

across Indian Country programs such as Operation Dakota Peacekeeper and the Safe Indian Communities Initiative?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO WALTER E. LAMAR *

Question 1. The Committee has heard concerns about the BIA's Internal Affairs Division. Please describe your thoughts on the possible consequences of the current Internal Affairs system. And, if you believe necessary, do you have any recommended legislative proposals to ensure that the BIA and tribal law enforcement agencies have adequate internal affairs practices?

Question 2. As a former FBI agent serving Indian Country, what in your opinion could be done on the part of the FBI—other than dedicating additional positions—to aid the investigation of crimes in Indian Country?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO WALTER E. LAMAR *

Question 1. Section 303 of the draft bill would allow tribes broader access to national criminal databases. What recommendations do you have for improving the tribal law enforcement officials' ability to access the NCIC as well as other data or information sharing capabilities?

Question 2. Background investigations and proper training are costly for Indian tribes. Section 301 of the draft bill authorizes law enforcement officers to obtain training through state police academies. What are other options should be made available to Indian tribes, such as accessing the FBI fingerprinting systems, to conduct proper background investigations and training which might decrease the costs incurred by Indian tribes in the hiring of qualified law enforcement officers?

Question 3. There are a significant number of law enforcement agencies and jurisdictions involved in Indian Country. Cross-deputization agreements have been one tool to improve coordination between the agencies and reduce confusion over such matters as jurisdiction. Section 301 of the draft bill also contemplates a plan being developed to enhance the provision of special law enforcement commissions to tribal and state law enforcement officers. What other tools are needed to ensure adequate coordination and response from and between the various law enforcement agencies is provided to victims of crimes in Indian Country?

Question 4. Your testimony indicated that the Federal Bureau of Investigation may have the number of their cases declined by the U.S. Attorney's Offices, but may not include the BIA or tribal cases referred to the U.S. Attorney's Offices. What other recommendations do you have to gather comprehensive data on the declination rates?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO KELLY GAINES STONER *

Question. I want to clarify that the enhanced sentencing provision for tribal courts in Section 304 is optional. The intent of the provision is to maintain the current standards for prosecutions subject to 1 year or less. However, if a Tribe chooses to enact criminal laws subject to sentences between more than 1 year and up to three years, the tribal court must afford the defendant certain protections. I agree that funding for tribal public defense programs must be included. Section 402 of the draft bill would reauthorize the Indian Tribal Justice Support and Technical and Legal Assistance Acts, which includes programmatic funding for tribal public defender programs. In your opinion, what other initiatives should be included in these tribal courts programs? For example, how could the BIA or Tribes collect and provide better data on tribal court statistics?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO KELLY GAINES STONER *

Question 1. What types of training should be included for law enforcement officials to increase the chances of successful prosecutions of domestic and sexual violence?

* Response to written questions was not available at the time this hearing went to press.

Question 2. Your testimony indicated that you referred cases to the federal prosecutor and either did not receive a declination report or received a delayed response from the federal prosecutor. The Committee received testimony from the Department of Justice that there are several serious concerns about releasing declination reports. What is your view about those concerns? Do you have any recommendations for how the Federal and tribal prosecutors and law enforcement could work together to address these concerns?

Question 3. The Department of Justice indicated that it opposes codifying the duties of the tribal liaisons within the U.S. Attorney's Offices which are outlined in the draft bill. What would you recommend for the U.S. Attorney's Offices in defining the tribal liaisons roles so that Indian Country crimes would receive significant attention, priority and be addressed in a consistent government to government relationship?

Question 4. The Committee has heard that in some jurisdictions the tribal prosecutors must turn cases over to the FBI, who then must review and present them to the U.S. Attorney's Office. Was this the case when you were the tribal prosecutor at Fort Totten? What problems, if any, could tribal prosecutors face in such circumstances?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. GRETCHEN C. F. SHAPPERT *

Question 1. Please provide the number of federal reservation-based misdemeanor prosecutions by District for the years 2006 and 2007. Please indicate the percentage of Native American defendants in these cases.

Question 2. The draft bill would enable the use of declination reports as a positive tool to coordinate prosecutions with tribal prosecutors, and to inform Congress regarding where additional resources are needed. This information is not available. Please provide a list by Federal District of the percentage of Indian Country criminal cases that were declined by U.S. Attorneys offices nationwide in 2006 and 2007? Again, by Federal District, please indicate the general reasons for declinations, attributing percentages to those reasons?

Question 3. Please describe the Department's policy on taping recording interviews with suspects, and provide reasons behind the policy.

Question 4. Please describe the Federal Bureau of Investigations efforts to aid background investigations for potential employees of gambling facilities operated by Indian Tribes, including the use if any of the Integrated Automated Fingerprint Identification System (IAFIS). Would the Department support similar coordination for purposes of expediting background checks for candidates for tribal and BIA police and corrections officers?

Question 5. Please provide the current number of offenders in federal custody (the Federal Bureau of Prisons System) that were convicted in either State, local government, or territorial courts?

Question 6. The Interior Department-contracted "Master Plan for Justice Services in Indian Country" indicates that most tribal jails have reached or will soon reach the end of their useful life. It notes that 90 percent of jails older than 5 years should be replaced. And it notes that contract beds at State and local jails are overcrowded and often far from remote tribal communities.

You indicated the Department's opposition to the proposal to permit coordination between tribal courts and the Federal Bureau of Prisons. What viable alternatives to incarceration for tribal justice programs would the Department support?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. GRETCHEN C. F. SHAPPERT *

Question 1. Your written testimony indicated that the Department of Justice N-Dex Program office is developing relationships with several Indian tribes to submit data to the N-Dex system. What kind of infrastructure does this N-Dex system requires for tribal agency participation?

Question 2. Your written testimony indicated that the Department's efforts in Indian Country have been above average across the board. As an example, your testimony cites that in FY 2006, the Department filed 606 cases against 688 defendants

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in Indian Country which is nearly 5 percent higher than the average rate of filing since 1994 of 580 cases against 643 defendants per year. Does that 5 percent figure correspond with the percentage increase in crime rates in Indian Country? What is the basis for determining an “above average” effort across the board?

Question 3. Your written testimony states that the number of FBI agents working Indian Country cases has increased by 7 percent since 2001. What has been the percentage increase or decrease in work-hours or Time Utilization Recordkeeping hours dedicated to Indian Country since 2001?

Question 4. Your written testimony indicates that the Department has concerns about releasing declination reports for several reasons, particularly the creation of potentially discoverable material. What kind of information do you think could be conveyed to the tribal justice officials to enable them to understand the status of the case and make a decision on proceeding in tribal court without creating potentially discoverable material?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO W. PATRICK RAGSDALE*

Question 1. Please explain the Interior Department’s efforts to coordinate with the Justice Department on the construction/renovation and the operation/maintenance of tribal jails.

Question 2. The Interior Department-contracted “Master Plan for Justice Services in Indian Country” indicates that most tribal jails have reached or will soon reach the end of their useful life. It notes that 90 percent) of jails older than 5 years should be replaced. And it notes that contract beds at State and local jails are overcrowded and often far from remote tribal communities.

You indicated the Department’s opposition to the proposal that would enhance tribal court sentencing authority to 3 years, and permit coordination between tribal courts and the Federal Bureau of Prisons. What viable alternatives to incarceration for tribal justice programs would the Department support?

Question 3. Please describe the Department’s efforts to fight juvenile crime in Indian Country.

Question 4. Please provide a detailed spending plan for the \$23.7 million appropriated in FY 2008 for the Department’s Safe Indian Communities Initiative? Include the amount spent on Operation Dakota Peacekeeper and other implementation to date.

Question 5. Please describe in your opinion what aspects of Operation Dakota Peacekeeper are working, and comment on whether and how the Operation will duplicated in other tribal communities.

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO W. PATRICK RAGSDALE*

Question 1. The draft bill would require the Office of Justice Services to coordinate with the Department of Justice to develop specialized family violence training for all of the law enforcement officials and prosecutors responsible for Indian country. What kind of training currently exists for such specialized family and domestic violence training for BIA and tribal law enforcement? How many BIA law enforcement officers have received this specialized type of family and domestic violence training?

Question 2. Your written testimony indicates that the Department may have constitutional and federal policy concerns with increasing the tribal court sentencing authority as well as placing Indian defendants sentenced by tribal courts in the federal Bureau of Prisons. You stated that there may need to be a separation of powers within tribal governments as one means of addressing these concerns. Please elaborate on your statement about separation of power—in particular, how or why it would address constitutional concerns.

Question 3. Would a “separation of powers” requirement also require some tribes to amend their constitutions?

Question 4. Your testimony indicated that the Operation Dakota Peacekeepers Initiative is for a limited time, but that the number of law enforcement officers is reaching the standard under the GAP Analysis and that it appears to be making

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a difference. You also mentioned that you will review this initiative to see if it could be employed at other Indian reservations. What other initiatives could be employed immediately on other Indian reservations, some of which are experiencing even higher crime rates than the Standing Rock Sioux Reservation?

Question 5. Your testimony indicated that there are Indian reservations with crime rates as high as 32 times the national average. Please explain the basis for the statement that crime rates on certain Indian reservations were 32 times the national average?

Question 6. How is the BIA coordinating with tribal law enforcement to improve the background checks process?

Question 7. How does the Indian Child Protection and Family Violence Act improve the background check process?

Question 8. Please describe the process followed by the BIA and Federal Bureau of Investigation to coordinate their efforts in investigating crimes in Indian Country?

Question 9. Your written testimony indicated that the Incident Management Analysis Reporting System (IMARS) is intended to provide a common information sharing capability across all participating functional areas within the Department of Interior for capturing and reporting law enforcement information. Once it is Department-wide, OJS will determine the feasibility of providing an opportunity for tribal collection of crime data using IMARS. What is the time frame for IMARS becoming Department-wide? How will OJS determine the feasibility of allowing Indian tribes to participate in the IMARS?

Question 10. What can be accomplished in the interim to assist Indian tribes in law enforcement data collection and information sharing?

Question 11. Your written testimony indicated that consistency in standards and staffing among the detention facilities needs to be assured to alleviate both constitutional and federal policy concerns regarding increasing the tribal sentencing authority from one year to three years. What assistance can the BIA provide to Indian tribes to achieve these standards and staffing levels?

WRITTEN QUESTIONS SUBMITTED BY HON. PETE V. DOMENICI TO W. PATRICK RAGSDALE*

Question 1. I often hear from New Mexico tribal officials regarding the difficulties tribal leaders face in trying to deal with crime including drug activity, gangs and other criminal activity. What program(s) or assistance does BIA provide to local tribes for the training of local tribal law enforcement officers?

Question 2. What law enforcement resources, both officers and support personnel, does the BIA have deployed in New Mexico at this time?

Question 3. Are crime rates on New Mexico reservations higher than those of other states per capita?

Question 4. In 2004, the Department of Interior Inspector General issued a report entitled "Neither Safe Nor Secure." The report outlined the poor conditions of detention facilities throughout Indian Country. Since the 2004 report, how has the BIA and DOJ worked together to plan for correctional facility replacement?

Question 5. What is the status of plans for correctional facility replacement and renovation and specifically in New Mexico?

Question 6. Would it be helpful for Congress to clarify what type of collaborative process would be required for BIA and DOJ's work on correctional facility replacement and collaboration?

WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO W. PATRICK RAGSDALE*

Question 1. Regarding data collection, do all tribes participate in the BIA's crime data collection efforts? Do they all use the same standards? How many tribes are still submitting hard copies of their data and what effort is being made to move these tribes towards electronic submission?

Question 2. At the conclusion of Operation Dakota Peacekeeper could you provide a report on the successes and failures of the operation as well as its long term project effect on crime on the Standing Rock Sioux Tribe?

* Response to written questions was not available at the time this hearing went to press.

Question 3. What percentage of BIA officers are cross-commissioned? How about tribal officers?

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. JOE A. GARCIA

Question 1. In their testimony, the Interior and Justice Departments indicated their opposition to Section 304 of the draft bill that would increase tribal court sentencing authority to 3 years imprisonment. The agencies stated their concern that the provision could adversely impact defendants' constitutional rights in tribal courts. Please discuss NCAI's position on the protection of constitutional rights in tribal court systems?

Answer. Section 305 of the draft legislation would extend tribal sentencing limitations under the Indian Civil Rights Act to provide for up to 3 year sentences for more serious offenders. In the original 1968 law, tribal sentencing authority was limited to 6 months or \$500. In 1986, the authority was expanded to 1 year or \$5000.

As a general matter, the rights guaranteed by the United States Constitution do not apply to tribal courts. Rather, the Indian Civil Rights Act (ICRA) incorporates similar protections as are found in the U.S. Constitution and makes them applicable to tribal courts. As such, defendants in tribal courts do not have "constitutional rights" other than rights recognized in the tribal constitution. Defendants in tribal courts do, of course, have a statutorily guaranteed right to many of the due process protections contained in the U.S. Constitution under ICRA.

We assume that the federal agencies are raising concerns that the full panoply of rights that have been enumerated in the U.S. Constitution would not be available to defendants in tribal courts, to the extent that some of those rights are triggered by a sentence that is greater than one year.

First, the Supreme Court has recently confirmed that an Indian tribe acts as a separate sovereign when it prosecutes its own members or nonmember Indians, and such prosecution is not an exercise of federal power. *United States v. Lara*, 541 U.S. 193 (2004). The power that Congress would exercise here is Congress's broad power in Indian affairs with its source in several places in the Constitution, and there is "no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches." *Lara*, 541 U.S. at 546.

As a matter of constitutional law, the length of the sentence imposed matter differently across constitutional rights. For example, the Sixth Amendment right to counsel is applicable as long as the defendant receives any imprisonment at all. See, *Alabama v. Shelton*, 535 U.S. 654 (2002). The right to a jury trial does not attach to all criminal offenses, but only attaches for all offenses that are not "petty offenses," which the Supreme Court has defined as six months in jail or less. See, *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538 (1989).

The Fifth Amendment provides a right to a grand jury indictment for "infamous" crimes, and a one-year sentence is the dividing line for infamous crimes. See, e.g., *U.S. v. Fitzgerald*, 89 F.3d 218 (5th Cir. 1996) ("Any federal offense punishable by imprisonment for more than one year is an offense for which the Fifth Amendment requires a grand jury indictment."). This is the only criminal procedure issue we can find that would relate to the expansion of tribal sentencing authority beyond one year.

However, unlike many other provisions of the Bill of Rights, the Supreme Court has ruled that the right to indictment by grand jury is not a fundamental aspect of due process, and was not incorporated to apply to state courts via the Fourteenth Amendment, and states therefore may elect not to use grand juries. *Hurtado v. California*, 110 U.S. 516 (1884). "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Because tribal prosecution is not an exercise of federal power, and because the right to a grand jury indictment has never been considered a fundamental aspect of due process, we do not believe that the expansion of tribal sentencing authority should trigger constitutional concerns for Congress. However, NCAI strongly supports the protection of due process in tribal courts, and we note that the legislation would specifically protect the right to assistance of counsel and the general right to due process in criminal proceedings.

Question 2. Please provide your legislative recommendations, if any, to initiatives that should be included in the reauthorizations of the tribal courts, tribal youth, and other tribal justice programs.

Answer. As noted in our testimony, one of the primary recommendations of tribal leaders has been to make funding from the Department of Justice programs more readily available and more useful for the actual needs on reservations. Right now, the funding requires a significant grant-writing capability and is often compartmentalized in ways that do not make sense. Our recommendation would be for Congress to consider something like the following:

25 U.S.C. § 458 —to read:

(a) Notwithstanding any other provision of law, the Attorney General shall carry out a program within the Department of Justice to be known as the Tribal Justice Self-Determination and Self-Governance Program.

(b) Notwithstanding any other provision of law, the Attorney General shall enter into contracts, compacts and funding agreements in accordance with Title I and IV of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, with any Indian tribe who elects to utilize the authority of this title to govern any funds available to Indian tribes under the authority of the Attorney General.

(c) Notwithstanding any other provision of law, the negotiation and implementation of each agreement entered into under this section shall be governed by this title and the provisions of Title I or IV of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended.

(d) Regulations.

(I) Not later than 90 days after [DATE OF ENACTMENT], the Secretary shall initiate procedures under subchapter III of chapter 5 title 5 to negotiate and promulgate such regulations as are necessary to carry out this part.

(II) A negotiated rulemaking committee established pursuant to section 565 of title 5 to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be representatives of Indian tribes with self-governance agreements under this chapter.

(III) The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Determination and Self-Governance and the government-to-government relationship between the United States and the Indian tribes.

(IV) The lack of promulgated regulations shall not limit the effect of this part.

Question 3. Please include any other recommendations or comments on the draft bill.

Answer. NCAI strongly encourages the Committee to consider including the pilot project to expand tribal jurisdiction in cases of domestic violence that was included in the concept paper for the bill last November. This provision was widely supported by Indian country and is a common-sense solution to one of the most pressing problems in tribal communities. Tribal governments should have the authority to intervene when a non-Indian who has chosen to become a member of the tribal community abuses his Indian family members.

NCAI also encourages the Committee to consider including some of the recommendations for improving the effectiveness of the Adam Walsh Act in Indian Country that were made at the July 17, 2008 hearing on sex offender registration.

There are many excellent provisions in the legislation and NCAI has had a significant opportunity to provide input, so we will limit our recommendations at this time to these two, and encourage the Committee to continue to continue its efforts to receive recommendations from tribes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON.
JOE A. GARCIA

Question 1. Both the Departments of the Interior and Justice appear to have serious concerns about provisions in the draft bill that would increase tribal court sentencing authority and allow tribally-sentenced Indian defendants to serve their time in the Bureau of Prisons system. How might tribes address the additional requirement of the defendant's right to legal counsel in implementing the increase in tribal sentencing authority to three years as contemplated by the draft bill?

Answer. First, NCAI strongly supports the provision which would allow tribes to send serious offenders to serve their time in the Bureau of Prisons system. As the Committee is aware, tribal detention facilities have been neglected and are significantly under funded. This is one of the most important provisions of this legislation.

Second, we agree that protecting the right to counsel is important to protect the constitutionality of tribal justice systems. In *United States v. Lara*, the Supreme Court left open the question of whether additional due process challenges could be raised to tribal prosecutions. “Hence, we need not, and we shall not, consider the merits of *Lara’s* due process claim. Other defendants in tribal proceedings remain free to raise that claim should they wish to do so. See 25 U.S.C. § 1303 (vesting district courts with jurisdiction over habeas writs from tribal courts).”

NCAI’s understanding is that a significant number of tribes already provide counsel to indigent persons who are prosecuted in tribal courts for offenses that could include imprisonment. For the remaining tribes, the issue is largely funding. We would encourage Congress to provide additional funds for tribal justice systems, but also note that the proposed statute would give tribes some flexibility. If the tribe chooses to impose sentences greater than one year, the tribal court would be able to provide counsel for indigent defendants on a case-by-case basis.

Question 2. The Operation Dakota Peacekeeper program will provide additional law enforcement officers on the Standing Rock Sioux Indian reservation for a limited period of time. Would it be more beneficial to the law enforcement efforts and public safety in general to make permanent throughout Indian Country programs such as Operation Dakota Peacekeeper and the Safe Indian Communities Initiative?

Answer. NCAI strongly agrees that increased law enforcement presence and focus is the top priority to improve law enforcement in Indian communities. Tribal leaders have made this their first concern, and this has only been reinforced by the recent successes of the Dakota Peacekeeper Operation. As noted in our testimony, we strongly urge increased resources for BIA law enforcement and the creation of specifically focused enforcement units within the Department of Justice and the Federal Bureau of Investigation.

Question 3. The Committee received testimony recommending that, to improve and prioritize law enforcement, the Office of Justice Services within the Bureau of Indian Affairs should be elevated to a Bureau directly responsible to the Assistant Secretary for Indian Affairs, similar in status to the Bureau of Indian Education, and the Deputy Director elevated to a Director. Does the NCAI agree with this recommendation?

Answer. NCAI does not agree with the recommendation at this time. Tribal leaders have been opposed to reorganization efforts to separate out the functions of the Bureau of Indian Affairs for two primary reasons. First, creating a separate bureaucracy requires the creation of additional high-level management positions that take away resources from reservation-level services. The priority of tribal leaders is to maximize the services provided at the reservation level, and this is particularly true for law enforcement. Second, the creation of a separate bureaucracy tends to “stove-pipe” decision-making and makes it more difficult to coordinate action at the local level and create bureaucratic delays. To our knowledge, this is not a question that has been discussed with tribal leadership and we would urge the BIA and Congress to take no action to reorganize the Office of Justice Services without support from tribal leaders.