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2007-08**

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By Judge J. Matthew Martin<sup>1</sup>

## Inside the Maze

**W**e have a dirty little secret in this country.

Native American women<sup>2</sup> are two and a half times more likely to be raped or sexually assaulted than women in the United States in general.<sup>3</sup> Between 1992 and 2001, five out of every one thousand American Indian women were sexually assaulted each year, for an estimated total of 5,900 sexual attacks.<sup>4</sup> According to the Department of Justice (DOJ), 34.1%, or more than one out of every three Native American women will be raped during her lifetime.<sup>5</sup> "[T]he comparable figure for the USA as a whole is less than one in five."<sup>6</sup> When one considers that the population of Native Americans and Alaskan Natives was 4.1 million in 2000, the enormity of this problem becomes obvious.<sup>7</sup>

The nature of these sexual assaults is somewhat different from those generally encountered within the dominant culture. According to the Department of Justice, in nearly 86% of reported cases of sexual assault on Native American women, "survivors report that the perpetrators are non-Native men." When indigenous women are removed from the equation in the United States, the DOJ typically finds that "sexual violence is usually committed within an individual's own race."<sup>8</sup> Secondly, and more importantly, these assaults occur within the backdrop of the most important issue in Indian Country<sup>9</sup> today: the creation of enclaves within the United States which are essentially lawless as to certain individuals. We call these enclaves Indian Reservations.

Historically, Indian Tribes were never fully conquered by either the European powers or later by the United States, and thus retain a significant amount of their aboriginal sovereignty, subject to the plenary authority of Congress. While fully American, they are also separate and, in a way, alien. The Supreme Court has characterized the legal status of Indian Tribes as being "domestic dependent nations."<sup>10</sup> That is, they retain those parts of their sovereignty which are not inconsistent with their status as being dependent upon

the United States.<sup>11</sup>

Over the course of the last 180 years, explaining exactly what this means has led to a quandary of jurisdictional conflicts, confusion and open hostility. One of the results is that Indian Tribes do not possess full jurisdiction over crimes committed in their territories.<sup>12</sup> In particular, non-Indians are not subject to being prosecuted in Tribal Courts for crimes committed in Indian Country.<sup>13</sup> And of the individuals who are subject to prosecution in the Tribal Courts, the maximum punishment allowed by Federal law is one year of incarceration and a \$5,000.00 fine. Furthermore, the jurisdiction of State Courts is constrained by the race of the perpetrator and the victim and intervention by the Federal Courts is constrained by race as well as the seriousness of the alleged crimes.

In 2007, Amnesty International released its blockbuster report: *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Assault in the United States*. This report details what many in Tribal Courts have known for years—the current modalities put a very vulnerable population at risk: Native Women.

The Judicial Division of the American Bar Association, with great foresight, several years ago created a Tribal Courts Council, in an attempt to address this and other major issues facing Indian Tribes. The Tribal Courts Council has prepared a most diverse and prominent panel to address this critical issue in a major presentation at the ABA Annual Meeting on Saturday, August 9, 2008 at 9:00 a.m. at the Marriott Marquis Hotel in New York City.

The panelists include: Sara Deer, a Native attorney and advocate has been a prolific writer on the subject of sexual assaults on Indian Women. Cecilia Fire Thunder is a Registered Nurse, who has seen first hand the horrors of sexual assault on Native women, has also served as the President of the Oglala Sioux Nation. James W. Kilbourne, Jr., is the long time Tribal Prosecutor for the Eastern Band of Cherokee Indians and a recognized expert on criminal jurisdiction in Indian Country. Gretchen C.F. Shappert is the United States Attorney for the Western District of North Carolina. Gavin Clarkson, a member of the Oklahoma Band of Choctaw Indians, has a JD and a Ph.D. from Harvard and is a



Professor of Law at the University of Michigan, who has written on the prosecution rate of crimes in Indian Country in Federal Court. Gary Fields is an investigative reporter for the Wall Street Journal, whose groundbreaking stories have exposed for the country the dimensions of the chaos in which the cracks threaten to swallow the foundation. This panel will be moderated by Robert O. Saunooke, a Cherokee lawyer practicing in Florida and before the Cherokee Court, has significant experience at the national level in pushing to pass the amendments to the Violence Against Women Act, while, at the same time on the local level, representing defendants charged with acts of domestic violence.

This program is co-sponsored currently by the National Conference of Specialized Court Judges and the National Association of Women Judges. Additional co-sponsors are expected. Please make plans to attend informative program during the Annual Meeting in New York this summer.

## ENDNOTES

1. Associate Judge, the Cherokee Court, Qualla Indian Boundary, Cherokee, North Carolina.
2. Included in this population are Native Alaskan women.
3. *Maze of Injustice The Failure to Protect Indigenous Women From Sexual Violence in the USA*, Amnesty International, Inc., 2 (2007).
4. Bureau of Justice Statistics, American Indians and Crime: Statistical Profile, 1992-2002, at 5 (2004), available at <http://ojp.usdoj.gov/bjs/abstract/aic02.htm>.
5. *Maze*, at 2.
6. *Id.*
7. *Id.* at 5. Using those figures and assuming two million Native American women, 680,000 of these females will be raped during their lifetimes.
8. *Maze* at 4.
9. "Indian Country" is a concept originating in Federal criminal law and includes: (1) "all land within the limits of" federally recognized Indian reservations, regardless

of ownership status; (2) all "dependent Indian communities," a phrase which has been construed as including the Pueblos in New Mexico; and (3) all allotted land held in trust by the United States. The definition of Indian country may also include land "owned" by non-Indians.

Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 726 (2000).

10. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 8 L.Ed. 25, 31 (1831).
11. *United States v. Wheeler*, 435 U.S. 313, 321, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303, 313 (1978).
12. Gavin Clarkson, "Reservations Beyond the Law," *Los Angeles Times*, <http://www.latimes.com/newes/opinion/la-oe-clarkson3aug03,0,1867347.story> (August 3, 2007).
13. *Id.*
14. 25 U.S.C. § 1302(7).

## Special Court Judges Contribute to the Success of the Judicial Clerkship Program

Hon. Margarita Bernal

An amazing thing is happening at our Midyear Meeting: judges are connecting with law students in a relaxed atmosphere that creates great learning and networking. It is amazing because having just returned from beautiful Los Angeles, most of the judges spent their time indoors working with students, rather than seeing the sights and enjoying beautiful Southern California. Now don't get me wrong, most judges had meetings and obligations that keep them from enjoying many of the local landscapes at these meetings. But since the inception of the Judicial Clerkship Program, more and more judges are devoting most of their Fridays and

large segments of Thursday and Saturday to sit down, with 1st and 2nd year law students to talk about every topic under the sun, not just the research exercise.

The interaction and energy with the over 90 law students was amazing. Each table had approximately 6-8 students paired with two or three judges to discuss over three days the process of research, clerking and all of the issues facing new lawyers.

Every conference of the Judicial Division was represented including our own Judge Ellie Finn, AZ, Judge Ron Wilson, AZ, Judge George Perez, MN, Judge Mike Witte, IN (and future Judicial Division chair), Judge Sandra Thompson, CA., Judge Ernestine Gray, LA. The energy and commitment given by all JD members was greatly appreciated by the students.

As we worked with the students, we reconnected with our past and realized we continue to give back and to the young people who will soon become lawyers and valued members of our chosen profession.

The excitement and the enthusiasm displayed by the students was contiguous.

I urge to you look again, next year in Boston at our next Midyear Meeting to work with the students on the Judicial Clerkship program. You will refresh and renew your sense of why you became a lawyer and finally a judge. Of course, special thanks to the brain trust for the very smooth and successful program, Judge William J. Caprathe, from State Trial judges and the godfather of the law student program, Justice Frank Sullivan Jr. of the State of Indiana Supreme Court. They are the reason the program is so well respected and successful. And finally, Gilda Fairley, ABA staff and her assistants, in pulling off another amazing event.

Thanks to all who participated and please join us next February 2009 in Boston!

Judge Margarita Bernal, Chair Elect of the National Conference of Special Courts, served on the advisory board for the Judicial Clerkship Program



# Judicial Division Record

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## CHAIR'S COLUMN



By Judge James A. Wynn, Jr.  
Raleigh, NC

We are now at the midway point of my tenure as Chair of the Judicial Division. Since the annual meeting, our committees and liaisons have worked tirelessly to ensure

that you enjoy the full benefit of your Judicial Division membership. That is why at this year's Midyear Meeting in Los Angeles, the Judicial Division Council focused on the reports of our committees and liaisons as well as our constituent conferences.

During our Council meeting, Professor Charlie Geyh reported that one of the major issues confronting our judges around the nation is the issue of recusal, which is the subject of a project funded by an Enterprise Grant obtained by the Standing Committee on Judicial Independence. Professor Geyh chairs

that effort and reported that recusal and disqualifications are becoming increasingly hot issues. The project will examine problem areas such as state procedural issues and disqualification issues concerning family and relatives. Professor Geyh stated that the project plans to develop recommendations that will be adopted by the HOD next year.

Additionally, Judge Charles Clevert, one of our liaisons on the Commission on the American Jury Project, reported that the commission is working to advance the implementation of the "ABA Principles on Juries and Jury Trials," by working with courts, rule-making bodies, state legislatures, and the organized bar. The Principles are available at [www.abanet.org/jury](http://www.abanet.org/jury).



At the request of our liaisons, the Judicial Council agreed to adopt the Principles as the Judicial Division Jury Standards, which now sets the stage for approval by the HOD at the ABA Annual meeting this year.

Judge Bill Carpenter reported on the Membership Committee's work, which reviewed a listing of ABA judge members who do not currently belong to the Division. The committee circulated the list to our conferences for recruiting ABA judge members. The Committee is also surveying states to determine which may provide financial assistance to support judicial memberships.

Be sure to read the minutes of the Midyear Council meeting online at our JD website, where you will find summaries of many other reports given by our conference and committee chairs, and our liaisons.

Turning to our upcoming programs, I also want to share with you the exciting programming that the Judicial Division Program Committee has planned for the Annual Meeting under the leadership of Program Chair Justice Mark Martin.

(continued on page 3)

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## Inside...

Appellate Judges Conference	13
Lawyers Conference	15
National Conference of the Administrative Law Judiciary	19
National Conference of Federal Trial Judges	22
National Conference of Specialized Court Judges	25
National Conference of State Trial Judges	28

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