

November 25, 2013

To: Legal Services Corporation
lscrulemaking@lsc.gov

Re: Restrictions on Legal Assistance with Respects to Criminal Proceedings
Proposed Rule by Legal Services Corporation
45 CFR 1613; 78 FR 65933

Comment on whether proposals for changes on legal assistance with respect to criminal proceedings in tribal courts should be accepted

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Purpose

Legal Services proposes to amend the current provision of 45 C.F.R §1613 that will essentially extend the conditions for Indians to obtain legal representation in criminal proceedings in tribal courts. It is widely known that federally recognized tribes exercise their own form of governance, which the federal government explicitly acknowledges via legislation and continuing efforts to maintain a good relationship with Indian country.¹ This comment will illustrate why Indians should receive legal representation in criminal proceedings in tribal courts, as it appears to be an ever-growing area of the law for which representation is scarcely available.

Background

Tribal courts were created in 1883 when the Department of the Interior decided that a separate body was necessary to resolve disputes occurring between Indian tribes.² Although these courts had jurisdiction to hear civil actions as well as minor criminal cases, today jurisdiction has expanded to cover Indian perpetrators and Indian victims involved in more

¹ 18 U.S.C. § 1151

² *Tribal Courts*, <http://www.tribal-institute.org/lists/justice.htm>

serious criminal activity.³ Whether federal, state, or tribal jurisdiction hears a case depends on the type of crime committed and the status of the person who committed the crime.⁴

Nevertheless, tribal courts vary in the procedures applied to legal matters, such as adversarial proceedings or those that more closely resemble alternative dispute resolution proceedings.⁵

The United States Supreme Court has held that state criminal law applies to non-Indian perpetrators who commit crimes in Indian country against non-Indian victims, that tribal courts have authority over federally recognized tribes when a member commits a crime, and that non-Indians cannot be prosecuted in tribal courts for criminal matters.⁶ However, as recently as this year, Congress allowed tribal courts to exercise criminal jurisdiction in domestic violence cases that involved non-Indian defendants pending the fulfillment of specific requirements.⁷

The Indian Reorganization Act (IRA) of 1934 provided guidance for Indian tribes in setting up their respective government.⁸ While most tribes have their own constitutions, American Indians are still citizens of the United States and subject to the laws and rights of this country.⁹ Because American Indians are afforded the rights granted in the Constitution of the United States, this means that under the Sixth Amendment, an Indian defendant has a right to have counsel present, whether hired or appointed by the state or federal government, when accused of committing a crime.

³ *General Guide to Criminal Jurisdiction in Indian Country*, <http://www.tribal-institute.org/lists/jurisdiction.htm>.

⁴ *Id.* The two categories of crimes include “Major Crime” and all other crimes. Most of the major crimes are felonies. The statuses of the individuals involved include Indian perpetrator, Indian victim, non-Indian perpetrator, or non-Indian victim. Depending on the combinations of these distinctions, federal, state or tribal jurisdiction applies. *Id.*

⁵ Center for Program and Performance Measurement, BUREAU OF JUSTICE ASSISTANCE, *What are Tribal Courts?*, <https://www.bja.gov/evaluation/program-adjudication/tribal1.htm>.

⁶ *Indian Country Criminal Jurisdiction*, <http://tribaljurisdiction.tripod.com> (citing *U.S. v. McBratney*, 104 U.S. 621 (1881); *U.S. v. Lara*, 541 U.S. 193 (2004); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)).

⁷ *Id.*

⁸ Frequently Asked Questions, U.S. DEPARTMENT OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/>.

⁹ *Id.*

Analysis

Legal Services Corporation (LSC) should provide funds to recipients to be used for representation of persons charged with criminal offenses in tribal courts. Chief Justice Marshall once said, “[Indian country] looks to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father.”¹⁰ First, as the Chief Justice stated, Indians seek protection from the United States government, and this includes protection in both the federal and tribal legal systems. Second, as a practical and humanitarian matter, American Indians should be afforded an attorney when in court for criminal charges especially when an attorney can easily get licensed to practice in tribal courts. This section will demonstrate why Indians should benefit from the funds to the LSC recipients and how accessible it is for attorneys to become licensed practitioners in certain tribal courts.

Benefits from LSC Funds

Indians should be beneficiaries of attorneys who receive LSC funds because the United States has explicitly created a relationship with Indian tribes in which the government has promised to protect them, including involvement in legal matters. Indian defendants should receive attorneys to represent them for all criminal matters regardless of the severity. This argument stems back to the creation of doctrine of trust responsibility. The Indian Tribal Justice Support Act of 1993 was enacted by Congress to reinforce its support for tribal courts.¹¹ This act provided in the findings section that the “United States has a trust responsibility to each tribal government....”¹² This responsibility includes abiding by the Constitution and affording its

¹⁰ *The Origins of Our Trust Responsibility Towards the Tribes*, http://fcln.org/issues/nativeam/the_origins_of_our_trust_responsibility_towards_the_tribes/.

¹¹ STEPHEN L. PEVAR, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v4c19a05_cwp2009.pdf.

¹² 25 U.S.C. § 3601(2) (Westlaw 2013).

citizens an attorney if they cannot afford one, or allowing an attorney to be present during every stage of the criminal proceedings.

Although tribal courts operate somewhat differently than American common law courts, the funds could be used to educate attorneys on such differences, and assist them in becoming licensed tribal court practitioners. Furthermore, the funds would be a cushion for legal aid to fall back on when defendants need representation but cannot afford it themselves. The funds LSC would provide to legal aid services create a win-win situation for all. The defendants receive the representation needed to seek justice, and the attorneys' work in trying to get their clients justice does not go uncompensated. LSC is an agency of the United State's government, and therefore, assumes the responsibility to maintain protections of its citizens. Attorneys who receive these funds will be able to uphold this promise to those they represent.

Licensed Attorneys in Tribal Courts

Different tribes require attorneys to meet different standards and pass certain exams in order to become licensed attorneys in the respective tribal court. Tribal Court Clearinghouse sets out some general practice requirements that pertain to every federally recognized tribe. First and foremost, attorneys "shall have the privilege to practice in an Indian court when they have qualified for admission to the court, and...show respect for the tribal law, customs, and conditions."¹³ Next, tribal courts decide their own standards, which include but are not limited to: passing a bar exam, residing on the reservation, and setting a licensing fee.¹⁴ Lastly, tribal courts are expected to have procedures in place for the removal of "advocates" from the courtroom or attorneys from the "tribal bar" should they engage in misconduct.¹⁵ The purpose of setting such standards is to ensure that Indians are afforded upstanding, ethical, and trustworthy

¹³ *Tribal Court Personnel*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/tcp.htm>.

¹⁴ *Id.*

¹⁵ *Id.*

attorneys.¹⁶ Each of the tribes abide by and interpret these considerations set out by the Tribal Court Clearinghouse to meet their individual tribal needs.

For example, Fort McDermitt and Palute and Shoshone Tribe in Nevada demand that an attorney must have “graduated from a law school...who has practiced on any Indian reservation or other jurisdiction for at least 18 months...[and] scor[e an] 82 or higher on the Fort McDermitt Bar Examination....”¹⁷ Another instance is in the Hopi Indian tribal court in Arizona where an attorney becomes qualified to practice when he or she becomes a member of the Bar of the Hopi Tribal courts and “obtain[s] a license from the Hopi Tribe authorizing his practice before the Tribal Courts, and...pay a fee of [\$10.00] for said license.”¹⁸ These two tribes are just a couple of illustrations as to how easy and inexpensive it is for attorneys to become licensed practitioners in tribal courts. The funding these attorneys and their firms receive from LSC would encourage more attorneys to become licensed in tribal courts, and more defendants would have the opportunity to have someone advocate their best interests and defend their honor.

With the simple access to resources and the low-cost expenses it requires to become a licensed attorney in tribal courts, it is reasonable to conclude that LSC’s funds would most certainly be used to promote its primary purpose of creating more qualified and available attorneys to represent those Indians who have been accused of a criminal offense.

Conclusion

The LSC Act should be amended to authorize LSC funds to be used for representation of persons charged with criminal offenses in tribal courts. This proposal reinforces the

¹⁶ *Id.*

¹⁷ *Law and Order Code of the Fort McDermitt Paiute and Shoshone Tribe, Nevada*, NATIONAL INDIAN LAW LIBRARY, <http://www.narf.org/nill/Codes/ftmdecode/ftmcdch2trct.htm>.

¹⁸ *Hopi Indian Tribe, Law and Order Code*, NATIONAL INDIAN LIBRARY, <http://www.narf.org/nill/Codes/hopicode/title1.htm>.

responsibility the U.S. government made to tribal governments many years ago and upholds the beliefs upon which the country was created – equality, liberty, and justice for all.