

Safe Nor Secure: An Assessment of Indian Detention Facilities.” General Devaney told the Finance Committee on September 21, 2004, that:

BIA–LES was unable to produce any annual budget submissions for our [OIG] review. We later learned that BIA–LES managers use historical funding levels as their new annual budget requests and have rarely asked for actual budget increases. In addition, we discovered that BIA–LES does not seek to obtain accurate or realistic budget projections from detention facility administrators. In fact, funds allocated to individual jails by BIA–LES are not even tracked. Their failure to make an effort to assess the true cost of operations or to have any internal controls in place becomes a self-fulfilling prophecy.

These fiscal management failures also impact new detention facilities built with funds awarded as grants by the Department of Justice (DOJ). Since 1997, DOJ has provided over \$150 million in construction grants for new detention facilities. However, these grants are only for construction of the facility. BIA is then responsible for providing the funding for operational costs. Given the poor budget planning and execution by BIA–LES, it was not surprising to learn that facilities completed with DOJ grant monies often do not get the necessary funding to actually open for business.

General Devaney forecast what would happen to Red Lake a year later when BIA abandoned its contractual obligations to Red Lake. We received no funds in CY 2005. The BIA failed to request funding for the Tribe’s juvenile facility in the FY 2006 budget and provided no other assistance to the Tribe to obtain such funding.

The Tribe was shocked to learn of this breach of contract and breach of trust. The Tribe needs this facility to be opened and operated. It is intended to help us deal with a significant number of youth involved with drugs, alcohol, violence, and gangs. Many of these youth have been in and out of our tribal court system and are often released because they are too vulnerable or too young to be placed in the adult detention facility. The purpose of the Phase III juvenile facility is to house and rehabilitate these young offenders and turn their lives around before it is too late.

About the time we first learned of BIA’s failure to honor its commitments to the Tribe, the tragic events of March 21, 2005 unfolded, in which a troubled juvenile went on a shooting rampage at our Reservation high school, killing 10 people, including himself. After the tragedy of March 21, the Tribe reached out for assistance for its youth and received some aid, including the ultimate realization of a new Boys and Girls Club facility from non-BIA sources. But the Tribe still needs a juvenile detention facility to deal with troubled teens who currently are sent through a revolving door. These kids require an environment in which there is confinement and security, but at the same time one which enables continuation of their education and offers rehabilitative treatment. In the aftermath of the shootings, the Tribe declared that the BIA had breached its contractual obligations to the Tribe, and asked again that the BIA include the Tribe’s juvenile detention facility funding in the FY 2007 budget process. So what was BIA’s response to the Tribe’s request that BIA finally make good on its promises? The BIA pivoted and began arguing that the Tribe’s new juvenile detention facility was not a facility eligible for BIA funding. Considering that BIA participated every step of the way, from funding its design to certifying the facility for occupancy and furnishing it, this new position of the BIA was outrageous.

So where are we today? The Tribe sorely needs a juvenile detention facility. It has one, but it has been sitting empty for over three years now. DOJ did its job as part of the DOJ–BIA partnership and constructed the Red Lake Juvenile Jail. But BIA failed to do its job and fund the operation of our juvenile facility, forcing the Tribe to sue the BIA in federal court. In the meantime, for over three years now, troubled juveniles at Red Lake are devoid of the option for rehabilitation that the Tribe’s new juvenile detention facility was intended to provide.

Mr. Chairman and members of the Committee, this story is not a happy one, but I thank you for the opportunity to tell it to you today.

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PREPARED STATEMENT OF HON. ELBRIDGE COOCHISE, INDEPENDENT COURT REVIEW TEAM

Our Team has spent the last three years traveling throughout Indian Country. We have reviewed approximately 37 Tribal Courts. We have, perhaps, more knowledge and experience than anyone else regarding Tribal Courts. We offer this knowledge and experience in our comments on this draft bill.

This is, without question, a good bill. There is much in here to be satisfied with. Thus, we have, with few exceptions, limited comments to proposed changes. We understand this is a Tribal wish list and that DOJ and Interior have not yet weighed

in. It is our experience that Crime is uncontrolled in Indian Country. This, we feel, needs to be the priority for Congress. With this in mind, we offer the following comments.

Within the bill, Programs are extended to 2013. Given the usual length of legislation, this we feel is too short. It would be better if the programs in the bill were given a seven year life to 2015.

The legislation amends several bills to include Tribes in a similar status to states. This should have been done in the first place and is a welcome update of this legislation.

The legislation also includes and considers DOJ over site of Indian Country. Considering the U.S. Attorney portion of law enforcement in Indian Country, this should also have been done sooner.

If this bill has a major failing, it is the failure to deal with *Oliphant*. Non-Indians are moving to reservations to make and deal drugs, including Meth. Non-Indians are abuser/perpetrators in relationships with Indian women and nothing can be done. It may be unrealistic to overturn *Oliphant*. However, this is, after all, misdemeanor jurisdiction. Some classes of crimes, such as DV, lend themselves to jurisdictional oversight by the most available sovereign. Limited criminal jurisdiction would not be a problem for Tribes in such cases. At the least, this legislation should acknowledge in the findings the potential for problems with non-Indian defendants as support for cross-jurisdictional law enforcement agreements.

It is vital to understand that you can't just hire more police and build more jails and the problems will go away. The step between law enforcement and jails is Tribal Courts. Funding for Courts, for training and staff, (Judges, Prosecutors and clerks) is just as important as it is for cops. This is often ignored. For this bill to be successful, adequate attention must be paid to the Tribal Courts.

Finally, the recent centralization of the Bureau of Indian Affairs Police has insulated them from responding to legitimate questions and concerns of Tribal leaders. The chain of command makes it difficult to establish an exact location of supervisors who should respond to Tribal leaders. In reality, the police administration considers itself answerable only to itself. Authority over police should be returned to the Superintendents of the Agencies of the BIA.

Specific Comments.

#### **Section 102. Declination Reports**

This section is very important. The DOJ could accomplish this administratively, however; it would show the level of work that isn't being done in Indian Country. It is not surprising this type of data isn't being collected.

There is some concern that the crimes committed, and subsequently declined, will decrease in severity. So that it doesn't look like an aggravated assault was declined, that crime will be labeled a simple assault. Recommend the crime recorded for data purposes is the crime charged by the initial Tribal investigation.

Tribal Prosecutor can pursue the case in Tribal Court once the Feds decline. This is good. Tribal Courts are not prepared legally or financially to prosecute what will likely be a number of severe (felony-level) cases. They will need training and funding.

Maintenance of Records. Records should also be maintained by reservation.

Confidential or Privileged Communication. This should be defined so it can not be used as an excuse to limit evidence that would hinder Tribal prosecutions.

#### **Section 103. Prosecution of Crimes in Indian Country**

Tribal Liaisons. Indian Cases have always had the lowest priority in a U.S. Attorney Office. Pay or other incentives should be used to insure the Tribal Liaison does not become an unwanted position.

To Hold Trials and Other Proceedings in Indian Country. This seems to presume U.S. Attorneys will practice in Tribal Courts. Not a bad idea. Perhaps better to consider them Special Prosecutors and require they comply with the rules of the Tribal Court regarding practice by outside attorneys.

#### **Section 106. Office of Tribal Justice**

If this is the only legislative duty of the Office of Tribal Justice, care must be taken their other important duties are not neglected down the road.

Meaningful and Timely Consultation with Tribal Leaders. Is this distinguishable from consultation not labeled "meaningful and timely" later in the bill?

Coordinate Prosecutions of Crimes of National Significance. Is the intent of this so Duro/Hicks type cases won't reach the Supreme Court? It is likely impossible to convince DOJ that the OTJ should exclusively handle these types of cases. It may be better not to try.

**Section 201. State Criminal Jurisdiction and Resources**

Needs a section; if a Tribe chooses where the Tribe is paying for or capable of paying for a sufficient standard of law enforcement, retrocession of state jurisdiction will be permitted. Many gaming Tribes are capable but denied this authority by their states.

**Section 202. Incentives for State, Tribal and Local Law Enforcement Cooperation**

Grants should also be available to develop cooperative agreements. Many states and Tribes have the incentive but do not have the funding to develop agreements.

**Section 304. Tribal Court Sentencing Authority**

Increase to 3 years and \$15,000 is reasonable. Three times current levels.

In Accordance with Guidelines Developed by the BIA. A deadline should be imposed so these guidelines do not take years to develop.

Appropriate Federal Facility. Though some will object, this should help rid Tribes of their most serious offenders.

Violent Crimes, Sexual Abuse and Serious Drug Offenses. An appropriate list of crimes for Federal prisons. Habeas Corpus and Federal review is still available.

Transfer of a Tribal Court Offender. Is it the intent to require a separate agreement for every prisoner that needs one? This is too cumbersome. It should be by charge . . . which would also limit favoritism.

**Section 305. Indian Law and Order Commission**

Experience and Expertise. These are not intended to be Tribal Leaders. Or even Indians. There should be some assurance Indians will be represented on this Commission.

Powers. The Commission should have subpoena authority because some, probably state officials, won't want to testify.

Commission Personnel Matters. There is no provision for staff. . . . Or even an Executive Director. It needs someone to compile the data. The Commissioners are volunteers. Most Tribes are poor. This assures only financially secure individuals and organizations are represented. It may cut out valuable applicants.

**Section 403. Cops Tribal Resources Grant Program**

It may be better to identify and designate a percentage of the grant funds for Tribes or Tribes, with limited grant-writing skills, will not get funded.

**Section 404. Tribal Jails Program**

(See above.) Set aside and designation of \$35 million for Tribal Jails will, over time, go a long way toward fixing the Jail space problem in Indian Country. Staffing may be a larger problem than facilities. Need training and staff funding as well.

**Section 601. Violation of Tribal Orders**

Under consideration. Any additional protection for victims is valuable. Requiring that Tribal Courts meet certain standards before Order reaches Federal felony status is not unreasonable.