



PATHWAYS TO JUSTICE

*Building and Sustaining Tribal Justice Systems
in Contemporary America*

DRAFT

Executive Summary

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In April, May, and July 2005, American Indian and Alaska Native tribal leaders from throughout the United States conveyed their nations’ concerns, needs and aspirations at three historic “Gatherings” funded by the Bureau of Justice Assistance, Office of Justice Programs, Department of Justice (BJA). The Gatherings were dedicated to giving tribal leaders a significant voice in the formation of public policy essential to the health and safety of American Indian communities. Collectively entitled “Pathways to Justice,” the concept of the Gatherings was to ensure a full opportunity for tribal leaders to speak and be heard, and to generate a record of the dialogue that would provide insight on critical needs of tribal justice systems. The Gatherings were also designed to give tribal leaders an opportunity to identify promising practices, and to serve as a platform for providing input into funding strategies by federal and state policy- and decision-makers. This Report contains the record from the Alaska and National Gatherings, including key findings and policy guidance from each Gathering.

BACKGROUND

Native communities have administered justice systems for their people and visitors for centuries. In the past, these diverse justice systems were able to function alone, unencumbered by the outside world and free to exercise justice in accordance with the customs of individual Tribes. Today, however, this is no longer feasible. There are 561 American Indian and Alaska Native tribes that have a unique government-to-government relationships with the United States. These communities are diverse in culture and location, encompassing 55.7 million acres of land. They are essential partners with the federal and state governments in concerns ranging from border security to drug trafficking to the increase in violent crime. Some Native justice systems share many of the characteristics of western-style justice systems, while others utilize traditional tribal values and customs to resolve disputes and restore losses in the communities they serve. Regardless of the nature of the justice system, tribal leaders recognize that their relationships with the modern world are critical to the health and safety of Native communities and society in general.

All who work with programs, policies or funding for Native American justice systems must recognize that these systems, though distinct from locale to locale, impact greatly on the overall administration of justice. Problems that can be addressed by Native justice systems will relieve the burden on state and federal courts, and give Native communities a genuine sense of controlling their own territories. Working together, tribal, federal



From Many Voices, Common Ground

“While tribal courts seek to incorporate the best elements of their own customs into the courts’ procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition....”

Sandra Day O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 5 (1997)

“These Gatherings have taught us what our ancestors already knew, that to be treated with respect we must learn to respect others, even though different.

Despite our differences, tribal, state and federal courts share the mission of delivering justice. Justice comes in different forms depending on one’s values and culture. Therefore, we must strive to learn from each other and respect the sovereignty and culture of different justice systems. Only in this manner can we achieve peace and harmony for the people we serve.

As judges, we do walk on common ground.”

*Eugene White-Fish, President,
National American Indian Court Judges Association
(Chief Judge, Forest County Potawatomi Tribal Court)*



and state judiciaries will generate dialogues, agreements and alternatives that benefit all.

Problems that have migrated from the larger community to tribal communities have been difficult to eradicate. Tribal communities are devising means of addressing these problems, and not unlike non-tribal communities some strategies are successful, some are not. Substance abuse, domestic violence and criminal victimization in Native communities are not merely Indian problems – they are American problems. Native people have a deep understanding of the devastation caused by these problems, and a vision for ways of resolving them. They need support and guidance, in terms of models, technical assistance and funding, from the larger community.

Thus, the challenge of the 21st century, not only for Native Americans but also for the country as a whole, is to maintain the cultural integrity valued by each individual tribe while simultaneously creating justice systems that resolve disputes in ways that are respected and accepted by other systems of justice. Ensuring justice means ensuring the protection and security of all Americans, Native and non-Native alike.

THE “GATHERINGS”

The Tribal Courts Assistance Program

In 1998, with congressional funding and support, the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (BJA) began an ambitious plan of assisting tribes in the development and enhancement of tribal justice systems through a competitive grant program entitled the Tribal Courts Assistance Program (TCAP). Since the program’s inception 294 American Indian tribes and Alaskan Native tribes have been awarded upwards of \$40 million for the purpose of planning, implementing and enhancing tribal justice systems. These grants have not only benefited the tribes that received them, but have also benefited federal and state judiciaries by relieving their burgeoning criminal dockets, and by providing treatment alternatives for American Indian and Alaska Native offenders in those courts. However, in spite of the great strides that tribal governments have made in developing and enhancing their tribal justice systems over the past decade, much remains to be done.



History of Tribal Court Development

To fully comprehend tribal approaches to justice systems, it is helpful to be familiar with the history of these systems. Many tribal justice systems evolved from courts established on reservations by the Bureau of Indian Affairs, which were intended to assimilate American Indian people into the predominant Anglo-American legal system. As a result, early tribal courts mirrored the justice systems of federal and state governments.

The precursors to modern tribal justice systems were the Courts of Indian Offenses established by the Bureau of Indian Affairs in 1883. These courts were also known as Code of Federal Regulation Courts or “C.F.R. courts.” The C.F.R. courts were not “tribal” courts; they were agents of assimilation. They followed laws and regulations designed to assimilate the Native people into the religious and jurisprudential mainstream of American society.¹

Only with the enactment of the Indian Reorganization Act of 1934,² and the subsequent promulgation of a revised Code of Indian Offenses for tribes, which expressly recognized for the first time the right of tribes to supplant the Code of Federal Regulations (C.F.R.) by the adoption of their own codes of laws,³ did Indian tribes receive the federal government’s imprimatur to create and operate their own court systems. Not surprisingly, because tribes needed to receive permission from the Department of the Interior to supplant the C.F.R. with their own codes, many tribes adopted most of the C.F.R. law and order provisions to appease the Department. As a result, the constitutional and statutory provisions contained in modern-day tribal codes often resemble the laws contained in the original Code of Indian Offenses.⁴

There are 15 C.F.R. courts operating in Indian Country.⁵ Most of those courts serve tribes in Oklahoma.



Sisseton-Wahpeton Oyate

This Tribe has a membership of approximately 10,000 and is located in northeastern South Dakota. It has used its BJA grants to enhance its justice system by developing a Treatment Court (a drug court that has graduated 70 tribal members, over half of whom were referred by adjoining state courts for felony drug or alcohol convictions), a Youth Probation and Home Monitoring Department that closely monitors 100 youthful offenders on intensive probation, a youth re-entry program in conjunction with the State of South Dakota that stresses cultural attachment and educational opportunities for young people facing potential out-of-home placements, and a treatment program that works closely with the court system to deliver culturally-appropriate alcohol and drug treatment. Without BJA funding, these effective programs would not be possible because of limited tribal resources.



Delivery of TCAP Technical Assistance and Training

In order to streamline the delivery of services and to facilitate collaboration among a variety of public and private agencies, the Tribal Judicial Institute at the University of North Dakota, School of Law was designated the lead agency in delivering technical assistance to tribal communities via the Bureau of Justice Assistance (BJA) Tribal Courts Assistance Program (TCAP). TCAP technical assistance providers have designed and presented numerous national and regional programs support justice initiatives for the benefit of Native and non-Native people involved in tribal justice systems. Providers have included: Alaska Native Justice Center; Fox Valley Technical College; National Institute for Trial Advocacy; National Tribal Judicial Center at the National Judicial College; National Tribal Justice Resource Center; Native American Alliance Foundation; Oklahoma City University Law School; and Tribal Law and Policy Institute.

This past year, the Institute and its partners delivered over 40 national and regional training programs. Personnel representing 129 tribal entities attended educational programs presented by TCAP technical assistance providers. The Institute and its partners also conducted on-site needs assessments in Alaska and California, provided regional orientation sessions to aid grant recipients in complying with federal financial and programmatic guidelines, and helped enhance the capacities of tribal information systems in the Northern Plains and Southwest.



In 2005, a historic undertaking to assess and evaluate the progress achieved by the federal government's tribal justice initiative was implemented through a series of meetings entitled "Pathways to Justice." The meetings were "Gatherings" of tribal justice leaders and state and federal decision-makers. The first, "Alaska Gathering of Tribal Justice Leaders" was held in Anchorage, Alaska from April 11-13, 2005. The second, "National Gathering of Tribal Justice Leaders" was held in Washington, D.C., from May 22-24, 2005. The third, "Walking on Common Ground: A National Gathering for Tribal-State-Federal Courts," was held in Green Bay, Wisconsin from July 26-29, 2005. Each Gathering was intended to develop a series of specific recommendations for tribal, state and federal policy-makers and leaders for developing and supporting critical tribal justice policies and priorities.

This Report covers the first two of the three Gatherings. Representatives of more than 200 American Indian and Alaska Native tribes attended the first two Gatherings. A report for the third gathering, which was attended by more than 300 tribal, state and federal judges and representatives, will be published separate from this Report. The third Gathering implemented one of the strongest recommendations of the first two: to bring together state and federal judges with tribal judges to address specific ways of envisioning and implementing judicial cooperation across jurisdictional lines. The objective of the third Gathering was to recognize and develop workable solutions that will foster respect and comity, mitigate intergovernmental conflicts, and reduce or forestall unnecessary, duplicative, and divisive litigation.

THE "GATHERING" PROCESS

The challenge of the "Gatherings" was to ensure that all participants would have a chance to express their concerns. They were given the opportunity to report the needs and challenges facing their tribal judicial systems, to voice the matters of importance to their tribal members, to explore solutions to common problems,

and to urge federal and state decision-makers to support tribal efforts.

To achieve this goal, a task force of organizers, including all of the TCAP technical assistance providers (listed in the Appendix as “Tribal Courts Working Group”), identified topics designed to generate discussion relating to the needs and challenges confronting justice systems in Indian Country. Experts discussed the topics in plenary sessions and then, working with facilitators and recorders, the participants were divided into small groups. The small group dynamic gave all participants a chance to speak and to be heard. As one tribal leader emphasized, “We are here for the past and future generations of leaders, and we carry that obligation with great commitment.” The resulting discussions were inspiring because of the candid, vigorous, powerful, sophisticated Native voices who shared their successes and failures. This Report compiles that information into findings, guidelines and recommendations.

HISTORY

It is important to say what this Report is *not* about. It is not about the historical trauma caused to Native American communities by the western assault on tribal cultures, although history is an important backdrop to any perspective on the mental, emotional and social lives of Native people and their relationships with the wider American community. There are, however, historical factors that directly undercut the effectiveness of tribal courts that must be considered. For example, tribal justice is complicated by artificial boundaries, both legal and geographical. There is a widely held belief, supported by factual history, that the development of tribal justice systems has been impeded by decades of misguided and destructive federal and state policies toward tribal governments, seeking to limit the ability of tribes to address complaints and crimes arising in their sovereign territories. In addition to the hodge-podge of statutes limiting tribes, federal Indian policy also created a checkerboard of Indian land areas. This checkerboard makes it impossible for tribal leaders to police tribal territories without the cooperation of the surrounding communities. The Report references additional information pertinent to the history of tribal efforts to control their own territories in the Appendix.

POLICY GUIDELINES AND KEY FINDINGS

The Report includes two sections reflecting the detailed work of the Gatherings: “Policy Guidelines” and “Key Findings.” Both contain significant

Southern California Tribal Chairman’s Association

The Southern California Tribal Chairmen’s Association (the “Association”) is a consortium of 18 federally recognized Indian Tribes that have agreed to develop an inter-tribal court to serve the needs of the member tribes. The small populations and close proximity of the member tribes made an inter-tribal judicial system the most cost-effective means for protecting the safety and welfare of their respective tribal communities. To ensure acceptance of the inter-tribal court among the members of the tribes represented by the consortium, significant community involvement in the planning stages of the court was required. The TCAP grant award enabled the Association to garner the necessary support to establish the inter-tribal court system.

Chickasaw Nation

The Chickasaw Nation has made enormous strides in developing its tribal courts and training its judges, peacemakers and court personnel with assistance of TCAP funding. When the Chickasaw Nation District Court was re-established in 2001, the caseload has grown from one case to over 1,400 most of which were transferred from the C.F.R. court that formerly served the Nation’s citizens. TCAP funding supported the implementation of several enhancements to the Nation’s Justice System, including improved case management technology, establishment of a peacemaking court, and creating court advocate service to assist pro se litigants. The current caseload managed by the District Court is 523 cases with 374 new cases filed in 2004. The Chickasaw Nation has made full use of BJA-sponsored training for its trial and appellate judges, peacemakers, and court personnel. In 2005, most of the court staff, the District Court Judge and Supreme Court Judge Barbara Smith taught a session on Case Management for “Practical Approaches to Family Issues in Tribal Court,” a TCAP course developed and presented by the National Tribal Judicial Center at the National Judicial College. The Nation has truly become a partner with the BJA and the Tribal Courts Working Group through its participation in TCAP trainings.

information about the state, and the state of mind, of contemporary Native America. The “Policy Guidelines” focus on actions that tribal leaders urge state and federal decision-makers to take if the positive momentum achieved by the TCAP and other funding sources is to have a lasting impact. Most require critical funding for specific projects at a time when Native justice systems



The Impact of Public Law 280 on Tribal Court Development

In 1953, Congress, concerned about the apparent void in criminal misdemeanor jurisdiction on some Indian reservations, enacted Public Law 83-280. The statutes codified pursuant to the session law are commonly referred to collectively as “Public Law 280.” The states to which Public Law 280 applies have criminal and civil jurisdiction over most actions that arise in Indian Country within the territorial boundaries of the state. California, Minnesota (with the exception of the Red Lake Indian reservation), Nebraska, Oregon (with the exception of the Warm Springs reservation) and Wisconsin (with the exception of the Menominee reservation) were the five states that were required to take jurisdiction pursuant to the provisions of Public Law 280. Other states were given the option of accepting jurisdiction by amending any constitutional limitations on jurisdiction and by affirmatively accepting jurisdiction through legislative enactment.

Public Law 280 has proved to be an impediment to tribal court development as well as adding to the level of jurisdictional ambiguity that exists in Indian Country. Because one of the objectives of Public Law 280 was to defray federal costs for tribal law enforcement by turning those functions over to state and county governments, the principal funding source of tribal courts, the Bureau of Indian Affairs and the tribes, believed that it was no longer necessary to fund tribal courts. Likewise, the leadership of many tribes perceived that Public Law 280 stripped tribal courts of jurisdictional authority and consequently did not adopt tribal codes or fund their court systems. Nevertheless, many Public Law 280 states found that tribal court development remained integral to the overall scheme of maintaining justice in Indian Country because jurisdictional authority over trust and restricted Indian property was expressly excluded, and limited to criminal offenses under state law. Additionally, laws passed after Public Law 280, such as the Indian Child Welfare Act, permit all Indian tribal courts, including those in Public Law 280 states, to exercise substantial jurisdiction both inside and outside Indian Country.

Despite extensive judicial review of the scope and application of Public Law 280, the statute continues to create tension between state and tribal governments, particularly as tribes begin developing their own justice systems. This is especially evident in Alaska and California. The concerns range from apprehension that the emergence of a new forum for adjudication will create jurisdictional conflicts to speculation that tribes will develop their own courts to evade review of tribal contracts and business activities by state and federal courts. Regardless of whether these concerns are legitimate or spurious, they indicate that the historical and future legacy of Public Law 280 is the repression of tribal court development.



have the most potential to contribute meaningfully to the administration of justice throughout the United States.

In the section entitled “Key Findings,” the Report sets forth summations from each of the discussions facilitated at both the Alaska and the National Gatherings. This section summarizes success stories, genuine grievances, and solutions, candidly shared by all participants, although the Report cannot truly demonstrate the extent and passion of the discussions. Nonetheless, read with other resources set out in the Report, these sections provide a rich and detailed perspective and background from which to understand some of the commonly identified needs of tribal communities.

POLICY GUIDELINES

The Gatherings produced many visions, ideas, and models for strengthening tribal justice systems. Although the focus was identifying challenges and opportunities for advancing justice in Indian Country, the commentary offers some insight on how the integration of social norms, traditional dispute resolution practices, and core values is influencing the evolution of modern tribal justice systems. Regardless of the type of justice system – western or traditional or a blend of each – participants agreed that justice systems must be perceived as fairly and competently serving the needs of the communities and respected by non-Native systems.

Altogether, the Report sets forth nine Policy Guidelines with recommendations. A theme among the

recommendations is that federal policy makers must change funding and grant-making processes to recognize the uniqueness of Native communities. Many specific suggestions were made as to how to use the public's money more efficiently and effectively, ranging from the timing and duration of grants to the essential flexibility that must be a part of grant programs if there is to be continued growth in the efficiency and effectiveness of tribal justice systems and culture of American Indians and Alaska Natives.

The Report's Policy Guidelines section discusses in detail each of the nine guidelines, with accompanying commentary and specific recommendations. These nine guidelines represent an effort to fix priorities, and the recommendations advocate for the immediate attention of state and federal officials. No recommendations are provided for specific tribes, because the cultural, social and governmental diversity of the tribes precludes anything more specific than the broad directives set forth in the Policy Guidelines. The nine guidelines and a summary of the recommendations are as follows:

1) **Strengthen tribal self-governance:** Through support of tribal justice initiatives, the federal government and tribes can strengthen tribal self-governance by developing justice systems that are independent, self-reliant, accountable, and fair. The Report recommends that:

- The federal government should explore easing restrictions on the criminal jurisdiction of tribes to include the authority to regulate and prosecute the manufacture and distribution of controlled substances within their territorial boundaries; and
- Where federal law extends or delegates civil or criminal jurisdiction in Indian Country to a state, the state should be required to negotiate cooperative agreements with the tribes with regard to law enforcement.

For Alaska Native tribes and villages, the Report recommends that the federal government should clarify their jurisdiction.

2) **Address the needs and expectations of the community:** Effective tribal responses to justice issues in Indian Country must address the needs and expectations of individual tribal communities. The diversity in population, geographic conditions, and culture of American Indians requires flexibility in program management. The Report recommends that the federal government should:

Hopi Tribal Court

The Hopi Tribal Court, a 2004 TCAP grant recipient, has made significant progress in hiring, retaining, and training personnel, including a new Program Director for the Youth Wellness Court and a Juvenile Probation Officer. Proceeds from the TCAP grant have also been used to purchase and install electronic court recording and case management systems. The grant also allows staff to travel to regional and national venues so they may participate in training crucial to the development and continued growth of tribal justice systems.

Alaska Native Village of Tuntuliak

The Alaska Native Village of Tuntuliak is a traditional Yupik Eskimo Village that is utilizing its BJA grant to strengthen its relationship with the Alaska state courts and child welfare workers to enhance the lives of the Yupik children. The unique legal status of the Alaska Native tribes as sovereign entities without territorial jurisdiction necessitates that the tribes coordinate their justice initiatives with state programs and services. The Village intends to augment state resources by providing culturally-relevant diversion programs and sentencing alternatives for juveniles. The efforts of the Alaska Native Village of Tuntuliak to reduce underage drinking by re-enforcing traditional tribal values and sense of social responsibility exemplifies the type of approach that many of the Alaska Native tribes are developing with their TCAP grants.

Tulalip Tribe of Washington

In 2001, the State of Washington retroceded its criminal and civil jurisdiction over the reservation lands of the Tulalip Tribe necessitating the expansion of the tribe's judicial system. Prior to 2001, the Tulalip Tribe of Washington administered a conservation court that averaged up to 40 hunting and fishing violations per year. Now the court averages 423 civil and criminal cases per year, a ten-fold increase. The tribe used its TCAP grant to establish a case management system and hire additional staff. The increased capacity of the tribal judicial system has lessened the burden on state courts in the areas in which the tribe has already assumed jurisdiction. The tribe projects further expansion of its jurisdiction to include juvenile and serious criminal activity in the next phase of its development.



- Send program managers to visit tribal communities to better understand the issues;
- Support the development of resources that will assist tribes in choosing the right tribal justice systems for their individual needs;
- Support educational efforts that assist federal and state policy-makers in understanding that diverse cultures, customs and traditions prohibit one-size-fits-all approaches;
- Offer flexibility in grant solicitations and execution, especially with regard to Alaska Native programs; and
- Develop civil and criminal model codes with easy-to-use instructions for tribes to modify provisions based on the needs of their communities.

3) Promote community wellness and secure a better future for the next generation: Tribal justice leaders support a holistic approach to addressing the serious social problems that affect the wellness of their communities. In many instances, they focus their efforts on youth because youth are the most amenable to prevention and intervention strategies, and their well-being ultimately foretells the tribe's future. The federal government should:

- Disseminate innovative ideas, promising practices and success stories (e.g., family-based treatment facilities, tribal youth programs, culturally relevant treatment options, etc.);
- Sponsor the development of a model protocol for collecting and measuring data on drug and alcohol abuse to allow tribes to make valid needs assessments;
- Support technical assistance on cost-effective, culturally-relevant screening and assessment tools for addiction to alcohol and illicit drugs, youth gang participation, and domestic violence; and
- Subsidize studies of drug usage that single out specific drugs (e.g. narcotics, methamphetamine, etc. instead of illicit drug use), so that tribal justice leaders and federal policy advisors can ascertain trends by type of drug used.

For Alaska tribes and villages, Alaska should enforce local option laws and develop standards and protocols for conducting searches should be added to local option laws; and the federal government should collaborate with tribal governments to expand tribal youth diversion programs.

4) Involve the tribal community in planning, implementation and evaluation: Effective tribal responses to justice issues in Indian Country must involve the tribal community at all stages of development. Tribal community participation in development is essential to promote community acceptance and participation in the justice process. The federal government should:

- Collect and disseminate of promising practices for involving tribal communities in planning, implementing and evaluating of tribal justice programs; and
- Sponsor tribal public information campaigns to create awareness about the detrimental impact of child abuse and neglect, domestic violence and elder abuse on tribal communities – to promote the confrontation of the issues within the tribal community.

For Alaska Native tribes, the federal government should support the development of educational programs and materials for community action planning of Alaska Native justice initiatives.

5) Facilitate collaboration and cooperation within tribal governments: To fully accomplish the tribal community's justice goals, tribal leaders must work together in a productive partnership that is built on mutual respect, trust, and effective communication. The federal government should:

- Support tribal justice initiatives that evaluate tribal policies and operating procedures; and
- Sponsor management training for tribal court judges and other justice officials.

6) Design cost-effective and sustainable solutions: Utilizing volunteers, leveraging individual tribes' strengths and using sound management principles will ensure the sustainability of tribal justice systems outside of federal funding. The federal government can assist the tribes by enhancing existing technical assistance programs and resources to meet this need. The federal government should:

- Continue to provide funding and technical assistance for the development of tribal justice systems;
- Coordinate grant notifications issued by various government entities so that all tribes have equal access to available resources;
- Support technical assistance and develop a publication that gives information about locating, writing and managing grants for tribal justice systems;

- Facilitate program evaluation and compliance by revising existing grant reporting forms to simplify the collection of information and data relevant to performance measures regarding program activities; and
- Enhance the tribal grantee website to include information that is useful to the tribes on grant implementation and develop strategies for increasing awareness about the site.

7) **Require qualified, culturally-competent staff and professional services:** For staff and professional services to function competently, they must be able to assess the nature of the problem, identify solutions, and apply those solutions to the justice issues that confront the community. This requires an ability to weigh the technical requirements against the cultural influences. The federal government should:

- Continue to support tribal initiatives for developing tribal laws and justice systems which honor tribal customs, traditions and values in addressing domestic violence, sexual assault, and elder abuse;
- Continue to support programs that assist tribes in obtaining culturally competent and qualified mental health professionals, probation officers, law enforcement officers, judges and other justice leaders, and court personnel;
- Support the development of legal institutes where non-lawyer tribal judges and non-lawyer tribal advocates can be educated in a comprehensive program similar to the first year of law school;
- Ensure that tribal probation officers are able to participate in trainings made available to federal probation officers; and
- Provide opportunities for tribal law enforcement to receive uniform training and certification offered perhaps under the auspices of the Bureau of Indian Affairs.

8) **Enhance the capacity to respond to a tribal community's evolving needs and expectations:** For tribal justice systems to be successful, they must have access to detention facilities, treatment centers, foster care placement alternatives and other services that allow for a full range of options for addressing justice issues. With regard to tribal foster care placement, the federal government should:

- Allocate funding for tribal foster care proportionate to the needs of tribal communities; and
- Support the assessment of how tribes can most effectively participate in the protection of neglected and abused Indian children and the assessment of the most efficient method for allocating funds to the tribes for that purpose.

In meeting its trust responsibility, the federal government should:

- Develop standards and guidelines for ensuring that appropriate health services and detention facilities are available in tribal communities;
- If the services are lacking, develop short- and long-term plans for remedying the inadequacies identified, including the construction of new facilities where necessary;
- Assist tribal communities in identifying and negotiating with state and local governments to provide suitable detention facilities for tribal offenders; and
- Permit usage of self-governance funds for incarcerating tribal offenders in state and local facilities.

With regard to technology upgrades, the federal government should:

- Assist tribes in attaining the minimum resources (e.g., forensic evidence collection and storage facilities, detention centers, crisis centers, victim support services, etc.) necessary to effectively deal with domestic violence and sexual assault in tribal communities; and
- Continue to support the acquisition of information technology systems and the upgrading of existing systems to meet minimum standards required to share information between federal and state databases.

For Alaska, the state and federal governments should:

- Ensure that all villages have some viable police protection, perhaps by increasing the number of Village Public Safety Officers (VPSOs);
- Redirect funding to enhance the training and compensation of VPSOs, and certify VPSOs to carry weapons; and
- Develop protocols that clearly delineate the scope of authority of state troopers and VPSOs.

9) **Facilitate collaboration and cooperation between tribal, federal, and state governments:** A comprehensive approach to justice issues in Indian Country requires that tribal, federal and state governments share information, recognize and enforce one another's orders, and efficiently use limited resources. The federal government should:

- Support public awareness campaigns to educate tribal communities that promoting safety in Indian Country requires intergovernmental cooperation;
- Support states and tribes in conducting recurring local and regional conferences to facilitate communication, information, sharing and cooperation in resolving jurisdictional disputes;
- Support the development and implementation of multi-jurisdictional programs for the prosecution and rehabilitation of serious juvenile offenders;
- Ensure that states give full faith and credit to all tribal court decisions or otherwise cooperate in resolving jurisdictional issues;
- Support the study of intergovernmental recognition of protective orders following the enactment of the Violence Against Women Act to determine if the states and tribes are in compliance with the full faith and credit provision and identify best practices for intergovernmental cooperation;
- Determine the current status of the prosecution of cases in Indian Country (e.g., the number of crimes committed compared to the number of cases prosecuted in all jurisdictions) to ascertain the best course of action for resolving those cases;
- Study the incidence of non-prosecution of crimes against Native Americans by the U.S. Attorney's Office and the implications for tribal communities;
- Support gang and crime-related information and intelligence sharing with tribal law enforcement via federally supported programs, agencies, and organizations with tribal law enforcement.
- Assist tribes in participating in the Department of Justice's national sex offender registry;
- Support the development of model cooperative agreements; and
- Continue to support the acquisition of information technology systems and the upgrading of existing systems to meet minimum standards required to share information between federal and state databases.

For Alaska Native tribes and villages, the federal government should:

- Establish formal policy recognizing a government-to-government relationship with tribes and enact appropriate legislation to provide for recognition of tribal orders, whether they are from a tribal court or another body designated by the tribe to issue orders; and
- Hold a tribal-state relations forum for tribes and states to develop action plans to initiate formal government-to-government relations and draft agreements with tribes to establish local control.



Policy Guidelines

The key findings from the Alaska and National Gatherings indicate that effective governmental policies for tribal justice systems will:

1. Strengthen tribal self-governance
2. Address the needs and expectations of the community
3. Promote community wellness and secure a better future for the next generation
4. Involve the tribal community in planning, implementation and evaluation
5. Facilitate collaboration and cooperation within tribal governments
6. Design cost-effective and sustainable solutions
7. Require qualified, culturally-competent staff and professional services
8. Enhance the capacity to respond to a tribal community's evolving needs and expectations
9. Facilitate collaboration and cooperation between tribal, federal, and state governments



KEY FINDINGS

Alaska Gathering Findings

A separate gathering of tribal justice leaders in Alaska was planned because Alaska Native governments and justice systems, and their relationships with state and federal policy-makers, present unique challenges and opportunities. To ensure a meaningful dialogue and analysis, the Gathering provided a rare opportunity for Alaska Native people to speak directly with policy-makers. The Report's Key Findings demonstrate the wisdom of a distinct Alaskan Gathering. Although the issues discussed paralleled the National Gathering topics, the Alaska Native tribes expressed an unyielding determination to protect traditional justice systems, which dominated the discussion of all topics. To make a positive contribution to the health and safety of Alaska Native people, Alaska policy-makers must respect this focus and determination. At the same time, Alaska Native tribal representatives recognized that such a focus carries with it a number of responsibilities including: (1) educating Native people as well as the non-Natives about their justice systems; (2) collaborating with other tribes, villages, and state and federal governments in implementing their justice systems; and (3) sharing their successful programs with one another and with local, state and federal justice officials who make decisions that impact greatly on their Native communities.

The Alaska Gathering key findings summarized in this Report are organized around the main issues discussed:

- Tribal justice, including the nature of justice systems, the role of restorative justice, and the limitations on jurisdiction.
- Intergovernmental relations, with emphasis on relations with Alaska, with other states, and the means of information sharing between them.
- Public safety, with emphasis on the challenges faced by tribal villages in remote areas.
- Alcohol and substance abuse, including the utilization of wellness court models to address social issues raised by addiction.
- Children and families, with emphasis on the need for tribal foster-care placement options.
- Juvenile justice, including the emergence of tribal youth courts and diversion programs.

The National Gathering Findings

The National Gathering involved tribal justice leaders from every corner of the lower forty-eight states and Alaska. It generated a wide-ranging exchange that reflected ongoing creative tension as tribes decide whether and how to integrate traditional and western-style justice systems to address the health of their communities. The program purposefully focused on a multitude of issues and in each category the discussion produced strong calls to action.

The National Gathering key findings set forth in this Report are organized around those issues:

- Tribal justice, including subtopics of courts, jurisdiction and juvenile justice, development of tribal justice systems.
- Community wellness, including key findings on substance abuse, domestic violence, sexual assault and elder abuse, neglect and abuse of children, and youth diversion programs.
- Administration of justice, with findings on alternative courts and problem-solving courts, corrections and probation, sharing justice information, and developing cooperative agreements.





PATHWAYS TO THE FUTURE

The Report of the Alaska and National Gatherings tells the story of an intense process designed to encourage heartfelt, creative, hard-nosed thinking and sharing focused on problems and issues impacting people living in tribal communities throughout the country.

While the process generated expressions of many different critical needs and challenges, in many different voices, in many different ways, from diverse directions, five strong central themes emerged. These themes point the way to the next steps essential to the efficient and effective use of resources to ensure the health and safety of American Indian and Alaskan Native peoples that is so important to the country as a whole.

CENTRAL THEMES – NEXT STEPS ON THE PATHWAYS TO JUSTICE

- 1) Tribal, federal and state governments must create a comprehensive approach to justice issues in Indian Country that requires sharing of information, recognizes and enforces one another's orders, and efficiently uses their combined pool of resources;
- 2) To create such a comprehensive approach, tribal, federal and state government leaders and justice officials must gather face-to-face in their communities throughout the country in a respectful spirit of collaboration, communication and comity.
- 3) Because education is the key to understanding between communities and peoples, a strategy must be devised and implemented to provide opportunities for Native and non-Native peoples to gather together, to share information and to gain cultural and professional competence.
- 4) Tribes and the non-Indian community must work together to devise communication channels that will permit sharing of success stories and replication of models that can be adapted for broader use; and
- 5) A plan must be created to bring to the tribes modern technology critically needed to gather and report data essential to allow for credible needs assessments and to help formulate tribal justice strategies.

The commitment of tribal, federal and state government and judicial officials expressed at the Gatherings to achieve a partnership is a dramatic beginning. If this beginning is to culminate in success, the commitment must be translated to action. Together, actively, they must follow the Pathway to Justice, every step of the way.



ENDNOTES

¹ In the first challenge to the authority of the Bureau of Indian Affairs to create and maintain court systems for Indians, the federal district court, in upholding that authority, clearly intimated the function of these courts as “mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.” *U.S. v. Clapox*, 35 F. 575, 577 (D.C. Or. 1888). The same court described an Indian reservation as an institution “in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.” *Id.*

² Act of June 18, 1934, c. 546, 48 Stat. 984 (codified as 25 U.S.C. §§ 461 et seq.) (Supp. 2004).

³ See 3 Fed. Reg. 952-59 (1938) (codified at 25 C.F.R. § 11 (Supp. 2005) (giving both substantive and procedural Indian law)).

⁴ For example, until recently, many tribal codes required a stipulation from a non-Indian party before the tribal court could exercise civil jurisdiction. See 25 C.F.R. § 11.103.

⁵ 25 C.F.R. § 11.100.

⁶ See *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (“The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”) (citing Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A.L.Rev. 535, 541-542 (1975)).

⁷ See 25 U.S.C. § 1321(b) (1994) (“Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States”).

⁸ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (holding that criminal jurisdiction conferred by Public law 280 did not authorize enforcement of a state statute regulating bingo, because the statute was a “regulatory” in nature, rather than “prohibitive”).

⁹ Indian Child Welfare Act of 1978, as amended, Pub. L. 95-608, 92 Stat. 3609 (codified as 25 U.S.C. §§ 1901, et seq.).

¹⁰ See, e.g., Pat Doyle, Judge Challenges Tribal Sovereignty, STAR TRIB. (Minneapolis), Feb. 19, 1996, at 1A.