

**Hearing
before the
United States
Commission on Civil Rights**

Enforcement of the Indian Civil Rights Act

**Hearing Held in
FLAGSTAFF,
ARIZONA**

AUGUST 13-14, 1987

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 Congress.

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Hearing Before the United States Commission on Civil Rights

Enforcement of the Indian Civil Rights Act

Flagstaff, Arizona, August 13-14, 1987

The United States Commission on Civil Rights convened for a hearing on enforcement of the Indian Civil Rights Act on August 13, 1987, in the Social and Behavioral Science Building, room 107, Northern Arizona University, Flagstaff, Arizona, at 9:20 a.m.

Proceedings

Morning Session, August 13, 1986

CHAIRMAN PENDLETON. We are prepared now, with Commissioner Destro's presence, to open these hearings. Let me say before we begin, my opening statement is available to the public and the press. I will read it in its entirety in case there are not enough copies around. I'm reading it for the record.

Let the record show that we started at 9:20 with Commissioner Destro and Commissioner Pendleton present, and Commissioner Allen will be coming from California for the afternoon session.

Good morning. I am Clarence M. Pendleton, Jr., Chairman of the U.S. Commission on Civil Rights. With me today are Commissioner Robert A. Destro; Acting Staff Director Susan J. Prado; Deputy General Counsel Brian D. Miller, on my right; Staff Counsel Neil McDonald, who is behind me; and staff members Jeannine Hinman and Robert Heilferty. As I mentioned, Commissioner Allen will be joining us later.

The hearing today and tomorrow is a continuation of the hearings that the Commission started last year on enforcement of the Indian Civil Rights Act of 1968. Those hearings were held in Rapid City, South Dakota. The Commission heard several witnesses, including tribal officials from three different tribes in South Dakota. The testimony showed that there were substantial problems with the enforcement of the Indian Civil Rights Act

on several reservations. Claims of tribal immunity from suit prevented any meaningful legal action against the tribe on some reservations. Tribal judges testified that they were removed from office after rendering decisions which were unpopular with the tribal council and that some decisions were overturned by tribal council resolutions. Private Indian citizens who reside on these reservations recounted their experiences with their tribal justice systems.

After we concluded our hearings in South Dakota, we began planning for further hearings. We were interested in holding hearings on the Navajo tribal court system because it has a reputation for sophistication and fairness. We also felt that it would be important to learn if some of the problems we heard about in South Dakota were, in part, attributable to the smaller size of those reservations and their scant financial resources. Our interest in holding hearings pertaining to the Navajo Reservation was heightened by the news last February that the tribal government had shut down what was perhaps the preeminent Indian newspaper in the country, the *Navajo Times Today*.

Our hearings for the next 2 days are going to focus on three areas: the independence of the judiciary, the defense of sovereign immunity when it is asserted by tribal governments in tribal court actions, and freedom of the press, in particular the closing of the *Navajo Times Today*.

We are fortunate to have as witnesses a number of preeminent American Indian scholars and scholars of American Indian history and government, lawyers with experience in tribal courts, former tribal court judges, newspaper editors and reporters, and others with firsthand knowledge of the workings of tribal government. We are most pleased that Indian leaders from the Zuni and Acoma Pueblos have agreed to tell us about their governments.

There is, however, one group that we wanted to hear from but who have declined our invitations to testify or otherwise cooperate with the Commission. I'm speaking of the leadership of the Navajo Nation. The Commission has been preparing these hearings for several months and has sent staff to Arizona and New Mexico for several visits in an effort to obtain the views of Navajo tribal officials on the issues I have outlined. I wrote to Peter MacDonald, Chairman of the Navajo Nation, personally and asked him for his cooperation and received a response from a tribal official in his employ that the Commission was not welcome on the reservation. I regret that the leadership of the Navajo Nation has taken this position. It is unfortunate for the Navajo people and the Navajo government, which would only be strengthened by the protection of the civil rights of its members.

Notwithstanding these difficulties, we have assembled several first-rate panels of knowledgeable persons who can educate the Commission and the American public on Indian civil rights. We have an earnest desire to learn

what the problems are, why they arose, and what might be done to alleviate them.

At the conclusion of our panel discussions, there will be an open session. The purpose of the open session—which begins tomorrow around 4 p.m. and will end approximately 5 p.m. because we all have planes to catch—will be open to the public and is to receive testimony from individuals wishing to make statements relative to the subject matter of this hearing. If there is anyone who wishes to speak during the open session, please give your name to one of our clerks in the Commission staff room upstairs. The record of this hearing will remain open for at least 30 days for inclusion of materials sent to the Commission subsequent to this hearing. That means if there's something anyone wants to send us to be a part of the record, the record will be left open, and we will be able to include that as part of the final record of these hearings.

Since the ICRA [Indian Civil Rights Act] 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. Commission hearings commonly involve critical evaluation of how public officials are performing their duties. Therefore, this hearing is not unique in that respect.

I wish to caution 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. We have invited several tribal officials, and they will have a full opportunity to respond to these criticisms of their performance both at this hearing and subsequently, if necessary.

That concludes my opening statement, and I would call the first panel to be sworn in: Jobeth Mayes, Margaret Wilson, Jerry Cordova, and Bruce Boynton.

As they are coming, may I please swear in the clerks?

[The clerks were sworn.]

CHAIRMAN PENDLETON. Witnesses, please stand and raise your right hand.

[Jobeth Mayes, Margaret Wilson, and Jerry Cordova were sworn.]

Zuni Election Dispute

CHAIRMAN PENDLETON. Thank you very much, and please be seated.

Let the record note that Mr. Boynton is not here at the present time or is absent.

MR. MILLER. Mr. Chairman, Mr. Boynton informed the Commission staff that he would be a few minutes late, maybe as late as an hour.

CHAIRMAN PENDLETON. Okay. Thank you.

Before my questioning, we will have questions from counsel, and then following counsel questions, we will have questions from Commissioners.

TESTIMONY OF JOBETH MAYES, CONCERNED CITIZENS COMMITTEE, ZUNI PUEBLO

MR. MILLER. Commission staff Jeannine Hinman will address questions to our first witness, Jobeth Mayes.

MS. HINMAN. Ms. Mayes, are you ready?

MS. MAYES. Yes, I am.

MS. HINMAN. Ms. Mayes, could you, for the record, spell your name and tell the people who you represent?

MS. MAYES. My name is Jobeth Mayes, spelled J-o-b-e-t-h, last name M-a-y-e-s.

MS. HINMAN. All right. I'm going to first ask you a question about the Zuni constitution. And in the Zuni constitution, there's a provision that discusses the procedure for succession in the event that a tribal official such as a Governor dies. Do you have that with you?

MS. MAYES. Yes, I do.

MS. HINMAN. I believe it's section 3, and it begins with the sentence, "In the event a Governor resigns, dies," etc. Would you mind reading that for the record?

MS. MAYES. "In the event a Governor resigns, dies, becomes otherwise incapacitated or is removed from office, his unexpired term shall be filled by the Lieutenant Governor. The head councilman will succeed to the office of Lieutenant Governor and an election will be called to replace the head councilman."

MS. HINMAN. In 1983 your Governor died. Could you briefly describe the succession that in fact did take place?

MS. MAYES. The succession took place shortly after his death. And according to that, they have—they were in violation of our Zuni tribal constitution, Article 17, section 3, which I just read.

MS. HINMAN. Was there an election held to replace the head councilman?

MS. MAYES. Yes, they did.

MS. HINMAN. And who voted in this election? Was it supposed to be open to the entire tribe?

MS. MAYES. According to our constitution, it should be.

MS. HINMAN. And who in fact did vote?

MS. MAYES. But in fact the council voted and held the election shortly after the Governor's death.

Ms. HINMAN. So the council themselves had the election rather than having an open one from the entire tribe?

Ms. MAYES. Yes.

Ms. HINMAN. Are you familiar with the judicial opinion that addressed the issue of succession?

Ms. MAYES. Yes. The judicial opinion to the Governor and the Zuni Tribal Council from the judicial department was sent to them telling them that they were in violation of their constitution.

Ms. HINMAN. I'm sorry; you said that the council was in violation?

Ms. MAYES. Yes.

Ms. HINMAN. I would like to introduce into the record a copy of this judicial opinion rendered by the Judicial Department of the Zuni.

CHAIRMAN PENDLETON. So ordered.

Ms. HINMAN. Thank you.

Now, after this occurred, you submitted a petition; is that correct?

Ms. MAYES. Yes, I did.

Ms. HINMAN. What is supposed to happen when you have a petition that demands an election?

Ms. MAYES. After I turned in the petition, there should have been 25 percent of the people to vote.

Ms. HINMAN. In other words—so the petition requires 25 percent of the people eligible to vote to sign in order to have a recall election?

Ms. MAYES. Yes.

Ms. HINMAN. Or to have an election?

What did happen when you had this petition?

Ms. MAYES. After I turned in my petition, they tore it apart with their harassment and with threatening people that they would take away their commodities, their social security checks, their welfare checks, or whatever assistance they get from the government.

Ms. HINMAN. So some of the people who had signed this petition, then, you are saying, were told to remove their names from this petition?

Ms. MAYES. Yes.

Ms. HINMAN. Who did you turn the petition in to? Who did you give it to?

Ms. MAYES. I turned it in to the assistant superintendent, Mr. Jerry Cordova.

CHAIRMAN PENDLETON. Assistant superintendent of what?

Ms. MAYES. The Zuni BIA [Bureau of Indian Affairs].

Ms. HINMAN. What did you then do?

Ms. MAYES. What?

Ms. HINMAN. What happened then?

Ms. MAYES. And then he turned it over to the secretary of the Zuni Tribal Council.

Ms. HINMAN. And then?

Ms. MAYES. And then from there it was supposed to have gone up to the area office, but I don't know if it ever did or not.

Ms. HINMAN. During this course of events, did you ask the Bureau of Indian Affairs for any advice or help?

Ms. MAYES. Yes, I did.

Ms. HINMAN. And with what result?

Ms. MAYES. Well, when the people were being threatened, I asked him if there's anything he can do. He told me that there was nothing illegal that they were doing and so—

Ms. HINMAN. So you are saying that the harassment—

Ms. MAYES. Continued.

Ms. HINMAN. You were told that that was not illegal?

Ms. MAYES. That's right.

Ms. HINMAN. What was the name of the contact you had with the Bureau of Indian Affairs?

Ms. MAYES. Well, he was the one that actually asked me to start the petition [for the recall election] if we didn't like what was happening. He said, quote, "It's got to be somebody that the tribal council cannot hurt or retaliate against."

Ms. HINMAN. That answer is a quote?

Ms. MAYES. And so, since I was on the election board and I knew of the violations that they made, from there on I was elected to be the head of this organization.

Ms. HINMAN. The Concerned Citizens Committee?

Ms. MAYES. Yes.

Ms. HINMAN. Now, again, I'm going to ask you about the BIA. You went to the BIA and asked them for advice after the succession you thought was required by the constitution had not occurred. When you went to the BIA, who did you speak with and with what result? What advice were you given?

Ms. MAYES. The advice that I was given was that Mr. Cordova said that I didn't have enough names on the petition and also that they were passing a new election code, that I have to follow that.

Ms. HINMAN. Were you or any of the people you were associated with in this course of events ever pressured in any way to refrain from your course of action, and if so, how?

Ms. MAYES. The threats that the petitioners could lose their social security checks, and our Governor at that time threatened the Concerned Citizens Committee at the general meeting that he was going to physically beat us up if we don't quit opposing the tribal council.

Ms. HINMAN. You are saying that the person who became Governor threatened your group, the Concerned Citizens Committee, with jail and beatings?

Ms. MAYES. Yes.

Ms. HINMAN. That's it. Thank you.

MR. MILLER. Ms. Mayes, I have a few questions. Did you file any lawsuits concerning the election dispute?

MS. MAYES. I tried. But the lawsuits that we filed were thrown out because of sovereign immunity of the tribal council.

MR. MILLER. Did you file more than one lawsuit?

MS. MAYES. Yes, I did.

MR. MILLER. Okay. Both in tribal court and then in Federal court?

MS. MAYES. Yes, sir.

MR. MILLER. And both of those lawsuits were thrown out because of sovereign immunity?

MS. MAYES. Yes, sir.

MR. MILLER. Do you feel that you had a forum or a place where you could go to seek redress for the problem, the election dispute problem?

MS. MAYES. No, I didn't.

MR. MILLER. Okay.

Staff attorney Neil McDonald has a question.

MR. McDONALD. Did the Zuni Tribal Court express an opinion, give an advisory opinion to the council interpreting the Zuni constitution on the matter of the succession?

MS. MAYES. Yes, they did.

MR. McDONALD. And what did they decide?

MS. MAYES. What was that?

MR. MILLER. What did they decide?

MS. MAYES. They decided that the council was in violation of their constitution, that they should have a general election for the head councilman.

MS. HINMAN. What happened to the judge who wrote this opinion that said that the succession had been in violation of the constitution?

MS. MAYES. He was fired.

MR. MILLER. He was fired?

MS. MAYES. Yes, he was.

MR. MILLER. Okay.

MS. HINMAN. This is Michael Zuni, the chief tribal judge?

MS. MAYES. Yes, he was.

MS. HINMAN. All right. Thank you.

COMMISSIONER DESTRO. If I may, Ms. Mayes, do you know who raised the question in the first place with the tribal court as to the legitimacy of the succession? Was it a lawsuit or did the tribal court undertake to decide whether to inform the council that they thought that the action was illegal on their own?

MS. MAYES. It was the tribal court.

COMMISSIONER DESTRO. Okay. Thank you.

MR. MILLER. Just in general terms, how would you describe the BIA's assistance to you during this time?

MS. MAYES. It seems like every time I had a problem I went to our area superintendent, who was Mr. Cordova, and he kind of gave me some information, which in turn, it seemed to be a stumbling block because he told us after that petition was started and got thrown out, he told me to go according to our new election code that he had supposedly passed, which we already had the election code as a working document. But he said that, "This is now the new working document that you must follow." And in that election code, he had amended our constitution, and that—in that new election code it says that we must recall each—an individual councilman if we wanted to, and so I did. We got about halfway, and then we knew that wasn't going to work.

So I went back in and I asked him what was another way of—but he said that it was all under the water. And then so we started another one, as secretary of elections. If our constitution was no good, which at that time the tribal council was going around saying the constitution was no good to the people. And so when we found that out, we said that if the constitution is no good, maybe we should set it aside until we find out which is good and which is not. Because it seems like when we was going against the tribal council, they will say it was good. If it's not going against them, it was no good. So which is it? And to me, I think the superintendent should have asserted authority and said that, "You are in violation," because the previous superintendent, John Montgomery, he was the one that recognized the violation, so he also was removed from the Zuni—from the Zuni Superintendent's office.

MR. MILLER. You are saying that the former BIA superintendent, John Montgomery, came out with the public statement that the manner of the election was improper and for that reason was removed from the Zuni Pueblo?

MS. MAYES. Yes, he was.

MR. MILLER. By the BIA?

MS. MAYES. By the BIA, and that's when Mr. Cordova came in.

MS. HINMAN. I just wanted to clear something up. I think what you meant to say, and correct me if I'm wrong, was that when tribal court decisions had been rendered contrary to the council's desire, the council would say the constitution was no good, but when the tribal court decisions were rendered in support of what the council wanted, then the constitution was going to be upheld?

MS. MAYES. Yes.

MR. MILLER. At this time, Mr. Chairman, the staff has no further questions.

CHAIRMAN PENDLETON. Of Ms. Mayes?

MR. MILLER. Of Ms. Mayes.

We will now address Margaret Wilson, and Commission staff Bob Heilferty will address the questions to her.

**TESTIMONY OF MARGARET WILSON, ATTORNEY,
CONCERNED CITIZENS COMMITTEE, ZUNI PUEBLO**

MR. HEILFERTY. Ms. Wilson, could you state your name, occupation, and address for the record, please?

MS. WILSON. My name is Margaret Wilson, W-i-l-s-o-n. My address is Box 1133, Pueblo of Zuni, 87327. I'm an attorney in private practice. I represent the Concerned Citizens Committee who represents 800 out of 1,700 registered voters on the Pueblo of Zuni and represents over 4,000 of the 8,000 inhabitants on Zuni. I'm assigned to the Governor on an as-needed basis.

MR. HEILFERTY. Okay. Based on your experience advising the Concerned Citizens Committee, could you describe your understanding of the role of the BIA at Zuni Pueblo and how this role was or was not carried out during the succession crisis?

MS. WILSON. I would like to answer that question first by saying what we perceive the role of the BIA should be.

Prior to the Indian Self-Determination Act, the role of the BIA was one of administration, standing over and administering the programs. After the passage of the Self-Determination Act, the Concerned Citizens agrees with the administration for Native Americans' view of the BIA role, which is technical assistance to the tribes. The BIA role changed from one of doing for the tribes to helping the tribes do for themselves.

The Pueblo of Zuni is unique because they had implemented a program agreement in 1965 whereby they took over the BIA function well before the Self-Determination Act got off the ground. When the Self-Determination Act got off the ground, the 15-page program agreement turned into a complicated set of 638 contracts that caused a problem. That problem was exacerbated by the fact that the BIA personnel present on Zuni did not and does not know anything about contracts, government contracts, BIA contracts, Self-Determination Act contracts, contract administration.

We see that the role of the BIA should be one to advise the tribal council of violations which are occurring, to read the constitution and to explain to the tribe: this is a clear violation. That should be done in writing. If it is not in writing, it doesn't exist.

Secondly, the BIA should advise the tribe on how to meet tribal goals.

CHAIRMAN PENDLETON. Just a second. I think that we are in a gray area about defame and degrade, and I don't want to go too far into those kinds of accusations, for the record, but if you could possibly recast the answer in such a way that it is not so pointed, I would appreciate it.

MS. WILSON. On the role of the BIA?

CHAIRMAN PENDLETON. Well—

Ms. WILSON. I didn't understand.

CHAIRMAN PENDLETON. The role of the BIA is getting kind of accusatory here. I don't want to get too far into that part of it.

Ms. WILSON. Oh, I don't mean that.

CHAIRMAN PENDLETON. Okay.

Ms. WILSON. I just mean that the role of the BIA changed during the Self-Determination Act, and we agreed with the administration for Native Americans that that role changed from one of administration to one of technical assistance.

CHAIRMAN PENDLETON. Okay.

Ms. WILSON. The third thing is: we see the role of the BIA is to read and write. All personnel in the BIA should be paperpushers in a way because that's one thing where the tribal governments are deficient. The Zuni tribal government has functioned for several thousands of years without file cabinets and without paper. One of the things that a bureaucrat, any bureaucrat, can help in is in discovering the value of a file cabinet, the value of certain types of paperwork, and the difference between trashy paperwork and good paperwork.

So during the crisis, there were several errors that were made—and this isn't to say anything personal about Jerry Cordova. He was the superintendent at the Zuni Pueblo during the constitutional crisis, during the Zuni civil war. He was not trained in contracts. Anybody else who would have been there, maybe they would and maybe they wouldn't. I've only met one BIA employee who knew about contracts, and his name was Evans.

But in fact what happened, 58 minutes after the Governor died, an illegal meeting was held by the tribal council, and they, by resolution, overturned the constitution. The BIA should have gone in and said, "Hey, Article 7, section 6, of the Zuni constitution says what the definition of a legal meeting is. Your meeting at 1 a.m. in the morning, 58 minutes after the Governor died, where you voted to move all of yourselves up, that does not meet the constitutional standards. You need to be aware of that."

Secondly, when the petition for recall was submitted—there were several petitions that were submitted. When that petition for recall was submitted, a month later the tribal council passed a resolution. They passed two of them; one on August the 15th and one on August 28 after their attorney came in and said, "Hey, you can't say this." They changed it. And that resolution said, "Since we have been faced with the petition for recall, gross negligence, and abuse of office and malfeasance, therefore we have decided to adopt this new Election Code and we hereby make it retroactive."

At that point the BIA, whether it be the superintendent or the area director or whatever of the chain, should have come in and said, "Hey,

that is an ex post facto law. That's not admissible. That's not—that's a violation of the constitution."

There's nothing complicated about that. A GS-13 should know what an ex post facto law is.

Then, the superintendent approved that ex post facto law Election Code. And he stood up in, a public election—in a public meeting, and he said, "This is the law. I have approved it, and you have to live by it."

Well, number one, he was wrong. Number two, he refused to put it in writing, and number three, he verbally enforced it. And all three of those things were errors in judgment on behalf of the BIA.

Number one, under the Zuni constitution, approvals by the superintendent have to be put in writing, and they have to be forwarded up the chain. That was never done. And yet there were dozens and dozens and dozens of people at that meeting that heard him do this. That is unacceptable.

CHAIRMAN PENDLETON. Any more questions?

MR. HEILFERTY. You had mentioned that you had additional problems with the 638 contract. You had mentioned that the chief judge at Zuni has administrative duty to review, and that many functions were improperly under that one 638 contract. Could you explain what problem that poses?

MS. WILSON. Right. Well, a major problem in Zuni is the structure itself of a 638 contract. Under that contract, the chief judge has conflicting duties. Number one, that chief judge is a program manager. He is responsible to go down to the prosecution office, to the probation office, to the social worker office on occasion, and to go through those files and make sure that those files are complete and that those cases have been properly brought forth. Well, of course, that completely conflicts with the role of a judge, because when a defendant walks in front of a judge, that judge is not supposed to know anything about the defendant.

So that judge under that 638 contract has two conflicting duties: one, to know what is in the prosecution files, and two, to not know what is in the prosecution files. And that isn't some minor little thing that a flick of the pen can solve. That entire 638 contract needs to be taken apart and put back together by lawyers who know what they are doing and not by GS-13s who don't understand the Zuni constitution.

Those 638 contracts under 25 U.S.C. section 450f have a waiver of sovereign immunity in there. What Zuni desires to do is to provide a very strong court system that can hear their constitutional violations and enforce its constitution and implement its constitution so that that waiver of sovereign immunity and \$6 million of Federal funds coming into Zuni every year is not bumped up to Federal court.

CHAIRMAN PENDLETON. Excuse me. Just for the record—and I know most of us here understand it, but for the record's sake, would you mind indicating what a 638 contract is?

MS. WILSON. Surely.

Prior to the Self-Determination Act, a lot of the monies for tribes came through the Snyder Act or several other acts. After the passage of the Indian Self-Determination Act, the monies flowed through that act into these horrendously complicated contracts. Public Law 93-638 is the name of the law that created these creatures, and we call those 638 contracts.

The problem that arises is in Zuni there are I don't know how many contracts. We could ask Jerry Cordova. He was the contract officer. But quite a few contracts. And none of the program managers had ever read those contracts. And because those contracts were not monitored by the BIA and because the tribal government is not a paper government—they don't function with papers; they don't read contracts, and they don't have a house counsel—nobody read those contracts. Nobody monitored those contracts, and at the end of 1984 \$6 million of 638 Federal monies were not closed out, and in 1985 those contracts were not closed out, and in 1986 those contracts were not closed out. As a consequence, none of the programs in the Zuni Tribe have any idea whether they are overdrawn or whether they have excess monies. The BIA is still sitting on \$402,000 of carryover funds and saying, "No, you can't have this."

COMMISSIONER DESTRO. Let me just understand then. This is something that has run through the whole set of hearings last year and we never really got an answer, and I think we are a little closer to it here. Correct me if I'm wrong, if my understanding is wrong. The prior method of administration was that the BIA administered everything.

Ms. WILSON. Correct.

COMMISSIONER DESTRO. Right. And when you say the money came through the Snyder Act and other acts, who did it come to, the BIA?

Ms. WILSON. In the Zuni constitution, the Governor was the contract administrator. The Governor signed off. The Governor was responsible for going over and dragging the BIA in willingly or unwillingly to monitor those contracts.

COMMISSIONER DESTRO. Let me make myself clear. Before the Self-Determination Act, all the administration was done by the BIA, right? Were there contracts then, too?

Ms. WILSON. There were contracts then.

COMMISSIONER DESTRO. Okay. Contracts to do what?

Ms. WILSON. Contracts to—in Zuni it was called the program agreement. The Zuni Tribal Council contracted with the BIA to supervise the BIA. The Governor was the supervisor of the BIA superintendent. The Governor had day-to-day contact with the BIA staff. The tribal council had day-to-day contact with the BIA staff. At the same time that that was happening, there was no doubt in anybody's minds that if a screwup occurred, it was the BIA's fault because they were responsible for the courts; they were responsible for the cops; they were responsible for social services; they were responsible for the elderly services and whatever.

After the advent of the Indian Self-Determination Act, two very fundamental critical problems arose. The first was the BIA got confused about what it should and shouldn't do.

COMMISSIONER DESTRO. Can I stop you right there for one second? You are exactly on the right track that I want you to be on, but I just want to tie up one of these loose ends. If I understand what you just said correctly, it is that the BIA in effect became the tribal administrative arm under the Governor?

Ms. WILSON. Right.

COMMISSIONER DESTRO. But it also reported to Washington?

Ms. WILSON. Right.

COMMISSIONER DESTRO. Okay. So—

Ms. WILSON. Paperpushers.

COMMISSIONER DESTRO. Okay. They were the bureaucrats?

Ms. WILSON. Administrators.

COMMISSIONER DESTRO. I mean, I'm not putting any pejorative meaning on that term.

Now, after the Reorganization Act, what was their function? And then you can get into what the problem was. How did the function change after the Reorganization Act?

Ms. WILSON. The \$6 million of contracts were taken away from Governors on the Pueblo Zuni and put into the lap of the BIA superintendents.

Jerry Cordova made a lot of errors, but a lot of those errors are not personal to him. They are because he was thrown into a situation where suddenly he wasn't an administrator being told what to do by the Governor; he was in charge of \$6 million worth of Federal contracts.

COMMISSIONER DESTRO. Contracts for whom now?

Ms. WILSON. For the courts, for the police, for the social services, for the elderly services. But for our purposes, for the courts and the police and the social services. All of a sudden, when a violation occurred in the courts, the Governor didn't have control over the contract. He didn't have control over the money.

COMMISSIONER DESTRO. Let me stop you again then and, again, just to tie up a loose end. So what happened after the Reorganization Act is that the administration then went within the tribal structure; the tribe itself became its own administrator.

Ms. WILSON. Right.

COMMISSIONER DESTRO. Okay. And the BIA did what precisely?

Ms. WILSON. The tribe and the bureau switched roles. The tribe became the paperpushers and the BIA became the contract administrator.

COMMISSIONER DESTRO. Okay. So in other words—

Ms. WILSON. The power over \$6 million worth of programs got taken away from the council and given to the BIA. We all think, well, “self-determination?” It worked the reverse in Zuni.

CHAIRMAN PENDLETON. Excuse me. Just so that I might be able to uncomplicate what I hear as very complicated, you talked about file cabinets before.

Ms. WILSON. Right.

CHAIRMAN PENDLETON. What you are saying, there’s a reversal in the roles of who put information in the file cabinet and who took it out, that is, if you—

Ms. WILSON. Who produced the paper.

CHAIRMAN PENDLETON. Who produced the paper for the file cabinet.

Ms. WILSON. Who was responsible to file the paper and who was responsible for retrieving the paper. It used to be that the BIA was in charge of all that paperwork. Everytime a resolution came out, boom, it was shot to the superintendent. He copied it, he filed it, he produced it on request, you know, and he took good care of papers.

CHAIRMAN PENDLETON. Just this one question, if I may. How do you relate this to the election dispute?

Ms. WILSON. When the election dispute came up—

CHAIRMAN PENDLETON. I mean we are talking about an election. I mean we could go on and on with this trail about who put something in the file cabinet, but I’m trying to find out between the file cabinets and the dispute over the election and Ms. Mayes’ suit; how does this all connect?

Ms. WILSON. It connects in two documents. The first document is after the illegal succession occurred; the tribal court on its own motion, which is not prohibited in tribal courts, advised the council that what they had done was illegal. That was good. That was true self-determination. The council—

CHAIRMAN PENDLETON. On the part of the courts?

Ms. WILSON. On the part of the courts. That was a responsibly written opinion, well-written and legally sound.

The council turned around and fired all of the judges. At that point, the BIA should have said, “I am your contract administrator. This is an intratribal dispute. You will not use Federal funds in this way. You will not fire a judge for making a decision.”

COMMISSIONER DESTRO. Okay. Then that is exactly what I was looking for. Is the control then—it’s the old golden rule; whoever controls the gold essentially makes the rules.

Ms. WILSON. That’s right.

COMMISSIONER DESTRO. And in this situation you are suggesting that there should have been intervention by way of revocation of funds to police the activity?

Ms. WILSON. Or at least a written opinion to the tribal council that said, "I know you don't realize this, but what you did, one, is illegal; two, these are the consequences; and three, put them back in office."

COMMISSIONER DESTRO. Okay. So, in other words, the BIA does in fact have the power—

Ms. WILSON. Power.

COMMISSIONER DESTRO. —whether it considers that it has the authority is another question?

Ms. WILSON. Right.

COMMISSIONER DESTRO. But it does in fact have the power, given the current structure, to make all of these things work a little better?

Ms. WILSON. And what is worse is that the Governor doesn't have the power.

COMMISSIONER DESTRO. Why is that?

Ms. WILSON. Because the Self-Determination Act 638 contracting officer is no longer the Governor. It is the BIA.

CHAIRMAN PENDLETON. Well, now, if that has happened and the BIA is in charge of the reservation, then why is the election declared null and void?

Ms. WILSON. Okay—

CHAIRMAN PENDLETON. It seems like to me if—

Ms. WILSON. The election wasn't declared null and void.

CHAIRMAN PENDLETON. Not null and void. If the election was declared—if the tribal council decided to move everybody up one—

Ms. WILSON. Right.

CHAIRMAN PENDLETON. —so what?

Ms. WILSON. So what?

CHAIRMAN PENDLETON. If the BIA is in control of the gold?

Ms. WILSON. If the BIA acts in control of the gold and says, "Either you follow your constitution so that I can carry out my trust responsibilities in this blatant case, or we are going to cart our toys home," then the council would have—their knees would have knocked and they would have put those three judges back in, and the Zunis would have a Zuni judge.

COMMISSIONER DESTRO. Doesn't that arguably knock the stuffing out of self-determination? The counterargument to that argument is in effect, then, by giving all the money to the BIA, that gives them the ultimate power to just dictate everything—

Ms. WILSON. That's right.

COMMISSIONER DESTRO. —that the council and the chairman and the courts do?

Ms. WILSON. I didn't write the law.

MR. MILLER. If I may, I would like to ask you if you think it is more in keeping with self-determination to be able to bring an action in Federal court or to bring your complaint to the BIA?

Ms. WILSON. All right. The answer to that question is the second half of the answer of your two questions.

After that advisory opinion was written and the judges were fired, the Concerned Citizens filed an action in tribal court on the election dispute. Intratribal dispute, exhaustion of administrative remedies—we all know those words, you know? The tribal court was told by the council, “If you don’t throw that case out, look for a job tomorrow morning.”

So the tribal judge wrote up this decision that said an intratribal dispute—the court does not have the jurisdiction to hear an intratribal dispute. You cannot sue your government because of sovereign immunity. Strike one for lay judges.

Because the tribal court did not provide a meaningful conflict resolution forum, the Concerned Citizens then hit the contracting officer, who was Cordova, with a petition to either rescind the constitution or to enforce the constitution. That went all the way up the chain of the BIA, and we got it into the IBIA, and the Interior Board of Indian Appeals in the majority decision said, “Well, we don’t know where the fine line lies with the BIA trust responsibilities either.”

However, in the dissent, Judge Muskrat said, “The BIA is on notice of constitutional violations, and if they don’t monitor the situation and correct that situation, they can be held accountable for a breach of trust in a Federal court.”

So right now we do have Federal court access because we can just exhaust that BIA chain with form paperwork, since we know we are going to lose there and bump it into Federal court on judicial review.

MR. MILLER. Let me ask you this. Is it more in keeping with self-determination to be able to go directly to the Federal court or to have to exhaust the remedies in the BIA system first?

Ms. WILSON. The control over the money needs to be given back to the Governors. Then, if the tribes use up the money and don’t have decent court systems, yes, they need to go to Federal court. But in Zuni, if that Governor controlled that 638 money, we would have court reform and we would have judicial reform that would stand up to a U.S. Supreme Court review.

Every structure of a tribal court is going to be different depending on the history and the cultural background of the tribe. Zuni has worked out the specifics and the particulars over a 3-year period. But the BIA won’t fund it. And they won’t even change a line-item contract to combine two judge salaries to pay a professional judge.

CHAIRMAN PENDLETON. Okay.

MR. MILLER. At this point we probably should move on to our next witness. Mr. Boynton is not here, so we will move on to Mr. Cordova.

Ms. WILSON. We would like to supplement the record, since it is going to be open for 30 days.

CHAIRMAN PENDLETON. Certainly.

**TESTIMONY OF JERRY CORDOVA, FORMER
SUPERINTENDENT, ZUNI AGENCY, BUREAU OF INDIAN
AFFAIRS**

MR. MILLER. Mr. Cordova, please state your name, current position, and your positions that you held at Zuni at the time you were at Zuni for the record.

MR. CORDOVA. My name is Jerry Cordova. I am presently the assistant area director for Indian services for the Bureau of Indian Affairs in Albuquerque. Prior to going to Albuquerque, I was superintendent of the Zuni Agency of the BIA, roughly from October—the middle of October of 1983 in an acting capacity, got the job permanently in April of 1984, until the end of August 1986.

MR. MILLER. And how long have you been with the BIA?

MR. CORDOVA. Next month I will have been with the BIA for 9 years.

MR. MILLER. And your technical position at Zuni, I've heard you described as having a number of different titles. What was your title when you were at Zuni?

MR. CORDOVA. I was superintendent at the BIA agency.

MR. MILLER. Thank you. What was the BIA's position in the election dispute?

MR. CORDOVA. My predecessor, John Montgomery, upon being notified of the succession and the subsequent elevation of one of the councilmen to the position of head councilman without benefit of an election, brought it to the attention of the council. And in subsequent correspondence, he admonished them that there was constitutional language that required the council to call a special election to fill the position of head councilman in the event of the death of a Governor.

MR. MILLER. Excuse me. May we submit a copy of that memorandum for the record?

MR. CORDOVA. Yes.

MR. MILLER. Do you have a copy?

MR. CORDOVA. I have a copy.

MR. MILLER. Okay.

MR. CORDOVA. I will have to dig through my—

MR. MILLER. Okay. We will get it.

MR. CORDOVA. And as brought out by testimony, the previous superintendent ran into some hassles with the council, and the area director made a decision to remove him because the working relationship between he and the council had deteriorated to the point where they were not communicating with one another.

So as a result, I was sent to Zuni as acting superintendent, and thereupon I proceeded to pick up where Mr. Montgomery left off and attempted to

get the council to consult with their community, their constituents, and run their actions by their constituency and get their sanction.

The council at that point had already told the area director, my boss, that they had conducted an election, such as it was. They interpreted the constitutional language to mean an election, and they said, "The council was there; they voted. We had an election." So they elevated the then-Lieutenant Governor to the position of Governor, the then-head councilman to the position of Lieutenant Governor, and one of the councilmen who had received the next larger number of votes in the previous election, put him into the position of head councilman, and declared a vacancy at the tail end. And this was what the superintendent was pointing out.

And the council would state from time to time that they would address the problem at a later date when somebody within the community would bring the issue to the forefront. And subsequently the somebody turned out to be Mrs. Mayes.

Mrs. Mayes would come to my office to inquire about what the remedies of the tribal members were in regard to taking care of this deficiency in tribal government. And early on I told her that it was one that the tribal members themselves would have to get a hold of and run with because they had elected this council under the terms of the tribal constitution, and they would have to make any changes, recall the council if they had to, or recall any action of the tribal council if they had to. That was their prerogative.

MR. MILLER. Mr. Cordova, if I could interrupt you just for a minute and move back to the election dispute itself. In your personal opinion, did they follow the Zuni constitution in having the election of the head councilman?

MR. CORDOVA. When you give a strict interpretation of the constitution, no.

MR. MILLER. And that's your personal opinion?

MR. CORDOVA. Yes.

MR. MILLER. Was that the the opinion of the BIA?

MR. CORDOVA. Yes, it was. It was expressed by Mr. Montgomery.

MR. MILLER. So the BIA is on record as stating that the election was improper?

MR. CORDOVA. Yes.

CHAIRMAN PENDLETON. Just so I can be clear, is the BIA on the record or is Mr. Montgomery on record that this was improper?

MR. CORDOVA. The BIA is on record.

CHAIRMAN PENDLETON. The BIA is on record?

MR. CORDOVA. Mr. Montgomery, acting on behalf of the area director.

MR. MILLER. How did the BIA arrive at that decision?

MR. CORDOVA. Mr. Montgomery consulted with the area director's staff, and the tribal constitution language was looked at, and he was advised then to write the letter to the council.

MR. MILLER. Did he consult the solicitor of the BIA office?

MR. CORDOVA. That I'm not sure of. But normally he would have.

MR. MILLER. Okay. Can you state that he did consult the solicitor?

MR. CORDOVA. No, I can't state that. I wasn't involved in the initial dealings with the issues.

MR. MILLER. But you say normally that's the procedure?

MR. CORDOVA. Normally, that would be the procedure.

MR. MILLER. Okay. Was the judicial services branch of the BIA involved at all?

MR. CORDOVA. The judicial services branch at the area office is rolled into the functions of the tribal operations shop, so the tribal operations branch handles the duties of the judicial services; that's the branch that was advising John.

MR. MILLER. I see. And could you summarize for the record what the purpose or the mission of the judicial services branch of the BIA is?

MR. CORDOVA. The judicial services branch of the BIA advises tribal courts, tribal councils, and interacts with tribal attorneys and the Solicitor's Office, and Department of Justice on matters pertaining to tribal judicial matters. That generally is their function.

MR. MILLER. For the—

MR. CORDOVA. It serves pretty much a coordination function for the most part.

MR. MILLER. For the record, I would like to read from a letter addressed to the General Counsel of the Commission on Civil Rights, William Howard. We received it on August 3, 1987. It's a letter from the chief of the Division of Tribal Governmental Services and it states, and I quote: "The mission of the Branch of Judicial Services within the Bureau of Indian Affairs is to help tribal governments establish and maintain a strong and vital Indian judicial system capable of dispensing equal justice." And I will submit the letter for the record.

Do you have much contact with the judicial services branch? And in this whole election dispute, do you know if Montgomery contacted them at all or had personal contact with them?

MR. CORDOVA. I wouldn't know that.

MR. MILLER. Okay. And you don't have much personal contact with them; is that correct?

MR. CORDOVA. Other than of a routine nature where we provide statistics and data that they can then incorporate into nationwide information banks. I don't have that much contact with them in terms of requesting technical assistance.

MR. MILLER. Getting back to the election dispute, it was your personal opinion that the election was improper; the BIA was on record that the election was improper; and why didn't the BIA do anything about the election?

MR. CORDOVA. There were a series of meetings between the area office and the tribal council in which the area director was attempting to have the tribal council take the prerogative of correcting any deficiencies, in the spirit of self-determination and in recognition of the relationship that is in existence between the Federal Government and the tribal governments. This was a tribal election. The people of Zuni had elected a slate of tribal officers and the actions of these officers were under scrutiny, and it was not the BIA's place to be forcing the issue but rather the people themselves to be righting the wrongs. And the BIA's role at that point was one of trying to convince the tribal council that they open up the whole matter for scrutiny by the people.

MR. MILLER. Did they do that?

MR. CORDOVA. Obviously not. Not to the extent that there should have been the healthy discussion about how the succession took place.

MR. MILLER. Okay. I'm running a little short on time so I'm going to skip down to the election petition. Did you receive a petition concerning the election dispute?

MR. CORDOVA. Yes, I did.

MR. MILLER. Could you tell us about that?

MR. CORDOVA. Mrs. Mayes submitted the petition after what was thought a sufficient number of signatures had been collected. And because of the reluctance of the tribal council to participate in this open discussion of their actions, she wasn't sure in what manner the petition would be received or what the disposition of it would be. So she asked me for assistance. And I said I could go to the extent of receiving the petition, having a copy made to ensure that there was an official copy somewhere, and that I would personally deliver the petition to the council.

And to correct a statement that she made, the petition did not have to go to the area office. It was not a BIA matter. The petition was supposed to be submitted to the council for their action in calling an election.

MR. MILLER. And so you submitted it to the council?

MR. CORDOVA. Yes, I did.

MR. MILLER. Did you get any complaints about your role in that—

MR. CORDOVA. Yes.

MR. MILLER. —process?

MR. CORDOVA. The council immediately called a meeting with my boss, complaining about the superintendent getting involved in tribal politics.

MR. MILLER. Okay. What was the outcome of that meeting?

MR. CORDOVA. The area director told the council that, "What difference does it make how the petition arrives? It could have been mailed

in; it could have been sent to me, and I would have then presented it to you. The important thing is your constituents are hacked off at you, and you better do something about it.”

MR. MILLER. What did the council do with the petition?

MR. CORDOVA. They didn't do very much upon receiving it until they met with their tribal attorney, Mr. Stephen Boyden from Salt Lake City. And throughout the summer of 1984, there were a series of meetings at which they would discuss what should be done about the petition.

And as Ms. Mayes pointed out, they did enact a tribal election code about the middle of August in 1984. And if I recall, there are no retroactive clauses in the Election Code. The code took effect immediately, and all elections henceforth would be governed by that code.

And as far as the BIA's approval or disapproval of it, my advice from the area office at the time was that BIA approval was not required. And if I made any statements as to whether I approved it, it probably would have been in the nature of “We recognize it as a valid tribal council enactment.”

MR. MILLER. Okay. Did the council do anything about the petition itself? How did they deal with that?

MR. CORDOVA. I was not privy to the council's scrutinizing of the petition. I did not receive any official correspondence. I did not receive any official complaints, either from the council or the community, about the allegations about intimidation and harassment. I did—

MR. MILLER. You heard of them though?

MR. CORDOVA. I heard of them, and I did let it be known that in my role as contracting officer's representative—incidentally, I am not a contracting officer. I do not have the authority to approve contracts. I do not have the authority to modify contracts. I am the contracting officer's representative. The contracting officer himself is a bonded individual who has certain authorities that I didn't as a superintendent.

But as contracting officer's representative, I would want to know specific instances of people being intimidated or harassed or threatened with loss of services under these contracts. And then I would want those complaints in writing. I did not receive any.

MR. MILLER. Did you hear of threats of—maybe you could go into detail about what the threats were. When you say “loss of services,” what do you mean?

MR. CORDOVA. I believe Mrs. Mayes and Ms. Wilson have made reference to these. They are in the same general nature: people being threatened to have welfare benefits cut off, housing services denied, threats of that nature.

MR. MILLER. Okay. Just briefly—I asked Ms. Wilson about Federal court review. What do you think—would it be more in keeping with self-determination for a tribe to have to come to the BIA for redress of grievances or to be able to go to Federal court?

MR. CORDOVA. Obviously, the answer would be Federal court. The BIA does not have any power to set things right in a tribal community. The matter of sovereignty and the exercise of sovereignty is one which, to paraphrase a time-worn statement about freedom, the price of freedom is eternal vigilance. And you could say the same thing about tribal sovereignty. Tribal sovereignty is something that should be safeguarded by the tribal members and the people they elect. And you can't have it both ways. If you want self-determination, you are going to have to take the good and the bad of governing yourself as a tribe. And because the BIA is a creature of the Federal Government, the BIA itself does not have the resources to address violations of civil rights within the Indian communities. We provide them money to fund tribal courts. We are supposed to provide the technical assistance, the expertise to advise these tribal courts as is stated by, I believe, Roland Johnson's statement that you have there.

MR. MILLER. That's correct.

MR. CORDOVA. But oftentimes that's not possible because of the lack of qualified individuals within the system to provide that assistance. But I believe that the meaning of self-determination and sovereignty is: The Federal Government contracts with tribes to provide these services. I'm not really sure—I believe there's a process going on right now to amend the self-determination legislation because Indian tribes are complaining about Public Law 93-638 being too much a constraint on the exercise of tribal sovereignty.

So in that vein, in my experience as superintendent at the Pueblo of Zuni, I tried to meld the best of what the BIA had to offer and tried to clarify some of the ambiguity that was in existence at the time. Ms. Wilson made reference to Judge Muskrat's *dicta* in a decision where he says there is a trust responsibility on the part of the BIA to resolve internal tribal disputes. There are really no guidelines as to how the BIA is supposed to do that.

CHAIRMAN PENDLETON. Are you saying that perhaps the judge put something on the BIA's list of activities that it really wasn't prepared to handle—

MR. CORDOVA. Yes, sir.

CHAIRMAN PENDLETON. —on the assumption that this would be the best place for the government to get this Federal trust responsibility?

MR. CORDOVA. Yes, sir.

COMMISSIONER DESTRO. Do you have any sense, though, for where—I mean, as I listen to you speak, you get a sense for the difficulty of treading that line. And certainly moves to amend the legislation, it may or may not help. But where do you think—you know, how did you draw the line yourself on this particular case? I mean, I know that there's an argument—and I haven't made a judgment one way or another—there's an argument that the tribal council could do what it did, too. You know, I saw that

referenced in the facts. And without making a judgment one way or the other, how did you all at the Bureau make a determination where that line was? I mean, whether you were stepping over it one way or stepping over it the other way.

MR. CORDOVA. Mr. Destro, this was the first time in memory of the Zunis that a Governor had died under the Zuni constitution. And there was no precedent to follow. So this was the dilemma that the tribal members were in, and this was the dilemma that Mrs. Mayes was in because she had no guidelines to follow. Nobody had done this sort of thing before. So in a sense, she and I were both groping around for guidance, and there was very little. So a lot of times we were pretty much going by seat-of-the-pants navigation as to what course to follow next.

COMMISSIONER DESTRO. But I guess the question that I have, though, is that when you are going by that kind of navigation, you basically have a sense for where the line is. There's certain things you just don't do. Sometimes you can't put your finger on them, but in retrospect, who would you say—looking back now and seeing things, who would you say—where would you say that line was between the proper advisory function of the BIA and an improper interference? Because that's really what I read—and I ought to note for the record that I asked the Chairman that we put in the opinion of the IBIA in *Pueblo Zuni Concerned Citizens Committee v. Acting Deputy Assistant Secretary of Indian Affairs*. It was decided February 12, 1986.

CHAIRMAN PENDLETON. So ordered without objection.

I would like to also add that we have a letter from Ms. Wilson. For the record, it is the letter dated February 27, 1986, to Secretary Hodel from the New Mexico congressional delegation with respect to this issue, and that's entered into the record, without objection.

COMMISSIONER DESTRO. In any event, if Judge Muskrat does say there's a line here, where would you say that line was and when did you decide you could go to a certain point and no further, and what was the sense of that? Because I think that swirling around this is the whole issue of where sovereignty stops, and as one of the witnesses put it last summer up in South Dakota, where the rights of the individuals under their own constitution and under the Federal Constitution start.

MR. CORDOVA. I really wouldn't know, Mr. Destro. If I had to do it all over again, I would probably chart the same course, and I would elicit the same responses from disgruntled citizens to councilmen telling me I had no business trying to interfere in internal tribal affairs.

CHAIRMAN PENDLETON. It seems, though, from my colleague's inquiry, that that line is a very elastic line depending upon who has to make the judgment, and it may be stretched at some point to include what they think might be appropriate. Or it might be constricted, if you will, or narrowed, as they might say in the law, to a very strict interpretation. I think what we

hear here is that there is no absolute zero point, and we do have an elastic situation depending upon who is sitting in the chairs at the time.

I just want to ask one other question while you are here. Probably just two. Ms. Mayes, what can you suppose would have happened had you not brought your suit?

MS. MAYES. I guess the same thing that did happen, that there were no written documents over there that they can follow.

CHAIRMAN PENDLETON. Let me try this one other way. In bringing your suit and the kind of response you got from the tribal council, are you, in a sense, of the opinion that perhaps the constitution only applies to the tribal council at the time they say it applies or doesn't apply?

MS. MAYES. That's right.

COMMISSIONER DESTRO. Let me ask another question in the sense that this may be a little bit more legalistic, but I was struck as I read the history of this, that the IBIA opinion basically says you have to exhaust your remedies within the tribe.

MS. MAYES. Yes.

COMMISSIONER DESTRO. What other remedies within the tribe were there other than the remedy you chose, which was really to kind of go back—my understanding was to go back to a very traditional way of dealing with things?

MS. MAYES. I went to the council; I went to the courts; I went to the commissioners. I tried everything. And there was nothing, no enforcement under our constitution. That's all I was asking because Mr. Cordova said that he—they were recognizing the duly elected tribal council, but what about our duly elected tribal constitution?

COMMISSIONER DESTRO. Then what prompted you to then go to the chief priest? Why did you choose that way of going about it?

MS. MAYES. Because our tribal constitution—the white man's law has failed, so we revert back to our tradition. And according to Mr. Cordova, we could go that way and appoint the interim council until we can straighten up.

COMMISSIONER DESTRO. That's what I thought you had said.

MS. MAYES. And that's on tape.

COMMISSIONER DESTRO. But Mr. Cordova advised you that you could go that way, so in a sense he was performing his advisory role in that sense as well?

MS. MAYES. Certainly, and then he went back and denied it.

COMMISSIONER DESTRO. Okay.

CHAIRMAN PENDLETON. Just one final question, I think, for this session. I just want to ask this—I guess there will be more references to the South Dakota testimony, the South Dakota hearing. Is it fair to assume from your point of view that tribal sovereignty only applies to the tribal council?

MS. MAYES. That's true.

CHAIRMAN PENDLETON. Is it also fair to assume that the Indian Civil Rights Act only applies to the tribal council?

MS. MAYES. No, it doesn't apply at all.

CHAIRMAN PENDLETON. It doesn't apply at all?

MS. MAYES. It's unenforceable.

CHAIRMAN PENDLETON. So we are saying now it doesn't apply at all from your perspective?

MS. MAYES. Yes.

MS. WILSON. It's unenforceable is what she says.

CHAIRMAN PENDLETON. Mr. Cordova, how do you feel about that?

MR. CORDOVA. Can I hear the question again, sir?

CHAIRMAN PENDLETON. It probably comes better from Ms. Mayes, that the ICRA is in a sense unenforceable. How do you feel about that?

MR. CORDOVA. Well, having worked with tribal councils and—

CHAIRMAN PENDLETON. I don't want to start off on the council part. I think I'm really talking about the tribe itself. I have some feeling about whether it applies to the council, but is the act itself enforceable?

MR. CORDOVA. By whom? That's—

MS. WILSON. Yes, yes.

CHAIRMAN PENDLETON. Well, I guess that's the answer.

MR. CORDOVA. When we get down to the matter of there being a Federal law but only one portion of it actually having redress in the Federal courts and the right of habeas corpus and everything else, which is actually the bulk of the act itself, the Bill of Rights, being within the confines of the community itself, my earlier statement about if it can be enforced and the degree to which it can be enforced is a matter of the tribal members themselves because the power vested in the tribal members as a people who delegate the responsibilities for governing to their councils and their courts. They have to hold themselves accountable. If it's not working, then it's lack of diligence on the part of the community.

CHAIRMAN PENDLETON. Isn't that part of Ms. Mayes' point that the members don't have any control over that?

MS. WILSON. The BIA refused.

CHAIRMAN PENDLETON. That it's not a government of the members, as we call it in white man's law, government of the people. Is it a government of the government?

MS. MAYES. Yes.

COMMISSIONER DESTRO. Let me add to that. What would have happened, Ms. Mayes, to your—I mean is it fair to say—what would have happened if the traditional method hadn't worked, if people had refused to give up the canes?

MS. MAYES. I think the violence would have broken out. At that point when the elected council—a few of them, their canes got picked up traditionally, and at that point I was also threatened, along with our head

religious leader, Micholita, and at that time I had—he wasn't there, but we called him up and informed him about the threats, that there was a violence starting, and he said that he could not do anything, to call in any law and order to assist us.

CHAIRMAN PENDLETON. Just one question—

MS. PRADO. We should state for the record who she referred to as “he.”

MS. MAYES. Jerry Cordova.

COMMISSIONER DESTRO. My last question relates to what the Chairman asked Mr. Cordova. I understand this fine line that you have to go by. But the trend in civil rights law in other contexts is to require Federal agencies which spend money to oversee the expenditure of that money to make sure that violations don't occur. Do you think that in our advisory capacity that the BIA ought to be more amenable to suit by members of the tribe, not so much to tell the tribe what to do but to define more clearly what the BIA's trust responsibilities are?

MR. CORDOVA. I don't know if the threat of suits will make BIA people more diligent, but it may make them more aware of what their responsibilities are under the contract provisions.

CHAIRMAN PENDLETON. Just a final question and we will take a break here. We have been informed that—and Mr. Cordova, you might not know about this, but to answer your question, that the BIA is threatening to withhold funds from the Yaqui Tribe because of an election dispute. Do you know anything about that at all?

MR. CORDOVA. No, I don't.

CHAIRMAN PENDLETON. We will take a break and we will come back with the next panel.

[Recess.]

CHAIRMAN PENDLETON. Can we reassemble, please?

I am reminded by counsel that I did not read page 3 of my statement, so those of you who have my statement who want page 3, as soon as I read it, you can have it. It's only one paragraph, but I think a very important paragraph.

The second matter I'm 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 retaliation against those witnesses for their testimony. The maximum penalty for violation of that statute is a fine of \$5,000 or 5 years' imprisonment, or both. The United States Attorneys for Arizona and New Mexico 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.

We will now move to our second panel. And gentlemen, if you will stand, I will administer the oath to you and then we can get on.

[Allen B. Toledo, Ronald Peterson, and Robert Lewis were sworn.]

Zuni Overview

TESTIMONY OF ROBERT E. LEWIS, GOVERNOR, ZUNI PUEBLO

CHAIRMAN PENDLETON. Be seated. We will ask that as counsel calls on you, would you please give us your name and other titles you might want to give us. Good to see you again, Governor.

GOVERNOR LEWIS. Thank you.

CHAIRMAN PENDLETON. Counsel.

MR. MILLER. Governor Lewis, we will begin with you. If you could state your name and title for the record, please?

GOVERNOR LEWIS. My name is Robert E. Lewis, and I am presently the Governor of Zuni.

MR. MILLER. I would like to state for the record that Governor Lewis has aided us tremendously in this hearing and has invited us to look at the Zuni Pueblo, and I would like to thank the Governor for his cooperation in this hearing.

The Commission first heard of the Zuni election dispute when a complaint—when Joebeth Mayes' petition was sent to us. Mr. Chairman, if I could submit that petition for the record at a later date—

CHAIRMAN PENDLETON. Without objection, so ordered.

MR. MILLER. Thank you.

Governor Lewis, have you held tribal office previously?

GOVERNOR LEWIS. Sir?

MR. MILLER. Have you held tribal office previously?

GOVERNOR LEWIS. Yes, I have. I have held tribal office in the same position that I hold now for 14 years previously.

MR. MILLER. Did you have a gap in your service as Governor?

GOVERNOR LEWIS. Yes, there were twice, in 1975, the following 4 years from '75, and then from '83 to '86.

MR. MILLER. You have heard the testimony concerning the election dispute. Would you like to add anything to that testimony?

GOVERNOR LEWIS. Yes, I have heard the testimony, and I believe that the area in regard to that matter has been pretty well covered by the previous testifiers, and I don't think it is necessary for me to add anything to it, unless you want some specifics. I would be glad to answer.

MR. MILLER. No, I just wanted to give you the opportunity to comment.

Maybe you could just tell us something about your judicial system and your opinion of the judicial system at the Zuni Pueblo.

GOVERNOR LEWIS. Well, before I answer that question, I would like to go back a little bit in history, if I may, to inform you that our tribal government has been in existence since what our people call the beginning. And no one knows when that was. But we have always had a tribal government, the same as some other pueblos have had the same type of system, but in our history we have come through with a government that existed for no one knows when. And I would like to add a little to that information.

Little historical information is available concerning the native form of Zuni government from the period prior to European contact. Castaneda, chronicler of the Coronado expedition which reached Zuni in 1540, commented only that, "They have no rulers as in New Spain but are governed by the council of their oldest men." The oldest men in those times—you know, as far as history is concerned, my people and the villages that existed at that time were referred to as the seven cities of Cibola. And there was a representative from each of these villages on the tribal council even before the Spaniards came in contact with us.

And so that brings us to the fact that most anthropologists describe native Zuni government as a theocracy in which the ultimate authority was vested in a council of priests. And this information is wrong. The only function that they had was to choose the headman. And other villages chose their spokesmen, and of course, they gave the oath as they gave it to us—give it to us in the present day. And the oath, the gist of it, is contained in our constitution, which I think you have a copy of.

MR. MILLER. Yes.

GOVERNOR LEWIS. But in that constitution, it indicates that whenever that oath was made in the beginning with the tribal government—it refers to civil rights because it mentions that whoever steps into a reservation or into our area immediately becomes the charge of the governing body for them to care for them as their own. And this has always been looked upon with great respect. And so we knew about civil rights long before even the Magna Carta was put out. But that I think is very important for people to know, as I heard the comment that we were here to educate one another and to learn something from each other, and so I thought I would give this information out.

The United States constitutional law recognizes the fact that since time immemorial Zuni has had an inherent right to self-government. Zuni exercised this right both in terms of inner-self-government and in its relationship to outside entities prior to the time of contact with non-Indians. Zuni had true external and internal sovereignty. In the 16th century, Spain restricted this somewhat. Presumably, Zuni could not deal with outside countries except through her. So since sovereignty ties in pretty closely with civil rights, it's sometimes hard to explain one side fully without the other being involved.

And so that's the way we have had our tribal government, which involved also a tribal traditional court in years past.

Of course, in 1968 with the passing of the 1968 Indian civil rights bill, we have had to change and convert to a constitutional type of government tied in with the rights that are expressed in the Bill of Rights as it is in the civil rights bill. We put that in our constitution. And our judicial system works when we have the proper people running our courts. I think that's the fault in many cases where tribes have had problems with tribal courts because you have to have experienced professional people to teach our people if we want our people to sit on the bench. And sometimes due to financial difficulties that some of us have, we can't afford to have these types of professional people to be with us and teach our people. And as far as we have observed, although the civil rights bill indicated that there would be funds available for training staff and court judges, this has never really been pushed, and naturally, even under the Indian Self-Determination and Education Act—we refer to it as 638—right now, for instance, our budgets in regard to the judicial staff is peanuts. And that's the reason why I think sometimes we have people that maybe have potential, but due to the fact that it's not the most enticing position as far as money is concerned, we don't get the kind of people that we should have.

And so we are hoping that, as time goes on, we will be able to get into our court improvement project that we previously had spoken to you folks about. And it's going to take some doing in this day I would assume, but we don't like to quit in midstream or feel that anything is impossible until we have tried every avenue to obtain the goal that we would like to have, and so we are attempting at this time to do that.

MR. MILLER. I have a paper here. It's called "Concept Paper—Tribal Government Stabilization and Civil Reform in the Pueblo of Zuni," dated May 7, 1987, and I would like to submit this for the record. Mr. Chairman, may I submit this?

CHAIRMAN PENDLETON. So ordered.

MR. MILLER. Governor Lewis, could you tell us some more about your proposal?

GOVERNOR LEWIS. Our proposal—in going to seek funds to carry on our proposal of improving our court system, we have given a budget justification, which I would like to read if it is all right.

"Judicial restructuring is not an area in which we wish to produce another cheap product that doesn't work. We choose a coordinated approach to judicial reform which integrates training, procedure generation, and drafting of systematic legal codes while the court docket is being handled. We choose to hire a team and to purchase a package of legal items which fit each other and all of them fit the Zuni people. Piecemeal approaches to judicial fairness have been tried and have repeatedly failed. The resulting inconsistencies oppress our people.

“The court docket is very small at present. The docket, if there was a docket, looks large because of the large number of cases which have been waiting, literally years in some cases, for a hearing. As amazing as it may seem, the Zuni court both does and does not have a docket at the same time. Cases which have been dismissed with prejudice reappear in the form of a notice of trial. Cases which are supposed to be scheduled for trial disappear out of the court. No one seems to know what happens to the monies that the court collects for costs nor records of the costs revenue are present in the court or with the tribal treasurer.

“Given the above background, Zuni desires to hire the best and nothing less. We choose to pay professional prices because we demand a professional product and because we can financially no longer afford to continue hiring a series of unconnected people to produce uncoordinated laws and procedures which oppress our people.”

This would give you an indication that we need to improve to meet any situation as we go down the road and be—have a court system that would be second to none. And it will take a lot of doing, we understand, but from the description I gave earlier, I feel that we have not had the right people training our people, and we know that under 638—we were informed at one time that if we were able to obtain professional people or retirees who could train our people, we should give them what they ask for, which was an understanding on the part of the Bureau when they set up these funds but unfortunately was never looked at it in that light by changes in administration.

And sometimes we do hurt each other, and when we get to the point of setting up a court system such as we are indicating we want, then perhaps we can have things tied in so that there will be no inconsistencies but a continuing program of getting the product that we should have continually.

MR. MILLER. Governor Lewis, how do you plan to ensure the independence of the judiciary in your judicial reform plan?

GOVERNOR LEWIS. In our situation, sir, we are hoping and will indicate to the people that we want their input. They should be part owner of the product that we would want to have and have a participation by setting up of committees who would be in a position to be able to bird dog, you might say, the operations of our council as well as the judicial.

Right now, we are not in a position to entirely separate our powers because we have a system that I think is unique to Zuni, although it may be the same in some other area, for instance, in regard to land. When land disputes come up, the tribal council will have that responsibility until such a time as property owners survey their property and put it on paper who their beneficiaries would be. Which brings to mind that recently we were given the information that we had to set up inheritance codes, not only Zuni but I would assume in other areas, where these inheritance codes

have to be set up so that those who would inherit whatever would be—these things would be done under regulations. And so we have to go out to the site. We do not expect our judge to leave his bench and his docket to go 22 miles to the north side of our reservation to settle a land matter because—and you can't bring it into the court because the judge would not know what he is talking about.

And that is just one area that I'm using for an example, but there are several others that we would have to have concurrent jurisdiction and—but it can work. And so we—but to your question, which I answered previously, is that we are going to involve our people. After all, it's their court. And the respect that any court should deserve and should have is one of the reasons why we want to set it up the way we had planned to do so.

MR. MILLER. Okay. If I could move on to a slightly different subject, and that subject is the Indian Civil Rights Act of 1968. In 1968 you testified against the Indian Civil Rights Act, and I have a copy of your testimony on March 29, 1968, and I would like to submit this for the record if I may, Mr. Chairman.

CHAIRMAN PENDLETON. Without objection, so ordered.

MR. MILLER. What do you think about the Indian Civil Rights Act now?

GOVERNOR LEWIS. Well, in answer to your comment about my subjecting to, it is entirely untrue. We were not against the Indian civil rights bill.

There were 14 of us pueblo Governors who went up to Washington to testify to the idea of requesting a moratorium of 5 years before they pushed such a bill through. And this was because, as we indicated in our statement, there were some tribes who were preparing to get their constitution voted on and get into the usage of such. Others were setting up their tribal codes. As I indicated before, in our tribal government we have always maintained the rights of the people as the priorities of the governing body. And in this case, we went to see if we could get the Congress to consent to hold off, giving us time to work out our problems in our own way and our own speed so that we would have a safe ground or a foundation to start from, because even though they were talking civil rights, we were observing these rights.

The idea that something that we have never done for years was put things on paper. We—and that's the reason why I think a lot of times we were taken advantage of, because in the early days we couldn't reach each other. Government people couldn't relate their feelings about certain things to our people, and vice versa, because they couldn't understand our language, and there was nobody among us who was educated enough to really interpret what the others were saying. Of course, they say that sign language was used, but I don't know how good it used to be back there.

But we had to wait a long time. And it's only recently that we've gotten to the point where we can talk things over and relate to each other those things that we want the other to understand.

But that was—that was a misunderstanding on the part of whoever—who indicated that I opposed this civil rights bill.

Of course, you know, we were getting assistance, and the only way that it came about that it passed so quickly was that President Johnson, you know, attached—he had the fair housing bill attached to it. And without going to the other house, it went to the House Ways and Means Committee from which it went to his desk and it was signed off on. So we never had a chance to have our say-so again in the Senate although we had the hearing in the House. But that was how it happened.

And I think one of the things that I indicated in my statement, when things are pushed on us so rapidly, we cannot change our people overnight because we have been inured to our system, which has been good, and then we have to talk in our language, and, you know, when you have a language of our own and try to interpret English into it, it takes time because it's not that easy. And then to have the people understand that if such a bill would pass, then we would have to make changes in our court system, which could eventually be done if we were allowed to do it our way.

And, of course, you know, the Secretary of Interior was given the mandate to set up a model code. Well, we waited almost 2 years before that came out. And then if we did not have a code of our own set up, then we would have to be like forced to use that one. And a lot of times whatever is made and thrown on the table just don't jibe with what you would like to have in line with what would be—whether it would fit us or not. And too often we have had the experience in that blanket laws are made which does not suit everybody. And without the understanding on our side, the Indian people's side, sometimes people sitting behind a desk say this will be good for us, but it's not that good for everybody, and so that's why we were asking for time.

The time element is too much, too short, we said. Many tribes will have to drop everything to concentrate on this matter, and a sloppy job will result. I think we got to that point. We are talking from experience. And the matter is too important to jeopardize. A minimum of 5 years should be considered is what we said. And also financial hardship will be placed on many tribes. Some tribes cannot even scrape up matching funds to participate in many good projects they desire to do, let alone hire and pay judges right now, as well as jurymen. We have not been blessed with resources that many tribes have been blessed with. We have looked for just about everything on our lands and find nothing of much—not found much of anything. And so we have a lot of things that we do without the benefit of things that come out of the ground, but that is what I was—I meant at

that time when we were indicating a little more time before the law was passed.

And we also indicated to the Congress that we cherish our rights and freedom and we are close to our lands, what little we have left. We take pride in the fact that our tribal government has endured all these centuries, and we firmly believe if we did not, in our own way, in our own government, indicate this to these individuals, we would long ago have disbanded the tribe and start a better way somewhere else. Also we shared democracy with all latecomers who came here seeking the freedoms and liberties that they did not have in their own country.

MR. MILLER. Excuse me.

GOVERNOR LEWIS. And I indicated that if we worked together, we could preserve these, but we also asked that we let us prove that we can build around the good things we have, and we assure you that it would conform to everything required. And I was referring to the civil rights of individuals, which we already had, but we could build more around these things and make it better. And that was our stand at that time.

MR. MILLER. Governor Lewis, would you like to submit that statement for the record?

GOVERNOR LEWIS. Yes. It's the same copy you have, sir.

MR. MILLER. Oh, I'm sorry. It's the same one.

In the interest of time, I'm afraid that I don't have any further questions, and at this point will move on to Mr. Peterson.

Thank you, Governor Lewis.

Staff attorney Neil McDonald will address the questions to Mr. Peterson.

TESTIMONY OF RONALD A. PETERSON, ATTORNEY,² COLORADO SPRINGS, COLORADO

MR. McDONALD. Mr. Peterson, will you state your name and occupation for the record, please?

MR. PETERSON. My name is Ronald A. Peterson. I'm a lawyer admitted to practice in the State of Colorado and Federal courts and the U.S. Supreme Court.

MR. McDONALD. Mr. Peterson, at the request of Governor Lewis, you participated in a survey of the Zuni Tribal Court in February 1987 and coauthored a brief report to him of your findings. Will you describe for the record your findings contained in that report?

MR. PETERSON. Yes. Ann Allott, another attorney from Denver, and myself were asked by—

CHAIRMAN PENDLETON. Would you speak into the microphone, please?

MR. PETERSON. —were asked by Governor Lewis and the counsel to review the court system and their police setup. We reviewed the courts; we talked to the judges they had then; we talked to the probation officers.

We talked to the district attorney, and we talked to the people in the police department. What we found was no one had a compilation or a copy of what the existing laws were. We found that there were bits and pieces of codes here and there, commercial-type codes and criminal codes. However, these codes had never been passed by the council, even though they were being sort of used as law.

MR. McDONALD. Excuse me. Even if it had been passed by the council, was there a problem of keeping it up to date?

MR. PETERSON. Oh, yes. The district attorney, for instance, would have copies of a law that was either more current or less current one than the judge might have, and they differed. There just was no place to find what the laws were, you know—

MR. McDONALD. Fine.

MR. PETERSON. —specific papers.

It was very difficult to determine what the actual caseload was in the courts. Initially, we were told that there were no dockets. However, we did finally find one for the month of February that indicated that there were not—an awful lot of criminal cases, but in our investigation, we found that—that apparently was a like amount, and that there were never any jury trials, that there were never really any trials of criminal cases unless they were political—there was a political flavor to it.

MR. McDONALD. What kind of accounting system was used?

MR. PETERSON. There was no accounting system. Receipts were given out of an unnumbered receipt book for costs, whether the money was for costs, for probation costs, for fines, for child support, maintenance, or whatever. There was no cross checking. There was no—absolutely no paperwork on—the court had set up a system whereby the court would accept crafts for payment of court costs, probation costs, and support, child support. They would allow the person who owed the money to establish what the value was. The judge would then take exclusive possession of the crafts. He would take them to various conventions or seminars that he went to. He would sell them at a price that he determined. And we were told that he would then bring the money back and deposit it into some sort of a savings account.

MR. McDONALD. This judge was a non-Zuni judge, was he not? Was he a non-Indian judge, just for the record?

MR. PETERSON. He was a non-Indian judge.

CHAIRMAN PENDLETON. Excuse me. Who designed this system?

MR. PETERSON. From what I can tell, the judge was there and the judge is—at least this system was designed by the chief judge they had at the time.

CHAIRMAN PENDLETON. So he had to earn money to pay whatever the compensation would be; is that right? He would take in the crafts and earn a little money and then pay?

MR. PETERSON. What he said was that he would take the crafts and he would sell them, and then he would deposit the money in a court savings account. But he was the one that had control over all of the crafts. There was no recordkeeping as to who brought them in, what the value was, what they were sold for, or what happened to the money.

CHAIRMAN PENDLETON. Probably only my colleagues at the table understand this, but at least we have to find out whether he augmented the budget of the 638 contract by doing this.

MR. PETERSON. Yes. He very candidly told us that—what they had—that they didn't get enough money, and they augmented it by raising the costs—that they were criminal costs, in some cases the civil costs, the probation costs, because this money didn't go back to the BIA or back to any other fund. They could keep control of the probation costs and the court costs and the docket fees.

COMMISSIONER DESTRO. Let me just ask briefly what was the—I know I read it in here—who was the—but I want to get it in into the record. What was the background of this particular judge?

MR. PETERSON. This judge indicated that he was a lawyer, but that he wasn't authorized to practice.

COMMISSIONER DESTRO. Okay. So he was trained as a lawyer though?

MR. PETERSON. Yes, he had been a lawyer, but—

CHAIRMAN PENDLETON. Something happened in the process of—

MR. PETERSON. Yes. He didn't go into why he wasn't allowed to practice.

CHAIRMAN PENDLETON. I can understand why now.

COMMISSIONER DESTRO. Let me pursue that another step further. Who was responsible for auditing the account of the court?

MR. PETERSON. There was no audit of the court.

COMMISSIONER DESTRO. But all this was done under a 638 contract; wasn't it?

MR. PETERSON. I have no idea, but I know that the monies that—now, the fines themselves apparently were turned over to the council. The fines were treated differently than costs and probation costs and other fees.

COMMISSIONER DESTRO. But I assume that the judge was paid, right?

MR. PETERSON. Yes, he was paid.

COMMISSIONER DESTRO. And he was paid from some source of funds, and was that source of funds a 638 contract?

MR. PETERSON. I think so, yes.

COMMISSIONER DESTRO. Okay. So then at least one would assume that there might be a trail back into the Federal Government and the BIA of at least some kind of audit responsibility over this?

MR. PETERSON. Only of the fines that they collected.

COMMISSIONER DESTRO. Not of the administration of the contract itself?

MR. PETERSON. Well, not at the costs that he imposed. In other words, if he would fine a defendant \$200 for being drunk and \$50 for court costs and a couple hundred dollars for supervision, the fine itself was—he would account for. He would not account for the court costs or the probation costs.

COMMISSIONER DESTRO. But I guess what I come back to is, as a lawyer myself, those—what we account for and what we don't account for doesn't really come—that's also relevant to what our clients are doing, but the bar association usually has something to say about those kinds of things, too, and it strikes me that—was this common knowledge that he took crafts for—for example, for fines?

MR. PETERSON. Oh, yes.

COMMISSIONER DESTRO. But nobody looked into this, I mean, as to what was happening?

MR. PETERSON. He didn't take the crafts for the fines. He took them for child support, for costs, and for probation costs. I don't know that anyone looked. But later on I found out that the council was objecting to it, and I think 2 days after I was sworn in as chief judge, I abolished it.

COMMISSIONER DESTRO. I'm not saying necessarily that it was unreasonable under the circumstances, either, in terms of people's ability to pay. What I'm looking at is the operation of how the judge did business as a judge and did anybody oversee his—

MR. PETERSON. No, no one oversaw what he was doing. He took—he had the exclusive right to the possession of the crafts. He determined what they were sold for, where they were sold, and then he would dispose of the money.

MR. MILLER. Mr. Peterson, how many jury trials were there and how many of those trials were against the tribe, and in general, did you find that due process was accorded to the accused?

MR. PETERSON. All right. There had never been a jury trial in any criminal case that we were able to determine. Never. And there certainly hadn't been in the prior year. From my evaluation in early February as well as the—what happened later on, as far as just talking and interviewing people in the community as well as sitting on the bench there, it was apparent that there was no due process or equal protection. The people would get—for instance, the cops didn't have any sort of docket control on their tickets. They would arrest somebody, decide how long they wanted to keep them, and maybe docket them into court after a few days and maybe not. And it was common for people to be in jail for 3 or 4 days or maybe 5 days before having bond set or a case set or anything. People were expected that they were supposed to go in and plead guilty if they were charged with a crime.

It took me probably an hour and a half one morning with an interpreter to get a person who was charged with a fairly serious crime under their

laws to understand that he didn't have to plead guilty, that he could see a lawyer or he could see an advocate; he didn't have to plead guilty. And he couldn't comprehend that he didn't have to plead guilty, and it took at least an hour and a half through an interpreter, and when he finally understood he didn't have to plead guilty when he was in court, why, he was astounded. He was shocked.

MR. McDONALD. Mr. Peterson, did you detect bias or favoritism in that court?

MR. PETERSON. I determined in the whole system there was bias and prejudice, yes, sir. I had one case where there was a person who was a drug counselor at the high school, had been—well, she had had a burglary at her apartment. A neighbor had seen the perpetrators and had given the names to the police department. There was an arrest warrant for one of them who was recognized. She asked the investigating officer why they wouldn't go out and arrest him—because they knew where he was—and the communication to her was that they would not arrest him on this unless he was picked up on something else because of who he was.

MR. McDONALD. I was referring to a more generalized favoritism by the judge.

MR. PETERSON. Oh.

MR. McDONALD. You mentioned the scheduling.

MR. PETERSON. What would happen was that when—after the judge had been dismissed and we went into a sealed office, I found that there were files of cases that had just been taken out of the system and buried in his office. There were other cases where all of a sudden late on a Friday afternoon the judge would call counsel and say, "We are going to trial Monday morning." There were cases where—other cases never would get to trial because they would always be put off and be put off, and it was apparent that the politics were controlling it.

MR. McDONALD. You are saying that bias was based on tribal politics?

MR. PETERSON. Well, it was either politics or personal politics I felt. Either in politics—

MR. McDONALD. Either/or?

MR. PETERSON. Yes.

MR. McDONALD. Now, do you have that report that you prepared?

MR. PETERSON. Yes, I have a copy of it—

MR. McDONALD. Would you submit that, please?

MR. PETERSON. —together with some of the other—

CHAIRMAN PENDLETON. We will take whatever documents you want to submit for the record and attach those to your testimony, if you don't mind, Mr. Peterson.

MR. PETERSON. Okay.

CHAIRMAN PENDLETON. If you have got something, too, Governor Lewis, we will take that, although we may have yours already.

MR. McDONALD. What are your recommendations for avoiding favoritism in the future?

MR. PETERSON. I think that what they would have to do is set up some sort of an independent judiciary, a judiciary that is going to get paid regardless of whether or not the council wants or likes their decisions. I think that basically that what they need there is a system of referees that are Zuni referees that are handling the advisement of rights, some of the trials that they would be having that would be supervised by a law-trained person, a lawyer. I think that the judiciary is going to have to be—essentially be—hold office for their constitutional term, which would be 6 years, be paid whether or not the individual councils like what they are doing or don't like what they are doing. I think there is going to have to be a complete reform of the laws there so the people know what the laws are.

The constitution provides that people can go to the tribe during working hours and see what the laws are, but they can't. They are scattered here, there, and elsewhere. When the last council went out of office, they took all the resolutions and ordinances with them. You know, if somebody has a copy of them, why, they can give it, you know. That's not fair.

I think that basically what has to be established there is a belief that the court system is fundamentally fair as far as the citizens of the community are concerned and that they have to understand they are going to have to—as far as the legal system is concerned, they are going to have to come—they are going to have a rule of law and not rule of man.

MR. McDONALD. Thank you very much, Mr. Peterson.

I have no further questions, Mr. Chairman.

MR. MILLER. At this point we will move on to Mr. Toledo, and Commission staff Jeannine Hinman will address the questions.

TESTIMONY OF ALLEN TOLEDO, ATTORNEY, BERNALILLO, NEW MEXICO

MS. HINMAN. Tell us your professional background.

MR. TOLEDO. I'm Allen Toledo. I'm an attorney in private practice although I have worked with the Legal Services on a contract basis at the Zuni office as the managing attorney for that office. And my background is that I'm a graduate of the University of New Mexico Law School. I'm licensed to practice in the State of New Mexico as well as the Federal courts in the State of New Mexico, and I'm also licensed to practice in some of the reservations in the State of New Mexico. And my exclusive practice is as a plaintiff's attorney. I don't represent tribal entities and I don't represent tribal government. My exclusive practice has been in representing plaintiffs in tribal courts.

MS. HINMAN. Individuals?

MR. TOLEDO. Individuals, private members, against either the tribal courts or State courts as well as Federal courts.

Ms. HINMAN. Do you have a statement today?

Mr. TOLEDO. Yes, I do.

Ms. HINMAN. I think—

Mr. TOLEDO. I have a statement, but it's not a complete statement. I would like to supplement the statement.

Ms. HINMAN. In the interest of time, maybe we can submit—

CHAIRMAN PENDLETON. Why don't you go ahead; it's okay.

Mr. TOLEDO. The statement, sure.

CHAIRMAN PENDLETON. I mean, whatever you want to say—

Mr. TOLEDO. Oh, I was just going to give my background a little bit, but—I've been in practice for approximately 5 years, and most of the courts that I have practiced in which allow professional attorneys—some tribal courts do not allow professional attorneys—but those courts that do allow professional attorneys have, some of them have bar examination requirements, and some of them just require a payment of \$50—anywhere from a \$50 fee up to a \$250 fee.

And as the Commission found out, there's numerous violations of the Indian Civil Rights Act. And we don't deny that there are violations, but I believe that the violations have to be studied in light of what area of the country that these violations come from. I believe it's a mistake to assume that whatever violations occurred in the Sioux country are going to be the same in this area because each tribe has its own unique government and their own unique judicial system which should be respected. And I respect the traditions and customs of the tribes and they should be at least accorded. And I believe that these violations that have occurred are a result of the passage of the Indian Civil Rights Act, and I have some—

Ms. HINMAN. I'm sorry; I didn't hear that last thing you said.

Mr. TOLEDO. The Indian Civil Rights Act.

CHAIRMAN PENDLETON. You said that the violations occurred because of the act?

Mr. TOLEDO. Yes.

CHAIRMAN PENDLETON. Is that what you said?

Mr. TOLEDO. Yes. Prior to the act, most of the violations of—the civil rights violations were not reported, and I believe that the—because of the act, we have—at least in my practice almost on a daily basis been confronted with some kind of civil rights violation.

Mr. MILLER. Mr. Toledo, would you mind holding the microphone closer to you? I think it would help.

Ms. HINMAN. So it's the reporting of the civil rights violations that has increased due to the ICRA?

Mr. TOLEDO. Yes.

Ms. HINMAN. Not the actual incidents?

Mr. TOLEDO. Well, I believe the incidents have occurred, and I believe they have been handled in the past by the—either they have not been

handled, or they have been handled by the tribal governments, the institutions. But since the Civil Rights Act was passed, most of the tribal citizens have gone outside and reported these violations. And I have—I know of—several of my colleagues have referred cases to me, Indian cases to me because they don't want to deal with tribal courts, basically because there are no procedures to follow and the fact that—I mean it's just to them, what they describe it is a can of worms. They don't understand the system. They don't understand the traditions, and they don't understand where the tribal courts are coming from.

MS. HINMAN. How do the tribal courts view the ICRA?

MR. TOLEDO. Well, basically, most of them that have constitutions, or some of them that have constitutions, have tried to abide by the ICRA, in my opinion; but there are some even with constitutions who ignore their constitutions, that ignore the provisions of the Law and Order Code. Like I said, I have basically some cases that to me were pretty egregious, in my opinion, in which there is no remedy, and I have one that happened recently out at the Zuni tribal courts.

MS. HINMAN. What is the name of that case?

MR. TOLEDO. It's a little exclusion case. It's *Claudia Fry*—it's *Robert K. Archer, Employee, and Hayes A. Lewis, Superintendent of the Zuni Public School v. Claudia Fry*.

MR. MILLER. Would you submit a copy of that for the record, please?

MS. HINMAN. Can you briefly summarize what took place in that case?

MR. TOLEDO. Well, Claudia Fry is an Indian who is not a Zuni member. She is married to a non-Indian school teacher on part of the Zuni school district. She is a teacher that's hired by the school district, and he is—the school district is a State school district, by the way. And the complaining witnesses are also members of the school district. They are both non-Indians. The school district and Hayes—Hayes Lewis is the superintendent of the school district.

And Hayes Lewis and Mr. Archer filed a complaint against her for removal in the tribal court, which has jurisdiction under their Law and Order Code. Initially, the council had jurisdiction, but they delegated that responsibility pursuant to their constitution to the tribal court.

Now, once this petition was filed, she came to me for advice, and I advised her that Hayes Lewis was not the real party in interest, that this case could be probably dismissed because he is the one that was pursuing the action on behalf of Mr. Archer. Mr. Archer was the husband of the complaining witness.

But, in any event, Mr. Lewis went to the tribal council, and he asked the tribal council to remove this into the tribal council for adjudication of this matter. And the tribal court responded by removing this to the tribal council, although I believe that the Law and Order Code and the constitution did not allow for this.

So I proceeded to enter my appearance in the tribal council to contest the jurisdiction of the tribal council from hearing this case. And I was asked—I was told by the tribal council that they did not allow professional attorneys, and I would not be welcome to sit in to represent Ms. Fry.

MS. HINMAN. They did not allow professional attorneys?

MR. TOLEDO. Yes.

MR. MILLER. If I could interrupt—I'm sorry—when we discuss the cases, please refrain from stating the personal names of the parties. We would appreciate that in the future.

MR. TOLEDO. Okay. Well, I'm going to have to scratch the names of the parties if I'm going to submit this as a part of the record.

CHAIRMAN PENDLETON. Well, I don't know why you are going to scratch it now. There are people in the front row writing about it. I think in the future we have to do that, but it looks as if somebody is going to get their name discussed.

MR. TOLEDO. Well, I'm—

CHAIRMAN PENDLETON. I'm saying in the future if this is a problem, we can take care of it. It's our error for not telling you in the beginning. Probably my error.

MR. TOLEDO. Okay. Well—

CHAIRMAN PENDLETON. It's okay. It's not your problem.

MR. TOLEDO. Well, in that the case, the plaintiff whom I was representing was not allowed legal representation. But the plaintiff went back in the tribal council and pleaded that at least I sit in with her so that I could advise her, take—I was hoping to take a recess and advise her as to what was occurring in the council chambers. But that was also denied. But eventually they relented and allowed me to enter the tribal council to represent her as a plaintiff.

However, when I arrived in the tribal council, I wanted to advise my client and I asked for a recess, and they told me I could not do that, I was not allowed to talk to my client in the tribal council. So I proceeded to take a notepad so I could take notes. And they told me I was not allowed to take notes in the tribal council, so I was just basically there as a spectator.

MS. HINMAN. A witness.

The tribal council is primarily a legislative body; is that right?

MR. TOLEDO. Yes, they are.

MS. HINMAN. But suddenly they were a review court then, in effect, if the case had been removed to them?

MR. TOLEDO. Yes, they were adjudicating the case.

MS. HINMAN. Is this unusual?

MR. TOLEDO. I'm not that familiar with what has happened in the past, but I believe as far as the Zuni system is concerned, it's unusual because

under their code, the tribal court has exclusive jurisdiction for the removal of cases.

MS. HINMAN. You have mentioned more than once that in some courts professional attorneys are not allowed, although we heard in Governor Lewis' testimony that professionalism is encouraged and that they are seeking people who've got professional training. Are you saying, then, that in some courts it's not desired at all and that you would be excluded if you have a law degree or if you have a law background?

MR. TOLEDO. I believe so. In my experience, in some of the court systems where I've made an initial appearance because the actions before the court were a criminal nature, I have been told that I would not be allowed to represent.

MS. HINMAN. What is the reason?

MR. MILLER. Could you specify which pueblos you are talking about?

MR. TOLEDO. I'm—well, in this one instance, this was the Pueblo of Santa Ana where I made my initial appearance. And they knew that I would make an initial appearance because they provided me with a copy of the complaint that was filed by the police department. And when I arrived on the date of the hearing—they gave me a notice of the date of the hearing, and when I arrived there to represent my client, I was told the council had decided I was not to represent my client.

And at that point I proceeded to explain to them that this was a clear violation of the Civil Rights Act. And it didn't do any good because they proceeded to remove me from the court and said I was not welcome there, professional attorneys were not allowed. And I was excluded and I was not allowed to enter—reenter the courtroom, and they proceeded on to find my client guilty without my advice.

MS. HINMAN. Can you discuss a few cases in tribal courts that you feel are illustrative of weaknesses in the Zuni court system? And I'm thinking of sovereign immunity issues and due process violations.

MR. TOLEDO. Well, the case I've just mentioned—and there's another case involving another student teacher at the Zuni public school. She was removed without cause, in my opinion. And then this case was—since it's a State school system, the State school board has the power to implement procedures, school policies. In my opinion, the superintendent exceeded his authority by summarily removing a student teacher. And I—she filed an action in tribal court on her own behalf for an injunction against her removal. And the court granted the injunction, and they had a hearing on this matter. And the court decided that she was not a protected person, that she was just a guest at the school, and therefore the school had to do whatever it wants to do with a guest. Yet, they did not take into consideration that she was a student teacher and she had certain rights as a student. And I argued that point in court, but it was not—they did not pay any attention to my argument. And also she filed an appeal on this case,

which is still pending. It's been pending for several months because the present administration has not provided under the constitution a full-time judge and an associate judge, and they are supposed to provide an appellate court to hear these appeals.

MS. HINMAN. How has *Martinez* affected your caseload and how has it affected your actual practice?

MR. TOLEDO. Well, there's another case that I'm familiar with had to do with a—most of those cases that involve land tenure and probably probate and also—matters that probably should be handled by the courts, tribal courts, but they also involve first amendment rights, such as your right to practice any religion that you choose to practice. And one of the cases I filed was pretty egregious, so I tried to file this in the Federal court, and the Federal court dismissed it. But it was based upon the *Martinez* decision that you can only bring actions that are under habeas corpus, which means criminal cases. And I did this to awaken the—hopefully awaken the tribes that what they were doing was probably not appropriate. And I didn't want to carry it this far, but they wanted to hear me out, such as the rest of the council. When I tried to explain the civil rights violations, they turned a deaf ear. As far as I'm concerned, I don't know why I'm doing it; I'm just another Indian trying to tell other Indians what to do. That's the impression I get.

But in this instance, I'll submit the case to you because this is a public record. It's a case that was filed in the New Mexico Federal court.

MS. HINMAN. I have a lot more questions, but I think it might be best to just ask you to sum up, in brief, the difficulties that a lawyer faces and what your opinion is of the need for Federal review.

MR. TOLEDO. Well, I don't think, my opinion at this point in time, there's a need for Federal review. I think the tribes should be allowed to implement the Indian Civil Rights Act. I think the tribes themselves are aware of the problems that are occurring, and I think the tribes are in the best position to evaluate their situations, their customs and traditions, and how they can implement it within their own systems.

I think what you need is more tribal and more Indian input into the Civil Rights Act and implementation of it, and if that fails, then I believe there might be a need for Federal review. But at this point in time, to compare South Dakota with the tribes in Arizona and New Mexico is, I think, ludicrous because each one of them has their own unique problems. And the implementation of the Civil Rights Act should be looked upon as a tribal remedy at this point in time rather than a Federal court or any other intervention because the tribes are strong. They have a unique form of government, and they should be allowed to exercise that form of government.

CHAIRMAN PENDLETON. I think, counsel, if you have other questions why don't you submit them to Mr. Toledo and perhaps we can get a written response for the record. I don't want to cut off—

MS. HINMAN. That's fine.

CHAIRMAN PENDLETON. Just a couple of questions, if I may. We will try to wrap up in the next 15 minutes.

I do need to make a statement from our previous panel, as I discussed with my colleague. We had considerable discussion about the constitutional right to vote. We never said that denying that right to vote was a denial of civil rights. That didn't come out in our discussions, so I'm going to put on the record at this point that our questions pertaining to that election situation had to do with the denial of civil rights and people's ability to be able to go and vote.

Governor, if you could give me just two brief answers to two questions. What laws are enforceable in the tribal council? Does the ICRA apply to the tribal council, and if so, how does it apply? Does the Indian Civil Rights Act really apply to the tribal council, and if so, how?

GOVERNOR LEWIS. It does. I think that the Indian civil rights bill is applied to the tribal council and can—the way it is applied—and in the future also there are improvements to be made. There are ways that can be worked out for—like testimony this morning brought out. Some of the things that are in question now—who wasn't doing what about these things.

And now getting back to the testimony that was given, the Solicitor approved the way the *Archer* case was handled. The Exclusion Code was never adopted by the council and was rejected by the BIA. The tribal judge at that time treated that as a criminal case. The council treated it as a civil case. A family had to be moved out of Zuni for their protection because of threats made by the individual that was mentioned a while ago, and it got to be a bad situation.

CHAIRMAN PENDLETON. Just let me ask one other question. I'm not quite so sure I got an answer to that, but I think you made a good try. But just let me ask you this question.

You talked about law and order codes and I have gone over what you submitted to us in your May 7 concept paper, and I'm looking down at the 12 priorities here that you have for law codes and ordinances on page 12. And the only item I see here that applies to the Indian Civil Rights Act, or civil rights per se, are rules of the court in 8 and 9 of the priorities. But I refer to page 16 of the priorities that you have listed here. It doesn't say very much.

I guess I need to encourage you that our concern would be how the ICRA is carried out, if you intend to carry it out under those two priority items 8 and 9. There's no reference made to it anywhere else in the list of

priorities. Do you intend to strengthen that, or how can we help you to strengthen that, or what do you feel about that?

GOVERNOR LEWIS. We can strengthen them, and we will need help to do so.

CHAIRMAN PENDLETON. Does the BIA help you with that?

GOVERNOR LEWIS. Well—

CHAIRMAN PENDLETON. The talk that we heard this morning about technical assistance and trying to make things right, or do you have to, under the 638 contract, go get a contract to help you do it, and if you are short of resources—

GOVERNOR LEWIS. I believe at one time I mentioned that—not in here, but I did mention the fact that when the Indian Civil Rights [Act] became a law we had to live by, there was no technical assistance in the legal area to start us off on these things. I mentioned the fact that underfunding, undermanned areas of the Justice Department never quite made it to get to us—to give us the fundamental assistance that we needed to comply to all Indian civil rights rules that came out. And I would assume that right now it could be worse.

There's a lot of areas where a lot of things have to be done. We have a landing area up in our mesa country for delivery of drugs. We ran across narcotics people who were only allowed 100 gallons a month to cover five States. How could—and we want to work together, but how can we under those circumstances? And that's the reason why we brought the idea up to the Justice Department.

We took it to our Congressmen, we took it to the White House, and we wound up in the Secretary's office with the idea of our concept. But who and where and how are we as tribes going to get the expertise? The Bureau cannot give it to us in that light. They can give us technical assistance in some areas, but when it comes down to implementing the meaning of civil rights, we are just not there and together.

CHAIRMAN PENDLETON. Thank you.

GOVERNOR LEWIS. So that's the way I look at this situation.

CHAIRMAN PENDLETON. Thank you.

COMMISSIONER DESTRO. Let me just ask a question related to something Governor Lewis just said and then work backwards and do some questions for him. Mr. Toledo, what is a removal case, or is it the same as the exclusion case that he was talking about?

MR. TOLEDO. Yes, it is.

COMMISSIONER DESTRO. What is it and why was it classified in one instance as criminal and then reclassified as civil? Why did this case come up?

MR. TOLEDO. According to the law and order code, which is Title 8 of the Law and Order Code—it's called the Zuni Exclusion and Removal

Code. It's part of the Law and Order Code. It was not approved by the Secretary, and I don't know what it's doing in the code.

COMMISSIONER DESTRO. Okay. But be that as it may, why was this person subject to exclusion—or allegedly subject to exclusion?

MR. TOLEDO. Well, on section 814 of the Removal Code, it says: "Upon complaint of any member of the tribe, the tribal court may determine whether a person has committed any act constituting grounds for exclusion, whether or not the removal shall be ordered, such proceeding shall be conducted and provided a hearing below. An order of exclusion and removal may be entered by the tribal court." In other words, the tribal court has to determine whether the act was committed by that person.

In the first place, I believe there's a two-step process. First of all, there has to be a complaint, a criminal complaint filed by a tribal member against the party, the defendant. And I believe there has to be an adjudication on that criminal proceeding, and that belongs in the tribal court. And once a person is found guilty, then I think the next step is whether or not that act that was committed is so egregious that he or she—that the defendant should be removed.

COMMISSIONER DESTRO. When you say "removed," it basically means kicked off of the reservation?

MR. TOLEDO. Right.

COMMISSIONER DESTRO. Now, let me ask a couple of questions for Governor Lewis. You drew the distinction between civil and criminal. Why did you feel that this was a civil action?

GOVERNOR LEWIS. Well, on the part of the judge—I think it was mentioned a while ago that there were no proper forms that are being used in our court for specific cases. These forms that was handed in by the judge, both had criminal and civil boxes, and the criminal area was checked, and the judge was blaming it on the staff. He indicated that—by his attitude that he was the one that had done it, but shifting the blame on the staff.

COMMISSIONER DESTRO. So in other words, am I right in assuming that basically you didn't feel that the tribal court could do the job correctly in this particular case?

GOVERNOR LEWIS. Yes. As I mentioned before, the code was never signed off by the tribal council, and also as I mentioned, it was rejected by the BIA. And in cases of this type where it would be up to the tribal council to have that authority, because in the first place the court said—I mean, the code mentioned—as it was made by the then administration, it mentioned that any member of the Zuni Tribe could put in a complaint against anybody. And it was really not a good thing for submitting to our court because there are ways that we have to look into these things. We don't try to let anything go by when it comes to where children are involved.

COMMISSIONER DESTRO. Okay. So in other words, the way you looked at it was that because the code really wasn't operative, as you saw it, this was just—you took it under the residual power that the tribal council still has?

GOVERNOR LEWIS. Yes. And that case, that's been waiting—I mean, you know, it was on the table for quite a while. And sometimes action had to take place where—we don't just push anybody out. We look at all the things that are tied in with the case. And I think these are things that we put a lot of thought into. And where others are involved, especially the threats on life, and I have it that it's not being overcome, which could mean disaster to the threatened party, we have to consider it very carefully, and the position paper covers the civil rights aspect in the context of our court reform.

COMMISSIONER DESTRO. Let me ask you then, too, there's a—in your concept paper, you have a distinction between traditional cases and commercial cases, and what do you—how do you define the traditional cases which should be handled by the tribal council, for example?

GOVERNOR LEWIS. I think I gave an example previously, sir, in regard to land.

COMMISSIONER DESTRO. Okay.

GOVERNOR LEWIS. And also in some family probate matters. Property, not including land, but the property of the two who are—may be having to split for some reason, a couple. And here again, some of these things are located where, you know, you can't actually describe some of these things on paper, stock and things like that. And these, I think, are more on the traditional side where the council is more mobile than the judge would be.

COMMISSIONER DESTRO. Okay. Then my last question is: I want to go back to the very first things you were talking about, about the traditional way of doing things before the Self-Determination Act or before the Reorganization Act where you talked about the council of the oldest men who basically ran the pueblo. And you said that the council of priests chose the headman, but the villages chose their representatives to the council.

GOVERNOR LEWIS. Right.

COMMISSIONER DESTRO. How did the villages choose their representatives to the council?

GOVERNOR LEWIS. By an election process. They would gather—well, right now we do have—still have farming communities. We got five. And their spokesman has to be responsible to bring to the attention of the tribal council anything that they may need in assistance in regard to their—maybe irrigation systems or whatever or any other thing that ties in with those districts out there. And they call a meeting and they nominate maybe two or three and choose them by voting.

COMMISSIONER DESTRO. So in other words, even under the old system before the Reorganization Act, there was democracy in the pueblo?

GOVERNOR LEWIS. Yes.

If I may, I would like to bring a case to your attention. Back in the late 1960s, a felony was committed by one of our tribal members which involved embezzlement of Federal funds, forging names on checks. This was a Federal case and we went up to the Federal court and requested it to be turned over to us where restitution would be made and a penalty for the violation be also collected. Whereas if she paid her what they call debt to society and was committed to the can for 3 years, who really gets the benefit of that type of an action on the part of a court? We got the restitution, the violation was paid for, and a hardship was not placed on the grandpa and grandma to take care of three kids.

COMMISSIONER DESTRO. When did this happen, Governor? How many years ago?

GOVERNOR LEWIS. In the late 1960s.

CHAIRMAN PENDLETON. There's just something that I want to ask you, Governor, since you are the only Governor we are going to have here, it looks like. Would you be willing at some point to waive the tribe's sovereign immunity to bring civil rights cases before it? Would you support any activity among the council to waive immunity to bring civil rights cases against the tribe?

GOVERNOR LEWIS. That's a hard question to answer because I would not want to put my tribe in the position to set an example for other tribes or make a precedent.

CHAIRMAN PENDLETON. Okay. That's fine. Counsel.

MR. McDONALD. I have a question for Mr. Toledo. Before the case of *Santa Clara Pueblo v. Martinez*, there was a case called *Dodge v. Nakai*, which was an exclusion case on the Navajo Reservation that went to Federal court. And the exclusion was overturned because of lack of due process. Do you agree that that case would have been a precedent for your exclusion case if it weren't for the *Martinez* case?

MR. TOLEDO. Yes, I believe so. I believe in this case there was a lack of due process because the complaining witness was not present. My client didn't have an opportunity to confront or examine the complaining witness, and I think that's a due process violation there and a lack of jurisdiction on the part of the council.

MR. McDONALD. So even though you would have won your case and justice would have been done, but before *Martinez*, you still do not favor Federal court jurisdiction in such cases?

MR. TOLEDO. Well, I don't favor Federal court intervention in this case because I don't think the tribes have really been given an opportunity to evaluate their system of government to implement the Indian Civil Rights Act, basically, because they have no monies to hire, as Governor Lewis

says, professional people to assist them in this matter. And I believe if you have tribal governments themselves looking into their customs and traditions and whether or not—I'm sure they can be implemented. There's no reason why a criminal code cannot be implemented, which gives you a penalty of—or elements of proof, and there's no reason—I don't think any tribe can implement those right now. But as far as the implementation of civil rights as it stands now, I think the tribes have to be given an opportunity to look at their system and whether they can be implemented. But, like I said, they lack funds, they lack professional staff, and I think they need help in this area. It can be done, I'm pretty sure, especially the fact that most of the tribes—

MR. McDONALD. Thank you very much.

MS. HINMAN. I have two quick questions; one, for the record, I would like you to tell us your tribal membership.

MR. TOLEDO. My tribal membership is, I'm from the Jemez Pueblo. That's one of 19 Pueblos.

MS. HINMAN. Okay. Secondly, this talk about implementing the Indian Civil Rights Act, which has been in existence for some time, are you saying that it's solely because they don't have enough funds that they're not going to be granting civil rights?

MR. TOLEDO. Well, each tribe has to answer the question themselves, but my observation is I think it can be implemented. There's no reason why—some portions of it can be implemented, maybe not all of it.

MS. HINMAN. And that the first step, far, far ahead of any possibility of Federal review, is simply implementing the Indian Civil Rights Act more so than it is being now?

MR. TOLEDO. Right. And those tribes that have implemented the Indian Civil Rights Act, such as the Zuni Tribe—this section of the constitution, I think, tracks word for word the Indian Civil Rights Act. I have no explanation why they can't follow through with it because it's part of the constitution. It's been adopted by the tribe.

MS. HINMAN. Thank you.

CHAIRMAN PENDLETON. As we recess, Governor, we will take your statement for the record.

GOVERNOR LEWIS. I would like to submit tribal ordinance 5, which gives jurisdiction to the tribal council.

CHAIRMAN PENDLETON. Okay. These proceedings are recessed until 1:30. Thank you.

[Recess.]

Afternoon Session, August 13, 1987

CHAIRMAN PENDLETON. For the record, we will not adjourn these hearings. We will recess them because there might be need to talk with other witnesses later if the Commissioners find it necessary.

[Edward Carlisle, Robert Roessel, O. Tacheeni Scott, Peter Iverson, and Robert Young were sworn.]

Navajo Overview

CHAIRMAN PENDLETON. As we proceed this afternoon, we want to hear as much as we can from people, but you must understand that we can hear but so much, so we would ask you if you have opening statements of any kind or statements to make to the Commission, please feel free to give them to us today in writing, or if you want to take time to give them to us later, feel free to do that. We would ask you to be brief in your opening statement or statements so that we can have some dialogue back and forth.

I must say that you are not unknown to us. The staff has briefed us well. We have read some of the things that you have written and certainly want to have a chance to engage in some dialogue with you.

With that, I would like to start with Dr. Young.

TESTIMONY OF ROBERT YOUNG, PROFESSOR EMERITUS, UNIVERSITY OF NEW MEXICO

DR. YOUNG. I have an opening statement which I did not prepare in prose form but prepared in outline form. The opening statement was prepared for the purpose of tracing the development of the Navajo tribal government from its beginning down to the present time. I have a number of points representing major factors and events that shaped the tribal government over the years. I will cover them as succinctly as possible—

CHAIRMAN PENDLETON. Thank you.

DR. YOUNG. —in very little time, I hope.

CHAIRMAN PENDLETON. Thank you.

MR. MILLER. Dr. Young, before you begin, could I ask some background questions? You were employed with the BIA for a number of years; is that correct?

DR. YOUNG. Yes, I was employed by the BIA from 1940 to 1971.

MR. MILLER. And you have written a number of books on the Navajo?

DR. YOUNG. Yes.

MR. MILLER. Including *The Political History of the Navajo Nation*?

DR. YOUNG. *History and Languages*.

MR. MILLER. Thank you.

DR. YOUNG. Traditionally, the Navajo Tribe was never organized as a political entity. It was a social, linguistic entity but not a political entity.

In 1868 the Federal Government and the tribe entered into a treaty, and one aspect of that treaty was a requirement that no part of the treaty reservation which was set forth in that treaty could be alienated or ceded except by the consent of three-quarters of the adult members of the tribe.

Well, this was unimportant until 1921, at which time oil was discovered in the northern reaches of that treaty reservation. And there was no

procedure for the granting of leases. And leases, of course, were in great demand by oil companies that wanted to exploit this resource.

The use of a general council or meeting of all the members of the tribe was not feasible because the area of land involved by 1921 approached 15 million acres of largely roadless areas. It was impossible to bring all the people together to give their consent.

So the Secretary of the Interior struck on the expedient of creating a Navajo Tribal Council for the purpose of giving tribal consent to oil and gas leases. The council was created in 1923 and cloaked with the necessary authority. It was an instrument then of the Secretary of the Interior.

One of its first acts when it held its very first meeting was to give a representative of the Secretary of Interior a power of attorney to do the very things that the council had been created to do. So it could have gone out of existence within the first hour of its birth. However, it didn't because representatives of the Bureau of Indian Affairs and others saw its potential value as a sounding board for government programs and as an intermediary between the tribe and the Federal representatives. So it continued to exist. It met about once a year, not at its own call, but at the call of the Secretary of the Interior or his representative.

In the 1930s, there was a revolution in Federal Indian policy. Prior to that time, for all through the last half of the 19th century and the early part of the 20th century, Federal policy had been the enforced assimilation of Indians all over the United States. In the 1930s, that policy was reversed, and it became one of seeking to organize Indian tribes in such manner that they could participate in planning and in programming for the solution of their own problems. One aspect of that was the development of tribal governments where those governments had fallen into decay or where they had never in fact existed.

This policy of the Federal Government was crystallized in the form of the Indian Reorganization Act in 1934, one feature of which was authorization for tribes to organize under tribal constitutions. In order to take advantage of the act, the Indian tribes had to accept the provisions of IRA, as it's called, in a referendum called for that purpose.

Well, it so happened that in the 1930s another event came about that had a bearing on tribal affairs. That was the emphasis of the Department of the Interior and the Congress on soil conservation. Public domain lands throughout the United States were being seriously eroded through overuse, and public domain was extended—or rather, Indian trust lands were extended to be incorporated, for all general purposes, as public domain. So the Federal Government began to concern itself with soil erosion control in the Navajo country.

Since the Navajos were primarily dependent on livestock during this period, the soil and moisture control effort largely reflected the need to

control erosion on rangeland, and this, in turn, required the reduction of livestock.

The Navajos were primarily dependent upon livestock. The threatened reduction or elimination of this resource that they had for livelihood was considered by them to be genocide. So this precipitated a long period of strife and discord between the Federal Government and the Navajo Tribe.

In 1935 this discord resulted in tribal rejection of the Indian Reorganization Act. Well, the Department of the Interior was looking to the development of the tribal council under a constitution in such fashion that responsibility for livestock reduction and range control could be foisted onto it rather than carried on the shoulders of the Secretary of Interior. With the failure of the tribal constitution, the Federal Government, the Department, was in something of a quandary, and the Secretary then urged the Navajo Tribe to proceed with the adoption of a constitution outside of the IRA.

In 1936 and '37, an abortive attempt was made to accomplish that purpose. A constitution was indeed drafted. It was sent to the Indian office in Washington for review, looking towards its approval by the Secretary. But when it got to Washington, it became the subject of controversy and debate.

One faction held that the Navajo Tribe having rejected IRA couldn't properly adopt a constitution which, to all intents and purposes, paralleled the constitutions adopted by tribes that had accepted the IRA. The other side, the other faction, took the position that the IRA notwithstanding, Indian tribes had certain inherent, residual sovereign powers which they could utilize at their own discretion to formalize and develop a tribal government for the exercise of those powers that they so desired.

Well, the argument went back and forth for some time while technicians chomped at the bit because they felt that time was wasting and they needed to get going on soil conservation measures. So the Bureau of Indian Affairs decided to place the issue of the constitution in abeyance for future consideration, and that was done.

Nothing happened during the decade of the 1940s, except that after the war, in 1946, the issue of livestock reduction was revived and with it, of course, the strife and discord that had characterized Federal-tribal relations in previous years.

In 1946 Congress passed the Indian Claims Act, and Indian tribes throughout the country hired claims attorneys for the purpose of representing them before the Court of Claims in the hope of receiving compensation for lands and other resources that had been taken from them in preceding years. The Navajo Tribe hired a Washington attorney by the name of Norman Littell, not only as claims attorney, but also under a contract that provided for his service as general counsel to the tribe in the hope that he could be a champion for their protection in their controver-

sies with the Federal Government over livestock control and soil and moisture conservation.

The postwar period for the Navajos was one of crisis. People had left the reservation during the war years either for service in the Armed Forces or for work in wartime industries. When they came back, there was no economic base, no jobs, nothing to support them, nothing except welfare, and there was not much of that. So the Federal Government and the tribe collaborated in the development of a rehabilitation program. It came to be known as the Navajo-Hopi Rehabilitation Act and was formalized in that piece of legislation in 1950.

One aspect of the Navajo-Hopi Rehabilitation Act was authorization, again, for the Navajo Tribe to adopt a tribal constitution. So in the period after 1950, between then and 1953, the Bureau and the tribe and the tribal attorney collaborated in the development of a draft of a tribal constitution. This document was sent into the Indian office, and it lay dormant for a 3-year period, from 1953 to 1956.

Periodically, the attorney reported to the tribal council to the effect that there were certain important questions that had not been resolved relating to tribal powers and their exercise by the council, and this was holding up adoption of the constitution. Well, it developed that the questions to which he had made reference were simply that he was making an effort to increase the authority of the tribal government over trust property, and his first attempt was to get an interpretation of the language of the Navajo-Hopi Rehabilitation Act that would permit the Secretary of the Interior to abdicate his trust responsibility which, of course, was placed upon him by Federal law.

Since the Solicitor's Office wasn't receptive to that recommendation, the attorney took another course and attempted to get legislation which would divest the Secretary of his trust responsibility. That again failed.

So in 1956 Mr. Littell advised the council that it was impossible to get a solution to these important questions and that a constitution would trammel them anyway in the prompt handling of tribal business. In effect, he told the council that it would increase the veto power of the Secretary of the Interior over tribal council enactment. So it died at that time.

In 1956 millions of dollars came into the tribal treasury with the discovery of the Four Corners oilfield, and the tribal organization burgeoned. Through the 1950s, in the absence of a constitution, it had taken shape by the tribal council adopting resolutions under the terms of which they assumed governmental powers. And they had the capacity then to exercise those powers to the extent the Secretary of the Interior approved those resolutions.

The tribal government took shape in its present form on the basis of those resolutions, which were adopted from time to time and which were finally compiled or consolidated in the form of a tribal code, which the

tribal attorney represented as tantamount to a tribal constitution. It's really a very good governmental organization, I think, and had the tribe proceeded to adopt the constitution, it's very likely that the organizational scheme would have found expression in it.

I hope I haven't taken too long.

CHAIRMAN PENDLETON. Enlightening. Thank you very much. Counsel?

MR. MILLER. Dr. Young, in your opinion, what were some of the problems in the Navajo adopting the constitution? Why do you think they never did? And maybe I should phrase it this way: was there much widespread grassroots support for a constitution?

DR. YOUNG. No, there wasn't. The Navajo people in the 1930s had had really no experience whatsoever in tribal government, much less in such a sophisticated document as a constitution. At that period they called it in Navajo simply "big law," which reflects the fact they had no real understanding of its purpose. So there was no real grassroots support. There wasn't even grassroots support for the council, because the council had taken actions that were considered by the people adverse to their interest in connection with livestock reduction. So there was no interest in a constitution at that period in Navajo history, or at least very little.

Later on in the 1950s, there was interest in it, but the problems that entered into its failure during that period are those I outlined a moment ago, namely, the attempts of the attorney to increase the powers of the Navajo Tribal Council over trust lands assets.

MR. MILLER. In your opinion, did the general counsel, Norman Littell, generally have an inordinate amount of power?

DR. YOUNG. Yes. As I mentioned, during the period between the signing of the treaty of 1868 down to the late 1940s, the relationship of the Federal Government to Indian tribes was often called "Federal paternalism." I think properly it could be said that after 1950, the Federal Government having withdrawn as part of the Federal termination program, the tribal attorney moved in, and to all intents and purposes, that became a period of legal paternalism. The tribe looked to the attorney for answers to every possible question, and he exercised then a great deal of influence, not all bad by any means. But, anyway, the tribal government looked to him for advice rather than to a representative of the Bureau.

MR. MILLER. Was there much participation by the Navajo people in their government during the fifties and sixties?

DR. YOUNG. Well, participation reflected largely in the fact that they elected individuals, and of course, they told the individuals they elected what they hoped to achieve from their representation. And secondly, during the 1950s, the chapter system was revived, and many chapter houses were built, community centers were built, and this gave the people an opportunity to express their desires and their opinions and to participate in a way in tribal government. Their participation was perhaps limited by

virtue of the fact that many of the major issues that came before the council went to the council delegates, much less to the people themselves, only after the fact, after they had been presented to and in many instances acted upon by the tribal council. So they didn't get the opportunity for input in items of business that the tribal attorney felt were private and should be kept in secret and kept away from the public eye.

MR. MILLER. I'm a little bit unclear on that last point about controversial issues. Could you describe that a little bit?

DR. YOUNG. Well, one controversial issue during the 1950s was a proposal by the legal department of the tribe to withdraw 5,100,000 acres of the reservation from leasing under the existing leasing regulations and procedures and enter into a partnership with the Delhi-Taylor Oil Company for a joint exploitation of potential gas resources in that area. This was about a third of the whole reservation, so it was a matter of interest, of course, theoretically, to every member of the tribe.

This was not very generally discussed during the course of its discussion in the tribal council. And as far as my own opinion is concerned, it should have been an issue that would have been discussed widely at chapter meetings and with the tribal council members before any action on the part of the tribal council could be taken because it was a gamble.

If no oil were discovered, if they drilled only dry wells, the tribe had to share with the oil company in the expense of those dry wells. And the tribe would share with the oil company at the rate of 25 percent in the event that highly producing oil wells came in. Marginal wells, they would still only get 12½ percent, and that's the amount they would get under lease; and they would lose, of course, the bonuses that are paid by oil companies for the privilege of leasing oil and gas land, which are very, very substantial and which represent a large part of their tribal resource now in the treasury.

MR. MILLER. As I understand it, the tribal council voted on that. Were the delegates well-informed and prepared ahead of time on the issue?

DR. YOUNG. On Delhi-Taylor?

MR. MILLER. Or on most significant and controversial issues?

DR. YOUNG. It was explained in general terms, largely in terms of the advantages of the arrangement over the existing arrangement, but I don't recall very much conversation about the potential gamble. And if tribal council members were aware of it, they didn't seem to consider it a great issue.

MR. MILLER. So, in your opinion, they were not all that well-informed or prepared ahead of time?

DR. YOUNG. They weren't as well-informed as I think they should have been.

MR. MILLER. I see. And is that true of most controversial issues around that time?

DR. YOUNG. Well, that was one controversial issue. There was another one involving the inclusion of *Healing v. Jones*, which was a court case adjudicated in the Federal courts in the 1950s as related to the Executive order reservation of 1882, which is occupied partly by Hopis and partly by Navajos. And the attorney was interested in classifying that as a claims case, much like the cases that were before the Indian Court of Claims under the Claims Act. And this proposal was not discussed very widely. In fact, it wasn't discussed widely at all. The only part of the tribal government that was aware of it was the advisory committee, which is a sort of an executive committee of the council to which the tribal council delegates authority for specific purposes. And they had delegated authority for extension of the attorney contract.

So the attorney was interested in classifying this as a claims case. In my estimation, he should have taken this up with the council, at least, and beyond them, probably with the people too, because it wasn't properly classifiable as a claims case such as those involving land resources taken in the 19th century.

These are two controversial issues that come to mind that probably should have received attention, wide attention.

MR. MILLER. But they did not. Thank you, Doctor.

CHAIRMAN PENDLETON. Dr. Iverson.

TESTIMONY OF PETER IVERSON, PROFESSOR, ARIZONA STATE UNIVERSITY

DR. IVERSON. Thank you.

My association with the Navajo Nation goes back to Dr. Young's time in the 1930s when my grandfather, who was trying to be a school principal during the livestock reduction, which was an interesting occupation at that time, and I grew up hearing his stories.

My own involvement goes back to the early days at Navajo Community College when Bob Roessel and others were good enough to bring me on board as a raw kid. And later I went on to graduate school to write a modern Navajo history, which was eventually published as *The Navajo Nation*.

Though I taught for a year in the mid-1970s as a visiting professor at Arizona State University, for most of the time since the 1970s I have been up in the tundra country of Wyoming, and I've only recently returned to the Southwest to live in trailers, as I did in Many Farms to get the west campus of Arizona State University off the ground.

So as far as my commentary is concerned, I'm more able, I think, to comment on events of the previous generation coming up to the early 1980s but not on the most recent events, and there are certainly many other people who can speak very knowledgeably to those developments.

I do have a prepared statement, and I will try to excerpt some things from that and perhaps submit the entire thing for the record.

CHAIRMAN PENDLETON. We would appreciate that.

DR. IVERSON. I do want to overlap a little bit with Dr. Young's testimony because I do think that the period of time after World War II is a very important one.

The combination of terminations, the legacy of stock reduction, war experience, I think, encouraged Navajo development on a number of fronts. And under the leadership of Sam Ahkeah, the Navajos started to assume new tasks. And as Dr. Young suggested, a key non-Navajo figure in this evolution was Norman Littell, and as he has also mentioned, the long range Rehabilitation Act was very important.

The tribal council did become much more active at this time. At the start of Ahkeah's chairmanship in the late forties, it met 4 or 5 days a year, I believe. It did not meet a great deal, but by the middle of the 1950s, it met more like a period of several months. So it was expanding its activities very strikingly.

A particular legal case which is worth citing is *Williams v. Lee* of 1959. That symbolized this transition. One well-known Indian attorney, Fred Ragsdale, has referred to this as the first modern Indian law case. It involved a non-Indian trader on the reservation who sued a Navajo in State court to collect for goods sold on credit. While the Arizona Supreme Court, not surprisingly, ruled in favor of the trader, the U.S. Supreme Court reversed this decision, and Justice Hugo Black stated: "There can be no doubt but to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and, hence, would infringe on the right of Indians to govern themselves."

The problem the Navajos faced was, of course, to govern themselves. For that to have real meaning, it had to be exercised. And the challenge at the end of the fifties and going into the sixties and seventies was how to do that. And I think what we see in the late 1950s, 1960s, and 1970s is a dramatic change in the power, the ambition, in the efforts of the tribal government.

For example, the tribal court system established at the beginning of the 1950s was amended by the end of the 1950s, and at this time, the council approved the idea of the Chairman nominating the judges to serve on a seven-person trial court, and then there would be an appeals court consisting of a three-person group, the chief justice with two of those judges from the trial court selected by the chief justice to hear a particular case. This was a change, I should add, from the early fifties when those judges were elected.

The 1960s were a time of rapid change, of course. The election of Raymond Nakai as tribal Chairman in 1963 meant the beginning of the end of the Littell period. He had cast, one might say, a long shadow over tribal

affairs for an extended period of time, and his successor, Harold Mott, as general counsel could not help but seem a little less substantial a figure, though not an insignificant one.

A very key development in the mid-1960s was the emergence of the Office of Navajo Economic Opportunity, funded through OEO in Washington. And those of us who lived on the Navajo Nation during the mid- or late sixties remember its vigorous activities. From its inception, it moved vigorously to affect the lives of nearly all Navajos. And its first director, Peter MacDonald, quickly was catapulted to the central stage of Navajo political affairs.

One of the programs under ONEO was DNA [Dinebeina Nahiilna be Agaditahe], the legal aid program, which, in English, the Navajo words could be translated as "attorneys who contribute to the economic revitalization of the people." The need for legal assistance for individual Navajos had long been acknowledged, and DNA was an important force right from the beginning.

It was also mired in controversy right from the outset. And some of the controversy, in my opinion, stemmed from its effectiveness. It employed recent graduates from top law schools. It took on consumer problems, family difficulties, other common dilemmas. It went against car dealers in border towns. It took on the States in this area, and it became a political force in its own right. And that made a number of people nervous.

As many of the people in this room will recall, it was headed initially by a non-Navajo, Ted Mitchell, who personified the independent nature of the DNA operation. There were many confrontations between Mitchell and a number of Navajo political leaders, between the *Navajo Times* of that day under the editorship of an Anglo editor, Dick Hardwick. And this culminated in a confrontation between Annie Wauneka and Ted Mitchell in the late 1960s.

This was a memorable event for those who were present at that time. According to most accounts, Mitchell was laughing during an explanation of the provisions of the 1968 Indian Civil Rights Act when Wauneka asked a Federal representative if a person could be excluded from the reservation under the act's provisions. The next day, Wauneka slapped Mitchell and told him to leave the room. He did. I would have, too. And the advisory committee voted to exclude Mitchell from the reservation. And after negotiations faltered over his return, DNA filed suit in *Dodge v. Nakai*, a well-known case.

It is worth noting in passing that DNA did not sue the tribe but rather three defendants, one of whom was Chairman Nakai. Mitchell was able to return to the reservation. The suit was based in part on the ICRA, especially Title 2. And he came back briefly to head up DNA and eventually left to head a legal services program in Micronesia. After that point, DNA was headed by a Navajo man, Leo Haven initially.

Peter MacDonald was elected tribal Chairman in 1970, and DNA survived. Its continuing impact should not be underestimated, in my opinion. In addition to taking on thousands of cases, it encouraged Navajos to become much more involved in the court system of the Navajo Reservation and in the legal system generally. Some people, indeed, went so far as to become attorneys themselves.

The 1970s also defy a quick summary, but let me mention just a couple of things.

One thing, of course, would be the selection of a new general counsel, the Phoenix firm of Brown, Vlassis & Bain was chosen, with a partner in the firm, at that time George Vlassis, and a then-young associate, Larry Ruzow, taking on primary responsibilities. As before, they became identified closely with the fortunes of the incumbent chairman, and they worked closely with him and with the council.

1970 also marked the 10th anniversary of six Navajo judges, with the seventh recently being retired. That was a record of, I think, remarkable stability, and most observers at the time felt the court system had matured in the sixties in part because of the prodding by DNA and the tribe's legal department. And by 1970, I believe, the court included prosecutors and advocates, many of them affiliated with DNA at this time.

The second and third term of Chairman MacDonald proved more troubled than the first term. There were a number of controversies during that time which are familiar, again, to many people here. There were problems in the Navajo Housing Authority, problems in regard to the Navajos and Hopis in terms of land, the indictment of the Chairman, the debate over reapportionment, creation of the supreme judicial council.

Let me talk very quickly about reapportionment and the supreme judicial council.

Reapportionment was prompted by the one-person, one-vote decision of the U.S. Supreme Court. And how to set that reapportionment in motion proved to be a very difficult matter. Eventually, the council came up with its plan, and then the court, the tribal court, released its decision. And then after considerable debate, the council devised still another plan. And some observers believed that dissatisfaction with the way the existing court system had handled the reapportionment question, and other matters, prompted formation of a third tier in the Navajo judicial system, the supreme judicial council.

Earlier in 1978, it might be added, the court of appeals had upheld a ruling overturning the decision by the tribal council to pay F. Lee Bailey \$70,000 for the defense of Chairman MacDonald when he had been indicted. The tribal council also voted in 1978 that the courts could not review tribal council decisions. Then the courts filed suit against the tribal council. So it got very complicated at that point.

The supreme judicial council was approved 35 to 22, which reflects the division on this matter, in May of 1978. It was an idea originally presented by Edgar and Jean Cahn of the Antioch Law School, and it was to consist of two retired justices, one tribal council member from each agency, and the chief justice, the chief justice voting only to break a tie. And there were several features of the judicial council which provoked criticism, and very quickly they were: first of all, the ability of the tribal Chairman to appoint the council representatives as well as the two retired justices, the majority representation of the tribal council on the judicial council, and finally, the existence of an additional court of review which would undercut, some people felt, the authority of the existing court system. And not surprisingly, supporters of the Chairman tended to favor the judicial council, and many opponents of the Chairman did not.

Developments in Chairman MacDonald's third term are beyond the time period that I've really researched carefully, and I'm sure there are other people who will speak to them.

There are certainly a number of matters which could be mentioned in passing, and many of them are variations on what seem to me to be old themes. It's worth noting in passing that the partnership of Vlassis and Ruzow split. By this time there were Navajo attorneys who vied for the opportunity to serve as general counsel. More Navajos were enrolling in law school, and by January of 1981, 17 had law degrees. There were more turnovers on the court at this time, more debates about the political nature of judicial appointments. The appointment of James Atcitty in June of 1981 would be a case in point.

There were questions being raised as the 1982 Chairman's election came closer about the nature of the judicial system. Peterson Zah, for example, in April of 1982 called for a more independent judicial branch to be established with more complete checks and balances. Finally, I should mention in passing, the position of attorney general was created at the end of this time.

There a couple of things I want to include very quickly before I conclude. One is the matter of the Indian Civil Rights Act. This, as you well know, has been a very controversial piece of legislation. It has been criticized by some people a number of years ago on the Navajo Reservation. Peter MacDonald, for example, said in September of 1982 that the ICRA was as an example of laws that have "whittled away what is left of our sovereignty."

There is a chapter in a book, the chapter written by Robert Winfrey, published last year in a book called *Between Two Worlds—The Survival of Twentieth Century Indians*, which addresses in some detail some of the criticisms of the ICRA and talks about the impact of the 1978 Supreme Court decision, *Santa Clara Pueblo v. Martinez*. And as Winfrey argues, and many Indian observers would agree, that while the *Santa Clara Pueblo*

v. *Martinez* decision would stem some of the apprehension, it did not stem all of it; and many people have felt that the ICRA has been an affront to the internal sovereignty of the tribes and was imposed without their consent.

The final main point I would make is that the issue of freedom of expression and dissemination of information is an old issue, a prevailing tension from time to time at least in Navajo country and elsewhere. It was an issue many years ago in regard to the Native American Church. It was debated within the pages of the *Navajo Times* long before recent controversies. Chairman MacDonald in September of 1982 commented that on Indian reservations, even what can be considered as innocent public information can be used to damage or destroy the image of an Indian tribe.

So it seems to me, in closing, that the intertwining of (a) sovereignty and culture with (b) the evolution of a stronger tribal government, especially at the executive level, and then (c) the issues of freedom of speech and individual rights poses an ongoing dilemma, one that's not easily realized. It seems to me there are many important questions that the Commission has been exploring and can explore, and it seems to me that it's important to put these things in an historical context and to recognize that many of the dilemmas faced on the Navajo Reservation have been faced elsewhere too.

I would just say in closing that I have great admiration for the Navajo people, and I believe the Navajo tribal government has evolved significantly over the past generation into a vital force within the Navajo Nation, within the Southwest. I have a great deal of respect for the largest Indian nation in our country, and I am convinced that the Navajo future is a bright one indeed.

CHAIRMAN PENDLETON. Thank you.

We are going to continue on with the panelists and then we are going to come back. It might give us a chance to ask some questions, and we're going to have to ask of everybody. Dr. Tacheeni Scott.

I must admit to the audience, though, this is a little different from our usual format; but we figure we should get all the information ahead and then the questions and answers, but we will get to that before it's all over.

TESTIMONY OF O. TACHEENI SCOTT, PROFESSOR, NORTHERN ARIZONA UNIVERSITY

DR. SCOTT. Thank you, Mr. Chairman.

My name is Tacheeni Scott, and I'm a Navajo person who is originally from Tuba City. And I grew up approximately 17 miles west of here at a place called Indian Camp during the forties and fifties and early sixties. I am a microbiologist and not a historian, as the two gentlemen to my left are, but I must say, the past 6 years I have spent back in the Indian country

here, and I feel like I can comment on some of the things that I have seen happening during my years back in the Southwest after I finished graduate school at the University of Oregon.

What I want to do is just preface my statement by sort of giving my talk a little title. And what I would like to have the Commission kind of go along with me on is I think what we are addressing today is something I would like to entitle "Feeling the Pulse of the Navajo Nation." As an educator, I'm coming from the standpoint that the Navajo Nation's greatest natural resource cannot be found at this point on the Navajo Reservation. And I'm talking about Navajo young people who are presently obtaining or working on college degrees at off-reservation universities. Let me just say in passing that we do have Navajo community colleges on our reservation where a good number of our Navajo people are being trained, and that's where I met Dr. Roessel and Dr. Iverson.

Let me just quickly brief the Commission and members of the audience on what I see as happening within the Navajo tribal government since approximately June of 1981. Now, 1981 was the third year of Peter MacDonald's third 4-year term. In November of 1980, MacDonald called for the creation of a department of justice apart from the general counsel, as has already been mentioned a couple of times, and I would like to have the Commission understand that what I would like to do is document some of the statements made in the media during the time since—

CHAIRMAN PENDLETON. Just a second. Before you do that, I need to remind the afternoon witnesses compared to the morning that we do have a defame and degrade portion of this, and we would ask you not to call names or make accusatory statements about people that will cause some problems later. I would be glad to give you a copy of the morning's opening statement.

Let me just read that paragraph again for the afternoon so that we can make certain that we understand where we are. I think it's only fair to you. I will read two paragraphs from my morning statement:

I wish to caution the witnesses, however, that the Commission is most interested, not in the performance of particular individuals but 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 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 or tomorrow to allege criminal misconduct by any person. Such allegations, if made, will be stricken from the record. We have invited several tribal officials, and they will have full opportunity to respond to criticism of their performance, both at this hearing and subsequently, if necessary.

The second one applies in a different manner, and that is that I am obliged to refer to concerns of the 18 United States Code, section 1505, a

criminal statute which prohibits individuals from in any way interfering with the testimony of witnesses at this hearing or retaliating against those witnesses for their testimony. A maximum penalty for violation of that statute is a fine of \$5,000 or 5 years' imprisonment, or both. The United States Attorneys for Arizona and New Mexico 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.

I thought I better put that in because it's a different forum here, and we are trying to keep this as a fact-gathering session more so than some other kind of a session. Thank you very much.

DR. SCOTT. Thank you, Mr. Chairman.

In the summer of '81, there was some talk about the tribal council evidently questioning the role of the judiciary in the tribal government. And some of the councilmen asked questions. Some of those questions involved—one of the—a probationary judge was quoted as saying: "My conception of tribal government is different. The tribal government is like a family with a mother, father, children. If the son doesn't like what the father is doing, the father responds in one of three ways. He says the son is wrong, he gives reasons, or he just says 'don't bother, it's none of your business.'" And one of the councilmen was quoted as saying that he questioned that method of trying to settle an issue relative to the smooth operation of tribal government without permission. And within the tribal government, various individuals, namely, directors of certain components, would try to abide by Federal mandates, and the leaders of tribal administration at the time wanted personal input.

And it seems that in August of '81, something like—the Navajo Nation had a budget of about \$46 million, and which is a significant increase from \$26 or \$28 million of the previous fiscal year.

And the council evidently raised questions about attorneys. And a new department of justice was enacted in 1980, and something like a \$1.9 million budget was on the floor one day when the tribal leadership decided to hold up the passing of this budget if a certain question wasn't—issue wasn't settled in favor of the then Chairman. So some of the council actually went on the floor and said that they had thought that the tribal leadership was afraid of the council. And evidently the question at that time was the power of the tribal council versus the power of the Chairman.

Then in late '81, Navajos living on the eastern reservation became upset with the prospects of actually mining coal near the reservation. And let me just interject this at this point: it may sound like I'm jumping around, but what I'm trying to do is I'm trying to create—reenact the turmoil that was evident in late '81 on our reservation with various problems. And a lot of these things had to do with the government, the outside forces in this case, wanting to mine land adjacent to the reservation. And the Navajos argued

that the land belongs to them through traditional use of inheritance. And even though the land that was going to be mined was not theirs, they still wanted to have some say as to what happens to the land immediately adjacent to the reservation.

Then a question that appeared on the tribal council floor in April of '82 had to do with some of the election laws. And the Chairman evidently was limited to two terms. And somebody did some research and found out there was a 1968 tribal referendum that eliminated the two-term limit for the tribal chairman.

Then also at this time, in 1982, Senator Dennis Deconcini was trying to address the relocation issue, and he said that this was a terrible thing and that the Senator was trying to oppose this relocation and on—mainly on just humanitarian grounds. And he mentioned \$500 million that it's cost, and in the words of one of his aides, that "that has purchased a lot of misery."

Then in November of '82, tribal documents appeared in an attempt to fire an attorney. And here the question came up whether the Chairman had the power to fire the deputy attorney general. And evidently the Chairman had one understanding and the tribal council had another understanding. In the wording of the contracts that were signed by both the attorney general and the deputy attorney general, these individuals serve at the pleasure of the Chairman. Evidently, there was a quite a bit of turmoil over that, and the deputy attorney general was fired because the Chairman of the Navajo Tribal Council decided that he had that right.

Then in September of '82, a new candidate for the top seat in the tribal council promised to enact a new policy of actually bringing taxation onto the reservation so that the Navajo Nation may have some resources from the private companies who were doing business on the reservation.

Let me just say at this point that in 1970 the Navajo Nation finally elected its first college graduate in Peter MacDonald. In 1982 Mr. Peterson Zah became our second college-educated tribal Chairman. Mr. Zah was the first to hire Navajo attorneys, and a Navajo person became an attorney general during Zah's administration.

In late 1982 in the new tribal administration an ethics law which tried to take in hand the conflict of interest issue that had been floating about. So in late '82 an ethics law was passed. Also in '82 the supreme judicial council was dissolved. Let me just mention at this point that in late 1983 the *Navajo Times* became a daily newspaper.

During this time, the way that the tribal council still did business, as it does today, is to pass tribal resolutions.

In March of 1985 the tribe wanted to take another look at some of the rules that the tribal council operated under. One of the councilmen in April of '85 stated on the floor that he felt that the tribal council should enact a

document of government system that is strong enough to meet its obligations and safe enough to respect the liberties of all Navajo people.

In January of this year, Peter MacDonald was reelected to his fourth term. One of the key issues that came about was: does he have the power to appoint people to the budget and finance committee as well as the advisory committee?

Then in May of '86—going back a year—the Navajo Tribal Council looked at the issue of sovereignty, and they did some work that reaffirmed their belief that the Navajo Nation has sovereignty.

At this point I would like to summarize my statement by quoting an editor who wrote in the *Navajo Times Today* in June of last year. This gentleman said: "Today with the daily paper and a 5,000-watt radio station, tribal members all over the country, and in fact, the world, can keep abreast of what is happening in the tribal government. And with many of the brightest and most talented Navajos working off the reservation at important jobs, the tribe's brain trust is spread all over the world as well."

I would like go to back to my opening statement, where I said that I think what we are doing today is feeling the pulse of the Navajo Nation. In particular, I want to point up that the average age of the Navajo Nation member is somewhere around 17½ years. We are close to 200,000 or a little bit over 200,000 today, so we are talking about a young tribe that is rapidly increasing in number. And yet, the educational experiences still seem to be lacking in the people who seem to be in charge in our tribal government.

CHAIRMAN PENDLETON. Thank you.

MR. MILLER. Mr. Chairman, if I could ask just one question. Dr. Scott, in your testimony did you refer to any event or statement that is not a matter of public record?

DR. SCOTT. No, I did not. All the things I mentioned are documented in newspapers.

MR. MILLER. Thank you.

CHAIRMAN PENDLETON. Thank you.

DR. ROESSEL, you have been sitting patiently through this. We appreciate your being here to give us testimony.

TESTIMONY OF ROBERT ROESSEL, FORMER PROFESSOR, ARIZONA STATE UNIVERSITY

DR. ROESSEL. Mr. Chairman, board members, ladies and gentlemen, my name is Bob Roessel. I've been on the Navajo Reservation, as many people in the audience know, since 1951. I married a Navajo. I have five children that are enrolled members of the Navajo, so I have a very real interest in what happens to the Navajo people and the Navajo Reservation.

I wish it were possible for the Navajo Tribe to have responded to this hearing in the same manner that the Zuni Tribe did. I think it would have been wonderful, instead of having lawyers coming representing the Navajo Tribe or to listen to see what I'm going to say, if they could have come, if the Chairman himself could have come. This morning we saw a difference of opinion, people who believe one thing criticizing the tribal officials and the tribal officials there to respond. I wish I could have said the same thing for the Navajo Tribe.

In my estimation, since 1951 things have never been worse on the Navajo Reservation than they are right now. I'm going to give you some specific examples of why I think things are not good. But out of this comes, in my estimation, only one possible solution, and I'm not even sure it will work, and that is for the Navajo people to adopt a constitution. It seems to me that if that the Navajo people want to preserve their rights, they have to have a mechanism to do so. They must be able to have the same guarantees that I have and that other members of this Commission have. We have heard from Dr. Young and Dr. Iverson about the earlier efforts, and these efforts failed because the Navajo people were never involved. I believe the time is right. Whether you are for Zah or whether you are for MacDonald, it seems to me that now is the time the Navajo people must demand action on approving and discussing and considering a tribal constitution.

Let me give you some specific examples of what I mean in terms of why I think this current situation demands some type of remedial action.

First, the Navajo Education and Scholarship Foundation was created around 3 or 4 years ago. It was created because the Navajo people wanted to have an opportunity to reach out to industry, to reach out to corporations, to reach out to foundations, not the Federal Government, and get their attention and get their assistance. Because as we all know, the Federal Government is drying up in terms of support for Indian programs.

So this was an idea that was born of Peterson Zah. He asked me to try to bring it into reality, and I did that. And it was an idea that was divorced from the tribal politics. It was divorced from the tribal council. And there's a gentleman in the office back there that can remember the times I came to him as a tribal attorney and told him how important it is for this organization to be separate from the tribe. It has to be separate. And because of the support of the tribal Chairman, it was separate. The education committee, the chairman, I mean the executive or whatever you call it, the director of the Navajo Division of Education, the tribal council—they all wanted it under their wings. But it was separate. And now just recently the current tribal Chairman tried to put it under his jurisdiction and his control.

CHAIRMAN PENDLETON. Excuse me, Dr. Roessel. We are getting in the gray area here, and I don't want to get too far into specific people as much as I want to get to the institution itself.

DR. ROESSEL. Okay.

CHAIRMAN PENDLETON. If you don't mind, I think we have problems if we go much beyond the institution and how it responds to the people as opposed to how individual tribal officials respond to the people. That was the point I was trying to make when I read the statement. I know it's difficult for you.

DR. ROESSEL. I think I have nothing more to say then. Thank you.

MR. MILLER. If I could add one more thing, Mr. Chairman. Some matters that come up may be a matter of pending litigation. Are there any Navajo district judges or judges in the audience?

Okay. What I was going to say was that if matters concerning pending litigation came up and there were any Navajo judges in the audience, I would ask that they would consider whether or not they ought to listen to what was being said or exclude themselves. But that's not a problem, I see.

CHAIRMAN PENDLETON. Dr. Roessel, I don't want to leave you with the impression that this Commission does not want to know or that there is an attempt to muzzle what it is you want to say. Far be it from my intent or this Commission's intent, but I think as counsel just described the situation that we are in, by law we are prohibited from doing the very thing that I just discussed. But I do think as important a person as you are, the years of experience you have with the Navajo, we need to hear more from you, and don't need you to abbreviate your discussion with us. It would be very helpful to us.

DR. ROESSEL. Well, I'm a little bit confused because I was discussing an institution, which was the Navajo Education and Scholarship Foundation, how it interacted with the tribal government, which is not individuals, and I was discussing that. I wasn't trying to get into terms of names.

CHAIRMAN PENDLETON. I wasn't saying that. I was just saying that I would hope that if we get to the gray area of names—we were almost in that area. I didn't want you to get to that. But we certainly want to get to what you have to say. If I have confused you or I'm confused, I'm sorry and I apologize. Go right ahead.

DR. ROESSEL. I apologize.

CHAIRMAN PENDLETON. Go right ahead.

DR. ROESSEL. But let me continue, and I'm not sure that this is what you want to hear.

CHAIRMAN PENDLETON. It's not what we want to hear; it's what you want to say.

DR. ROESSEL. I'm not sure about that.

I think the next matter that I would like to bring up is the *Navajo Times*, which is something that I have had great respect for. And it can easily and

properly be pointed out that the managing editor was my son. But I think the actions that have been directed at the *Navajo Times* deal exactly with what your Commission is involved with, and that is violations under the Indian Civil Rights Act in which it guarantees freedom of speech. It guarantees freedom of press.

I was reading your little booklet here, to make sure that you said those things. And you did say those things.

One of the reasons made in terms of shutting down the *Navajo Times* was that it spent excessive amounts of money. And I think it is important for everyone to know that, currently, the *Navajo Times* is paying the editor at the rate of \$500 a day. This means \$130,000 a year. When the *Navajo Times* was a daily, it employed three top people, and the total salary of these three people was \$83,000. So I think the allegations about the excessive expenditures are not true. I think the reason the *Navajo Times* was shut down was because the current administration felt more comfortable if it could have a larger voice and could control the newspaper.

I think another thing that needs to be said—these are things that need to be said now. Whether or not you are in a position to listen, that is something that you've got to decide.

Another element that is happening today deals with the Navajo Housing Authority. This is an entity that you have heard different people speak of. It was an entity that had all kinds of problems. It was an entity that was restructured and was doing very well. The current director has now been relieved.

I think these are the kinds of things that lead me to the conclusion that the hope for the Navajos is to adopt a constitution. Now, I think we saw this morning the problem the Zuni Tribe had with a constitution. They have a problem. I would rather have their problem than the current problem facing the Navajos. In other words, I believe that a constitution is something that is inherently American, inherently powerful, inherently proper, and I think that it is something that someday there will be one on the Navajo Reservation. Whether I'll live to see it or whether any of us will live to see it, I don't know, but there will be a constitution someday to protect the rights of Navajos.

I think the very interesting question that was raised earlier was the problem of the [Indian] Civil Rights Act and tribal sovereignty. And someone mentioned that tribal culture enters in here. Well, if there is any person that can respect Navajo culture, it's me. And I feel that there is no inherent conflict. There is no inherent reason why a tribe, the Navajo Tribe, could not adopt a constitution to protect the rights of individuals.

And I would like to compliment the Commission for coming to hold this hearing. I think—and I would like to compliment the staff that has made the arrangements. And I apologize if I said things that I should not have

said, but I'm the kind of a person who says what I believe, and I will continue to say what I believe.

CHAIRMAN PENDLETON. Thank you. As one who understands that one says what one believes, irrespective of the circumstances, I applaud you, sir. Perhaps if more of us did that, we might be able to resolve some of our differences.

Mr. Carlisle.

TESTIMONY OF EDWARD CARLISLE, FORMER TRIBAL OPERATIONS OFFICER, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

MR. CARLISLE. Thank you, Mr. Chairman. Members of the Commission, the staff, and the audience—I hope I only have friends out there.

I'm a member of the Navajo Tribe. And I was the tribal operations officer for the Navajo Area Office from 1979 to 1985. And thanks to Dr. Young, I had a lot of records that I could go back to which provided me with a lot of guidance. And I think what we are involved in—and certainly during the time that while I was in that office, it was a real learning experience for me, and at the same time it was a very encouraging experience. I have a great deal of confidence in the Navajo Tribe. I have a great deal of respect for the people who serve with the Navajo tribal government, the attorneys who represent the tribe, and so on. I have nothing but good memories. I know that we have had our battles and we have differences of opinion, but the people that I worked with were nothing but professionals. I have the highest regard for them, the Navajo tribal government, because of that.

During the time that I was in office, we were and are in the era of Indian self-determination. There were still tensions and there are still tensions today between the Chairman's office, the executive branch, and the tribal council or legislative branch and our court system over the separation of powers.

During the time that I was in office, there were great strides made in the area of economic development. Mineral leases were renegotiated, and the Navajo Tribe won a tremendous victory in the Supreme Court where the Supreme Court reaffirmed the Navajo tribal government's right to exercise the power of taxing. We also made tremendous strides in the area of education for our young people.

And in this process, in this process of tribal government evolution and in this process of trying to develop businesses on the reservation to create jobs for our people, I think that we are finding that we need a stable government to do that, a government where—which operates so that we can predict their actions. And while I do not fully agree with some of the statements that the others have made here on why a constitution is needed, I think that, with the tensions that are going on now and with the need for

economic development, either our generation or the next generation will establish a constitutional form of government for the Navajo Tribe.

On the other hand, I see that the Federal Government, going back to the treaties of 1865, recognized the Navajo Tribe as a protectorate, and that by the treaty of 1868, it set up a land base for the Navajo Tribe and established that trust relationship. I also believe that the government has some very historical and important relationships with the Navajo Tribe. I think some of their actions, which may have been well-intended, do impede the development of the Navajo Tribe.

For example, earlier Dr. Young was talking about the powers of government, and one of those powers is that any government has the right to establish the form of government that it desires. It has the right to set up its own laws and be ruled by them.

But with respect to Indian country, we have the Major Crimes Act, which I think infringes on the Navajo tribal right to self-government. We also have the *Olyphant* decision, which says that Navajo tribal courts have no jurisdiction over non-Indians who may infringe on the civil rights of Indians on their own reservation. And while we might have the Major Crimes Act, which put the responsibility of prosecuting major crimes on the Federal Government for the crimes occurring on the Indian reservation, I think that too many crimes, especially those committed by non-Indians against Indians on the reservations, are allowed to slip through the cracks.

I think that we really need—if we are going to really do a good job in making some decisions with respect to Indian civil rights, that we have to address it in the large, comprehensive perspective; that is, to address all these needs. I have no problems with people setting legal standards for Indian tribes even though they might infringe upon their rights. If it improves the operation of tribal government, I think we'll all come out winners. And I do agree that Indian civil rights need to be protected.

On the other hand, I know that tribal governments are very vulnerable. They don't have the—a lot of cases, Indian tribes do not have the tax base that would allow them to handle large tort claims if the judgments go against them. And in many cases, any large judgment could bankrupt a tribe. I think those things need to be considered carefully.

I think that about sums up what I told you in my statement, but I will give you a written statement, so if I have left out anything, I will cover it in that written statement.

CHAIRMAN PENDLETON. Thank you, Mr. Carlisle.

We have some questions from those of us seated, the staff and my colleagues on my left. That's not usually where I like to have them, on my left. You have questions, counsel?

MR. MILLER. Yes, we do. Beginning with Dr. Iverson, I have a few quick questions for him.

In your opening statement, you referred to the role of the general counsel, and you spoke of George Vlassis in particular. If you could make a statement or two about the role of the general counsel and any historical links between the role of the general counsel in the seventies and the role of the general counsel in the fifties, that would be most helpful.

DR. IVERSON. Well, I think the thing I would say very quickly is that if a person is in the position of being general counsel for an extended period of time and enjoys the confidence of the tribal Chairman—and this again is not limited to the Navajo Nation; there are other obvious examples among the Hopis and so forth—that then he is in a position or she is in a position to be a very, very strong influence over the workings of tribal government. And I think most observers would agree that both Mr. Littell and Mr. Vlassis have been influential people.

MR. MILLER. Another statement you made in your opening statement was that some people think that the reapportionment controversy prompted the creation of the supreme judicial council. Could you elaborate on what you mean by “some people”?

DR. IVERSON. Well, I think there were members of the tribal council who felt that way. There were people who were reporters, others who were in close touch, who saw that link. I don't think they saw it as being the only cause, single cause, but that some people felt that that may have been one significant factor.

CHAIRMAN PENDLETON. Mr. McDonald?

MR. McDONALD. Dr. Roessel, Dr. Young mentioned the role of the advisory council very briefly. Would you care to comment on the role of the advisory council committee in Navajo government?

DR. ROESSEL. I think the advisory committee is obviously the most important single committee of the tribe. The second most would probably be the budget and finance committee. But the reason, in my view, it is so influential is because it is the entity that meets usually all the time. The tribal council usually meets only four times a year, as Dr. Young pointed out. The advisory committee is supposed to operate under the mandate or under the delegated authority of the tribal council. But in recent years this has not been so. You can—a Chairman can certainly control the operation of the entire tribal government by appointing a majority of the members of the advisory committee, in my estimation.

MR. McDONALD. Thank you. What is your impression of the independence of the Navajo judiciary?

DR. ROESSEL. Well, I think that what I was alluding to in discussing the need for a constitution is that we need to have the branches of government separate, and we need to have them each powerful. And I do not feel the current judiciary is independent. I do not feel it has the kind of authority—well, let me put it this way: a probationary judge is reviewed by the executive and the legislative, and I think that that is one of the things that I

think makes it not a strong and not an independent separate judiciary, which I think is what is needed.

MR. McDONALD. Mr. Carlisle—

MR. MILLER. Excuse me for one minute. We neglected to get some background information on Dr. Roessel, if I could get that for the record right now. Dr. Roessel, isn't it true that you started the first Native American school?

DR. ROESSEL. Well, I started the Rough Rock Demonstration School, which Dr. Young will recall. It was the first contract school, which later led to 93-638, the one we have had problems with. I think that there now are perhaps 65 contract schools. I was the first president of Navajo Community College as well. And there are now around, I think, 15 Indian community colleges.

MR. MILLER. And you were also influential in the founding of the Navajo Education Foundation—or Scholarship Foundation?

DR. ROESSEL. I was the first director and I was the person who was involved with the origin in the beginning.

MR. MILLER. Thank you, Dr. Roessel.

MR. McDONALD. Mr. Carlisle, in your personal opinion, you discussed the *Oliphant* case, but do you have any recommendations in the area of criminal law for change?

MR. CARLISLE. I think that several things could be done. One is that if the feeling—well, before I answer this, let me say this: that we have a large number of Indian tribes who are covered by the Indian Civil Rights Act. And my experience has only been working with the Navajo Tribe, and so what I say has no relevance to the activities of the other tribes. And so I want to make sure that everyone understands that.

And what I am saying are strictly my own observations and opinions. They are not the policies of my employers. In fact, what I'm saying may be frowned on by some of the people that I work with.

But with respect to what I feel should be done in the area of criminal law, since tribal governments have the right to establish their own laws and be ruled by them, I think that what should be done is that they could be given financial assistance to upgrade. The reason I say that is because I know that the Navajo tribal government has taken a great deal of effort to upgrade their court system, but with all the governmental needs that they need to meet, they do not have the financial resources to provide coverage of criminal laws at the level expected by the Federal Government. So that I believe it would be proper in the context that the Federal Government supports tribal government development that they also provide additional funds to the tribe so that they can upgrade their court systems and police forces and jails and court facilities, so that the tribe can comply with the standards that are being imposed on them. That's what I would like to see.

If that cannot be done, I think maybe we should have, as was suggested several years ago, have a magistrate established on or near our reservations who can deal with these criminal cases and provide the criminal protections that I think the standards require.

CHAIRMAN PENDLETON. Just a second. It does seem to me that—one of Dr. Roessel's statements comes back. I don't think anybody can look forward to increased funding, not just the reservations themselves or nations themselves, but I'm looking at something that we all know about called Graham-Rudman, and I'm reminded by Senator Hollings in a certain form that it's Graham-Rudman-Hollings. It does seem to me that if one is going to count on increased funding to do the kind of things we are talking about along with the other activities that you discussed, waiting for—the funding is not going to happen. Now, what the solutions are beyond that point, I don't know, but I don't think we can count on the fact that we can wait for the funding to come to, in effect, maintain people's civil rights.

MR. McDONALD. I think Mr. Carlisle, Mr. Chairman, also mentioned Federal magistrates. Is that your suggestion?

MR. CARLISLE. Yes, that was my alternative suggestion. But if we cannot look forward to additional Federal funding, then maybe we should allow the Navajo Tribe, which has a Bill of Rights, to use those as their own standards and indeed be allowed to set their own laws and be—and use those laws by setting their own standards.

MR. McDONALD. And with respect to tribal court cases under the Indian Civil Rights Act, do you recommend some form of limited Federal court review of those cases?

MR. CARLISLE. I would. Yes, I would recommend limited review because some of these cases can get very nasty and really infringe on individuals' civil rights. But on the other hand, as I said earlier, we need to also look, at the same time, on the financial ability of the Indian tribal government to pay large damages. I don't think the tribes can stand that.

MR. McDONALD. What about nonmonetary relief?

MR. CARLISLE. So, with respect to nonmonetary relief, maybe if it's a case where an individual loses a job, maybe that person should be restored to the job if he can prove that there was no cause for his removal.

MR. McDONALD. Thank you.

Mr. Chairman, I have no further questions.

MR. HEILFERTY. I have one question for Dr. Scott. You have stated your belief that the Navajo must adopt a constitution. How would you—how would a constitution help prevent some of the problems which you see facing the tribe, and would it be your opinion that a constitution would obviate the need for Federal court review?

DR. SCOTT. Thank you.

What I would like to suggest to this hearing this afternoon and to the audience is that, once again, you are asking me a question that I will put some personal input into. The way I see the Navajo Nation today is like this piece of paper. This piece of paper was a straight piece of paper, but once it was knotted; there are four pieces, four pieces that are in this area here.

In the absence of a tribal constitution, former Chairman Peterson Zah was talking about three branches of government, but I see actually four branches as the way—as I see it now, one individual constituting a fourth branch. And so as I see it, the Navajo—we have a word for something like this. It means—the Navajo term is ahenadza. That means it's balled up within itself, that it cannot function.

So the constitution, I think, would take this sort of a situation and unravel it so that we can take the three branches of government and segregate them somehow to be autonomous, but yet be able to work together. But, as it is, it's tied up like in this knot. And I think that the mandate of the 1968 Civil Rights Act is that the tribal government should have either a constitution in place or they should be all set to go all the way with the 1968 Civil Rights Act.

And your last question was, I'm sorry?

MR. HEILFERTY. Is it your opinion then that Federal court review is not necessary, that a constitution by itself is sufficient?

DR. SCOTT. That has to be—my answer has to be qualified. The qualification comes from our taking a document and synthesizing it within our own environment. The Navajo people—you know, the Navajo people have to come together. And I'm talking about a constitutional convention. I don't envision one individual drawing up a document. It's going to have to be put together by many minds, very sharp minds, legal minds, but basically the input is going to have to be Navajo.

And I even see the constitutional convention taking place in the heart of Navajo land. And I think that cost should not be an issue. We have—the Navajo Nation is spending millions of dollars on different things now, and I think that putting together a constitution should—the cost should be just thrown out. We need to do it right. And I think that as we put together a constitution, we need to think in terms of what can function for us because we are going to have to look at that constitution as a tool that's going to be working for us. Rather than binding us up like this, it should be a tool that will outline the plan of operations for the entire Navajo tribal government.

MR. HEILFERTY. Thank you, Dr. Scott.

CHAIRMAN PENDLETON. Dr. Iverson, I just want to ask you a couple of questions. Do you happen to believe that we are never going to have real enforcement of the ICRA because it infringes upon the sovereign immunity of the tribe? If that is the case, what do we tell the Congress and the President?

I mean, we are going to sit here for 2 days and get a lot of things, but I'm not ready to leave here without some wisdom from you about what we should say about this monster that we imposed upon some people. I've heard people say that white men gave it to you and then ran away. We are sitting here trying to make this thing work, and we have customs over there and we have sovereign immunity over there, and if we give up sovereign immunity on the ICRA issue, we give it up on other issues because once that door is open, we have a problem.

What I'm also asking you is: are we beating our heads against a wall in talking about ICRA enforcement from a Federal perspective as it involves Indian nations?

DR. IVERSON. Well, there's a lot I would like you to tell the President.

CHAIRMAN PENDLETON. I will take your list.

DR. IVERSON. I'm reminded of a statement made by Dave Warren, a friend of mine, and some of the people will know him from New Mexico, who said that, for us, that something happened is more important than when it happened. And those of us who are with Indian people or studying Indian history need to be determined to take the long view: 1968 was yesterday. The stock reduction was the day before yesterday. The Long Walk was the day before that. So I don't think we look at it in terms of never or the immediate. We also need to see that certain things go in cycles and in circles.

But the way in which the ICRA came to be, I think, influenced the kind of opinion that many people have had about it, and I think that what happened, the judgment of a number of people between 1968 and 1978 with the *Santa Clara Pueblo v. Martinez* decision and the way in which the ICRA was interpreted through the court system damaged its image as well in the minds of many Indian people. So I don't think you look upon it in terms of never. But I think that the 2 days can be profitable if we are all patient, if there is time to speak and to listen. And I know that there are other people not only on this panel but who are forthcoming to speak to you who will be able to give you very enlightened and wise judgment.

CHAIRMAN PENDLETON. Thank you.

COMMISSIONER ALLEN. Dr. Iverson, I would just like to follow that. You mentioned in your formal remarks that somewhere in the early eighties, if I remember correctly—I'm paraphrasing what you said—that the then-tribal Chairman spoke of the ICRA as an example of the kinds of laws which have whittled away our sovereignty, and I'm reminded that I think the same tribal Chairman in 1973 spoke very differently of the ICRA when he welcomed an earlier version of this Commission to Window Rock and spoke with great praise and expectation of what would come from it.

Your most recent remark leads me to wonder what transpired in that 10-year period and particularly whether you meant to convey the impression that the statement in the early eighties was in fact a conclusion that,

without substantial Federal intervention, it would be meaningless and that the courts have taken away that opportunity? Is that what you are saying?

DR. IVERSON. I don't think that's necessarily what I was saying. I think the historians are great ones for saying that you need to look at a particular statement in the context of a particular time. I think 1982 was simply a very different time than 1973 in regard to a number of developments on the Navajo Nation and within Navajo political life, and I just think it needs to be analyzed in that way.

COMMISSIONER ALLEN. Just let me clarify. You are saying it needs to be analyzed in terms of what was happening on the reservation, not in terms of the ICRA?

DR. IVERSON. Well, I think both, but I think you always have to look at local conditions, local issues, and see the kind of perspective that people are bringing to it. We all are not blank slates. We all come in and will look at a particular document or a particular statement from a particular vantage point, which is influenced by a number of factors, and all I'm suggesting is that a number of things had occurred during the 1970s and early 1980s which may have influenced that particular statement.

COMMISSIONER ALLEN. Any hint of what some of those might have been, the things that transpired?

DR. IVERSON. Well, I think there are other people who can speak to that probably more knowledgeably than I can, but I would just—I would just say you need to look at the timing of certain comments in regard to political affairs and so forth.

COMMISSIONER ALLEN. Thank you.

COMMISSIONER DESTRO. Dr. Iverson, I wanted to address a couple of questions to you and some of the other members of the panel, but I wanted to say at the start that one of the—I did a lot of reading not only for this hearing but for the ones we had last summer. And I found your book to be particularly useful. It was very enlightening, and I wanted to tell you that I thought it was a job very well done.

But in any event, what I wanted to ask you is that you posited a little earlier a conflict between sovereignty and culture on the one hand and then the rights of individuals more or less on the other hand.

DR. IVERSON. I didn't quite say it that way. I think—

COMMISSIONER DESTRO. You were referring to—

DR. IVERSON. I said the intertwining of those issues, and I think that those kinds of things often do—are not inherently conflicting. I didn't mean to suggest that. What I'm saying is that they get mixed up in the discussion of certain kinds of things, and so sometimes it is difficult to have individual rights be looked at in one way. And that's really what I'm trying to say in and of itself. I agree with my old friend, Bob Roessel, that there's nothing in Navajo culture that is, you know, inherently conflicting with the idea of individual rights—to the contrary. But I think what often

happens is that sovereignty, Navajo nationalism, the good of the people or whatever, gets thrown in with—the individual rights issue gets in, and so that it becomes very difficult for critical discussion, shall we say, to take place about some of these things without that flag of sovereignty being waved.

COMMISSIONER DESTRO. Well, isn't it also—I really want to follow on to that. I agree. I mean, I didn't want to put it in such stark conflict terms, because I don't see it that way either, but isn't—is it possible in your view—and I would like to also address this to Dr. Roessel as well—isn't it possible to parse out a little of the sovereignty issue, saying sovereignty is within the tribe, the tribal council versus tribal courts, and then sovereignty as with respect to outsiders, which would really be the Federal court review issue? I mean, it seems to me there's a real difference. One is, you know, intratribal control, and other one is extratribal control; and the first one is that the latter strikes me as the true sovereignty issue, whereas the other one is really the sovereignty of the tribal council, not the sovereignty of the tribe. Would you say that that's a legitimate way to parse out the sovereignty issue, at least to begin with?

DR. IVERSON. Well, "sovereignty" is a difficult word, isn't it?

COMMISSIONER DESTRO. It is. It's very difficult.

DR. IVERSON. It's one of those words that—going back to that philosopher of some years ago who said a word means what I mean it to mean, and it means different things to different people. And I think it's difficult to have us carve away at it or take portions away and have it mean the same thing. So I think it's certainly legitimate and appropriate to try to get at pieces of that particular puzzle. But I think often we can get bogged down in semantics when we do so.

COMMISSIONER DESTRO. Let me address the same question to Dr. Roessel but put a slightly different spin on it. You put it in terms of that you feel that the tribe needs to adopt a constitution. Do you see the adoption of that constitution as a mechanism whereby the tribe as a whole exerts its sovereignty or what do you see that function, the function of the constitution adoption process, being?

DR. ROESSEL. I think that the adoption of a constitution, which I feel is a necessary step, does not have to mean any loss of tribal sovereignty. I think that one of the reasons in the 1960s when Raymond Nakai attempted to get a constitution adopted was the fact that many people said the treaty contained all of the protection the Navajos needed; they didn't need a constitution. So I think that the thrust of the constitution has to come from the people. If the Navajo people don't want one, obviously, there's no reason for me or anyone else to discuss it.

I think what I'm suggesting is that I think the current set of circumstances are going to lead more and more Navajos to wanting to get a system that will protect their individual rights; this is what I feel is

important. I don't believe in judicial review. I mean, I'm against that. I think the tribe, the court is sovereign. It makes its own decisions, its own mistakes. Now, I would hate to say that in terms of my current review of decisions that the court has recently made, but still the principle is important.

The principle is the Navajo Tribe is a Navajo Nation. It has certain rights. And I think we have to help them. They have to help themselves. It isn't through more Federal money. They have to do it themselves. They've got all the money they need. They have to—through education, they have to educate and develop a court system that can stand alone and that can make decisions that judicial review would not be important, would not be necessary.

COMMISSIONER DESTRO. Dr. Young, let me follow up with just a question for you then.

Maybe I'm wrong, but what I've heard—and I didn't see in Dr. Iverson's book, and I may have just overlooked it, and I didn't hear it in your presentation although I may have missed it—that the Navajo Nation as a whole, which I understand from reading Dr. Iverson's book began to create its identity, began to arise as it was forced together by outside circumstances. There was the Navajo people, then the gradual creation of the identity of the Navajo Nation. Has the Navajo Nation ever spoken as a whole as to what its governmental identity ought to be? It seems to me that that's the essence of self-determination. When we admit a State to the Union, for example, we say: you get together and you come up with something, and then we will decide whether or not we are going to let you in. Has that process of identity—what kind of government do we want to have?—has that ever taken place in the Navajo Nation?

DR. YOUNG. Not to my knowledge, at least to my experience on Navajo. The tribal council was primarily a superimposition from the outside to begin with. The Navajo Tribe, as I pointed out at the beginning of my presentation, was not previously organized as a political entity. It was not consonant even with Navajo cultural concepts of organization because the tribe was only a social and linguistic group that shared the same social organization, the same language, but there was no government that was tribewide that covered all areas of the reservation, all areas of the Navajo country. And in view of the fact that none of the proposed constitutions were ever taken out to the populace, out to get grassroots input, the people had little opportunity to express their opinions and their preferences with reference to the organization of tribal government. That may have changed in recent times. I don't know. I hope so.

CHAIRMAN PENDLETON. Dr. Roessel, in response to my colleague's question, Mr. Destro's question here: don't we have the ultimate conflict as the independence of the judiciary versus tribal sovereignty or sovereignty of the council? Aren't those two things in a sense the real problems, that if

you had an independent judiciary, you might have some problems with the council?

DR. ROESSEL. Well, you know, I don't see them as being mutually exclusive.

CHAIRMAN PENDLETON. No, I don't see them as being exclusive, but I'm saying if you are going to have one—

DR. ROESSEL. You are going to have a problem with the existing council. That's right.

CHAIRMAN PENDLETON. That's the point; isn't it?

DR. ROESSEL. That's right.

CHAIRMAN PENDLETON. But it does seem like those of us who live in the other world, if you will, we don't like the way that our courts make some decisions—some are good, some are bad—but that's what we have to really live with.

I guess the point you are making, Dr. Iverson, over a period of time this might develop where people might begin to respect the court in a sense as an independent judiciary not requiring tribal council to have judicial review?

DR. IVERSON. Well, what I would say is that we need to look at the remarkable ability of Navajos time and again to incorporate new things into their way of life, including their political life, and even though the council system and the form of government was initially something that was imposed on the people, we know that Navajos participate very vigorously and are remaking that government progressively within their own image and responsive to their own particular needs and values. And that's not a straight line. It's not always an even progression. But when you look to how the Navajos responded to that government to the degree in which they participate in elections, care about who wins, and get involved in a variety of issues, that's worth taking note of.

MR. MILLER. Dr. Scott, do you find that there is much respect for the Navajo courts today?

DR. SCOTT. Do I observe respect for the Navajo court system?

MR. MILLER. Why or why not also.

DR. SCOTT. I do not. I think that the judges, a good number of them are appointed, and I think that in the eyes of the people, the—maybe the best people aren't the judges, the best qualified people. And so I think in the eyes of the people, the court system still has a long way to go, but certainly we would be open to our running our own court system. I think that part is good. But as far as actually having confidence in the system, I don't think it's there.

Now, during the previous administration, as I mentioned earlier, we had a Navajo attorney general and Mr. Zah employed Navajo attorneys for the first time. And that was a real shot in the arm, I think, for Navajo sovereignty.

MR. MILLER. Just two quick questions. Dr. Scott, in your opening statement you mentioned a referendum concerning the limitation of election terms. Could you explain that? I wasn't aware of the fact that there was a referendum. Did you mean referendum in the sense of a plebiscite, or what did you mean by that?

DR. SCOTT. Okay. I'm quoting the newspaper. That's what they called it in the news. In 1968 during Raymond Nakai's administration, there was evidently a change. Evidently, there was a law that was on the books that said that the tribal Chairman can only serve two terms, but in 1968 that was changed.

CHAIRMAN PENDLETON. I guess the point about the referendum was whether or not—to us that means that that was submitted to the people to vote on a referendum, and you said—it seems like to me that somebody would have known that that happened in 1968 if it was a referendum.

DR. SCOTT. As I said, it was a referendum because that's what the newspaper called it. I would question that as well.

MR. MILLER. Dr. Iverson, do you have any knowledge on that?

DR. IVERSON. I defer to Bob. You were there at that time.

DR. ROESSEL. It was not a referendum in which people voted. It was an action of the tribal council.

CHAIRMAN PENDLETON. Okay.

MR. MILLER. Is there a mechanism today for a referendum?

DR. ROESSEL. I don't know. Is there? I don't know.

CHAIRMAN PENDLETON. This is a very important question. Is there a chance of a referendum today among the Navajo?

COMMISSIONER ALLEN. Is the question—I'm not clear. I want you to make this clear. Are you asking whether there's an independent provision for referendum, or are you asking is it within the power of the council to hold a referendum if it chooses to?

MR. MILLER. The former.

DR. YOUNG. I have a vague recollection of a question that was submitted to the electorate in one of the tribal elections which would be tantamount to a referendum, but I can't right at the moment recall what the question was. But it was included on a tribal ballot.

CHAIRMAN PENDLETON. If you find out this is the case, would you let us know on both questions, the former and the latter, raised by my colleague?

MR. MILLER. And then briefly, Dr. Scott, could you give us or narrate to us your experience, your own experience, and perhaps communicate to us the experience of some of your Navajo students concerning the right to free speech protected in the Indian Civil Rights Act?

DR. SCOTT. As I stated in my opening statement, I do teach here at this university, and I do work with a good number of Native American students here on this campus. And let me just mention that we have close

to 700 Native Americans attending this university. It's the largest Native American student population in this country.

Now, my observation is that the students feel some reluctance to voicing their concerns. And it really comes down to the area of getting tribal scholarships. A lot of them feel that they can't really go to the tribal scholarship office and complain if the checks are late, or sometimes they are denied and they haven't been given an explanation of why their scholarship has been revoked. So a lot of them—just this summer I had two students come to me. And the feeling that I get is that they think it's hopeless. And then at the same time they also say if they speak out, then for sure they won't have that opportunity to be reinstated in some manner.

MR. MILLER. You meant that they felt it was hopeless to fight the system or to say anything or—I wasn't quite clear on what you meant.

DR. SCOTT. Hopeless on two levels. Hopeless in the bureaucracy of the tribe and hopeless in the other sense that, you know, ultimately, if you get an answer on the first level, then there might be a negative answer at the second level, which is political.

CHAIRMAN PENDLETON. I want to thank the panel for assembling.

MS. PRADO. Mr. Carlisle, I think you had something you wanted to add.

MR. CARLISLE. Mr. Chairman, members of the Commission, on the question of whether the tribe would allow a referendum on the issue of the constitution, based on my experience in working with the tribal council, the tribal council is very flexible in adopting agenda items to the deliberations of the Navajo Tribal Council. I believe that if a member of the tribal council asked to have a referendum placed on the agenda or that the tribe as a whole vote on it, that request would be honored by a two-thirds vote of the tribal council. So it's also possible for the Navajo chapters, which are units of local tribal government, to make the request to the tribal council to put such an item on the election ballot. So it is possible.

CHAIRMAN PENDLETON. I think that was not quite our question, but I think it does clear up part of the matter.

Thank you very much, panel, and we will take a short break to give our court reporter a chance to relax a little bit.

[Recess.]

CHAIRMAN PENDLETON. As we reconvene, I need to ask two questions. One is—and I'm late with both of them—if there's anyone here who is hearing impaired, we are obligated to provide services for you.

The other one is that if there are people who need translation from English into the Navajo language, raise your hands. If there's anybody who needs a translation, we are also able to provide that.

MR. MILLER. Is Dr. Roessel in the audience?

VOICE. He left about 5 minutes ago.

MR. MILLER. Did his wife also leave? She had volunteered to translate for us.

VOICE. I didn't see her leave.

MR. MILLER. Is Mrs. Roessel in the audience?

CHAIRMAN PENDLETON. Gentlemen, our next panel is on the independence of the judiciary. We have Richard Hughes, an attorney at law, the former director of litigation for DNA; Charley John, a former tribal judge; and Merwin Lynch, a former tribal judge. Gentlemen, if you will stand and take the oath, we will begin with counsel.

[Merwin Lynch, Charley John, and Richard Hughes were sworn.]

Independence of the Judiciary

CHAIRMAN PENDLETON. Counsel. And, gentlemen, pull the microphone close to you and speak right into the microphone for the sake of the recorder here. The public address persons in the room would appreciate it.

TESTIMONY OF RICHARD HUGHES, FORMER DIRECTOR OF LITIGATION, DINEBEIINA NAHIIILNA BE AGADITAHE

MR. MILLER. Mr. Hughes, I would like to direct the first set of questions to you. How long were you an attorney with DNA?

MR. HUGHES. I began with DNA in the fall of 1970 as a law clerk until being admitted to the bar in April of the following year. I was a staff attorney at the Shiprock office until the end of 1975. From 1976 through 1978, I was in the Window Rock office, for most of time as director of litigation of the program. And I left the program really finally in early 1979.

MR. MILLER. Do you have much experience in Navajo district court and Navajo courts in general?

MR. HUGHES. For the 9 years that I was on the reservation, of course, I had an intimate familiarity with the Navajo courts in the communities where I worked, obviously, and to some extent throughout the reservation. I played a role in the formation of the Navajo Bar Association in the late 1970s and, of course, worked with Navajo judges periodically on various projects and development of the judiciary.

Since leaving DNA, I've been involved in private practice in Albuquerque, primarily in Indian affairs law. Our firm represents a number of pueblo tribes in New Mexico as well as tribes in California and Nevada. I have continued to practice on the reservation in various respects and have been involved in cases in the tribal courts for much of that time since 1978, so I have kept up my familiarity with the tribal courts through that work and then as well through personal contacts with judges and others involved in the legal system on the reservation.

MR. MILLER. Could you give us a brief statement about the quality of the judiciary, Navajo judiciary, during the 1970s when you practiced at DNA?

MR. HUGHES. I can't really give it briefly because, frankly, in my view, the quality of the Navajo courts changed markedly during the period that I was there.

I began my work in Shiprock in 1970 just a few years after DNA was established as a Legal Services program on the reservation. In fact, I was privileged to work with Charley John at the DNA office in Shiprock, and he was there as a tribal advocate the first few years I was there.

And in those early years, Navajo courts were, I think—while they had published rules of procedure and they had judges who had some training, by and large the judges were older men, more traditional in their approach and outlook, and less given to the fine points of procedure and legal interpretation. And, of course, as I think Mr. Iverson may have pointed out, DNA at that time was playing an increasing role in the development of the judicial system on the reservation, especially through its program of Navajo lay advocates, who, though not professionally trained lawyers, were highly skilled and did have training in legal advocacy and became increasingly good at acting as lawyers in the Navajo court system.

And that system of advocates and the advocates really handled in numbers probably twice as many cases as the Anglo attorneys in the program handled, and the advocates really did almost all of the litigation in tribal courts themselves unless there was an Anglo attorney on the other side of a particular case.

But the advocates made demands on the judges that gradually—and on the court system, which it gradually responded to over the time that I was there in terms of judges being appointed who were far better equipped to handle an Anglo-style system of adjudication in terms of improvement in the rules of procedure, the publication of decisions of the Navajo appellate court, originally the court of appeals. It's now known as the Navajo Supreme Court.

So, in all those ways and in other ways, I would say that in my years on the reservation, the quality of the Navajo judiciary and the Navajo justice system overall improved enormously, such that by the time I left Navajo, I felt—and I say this in all sincerity—I felt at least in many of the Navajo courts on the reservation one could have as good a hearing of an important or complex case as one could expect to get in the average State court in New Mexico of which I was familiar.

MR. MILLER. So, in other words, they steadily improved throughout the seventies?

MR. HUGHES. Very much so.

MR. MILLER. Could you name a few of the best judges during that time period?

MR. HUGHES. Well, I think there were several individual judges who did excellent jobs. I happen to feel, because of just personal experience in their courts, that former Judges Lynch and John, who are here with me today, were among the very finest judges to sit on the Navajo bench. I certainly wouldn't want to overlook, however, judges such as Judge Neswood, who still sits in Crownpoint; Chief Justice Tom Tso, who is now Chief Justice of the Navajo Supreme Court; Judge Bob Yazzie, who is on the Navajo District Court at the present time in Window Rock. And I'm sure there are others that I have overlooked, but those do come to mind.

MR. MILLER. Thanks.

You were lead counsel in the *Halona* case and the *Yazzie* case. Could you briefly describe those cases?

MR. HUGHES. I will. Let me make a correction. I was not lead counsel in the *Yazzie* case. I was involved in working with Eric Eberhard, who was lead counsel, but I can, I think, give you some background on those cases.

Halona arose in the wake of Chairman MacDonald's Federal criminal trial in Phoenix on charges of mail fraud and other Federal charges. It was alleged that the Chairman had fraudulently used the mails to defraud Tucson Gas & Electric Company of money in connection with the negotiation of a powerline right of way which TG&E needed through the New Mexico portion of the Navajo Reservation in the mid-1970s. Obviously, the indictment and the trial received a great deal of press on the reservation. The Chairman was, of course, then the head of the largest Indian tribe in the country.

The Chairman hired F. Lee Bailey as his defense counsel, and the trial ultimately ended in a hung jury, following which the judge directed a verdict for the defense.

Subsequently, one Friday afternoon as I recall it, while—this was in 1977—we heard that a resolution had come up on council floor while the tribal council was in session on sort of an emergency basis to appropriate \$70,000 in tribal funds to pay Mr. Bailey's legal fees for Mr. MacDonald's defense in that Federal criminal proceeding.

Within a day or so, and I may have the exact timing off, and Charley may recall these details somewhat better, several members of the tribal council, as well as two Navajo individuals who had come into the Shiprock DNA office to complain about this, filed suit in Navajo District Court in Shiprock seeking an injunction against expenditure of tribal funds under the resolution that had been passed. DNA was co-counsel with Donald Benally, who at that time was a former DNA advocate. At that time he was in private practice as an advocate in Shiprock. I believe now he is on the tribal council.

They went—they filed the suit, asked for a temporary restraining order, and Judge John issued the TRO on the same day and set a hearing on a motion for a preliminary injunction.

MR. MILLER. If I could interrupt just for a second. At the point that the pleading was filed for the TRO, how much had been paid out of the treasury?

MR. HUGHES. Actually, the way I heard it was that nothing had been paid as of the time the TRO had been issued. MacDonald went to the press before they got the TRO served, and the tribal treasurer got \$40,000 in checks paid out before the TRO was actually served on him that afternoon. As we understand it, approximately \$40,000 was, however, paid out before the expenditure of further funds was enjoined by the court order.

MR. MILLER. As you understand it, after the TRO was issued, some \$40,000 was spent?

MR. HUGHES. I don't know the timing. I said that as kind of a joke and I apologize. I didn't mean it as a slur.

CHAIRMAN PENDLETON. Are you serious? A joke for the record or a joke for the—

MR. HUGHES. He may not think it's a joke. A joke for the record, Mr. Pendleton.

As I say, as I understand it, about \$40,000 had been expended at about the time on the day the suit was filed, whether before or after the TRO was actually signed, I can't really say, before the TRO was served on the tribal treasurer, Mr. Hansen. But further funds, expenditure of further funds was enjoined by the court order.

Mr. MacDonald and Mr. Hansen appeared through counsel Michael Stuhff, who was then employed by the legal office of the tribe, and a trial was held on the preliminary injunction motion, I would say probably about 10 days later, in court in Shiprock. It was a day-long trial that went quite thoroughly into the details of what occurred in the passage of the act, of this resolution, and practices of the council in handling budgetary amendments such as was involved here.

Subsequently, Judge John issued the preliminary injunction and then issued a final decision in which he found that the resolution in question was invalid, because it had not been referred first to the budget and finance committee as was the requirement under the plan of operations for that committee and that there had been no emergency conditions either stated in the resolution or otherwise apparent to justify circumventing that procedure.

There were other details of the decision that we don't need to go into. Subsequently, that decision was appealed and we argued it—argument really lasted almost a day in front of the Navajo Court of Appeals which issued a decision, I think in very early 1978, affirming Judge John's decision and a lengthy opinion that dealt with a number of issues, tangential issues and procedural and otherwise, that had been raised by the defendants and ruling in the plaintiffs' favor on all issues.

I might add, I think in retrospect it appears clear to me—in fact, I'm certain of it because of conversations that I had later on with Edgar Cahn that that case, that decision, while it wasn't the very—well, it was not the first decision of Navajo courts that attacked an official act of the Navajo tribal government; it probably was the first direct, head-on assault on the validity of a Navajo Tribal Council resolution and, certainly, the first successful one, and it led almost directly to the actions that resulted in the creation of the so-called supreme judicial council a few months later.

MR. MILLER. Was sovereign immunity claimed by the tribe?

MR. HUGHES. Well, no. Actually, what they claimed was the absence of an indispensable party, to wit, the Navajo Tribe, from the suit as being fatal to the plaintiffs' claim, and that was disposed of by the court of appeals on the obvious grounds that the Navajo Tribe wasn't necessary. What was asserted here was the invalidity of an action by the tribal council and these officers were ones who would otherwise carry out that action, and the court could decide that issue without the tribe's presence. There was no assertion of sovereign immunity on behalf of the individual officers.

I'm sorry; you also asked me about the *Yazzie* case. Would you like me to go on and talk about that?

MR. MILLER. We will get to that later.

You mentioned in that conversation you learned that the *Halona* case was one of the reasons for the supreme judicial council. Could you tell us more about that entity and why it was created, how it operated, things like that?

MR. HUGHES. Well, in May of 1978 at about the time—actually it was shortly after, I think, the tribe was before Judge Lynch in the reapportionment case, *Yazzie v. Navajo Tribal Board of Election Supervisors*, another rumor began racing through Window Rock that Edgar Cahn was in town with what was described as an outlandish proposal to revamp the Navajo court system.

Edgar Cahn, of course, at that time was quite familiar to many of us at DNA because he was—he and his wife Jean really had been parents to the Legal Services Corporation. He had really conceived of the idea of free legal services for the poor as part of the war on poverty barely 10 years before, and he was held in sort of a sense of reverence by legal services people and those who had been in on the legal services movement in the beginning years.

At that time he was dean of Antioch Law School, which was trying to make it as kind of an alternative law school in the city of Washington with a curriculum that focused more on a clinical approach to legal instruction rather than the standard classroom techniques. And he had also—he had a relationship with the Navajo Reservation. In fact, Mr. Cahn had played a direct role in the founding of DNA and had been very supportive of Ted Mitchell when Ted did the proposal that led to DNA's establishment. And

Dean Cahn subsequently had—was occasionally called on by Chairman MacDonald to perform studies or do various tasks under contract to the tribe, so there was a preexisting relationship there.

Anyway, it turned out that the Chairman had once again, early in 1978, called upon Dean Cahn to—and his wife—to perform a study of what was characterized, by Mr. Cahn at least, as a crisis in the Navajo court system and to make a recommendations to the tribal council as to what might be done about it. And the council was in session—this was May. The spring session was just starting when we found out that Mr. Cahn and his wife were in Window Rock. In fact, they came over to the DNA offices and spoke to Eric Eberhard, the counsel on the reapportionment case, which was still going on at the time. They spoke, I think, probably to Peterson Zah, who was the director of the program. And then we had a meeting with them in the DNA library to talk about our concerns about the proposals that they were going to put forward, which by then we had become aware of the fact that it had to do with the creation of sort of a super court consisting primarily of tribal council members that would have jurisdiction to review decisions of the Navajo courts holding invalid any action of the tribal council.

Some similar action was done—I recall an article in *New Yorker* about the same time concerning the history of South Africa.

MR. MILLER. The Ghana—

MR. HUGHES. When the current government took office in 1949, the first thing they did was to create a legislative court to review the decisions of the South Africa Supreme Court. And it seemed like an interesting analogy.

But, anyway, Dean Cahn obviously felt, at least as he said, as he represented to us, he felt sincere in his belief that there was a problem with the concept of judicial review of legislative action being applied wholesale to the Navajo court system. It was a new thing. In other words, there was no constitution, obviously, that expressly or by implication that could provide for it. And he said—he told us, “I talked to the Navajo Tribal Council members. They are in a panic. They are terrified the courts are just going to run rampant and, you know, whenever anybody doesn’t like something the council does, they are going to run to the court and have it undone and the government will be in chaos, and we feel something needs to be done.”

MR. MILLER. And that was because of the F. Lee Bailey case?

MR. HUGHES. This was—he specifically mentioned the *Halona* case and, of course, the reapportionment case.

CHAIRMAN PENDLETON. Reapportionment was the *Yazzie* case?

MR. HUGHES. *Yazzie v. B.O.E.S.* is the reapportionment case.

And I think—again, my recollection of exact dates is imperfect. I think by that time Judge Lynch had already held that the last reapportionment

plan adopted by the council was invalid and had called upon the parties in that case to submit new plans.

MR. MILLER. That's correct.

MR. HUGHES. So there were two decisions that sort of led to this crisis.

And anyway, what Dean Cahn ultimately proposed in a tribal council proceeding that lasted about 3 days was this—I always thought it rather elaborately, too elaborately named—the supreme judicial council, which was—and I think it was described by Dr. Iverson a little earlier. And I think his description was accurate. It consisted of the chief justice of the court of appeals, two retired judges to be appointed by the Chairman, and five members of the tribal council to be appointed by the Chairman. And the jurisdiction of this body was to embrace any—it had the right to review, essentially on command to call up from the court, from any of the Navajo courts, any case in which any party assailed the validity of an action of the tribal council. And it had the power to stay court proceedings and to do a lot of other things, actually some things that seemed rather extravagant in light of its relatively narrow jurisdictional ground.

And the interesting thing to me was that, as I later pointed out to Dean Cahn in a letter that got circulated throughout the tribal government apparently, was that in listening to the debate over 3 days on the tribal council on this proposal, it was quite clear to me that there was no crisis at all. There was no panic in the tribal council. And there might have been a crisis in the tribal administration, but the council itself felt no urgent need for such a radical reform of the court system.

For example, the council the previous fall had passed a tax on—a sulphur emissions tax, a tax on companies that pollute with emission of sulphur dioxide, primarily Arizona Public Service operating in the Four Corners powerplant. Predictably, of course, APS filed a Federal lawsuit challenging the tax. The council was undaunted. They passed another tax, a business activity tax. And sure enough, the companies came back and took them to Federal court after that. And they passed another tax, the corporate property tax, and drew yet another major Federal lawsuit. They weren't daunted by the prospect of litigation over their actions.

Moreover, many of the council members in that debate seemed to have no philosophical problem with the idea if they made mistakes, the courts ought to be able to correct them. So that I think that the premises that Dean Cahn stated for this proposition were overstated, but Dean Cahn nonetheless managed to be an effective advocate for his proposal in front of the council, and of course, no nonmembers of the council who opposed the proposal were allowed to speak against it, so that the council's debate on the matter was, I think, rather constrained. And the proposition then was enacted by a 12-vote margin.

MR. MILLER. Mr. Hughes, would the council delegates or the tribal council have had a problem—did they have an actual problem with the decisions that Judges Lynch and John made?

MR. HUGHES. Well, I'm sure some of them did, but on the other hand, I think it is relevant to point out in the *Halona* case, at least four of the plaintiffs were members of the tribal council themselves, and the reapportionment issue, again, was a rather controversial issue within the council itself as well as outside. And there were a lot of strong feelings about reapportionment, and the members of the council were by no means of one voice.

In fact, that was an interesting point. Dean Cahn kept making the point that—and I never did understand why he felt this way. But he kept making the point that the Navajo Nation must speak with one voice to the outside world. And, of course, as I tried to point out to him in our meeting and subsequently in my letter at that time and of course since that time, there was a very definite split, political split, on the reservation between—and it would be nice if it were identifiable in terms of party or political factions. It happens to be people who support Chairman MacDonald and those that don't. These days it's people that support McDonald and people who support Zah. That's usually how they were identified.

But those two factions have some very distinct philosophical bases that bind them together and that oppose them one to the other. And it certainly sounded like—to say that the Navajo Nation must speak with one voice, it sort of sounds like we have to oppress the dissent, and that was what this was a device to achieve. And of course, as it happened at that time, as I think certainly is a fundamental premise in our system of—our American system outside of Indian country, the courts are always available to dissenters to see that their rights are enforced against the will of the majority.

And the Navajo courts were beginning to, I think, reach a degree of maturity in affording that kind of a forum for dissenters and the minority voice politically in the Navajo Reservation. And so it was particularly troubling that—especially for someone like Edgar Cahn to lend himself to a proposition that expressly was premised on the notion that somehow we have to silence these people who are saying the wrong—giving the wrong message, saying something different than the prescribed pitch that we want the Navajo Nation to be saying to the world.

MR. MILLER. In terms of dissent, since you brought it up, in a sense, Judges Lynch and John were dissenters, at least, from the administration. Later on in that year they were removed. Why in your opinion were they removed?

MR. HUGHES. Well, first of all—I don't want—I wouldn't say that they were dissenters from the administration. I think they decided cases that were presented to them. They decided them based upon the facts and the

law that were presented to them. And I frankly think that their decisions were correct, or at least fair and arguable, and there was nothing wrong with the decisions that they arrived at on either the more controversial cases they decided or the more routine ones.

MR. MILLER. Now, all that I meant was one of the first things the supreme judicial council did was overturn Judge Lynch's decision.

MR. HUGHES. Right, that's true. And obviously the decisions—what Judge Lynch and Judge John did was to try to bring the Navajo judicial system into a period of real independence in which they could exercise judicial power in a manner more or less coordinate with the other branches of Navajo government. And I think—I suppose I see their dismissal subsequently as really a reaction to that rather fundamental institutional change. And in fact—it's interesting. In preparation for this hearing, I pulled out my file of goodies on the supreme judicial council period, and I came across an editorial that was in the *Albuquerque Journal* on December 24, 1978, labeled "Tyranny in the Making." It was sort of castigating the tribal government for having dismissed Judges Lynch and John. And then subsequently, about a week later, there was—

MR. MILLER. Would you like to submit that for the record as an exhibit?

MR. HUGHES. Oh, sure. Why not?

CHAIRMAN PENDLETON. We can copy that.

MR. HUGHES. Actually, it's sort of interesting because—I had forgotten this totally. In the last paragraph, the editorial is kind of saying tyranny is happening on the reservation. The last paragraph says, "If the trend continues, the Navajo government will speak with one voice," a la Edgar Cahn. "Differences of opinion will not be tolerated. Dissent will be suppressed. Freedom will be lost."

Well, about a week later, Samuel Pete and Daniel Peaches, who were both aides to Chairman MacDonald, wrote letters, just vicious, angry, nasty letters to the editor condemning the editorial but doing so really in exactly the terms that I just said, essentially saying, "Judicial review may be fine for Anglo courts; that's not the way we work at Navajo," and essentially justifying the tribe's actions in getting rid of Judges Lynch and John on the ground that we aren't ready for judicial review.

And I think that's a rather interesting concession on the part of the tribal government. I think it's wrong. But I think its candor is at least admirable, and it really—they went right to the heart of the matter, I think, in saying that.

MR. MILLER. How does that relate to enforcement of the ICRA?

MR. HUGHES. Well, what I think is that, at least by 1978 and I think even that a lot of ground has been regained since then, that the tribal courts had become, in the eyes of Navajo people generally, the proper forum for bringing grievances against the government, seeking redress for grievances against the government. I think it is very notable that in the entire 10-year

history of litigation under the Civil Rights Act, the very first suit under that act was brought against the Navajo Tribe by—in fact, on behalf of Ted Mitchell. He got thrown off, as Dr. Iverson recounted.

After that suit, to my recollection, until 1978 there was not another suit brought in Federal court against the Navajo Tribe. I mean, Indian tribes were being sued left and right all over the country under that act, but the Navajo Tribe was not sued in Federal court under that act. It was sued; however, its officers were frequently brought to court in the Navajo tribal courts. And I think it's extremely important that was happening. I think it is a tribute to the Navajo judicial system that those cases were heard and decided, and they were decided fairly, and the cases like *Halona* and *Yazzie* were brought and given the hearing that they received and decided in the way that they were decided. This is to say I think that one cannot underline or emphasize too much the extent to which that shows the tribal forums can and should, really, be the enforcement mechanism for civil liberties with respect to Indian tribes.

And I think—as I say, I think there was a setback there. I think whether—I think the loss of judges as distinguished as Judges John and Lynch was a real blow to the quality of the judicial system overall, and I think appointments under the MacDonald administration generally showed a lesser concern for maintaining qualified judges that one might like, at least after 1978.

But, as I say, I think some ground has been regained in that area, and I think that the Navajo courts should continue to be seen as the strong and effective forum for enforcement of Navajo civil liberties. I think it is—and I would like to underline the point that Dr. Iverson made—that there is nothing inconsistent in the Navajo culture with the notion of individual liberties. The Navajo, I think, in my experience, are always extremely tolerant of diversity and differences and willing to let people be themselves and be different. And I think that the fact that the Navajo have a Bill of Rights in their own tribal code, unlike any other Indian tribe, reflects their uniqueness in that area. I would not say that, for example, about pueblo tribes, of which I'm very familiar. That certainly would not be true. But I think the Navajo experience and the experience of the Navajo judiciary shows that the tribes, given the tools, given the resources, can do a superb job on their own of enforcing civil rights under their own standards, in light of their own cultural traditions, and given the structure of their governmental system. And the fact that the Navajo courts may have had a few setbacks along the way, I think, is not a reason for pessimism. I think that hope can still be achieved.

MR. MILLER. Nevertheless, is there still a place for Federal court review of ICRA cases at some point?

MR. HUGHES. Well, I hope none of my clients are here.

CHAIRMAN PENDLETON. The record is open now.

MR. HUGHES. Yes. Well, I'm back to wrestling—I have the bad habit of saying what I think.

I continue to believe that, as much as tribes may have felt that the *Martinez* case was a victory, that nevertheless some form of very limited Federal remedy for the enforcement of the Indian Civil Rights Act would ultimately be a benefit not only to Indian people, but to Indian tribes.

You know, I—the discussion during the previous panel of what sovereignty is, and there's always the—you know, I hear a lot of talk, of which I have very little patience, about how, for instance, the Civil Rights Act is an infringement of tribal sovereignty. That's nonsense. Sovereignty is not the same as accountability.

It did recall to mind a statement by Larry Ruzow, who has been mentioned, who was formerly a counsel for the Navajo Tribe: "Sovereignty means never having to say you are sorry." I really don't believe that.

Sovereignty is a product of status. Status of Indian tribes as governments within our Federal system makes them sovereign to the extent they wish to exercise their sovereignty; that is, their power over various persons and things. That's their choice. But their status as sovereigns doesn't change unless Congress simply decides to do away with them, which I suppose theoretically Congress might have the power to do. So we call them dependent, domestic sovereignties, in Justice Marshall's phrase.

But accountability is in no way in my mind an impairment of sovereignty. And we don't worry about the sovereignty of the United States. And yet respect for and vigorous enforcement of the civil rights of individuals has been a bedrock of our American constitutional system since 200 years ago, as I recall, or so.

And I think that Indian tribes could—like the Navajo Tribe apparently accepted long ago—could benefit from the premise that being accountable not only doesn't impair their sovereignty but increases their regard as coordinate governments within the community of governmental entities in our country and makes them better governments. And I think that's—that in these days, and I say this with great qualification because I work with pueblo tribes some of whom have governmental structures that are literally—I say this in all honesty—literally unchanged in form and substance since Coronado trooped his men up the Rio Grande and discovered them 400 years ago.

And for those tribes, obviously these generalities just don't apply so clearly. But for many tribes, I think the larger tribes, and certainly the Navajo Tribe, not only can they afford protection of individual liberties, they can profit from it. I think the Navajo experience, court experience, has shown that to be the case. And, as I say, I would qualify the availability of the Federal remedy strongly. I would absolutely require a complete exhaustion of all tribal remedies. Where those tribal remedies are shown to be effective, I would limit review to the record made within the

tribal forum. I would eliminate any damages remedy. I would eliminate corporate due process. I think that's kind of a ludicrous idea dreamed up by corporate lawyers. I would restrict the availability of civil rights to individuals. And I think—in other ways, I think the remedy could be made not to be as onerous as the tribe saw it under the period from 1968 to '78, but I do think that, especially with tribes that do not have the kind of vigorous judicial systems Navajos have or have had—they had for a few months back in '77 and '78—the availability of a Federal remedy could be ultimately a very positive thing.

MR. MILLER. Thank you, Mr. Hughes.

Bob.

TESTIMONY OF CHARLEY JOHN, FORMER NAVAJO DISTRICT JUDGE

MR. HEILFERTY. Mr. John, you were a district court judge in Shiprock from 1976 until 1979. I wonder if you could just briefly describe your term as judge and describe the events which led to your removal in 1979?

MR. JOHN. Thank you.

Commissioners and the audience and Mr. Hughes and Mr. Lynch: during the time that I served on the tribal courts from 1976 to '79, I believe we made quite a number of innovative changes in the tribal court system. And one of the most important changes that we made collectively as judges was to get ourselves out from the executive influence over our personnel policies and procedures, which directly led to the confrontation with the executive in reference to the case of *Gudac v. Marianito*.

The other things that were very innovative were the district judges collectively began to participate in the development of their judicial financial budgets, which prior was the primary responsibility of the chief justice without any consultation with the district judges, and it was during our time that we developed this type of intercourt procedures.

And the other that I think was probably most important to us as judges at the time was the implementation of written opinions from the appellate as well as the district courts. We had begun to utilize law clerks in developing research for us that we could utilize in writing our opinions, making references to the specific cases that they had researched for us. And at the time, we, some of us judges, and specifically myself, I had the opportunity to learn from attorneys like Mr. Hughes to do research, and a lot of times I did research on my own.

The other thing that we developed during this period was to have the appeals hearing from the trial de novo type of hearing, which was the standard appellate procedure prior to our appointment, to appeals based on law and on the record from the court below. Up to this point, the Navajo tribal court system was not a court of record. However, we changed that within this period of time to make it a court of record, and as a result, we

changed the court of appeals procedures from a trial de novo to appeals based upon law.

And we at this time were involved in highly controversial cases such as described by Mr. Hughes, one of them the *Halona v. MacDonald*, and another one was an election case in which Donald Benally had won a seat on the council, the tribal council, and was denied it by the executive, which at that time was under MacDonald, to take his seat on the tribal council based upon the fact that, number one, he was under age; number two, that he was not full Navajo. He was part black. I issued decisions against the current administration in reference to these particular cases, and I think primarily these major controversial decisions were ones that actually led to my dismissal.

But it was during this time that we did have—made tremendous gains as far as teaching fellow judges from our people—that we worked with our general counsel in procedural due process in application of the ICRA.

At this point the Navajo Tribe did not have a bill of rights, so to speak, so we depended mostly on the ICRA. And earlier today I think there was a question that was asked regarding what—how ICRA had an effect on Indian tribes. And the way I looked at it, and the way I still continue to look at it, is that it has the same type of effects as the 14th amendment has on the States. Without the ICRA, we would have no recourse on the Indian reservations to redress violations of our individual rights.

MR. HEILFERTY. So in your opinion, it provides judicial review of legislative actions?

MR. JOHN. I believe it does, although in my opinion, in the *Halona* case I didn't directly cite the ICRA, but I think it does because it provides a mandate in Indian tribes in the act of self-government to guarantee certain expressed rights. Certainly, these include the exercise of free speech, the freedom of the press, people to redress their grievance before a government, to peaceably assemble. I sort of look at it more in the light of the Indian tribes' *Marbury v. Madison* type of situation. I'm pretty sure—if we did have a written constitution, I'm pretty sure that we could lock solidly the principles of *Marbury v. Madison* in judicial review of legislative council.

MR. HEILFERTY. What is your opinion of the *Martinez* case then, and would you recommend a return of the Federal court review?

MR. JOHN. Well, the *Martinez* case, for the Navajo Tribe specifically, is sort of like a double-edged sword. I guess it would be something like a double-edged sword to other Indian tribes as well, too, but the *Martinez* was—I guess Thurgood Marshall was really thinking he was striking a good blow on behalf of Indian tribes when he wrote that opinion. For an Indian tribe that has a good, accountable, responsive government, I don't see anything wrong with the *Martinez* case. I think that particular tribe can be very strong, very formidable with that particular decision. However,

the double-edged sword that I'm talking about is referring to a tribal government that is more inclined to rule by autocracy. With that kind of a tribal government, the *Martinez* case is very devastating. We have absolutely no recourse to violations of our civil rights as guaranteed by the ICRA.

MR. HEILFERTY. In your opinion then, would—if a constitution did exist in the Navajo Reservation and to the extent that that would strengthen the Navajo government, would your opinion be, then, that there would be no need for a Federal court review provided there was a constitution?

MR. JOHN. Well, I would have to answer that question with another question of my own. Did the States, in passing their constitution, do away with the Federal review? I don't think so. I think the same situation would apply under these circumstances. I think it would enhance the tribal governments to operate more responsibly to their people and in that way strengthen the sovereignty of the Indian tribes a lot more than if we say that we don't want Federal review.

MR. HEILFERTY. I guess another criticism of Federal court review would be that the Federal judges wouldn't be able to address traditional Indian issues. Because you were a judge before the *Martinez* decision, what was your opinion of the ability of Federal judges to review tribal issues?

MR. JOHN. I believe they were fairly competent in the review of tribal issues concerning matters of cultural and religious matters. Take, for instance, the Native American Church issue. If it wasn't for the fact that it went to the Federal court level, I think that the particular incident led—gave an impetus to the tribal council to review their stance as to whether they should define that exercise of freedom with that particular group on the reservation or not. But, based on that, I believe that, with much political pressure from within, they decided to pass a resolution or a law allowing the practice of that particular religion on the Navajo Reservation. And under those circumstances, it has been upheld in Federal courts and State courts in the Southwest.

MR. MILLER. Along those lines, could you see Federal court review as an impetus for the Navajo Nation to adopt a constitution?

MR. JOHN. I would not probably see it as an impetus. I think the constitutional issue, as far as the Navajo Tribe is concerned, is inevitable based upon the current median age and the educational level that many of our younger people are attaining. I think it's going to be demanded. I think that somebody said whether they see it within their time or not, that remains to be seen. But I don't think a Federal review will provide an impetus, as such, to that.

COMMISSIONER DESTRO. I just have one question to follow up on Mr. Heilferty's question about what should really be reviewed.

If a Federal court is going to do any reviewing, it strikes me that there's an analogy here between traditional issues, which are really internal issues

of tribal law, and then some of the civil rights issues, which are really Federal issues. The Indian Civil Rights Act, although enforced under *Martinez*, to be enforced primarily at the tribal level, is still a matter of Federal right, and the Supreme Court can always review Federal issues, but it can't review State issues. And it seems to me that—I mean, is that a workable distinction? Is that a workable analogy? If it's done as a matter of Navajo tribal law, that's one question, that maybe it ought not be able to review by Federal courts; but if it's a matter of Federal imposition, which the ICRA is, you know, and people in South Dakota argued last year that they not only had rights as tribal members but as citizens, that that's really not a tribal question, and in that respect that may well be a limitation on the accountability of the sovereign which is to the Congress in that respect. Do you buy that distinction?

MR. JOHN. Well, that was one of the reasons I had—you had a couple of people here before stating that there was no inherent conflict between what is termed tribal customs and tradition and the enforcement of ICRA.

CHAIRMAN PENDLETON. I just want to ask a question I would like either you or Judge Lynch to get to. I understand both of you have opinions with respect to judicial independence and tribal sovereignty.

Could you share that with us, Judge Lynch? You have some special concerns I want you to express for the record about those two issues.

TESTIMONY OF MERWIN LYNCH, FORMER NAVAJO DISTRICT JUDGE

MR. LYNCH. Yes.

Mr. Chairman, members of the Commission, and staff and the two panelists that are up here with me, Mr. Hughes and Mr. John, and also the audience, I'm grateful that I'm here this afternoon to testify on the issues here.

Let me go back a few years.

I'm a member of the Navajo Tribe. My name is Merwin Lynch, and I am a member of the U.S. Army. In 1951 I served in the Korean war and was discharged in 1957. I was then self-employed. And during that self-employment, I was a contractor, worked with auto mechanics and welding, and I also was a practitioner in the tribal courts when the tribal court was the court of Indian offenses at Fort Defiance. The court was there at that time. I handled several cases, probate cases and other cases. And I would appear on behalf of my clients, specifically in the area of grazing permits and other property to be distributed for probate.

MR. MILLER. Mr. Lynch, in the interest of time, maybe—

MR. LYNCH. I will get directly to—

MR. MILLER. Could I bring out two background pieces of information? You did teach at the National Institute for Tribal Judges; is that correct?

MR. LYNCH. I did work with the American Indian Court Judges Association and I instructed with Robert Bennett, who I was going to bring out in just a few minutes, who I worked with extensively, and—back in the late sixties I worked with him. But from '57 through '68, I worked as a practitioner part time in the court of Indian offenses.

And we worked with the judges. And I'll tell you, it was a circus. It was like the blind leading the blind. Everybody would go one direction one time; the next time we would go in the other direction. For instance, at one time I was defending a person over there, and after I became a prosecutor in 1968, I took the oath of office, I was prosecuting, and right about that time the Indian Civil Rights Act was just—had been just passed into law. And I was prosecuting a case in Tuba City. I presented my case to the judge, and the—Judge Yellowhair was on the bench. And immediately after prosecuting my case, I immediately asked the judge for a directed verdict to find the defendant guilty because we had enough evidence to find him guilty. And the judge turned around and he immediately took the case out of the jury's hands, found the defendant guilty as charged. So that's what I mean by like the blind leading the blind, and we learned a lot.

After that, I worked with the American Indian Law Center. And with that information, the Indian law center, from there in '68 through my appointment as judge in December 1975, I worked as a prosecutor. And upon my appointment as judge—I went on the bench in January of 1979 and worked as a district judge—not '79, but I mean 1975. December '75 I was appointed to the bench, and January of 1976 I was district judge in the Window Rock area. And up until then, we had the Indian Civil Rights Act pretty well in place.

And about 1969, the Navajo Tribal Council adopted the Navajo Bill of Rights. And the Navajo court system from the Indian—court of Indian offenses in 1959 was established by tribal council resolution CJA-1-59, which that court system, which was explained by Mr. Hughes, had come a long way up through the seventies. And that did happen. And upon our appointments to the bench, we had adopted the rules of court procedures, which didn't exist before. They were very vague. And there was also a children's court system that had—was supposed to have been adopted back in 1969, which, no children's court judges were available. So we district judges had to wear three hats: had to be children's court judges, had to sit on civil cases, and also sit on criminal cases. And that took a lot of our time. We had to give the people the due process of law, which when Judge John and the other judges that were there, we took it into our own hands and separated the judicial branch as it was established by CJA-1-59.

MR. HEILFERTY. And you attempted to do this during your term as district judge?

MR. LYNCH. During our term as district judge.

MR. HEILFERTY. And you were district judge until 1979?

MR. LYNCH. Until January 1979.

MR. HEILFERTY. Would you explain what led to your removal as judge?

MR. LYNCH. Yes, I will explain what led to my removal as judge.

The two cases that were mentioned here, *Gudac v. Marianito*, I presided over that case, and my decision was appealed to the court of appeals. The court of appeals upheld my decision. And then immediately after that, they heard the *Yazzie v. Navajo Tribal Board of Election Supervisors*.

MR. HEILFERTY. That's the redistricting case that Mr. Hughes was speaking of?

MR. LYNCH. The reapportionment case.

MR. HEILFERTY. The reapportionment case?

MR. LYNCH. I presided over that case, and that was decided, and the decision that I made in that case, that was upheld by the court of appeals again. And immediately after that, the SJC, supreme judicial council, was formed. That was by the council resolution CMY 39-78. So that was brought in effect just about the time I made my ruling; the court of appeals made its ruling; and Edgar Cahn made his brief visit about 2 or 3 days and came up with SJC, supreme judicial council, for the Navajo tribal government.

CHAIRMAN PENDLETON. Allow me, Judge Lynch, just a second. You got removed from the bench, right?

MR. LYNCH. Yes, sir.

CHAIRMAN PENDLETON. What happened to the appellate judges?

MR. LYNCH. The appellate judges—

CHAIRMAN PENDLETON. If they upheld your decision—we know you got the axe. What happened to the other guys?

MR. JOHN. I was the acting chief justice on that *Marianito* case.

CHAIRMAN PENDLETON. Oh, now we see. I see. I see.

MR. LYNCH. So you see what happened. Judge Bluehouse was a permanent judge, who presided over the reapportionment case, *Yazzie v. Navajo Tribal Board of Election Supervisors*.

MR. HEILFERTY. And both yourself and Judge John were probationary judges at the time of your removal; is that correct?

MR. LYNCH. Yes. We had been probationary judges for a period of over 2 years.

MR. HEILFERTY. What does the code say about how long a judge should be probationary?

MR. LYNCH. The code states in there that a probationary judge serve a period of 2 years and then be recommended for a permanent judgeship.

MR. MILLER. Now, Mr. John, were you also a probationary judge for 2 years or longer than 2 years?

MR. JOHN. I believe it was a little over 3 years. I think Judge Lynch was a little over 4 years that he served as a probationary judge.

MR. MILLER. I see.

MR. JOHN. May I interrupt a bit here—the question that you asked about sovereign immunity versus the ICRA, my personal feeling is based upon my experience of the cases that I've had involving sovereign immunity issues before the courts at the time I was judge is—the concept to me is an archaic terminology.

CHAIRMAN PENDLETON. Sovereign immunity?

MR. JOHN. Sovereign immunity. I think it's outdated the way it's utilized by the Navajo Tribe. It does not support the concept under which sovereign immunity ought to be used. I think, based on recent developments and based upon experience that we have had before, the tribal officials generally have the idea of using the issue of sovereign immunity as a carte blanche protection against a wrongdoing or for their wrongdoing.

CHAIRMAN PENDLETON. This Commission has heard testimony before in our previous hearing in South Dakota, and it is a real belief among some tribal members that the only people that have rights under ICRA are the tribal council.

MR. JOHN. Most definitely.

CHAIRMAN PENDLETON. Do you happen to feel that way?

MR. JOHN. I happen to feel that way based upon their usage of term "sovereign immunity." The tribal council, members of the tribal council cannot be sued—neither the Chairman or the vice chairman, regardless of whether their actions are outside the scope of their responsibilities. I think, again, it is most important and crucial that our tribe develop some kind of a document, whether you call it a constitution or not. But that document ought to state specifically the limitation of powers that these elected officials ought to have, and they ought to be held accountable with that particular document for any wrongdoing that they may do in reference to their—what their authorities are.

CHAIRMAN PENDLETON. Just one more point on this issue.

As I've heard all of you testify today and what we have heard earlier, it does seem to me that the cases that you two gentlemen decided really put the issue of sovereign immunity at a critical point, a political juncture of that and judicial independence. And it does seem that we might have a different situation had you not been terminated. That is, we might have been well on our way to an independent judiciary in the Navajo Nation as compared to what we understand may be happening today. We will hear more testimony later. Is that a fair assessment?

MR. JOHN. I believe so. I believe so. I think, like Mr. Hughes indicated earlier in his testimony, the issue of sovereign immunity was misinterpreted by the tribal officials. What we essentially did was hold these tribal officials accountable for their actions above and beyond the scope of their authority.

CHAIRMAN PENDLETON. Just one more point. Are you saying here—it does seem like the issue of sovereign immunity versus judicial indepen-

dence goes to who controls the tribal members. But you didn't want control. It just seemed like you wanted people to do the right thing, but it seems that gets confused with control of the members. Is that an accurate assessment?

MR. JOHN. I believe that's a correct assessment.

COMMISSIONER DESTRO. I wanted to follow that question with another one, and it's just an impression I have, although it has been—it's something I have discussed with some Indian law experts in other parts of the country, and that is that—do you have a sense—do any of you have a sense—perhaps I will just start with you, Mr. Lynch, that the assertion of sovereign immunity by the tribal council is really an assertion of sovereignty against the right of the Congress to oversee what they do as well? I mean that there's a sense of—I've had that argument made to me that basically *Martinez* stands for the proposition there should be no Federal oversight, and the assertion of sovereign immunity stands for the proposition that there will be no oversight inside the tribe either; therefore, there is simply no oversight on Federal grounds at all. Is that too far off the mark or am I completely wrong or what?

MR. LYNCH. Well, let me give you this bit of information. Title 2, section 101, the Navajo tribal government shall be—the Navajo tribal councilmen shall be the governing body of the Navajo Nation. That paragraph in the tribal code, Title 2, section 101, is all they have, the tribal councilmen, to go on. There's no duties and responsibilities, no plan of operation for them, no plan of operation at all, and they look at sovereign immunity, "We're the untouchables" is the way I look at it, and I perceive it and look at it that way, and they do what they please and it hurts the people. What they need is a bill of rights. They need to establish three separate branches of government.

MR. MILLER. You meant a nonstatutory bill of rights, a constitutional bill of rights?

MR. LYNCH. A constitutional bill of rights, they need to establish that. And by the people, for the people, instead of what we have is by the tribal council for the people. And they can change that when they damn please. Excuse the expression, but that's for want of a better word.

CHAIRMAN PENDLETON. We understand, sir. We understand.

MR. LYNCH. That happens, and they will change it, and it just—they do what they please. Just look back here not over a couple of months ago. They bought a white elephant down here at Seligman, spending \$39 million of the Navajo people's money. That's our money they are spending. That's my gripe, everybody else's gripe. Where are we going to get that \$39 million? That's funds that we need for our future people.

And they don't review their legislation before it's presented to them. They need their legislation 2 or 3 weeks ahead of time. And it's really hard

to—you can just go on and on. It's not presented to them. And it's really hard.

MR. MILLER. You are making the same point that Dr. Young made earlier that on controversial issues the tribal delegates are not informed of the issues before them?

MR. LYNCH. Correct.

MR. MILLER. And they are expected to come in and vote without being prepped on what the real issues are; is that the point you are making?

MR. LYNCH. That's the point I'm making. Thank you.

MR. HUGHES. I can give you an interesting example of that. In 1973 or '74 the council was asked to vote on what was described as a prospecting permit for Exxon Corporation to prospect for uranium in a large area of the reservation, and the document was presented to the council about a half an hour before the vote was called. It was about a half an inch thick. It consisted of about 120 pages, and in fact, not—as it turned out—and it was passed, although a few councilmen did object that nobody had read this, nobody knew what was in it, nobody knew what the terms were except for the fact that there was a \$6 million bonus being offered. And as it turned out, not only was it a prospecting permit but also a mining lease and a rather innovative joint venture agreement, both of which took effect automatically upon the occurrence of certain events in the course of the company's exploration of the prospecting permit. That was a typical example, a rather extreme one, but characteristic of the way the council was operated in those days.

I might say that I think that one of the very important reforms made by Chairman Zah during his term was to essentially do away with that system and have advance publication of council agendas and provide means by which important measures could be—the information could be circulated to members of the council about important measures well in advance of their being called upon to consider them. I don't know if that's being carried on today or not.

MR. MILLER. Well, that was my question. Is that the case right now?

MR. JOHN. I don't believe so, not that I have seen anyhow.

One of the things I would like to point out also, I would like to disagree with Mr. Carlisle in his assessment that the Navajo Tribal Council is very flexible. I don't think they are flexible at all. Based upon a certain event that transpired concerning our community in Shiprock, they are inflexible as to changing their ways.

And the other thing I would like to point out is what Mr. Destro asked about. One of the things that you've got to understand is that *Martinez* dealt primarily with a tribal membership that, that particular tribe had since time immemorial determined their membership in a certain way. And that to me is 100 percent cultural, whereas when we are dealing with

ICRA, we are dealing with something that's totally foreign to that cultural aspect. So I don't think we are—the two could be incompatible.

CHAIRMAN PENDLETON. Mr. Allen, you have a question?

COMMISSIONER ALLEN. Yes. Actually, I have a couple of them. Mr. Hughes, you mentioned the Edgar Cahn study and recommendations in 1978, and you also mentioned your files of goodies there—perhaps you happen to have that study? Or is it otherwise accessible?

MR. HUGHES. Actually, I do. I have to leaf through this. I have a copy of—

CHAIRMAN PENDLETON. We have a—we have copies.

COMMISSIONER ALLEN. That's one I didn't get.

MR. MILLER. Could we enter that as an exhibit?

COMMISSIONER ALLEN. I would like to have it entered.

CHAIRMAN PENDLETON. You can take a look at it.

MR. HUGHES. I suppose that's the resolution. There was also a report.

CHAIRMAN PENDLETON. We have the report, too.

COMMISSIONER ALLEN. I have a second question about the precise nature of some of the limitations on individual rights that are either witnessed or experienced in the Navajo.

Mr. Hughes, you mentioned that factual disputes seemed to be at some point the source of limitations of rights and sometimes the access to courts, as in the creation of the supreme judicial council, is withdrawn from dissenters. I wanted to know whether there have been any allegations of judicial or criminal justice improprieties apart from those who might be identified as victimized on account of their faction?

MR. HUGHES. I can say that—you know, I'm certainly aware that there were occasional lawsuits brought against the tribal police, for example, alleging instances of excessive police—or police conduct that was alleged to be misconduct. I certainly don't think that there was anything amounting to a practice in that regard. I think it was—you know, it's sort of the typical kind of occasional incident that happens in police work. And I think in general—my experience always was, and I'm sort of underlining the point I made a while ago—but, in general, I always felt that the Navajo government was extremely tolerant of individual rights and that really the only sort of major systemic civil rights issues that arose really were these issues of political rights that really arose in the context of this, what I think—what I describe as kind of factual dispute that I think continues to this day.

COMMISSIONER ALLEN. May I ask Judge John to respond to that as well?

MR. JOHN. I would have to agree with the assessment of Mr. Hughes. I can't add or delete any more than what he has given you.

One of the interesting things that is currently going on in that context is in our community in Shiprock where we have what is known as the

Northern Navajo Fair Board, and that particular group has the responsibility of operating an annual event in our community. And it's been the practice since its inception that the local people decide on who is going to be elected to serve on that board. Well, the current people who were on the board were all charged with embezzlement in one way or another. So the citizenry were upset and decided to remove them and elect new officers to the board.

One of the people who were—who was a very influential—was very influential on that board is also a member of the advisory committee of the Navajo Tribe. He decided to take that issue to the advisory committee to get support from them for voiding the election that was done at the local level. And as a result, the advisory committee approved that resolution, giving this one individual complete authority to the appointment of who should serve on the fair board. And that was taken out of the local home rule type issue, and we are just having one heck of a time trying to get that right back where it belongs, to the local people.

COMMISSIONER ALLEN. Let me ask you a final question then. Your last comment, and most of what I've heard the short time I've been here this afternoon, focuses on what I would have to call political motivations, at least for alleged abuses of individual rights; and I want to ask the question—and I want to be very sensitive about it, because I don't mean to imply or suggest anything to anyone. I'm simply trying to find out what the limits of this discussion are and how you perceive the problem. I want to do it without recourse to some of the legal terms that we have used, without "sovereign immunity" or any of the others.

It sounds to me as though there's some concern with power as it's divided between those who have it and those who don't, and the claim seems to be those that don't have power have their rights systematically abused. Now, when you state it that way, I'm reminded of two things. One is, of course, what happened to the United States in the period following the Civil War and in which much of what happened in the South could be characterized as lawlessness, and what was most important was the rule of law that people didn't have to be in office themselves to think that they were protected. They just had to know that their own rights, such as the right to contract, could be defended in a court of law. Lacking that, then, of course, the entire regime would be in poor shape. On the other hand, if you divide it between those who have it and those who don't have the power even in place of a general foundation, what is then to—I mean what keeps those who have power in power?

Now, we saw how that was answered in the South in some sense. The southern system of segregation was built on the existence of the Federal Government; that is, one Southern State set apart by itself might in fact experience, say, an overthrow, a coup, but because it was part of a much

larger system, it was defended on that side without any opportunities for redress on the other side.

Now, what I'm asking you again, and again this is a theoretical question—I want to explore the limits of your understanding of this—is whether the position of the Federal Government relative to the Navajo is such that what you are really saying is that there are no practical alternatives either for redressing grievances or for restructuring the policy apart from those that can be brought about through the pursuit—through either something like the Indian Civil Rights Act or other alternatives of Federal grounds to defend rights among the Navajo. Is that the kind of thing I'm hearing? Is the Federal Government the problem that has you hemmed in, that you can't do what you need to do practically, and is it because of that that it's the solution, or is it the solution because there's some other ground for the rights that I haven't quite heard yet?

MR. JOHN. I don't believe the Federal Government is the problem. I think the tribal governments themselves are the problem. I say this because of the way the people have been reviewing the *Martinez* decision. As I have stated earlier, the *Martinez* decision is a good decision as far as that particular tribal government being a good, responsive government to the needs of the people. But where you have a type of government that is going to rule by tyranny, autocracy, whatever you put—a dictatorship, to the extreme, you don't have any recourse as a result of *Martinez*.

COMMISSIONER ALLEN. Let me just ask you one simple question. If you had the same government assistance in the Navajo that now exists and there were no United States, how long would the government last?

MR. JOHN. I think the tribal government would operate on its own because—for instance, if we didn't have the type of government that we have now, it would have been the type of government that was ruled by the clan system which ruled the internal structure of that clan system since time immemorial. We had no chiefs, so to speak, like other tribes. Each individual clan system had a leader. and the people were very responsive to that ruler.

So, I guess in that term I would say the government is responsible for all of our problems much—that's the reason why I feel such negative attitudes toward anthropologists because they are the ones that studied us to begin with, which caused the Federal people to pass rules and regulations governing us. I think earlier the comment was made that the tribal government, the system that it operates under, was a foreign imposition upon the tribe.

COMMISSIONER ALLEN. Yes, I understand that in the historical point of view, but are you also saying that the people today, the Navajo, would sustain the current governmental framework even if there were no United States, forgetting the history?

MR. JOHN. Forgetting the history, if the tribal government operated on their traditional system—

COMMISSIONER ALLEN. As it operates now.

MR. JOHN. As it operates now, no. No.

COMMISSIONER ALLEN. Now, so—what, would it be overthrown? What would happen to it? Do the people support it?

MR. JOHN. Not necessarily overthrown. You cannot overthrow the current administration because it has police powers vis-a-vis the closure of the *Navajo Times*.

CHAIRMAN PENDLETON. I'm not sure that's what he is asking. Irrespective of that, I think he is saying whether the government is overthrown or not, but the kind of things we are hearing people say. Isn't that what you are asking?

MR. HUGHES. Let me take a shot at it.

I agree with what Charley is saying, and I think the answer is that the Federal Government really is sort of having no impact whatever on the regime of the justice system and the regime of political and civil rights on the Navajo Reservation. It's somewhat tempting to think that, but for *Martinez*, the availability of Federal courts as a remedy to the ICRA would make a difference, but I'm not so sure of that, largely because, as I think we have all agreed, there really is not a sort of, an oppressive sort of right-wing tyranny on the reservation. It really is a more subtle matter. The government is very sophisticated, and it's a question of the kind of invasion of rights that are—that it's not so clearcut. The United States is really playing no role—

COMMISSIONER ALLEN. Let me close it up with this. I think you are getting close to what I'm asking. If we know that there is an economic, for example, struggle going on that involves people indigenous to the country on both sides, and so what you are saying now is you don't think what you described to us is sufficiently grave that, in the absence of the United States as a shadow police power to prevent it, that there would be that kind of internal struggle?

MR. HUGHES. I think there might be a struggle absent the United States. Whether it would take on a different form than goes on today on the Navajo Reservation is hard to say. I guess—and certainly, I think it's grave. I think it's perceived by the Navajo people as being grave because I think the Navajo people perceive the problem as being one of, well, the things we talked about, lack of accountability, a sense of powerlessness on the part of the people to achieve their goals through the governmental system that supposedly represents them and serves them. Whether we would have armed uprising in Window Rock or not is another question, because that's not the Navajo way of dealing with problems like this.

COMMISSIONER DESTRO. Let me ask a followup on this then. You have said that if the government were to go away tomorrow, you wouldn't have

any of those problems. One of the questions that we asked in an earlier session was if we talk about the government as having positive impact. You say now there's really no impact at all. What is the effect of the Federal money coming in? Doesn't the tribal structure—doesn't the tribal government administer the money that the Federal Government is putting in? And if you took that away, what impact would it have on the ability—you say, for example, the police power? If any of that is funded by Federal money, and if that money went away, would they still have as much—the police power to the same extent? Because there's that money part of the Federal Government involved as well.

MR. HUGHES. There certainly is a large amount of Federal money for specified Federal programs. In terms of the general support of tribal government, there's not—certain programs, the social services program, which is largely federally supported. And were the government to require meaningful accountability in the use of those Federal funds, that could have some impact, at least with the administration of those programs. But, of course, today the Navajo Tribe, as a result of actions that occurred in the last administration, derives an enormous part of its income from tax revenues that do not depend upon the Federal Government to enforce or administer or do anything else about. And those revenues, of course, are general revenues of the tribe to be administered by the tribal government as it sees fit. And there really is—again, the United States Government has no power to force an accounting of the use of those monies, and I think the imposition of such a power would be unwise.

CHAIRMAN PENDLETON. We have to sort of break here. We have one more witness to come up, and counsel has a couple of items to clear up. We will have our next witness, but only a very, very short break.

MR. MILLER. I want to clear up a few loose ends for the readers of the transcript. Mr. John, perhaps you could help me on this. We mentioned earlier that both of you were probationary judges, and a probationary judge serves a term of 2 years. Is the reason why both of you were serving longer than 2 years as probationary judges because you had controversial cases pending before you?

MR. JOHN. I don't have any idea of the reasons why, primarily because those reasons were never revealed to us, nor the reasons for our removal.

MR. MILLER. Your removal was unusual though?

MR. JOHN. It was unusual.

MR. MILLER. And you did have controversial cases pending before you?

MR. JOHN. Yes, sir.

MR. MILLER. And both of you were removed on December 20; is that correct?

MR. JOHN. Yes, sir.

MR. MILLER. At around 12 o'clock?

MR. JOHN. Around 12 o'clock midnight, I believe.

MR. MILLER. It's referred to as the midnight massacre?

MR. JOHN. Yes, sir.

CHAIRMAN PENDLETON. You had your own?

MR. JOHN. We had them all.

MR. MILLER. You both attended or at least showed up at the council session but were prevented from entering; is that correct?

MR. LYNCH. It was an executive council session where no one was allowed. I showed up, but they would not let me enter.

MR. MILLER. That's it for my questions.

CHAIRMAN PENDLETON. Okay. Is there a difference in executive session and an advisory committee?

MR. LYNCH. The executive session, the tribal council session, where there is no one allowed in the tribal council except the council members and the staff.

CHAIRMAN PENDLETON. Okay. Thank you, gentlemen.

Mr. Hale is coming down next. I checked with my colleagues and with staff, and we want to make an announcement that we will—hopefully will be taken up on our request. Dr. Roessel said today in his testimony he thought it was important that—well, let me back up.

Since the Zuni administration was represented here today, he thought it would be important that the Navajo administration be represented. We will send tonight a notice to Chairman MacDonald that we will welcome him here tomorrow at 5. We will open testimony. We promise him there will be no questions, that he can say to us what he would like to say to us, the same as other public witnesses. We think it is important that we offer this since we are here. We have been having letters going back and forth. We think that's not the right way to go. I think those of you here today can see this Commission is open to testimony. We don't cut anybody off, and we think these hearings would be incomplete if we did not hear from a representative of the Navajo administration, and preferably Chairman MacDonald. We will serve notice tonight by staff and we will take the appropriate steps to do that.

MR. MILLER. Mr. Riordan, the Navajo assistant attorney general in the back, would you give that message to the Chairman? And could you come forward for a few minutes?

CHAIRMAN PENDLETON. Is Mr. Hale here?

[Recess.]

Judicial Reform

CHAIRMAN PENDLETON. Mr. Hale, would you stand and take the oath, please, for me?

[Albert Hale was sworn.]

CHAIRMAN PENDLETON. Thank you. Have a seat, sir.

Counsel, you have some testimony to insert, madam recorder, in the last panel?

MR. MILLER. Thank you, Mr. Chairman. Eric Eberhard was originally part of the last panel. He has responded to our questions in written form, and I would like to submit his written testimony as part of the record at this point. Thank you, Mr. Chairman.

**STATEMENT OF ERIC D. EBERHARD, ATTORNEY,
WASHINGTON, D.C.**

[Following is text of the letter of August 6, 1987, to Brian D. Miller, Deputy General Counsel, U.S. Commission on Civil Rights, from Eric D. Eberhard.]

This letter will serve as my response to the questions which you posed to me with your letter of July 31, 1987. For the sake of clarity, I have repeated your questions preceding my answers.

1. Please list your name and address.

Eric D. Eberhard
Suite 100
1155 Connecticut Avenue, N.W.
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2. Please identify all positions you held at DNA and the Navajo Nation.

My original employment with DNA—People's Legal Services began in 1973 and I was initially employed as a staff attorney. I was later assigned to the Community Legal Education Unit, where I assisted in the development of legal education materials to assist the client community in learning how to avoid legal problems. Later still I was assigned to the Litigation Unit where I assisted in the preparation and handling of litigation in Tribal, state and federal courts. After leaving DNA in 1978, I was retained by DNA on a contractual basis to provide support for staff attorneys engaged in litigation.

From January, 1983 to October, 1984 I was employed by the Navajo Nation Department of Justice as the Deputy Attorney General. From October, 1984 to January, 1987 I was employed by the Chairman of the Navajo Tribal Council as the Director of the Navajo Nation Washington Office.

3. Please describe your experience before the Navajo Tribal Courts. A comparison to the local state courts may be helpful.

I have represented clients before the Navajo Tribal courts in a variety of civil matters ranging from domestic relations to civil rights to reapportionment of the Navajo Tribal Council. These cases have involved practice before the District Courts and the Court of Appeals (now the Supreme Court). I also handled one matter which involved appearances before the Supreme Judicial Council.

My practice has also involved the representation of clients before the Courts of the State of New Mexico in a wide array of civil matters and some misdemeanors. By way of comparison between these state courts and the courts of the Navajo Nation, my general experience has been that the courts of the Navajo Nation are as competent as or more competent than the New Mexico state courts on a case-by-case basis. In some respects, such as allowing all parties to be heard fully, I believe that the Navajo courts do a better job of administration of justice than the Courts of New Mexico.

4. *What is your opinion of former Tribal Judges Charley John and Merwin Lynch? Why were they removed? Were they afforded due process?*

I believe that Judge John and Judge Lynch were both excellent District Court Judges. While neither of these men hold law degrees, both are well educated in the practice of law in the forums of the Navajo Nation. Both are deeply dedicated to the rule of law and equal justice under the law. The actual reasons for the removal of Judge John and Judge Lynch will probably never be known. Some people believe that they were removed for issuing orders which were unfavorable to Chairman MacDonald. Others believe that they were removed because they exceeded their judicial authority by entering such orders.

I personally do not believe that Judge John and Judge Lynch were accorded due process of law in terms of being apprised of the nature of the charges against them and in terms of being provided an opportunity to respond to those charges.

5. *Were the Tribal Courts improving during the 1970's? Did they continue to improve during the late 1970's and early 1980's?*

I believe that in general the Tribal Courts at Navajo have steadily improved since their establishment in 1957. This is evidenced by the increased complexity of cases being heard, the improved education and training of the judges and court personnel, and the overall capacity to administer justice. In more recent years, particularly from 1983 to 1986, the courts have been vastly improved through the implementation of the juvenile court system, the establishment of a permanent three judge Supreme Court, the appointment of highly qualified judges and the abolition of the Supreme Judicial Council.

In my view the only exception to this steady improvement over the years was the establishment of the Supreme Judicial Council. I view this as an exception to the progress of the courts because it directly involved the Tribal Council in the judicial functions of the courts.

6. *What was the Supreme Judicial Council and why was it created? Did you appear before the Supreme Judicial Council?*

The Supreme Judicial Council (SJC) was an entity created by the Navajo Tribal Council to review decisions of the Tribal Courts in cases involving interpretations of the Navajo law. The SJC was composed of

several members of the Tribal Council and the retired Chief Justice of the Navajo Nation. I believe that the immediate impetus for the creation of the SJC was the rulings of the Tribal Courts ordering the reapportionment of the Tribal Council and prohibiting Chairman MacDonald from using Tribal funds to pay for his legal fees in a federal criminal prosecution.

I appeared before the SJC in a case involving the disqualification of Donald Benally of Shiprock as a candidate for a seat on the Tribal Council. The principal issue in the case revolved around whether Mr. Benally was old enough under Navajo law to be a candidate.

7. Please describe the atmosphere at the Supreme Judicial Council. How many policemen were there and where did they stand? Were any inside the hearing room? Did your clients feel uncomfortable because of the police presence?

The hearing before the SJC was held in the Tribal Council Chambers in Window Rock. A sizeable group of spectators were present. Police were located both inside and outside of the Chambers, presumably for crowd control purposes. However, the police presence was disconcerting to my client and his supporters from Shiprock. At the request of my client, I did request that the SJC ask the police to leave the inside of the Council Chambers or at least to reduce their numbers. I did not count how many police were present, but my recollection is that they were at all entrances and exits and that they were otherwise present around the inside of the Council Chambers. The SJC did not act on my request to reduce the police presence during the hearing.

8. Did George Vlassis participate at all, indirectly or directly? Did his participation create any appearance of a conflict of interest at anytime?

My recollection is that Mr. Vlassis accompanied the members of the SJC into and out of the hearing. At one point I believe that Mr. Vlassis handed a note to Chief Justice Kirke during the hearing. Mr. Vlassis' partner, Mr. Ruzow, argued the case for the appellants, the Tribal Board of Election Supervisors. Both my client and I believed it was improper for Mr. Vlassis and Mr. Ruzow to be involved in the proceedings since it appeared that Mr. Vlassis might be advising the members of the SJC while Mr. Ruzow represented one of the parties. We raised this concern in the form of a motion which was denied by the SJC.

9. Did the Supreme Judicial Council hinder the administration of justice at the Navajo Nation? Please explain fully.

In my opinion, the SJC hindered the administration of justice in at least two ways. First, it created the impression if not the reality, of legislative control of the judiciary. Second, I believe that it may have made some Tribal judges wary of entering orders which interpreted Navajo law. In turn, I believe that the independence of the judiciary was called into question. In my view, anything which impairs or appears to impair the

independence of the judiciary will have a negative impact on the ability of the Courts to administer justice.

10. Please state your opinion on whether the executive branch exerts any influence on the judicial branch.

In the same way that the federal and state executives exert influence on the courts through appointment and removal powers, there is a similar influence in the Navajo system of government. These influences are unavoidable in any government and, I believe, ultimately positive in terms of promoting stability and democratic principles.

There were allegations in 1981 and 1982 that staff of the Chairman may have improperly interfered in the handling of several cases in the Tribal Courts. These allegations were investigated by a former United States Attorney for Arizona, Mr. Michael Hawkins. Mr. Hawkins did conduct an investigation and prepared a written report. I have not read this report, but you may want to obtain the report and/or contact Mr. Hawkins in Phoenix, Arizona.

11. Would you recommend a limitation of the power of the Chairman?

Yes. However, any decision on the structure of the Navajo government and the powers and duties of its officers should properly be made only by the Navajo People themselves.

I hope that you find my answers to be responsive to your questions. . . .

TESTIMONY OF ALBERT HALE, PRESIDENT, NAVAJO NATION BAR ASSOCIATION

CHAIRMAN PENDLETON. Mr. Hale, we are sorry to have to delay you, sir, and we will not keep you any longer than necessary. We are ready to go, counsel.

MR. McDONALD. Thank you, Mr. Chairman.

I would like to point out that Mr. Hale has been kind enough to agree to appear here by himself at this time, but he is part of the panel on judicial reform which includes two other panelists who, for personal reasons, could not make it until the morning, so this panel will be carried over until tomorrow when Mr. Hale is welcome to rejoin that panel at that time or to submit anything in rebuttal that he might wish to submit within the next 30 days.

Mr. Hale, would you tell us your occupation and a little bit about your background?

MR. HALE. My name is Albert Hale. I'm a private attorney in Window Rock, Arizona, and I am also a member of the Navajo—the president of the Navajo Nation Bar Association and have been in that capacity for about 7 years or so.

MR. McDONALD. Thank you.

The 1986 Judicial Reform Act created the Navajo Supreme Court, abolished the supreme judicial council. Can you tell us why, in your

opinion, the supreme judicial council was created originally and why it was abolished?

MR. HALE. From reading the records of the tribal council, that was created to—I believe to stop any type of intervention by Federal courts in the decisions that were being made by the tribal courts, and that will be borne out by the minutes of the tribal court.

MR. McDONALD. Now, you are referring to the Judicial Reform Act?

MR. HALE. I'm talking about the supreme judicial council. Is that what you are talking about?

MR. McDONALD. Yes.

MR. HALE. The supreme judicial council was created for that purpose, as I could tell from reading the minutes of the tribal council.

MR. McDONALD. And why was it abolished?

MR. HALE. It was abolished because it was creating a lot of problems as far as what is perceived to be the due process that's required by outsiders. In particular, I'm referring to some cases that were filed that were mentioned, that case where laws were being passed by the tribal council and then the same tribal council is interpreting that law. The supreme judicial council had nine members, and five of those were council members, and they were given the authority to review and interpret the laws that were passed by the tribal council. That was one reason why it was done.

MR. McDONALD. In other words, there was a perception that maybe it would be held in Federal court that there was not a tribal forum provided for civil rights cases?

MR. HALE. What Dr. Cahn was saying, as far as the purpose behind it, was to give the council an opportunity to take a look at the end at its resolutions that might have been held invalid by the tribal courts. They were very concerned about the tribe speaking with one voice. And they said that because the recent actions that had been taken, recent decisions that had been made by the tribal courts, that there was no longer that one voice that was being heard.

MR. McDONALD. Right. But then when it came time to abolish it, what were the concerns behind that?

MR. HALE. The concern was to eliminate that fear that the outsiders had and also to make sure that the legislative bodies were not involved in interpreting the laws that they had passed. That was the concern that we had, and that was the reason why it was abolished. And another reason was because it was just in place for—ever since it was enacted, which was in '78. It was in place for that period of time, but no funds were ever—well, I take it back. Funds were allocated for it for a while, and then it just dried up, and I believe they heard only about three cases during its lifetime.

MR. McDONALD. Right. And those reasons were stated in the preamble to the—

MR. HALE. Those reasons were stated along with the portion of the resolution that adopted the Judicial Reform Act of 1985.

MR. McDONALD. Thank you. How does the Judicial Reform Act enhance the role of the judiciary committee in calling for the removal of judges and then confirming judges?

MR. HALE. Prior to the Judicial Reform Act, only the advisory committee had the authority to remove or recommend removal to the tribal council of a judge—of a sitting judge. So with the reform act, the judiciary committee was also explicitly included in that particular provision as a body that can recommend removal by itself without having to go through advice from the committee.

MR. McDONALD. And for confirmation, the judiciary committee has a stronger—

MR. HALE. They have a stronger role in the confirmation process, particularly in the recommendation process. They would get all the applicants, they would do the interview, and then they would make the recommendation to the Chairman of the Navajo Tribal Council, who had authority to make the appointment, and that appointment would then be presented to the tribal council for confirmation. And the first round of that appointment was a 2-year probationary period, and after that was—there was a confirmation for permanent appointment, and that judge would then serve up until he is 70 years old, whether he was behaving himself.

MR. MILLER. I would like to enter the resolution adopting the Judicial Reform Act of 1985 as an exhibit for the record, Mr. Chairman.

CHAIRMAN PENDLETON. So ordered without objection.

MR. McDONALD. With respect to judicial removal, are a judge's responsibilities spelled out in the Judicial Reform Act?

MR. HALE. If you are talking about the district court judges, their particular duties are not spelled out in the reform act. If you are talking about the chief justice, his duties are spelled out in the reform act.

MR. McDONALD. Are you referring to his supervisory capacity?

MR. HALE. Yes, supervisor authority and administrative authority of the judicial branch.

MR. McDONALD. Has the judiciary committee exercised its new powers of removal of judges?

MR. HALE. Yes, they have recently exercised that authority in the removal of Judge Walters, who I understand was supposed to be a member of the panel this afternoon.

MR. McDONALD. Yes.

MR. HALE. That was the first time that that exercise was made under the reform act.

MR. McDONALD. And that was quite recently, was it not?

MR. HALE. Oh, about a couple of months ago.

MR. McDONALD. Was there a proposal that the Judicial Reform Act contain a provision requiring that judges be members of the Navajo Bar Association?

MR. HALE. There was such a proposal and that came about not as part of the reform act. There was a separate resolution that dealt with spelling out the qualifications for appointment of judges. And during that process, there was a recommendation that was made by the advisory committee to include that qualification, that a judge who was going to be appointed had to be a member of the Navajo Nation Bar Association. However, that was taken out because there were feelings among some of the council members that that would limit the pool from which you would be able to make appointments because there are—members of the Navajo Nation bar numbers maybe about 300, and I would say less than half of that are members of the Navajo Tribe.

MR. McDONALD. Was that the recommendation of the advisory committee or the judiciary committee?

MR. HALE. Well, the advisory committee made that recommendation, as I recall it. My recollection may not be correct, but the advisory committee took a look at those qualifications, and it was in that that they were going to make that recommendation. And I believe when it went to the council, the council struck that as part of the qualification requirements.

MR. McDONALD. Do you agree with that argument?

MR. HALE. Are you asking me if I agree with the appointees being members of the bar association?

MR. McDONALD. Yes. You can answer it either way, yes.

MR. HALE. Well, at the time I was president of the Navajo Nation Bar Association also, so I had an interest in it because—I may have been biased at the time, but my position at the time was that they should be members of the Navajo Nation Bar Association because, to me, that was a qualification that would alleviate a lot of fears that outsiders had about the tribal courts and decisions that were made by tribal judges.

MR. McDONALD. Can you discuss the separate judicial branch personnel policies and procedures allowed by the Judicial Reform Act?

MR. HALE. The Judicial Reform Act—let me backtrack a minute, digress, and go back to the budget that was adopted by the tribal council prior to the adoption of the '85 reform act. In that resolution that adopted that budget for the fiscal year for tribal operations, it was stated that the judicial branch had to comply with the tribe's personnel policies and procedures. But after consideration and upon discussion of what should go into the Judicial Reform Act, it was decided that, in order to achieve a more independent judiciary, that they should be given an opportunity to set up their own personnel policies and procedures and not have to comply with or abide with the tribe's personnel policies and procedures. For that

reason, there was a provision that allowed them—allowed the judicial branch to do that. And I don't know whether they have done that or not. I've been out of the tribal government since January 13.

MR. McDONALD. Thank you. Are there still separation of powers problems in the Navajo government structure?

MR. HALE. I believe there are. I say that because if you take a look at the tribal code, there's no real distinction between the Chairman, which is who represents the executive branch, and also the tribal council. If you took a look at the code, there are sections in there that say that he is the Chairman of the Navajo Tribal Council, and nowhere in the code will you find that he is the Chairman of the Navajo Nation. So, because of that, there's still some separation problems, separation of power problems. And it's really hard to make a distinction between what the Chairman's responsibilities are and what he could do. There's also some problems as far as the council is concerned, not particularly that much of a problem as far as the council is concerned because the council has always been deemed to be the supreme authority with regard to governing of the Navajo people and the Navajo Nation.

MR. McDONALD. Thank you. Can you explain why there is a problem in obtaining copies of the *Navajo Reporter* from the judicial branch?

MR. HALE. Probably because of all the audits that have been done recently by the tribe's internal auditors saying that there was—I recall an audit that was done by the auditor general for the Navajo Nation where they stated that they questioned whether it was possible for a publication to be done utilizing 638 monies and then turning around and selling those publications and taking in the proceeds. To my knowledge, there are some publications that are available, but the chief justice at this time—I think he asked for this quite a while back, an opinion from the contracting officer for 638 regarding what he could do with those proceeds, since those were proceeds from 638 monies. And I think that's the reason why they are not selling any more.

MR. McDONALD. Is that still pending?

MR. HALE. To my knowledge, it's still pending. It hadn't been decided or no response had been given by the BIA contract at the time I left.

MR. McDONALD. In your opinion, should a plaintiff in an Indian Civil Rights Act case be able to seek a remedy in Federal court?

MR. HALE. My—I've been in private practice for quite a while, ever since I graduated from law school in '77, and then I went with the tribe from '82 to just recently, '87. I'm back in private practice now, and I have had numerous occasions to represent plaintiffs in tribal courts. And based on my experience, I would say that there should be some, but by that I mean that it should be in the same lines as the State would, the State proceeding. They go all the way through the State proceeding; then

there's an appellate review by the Supreme Court. And I think that's the type of review that should be available.

MR. McDONALD. Thank you very much. I have no further questions, Mr. Chairman.

MR. MILLER. I have one brief question. Mr. Hale, some people think or have alleged that the enactment of the Judicial Reform Act was simply a ratification of the removal of Chief Justice McCabe. How would you respond to that kind of allegation?

MR. HALE. I would respond by saying that there are no merits in those allegations because that was never a consideration when the reform act was being formulated. I think the same type of results would have happened under the new act as in the old act because there are independent efforts to substantiate the finding of malfeasance, misfeasance, etc.

MR. MILLER. And it's been established that you are the principal author of that act?

MR. HALE. Yes.

COMMISSIONER ALLEN. Mr. Hale, you several times mentioned changes in the statutes and procedure as a reaction to the fears of outsiders, in the course of your responses earlier. Would you say something about those fears? What were those fears that outsiders had that had this impact on the council of the nation?

MR. HALE. Well, it's a fear that I find to be unfounded by outsiders. I think it's based on ignorance of the tribal process and how the tribe operates. If they could only obtain more knowledge on how tribal government operated, I think all those fears would be allayed.

But from what I've seen—there was one particular case that comes to mind which involved the *Kerr-McGee* case. That was the uranium tailings mine spill. There was a tribal court proceeding that was initiated on that, on those causes, on those facts, and Kerr-McGee lawyers came in and they alleged—they went to the Federal court to try to stop the tribal proceeding. And one of the things that they alleged was that they could not get a fair hearing in the tribal court basically because the judges were untrained, and then there was the supreme judicial council.

So the reform act, by eliminating the supreme judicial council, hopefully addressed that. And secondly, there are requirements in the reform act now that there have to be certain types of training and qualifications for judges once they come in. And even before they come in, they are to meet certain qualifications.

COMMISSIONER ALLEN. Let me follow up just to be precise then. If I understand you, the outsiders you are talking about are primarily those who might at some point have dealings with the Navajo judicial system and who, in addition, had fears of arbitrariness in the judicial system; is that what you are describing?

MR. HALE. Right. I think they are fearing that there would be application of custom and tradition, which they have no knowledge of.

COMMISSIONER ALLEN. And so the adaptation is to make the system more nearly conform to ideal American judicial proceedings or what?

MR. HALE. I think that decision had already been made back in '59 or whenever the tribe decided to go with this type of system and to adopt what was under the—in the court of Indian offenses. And that decision had already been made, as far as I'm concerned, that that was the direction the tribe was going to go. And what we were doing with the reform act was trying to refine that and try to allay some of the fears that the outsiders were having.

COMMISSIONER ALLEN. So finally, then, the concern with the fears of outsiders, and I suppose this involves, to some degree, commercial transactions and things of that nature, will account for, let us say, the Judicial Reform Act? Let's focus on that. And the question was whether rights of the Navajo themselves would not, in your understanding, be directly involved in the Judicial Reform Act? That would not be a motivation to the adoption of that act?

MR. HALE. I'm not sure I follow you.

COMMISSIONER ALLEN. That is to say, was the motivation—let me rephrase the question. Would it be incorrect for me to think that at any point the impetus to reform the judiciary was concerned with furthering the protection of the rights, the civil rights, of the Navajo themselves?

MR. HALE. I think it was in furtherance of protection of everybody's civil rights, all the rights of outsiders who might be coming in and transacting or engaged in transacting business on the reservation, and the Navajo people themselves. I think that was the impetus for it.

COMMISSIONER ALLEN. Thank you.

COMMISSIONER DESTRO. I have one question as well, and it deals somewhat with this insider-outsider argument. And it may not be exactly appropriate here, but in the notes we received from the staff, it was indicated that you thought we ought to pay particular attention to the *Oliphant* case and that a recent Ninth Circuit case has held that nonmember Indians fall under the jurisdiction of the tribal court for criminal matters. What is their rationale for that? I mean, as I read *Oliphant*, it was basically that members of the tribe can be bound or should be bound by the tribal court system. But how does the Ninth Circuit rationalize the link to nonmember Indians, which then makes it look an awful lot like a racial classification rather than a jurisdiction over your own members case?

MR. HALE. Well, the way I looked at *Oliphant* is that it applied to nonmembers. Nonmembers—non-Indians, I should say. The fact is that there was a non-Indian that violated tribal laws, and they were trying to prosecute him in the tribal courts, and the Supreme Court said that the

tribe did not have jurisdiction over him. In the *Duro* [*v. Reina*] case, there was a nonmember, an Indian from another tribe who was living on another Indian reservation, and he committed an offense there and he was being prosecuted for that, and his position was that the tribal court doesn't have jurisdiction over him because he was a nonmember.

COMMISSIONER DESTRO. I guess my question is: how did the Ninth Circuit make the belief—it seems to me that if you say, well, the tribal court has no jurisdiction over the nonmember of the tribe, then that would make sense, that his argument would follow. But the way it sounds to me, and having not read the Ninth Circuit case and not knowing anything about it until I read this, was basically it's like Indian law is good enough for Indians, but it's not good enough for anybody else. That's what it sounds like. Is that what it basically says to you?

MR. HALE. Yes, that's why I say, basically, pay attention to *Oliphant*. That's what it is. You are telling the tribe you can do only certain things, and for that reason, you know, you can't—one is that you can't exercise jurisdiction over non-Indians who might commit crimes on the reservation, and because of that, on the reservation there's a lot of confusion. There's a lot of nonprosecution of people who have committed felonies on the reservation. And that's a real problem on the reservation.

COMMISSIONER DESTRO. But one of the things we have heard all last summer as we were up in South Dakota was that you can't lump all Indians together. It seems like that's what the Ninth Circuit is doing; isn't it?

COMMISSIONER ALLEN. *Oliphant* is doing that?

COMMISSIONER DESTRO. It's the permutations after *Oliphant*, the spin that the Ninth Circuit puts on it; isn't it?

COMMISSIONER ALLEN. Are you saying *Oliphant* did that?

MR. HALE. I think both cases did that. They just lumped all the Indian tribes together.

COMMISSIONER DESTRO. Okay.

MR. HALE. Once that decision is made, then it applies to all Indian tribes, regardless of whether they are small and whether they have a sophisticated court system or not.

COMMISSIONER DESTRO. But assuming the Ninth Circuit case had come out the other way—at least *Oliphant* would have been explainable, or *Oliphant*, as modified, if you will, would have been explainable. You have to be responsive to your tribe, but you don't have to be responsive to anybody else.

MR. HALE. Yes.

COMMISSIONER DESTRO. Okay. That's an interesting part of it.

CHAIRMAN PENDLETON. We have a final question coming from—

MR. MILLER. One quick question. It deals with sovereign immunity. It's a little bit unrelated, but important.

CHAIRMAN PENDLETON. This is never a quick question.

MR. MILLER. Do suits under the ICRA against the tribe fall into any exception to the Navajo Sovereign Immunity Act?

MR. HALE. Yes, it does because there was a recent amendment that included suits based on violations of civil rights and that was, I believe, passed in December or in January. No, I think it's in December of '86.

MR. MILLER. '86. Do you happen to have a copy of that amended—

VOICE. It's attached to the resolution.

MR. HALE. Yes, I do have a copy of that.

CHAIRMAN PENDLETON. One that's floating around, a resolution from last night?

MR. HALE. The resolution that was passed by the tribal council last night includes an attachment.

MR. MILLER. I see.

CHAIRMAN PENDLETON. We haven't seen that one yet.

MR. MILLER. We just got that today, but it's uncertified, so—

MR. RIORDAN. That resolution is, but it contains attached to it several tribal civil rights laws. It includes the amendment to sovereign immunity.

MR. MILLER. I see. Would you be in a position to address these questions?

MR. HALE. That's Bill Riordan who is talking, and I think he is prohibited in that resolution from facilitating your proceedings here. Isn't that right, Bill?

MR. RIORDAN. If you have any questions about the tribal law, I have no way to answer them.

MR. MILLER. Maybe you could state the official position on ICRA suits against the tribe and the Sovereign Immunity Act.

MR. HALE. Well, I can't take an official position for the tribe, if that's what you are asking me, because I'm no longer an attorney for the tribe. I'm in private practice, so I'm not inclined to do so.

CHAIRMAN PENDLETON. These hearings are recessed until—

COMMISSIONER ALLEN. I just want to ask a very tiny question. I'm sorry—I just wanted to know whether the Navajo Bar Association took a position on the judicial reform enactment.

MR. HALE. I was involved in it as the president of the bar association, and then the committee took a look at it.

COMMISSIONER ALLEN. You were acting pursuant to a decision by the bar association?

MR. HALE. Yes, I was.

COMMISSIONER ALLEN. Thank you.

MR. HALE. Thank you very much.

CHAIRMAN PENDLETON. These proceeding are recessed until tomorrow morning at 9.

[The proceedings were recessed at 6:16 p.m.]

Morning Session, August 14, 1987

CHAIRMAN PENDLETON. I wish to reconvene the meeting from yesterday. Before we proceed to today's panel discussions, I need to make a couple of statements.

This Commission does have jurisdiction over the ICRA. We have no question about that. That was not a question when the Commission convened here in 1973 or 1974, and we were welcomed with open arms.

One of the reasons why we came to this place initially was by invitation, and we took that invitation seriously and are trying to work within the spirit of cooperation.

Overnight we have read Mr. MacDonald's signed resolution and reviewed section 3. I want to read section 3.

It says: "The Navajo Tribal Council as the governing body of the Navajo Tribe further instructs its governmental officers in their respective official capacities to refrain from facilitating such continued actions by the United States Commission on Civil Rights until such time as such lawful appropriate government relationship is reestablished by justification of the Commission's defined authority as requested by the Chairman of the Navajo Tribal Council, and the Attorney General, so that in this bicentennial anniversary of the American Bill of Rights, the sovereign governments of the Navajo and all other recognized Indian tribes may also share in the American experience of furthering the cause of universal human rights and dignity."

Governor Lewis yesterday came and spent time with us. He spent time with us in Washington. We have answered all of Chairman MacDonald's questions in writing, and this correspondence has been going on for, I know, more than 6 to 8 months.

What I need to say for the record and for the public is that what Mr. MacDonald is proposing to do is illegal. Mr. MacDonald has no authority over this Commission. This Commission has refrained from using its subpoena power. As my colleague Mr. Destro noted, in the last hearing almost 80 people were subpoenaed.

We thank and applaud those who came to testify who were not subpoenaed.

I must say to you in all candor that we will subpoena every witness that is on this list. This Commission will not be shoved into a corner nor will this Commission participate in an activity that we believe to be inappropriate and, obviously, other tribes have felt to be inappropriate.

When we were in South Dakota, other nations were represented at our hearing, to come and show us how good their tribal court systems were. They came on their own. That is a part of the record.

So I will say once again that if we have to subpoena people, we will do it. It is an unfortunate thing to have to compel people to testify. We don't like to use that power and we would prefer not to, because it does cause

problems in perception, as well as hard feelings, and we don't want to do that. We would certainly prefer to do this all informally, and we really do thank all those who have participated voluntarily and who will be doing so later today.

Commissioner Allen.

COMMISSIONER ALLEN. I would like to add that the Indian Civil Rights Act was enacted on the sovereign and constitutional authority of the United States, and one of the consequences of its enactment was to impose moral and legal obligations on this Commission. Our obligation is to respond to the complaints of citizens throughout the United States as well as obligations to study, assess, and to make recommendations.

It is in the pursuit of those obligations that we have undertaken the task of reviewing the status of the Indian Civil Rights Act with respect to Indians throughout the United States. It is our firm conviction that that task must be completed and cannot be completed well without including the Navajo, one-eighth of all the Indians in the United States.

We proceeded on the basis that voluntary cooperation would provide all that we required for the purpose of conducting this inquiry. We prefer voluntary cooperation. We look for that same spirit which I encountered when, not being a member of the Commission, I visited Window Rock and Shiprock, Forest Industries, and other places in the Navajo Reservation 2 years ago.

If we must resort to the subpoena power, it will be done only in the spirit of completing those obligations which we believe we must in fact carry out in order to fulfill our responsibilities not only to Congress and the President, but to Indians in the United States.

We also believe most importantly that if we are to make a correct assessment of the promises and prospects of the Indian Civil Rights Act, we cannot do so well without relying upon the information and conversations of Indians themselves and particularly of the Navajo.

CHAIRMAN PENDLETON. Thank you, Commissioner Allen. I just want to make two other announcements.

One: Those persons who wish to testify in open session once the panel has been completed this afternoon can let us know and sign up, and you will have 5 minutes to tell us what you want to tell us. There is no question and answer period during that time, but we welcome that kind of testimony. And I might add again for the record that those of you who wish to give us information beyond today, this record will be kept open for a period of 30 days.

Just two more points, and for the witnesses primarily, I wish to caution the witnesses, however, that the Commission is most interested, not in the performance of a particular individual but in the performance of tribal institutions, such as the tribal court system and the tribal council's oversight committee.

We are not interested in and will not permit this 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. We have invited several 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 certainly applies to our discussion about the subpoenas and particularly, I think, is addressed to section 3 of the resolution. The second matter I am obliged to refer to concerns Title 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. A maximum penalty for violation of that statute is a fine of \$5,000 or 5 years' imprisonment or both.

The United States Attorneys for Arizona and New Mexico 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 and the number is 376-8351.

Finally, do we need interpreters at all in this session? Is anyone here hearing impaired? If not, I will turn the morning session over to counsel.

MR. MILLER. Mr. Chairman, I would like to clear up a matter that came up at the close of yesterday's session, if I may. Last night at the close of the session, it was suggested by Navajo Assistant Attorney General Riordan that the Navajo Nation adopted recent amendments to its sovereign immunity statute. We had already in our possession the most recent amendments to the sovereign immunity statute, which contains only a very limited waiver of sovereign immunity in ICRA cases. I submit those amendments with the exhibits for the record as an exhibit.

CHAIRMAN PENDLETON. So ordered without objection.

MR. MILLER. Thank you, Mr. Chairman. Let me read from the Navajo Attorney General opinion construing these amendments.

"Therefore, while Title 1 of the ICRA—25 U.S.C.A. section 1302—represents an exercise of the plenary power of Congress to impose restrictions upon the powers of local self-government which the tribes otherwise possess similar but not identical to those contained in the Bill of Rights and the 14th amendment, it does not," and "not" is highlighted, "follow that the Congress thereby intended to require identical tribal enactment interpretation, *implementation*, or *enforcement* of its provisions."

This statement seems to imply that the Navajo Nation does not feel obligated to enforce or implement the ICRA. Their position seems to be that unless Congress passes new legislation requiring tribes to enforce the ICRA, they may choose not to.

My intention last night was to have someone respond to this position, this position taken in the Navajo Attorney General opinion, and that was the thrust of my question. If Chairman MacDonald accepts our invitation made to him last night, I would like to hear him or one of his officials address this question.

Thank you, Mr. Chairman.

Judicial Reform

CHAIRMAN PENDLETON. Thank you, counsel. Will the witnesses please stand and be sworn in.

[Daniel Deschinny and Robert Walters were sworn.]

TESTIMONY OF DANIEL DESCHINNY, NAVAJO LAY ADVOCATE

MR. McDONALD. Mr. Deschinny, will you state your name and occupation and background for the record, please.

MR. DESCHINNY. My name is Daniel Deschinny, and I am a resident of the community of Oak Springs, Arizona, and I practice law on the Navajo Indian Reservation as a tribal court advocate and have been for the past 5 years.

MR. McDONALD. Thank you. You represent former Chief Justice Jerome McCabe; do you not?

MR. DESCHINNY. That is correct.

MR. McDONALD. Mr. Chairman, would you announce that any judges in the audience might care to leave. If there are any judges in the audience who may have occasion to hear Chief Justice Jerome McCabe's case which is pending, we would like to give them an opportunity to leave the hearing at this time so there will not be conflicts of interest or prejudice to the case. Thank you.

Mr. Deschinny, you were present at the time that the Commission staff interviewed former Chief Justice McCabe; were you not?

MR. DESCHINNY. Yes, I was.

MR. McDONALD. Has Chief Justice McCabe asked you to appear personally in his place because of a medical condition which makes it advisable he not appear here today as a witness?

MR. DESCHINNY. That is true.

MR. McDONALD. Will you, to the best of your ability, relate to the Commission the facts that Justice McCabe would have testified to, had he been personally present?

MR. DESCHINNY. Yes.

MR. McDONALD. Thank you. Will you then relate to us for the record the judicial career of Chief Justice McCabe?

MR. DESCHINNY. Okay.

MR. McDONALD. Starting with his appointment.

MR. DESCHINNY. Chief Justice Nelson Jerome McCabe was appointed to the judge position in 1979, the fall of 1979, as an acting judge, and later on he was promoted to the acting chief justice position of the tribal court system on the Navajo Reservation.

At that time or before this time, he was a member of the tribal council for approximately 4 years.

What I wanted to relate to the Commission here is that the former chief justice's position concerning his removal, which essentially began at the advent of the new administration which under the former Chairman Peterson Zah—but basically the gist of what has happened here is, I will state as an example of a member of an Indian tribe practicing law within the tribal court basic lack of appreciation or the ability of tribal officials to reflect to have appreciation for the rights of individual members. And that is the basic theme of the position that we have taken in the tribal court system at this particular time.

What has happened to the former chief justice was—it can be seen immediately upon the—during, before and during the inauguration of the new tribal government, he was asked to leave the Navajo Reservation and be responsible for certain meetings elsewhere and was therefore prevented from administering the oath of office to the new elected official.

Thereafter, when he did come back he was informed of the new administration, tribal administration's desire that he resign directly by the counsel of the office of the Chairman.

So I see this as what I say is the lack of appreciation for rights of people in the sense that the American society or people in American law as they understand; that this has happened, I think, shows that there is a real need for a provision within the law for the tribal government.

I understand what the tribal position is this morning, that there is a separate government there. There is a treaty involved between the United States and the Navajo Tribe.

But I am here to testify as an individual person, also as a lawyer practicing within the tribal court system and express some of the positions we have taken there, and I don't wish to really go into detail about what our strategy is, but the testimony, if the former chief justice were to have come, would include the statement of how he was dealt with within the tribal system itself. There was a constant threat for his removal, constant insinuation—I would say it was harassment—that he would leave.

MR. McDONALD. Excuse me. What was he told about going to Ramah?

MR. DESCHINNY. He was asked if he would resign his chief justice position; he would be reassigned as a judge as a consolation from being fired totally from the tribal court system.

So he refused in all regards simply because at that time the tribal government, it is still thinking about it, the idea of having a three-branch government.

Now the tribal government is not a government we know of within the United States system. It is just a one-head government. It is not a three branch, but the tribal government, as I understand it, is trying to get to that position.

MR. McDONALD. But he had a lifetime appointment; did he not?

MR. DESCHINNY. He did have a lifetime appointment. He could be removed for cause, and it was this cause, the reason for his removal, that people had a rough time with; and in his desire to keep the court intact, he was pressured in this way by tribal officials, basically the lawyers within the system and also from the office of the Chairman.

He was also advised by the judiciary committee—there is a committee within the tribal council that would be acting to some committee within the United States Government itself, but without a written constitution—the tribe does not have one, like I said.

MR. McDONALD. The judiciary committee advised him to stand his ground, to stay in office?

MR. DESCHINNY. To stay in office, and recommended to the other government, the Chairman and the advisory committee, which is an executive committee of the tribal council, to stay in there and also that they would not be required to leave their position.

This happened and there was developed within the tribal governmental system itself, like I said, within the justice department, an idea of catching the former chief justice off guard.

MR. McDONALD. All right. Let me ask you: was there an audit done?

MR. DESCHINNY. There was an audit done.

MR. McDONALD. By whom?

MR. DESCHINNY. By the tribal government, the tribal attorney, auditor general, requested by the Chairman. This was back in 1984. About 1 year later when it was found that there were some funds being used, but these funds could not be identified as tribal funds, and so forth.

MR. McDONALD. Were these bar association funds?

MR. DESCHINNY. These were essentially bar association funds that were given to the court of appeals, which is the Navajo Supreme Court now, as bar dues for various other purposes.

So pursuant to this audit, although there was really no connection made, no real grounds that the former chief justice was supposedly quote, "manipulating or doing something with the funds," unquote, the tribal government through its effort to move him out filed criminal charges against the former chief justice.

MR. McDONALD. Where were those filed?

MR. DESCHINNY. These were filed at Tuba City, which is about 150 miles from Window Rock, and basically, the outcome of that was the tribal government never pursued these criminal charges. They asked for one

continuance after another, and finally in the end the criminal charges were dismissed.

Now, the former chief justice's position is that the criminal charge was a vehicle upon which to place him—to railroad him out of the office.

MR. McDONALD. He issued an order, did he not, and refused to step down pending the criminal charge?

MR. DESCHINNY. Yes, he was asked to step down because there was pressure coming from all directions, that once the criminal charges were—as we describe it, as trumped-up charges—filed, he was asked thereafter by the advisory committee to step down while his case in court would be heard.

Now, the advisory committee—at this point I should say that it was authorized; now, there is some discrepancy as to who had authority and so forth as to judicial conduct of judges—asked the chief justice to step down. Now, the judiciary committee, on the other hand, which works with the tribal judges, told him not to and stay put.

MR. McDONALD. Step down pending the criminal charges?

MR. DESCHINNY. Pending the criminal charges, yes.

At the same time the criminal charges involved the subpoena of all the judges, most of the personnel in the tribal court system, so that the chief justice was more or less surrounded with his—unable to deal with his own case, and there were other pending cases before the tribal court system.

MR. McDONALD. Do you mean other people were implicated by the audit?

MR. DESCHINNY. Yes, the staff of the judicial branch, and I think there were about four or five other members who were charged with the same offense as the chief justice.

Basically, he contends—

MR. McDONALD. Were those charges dropped before the charges were dropped against the chief justice?

MR. DESCHINNY. Yes, some of them were dropped, and the others were dropped after June 24. That is when the criminal charges against the chief justice were dropped.

Now, I represented another individual within the judicial system, a secretary charged with the same offense that the chief justice was charged with, and we had that dismissed in the month of May of 1985.

There were other personnel implicated in these criminal charges filed by the prosecutor.

Basically, therefore, the position, as you can understand, is a matter of entrapping the chief justice into the position of making some decision that perhaps should not have been made, meaning to say that he—all the judges were subpoenaed against him. He could not ask the same judge to hear certain cases.

MR. McDONALD. Now, at the same time that the hearing was going on in Tuba City, was there a tribal council meeting going on concerning the same subject?

MR. DESCHINNY. Yes, this was going on much different from the latest episode of removal of judges.

MR. McDONALD. Tell us what were the reasons given by the advisory committee when it recommended to the entire tribal council that Chief Justice McCabe be removed from office? What was the reason given?

MR. DESCHINNY. They called it malfeasance in office and neglect of duty.

MR. McDONALD. Based on which facts?

MR. DESCHINNY. His refusal to step down as they requested for him to do while the criminal charges were pending. On top of that, he made orders in which he was involved which was self-serving and—

MR. McDONALD. He issued orders to the lower court?

MR. DESCHINNY. He issued orders to the lower court, and since he was the defendant in that case, it got complicated for him; and they also said that he conducted himself—basically, that of unbecoming of a judicial or chief justice by publicizing, sensationalizing his predicament with the tribal council.

So that was the reason they removed him, but not in the record. It shows that he was removed because of the criminal charges, the misconduct. He was not removed for that, but basically charges following the criminal charges.

MR. McDONALD. In your opinion, has the Judicial Reform Act been a success and please explain?

MR. DESCHINNY. That needs to be seen because I have this litigation pending and it's too early to tell, and without additional support for or the foundation for judicial reform, it is my position that basically it needs to be seen, because I have not really seen that much change. The decision that has been made in the past is still being followed, and I haven't been given the opportunity to argue that, so I think that needs to be seen.

MR. McDONALD. Do you have any recommendations for improvement of civil rights enforcement on the Navajo Reservation?

MR. DESCHINNY. Well, within the Navajo Nation, aside from talking about the American system, I would just like to say there needs to be better educated judges and a lot more healthy appreciation, like I said before, by tribal officials, tribal judges, of individual liberties, individual rights of its own members as well as people who live within Indian country.

There is that lack, because I think—I know because I argued before judges and they tell me that what I argue, the individual rights, the civil rights of people, either under the Indian Civil Rights Act, Federal law, or the Bill of Rights, found within the tribal code, basically don't mean anything.

I can't come to court—and judges do tend to sometime demean me and say: “You call yourself a lawyer and you argue these things; where did you find that Civil Rights Act or the Indian Civil Rights Act could bring you to court? What procedure are you using?”

So, it is disheartening to argue on behalf of people who don't know their rights, don't know the law, that the tribal court cannot provide this procedure so that their rights can be vindicated.

MR. McDONALD. Thank you very much. I have no further questions, Mr. Chairman.

MR. MILLER. I have one or two questions. Let me ask one thing first. You recently filed suit in tribal court. Why didn't you file suit earlier?

MR. DESCHINNY. Well, I was not hired until a few months ago, and I did ask that question. The former Chief Justice McCabe's position is that he would not have been able to prevail in any event had he filed a suit under the former tribal administration and felt that under the new administration he would get somewhere.

MR. MILLER. What difference should a change in administration have? The judiciary is independent.

MR. DESCHINNY. As I said, the judiciary and the legislative and the executive are only in American society, American system of government, not on the Navajo Reservation. That needs to be worked out. That needs to be developed and created and established. There is no such thing as three-branch government.

CHAIRMAN PENDLETON. Aren't you saying there is a three-branch government, but two branches control one?

MR. DESCHINNY. Yes.

CHAIRMAN PENDLETON. Executive and the tribal council, then there is the judiciary. It seems like to me the two branches control the other one.

MR. DESCHINNY. Well, when you try to practice law or what should be as they are recorded in the tribal code, you find out that only sometimes and for various reasons one branch controls all the others.

MR. MILLER. Which branch is that?

MR. DESCHINNY. Sometimes, like in the McCabe case, it came to be the office of the Chairman or the executive branch.

MR. MILLER. Isn't it true that all the former judges that are appearing here and have appeared were dismissed by the tribal council after they made unfavorable rulings against the tribal council?

MR. DESCHINNY. I am not aware of that.

MR. MILLER. Why were they removed? In your opinion, why was Chief Justice McCabe removed?

MR. DESCHINNY. Because he—they wanted him out even before the people who wanted him out got into office.

MR. MILLER. Why is that?

MR. DESCHINNY. He was thought of as being a friend to the former Chairman at that time, Peter MacDonald. And they just want everyone who associated with the former Chairman out of the tribal government.

MR. MILLER. Just because he associated with the former—

MR. DESCHINNY. Yes.

CHAIRMAN PENDLETON. Are we saying that association with a former executive is grounds for dismissal; is that what you are saying?

MR. DESCHINNY. Yes, in this particular regard.

CHAIRMAN PENDLETON. There was no question about his ability as a judge; none of those questions came up?

MR. DESCHINNY. That was not brought up, and it appears to me that no foundation has ever been found for removing him for a real legal reason to remove him. That connection was never made.

CHAIRMAN PENDLETON. In other words, from what you know about the code, then, it appears as though nothing in the code was violated by the judge?

MR. DESCHINNY. Nothing in the code was violated by the former chief justice because there was no hearing conducted, there was no proceeding to develop all of these facts that perhaps could have supported a removal, but that was not done.

CHAIRMAN PENDLETON. None of the requirements as set forth by the judiciary committee were violated that you know of?

MR. DESCHINNY. That is correct.

MR. MILLER. No further questions.

CHAIRMAN PENDLETON. Do you have questions of Mr. Walters?

MR. McDONALD. Yes. Judge Walters, will you state for the record your name and address, please, and status.

TESTIMONY OF ROBERT WALTERS, FORMER NAVAJO DISTRICT JUDGE

MR. WALTERS. My name is Judge Walters. I am originally from Red Lake, which is about 30 miles north of Tuba City.

I have been employed by the Navajo Nation for approximately 17, almost 18 years. Ten of that is being a judge for Tuba City District Court.

MR. McDONALD. Thank you. What was the factual basis for your removal from the Navajo District Court in Tuba City in July of this year?

MR. WALTERS. Well, as far as I know there was no—actually, there are no facts to support the removal, I contend.

MR. McDONALD. Can you tell us about the audit that was used?

MR. WALTERS. The Navajo Auditor General conducted an audit which took almost 3 or 4 years to complete. Arising from that, there was alleged some money missing, and I was removed for misfeasance and neglect of duty. But there was no factual basis to support the judgment which was made against me by the tribal council.

MR. McDONALD. Did the audit report, the auditor, or anyone ever attempt to connect you with the money from the court which the auditor states is missing?

MR. WALTERS. There appears to be no connection as I read the audit, and the audit specifically points out the fault lies with fiscal directors of the judicial branch, and there is no connection between myself as a presiding judge and the fiscal matters.

MR. McDONALD. Was the auditor asked that at the tribal council hearing?

MR. WALTERS. Yes.

MR. McDONALD. What did the auditor say?

MR. WALTERS. The auditor was unclear as to, even they were unclear as to who was responsible, has an oversight for the money matters of the court because—

MR. McDONALD. We will get to that. Had you ever requested a judicial branch audit of your court?

MR. WALTERS. Yes, I have made two requests to the chief justice requesting an inhouse audit. That was never carried out.

I presented that to the tribal council, but that was just never taken into consideration, but I did make a written request to the chief justice for an audit.

MR. McDONALD. Which chief justice?

MR. WALTERS. Tom Tso.

MR. McDONALD. When was that request?

MR. WALTERS. I believe that was made in '85, September '85.

MR. MILLER. Sir, could we have a copy of that request or letter?

MR. WALTERS. Yes, I will provide that for you.

MR. McDONALD. What was the reply?

MR. WALTERS. There was no reply at all. I requested that we have an inhouse audit to be done. There was no reply to me. I wrote one in September requesting an inhouse audit, and also in December I requested a followup letter with it and there was no response to that.

MR. McDONALD. What role did the chief justice play in your removal proceedings before the tribal council?

MR. WALTERS. He testified and utilized the Professional Responsibility Code and also the Code of Judicial Ethics rules, and he successfully applied that to my case even though the facts don't support that, but—

MR. McDONALD. Did he issue some orders also?

MR. WALTERS. Yes, there were orders made that I couldn't publicize and I couldn't get an attorney.

MR. McDONALD. You couldn't get an attorney?

MR. WALTERS. No, I just couldn't. I couldn't get to publicize that, and I couldn't do anything until it was brought to court—I mean, brought to the tribal council.

MR. McDONALD. Were there any other orders issued by the chief justice?

MR. WALTERS. The judiciary committee issued an order in November, which was issued late October, indicating that it would be recommending that I go on leave, administrative leave, with pay pending the resolution of the audit.

Also along with that they had recommended that I do not publicize or even talk to anyone about the audit or the action that is taken against me. The chief justice also wrote a letter to me enforcing that judiciary committee's resolution to refrain from publicizing the action against me.

It appears to me and I know for a fact the letters that I received from the judiciary committee, they used the same letterheads; they used the chief justice's office. They used the attorneys for advice, and they all meet there at the chief justice's office. There appears to be no separation between the—

MR. McDONALD. Do you have that letter with you?

MR. WALTERS. Yes, I do.

MR. McDONALD. Could we submit that for the record, please?

MR. WALTERS. You will have to give me a few minutes. I will do it a little later.

MR. McDONALD. What did the *Sells* case of 1985, how was it relevant to your removal from office?

MR. WALTERS. The *Sells* case specifically prohibited me from, the judges—from interfering with the fiscal procedures.

MR. McDONALD. You were involved in another case. What did that case hold basically; what was the holding of that case?

MR. WALTERS. That the judges that do not handle the fiscal matters, that we refrain from dealing with the fiscal affairs of the judicial branch. That was prohibited from interfering with anything that had anything to do with the fiscal matters of the courts.

MR. McDONALD. And who has such responsibility under the *Sells* case?

MR. WALTERS. The fiscal director. Under the *Sells* case, it is strictly pointed out that the fiscal director has an oversight of the fiscal matters of the courts of the Navajo Nation.

MR. McDONALD. I am sorry, the fiscal officer of what? Which fiscal officer?

MR. WALTERS. Judicial, what do you mean?

MR. McDONALD. Of which branch?

MR. WALTERS. Judicial branch. Judicial branch has its own fiscal officer.

MR. McDONALD. Who is his boss?

MR. WALTERS. Tom Tso, the chief justice. That is the way it was outlined in that *Sells* case, that the chief justice oversees the fiscal director, and the fiscal director then controls all the fiscal matters within each court,

and the fiscal director oversees the court clerks and the fiscal management, changes, training. So the court clerk really actually has two persons that it's responsible to: the fiscal director in fiscal matters and the judge also supervises the clerks, but in case management.

MR. McDONALD. That was an opinion of the supreme court or of the court of appeals as it was called at that time?

MR. WALTERS. Yes. The court of appeals.

MR. McDONALD. As I understand the way that court worked, the court of appeals which has been superseded by the supreme court; at that time the court of appeals was the highest court of the Navajo Nation; that is when Chief Justice McCabe was presiding. Who were the other two judges who sat by special assignment, being named by the chief justice to sit on that case; who were the other two judges who issued that opinion in the *Sells* case?

MR. WALTERS. That opinion was issued by Judge Bradley and also Judge Tom Tso and former Chief Justice McCabe, himself, also.

MR. McDONALD. Mr. Tso is now the Chief Justice of the Navajo Nation?

MR. WALTERS. Yes.

MR. McDONALD. At this time I would like to introduce for the record the *Sells* case.

CHAIRMAN PENDLETON. So ordered without objection.

MR. McDONALD. Judge Walters, what were the conditions under which you were served a subpoena for your hearing before the tribal council?

MR. WALTERS. Keep in mind there was the first hearing that I was called before the tribal council, and that is the time that I received a subpoena to appear before the tribal council at my removal hearing.

At that time I would receive a subpoena approximately midnight; I don't have the dates; I have the subpoena here, but I was served a subpoena at midnight. I had to be awakened by my daughter to get up, and the police were at the door, and the police handed me the subpoena to appear at the hearing.

MR. McDONALD. There was a knock on the door in the middle of the night?

MR. WALTERS. Yes.

MR. MILLER. When were you to appear before the council according to that subpoena?

MR. WALTERS. Excuse me a minute.

CHAIRMAN PENDLETON. Has any judge ever been subpoenaed in the daylight? I mean, all we have heard is midnight or some ungodly hour they knock on your door and say come on over and talk to us.

MR. WALTERS. I will submit that. I don't have the date on that.

MR. MILLER. Mr. Walters, what document would you like to submit for the record?

MR. WALTERS. The subpoena.

MR. MILLER. Mr. Chairman, at this point Judge Walters would like to submit for the record a copy of the subpoena as an exhibit.

CHAIRMAN PENDLETON. So ordered without objections.

MR. WALTERS. I have to locate it.

I received a notice on Wednesday night at midnight to appear for my hearing on Friday.

MR. McDONALD. Judge Walters, can you describe the circumstances of your removal hearing and how it affected your right to due process of law?

MR. WALTERS. The hearing that took place in June started at 10 o'clock.

MR. McDONALD. In the morning?

MR. WALTERS. In the morning, and it went on—it was on Thursday morning—it went on all day. There was a few short breaks.

MR. McDONALD. This is the prosecution that went all day?

MR. WALTERS. Yes.

COMMISSIONER DESTRO. Were you subpoenaed to appear on Thursday or on Friday?

MR. WALTERS. On Friday. The first subpoena that I got I received a subpoena at midnight. This was in May. I had asked the tribal council—I did appear that first hearing, but I asked for a continuance because I wasn't ready; I just received notice on Wednesday night; Friday I appeared before the council. My attorney couldn't come out. He came out from—he lives in Alabama and I couldn't get him out, so—

COMMISSIONER DESTRO. Only reason I ask the question is because you said you were subpoenaed to appear on Friday and now we are talking about a hearing that started at 10 o'clock on Thursday, and I just wanted to clarify.

MR. WALTERS. That was the first hearing I had to continue. Then the second hearing, the final hearing, that is when the hearing started on Thursday at 10 o'clock.

COMMISSIONER DESTRO. You were served with a subpoena at midnight on Wednesday which would have been 12 o'clock a.m. Thursday, right? Is that correct?

MR. WALTERS. No, on Friday. I did appear.

COMMISSIONER DESTRO. Let me understand the chronology here because I am a little baffled about it. You received a subpoena at midnight Wednesday night which would have been 12 a.m. Thursday morning?

MR. WALTERS. Right.

COMMISSIONER DESTRO. Then the hearing started at 10 o'clock that morning?

MR. WALTERS. No. I did appear on Friday.

COMMISSIONER DESTRO. You appeared on Friday?

MR. WALTERS. This was in May. I did appear, and I had the removal hearing continued.

COMMISSIONER DESTRO. I see.

MR. WALTERS. Into June.

MR. McDONALD. At that June hearing that began at 10 o'clock in the morning and the prosecution went on all day until when? What happened?

MR. WALTERS. It went on until, all day and all evening and that morning at 2:30 in the morning that is when we concluded the case.

MR. McDONALD. That is when what?

MR. WALTERS. That is when the case was concluded.

MR. McDONALD. What happened to your witnesses?

MR. WALTERS. Some of my witnesses left; some were sleeping out in the lobby, and we talked to some of the witnesses; they were so tired, we couldn't even put them on the stand.

MR. MILLER. When did the hearing actually start that day?

MR. WALTERS. Ten o'clock.

MR. MILLER. Concluded at 2:30 the next morning.

MR. WALTERS. Next morning. It went on all day, and the next morning at 2:30 in the morning that is when—

MR. MILLER. Was that the prosecution side?

MR. WALTERS. Prosecution side.

MR. McDONALD. So you never got to put any witnesses on the stand?

MR. WALTERS. No, I never got to put any witnesses on the stand. Otherwise, if we had, it probably went the next day another 12 hours.

MR. McDONALD. Thank you, Judge Walters.

COMMISSIONER ALLEN. Was there ever a motion for recess made?

MR. WALTERS. There was a request made from the tribal council, one of the tribal council members. But he was overruled and it just went on, and this was about 7 o'clock in the evening.

COMMISSIONER DESTRO. Did your counsel make a request that they recess the hearing until the next day, so that your witnesses could get some sleep and come back and testify?

MR. WALTERS. No, we didn't, but at the point that we thought there was going to be a recess, but that was defeated.

COMMISSIONER DESTRO. You asked for one and didn't get one or what?

MR. WALTERS. No, the other party asked for it, and I mean, the tribal council members themselves asked for a recess and that was defeated. We never asked for it, because we were relying on they would call a recess. We thought there was going to be a recess that evening, but they didn't.

COMMISSIONER DESTRO. What was the remainder of the chronology? When you say it concluded, what happened? Did you try to call your witnesses?

MR. WALTERS. All the witnesses were excused.

MR. McDONALD. They voted, did they not; they voted on your removal?

MR. WALTERS. No, not that night. They just recessed. The next morning at 10 o'clock they reconvened, and they went into executive session without me. I don't know what they talked about for 2, 3 hours.

MR. MILLER. Could you have appeared at the executive session?

MR. WALTERS. I think I could have. We were excluded from that executive session. I don't know what they talked about until later that afternoon, they went back into session and announced their decision on my removal. Well, they did act, voted on my removal.

CHAIRMAN PENDLETON. I am a little confused. You said you thought you could have gotten to the session, but you were excluded. Is it either/or, or what is it? Is it that you were excluded altogether?

MR. WALTERS. Before that, during the advisory committee hearing back in March, we were—I was excluded, and when they tell you they go in executive session, they exclude you, and they do whatever they have to do to discuss the matter.

MR. MILLER. I'd like to ask you a few questions about events earlier on that night. Did you have an opportunity to cross-examine the witnesses?

MR. WALTERS. Yes, we did.

MR. MILLER. You had your counsel with you?

MR. WALTERS. Yes.

MR. MILLER. You had advance written notice of that second hearing?

MR. WALTERS. Yes.

MR. MILLER. In time to prepare your case?

MR. WALTERS. Yes.

MR. MILLER. Why didn't you at 10 a.m. the next morning try to put on your defense right before they went into executive session?

MR. WALTERS. All our witnesses had left. There was no real control. The problem I have with my case was there was no procedure for removal. There was no procedure, and it seems to me like the people made it up as they went along. I think it is very different from the former chief justice. I think the next removal of a judge is going to be different also. There is no consistency and there were no rules.

They adopted rules, but that was just to cover me for that time, but it was very difficult, because there were no procedures. If we had procedures, we could argue the procedures and the process.

MR. MILLER. Just for the record, your witnesses were coming from Tuba City, right?

MR. WALTERS. Yes.

MR. MILLER. How far away?

MR. WALTERS. Average of 150 miles, average 3½ hours' drive. I imagine most of them left 6 o'clock in the morning to be at the hearing at 10 o'clock at Window Rock.

MR. McDONALD. They had to get up early?

MR. WALTERS. I imagine 4, 5 o'clock. They stayed up all day that night until 2:30.

MR. McDONALD. What are your recommendations with respect to enforcement of the individual rights promised by the Indian Civil Rights Act?

MR. WALTERS. I think the problem that we have is the fact that there is just really no enforcement. I think there ought to be some kind of enforcement to guarantee the rights of every individual person that comes within the Navajo Indian country.

Sure, as an Indian tribe we can say we have sovereignty, we are self-sufficient, but in reality we do not have enforcement.

MR. McDONALD. Do you have any recommendations?

MR. WALTERS. My recommendation is just probably an interim development of a constitution or an oversight by the Federal court to monitor the civil rights, since we do not have anything.

I don't have anyplace to go. As a judge I have dealt with—why am I so different as an individual Navajo that has been terminated within the—from the tribal government? Another person will have a grievance process. When you get to the top of the grievance process within the tribal government, then you go to the courts; then you have another process within the court system. In my case, I went straight to the top and bang, I'm gone.

MR. McDONALD. When you say Federal court supervision, what do you mean by that?

MR. WALTERS. Not exactly supervision, but monitoring, at least monitoring. I think the Bureau should have some responsibility also. Somebody is going to have to take responsibility because it seems to me the tribal government, the Navajo Tribe, does not have enforcement at all.

CHAIRMAN PENDLETON. Just one question. We have heard other witnesses in these proceedings testify about limited Federal review. Then I have heard talk about a constitution. Then we hear sovereign immunity. How would civil rights be enforced with a constitution on one hand and sovereign immunity on the other; how does it really work?

MR. WALTERS. That would have to be changed.

CHAIRMAN PENDLETON. What has to be changed?

MR. WALTERS. The sovereign immunity law is going to have to be changed. To me, what happened to me if there was a constitution, if there was a constitution and separation of powers, I think these things can be developed to provide enforcement for the civil rights. Now we don't have any enforcement.

CHAIRMAN PENDLETON. You would say, I think, like Mr. Iverson said yesterday, we have to be patient in hopes that over a period of time there may be some changes where a constitution may take the place of sovereign immunity?

MR. WALTERS. Probably, yes. Going to have to give that up.

CHAIRMAN PENDLETON. In order to have a constitution you have to give up sovereign immunity?

MR. WALTERS. Yes, it looks that way. Seems to me the history of different courts people have done, there has been arguments about it.

CHAIRMAN PENDLETON. Who is responsible right now for enforcing the Indian Civil Rights Act on the reservation? Or whose responsibility should it be? Either one of you can answer the question.

MR. DESCHINNY. I think the courts are responsible for providing procedures for the enforcement of the Civil Rights Act, Federal law, and the tribal council legislative body that makes the law is responsible for giving recognition how the court can proceed to recognize the Indian Civil Rights Act.

CHAIRMAN PENDLETON. Go right ahead.

MR. WALTERS. I think that the court already has a limited, well, the court has responsibility right now in criminal matters and in cases of habeas corpus that the Federal court can intervene; at least they monitor that section of it.

Outside of that, I think there ought to be a commission or group of—our problem with it, sir, there is no separation of powers.

CHAIRMAN PENDLETON. We understand that.

MR. WALTERS. People just sway one way or the other. I don't care who you set up within the system to check that, they are going to sway with the system.

CHAIRMAN PENDLETON. Let me just ask one other question. There are other Federal laws that operate on reservations—correct?—other Federal laws you have to comply with, the nation does, Major Crimes Act?

MR. WALTERS. Yes, Major Crimes.

CHAIRMAN PENDLETON. How come we have so much difficulty with this one, ICRA, probably compared to other Federal laws or am I just dreaming? Is it just noncompliance across the board or what are we talking about here in comparison to Federal law?

MR. WALTERS. I think our problem is that we tend to ignore, pretend that we do provide enforcement, but I think more and more pressure is being brought on—there needs to be enforcement.

I don't know, seems to me like the government, tribal government, seems to ignore, say, "Well, we don't have that particular problem," but there are people being injured.

MR. DESCHINNY. It is a strange concept to the Navajo or perhaps Indian government, this idea of civil liberties and so forth, and on the other hand, the idea of self-government, developing and strengthening tribes—

CHAIRMAN PENDLETON. How about *Martinez*? Do you have a problem with *Martinez* on the reservation?

MR. WALTERS. My interpretation of *Martinez*, sure, give all these powers to the Indian reservations; but the problem is, it's given to us and we are not enforcing the—we are not enforcing the civil rights; we are not enforcing that.

CHAIRMAN PENDLETON. But you are enforcing *Martinez*?

MR. WALTERS. It is given to us, yes, but the fact that I think that the decision is left open to where there would be a review by the Federal—

MR. MILLER. Judge Walters, you have had a fairly long tenure as a judge and you decided the famous case, famous *Sykes* case, and you have been on the bench for a while. Could you tell us about the ICRA cases that you have heard personally? Did you find that generally plaintiffs alleging an action under the ICRA were granted relief in your court?

MR. WALTERS. Yes, I think it's a very valuable—the court is going to have to be—I value the civil rights of every individual and I think that I have granted every opportunity or, I mean, every case that has come before me, that I have abided by or upheld the rights of every individual.

MR. MILLER. Did you vote for sovereign immunity on behalf of the tribe as a judge?

MR. WALTERS. I have never—yes, I have, but, you know, there are, it depends on different problems, cases.

MR. MILLER. ICRA cases that came before you, do you remember those and do you remember whether or not you held that the tribe was immune from suit because of sovereign immunity?

MR. WALTERS. I only recall one that was still pending when I left, when I was relieved of my duty, but I think that was involving two people that were fired from the job, and they were—

MR. MILLER. Just briefly, did you uphold the defense of sovereign immunity?

MR. WALTERS. Yes, I was going to uphold the decision. It was a big problem. When you are a judge out there, there seems to be right now, under this reform act, there is constant threats from the chief justice on the judges.

MR. MILLER. What do you mean by threats, written threats, verbal?

MR. WALTERS. Written threats—well, there has already been letters that these cases should be decided this way or that way on general terms. I have seen a judge get terminated because he made a decision against the order that was made by the chief justice.

MR. MILLER. Are you saying that there was a written instruction to you from the chief justice saying that on ICRA cases you have to uphold the defense—

MR. WALTERS. It doesn't have to be that; it can be anything else. But in the children's case, there was a written letter saying that the court should, the judges should uphold the Children's Code because of jurisdiction over the Indian children, Navajo children; even though they may be residing in

California, they have a continuing jurisdiction, and that was the general order of the chief justice.

MR. MILLER. Do you have copies of those written—

MR. WALTERS. I can get that.

MR. McDONALD. I was just going to ask which judge was terminated? Was that a temporary probationary judge?

MR. WALTERS. That was Tauney Bowman.

MR. McDONALD. Was that a juvenile court?

MR. WALTERS. Children's court. In fact, in his opinion, he even pointed out the fact that, "I will probably get terminated for deciding against the general order."

MR. McDONALD. That was a brave thing to do, and that is what transpired?

MR. WALTERS. Yes, that is what he says in his opinion that he made.

MR. McDONALD. Could you send us a copy of that?

MR. WALTERS. Yes.

MR. McDONALD. Thank you.

CHAIRMAN PENDLETON. Mr. Destro?

COMMISSIONER DESTRO. I would like to ask both of the witnesses to address this question, and it's a little different in its form from the other ones you have been asked, but I would like you for a moment to put yourselves in our position, and keep in mind that the tribal council resolution that we were talking about this morning talks about the sovereignty of the Navajo Nation and what we are dealing with here.

The complaints that the tribal council has essentially are the same kinds of sovereignty questions that you have been talking about in terms of sovereign immunity, so what I would like you to address for us is, as we go back and start to think about what to say to Congress and the President about sovereignty and how the sovereignty of the Indian nations is going to be affected by anything that they do in terms of changing the law or requiring enforcement of the ICRA, whether or not it is by Federal court review or not—it could be every bit as much effective if Congress said tribal courts must enforce the ICRA; Congress could just do it itself.

How would you suggest that we handle the sovereignty question given its sensitivity, its understandable sensitivity, throughout Indian country? The tribes do want to be independent, and they do want to maintain their sovereignty, but how would you suggest that we deal with the trade-off between the ICRA and sovereignty of the tribes?

MR. DESCHINNY. Members of the Commission, to that question or statement I would say that the Judicial Reform Act needs to be given an opportunity. I would like to see how the present tribal administration applies it and enforces it, and there is a little confusion in my mind of the present tribal government's position.

In the resolution that is before you, given out this morning, it appears to me a kind of a cover of what happened in the past, but it is, as you describe it, a sensitive thing which the tribal officials are stingy with sharing with other government—enforcement of Indian laws within their country—and I just see this Commission as a sounding board, and I don't think that you would recommend a Federal supervision of judicial review within the Indian country, and I don't think you would be in a position to or want to be in a position to take away whatever authority, whatever rights the Indian government has as a tribal government because it is a unique thing in the United States as long as we speak the language and participate in cultural matters and so forth.

That I think everyone, including myself, recognize that it should continue as long as it can. It is down the road and we are not there and perhaps we will never see when it ends, so I just see this as a review of history of what has happened so far as an enforcement of civil rights within an Indian country, on a Navajo Reservation, and perhaps other Indian reservations.

So I would think that you would say to whoever you need to report to that there has been basic change and there continues to be change, and I think the Judicial Reform Act is just another step and I think it is going to get better.

It is emancipation of the Navajo people, the conscience of the officials, legal conscience—I think it is developing, and that basically they now assert against the Federal Government, the BIA officials, the integrity of their own self-government and are able to speak up about what they can do. And I think this is good, and especially as I see it, a personal opinion on the whole thing, it is a process of the Indian people somewhere entering the American government because somewhere we are going to have to say we won't need the tribal government anymore, probably 20, 50, 100 years from now, but how is it best, how can gracefully, eloquently enter that American society because we are American citizens, State citizens, and so forth. So I wouldn't recommend that you abruptly bring down the hatchet and say, well, this is what happened, let's change this, and so forth.

Thank you.

CHAIRMAN PENDLETON. I don't want to bring down the hatchet, but I find your comments interesting in that Mr. Walters was removed under the same Judicial Reform Act; is that correct?

MR. DESCHINNY. Yes.

CHAIRMAN PENDLETON. How can you sit and tell us that this looks like a form of improvement? I don't understand that. Maybe I didn't hear you correctly. Did you say we should not look at that as a way of improvement, that there have been improvements, and we might recommend this when there is a man sitting right there removed under the same act.

MR. DESCHINNY. I know. I heard his testimony. What I am saying is, the written legislation that the tribal council enacted is good. Now, how the tribal officials enforce it is another matter. That is different.

CHAIRMAN PENDLETON. Okay.

MR. WALTERS. I would like to make a comment on that. As far as the Judicial Reform Act, just the title changed; I don't think there are any changes in it. It was also under the *Sells* decision and the *Gudac v. Marianito* case that the courts have appealed decisions and fully separated the separation of powers, but under the *Sells* decision that was rescinded and because of the *Gudac* case, that was because of the dispute over the personnel problem, judicial branch and the tribal council, the Navajo Tribe, that is how that restraining order came about. Now, that was rescinded under the *Sells* case and the reform act goes back under the tribal council.

CHAIRMAN PENDLETON. Mr. Allen.

COMMISSIONER ALLEN. Judge Walters, we have heard a lot about self-government and the term is applied to the tribe, to the nation. In your understanding, is it also applicable to the individuals? Is there a notion of self-government for the individual Navajo?

MR. WALTERS. I think that is true, yes. I think that there needs to be more attention focused on the individual rights of every person that is within the Indian country, and I think that there ought to be provided [more attention] for enforcement of the Indian Civil Rights Act. I think your responsibility is to see that and to make sure that the provision is made. Why are we being treated as an outsider within the United States?

COMMISSIONER ALLEN. Do you think the Federal emphasis on self-government has shown sufficient regard for self-government for the individuals as well as the tribe?

MR. WALTERS. Yes.

COMMISSIONER ALLEN. You think it has or has not?

MR. WALTERS. I didn't understand your question.

COMMISSIONER ALLEN. Do you think that the Federal Government's emphasis on tribal self-government has shown enough concern for individual self-government along the way?

MR. WALTERS. Probably not because I think our shortcoming is that we, the Indian tribes, we can talk about self-government, but I think we need to go further and ensure the civil rights of every person within that tribe.

COMMISSIONER ALLEN. Thank you. Mr. Deschinny, you are probably familiar with what has happened in Chicago in the last several years. There has been something of a struggle in that city's government and its elections. One side is in and one side is out. Classically, Chicago has been for us, I suppose, the end of the spoils system era. I wonder, do you think that much of what has been described to you this morning and yesterday, does it sound any different than Chicago to you?

MR. DESCHINNY. No, not really.

COMMISSIONER ALLEN. Well, that's true. What I would like to know then, if it is fair to characterize the government of the Navajo as a spoils system in which positions of trust and responsibility are at the complete disposition of the Chairman and the council? Is it possible at the same time to raise claims of rights relative to removals and such things which are perfectly natural under the spoils systems; what would you say?

MR. DESCHINNY. Would you ask that question again?

COMMISSIONER ALLEN. Let me change the question slightly. It is the same question.

A lot of what the two of you have described this morning seems to me concerned with due process of law, if I understand you correctly, and you are asking that, one, there be clarification of what there is, legal procedure, how to guarantee due process for individuals, and you are also suggesting that due process ought somehow to override certain forms of decisionmaking that have taken place in the past.

But, if the system of government is truly a spoils system of government, and I do not say that judgmentally, I am just asking for information now, if it is a spoils system, at which point should due process of law be permitted to undercut the full and natural operation of a spoils system?

MR. DESCHINNY. As a lawyer on the reservation within the system, I would say at any time because we have—I have screamed at certain decisions being made. There are administrative decisions that are also being made besides the judicial decision where I really—where I feel rights of people, like to grazing lands, are being violated, and it should be raised in the administrative decisionmaking process as well as other informal decisionmaking.

There is a total lack, in my opinion, of any appreciation for giving whoever needs to be dealt with, a person, notice that a decision is going to be made. A decision is already made, and that the form some decisionmakers take is somehow to cover and make the decision stick, and I have some administrative decisions, been in the form of grazing committee decisions, where my clients have never been informed of the decision over a period of 2 years.

I would say that it is totally lacking the concept of due process. There is no equal protection that the tribal government—justice department did say that has been remedied and so forth, but the decisions are still being made that way.

So I would say it has to be taught to the decisionmakers down to the administrative level besides the judicial system.

CHAIRMAN PENDLETON. In terms of the spoils system, I guess for the record and for others, to me it means you reward your friends and punish your enemies, and it means whoever is in power rewards the power and you punish the enemies. It seems like what we are sitting here now, in the

situation we are in, is that we have a reward and punishment system depending upon who is in power and that doesn't necessarily protect individual rights. But I must say to you, in many cases, my colleagues—there is notice of what is going to happen, as compared to where you think there might not be notice here, there is notice in Chicago and some other metropolitan areas, but it is going to go on, and it happens just that way.

COMMISSIONER ALLEN. I will apologize. I didn't mean to suggest anything about the city of Chicago beyond what is colloquially known.

Finally, I would like to make one comment just for the record, Mr. Chairman, since you read the resolution relative to the bicentennial of the American Bill of Rights. I want to point out this is not that anniversary, this is the anniversary of the drafting of the Constitution. The Bill of Rights was drafted in 1789 and ratified in 1791.

CHAIRMAN PENDLETON. In case you don't know, Mr. Allen lectures on this quite frequently. So when you put those kind of papers in front of him, one must be careful, cautious, and also deliberate and accurate.

MS. PRADO. Judge Walters, I had a question about the hearing again. You mentioned there were no rules and procedures. There were rules and procedures adopted at the time of hearing; is that correct?

MR. WALTERS. I am unclear. There was a rule that was set up for subpoenas, and this was right before, a few days before my hearing; in fact, they were even changing those and amending the rules the date of the hearing.

MS. PRADO. Does the Judicial Reform Act provide for rules in the case of a removal hearing?

MR. WALTERS. No.

MS. PRADO. Can you speak to that question at all?

MR. WALTERS. There is just no procedures for removal of judges.

MS. PRADO. The rules that were adopted at that point, you said, were specific to your hearing?

MR. WALTERS. Yes, I assume it was specifically to my hearing only.

MS. PRADO. Would you recommend something like that be included in the Judicial Reform Act?

MR. WALTERS. I think there needs to be some kind of rules set up specifically, and I think there ought to be fairness and that we do not have double standards, we treat everyone equally because, in my case, I presented evidence showing that there are people that have done worse, committed offenses that were never dealt with.

MS. PRADO. Thank you.

CHAIRMAN PENDLETON. Thank you very much, gentlemen. It has been an interesting morning. We will adjourn briefly and get our next panel on sovereign immunity.

Attorneys at law Mr. Moeller, Mr. Wilson, and Mr. Yazzie, if you are present, come forward.

[Recess.]

Sovereign Immunity

CHAIRMAN PENDLETON. Gentlemen, I would like you to do something that you are not accustomed to doing, which is to stand and raise your right hand and take the oath.

[F. Douglas Moeller and Robert J. Wilson were sworn.]

CHAIRMAN PENDLETON. We can begin the questioning with counsel.

TESTIMONY OF F. DOUGLAS MOELLER, ATTORNEY, FARMINGTON, NEW MEXICO

MR. HEILFERTY. Could you state your name and occupation please, for the record.

MR. MOELLER. My name is Doug Moeller. I am an attorney in Farmington, New Mexico, associated with the firm of Moeller & Burnham.

MR. HEILFERTY. The Navajo judicial system has been cited as one of the more sophisticated tribal court systems. I wonder if you could describe some positive developments you have seen in the last 10 years?

MR. MOELLER. In my 10 years of experience in dealing with the Navajo tribal court system, I have seen a trend, I think, to a more sophisticated, a more knowledgeable judiciary, in my opinion, as strong an independent judiciary as necessary for any type of democratic government to work; and we have seen, at least in the district courts with which I am familiar, much more accurate review from the court of appeals, now lately from the supreme court—the court of appeals used to be the supreme court and it was just called the court of appeals, now they changed the designation to supreme court. And I think that we are also seeing a more better prepared person being appointed to the judicial position. We are getting members of the bar association who are all tribal advocates who are also trained attorneys, and as a result some of the judges are now law school graduates, and I think that has helped considerably in upgrading the caliber of the judicial branch.

MR. HEILFERTY. You are a plaintiff's attorney in a civil rights case in which the tribal council has raised sovereign immunity as a defense. I wonder if you could describe the facts of the case. Describe how you are addressing the sovereign immunity defense.

MR. MOELLER. I will try to explain that case as briefly as possible because it's still a pending case. This is a case involving a young man who was detained for his own protection because of a problem of schizophrenia. He was a known schizophrenic. He was arrested by Navajo police officers as a result of a court order.

The court order recited that he was arrested for his own protection and for the protection of other persons in the community and, I think, entirely

properly under tribal law. At the time of his incarceration, this young man was unable to care for himself, unable to care for his family, and certainly was a present danger to himself.

He was put into jail, and while he was in jail, he was placed in the drunk tank; and unfortunately, he was alone in the drunk tank, and while he was there, he removed his—he maimed himself, removed his eyes from his face and permanently blinded himself.

I don't want to argue my case, but I think that is basically the facts.

MR. HEILFERTY. Now, the tribe has raised a sovereign immunity defense to the case.

MR. MOELLER. This instance that I have just recited took place in 1982, and we have been litigating the sovereign immunity question since 1982. We have it up on appeal to the court of appeals, and actually that—and we have also been in the Federal courts on two occasions.

MR. HEILFERTY. What was the result in the Federal court?

MR. MOELLER. On both occasions it was ruled that the *Martinez* case would apply and that we had not yet exhausted our tribal remedies.

The interesting thing, of course, is we are now several years after the incident, and we have still not had a trial on the merits. We are still arguing the legalities.

MR. HEILFERTY. There is an exception that you tried to get into the Federal court?

MR. MOELLER. There is an exception and at least one I thought that applied, and that is the *Dry Creek Lodge* exception to the *Martinez* case, which basically says that if you have done everything you can do in tribal court, you have exhausted your remedies and you can go to Federal court.

Unfortunately, that particular exception is kind of narrow, and it probably only applies, if it applies at all, in the Tenth Circuit. The last time we went to the Federal district court, the judge ruled we had not exhausted our tribal remedies.

MR. HEILFERTY. Could you describe the tribe's sovereign immunity defense and what that involves?

MR. MOELLER. Basically, that the sovereign immunity code that applied at that time has a three-pronged exception to sovereign immunity.

I don't want to be too particular, but basically, you can't sue a government. Some governments have elected through statutes or through a statutory process to create exceptions to that general rule, and the Navajo Tribe has elected in their Sovereign Immunity Act to give you three different approaches by which you can get into the sovereign immunity waiver.

The first one, of course, if they specifically authorize it; second one, if there is a Federal statute that authorizes it; and the third is if there is a liability policy of insurance that would apply. We are trying to go under all three of those, with more success under the liability insurance leg.

MR. HEILFERTY. What was the problem with the liability insurance issue?

MR. MOELLER. Unfortunately, although the tribe was insured, the insurance company that the tribe had during the period went bankrupt and, of course, this is the kind of thing that lawyers argue at length about.

The tribe took the position that because their insurance policy issuer was bankrupt, there was no issue—that the exception of the sovereign immunity rule did not apply.

MR. HEILFERTY. I see. You stated that the Navajo are making a good faith effort to open up sovereign immunity. I wonder if you could describe some of those developments that you can see.

MR. MOELLER. As a result of my contacts with the tribe, I have had access to some of the discussions, actually the minutes from the tribal council meetings where the Sovereign Immunity Act has been discussed and has been worked on, and I would like to quote if I could from the comments of Mr. Albert Hale, who at the time, I believe, was the attorney general for the tribe and probably during this period—I have to find a date—he was either still the president of the Navajo Nation Bar Association or the immediate past president. But he says, again reiterating what I said before: “We’re not actually denying anybody an opportunity to have a grievance or an injury that he might have received at the hands of your employees. . .”

He was addressing the council.

“at the hands of your employees, tribal employees, tribal officers to bring an action, which would have been the case before the Sovereign Immunity Act was enacted; we are actually helping the individual that is injured. We are not barring that individual from any action against the nation.”

I think that from my own experience that there has been in fact a good faith effort to broaden the scope of the rule to allow people to bring causes of action against the tribe that sound in the civil rights area and also sound in tort and also sound in contract.

I think that was the intent of the sovereign immunity rule and, again, I need to point out when we say “sovereign immunity,” we are talking about a general rule that you can’t sue the tribe and the Navajo tribal Sovereign Immunity Act has actually created exceptions to that general rule, much as the Federal Government has done and most of the States.

MR. HEILFERTY. Thank you. Do you believe that the Indian Civil Rights Act can be enforced on the Navajo Reservation, and is it also your belief that the ICRA provides judicial review for the actions of tribal governments?

MR. MOELLER. Unfortunately, it’s my belief that the ICRA does not yet provide as much review as it should, and as has been previously pointed

out by a witness, that is a simple remedy. All Congress has to do is say, "This is going to be applied by the tribes," and it hasn't happened yet.

What is happening is we are caught in kind of a whipsaw effect. The tribal judges do not know whether to apply the Indian Civil Rights Act. Luckily for most of the people that have cases in the civil rights area, we are bringing them in tort.

MR. MILLER. I am a little confused. Are you saying that the ICRA as it is presently enacted does not allow the mandate of the tribal courts to enforce the rights protected by the ICRA?

MR. MOELLER. Most of the cases that interpret the Indian Civil Rights Act at present limit the ability of the Federal judiciary to review the tribal judiciary to writs of habeas corpus.

We had a recent case in New Mexico, *Loucas v. Leekity*, in which Judge Bratton, who is the presiding judge in New Mexico, stated that limiting the Indian Civil Rights Act to the remedy of a writ of habeas corpus is basically saying the rest of it doesn't matter. I am paraphrasing what the judge said. He was much more scholarly than I am.

But he did say that in his opinion, and I think this is well reasoned, the Indian Civil Rights Act in order to be a viable, existing law must have a remedy beyond a writ of habeas corpus, and that would include—in my opinion, not Judge Bratton's—in my opinion, that would include a suit for money damages.

MR. MILLER. You are saying that, in your experience, the rest of the provisions of the ICRA are unenforceable in tribal court because of the ICRA as it is written right now?

MR. MOELLER. Yes. I think it would be a simple matter if Congress wanted to do it to make that change. As Mr. Deschinny pointed out, the tribe has a Bill of Rights, and the Bill of Rights that the tribe has—although the code is not really that much different from the Bill of Rights that is in the Constitution or in fact from the Indian Civil Rights Act, so there really hasn't been that much problem, at least in the cases with which I have been involved in, enforcing civil rights because there is a remedy that exists.

Sometimes we get caught up in these questions like the sovereign immunity and damnable mess with the insurance company that went broke, but that is a problem that is being worked out.

I grant it has taken several years, but I have confidence that ultimately we will have an answer. It may not be the answer that my client wants, but it will be an answer.

MR. MILLER. In your experience, though, the tribe's position is that the ICRA doesn't apply; it is the Navajo Bill of Rights?

MR. MOELLER. I wish that we could get a more standard viewpoint on that. It depends on which district judge you ask. And one of the problems that we have right now with the tribal judicial system is that it is very

poorly digested. By digesting, I mean that when a case is decided, it's not always easy to find that case. It is not always easy to be familiar with it, and I am hoping for the day when the tribal case law is as digested as State law is, and maybe West Publishing could do that or somebody else that does digesting will come in and do that. Right now there is no system for that.

MR. MILLER. Just briefly, you mentioned your Federal court action and the remand for the dismissal on the grounds of tribal remedies were not exhausted. What other tribal remedies needed to be exhausted?

MR. MOELLER. Well, I was in a no lose situation. My interpretation of the *Dry Creek Lodge* case was that if you waited too long, your tribal remedies have been exhausted.

From a plaintiff's point of view, as anybody that has ever tried a lawsuit knows, the older the case gets, the harder it is to win it. And so a case that is now several years old is a very difficult problem from a trial lawyer's point of view. And I made that argument before Judge Campos, that delayed remedy is as bad as no remedy at all, and he disagreed with me, so I lost.

MR. MILLER. You also mentioned the three prongs of the exception to the Sovereign Immunity Act. What is the tribe's position on the other two prongs?

MR. MOELLER. The first one, of course, is that there is Federal law that specifically applies, and—

MR. MILLER. ICRA doesn't apply?

MR. MOELLER. They took that position, and I don't believe that that issue has ever been reached.

We are waiting to—hopefully we are going to get in on that third leg and we won't have to address that issue—perhaps it would be better for the entire system if the issue we were going on. I am primarily interested in getting my client's case to court.

MR. MILLER. The other prong, if you could describe it briefly?

MR. MOELLER. I mentioned the Federal prong. While we are on that particular question, there is a Federal statute that gives the Secretary of the Interior the right to enter into contracts and the right to require liability insurance. My reading of the tribal Sovereign Immunity Act would indicate that that was, they had that in mind when they originally passed the act, and in fact that statute specifically refers to police officers.

It would be my position that that law requires the tribe to maintain liability insurance, which in turn would require them to waive immunity in any action in which it is alleged that civil rights have been violated.

MR. MILLER. Such as your case?

MR. MOELLER. A good example.

COMMISSIONER ALLEN. Whether Mr. Gould—I guess he was a diagnosed schizophrenic?

MR. MOELLER. Yes, sir, he was. There was no question about what his mental condition was. In fact, it's been diagnosed by several different physicians.

COMMISSIONER ALLEN. But it was diagnosed at the time of his incarceration?

MR. MOELLER. Yes, sir.

MR. MILLER. Just briefly, one last question, Mr. Moeller. Usually, in the State situation when insurance is not provided, there is a fallback to the State. Is that the case on the reservation?

MR. MOELLER. I would say the case is more complicated than that because, in this particular instance, the tribe or the nation was, they had a \$500,000 deductible, so the question is, if your insurance company goes broke and you have got a \$500,000 deductible, were you intending to be self-insured in any event?

CHAIRMAN PENDLETON. That is pretty cheap these days.

MR. MOELLER. I don't know.

CHAIRMAN PENDLETON. I know. The point is whether to fund the deductible or not.

TESTIMONY OF ROBERT J. WILSON, ATTORNEY, GALLUP, NEW MEXICO

MR. MILLER. Mr. Wilson, if you could state for the record your name, occupation, and address.

MR. WILSON. My name is Robert J. Wilson. My address is 209 East Hill in Gallup, New Mexico.

I am a private attorney. At this time I practice in Arizona and New Mexico in both State and Federal courts and also have been a member of the Navajo tribal bar association since 1978 and have practiced in tribal court both as a tribal attorney and as a private attorney representing private clients.

MR. McDONALD. Mr. Wilson, what is the current status of the Indian Civil Rights Act in the Navajo tribal courts?

MR. WILSON. Well, the status right now is the Indian Civil Rights Act is not being enforced at all in the Navajo tribal courts to my knowledge.

It is possible some districts haven't thrown cases out on sovereign immunity that I am not aware of, but I have been involved in a number of cases and have knowledge of other cases where, at least since 1983, the consistent line of the Navajo tribal government through its attorneys has been that the Indian Civil Rights Act does not fall within the exception to the Navajo Sovereign Immunity Act, which says you can be sued if there is an express Federal law allowing it, an express Federal law or regulation.

The interpretation of that by the Navajo courts has been that that is not an express Federal law because it is not expressly enough waiving the sovereign immunity of the tribe for these types of suits.

MR. McDONALD. Is the *Jones* case a good example of that?

MR. WILSON. Yes, I think the *Jones* case which is *Yellow Horse Jones v. Navajo Nation* and a number of named defendants, was filed back in 1984, and Judge Tom Tso was the district court judge at the time and wrote what I would say is the first and perhaps only well-thought-out legal opinion on these precise issues, which is dated September 21, 1984.

As to the Federal question issue, that decision—by the way I should say before I read this: this is still pending on appeal, and other cases that have been dismissed under the alleged jurisdiction of Indian Civil Rights Act jurisdiction are also on appeal.

I don't think there has been a clear statement from the Navajo Supreme Court which is correct and, yet, it has been several years without getting a statement on these appeals.

MR. MILLER. At this point I am going to take the opportunity to allow any Navajo judges that may eventually hear this appeal to excuse themselves because of a conflict of interest. Thank you.

MR. WILSON. Let me very quickly—the court—Judge Tso's opinion, by the way, has been followed by most of the other judges, not always in a written opinion of this nature, but in an opinion—for instance, I just have an example.

MR. McDONALD. Would you say now because he is the chief justice this opinion has special status?

MR. WILSON. I think special status in the community of attorneys and advocates who work in Navajo tribal courts. This is a very well-known opinion and is what is relied on consistently by the Navajo attorneys in addition to one or two other cases.

There is a *Tome* case they constantly refer to now because it is more current, 1985, also dismissing on the basis of no clear waiver by the Indian Civil Rights Act.

MR. McDONALD. This is one in which you were involved as attorney?

MR. WILSON. That other case I have no knowledge. This one I was the attorney after this order was entered.

What was left of the case after this dismissal was claims against individual defendants for acting outside of the scope of their authority, and that later was dismissed on other grounds which I don't think we need to get into unless you would like to.

What I would like to point out, for instance, I have a case which is *TBI General Contractors v.*—

MR. McDONALD. Before that, would you like to read from the *Jones* case?

MR. WILSON. Yes, I would. I think the quotes are very important in here that the—it also deals with the Navajo Bill of Rights issue and the insurance coverage issue to some extent.

Specifically it says: "The 1968 Indian Civil Rights Act is a section of the United States Code prohibiting Indian tribes exercising self-government from certain activities towards its citizens. It is not an explicit authorization allowing suit against the Navajo Nation. The exception is the provision regarding habeas corpus, but the instant case is not a habeas corpus action." They also previously had discussed in here that it required an explicit authorization under this interpretation of the Navajo Nation Sovereign Immunity Act and Federal statute in order to have suit brought in tribal court, so the interpretation is that the Indian Civil Rights Act is not a jurisdictional basis for any claim whatsoever in Navajo tribal court, and I might—

MR. McDONALD. Thank you. I would like to ask the Chairman to accept for the record a copy of the *Jones* case.

CHAIRMAN PENDLETON. So ordered without objection.

MR. McDONALD. Excuse me.

MR. WILSON. Just to finish my other thought. This has kind of been followed as the point I was making. Systematically in my experience, that's the normal way that it's done. This is an order from another case where it simply says that: "As a matter of law, the allegations contained in the complaint do not fall within any exceptions to the Navajo Nation's Sovereign Immunity Act."

This case also clearly alleged jurisdiction under the Indian Civil Rights Act. Number one, the Navajo Bill of Rights; number two, exception to the Sovereign Immunity Act; number three, as well as I have added in my case, the argument that Navajo tradition and custom recognizes individual rights and due process of law and that the courts also have jurisdiction under tradition and custom. This has also, is a—was dealt with in one of these opinions by the tribal courts saying that tradition and custom is not an explicit waiver of sovereign immunity.

MR. McDONALD. Thank you very much. Do the waivers of sovereign immunity contained in the Navajo Sovereign Immunity Act cover contract cases?

MR. WILSON. No, they do not, not unless you can fashion a complaint, which we have tried to do so in some cases, that alleges the provision of services and materials to the tune in some cases of several hundred thousand dollars or even more is a wrongful taking of private property by the tribal government when they don't pay what the contract said to pay for it.

MR. McDONALD. That would be the Indian Civil Rights Act provision providing for just compensation when private property is taken for public use?

MR. WILSON. Correct. That would be the closest. The Navajo Bill of Rights also has a catch-all provision that says: no other rights are excluded only because we have listed several here.

So, you can say that there ought to be a cause of action or a civil right to have your contract dispute decided in some forum.

MR. McDONALD. But that has not been accepted?

MR. WILSON. That theory has not been accepted at all. The attorneys who advise business clients, such as myself, have always advised them when they have asked us: first, ask for a waiver of sovereign immunity, but the tribe will never grant that, so your choice is do business anyway or don't do business because they won't give you sovereign immunity so you can resolve a dispute if there is one.

MR. McDONALD. You mentioned the *TBI* case; is that relevant to this issue?

MR. WILSON. There were two cases brought on behalf of a plaintiff, TBI General Contractors, against the Navajo Tribe and various individuals in connection with the construction of the Tuba City shopping center and quite large sums of unpaid monies and this goes back to 1984 also.

MR. McDONALD. This is a contract with the tribal government?

MR. WILSON. This was a contract with the tribal government for—and this was the contractor, and the tribe was the owner in connection with this contract. And when you get in a contract dispute, you need some either administrative or other contract dispute resolution forum.

MR. McDONALD. That case was dismissed on the basis of sovereign immunity?

MR. WILSON. Yes, that case was dismissed on the basis of sovereign immunity; in fact, that was the order I just read, that very brief—"As a matter of law, the complaint does not fall within any exception."

MR. McDONALD. Would you submit that one for the record, please?

MR. WILSON. Yes, I will. I am sure there are extra copies so you can have this one.

MR. McDONALD. Thank you very much.

MR. WILSON. By the way, this brings up just a short other point which is that you don't always get the same judge on these cases. Judge Harry Brown signed this particular order. And the judges may rotate or go on assignment even for a day to another court if a judge is ill or on vacation or whatever, and may decide a very important issue on that day even though he has not been the judge of record prior to that time.

CHAIRMAN PENDLETON. Gentlemen, I just want to ask a question. I might be reaching for something here. I might be reaching way beyond what we have been talking about, but I want to just ask something. As one who is interested in business development, and certainly as business development begins to provide people with employment, and certainly when one gets employed, one can anticipate more than one can when one is not employed and one tends to take a broad interest in the activities of his or her community, and it seems to me that people need to have equal access to employment.

I think we heard part of this in Rapid City. Why would I as a banker want to invest any money on a reservation when I might not be able to get it out if the deal goes sour?

I mean, it just seems that I would be pouring money down the wrong hole, and it would just go and go and go. When people assume that the administrators of the affairs are doing things in their best interest and they can have access to the fruits of those labors, that is, engaging in contracts to do various kinds of business, nothing specific, but just in general, then how do you ever exercise independence if you don't begin to share in some of these business ventures that we all do as Americans?

MR. MOELLER. I would like to answer that if I could.

CHAIRMAN PENDLETON. I thought you just might want to do that.

MR. MOELLER. I represent several car dealerships. The Navajo code has a provision which is unique. I don't know why—that's funny.

CHAIRMAN PENDLETON. I don't know either.

MR. MOELLER. The Navajo code, which is unique, Title 7, section 607, I think, which provides that you cannot repossess the personal property of Navajo Indians from land subject to the jurisdiction of the Navajo Tribe absent one of two things, either a written consent from the person who is on the contract at the time repossession is sought or a court order.

CHAIRMAN PENDLETON. Which court?

MR. MOELLER. Navajo tribal court order. Most of the car dealers are aware of this provision, of course; they are now and have taken that on as a cost of doing business, and I want to point out that the Navajo people—and doing business with the Navajo people is an extremely lucrative thing for people who live on or near the reservation, and people that do business with Navajos are aware of this particular provision and they take it into account.

They raise the prices, and although the tribe, I am sure, is trying to be helpful, paternalistic, if you will, for their people, in many instances they are actually costing people more than they would be paying in another instance.

And, well, can you imagine how many people actually give a written consent to the repossession of their automobile when they know they are behind and know it can't be taken unless you sign their name to something?

CHAIRMAN PENDLETON. They are going to be behind one end of the deal.

MR. McDONALD. Don't a lot of States have similar laws that you have to have a court judgment before you can repossess a car?

MR. MOELLER. There are States that have that type of law, but there are many more that have self-help statutes. Jurisdictions which are usually governed by Uniform Commercial Code let you take if they are behind, as long as you do not hit them or anything.

MR. McDONALD. I guess being from Louisiana, that is the only State without the Uniform Commercial Code, and I am very familiar with the fact that in that State you must have a court judgment also.

MR. MOELLER. I anticipate there will be a civil rights hearing in Louisiana before long—I am just kidding.

MR. McDONALD. Good idea. Thank you.

CHAIRMAN PENDLETON. We can discuss that pretty soon, but we can't discuss that here, but I will tell you about it.

MR. MILLER. If I may, I have one question to either Mr. Wilson or Mr. Moeller. That question is, do you know of any tort or contract actions against the tribe that have been successful?

MR. WILSON. I am not aware of any through court decision. Let me limit that to contract. When we say tort, I think we have to be more specific. A tort is negligence of a tribal employee driving a vehicle over somebody or their cow. That is covered by the insurance coverage, and the tribe, as long as the action isn't too big a claim or brought by the wrong person, will settle those cases before it has to go to trial in many instances.

MR. MILLER. Could you explain that a little bit?

MR. WILSON. Let me say, I think when the claims get bigger, and part of the concern of the Navajo Nation with their sovereign immunity is a floodgate of monetary losses, and when the claims get bigger monetarily, you see more sovereign immunity dismissals. When the claims are brought by persons who, if we follow the spoils system analysis, people who are on the outside of that particular administration aren't going to be as successful in court as someone else.

Why is that? I think it is just perceptions of the judges and more general perceptions than specific conspiracy or those type of things. I am not suggesting that.

MR. MILLER. The more you are hurt, the less likely it is to get recovery?

MR. WILSON. I think there is a definite trend that I have seen of that nature. I will say, however, if it's an insurance claim, clearly covered by insurance and the insurance company says it's covered, then you may get into court. Those cases have gone through court and get decided one way or the other.

MR. MILLER. You are not aware of any contract cases against the tribe that have been decided in favor of the plaintiff?

MR. WILSON. No. I am involved in three major contract cases, and I know of a number of others, none of which have ever gone to trial or been decided either way.

MR. MILLER. Mr. Moeller.

MR. MOELLER. I am going to have to defer to Mr. Wilson's greater expertise in that.

MR. MILLER. On the tort action, most of those cases against the tribe are decided in favor of the tribe; is that right?

MR. WILSON. No, I am not saying that. Again, tort is a very confusing legal word for a lot of folks. If we talk straight negligence torts or these types of things, then those do have a pretty good rate of being taken care of and even with the \$500,000 deductible on the previous and current insurance, the tribe will pay that out of their own funds if there is a settlement or a court order. But other types of torts, depending on what you call your case or how you fashion your theory, if it is not clearly under the insurance, they will just throw it out.

One last point that I would like to make about insurance—in fact I have it in this order on the *TBI* case.

MR. MILLER. Is that part of the record?

MR. WILSON. Which is part of the record we already submitted, is that I have had the experience in several cases where the existence of insurance that is adequate and the exception to the Sovereign Immunity Act is pled in the complaint. The answer to the complaint pleads that there is no insurance, and based on those pleadings, the judge will say that you have failed to prove the insurance exists, and the tribe has conclusively proved it doesn't, and so you are dismissed because it is not an exception of the Sovereign Immunity Act. That is in paragraph three of this order and some other orders that I have also.

MR. McDONALD. Is there anything else you want to say about insurance issues under the Sovereign Immunity Act?

MR. WILSON. I think that the other thing that has been raised as a possible theory to get into court on these is, if the insurance company tells the tribe that it denies coverage, it has been suggested by tribal attorneys that we should bring declaratory actions against the insurance company to have the judge say that the coverage does apply.

I am not sure that would work. I thought we ought to mention that, since we are looking at possible solutions here.

MR. McDONALD. Thank you. Are you familiar with any cases in which a manifest injustice has resulted from the use of a sovereign immunity defense by the Navajo tribal government?

MR. WILSON. Yes, Mr. McDonald, I am aware of several. There are several employee cases which I don't think are as horrible because of the status that they have been in.

MR. McDONALD. You mentioned the Jones case.

MR. WILSON. The two cases I would think of that are kind of illustrative, they were companion cases involving folks. There was a Jane Yellow Horse Jones and Dennis Jones, husband and wife, who had a trading post at Fort Defiance and also were operating a program under contract with the Navajo Tribe for purchase and then sale of arts and crafts merchandise in a rather large volume, over a million dollars worth.

The tribe, without going into all the details, the Navajo Tribe under the Zah administration came into the trading post on the basis of seizing stolen

tribal records, removed by former Chairman MacDonald, and this took place over a period of 4 p.m. until 2 a.m.; and as a result of this police activity and removal of boxes of records, the trading post was also seized and closed down for 3 weeks to a month, depending on whose version you care to believe.

The vault that contained the arts and crafts merchandise was sealed up with evidence tape and armed police guards posted on the vault for unclear reasons at the time, and it is still not clear what the proper reasons were. This resulted in both the loss of the business to these folks and also the loss of their contract ultimately, and also they never were paid on that contract for any of the services they had already provided. They tried to sue the tribe and were dismissed on the basis of sovereign immunity, which is Judge Tso's order that we have put on the record. The tribe then sued them, and that suit was already pending at this time in a different suit, given a different number, for a number of theories, including the simplest was breach of contract.

MR. McDONALD. Wasn't there a burglary?

MR. WILSON. There was burglary of the trading post while the vault was still sealed with evidence tape, resulting in over a quarter-million dollars loss of inventory, and the tribe then sued the operators of the program, Yellow Horse Jones, for breach of contract and then also for conspiracy to join in with the known burglars to burglarize their own place. Also for, basically, forgery and fraud in connection with handling of the checking account on the purchase of these arts and crafts, and yet called it a civil case and put these folks through a horrible 2½ week-long trial with just the plaintiff side of the case, which was in the front page of the newspaper every day.

MR. McDONALD. What was the final disposition of that case?

MR. WILSON. The final disposition was, basically, the court didn't allow us to go forward with our defense at the time in spite of subpoenaing 25 to 30 witnesses.

MR. McDONALD. What was the bottom line?

MR. WILSON. The bottom line was, the court made a decision in December of 1986 after the election in November of 1986, which made some findings of liability against the defendants, but denied the liability of the larger plaintiffs.

MR. McDONALD. What were they found liable for?

MR. WILSON. One thing comes to mind particularly of note. They were found to have negligently handled the checking account, although there was no connection between any of the folks or defendants in any check alleged to be funny.

MR. McDONALD. Is that a basis of security or lack of security for the burglary?

MR. WILSON. The lack of security and lack of insurance were issues in the contracted claim also.

The court did rule, I feel correctly, and favorably, on the issue that when the tribe seized the trading post, the contract was terminated, and that had been an issue in the case. So there was no liability afterwards for the loss of that jewelry, but the court still found liability on several other grounds, including basically just negligence, inadequate security, and inventory in connection with alleged lost items before the burglary. Then they picked a number out of basically thin air, in my opinion, that is on appeal, and said, "This is what you negligently lost," but it wasn't the burglary loss.

MR. McDONALD. They had no recourse because of the sovereign immunity defense?

MR. WILSON. They had no recourse.

MR. McDONALD. Their case, against the tribal government, for disruption of their business?

MR. WILSON. That is correct. Let me say it this way. We brought a counterclaim in that suit, since the other case had been dismissed raising most of those same issues, their claims. The court orally ruled, but in some other cases it has ruled in writing, that a counterclaim is not appropriate.

It also must comply with the Sovereign Immunity Act even when the tribe—this was the first time the tribe sued a private person who was a Navajo that I am aware of. They sued these folks.

MR. McDONALD. They did not rely upon collateral estoppel?

MR. WILSON. They did try to use that, etc. They did try to use that, but not much. They relied on sovereign immunity, and the judge's ruling was not in writing but in chambers, that we would be able to use any counterclaim as an affirmative defense, but we would not be able to bring it as a true counterclaim or obtain any relief.

MR. McDONALD. Thank you. Is the sovereign immunity defense used to defeat the personnel rights of tribal employees who have been terminated, and can you please cite a specific case as an example?

MR. WILSON. Yes, I think it has been raised. It is raised whenever an employee, whether he is afforded certain administrative procedures and rights under the tribal personnel policies or not, if an employee tries to go to court and sue the Navajo Nation officially or its officials in connection with a termination or any personnel action, the sovereign immunity defense is always raised as it is in these other cases.

MR. McDONALD. Can you cite us a case that you have handled?

MR. WILSON. There was a case that started kind of this trend, and we had Mr. Deschinsky here earlier. He was terminated by former Chairman Zah within a week of his inauguration and was told that he was terminated as being an employee at the pleasure of the Chairman, although all indicators and every employment record that was on file showed that he

was a regular employee, and the tribe does have in its laws a tribal personnel policies and procedures law, which applies to all regular employees. There are specific limited political appointees, division heads and a few others, who are in a resolution as being appointed by the Chairman.

MR. McDONALD. Is that in the tribal code?

MR. WILSON. Yes.

MR. McDONALD. Do you know the citation to that?

MR. WILSON. The citation to that resolution I have in my briefcase. I can get that for you right now if you want to take a second.

MR. McDONALD. But basically what that does, it lists the political appointments?

MR. WILSON. It does, and Mr. Deschinny's job was not one of those listed political appointees that served at the pleasure of the Chairman. He was told he had no appeal rights although initially the personnel department said, did say, "You are a regular employee; you have a right to a grievance hearing."

At that point the Chairman's office intervened with the personnel department and told them to write a new letter that he didn't have any rights to a hearing, which they did. We went to court, and this was in early 1983 or spring of 1983.

That was the first time the Navajo Tribe raised the sovereign immunity defense that we alleged Indian Civil Rights Act jurisdiction as well as tribal Bill of Rights and tribal personnel policies, and it was argued in the responding brief that sovereign immunity barred that suit.

MR. McDONALD. That was in court?

MR. WILSON. In the Window Rock District Court.

MR. McDONALD. Before that, can you tell me, had you gotten into the grievance procedures?

MR. WILSON. Yes, in fact, I was the only attorney when I worked for the tribe prior to that who handled grievance matters and advised tribal managers and supervisors on what the law was, and the grievance procedure is rather simple and not fleshed out as well as it should be and still hasn't been amended to be fleshed out even though a number of drafts were proposed. Basically—

MR. McDONALD. That is the appendix to Title 2, Personnel Policies and Procedures?

MR. WILSON. Yes. It is called Personnel Policies Memorandum No. 2, appendix 2.

MR. McDONALD. Mr. Chairman, I would like to submit a copy of that for the record at this time.

CHAIRMAN PENDLETON. So ordered without objection.

MR. WILSON. I know we are short of time.

MR. McDONALD. I had one more question about the appeal procedures of an aggrieved tribal employee after an adverse decision of the grievance committee.

MR. WILSON. Yes. Let me use an example to highlight that.

I had a client who was a 20-year employee of the tribe named Raymond Barton who was terminated. First he was asked to resign for eight specified reasons. He was terminated 2 weeks later for basically six new reasons that weren't stated in the first memo. We went to a grievance hearing and obtained a unanimous decision reinstating Mr. Barton.

This hearing, by the way, the time frames are supposed to be 5 days from the personnel action, and the hearing was 3 months after he was terminated.

Then the Navajo Tribe took an appeal, and the appeal procedure is that one member of the tribal advisory committee to the tribal council is appointed by the Chairman to hear the appeal and decide the appeal from either side appealing from a grievance committee decision. And so it is a hand-picked single individual, picked by the Chairman, which raises some concerns of conflict of interest and fairness and due process.

In Mr. Barton's case, for instance, that hearing was supposed to be, by the tribal personnel policies, 7 days from the grievance committee hearing, but it was several months later. And even though these issues were raised at the hearing, the decisions of the appeal authority were, "Those time frames are just guidelines and not binding on us." And I think the language in the law is very clear that it says do it in this time frame.

MR. McDONALD. And if these procedures are not followed, then you are barred from tribal court by the sovereign immunity doctrine?

MR. WILSON. Then you would be barred. The only thing I can recall prior to the 1983 position—change of the tribal government, that people did go to tribal court and allege violations of due process in these personnel proceedings, and the court several times in 1980 and 1981 remanded the matters back to the tribal grievance committee with instructions to comply with the procedures and provide due process.

MR. McDONALD. That is not the case anymore?

MR. WILSON. That doesn't happen anymore.

MR. McDONALD. Thank you very much. That's all I have, Mr. Chairman.

CHAIRMAN PENDLETON. Back to my matter about the contracting and economic development and the like. Is it right if I presume that the 638 contracts are in a sense a Federal payment for the tribe. It is for all the members of the tribe?

MR. WILSON. I am not sure I understand your question.

CHAIRMAN PENDLETON. There is a Federal payment that comes as part of the Navajo budget or any tribal budget that comes from the Federal Government, and I would presume that its beneficiaries are all the

members of the tribe. How do you spend those monies that you are eligible for a part of the various programs?

MR. WILSON. It would depend on the type of program. Some 638 grants and contracts are for tribal government development or, you know, general purposes, and some are service programs like social services.

CHAIRMAN PENDLETON. What would be a development contract?

MR. WILSON. There might be a grant or a contract, for instance, to pay some people with expertise to revise the court procedures or some aspect of the tribal government itself.

CHAIRMAN PENDLETON. Would it pay for things like the recent economic development conference?

MR. WILSON. If it was properly submitted in an application to an appropriate agency that had that kind of scope in one of their available grants, and 638 does sometimes have that kind of scope in it.

CHAIRMAN PENDLETON. Otherwise, it would be just general tribal funds that would be going to do that?

MR. WILSON. Otherwise, it would be general tribal funds, correct.

CHAIRMAN PENDLETON. Was this contracting matter you and Mr. Moeller have been discussing, was that ever brought up in the context of this economic development conference we have been hearing about now? Is there ever a part to talk about how we can improve our relations with this community?

MR. WILSON. I would say, Mr. Chairman, that I have heard two influential Senators commented on that point, who were in attendance. Their comment is consistent with my feelings, which is that the Navajo Nation must gain a reputation in the larger business community of both respect for contracts and the provision of an appropriate forum for contract dispute resolution before anybody is going to come in and invest big money, and I think that would be my quick answer to that.

CHAIRMAN PENDLETON. I think that is the answer I was looking for.

COMMISSIONER DESTRO. I just have a couple of questions. Basically, what I have been hearing, if I am correct, is that you have been trying to get jurisdiction over the tribe through assertion of basically normal tort claims and using the ICRA as a possible basis for getting in, right? Is that basically it?

MR. MOELLER. I think that is a safe statement. Anytime you sue somebody, you bring as many different causes of actions as you can think of, hoping one of them will stand up. That is true in any court.

COMMISSIONER DESTRO. And would you agree with me that the kinds of cases that you are bringing are essentially different than the kinds of cases where somebody, for example, is denied an attorney or denied a hearing, something that could be remedied by purely injunctive rather than—or declaratory rather than monetary relief?

MR. MOELLER. That is exactly right. I could have gotten a writ of habeas corpus to get my client out of jail, but once he hurt himself, they were eager to get rid of him.

COMMISSIONER DESTRO. In other words, the strategy that you are using really isn't a whole lot different than the kind of strategy attorneys have used in Federal courts to get around State immunity laws which say, for example, if you were to sue the warden of the county surrounding Gallup for an injury which happened in the jail, you could bring it either under State tort claims procedures or you might want to bring in Federal court as a denial of civil rights because it was in the custody of the warden, right?

MR. MOELLER. I think it needs to be emphasized, and I want to make this point, I feel very positive about what goes on in the Navajo tribal judicial system, and the fact that sovereign immunity is raised doesn't put me off. I think any good defense lawyer would raise that, and it doesn't matter the forum that he is in. I think it says a lot for the system that we have that we are even able to go to court and discuss these issues. Sometimes we win, sometimes we lose, but the mere fact that we have a hearing pleases me.

COMMISSIONER DESTRO. The only reason I raise these questions is not so much to raise questions about the system, because my tendency is to feel during this testimony that the sovereign immunity claimed by the tribe is not a whole lot different than the sovereign immunity against tort claims that is claimed by many States. I live in Virginia and counties are immune from suit. The State is not immune, but counties are, and if you want to raise a tort claim, manifest injustices are done all the time in the name of sovereign immunity, but there is a sovereign reason why the States do it, and it has never been explicable other than the State wants to preserve its treasury and do what it wants to do.

The same kind of immunity applied to charities for many years. You couldn't sue them either.

And the concern I have is that the tribe—and somehow when you are dealing with contract and tort and economic development, whereas you do have rights that are at stake, it seems to me that we might be talking about that kind of issue and whether or not it is good for economic development in a noncivil rights context, that is, more of an economic question; whereas the question of a gentleman who has to have it explained to him that he doesn't have to plead guilty is really much more—really much more the traditional civil rights claim that we are used to hearing about which would fall more into the jurisdiction of the Commission.

COMMISSIONER ALLEN. Let me just interrupt you for something, to clarify something. Do you mean to say in the State of Virginia, for example, a county is not subject to mandamus action?

COMMISSIONER DESTRO. It is subject to injunctive or declaratory relief. A mandamus action is declaratory, but you cannot sue a county for damages without going through a very specified procedure.

COMMISSIONER ALLEN. I understood that, but is not a great part of what has been described to us rather a declaratory nature—for example, these procedures that were described dealing with personnel, if you have written procedures in the law, then you also have access to mandamus proceedings to enforce them, but here we have sovereign immunity claims which prevent them—isn't that part of which is being said?

COMMISSIONER DESTRO. Maybe we ought to address that to the witness. If it is there, do you agree with the distinction I am trying to parse out here?

MR. WILSON. I understand the distinction that you are making and I think, though, that you are overstating the typical legal use of any possible jurisdictional basis in tort or contract claims, and I think I should get back to, for instance, this Yellow Horse Jones case. We are talking about police misconduct and conspiracy to ruin these folks and some very basic civil rights issues, people coming into their home and holding them at gunpoint, asking them to leave or be roughed up.

And these are basic civil rights issues, and the decision is real clear and black and white. It says, "The Indian Civil Rights Act does not give us jurisdiction over these claims," and it even says in that decision that "these people have, appear to have very good claims against the tribe, but my hands are tied as the judge because I do not have an explicit waiver under the Indian Civil Rights Act or the *Santa Clara v. Martinez* decision to allow suit in this court under those theories."

And also that same decision says, and it is being followed in the other cases, the Navajo Bill of Rights is not an explicit authorization by the tribal council for suit.

If you allege in a very straightforward civil rights case—I have had those too, people beaten up by the cops in the drunk tank and this and that—sovereign immunity is alleged unless, and the only way you can get in on those is the insurance exception, but not the Bill of Rights and not the Indian Civil Rights Act.

MR. MILLER. Mr. Wilson or Mr. Moeller, do you know of any State that has sovereign immunity in a contract action?

MR. MOELLER. I certainly don't.

MR. WILSON. I don't think so. I think they all have certain procedures. Either they have mandatory mediation or some procedure.

MR. MILLER. I don't know of any either.

CHAIRMAN PENDLETON. Are you trying to make the point that it isn't the case in terms of contracts, but elsewhere the State's immunity is in place?

MR. WILSON. Correct.

MR. MOELLER. We take your point as a plaintiff's lawyer. I would love to see the sovereign waive its immunity completely, but that's never happened. I don't think it ever will. I think they are well within their rights to maintain some of the traditional sovereign immunity. I think they would be foolish to do anything different.

CHAIRMAN PENDLETON. You read in *The Republic* of Plato that justice belongs to the strong. They make the laws by which they benefit.

COMMISSIONER DESTRO. The reason I raise the question even in relationship to your example of the break-in, as I recall, it had to be slugged out over a number of years in the *Bivens* case as to whether or not you could even bring a suit against the Federal Government with respect to a midnight break-in, and that suit was founded, it really was not even founded on the Federal Tort Claims Act; they had to make a specific constitutional exception to get that one brought in.

But the last question I wanted to ask was, to explore for a minute the decision of Judge Tso with respect to the ICRA being a jurisdictional statute. That interests me in a number of contexts inasmuch not only have I done a fair amount of practice in civil rights cases, but I also teach conflict of laws, and it never struck me that in his statement that the Congress did not grant jurisdiction to the tribal courts.

It strikes me that Congress wouldn't have the authority to grant jurisdiction to tribal courts. Those are portions of the tribal sovereignty, just like Congress cannot grant jurisdiction to State courts. Does that make sense to you?

MR. WILSON. I think that is exactly what the issue we have in the Navajo judicial system is: the language is not clear enough in *Santa Clara v. Martinez*, and there is no express language in the statute, but the language in the case talks about the tribe's being the appropriate place for exclusive adjudication of these types of matters and also saying that: "tribal forums are available to vindicate rights created by the Indian Civil Rights Act, and that the Indian Civil Rights Act has a substantial and intended effect of changing the law which these forums are obliged to apply."

This is from *Santa Clara v. Martinez* at page 65.

This is really—the problem is interpreting that language. Is it mandatory upon the Navajo tribal judicial system to entertain Indian Civil Rights Act cases?

COMMISSIONER DESTRO. That is why I say that it seems to me, in reading Judge Tso's opinion, he concedes that the court has jurisdiction of the claim and under its general jurisdiction, and then he says, but there is no jurisdiction to entertain ICRA claims, but the court has general subject matter jurisdiction of all claims. And the question is whether—I mean, this is hard stuff even to teach in law school—but if it has general jurisdiction, the question is not, do they have jurisdiction to entertain ICRA claims; they do. There is no question they do. The question is, is it applicable and

how does it apply because otherwise the assertion of sovereign immunity against the ICRA is an assertion of tribal immunity against the congressional enactment. Other States have tried that too, and they haven't gotten away with it.

MR. WILSON. That is exactly what we have here. You have phrased it precisely. They say that the ICRA doesn't apply to us because it doesn't clearly say that it applies to us. And they are never going to apply it, and they haven't even in the changes in December to the Sovereign Immunity Act, which increased Bill of Rights protections, and the Navajo Code said you can bring suit now under the Bill of Rights. Now, whether people are doing it, I don't know.

COMMISSIONER ALLEN. Is it the claim at the moment that it can only apply to them if the Navajo Nation itself adopts it as applying to them?

MR. WILSON. Well, that would be one case. That is exactly it. If we changed our sovereign immunity laws to say we will entertain the Indian Civil Rights Act cases, they could do that, but they have refused to do that.

COMMISSIONER DESTRO. Let me put this in very technical jargon. The lawyers may only understand, but nobody else does. In effect, then, the tribal courts are treating the ICRA for conflict of laws purposes as foreign law which can be applicable or inapplicable as they choose, right? Would that be right?

MR. WILSON. I think it is even more than that. I think they have made the interpretation that it doesn't apply, not that they can choose when it applies. It never applies.

COMMISSIONER DESTRO. It is law which under the supremacy clause is not even applicable in tribal courts.

MR. WILSON. It is not binding, not applicable to the Navajo tribal courts or the Navajo Nation.

MR. MOELLER. The interesting thing, the Navajo Nation is not the only jurisdiction that has done that, and basically we have a long line of Federal cases that say the only application is habeas corpus. That is why earlier I made the statement that if Congress wanted to make it applicable, all that they would have to do is make it applicable.

CHAIRMAN PENDLETON. If they made it applicable as my colleague is saying, then what do we have? Suppose Congress does that, would you recommend that we recommend that to Congress, that they do that for us?

MR. MOELLER. I think I would. Then the burden would be on the tribal council to take a firm stand. On this point, all they have got to say is, "That doesn't directly apply to us; therefore, we can ignore it." If Congress made it directly applicable, then something would have to be done other than simply shrugging your shoulders and walking away.

COMMISSIONER ALLEN. I am not sure yet about how you arrived at that conclusion. If we abstract from *Martinez*, take *Martinez* out, I don't know how we can conclude that Congress hasn't made it applicable.

It seems to me that it could only be done through construction. If that is true, then we have two constructions, that in *Martinez*, that of the tribal council. The tribal council's construction is that the ICRA is only an advisory act on the part of the United States Government. I don't see how one can change its status as an advisory act simply by having Congress add more words to it.

MR. MOELLER. The problem isn't really that Congress is the one that is construing the act; it is the courts that have construed it. We are not dealing with the act itself anymore; we are dealing with the *Santa Clara Pueblo* case.

COMMISSIONER ALLEN. Let me stop you there again. Are you saying the tribal council is actually relying on Supreme Court interpretations and to that degree are accepting the sovereignty of the United States?

MR. MOELLER. No. In my opinion, I don't think that was ever thought of. I think they have gotten to that point more by default than by actual analysis.

CHAIRMAN PENDLETON. Does it matter whether by default or actual analysis?

MR. MOELLER. No, I don't think it matters.

COMMISSIONER DESTRO. To the contrary, I think the Navajo Nation has given some thought to this, and I am looking now at the advisory opinion on page 4, the advisory opinion of the Attorney General of the Navajo Nation dated October 31, 1986, and in the third paragraph of that opinion on page 4 it says, it quotes from *Martinez*, and it says that: "the application, the resolution of statutory issues under section 1302 and particularly those issues likely to arise in the civil context," and he emphasizes here, "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than Federal courts."

Then he goes on to say, in accordance with the above: "it's the opinion of the Department of Justice of the Navajo Nation, that the intent of Congress in enacting the ICRA, as interpreted by U.S. Supreme Court in *Martinez*, was to bring about the effect of enactment of tribes of legislation within the general restrictions of constitutional norms as best suited to the unique political, cultural and economic needs of each respective tribal government."

In other words, what he is saying is that the ICRA was intended to light a fire under the tribes, to suggest to them that they do, they enact these as a matter of their own law, and that is as far as it goes. It doesn't apply itself. All it does is suggest that they might do this themselves.

Some tribes have done it and other tribes have not, and in fairness to the attorney general here, he basically says, "Not only have we done it, we

have some things in there that are actually better and more inclusive than that.”

MR. McDONALD. Is that Claudine Bates Arthur’s opinion you are referring to? The former attorney general?

COMMISSIONER DESTRO. Yes, that is the Claudine Bates Arthur. I am not saying I agree or disagree, but I think that is the position they have taken.

MR. McDONALD. I would like to ask, I think Mr. Wilson has already said and he has read from the *Martinez* case, and he thinks that interpretation is contrary to the holding in *Martinez* and that *Martinez* in fact said tribal courts are going to apply this Federal law and that is what Congress intended. Mr. Moeller, do you agree with that?

MR. MOELLER. Judge Bratton agreed with that too, in *Loncassion*.

CHAIRMAN PENDLETON. Mr. Yazzie has been patient. We need to swear him in and Mr. McDonald has questions. Is this the appropriate time to do that?

MR. MILLER. If I might, there are a few things about our discussion of State sovereign immunity acts that I would like to address and clear up. Do you know of any State which has refused to waive sovereign immunity for tort claims, either one?

MR. MOELLER. Sure, New Mexico has.

MR. MILLER. They have refused to waive—

MR. MOELLER. They have waived in a limited fashion. You can’t just go sue them for anything that happens. That is what the waiver of sovereign immunity is.

MR. MILLER. Have they limited that waiver to cases where they are insured? Is insurance a factor?

MR. MOELLER. No.

MR. WILSON. It is not a factor in New Mexico. I don’t know if it is in any other States, to be honest with you.

MR. MILLER. The other thing is, do you know of any State or local government where, if you follow the procedures of the Tort Claims Act, you cannot obtain relief in any case regardless of the availability of insurance; as long as you follow the procedures of the Tort Claims Act, you will get relief regardless of insurance. Is that a correct statement of most States?

MR. WILSON. I think that is basically correct as long as you have a winning claim.

CHAIRMAN PENDLETON. Mr. Yazzie, would you please stand.

[Larry Kee Yazzie was sworn.]

CHAIRMAN PENDLETON. I might add, that Claudine Sattler, the court solicitor of the Navajo Nation, was invited to be a part of this panel and is not here, and I would assume that is in response to the resolution I read from this morning.

TESTIMONY OF LARRY KEE YAZZIE, ATTORNEY, KAYENTA, ARIZONA

MR. McDONALD. Mr. Yazzie, will you state your background for the record, please, your name and place of residence and some background information for us.

MR. YAZZIE. My name is Larry Kee Yazzie. I am a Navajo Indian. My occupation is attorney at law. I am licensed in the State of Utah, Federal court for the District of Utah, Navajo Tribal Court, Hopi Tribal Court. I am presently in private practice on the Navajo Reservation.

MR. McDONALD. You were once the chief prosecutor for the Navajo Nation?

MR. YAZZIE. That is correct, in December of 1982 I was appointed by the attorney general.

MR. McDONALD. You also have taught part time at this university, Northern Arizona University?

MR. YAZZIE. That is correct. I taught law for this university as well as the Navajo Community College.

MR. McDONALD. Thank you very much.

You have observed the panel here and you are well qualified to comment, and we would like to ask you what your recommendations are with respect to sovereign immunity and the issues that have been raised here today.

MR. YAZZIE. Thank you, Mr. McDonald. I appreciate the fact we are running late.

I appreciate having been offered this front row seat in my colleagues' debate.

I have 9 years of experience with the Navajo tribal government as chief prosecutor and as a practicing attorney on the Navajo Reservation. In those 9 years of experience, I have observed the various departments of the tribal government operate at close hand.

We are a fairly new judicial system, the Navajo system, really established in the sixties. And more recently, just in the last couple of years, there have been appointments to judicial positions—Navajos have been appointed that have law background, that are law trained, and I know of one individual that is on the supreme court who is an attorney with a few years of experience, but we are making progress.

However, it been my unfortunate experience through the years that the caliber of judges that have decided these important issues of sovereign immunity, due process of law, the rights of individuals, have not been trained. They have not received law training, who are appointed and receive on-the-job training.

As a young attorney prosecutor, I was presenting a case before a newly appointed district judge, and we were prosecuting an individual for aggravated assault, and my key witness was not allowed to testify because

that individual was not, the objection raised by defense attorney was, he is not keeping his testimony, his testimony is not in keeping with the direct testimony of the officer that was questioned earlier.

In other words, the objection was, you are not keeping within the direct examination of the earlier witness.

MR. McDONALD. It was as though he were being cross-examined?

MR. YAZZIE. That's correct. We are talking about two different witnesses altogether. My case was stopped; I couldn't continue on with the primary witness because of that objection. The judge—we just had to discontinue the case altogether.

I went in and met with the judge privately, and he admitted to me he did not understand what he was doing. It was really a sad thing to see. He said, "I have not received any training. I was just appointed. I have all these cases and I honestly don't know how to do them."

That same judge was appointed to chief justice within a matter of a month. And I make this statement not to be highly critical of the Navajo system. I concur with Mr. Moeller; our system has made great progress. We are getting it together. It is just that we are a new system; we need the additional time to do that. I hope my statements will be taken by the Navajo people as constructive criticism, that in the future we will call upon more qualified, trained people.

MR. McDONALD. Thank you. Do you have any thoughts about the sovereign immunity defense, particularly in personnel cases when people are fired from the tribal government and the sovereign immunity defense is used?

MR. YAZZIE. Yes, I believe the sovereign immunity statute—I have not, I understand there is a recent amendment to the statute.

The former statute contains language that, this is the 1985 Sovereign Immunity Act that states: "It has become clear that both the judicial and executive branches have determined a need for more explicit statements to clarify the act."

In other words, the act, they understood at the time they enacted it, was vague in its terms, and there needs to be more explicit statements made in the future. However, in its application the judiciary would interpret it in the light most favorable to them and cut off personnel-type actions.

MR. McDONALD. You think that the person ought to be able to go to Federal court if he is denied a forum in tribal court?

MR. YAZZIE. If he is—

MR. McDONALD. On the basis of sovereign immunity or any other basis, if you can't even get into tribal court?

MR. YAZZIE. Yes, I agree with that, that if a person is denied opportunity to raise his claim in any forum in a tribe, he must rely on the forum that, in this case, a Federal forum.

There are Federal funds being utilized. The office that I directed, I believe 638 monies were utilized, 90 percent of the money was obtained that way.

MR. McDONALD. As long as they are using Federal funds, there ought to be a Federal remedy?

MR. YAZZIE. Certainly; the funds were made available to the tribe by resolution. The tribe establishes the office of chief prosecutor. The Bureau of Indian Affairs had input into that particular official and how the official would operate. They included language in the contract whereby funds were obtained, hopefully, to give some protection to the chief prosecutor.

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

CHAIRMAN PENDLETON. We want to thank the panel members for being here. We will recess until approximately 1:30. The afternoon panel will deal with the closing of the *Navajo Times*; that is one panel.

[Recess.]

Afternoon Session, August 14, 1987

CHAIRMAN PENDLETON. Allow me to make an announcement before we have the afternoon panel. We have reason to believe that one of our afternoon panels will not convene. It is another panel on the independence of the judiciary. We invited several members of the Navajo Tribe, and we can assume, I guess, that they would not attend, pursuant to the tribal council resolution.

So, what I am proposing that we do is that we move up the panel of Merle Garcia, the former Governor of Acoma Pueblo, and Ickes, attorney at law, and perhaps we can then, after, have the open session at which time people may submit material, but may speak for 5 minutes to the Commission without questions being asked by Commissioners.

It is a matter of establishing a record. That is not a new procedure. That is a procedure that we have followed in other hearings, and it has been Commission procedure since the Commission has been in business, a little bit more than 30 years.

I will stick kind of close to the time schedule so that my colleagues who have planes may be afforded enough time to get to the airport and be on their way.

With that we will move to the next panel on the closing of the *Navajo Times*. Panel members will please stand. We would like for you to be sworn in.

[William Donovan, Monty Roessel, Mark Trahan, and Marshall Tome were sworn.]

Closing of the *Navajo Times Today*

CHAIRMAN PENDLETON. Ms. Hinman will begin the questioning.

TESTIMONY OF MARSHALL TOME, PUBLISHER, NAVAJO NATION ENQUIRY

MS. HINMAN. Good afternoon. I am Jeannine Hinman. I would like to start with Marshall Tome.

Mr. Tome, I would like to start off asking you a question about the *Navajo Times*. I would like to ask you what you consider the function of the *Navajo Times Today* to be.

MR. TOME. Mr. Chairman, members of the Commission, I don't—what do I think about the *Navajo Times*, you say?

MS. HINMAN. I am sorry—what do you think the role of the newspaper on a tribal reservation should be?

MR. TOME. The paper on Navajo Reservation, having worked with the *Navajo Times* when it was just a piece of paper for education committee, coming through become a monthly, then became a weekly; then later it become a daily. I think that it lost its path somewhere along the way. And what it used to be was, that it's a house organ paper, an organization paper, a tribal paper, and the instruction we used to get from the tribal council that, put the best feet forward for the Navajo people, whatever the news may be.

MS. HINMAN. Is journalistic independence a goal of the paper?

MR. TOME. It became, after I left there, then it was, yes.

MS. HINMAN. Journalistic independence was a goal of the paper. Is that a goal now of the paper?

MR. TOME. I don't know if it is a goal now, but it was. As far as I know it still is.

MS. HINMAN. Now, back a few years, I week prior to Peterson Zah taking office you intended to purchase the *Times* for \$40,000; is that correct?

MR. TOME. Yes.

MS. HINMAN. What did you think the value of the paper was at that time?

MR. TOME. I don't know what the value was, but the estimate given to me was somewhere in the neighborhood of \$100,000, but after looking at the equipment, most of the equipment has been updated, and it will cost you more to take it to the junkyard, I mean, at that time.

MS. HINMAN. Were you aware that subsequent to that a man named Bob Pincock assessed the value in excess of \$600,000?

MR. TOME. Later on, yes.

MS. HINMAN. Subsequent to Peterson Zah taking office and rescinding your purchase contract, did you reattempt to purchase it?

MR. TOME. I tried to get some information that I wanted to be heard. At least why I don't get the paper. I went through proper channels, proper committee, to get the paper, yes.

I wanted to know as soon as Peterson Zah, before he came into office, he put a restraining order on the paper and said I couldn't have it.

MS. HINMAN. Well, subsequent to his taking office, did you attempt to purchase it again? There were—supposedly there were bids. It was open to bidding. Did you try and buy it then?

MR. TOME. I tried, but I couldn't get it.

MS. HINMAN. Was the price higher?

MR. TOME. I couldn't afford it, and secondly, it wouldn't be purchased by me.

MS. HINMAN. Are you saying, then, that under the prior administration, the paper was much less expensive for you to purchase, but then subsequent to Peterson Zah taking office, an assessment was made and it was no longer a feasible alternative for you?

MR. TOME. I didn't say that. I said in business you go for the least money and however you make the best deal, so I figure the best deal was made with me with the prior administration. Besides, the council over the years since 1965 would like to purchase, at least somebody to take over the paper, and at which time the budget was something in the neighborhood of \$50,000. Even then they thought it would be better to farm it out.

CHAIRMAN PENDLETON. Excuse me, counsel. Just so we know where we are, with which administration?

MS. HINMAN. Okay.

CHAIRMAN PENDLETON. Would you help us? The \$40,000 purchase was under who's administration? I am sorry; the \$40,000 offer to purchase was under which administration?

MR. TOME. Former Chairman Peter MacDonald. He is the Chairman now.

CHAIRMAN PENDLETON. Are you saying when Mr. MacDonald went out of office the purchase price increased for some reason?

MR. TOME. It didn't increase, but it just wasn't—I was not to have the paper, period.

CHAIRMAN PENDLETON. At any price you couldn't have the paper?

MR. TOME. I think that the price was all right then, yes.

CHAIRMAN PENDLETON. I think there needs to be help. The record is kind of cloudy here. There was more money in the audit of the paper. What we are hearing now, it wasn't available.

I guess what we want to know, was it not available because of the cost of the price of purchasing the paper or because the administration that was in power tried to buy it again and did not let you have it?

MR. TOME. That is about right, yes.

CHAIRMAN PENDLETON. The second case is true?

MR. TOME. Well, what happened is that—

MS. HINMAN. Correct me if I am wrong—well, go ahead.

MR. TOME. We should start from the beginning.

MS. HINMAN. What we are trying to establish is that the price that was offered by Mr. Tome 1 week prior to Peterson Zah taking office was considerably less than the paper was assessed at only a few weeks later.

Now, we have on record that a man named Bob Pincock did assess the value of the paper in excess of \$600,000 when, not too long before, Mr. Tome agreed to buy the paper for \$40,000, which is much, much less. That is what I am trying to establish for the record. Whatever the reason, aren't those facts true?

MR. TOME. A portion of it. \$40,000, which was agreed by the committee, and then they said that wasn't enough—what about—how much would you take for it? And I think the record shows that \$7,000 to \$8,000, which I was willing to pay at that time.

And then comes a new administration. Then Peterson Zah, before he comes in, stopped the purchase, put a restraining order on it, and then it was reevaluated, said they didn't want to purchase, they wanted to keep it within the tribe. I said, fine, but I didn't get a chance to talk to anybody about it; what is it they want for it? I was trying—

MS. HINMAN. Wasn't it open to bidding after he took office?

MR. TOME. Yes, it was open for bid, but it's not worth what they want.

MR. MILLER. What did they want for it?

MR. TOME. My understanding is somewhere close to a million dollars, which is without reach. We don't have that kind of money; at least, I don't.

MS. HINMAN. What positions have you held on the *Times* in the past?

MR. TOME. I have been the associate editor, reporter, photographer, advertising agent, and did circulation, just about every area; and finally, I was the editor at the same time I was an assistant public relations director for the Navajo Tribe, then became the director for public relations, still participated in the newspaper and with the news and whatever that is going on, on the reservation.

MS. HINMAN. Do you have anything to do with the paper now?

MR. TOME. Right now I have my own paper; it is a monthly publication.

MS. HINMAN. I have no further questions.

MR. MILLER. Mr. Tome, I would like to thank you for coming to testify. I just want to take this time and state my appreciation for you being here.

Perhaps you could tell me, in your opinion, whether or not you thought the closing of the *Times* was justified?

MR. TOME. Well, I don't know in detail. There are some documents available which I saw.

MR. MILLER. Do you have those with you?

MR. TOME. I don't have it—what the tribal council put, a type of resolution that we are not to participate, and they wouldn't let me have some of the documents. That is why I was going to bring it.

MR. MILLER. That is the reason why you did not bring those documents?

MR. TOME. Not the reason. It could have been available if the tribal council—some of the employees I don't think let go of the documents.

MR. MILLER. Did you ask for them?

MR. TOME. Yes, I asked for it.

MR. MILLER. And that was the reason why they prevented you from obtaining them?

MR. TOME. They didn't say that was the reason, but I think that is the reason.

MR. MILLER. Was that last night's resolution?

MR. TOME. Wednesday afternoon.

MR. MILLER. Did that resolution make you more hesitant to come here today to testify?

MR. TOME. No, I come here because I am interested in seeing what is happening, for one, in the news, and I make the news release on what actually happened with the resolution. And finally, I want to know what is taking place here because I am interested in informing the Navajo people.

MR. MILLER. Just to get things clear, when did you request those documents from the tribe?

MR. TOME. I requested the documents about a week ago.

MR. MILLER. When were you informed that they would not be available?

MR. TOME. Just last night before I was leaving. It is not available—I don't know—

MR. MILLER. The day after the resolution was passed?

MR. TOME. Yes.

MR. MILLER. In your opinion, because of the resolution?

MR. TOME. I think this, that is the reason, yes.

MR. MILLER. At one point you requested that your attorney Mr. Pete appear with you. He is not present here today. Why do you think he has not appeared?

MR. TOME. I don't know. I know that he told me he was coming over last Wednesday afternoon when I talked with him, this past Wednesday.

MR. MILLER. Before the resolution?

MR. TOME. Yes.

MR. MILLER. Do you think the resolution had anything to do with it?

MR. TOME. I don't know.

MR. MILLER. In your opinion, what do you think?

MR. TOME. No, up until yesterday I called him, and he said he was coming this morning.

MR. MILLER. Did you talk about the resolution at all at that time?

MR. TOME. No.

MR. MILLER. Getting back to the *Navajo Times* issue, maybe you could just tell us generally what you think the function of the *Navajo Times Today* should be?

MR. TOME. The function?

MR. MILLER. Yes, you mentioned at one point informing the people, having some, I think you mentioned, some kind of journalistic independence. Are those reasons for having the *Navajo Times Today*?

MR. TOME. Yes.

MR. MILLER. Just briefly, do you think that the closing down of the *Navajo Times* by the MacDonald administration was justified?

MR. TOME. Well, I think I wrote an editorial on it stating that there have been individuals saying that, in a paper, the public newspaper and radio, they are doing it just to get the paper to me. And I wrote an editorial saying I am not interested in it. I don't want it.

Besides the way it has been handled, I don't want any part of it. I think that is what I said in the editorial.

MR. MILLER. Now, I—

MR. TOME. So, I think that if you are losing money in business, you have to change and do things accordingly, and if you lose a lot of money and get so much money and you are not accountable—no accountability, who is doing what—and I think that is the time you need to look at it. I think it's up to the people who fund the *Navajo Times* to do whatever they can. I can't say that I know what I would do, which is—if I lose money, I just close the shop and do something else.

MR. MILLER. When you worked on the *Navajo Times*, did it ever lose money?

MR. TOME. It did lose money. It did lose money, and then it made money.

MR. MILLER. Isn't it true it lost money the whole time you were involved with the *Navajo Times*?

MR. TOME. No.

MR. MILLER. You are saying there were years when it was actually profitable?

MR. TOME. There were years that we made money, yes.

MS. HINMAN. Could you tell me what years those were? Do you know what years they were, offhand?

MR. TOME. I believe that was 19—it was right after election 1963, '64.

MS. HINMAN. Since then has—

MR. TOME. Since then I haven't been involved in it.

MS. HINMAN. Isn't it true the *Navajo Times* lost money 25 out of the past 28 years?

MR. TOME. Maybe. I don't know about that. I know a couple of years they made money.

MS. HINMAN. Isn't it true they were approaching solvency, and it was possible they would in fact achieve that?

MR. TOME. I don't know that.

CHAIRMAN PENDLETON. Excuse me, I am a little perplexed here as usual, but wasn't it a weekly paper, then a monthly paper? It wasn't always a daily paper, so you would assume it would lose money if it is a daily paper as compared to being a weekly or a nondaily paper. So to say that it didn't lose money or that it made money, it might have made money in the times when it wasn't producing as many editions or as many copies. Is that accurate or not?

MR. TOME. Yes. It made money when it was a weekly paper, is what I am saying.

CHAIRMAN PENDLETON. But it lost money when it was a daily paper?

MR. TOME. From what I understand. I am not looking at the financial report. I know I saw some of it.

CHAIRMAN PENDLETON. Just one more question. You say that it was closed down because it was losing money?

MR. TOME. From my understanding, yes.

CHAIRMAN PENDLETON. We understand that it was closed down because it endorsed Mr. Zah; is that right?

MR. TOME. I don't—they endorsed Mr. Zah. All the years we had it, we never endorse any candidate. Maybe—I don't know.

CHAIRMAN PENDLETON. I am looking at some information here that says that it was the case. Are you saying that it was not the case?

MR. TOME. As far as I know. I don't know whether that is the case or not.

MR. MILLER. Weren't there statements to that effect by spokesmen for the MacDonald administration, that one of the reasons for the closedown was because it endorsed former Chairman Zah?

MR. TOME. I don't know.

MR. MILLER. One last question. I noticed in some of your editorials you mentioned the theory that former Chairman Zah controlled the newspaper. Do you still agree with that position?

MR. TOME. Yes.

CHAIRMAN PENDLETON. Next witness or next witnesses.

TESTIMONY OF MARK N. TRAHANT, FORMER PUBLISHER, NAVAJO TIMES TODAY

MS. HINMAN. Mr. Mark Trahant, could you state your name and spell it for the record.

MR. TRAHANT. Mark N. T-r-a-h-a-n-t.

MS. HINMAN. What is your background with the *Times*?

MR. TRAHANT. I arrived at the *Times* as managing editor in 1983, later became publisher in 1985 until it was closed.

MR. MILLER. Tribe membership?

MR. TRAHANT. I am a Shoshone Bannock Tribe of Idaho.

MS. HINMAN. Did they receive any awards while you were editor or publisher?

MR. TRAHANT. One posthumously. I was given a citation as editor of the year in 1985 by the National Press Foundation in Washington, D.C., and the paper was given an award by the Arizona press club when it was closed.

MS. HINMAN. Were you subpoenaed to testify today?

MR. TRAHANT. Yes.

MS. HINMAN. Can you briefly, generally, describe the level of independence that the *Times* experienced when you were there?

MR. TRAHANT. We were completely independent if not outright ornery.

MS. HINMAN. Did you endorse Peterson Zah in the election?

MR. TRAHANT. Yes, we did.

MR. MILLER. Why did you do that?

MR. TRAHANT. I think the biggest reason was freedom of the press. We felt that Zah had given us the opportunity to show that a quasi-government newspaper could print the truth, and it was a dangerous role, a noble experiment, and all things considered, we thought that was the reason alone to endorse Zah. I remember the day I wrote the editorial, Monty sent me a note saying, "That was a very courageous thing you did." And at the time I didn't think much of it.

MS. HINMAN. Did you also write an article entitled "Jimmy Zah"?

MR. TRAHANT. Yes.

MS. HINMAN. Was that critical of Peterson Zah?

MR. TRAHANT. Yes, and the administration. We tried to call the shots on a daily basis as we saw them. We were a real newspaper.

MR. MILLER. Do you have a copy of that article?

MR. TRAHANT. No, I don't have it handy.

MR. MILLER. At this point I would like to admit that article later as an exhibit for the record, Mr. Chairman.

CHAIRMAN PENDLETON. So ordered without objection.

MS. HINMAN. You had editorials that were critical from whomever was in power, then?

MR. TRAHANT. Numerous.

MS. HINMAN. Were you present on the day the *Times* closed?

MR. TRAHANT. I was, but I left by 9 o'clock in the morning.

MS. HINMAN. Do you think there was any connection between you leaving and the paper being closed?

MR. TRAHANT. Let's say I am suspicious. I talked to two people in the Chairman's office prior to the paper closing, and neither of them let me know anything was coming down the pike.

MS. HINMAN. You had no indication?

MR. TRAHANT. No.

Ms. HINMAN. Did anyone from the administration contact you subsequent to the closing?

Mr. TRAHANT. Not yet.

Ms. HINMAN. So, for all you know, you are still employed?

Mr. TRAHANT. I have seen a memo that asked us to leave the building, but other than that there has been no personal communication.

Ms. HINMAN. What do you think the monetary value of the paper was or has been in the past and can you give us an idea of what you base it on?

Mr. TRAHANT. Until the day it was closed, I would say between a million and a million and a half. The day it was closed it was worth practically whatever the equipment could be sold for, which would probably be less than \$300,000.

Ms. HINMAN. Hadn't you gotten an offer for \$2 million?

Mr. TRAHANT. We had a tentative offer from Gannett of \$2 million, but it was the real early talking stage.

Ms. HINMAN. When was the paper put under the division of accounting and finance?

Mr. TRAHANT. Division of administration and finance. On September 29, 1985, then-Chairman Zah issued an executive order placing us independently.

Mr. MILLER. Do you have a copy of that?

Mr. TRAHANT. Yes.

Mr. MILLER. I would like to admit that as an exhibit for the record. CHAIRMAN PENDLETON. So ordered without objection.

Ms. HINMAN. Then you were—I am sorry, go ahead.

Mr. TRAHANT. And then that made us independent, and then when I became publisher almost 2 years later—

Mr. MILLER. Can we slow down just a minute here. Before that, the newspaper was under a branch of the tribal government?

Mr. TRAHANT. Right. Division of natural resources.

Mr. MILLER. After that an executive order was entered to take it out from under the branch of the tribal government and—

Mr. TRAHANT. Right.

Mr. MILLER. So, it would be quasi-independent.

Mr. TRAHANT. We did not report to anybody in the tribal government.

Mr. MILLER. Before that—

Mr. TRAHANT. I wasn't publisher then, but that was my understanding.

Ms. HINMAN. What happened when it was put under the division of accounting and finance?

Mr. TRAHANT. We weren't really put under the division; we had a kind of accounting arrangement with the division. We would spend the money and they would pay the bills. It worked out very convenient.

Mr. MILLER. Are you saying that their only oversight was financial, they had no editorial oversight or any other oversight?

MR. TRAHANT. Everything was decided by me.

MS. HINMAN. When did the paper become a daily?

MR. TRAHANT. March 21, 1984.

MS. HINMAN. When did you predict that the paper would become solvent? When did you think that it would become solvent?

MR. TRAHANT. We were saying between 5 and 7 years.

MS. HINMAN. Did you tell the administration that?

MR. TRAHANT. Oh, yes, in memos and personally several times, both administrations.

MR. MILLER. Did you submit writing to that effect?

MR. TRAHANT. Yes.

MR. MILLER. Do you have it with you?

MR. TRAHANT. Sure.

MR. MILLER. May we admit those as exhibits?

MR. TRAHANT. Sure.

CHAIRMAN PENDLETON. So ordered.

MS. HINMAN. There was a tax lien on the *Times*. Can you give us a date on that tax lien?

MR. TRAHANT. I first found out about it in December of 1986.

MS. HINMAN. Did you tell—

MR. TRAHANT. It stemmed from 1984, however.

MS. HINMAN. When did you tell the administration of the tax lien?

MR. TRAHANT. The day after the inauguration.

MS. HINMAN. Did you tell them in writing?

MR. TRAHANT. Yes.

MS. HINMAN. Did you ever present a detailed financial report about the *Times*?

MR. TRAHANT. Yes, just after the election.

MR. MILLER. How long was that report?

MR. TRAHANT. It was a whole binder, so it was probably about 250 pages.

COMMISSIONER DESTRO. What kind of a tax lien was it?

MR. TRAHANT. Withholding taxes.

COMMISSIONER DESTRO. How did you happen to find out about the tax lien? Withholding taxes is not something the IRS usually wastes a whole lot of time coming after you for.

MR. TRAHANT. Apparently, this stems from 1984 before I was publisher, but we had a bookkeeper who didn't keep books very well.

When I became publisher, I asked him to find out exactly how much we owed the IRS for payroll taxes, and he gave me a number and I went to the tribe and begged for money. They gave me that money. I paid the IRS and I thought it was all taken care of.

After that the IRS and the guy I hired to keep books were exchanging letters saying there was some discrepancy, but it took the IRS to actually

go back and go through every check the *Times* had written for payroll to come up with a number. So, that is why it took so long to find out.

COMMISSIONER DESTRO. When did they finally come back with the actual deficiency notice?

MR. TRAHANT. They issued a deficiency notice in February of 1987.

COMMISSIONER DESTRO. Okay.

MR. TRAHANT. But they let us know what the amount was in January.

COMMISSIONER DESTRO. January of '87?

MR. TRAHANT. Yes.

MR. MILLER. You informed the new administration when?

MR. TRAHANT. The day after the inauguration.

MS. HINMAN. What was their response?

MR. TRAHANT. They would look into it.

MS. HINMAN. Did you discuss then with the new administration the status of the paper other than the tax lien or in addition to the tax lien whether it was going to become solvent? Or any other types of information regarding the paper?

MR. TRAHANT. Yes, at that point there was no indication from the new administration there was any time pressure to have the paper become solvent.

MS. HINMAN. What led you to believe that?

MR. TRAHANT. I had a meeting with Mr. MacDonald 2 days after the election. At that meeting he said, "We know it takes time to establish things, and we want to let you know that you have plenty of time."

At that time he also asked me not to resign.

MR. MILLER. Did you also inform him about your contract?

MR. TRAHANT. Yes. I informed him that I had a contract that expired in February and I was willing to leave earlier than that to allow him to appoint a new publisher.

MR. MILLER. What about after February?

MR. TRAHANT. After February I had no communications with him.

MR. MILLER. I meant, did you discuss with him the possibility of what would happen after February?

MR. TRAHANT. Yes, he asked me to stay on. He said he would like to see me stay and run the paper.

MR. MILLER. Was he friendly to you?

MR. TRAHANT. Yes, in fact, he put his arm around me.

CHAIRMAN PENDLETON. Pretty good sign.

MS. HINMAN. What did he say to you then?

MR. TRAHANT. "We just know it takes time, and we think the paper has been as fair as it could be, and we are willing to give you that time."

MS. HINMAN. In the short time that the new administration had occupied office, were there articles that were critical of the new administration?

MR. TRAHANT. Yes, there were a number of articles, both editorials and news articles.

MS. HINMAN. Do you have any samples of them with you?

MR. TRAHANT. Yes.

MS. HINMAN. Could you title the one? I think there is one called: "MacDonald's Numbers Don't Add Up," and if we could have that admitted and some other editorials.

CHAIRMAN PENDLETON. I think we have some in the packet, but without objection.

MS. HINMAN. Do you think the *Times* was closed for financial reasons?

MR. TRAHANT. Not likely.

MS. HINMAN. Do you think other organizations on the reservation were not solvent?

MR. TRAHANT. A number of them.

MS. HINMAN. Have any of them been closed down?

MR. TRAHANT. I take that back; the Ganado Community College was closed, so there was one.

MR. MILLER. If you have these other tribal enterprises that are not financially solvent and they are still in operation, why did the *Navajo Times* get closed down?

MR. TRAHANT. Actually, and this is more theoretical than anything, I think it was a series of blunders within the Chairman's office. Originally, I don't think they intended to close the paper. I think certain individuals within the Chairman's office just kind of got carried away, and before they knew it they had a major public relations problem on their hands.

MR. MILLER. That was a very vague answer. I am not sure of what you meant. Could you explain that more?

MR. TRAHANT. I think what happened, I don't think the Chairman was involved with the decision originally to close the paper. I think one of his staff assistants, Loyce Phoenix, made the decision, implemented it, and after the hullabaloo decided he had to sign on to the decision to close rather than say, "We made a mistake; let's keep the paper open."

And to answer the question now, it not being financial, I think two things led me to believe that it was not a financial decision. One, if it was purely a financial decision, the Navajo reporters would now be back at the paper and the managing editor. Second, if it was purely a financial decision, there would have been room for negotiation on how to close the paper, and it would not have prevented the last edition from being printed.

MR. MILLER. I guess, along those lines still, why would Loyce Phoenix come to that conclusion?

MR. TRAHANT. I think mostly because it was the easy thing to do. It would be a way of getting rid of a voice that would bother them for the next 4 years, and by closing it they wouldn't have to worry about (a) financing it and (b) what the paper said.

MR. MILLER. Which of those two reasons do you think was primary?

MR. TRAHANT. I think what the paper said was the primary reason.

MR. MILLER. I just wanted to establish once again that before that time, with the quasi-independent status, the tribe was obligated to fund the newspaper, but they did not have control; is that correct?

MR. TRAHANT. That is correct. All the editorial decisions were made in a 3 o'clock afternoon meeting in my office.

MS. HINMAN. What is the paper like today, in your opinion?

MR. TRAHANT. I think Mr. Tome's paper is superior to the *Navajo Times* right now. At least it says something.

MS. HINMAN. What do you think the role of the *Times* should have been, or newspaper on a reservation should have been or should be?

MR. TRAHANT. This gets into a little philosophy, but I think it is important, because there is no separation of powers within the Navajo government, that the newspapers serve as a protector of the people, and I always imagined our role as working for the people, not for those who happen to govern. I think the danger is that we were kind of a check and balance because whatever the Navajo leaders did, they had to know that it would be reported and the people would know about it.

MR. MILLER. Mr. Trahant, when there was criticism of the financial status of the newspaper, did you or anyone from your staff suggest alternatives to make the paper solvent?

MR. TRAHANT. Yes, I heard rumblings a couple of weeks before the paper was closed that they were going to turn the newspaper back into a weekly, which is something that I opposed at that point.

I wrote a memo to the Chairman and suggested that we sit down and talk about options other than closing the paper or other than turning it back into a weekly. One of those options was that I, Monty Roessel, and Mike Kellog would purchase the paper.

MR. MILLER. What were those alternatives and when were they proposed?

MR. TRAHANT. I think the three were, purchase of the paper, putting it out on the market again for bids, and the third was restructuring it somehow as a weekly, but I would not be a participant of that.

MR. MILLER. Didn't you mention to me one alternative about purchasing a TV or radio station?

MR. TRAHANT. Yes, another option, in fact, I did talk to Mr. MacDonald personally about this option. One of the things with sovereign immunity that I think benefits tribes, or could benefit tribes, is to issue a limited warranty of sovereignty that would serve as an incorporation. And what I suggested to Mr. MacDonald was that the paper go out and acquire a television station in the marketplace, such as in Tucson or Phoenix, using the limited waiver of sovereignty as a vehicle to get bonding, and to say the tribe's limit was up to \$6.7 million, and we would be subject to court

action up to that, and on a leveraged buyout pick up a television station that would be under the *Navajo Times* company.

It would have two operating advantages. First, it wouldn't have to pay corporate income tax, which is a big factor. And second, we could have got the bonds tax exempt, which would have been another financial advantage.

MR. MILLER. Just to move on, did you ever push to have private ownership of the *Times*?

MR. TRAHANT. Yes, and I think that is the only way to go at this point.

MR. MILLER. Pardon me?

MR. TRAHANT. I think the Navajo government, by operation, was trying an experiment along the lines of the BBC, quasi-government, quasi-public institution. However, I believe that the government violated a public trust by closing the newspaper, particularly in the capricious manner that it was closed, and because of that violation of a public trust, I don't think the Navajo government ought to own a newspaper at this point.

MR. MILLER. What do you mean by public trust? Didn't the government own the paper?

MR. TRAHANT. The public trust was making sure that the paper was fair and free and living by the rules that had been established over the past 4 years.

MR. MILLER. You are saying the trust was between the people and the paper, not the government and the paper?

MR. TRAHANT. Correct.

MS. HINMAN. What did you mean by capricious closing of the *Times*?

MR. TRAHANT. I think the most capricious act was sending the police down to the paper so I could not print a final edition.

MR. MILLER. If you were there, would you have printed a final edition?

MR. TRAHANT. Absolutely. We would have gone to Gallup, Albuquerque, whatever it took.

MR. MILLER. Do you think that affected their decision as to when they closed you down?

MR. TRAHANT. Let's just say it was convenient.

MR. MILLER. In your own opinion, what do you think?

MR. TRAHANT. I think probably; I think it made it a lot easier.

MR. MILLER. Probably yes or yes?

MR. TRAHANT. Yes.

MS. HINMAN. What was your opinion of the attempted sale 1 week prior to the new Chairman coming into office for \$40,000?

MR. TRAHANT. I really arrived too late. Almost everything was resolved and was in court by the time I had moved to Window Rock. It wouldn't be proper for me to comment.

MR. MILLER. I am ready to move on.

MS. HINMAN. I am ready to move on.

TESTIMONY OF MONTY ROESSEL, FORMER MANAGING EDITOR, *NAVAJO TIMES TODAY*

MR. MILLER. Mr. Roessel, could you state your name, occupation, and address for the record?

MR. ROESSEL. My name is Monty Roessel, unlike Montgomery Roessel, which the program shows. I am a freelance photographer living in Ganado, Arizona.

MR. MILLER. What was your position with the *Navajo Times Today*?

MR. ROESSEL. I was the managing editor.

MR. MILLER. That, basically, is second in command under Mark?

MR. ROESSEL. I was in charge of the daily operations of the editorial side.

MR. MILLER. Were you present at the time the *Navajo Times* was closed?

MR. ROESSEL. Yes, I was.

MR. MILLER. Could you narrate the events that happened that day?

MR. ROESSEL. About 9:30 or 10 o'clock, Mike Kellog, who was general manager, went up, had a meeting with the Chairman's office. While he was away, we had a phone call from the Chairman's office saying there was going to be a press conference that day, on Thursday.

MR. MILLER. Did they say for what purpose?

MR. ROESSEL. They did not say, no. We then called around, found out it was going to be about the *Navajo Times*. But we knew nothing else.

Mike Kellog came back about 11 or so. He called me back into Mark's office. At that time he told me he had met with Loyce Phoenix, and they were going to close the paper down on Friday at 5 o'clock. That would be the last edition, so we would have a chance to put out our last edition.

MR. MILLER. Did he tell that to the whole staff?

MR. ROESSEL. No, just me. I went, had a meeting on the editorial side and the reporters, and we started planning out, writing our own little bit.

MR. MILLER. What time was that?

MR. ROESSEL. Just before lunch. We had lunch together, all the reporters, at the motor inn over there. And while we were there, Peter MacDonald, the Chairman, was there, and so we waited and waited and waited, and finally we cornered him as he was coming out. Bill Donovan asked him about the closing of the paper, and at that time he mentioned that "That was purely a staff decision, and I'll be briefed on that this afternoon."

When we returned to the office about 15 minutes later, this is just across the street from this place, we received a phone call from the Chairman's office saying the paper would be shut down Thursday at 5 o'clock, and—

MR. MILLER. What time was the phone call?

MR. ROESSEL. About 1:30, 2. And, then, at that time they also, during that same phone call, said that the press conference was at 3 o'clock.

MR. MILLER. The paper closed at 5:30.

MR. ROESSEL. And that we would not have the opportunity to print a last edition.

MS. HINMAN. Did you try and print the last edition?

MR. ROESSEL. After we came back from the Chairman's office or the press conference, I started asking different reporters if they were willing to put a last edition out.

We rounded up about three of them and we had a person in the backroom print shop who said he would stick around, and we started again still planning on coverage, and around 4:30 I went outside—the other thing that happens is that we jokingly notified the staff that if you have anything personal that you cherish in your desk, to take it out to the car now, that there will probably be police cars, and Bill Donovan, who is experienced in these matters, mentioned that to us.

Then about 4:30, on one of my trips out to the car with my personal items, there were approximately six police cars outside. I then returned to the office, said, "Well, there goes that idea."

About a quarter to five the police walked in, handed us those memos. I believe around five, four to five policemen handed us the memos saying we were terminated, and then checked certain people's items as they left the building.

MR. MILLER. Do you happen to have one of those memos?

MR. ROESSEL. No.

MS. HINMAN. What did the memo say?

MR. ROESSEL. That it would be shut down and we would be given enough time to take our personal belongings out.

MR. MILLER. Were these policemen in full uniform and have guns?

MR. ROESSEL. Yes, nice big ones too.

MR. MILLER. When they actually came in, did they—was there any need for policemen to be there, do you know?

MR. ROESSEL. Not to shut down a newspaper unless you are afraid of something that may be printed the next day.

MR. MILLER. Were there ever any threats of taking equipment?

MR. ROESSEL. No.

MS. HINMAN. Did they believe something was going to be stolen or somehow lift a press out?

MR. ROESSEL. It would be impossible to lift a press out or computers; if you did lift them out, they would be useless. They are tied into a mainframe, so—

MR. MILLER. Did they stop you from using the telephone or any equipment there?

MR. ROESSEL. In that memo, they mentioned we would be given as much time as we needed that day, and then after about 5:15, they said, "That is enough time; everyone out."

The following day they said we could return and pick up anything we left behind. Then later that following day, there was some statement from the Chairman's office saying that Mark Trahant and myself would not be allowed back into the *Navajo Times* building.

MR. MILLER. Why was that?

MR. ROESSEL. I have no idea. They just assumed they didn't want us in there.

MR. MILLER. Do you think it had anything to do with the fact that you tried to put out a final edition?

MR. ROESSEL. I don't think they really knew that we were trying to put out a final edition. They would rather not have us two around. We were in charge of the editorial side. The ads were already paid for—I mean, the paper was all ready; the ads were already paid for. I mean, we were going on the assumption that we were printing a final edition.

MR. MILLER. In your personal opinion, why was the paper closed?

MR. ROESSEL. I think that the administration was afraid of the possibility that, daily, their actions would be reported on, but I think more so than just reported on. They would be analyzed and also criticized in the editorial pages, and he wasn't used to that. This administration was not used to it, and freedom of the press is new, was new to the Navajo people.

It is like giving someone who has never seen a car keys to a car; it takes a while for them to learn how to use it.

Navajo people were still at that time learning how to use a free press. I don't think he looked at the potential of what could happen with a free press and what we were doing, and he did it.

MR. MILLER. Do you think that article "MacDonald's Figures Don't Add Up" had anything to do with it, or could you name any other articles?

MR. ROESSEL. From the beginning we had, after the inauguration, or before the inauguration, right after the election, they had proposed the inauguration cost of \$142,000 that the tribe would pay for the inauguration. We said that was ridiculous. We cited examples from New Mexico and also Arizona, how much they were putting up for their inaugurations, and that didn't go over real big. As a spinoff of that, the tribal council decided they were going to lower it.

MR. MILLER. In your opinion, that article was one of the reasons why?

MR. ROESSEL. It was just a buildup, and slowly it became obvious that we weren't going to be quiet about it. We had written right after the inauguration, or the election, an editorial saying, you know, give them a chance, okay, you have a 100-day grace period, whatever, but soon it became obvious that we couldn't live by that.

MR. MILLER. In your personal opinion, why was the paper closed in this manner?

MR. ROESSEL. I think they were afraid of the printed word, what it would say the next day—our circulation was maybe 8,000, and the way the

Navajo live in clusters, the readership was a lot higher, and he was afraid and the administration was afraid of closing down the newspaper.

MR. MILLER. They were afraid you would put out another edition?

MR. ROESSEL. And they would read about what happened. Any paper that is closing, the majority of that edition is going to be, you know—

MR. MILLER. That might explain the presence of one policeman. Why do you think he sent five?

CHAIRMAN PENDLETON. Because five are better than one.

MR. ROESSEL. That is as good an answer as I have.

MR. MILLER. No further questions.

MS. HINMAN. I have one further question. Were you asked after the reopening of the *Times* to rejoin the staff?

MR. ROESSEL. No, I wasn't. That to me, in my mind, shows that it was a political move. I had no check-writing authority or anything to do with the financial situation of the paper. All I had was the editorial side, and I had submitted an application and no phone call ever rang at my place.

MS. HINMAN. Who was in charge of hiring, to your knowledge?

MR. ROESSEL. They said to drop one off at the *Navajo Times*. I had no idea who was in charge. I just dropped one off.

MS. HINMAN. How long had you worked there?

MR. ROESSEL. From June of '85 until it closed.

MR. MILLER. Did you state your tribal membership?

MR. ROESSEL. I am Navajo.

MS. HINMAN. I have no further questions.

MR. MILLER. Mr. Donovan.

TESTIMONY OF WILLIAM DONOVAN, CORRESPONDENT, *NAVAJO TIMES TODAY*

MS. HINMAN. Mr. Donovan, state your name and spell it for the record.

MR. DONOVAN. My name, Bill Donovan, D-o-n-o-v-a-n.

MS. HINMAN. Can you state the positions you held at the *Navajo Times* and how many times you have been fired from the *Times*?

MR. DONOVAN. I started with the *Times* in 1977, I think in August, as general manager. I was general manager until May of '79 when I was fired for the first time.

I then became a correspondent for the *Navajo Times* and that lasted about a year and a half, and I was fired because of the way the paper was going, getting too liberal in the administration's view.

I was rehired again about 3 weeks later with the condition that my stories be read carefully and that a week's delay occur between the time I submitted a story and the time it was printed.

MS. HINMAN. They were screened, in effect.

MR. DONOVAN. My stories were going into the paper unedited. That lasted for about 2 weeks. They realized it wouldn't work.

About 6 months later, there was a feeling that the paper was losing too much money, and they decided that something had to be done, so they fired me, saying that it was obvious I must have had control of the paper. I had nothing to [do with the] financial aspects of the paper. I went to some of my supporters in the Chairman's office; they got a decision to put someone else in as editor and they rehired me again. And then the fourth time I was fired—I stayed on as correspondent after that, and I continued on as correspondent during the time that it went from a weekly to a daily. Then when the whole staff was fired last February, I was fired for the fourth time.

MS. HINMAN. Four times in all so far?

MR. DONOVAN. So far.

MR. MILLER. When do you think the fifth will be?

MR. DONOVAN. Takes about 2 years.

MS. HINMAN. You don't think it will be next week. Are you saying the reasons behind these terminations, then, were political reasons based upon what you had written?

MR. DONOVAN. Most of them were political, yes.

MS. HINMAN. Can you describe the closing of the *Navajo Times* that day?

MR. DONOVAN. I got there—it happened mostly as Monty said. There was a lot of talk going on. After I found out that the *Navajo Times* was going to be closed down, I talked to people in the Chairman's office, and they told me that the decision was made the night before and that it was a decision made by Bobby George and Loyce Phoenix. I was told that the Chairman had received a report earlier that morning about what they planned on doing and he concurred.

MS. HINMAN. As far as you know, though, financially—later when it came out that they said the decision to close was based on financial reasons, but if those financial reasons were the basis, they had known about them for some time then?

MR. DONOVAN. Yes.

MS. HINMAN. It wasn't through the results of any investigation on their part?

MR. DONOVAN. If it was financial reasons, the logical thing would have been to do, would have been to send someone to find out how serious the situation was.

MS. HINMAN. Some type of audit?

MR. DONOVAN. Remove the people who had financial control, put your own people in, and see if there was any way of salvaging what you could.

MR. MILLER. Along those lines, did anyone contact either you or Mr. Trahan to find out what the financial status of the paper was?

MR. DONOVAN. No.

CHAIRMAN PENDLETON. One more point, Mr. Trahant. You said that some other committee was in charge of the money.

MR. TRAHANT. The division of administration and finance paid our bills, correct—we did not pay our own bills—which is a tribal entity.

CHAIRMAN PENDLETON. But now I am hearing that you had to know something about the paper's finances. Did you give some kind of report from the committee as to where—

MR. TRAHANT. We sent reports up on a daily basis.

CHAIRMAN PENDLETON. Did you report back to them what the status of the funds were?

MR. TRAHANT. Usually with minus signs back to them, but they sent us back regular reports.

CHAIRMAN PENDLETON. Are these ever audited at all, these statements?

MR. TRAHANT. I assume if the tribe has a general audit, they would be included in the tribe's, but again, we didn't have any control. It was all division of administration and finance.

CHAIRMAN PENDLETON. Excuse me one second. In other words, then, if the decision to close because of money was the issue, why did they come to you?

MR. TRAHANT. That is a good question.

CHAIRMAN PENDLETON. I mean, they told you, you had to go. They said it was being closed, not making any money, but why did they come to you with the money situation? You weren't in control of those dollars, were you?

MR. TRAHANT. No. They paid the bills; we didn't.

Mr. Chairman, I would like to make one quick point about the money too. Closing a newspaper is an exceedingly expensive thing to do. Just converting it to a weekly would have saved the tribe—in fact, I would be willing to wager that this year's losses are far more than ours, with just the severance pay alone, was enormous, but closing a newspaper is not cheap.

MR. MILLER. One other point. What is your opinion as to when the paper would break even?

MR. TRAHANT. The way we were going, and we had our best year ever last year, I would have said within 3 or 4 years the way we were going.

MR. MILLER. Mr. Donovan, would you say it was any earlier than that?

MR. DONOVAN. I had been advocating for the past few months before that we take steps ourselves to cut down on the expenses because I felt that once MacDonald got in, the thing he could hold over us was the fact we were losing so much money. In order to go before the B. and F. committee, we had to get a resolution signed off by the Chairman's office, so we had a tie-in with the Chairman's office on that and he held some control over us.

I felt after the paper closed down—that closed down on a Thursday. On Saturday, I met with Samuel Pete who had been assigned by the

Chairman's office to look into the financial problems. I sent him a memo saying that the expectation we were going to lose \$350,000 this year, and yet—

MR. MILLER. Do you have that memo?

MR. DONOVAN. Mr. Pete was supposed to bring a copy with him. So, in that memo I explained how I felt some \$300,000 could be cut back at the *Navajo Times*, so that it was possible that we could start breaking even in about a year.

MR. MILLER. About 1 year?

CHAIRMAN PENDLETON. I just want to say for the record I am reminded by our Acting Staff Director that this Commission also understands how costly it is to close down an activity, like the Commission.

MS. HINMAN. First of all, going back chronologically, when the paper was closed, what did the administration publicly say about the closing, if anything?

MR. DONOVAN. The administration kept on saying it was done for financial reasons.

MS. HINMAN. Did they ever discuss restarting it?

MR. DONOVAN. From the beginning, MacDonald said the paper would be reopened as soon as a review was done by a committee of learned journalists and publishers from across the country to get their recommendations on what kind of paper the Navajo people should have.

MS. HINMAN. When did that paper begin?

MR. DONOVAN. About 3 months later.

MS. HINMAN. Did you become a part of that staff?

MR. DONOVAN. I became a correspondent.

MS. HINMAN. What were you told about the content of your writings?

MR. DONOVAN. At the beginning, I was told by Willis Brown, who was the new, basically, publisher of the paper, that we would not cover the tribal government. We would only print news about local community—only print positive things about the tribe.

MS. HINMAN. Nothing about the tribal government?

MR. DONOVAN. Nothing about tribal government.

MS. HINMAN. No editorials?

MR. DONOVAN. No editorials.

MS. HINMAN. Nothing about tribal government and then nothing negative?

MR. DONOVAN. Nothing negative, nothing about tribal government, not even anything positive.

CHAIRMAN PENDLETON. Freedom?

MR. DONOVAN. Feeling was, we talked about tribal government, eventually we would get in trouble.

CHAIRMAN PENDLETON. Excuse me. I just want to get something straight for the record. Mr. Pete was supposed to have brought lots of

records and things for today's discussion or some records, you hoped. But I am reading here from the staff report that he was paid \$16,000 to write the report to close you down; is that accurate?

MR. DONOVAN. No, he wrote a report to explain why we were closed down after the fact.

CHAIRMAN PENDLETON. After the fact he wrote a report why you were closed down and that was \$16,000?

MR. DONOVAN. I think it was \$17,000, but around that figure.

CHAIRMAN PENDLETON. This is a report to say why you were closed down?

MR. DONOVAN. He looked into the financial problems and discovered a number of discrepancies.

CHAIRMAN PENDLETON. Is he an auditor of any sense?

MR. DONOVAN. No.

CHAIRMAN PENDLETON. What qualifications does he have?

MR. DONOVAN. He was a former aide to the Chairman. That was his main qualification, I guess.

MR. MILLER. Any business qualifications?

MR. DONOVAN. He was an advocate within the tribal court system. He was like an attorney without a law degree.

CHAIRMAN PENDLETON. Is it kind of like safe to say, or accurate to say, that we have an order after the fact by a nonauditor to write a report?

MR. DONOVAN. He didn't actually do the audit. People from Peat, Marwick and Mitchell came in that week and did the actual audit. They turned over the figures to Mr. Pete, who kind of interpreted them.

CHAIRMAN PENDLETON. Seems like it would be better to close down the budget and finance committee rather than the newspaper?

MR. DONOVAN. Might save some more money.

MR. MILLER. Mr. Donovan, when did you submit your memo to Mr. Pete?

MR. DONOVAN. Two days afterwards. I explained to him, I tried to explain to him, how much damage it would do to the paper to close down and how we would lose the credibility, not only of the readership but our advertising, and I said if we could come back by Tuesday or Wednesday with another paper, we could salvage something out of this.

I was pushing for Tuesday or Wednesday to start back. It wasn't until the next day he said he would talk to MacDonald, and MacDonald said there was no way that it could come back that soon.

MR. MILLER. Did he incorporate any of your memo in his report, do you know?

MR. DONOVAN. There was some of my memo in his report.

CHAIRMAN PENDLETON. We don't have that report anywhere or do we have that report?

MS. HINMAN. We have the report.

CHAIRMAN PENDLETON. We have the \$16,000 report?

MS. HINMAN. We have the report that the panel wrote on how to restart the paper?

MR. MILLER. That is not the same report.

CHAIRMAN PENDLETON. Not the same report?

MR. MILLER. Do you have that report?

MR. DONOVAN. I was not given a copy of that report.

MR. MILLER. Does anyone here have that report?

MS. HINMAN. We do not have that report.

MR. MILLER. Commissioner Allen, did you want to ask a question?

MS. PRADO. I also have one other question. I want to know about the report, if we could get hold of that?

MR. DONOVAN. As a journalist I was not permitted to have that report.

MS. PRADO. You mentioned there was a committee to be formed?

MR. DONOVAN. Yes.

MS. PRADO. Was that committee in fact formed and did they make a recommendation?

MR. DONOVAN. The committee was made up of seven people, maybe eight. They met for 3 days—1 day or 2 days here at Window Rock, 1 day in Phoenix—and came up with the report, which I have also not been able to see.

CHAIRMAN PENDLETON. I just have a couple questions. Mr. Tome, why do you think you were allowed to start a paper after the *Navajo Times* closed down?

MR. TOME. Well—

CHAIRMAN PENDLETON. Or stay in operation after the *Navajo Times* was closed down?

MR. TOME. I think the main reason that I started the paper was, I was on trial, and the judge and people said they have no confidence in me, "Let's see something printed that you are doing even if it is just two pages." So I come out with the full page printed and that is how I got started.

CHAIRMAN PENDLETON. Were you critical of the MacDonald administration in your paper? Have you been?

MR. TOME. Eventually probably, yes.

CHAIRMAN PENDLETON. You mean eventually, later, or eventually, you might someplace else in the future?

MR. TOME. You have to sometimes.

CHAIRMAN PENDLETON. Is that a promise?

MR. TOME. That is part of the business.

CHAIRMAN PENDLETON. In terms of the daily paper, did you get a lot of nonreservation, if you will, advertisement? I mean, did businesses outside advertise? I have never seen a copy of the *Times*, by the way; I don't know—that is why I am asking the question.

MR. TRAHANT. Absolutely. I think that is one of the important things of the *Times*. We were bringing about \$700,000 a year back onto the reservation that was spent off the reservation. Primarily, our source of income was from border town markets in Farmington and Gallup.

CHAIRMAN PENDLETON. Tell me about some of that; that is interesting.

MR. TRAHANT. Our biggest advertisers were grocery stores. We worked hard to get grocery stores. I think to me the most important thing about why it ought to have been daily is to get this one flow of capital back and forth onto and off the reservation.

And second, because it created a barrier where the political leaders would have to know they wouldn't have any time to stop the information; every day there would be something there. Even if we disagreed with them, for example, on an issue they would get hit over that issue every day. It was that relentless pounding that I think gives the press an opportunity to make a difference.

I think one of the examples that I have, the *Times* made a difference, was when the Navajo Tribal Council was debating its ethics laws 2 years ago. The *Times* was very much behind the ethics laws, and for 2 weeks we ran editorials as to why ethics laws were important, and they were eventually passed.

CHAIRMAN PENDLETON. Now, did it develop both confidence in the nonreservation people and businesses and tribal members, I mean, just the idea of shopping in the stores and so forth? What did that do for the image of the people, of the tribal members?

MR. TRAHANT. I think the biggest, in terms of image, where we benefited was the way we brought young people into the profession. Our sales crew was becoming more and more young Navajos who wanted to become sales people and wanted to work on commission. That produced a new image that the border towns hadn't seen of professional Navajos going from business to business saying, "Here is the opportunity to get your message out to the Navajo audience."

Second, I think our influence among the young in terms of—because we were a daily paper and a daily paper largely produced by Navajos, young kids knew they could do that as a career; they knew it was an option before when the paper had been a weekly, mostly been produced by people like Bill, but had no ties to the reservation and because of that, kids I don't think knew they could become journalists. In our short 3-year stint as a daily we brought about 15 people into the profession.

MR. MILLER. Were they Navajos?

MR. TRAHANT. Yes.

MS. HINMAN. Today how many Navajos are on the *Times* staff, to your knowledge?

MR. DONOVAN. There are seven Navajos working for the paper now, not in the editorial.

MS. HINMAN. Are there any in editorial?

MR. DONOVAN. One person who writes sports who is a Navajo.

CHAIRMAN PENDLETON. You mean there are no Navajos writing Navajo editorials?

MR. DONOVAN. Most of the copy is written by me and the consultant, Joe Shields.

CHAIRMAN PENDLETON. Consultant?

MR. DONOVAN. Consultant.

MR. MILLER. Mr. Donovan, you mentioned a sports writer. Is he presently employed?

MR. DONOVAN. No, he is paid by the inch, column inch.

MS. HINMAN. On a full-time basis, how many Navajos are working for the staff?

MR. DONOVAN. I don't think there are any Navajos working full-time basis. Everybody is part time, 20 hours a week, I think.

MR. MILLER. When you were publisher, how many were working?

MR. TRAHANT. Twelve Navajos, I believe, in the editorial department and 42 total.

MR. MILLER. Full time?

MR. TRAHANT. Yes.

MS. HINMAN. Mr. Donovan, how is the *Times* as presently published different from the *Times* before it was closed?

MR. DONOVAN. Like night and day.

MS. HINMAN. You are both on the staff, staff before and on the staff now, so—

MR. DONOVAN. Currently, lot of stuff—I am also freelance for other newspapers; currently, a lot of stuff I write for other newspapers doesn't get into the *Navajo Times*.

MS. HINMAN. Who decides that it doesn't get in?

MR. DONOVAN. The consultant.

MS. HINMAN. He is paid a salary for consulting. This is what was discussed yesterday.

MR. DONOVAN. Yes.

MS. HINMAN. Mr. Shields' salary, which apparently exceeds—

MR. DONOVAN. I been trying to find out how much his salary is, but the tribe won't tell me.

CHAIRMAN PENDLETON. Did you ask the finance committee?

MR. DONOVAN. I asked administration of finance people, and they said it was none of my business.

CHAIRMAN PENDLETON. Are these hearings being covered by the *Navajo Times*, by you, today?

MR. DONOVAN. No, they are being covered by Joe Shields.

MR. MILLER. I think the record should show that I invited Mr. Shields to come up and sit on the panel, but he declined.

MS. HINMAN. Mr. Donovan, would you care to discuss the difference between today's paper and the paper before it was closed?

MR. DONOVAN. The emphasis in today's paper is still toward positive. We use a lot of press releases; we use a lot of press releases from the tribe.

MS. HINMAN. Tribal council or whom?

MR. DONOVAN. Public relations office of the tribal government. My objection—in the past, we refused to use press releases per se. We would take the press releases and use them as a source to write our own stories—more balanced. Today, the press releases are used word for word.

MS. HINMAN. How much influence are you saying the tribal government has over what is published today?

MR. DONOVAN. I don't think the tribal government has—is saying to Mr. Shields, "This is what you will do." I think this is Mr. Shields' decision on how the paper would run.

MS. HINMAN. What type of relationship do you think, if any, should the Chairman's office or the tribal council have with the paper? I guess I am asking what role the paper should be playing on the reservation, in your opinion?

MR. DONOVAN. I think the paper should be as independent as possible.

MS. HINMAN. How best can that be achieved?

MR. DONOVAN. There was a time in the early 1960s when the paper was as independent as it could be. Under the laws that were in effect at that time, the publisher of the paper served at the pleasure of the council. The Chairman's office could not fire the publisher.

And the Chairman at that time, Raymond Nakai, wanted to fire the publisher of the paper, but he couldn't, and the paper was able to do what it had to do at that time. Two years later after his first attempt, he got enough members of the council on his side and the publisher was fired.

At least, you have some kind of mechanism whereby the Chairman's office couldn't influence the paper directly if you had that kind of thing.

One of the things I also kind of suggested, maybe a little bit in jest, is that maybe the tribal government should sell the paper to a faction that is not in power, let them run it, and then when the faction is changed, let them sell it back to the other faction so that way there would be no control.

CHAIRMAN PENDLETON. Do you want to be fired more than four times?

MR. DONOVAN. Yes.

CHAIRMAN PENDLETON. Just one question. I just want to ask you, you have been around a long time with this *Navajo Times*, Navajo press. Could you possibly tell this panel or this Commission how many institutions that report to the tribal council have independence?

MR. DONOVAN. Let me put it this way: one of the things that I don't think has been discussed yet is the fact that the situation faced by *Navajo Times* is not that different than the situation faced by almost every tribal newspaper in this country.

When we were under Zah, it is because of Zah's decision that we be free and independent that it happened. And I remember talking to people in other newspapers who would come up to me, say, "How can you write the things you write?" They said, "We could never put that in our tribal newspapers." That is true; they couldn't.

MS. HINMAN. Almost gratuitous on the part of Zah.

MR. DONOVAN. Zah himself keeping away, this was a result of—until you get a tribal leader who thinks that way, you will not have an independent paper.

CHAIRMAN PENDLETON. Or anything else independent also.

MR. DONOVAN. Also, at the same time we were having trouble with KTNN; the tribal radio station was also having problems with the tribe trying to take over more control of what was put on the air.

MR. MILLER. For the record, would you be considered a Zah supporter?

MR. DONOVAN. I didn't get along too well with Mr. Zah when he was Chairman either.

MS. HINMAN. More or less a consistent skeptic?

MR. DONOVAN. Some people—some of my articles may have turned off some voters to Zah.

MR. MILLER. You have a reputation of being very critical?

MR. DONOVAN. I have a reputation of being a cynic of all tribal governments.

CHAIRMAN PENDLETON. I withdraw my question.

COMMISSIONER ALLEN. I would like to be a bit cynical for a moment. You are all journalists, and there is something in this story that doesn't quite seize upon my mind.

As I understand the working of the tribal government, if the newspaper is a thorn in its side and a new inauguration takes place, you have contracts expiring, nothing is easier in the world, apparently, than to get rid of the people running it who cause you trouble and to put in others more to your liking. Why, with such powers available, would anyone go to all the trouble you have described this afternoon, closing down and losing great amounts of money? Any of you may respond. I don't follow this.

MR. DONOVAN. Again, you have to realize that I think a lot of us think the decision was made by Loyce Phoenix. She had just come on with the tribal government. She was new. My feeling, I think she overstated the situation and decided the wrong course on her own decision.

COMMISSIONER ALLEN. Let me understand you then, and any of the officers may want to comment on this also. You do not believe the *Navajo Times* was shut down as a way of gaining control? You believe that, while the intention may have been to gain control of the *Navajo Times*, it was shut down by mistake?

MR. DONOVAN. I think in retrospect a lot of people think it was in the Chairman's office, but I think Loyce Phoenix convinced enough members of the staff to go along with it.

MS. HINMAN. You are saying a strategic error then?

MR. DONOVAN. Yes.

COMMISSIONER ALLEN. Let's go a step beyond that. Assuming the shutdown was by mistake, let's speculate. Suppose that mistake hadn't been made and the new administration had done nothing more than make a change in personnel at the *Navajo Times*, are there any of you who do not concede the new administration's right to do that?

MR. TRAHANT. They had a right to do that.

COMMISSIONER ALLEN. Everyone agrees they have a right to do that as things now stand?

MR. DONOVAN. Not only a right for MacDonald to come in and remove Trahant who is not a Navajo and put a Navajo in there—would have been a good move on his part.

COMMISSIONER ALLEN. Thank you.

MR. MILLER. Mr. Donovan, for the record, I have a document here that has some figures on it. I would like to show it to you and ask you to answer one or two questions.

COMMISSIONER DESTRO. While he is passing those out, let me ask one other question that is related to Commissioner Allen's. Assuming that the tribal government did not take simply replacing the individuals who worked for the *Times* method and they had simply decided that a newspaper of the form of the *Navajo Times* was not in the best interest of the tribe, perhaps that there was too much of a drain of assets, then, would it have been a reasonable decision, not necessarily one that you would have agreed with, but nevertheless reasonable, to say that "We are simply going to stop subsidizing it and just let it shut down and sell all the equipment." Could they have done that?

MR. TRAHANT. If finances were the primary motive, let's say for a minute they were since we are getting hypothetical, why not say, "Let's sell it," and they did have a standing offer on the table. At that time we would have negotiated a price and purchased the paper. It would have no longer been something they would have had to worry about.

COMMISSIONER DESTRO. How much were you losing on an annual basis?

MR. TRAHANT. Between \$350,000 and \$400,000 a year. And part of it, let me explain that was because of the philosophy that I had in running the paper and Bill disagreed completely with this, but what we wanted to do was prove that a Navajo newspaper could be excellent, and we were willing to spend the money necessary to do that.

We wanted our share of the market, which is something that the Navajos have never had before, and slowly we were encroaching on what had been the Gallup *Independent's* domain. Our strategy was the same

employed by *USA Today*. We were going to accept the losses, and we were going to go move on and we were going to let the market catch up with us.

COMMISSIONER ALLEN. May I follow up on that just briefly. I read the *Times* 2 years ago when I was in the nation, and one of the things I noticed was that you published widely not just about items relating to the Navajo, but you covered national and regional stories as well. You are saying now that was a deliberate strategy to give the *Navajo Times* a market share that extended beyond the reservation.

MR. TRAHANT. It was twofold. One, to give it the market share beyond the reservation and, more important to me philosophically, I think a Navajo has just as much right to decide what's news in Cleveland, what's news in Washington, and what's news in Teheran as anybody else. I think to say the Navajo newspaper ought to only print Navajo news is relegating the tribe to second-class citizenry.

COMMISSIONER ALLEN. I just noticed that when I was there I enjoyed the paper. I commend any of you who were involved with it as having produced an excellent paper.

MR. DONOVAN. I would like to comment on one thing. My objection during the time the paper was a daily was the fact that during most of that time there was no one over Mark approving the budget. Basically, he could print his own money. He decided how big a staff to have, how much money to spend. There was no one really overseeing the level of his spending. The *Navajo Times* is the only tribal department in the history of the tribe that could do that.

COMMISSIONER ALLEN. Your estimation was that there were legitimate fiscal questions?

MR. DONOVAN. In my estimation, the paper could have approving the budget. Basically, he could print his own money. He decided how big a staff to have, how much money to spend. There was no one really overseeing the level of his spending. The *Navajo Times* is the only tribal department in the history of the tribe that could do that.

COMMISSIONER ALLEN. Your estimation was that there were legitimate fiscal questions?

MR. DONOVAN. In my estimation, the paper could have saved a lot of money.

MR. MILLER. Just for the record, I would like to acknowledge that Mr. Trahan has handed me a bundle of documents which I would like to admit as exhibits to the record. Mr. Chairman, any objections?

CHAIRMAN PENDLETON. No, not at all.

COMMISSIONER ALLEN. Could they be identified?

CHAIRMAN PENDLETON. I will identify these as Mr. Pete's consulting contract, and apparently, a consulting contract to Mr. John R. Brown. Also one to Marshall Tome and Mr. Raymond L. Lancer. These are

contracts awarded by the tribal council. They pertain to this panel here and have to do with the newspaper.

MR. MILLER. Would anyone care to comment on those contracts from the panel?

MR. DONOVAN. I am not sure which ones you have.

MR. TRAHANT. They were just handed to me from the audience.

CHAIRMAN PENDLETON. They miraculously appeared from someplace.

MR. MILLER. Mr. Donovan, I handed you a document there that I would like to admit as an exhibit for the record, Mr. Chairman. Any objection?

CHAIRMAN PENDLETON. No objections at all, sir.

MR. MILLER. Mr. Donovan, could you explain what that document is? I believe it pertains to the finances after the *Times* was closed down, but then reopened under either a consultant agreement or agreement to publish whereby Willis Brown would be the publisher or consultant?

MR. DONOVAN. Willis Brown was one of those seven or eight members on that special task force set up by MacDonald, and it was his job to get the *Times* back in operation. He came in here in mid-May, and his first duty was to set up a budget for us to operate on for the rest of the year, and with the help of Mike Kellog, he came up with a budget of \$66,647, which was submitted to the budget and finance committee, and this is the one that they approved.

MR. MILLER. What was his salary?

MR. DONOVAN. According to this, his salary was—it was not a salary exactly; it was a consultant contract. So his fee was \$30,030.

MR. MILLER. What does that work out to per day?

MR. DONOVAN. \$500 a day.

MS. HINMAN. You are saying it was \$30,000 for 12 weeks?

MR. DONOVAN. Twelve weeks, \$500 a day, plus expenses, yes.

MR. MILLER. Mr. Trahant, how much were you paid as publisher?

MR. TRAHANT. I think the final salary I had under a raise given to every tribal employee just before the election was \$35,000 a year.

MS. HINMAN. That is what it would have been had the paper continued?

MR. TRAHANT. Correct.

MS. HINMAN. Your salary was made public?

MR. TRAHANT. Right.

MS. HINMAN. You don't know Mr. Shields, the present editor's salary because that is not made public?

MR. DONOVAN. No, I don't.

CHAIRMAN PENDLETON. Maybe it will appear. Thank you very much for coming, gentlemen.

MS. PRADO. Mr. Roessel, you mentioned a memo that was handed to you when the police came to close down the *Times*. You don't have it with you today or do you have one in your possession?

MR. ROESSEL. I kept a souvenir.

MS. PRADO. Can we get a copy of that memo?

MR. ROESSEL. Yes.

MS. PRADO. Who was the memo from?

MR. ROESSEL. I believe it was from Loyce Phoenix.

MS. PRADO. What is her position?

MR. ROESSEL. Right now, unemployed.

MR. MILLER. May I admit that document as an exhibit for the record?

CHAIRMAN PENDLETON. So ordered without objection. Mr. Destro has a point to raise—I am sorry, Mr. Tome?

MR. TOME. Mr. Chairman, members of the Commission, I would like to have an opportunity to submit what actually happened. I didn't prepare for it; I have no documents. I would like to have a chance to submit this document.

CHAIRMAN PENDLETON. The record is kept open for 30 days after this is over. We would be glad to have your document, no question. We would like to have your document.

COMMISSIONER DESTRO. Let me ask you a quick question. I have a document here dated May 27, 1987. It is a letter to you and Mr. Lancer from Mr. Upshaw, and it includes a contract in the amount of approximately \$49,990 for consulting work. It says you are going to be a media consultant here. I am quoting now from the attachment b, "Statement of Work: Marshall Tome."

It says: "The incumbent media consultant is to assist the tribal administration in all areas of news media; the chapter communities and five agencies on Navajo will be getting factual information about their tribal government and program activities in newspaper, radio and television."

Could you explain what kind of work you are doing under this?

MR. TOME. Yes, what has happened is from the contract I received, I don't work a full 8 hours a day, just work 5 hours a day and not every day, and this is for 5 months, maybe 6 months; it depends.

And what we do, at least I do, is that what has happened, what are people saying, one. Number two, is that—the main purpose I think it's in there, the Chairman made an inauguration, what he is going to do, and one of the areas is jobs, and one of the areas we recommend, at least, I have worked on, is to bring in industry from—not just the type we been doing over the years. We are bringing in computer chip type of work, and I think that can be done.

So I think what I am doing is getting out to the chapter and explaining, can there be a place for this? It can become a different type Navajo work and rather than have—I haven't checked with the various sites, Los Alamos Scientific Laboratory, National Academy of Science. They sent all their stuff to Japan to deal with computer chips. So in the semi-conductor program, this is some of the things that the Navajos can do, and that is

some of the things I am working on. And then we communicate this to the local people as to how we can go about this, is there land set aside if this happened, and then eventually, if this is going to happen, then I write out a news release and give it to the Chairman, said this is what we are coming to and/or whoever, economic development committee.

COMMISSIONER DESTRO. I can see the relationship by looking over the contract between the economic development part, but it appears that you are serving as a media consultant to the Chairman to advise him on how best to get accurate information out to the people about the operations of the tribal government; isn't that part of the—

MR. TOME. That is part of it, yes, and there has been—we have so many do-gooders, newspaper people. I picked up a paper last night, Arizona public service, I mean, *Arizona Republic*, and I read where it says, Dr. Bob Roessel was the first president of the Navajo Community College; it is not. It's Ned Hatathli is the first president, and I just see stuff like that, full of errors, all the time. You read in the *Gallup Independent*, Albuquerque, all the big papers, even on TV, so I take those articles and I say this is a correction.

We are trying to make the people aware of what we are doing.

And, secondly, I think that we can—could do this, even do some of the things that we like to do ourselves rather than have somebody come in and do for us.

CHAIRMAN PENDLETON. Let the record show this contract is for 4 months at \$49,000. I am only assuming that you get this kind of contract from the advisory committee or from the Chairman. There must be a limit on the amounts of money that he can award without going to the tribal council; is that correct?

MR. TOME. No, the budget and finance committee has a resolution and the council gave the budget and finance, they can approve any contract up to \$50,000.

MR. MILLER. \$50,000?

MR. TOME. \$50,000. The committee chairman can sign off on. This has been going on for a number of years.

CHAIRMAN PENDLETON. Obviously, we understand. I want to thank you gentlemen for coming very much.

We will move to the next panel.

Those of you who want to sign up, please do so.

[Recess.]

CHAIRMAN PENDLETON. Would you two gentlemen stand and be sworn.
[Merle Al Garcia and Dennis Ickes were sworn.]

CHAIRMAN PENDLETON. Counsel.

**TESTIMONY OF MERLE AL GARCIA, FORMER GOVERNOR,
ACOMA PUEBLO**

MR. McDONALD. Mr. Garcia, will you state your name and address and your background for us, for the record.

MR. GARCIA. Yes, sir. Mr. Chairman, members of the Commission, my name is Merle Al Garcia. I am the former Governor of the Acoma Pueblo. I served as their Governor in 1975 and 1976, and came back in again as the Governor of the pueblo in 1982 to 1985.

I also served on the executive committee of the All Pueblo Council, and I also was the chairman of the Ten Southern Governors in Albuquerque.

From 1982 to 1985, I was a member of the board of directors for the National Tribal Chairmen's Association, and I also was on a policy review committee for the National Congress of the American Indian and the National Tribal Chairmen.

I also served on the executive committee for the Council on Energy Resources Tribes. And lastly, I was appointed through the Department of Interior from the State Department to represent the United States in the Inter-American Congress where I chaired the civil rights, I mean, the human rights committee.

That is my background.

MR. McDONALD. Thank you very much, Mr. Garcia.

Can you explain to the Commission why the Acoma Pueblo does not have a constitution?

MR. GARCIA. The Acoma Pueblo is one of the oldest and traditional tribes, and the majority of the 19 pueblos in the State of New Mexico are basically that, and they have a government which ties back in its traditional system.

I think that the Reorganization Act of 1934, the All Pueblo Council refused to be the IRA tribe, and for that reason the majority of the pueblos in the State of New Mexico do not have a constitution, but they do have ordinances and bylaws in place which governs them.

MR. McDONALD. Thank you. What is the appellate court system at Acoma?

MR. GARCIA. The appellate court system, as I set it up in 1975, was the first time that I tried to proceed in the direction of having a due process of law on Acoma Pueblo. The court system was established in the late sixties or the early seventies—I am not quite sure of the exact time. But when I came in as Governor in 1975, I felt that we need a due process of law in the tribal court system. Hopefully, once it was established that improvements could be made so that it would protect the individual birthrights and their civil rights.

MR. McDONALD. When one appeals from the tribal court judgment, where does he go, to the tribal council?

MR. GARCIA. To the tribal council. The way the court system is set up, as I see it, and set it up, I indicated that the pueblo was very, very traditional in its government, and any civil case would supersede the court, the tribal courts.

MR. McDONALD. The council?

MR. GARCIA. Yes, it will supersede anything in the system itself and try to have it settled the traditional way whatever the problem is. If it is divorce, the family of the woman and the family of the man get together to resolve the problems that they were having because the majority of the pueblo in the State of New Mexico do not believe in divorce.

Then the next step is the tribal courts. The last remedy for any issue would be the appellate court, which is the tribal council and governor.

MR. McDONALD. How is the Governor elected, every year?

MR. GARCIA. The Governor is appointed. The majority of tribes in the State of New Mexico also had a government system long before the white man came to this country. They have, I guess in other Indian country they would be called chiefs.

Well, in our system they are caciques, and they have religious leaders as their advisors whom they go to for advice of appointments of different individuals to serve in the governorship, and it's done on an annual basis.

MR. McDONALD. Can you give an example of a case for which there is no adequate tribal forum at Acoma?

MR. GARCIA. I think one of the most serious, as I sit here and listen to individuals and then people testify before this committee, that in order to have a good forum, each tribe would have to build in a consistency of government where you would have a continuity instead of having something set up where a new chairman, a new president, a new governor comes in, then he changes the whole thing; he wants to run his show the way he feels he should.

MR. McDONALD. If a case arises in which the government is one of the parties, and the only forum is the tribal court and the tribe, if it loses in that forum, can appeal to the council, and the council is the same as the tribe, then it seems that person has lost his case already before he ever starts out. Is that your assessment?

MR. GARCIA. No, I think there should be other remedies built into it.

MR. McDONALD. Is that the case, though?

MR. GARCIA. Yes, that's usually the case in something of the nature you are talking about.

MR. McDONALD. Did you have a case recently involving a lease of land? Or your daughter?

MR. GARCIA. Oh, yes, I do have a case where my daughter is living on tribal property, but it was really meant for economic development purposes, and we have a system at Acoma where each individual is allotted a parcel of land to build their homes on by the cacique, and in 1983 I

acquired this 245-acre right off of I-40 for industrial development for Acoma.

My daughter's mobile home is located on this parcel of land. I indicated to them that they would have to move because there might be some development on there, but we weren't looking at that particular area at this time because the water table is close to the surface and—

MR. McDONALD. What was the status of that case now?

MR. GARCIA. Nothing has happened. I think the tribal government has found out that I have appealed to this committee for help.

MR. McDONALD. Has she received an eviction notice?

MR. GARCIA. Yes, she has, from the Governor, about the middle of July, that she had 90 days retroactive back to 5/7/87, which was the first time she met with the tribal Governor.

MR. McDONALD. What is the procedure for obtaining the land lease to which she is entitled?

MR. GARCIA. I think the only remedy that we have is that.

MR. McDONALD. Is the only procedure available one of her going to the cacique and requesting assistance?

MR. GARCIA. That is the only procedure that we have, and that is the thing I tried to make the cacique aware of—the fact that he may be the chief and the leader of the tribe, but I think he also has limitations on where he refuses because we have a lot of intermarriages at Acoma, yet, some of these non-Acomas already have homes, and my daughter is a full-blooded Acoma and she doesn't have a lot. So I feel that it was intentionally refused by the cacique.

MR. McDONALD. Her only recourse is to go to tribal court; is that correct?

MR. GARCIA. That is correct, but in the last month or so the tribal government and the tribal council have intruded into the due process of law.

MR. McDONALD. How is that?

MR. GARCIA. They have written a letter to the judge, who is an Anglo out of Gallup, a licensed attorney as the judge of the pueblo, and they have already told him exactly what kind of sentence to pass onto the individual. So the due process of law in Acoma has been defeated. I am wondering, where do we go? The only alternative we have is come for help to this committee or go through the Federal courts.

MR. McDONALD. Of course, this Commission is not a law enforcement agency.

So, the *Santa Clara Pueblo v. Martinez* case prevents you from going to Federal court or your daughter from going to Federal court. Do you have any recommendations how the law should read in that regard?

MR. GARCIA. I think that that law should be changed to where there is a remedy for Indian members if something like this should happen. In order to protect their rights, they should have a remedy—where do they go?

I feel that the *Martinez* case puts a limit on us. Yes, I think the tribe sovereignty is important. But I don't think discrimination should play a big role in hiding behind the apron of the tribal sovereignty or much less another crime that might happen.

Then the tribe hides behind that, "We have the sovereignty; you can't sue us" because, as I see it, crime has no boundaries. So, there has got to be a remedy. Where do you go? I feel that there should be a limit on the sovereignty. What do we protect under the sovereignty system?

My feeling is that land, water rights, mineral rights, tradition—especially the religion—should be protected, but there are other crimes, other things that happen within the reservation. I don't think that we should hide behind, under the sovereignty power of the tribe.

As I sat here, I was listening to how the Navajos were working. I worked all my life off the reservation; I sold automobiles—in fact I sold some automobiles to the Navajos.

When I went in as the Governor, I set up a system that there should be a way for business people to come in to repossess or make collections, and the tribal courts were set up to help in that direction—evaluate the issue, and if the person is a low income, what can they afford? Then we settle with business people from Albuquerque, Grants, wherever, to give them so much payment every month as we, as the family could afford, and we worked it that way rather than to say, "Hey, you can't come in and repossess," because I want the Commission to take a serious look at this.

The majority of the Indian pueblos in the State of New Mexico don't have any business establishment of anything within their reservation, and in the long run it hurts other Indian people to buy in Albuquerque or Grants. Even the banks will refuse to make loans because they cannot go in and make collections.

So, these are the areas that really need a serious attention, and those laws have to be changed to work in—after all, the individual in Albuquerque in business, they have debts to pay just like anybody else; otherwise, they are not in business anymore.

MR. McDONALD. Thank you very much, Mr. Garcia. I have no further questions. Mr. Chairman.

TESTIMONY OF DENNIS ICKES, ATTORNEY, SALT LAKE CITY, UTAH

MR. MILLER. Mr. Ickes, would you please state your name and position and address for the record.

MR. ICKES. My name is Dennis Ickes. I am an attorney of law in Salt Lake City, Utah, appearing today on behalf of Duchesne and Uintah

Counties, Utah. I practiced law for 17 years. I was the first director of the Office of Indian Rights in the Department of Justice; later became the director, Office of Indian Rights, Department of Justice; subsequently became the Deputy Secretary of Interior. Subsequent to leaving Federal service, I've been practicing law in Salt Lake City. I am very familiar with the subject which you have been addressing these last couple of days and very much appreciate the fact that this subject is being reviewed and investigated and that a report will be made to the Congress and to the President on a matter that has been 10 years, at least 9 years, perhaps in coming.

I have today a prepared statement which I would like to submit for the record and for members of the Commission's review and counsel's review. I have some other copies here if there is need for additional copies. So, for the record, I would like to submit those, and I have some other comments that expand upon this statement. I won't read from the statement itself, but I would like to cover a couple of issues which I think are of interest to this Commission and its review.

The decision in the *Santa Clara Pueblo v. Martinez*, in essence, converted rights into privileges, and by converting rights into privileges, it has basically left the Indian Bill of Rights, Indian Civil Rights Act, on the reservation in a position of being applied at the sole discretion of the tribal government.

I heard this morning some testimony, some expressions of opinions by panelists, and it would be my opinion that the application of the Indian Civil Rights Act on the reservation is solely at the discretion of the tribe, and that surely was not the original intent of the legislation, and I think it is a matter that must be corrected.

The practical results of *Santa Clara Pueblo*, I think, is something that the Commission should be interested in. The practical results are that it permits discretionary rule by tribal governments. It results in tribal courts being more political courts rather than courts of law. It permits no oversight by Federal courts or by any other nonpolitical body except perhaps for commissions like yourself.

It increases the potential for the lack of access to any court, and I just merely refer you to the *Dry Creek Lodge* kind of situation where an individual living on the reservation operated a business on a reservation up in Wyoming, had no access to any court. Tribal court wouldn't accept it. He had no access to Federal court, and this is a condition that exists. It is discretionary with the tribal court and with the tribal government to allow access. That needs to be overcome.

It diminishes realistic, meaningful remedies available to persons who do business and who live on reservations, who are members of the tribes or persons who are nonmembers of a tribe. It truly makes second-class

citizens out of members of the tribe and third-class citizens out of nonmembers of the tribe living on the reservation.

It most certainly perpetuates government based upon tribal membership rather than upon the consent of the governed.

I would like to make the Commission aware, and I put a map on the blackboard behind you, and you might also want to refer to exhibit A to the statement. Perhaps exhibit A is a little bit more clear as to what the impacts and the effects of *Santa Clara Pueblo v. Martinez* are in the State of Utah on the Ute Reservation.

The legal result of a recent decision called *Ute Tribe v. State of Utah* merely is that the reservation boundaries have been established to be what you see on the blackboard as being the yellow lines, which unfortunately may not be quite so clear to you, but in your exhibit A they would be the blue lines.

It converted a 1 million-acre reservation that had been previously accepted into a 4 million-acre reservation.

What that has done is to quadruple the size of the reservation to make it the second largest reservation of the Nation. It has incorporated approximately 15,000 persons who are nonmembers of the Ute Tribe. It has incorporated and included in those boundaries approximately 70 percent of all fee land within those two counties. It has expanded the territory over which the Ute Tribe has jurisdiction over people and property such as hunting and fishing, water, control of ingress and egress, taxation and licenses, and a whole host of tribal powers that are available to tribal governments.

It has placed the tribe, the State, and local governments into direct competition for revenues. It has eliminated access to Federal courts by tribal members and nontribal members. It has placed approximately 15,000 nonmembers under government control of a tribe in which they have no political participation.

It has ousted the State and local governments from concurrent jurisdiction in many instances. It has placed most government affairs in the hands of 450 tribal voters. It has increased the likelihood of much more litigation over jurisdictional issues within this 4 million-acre reservation. It has imposed greater burdens and stresses upon tribal courts. It has increased political tensions and sensitivities between tribal members and nontribal members. It has diminished respect for and support for the tribal government by nontribal members. It has diminished respect for the Federal Government by nontribal members because the Federal Government has allowed this condition to continue since 1978 when the *Martinez* case was decided. It has increased political pressure upon the tribal government by tribal members and tribal government advocates to expand tribal powers on the theory of either use tribal powers or you are going to lose tribal powers. It has diminished the values of existing reservation

property owned by all persons, and it has diminished the interest of economic development within the reservation by persons both within and without the reservation.

Because of these conditions and because of the conditions that exist in this country since the *Martinez* case, it has created most certainly an opportunity for tribal governments to ignore those rights that had previously been recognized by the courts prior to the *Martinez* case, and you know, it is not whether or not tribal governments are actually abusing their powers; there are many tribes that are not. And as I came in today, I saw several tribal chairmen, including Mr. Garcia and others who are here, whom I have personal familiarity with their tribal governments when they were chairmen and some are now chairmen. I have seen that they have undertaken efforts to try to implement the Civil Rights Act in the way it was intended to be.

However, the point is that rights are privileges, and whenever you have rights that are privileges instead of rights, then you have a situation where it is totally at the discretion of the governing power, and I think that is the most important thing that this Commission can address.

I couldn't help but notice—I take several Indian newspapers—the *Lakota Times* headline in this newspaper on July 29, says: “Oglala Tribal Council System Overrules Tribal Court,” and it goes into quite a story about that certain instance.

I think that it is in the best interests of Indian tribes to support—

MR. MILLER. Would you like to submit that for the record?

MR. ICKES. I would be happy to submit that for the record.

CHAIRMAN PENDLETON. So ordered.

MR. ICKES. I think it is in the best interest of Indian tribes to be very supportive of this Commission. It is very unfortunate to hear this morning about the action of the Navajo Tribal Council to not support and not participate.

I was impressed with a statement made by Chairman Peter MacDonald in the *Navajo Times*, which was a point of discussion, on page 7, which I will also submit for the record, where Mr. MacDonald made a quarterly report to the Navajo Tribal Council. In making his report, he noted that the Navajo Tribal Council's number one effort was to build a thriving private sector on the Navajo Reservation with hundreds of new Navajo-owned businesses and thousands of new jobs for Navajo: “Navajo means business. We want to be competitive with any other State and any other country in the world.”

He goes on and describes what the goals and ambitions are and the economic summit conference that was held there, all designed to advance the economic interests of the Navajo Tribe. All very good.

In his statement, a very good statement I thought, but one thing was lacking there. He wanted to give tax incentives. He wanted to give various

kinds of incentives for businesses, for economic development on the reservation to occur. But the one thing that I felt that he omitted, that I think is very important to tribal self-sufficiency, on the one hand, and to tribal protection, on the other hand, is to have the protections of good laws so that persons will come on the reservation.

I have looked at this situation from every angle. I have been in the Federal service. I looked at it from that angle. I have looked at it from the angle of being an attorney representing tribal interests, of the tribal government. I have looked at it from representing clients who have challenged actions of a tribal government. I looked at it from every angle.

I currently represent businesses who would like to do business on reservations. But one of the major deterrents is the conditions that exist on reservations with respect to the courts and the laws and the protections or lack of protections that may exist there.

I think that this Commission can do a great service to tribal governments and to Indian people generally, and I know that tribal governments for the most part won't appreciate it at the time, but I think they will find that with a strengthened and improved tribal system that they will best be able to accomplish that which Chairman Pendleton stated, access to an opportunity for jobs; economic development can occur under those—cannot or will not occur under the present conditions.

I would like to make several suggestions to the Commission about a solution. I don't want to come today just to give you problems. There are problems, but are there are solutions here, and I would like to outline what I think would be a reasonable solution for you to report to the President and to the Congress.

I think that the Indian Bill of Rights needs to be overhauled to some degree. I think that any overhaul requires that it preserve and protect Indian sovereignty and tribal sovereignty, but it also needs to balance the rights of individuals against the powers of tribal government. Just as we have the protections and the balance of powers between the Government of the United States and the respective States and its citizens, we need that here to protect people and also to protect the tribal government.

We need to closely adhere to the principles of the United States Constitution. We need to make adjustments which require the consent of the governed before a tribe imposes its will upon those who reside within the reservation's boundaries. We need to provide for Federal oversight through the Federal courts that makes those remedies reasonably available and certain.

And finally, I would strongly recommend that you provide Federal funding incentives to improve the quality of justice on reservations by assisting tribes in their efforts to reform the judiciary system and to help them along because I consulted with one tribal chairman who made the point that, "We would like to do better; we want to do more, but we don't

have the financial means available to do that.” And I think that this Commission in its recommendations could include that, to make it a priority and important point to help tribal governments and bring about those kinds of changes both before and after the fact.

I can’t think of a more fitting present, you might say, to the United States this year, in the year of the 200th year of the Constitution, to have an improved Indian Bill of Rights which will both protect sovereignty and protect people in its relationships with the tribal government.

And then, finally, I would like to turn more specifically to Duchesne County and point out how all of this pertains to them. That a situation exists where approximately 15,000 nontribal members, both Indian and non-Indian, who live within the exterior boundaries of the reservation and are subject to the rule of law by 450 tribal members who elect their government. That is an unfair condition when great powers exist and there isn’t that means to participate in tribal government.

More that I have on that subject is covered in the written statement and, therefore, I won’t go into greater detail. I wanted to bring those to the Commission’s attention. Thank you very much.

MR. MILLER. Counsel has no questions.

CHAIRMAN PENDLETON. I just want to say for the sake of my colleagues, who can speak for themselves, I think the testimony you have given us is enlightening and informative, and thank you very much for taking the time to prepare it. It is rather alarming.

MR. ICKES. Thank you for the opportunity.

CHAIRMAN PENDLETON. Thank you. We will now take public witnesses.

MR. MILLER. I believe Mr. Garcia would like to submit—

MR. GARCIA. Mr. Chairman, members of the Commission, I have two more copies of my testimony, and all the documents are marked as exhibits in my issue. I didn’t want to go into it because it was pretty lengthy and I’ll leave them. I was supposed to have received the tribal ordinances, or the tribal advocate, but it evidently got lost. I had requested that a week ago, but I thought I was refused and he finally got it yesterday, and there will be other materials that I will submit to the Commission when I gather them.

CHAIRMAN PENDLETON. Please give them to us. The record is open for 30 days beyond this point.

MR. GARCIA. Thank you.

Open Session

CHAIRMAN PENDLETON. We are pressed for time; we have about 20 public witnesses. Some witnesses are under one number and so are multiple witnesses, and I would ask those of you who have come together to decide who wants to speak or how you divide your 5 minutes.

It does not mean if you are in a group that you get 5 minutes each. We do want public testimony. We do want you to feel free to discuss with us. If you can't get it all in today, I repeat, you need to feel free to send us that testimony at the addresses available here, and it will be included as part of the record.

We want to take the people who made phone calls first, and we will have to swear them in. We will swear them all in one at a time.

Is Ed Little present? Come right down. Following Ed Little is Ben Shelly. Is Willy Reed or William Long Reed here? You are now third. Willy Reed. If the three of you would just sit, then I could swear you in at one time.

You have documents to submit; the record will show that public witnesses have documents to submit, and we have received them. Please raise your right hands, gentleman.

[Ed Little, Ben Shelly, and William Long Reed were sworn.]

CHAIRMAN PENDLETON. Mr. Little, you are first. Mr. Little is over here. Would you please speak into the microphone.

TESTIMONY OF ED LITTLE, NAVAJO CIVIL RIGHTS ASSOCIATION

MR. LITTLE. Thank you, Mr. Chairman. I would like to, first of all, express my appreciation to the Civil Rights Commissioners for coming to the Navajo Reservation to give the Navajo Rights Association some help, and we are proud to have you and thank you. You have been a great help to us. I would like to thank you on that first before I start.

CHAIRMAN PENDLETON. Thank you, sir.

MR. LITTLE. I would like to make a statement that I turn in that, why the Navajo Civil Rights Association was formed. The reason the association was formed was because we have a lot of Navajo people who didn't like what's going on in their tribal government.

First of all, in the first amendment, freedom of religion, freedom of speech, freedom of press, freedom of assembly—they have been denied to these Navajo people, especially in the chapter meetings. People started talking about these areas and started asking questions about what our freedoms are.

That was the first reason the association was formed by a concerned citizen; this was formed in Tuba City, Arizona, by a group of people, and then it was presented to other agencies, and we started talking about what our rights are. We started from the scratch.

First, we started working with the first amendment and people started asking questions. We found out that most of the Navajo people didn't know there is such a right. There are such rights under the 1868 Indian Civil Rights Act. So we contacted several people to get documents on it,

and we tried to inform the Navajo people of the 1868 Indian Civil Rights Act.

CHAIRMAN PENDLETON. You mean 1968?

MR. LITTLE. 1968 Civil Rights Act which was passed. So we went back and checked what kind of government we had. And we found out that in the early days the Treaty of 1868, Article 1 through Article 13, was made. That was our first Navajo constitution.

We tried to work under that constitution and found out that this treaty, we call treaty, which was established by the United States Government, was so weak that it could not meet an economic or state policy or the needs of the Navajo people which fulfilled their emerging sense of the Navajo Nation in America.

In 1938 the Secretary of the Interior, Harry L. Ickes, adopted the rules to form a tribal council, and that was another weakness that we have at the present time.

Now, what we like to see is the constitution for the Navajo tribal government. We like to have three branches of government, executive, legislative, judicial. We like to have check and balance, which we don't have right now. We have something like a government behind a closed door. They do what they want and we don't like that.

So we encourage our people. One of these days the Navajo Rights Association will draft a constitution for the Navajo people, and we would like to present it to the Navajo Tribal Council to look into. We like to see that in the future. We want some kind of local interest in it. We need some selfish views, prejudiced ideas, passionate inputs, and any kind of interest, any kind of help. We need to get this so we can have a constitution for the Navajo tribal government.

TESTIMONY OF BEN SHELLY, NAVAJO CIVIL RIGHTS ASSOCIATION

CHAIRMAN PENDLETON. Your name and your tribe for the record, please.

MR. SHELLY. My name is Ben Shelly. I am with the Navajo rights organization. I am here to kind of help along the president, executive president of the new rights association.

CHAIRMAN PENDLETON. What is that, I couldn't quite hear the name? Navajo rights association?

MR. SHELLY. Let me talk first about the organization and let me say this again, that we do appreciate the Civil Rights Commission coming around the reservation. I thank you much on that. There were a lot of things happening when you were here, and I think you are very strong and I appreciate your Commission people to be here and done your investigation on this.

First, I would like to say is, the Navajo association does exist; we do have executive officers, president, vice president, and secretary, and then we have a legislative body made out of 15 executive board members which I am the chairman of. And we also have vice chairman and secretary. All five agencies all over the reservation, Arizona, Utah, New Mexico, and Colorado, whatever the reservation boundary is, we have members, executive board members from all areas, so just the Navajo association consists of the whole reservation the way we look at it.

The main purpose of the Navajo association is to inform the people of their rights. The first amendment of the United States Constitution, also 1968 Civil Rights Act that was given to the reservation for the self-governing tribe and can use to protect themselves regarding to their rights. We tell these people by going from chapters to chapters; we usually number somewhere around 100, maybe more; the least we ever got is about 60. But we do tell the people of their rights and what the five basic rights of freedom of expression are and that is speech, religious, petition, press, and assembly.

We like to tell the people of the new—of their rights and to be aware of how a tribal government is working on them. We tell them of the thing that is happening, what the tribes are doing to them and their money and their resource. We also tell the people of how their revenues and their assets, which a lot of these revenue or money belong to them, are being played by a few people, by whoever is in power in the tribal government does play with these resources that the Navajo people solely belong to.

So we, the association, for my conclusion I would like to say we will continue doing this and the association will exist and grow, and I think we can make people aware that there is a group or organization out here that can stand up to the thing that is going on, on the reservation.

Thank you.

CHAIRMAN PENDLETON. Thank you. Mr. Reed. Identify yourself and your tribal affiliation, please.

TESTIMONY OF WILLIAM LONG REED, TEACHER, TUBA CITY, ARIZONA

MR. REED. My name is William Long Reed. I am a Navajo. I am from Tuba City and I teach high school. The Commission seems to have forgotten what high school is. We are still around.

I have prepared a written statement here which I will just read verbatim. This is regarding the statement on educational and political issues affecting the Navajo people. My concerns are directed towards a lack of parallel between Navajo tribal government and the objectives of the American democracy.

First, Navajo students attending Navajo high school in the Navajo Nation are taught the basis of United States Government and its

Constitution. Students should have a working knowledge about a democratic government, i.e., checks and balances as a purpose of the three branches. However, the necessary information that these students need to know about the Navajo tribal government is not available. Navajo students do not know the power and limitation of a tribal chairman and those of a tribal council.

The Navajo tribal government is not a democratic system but an autocratic system where Chairmen almost have an absolute authority. This is contrary to what the public schools teach. It would seem reasonable that if the Navajo youth are to be involved in Navajo politics, then high schools would have to offer a course in Navajo tribal government. Perhaps the next generation would then possess the powerful understanding of democracy which is suppressed under the current system.

Secondly, many Navajo voters participate in tribal elections without adequate knowledge of candidates' positions on various issues. Recently, the Tuba City chapter elected an officer who was charged with embezzlement of tribal funds. This information was not made available to the voters either from the chapter or from the people themselves. In this case, people voted on the basis of popularity, not on the stands on community issues and background.

The mechanism to inform the public on various community activities is not made available. It is common practice that opposition parties remove posted notices from public places. There are no rules or regulations on political affairs. Information is continually and systematically suppressed.

Third, it is to the benefit of the Navajo tribal government to reform its political system so that more people participate in the larger and local political affairs. The Navajo system, or rather, the chapter system was created mainly for traditional language speakers and the uneducated. Today, many young Navajo people do not participate because of the language barrier and an outdated system. The Navajo language is a medium of communication, not English, which is the language that young people use more often. The chapter system largely serves the traditional people who often are unaware of its political objectives. Most chapters can be described as a social welfare agency instead of being a local governing body. Creation of townships and similar community governments would seem to be the best approach.

I thank you.

MR. MILLER. Thank you very much.

CHAIRMAN PENDLETON. Thank you very much, gentlemen. If you don't mind, we will take that statement if you want to give it to us.

The next persons are Dennis Jones, J. Tauney Bowman, Chief Judge Violet Mitchell, and Mrs. Chewiwi. And Dr. Iverson, could you come up at the end of this one.

[Dennis Jones, J. Tauney Bowman, Violet Mitchell, and Mrs. Stephen Chewiwi were sworn.]

CHAIRMAN PENDLETON. We will start with Mr. Jones. Would you identify yourself and your affiliation, please.

TESTIMONY OF DENNIS JONES, GALLUP, NEW MEXICO

MR. JONES. My name is Dennis Jones. I live in Gallup, New Mexico, and I am married to Jane Yellow Horse Jones, a Navajo Indian, and we are business people on the Navajo Indian Reservation. I would like to start out by saying I appreciate having the opportunity to appear here before the Commission on Civil Rights.

Approximately 4 years ago my wife and I had a business on the Navajo Indian Reservation, in Fort Defiance, Arizona, called Fort Defiance Trading Post. Two days after the Zah administration come into power, we were stormed at our trading post by approximately 30 police officers. I was held at gunpoint. My wife was held at gunpoint. We were pushed around. We were denied any rights whatsoever. We were denied the right to talk to an attorney, and we were told that we better shut up or we were going to jail.

I find that very difficult to believe that that happens in this country. To be honest with you, I am very bitter. I am very bitter about it.

Our business was closed. It has been closed since then. It is closed today. We were possibly close to bankruptcy.

Mr. Pendleton, you made a good point this morning about economic development, and things like this are difficult for investors to bring in funds to the reservation. In my situation after this happened, I went to a local bank and I asked the bank if I could borrow money to reopen my business, and I was told flat out: how do I know or how do they know this won't happen again by a tribal official? And to be honest with you, I couldn't answer them.

Since then we have operated our business, our other business on the reservation, and we are in the process of selling out.

The tribal government, in my estimation, needs to be closely looked at insofar as civil rights go. I have paid thousands of dollars in legal fees, basically defending myself. I was told by a lawyer here in Flagstaff that, "The tribe has no right doing what they did to you." I am not a lawyer. They told me, "Take them to court." I took them to court and the flag of sovereign immunity was raised, and I spent thousands of dollars defending myself because then they turned around and took me to court, yet, I can't raise the flag of sovereign immunity. And to put it bluntly, it's like being in a ring with a prizefighter and having your hands tied behind your back: you can't fight, you just sit there and take the punches one after another; and that is what I've been going through for the last 4 years.

CHAIRMAN PENDLETON. Thank you, sir. Mr. Bowman.

TESTIMONY OF J. TAUNEY BOWMAN, FORMER NAVAJO CHILDREN'S COURT JUDGE

MR. BOWMAN. My name is J. Tauneey Bowman, and I am a member of the Navajo Tribe. I have a census number, and I have lived on the reservation most of my life, but spent quite a bit of time off reservation. I spent a lot of time in Salt Lake City, Utah. That is where I went to school and worked my way through the university. Then I needed more education so I went to law school, and I never went to high school because at the time when I was at school age there were no schools, no high schools on the reservation. That is the reason why I missed out on obtaining a high school education, but despite that I worked my way through University of Utah. I would like to thank you very much for coming on the reservation as well as holding this session here at this time.

I would like to thank the ladies and gentlemen who have been attending the hearings here because I think they are interested in what is going on as well as they would like to know and seek some kind of solution to the problems that have been stated here at this hearing.

I was children's court judge for Window Rock Children's Court from December 2, 1985, to October 15, 1986. I would like to say again, I concur with Mr. Dennis Jones here. I am American citizen, number one, although I am American Indian, but I am American citizen number one. I have never belonged to any organization that sought to overthrow the American system of government, and I'll say to the tribes: any tribe that does not protect the rights of individuals has no right to exist.

Number two, and that if they are doing it, I believe that the only reasons why they are doing it is because they have money, and Navajo Tribe and other tribes are receiving hundreds of millions of dollars from the Federal Government. They are receiving it from the taxpayers' money, and I believe that, and in that sense that the Federal Government and the Commissioners have a right to have the authority to withhold funds. Once you withhold funds from the tribal government, I think they will come into line.

As I mentioned, I was removed under Judicial Reform Act of 1985 of Navajo Tribe which was initiated by, removal was initiated by the present chief justice of Navajo Tribe—in concurrence with the judiciary committee without notice, without hearing.

I was never notified as to what the charges were against me. The first time that I received any notice was revealed in the *Navajo Times*. That was on November 4, the day of the election. I received no other notice.

The former tribal Chairman concurred with chief justice and judiciary committee and I was removed.

I was appointed prior to the judicial format of 1985. Under previous law, the tribal council will be the only one who would remove me for cause. I

believe my rights were protected under the previous law, but nevertheless I was removed.

After my removal the former chairman of the judiciary committee of the Navajo Tribal Council—

MR. MILLER. Thank you.

CHAIRMAN PENDLETON. Please wind up for us; if you have something, we'll take it, if not, you can send it into us later.

MR. BOWMAN. I will do that. Then the former chairman of Navajo judiciary committee then applied for the position that I was removed. Thank you.

CHAIRMAN PENDLETON. Thank you. Ms. Chewiwi.

TESTIMONY OF MRS. STEPHEN CHEWIWI

MRS. CHEWIWI. I am speaking on behalf of my husband. We're from the pueblo, and he has been involved in a civil case for the past 20 years.

He was given property, as was the custom, by his father, by word of mouth in 1948. His mother made a will to uphold the father's statement after the father passed away. He passed away in 1950 and she made the will in '67. Her daughter took her to court, took her and my husband to court. They went to the lower tribal court. The old woman, which is translated from Indian, her testimony was that she was organizing her husband's word and that she owned nothing, that she was only the trustee or pastoree, and that Stephen was the owner.

For 30 years he's been farming that property. He's been recognized owner, paid all the dues, kept it up, paid for the improvement, planted the crop, and everything.

Several times the case, for political reasons, has been sought to be reopened, but each time the council said that it cannot be reopened because, in reopening it, they would violate the constitution which says that once the case goes to a lower court, an appellate court, that is like the supreme court, the case is closed and dead, and the decision is final.

Regardless, in 1986 for political reasons and because of the relatives, they reopened the case and immediately reversed the decision. We got a court order saying that his land was to be given to his sister and that her son would take our crop.

This goes against the—breaks the Constitution. You have all the documents as to the articles and the sections. Violates the United States Constitution, violates our civil rights. There is no statute of limitations; there is no compensation. They tell us, "Leave the property in good condition." In other words, don't plow up your crop.

Right now we are in contempt of court because we have refused to do it. We went for help to the BIA; the area director was too busy. He sent us to his staff member, and Ron Toya, he was his assistant, he told us, "I could tell you of horror stories worse than this that are happening, but our hands

are tied." I can't understand why they are GS-13s, GS-14s, if they will not involve themselves.

We went to the U.S. marshal for help because they were going to seize our bales. They said they could not come in because, unless a crime is committed; in other words, we have to shoot somebody or somebody has to shoot us first.

We went to the congressional delegation; Senator Bingaman and Congressman Richardson have tried to help us. Senator Bingaman contacted the Secretary of Interior.

The Secretary of Interior approves and ratifies our constitution. His name is on it. I can't understand; is it there just for decoration or doesn't he have some trust responsibility to see that governments follow the Constitution in ruling their people?

We went everywhere. Lawyers won't listen to you because of the *Martinez* case. We finally got one, and we have a case filed in Federal court, but the tribe's attorney has filed for lack of jurisdiction because of the *Martinez* case and because of Indian sovereignty, and my feeling is that sovereignty is good if you don't have to live under it. It sounds ideal. But when you have a government that is not fair with the people and breaks their own constitution and the laws are not applied equally, citizens like us are in a bind.

We vote, we pay taxes, and like the gentleman here, we thought we were American citizens. When it comes to going for help, it seems like the Bill of Rights, the Constitution, nothing applies to us.

CHAIRMAN PENDLETON. Thank you very much.

MRS. CHEWIWI. I wanted to add that I feel that Federal funds are one of the causes why the officials feel that they can do anything. According to Senator Domenici's office, officials are not accountable for Federal funds that they receive. So they have a tribal attorney that they use to fight us, and we are in debt up to here trying to defend ourselves and keep our possessions.

CHAIRMAN PENDLETON. Thank you very much.

MRS. CHEWIWI. You have all my records and I will send you more.

CHAIRMAN PENDLETON. Thank you. Chief Judge McCord, attorney Phillips, Chief Judge Whitford, and Cecil J. Largo, Jr. Would you please assemble right behind Mr. Iverson.

Dr. Iverson, do you want to make a comment?

DR. IVERSON. I have just a point of correction. It was stated earlier that Bob Roessel was not the first president of Navajo Community College and Ned Hatathi was first president.

In point of fact, Bob Roessel was the first president of Navajo Community College. He was succeeded by Ned Hatathi in the summer of 1969, but Bob Roessel was the president at the beginning of the college and served as president during the first semester of the college.

CHAIRMAN PENDLETON. Thank you very much. I would like to ask for—I will start our next witnesses then.

[Sheila McCord, Lee Brook Phillips, Cecil Largo, Sr., and Jeanette Whitford were sworn.]

CHAIRMAN PENDLETON. Judge McCord, we will begin with you. Please identify the tribe, for the record, and your name.

TESTIMONY OF SHEILA McCORD, CHIEF JUDGE, FORT MOHAVE INDIAN TRIBAL COURT

Ms. McCORD. Judge Sheila McCord, sovereign Fort Mohave Indian Tribe. I am the chief judge of the Fort Mohave Indian Tribal Court. I am also a deputy judge for the Hualapai Indian Tribe and the Colorado River Indian Tribe. The Fort Mohave Tribe's offices are in Needles, California. The reservation is actually located within three States, Arizona, Nevada, and California. We are a relatively small tribe. There are approximately 825 tribal members who live on the reservation.

The Fort Mohave Tribe has a very keen interest in the Civil Rights Commission's investigation. The tribe has a law and order code that applies to members and nonmembers who live and do business on the Fort Mohave Reservation. The tribe has a judicial department consisting of four permanent employees; that includes one chief judge and three deputy judges on call.

The Fort Mohave Tribal Court handles a variety of cases dealing with family domestic issues, property rights, interpretation of contracts, torts, and housing rights. From all indications, our tribal court caseload will continue to increase.

The tribe is concerned, as other tribes are, with the nature and scope of the Commission's investigation. When we first learned of the investigation, we wrote to Chairman Pendleton with questions concerning the nature of the investigation. We asked the Commission to tell us, among other things, the underlying cause for the investigation, who was scheduled to testify, what complaints had been filed, and what authority there exists for the investigation. For some reason, we never received a response. We still do not know the full scope and intent of the Commission's investigation, and this concerns us very much.

Obviously, if there is widespread abuse of individual rights in connection with tribal courts, some action should be taken, and we are willing to cooperate in an investigation if one is warranted. But at the same time we are entitled to know exactly what it is that you are investigating. Through our own channels, we have learned that the Commission will provide a forum for hearing complaints as to possible violation of civil rights within the tribal court systems.

We know of no such complaints or violations with regard to the Fort Mohave tribal courts. Based upon a recent Justice Department statement

concerning the investigation, the scope of the complaints does not appear that widespread. Since 1978 the Justice Department has received only about 45 Indian civil rights complaints. That appears to be a pretty good track record considering the number of cases that the tribal court handles. For our part, we would hope that our tribal court system has worked and responded to resolve these disputes without violating anyone's civil rights.

We are very much interested in hearing the comments and complaints from individuals whose cases have been heard in our tribal court. If there are any that come to light during this proceeding, we would, of course, like to respond and request that the record be kept open for that purpose for at least the next 90 days.

Do I still have time sir?

CHAIRMAN PENDLETON. No, ma'am.

MS. MCCORD. I will submit my written statement.

CHAIRMAN PENDLETON. The record is kept open for 30 days, not 90 days.

MS. MCCORD. I will go ahead and submit my written statement on behalf of my organization, the Southwest Indian Court Judges.

CHAIRMAN PENDLETON. Thank you. Attorney Phillips.

TESTIMONY OF LEE BROOK PHILLIPS, ATTORNEY

MR. PHILLIPS. Thank you, Mr. Chairman. My name is Lee Brook Phillips, attorney licensed to practice law here in Arizona as well as the Hopi tribal courts. In addition, I am licensed in the district Federal courts here as well as United States Claims Court.

I represent individual Indian people who are subject to forced relocation under the Federal Navajo-Hopi relocation program.

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of the land dispute resolution created by Congress.

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court, which has an interest in the outcome of the dispute. It is my personal experience that these individuals have experienced a violation of their rights to the free exercise of their religion, to their right to trial by impartial jury, and their right to due process of law in these situations where they face, as a result of the land dispute, the Hopi Tribal Court's exercising jurisdiction.

Let me say from the outset, I think the tribal courts should be obviously given complete jurisdiction over their territory. It is my personal opinion

that the *Oliphant* case, which limits their jurisdiction to Indian people or member Indians, is incorrect. It deprives Indian tribes of sovereignty, exercise of sovereignty, which they should have, but if *Oliphant* is the law as it is today, I believe it is incorrect to allow the Hopi Tribal Court to exercise jurisdiction over people who are not members of their tribe, and to allow them to exercise jurisdiction over Navajo people simply based on their race as Indians violates the equal protection provisions of the Indian Civil Rights Act.

I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.

The political process, which is usually used to define jurisdiction of a government, is completely denied my clients as it would be denied me, but because they are Indian and I am white, the Hopi Tribe can try them and convict them of a crime, the same crime that they could not try me for.

It is my personal feeling and experience that that runs contrary to the United States Constitution; it clearly runs contrary to the history of Federal law in the area of due process, equal protection; and it violates various provisions of the Indian Civil Rights Act. To deny these people a legal forum where they can have their civil rights reviewed and protected leaves them no alternative but to resist, as they are now doing out on the land, and increase the possibility that we will have not only violent confrontations, but increases in violent confrontations, because there is no way that the Hopi Tribal Court can begin its best effort and Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land. When we have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed, and where those rights can be protected clearly, which was the indication of Congress to do.

CHAIRMAN PENDLETON. Thank you, sir. Mr. Largo.

TESTIMONY OF CECIL LARGO, SR., NEW MEXICO

MR. LARGO. My name is Cecil Largo, Sr., not Jr.

CHAIRMAN PENDLETON. I can't read, excuse me.

MR. LARGO. I come from New Mexico, the so-called checkerboard area. Also, I represent the people in the area who own their own land of about 20 years.

Before I came into the area I build a highway, build a power plant, build a city, became engineer architect, but after that my people got me involved; we had organized because I had a problem with Peter MacDonald at that time. So right now this organization was undertaken by New Mexico or Navajo organization, not by the tribal court.

I served Navajo people more than 20 years, represented lawsuit filed in U.S. court to be about BIA proposal.

CHAIRMAN PENDLETON. If you have a written statement, we can take the whole statement. We will take the entire statement.

MR. LARGO. Just to repeat at my part. So, here's the deal. We have only got 5 minutes. I was going to take a different position. I can't read whole thing, but I will send this one to you.

This is position I still assert. The Navajo people in that area, the checkerboard area, there are about 40,000 Navajo there. And the Navajo tribal government has no jurisdiction there. Only we people with allotments have jurisdiction, held in trust by the BIA. We've had a lot of problems. We had to face the railroad. Even our tribal government tried to put a railroad—we stopped that. Even when they tried to sell minerals—coal of 8½ cents—we stopped that. We had—Congress try to pass a bill so they could give them \$50 million uranium mine, \$100 million railroad—we had to stop that. This was not with tribal help. We had to do everything.

When I turn around to my tribal government, I don't see nothing. There is no law; there is no freedom. That is where the people, you people are on this. I think people here today trying to fiddle around today to try to find solution, for example, sovereignty—who knows sovereignty?

I think we're talking about something we don't even know. When our grandfather did know these things, time created—we don't know anything about this. This meeting is like, well, a learning time created. We don't know anything about this. This meeting is like, well, a learning. You got a lot to learn—it's all about seeing the others and them seeing themselves. Everybody has to learn no matter how much education you got, you have to learn and the only thing about it, like sovereignty, we had lot of, several, attorneys' testimony. They don't know where they're at. Because they don't know what they talk about, like yesterday, Lynch testimony was saying blind try to lead the blind and that is what is going on, I think, that—not only Navajo Tribe—going on. So here is the one thing I am looking at is Constitution and also civil rights which the other woman discussed this afternoon.

The question comes out was that, I can understand and that way I understand it too—let's put it this way. The Constitution is the father, he's got the ball, he's the boss, says, "Son, you got to obey me what I tell you."

Later on, "Here, son, I throw a ball at you; you do what you want with me, but go jump in the river or kill yourself if you violate the law, you violate civil right." You decide how you're going to settle that thing. Because under Federal law we can overturn tribal court except the person in the hill will tell tribal court what to do. Then the other thing you take care of your violation, so this way—I think that is the way the deal is instead of fooling around with these areas. There is sovereignty is related to Indian religious freedom act and also little bit of—but on the Constitution everything is generally open for you, do what you want, and this is the thing that your Commission going to have to understand, because it's something that need to be done if you are really going to help us out, because this way I look, we serve our country, we fight someone, we didn't come back; I served, I—in the wrong place but God sent me back.

But here, Federal Government still step on my neck. I'm still fighting or still fighting for my land; if you own something, you don't protect by fighting.

I own the ranch; I'm a businessman. I have to fight; I had to fight the State and everything. This is what I mean, where am I is—is it—that freedom of speech or freedom of guarantee of the land base or against self-incrimination, or saying if there is a violation, recourse is that? Can I say there is protection before the law?

This is the thing I think we are facing, so I just want to get—I will send the rest of this stuff, but the main thing I think is appreciate you people coming out, and I think I will support you 100 percent.

If you need any help, I am a man of experience. A lot of things have been said, but that is not going to solve anything. The main thing is, where is the solution? Is it the Constitution, Sovereign Immunity Act, civil rights, and that's where the problem is about the Congress. Congress wants to help reform our government and that's what we need.

CHAIRMAN PENDLETON. Thank you, sir. Judge Whitford. I forgot. Just a minute. Is Chairman Drennon in the audience? Would you kindly meet with counsel for just a moment? Go right ahead, Miss Whitford.

TESTIMONY OF JEANETTE WHITFORD, NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

MS. WHITFORD. My name is Jeanette Whitford. I am Chief Judge for Coeur d'Alene Tribal Court, and I'm here representing the Northwest Tribal Court Judges Association. We have 45 member courts and about 83 judges.

I would be remiss if I did not at least read the resolution that the Northwest Tribal Court Judges Association has sent, and we have a position paper, and I will only read the last couple paragraphs of that.

CHAIRMAN PENDLETON. Are you going to submit those for the record, ma'am?

Ms. WHITFORD. I already have copies that I have given to your righthand lady over there.

The resolution reads:

Resolution number 87-0207 of the Northwest Tribal Court Judges Association:

Whereas: the United States Commission on Civil Rights has been and continues to conduct an investigation into allegations of civil rights violations in tribal courts and

Whereas: The Northwest Tribal Court Judges Association believes that it is necessary and proper for the association to make its position regarding this investigation known to the Commission and to the public and

Whereas: The Commission has not provided the association or any of the tribal courts of the Northwest an opportunity to participate in any manner in this investigation and

Whereas: The members of the association have directed the board of directors of the association to compose and distribute to the Commission and to the public a paper outlining the position of the association and

Whereas: In accordance with Article five, section four, of the constitution bylaws of the Northwest Tribal Court Judges Association, the board of directors is authorized to execute the decision of the membership.

Now, therefore, be it resolved that the Northwest Tribal Court Judges Association board of directors hereby adopts an association's official position regarding the investigation into the tribal courts by the United States Commission on Civil Rights, the attached paper entitled: Northwest Tribal Court Judges Association Position Paper on the Investigation of Tribal Courts by United States Commission on Civil Rights.

Be it further resolved that the position paper be sent immediately to the United States Commission on Civil Rights and to other organizations as deemed appropriate by the board of directors.

And, in the position paper we have the paragraph that reads: "If the intent of this investigation is to improve tribal courts and to help them resolve their difficulties, then we believe it is vital for the Commission to speak personally with the people who work in and directly with tribal courts."

Our biggest problem today is a lack of adequate funding. We have shown that many demands put on upon tribal courts by Indian Civil Rights Act. We are more than willing to meet these demands, but we must have adequate funding to do that. We need funding for training of court staff, tribal council members, tribal court judges, and all other personnel working in the judicial system. We need better facilities, libraries, other resource material, office equipment, and so on.

We realize that tribal courts, like all courts, have some problems. We are willing to resolve our problems, but we need assistance. We do not need an investigation of a few courts with severe problems to negatively impact the majority of tribal courts that have fewer and less problems. We need you to listen to us and to support us in our attempts to better our own court systems.

In closing, we extend an invitation to members of the United States Commission on Civil Rights to attend a meeting of the Northwest Tribal Court Judges Association. We welcome the opportunity to meet you personally and to show you firsthand the quality of justice that is administered by the tribal courts of the Northwest. And I would like to add further that in our tribal courts, we have everything from the Code of Federal Regulation Court to very sophisticated courts that are run equal to superior courts.

In the State of Idaho, we still have nonlawyer magistrate judges, and I as the chief judge of my court carry responsibilities beyond those magistrate judges in that other court, and their salary is about triple my salary. I handle everything that walks in the door.

We are using Federal law; we have tribal codes; we use traffic code for State. We are a public [law] 280 tribe; we have a juvenile justice system, and some of the interesting things that we do is that all of our law enforcement people are cross-commissioned. We use the same dispatch service. We do a lot of cross-community service with the tribe in the non-Indian community.

We have a lot of firsts in our tribe. And I think it is important to say that when you report to Congress, that you cannot make blanket statements and include all of us. You have to name the tribes that are specifically having problems.

I could draw you diagrams on how our governments work, and they work quite well. We have resolution processes for everything and we try to protect people's civil rights.

I have cases pending right now, and the litigation is going beautifully, and to me this has been an eye opener to sit here and listen to the problems that people are having in the local tribal courts. I have always been a great admirer of the Navajo and some of the tribes locally because they have hung onto their culture and other aspects like language which we have lost, and to hear the problems they are having, I am a little disconcerted, but thank you for the opportunity of speaking at this hearing.

CHAIRMAN PENDLETON. I want to thank the two judges for coming from such a long way. Thank you for coming.

Next we will have Chairman Drennon, general counsel from the Colorado River Indian Tribe. We will have Mr. Lewis, general counsel, Gila River Indian community. I am hoping I read the name right. Is it

Farren Morgan? Is Edith Yazzie here? I called Ms. Mitchell's name before, Judge Mitchell; is she available or around?

MR. MILLER. Is Judge Mitchell here?

CHAIRMAN PENDLETON. I would like to swear you in.

[Anthony Drennon, Rod Lewis, and Edith Damon Yazzie were sworn.]

CHAIRMAN PENDLETON. We will begin with Chairman Drennon. Thank you for coming, sir.

TESTIMONY OF ANTHONY DRENNON, CHAIRMAN, COLORADO RIVER INDIAN TRIBES

MR. DRENNON. Thank you, Mr. Chairman. My name is Anthony Drennon. I am the Chairman of the Colorado River Indian Tribes on the Colorado River Indian Reservation.

Mr. Chairman, I don't have a prepared testimony with me today. I am simply here to ask a simple request from the Commission, and I was up in Rapid City when the hearings were going on there, and I have asked our tribal attorney at that time to speak into this kind of gadget for the record requesting transcripts of the hearing there so that we could be able to find out what the Commission's investigations were intended, so that we can provide testimony as far as these hearings are concerned. But I brought this to the tribal council's attention, and I have a resolution that the Colorado River Indian Tribal Council passed, and I would like to read this into the record.

A resolution concerning hearing scheduled before the United States Commission on Civil Rights:

Be it resolved by Tribal Council Colorado River Indian Tribes regularly assembled on August 8, 1987

Whereas: On July 14, 1987, the United States Commission on Civil Rights caused to be published in the *Federal Register* a notice that it would begin hearings on August 13, 1987, in Gallup, New Mexico, to receive evidence about the enforcement of the Indian Civil Rights Act, and

Whereas: The intent and scope of the Commission's investigation is not fully known because the Commission has failed to consult, coordinate, and work with the tribes affected by these hearings, and

Whereas: The Colorado River Indian Tribes believe that without a clear understanding of the Commission's purpose for holding these hearings it would be extremely difficult to prepare testimony for submission on August 13, 1987, and

Whereas: United States Commission on Civil Rights held hearings in Rapid City, South Dakota, on July 31, through August 1, 1986, concerning enforcement of the Indian Civil Rights Act, and

Whereas: Many tribal leaders present at that meeting, including a representative of the Colorado River Indian Tribes, requested a transcript of the hearings to assist in preparing material to be added to the record and

Whereas: The Colorado River Indian Tribes are committed to enforcement of the Indian Civil Rights Act and believe that it is important that any record developed by the Commission reflect the fact that the civil rights of the Indians are protected here and at other Indian reservations.

Now, therefore, be it resolved that the Colorado River Indian Tribes request these proceedings be held open for 90 days after termination of the hearing to permit interested tribes to submit testimony relative to the enforcement of the Indian Civil Rights Act and that the record of the July 31 through August 1, 1987, hearings at Rapid City, South Dakota, and report of hearing at Gallup, New Mexico, be made available to all tribes in a timely manner after the August 13 hearing.

Be it further resolved that the Chairman hereby be directed to forward a copy this resolution to the United States Commission on Civil Rights, congressional delegation, and the Inter-Tribal Council of Arizona.

So, giving me authority to sign that resolution, but I heard yesterday and today the record was going to be open for 30 days, but our specific request is 90 days because of the fact that by the time we get the transcripts, 30 days will lapse, and we will not be able to review what is on the record, so, therefore, we would like to have that opportunity to respond after review of those transcripts.

CHAIRMAN PENDLETON. Just let me say, in a procedural way it is impossible to leave the record open for more than 30 days. It will be highly improbable that the record will be printed and distributed within 90 days. It has not been within our ability to do that.

Standing behind you is Deputy General Counsel and you may have a copy of the Rapid City hearings now being given to you.

I think you are right.

MR. DRENNON. My tribal government, in behalf of the people of our reservation, feel that whatever the Commission is going to make recommendations, it may have some serious effect on what we have done for the long period of years that we have been in existence, and that if we don't have the opportunity to see what this is all about, then we are being violated our rights also.

CHAIRMAN PENDLETON. Let me just be clear with you, and I think that Judge Whitford raised the similar point in a resolution from the tribal judges in her area; is that correct?

VOICE. Washington, Oregon, Montana, Idaho.

CHAIRMAN PENDLETON. The purpose you read from the July 14 *Federal Register* announcement, we had to move these hearings to this place and there is only one purpose of these hearings, and that is to see how the ICRA is being enforced.

It is not a matter of receiving individual complaints and saying those complaints we can investigate—we can't investigate; we have no law enforcement powers at all. I think that it would be only fair to say to you

that we don't know, have any idea at all what we would be recommending to the Congress and the President. We have to take this transcript, the Rapid City transcript, consider possibly the other hearings that we have had and documents that we have, to see what we can do to make some recommendations.

That is not to say that we would even make any. At least we have to find out how the act is being enforced. We are not being judgmental about this at all, but we are taking testimony to that effect.

The reason why we are having open testimony is to hear from the kind of requests that your tribe has, other tribes would have, and we take that under advisement and appreciate you coming here.

COMMISSIONER ALLEN. Having heard several of these comments now, I wanted to add the note that it seems to me, as the Chairman has said, it is very well known, and I hope the record will show that the comments made indicate how well known it is, that the purpose of these hearings is to assess enforcement of the Indian Civil Rights Act.

It should be equally well known that anyone with direct experience of that enforcement ought to feel free to communicate that direct experience to the Commission. I trust, therefore, that no one has any sense of having been impeded in sharing with us what they have long known and already possessed, since they also have long known that we are very interested in learning what they know about the enforcement of the Indian Civil Rights Act.

CHAIRMAN PENDLETON. The final point is this. I think it would be insensitive and irresponsible for us to have two hearings and base our recommendations upon two hearings in only four or five of the nations. I think that would be irresponsible on our part, and I think you can be rest assured we have no intention of doing that.

The quality of the recommendations, should there be any, depends upon the kind of input we would get. I would hope with that kind of statement you understand that we need to have all that you can give us.

At Rapid City, we got documents from other nations, other tribes that came on their own and testified in this same public open session and left us voluminous documents, if you will, that would allow us to have some sensitivity.

It is utterly impossible for us to do this kind of hearing in every tribe in every nation around the country, even if we didn't have this budget cut that we are into now. There would not be enough money to do it. We are going to do the best we possibly can under the resources we already have. I think you need to feel that we would certainly ask certain questions before we finalize any document at all.

We are not going to leave here and go back to Washington and write a report based upon this transcript and say, "Here, here is how the Indian Civil Rights Act is being enforced." That is just not going to happen. It

will not happen. Since you didn't get here earlier, I think my colleagues share this with me, that it is not our intent to write a report next week or next month or the next 90 days. There is too much material to go over.

If anybody has not gotten a copy of the Rapid City report, if you would like to leave us your name and address—okay, Ms. Prado is informing me we will have a sign-up sheet outside for those who want copies of the Rapid City transcript. It is only a transcript, nothing in there about recommendations, only a transcript.

And the *Indian Civil Rights Handbook*, if you sign up outside, we will make sure they are mailed to you. I am sorry to be long with that.

MR. DRENNON. Again, I thank you for giving this time and your response, but you know we have a lot of concerns on this. I am quite sure when we analyze this, and we draft up our testimony that you will be getting this, so, you know, the scattered violations—so to speak alleged civil rights violations, you know, is compared to what I see all over the country, little, USA towns, cities—

CHAIRMAN PENDLETON. I think we are well aware.

MR. DRENNON. So, the tribal governments are doing a darn good job. Thank you.

CHAIRMAN PENDLETON. We are also saying we are not being judgmental of all tribal governments. That would be insensitive and foolish.

Mr. Lewis.

TESTIMONY OF ROD LEWIS, GENERAL COUNSEL, GILA RIVER INDIAN COMMUNITY

MR. LEWIS. Thank you. My name, Rod Lewis. I am the general counsel now for Gila River Indian Community of Sacaton, Arizona. I am glad you cleared up some concerns with your two comments because we sure had a mistaken impression of you going back in the next week or next 30 or 60 days with recommendations to Congress and the President. In fact, you have even told several witnesses—I been here for last past 2 days, and you asked them for some input about the kinds of recommendations you plan to hand in. And it just seriously alarms me, my clients, and I think many of the tribes, Inter-Tribal Council who were not the focus of these hearings, that on the basis of two hearings that is what you plan to do. I am glad to see that you are not going to go do that.

It's very difficult to assess what this Commission is about. The focus seems to be on enforcement of the Indian Civil Rights Act, but really in reality what you are generating is a lot of adverse publicity, as far as Indian tribes are concerned, by doing this, by the way you structure the hearings, by your evident poor investigation into topics to be focused on in these hearings, by your lack of understanding generally of life on reservations, on Indian tribes, and Federal Indian law.

In this process, you are irreparably harming tribal governments which effectively and efficiently deliver services to their constituents. The United States Civil Rights Commission once had a distinguished record of looking into areas of civil rights of minorities, and Indians were systematically, intentionally abused and violated.

These days it appears as if there has been a 180 degree shift. Instead of looking at civil rights violations by non-Indians, by non-Indian governments, by the States, by the Federal Government violating the rights of Indians, you have looked into tribes themselves, and that just seems to be a misplaced focus of your inquiry.

With that in mind I would like to make a few comments regarding a couple of the areas in which you have covered.

It seems to me the worst way in which to obtain any kind of factual information about alleged civil rights violations is the way you have gone about in these hearings; that is, to look into intratribal disputes that has volatile political situations within the Navajo Tribe, which are obviously two sides, maybe more than one.

It appears as if you have obtained testimony, information from people who are in power, people who are out of power, and in that kind of situation you have obtained information which simply is not very reliable in my mind. By doing this, you have caused problems within the Navajo Tribe and within tribes in general in the Southwest.

But turning to one issue which has received much discussion. That is the issue of sovereign immunity. This is, I suppose, a topic which arises most often in the area of commercial transactions and economic development. You have made that distinction between, I think, personal civil rights and potential abuses of personal civil rights and the area of commercial transaction and economic development.

I submit to you this is not necessarily a barrier, a real barrier, as far as economic development on reservations. I think perception has little substance because non-Indian investment has occurred and is occurring on Indian reservations. If there is a concern about immunity in business transactions, accommodations can be negotiated. Various tribes allow or have negotiated instances where arbitration proceedings could be enforced in the Federal court. Administrative appeals are available through the Department of Interior administrative review system for lease disputes, and partial waivers of sovereign immunity can be negotiated and decisions arrived at in most situations.

I seriously doubt that sovereign immunity is a real issue here or even enforcement of the Indian Civil Rights Act. The real issue is tribes which control as sovereign governments large land areas and valuable natural resources. I remind this Commission that the existence of Indian tribes as sovereign governments has been validated and reaffirmed by Congress, by

the court system, and by presidential Executive orders for more than two centuries.

It is my feelings these hearings will only increase the distrust of the Federal Government about Indians and Indian tribes. I suggest that you are signaling to those groups most opposed to the political and economic development of tribes that the sovereign status of Indian tribes are fair game for them.

CHAIRMAN PENDLETON. I just want to say you have 1 minute.

MR. LEWIS. It would be regrettable indeed if this Commission encouraged a new assault on tribal sovereignty under the guise of reviewing tribal court jurisdiction, separation of powers, and sovereign immunity. To allow this line of spurious allegations to continue would tarnish the Commission's past good reputation for upholding and advancing the civil rights of minority groups to include Indians.

CHAIRMAN PENDLETON. Just one point. I was just checking with counsel here. I would like to respond to your testimony. That is not what we want to do. Our General Counsel is not here.

I recall that we asked to come to Gila River and were turned down. Initially, the Navajo invited us to come here. That is why we came. To make the assumption that we wanted to go someplace to stir up difficulties is just not accurate.

We were invited and we came. If other tribes had invited us, we would have gone the same way, and I think that we have to also remember the fact that we just don't have the funds to do that.

I would like at some point to respond to the content of your testimony. Because this is a public hearing, we can't do that. I want to set the record straight. If we were invited and did not come, we need to know that.

But it is my recollection that we were asked to come as late as last year. We were trying to put this one together. This has not been a spur of the moment hearing. This has been on our books since 1983.

MR. LEWIS. Could I submit a statement for the record from Thomas White, Lieutenant Governor of Gila River?

CHAIRMAN PENDLETON. Certainly. Mrs. Yazzie.

TESTIMONY OF EDITH DAMON YAZZIE, MEMBER, NAVAJO TRIBE

MS. YAZZIE. Thank you, Commissioners and Mr. Chairman, and audience. My name is Edith Damon Yazzie. I am a member of the Navajo, tribal member, and I am a former council delegate from St. Michael Chapter, and I feel that this Commission has been requested by the Dineh Rights Association because of the concerns that I consider are being violated by a lot of tribal officials, and these are my concerns, and I like to sort of express of my concern that bothers me.

There is a lot of concerns that I have for the Navajo tribal government, and I am a member, and I am concerned, and I am a citizen, I am a voter of the Navajo Tribe, and also the State election voter.

And one of the violations that I feel has been violated by the Navajo tribal officials are the employment rights, like for instance, I apply for employment with the Navajo Tribe. I learned—during May of 1987 I applied for a job, temporary position. The director of that department was hiring me for administrative assistant. But he has learned that I was on the blacklist, not to be hired for the next 4 years. This is a violation of the Navajo people who are shareholders of the general funds which is only \$76 million this fiscal year, and the Navajo Tribe received \$138 million of State and Federal funds which has spelled out that the Navajo Tribe and signed this grant to comply with the Indian Civil Rights Act. Yet, the Navajo tribal official removed some of these employees who are employed with the State and Federal funds. These employees have families to support. Some are single mothers and with so many, maybe several children, and in my opinion this is a total violation of the rights to equal employment, fairness, and reasonable justice to the Navajo people.

I don't know how many more Navajo there that are on that blacklist not to be hired. Maybe try to keep a—starve them out for the next 4 years. These are my concerns for these people, but I myself, I can support myself pretty well.

And one good example is the case of John Chapella, an employee of Navajo Housing Authority. He was terminated, and this paper shows that Mr. Chapella says no one's job is safe. Chapella says that is true with the Navajo tribal official doing this to their own people.

Another example is the Boquillas ranch that was bought on June 30, for \$33.4 million. The tribal council, 43 of them, violated the Navajo people by not informing the people at the chapter level who elected them. They did not consult them: "Is it all right to buy this?" Or, "We are buying this land and we are going to go buy bonds, and so forth, to fund these purchases." They did not inform those people.

To me that is violation of Indian Rights Act totally, and I feel that the only way they can resolve this kind of treatment to the Navajo people is that check and balance has to be in place, and also the background check should have been made with all these tribal officials at the election time when they were first elected because that is very important to me.

According to the tribal election law, it is written in there, says: "Tribal members who are running for council delegate must have established a good background and shall not have been convicted of a felony within 5 years preceding the date of the election." And one of the other important things is he must have understanding of tribal government affairs. The way I feel—

CHAIRMAN PENDLETON. You have 1 minute.

Ms. YAZZIE. They don't have the background; they don't know the tribal government, you know, before they got into the office. I think they should have been checked on these before the election. I think that is the only solution for the next election.

Thank you very much.

CHAIRMAN PENDLETON. Thank you very much. The next panel we will have—is Susan Green available, please. Violet A. P. Lui, is that the correct name? Mr. Costello here? Please come down, sir. Greg Lesly. Mr. Joe. [Recess.]

CHAIRMAN PENDLETON. Would you please raise your right hand.

[Susan Green, Violet A. P. Lui, Tim Joe, Joe Costello, and Greg Lesly were sworn.]

CHAIRMAN PENDLETON. If you have something for the record, and for the sake of time, if there is an abbreviated conversation, we would certainly appreciate it at this point, between now and the airport time. We will start with you, Ms. Green.

TESTIMONY OF SUSAN GREEN, LIAISON, HOPI EPICENTER FOR INTERNATIONAL OUTREACH

MS. GREEN. Thank you very much for coming. I am awfully glad you are here. I am here as a liaison person for the traditional Hopi people, who are currently in ceremonies right now and aren't able to send someone down to talk to you. So we have prepared three exhibits beginning with, hopefully, and we will send you more now that you have an open record for 30 days.

Briefly, let me just outline what we have for you, then we will be more than happy to talk to you at any other time.

The traditional Hopi people offer these exhibits as evidence of violations to the Hopi tribal constitution and bylaws. The traditional Hopi people request your attention to be directed to the contradictions inherent in proposed legislation introduced March 17, 1987, which I will give you a copy of just in case you don't happen to have it, which is Senate Bill 788 under Title 1, Designation of Indian Enterprise Zones, and we offer the current Hopi tribal constitution, exhibit 2, Hopi tribal constitution and bylaws, Article 6-c, which is stated to prevent the sale, disposition, lease, or encumbrance of lands or other tribal property. Being that said proposed legislation is in direct contradiction to the tribal constitution, it is requested that the Commission should recommend an examination of these contradictions before said legislation is passed into law.

The traditional Hopi people would also bring to your attention violations of Article 6-c of the tribal constitution by the tribal council and offer as example exhibit number 3, the unheard complaint for declaratory relief and to set aside agency action dated at Washington, D.C., May 14,

1971, which was the lawsuit calling for the United States Government to address these same violations of the tribal constitution and the Secretary of the Interior, which was the illegal leasing of land.

The Hopi traditional people invite your Commission to meet with the traditional religious leaders of the sovereign villages in whom is vested with the power of government as prescribed by the tribal constitution, that they may enumerate a list of violations by the tribal council of the tribal constitution for which documentation can be provided. They appeal to the United States Commission on Civil Rights as one of their only hopes to address these violations under current Indian law.

If you have a little trouble getting there and place to stay, they will be more than happy to put you up on the mesas.

This is presented this day through the liaison of the Hopi Epicenter for International Outreach. They pray this Commission shall listen and act on this request.

CHAIRMAN PENDLETON. Miss Green, before you leave, would you please identify your name and organization for the record. I have it on—

MS. GREEN. My name is Susan Green. I am a liaison and resource coordinator for the Hopi Epicenter for International Outreach, which is an office designated by the Hopi religious leaders of Second Mesa.

CHAIRMAN PENDLETON. Thank you. Would you identify yourself and your affiliation, please, for us.

TESTIMONY OF VIOLET A. P. LUI, ATTORNEY, NAVAJO NATION DEPARTMENT OF JUSTICE

MS. LUI. My name is Violet A. P. Lui. I am an attorney with the Navajo Nation Department of Justice, and I will be one of those who will be brief.

I am here to request that you put into the record the resolution of the Navajo Tribal Council which you referred to earlier, as well as the statement offered by the chief justice of the Navajo Nation.

CHAIRMAN PENDLETON. Thank you. For the record, it is so ordered without objection. Thank you very much.

Mr. Lesly—I am sorry; are you Mr. Costello? Give us your name and affiliation for the record.

TESTIMONY OF TIM JOE, NAVAJO LAY ADVOCATE

MR. JOE. Thank you. My name is Tim Joe. I am a lay advocate practitioner for 9 years in the Navajo Nation court system since 1977. And just as a private citizen, concerned citizen and I decided to respond, listening to these hearings since yesterday.

Seems to me there is quite a bit of confusion as people confess or give their testimonies as to their experience create issues and side issues as to what should be done in the Indian Civil Rights Act versus sovereignty, whether or not both should coexist or not.

My experience with the court system, I am only speaking in reference to the court system, I believe that the Navajo Nation court system has come a long ways only within 29 years as far as development. I have litigated quite a number of criminal cases and also civil and tort actions. There has been practicing all three levels of court systems, and I have had not litigated an ICRA violation case. However, I have litigated quite a number of criminal cases and also civil and tort actions.

There have been occasions where I was in a situation where I could have brought actions against the tribe for police brutality actions, but those have been settled with the police insurance carriers, and my understanding of the situation is that my observation as far as the court system, and also my participation in the Navajo Nation Bar Association where I have served as the member of the admissions committee, also board of bar commissioners. As to what I hear within the Navajo Nation systems, people complain about violations of their civil rights, is that these are usually in situations where people have negative experiences with courts, is that usually those occur as a result of incompetent legal representation, both lawyers and advocates, and the majority of the cases I know that are violations of civil rights, those were usually carelessness, improper practice by practitioners and counsels, and I am quite concerned because it seems to me within the last 2 days, especially this morning, that there have been lawyers from the outside Navajo Nation coming here. These lawyers have had negative experiences just within their practice and their professional responsibility, problems that they have taken on and blamed the Navajo Nation court system.

As far as my practice is concerned, even though I am not affiliated with any particular political groups, I have seen some of these court practices and I have observed some of these proceedings, and it is just that people that have complained have created their own problems, their situation that they have ended up in.

As I see a lot of these possible violations and complaints that it is just incompetent or insufficient legal representation that these people had, so I think the problem is that the Navajo Nation Bar Association disciplinary committee really, I think, needs to get their act together, start disciplining, and start screening these bar members going to these tribal courts. They have lack of understanding and rules of procedures of the court.

Also, we have civil rules of procedures, appellate procedures; we have adopted brand new rules of appellate procedures and criminal procedures, so we have all these procedures available. And I think it is just unfair to classify the Navajo Nation as a whole violating these rights because people seem to confuse the waiver of sovereignty such as some of the lawyers that represent car dealers seem to favor that the repossession law that we have in effect now to be waived, and I think that because of these lawyers that have insufficient, inappropriate practices that have been involved in these

litigations come in here and try to tell the Commission that sovereign immunity ought to be—open up the gates, and I think that is inappropriate.

I think just one more last comment is that if sovereign immunity is going to be attacked in Indian country, and I believe people got to make comments about the *Martinez* case, that the tribe's been hiding behind this particular Supreme Court decision, I think if the Commission is going to report back to Congress to recommend legislation, recommend that the *Martinez* case be overturned, I think in return that you ought to recommend the same thing, that the *Oliphant* case be overturned, so us Indians could have criminal jurisdiction over non-Indians because I think the case itself has a racial overtone. I think it is unfair also.

I don't think it's fair to legislate and change one particular Supreme Court decision and not address the other one. So, that is my position. I certainly thank the Commission for the time given here.

CHAIRMAN PENDLETON. Thank you. Mr. Joe, are you going to help Mr. Costello.

MR. JOE. Yes, sir.

CHAIRMAN PENDLETON. Identify the name and the tribe for us.

TESTIMONY OF JOE COSTELLO, TUBA CITY, ARIZONA

MR. JOE. The gentleman here is Joe Costello. He is a member of the Navajo Tribe, resident, Tuba City, Arizona.

What I understand, he's going to give testimony as to a particular time and incident in Tuba City at his local precinct where he was involved in a passing out of a flyer, a flyer or publication that was questioning the practices and activities at the current tribal administration, and his practice and his understanding was only acting in a capacity as a concerned citizen and informing the public as to what he believes was the tribe's negative activities and, therefore, affecting the citizens' rights. In doing so, passing out these leaflets at a particular chapter meeting, a supporter of the current administration had approached him and took away the pamphlets and ripped it up. They denied him access to explain. They denied his participation in the particular meeting where he could at least be given the opportunity to explain his privilege and rights to freedom of the press. He tells me that is what his testimony is going to be about.

CHAIRMAN PENDLETON. Does he have to give it now?

MR. JOE. Yes.

CHAIRMAN PENDLETON. I am sorry; it is getting late. He's going to give us testimony in addition to just what you just told us?

MR. JOE. I just gave you an introduction of what he's up to.

MR. COSTELLO. This is probably back December 1986, approximately 12:30 p.m., I was present at a particular meeting in Tuba City. However, I don't remember exactly all this small details of whole incident, but I have generally—the incident is that I was passing out these leaflets and a

gentleman by the name of [name deleted] had come up to me and had taken away the flyers that I was passing out and right at the same moment another gentleman named [name deleted] had punched me in the chest and have a brief scuffle there.

MR. MILLER. Excuse me, sir, we may be getting into a defame, degrade, or incriminate problem, Mr. Chairman.

CHAIRMAN PENDLETON. Thank you, counsel. We have to be careful about how far we go into pending litigation and defame and degrade and this kind of thing. Can you understand that what we are saying, we don't want to get too far into litigation here.

If you could read the incident without the names, it would be just fine. I am not so sure we got the names anyway. At least you can read to us the incident, but without the names of the incidents.

MR. JOE. Mr. Chairman, then maybe to save some time and then some confusions here maybe I would suggest that Mr. Costello put his testimony in writing and then I will assist him with that writing and mail to the Commission within the 30-day limit.

CHAIRMAN PENDLETON. We like to thank you. Mr. Costello, thank you. Yes, sir.

TESTIMONY OF GREG LESLY, DIRECTOR, LEGAL PUBLIC AFFAIRS, WESTERN DIVISION, PEABODY COAL CO.

MR. LESLY. My name is Greg Lesly. I am director of legal public affairs for Peabody Coal Company's Western Division, headquartered here in Flagstaff. That division operates two large areas on lands leased by the Navajo and Hopi Tribes.

I recognize that the Commission's most important function is to listen to and speak for groups and individuals who might otherwise lack an effective way to make known their views and concerns on civil rights matters. The corporations and business interests have other organizations that can speak effectively for them, so in no way in making these comments am I seeking to have the Commission take up the cause of business or corporate interests. I don't want that to be the view of what my statement involves.

However, in attending the hearings, two points came up that I thought might be worthwhile for Peabody to at least provide comments for the benefit of the Commission.

The first is, we would like to lend our support to the idea that reservation economic development, which is an express goal of the Federal and most tribal governments, can be fostered by any action that provides for the effective preservation of contract and other property rights for the business community. Those protections need to be institutional rather than being dependent on the personality of any given tribal administration at any point in time.

Quite frankly, due to a line of cases that raise the issue about what governmental police powers can be contracted away, there is a real doubt in the minds of many of the business communities and their attorneys as to what can be accomplished in contractual provisions with the tribe at any given point in time. The basic problem, basic issue is, to what extent can one tribal council commit subsequent tribal councils in the area of governmental powers, and that is an issue that has caused a great deal of concern.

So, I want to emphasize I think you're dealing with a very real issue. Economic development on the reservations is not what it should be. The workers, the ability, the resources are there, but I do think there is a lack of adequate economic development, a lack of jobs that needs to be a concern, is a concern, and I would say that it should be, and is, a valid consideration for you as you do your work.

The second point I would like to address is a point that was raised by one of the panel members yesterday that I felt needed to be responded to, if I understood it correctly. I understood his point to be that there should be protections of civil rights through limited Federal court review of ICRA issues. But it should be for individual rights not corporate rights. I believe the statement was "corporate rights are a creation of corporate attorneys."

I don't think that's right. Corporate rights, if they are the product of anything, I think they are the product of the many responsibilities and obligations that our system places on corporate entities. That those responsibilities and obligations are properly accompanied by fundamental rights that are accorded to corporate entities and particularly the right to due process and equal protection. Clearly also, individual property rights are often held under a corporate structure. A great deal of the wealth of the individuals of our country is held under the corporate form.

Individual rights are often preserved through an assertion of corporate rights. As an example of that I would cite an instance in December of 1983, in which the Assistant Secretary for Indian Affairs of the Department of Interior vetoed a proposed Hopi coal severance tax. This is done pursuant to review authority provided under the Hopi constitution, also provided under the constitution of most IRA tribes. Peabody and its utility customers filed briefs and made presentations at a hearing before the Assistant Secretary on the tax. The tax was vetoed by the Assistant Secretary on two legal points.

The first point is—those points were contained in a memorandum which was prepared by the Solicitor of the Department of the Interior. The first point was the ordinance violated the Navajo and Hopi Settlement Act of 1974.

The second and more important point for this Commission was that the Solicitor found that the tax violated the due process provision of the Indian Civil Rights Act because the tax did not have a rational relation to the

Peabody contact with the Hopi Reservation. Some might say this was a victory solely for corporate interests; however, those familiar with Peabody's pricing structure and the rate structure of Peabody's utility customers would recognize that the burden of a tax would have ultimately been paid by utility rate payers in their electric bills. In this case the assertion of a corporate right to due process served to protect ultimately the rights of individuals.

In closing, I believe that so-called corporate rights have a long-standing recognition in our system of laws and the perception that those rights will be retained and protected for businesses operating on Indian lands is essential to tribal economic development. Thank you.

CHAIRMAN PENDLETON. Thank you.

I want to thank all of the witnesses, the panel people, the audience, the university for providing us with these facilities, and on behalf of my colleagues I want to thank our staff, Acting Staff Director Ms. Prado, General Counsel Bill Howard who is not here for personal reasons, and good reasons, and to you, Deputy General Counsel Miller, we want to thank you for putting these hearings together, and they are hereby recessed until further notice.

The written record is kept open for 30 days.

[The hearing recessed at 6 p.m.]