

Michael Petoskey:  
Focusing on the Common Ground



by

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Chief Judge Michael Petoskey is one of many tribal court judges who promote tribal sovereignty *and* understanding between tribal and nontribal courts. He stands out as a champion of sovereignty because of his longstanding commitment to tribal justice and because he has been a tribal leader in fostering the development of positive relations between tribal and state courts by focusing on the common ground between them. A humble man, he feels he is no different

from many of the other tribal judges who have received little recognition for their hard work and dedication. When interviewed for this essay, he said he appreciated the opportunity to raise the visibility of all tribal judges, especially those who have committed themselves to similar work.

Michael Duane Petoskey was born in a town of the same name, Petoskey, Michigan, in 1947. His surname comes from the Odawa word “Pe-taw-se-gay,” as it was spelled on the 1855 treaty between the Ottawa and the Chippewa and the United States; it means “the thin red line of light along the horizon just as dawn breaks the black of night.” Judge Petoskey is a member of the Grand Traverse Band of Ottawa and Chippewa Indians, one of Michigan’s twelve federally recognized tribes, and one of the “Three Fires” groups of the Anishinaabe (“First People”).

Petoskey spent the first five years of his life living in the “Indian Town” part of Harbor Springs, Michigan. After attending school in Petoskey, he began studies at Michigan State University. When he returned from military service in Vietnam, he finished a degree in economics and eventually headed to the University of New Mexico for law school. Law school did not come easy for Judge Petoskey. He says that he had no foundation or framework to put the first-year classes into context and that he would look around at the other students and wonder what he was doing there. Surviving the first-year experience, he found classes in the second and third year that he could relate to and that interested him.

Following law school, Judge Petoskey took a job working for Michigan Indian Legal Services. In 1986, Petoskey began his judicial career as a chief judge for the Grand Traverse Band and served in that capacity for sixteen years. During those years, Judge Petoskey also worked for Northern Michigan College in Traverse City to develop programs to recruit and retain Native American students. He also served as chief judge of the Little Traverse Bay Band

of Odawa Indians for ten years; he held the same position for the Nottawaseppi Huron Band of Potawatomi Indians for four years. Currently, he is chief judge of the Pokagon Band of Potawatomi Indians (the band appointed him as its first chief judge in February 2002) and chief judge of the Gun Lake (Match-E-Be-Nash-She-Wish) Band of Pottawatomi Indians courts (where he was appointed as that band's first chief judge in January 2010). All of these appointments indicate that Judge Petoskey has developed quite a reputation as a distinguished and trusted jurist among Michigan's indigenous peoples.

As with all courts, tribal courts must be able to take jurisdiction over a case before hearing it. Tribal courts, however, are very much at the mercy of the United States Supreme Court and Congress as to their jurisdiction. Long ago, before modern-day tribal courts, the Supreme Court recognized tribal judicial systems in an 1883 decision, *Ex Parte Crow Dog*. In that case, Crow Dog, a member of the Lower Brulé band of the Lakota Sioux tribe, killed a Brulé chief named Spotted Tail. The matter was settled by the tribe, and Crow Dog was ordered to pay Spotted Tail's family \$600, eight horses, and one blanket. Even though the tribe had resolved the dispute, the federal government in the Dakota Territory charged Crow Dog with murder. Eventually, the U.S. Supreme Court ruled that the federal government did not possess jurisdiction to bring a case involving a dispute between two tribal members on reservation land. With this decision, the Court recognized the right of tribes to fashion their own legal remedies. Displeased with this ruling and with the holding that criminal jurisdiction on a reservation was exclusively within the purview of a tribe, Congress passed the Major Crimes Act of 1885, which gave federal courts jurisdiction over murder and six other "major crimes." Although it has been amended over the years, the Major Crimes Act is still a valid law. Tribes do have limited criminal jurisdiction over certain serious crimes because tribal codes contemplate major crimes

such as murder. However, the tribe's sentencing authority is restricted under the Major Crimes Act, the Indian Civil Rights Act, and the Tribal Law and Order Act.

Generally speaking, however, the Supreme Court has upheld the *civil* jurisdiction of tribal courts and tribal governments. The Court acknowledged the civil authority of tribal courts in 1959 in *Williams v. Lee*. In that case, a non-Indian who owned a general store on the Navajo reservation brought a suit in an Arizona state court to collect a debt owing to him by two Navajo tribal members living on the reservation. The state court sided with the non-Indian, and the Supreme Court of Arizona held that Arizona courts could exercise jurisdiction over civil suits brought by non-Indians against Indians on reservation land. The U.S. Supreme Court overturned the decision, holding that state jurisdiction over cases of that nature “would undermine the authority of the tribal courts over Reservation affairs and . . . infringe on the right of the Indians to govern themselves.” The case recognized the sovereign power of a tribe to manage its own civil matters.

Although it had recognized civil jurisdiction, the Court continued to chip away at tribal criminal jurisdiction. In the 1970s, and despite not having complete jurisdiction over major crimes, tribes continued to develop and enforce criminal law over both Indians and non-Indians within their reservation boundaries. The case that challenged and eventually ended tribal criminal jurisdiction over non-Indians was *Oliphant v. Suquamish* (1978). In that case, the Court held that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.” Because they did not possess inherent jurisdiction, the Court determined that Congress would have to give tribes the authority to prosecute non-Indians for crimes on Indian land. To this point, Congress has not provided that authority. An underlying message throughout the *Oliphant* decision was that the Supreme Court was fearful that a non-Indian would not receive a fair trial

from an Indian tribunal. As such, while tribal courts serve as the center piece of justice in tribal communities, they often face the difficulty of maintaining a certain status; tribal court judges and their staffs have to maintain legitimacy in ways state or federal court personnel likely never contemplate.

On top of that, tribal judges often work under more challenging conditions than other judges. Tribal judges such as Michael Petoskey often work for more than one tribe, which could be in another part of the state or another part of the country. Judge Petoskey, for instance, lives in Traverse City, Michigan and travels to Dowagiac, home of the Pokagon Band's court, and Dorr, site of the Match-E-Be-Nash-She-Wish Band's court, in a grey Volvo that he has owned for twenty years and that has run up almost five hundred thousand miles. Last year, Judge Petoskey drove to the Dowagiac area alone at least forty times. In addition to his road travel, he typically flies to conferences, meetings, and trainings about eight times a year. The travel is necessary, he says, to promote the common ground approach to tribal sovereignty on a local, state, and federal level.

In his work in Dowagiac with the Pokagon Band's court, Judge Petoskey and his court staff work hand in hand with other judges and court personnel in surrounding Cass, Van Buren, and Berrien counties. Through his work with multiple tribes and communities both in and outside of Michigan, he has demonstrated how collaboration can enhance the sovereignty of a Native nation. This cooperation with officials from other counties also enables the judge and his staff to form working relationships in a wide area and, more important, ensures that the surrounding state and county officials are aware of the services offered to tribal members in those communities.

Judge Petoskey has also promoted sovereignty by developing and strengthening the tribal courts on which he has served. Judges are the pillars of tribal court systems; through their work and the efforts of their staff, they shape the way the court runs, how it works with outside governments and agencies, and how tribal members and nontribal members view it. Although they are not usually involved in writing tribal law, tribal judges shape the law by providing precedent, which can be used far into the future, and by providing interpretations that influence and change the statutory law.

In order for the court's decisions to be taken seriously, it must demonstrate to both the tribal community and outsiders that it is a legitimate source of judicial authority. Judge Petoskey understands this problem, acknowledging that "two primary challenges for any court system are respect from the community it serves and credibility with those outside the fishbowl." Courts that make decisions based only on the facts and the law, and not on political, personal, or interpersonal considerations, he says, have taken a huge step to earn respect from those it serves and to establish its credibility with outsiders. Judge Petoskey's reputation and the relationships he has developed with Michigan's tribal communities over the course of his thirty-year career have strengthened the courts on which he has served and have helped to outweigh the mistrust of lawyers that might have existed on those reservations. Matthew L.M. Fletcher, a law professor at Michigan State University College of Law and director of the school's Indigenous Law Center says, "I have heard Mike Petoskey say many times that he is far more interested in the development of tribal justice systems and the legal infrastructure of Indian tribes than in merely hearing cases and rendering decisions. That's the nation-building mentality, and it especially shows in the successes of the Grand Traverse Band, Little Traverse Bay Bands, and Pokagon

Band tribal courts where he carried out his vision.” This vision and influence reaches across the country, even if it is centered in local Michigan communities.

Judge Petoskey believes tribal courts must strive for judicial independence. The Grand Traverse Band of Ottawa and Chippewa Indians, for example, is one of the few tribes with a judicial branch independent of the other tribal branches of government. While at Michigan Indian Legal Services, Judge Petoskey worked with others on the Grand Traverse Band’s final review committee to revise drafts of the band’s constitution, focusing specifically on the sections dealing with the establishment of an independent judiciary. Judge Petoskey believes this separation of the judiciary from the other branches of government is a crucial aspect for a court. “It seems to me that it’s really not about power,” he explains, “but rather about separating the judicial functions of government from the political functions, both the legislative and executive functions.” James Keedy, the current executive director at Michigan Indian Legal Services, agrees that separation of powers is important. Without separation, he says, the tribal council would be the court of last resort. Litigants were not always comfortable with that situation because they feared that tribal councils might not focus on the legal issues like a judge and would take political considerations into account. Keedy points out that judges cannot comment on a litigant’s proceedings or conduct conversations on a case in the way that tribal councils can. Tribal judges must make a lot of tough decisions, he says, implying that they have to make them on their own.

Judge Petoskey believes tribal judges can help people negotiate the boundaries between legal jurisdictions. Tribal courts must work with other courts, including those in jurisdictions that surround the reservation. Tribal members are also citizens of the states in which they reside and citizens of the United States; therefore, it is not unusual for reservation residents to become

involved in jurisdictional conflicts. The better the tribal court is able to maintain good relationships with other courts, the quicker these jurisdictional issues can be resolved. These relationships may not always be possible because understanding is not always easy, but it is something that Judge Petoskey says that all courts should strive for.

A diverse group of litigants can find themselves before the tribal court, including tribal members, nonmember Indians, and non-Indians. When asked if the experiences of any of the three groups differs, Judge Petoskey is certain they do not. He also has no doubt, however, that some non-Indians (and some nonmember Indians) have concerns about whether a tribal court will treat them fairly. That said, Judge Petoskey does not feel a responsibility to treat these parties differently. He believes that “for all litigants it is about treating them with dignity, being fair and impartial, listening to their story, and dispensing justice in accordance with the law.”

Judge Petoskey suspects that the attorneys and litigants who have experienced the state court system are pleasantly surprised by the respect and attention they receive in his tribal courts. While he points out that he can only speak about the courts in which he has presided, he does believe that this is likely a common reaction to tribal courts across the country. For one thing, there is a tremendous difference in the number of people who go through the state courts every day compared with the number who deal with legal problems in tribal courts. Typically, the staff in tribal courts is smaller in number and responsible for all cases instead of just one or a few types of case as in state courts. Judge Petoskey observes that “dockets with caseloads that are not overwhelming allow each case to have whatever time it needs, without being rushed.” “All the non-Indian attorneys who practice in our courts love their practice and experience there because the experience is a stark contrast to the rushed, often uncivil with opposing counsel, experience in state and federal courts,” he says. Carol Bealor, an attorney and mediator in Niles, Michigan,

agrees. “In tribal court,” she points out, “much consideration is given to the many challenges facing the parties and a lot of effort is put into focusing on what can be done to provide the parties with necessary services and in making sure the parties can be a part of the process.” Bealor, who frequently represents litigants in Judge Petoskey’s court, notes that “tribal court will often be held in the evening in order to accommodate working parents and make sure the parents can fully participate in the proceedings.” Of Judge Petoskey, Bealor states, “I have seen him earn the respect of the parties in front of him because of how he treats the parties. He is respectful to the parties and in turn this earns their respect.”

Perhaps these reactions are a response to the distinct nature of tribal courts. Above all else, tribal courts represent Native communities. Judge Petoskey argues that a tribal court needs to reflect the culture of the people and not just replicate a state or federal court for it to receive respect from the tribal community. There are hundreds of tribes, and each one has its own way of doing things, so it would be impossible to generalize their systems. However, there are some common approaches that judges adopt, such as integrating traditional cultural ideas, teachings, art, and practices into their tribal court. The heritage of Judge Petoskey and other tribal judges is manifest in tribal courtrooms all over Michigan. For example, their robes reflect the art of their people, and items reflecting Anishinaabe religion and philosophy appear in their courtrooms. Sage may be available for those who want to smudge, which is a way to cleanse the body and spirit. There may be a medicine wheel in the courtroom as well, which carries the teachings of the four directions and the idea that all peoples are equal. These cultural and religious items ensure the courtroom is a place where healing can occur. The court’s connection to its people’s history helps remind tribal citizens that it is, in fact, *their court*.

A number of tribes use the peacemaking court, which is a cooperative alternative to adversarial proceedings. Tribal communities are oftentimes small and disputes affect more than just the parties directly involved, making it necessary for courts to examine the bigger picture in order to come up with the best plan for resolution. Instead of focusing on a winner or a loser, those presiding over peacemaking (or sometimes “peacekeeping”) courts turn the parties’ focus beyond the dispute and work toward healing their relationship and the relationship with the community. Although the peacemaking process differs depending on the tribe, it usually involves one or two people who guide the parties to working out a solution to their problems. The peacemakers, often elders, act as facilitators and educators, helping each party learn from one another; and they assist judges in promoting the healing process.

Tribal court judges may not act as peacemakers, but the judge’s role in the development of peacemaking courts is vital. They are often in a position of respect, which allows them to promote peacemaking as an appropriate judicial tool for dispute resolution. Many times tribal court judges play a critical leadership role in the grants it takes to fund alternative dispute resolution programs like the peacemaking process. Once the process is up and running, judges such as Petoskey continue to nurture these non-adversarial programs in hopes they will grow and expand.

Like many Native judges, Judge Petoskey is not a fan of the adversarial process. Even when it is necessary, he takes measures to find common ground in his courtroom. This might be achieved by meeting with the attorneys before a custody case or allowing for a break in the proceedings so that parties can talk among themselves and resolve things on their own terms. Judge Petoskey believes the adversarial process is destructive to the relationships among community members; the idea of being able to leave feelings in the courtroom, he says, is not

realistic in small communities. Therefore, it is even more important for tribal communities to apply alternative dispute resolution methods when possible. Petoskey maintains that “tribal courts should look like the community that they are a part of by being a reflection of community values, traditions, customs, and culture. Problem-solving and peacemaking are always at the forefront. We will take whatever time is needed. We listen to what people have to say. We do treat people with respect and dignity.” While not all tribes use peacemaking courts, Judge Petoskey believes that each tribal court judge would say that the peacemaking philosophy pervades every move they make, whether on or off the bench.

Peacemaking courts and similar alternative dispute resolution proceedings are representative of the desire of tribal courts to replace the adversarial process with more cooperative means to resolve disputes. State courts throughout the country are now looking to tribal courts for non-adversarial alternatives. Drug courts, victim-offender programs, and neighborhood mediation programs are just a few non-adversarial solutions used by states more frequently. Like many other tribal court judges, Judge Petoskey frequently speaks at conferences all over the country to nontribal audiences who are interested in implementing forms of the peacemaking process. The work of peacemaking and alternative dispute resolution goes to the heart of Judge Petoskey’s commitment, both inside and outside the courtroom. When outside the courtroom, he works to bring together institutions and governments so they can see where their commonalities lie. It is in this overarching quest for common ground that Judge Petoskey shines as an educator and as a peacemaker.

The idea of common ground is one that Judge Petoskey takes with him when he works with other jurisdictions, and he encourages positive government-to-government relationships. “Tribal governments are members of the family of governments that exist in this country and

their courts function in the common ground that exists with sometimes overlapping concerns of the separate sovereigns,” he says. “Credibility with the surrounding sovereigns is important because of the common ground. We want others to recognize and respect our sovereign authority.” Judge Petoskey has worked diligently to develop common ground with the state courts of Michigan. The effort to improve tribal and state government relationships was spearheaded in the early 1990s by Michael Cavanagh, chief justice of the Michigan Supreme Court. He, Judge Petoskey, and others brought state and tribal judges together in a forum that has promoted progress and understanding between the two systems of justice.

Many people, including attorneys, know very little about tribal courts, jurisdictional issues faced by tribal governments, and special rules (such as Public Law 280, which provides some states with criminal jurisdiction over Indian territories within their borders) that may or may not apply to certain tribes in a state. While it may not be necessary for every person to understand the workings of the tribal courts, it *is* crucial for attorneys, judges, and lawmakers to have at least an elementary understanding of them and to realize the resources available to them if questions arise. Justice Cavanagh’s forum, which was funded by a grant from the National Center for State Courts, made several recommendations to improve understanding among the state and tribal courts.

The forum recommended that the Michigan State Bar develop an Indian law section and that the tribal courts and state courts work toward a recommendation that would enable them to respect orders and decisions from their counterparts. This recommendation led in 1996 to the adoption of Michigan Court Rule 2.615, which creates a presumption that a tribal court judgment is valid and requires recognition by the state court unless certain grounds are demonstrated. This concept of comity covers judgments, subpoenas, warrants, and other orders of the courts of any

federally recognized tribe. (The forum also suggested that the state court directory add a listing of tribal courts and that the tribal courts be included on the Michigan court website. Not only does this innovation provide a convenient way for judges and court staff to reach one another, it also implies that tribal courts hold an equal status with state courts. Tribal courts may be different in structure and ideology from state courts, but placing them alongside one another in these kinds of listings indicates that their decisions, like those of the state courts, hold the force of law.)

The idea of state and tribal comity differs from full faith and credit in that it is not a hard and fast rule, and, although it requires compliance unless there is a reason to the contrary, it is not a mandate. Full faith and credit, for instance, is mandated in the Uniform Enforcement of Foreign Judgments Act, which requires a court in one jurisdiction to respect the child support order of a court in another. With full faith and credit there is no choice; therefore, state or tribal courts may feel pressure to recognize the order of another court instead of taking time to develop mutual respect. Comity, on the other hand, allows state and tribal courts to consider whether they will honor judgments without forcing them to do so. Comity thus fosters a government-to-government relationship between the state and tribal governments. Comity may be a slower road, but it is also one that encourages the development of mutually beneficial relationships.

The success of efforts to promote cooperation between state and tribal courts speaks for itself. In a recent letter to Justice Cavanagh, Judge Petoskey shared numbers that point to progress. Since the adoption of Michigan Court Rule 2.615, the Pokagon Band of Potawatomi Indians has enforced 113 Michigan state court judgments. In addition, between 2007 and 2012, the Band opened 303 child support orders from Michigan courts spread across 22 counties and withheld nearly a million dollars from the checks of those owing support for the care of their

children. The Band has also collected similar amounts for the payment of child support orders from other states. Judge Petoskey believes these numbers show that the tribes are responsible members of the family of governments and hopes that successes like these will promote more cooperation between state and tribal governments.

New tribal courts are being developed all the time, and they have the constant task of adapting to federal and state laws regarding jurisdiction while they try to assert and expand their existing authority. As tribes continue to write and enforce laws, develop courts, and try cases, it will become even more necessary for attorneys and judges alike to recognize and respect the presence of tribal courts. With this respect comes the recognition of sovereignty. Working toward a common ground approach to tribal sovereignty involves the support of many people, such as judges like Michael Petoskey. His work demonstrates the overall importance of tribal courts and tribal court judges in protecting and enhancing the sovereign powers of tribal nations. And while he remains a very humble man, others have recognized and commented upon his importance. As Professor Fletcher put it, “Mike Petoskey is the Anishinaabe John Marshall—the great chief justice of Michigan Indian country.”

#### Suggested Reading

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