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?

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* 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.