itself that was being sued?

JUDGE GARREAU: This is the greatest contention that we have today, and that is when a tribe accepts 93-638 grants--and I don't think I need to explain that, since you already heard what 93-638 grants are--but the tribe in accepting the provisions of that act--I wish I had brought a copy of that with me. There is a Federal rule that states that they might have waived sovereign immunity in accepting the 93-638 grants. It's in there. So in case of suit, some attorney could say in court that, "Yes, you have waived it." And if they brought this Federal rule out, I'm afraid we are going to have a hangfire here on it. I use that term pretty loosely because in other instances where there is strictly tribal money involved, you'd have to gain the tribe's consent for suit. But in the area of 93-638 grants, it's in there that they can be sued.

MS. MILLER: So it depends on what sort of funding is involved is your answer?

JUDGE GARREAU: Yes. It's Federal funds we're talking about.

MS. MILLER: If we could just move on, I'd like to ask a few more questions.

JUDGE GARREAU: All right.

MS. MILLER: Could you describe your understanding of Indian law and whether that conflicts at all with the civil rights provisions in the Indian Civil Rights Act?

JUDGE GARREAU: That is a law that, like the white man has it, we don't have it in so much written books and forms, but Indian law is a law that is passed down from generation to generation, told from one elder to another, and on it goes. It's uncanny that a lot of it is still retained to this day.

Indian law--the assumption of the use of what we know now in the codes as pretrial conferences. Lots of things are resolved, as one gentleman said, by the use of conferences and what the elders had to say. Then it was followed, and that was the law of the Indian people. That is how I understand Indian law.

But Indian law, beyond what Felix Cohen said in the Handbook of Federal Indian Law, reaches far beyond what ordinary legislation does. And it is very hard for us to understand, as his interpretation of Indian law is. In fact, I'm still studying that.

MS. MILLER: Do you see any conflicts between your concept of Indian law and the civil rights provisions of, say, due process in your position as superior court judge?

JUDGE GARREAU: Yes, there is a conflict between the Indian Civil Rights Act and what Indian people themselves would use as corrective measures, because before civil rights, before any of this--I think I said this in my office with you and Mr. McGoings present--we preceded everything on this continent by the Indian law. The Indians were here first. And everything that was done was done according to customs, traditions, religion, and language.

And, indeed, for your information, the very constitution under which we all predominate ourselves is taken from the Iroquois Federation, and General George Washington borrowed much of what you see in the Constitution of the United States as being Iroquois. That's where it came from. So that constitution was here in this country.



MS. MILLER: In your position as superior court judge, though, are there ever occasions where there are actual conflicts where you have to decide whether to apply Indian law or whether to apply due process requirements of the ICRA?

JUDGE GARREAU: No. I have had one judge say I applied too much Indian law. But I guess maybe it's because I'm Indian. That's why I do that.

MS. MILLER: So is your answer yes?

JUDGE GARREAU: Yes, I do. And there is really nothing wrong with that.

MS. MILLER: I have other questions, but we are running rather late. Maybe I could stop now and ask if the Commissioners have any questions.

COMMISSIONER DESTRO: I just wanted to clarify that last comment. I want to make sure that the record is very clear. What you are saying is there is nothing wrong with you applying Indian law.

JUDGE GARREAU: That's right, exactly right.

COMMISSIONER DESTRO: And you're not saying--and if you are, please correct me--that in cases where you might see a conflict between the ICRA and Indian law, you would apply Indian law.

JUDGE GARREAU: That's right, I would.

MS. MILLER: You would apply Indian law if there is a conflict?

JUDGE GARREAU: I would apply Indian law because that is the first law.

COMMISSIONER DESTRO: All right. Thank you.

CHAIRMAN PENDLETON: Let me just ask you a question from your opening statement. I don't know much about reservations or Indian law. In Indian law, does one get a chance to face his or her accuser?

JUDGE GARREAU: Yes, probably more severe than the conventional methods.

CHAIRMAN PENDLETON: Why is that not applied under the Indian Civil Rights Act? All I've heard in these two sets of hearings is that people have never had a chance or seldom have a chance to question their accusers. I mean, I have heard testimony after testimony of ex parte involvement, of tribal councils interfering in the process of justice. I think we heard it from Ms. High Elk and Mr. Springer. He heard it from Ms. Thompson. But why is it, if that is fundamental law, and now we have the Indian Civil Rights Act, that people are seldom allowed to face their accuser?

We heard the police chief just now say that somehow somebody wants him suspended. The "somebody" is a phantom, it seems to me. Then that never happens. And nobody knows from where all these things come.

I've got to go back to Mr. LeBeau's statement from the previous testimony, and I think he raises an issue that was also raised by the police chief. He mentioned that he fought for this country and for its Constitution, and he comes back to the reservation, and yet people are allowed to discriminate against him.

A person comes to testify at these hearings--and we've heard it from more than one person about retaliation, and we don't know where that really comes from. Somebody retaliates, but nobody knows who. But somewhere in this system, whether we like it or don't like it or whether we understand it or don't understand it, it seems to me it is just for people to be able to face their accusers. Or maybe the question should be asked in reverse: When do the accusers get to face the people whom they have accused?

I don't know if you can respond to that, but I am interested in it.

JUDGE GARREAU: I will respond to that. If they have the right, then we also have the right. If they want to face us, then we'll face them. But so far we have never been able to face them because they have been devious in their methods, and that's a thing you find throughout all the reservations.

CHAIRMAN PENDLETON: Who is "they" that you're talking about?

JUDGE GARREAU: Well, you know, there are factions on these reservations that are setting aside, and particularly us. You don't know this one. Cheyenne River is about to have a general election of a chairman, and various council seats are up. Now,

what I think has happened here is that you have been used. This Civil Rights Commission comes onto that reservation on the eve of an election, and the story that's going around out there on that reservation is that somehow this Commission was duped into coming here because it's going to work to an advantageous nature for the opposition.

Did you know that there was going to be an election?

CHAIRMAN PENDLETON: No. I don't know about the duping either. I think people who know about me know I'm not easily duped.

JUDGE GARREAU: Well, I hope not. I hope that's not the case.

MR. HOWARD: I think we should add at this point that the Commission's hearings on enforcing the Indian Civil Rights Act have been planned since 1984.

JUDGE GARREAU: That's reassuring then. But the timing here--it appears as though it was orchestrated.

CHAIRMAN PENDLETON: Mr. Garreau, I can tell you that things which I have participated in as Chairman of this Commission have been used for a variety of orchestrations.

JUDGE GARREAU: I would imagine so.

CHAIRMAN PENDLETON: I am not surprised--or I should better say I am not shocked about this orchestration. But--I think my colleague will bear me out--that we planned this as early as January 1984 in Hunt Valley, Maryland, that this is one of the activities we would take on, and we would take it on in this particular year. You might ask why we didn't do it in 1984.

JUDGE GARREAU: Yes.

CHAIRMAN PENDLETON: It's because we didn't have the money to do it in 1984. And anybody who knows about government planning knows you have to plan for the out years to be able to get the money to be able to say what you're going to do. And I think if anybody wants to check our records, the Office of Management and Budget's records, the congressional records, this has been on the drawing board for some time.

What I do commend my colleagues and the staff about is that this is the first government organization that decided to come to Indian territory, if you will, or adjacent to Indian

territory, to be able to gather some facts with respect to an act that Congress has passed. That is our role, and we will continue to follow that role.

We have been in other areas where we have not really been before--in the area of the handicapped or disabled people. We have held extensive hearings on issues important to the disabled or handicapped community. And I think we have been very jurisdictional in our work and will continue to do so.

But I am interested in your comment about the "they." I heard about the orchestrations. But what is your feeling about the accusers and the accused getting together?

JUDGE GARREAU: They should. They should face each other in court.

CHAIRMAN PENDLETON: What would you do as judge to encourage that?

JUDGE GARREAU: I would encourage that probably with meetings and the law and order committee. Most of them are here.

CHAIRMAN PENDLETON: Would the law and order committee allow that to happen?

JUDGE GARREAU: Oh, yes, I'm sure they would.

CHAIRMAN PENDLETON: Would the council allow that to happen?

JUDGE GARREAU: Now, that is the question.

CHAIRMAN PENDLETON: Ah.

JUDGE GARREAU: We will see if they do.

CHAIRMAN PENDLETON: Thank you. I don't have any other questions. Thank you very much, Judge.

JUDGE GARREAU: Mr. Chairman, you said to be candid.

CHAIRMAN PENDLETON: I like it. Thank you. I have trouble being other than that. I'm not fully understood.

Nancy Condon, associate judge of the Cheyenne River Reservation.

[Nancy Condon was sworn.]

CHAIRMAN PENDLETON: Counsel.

Testimony of Nancy Condon, Associate Judge, Cheyenne River  
Reservation

MS. MILLER: Thank you, Mr. Chairman.

Ms. Condon, first of all, can you give us your address for the record.

JUDGE CONDON: Post Office Box 811, Eagle Butte, South Dakota.

MS. MILLER: Thank you. Could you tell us about your background, please.

JUDGE CONDON: Okay. First off, I want to make a correction. When I met with you before I said I worked in '78. At the time you were questioning me, I was pretty excited. I got hired in October '80, and I worked for a year and a half, and that was April '82 when I transferred to another position.

MS. MILLER: You worked where?

JUDGE CONDON: As an alternate judge.

MS. MILLER: How long have you been the criminal court judge?

JUDGE CONDON: I'm associate judge now, and I started November '85.

MS. MILLER: And you handle criminal court matters; is that correct?

JUDGE CONDON: Right.

MS. MILLER: And your testimony is that you were an alternate judge at a prior date.

JUDGE CONDON: Yes.

MS. MILLER: For how long?

JUDGE CONDON: For a year and a half.

MS. MILLER: Could you tell us about any legal training that you have had?

JUDGE CONDON: I've only experienced a 3-day workshop in Pierre when I was an alternate judge.

CHAIRMAN PENDLETON: Could you bring the microphone closer to you so they can hear you in the back?

MS. MILLER: Have you had any legal training since you have been an associate judge doing tribal court matters?

JUDGE CONDON: No.

MS. MILLER: Can you tell us whether there have ever been occasions in which other judges have issued orders or become involved in cases to which you are assigned?

JUDGE CONDON: There's only been one time when the chief judge acted on one case, and he dismissed it.

MS. MILLER: Why was that done?

JUDGE CONDON: Because the process was taking too long, and it happened way before I came aboard.

MS. MILLER: How did you come to find out the case was dismissed?

JUDGE CONDON: He called me later on that afternoon.

MS. MILLER: In your opinion, did the court experience problems providing service of process?

JUDGE CONDON: Yes. It was a problem when I first came on board, but in the past 4 months it's picked up.

MS. MILLER: Is there still a problem, or is it just less of a problem?

JUDGE CONDON: Well, less of a problem now.

MS. MILLER: Would you like to have more legal training?

JUDGE CONDON: Sure.

MS. MILLER: Do you think that it is necessary for you to have more legal training in order for you to do your job?

JUDGE CONDON: Yes.

MS. MILLER: Have you requested any training?

JUDGE CONDON: When I first came on board, I heard of one that was going to be held--I think it was in Nevada or someplace. I inquired about it, and there wasn't any funding.

MS. MILLER: Has that been the only instance in which you have requested training?

JUDGE CONDON: Yes. Since then it seems like everything--the problem was we didn't have no funds.

MS. MILLER: Is that still a problem?

JUDGE CONDON: Yes. Because right now I have had a clerk working under the manpower program, job-training program, and in April I had my two clerks RIF'd, my criminal clerks.

MS. MILLER: So you have no criminal clerk at this time?

JUDGE CONDON: No.

MS. MILLER: How do you function without a clerk?

JUDGE CONDON: I don't. We have had a temporary one. But it's been within the last 2 days that we haven't had anybody because she up and quit on us. It was too much for her. The paperwork was too much for her.

MS. MILLER: So you have had a temporary criminal court clerk?

JUDGE CONDON: Yes. And that was in the job-training program.

MS. MILLER: Has the tribal council ever overruled a decision of yours?

JUDGE CONDON: Yes.

MS. MILLER: Could you tell us about that?

JUDGE CONDON: On June 6, 1986, I made a decision that was referred by tribal council for the tribal court's determination. And on my decision I got suspended for it for 2 weeks.

MS. MILLER: Based on the decision that you made in the case?

JUDGE CONDON: Yes.

MS. MILLER: The council didn't like it?

JUDGE CONDON: I guess not.

COMMISSIONER DESTRO: Excuse me, counsel. How do you know that was the reason that you got suspended? Did somebody tell you that or what?

JUDGE CONDON: Well, see, it was referred to the tribal court for determination on April 1, and I didn't get it until June 6. I acted on it, and then I got terminated on June 9--I mean suspended; excuse me.

COMMISSIONER DESTRO: And did the council act itself? How did that happen? Would you tell us how that happened? Did they take a vote and you got suspended, or did the chairman suspend you, or what?

JUDGE CONDON: No, the council itself suspended me.

MS. MILLER: Was there a resolution?

JUDGE CONDON: There was a tribal memorandum on June 10 that was sent out, and I was suspended on June 9.

MS. MILLER: Did the memorandum describe the reason for the suspension?

JUDGE CONDON: I could read it.

MS. MILLER: All right.

JUDGE CONDON: "The Cheyenne River Sioux Tribal Council, during its special session held on June 9, 1986, approved to suspend Nancy Condon, Associate Judge, and that the Law and Order Committee be directed to address this issue, and to investigate the judicial department and report back to tribal council for reconsideration at the next session of council."

MS. MILLER: So the memorandum didn't state that the reason you were fired was because of the decision that you made in the case?

JUDGE CONDON: No.



COMMISSIONER DESTRO: But my question is: Is that what it means, though, when it says "investigate the reconsideration back." I may be misquoting it, but what did that mean to you? That you had made a bad decision and you were getting suspended for it?

JUDGE CONDON: That's the only reason I could think of.

COMMISSIONER DESTRO: Okay.

MS. MILLER: Are you aware of any complaints in the community about the tribal court system, the operation of the court system?

JUDGE CONDON: No.

MS. MILLER: What do you think the community opinion is about the way the courts operate?

JUDGE CONDON: Well, I don't know of any, except that I know if a defendant should come to court on a motion for dismissal or something, or if they want a bond reduction or something and I don't go along with it, then I get threatened to go before the law and order committee or go before the council.

CHAIRMAN PENDLETON: Excuse me, counsel.

Ms. Thompson and Mr. Springer and Ms. High Elk don't have a high regard for the court system, and there's a lot of testimony in here from the last time out that they are dissatisfied. I imagine some of that must have gotten around a little bit. Are you saying you have never heard any complaints about the justice system at Cheyenne River?

JUDGE CONDON: No.

CHAIRMAN PENDLETON: Thank you. Counsel.

MS. MILLER: Just maybe one or two more questions.

Have there ever been instances in which you have dismissed a case based on objections founded on civil rights grounds, for example, based on the fact that a person wasn't told of the charges against them or based on the fact that a warrant was not produced when it should have been produced, or grounds such as that?

JUDGE CONDON: No, not that I can remember.

MS. MILLER: Have you ever had any of your decisions reversed by the appellate court based on those types of grounds?

JUDGE CONDON: No.

MS. MILLER: In your opinion, do you think criminal defendants appearing in your court understand their rights under the Indian Civil Rights Act?

JUDGE CONDON: Right.

MS. MILLER: Why do you say that?

JUDGE CONDON: Well, when they are arrested they are told, you know--they were given their rights, and when they come in for arraignment, they are given their rights.

MS. MILLER: Who gives them their rights? Who tells them?

JUDGE CONDON: The prosecutor. You mean when it comes to court?

MS. MILLER: I mean anywhere in the process.

JUDGE CONDON: When they are making the arrest, and when they come for arraignment, the prosecutor explains it.

MS. MILLER: And you are sure this happens with each arrest?

JUDGE CONDON: Yes.

MS. MILLER: Do you in your courtroom ever talk to people about their rights to make sure they understand them?

JUDGE CONDON: Well, usually after the prosecutor explains their rights, I reask again when they come before me to enter their plea, ask them if they do understand their rights, if they understand the charges that they are being charged with.

MS. MILLER: I have no more questions.

CHAIRMAN PENDLETON: Thank you very much, Ms. Condon.

Our final witness is Morgan Garreau, chairman of the Cheyenne River Reservation.

[Morgan Garreau was sworn.]

CHAIRMAN PENDLETON: Counsel.

MS. MILLER: Thank you, Mr. Chairman.

Testimony of Morgan Garreau, Chairman, Cheyenne River Sioux Tribal Council

MR. GARREAU: Just a minute. Could I make a statement prior to the questioning?

CHAIRMAN PENDLETON: Certainly. We have allowed that to happen before.

MR. GARREAU: One of the things I'd like to comment on is that I am aware of the article in the Washington Post. Comments were made alleging nepotism. You just heard testimony from my father, who is the chief judge of the Cheyenne River Reservation. I would like to clarify that issue before the Commission.

When Mr. Garreau was considered as judge of the Cheyenne River Sioux Tribe, I was a council member at that time. I was elected back in September of 1982 as the chairman of the tribe.

Now, at the time Mr. Garreau's name was being considered for the judgeship or for the chief judge of the Cheyenne River Sioux Reservation, I had stated to the council that I felt it was a conflict of interest. Therefore, I excused myself from the council chambers. I left the room. I did not take part in any of the deliberations in the hiring of my father as chief judge. I did not entice anyone to hire Mr. Garreau as the chief judge of the reservation. Upon my return back to the council chambers, I found that Mr. Garreau was selected as the chief judge of the reservation.

And as I stated, it's been like that in our code for years now. Our code has been amended back in 1978, but that has always been in our code for the selection of judges to be done by the tribal council. So I wanted to clarify that.

The other thing mentioned also was that we had refused to testify here before the Commission when you were first here in Rapid City. That is not so. It was also iterated that we had something to hide. That is not so either. I am here today to answer any questions you may have to the best of my ability. It was put to us that it was purely voluntary for us to be here

to testify before this Commission. Therefore, I thought it meant we could come here if we wished to; if we didn't wish to, we didn't have to be here.

It was then stated that subpoenas would be submitted for us to be here. Therefore, a subpoena was submitted, and I am here today to testify to you.

There is also the issue that others have made that they were afraid that they would be retaliated against. I want to make it very clear, as I stated to the tribal council when we had council last week, that I feel it is a right for any member of our tribe to speak their mind, whether it's to this Commission, to the tribal council, or to the courts. That is their right. And I, as chairman of the tribe, have no wish to retaliate against anyone, nor do I plan to retaliate against anyone. As I stated, that is their right to say what is on their mind.

CHAIRMAN PENDLETON: Just in response, I can appreciate the comments that you have made. I think the type of comments you made echo exactly what we were trying to get at the first time. We wanted to make sure there was a balanced record. It was not a matter of accusation. We just wanted to make sure the record was balanced. This is not a court of law. Issuing subpoenas is not something we do in a haphazard manner or just as a matter of course. We take it that when people agree to testify, it is not our understanding that you can or cannot come. We understand that 'voluntary' means you have volunteered to appear; you have not volunteered to not appear. We wanted to make certain the record was squared away, and therefore we issued the subpoenas to make sure that the record was clear as a matter of protection for all sides of the question.

Beyond that, I don't have any other comments to make, and we will return to counsel.

MS. MILLER: Thank you, Mr. Chairman.

Mr. Garreau, could you first of all tell us something about your background. If you could state your address for the record, and then tell us something about your background.

MR. GARREAU: My address, for the tribal office, Post Office Box 590, Eagle Butte. My home address, my personal address, is Box 122-C, Star Route 3, Gettysburg, South Dakota.

MS. MILLER: Could you tell us a little about your background?

MR. GARREAU: What do you want to know about my background?

MS. MILLER: Well, I don't know. I don't know what your background is.

MR. GARREAU: But what type of background are you requesting?

MS. MILLER: What have you done? How long have you been on the council? How long have you been chairman? What did you do before that? Those kinds of things.

MR. GARREAU: I've been chairman now going into my fourth year. I'm up for reelection on September 2 in the general election. I've been a chairman for 4 years. Prior to that, I served on the council for about a year and a half.

Before that I served as administrative officer to the Cheyenne River Sioux Tribe. Before that I worked in Aberdeen, South Dakota, under contract with the Indian Health Service, for almost 5 years with the Indian Health Service. Before that I worked with the Cheyenne River Sioux Tribe as director and department head of various tribal programs.

Is that what you wanted?

MS. MILLER: That's fine, unless there is something else you'd like to add that you think is relevant.

For the record, I would just like to state at this time that on July 9 I did have a conversation with you, if you recall, and asked about your availability to testify at our hearing, and you indicated that you would be available. At a later date, on July 28, we had another conversation at which you were formally invited to testify at our hearing. A message was also left with your secretary earlier because we were not able to get through to you by phone. And at that time you did not give us an answer about whether you would testify but scheduled an appointment for the following morning to have a meeting. And at that meeting on the following morning, you informed us that you would decline to testify.

I just wanted to get that into the record.

MR. GARREAU: Yes, I'd like to respond to that. I think I made that perfectly clear in my opening remarks to the Commission that I took it that it was voluntary for us to be here if we wanted to testify. I opted not to testify at that time. Therefore, I thought it was voluntary.

Then later on it was stated we had refused to testify. You had come to my office, correct, but you wanted to confirm that I was going to be here to testify, and I said I would not be.

MS. MILLER: So you did decline to testify.

MR. GARREAU: I did decline, yes. I did not have anything to hide from this Commission.

MS. MILLER: All right. I think we've got that straight. Thank you.

MR. GARREAU: Okay.

MS. MILLER: Let me just ask you a general question to start out. Do you think the tribal courts are working to enforce the Indian Civil Rights Act at Cheyenne River or not?

MR. GARREAU: The present system that is set up at Cheyenne River regarding the court systems I think is working. We have a law and order committee set up through the tribal council that I would hope would be a working committee. We do get many complaints verbally on our systems. It has been stated that there should be written comments made to the committee for them to act upon. It has been found in some cases, as stated by some of the council members--I believe Commissioner Destro stated there are always two sides to a story. In some instances it has been found that when a complaint or accusation has been made, after further investigation that is really not the case at all.

Now, for me to be sitting here testifying to the Commission--and I stated to the tribal council--I feel our problems are our own. I think the Indian Civil Rights Act, as passed by Congress, should be enforced by tribal courts. I believe that is where it should stay.

If the Commission is trying to gather testimony to get the Indian Civil Rights Act amended to give members, I guess, an opening to go into Federal court, I cannot agree with that. And the reason I cannot agree with that, as I stated at the tribal council, is I was elected at large by the people for the reservation to defend the constitution and bylaws of our tribe, and I have been doing that. I defend the laws that our council passed.

If they are implemented correctly and properly, we have a good system. And I don't think I should be here testifying to

the Commission complaining about our system of government, because I truly feel that there is an issue of tribal sovereignty, and the issue of the ability of the tribe to govern themselves.

CHAIRMAN PENDLETON: Excuse me, counsel. I just want to say, Mr. Garreau, for the record, that we are not trying to gather information for the purpose which you stated, which is to move any civil rights cases to the Federal courts. That is not our intent at all.

The other part about it, I think, is also important for us to say, that I share the intensity of your feelings about sovereignty. At the same time there is a law on the books, and there is a law on the books that requires some enforcement. It has not been left to the mechanism as you outlined for that to happen. And one of the reasons we are here is to find out why that does or does not happen. It is not to be punitive in any way at all but to try to collect the set of facts that may or may not lead to an amendment. It might not do anything at all, just to make recommendations to the Congress on status. That is how it might turn out.

It is also important to say that our recommendations to the Congress and to the administration would not center on these hearing just in South Dakota. There are hearings planned elsewhere in the country where there might be a different set of circumstances to come up. So I don't think anyone should leave here with the idea that we base what we are saying purely upon what happens in the tribes that are the subject of this hearing.

Counsel.

MS. MILLER: Thank you.

You said that you oppose any sort of Federal court review, then, for ICRA cases. Would it be correct to say that it is your view--I guess I should ask you: Do you believe that the Indian Civil Rights Act should be enforced at all?

MR. GARREAU: I believe it should be, but it should be enforced in tribal courts.

MS. MILLER: In tribal courts.

MR. GARREAU: Yes.

MS. MILLER: Do you believe that it is being properly enforced in tribal courts at Cheyenne River?

MR. GARREAU: Yes, I do.

MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe?

MR. GARREAU: Yes, I do. It has come to the tribal council with regard to waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present, has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?

MR. GARREAU: Unless the council waives sovereign immunity.

MS. MILLER: Which it hasn't done.

MR. GARREAU: No, they have not, for anyone.

MS. MILLER: And you don't believe they should?

MR. GARREAU: As it has been stated in tribal council, sovereign immunity is something that should zealously be protected by the tribal government, and that's been the case, that the tribal council has protected that and has not waived sovereign immunity.

MR. HOWARD: It is possible, Mr. Garreau, if I could add, that you could waive your sovereign immunity with respect to equitable relief.

MR. GARREAU: I realize that.

MR. HOWARD: Have you considered doing that?

MR. GARREAU: I realize that, and it's been stated to the tribal council, but the council will not waive sovereign immunity.

MR. HOWARD: Even though most likely their greater fear is money damages.



MR. GARREAU: Basically, what has been discussed is if the tribal council should waive sovereign immunity for any instance, that other people, other members of the tribe, could come to the council requesting that sovereign immunity be waived at that time. And apparently council feels that by waiving it once, they would probably feel obligated to waive it again.

CHAIRMAN PENDLETON: In other words, you don't want to set a precedent.

MR. GARREAU: Basically, that's what council has stated.

CHAIRMAN PENDLETON: Let me ask one question, then. Are you saying that the Indian Civil Rights Act does not apply at Cheyenne River?

MR. GARREAU: I would say that it should be applied, but it would seem the only way it can be applied is if the tribal council would waive the sovereign immunity, and in this instance it would not.

CHAIRMAN PENDLETON: So what you're saying, in other words, is that the tribal council has decided that that Federal law is not enforceable on the reservation?

MR. GARREAU: Put as such, when I state that if it takes a waiver of sovereign immunity, yes, I guess that would be the case.

MR. HOWARD: Then it would be unenforceable, and it is unenforceable presently.

CHAIRMAN PENDLETON: That means, as far as what we heard from witnesses from Cheyenne River, they might well forget about civil rights enforcement on the Cheyenne River Reservation--with respect to the Indian Civil Rights Act.

MR. GARREAU: As I stated to you before, Mr. Howard, the council does protect sovereign immunity. And as I stated, it has been explained to the council that they can waive sovereign immunity in specific cases. But the council has decided not to do that.

There have been times, though, that the council, I am aware of, back in the sixties and I believe the early seventies had waived sovereign immunity, and copies have been provided for general information of the tribal council. But that has not been the case. There has been no waiver of sovereign immunity.

CHAIRMAN PENDLETON: I imagine you heard my question to Judge Garreau, and from what you say it is impossible for accusers and accused to confront each other.

MR. GARREAU: With respect to talking about waiver of sovereign immunity?

CHAIRMAN PENDLETON: With respect to the Indian Civil Rights Act.

MR. GARREAU: I go back to the waiver of sovereign immunity. It takes waiver of sovereign immunity by the council, and as I stated, the council has not opted to do that.

CHAIRMAN PENDLETON: Okay.

MS. MILLER: If someone can't pursue a remedy for a violation of civil rights by the tribe or some part of the tribe, what is a person supposed to do, in your opinion? Is there another remedy outside of the ICRA provided by the tribe?

MR. GARREAU: The individuals that feel there is a violation of civil rights have asked the council to waive sovereign immunity. As Judge Garreau stated to you, if there is a case regarding sovereign immunity, those individuals are then asked to come directly to the tribal council to request the tribal council to waive sovereign immunity. And as I stated, the council would not waive sovereign immunity.

I believe you had testimony from Ms. Imogene High Elk, and that was the case. The council did discuss it at length in executive session, and we spoke with her and her attorney for, I believe, almost 2 hours. And it was decided by the council not to waive sovereign immunity.

CHAIRMAN PENDLETON: Counsel, let me try to ask it another way. I'll probably get the same answer.

MR. GARREAU: You're trying to--

CHAIRMAN PENDLETON: Under sovereign immunity, what civil rights remedies are available to members of the reservation?

MR. GARREAU: Basically, at this point, as I stated to you, they are not allowed to waive sovereign immunity.

CHAIRMAN PENDLETON: I'm not asking them to waive at all. What I'm asking is: Under sovereign immunity, as a given--you have already said you are not going to waive that in terms of civil rights violations.

MR. GARREAU: Yes.

CHAIRMAN PENDLETON: Under sovereign immunity, which is under the tribal council's jurisdiction--

MR. GARREAU: Right.

CHAIRMAN PENDLETON: --if there are what tribal members believe to be civil rights violations, what remedies are available to them under the rubric of sovereign immunity?

MR. GARREAU: At this time none.

CHAIRMAN PENDLETON: So there are no civil rights remedies available to people at Cheyenne River? If there are none under sovereign immunity and there are none under ICRA, then there are no remedies for civil rights violations. Is that what you're saying?

MR. GARREAU: If it takes waiver of sovereign immunity, then there is none.

CHAIRMAN PENDLETON: No, no, no. I want to be very clear. I'm not asking you about a waiver. I want to be very clear on this point. Under sovereign immunity--I mean you've got that and you decide. And a member of the reservation comes to tribal council in an attempt to get a remedy for what he or she perceives to be a civil rights violation; okay? What is that remedy, or is there a remedy available?

MR. GARREAU: That individual can file in tribal court. But again I must remind you that--

CHAIRMAN PENDLETON: So there are civil rights remedies available in tribal court under sovereign immunity. I want to know what those are.

MR. GARREAU: As I stated, they can go to tribal court. But court decisions, since we do not have a separation of powers, can be subject to review by the tribal council.

CHAIRMAN PENDLETON: I'm going to chase this around one more time. This is important, I think, for the record. What I hear you saying, the more I ask the question or the more I try

to make the point, is that there are no civil rights remedies to members of the Cheyenne River Reservation, either from the tribal council or from the court. Because you just said earlier that there are none. You can go back to tribal court, but the council has the power to wipe out a decision from the tribal court.

MR. GARREAU: That's correct.

CHAIRMAN PENDLETON: In other words, there is no such thing as free speech or freedom of the press or any of those activities on the reservation.

MR. GARREAU: No.

CHAIRMAN PENDLETON: Is that true?

MR. GARREAU: No, there is freedom of speech. You see, when you get back to the matter of retaliation, as some individuals have stated here, that is not so. What we have heard from staff--basically, when I talk about retaliation, I would hope there would be no retaliation.

CHAIRMAN PENDLETON: Here it says, under the Indian Civil Rights Act: "No Indian tribe in exercising the powers of self-government shall"--this is number 2--"violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

Are you saying to me that people on the reservation are not protected by this at all?

MR. GARREAU: They are protected by that, as stated in the law and order code of the tribe.

CHAIRMAN PENDLETON: Counsel.

MR. GARREAU: But I just want to make it very clear regarding the sovereign immunity case.

CHAIRMAN PENDLETON: I think you have made it very clear.

MR. HOWARD: Let me just follow up. You say they are protected by the law and order code. But what happens--

MR. GARREAU: There are laws passed by the tribal council on the law and order code, which has been amended back in 1978, and there are laws to protect the individuals of the tribe.

MR. HOWARD: If those laws are violated, then what happens? What happens to the person who seeks redress?

MR. GARREAU: He can go back to the tribal courts regarding if any of his rights have been violated. Then the courts at that time can make a decision regarding that.

MR. HOWARD: But aren't we back in the same situation as we were with the ICRA? That is, the tribal council claims sovereign immunity, and then that person has no redress even under a violation of the law and order code?

MR. GARREAU: That's correct.

MR. HOWARD: All right.

MS. MILLER: And the council has the power not only to overrule tribal court decisions, but has the power to fire judges; is that right?

MR. GARREAU: That's correct.

MS. MILLER: And in most instances, is it your opinion that if the tribal council decides not to grant sovereign immunity in a civil rights context, to allow a claim to be brought in tribal court, would you say that judges generally would not even hear such a case?

MR. GARREAU: As Judge Garreau stated, it would probably be referred to the tribal courts for a determination if it takes a waiver of sovereign immunity.

MS. MILLER: What I'm asking is: If somebody goes before council and requests a waiver and is denied a waiver of sovereign immunity, then the person files in tribal court anyway. In most instances, would the judge even hear the case?

MR. GARREAU: Probably not, because the council wouldn't waive it.

MS. MILLER: Mr. Chairman, did you have a question?

CHAIRMAN PENDLETON: I'm reading in your law and order code here, under Chapter 2, "The establishment of courts, judges, and other personnel." It says here that the appointment and

qualification and terms of compensation received by the judges shall be determined by tribal council. But further on it goes on to say that, "No judge shall be suspended or removed from office prior to the expiration of his term except provided hereinafter. Judges may be appointed."

But it also says over here that the only way you can remove a judge is for neglect of duty or gross misconduct, after which a public hearing is held.

Is gross misconduct an elastic clause that the tribal council decides what gross misconduct is?

MR. GARREAU: The section that you are making reference to has been amended by the tribal council.

CHAIRMAN PENDLETON: And when was it amended?

MR. GARREAU: That was amended back in 1981 or '82. It has been amended that council can just remove a judge.

CHAIRMAN PENDLETON: Could you supply us with the amended law, because this one is dated 1970. It's a revision, too.

MR. GARREAU: It has since been revised or amended by the tribal council that no reason is needed now to remove a judge. All it takes is just an action of the tribal council to remove a judge.

CHAIRMAN PENDLETON: So the judge has no civil rights either.

MR. GARREAU: Basically, yes.

MS. MILLER: Am I to understand, Mr. Garreau, that you approve of the council's action in overruling the decision in LeCompte v. Jewett?

MR. GARREAU: Do I what?

MS. MILLER: Did you approve that?

MR. GARREAU: No, I didn't. I did not approve of that. I felt that any decision made by the appellate court should remain as such in the appellate court.

MS. MILLER: Even if the appellate court was deciding that sovereign immunity did not bar Indian Civil Rights Act claims?

MR. GARREAU: That's basically why council set up an appellate court, is that the complaints we consistently heard was that the lower court would make decisions that were appealable to the appellate court, to the tribe's appellate court, and as I understood it, at that time when the council set it up as such, that those decisions should stay there.

MS. MILLER: So you think the appellate court should be independent of the council?

MR. GARREAU: I am very favorable that there should be a separation of powers. As a matter of fact, there is an effort underway right now on the reservation that judges be elected for 5-year terms, and that the judicial system be basically independent from the tribal council.

MS. MILLER: Did you vote in favor of overruling LeCompte v. Jewett?

MR. GARREAU: I don't vote on that. Only the council votes on it. The only time I can vote is in case of a tie.

MS. MILLER: Are you then also in favor of a separation of powers between the lower tribal court and the council?

MR. GARREAU: Yes, I am. I am in favor of separation of powers of the executive, legislative, and judicial branch. I'm in favor of the checks and balance system.

MS. MILLER: How would separation of powers affect the sovereign immunity issue, then?

MR. GARREAU: Basically the people, under a constitution, can amend by a submission of a petition of 200 names. But that in turn has to be approved by tribal council. I think there is an avenue available for the people if they feel there should be a separation of powers, and it then goes to the vote of the people to make that decision.

CHAIRMAN PENDLETON: Counsel, may I ask just one other question.

On this matter of tribal civil rights, just once more. Would I be fair in saying that at Cheyenne River only the tribal council has civil rights?

MR. GARREAU: The way the constitution was approved under the Indian Reorganization Act of 1934, that authority, our power that it is sometimes referred to, is given to the tribal

council. As a matter of fact, it has been stated time and time again that the tribal council is the authority of the reservation.

CHAIRMAN PENDLETON: So what you're saying is--

MR. GARREAU: I myself, as chairman of the tribe, have eight constitutional duties, but they are basically ceremonial duties, and any other authorities that I do have have to be given to me by the tribal council, even to the point of signing checks or such. It has to be given to me.

MR. HOWARD: Did you say--perhaps you didn't say this. What is the amendment process?

MR. GARREAU: The amendment process by the people is to submit a petition with 200 names in accordance with ordinance 14, which is our election ordinance. Once that petition is submitted to the tribal council, the signatures on that petition are verified to make sure they are legal voters of the reservation. They have to be 21 years of age. That is submitted to the council. Once the signatures are verified, then under our constitution, it has to be approved by the tribal council.

Upon approval by the council, the council then requests the Secretary of Interior to set up a secretarial election, and at that election 18 year olds can vote in the secretarial election regarding that specific amendment to the constitution. And by a majority vote of the people, the amendment is accepted once it's approved by the Secretary of Interior.

MR. HOWARD: The only criterion, then, is the validity of the signatures?

MR. GARREAU: Once those 200 signatures are submitted.

MR. HOWARD: Two hundred signatures by persons over 21 years of age?

MR. GARREAU: Yes, that's right.

CHAIRMAN PENDLETON: Mr. McDonald.

MR. McDONALD: Mr. Garreau, you mentioned that you favor separation of powers of legislative, executive, and judicial branches.

MR. GARREAU: Yes.



MR. McDONALD: In these hearings we have focused on separation of the judiciary, but you also indicated, and I believe this is the case, that you are a member of the legislature, the council, and also the executive, being the president.

MR. GARREAU: Chairman.

MR. McDONALD: Chairman. Do you also favor the change so that there is separation of the executive and the legislative branch?

MR. GARREAU: Yes.

MR. McDONALD: Thank you.

CHAIRMAN PENDLETON: Counsel, you can have one more and then we'll move on to the public witnesses.

MS. MILLER: Let's see. If I get to have one more question--

CHAIRMAN PENDLETON: You can have a followup question, too.

MS. MILLER: Let me move to another area just briefly. Can anyone appeal to the council and get the floor to speak to present their case?

MR. GARREAU: Yes. Definitely. I think any member of our tribe has that right. That option is to come to the tribal council to present whatever it is that is on their mind.

MS. MILLER: During the time you have been chairman, have there been any instances in which people have been denied that right?

MR. GARREAU: No, as chairman of the tribe, if anyone wants the floor, we give them the floor. As a matter of fact, there are times when even the council requests the floor for the members of the tribe. I fully support, as I stated, that every member of the tribe should have the right to speak to tribal council.

MS. MILLER: If I could squeeze in just one more question.

CHAIRMAN PENDLETON: It's attorney's privilege.

MS. MILLER: Thank you, Mr. Chairman. It gets us back, I guess, to this issue of sovereign immunity. My question would be: If there were separation of powers, and if the tribal court or the appellate court at Cheyenne River decided that persons can sue the tribe for declaratory and injunctive relief under the Indian Civil Rights Act, in your opinion, would the council have to go along and abide by that decision, and would you be supportive of respecting that type of decision?

MR. GARREAU: Yes, I would. At times, though, when people come to the tribal council--when council does not want to waive sovereign immunity, and it does not go to tribal court, I feel it should remain in tribal court. A decision should be made that should be honored by the tribal council. But that is not the case, though. Because it takes a trial to determine what that individual wants. If it has not gone to trial, there is always a fear that the individuals would sue the tribe for considerable amounts of money, but it has never gone to tribal court, though, and I think that's where it should remain.

MS. MILLER: No more questions.

CHAIRMAN PENDLETON: Mr. Chairman, I want to thank you for coming, and I think you cleared up the record that you have nothing to hide.

MR. GARREAU: Thank you, Mr. Chairman.

CHAIRMAN PENDLETON: We will now move to the open session, and we'll take a little break while our recorder changes the tape.

[Recess.]

#### PUBLIC SESSION

CHAIRMAN PENDLETON: May we reconvene, and we will take the witnesses in some order. And if you don't have 5 minutes of testimony to give us, please do not be constrained to give us 5 minutes' worth. If you have 3 minutes or 1 minute to give, we'd appreciate it. We have some planes to catch. I rode all night last night trying to get here, between Idaho Falls and Salt Lake City and every place else.

So we will move to our first witness, Mr. Walter Woods.

[No response.]

CHAIRMAN PENDLETON: C. Hobart Keith. Is that you, sir?

MR. KEITH: Yes.

CHAIRMAN PENDLETON: We will take you first, since you are here.

[C. Hobart Keith was sworn.]

Testimony of C. Hobart Keith, Oglala Sioux Tribe

MR. KEITH: I swear to testify better than the best of my ability.

CHAIRMAN PENDLETON: Enlighten us, please.

MR. KEITH: Thank you. Be sharp, little lady, and record this for posterity. Shall I announce my name? You did already.

CHAIRMAN PENDLETON: It would be helpful if you would repeat your name and address and so forth.

MR. KEITH: I am C. Hobart Keith, duly enrolled member of the Oglala Sioux Tribe, also known as Toshokahinko, Blue Horse. A long time ago when I was a wee laddie, a hostile Indian of long ago gave me that name. I'm proud of it.

Now, where would you like me to start? Civil rights?

CHAIRMAN PENDLETON: That is the limitation.

MR. KEITH: I have documentary evidence that will take more than 5 minutes. It entails my rights being violated.

CHAIRMAN PENDLETON: We will take your records, your documents, but give you 5 minutes to talk about them.

MR. KEITH: Well, my big mouth. I'd better be right.

The trouble I think on the Indian reservations, we have a section 19 of the tribal code--incidentally, I'm a former chief judge of the tribal court. Robert Fast Horse is the current chief judge, and I look for him to sit there a long time if he wants.

Now, section 19 reportedly restrains any councilman or anyone else interfering with the tribal court. But the problem with it is that those who drafted that Reorganization Act, 50 years of successful failure, failed to put teeth into the

ordinance. As a consequence, heretofore, that is, until recently, I believe, the court has been subjected to the ignorance and treachery of the tribal council. It is not really self-government, because there's too much outside influence.

I'll give you an example. The Shenasof or the Black Robe Jesuit wanted to dig up Red Cloud, exhume him, and put him down by the road. I was chief judge, and they brought me out of the chair, and I wouldn't let him do it. As a consequence, I lost a lot of the Catholic vote. And it's tied into civil rights.

The case of Santa Clara Pueblo v. Martinez, as I read the law, the Supreme Court knocked the civil rights thing out. Right here I've got a tape. An eminent attorney locally here in essence robbed me of \$25,000 in the tribal court.

[Discussion off the record.]

MR. KEITH: I think this council is younger, and it's a better council; and the court is better, and you should see some changes.

But I have documentary evidence where I had a default judgment in my favor, and I was never able to prosecute it until the 28th, just a week from today, and we'll settle the thing one way or another in court. That judgment goes back to July 14, 1974. And they failed to answer timely, and they never answered until they formed this fraudulent appellate court, which is a gross violation of my purported civil rights. They didn't answer it until 1977 on February 22. The most they can have is 60 days.

The documents are here. I'd like to give them to you so you can study them.

CHAIRMAN PENDLETON: We will accept your documents.

MR. KEITH: Now, one more thing. At the risk of seeming facetious, I think I'm quoted in some kind of a health thing. They don't treat the symptoms in public health. The white man can't pretend to be the doctor--no offense as an individual--because he's a disease, in my opinion.

Civil rights, before we got to it just recently, had been violated innumerable times by different tribal members. There is documentary evidence.

What I don't understand is why don't you come to the reservation and examine the court instead of coming way up here, and then we have to make these trips. I'm just up here inadvertently because I had to bring my boy to the airport, and then I just happened to stumble into this thing.

MR. HOWARD: We appreciate that. We did send staff attorneys to all three reservations to talk with tribal officials.

MR. KEITH: Well, I'm at a loss, because there's been a lot of meetings out here trying to cure the Indians' woes and what not, but it is generally taken back there and pigeonholed someplace. I'm wondering what's going to happen to this.

CHAIRMAN PENDLETON: All parties being willing, we will survive a little longer and at least be able to put out a report. If no report goes out, we will certainly be able to distribute to the public the transcript of these hearings.

MR. KEITH: Who gets the report? Congress?

CHAIRMAN PENDLETON: And the general public.

MR. KEITH: The general public--news releases.

CHAIRMAN PENDLETON: And Congress. You can get them. Everybody gets them.

MR. KEITH: Well, currently I think it's not equal protection of the law when I have to face, you might say, a genuine attorney. I've never been to law school. I'm not a lawyer. I'm an artist. I didn't get along there because I'm not gay--I just wanted to interject that--in your art colonies.

It's unfair. Right now there's a lawyer in a case down there right now. He's trying to invoke rule 12 of the State code.

[Discussion off the record.]

CHAIRMAN PENDLETON: Mr. Keith, if you have other testimony, please give it to us. We have to move on.

MR. KEITH: Is my 5 minutes up?

CHAIRMAN PENDLETON: Yes, sir.

MR. KEITH: It's up now?

CHAIRMAN PENDLETON: Yes, sir.

MR. KEITH: How will I get these documents to you?

CHAIRMAN PENDLETON: Give them to counsel, and we will move right along.

MR. KEITH: I want to thank you for the few minutes you allowed me. I wish I had more time and a bigger audience. I apologize for that.

MR. HOWARD: Thank you, Mr. Keith.

CHAIRMAN PENDLETON: Mr. Woods, please.

[Walter Woods was sworn.]

CHAIRMAN PENDLETON: You have up to 5 minutes, sir.

Testimony of Walter Woods, Cheyenne River Sioux Tribe

MR. WOODS: Back in 1968 I think, Congress created a monster, which is called the Indian Civil Rights Act. I think it is better known in Indian country as the Revenge Act, the Creature Revenge Act. In order to correct this double justice, they called it the Indian Civil Rights Act.

The Indian tribes were assured of their civil liberties on the reservations through a modified version of the Bill of Rights--they were assured of their civil liberties through this Bill of Rights, a sister to the U.S. Constitution. The Federal courts began moving rapidly into this area, deciding a variety of enjoining violations of tribal government, of civil rights. This led to the early impression that the Federal courts might take over much of the judicial responsibility of the tribal courts.

In the past or maybe 3 or 4 years back, however, this trend has been reversed. The Federal courts are now applying an increasingly strict exhaustive remedies requirement. However, a decade later it was ruled by the Supreme Court virtually meaningless, that it could be enforced by the tribal courts. This would seem that the justice in Indian country was now forthcoming, but lurking in the background was the tribal council.

When tribal councils were created, now the people thought that they could have someone in there to represent them, so they voted on that certain individual to council. And again, this council was another monster.

The people in tribal courts were at their mercy. The tribal councils ignored their own law and order codes at times. They controlled the police officers, which you heard today. They defied Federal and State and tribal laws. They set themselves up and created barriers so the people who elected them to office, their needs and wants were ignored.

Now they are the untouchables, and whoever tried to reason with them, his or her head was on the chopping block. Their name was on the blacklist. They did not want to know anything about their own constitutions, ignored their own ordinances, voted on resolutions to benefit themselves, and anything above that was duly passed by a motion from the floor.

Again this year, next month, we will be having an election, and the same people again are running for office, so we see no change for the next 4 years. Our only hope for our people now would be Federal relief, and I think most of the Indian people would agree.

Tribal governments must realize that if Indian judges understand and thoroughly apply the principles of equal protection and due process and other civil rights under the act, then their decisions will be upheld by the Federal courts. But if Indian judges fail in this effort, the future will see further Federal intervention into tribal governmental affairs.

Congress can amend the ICRA to authorize the Federal judicial remedies. This is what we face today in tribal courts or all courts. The judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing--because I know; I was one of the individuals that was removed.

I am a veteran of World War II. I am also a veteran of the Korean conflict and the Vietnam era. I retired from the military service after 22 years of honorable service to my country. I defended the U.S. Constitution, and when I was appointed a judge for my tribe, I took an oath of office to defend our tribal constitution. Little did I realize at that time that this oath of office meant nothing to the tribal council when they removed me from office without due process and equal protection of the law.

What I want to know, why was my name on certain resolutions? I want my day in court. It was my duty to sign a complaint after I reviewed it, and also I signed a summons. For this the tribal council removed me from office.

I feel as though I am still affected by this resolution 190. Also, my spouse is affected by this resolution. She was asked to resign as a tribal controller because there was another party that challenged her position. Although there was Federal money in this, 638 money, she was asked to resign from this job because there was somebody else who was just as qualified or more qualified, although my wife worked for the tribe for 14 years or more.

I think my spouse's rights were violated too. But this is known as a challenge, and it is legal in our tribe. Anyone can go in and challenge a person.

So this is the only statement I'd like to make, and I would like to thank the Commission for hearing me out with this short statement.

CHAIRMAN PENDLETON: Can you identify us by your address, Mr. Woods. We didn't ask you that in the beginning.

MR. WOODS: My name is Walter Woods. I'm a paralegal. I do act sometimes as a special judge, and sometimes I work for the Legal Services. My address is Box 602, Eagle Butte, South Dakota 57625.

CHAIRMAN PENDLETON: Cheyenne River.

MR. WOODS: Cheyenne River Sioux Tribe.

CHAIRMAN PENDLETON: Thank you, sir.

We will now hear from Chief Judge Robert Fast Horse of the Oglala Sioux Tribe, Pine Ridge. I think we can let you go by this time. We have already sworn you once.

Testimony of Robert Fast Horse, Oglala Sioux Tribe, Pine Ridge Reservation

JUDGE FAST HORSE: I understand I'm under oath from the prior testimony.

CHAIRMAN PENDLETON: Yes, sir.



JUDGE FAST HORSE: What I have here, Mr. Chairman, is an affidavit of prejudice, pursuant to section 7(a) of the Administrative Procedures Act, against you, sir.

CHAIRMAN PENDLETON: Thank you.

JUDGE FAST HORSE: There is attached by reference and incorporated the Washington Post article. I feel that your comments before the public press demonstrated lack of impartiality, showed an atmosphere of bias and unprofessionality, and in a quasi-judicial function, I believe that we, as Indian tribes and Indian tribal courts, should be guaranteed an impartial hearing group.

I am also moving and requesting your removal from these proceedings and any further proceedings involving the Indian Civil Rights Act enforcement. The Washington Post article quoted you as saying that you were shocked, there is no due process, that we have something to hide, and some type of unprofessional statement about a lot of these guys wearing button-down shirts and Brooks Brothers suits; they don't run around in Indian dress. I apologize for not bringing my Brooks Brothers suit or my button-down shirt. I did wear my hair in braids, so you wouldn't think there weren't any Indians here. And I intend to pursue this matter as well.

CHAIRMAN PENDLETON: Thank you, sir. Is that for the record?

JUDGE FAST HORSE: Yes, it is.

Is there going to be any action on my formal move for a hearing on this matter?

CHAIRMAN PENDLETON: I have absolutely no idea, sir. Do you want me to act on my own demise?

JUDGE FAST HORSE: I'm at this time making a formal move for a hearing on this matter, and I would like the Washington Post staff reporter, Benjamin Weiser, subpoenaed for a formal hearing.

MR. HOWARD: I'd be glad to review your affidavit and to telephone you once I have had a chance to review it.

JUDGE FAST HORSE: Okay, thank you.

CHAIRMAN PENDLETON: Bertha Chasing Hawk.

You are still sworn in, Ms. Chasing Hawk.

Testimony of Bertha Chasing Hawk, Council Member, Cheyenne River Reservation

MS. CHASING HAWK: Thank you, Mr. Chairman.

I was sitting here listening to some of the people from the judicial department speak about their jobs, and I just marveled at how insensitive they were to the problems that are on our reservation. There were some things that I'd like to correct, Mr. Chairman, concerning the associate judge, that land business.

What the council had said--they made a motion that there was a dispute on property on arranging it, on the land unit. What the council wanted the court to do was to determine who that property belonged to. When the memo got out, all it said was "for your determination."

The judge should have known that in the constitution and bylaws the council allocates land. But when this person had got up before council and said, "I got a restraining order not to go on to this range," that's when this business came up. So it was all a misunderstanding, from the tribal secretary's office to the judge's chambers. That's what it was. It was not a political whatever she said it was.

And as for the chief of police, how his name came up in council, last year there was a chief of police who was suspended, pending allegations of some charge, one of the 14 major crimes. He was suspended. And upon the finding of that allegation, he would be either terminated or reinstated.

Well, nothing happened. In the meantime, the complaint was withdrawn, and nobody had done anything, and the Federal prosecutor could not prosecute because of insufficient evidence. So then he came before council and said, "Hey, I was not given due process. I have been without a job, and I was the chief of police, and I was never officially terminated, and yet you guys hired this other judge."

In the meantime, over the year we had had budget problems, so we put the chief of police under the 638 contract, which means we have to give him due process and everything else before we terminate the chief of police. So how his name came up was because this other guy had said, "You guys did me an injustice."

So then some councilman made a motion to reinstate this other guy. And there were no allegations made against the present chief of police. There were none. His name came about because this other guy wanted to be reinstated as chief of police because he was not given due process last year. That's how his name came about. As far as I know, nobody has said anything about suspending him or anything for testifying.

Also, on the prosecutor, she has been suspended and fired and rehired eight times. I believe, I firmly believe, it's because she had political friends on the council and not because of whatever she said it was.

And talking about retaliation, when I get back I may be assaulted for even saying these things, even though I'm one of the only ones who have civil rights on the reservation.

Two persons came before council, and I was sitting there listening to them, but I didn't perceive what other people on the council construed to be a threat to us. They said--I don't know what they said. But Mrs. LeBeau would know more about that. They did threaten, I guess--I didn't see it as a threat.

Since the last time we were here, since we have recognized that the law and order committee is defunct, we have asked the tribal chairman to reappoint a new law and order committee. And let me say, Mr. Chairman, if anybody gets fired, it's going to be for cause. And I think these were ongoing before you guys ever came up. What these persons have said that are employees--it's not because they are testifying here. We have hired them to do a job, and if they don't do it, that's it.

CHAIRMAN PENDLETON: Ms. Chasing Hawk, thank you very much for your time. I appreciate your coming forward.

We have a panel now, but that does not extend the time for 15 minutes. There's only 5 minutes for the panel. Mary Wright from Rapid City, originally from Pine Ridge; Marie Lambert; and Gertrude Hutchinson.

Are they here? I was told you would all share some time. Is that correct? Please come forward, ladies.

[Gertrude Hutchinson, Marie Lambert, and Mary Wright were sworn.]

CHAIRMAN PENDLETON: As each of you talk, would you please give us your name and address so that can be for the record. Whoever wants to go first it is perfectly okay.

Testimony of Gertrude Hutchinson, Rosebud Sioux Tribe; Marie Lambert, Oglala Sioux Tribe; and Mary Wright, Oglala Sioux Tribe

MS. WRIGHT: My name is Mary Wright. I live here in Rapid City at Route 10, Box 2360. I'm from here, from Rapid City.

MS. HUTCHINSON: I'm Gertrude Hutchinson, and I'm from Rapid City here, and I live at Dakota Homes. It's an Indian community about 5 miles north of town.

MR. HOWARD: What are your tribal affiliations?

MS. HUTCHINSON: I am an enrolled Rosebud Sioux.

MS. WRIGHT: I'm an enrolled member of the Oglala Sioux Tribe at Pine Ridge.

MS. LAMBERT: My name is Marie Lambert, and I'm a member of the Oglala Sioux Tribe.

CHAIRMAN PENDLETON: Thank you.

Who wants to start?

MS. LAMBERT: My name is Marie Lambert, and I live in Rapid City, South Dakota, and my post office box is 875.

My complaint is at the Siouxan Hospital outpatient clinic. I go up there if I have a sickness or I'm ill. I understand that this land and this hospital is for Indian members only and for Indians. And when we go up there to see a doctor and we get an appointment--Monday I went up there and made appointment. And Tuesday they gave me an appointment for 3:15. I went in there, and the nurse that took my file, she hid it somewhere, and I didn't get waited on until after 4:30, 5 o'clock. And I never got out of there until after 5.

This has been going on and on. They done that to me I don't know how many times. But my back was hurting. I needed some prescription, and I had to go for bone scan and the other things.

I feel when I go up in that hospital and that clinic for the Indians--there's nothing but non-Indians sitting in there, and the Indians are being left out. And I understand there are non-Indians who have a lot of money and have stores down here who are utilizing that hospital, and there's no income guidelines. Now, us Indians are interrogated--we have to go

and get enrolled members for ourselves and for our children. And I think we, the Indian community and members, that go up to the Siouxan Hospital are either segregated or discriminated. But that's up to you.

CHAIRMAN PENDLETON: Thank you.

I wish we could provide you with more of a resolution to your problem. We cannot. We can only pass it on. What we are doing here now is really talking about the tribal court system, and we'd appreciate some comments in that direction. Although we understand your other problems, we cannot begin to resolve those.

MS. WRIGHT: I am here because I really feel I have some concerns regarding the type of mistreatment from the judicial system. I know that you feel that maybe it's irrelevant, that this is just primarily and specifically about tribal law and tribal courts and all those types of things. But here in the urban areas I really feel that the Indian people have a real serious problem regarding the judicial system and how it treats the Indian people. And I really feel that we would appreciate it if the Civil Rights Commission would come back again another day to hear some of the problems regarding police brutality, all the things that have happened to the Indians in the Rapid City area. And I am very familiar with some of the incidents. I will not be specific in some of the incidents. However, there are a great many things that need to be corrected with the law enforcement, the judicial system, here in Rapid City and across the State.

CHAIRMAN PENDLETON: Thank you very much for those comments.

Ms. Hutchinson.

MS. HUTCHINSON: I have also experienced problems out on the reservation, too, at times. In fact, Mr. Alex Lunderman was in on one of the problems with me at one time so he kind of understands that. But I also feel like we should have a say here while the Civil Rights Commission is here.

But the urban Indians also have problems here, and we feel like our civil rights are being violated also. And it's concerning the Indian hospital here. I'm talking about the real Indians, the silent majority. There is abuse in employment practices, eligibility requirements practiced on Indians, where if a white person comes there, there are no questions asked, but if an Indian comes in there from out of

town, they are given the third degree. Everything is done in a subtle way so you can't really come out and say it's outright discrimination against the real Indian people.

These facilities were put here for the real Indian people who these provisions were implemented for, and they are not being served properly.

I have lived here for 35 years, and it's always been here. It's very subtle.

CHAIRMAN PENDLETON: Thank you very much, ladies.

Mary Lee Johns.

[Mary Lee Johns was sworn.]

Testimony of Mary Lee Johns, Cheyenne River Sioux Tribe

MS. JOHNS: I do, so help me God. I just wanted to put that in there since you have left it out all afternoon.

My name is Mary Lee Johns. I'm a member of the Cheyenne River Sioux Tribe. The reason I have come up here to testify is to testify about the great tribe that I belong to. I have sat here and I've read in the newspapers over the past month how terrible our tribe is. I'd like to stand up for my tribe and say I am a proud member of the Cheyenne River Sioux Tribe.

Our land base, the Great Sioux Nation--our eastern border was the Mississippi River, which included Minnesota, North Dakota, South Dakota, parts of Nebraska, Wyoming, Colorado, Montana, and large parts of the Canadian Plains. We were one of the strongest, mightiest nations in this world. There are no other fighters that compared with the great Sioux warrior, except for possibly the Afghanis right now that are standing against the Russians.

In 1868 the United States Government signed a treaty with us, and we set aside the Great Sioux Nation. We did not give up our land. We allowed the United States Government to take that land from us. So, therefore, we paid for any right to receive health services, education services, and whatever rights that we have now. We prepaid for those rights. All the gold that was taken from the Black Hills basically paid that for us.

In 1877 the Black Hills was taken from us illegally. In fact, the Supreme Court said there was no other act that was as terrible performed by this government when they took the Black Hills from us.

In 1889 they broke up the Great Sioux Nation, where we, as the Cheyenne River Sioux Tribe, was made at that time.

In 1946 the Pick-Sloan Act was initiated in Congress, and the Cheyenne River Sioux Tribe lost over 100,000 acres of our best bottom river land, our best farm land, and so we basically ended up with a problem in the area of economic development. And during that time, the 1946 Pick-Sloan, at no time was there ever a feasibility study to see what the impact of our people was going to be as a result of the taking of that land.

We lost, I think, a lot of our economic opportunities at that time. In fact, there was a study that has just been completed on the Standing Rock Reservation where they figured they lost, by the land which they lost, which was half of our land, \$400 million. So you can possibly say we, as the Cheyenne River Sioux Tribe, lost in the past 20 years a billion dollars.

In 1950 our tribal councils had to fight termination.

In the 1960s the State of South Dakota, without consulting the Indian tribes, took our right to have law and order jurisdiction over our land. We fought that. The Sioux Nations fought that, and we won.

In the 1960s we finally received what we considered--

CHAIRMAN PENDLETON: Excuse me, Ms. Johns. You only have 5 minutes.

MS. JOHNS: I am quickly going to finish.

In the 1960s we were given the right of self-determination. We are a strong and healthy people and have had our own government and our own law and order. Our abilities to provide for our families and ourselves have been taken from us in various ways by this government. We are basically an underdeveloped nation, and to run our government for the past 20 years, we have not had enough money to adequately do that. We have had a lack of training in our judges; we have had a lack of training in almost every aspect of our government. Our children learn nothing from the school system about our unique system of government so they come out

of the school system without understanding our unique tribal government or our constitution. When they go into the tribal council, if someone goes in, they have to learn all by themselves.

We have 90 percent unemployment, virtually no economic base. Our suicide rate is so incredibly high it goes beyond comprehension for our youth. Hopelessness is what you find on our reservation. And you come before us and you talk about civil rights. I find that the United States Government has continually violated our rights as an Indian people. And I believe our tribe, the Cheyenne River Sioux Tribe, has in the past been one of the leading tribes when it came to setting up the law and order system.

Granted, we have had our problems--and you have heard them all spread out, our dirty linen, in front of you. I think everyone has a right to do that. However, I feel that our tribe has the right to speak and tell you that in the past we were one of the leading tribes when it came to law and order. In fact, we have set some of the standards in which other tribes have used their law and order.

We have the right to govern ourselves under the 1868 treaty, not only to govern ourselves but to correct ourselves. And I think that you have served a purpose. You have opened our eyes to some of the violations that have happened on our reservation, and we as a people will correct those violations.

But to sit and have our tribe talked about on a national level in a national newspaper, I find that appalling. And I would like to have you know that we are a great people, and we have been and we always will be.

And when the council was asked to waive sovereign immunity, I sat there during that council meeting. We were asked to waive sovereign immunity by an attorney who was representing a member of the tribe. That tribal council, our tribal council, did not have an attorney present to ask the consequences of their action. To have had that type of council waive sovereign immunity and open up our assets and our land to loss through a lawsuit--I applaud their action. I think that they had great courage to stand and protect the sovereign immunity of our tribe, because we are a nation.

And I thank you for this time that you have allowed me.

CHAIRMAN PENDLETON: Thank you very much.



I just want to remind you that the Cheyenne River Tribe invited us to hold these hearings, in a sense. We don't come to accuse anybody at all. We come to gather facts. And we, like you, can make comments. But at this point, all I can say is I think we have done what we are supposed to do, and we will continue to do what we are supposed to do under our jurisdiction.

Thank you.

Judge Gonzalez.

JUDGE GONZALEZ: Thank you, Mr. Chairman, and members of the Commission.

CHAIRMAN PENDLETON: You have already been sworn in, sir, so we appreciate it.

Testimony of Mario Gonzalez, Appellate Judge, Cheyenne River Reservation

JUDGE GONZALEZ: I'd like to make a few comments with regard to Public Law 93-638. That's codified at 25 U.S.C. 450 et seq. This is commonly known as the Indian Self-Determination and Educational Assistance Act of 1975. It essentially allows Indian tribal governments to contract for certain Bureau of Indian Affairs or Indian Health Services that are provided by the Federal Government.

Among the services that are contracted are law and order, realty, social services, and such other services that the Federal Government provides on reservations.

In terms of law and order, Judge Two Bulls indicated there are exhaustion requirements at Pine Ridge that are cumbersome. I'd just like to clarify her statement. There are certain exhaustion procedures for the police, and then there are other exhaustion procedures for other types of tribal agencies. And it is a little cumbersome when it comes to the police department.

Under the Public Law 93-638 contract at Pine Ridge, we have a chartered organization that administers law and order under that contract. And they have procedures that are set up to hear grievances. You start with the local review boards in the nine districts. That came about because of the idea that law and order should be decentralized. So a person usually files a grievance there, and it comes up to the commission, and at that point they can go to the tribal executive committee, and the

executive committee has 30 days to review it and either reverse or affirm, and from there they can go to tribal court. That looks like it's a little cumbersome, but it's required by our Federal contract.

Other types of grievances can be aired directly to the executive board and to the tribal court. It's not quite as cumbersome.

In regard to Mr. LeCompte's statement that he felt his due process rights were being violated under the 638 contract at Cheyenne River, I'd like to point out to the Commission that removal of police officers operating under a Public Law 93-638 contract, I believe, are governed by 25 Code of Federal Regulations--I think it's part 11, the part dealing with the courts and the police. There are provisions in there that require that an officer be served with notice and be given due process rights, and I would assume that would be applicable and perhaps people are not aware of that.

CHAIRMAN PENDLETON: Just let me say, sir, that we appreciate the clarifications, but I don't think we would be in a position to make recommendations about personnel matters in that respect. I think our jurisdiction and the reason for being here is to look at the overall process, but I would doubt very seriously we would get down to the fine detail of whether or not someone can be discharged or not.

But I appreciate what you're saying. I think you need to keep on with the record, but I wanted to assure you this is not where we are going with this hearing at all.

JUDGE GONZALEZ: There was an allegation of due process rights being violated by the tribe, and I think those are governed by Federal regs.

CHAIRMAN PENDLETON: Yes. I think you're right. I'm saying we don't want to get so far into detail that the due process breaks down into specific detail. But you're right to clarify the point.

JUDGE GONZALEZ: Thank you.

I also want to talk about the LeCompte case. Santa Clara Pueblo v. Martinez does not require that a person have access to tribal courts per se. As long as a person has access to any type of tribal body, I think, satisfies the requirements under Martinez.

In the LeCompte case there happened to be a tribal court in existence. Down in the Pueblos of New Mexico, there is probably no tribal court; the governing body is the court. So all the tribes are different.

CHAIRMAN PENDLETON: The governing body is the court.

JUDGE GONZALEZ: I think in the Pueblos down in the Southwest, they have one body which serves as a legislative body and a judicial body. So there, of course, you go to that body.

In the LeCompte case at Cheyenne River, there is a court system. So the question was should there be a remedy in that court if it exists. And there is still an open question as to whether the '68 Civil Rights Act waives sovereign immunity in tribal courts. Sovereign immunity is a judicial doctrine created by the Supreme Court. It's not required by statute and it has been made applicable to Indian tribes.

But I am aware of Judge Bogue's ruling, I think in a case involving Hobart Keith who testified here, Keith v. Oglala Sioux Tribe, back in the 1970s, that the Civil Rights Act did in fact waive immunity in tribal court. There has to be a remedy somewhere. And that is essentially what LeCompte held, and the views are similar to the views expressed by Judge Bogue that the '68 Civil Rights Act, as a matter of Federal law, waives sovereign immunity in tribal court. You have to have somewhere to enforce it.

So that's what we ruled in the LeCompte case. But we also ruled, as a matter of tribal law, that immunity was waived. So both federally and tribally, but only in a very limited sense, and that is only for equitable relief. We don't think Congress ever intended that tribes should be open to suits for damages, because they have very limited funds and you could easily break a tribe or send it out of existence if they had no money to operate.

So I think that has to be clarified, the point being that if there is remedy in any tribal council, then that would be sufficient to satisfy the requirements of a forum being available under the Civil Rights Act.

CHAIRMAN PENDLETON: Thank you, sir. We appreciate that.

Mr. Lunderman, you have some documents you want to give us? You are having your second bite at the apple today.

Further Testimony of Alex Lunderman, President, Rosebud Tribal Council

MR. LUNDERMAN: I, too, want to thank you and stay within the 5 minutes. I don't think you have a copy of the Rosebud Sioux Tribe's constitution and bylaws, do you?

CHAIRMAN PENDLETON: Don't we have that?

MR. LUNDERMAN: You have a copy of our constitution and bylaws?

CHAIRMAN PENDLETON: I think we do, yes, sir.

MR. LUNDERMAN: Then everything I have talked about is explained in there.

CHAIRMAN PENDLETON: What date is that? Is that a new one? Because we have talked about Cheyenne River having an updated law and order code.

MR. LUNDERMAN: This is June 18, 1934--51 years of misery. We have it.

What I have is some recommendations. One is that you recommend to Congress that they hold hearings concerning treaty obligations of funds so that we can enforce the IRA act, the 638 act, the ICRA act, and other acts affecting Indian tribes. That is one recommendation.

CHAIRMAN PENDLETON: It sounds like three to me, but we'll take them one at a time.

MR. LUNDERMAN: I have maybe five more here.

That you recommend to Congress that they initiate another act to set up a supreme court of Indian nations, and also a lower court of district tribes, 12 districts; and then tribal courts, and between the tribal courts and the council a public safety commission. That's where that is.

These are my recommendations.

CHAIRMAN PENDLETON: Fine.

MR. LUNDERMAN: You already have a copy of this [indicating], and it tells you the duties of the officers. "The president shall manage and administer the affairs of the

tribe, including the supervision of tribal employees, subject to the resolutions, ordinances, and instructions of the tribal council."

I heard testimony earlier, back in July--back in '81 on the Rosebud Reservation, a chief judge interfered with an election. He was not fired. He had a hearing. It was given to him. But when you try to interfere with an election, whose rights are you violating? The people that are going to vote? Civilly, I say yes. And when anyone's heart beats 100 beats a minute, either they are going to lie or they are ready to lie or they have already lied. And my heart isn't beating that fast because I'm telling you the truth. These individuals that are not telling the truth will be dealt with accordingly.

Now, the testimony that was given on July 31--that individual said he would notify this Commission and straighten out his testimony. That, I hope, will take place. Because if he don't, whose civil rights are violated?

But these are the things that I need to explain about resolutions. Civil rights--you've got the BIA. If I've got a complaint, I go to the captain, and he refers me to the agency's special officer, and then eventually to the superintendent. Now, each one says it will be handled administratively. That is the answer we always wait for. And on the tribal side, I go to the judicial committee, which was created by ordinance. And they recommend to the council that certain actions take place, whether it be against a judge or a policeman or an individual. There is a due process there. Within this act there is a bill of rights, which I think is much greater than the United States Government.

How do I sue the United States Government? What is the procedure? Who do I go to? Do I ask them for permission? Will they waive their sovereign immunity?

Those were asked here today. We have a procedure. All they have to do is follow it. They have a procedure for removing me.

So again, I will present more testimony in writing--and I don't know if I've got 2 weeks or 1 week.

CHAIRMAN PENDLETON: You have 1 week. I will announce that shortly.

MR. LUNDERMAN: One week; good. I will get that taken care of.

I want to thank you for this opportunity.

CHAIRMAN PENDLETON: Thank you for coming.

Ladies and gentlemen, the hearing record will be left open for 1 week. For a variety of purposes, it is important to close the record and at least get the transcript put together. Therefore, we'd appreciate your sending anything to us at our Washington address in one week.

These hearings are adjourned. I thank everybody for coming.

[At 5:30 p.m., the hearing was adjourned.]

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