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**ADDRESS OF DEPUTY GENERAL COUNSEL
BRIAN D. MILLER, U.S. COMMISSION ON CIVIL RIGHTS,
BEFORE THE FEDERAL BAR ASSOCIATION'S
13th ANNUAL INDIAN LAW CONFERENCE***

I am delighted to be here today to talk about the Commission's Indian Civil Rights Act (ICRA) project. I would like to thank Lawrence Baca for the invitation, and I would also like to thank those tribal judges, Indian law scholars, and tribal leaders who took the time to talk with me and the Commission about these important issues. Some of you were even so bold as to speak to me in public.

I know that many of you are very concerned about the Commission's study. The history of the federal government in Indian affairs is not a laudable one. With this history, I do not blame you for fearing the federal government, and these fears are compounded because of differences in culture and tradition.

This afternoon, however, I would like to allay many of those fears. I realize that some of you will not be completely convinced by what I am saying. I simply ask that you keep an open mind about the Commission. Read the transcripts of our hearings for yourselves and make your own judgment.

Given the fears and rumors about the Commission, I will begin by stressing what the Commission is not doing. Then, I will address what the Commission is doing. And last, what the Commission plans to do.

First, what the Commission is not doing. The Commission is not preparing an anti-Indian report. In talking with Indian leaders and scholars, I sense a real misunderstanding concerning the Commission's ICRA project. One individual told me that he thought that the Commission was out to abolish the tribal courts. Nothing could be further from the truth! Yet when I assured him of that, he still seemed skeptical.

Some I spoke with think that the Commission has adopted the position taken in an ABA study a few years ago. I have read Mr. Brakel's book, and I do not agree with it. The Commission does not agree with it. The Commission issued a strong statement several years ago on the constitutional status of Indians. We stand by that statement. Among other things, that statement acknowledged the federal government's commitment to tribal self-determination.

* April 8, 1988, Albuquerque, New Mexico.

Another misconception is that the Commission is intentionally critical of tribal governments. Like all governments, tribal governments are not perfect. Our goal, however, is not to point out the imperfections. Nevertheless, all governments tend to infringe upon individual liberties, not because they are evil but because they have different interests. This is why some kind of check on government power or safeguard for civil rights is necessary, whether we are concerned with federal, state, or tribal government.

The Commission is not antitribal courts. To the contrary, the Commission would like to see tribal courts strengthened. After all, who is better able to resolve intratribal disputes than tribal forums? Who is in a better position to apply the ICRA with sensitivity to tribal culture and tradition than tribal forums?

In keeping with the tribes' sovereign status, the Commission does not want to see federal intervention in any form, including federal court review, unless it is absolutely necessary. Federal court review is last on the list of enforcement options or alternatives for ICRA compliance, precisely because Indian tribes are separate sovereigns.

What the Commission is doing, however, is reviewing tribal compliance with the Indian Civil Rights Act, post-*Santa Clara Pueblo v. Martinez*.¹ The ICRA is a federal civil rights statute, passed by the Congress, and binding on all Indian tribes. It must be enforced. The Supreme Court stated in *Martinez*, and I quote: "Tribal forums are available to vindicate rights created by the ICRA, and Section 1302 [of the ICRA] has the substantial and intended effect of changing the law which these forums are obliged to apply."² End of quote. Enforcement of the ICRA is not optional; it is mandatory.

The mandate of the Commission is to monitor enforcement of federal civil rights statutes, of which the ICRA is one. The Commission is monitoring, pursuant to its mandate, enforcement of the ICRA. The Commission is making a factual inquiry: Is the ICRA being enforced? If it is not, is nonenforcement a pervasive problem? This factual inquiry is entirely consistent with, even required by, *Martinez*, which stated: "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions."³

1. 436 U.S. 49 (1978).

2. *Id.* at 65.

3. *Id.* at 72.

In an effort to ascertain whether the Act is being enforced, the Commission has held four hearings: one in the Midwest; one in the Southwest; one in Washington, D.C.; and one in the Northwest. Last week, we heard from approximately thirty judges from the Northwest Tribal Court Judges Association. Earlier this year, we heard from Assistant Secretary Ross Swimmer. Mr. Swimmer told the Commission that the BIA lacks the ability to oversee compliance with the ICRA. He suggested that we explore both an Indian Court of Appeals and some limited federal court review.

In our hearings, we have received testimony from a number of current tribal officials (including chairmen and governors), tribal judges, former officials, former judges, Indian scholars, attorneys, representatives of civil rights organizations, and individuals whose rights the ICRA is designed to protect. Some of the people we have heard testify include the Honorable Robert E. Lewis, governor of the Zuni Pueblo; Ronald A. Peterson, Colorado attorney and a former chief judge of the Zuni Tribal Court; Dr. Robert Young, professor emeritus, University of New Mexico, and author of *The Navajo Yearbook* and *A Political History of the Navajo Tribe*; Dr. Peter Iverson, professor, Arizona State University, and author of *The Navajo Nation*; Dr. Robert Roessel, former professor, Arizona State University, and a founder of the Rough Rock Demonstration School (the first contract school), first president of the Navajo Community College, and first director of the Navajo Education and Scholarship Foundation; Charley John, former Navajo district judge; Merwin Lynch, former Navajo district judge; Albert Hale, president of the Navajo Nation Bar Association; Merle Al Garcia, former governor of the Acoma Pueblo; the Honorable Elbridge Coochise, vice-president of the Northwest Tribal Court Judges Association; and, Jane Smith, president of the National American Indian Court Clerks Association. These are just a few witnesses, whose names I have read primarily from the table of contents of the Flagstaff transcript.

Incidentally, before the Commission held its hearing in Flagstaff, Commission staff spent about 100 staff days on or near the Navajo Reservation, conducting interviews and speaking with well over a hundred individuals. In each of our hearings, we held open sessions where anyone who wished to testify could do so.

Now, what will the Commission do with the testimony and data it has received? The Commission will make a report to the Congress and to the President. The Commission has not issued any report nor has it made any findings or recommendations. In fact, we have not even begun writing our report. We need to complete

our fact-finding and evaluate the testimony and data. Only then, will we begin our report.

There is time to hear your views. Part of the reason I am here today is to solicit your views on compliance with the ICRA. However, if we can assume for a moment that the facts support a need to change the status quo, I would like to give you some idea of possible remedial options or alternatives.

Increased funding and training of tribal courts, clerks and support staff, and possibly separate federal funding for tribal courts, may be called for by the facts. Funding and training may eliminate some of the alleged violations that we heard about, such as ex parte hearings, improper arrests and imprisonments, and police misconduct. I understand that, out of a total budget of about one billion dollars, the BIA allocates about 9 million dollars for tribal courts. That amount may not be sufficient to operate a viable court system.

Some of the testimony, however, indicates systemic problems that no amount of funding or training can eliminate. One is the problem of sovereign immunity. Training and funding are not going to convince tribes to waive sovereign immunity in tribal forums. Without a waiver of sovereign immunity, the ICRA is rendered meaningless. Notwithstanding the dicta in *Martinez* that tribal forums are available to resolve ICRA disputes, we have heard tribal judges testify that sovereign immunity may prevent enforcement of the ICRA in tribal forums.

Another systemic problem that we heard about is a lack of independence of the judiciary. Many judges have complained that they cannot enforce the ICRA when they fear retaliation from the tribal chairman or the tribal council. Last week, for example, we heard testimony that a lack of separation of powers interfered with hearing child abuse cases when relatives of the chairman were involved, with the result that the children had to return to the abusing parents.

Systemic problems present the most difficult challenge to the Commission because it has to find a way to ensure compliance with the ICRA which is also the least intrusive to tribal sovereignty. Various alternatives are possible, including a limited federal court review following exhaustion of tribal remedies. I want to stress, however, that the Commission has not adopted any of the possible remedial options, including a limited federal court review. The Commission has not even determined whether the facts support any change in the status quo.

I invite you to share your views with us on these matters. Please

send me your thoughts on enforcement of the ICRA. My name and address is on the bulletin board outside. One thing is certain; if we do not hear from you, the Commission's record will not reflect your view.

I hope that these comments have been helpful and will contribute to establishing better communication between the Commission and the Indian community.

