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TRIBAL COURTS AND THE ADMINISTRATION OF JUSTICE IN INDIAN COUNTRY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JULY 24, 2008

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TRIBAL COURTS AND THE ADMINISTRATION OF JUSTICE IN INDIAN COUNTRY

THURSDAY, JULY 24, 2008

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m. in room 562, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. We will call the hearing to order. My colleagues will be joining me shortly, but this is a hearing of the Indian Affairs Committee of the United States Senate.

This morning, the Committee will examine tribal court systems and the administration of justice on Indian lands.

In a spirit of independence this morning, I ordered that the drapes be opened finally in this Committee room. You are welcome. I get so weary of going to committee rooms in this United States Senate building, and not only this one, but the other buildings as well, and the drapes are closed and it is dark, and then they turn the television lights on. So we will see how long we get away with this. All right. Good.

It is customary for our Committee to hear from the elected tribal leaders, but today we are going to hear for the first time in a while directly from the men and women who serve the tribal court systems as judges and prosecutors. I deeply appreciate their willingness to be with us. They get precious little attention. They work very hard trying to make a system work that is in many ways almost a dysfunctional system, but the men and women who are joining us today are people that do unbelievably important work on Indian reservations.

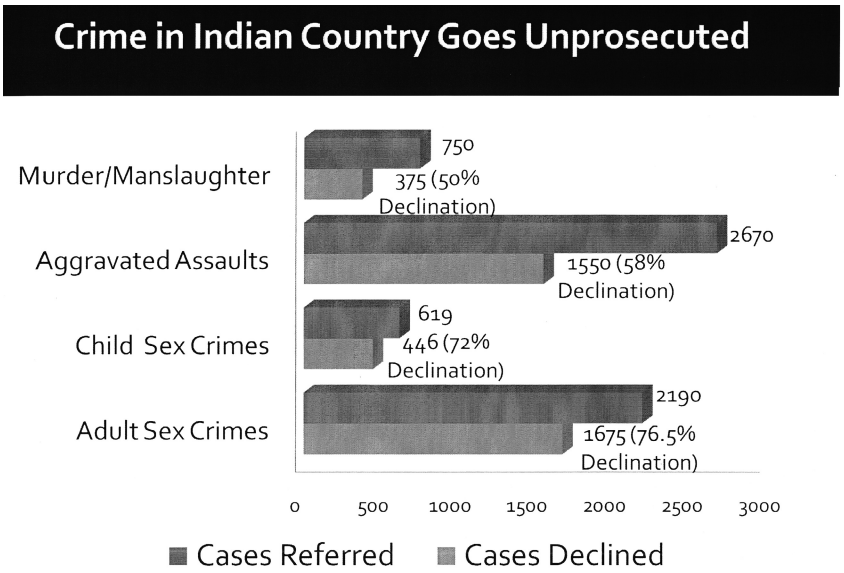
Tribal courts are the frontline institutions for preserving the peace in Indian communities. They also help resolve civil disputes among community members and those doing business on Indian lands. To that end, a strong tribal court system is a proven factor in fostering economic development on Indian lands.

Today, there are about 290 tribal district courts and more than 150 tribal appellate courts. Training and funding for tribal courts is vital to their success. But as we will hear this morning, funding shortfalls have limited the ability of tribal courts to fulfill their goals.

For many tribes, Federal funding is the primary source of revenue for the court systems. That funding has not nearly kept pace with the increased number of court systems, their responsibilities, or for that matter, their growing technology needs. Last year, Congress appropriated $14.3 million to the Interior Department's Tribal Courts Program. This was the highest figure for the tribal courts in more than a decade. The President's budget proposes a $2 million cut to that program for Fiscal Year 2009.

As I noted, the funding needs of tribal courts have further increased in recent years. One example is the significant amount of time, technology and resources that tribal courts will have to expend to comply with the Adam Walsh Child Protection and Safety Act, which this Committee examined last week.

Another example of increased responsibility is the need to address increases in violent crime and the significant number of cases that fall through the cracks or are declined in the Federal system. The chart below shows that in the four years from 2004 to 2007, the United States Government declined to prosecute an average of 62 percent of reservation crimes. This means that nearly 75 percent of adult and child sex crimes and 50 percent of reservation homicides, went unpunished in the Federal system.



That is truly stunning to me to see these statistics. When declined in Federal court, the victims and the families of Indian Country then must turn to the tribal court systems to deliver justice. But current law limits the authority of tribal courts to sentence offenders to no more than one year in incarceration. One year for a rape or murder does not deter those crimes or provide any justice at all to these victims or to their families.

For that reason, yesterday we introduced the Tribal Law and Order Act of 2008, with the support of the Vice Chair Murkowski and 11 other Senators. We have introduced legislation that we believe will begin to address this serious problem. Senators Domenici,

Johnson, Cantwell, Smith, and Tester are from this Committee. Senators Biden, Baucus, Bingaman, Lieberman, Kyl, and Thune have all signed onto this bill.

It takes initial steps at addressing the disjointed criminal justice system in Indian Country. The bill would enable tribal courts to sentence offenders up to three years in prison for violations of tribal law. If a tribe exercises the option to sentence an offense to more than one year, it must provide a public defender and must meet other requirements as well.

Again, this is only an option. A tribe may choose to continue to act under current law. The bill also would reauthorize the tribal court programs within the Interior and the Justice programs. These reauthorizations have been waiting for a long, long time. They will help address some of the funding shortfalls that I have described.

Let me just mention that in recent years, we have had hearings in which we have been told that some have targeted Indian Country as safe havens for crime, drug dealers, and others. It has led to a longstanding public safety crisis on many reservations, and the tribal court systems themselves are vital to trying to combat this problem.

For that reason, the bill we have introduced seeks to empower the tribal court institutions, which are fundamental to the administration of justice on tribal lands.

Again, I am proud that we were able to introduce a piece of legislation with very strong bipartisan support. I mentioned the staff, both the majority and the minority staff, who have worked on this a great deal. We consulted carefully all across the Country with Indian tribes, and we worked with local law enforcement officials, State law enforcement officials, and others in order to get to the point where we had bipartisan support to introduce this bill yesterday.

It will be our hope to move the bill as quickly as we can. At least a part of the discussion of that will be here today with respect to the tribal court systems. We appreciate your being here.

Let me call on the Vice Chair, Senator Murkowski.

STATEMENT OF HON. LISA MURKOWSKI,
U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Well, thank you, Mr. Chairman.

I want to add just really my support and truly, I guess it is congratulations as we were able to introduce that legislation yesterday with really very strong bipartisan support. I think that is a very telling indicator of the commitment within this body to do something meaningful when it comes to law enforcement in Indian Country.

So I was pleased to be part of that, and look forward to kind of this ongoing consultation which is what we do in this deliberative body.

I want to thank the witnesses for your appearance here today. I know that some of you have come from some far away places, and we appreciate the effort that you have made to come here and share with us some of your input in this area. I appreciate the work that you do within the tribal courts. Your dedication to the

general task of administering justice in the tribal, as well as the CFR courts throughout Indian Country, is greatly appreciated.

We recognize very well that tribal court officials face some real challenges adjudicating the really heartbreaking stories of what we see, whether it is with child abuse, domestic violence, juvenile delinquency, the issues that come before you. We know that they are not easy for you. So again, we appreciate that.

So many issues out there, so many things that you can point to and say, well, this is not working. We certainly look at the adequacy of the funding. We recognize that in many instances there just may be no place to incarcerate the dangerous offender.

We often see that despite the best efforts of the tribal or the BIA law enforcement prosecutors, that there is an inadequate response from the Federal justice system as we attempt to deal with these serious felony crimes.

Yesterday, certainly at the press conference and as the Chairman has led the debate on what we do with law enforcement in Indian Country, the five hearings that this Committee has held, we have heard incredible statistics about the various crime rates, the rates of sexual assault, violent crimes against women, against our children. It is appalling, and we recognize that the Federal Government has a responsibility to address these public safety concerns of Indian Country. It is something that we cannot turn our back on.

So I look forward to hearing your comments this morning. I am certain that you will provide additional concerns to the Committee regarding the resources, the additional challenges that we face. But again, my thanks to you for your appearance here this morning and for the good work that you do.

The CHAIRMAN. Senator Murkowski, thank you very much.

We thank the witnesses for being here. We are going to begin today with Mr. Pat Ragsdale, the Director of the Office of Justice Services in the Bureau of Indian Affairs. He is accompanied by Mr. Joe Little, the Director of Office of Justice Services, the Division of Tribal Justice, at the Department of the Interior.

Mr. Ragsdale, you may proceed.

I would say to all of the witnesses that we will include your entire statements as a part of the permanent record. You may summarize.

STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, OFFICE OF JUSTICE SERVICES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY JOE LITTLE, ASSOCIATE DEPUTY DIRECTOR, OFFICE OF JUSTICE SERVICES, DIVISION OF TRIBAL JUSTICE SUPPORT

Mr. RAGSDALE. Thank you, Mr. Chairman, and thank you, Madam Vice Chair.

I will summarize my testimony. I need to note that there are a couple of errors in the testimony, in our formal statement, that I will try to correct here in my brief statement.

The Bureau of Indian Affairs for fiscal year 2008 supports approximately 207 tribal court systems. In Fiscal Year 2008, Congress enacted $14.3 million for tribal courts. Additional funds in the amount of $11.5 million are provided in the allocations for the

consolidated tribal government program and self-governance budgets, for a total allocation of about $26 million to support tribal courts.

On average, the Bureau funding accounts for only a modest amount of most tribal court operating budgets. The majority of tribal court budgets are funded with tribal monies and sometimes with various grants from other agencies such as the Department of Justice.

The funds provided by the Bureau are administered though Public Law 93–638 contracts or self-governance compacts. These funds support both criminal and civil court systems, and in some areas such funding supports intertribal appellate court systems.

When we indicated in our formal statement that we did not provide funding to Public Law 280 States, that is not correct. We do provide some funding to tribal court systems where Public Law 280 does apply.

The Tribal Support Division, which is directed by Joe Little, who sits at my right, consists of five staff members dedicated to providing technical support, funding and training to tribal and CFR court systems nationwide. The division, with the assistance of contractors, has completed about 40 tribal court reviews in an attempt to ascertain tribal court needs and tribal judicial trends as they apply to sentencing, caseloads, types of crimes, et cetera.

Based largely on these court reviews, the Bureau distributed over $2.4 million to tribal and CFR courts in Fiscal Year 2008 over and above the tribal court base funding. These funds are being used to cover everything from staffing to fireproof cabinets for storage of case files, to supplying new computers and software. The tribal courts are allowed maximum flexibility in allocation of these funds.

The review of tribal courts also provides recommendations to the judges for improved or adjustments to ensure fair and impartial treatment of those coming before the court. We try to collaborate closely with the Department of Justice programs that also provide funds and support the tribal court systems.

Currently, the Division of Tribal Justice Support within the Office of Justice Services is in discussions with the National Judicial College in Reno, Nevada to explore the possibility of developing and executing more types of on-site training for tribal judges and tribal court staff. Although the main request from tribal courts is operating funds, the next two main areas that tribal courts consistently seek assistance is in training for tribal judges and staff, and technical assistance in developing judicial administrative systems.

Finally, we are working on developing a process to acquire data on tribal court activities such as extent of and types of caseloads, types of sentences, types of repeat offenses, et cetera.

The Office of Justice and the Division of Tribal Justice Support is committed to helping tribal judicial systems maintain and advance the administration of justice in Indian Country.

Thank you.

[The prepared statement of Mr. Ragsdale follows:]

PREPARED STATEMENT OF W. PATRICK RAGSDALE, DIRECTOR, OFFICE OF JUSTICE SERVICES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to provide testimony for the Department of the Interior, regarding Tribal Courts and concepts aimed toward improving and addressing Tribal Courts and the Administration of Justice in Indian Country.

The Bureau of Indian Affairs (BIA) has a service population of about 1.6 million American Indians and Alaska Natives who belong to 562 federally recognized tribes. Nationwide, there are over 200 tribal courts, but not all receive funding from the BIA. There are currently 156 tribal courts and Code of Federal Regulations (CFR) court that are funded by the BIA through a budget line item known as Tribal Priority Allocation (TPA) funds. In fiscal year 2008 Congress enacted $14.3 million for Tribal Courts of which $2.5 million was a Congressional increase over the President's Budget request.

A majority of tribal courts' operating budgets are funded with tribal funds and various grants from other agencies, such as the Department of Justice (DOJ). The BIA funds that are provided are administered through P.L. 93–638 contracts or self governance compacts. The BIA funds provided support both criminal and civil court systems, and in some areas, the BIA funding supports inter-tribal appellate court systems. The BIA does not fund tribal courts that fall within P.L. 83–280 States.

The Division of Tribal Justice Support (DTJS) is the office that oversees tribal and CFR courts funded by the BIA. The DTJS is located within the Office of Justice Services (OJS). Prior to 2006 the BIA dedicated one employee, on a part-time basis, to work with tribal courts within the Division of Tribal Services in the BIA. In 2006, this function of oversight of tribal and CFR courts that receive BIA funding was moved to the OJS and re-designated the Division of Tribal Justice Support and two full-time staff began developing the program. Currently the Division consists of five staff members dedicated to providing technical support, funding, and training to the tribal and CFR court systems, nationwide.

The DTJS has completed over 40 tribal court reviews in an attempt to ascertain tribal court needs and tribal judicial trends. The reviews are conducted by independent contractors who assess the operations and administrative activities of the courts. The needs and trends may include how sentencing may apply based on the offense, current and backlogged case loads, types of crimes, etc. These court reviews were used in large part to assist the BIA to distribute over $2.4 million to tribal and CFR courts in fiscal year 2008 over and above tribal court base funding. These funds are used to cover everything from staffing to purchasing fire proof cabinets for storage of case files to supplying new computers and installing new software. The tribal courts are allowed maximum flexibility in the allocation of these funds.

These reviews of tribal courts also provide recommendations, such as developing policies to account for and administer fines or ways to amend tribal constitutions to provide for separation of powers, to the tribal court judges, court administrators, and tribal councils on how court operations might be improved or adjusted to insure fair and impartial treatment of those appearing before the court. However, as extensions of sovereign tribal government, the tribal courts are free to follow or not follow the Bureau's recommendations. The Courts of Indian Offenses (CFR Courts) are less free to discard any recommendations since they are actually an extension of the BIA.

Over the last two years the DTJS has developed a close working relationship with the DOJ in an attempt to collaborate with DOJ programs that also provide funds and support to tribal court systems. As the DTJS provides training and funding to the tribes, the DTJS will continue to work closely with the DOJ to minimize duplication of services while maximizing support activities to the tribal court systems through supplemental and joint initiatives.

Currently, the DTJS is in discussions with the National Judicial College in Reno, Nevada to explore the possibility of developing and executing more on-site training for tribal judges and tribal court staff. Two of the main areas that tribal courts consistently seek assistance in is training for tribal judges and staff, and technical assistance in developing judicial administrative systems.

Finally, the DTJS is working on developing a process to acquire data on tribal court activities such as the extent of and types of case loads, types of sentences, types of repeat offenses, etc. While some of these data are currently collected under P.L. 93–638 contracts at the local level, such information needs to be stored in one location to be analyzed and studied. Acquiring such data on a consistent basis and subjecting it to close analysis would assist the DTJS, the BIA and tribal courts in developing long range planning to better address tribal court needs and to track de-

veloping trends. The DTJS is committed to helping tribal and CFR court systems maintain and advance the administration of justice in Indian country.

Mr. Chairman and members of the Committee, I thank you for providing the Department of Interior's Bureau of Indian Affairs the opportunity to comment on the issues related to Tribal Courts in Indian Country. We will continue to work closely with the Committee and your staff, tribal leaders, and our Federal partners. I will be happy to answer any further questions you may have.

The CHAIRMAN. Mr. Ragsdale, thank you very much. We appreciate your testimony.

Next, we will hear from the Honorable Roman Duran, First Vice President, National American Indian Court Judges Association, from Albuquerque, New Mexico.

Mr. Duran, thank you for being here.

STATEMENT OF HON. ROMAN J. DURAN, FIRST VICE PRESIDENT, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

Mr. DURAN. Thank you. Thank you, Chairman Dorgan and Madam Vice Chair Murkowski. With all due respect, if I could speak in my native language for a brief period here. [Phrase in native tongue.]

Again, Chairman Dorgan, Madam Vice Chair Murkowski, on behalf of the National American Indian Court Judges Association, I respectfully thank the Senate Committee on Indian Affairs and staffer John Harte for the opportunity to present both oral and written testimony on the Tribal Law and Order Act of 2008.

My name is Roman Duran. I am an enrolled member of the Pueblo of Tesuque located in New Mexico, and also a member of the Hopi Tribe of Arizona. I currently sit as an Associate Judge for the Jicarilla Apache Nation Court in Dulce, New Mexico.

NAICJA is comprised of tribal judges, peacemakers and tribal justice adjudicators representing approximately 350 tribal justice systems throughout the Nation. It is important to note that tribal courts differ greatly from that of their Federal and State counterparts in that each tribe to a certain degree operates on a theocratic form of government, such that there is no separation of church and state, whereby custom and tradition is the choice of law on a consistent and daily basis.

NAICJA has consistently been the main voice for tribal justice systems in promoting tribal judicial independence and continued development, education, training and funding of such systems. Of the 565 federally recognized tribes, approximately 291 have an established tribal justice system or dispute resolution forum, ranging from a highly sophisticated judicial system to the newer systems with minimal experience in the administration of justice.

Tribal courts agonize over the very same issues that State and Federal courts confront in a criminal context, such as assault and battery, child sexual abuse, alcohol and substance abuse, gang violence, violence against women, and now methamphetamines, along with the social ills that are left in its wake.

If tribal courts were not functioning, the respective Federal and State court systems would be overwhelmed with the caseload, which we unofficially estimate at around 1.6 million cases per year, which I am sure the Federal and State courts would not want, es-

pecially given the traditional and customary laws that lay the foundation for tribal statutory and common laws.

Lack of adequate funding for tribal court systems threatens the excellence of tribal justice systems. If adequately funded, it will directly reduce the number of appeals being filed in the Federal courts. On average, small tribal judicial systems handle 250 to 1,500 cases per year, whereas medium to large tribal justice systems handle over 1,500 to 20,000 cases per year. With a disproportionate funding of tribal justice systems, a medium to large justice system may have one judge handling a caseload of up to 5,000 cases a year at a median salary of $40,000 per year.

The fallacy contained herein is that the Federal and State courts are adequately funded, yet scrutinize the ability of tribal court judges in their decision-making. However, tribal court judges maintain excellence in applying tradition and customs in their respective courts, while being under-funded.

Although the crime rate continues to increase in Indian Country, tribal court systems have been able to make do with little funding, resulting in the creation of alternatives to sentencing, which did not sit well with some non-tribal law enforcement agencies and departments. Correctional facilities are a great need throughout Indian Country, but are useless if there are no funds for construction and operation, including adequate funding for the entire justice system, for law enforcement, prosecution, public defenders, probation, parole and treatment providers.

The number and complexity of tribal civil caseloads has also increased, including cases involving non-Indians, non-Indian business entities, and corporations, which is attributed to Indian gaming and economic development in Indian Country. NAICJA is of the opinion that the majority of non-Indian parties approve of the tribal court process.

The assault of critics that feel there is no due process for criminal defendants in tribal courts is a fallacy. Again, a well-funded justice system will result in the excellence of such justice systems, affording individuals their rights and protections within those systems.

In addition, Congress must ensure equitable funding of all tribal justice systems, including Public Law 280 tribes.

In conclusion, tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. NAICJA fully supports the proposed Tribal Law and Order Act of 2008 which will promote for the base funding of tribal courts and ensure the identified departments and agencies are held accountable in fulfilling the United States' trust responsibility for maintaining excellence in the tribal justice systems throughout Indian Country. Attached are NAICJA's comments regarding the proposed Tribal Law and Order Act of 2008.

Once again, thank you for the opportunity to present the concerns of the tribal justice systems and needs of Indian Country. I am happy to answer any questions that you may have.

[The prepared statement of Mr. Duran follows:]

PREPARED STATEMENT OF HON. ROMAN J. DURAN, FIRST VICE PRESIDENT, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

Chairman Dorgan, Vice Chairwoman Murkowski, and distinguished members of the Committee, on behalf of the National American Indian Court Judges Association (NAICJA), I respectfully thank the Senate Committee on Indian Affairs, and staffer John Harte for the opportunity to present both oral and written testimony on this most important and critical Indian legislation, the "Tribal Law and Order Act of 2008". My name is Roman Duran; I am an enrolled member of the Pueblo of Tesuque located in New Mexico, and also a member of the Hopi Tribe of Arizona. I have been a Tribal Court Judge for the last 11 years and currently sit as an Associate Judge for the Jicarilla Apache Nation in Northern New Mexico.

National American Indian Court Judges Association

In 1969, NAICJA was established by a small group of tribal court judges who met at the University of New Mexico Law School; which incorporated as a voluntary non-profit national membership association, and is representative of current and former tribal court judges throughout the United States. NAICJA now represents approximately 350 tribal justice systems nationwide, with a track record of providing quality training and technical assistance services for tribal justice systems.

In 1969 NAICJA established a mission to strengthen and enhance tribal justice systems through a variety of strategies and services including training, education, and technical assistance; such mission is in line with each tribal government sovereign status of self-governance. It is important to note that tribal courts differ greatly from that of their federal and state counter parts, in that, each tribe to a certain degree operates on a theocratic form of government; such that there is no separation of "Church" and "State", whereby custom and tradition is the choice of law on a consistent and daily basis. For over thirty-nine years, NAICJA has directly and indirectly supported each tribal justice system, and continues to meet its mission.

NAICJA's goals are to: (1) foster the continued development, enrichment and funding of tribal justice systems as a visible exercise of tribal sovereignty and self-government; (2) to provide continuing education for tribal judges and tribal justice systems personnel in order to enhance the operation of the tribal judiciary; (3) to further the public knowledge and understanding of tribal justice systems; (4) to establish and maintain a forum for the dissemination of information concerning issues impacting tribal justice systems; (5) to encourage and assist tribal officials to support educational programs that serve the members of the NAICJA: (6) to conduct research and educational activities that promote the affairs and achieve the mission of the Association; and (7) to secure financial assistance and support for the advancement of NAICJA activities and objectives.

NAICJA is and has been the only national tribal court membership association to provide expert and qualified testimony regarding the passage of such legislation. This is evidenced in NAICJA's consistent record of providing direct testimony and support for the Indian Tribal Justice Act (Public Law 103–176, December 3, 1993), the Indian Tribal Justice Technical and Legal Assistance Act of 2000 (Public Law 106–559, December 21, 2000), the ongoing Bureau of Indian Affairs funding for Tribal Courts under the Tribal Priority Allocations (Public Law 93–638), and all Department of Justice grant funding.

NAICJA has been the only entity to coordinate the first true cross-court cultural exchange between tribal courts and the U.S. Supreme court, dubbed the "Summer 2001 Study Tour of Native American Tribal Courts." The Tour had the honor of Justice Sandra Day O'Connor and Justice Stephen Breyer visiting and observing proceedings in the Spokane Tribal Court, and the Navajo Nation Court, culminating with a symposium at the National Judicial College, Reno, Nevada. Such events are also replicated in various forms in states with numerous tribal governments, such as the New Mexico Tribal & State Judicial Consortium, the Wisconsin Tribal and State Judges Association, and the Arizona Tribal, State & Federal Forum, to name a few.

Importance of Tribal Courts

Of the 565 federally recognized tribes and Alaska Native Villages in the United States, approximately 291 have an established tribal justice system or some level of tribal dispute resolution forum. Tribal courts have a variety of tribal dispute resolution forums ranging from highly sophisticated judicial systems modeled after the American jurisprudence system to the newer systems with minimal experience in the administration of justice. The jurisdiction and authority applied by each tribe is distinctly unique to that tribe. Now more than anytime in their history, tribes

and their tribal courts are challenged to maintain their judicial and tribal sovereignty in a manner that will pass legal scrutiny by the federal judicial system.

Tribal courts play a vital and key role in the jurisdictional maze among the federal and state judicial systems, constituting the third sovereign, as Supreme Court Justice Sandra Day O'Connor eloquently stated, "Today, in the United States, we have three types of sovereign entities—the Federal Government, the States, and the Indian Tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country." (O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L. J. 1, 1 (1997). Justice O'Connor recognized the unique status of tribal sovereignty and more importantly, the recognition of tribal justice systems which ultimately have the responsibility of interpreting that sovereign status. Such support and recognition for tribal courts must continue at all levels of the federal, state and tribal governments, to ensure equitable administration of justice.

"Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them. In addition, they constitute a key tribal entity for advancing and protecting the rights of self-government. . . . Tribal courts are of growing significance in Indian Country." (Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Law 57 (1995)). Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. Attorney General Reno acknowledged that, "With adequate resources and training, they are most capable of crime prevention and peacekeeping" (A Federal Commitment to Tribal Justice Systems, 79 Judicature No. 7, November/December 1995, p. 114). It is her view that "fulfilling the Federal Government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian Country, but enhancement of tribal justice systems as well." Id.

Tribal courts agonize over the very same issues state and federal courts confront in the criminal context, such as, assault and battery, predatory crimes, hate crimes, child sexual abuse, alcohol and substance abuse, gang violence, violence against women, and now methamphetamine along with the social ills that are left in its wake. These courts, however, while striving to address these complex issues with far fewer financial resources than their federal and state counterparts must also "strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within." (Pommersheim, "Tribal Courts: Providers of Justice and Protectors of Sovereignty," 79 Judicature No. 7, November/December 1995, p. 111). Judicial training that addresses the present imperatives posed by the public safety crisis in Indian Country, while also being culturally sensitive, is essential for tribal courts to be effective in deterring crime in their communities.

There is no federally supported institution to provide on-going, accessible tribal judicial training or to develop court resource materials and management tools, similar to that of the Federal Judicial Center, the National Judicial College or the National Center for State Courts. Even though NAICJA annually sponsors the National Tribal Judicial Conference, the three-day conference cannot provide the in-depth extensive judicial training necessary to make tribal justice systems strong and effective arms of tribal government.

In 1991 the United States Commission on Civil Rights issued its *Report on the Indian Civil Rights Act,* 25 U.S.C. § 1301 et seq. and found that the United States Government failed to provide proper funding for the operation and development of tribal judicial systems, particularly in light of the imposed requirements of the Indian Civil Rights Act. Finding that the Federal Government had not lived up to its trust obligations to tribal governments, particularly the tribal courts, the Commission urged Congress to continue to promote the authority of tribal courts, advocate for increased tribal court funding and to work toward strengthening tribal forums. It was not until nine years later, in 2000, that a federal grant was awarded to NAICJA to establish a clearinghouse and a resource center to meet the technical assistance needs of tribal judicial systems.

National Tribal Justice Resource Center

NAICJA, through its National Tribal Justice Resource Center, (NTJRC) funded by the Department of Justice's Bureau of Justice Assistance's Tribal Court Assistance Program, (TCAP) has established a clearinghouse and an Internet website (www.ntjrc.org) that has become the primary dissemination mechanism addressing the technical assistance needs of tribal justice systems throughout the nation. (2009 award is currently pending.) NAICJA, through its Resource Center provides tech-

nical assistance and training through a strategy of collaboration and communication by implementing a clearinghouse function for Native American and Alaska Native tribal judicial systems that enhances their development and continued successful improvement to deliver justice in their respective communities.

NAICJA, along with the NTJRC staff, successfully works with other national Indian organizations such as the Native American Rights Fund, the National Congress of American Indians, and its technical assistance partner notably, the Tribal Judicial Institute, Tribal Law and Policy Institute, Fox Valley Technical College and the National Tribal Judicial College to carry out its mission and goals successfully. The Center recently relocated is office to Albuquerque, NM in July, 2008, to better serve the needs of tribal courts throughout Indian Country.

Inadequate Support of Tribal Justice Systems

During the initial hearings on the Indian Tribal Justice Act of 1993, NAICJA provided both written and oral testimony for the full base funding of $50 million per year for tribal courts, unfortunately appropriations were never made to the base funding. A Tribal Court Survey was conducted by the American Indian Law Center and issued a written report in May 2000, which provided a cost analysis and set a base funding level for the then existing Tribal Courts, however, not one penny was appropriated under the Indian Tribal Justice Act, as the Department of Interior and Office of Management & Budget did not approve the report prior to its release.

Inadequate Funding of Tribal Justice Systems

There is no question that tribal justice systems are, and historically have been under-funded. The 1991 United States Civil Rights Commission found that "the failure of the United States government to provide proper funding for the operation of tribal judicial systems . . . has continued for more than 20 years." The Indian Civil Rights Act: A Report of the United States Civil Rights Commission, June 1991, p. 71. The Commission also noted that "[f]unding for tribal judicial systems may be further hampered in some instances by the pressures of competing priorities within a tribe." Moreover, they opined that "If the United States Government is to live up to its trust obligations, it must assist tribal governments in their development . . . " Almost ten years ago, the Commission "strongly support[ed] the pending and proposed congressional initiatives to authorize funding of tribal courts in an amount equal to that of an equivalent State court" and was "hopeful that this increased funding [would] allow for much needed increases in salaries for judges, the retention of law clerks for tribal judges, the funding of public defenders/defense counsel, and increased access to legal authorities."

As indicated by the Civil Rights Commission, the critical financial need of tribal courts has been well documented and ultimately led to the passage of the Indian Tribal Justice Act, 25 U.S.C. § 3601 et seq. (the "Act"). Congress found that "[T]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health, safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5). Affirming the findings of the Civil Rights Commission, Congress further found that "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation." 25 U.S.C. § 3601(8). In order to remedy this lack of funding, the Act authorized appropriation base funding support for tribal justice systems in the amount of $50,000,000 for each of the fiscal years 1994 through 2000. 25 U.S.C. § 3621(b). An additional $500,000 for each of the same fiscal years was authorized to be appropriated for the administration of Tribal Judicial Conferences for the "development, enhancement and continuing operation of tribal justice systems . . . " 25 U.S.C. § 3614.

Functionality of Tribal Justice Systems

Ironically, Associate Justice Anthony M. Kennedy, having appeared before the Senate Committee on the Judiciary, for a Hearing on Judicial Security and Independence, on February 14, 2007 stated,

> "[J]udicial independence is just like separation of powers and checks and balances. Those phrases do not appear in the Constitution. They are part of the constitutional dynamic that we use. They are part of the constitutional custom, part of the constitutional tradition that we have.
>
> Judicial independence is sometimes overused by judges. Just because you can't get a few more volumes in your library doesn't mean judicial independence is under attack. It's unfortunate if we over-use the term, because it is essential as a principle to establish the idea that the rule of law depends on an independent judiciary, or else you have the rule of power, not the rule of law.

> The raw fact is that the congressional policy with reference to judicial compensation is threatening the excellence of our judiciary. Judicial independence presumes an excellent judiciary."

Justice Kennedy was speaking during the Federal Courts budget hearings and pay raises for federal court judges, and the need to sustain a financially healthy judiciary thereby maintaining a well trained and competent judiciary. The truth of the matter is that the tribal court systems are facing the very same issues Justice Kennedy pointed out. Lack of adequate funding for tribal court systems also "threatens the excellence" of tribal justice systems; properly trained and qualified tribal court judges may have a direct result in reducing the number of appeals being filed in the federal courts and state courts, and reduce the tension and scrutiny by the federal and state courts. The irony contained herein is that federal and state courts are adequately funded yet scrutinize the ability of the tribal court judges in their decision making. Nonetheless tribal court judges maintain excellence in applying traditions and customs in their respective court while maintaining their judicial independence in light of being under-funded. The second irony is that the lack of adequate funding of tribal justice systems creates the rule of power, and hinders the rule of law and tribal judicial independence.

If tribal courts were not functioning, the respective federal and state court systems would be overwhelmed with the case load which would unofficially estimate around 1.6 million cases per year. Which I'm sure the federal and state courts would not want, especially given the traditional and customary laws that lay the foundation for tribal statutory and common laws.

On average, small tribal judicial systems handle 250 to 1,500 cases per year, whereas medium to large tribal justice systems handle over 1,500 to 20,000 cases per year. With the disproportionate funding of tribal justice systems, a medium to large justice system may have one judge handling a case load of 3,000 to 5,000 cases a year, at a median salary of $40,000.00.

Setting Tribal Court Base Funding

NAICJA along with various organizations and institutions have reinforced the Congressional findings under the initial Indian Tribal Justice Act on countless occasions. Such organizations and institutions includes: Law Schools, State Bar Associations (several of which have included a section on Federal Indian Law on their Bar Exams), tribal/state/federal forums, Association of State Chief Justices, National Congress of American Indians, National Indian Child Welfare Association, National Judges organizations and associations, Federal Indian Bar Association etc. . . In addition various federal agencies, departments and programs have also confirmed the needs of tribal justice systems both directly and indirectly through their funding programs. Such as, the Department of Justice, Department of Interior, Department of Health and Human Services, Indian Health Services, Bureau of Justice, Bureau of Indian Affairs, Bureau of Justice Statistics, Office of Tribal Support, Office of Tribal Justice, Native American & Alaskan Natives Desk, Violence Against Women's Office, Substance Abuse & Mental Health Services Administration, Office of Juvenile Justice, Delinquency and Prevention, etc. . . These lists go on and on, unfortunately, they do not communicate with one another on a consistent and coordinated basis, which is part of the reason for piecemeal tribal justice systems.

NAICJA provided this Committee written testimony on February 26, 1992 projecting a one judge tribal court (which included a court clerk, secretary, law clerk, prosecutor and public defender with operating costs) budget at $290,000.00. (Statement of Judge Elbridge Coochise, President NAICJA, On the President's Budget for Indian Programs.) Noting that "We (NAICJA) understand the funding caps imposed on the Appropriations Committees, however, the tribal courts have never been funded to a sufficient level to meet the needs of the tribes in providing judicial services. Only with sufficient financial resources can the tribes hope to make any real improvements. . ." Additionally, NAICJA conducted two informal tribal court surveys in 1995 and 1998 as a direct result of the lack of efforts to implement the Indian Tribal Justice Act. Not surprisingly, the 1995 survey "revealed an unmet need that exceeded the 1995 funding level for tribal courts by 215 percent." (Written testimony of Jill E. Shibles, President, NAICJA, Committee of Indian Affairs, Tribal Justice Issues Hearing, June 3, 1998.)

The 1992 figure would have to be recalculated for inflation and cost of living, which could have it set at or near $500,000.00. The Final Report on the Survey of Tribal Justice Systems & Courts of Indian Offenses, (May 2000) proposed an annual budget for a one court judge at $200,000.00 per year (which only accounted for one judge and one court clerk, with a service population of 1,000 or less), and a budget of $350,000.00 per year for a two judge court (two judges and two clerks, with a service population above 1,000.) The Final Report did not budget for a fully func-

tioning justice system, which gives a stark contrast in funding a fully functional justice system. A vital note to make here is that most tribal justice systems lack access to law libraries, legal authorities, internet access, and law clerks to provide the needed research in rendering decisions. Most tribal justice system budgets do not account for law clerks, and the BIA office of Tribal Justice Support budgets do not account for this need as well and/or provide technical assistance in this area.

Then on December 3, 1994, Chief Judge, Carey Vicenti, Special Assistant for Tribal Justice Support, Office of the Assistant Secretary for Indian Affairs prepared a presentation on the Indian Tribal Justice Act; wherein a base funding formula was proposed, given the number of factors that gave rise to the needs of each specific tribal justice system at the point in time. Interestingly enough, Judge Vicenti noted, "[T]he perception of Tribal Courts as institutions solely responsible for the enforcement of criminal laws must be abandoned for a comprehensive vision of Tribal Courts and tribal justice systems as an essential component in the maintenance of social, economic, and political stability of tribal societies. *With the enhancement of contemporary and traditional justice systems government stability will be guaranteed, community health will be strengthened, the atmosphere for economic growth will be improved, and the possibilities for the fulfillment of individual potential will become realized.*" (emphasis added)

Since May of 2000, there have been no other comprehensive surveys of tribal justice systems having been conducted. The current tribal court surveys being conducted by the Bureau of Indian Affairs via and Independent Review Team is not a comprehensive survey, and does not take the comprehensive position that the Office of Tribal Justice Support had back in 1994. Therefore it is critical that Congress ensure for the consistent coordination of all key players in setting the measures to determine accountability and equity in the determination of base funding for tribal justice systems. Also that tribal justice systems have full inclusion and consultation on the setting of policy and procedures to carryout the Tribal Law and Order Act.

Issues Relative to the Tribal Law and Order Act

Native American tribal courts must deal with a wide range of difficult criminal and civil justice problems on a daily basis, including the following:

- While the crime rate, especially the violent crime rate, has been declining nationally, it has increased substantially in Indian Country. Tribal court systems are grossly under-funded to deal with these criminal justice problems. Resulting in the creation of alternatives to sentencing, some of which do not sit well with non-tribal law enforcement agencies and departments.
- Dealing with the lack of correctional facilities to house serious criminals when the Federal Government fails to prosecute those cases. Even if the tribal courts are able to impose long term sentences, there is a shortage of funds to incarcerate these individuals. Increasing the sentencing capabilities is only as good as there is funding for incarceration, however, this is a political decision of the tribal legislatures and the tribal sentencing statutes will provide guidance to the tribal judges when imposing each sentence.
- Number and complexity of tribal civil caseloads have also been rapidly increasing. The number of cases involving non-Indians is also on the rise, and includes non-Indian business entities and corporations; which is in direct response to Indian Gaming and economic development in Indian Country. It is the consensus of NAICJA that a majority of the non-Indian parties approve of the tribal court process.
- Congress recognized this need when it enacted the Indian Tribal Justice Act in 1993. Congress specifically found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments" and "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation." There is a lack of a coordinated effort to pull the resources needed to sustain healthy communities, when various funding entities either duplicate services or are territorial and fail to communicate. NAICAJ fully supports the findings and recommendations of the Inter-Tribal Workgroup comprised of the Navajo Nation, the Hopi Tribe, and the Fort McDowell Yavapai Nation, in their holistic concept of "restorative justice."
- The assault of critics that feel there is no or insufficient due process for criminal defendant's in tribal courts since the language contained in the Indian Civil Rights Act only requires a lawyer at your own expense which is compounded with the lack of funds for public defenders. Again, a well funded justice system will result in the "excellence" of such justice systems, affording individuals the rights and protections within those systems.

- Since Congress enacted the Indian Tribal Justice Act, the needs of tribal court systems have continued to increase, but there has been no corresponding increase in funding for tribal court systems. In fact, the Bureau of Indian Affairs funding for tribal courts has been minimal at best, fluctuating up and down since the Indian Tribal justice Act was enacted in 1993. Moreover, there appears to be no direct funding, services and technical assistance to PL–280 tribes. The PL–280 tribes must be given the same respect and consideration for their justice systems as non-PL–280 tribes. As they must handle the ill social effects of the drug and alcohol problems that all tribal jurisdictions face.
- *Most importantly, if this bill is passed, Appropriations must be made to carryout the intent of the bill. Fourteen years has elapsed since the Indian Tribal Justice Act was passed and has yet to be fully funded to ensure the minimal base funding is made for tribal courts. The increased funding to law enforcement will continue to create an additional case load to tribal justice systems, and if this comprehensive bill is not funded, the needs will only increase exponentially.*

As Attorney General Janet Reno stated in testimony before the Senate Indian Affairs Committee on, it is vital to "better enable Indian tribal courts, historically under-funded and under-staffed, to meet the demands of burgeoning case loads." The Attorney General indicated that the "lack of a system of graduated sanctions through tribal court, that stems from severely inadequate tribal justice support, directly contributes to the escalation of adult and juvenile criminal activity."

Concept of Appointing Tribal Judges as "Special Federal Magistrate Judges"

On February 20, 2008 NAICJA President Eugene Whitefish met with Attorney General Michael B. Mukasey, Gretchen C. F. Shappert, U.S. Attorney, Tracey Toulou, Director, Office of Tribal Justice, and along with several tribal leaders, to discuss the issues of law enforcement and crime in Indian Country. The issues presented in the "Tribal Law and Order Act of 2008" were addressed, and it was there that President Whitefish proposed the concept of "cross-deputization" of tribal court judges to serve as "Special Federal Magistrate Judges" to address several areas such as:

- Expediting the federal criminal investigations, arrests and indictments of crimes occurring in Indian Country.
- Reducing the case load of the Federal Magistrate Judges (reducing costs to create and establish new special division on Indian Country) regarding the initial appearances, and detention and probable cause hearings.
- Such as system would support the law enforcement and prosecution of crimes committed in Indian Country as this Act seeks to do, along with the supporting the notion of appointing special prosecutors.
- Assist in the creation of educational and training opportunities for both federal and tribal court personnel.
- Strengthen the tribal, state, and federal justice systems.

Conclusion

Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. They are the keystone to tribal economic development and self-sufficiency. Any serious attempt to fulfill the federal government's trust responsibility to Indian Nations must include increased funding and enhancement of tribal justice systems

NAICJA fully supports the proposed "Tribal Law and Order Act of 2008," which is a reauthorization of the initial Indian Tribal Justice Act of 1993 and reauthorized under the Indian Tribal Justice Technical and Legal Assistance Act of 2000. The Act of 2008, if authorized, will provide for the base funding of Tribal Courts and ensure that the identified departments and agencies are held accountable in fulfilling the United States trust responsibility for maintaining "excellence" in the tribal justice systems throughout Indian Country. . Attached are NAICJA's comments regarding the proposed "Tribal Law and Order Act of 2008." (Attachement A)

Once again, thank you for the opportunity to present the concerns of the tribal justice systems and needs of Indian Country. I am happy to answer any questions that you may have.

NAICJA ATTACHMENT: A

SECTION-BY-SECTION COMMENT ON THE TRIBAL LAW & ORDER ACT OF 2008

TITLE I. FEDERAL ACCOUNTABILITY AND COORDINATION

Section 101. *Office of Justice Services.*—Section 101(a) would require the Interior Department's Office of Justice Services to hold timely consultations with tribal leaders, and to provide technical assistance and training to tribal police. This provision would also require the Office of Justice Services to submit annual spending and unmet needs reports to Congress. It would also require OJS to coordinate with the Department of Justice to develop a long term plan to address the tribal jails system.

Section 101(b) would authorize BIA police to make warrantless arrests where the officer has probable cause to believe that a suspect committed any crime in Indian country. Current law limits warrantless arrests to felonies.

Comment

While it is important to consult with tribal officials, it is equally important to consult with the appropriate tribal officials and that should be the justice system personnel as well. Judges, probation officers, police officers, court clerks, juvenile system personnel, and traditional justice system personnel should be consulted with by not only the DOI's BIA and Office of Justice Systems but by all federal agencies purporting to do business that directly or indirectly affect or impact any aspect of tribal justice systems that operate within Indian Country jurisdiction including especially those tribes who reside within the exterior boundaries of PL 280 States who share civil and criminal jurisdiction with the state. It is critical that such consultations are done on a consistent basis, along with identified liaison's to maintain open communications between all parties.

It is important that *all* peace officers having jurisdiction within Indian Country be authorized to make a warrantless arrests based on probable cause and bring the offender to justice in both tribal and federal courts; and ensure that such authorizations are executed to established tribal, state and federal laws.

Section 102. *Declination Reports.*—This section would require U.S. Attorneys to coordinate with tribal justice officials when declining to prosecute a reservation crime. It would also require U.S. Attorneys to maintain data on declinations, and report to Congress annually on declinations for each Federal District responsible for prosecuting crimes in Indian country.

Section 103. *Prosecution of Indian Country Crimes.*—Section 103 would clarify that U.S. Attorneys may appoint tribal prosecutors and other Indian law experts as special Assistant U.S. Attorneys to prosecute reservation crimes in federal court. This provision would encourage such appointments, and urge the U.S. Attorneys to coordinate with the Federal District and Magistrate courts when such appointments are made.

This section would also define responsibilities of Assistant United States Attorneys serving as Tribal Liaisons. This section clarifies that Tribal Liaisons will coordinate prosecutions of reservation crimes, and be responsible for developing multidisciplinary task forces, and communicating with tribal leaders and law enforcement officials.

We believe the proposed the concept of "cross-deputization or authorization" of qualified tribal court judges to serve as "Special Federal Magistrate Judges" to prosecute persons violating federal criminal laws would belong in this section.

Section 104. *Department of Justice Agencies.*—Section 104 would elevate the Department of Justice's Office of Tribal Justice within the Deputy Attorney General's office. It would also define OTJ's role to develop and direct the Department's Indian affairs policies, and coordinate and consult with tribal leaders on matters affecting their interests.

This section would also establish an Office of Indian Country Crime within DOJ's Criminal Division. The Office would be responsible for developing policies to enhance prosecutions, and coordinating task forces to address Indian country crime.

Comment

Section 102. No doubt these subsections recognize an important area of coordination or the lack of coordination between tribal justice systems and the federal justice system. Some U.S. Attorneys Offices have done a better job in recent years to cooperate in many Indian Country jurisdictions, however, as these sections point out, much more remains to be accomplished in improving the communication and coordination between the two law enforcements systems.

While requiring declination reports brings some accountability to the problem of not prosecuting crimes occurring within Indian Country, it does not mandate that such prosecutions occur. Perhaps it is a subtle way of forcing U.S. Attorney's Offices to take a closer look at such prosecutions. Frequently, prosecutions are declined because of the lack of quality law enforcement investigations being conducted by tribal police or local BIA law enforcement officers as well as using tribal court prosecutions as a "discovery" device. (Other sections of this Act address that issue so I will not comment on that right now.) The time is takes to decide whether to prosecute needs to be addressed. Tribal prosecutors are asked if not required to wait for such decisions before they can prosecute, and, of course, this can result in seriously long delays which may affect constitutional rights of offenders. A time limit of 30 days or less should be required, and this time line should not operate to hold up tribal prosecutions. Double jeopardy is not a problem.

Section 103 may help with the delays or lack of prosecutions, and it is welcomed if it proves to do so. We believe a few U.S. Attorney's Offices have implemented this kind of cooperation, and it has proved successful, at least on a limited scale, in New Mexico.

Section 104 authorizes the elevation of the DOJ's Office of Tribal Justice and empowers it with several duties. We welcome and support the elevation and duties as outlined. However, the establishment of the Office of Indian Country Crime, which we also support, together with the elevation of the OTJ office requires a further coordination and delineation of roles and responsibility between these two offices, and the DOI's tribal law enforcement agency. Too often Indian Country has fallen between the cracks of turf wars between agencies pointing figures at each other. We need to ensure this does not happen.

TITLE II. STATE ACCOUNTABILITY AND COORDINATION

Section 201. *Public Law 280.*—Section 201 would amend Public Law 280 to permit an Indian Tribe to request federal assistance in investigating and prosecuting reservation crimes, providing the United States with concurrent authority over reservation crimes.

Section 202. *Incentives for Tribal-State Cooperation.*—Section 202 would authorize the Attorney General to provide grants, technical, and other assistance to tribal, state, and local law enforcement agencies that have entered into cooperative law enforcement agreements to combat crime in Indian country and nearby communities.

Comment

Perhaps the most critical and least understood sections, these two sections must be carefully considered so as not to be deemed any form of diminishment of tribal sovereignty. Section 201 increases the role and responsibility of the federal government in PL 280 tribes and states but should not become the reason for "letting the Federal Government do it all." This would not be strengthening tribal sovereignty. The USAG should not be consulted as it would impliedly empower that office to say "no" and leave matters as they are in PL 280 jurisdictions. We believe the language should be more directive in setting out the jurisdictional duties of the federal government. Again, funding becomes an issue as to the caseload of federal law enforcement agency. Cross-deputizing and bringing more tribal law enforcement personnel may better serve all jurisdictional interests. PL 280 tribes must be treated equally as a non-PL 280 tribes in all aspects of this Act. A tribe choosing not to exercise criminal jurisdiction should not be considered having a lower priority. Crime rates in these jurisdiction are sometimes higher due to the lack of prosecution by state authorities.

We support and applaud the technical assistance and enforcement funding set forth in section 202, however, its make little or no mention of local federal enforcement agencies' roles in relation to these Cooperative Assistance Programs. While listing several requirements of the grants, it should also require which jurisdiction will actually prosecute or at least require a priority provision, if all three have jurisdiction. More than likely this decision will weigh the correctional (sentence severity) element heavily which may affect the tribes' decision to prosecute. In other words the jurisdiction with the more serious crime, i.e., one with the longer sentence will be utilized more than tribal prosecutions.

TITLE III. EMPOWERING TRIBAL JUSTICE SYSTEMS

Section 301. *Empowering Tribal Law Enforcement Agencies.*—Section 301(a) would require Interior to permit greater flexibility in training for law enforcement officers serving Indian country, including permitting candidates to train at State

and tribal academies, tribal colleges and other training centers that meet Peace Officer Standards and Training.

Section 301(b) would enhance existing law to grant Special Law Enforcement Commissions to authorize tribal officers to enforce violations of federal law committed on Indian lands. It would require the BIA and DOJ to coordinate to provide trainings in Indian country to certify tribal officers, and add requirements to expedite the MOU process with the BIA.

Section 302. *Drug Enforcement in Indian Country.*—Section 302 would authorize DOJ's Drug Enforcement Agency to provide technical and grant assistance to tribal police to address drug trafficking in Indian country. This provision would also require the DEA to place tribal law enforcement officials on the advisory panel to develop and coordinate educational programs to fight drug trafficking.

Section 303. *Access to National Crime Databases.*—Section 304 would provide tribal law enforcement officers broader authority to access and input information into the National Crime Information Center and similar federal criminal databases. This provision would also direct the Attorney General to ensure that tribal officers meeting either state or federal standards would gain access to the databases. Tribal officers would be treated as federal officers for purposes of sanctions for misuse of the databases.

Section 304. *Tribal Court Sentencing.*—This section would acknowledge the ability of tribal courts to sentence offenders for up to 3 years imprisonment, a $15,000 fine, or both, where the Tribe provides counsel for indigent defendants and meets other Constitutional due process standards. This provision would also permit tribal courts to sentence offenders to serve time in: (1) the tribal facility that meets minimum federal standards; (2) the nearest appropriate federal facility pursuant to an agreement with the summer education and activity programs for tribal youth; (2) to develop tribal juvenile codes; and (3) to construct halfway houses and detention centers for youth in tribal custody.

Comment

Section 301 will help alleviate the shortages of law enforcement officers in Indian Country. We would, however, request, at the least, recognition of an Indian Preference law in the recruitment of candidates and the hiring of tribal and BIA law enforcement officers.

301(e) (1)(B) is supportable in that it authorizes the Secretary of the Interior to utilize cooperative agreements with other federal agencies including tribes to assist with the enforcement of federal laws in Indian Country. The language in this subsection, referring to the laws of a tribe that authorizes the Secretary to enforce tribal law is confusing. Is this referring to cross-deputization agreement, a Code of Federal Regulation court or some other relationship between a tribe and Secretary? This needs to be clarified. It would also seem that the U.S. AG be authorized to inter into these types of agreements as well and create localized special commissions to perform regional trainings. After all, it will be the USAO's that will do the actual prosecution of crimes in Indian Country. (State Councils on Law Enforcement and Education Training centers (CLEET) may play a role here if federally funded.)

Section 302 amend the current laws that centers on drug education and enforcement to include tribes. We support this and hope that additional funds earmarked for tribes will follow.

Section 303 allows tribes access to national crime databases if they meet the requirement of the federal or state regulation. It is the language that requires state compliance that is troublesome here. The confidentiality and technical requirements are federally mandated and the states should not be involved in this access issue. Ownership we believe lies with the federal government and they and they alone should authorize access to these national databases.

Section 304 is perhaps the most if not one of the most important sections of the Act. It amends the Indian Civil Rights Act by requiring tribes to provide a public defense for defendants charges with a higher level of crime. It does not define what a public defense is in regard to a licensed attorney or trained and certified lay public defender. It does define the level of a charge that would require such a defender; if the crime charged "subjects a defendant to more than one year imprisonment for any single offense". Unless funding is also provided for a public defense system, tribes would simply amend their sentencing laws to under one year. We think this needs to be re-considered especially in light of all the potential law enforcement activity authorized by this Act. Without adequate funding a public defender system, this section could prove most harmful.

The sentencing aspects under this section addresses the dire need for correctional facilities in Indian Country. Due to the lack of funds many tribal or BIA correctional facilities lack the manpower and funds to operate in a constitutional manner. However, we believe that a BIA is not qualified to determine guidelines for correctional facilities and would prefer the Bureau of Prison or the American Correctional Association guidelines be made applicable. Moreover, private prisons may be an alternative that should be considered by tribes. We would recommend excluding the BIA in the MOU section dealing with the BOP.

Section 305 established the Indian Law and Order Commission. We offer no comment on that concept. We believe federal dollars can be better expended in other areas.

TITLE IV. TRIBAL JUSTICE SYSTEMS

Section 401. *Indian Alcohol and Substance Abuse.*—This section would reauthorize and amend the Indian Alcohol and Substance Abuse Act which provides grants: (1) for summer education and activity programs for tribal youth; (2) to develop tribal juvenile codes; and (3) to construct halfway houses and detention centers for youth in tribal custody.

This provision would also direct the Substance Abuse and Mental Health Administration (SAMHSA) to take the lead role in interagency coordination on tribal substance abuse programs. It would also direct SAMHSA to establish an Office of Indian Alcohol and Substance Abuse, that would develop a framework for setting interagency communication goals, and provide technical assistance to tribal governments. *25 U.S.C. §§2401 et seq.*

Section 402. *Tribal Courts Programs.*—Section 402 would reauthorize the Indian Tribal Justice Support and Technical & Legal Assistance Acts, which provides funding for tribal court judicial personnel, public defenders, court facilities, development of records management systems, and other needs of tribal court systems.

Section 403. *Tribal COPS Program.*—Section 403 would reauthorize and amend the Tribal Resources Grant Program within the Community Oriented Policing Services Office of DOJ. It would authorize long term funding for the hiring and retention of tribal law enforcement officers, and remove matching requirements.

Section 404. *DOJ Tribal Jails Program.*—This section would reauthorize and amend the DOJ tribal jails construction program. It would authorize and encourage the construction of regional detention centers for long-term incarceration, and would require DOJ to consult with the Interior Department and tribal governments in development of a 5-year plan for the construction, maintenance, and operation of tribal detention and alternative rehab centers.

Section 405. *Assistant Probation Officers.*—Section 406 would authorize and encourage the Director of the Administrative Office of the United States Courts to appoint Indian country residents to serve as assistant probation and parole officers to monitor federal prisoners living on or reentering Indian lands. This provision would also encourage the Director to offer services at more convenient locations closer to Indian country.

Section 406. *Tribal Youth Program.*—Section 407 would amend the Juvenile Justice and Delinquency Prevention Act by establishing a Tribal Youth Program in Title V, and authorizing the Director to provide grants to tribes to establish youth leadership programs, tutoring and remedial education, develop job training skills, and other activities aimed at reducing delinquency in tribal youth.

Comment

Section 401 establishes, *inte se,* the Office of Indian Alcohol and Substance Abuse under SAMSHA. We generally support this office and it functions with regard to what SAMSHA does, however, we emphasize that the connection between tribal courts, its sentencing to treatment programs operated or funded by SAMSHA should be improved and coordinated with our Healing to Wellness or Drug Courts currently funded by DOJ's BJA. We believe there should be closer cooperation with law enforcement and SAMSHA tribal programs. Tribal probation officers should also be involved with these types of program and an emphasis should be placed on meth treatment programs. In this regard, BIA schools should actively engaged in drug prevention program during the school year as well as during the summer. Summer programs can be effective but are short term. We need these programs in our schools year round and beginning at an early age or grade. Holistic approaches involving entire families are recommended.

Training law enforcement officers in drug interdiction techniques as well as investigation of drug related crimes is necessary as drug dealers have discovered Indian Country and they work the myriad of jurisdictional issues to their advantage.

Section 402. NAICJA has been the recipient of BJA grant for several years under their Tribal Court Assistant Program. TCAP, as it is called, provides a few tribes each fiscal year with improvement grants for up to two years. This has been a successful program authorized under the Indian Tribal Justice; Technical and Legal Assistance Act. We welcome its reauthorization. This act directly impacts and affects tribal courts. It should be noted that there should be a commensurate rise in funding as funds increase for tribal law enforcement. Tribal courts have in the past not received commensurate funding and have become bogged down, overcrowding of jails has occurred, and tribal probation officers ratios, on average, are 1–150 offenders.

DOJ has done as much as any agency in recent years with funds as little as $7–8 million dollars each year. This is hardly sufficient and woefully insufficient in relation to the funds and programs authorized by this Act. It is paramount and enough cannot be said that Congress should fund tribal courts improvement programs on a long term basis. Tribal courts are doing the best they can with what little funding they receive from their respective tribes and from the federal government but such funding is intermittent and does not lead to long term improvement. When federal funding ends so does the improvements gained in many instances. This needs to be looked at more closely and directly integrated in the Law and Order Act of 2008.

Tribal courts need more funding and training opportunities and tribal councils must be required to give credibility to tribal court operations and judicial independence must be reinforced through federal funding incentives. DOJ views itself as more of a law enforcement agency than a judicial improvement agency. Agency personnel have a difficult time justifying tribal court enhancement programs as connected with law enforcement. Section 403 references the COPS program and DOJ's consisted effort to place the TCAP program under COPS is a prime example of this mentality. This needs to be addressed in this Act.

Section 404 funds more jails in Indian Country. This assumes more jails are the answer. Traditional justice systems like peacemaking courts or healing to wellness courts have also proven to be effective alternatives to the criminalization process. The subsection allowing tribes to develop alternatives to incarceration should be prioritized. Prison bed space around the nation is at a premium and even more so in Indian Country. Tribes practically operate a criminal justice system without any jail space and have done so for years. As violent crimes increase, we call upon the USAO to prosecute these crimes and look for programs that effectively prevent violence in our communities. Drug interdiction should also help in this regard.

Section 405 as it relates to increased funding for tribal probation officers is central to an effective tribal justice system but referencing only federal probationers is hardly the answer. This probation program should be made available to all probationers and parolees residing within Indian Country. Trained and well equipped tribal probation officers and assistants will help with reducing revocations especially where treatment programs are available and accessible.

TITLE V. INDIAN COUNTRY CRIME DATA COLLECTION AND INFORMATION SHARING

Section 501. *Uniform Indian Country Crime Reporting.*—Section 501 would require all federal law enforcement officers responsible for investigating and enforcing crimes committed in Indian country to coordinate in the development of a uniform system of collecting and reporting such crimes, including if feasible, amending the Uniform Crime Reports monthly returns to acknowledge that crimes were committed in Indian country.

Section 502. *Tribal Data Collection Program.*—This section would authorize and direct the Interior Department's Office of Justice Services, in coordination with the Department of Justice, to develop a program to aid tribal police departments to establish information systems to uniformly collect and analyze criminal data.

Section 503. *Tribal Criminal History Record Improvement Program.*—Section 503 would authorize the Director of the Bureau of Justice Assistance to provide criminal information system grants to Indian tribes to address multi-jurisdictional crimes and establish secure information sharing systems to enhance investigations and prosecutions.

Comment

NAICJA supports the strategy behind these sections. Statistics of any sort is difficult to collect in any meaningful manner. Measuring the success or failure of pro-

grams requires an effective statistical reporting tool that is consistent from jurisdiction to jurisdiction.

TITLE VI. DOMESTIC VIOLENCE AND SEXUAL ASSAULT ENFORCEMENT AND PREVENTION

Section 601. *Notification of Tribal Governments.*—Section 601 would require the Director of the Bureau of Prisons and the Director of the Administrative office of the U.S. Courts to: (1) notify tribal justice officials when a person in federal custody will return or move to Indian country; and (2) register the offender according to the appropriate registry requirements.

Section 602. *Domestic and Sexual Violence Training.*—Section 602 would require the Office of Justice Services, in coordination with the Department of Justice, to develop specialized family violence training for all law enforcement officers and prosecutors responsible for investigating and prosecuting crimes of sexual violence in Indian country. This provision would also require Bureau of Indian Affairs and tribal criminal investigators to take annual sexual violence and evidence collection certification classes, and require the Bureau to make such trainings available to tribal law enforcement officials in Indian Country.

Section 603. *Testimony by Federal Employees.*—Section 603 would require federal employees to testify in tribal court pursuant to request or subpoena on matters within the scope of their duties, unless their supervising officer finds that such testimony would violate Department police to maintain impartiality.

Section 604. *Coordination of Federal Agencies.*—Section 604 would require the Bureau of Indian Affairs, the Indian Health Service, and the Department of Justice to coordinate to develop victims services, victim advocate training programs, and identify obstacles to prosecuting crimes of domestic violence and sexual assault.

Section 605. *Sexual Assault Protocol.*—This section would require the Indian Health Service to establish standardized sexual assault protocol at tribal health facilities.

Comment

All of these sections are designed to improve investigations that will allow appropriate prosecution by the USAOs and tribes. Training of peace officers is an important step in the right direction. Retention of such officers is also important. Tribes may not be able to afford to keep these highly trained officers. Funding programs must address these issues. Sex offenses require some form of medical evaluation or exams by trained and licensed personnel. Indian Health Service doctors and health care providers must be trained and willing and authorized to testify. It should not matter whether they get permission from supervisors. Permission denied is justice denied. This could be another barrier authorized by law for the lack of prosecutions. There is a need for such cooperation between law enforcement and health care providers and while the Act addresses such need it also creates a loop hole for adding to the problem.

Again, thank you for the opportunity to comment on the proposed Act. NAICJA supports the Act and its principle to strengthen tribal sovereignty by strengthening tribal justice systems. NAICJA remains available to your questions.

The CHAIRMAN. Judge Duran, thank you very much for your testimony.

Next, we will have testimony from the Honorable Joseph Flies-Away, the Chief Judge at the Hualapai Tribe in Peach Springs, Arizona.

Judge, you may proceed.

STATEMENT OF HON. JOSEPH THOMAS FLIES–AWAY, CHIEF JUDGE, HUALAPAI TRIBE

Mr. FLIES-AWAY. Thank you. Good morning and thank you, Mr. Chairman and Madam Vice Chairperson.

I am going to try to talk for five minutes, but it is very hard for me to do that, so I am going to do my very best because I am not used to that.

But we are talking about tribal courts, and what I see in the tribal courts is that they are a critical component of tribal govern-

ment. They have to be there, just like any conflict resolution system for any government all over the Country. We have to do dispute resolution and we have to work everyone in the government. It is not just the tribal court. There are police. There are probation officers. There are social workers. It is a system of a bunch of people and programs.

So when we talk about funding, yes, tribal court needs funding, but there is a funding need throughout a government, community and nation-building issue.

Tribal courts in their action actually express tribal sovereignty. It is a way for any nation to express their sovereignty, by being able to have a conflict resolution system for their people, just like the United States.

It is also, as the Senator stated, a way to contribute to economic development, our economic possibility. When people want to come to the reservation and do business and there is a fair playing field to do so, then that is going to be a court, a good court is going to be a place where they can come and actually feel good and comfortable about doing business there.

It is also a manifestation of tribal culture. Tribal culture can be saved in writing and common law, as some tribes are doing that in culture, writing the ways and practices into law. That is something that we try to do with the best of our ability.

It also upholds and protects the constitutional rights of the people. We have constitutions and we have bill of rights sections, due process, and all of these different types of rights. It is the place where people, tribal members and persons, because the tribal constitution just doesn't take care of the tribal member. It is all the persons under the jurisdiction of the tribe, so it protects their rights.

Now, about the funding. Tribal courts and the systems that are involved with it requires adequate funding and resources, facilities and programs. I was in a tribal court where I actually got electrocuted one time. I should have just fell over and maybe they would have gotten a new building, but there is a lot of need as far as facilities and as well as programs and staffing.

Tribal courts necessitate consistently availability of detention and rehabilitation resources. We talked about detention. We have a juvenile detention facility that has been sitting empty at Hualapai for the past nine or so months and we don't have funds to operate it. Actually, kids have already broken into it. I talked to one of them. I said, you are so eager to get into there you are breaking into it. But it sits empty, and we need that facility open.

A couple of comments about the Act. There is section 303, the database.

The CHAIRMAN. Judge Flies-Away, would you just tell us how large that facility is?

Mr. FLIES-AWAY. It is a 40-bed facility.

The CHAIRMAN. Forty beds. Thank you.

Mr. FLIES-AWAY. About $7 million, and $4 million of it came from the tribe itself. I am not sure if that is the exact number, but I think so.

Section 303, the database, council members have had a concern about how that database is to be used if tribal law enforcement

puts the information in, and how is it to be used by the other jurisdictions. I used to be a tribal council member myself, so we have a concern about sharing information with other jurisdictions and how that might be done.

The 304 sentencing, I like that, three years/$15,000. The only issue with that is the capacity. If we don't have detention facilities to put people in, then how are we going to do that? It takes a lot of money for that. But I like that. It is going up. We can do more with that.

Section 603, I have a beef with this one, well, not with this, but I will tell you.

The testifying of Federal employees, I had once asked a BIA detention officer to do something. He was supposed to bring over a defendant. He did not do so, so I ordered and order to show cause on him. He got your attorney, the Solicitor General, to write me a letter, threaten me with arrest for getting in the way of his job. I wasn't calling him to testify on anything. I was calling him to come to order to show cause why he did not bring over a person, doing his job as a BIA employee. I should have told these guys. But you know, but I got a letter from the Solicitor. You will be arrested if you interfere with the Federal officer. And I go, oh, my goodness.

On the IHS side, I asked a health nurse to come in and help create a plan for a minor child. He needed help and she wouldn't come because of the same, I can't remember, section 45 CFR Part 2. They keep Federal employees from testifying in tribal court. Hopefully, there could be an amendment of section 603.

There is a lot more things to say about this issue, but I am glad that I was able to say these few things.

Thank you.

[The prepared statement of Mr. Flies-Away follows:]

PREPARED STATEMENT OF HON. JOSEPH THOMAS FLIES–AWAY, CHIEF JUDGE, HUALAPAI TRIBE

Mr. Chairperson, Madame Vice-Chairperson and Members of the Committee, Gamyu:je,

I am honored to be invited to testify before the Senate Committee on Indian Affairs on Tribal Court Systems and the proposed Tribal Law and Order Act of 2008. Unfortunately, the timeframe for preparation did not give me the ability to fully articulate all of the prevalent issues that come to mind though I will attempt to address some of the most important issues as I and our Tribal Council sees them. Below I describe a few of these issues and comment briefly on specific sections of the Act.

First however, let me let me briefly introduce myself to you. I am a Hualapai Tribal Member and the Chief Judge of the Hualapai Judiciary. I have served as a Tribal Council Member and Planner for my Tribe in recent years. I have also served as a judge for the past 12 years and in total sat in 9 tribal courts throughout Indian Country and serve currently as a pro tem judge, visiting judge, and appellate justice for various tribal courts as well as consult with tribes when I have time. I have been privileged to work with many other tribal courts throughout the country, including native villages of Alaska, to help develop their judicial systems and infrastructures, perform evaluations, draft and review codes, and provide other technical assistance to Courts and tribal government. I have also taught at the university level in Indigenous Community & Nation Building and Federal Indian Law. In my travels and efforts throughout Indian Country I see a strong commitment and dedication from tribes/villages to continue to rebuild their nations taking the best of their past and culture and mingling with the advantages and innovations of the present. I see indigenous peoples take what little resources they may have and make the best of it even though the community and nation building journey is difficult and frustrating much, if not all the time.

Below is a short description of the topics that I believe are important for the Committee to hear and take into consideration in your legislating efforts. Unfortunately, as the time given to each witness for verbal testimony is only five (5) minutes, my comments to the Committee will be limited at that proceeding. I will do my best to articulate what I think is most important in the little time that I have. I imagine that there may be questions for the witnesses by the Senators on the Committee. With your questions I hope I will be able to stress other areas that require federal intervention and assistance that I do not mention in my direct comments and in this written testimony.

As requested by Senator Dorgan the primary purpose for my testimony is to discuss Tribal Courts in general and comment on the proposed Tribal Law and Order Act of 2008. Below I highlight various issues regarding tribal courts that I think are relevant, which I have written about previously and discuss with tribal folks at every opportunity. I am sure you will hear similar remarks from the other witnesses who I am honored to be sitting before you today. Of course what our tribal leaders wanted me to emphasize up front is the need for more funding for tribal courts and the areas that support its work. Funds are required so that the need for culturally accordant conflict resolution for our Tribe and others can be accomplished more thoroughly and for benefit of those persons under our jurisdiction. The other issue my Council directed me to emphasize is the need for detention and rehabilitation resources that allow the Court to address the criminal and other negative behavior that hampers our Tribe's progress.

My final statements here regard the proposed Tribal Law and Order Act of 2008. Below I have highlighted a few sections in the Bill that our Tribe and I both have questions and/or concerns.

I will begin with general comments about Tribal Systems:

Tribal Court System (Tribal Justice System)

Critical Component of Tribal Government

Tribal Courts and Tribal Court systems are critical components of tribal government. All governments must provide a means for conflict resolution for its polity, its people. Without such a forum disputes and disagreements of all sorts would negate the ability of the *people to gather, ground, and grow* (i.e. build and rebuild communities and nations). Prior to Anglo intervention in the Americas indigenous peoples practiced various forms of conflict and dispute resolution. While the practices may not have resembled those of Western Culture the ability of tribal members to participate in debate and defend their points of view was not just allowed, but expected (i.e. due process). Unfortunately, because tribal ways did not resemble European practices, they were thought to be savage, backward, and uncivilized. Suffice it to say the forums for indigenous people worked for native folks then as much as the methods worked for other peoples around the world.

Tribal Courts/Systems currently are the tribal forums that attempt to resolve various controversy and conflict that Tribal peoples, our governments, and other persons face. Many systems rely on written law (constitutions and codes) to direct the settlement of disputes and conflicts. Others apply customary processes, procedures, and laws to address controversy. In all the tribes/villages that I have visited thus far their Tribal Court systems were thought to be critical to the success of their governmental function to serve the needs of the people. Or, if the systems were in development tribal staff and officials would state that they wanted their Court System to provide a fundamental service that would benefit the community/nation as a whole. As are many nations around the world, each tribal or village government is at a different period of development of a justice system. Some are quite advanced, while others are just beginning to develop a judicial system under the conditions and circumstances they may face in their part of the United States. Despite the various places these tribes may be in their development journey, they each need the resources, support, and encouragement to continue to develop the best practice judicial system they can to bolster their overall governing system.

Requires the Cooperation & Collaboration of Various Sectors (Departments and Programs) of Tribal Government

As a judicial system is an important and critical part of tribal government, it cannot function all alone and unto itself. A system to resolve conflict and dispute for any polity must include or collaborate with a number of various agencies, programs, and people of their government. A true full compliment of a judicial system, though to many it is not as clear, does not only consist of a judge, clerk, probation officer, jury members, advocates, and bailiff. To fully move towards resolution or conciliation of criminal, civil, juvenile, family, and other issues brought to Court there are many others who contribute to a beneficial end; to peace.

This is not to say that Separation of Powers is not an important and necessary characteristic of good government. Separation of Power is essential to keep various branches of government from interfering with each others work. Nevertheless, there is considerable contribution and cooperation that must exist between the branches or departments that must be present in order for resolution/concord to be reached. Individual court users, practitioners, and staff including the citizenry of a nation must be trained and provided insight of how this separation works and how parts of government must also work together.

Expression and Exercise of Tribal Sovereignty

The existence and administration of a Tribal Court—Judicial Branch is an expression and exercise of Tribal Sovereignty. As mentioned above the provision of conflict and dispute resolution is an important part of a government. Because conflict resolution is a necessary service that the Tribe must provide, the provision of such a service demonstrates the government's sovereign responsibility to address and fix its own problems, controversy, and other conflict. As a tribal court confronts conflict and listens to the parties regarding the issues raised it must develop a understanding and ruling of the law, wholly applicable to that matter and to that sovereign. The creation and development of law is unique to that nation. This practice contributes to the individuality and sovereignty of that nation. As a tribal court continues to resolve conflict, develop standards and precedent for litigants to apply, the more the Tribe is expressing and exercising its sovereignty.

Contributes to Economic Possibility

Tribal Courts further support an environment of impartiality and fair play. In doing so individuals, corporations, and others believe they can safely engage in commerce and business with the Tribe and tribal members with the assurance that wrong doing can be challenged, addressed, and corrected. Economic development and possibility become more achievable when there is a forum for legitimate legal issues to be brought and remedies sought. Whether the matter concerns a promise/contract issue of a small amount of money between tribal members or a multi million dollar claim between a corporation and vendor, Tribal Courts can provide a competent and transparent forum for resolution.

Many tribes, however, are still developing Courts where business matters can be brought. Outside business entities are weary of tribal law and processes, which may not resemble a U.C.C. or other commercial code. Overtime, however, with greater resources and further development, tribal courts will provide the necessary components and legal procedures as does any state or federal court hearing such cases. Hopefully, however, Tribes will not adopt other jurisdiction's laws full sail without assuring its efficacy for their nation. Tribes who have developed in this area can be supportive and helpful to others in their development.

Manifestation of Tribal Culture (i.e. culturally accordant conflict resolution/peacemaking)

Tribal judicial systems can be fashioned into culturally accordant tribal institutions that reflect the culture and history of the tribal people it serves. Tribal Courts over the years have been grappling with the nature of the adversarial system that was more or less imposed upon them. While some tribes find the adversarial system adequate and useful, other tribes desire to develop courts that reflect more of a restorative nature that tribal people traditionally practiced. Unfortunately, because the adversarial system is deeply ingrained in tribal court personnel, as that is what they were taught, and 'outsiders' bring to the Court, it is difficult for some to reclaim the traditional method and move forward with it. Some tribes, however, have been successful at this development and produced peacemaking processes or other traditional means of bringing people to peace, and the practices are greatly appreciated by their people as they feel familiar and are comfortable with it. Tribes must be allowed to develop these processes, perhaps allow for various tracks for court users to choose from so that the greatest appreciation can be solicited.

Uphold and Protect Constitutional Rights (including due process)

Tribal Courts serve to uphold and defend the rights of all persons, not just members, who are within its jurisdiction. Individual rights as defined in tribal constitutions, codes, and federal statutes such as the Indian Civil Rights Act are best adjudicated in the Tribal forum where the tribal court judge can articulate what the law means in that jurisdiction. This is even a more important when the tribal judge is a member of the tribe who can also apply or be open to applying tribal custom and tradition.

Tribes throughout the United States are actively pursuing or considering revising and amending their constitutions to articulate a more tribal perspective, rather than

applying the constitutions that were basically written for them or modeled after BIA documents. What may be at issue as tribal courts continue to develop and revise their constitutions, are conflicts between rights as articulated in their constitutions and tribal government (and their subordinate entities) claims to sovereign immunity? If a tribal government does not afford due process to a person under their jurisdiction, and or change the law on an individual after the matter was brought to Court, when the Constitution articulates various rights, does sovereign immunity completely shield the Tribe from what might be illegal or unconstitutional conduct? These claims will be brought before tribal courts and have been slowing reaching the courts of late, and outcomes may be telling as to the future of tribal sovereignty.

Requires Adequate Funding & Resources (facilities & program support)

All Tribal Courts, including the Hualapai Tribal Court, require the funding to fully meet the judicial needs of their constituents. While some tribes, such as Hualapai, have been able to put some of their own general funds into Court development, the amount is not enough to fully satisfy the need the growth the Tribe has had over the years. Hualapai, and I am sure others, require adequate facilities and space to perform its function and purpose for our people. Many tribal courts are housed in older buildings and required to hear cases in makeshift court rooms while at the same time endeavoring to demand the respect of Court users and others who come to Court. Offices are small and hearings sometimes must be held in them as there may be only be one court room. Funding issues, of course, are always an issue for tribal governments, but it appears that given judicial services is a primary and critical function of government that federal funding would rise to the level of support that such a need requires.

Necessitates Consistent Availability of Detention & Rehabilitation Resources

Lastly, more funds are required for both detention and rehabilitation resources. The Hualapai Tribe has put some of its own funding into building a state of the art juvenile detention facility only to have it sitting unused for almost a year. The BIA is unable to provide the funding for staffing and operating the facility and the Tribe cannot assume the responsibility alone. The Tribe initially intended to provide resources in the facility to address rehabilitation issues, however, again BIA funds do not serve this function and IHS is also unable to assist in the goals the Tribe set out to accomplish. Over time, perhaps, after many years of economic develop for us and others, the Tribe(s) may be able to cover various costs for this operation, however, at this very moment, the need is huge for our young people to be not only disciplined but provided the healing services they need to someday be positive contributors to our tribal society.

Other

There is a Federal Law that prevents BIA & IHS employees from being brought to Tribal Court via a subpoena as well as denies the Court the ability to issue Order to Show Cause orders to BIA detention staff for failure to provide adequate detention services (see below).

Tribal Law and Order Act of 2008

Sec. 303—Access to National Criminal Information Databases

While criminal data collection is important in order to analyze criminal behavior and trends, this act will allow tribal law enforcement officials to enter criminal data into a national data base, presumably regarding tribal members. One question is how will the criminal information be utilized by federal, state, and tribal jurisdictions? Will it be used to augment sentencing orders in each jurisdiction? Tribal leaders in the past have been wary of sharing criminal information as it is thought to infringe on tribal sovereignty. Do tribal leaders need to approve the sharing of information in a manner and form that they prefer or is the Federal Government to do so for them?

Sec. 304—Tribal Court Sentencing Authority

Section 304 of the Act provides for increased Tribal Court sentencing authority for one charge from 1 year/$5,000.00 to 3 years/$15,000.00. Though this provision to strengthen Tribal Court sentencing power is positive, capacity issues and shortfalls for most Tribal or BIA detention facilities must be addressed and remedied. Many Tribes simply do not have jails and rely on the BIA to provide detention services. The supply of bed space does not meet the demand, which creates an inconsistent detention system allowing for release of inmates for lack of space, medical ailments, and swapping of more dangerous inmates for lesser dangerous ones. The need for more detention funds (both facility construction and programmatic) is required. Not only must more detention facilities on tribal lands be constructed,

Tribes must have resources to staff the jails and provide treatment (healing & restoration) to tribal inmates. Though the Act states the possibility of housing tribal inmates in Federal detention facilities, the preference for tribes may be to house their tribal and native community members in a tribal detention facility.

Sec. 603—Testimony by Federal Employees in Cases of Rape and Sexual Assault

Section 603 of the Act will allow federal employees in rape and sexual assault cases to testify in tribal court. The Hualapai Tribal Court has received two letters from both Bureau and IHS officials citing 45 C.F.R. Part 2, which states that federal employees are prohibited from giving testimony unless the appropriate Director approves. How does Section 603 mesh with 45 C.F.R. Part 2?

A Hualapai Tribal Court Order to Show Cause on BIA Detention Supervisor for failure to assure that a Defendant (father) was transported to a custody Hearing, upon proper notice to him in the detention facility, caused a U.S. Solicitor to threaten the arrest of any Tribal Judge who interferes with the federal officer's duties. The Tribal Court merely issued the OSC to the BIA Supervisor for failure to perform his trust responsibility to the Tribe by bringing the inmate to Court.

A Hualapai Tribal Court Order requesting the attendance of an IHS Community Health Nurse to a hearing to develop a service plan for a Child in Need of Care was denied as the Order needed to be approved by a senior official in the area. Again a letter to the Court citing 45 C.F.R. Part 2 was sent to the Court stating the Nurse cannot provide testimony to the Court. The hearing, however, was scheduled only to solicit the input of service providers, include the Community Health Nurse, to develop a plan to provide services to the Minor Child and family to meet his needs. The Nurse was not requested to provide testimony to prove innocence or guilt in any way.

If the Act is to promote cooperation between federal agencies and the Tribes, then this area must be reviewed so that the Tribal Court's request for federal assistance is honored and any trust responsibility honored.

The CHAIRMAN. Judge, thank you very much.

Next, we will hear from the Honorable Theresa Pouley, the President of the Northwest Tribal Court Judges Association in Tulalip, Washington, with the Tulalip Tribal Court.

Judge, you may proceed.

STATEMENT OF HON. THERESA M. POULEY, JUDGE, TULALIP TRIBAL COURT; PRESIDENT, NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

Ms. POULEY. Good morning. Thank you for the opportunity to allow me to testify today.

As a judge at Tulalip Tribal Court, Colville Tribal Court, Northwest Intertribal Court System, and also as the President of the Northwest Tribal Court Judges Association, we appreciate the attention of this Committee to tribal justice systems in Indian Country.

Justice O'Connor and Janet Reno said that tribal courts are part of the mosaic of the justice system in the United States, and that they are uniquely situated to resolve problems in Indian Country.

As tribal court judges in the Northwest, we are acutely aware of the violent crime rate. We are acutely aware that one in three Indian women will be raped in their lifetime. And Senators, we are poised with the proper funding and the proper authority to be able to take responsibility and make a difference in Indian Country.

As President of the Northwest Tribal Court Judges Association, I am delighted to report that we hear over 10,000 cases every year for the last five years. As a judge of the Northwest Intertribal Court System, we hear 2,400 cases a year. And as a judge of the Tulalip Tribal Court System, we heard 1,100 cases last year.

All of those cases were done in a very competent and professional manner. The six biggest tribes in the Northwest all have public defender services. Tulalip, Lummi, Colville, all provide public defender services on their own dime for indigent defendants. All of those courts have courts of appeals. The Colville Tribal Court of Appeals is a constitutional court with nine appointed justices. Each and every one of those courts in the last 30 years has come light-years forward in being able to resolve issues in Indian Country.

We certainly appreciate your support and your belief in tribal justice systems, but you should know that we have the ability to provide those solutions to those problems of crime in Indian Country if we are given both the funding and the tools.

Tulalip Tribal Court is a perfect example of that. They retroceded their criminal jurisdiction from the State of Washington in 2001. By 2003, those cases, including criminal cases on the reservation, started being investigated by tribal police, prosecuted by tribal prosecutors, and entered tribal court systems.

In five years, Tulalip Tribal Court has gone from what some characterized as a lawless reservation with rampant drug and alcohol deaths on our highways, to a very safe community. They did that to ensure the economic development of their community, but they also did that by prioritizing the tribal justice system.

Although the Bureau of Indian Affairs gave us $30,000 last year to hear those 1,100 cases, Tulalip Tribal Court knows better. And the results are absolutely dramatic. In that five-year period of time, every year since Tulalip Tribal Court has been hearing cases, violent crime has been substantially decreasing within the boundaries of the Tulalip Reservation. Tulalip Tribal Court was given the Harvard's Honoring Nations Award for a wellness court or drug court program that reduced recidivism in just a couple of years by 25 percent.

We need stable funding to be able to address those issues. We also very much support the holistic and coordinated fashion in which this bill addresses the Department of Justice in making sure that they provide tribal officials with information regarding the declination of prosecution. When you combine that with an increase in tribal court jurisdiction, we are going to have the ability together to substantially change the face of Indian Country.

Before I came here to testify, I was visiting with my husband about what that testimony might be. I said, and repeated to him, one in three Indian women are going to be raped in their lifetime. My 15-year-old daughter looked at me and said, Mom, is that true? And the look on her face said, Mom, am I the one or am I the three?

This kind of concerted effort and this bill, and support of this bill, to allow tribal courts to answer that question for my daughter, help us fulfill an old Shenandoah proverb: It is no longer enough to cry peace. You have to act peace, live peace, and live in peace.

We look forward to the opportunity of taking that responsibility and we are ready, Senator.

[The prepared statement of Ms. Pouley follows:]

PREPARED STATEMENT OF HON. THERESA M. POULEY, JUDGE, TULALIP TRIBAL COURT; PRESIDENT, NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

Mr. Chairman and members of the Committee, I appreciate the opportunity to provide testimony on the vital role that tribal courts play in the effective administration of justice in Indian Country. I speak from my experience as a long time Judge serving tribes in the Northwest and the President of the Northwest Tribal Court Judges Association. Currently, I serve as a judge in the Tulalip Tribal Court and the Northwest Inter-Tribal Court System (NICS) and an Associate Justice of the Colville Court of Appeals. The tribes I have had the honor to serve in Washington State range from urban to rural, and vary in size from small communities with a greatly diminished land base to tribes with expansive reservations. Although the governmental services and needs vary for these tribes, I have found they all share a core commitment to fairness and justice for their communities. No government has a greater stake in effective criminal justice systems in Indian Country then the tribes themselves.

A quality justice system is a central component of the right of a people to make their own laws and be ruled by them. Congress has expressly recognized the importance of tribal courts in enacting the Indian Tribal Justice Act, (ITJA), 25 USC § 3601 et. seq., "to assist in the development of tribal justice systems." S. Rep. No. 103–88, 1993 WL 304728 at 1 (July 15, 1993). In enacting this law, Congress recognized that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."

The findings of Congress, however, are often at odds with the actions, or inaction, of federal agencies vested with a trust obligation to provide public safety in Indian Country. While the Indian Tribal Justice Support Act promised $58 million for tribal court systems per year, tribal courts have yet to see any funding under this Act. The vast majority of tribes continue to struggle to meet basic public safety needs based on lack of federal support. The ITJA did result in the creation of the 2000 Report of Tribal Justice Systems prepared for the Bureau of Indian Affairs. The report confirmed the competency of tribal courts, found that tribal justice systems are severely underfunded, and recommended base funding levels for tribal courts.

Although the Federal Government has fallen far short in addressing the critical public safety problems in Indian Country, Tulalip and other Indian tribes fortunate enough in recent years to raise revenues through gaming and new business enterprises have started taking on the primary role of law enforcement on the Reservation. Since taking on this responsibility, Tulalip and other Northwest Tribes have seen crime rates begin to drop, and the quality of life on the Reservation improve. Taking a lead role in criminal justice has gone hand in hand with steady gains in economic development and employment opportunities on the Reservation. Tulalip recognizes, however, that these gains are fragile, without reliable funding sources that traditionally fund government justice systems.

The Tulalip Tribes, NICS and the Northwest Tribal Court Judges support provisions in the proposed Tribal Law and Order Act of 2008 which seek to hold the Federal Government more accountable for addressing the serious crime problems in Indian Country. The Tribes believes that the Federal Government must do a better job of supporting and empowering tribal justice systems. Toward this end, we strongly support the extension of criminal sentencing authority as necessary in certain cases to protect the Reservation community from dangerous offenders.

I encourage the Committee to identify further measures to support and fund strong Tribal law enforcement and court operations. More direct funding to tribal courts is drastically needed. The Tulalip Tribes wholeheartedly supports the additional authorization of Tribal justice system funding that was recently added to S. 2731. In addition to federal funding, Congress has a role to play in authorizing an expansion of Tribal government taxing authority to raise revenues for tribal justice systems—justice systems that benefit both Indians and non-Indians who reside in and around Reservation communities.

The Tulalip Tribes

The Tulalip Tribes consists of a confederation of several Coast Salish Tribes signatory to the 1855 Treaty of Point Elliott. The Tulalip peoples originally occupied a large area of western Washington that extended from the crest of the Cascade mountains to the islands of Washington's marine waters. Salmon have always been of central importance to Tulalip subsistence and culture, and many Tulalip families still depend on fishing for their livelihood.

Today, the Tulalip community is located on a 22,000 acre Reservation bordering the Puget Sound 40 miles north of Seattle. This area has recently experienced rapid

population growth and development. Tulalip has 4,000 enrolled members, but the majority of Reservation residents are non-Indian. This is due to a history of allotments on the Reservation, which resulted in most Reservation land falling out of tribal ownership. This created a checkerboard of Indian and non-Indian land ownership that is common to most Reservations in Washington State. The Tribe has in recent years re-acquired a great deal of its Reservation land, and today the Tribe or Tribal members hold approximately 60 percent of the Reservation lands with the balance held in non-Indian ownership.

Tulalip Justice System—Background

The Tulalip Tribes is organized under a Constitution and Bylaws adopted by the Tribes and approved by the Secretary of Interior in 1936 pursuant to the Indian Reorganization Act. The Tribe is governed by a seven member Board of Directors, who are elected to three year terms. The Tulalip Constitution provides authority for establishment of a tribal judiciary, empowering the Tribes governing body to provide for the maintenance of law and order and the administration of justice by establishing a court system.

Despite the Federal Government's stated commitment under the Indian Reorganization Act to foster tribal self-determination, the goals of the policy went largely unfulfilled due to lack of federal support and little economic opportunity for tribal members residing on the Reservation. In the years following the IRA, there were simply no funds to carry out the basic functions of tribal self-government.

PL 280—State Assumption of Criminal Jurisdiction Not the Solution

In order to address the problems associated with inadequate federal criminal justice resources, the Tulalip Tribes requested the State of Washington in 1958 to assume criminal jurisdiction under PL 280. However, Tulalip soon found out that State assumption of criminal jurisdiction was not an effective remedy for the public safety problem. The county failed to dedicate adequate police resources to the Reservation, in part because the county received no tax revenues from tribal trust lands. As a result, little improvement was made in crime rates or public safety on the Reservation.

During this period of the 1950s through the mid 1990s, Tulalip was failing to provide the most basic of services to its community—police and criminal justice. The Reservation remained a difficult place to live, and job opportunities were limited. Law enforcement and criminal justice on the Reservation was at best inadequate, and at worst non-existent. Older tribal members often speak of the harsh conditions on the Reservation during most of this time, when serious crimes such as murder, rape and aggravated assaults often went uninvestigated and perpetrators were not prosecuted or punished.

Building an Effective Tribal Justice System at Tulalip

The Tulalip Tribal justice system has made great strides in the last decade. Tribal law enforcement has gone from a single part time officer to a full service police department of 47 officers and staff protecting the community seven days a week. The Tribal Court has evolved from part time operations in an old trailer to a large modular facility with two full service court rooms and a complement of court staff operating 5 days a week. Crime rates have dropped and the quality of life in the community is improving. The Tulalip Tribes has taken on this responsibility to build its own criminal justice system on the Reservation largely because the Federal Government has failed to fulfill its responsibility, and the state criminal authority proved ineffective.

The Tribes recent success in criminal justice is attributable to two key factors—(1) retrocession of state criminal jurisdiction under PL 280, and (2) new tribal economic development on the Reservation generating much needed revenues and creating new jobs.

Retrocession—Tulalip Assuming Primary Law Enforcement Responsibilities

The Tulalip Tribes began the process of seeking retrocession of State criminal jurisdiction in 1996. Navigating the retrocession process under current federal law proved to be an arduous task. Indian tribe's had not petitioned the Department of Interior for some time which meant that there were few in the Interior accustomed to the process of retrocession. Also during this time, as is true with the Justice Department's current opposition to S. 2731, the Tribes found out that the U.S. Attorneys Office in Seattle was not supportive of the Tribes request for retrocession because they perceived retrocession as adding responsibilities to that office and other federal law enforcement agencies. The Tribes held numerous meetings with Justice and argued persuasively that an increased tribal law enforcement presence would

actually lower crime rates and eventually decrease the demand for federal law enforcement services. Gradually, the U.S. Attorney warmed to the idea and sent a letter of support to the Attorney General. With the Governors support and the letter of support from Justice, Tulalip officials were finally successful in obtaining retrocession of state criminal jurisdiction on the Reservation.

After retrocession, the Tribes took on the responsibility of primary law enforcement on the Reservation. The Tulalip Police Department grew to a full service police department with 47 officers and staff. The department is currently headed by a police chief with 27 years of experience. The Tribal police department responds to all police calls on the Reservation, from both the Indian and non-Indian community. Incidents range from simple misdemeanors to major crimes such as murder and rape. In 2006, the Tulalip Police Department responded to 13,493 distress calls.

Last year, the State of Washington passed legislation which strengthened the agreement by authorizing statewide cross-commissioning of Tribal officers, providing Tribal officers meeting specific qualifications with Washington State peace officer arrest authority. Currently, 20 Tulalip officers, all with qualifications that meet or exceed that required of state officers, are cross commissioned as both Tribal and state officers. In addition, two Tulalip police officers hold federal law enforcement commissions. This cross-commissioning provides for seamless law enforcement arrest authority over crimes committed by all persons on the Tulalip Reservation.

Assumption of Primary Tribal Law Enforcement Coincides with Dramatic Improvements in the Reservation Economy

During the same period Tulalip assumed primary law enforcement authority, tribal economic development increased exponentially. It was during this period that the Tribes incorporated Quil Ceda Village to promote Reservation based business development, including a casino, retail outlet mall, and most recently, a brand new 400 room hotel. The success of Quil Ceda village has created thousands of new jobs, brought in millions of new visitors to the Reservation and much needed revenues to the Tribal government.

It was these initial gains in Reservation economic development that provided funds to establish a police force and further develop the Tribal court system. Tribal leaders immediately recognized the important relationship between continuing successful economic development and a strong, quality justice system. The Tulalip Tribes recognized that to continue to be successful with growing the Reservation economy, the Tribes would need to invest in a first rate justice system. The type of crime that was rampant on the Reservation as recent as 10 years ago would need to improve if the Tribe was going to be successful in attracting visitors to its economic enterprises on the Reservation and lifting its membership out of poverty.

Although the Tribes' new gaming revenues were in great demand to fund unmet housing, health care and education needs, the Tribe knew it could not neglect its justice system. The Tulalip Tribes have gradually increased its law enforcement and tribal justice system budget to more than five million dollars annually. These increases have come almost entirely from Tribal sources, with the Federal Government's share of the total budget declining.

This Tribal investment in criminal justice is starting to pay off. Tulalip criminal statistics demonstrate improvements in law enforcement and the justice system are starting to lower crime rates:

TULALIP CRIMINAL STATISTICS 2003–2007 *

Year	2003	2004	2005	2006	2007
Criminal filings	1172	679	563	493	435

*The 2007 figure is through the 3rd quarter.

The criminal statistics show a steady decline in crime from 2003 thru 2007. In 2007, the number of infractions has almost doubled, from 140 in 2006 to 260 in 2007. Thus, excluding traffic, criminal cases declined about 12 percent.

The Tulalip Tribal Court

The Tulalip Tribes operates its court through a contract with the Northwest Intertribal Court System. The Tribal Court currently employs two full time Judges, utilizes multiple pro tem judges, and is staffed by a Court clerk supervising four court support staff. The Tulalip Court judges have distinguished backgrounds with decades of experience as jurists and as licensed attorneys practicing in tribal, state and federal courts.

The Court operates under criminal and civil rules adopted by the Tribes governing body. Criminal laws are enforced under a comprehensive criminal code, and the Tribes regulates Reservation activities under environmental, fish & wildlife, land use, gaming and other regulatory codes. The Tribes also has enacted child dependency, domestic relations and employment codes that generate additional caseload for the Tribal Court. The Tribal Court adjudicates a wide variety of civil matters, from child dependency cases and domestic relation cases to complex civil torts between private litigants, involving both Indian and non-Indian parties. Attorneys practicing before the Tulalip Tribal Court must pass a Tribal Bar exam and be licensed to practice in the Court.

The Northwest Intertribal Court System: The Tulalip Tribes operates its court through The Northwest Intertribal Court System (NICS). NICS is a consortium of seven western Washington federally recognized tribes and is the oldest continually existing intertribal court system in the country. NICS serves as a cost-effective way for tribes to deliver high quality court services. Last year alone, seven NICS tribal member courts heard over 2,400 civil and criminal cases, including appeals. To meet the needs of member tribes, NICS maintains a roster of judges, including lawyers in private practice, law professors, and tribal court judges from non-NICS member Indian tribes. Appellate opinions issued by NICS administered courts are published in a NICS reporter.

As the Tulalip government grew, NICS began to play a much larger role in the Tulalip community and government. Today NICS administers the Tulalip Tribal Courts, the Appellate Court, the Tulalip Prosecutor's Office and some probation services under a contract and budget supplied by the Tulalip Tribes. Tulalip appoints one member of the NICS Board of Directors and is the largest jurisdiction within the NICS system.

One of the benefits Tulalip realizes in operating its court through this contract is that NICS provides the Tribal Court with structural separation from the Tribes elected political branch of government. Although judicial independence does not require an arrangement of this type, the Tulalip Tribes long time participation with NICS has worked well in developing a quality court system. The Tulalip Tribes prides itself on maintaining an independent judiciary providing for the impartial administration of justice on the Reservation.

Tulalip Public Defender: In expanding its criminal justice system, the Tulalip Tribes quickly realized that many defendants could not afford criminal defense attorneys. The Tribal government made a decision that, although costly, it would provide defense counsel to Tribal members meeting low income thresholds. In order to meet this need, the Tulalip Tribes developed an institutional relationship with the University of Washington Law School to develop the Tribal Law Criminal Defense Clinic. Through the Clinic, the Tribes provides all indigent defendants with representation through clinic lawyers, and law students working under lawyer supervision. In addition, the Tulalip Tribes also provides attorneys to indigent parents in child dependency proceedings.

Tulalip Appellate Court: The Tulalip law and order code provides for a right of appellate review for all criminal and civil cases. The Tulalip appellate judges, under contract with NICS, are paid by the Tulalip Tribes for their services on a case by case basis. Currently, there are seven appellate justices—they include distinguished law professors, lawyers and jurists, all with long experience in federal Indian law and tribal government. Decisions of the Tulalip Court of Appeals are published in the Indian Law Reporter and the NICS Reporter and are available to all litigants.

Tulalip Corrections: With the expansion of the police department and the court system, Tulalip found it essential to address jail space needs. In 1994, the Tribes signed an Interlocal Agreement for Jail Services with Snohomish County which provided for the use of the County jail for the incarceration of Tulalip prisoners. The Tribes are currently exploring other options, including an intertribal facility to house tribal prisoners. Providing for an intertribal corrections facility would allow for more innovation in corrections programs, and would be more cost effective. As always, limited funding to operate a new facility is a major obstacle to meeting this need. Tulalip is supportive of provisions in the proposed Tribal Law and Order Act that will provide for greater support for construction and operation of detention facilities in Indian Country

Healing-to-Wellness (Drug) Court: An integral part of the Tribes justice program involves rehabilitation programs designed to reduce recidivism. The Tribal government is uniquely suited to designing programs that work best in the Tribal community. These programs, however, again require new sources of funding, and the Tulalip Tribes strongly support re-authorization of federal programs which contribute to the funding of these valuable programs.

In response to the growing problems of drug-related crimes, the Tribes established a Wellness Court, also known as a drug court. Typically, defendants must be charged with possessing or purchasing drugs; must not have a history of violent crime, or drug-trafficking arrest, or more than two previous non-drug felony convictions. Program participants must have regular drug tests and return to court regularly, often weekly, for a review of their progress. Participants also receive counseling, educational courses, and vocational services. The purpose of the Wellness Court is to approach crimes committed by the offender under the influence of drugs or alcohol in a holistic manner that supports and encourages traditional practices rather than punitively while ensuring that the offender is still held accountable. The Court's Alternative Sentencing approach was awarded the Harvard Honoring Nations Award presented by the Harvard Project on American Indian Economic Development in 2006 for demonstrating its excellence and innovation in addressing the combined problems of substance abuse and crime in the criminal justice system.

Federal Role in Indian Country Justice

Despite the recent gains by Tulalip and other tribes in fighting crime, Indian tribes cannot solve the public safety problem on their own. Due to jurisdictional constraints, and lack of traditional funding sources, tribes must rely on the Federal Government to play an important role in addressing Reservation crime problems. Tribes rely on the Federal Government for prosecution of most, but not all, major crimes pursuant to 18 USC ◊1153. Tribes must also rely on federal and/or state prosecution of non-Indian criminal offenders on the Reservation.

Indian Country continues to face a crisis of violent crime. A Bureau of Justice Statistics Report covering the period 1992–2002 found that American Indians are victims of violent crime at a rate more than *twice* that of the national population. *"American Indians and Crime." (U.S. DOJ Publication No. NCJ 203097).Washington, DC: U.S. Department of Justice (2004).* According the DOJ–BJS report, American Indians experienced an estimated 1 violent crime for every 10 residents over age 12. The figures are even worse for Native American women, who are the victims of rape or sexual assault at a rate more than 2.5 times that of American women in general. The DOJ–BJS study concluded that 34.1 percent of American Indian and Alaska Native women—more than one in three—will be raped in their lifetime. This level of violence against native women is tragic and unacceptable. The majority of perpetrators of violent crime against Indians were non-Indian. Because tribes have been stripped of jurisdiction over non-Indian offenders, tribes need the assistance of federal law enforcement. The Department of Justice must work cooperatively with Tribal law enforcement and dramatically step up its efforts to combat this crisis.

Tulalip has shared in this experience of unacceptable levels of violent crime, and has worked hard to forge a relationship with federal law enforcement. In recent years, Tulalip has built a good relationship with the U.S. Attorneys Office on major crimes enforcement on the Tulalip Reservation. However, as president of the Northwest Tribal Court Judges Association, I know many Indian tribes do not share the same positive relationship with federal law enforcement. Tribes in more remote locations have experienced problems getting federal support and assistance in investigating and prosecuting crimes. These problems have worsened in recent years with the reallocation of federal law enforcement resources to foreign terrorism matters.

We welcome and support the provisions of the proposed Tribal Law and Order Act which call for reporting by the FBI and Justice Department regarding Indian Country criminal investigations and prosecution declinations. We would urge the Committee, however to strengthen the bill by *requiring* the timely transmission of evidence and case files to tribal justice officials when a federal investigation is closed or case declined.

Another important responsibility of the Federal Government in Indian Country is the provision of support for courts and justice systems through funding, technical assistance and training. It is in these areas that the Federal Government is falling woefully short of fulfilling its trust responsibility. Where tribal justice systems have been developed, the systems have been funded by the tribes themselves. These limited tribal funds are in great demands for other essential government functions such as health care and education, areas which are equally vital to improving crime rates in Indian Country. The current 2008 budget for the Tulalip Tribal Court is over one million dollars (including prosecutorial services), of which $30,000 is funded by the Federal Government (3 percent). For the Tulalip police department, the annual budget is now 4.3 million, with only $212,000 coming from federal funds (5 percent).

Because tribal justice systems are the most effective means of addressing the public safety problems on Reservations, federal funds used to support tribal justice systems are funds well spent. Tulalip has demonstrated that if sufficient resources are

dedicated to tribal justice systems, real gains can be made in addressing the serious public safety problems in Indian Country. We urge the Committee to authorize increased federal funding to what works best—building quality tribal justice systems.

Compounding the problem of lack of federal funding is the constraints on tribal governments raising revenues for public safety in the same manner as state and local governments—through taxation. Washington State funds public safety through taxes on retail sales, real property and business activity. On the Tulalip Reservation, (which contains many non-Indian residents and businesses), the Tribe is effectively precluded by recent Supreme Court decisions from imposing these same taxes to fund this basic government service.

The Tulalip Tribes request that this Committee strengthen the proposed legislation by directing that the funding shortfalls for tribal criminal justice systems be examined and addressed. In addition, legislation should provide additional funding avenues for Tribal justice systems by removing impediments to tribal taxation of all persons and activities on Indian Reservations that reap the benefits of effective tribal justice systems.

Tribal Law and Order Act—Proposed Provisions for Expanding Criminal Sentencing Authority of Tribal Courts

The Tulalip Tribes strongly supports the proposed legislation's extension of tribal court sentencing authority from one to three years. At Tulalip, the Tribal Court is the primary forum for criminal prosecutions on the Reservation involving Indian offenders. The effective administration of justice benefits the entire Reservation community, both Indian and non-Indian. The Tribe's criminal justice system is often the first and last line of defense in protecting the community from violent offenders. Many serious crimes, including those involving dangerous offenders, end up falling to the tribal justice system for prosecution.

Since September 11, 2001, federal resources have been reallocated. According to data released by this Committee, federal criminal investigations on Indian lands in Washington State declined by 55 percent since 2001. This has left a gap not only in the prosecution of major crimes, but the serious crimes that fall into the gap between misdemeanors and Major Crimes Act felonies. The reality on the ground is that Tribal Courts are often responsible for prosecuting felony crimes.

In sentencing serious criminal offenders, I have long been concerned that the one year sentencing limitation was placing the safety of the tribal community at risk. Although the need to impose longer sentences is not a common occurrence in my courtroom, in those situations where the court is faced with prosecuting serious violent crimes, it is important for the Tribal Court to have appropriate sentencing authority. During my tenure as a judge, I have presided over cases involving charges of rape, child sexual assault, drug trafficking, aggravated assault and serious domestic violence. Increasing sentencing to three years will provide Tribal Courts with the authority necessary to protect the Reservation community.

I do not believe that Tribal Courts will need to use this authority often. At Tulalip, our focus has been on alternatives to incarceration aimed at promoting behavioral changes, healing and preventing recidivism. However, there are times when the Tribal Court is faced with violent offenders in which longer incarceration periods are necessary and vitally important.

Competency of Washington Tribal Courts and Response to the Concerns of the Departments of Justice and Interior

At the hearing last month on the draft Tribal Law and Order Act, representatives from the Departments of Justice and Interior expressed concerns to this Committee regarding the extension of tribal court sentencing authority. DOJ and BIA expressed concerns as to whether tribal courts would adequately protect the rights of criminal defendants. DOI expressed similar concerns, and also raised issues regarding increased costs of longer detentions and possibly an increase in habeas petitions.

With regard to the rights of the accused, I can personally attest that all of the tribal courts that I have served as a judge, or practiced in as an advocate, have a strong commitment to protecting the rights of criminal defendant that is equal to that of the state and federal courts. Although tribal courts may differ in size and scope (some tribal governments rely on state rather than tribal criminal law enforcement), an ITJA survey published in 2000 reported that the vast majority of participating tribes had formal justice systems similar to state or federal court systems, and virtually all provided for appellate review. Washington State courts have adopted court rules which provide full faith and credit for Tribal Court judgments. *Washington State Civil Rule 82.5*

All NICS member tribes have developed tribal codes. The NICS member tribal codes are publicly available from court clerks and law libraries. Many are also avail-

able on-line. Most of these tribes have comprehensive civil court procedural rules like those at Tulalip. In addition, the other large tribes in Washington State including Colville, Lummi, Puyallup and Swinomish operate their own sophisticated court systems complete with indigent public defense services and all utilize comprehensive Tribal codes and court rules. In one small NICS tribe, the tribal court held last month that the tribes' constitution required the appointment of public defenders for indigent defendants.

Similarly, most Washington tribes have developed a court of appeals. NICS provides appellate services to all of its member tribes as well as to non-member tribes in Washington, Oregon and California. The Colville Confederated Tribes has a constitutionally established Court of Appeals and appoints nine justices to serve six year terms. All the opinions are available and are maintained by the Court.

Tribal courts have now long been operating under the provisions of the Indian Civil Rights Act, which provides the same fundamental protections for the rights of the accused as the Bill of Rights provides under the U.S. Constitution. These substantive and procedural protections are embodied in the tribal criminal codes which incorporate the protection of defendant rights, including: the right to speedy trial, the right to a jury trial, the right to subpoena witnesses and evidence, the right to cross examination, the imposition of probable cause warrant requirements, and prohibitions on excessive bail, double jeopardy and compulsory self-incrimination. The Tulalip Tribes, as do most tribes in the northwest, also provides defendants with the right to seek habeas corpus relief in their Appellate Court.

It is difficult to understand the objections of federal officials in increasing tribal court sentencing authority from one year to three years. The reality is that many Indian tribes have been prosecuting the great majority of criminal offenses on their reservations, including serious crimes, for many years now. Sentencing an individual to one year in jail is a serious deprivation of liberty, and as a Tribal Court Judge, I can tell you the court takes this responsibility very seriously. After years of adjudicating criminal cases, we have a demonstrated track record. In my years presiding as a judge in the Tulalip and Lummi Nation courts, and other Northwest Indian Tribal Courts, I am unaware of any habeas petitions being granted to Indians incarcerated as a result of Tribal prosecutions. Furthermore, the ICRA provides habeas relief in federal court which insures due process protections for criminal defendants. These are the same claims made by federal officials when Tulalip requested retrocession and the concerns have proven unfounded then and remain unfounded now.

Although the commitment to protecting defendant rights is a shared value throughout Indian country, the ability to provide sufficient funding to justice systems varies greatly from tribe to tribe. I agree that the provision of criminal defense counsel to indigent defendants is an important aspect of prosecuting more serious crimes involving the potential for penalties that include extended incarceration. However, many Indian tribes have extremely limited governmental budgets and sufficient tribal funds are not always available for many essential government functions. While we do not object to the requirement to provide defense counsel as a condition to exercising longer sentencing authority, it is imperative for the Federal Government to provide a mechanism for funding this responsibility. If the serious public safety issues on many reservations are going to be addressed, the Federal Government must fulfill its trust obligation by providing funding, or funding mechanisms to provide for public defenders in Indian country.

Finally, I feel it is important to respond to Department of Justice objections to provisions in the proposed legislation which would require additional Justice Department emphasis and accountability in Indian Country. Apparently, current Justice Department officials believe that the status quo is sufficient and that there is no need for improvements in federal justice efforts in Indian Country.

The Department of Justice's own statistics demonstrate better than anything else the need for Congress to act to compel the Justice Department to re-prioritize its responsibilities to Indian Country. Despite statistic showing a crisis in violent crime rates, Justice Officials cited the filing in 2006 of **606 total cases in all of Indian Country** as evidence that it was effectively fulfilling its criminal justice responsibilities. This number is unacceptable in the face of the staggering statistics of violent crime in Indian Country. 606 total criminal cases filed for all of Indian Country—covering over 562 federally recognized tribes with a population of approximately 1.6 million amounts to little more than one prosecution per tribe per year. Contrast the Justice Department's 606 criminal filings with the 493 criminal cases filed in the Tulalip Tribal Court alone in 2006—a single reservation with a population under 4,000; or the 9,973 criminal cases filed in Seattle-King County Superior Court in 2006 (just south of the Tulalip with a population of 1.8 million).

The Need for Greater Federal Support and Funding for Tribal Courts

The experience at Tulalip has demonstrated that, given adequate resources, tribal courts provide the most effective means of addressing the problem of crime in reservation communities. Tulalip has seen first hand the dramatic change in serious criminal behavior from a crisis situation a couple of decades ago to one in which crime are being steadily reduced. The difference has been the result of a comprehensive tribal police presence on the Reservation accompanied by an effective Tribal court justice system.

Tulalip has been able to step forward and make a difference due to recent gains in economic development brought about by its gaming and business enterprises. However, these business revenues are subject to economic cycles and other factors outside the Tulalip Tribes control. A business downturn could easily put the Tribes public safety gains at risk. Like all Tribal governments, Tulalips' public safety infrastructure needs a reliable source of government revenue.

The Tulalip Tribes urges this committee to enhance the Tribal Law and Order Act by not only authorizing an increase in sentencing authority, but by authorizing an increase in tribal justice system funding. No other governmental entity has a greater stake in reducing reservation crime than the tribal governments themselves. What tribal courts need to be successful is sufficient level of reliable support—in terms of training, technical assistance, and funding. The recent funding authorizations for Tribal justice and law enforcement included in S. 2731 are a step in the right direction. I urge the Committee to press for passage of the tribal justice funding included in S. 2731 and continue to authorize greater investments in tribal courts as the most effective use of federal resources to combat the problem of crime in Indian Country.

An increase in direct Tribal funding should be complemented by legislation that empowers tribal government to raise revenues themselves to meet their public safety needs. Recent Supreme Court cases which limit taxation powers of tribal governments create serious obstacles for tribes struggling to fund public safety needs. Taxation provides a steady and reliable source of revenue that is now effectively foreclosed to tribal governments due to land status and de facto limits on taxation of persons and businesses operating in Indian Country.

I thank the Committee for this opportunity to provide testimony on these important issues of tribal criminal justice and I would be glad to provide additional information and assistance in support of the Committee's efforts to strengthen tribal justice systems throughout Indian Country.

ADDITIONAL COMMENTS OF THE TULALIP TRIBES ON THE PROPOSED TRIBAL LAW AND ORDER ACT OF 2008

FTCA Coverage for Tribal Law Enforcement.—This is an issue that has been in dispute in recent years, and several courts have found the FTCA did not cover tribal police for many law enforcement related torts, even though the tribal police departments at issue were operating under P.L. 638 contracts. 28 USC 2680 (h) provides that the FTCA covers assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution of investigative or law enforcement officers *of the United States.*

When a Federal Tort Claim is brought against a tribal police officer for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, the United States currently points to 2680 (h) and says that tribal officers are not covered if they do not carry a commission from the BIA as a law enforcement officer under 25 CFR 12.21. This interpretation has left Tribal police department operating under 638 contracts without FTCA coverage for their tribal law enforcement officers.

Insurance coverage and costs are major issues for tribal police departments. Insurance coverage is also important in securing cross-deputization agreements with surrounding jurisdictions. The Tribal Law and Order Act presents an opportunity to clear up this problem by authorizing FTCA coverage for Tribal police officers operating under 638 contracts. We propose the following amendment be added to the bill:

Amending Indian Self-Determination and Education Assistance Act of Nov. 5, 1990 (codified at 25 USC 450f notes) by adding the following language:

> Provided further, that any tribal law enforcement officer deemed to be covered under the Federal Tort Claims Act shall not be excluded from coverage for assault, battery, false imprisonment, false arrest, abuse of process, malicious prosecution because of the lack of commission or other appointment by the Bureau of Indian Affairs under 25 CFR 12.21 or other federal agency.

Section 2. Purpose. We suggest that a reference be added that Tribal law enforcement is frequently responsible for responding to distress calls for both Indian and non-Indian residents of their reservations.

Title I, Sec. 102. We support the provisions directing federal law enforcement and the U.S. Attorney to report to tribal justice officials with regard to termination of criminal investigations or declination of cases. We request that the language be amended to ensure that if a tribal justice officials request case files and evidence after a federal declination, that the transmission of such files be mandatory rather than permissive.

Title II, Sec. 202. We support assistance and funding for inter-governmental cooperative law enforcement agreements between tribes and other jurisdictions. We request that the authority for support and funding be revised to include support for implementation and development of *existing* joint programs, as well as for new programs. Tulalip has an existing program, but continuing assistance and funding is necessary to ensure the continued viability of its Tribal-County cooperative Law enforcement agreement program.

Title III, Sec. 304. As explained above, the Tulalip Tribes supports the extension of Tribal Court Sentencing authority. We request that the legislation additionally include authorization for funding tribal public defender programs.

Title IV, Sec. 401, 402, 403. The Tulalip Tribes support re-authorization of provisions of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1896, the Indian Tribal Justice Act, and the Tribes COPS program(Omnibus Crime Control and Safe Streets Act).

Title IV, Sec. 404. We urge the Committee to authorize additional funding for construction and operation of tribal and inter-tribal regional detention facilities.

Title IV, Sec. 406. Tribal juvenile justice is a huge unmet need that is unaddressed by this legislation. The Tulalip Tribes urges the Committee to add authorizations for federal support and funding of tribal juvenile justice systems. If congress is serious about reducing the serious public safety problems present on many reservations, it must invest in tribal juvenile justice programs.

Title V, Sec. 502. The Tulalip Tribes supports improvement in Tribal data collection systems, which is a big need in Tribal justice systems today. We request, however, that the legislation add a requirement for the Office of Justice Services to consult with Tribes in advance as to the development of grant program requirements. In the past, certain grant program requirements, such as mandating the sharing of fingerprints with outside agencies, caused many tribes to forgo grant opportunities.

The CHAIRMAN. Judge Pouley, thank you very much. Thank you for being with us.

Let me mention that the Honorable John St. Clair, Chief Justice of the Eastern Shoshone and Northern Arapaho Tribal Court was scheduled to be a witness today. He is apparently in Cincinnati, Ohio, courtesy of the airlines. As you might know, very substantial storm systems came through and I think interrupted flight plans, so he is not able to be with us. But we appreciate his attempt to get here and we will include his statement as a part of the permanent record as well.

Finally, we will hear from Ms. Dorma Sahneyah, who is the Tribal Prosecutor at the Hopi Tribe in Kykotsmovi, Arizona. You are the Tribal Prosecutor, and we appreciate your being here today. You may proceed.

STATEMENT OF DORMA L. SAHNEYAH, CHIEF PROSECUTOR, HOPI TRIBE

Ms. SAHNEYAH. Thank you.

Thank you, Chairman Dorgan and members of the Committee for taking the time to seriously consider the needs of tribal justice systems in Indian Country.

My name is Dorma Sahneyah. I am an enrolled member of the Hopi Tribe in Arizona. I have a law degree from Arizona State Uni-

versity School of Law. I have served as Hopi Chief Prosecutor for the past 12 years.

I represent a work group consisting of tribal government leaders, chief justices, judges, lawyers and behavioral health experts from the Hopi Tribe, Navajo Nation, Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation, and BIA Tribal Courts Program. Navajo Nation Chief Justice Herb Yazzie, Hopi Chairman Benjamin Nuvamsa, and Salt River President Diane Enos are the work group leaders.

The work group submitted two memoranda to the Committee on April 21 and July 10. The first addresses what Indian justice is and what it needs. The second addresses interagency provisions to the Indian Alcohol and Substance Abuse Prevention and Treatment Act. Both memoranda will be included as addenda to my written statement.

The core responsibilities of Indian justice are broader and more community-oriented than American justice. In addition to determining guilt and punishment, tribal courts have the responsibility for the overall well being of the entire community. As a result, Indian justice demands that offenders take personal responsibility.

Indian justice is not soft on crime and does not exclude detention and penalty fines. The responsibility of bringing restoration to our communities is a vital duty. In all tribes, restoration generally requires that the offender be given real opportunity to make right the wrong, and to become a productive member of the community.

Community participation should be a given. Salt River takes community inclusion seriously so as to have located their detention center in the heart of their community, both for community access and to maintain the sense of community membership in inmates.

It is ironic that restoration under the American justice system is becoming increasingly important as an alternative to incarceration, while tribes, eager for legitimacy, have for years been taught to unlearn these core duties of Indian justice or address them outside of the tribal court system.

Tribal courts generally are under-funded. Funding that is allocated for restoration programs is often given in piecemeal fashion through limited grants. Problem-solving courts which should be the pillar of American Indian justice systems are considered alternative programming. Rehabilitative sentencing tools have been in short supply. We need treatment resources and facilities for alcohol and substance abuse, behavioral health counseling, meaningful interagency collaboration, and the ability to control an offender's time in detention and rehabilitation, with the goal of full acceptance of personal responsibility for criminal behavior.

Our court systems are the principal players in the process of achieving restoration. Yet, our judges are constrained by limits on sentencing authority and fear of overstepping roles defined for them according to modern court systems. These constraints stem largely from more than a century of being told what is right and what will best work in Indian Country by others who live lives far removed from Indian reservations and culture.

Restoration responsibilities cannot be incorporated into core tribal court functions without adequate resources and personnel, facilities, and funding. We recommend that tribal interagency coordina-

tion and collaboration in Indian alcohol and substance abuse treatment be given full focus and encouragement. The approach so far has been to compartmentalize responsibilities and services, discourage resource and information sharing, yet require that services be somehow jointly applied. The Hopi Healing to Wellness Court lacks a Federal agency collaboration partly for this reason.

We recommend first that a consistent framework be established for interagency coordination and collaboration, that justice and health consolidate their playing field in Indian Country, and that programs be fully funded.

I understand that some recommendations of the work group have already been incorporated into the bill and that funding remains an issue. I would like to emphasize that our courts must be legitimate for our people. For many years, tribal court practitioners have strived to make tribal courts legitimate in the eyes of non-natives. Seemingly, no matter how dedicated tribal courts are to their function, they are doomed to being perceived as substandard, even when compared to local justice courts in some States like New York, where part-time plumbers and retirees who lack any understanding of law, have authority to sentence wrongdoers up to two years.

Our judges receive compulsory ongoing training. Training is provided by tribal, State and Federal programs at the National Judicial College at the University of Nevada, which is affiliated with the American Bar Association. All Hopi Justices must be law school graduates. All Navajo Nation judges must be members of the Navajo Nation Bar.

In our tribal courts, witnesses are sworn. Records of court proceedings are maintained and accessible to the public. Written, reasoned judgments must be produced for appeal purposes. And avenues exist for appeal in our appellate courts. Individuals in our respective courts are afforded all the basic rights guaranteed under the Indian Civil Rights Act. We give great weight to due process of law.

Additionally, our courts strive to meet greater and more encompassing rights based on our own common values of fundamental fairness. I expect that persons with little or no knowledge of how tribal courts operate would be surprised at how similar tribal court procedures are to those of State and Federal courts.

We acknowledge that much work lies ahead and we stand ready to continue to work closely with the Committee and staff.

On behalf of the work group, thank you for the opportunity to testify today on these critically important issues. Thank you.

[The prepared statement of Ms. Sahneyah follows:]

Inter-Tribal Workgroup Participants:
The Navajo Nation
Hopi Tribe
Ft. McDowell Yavapai Nation
Salt River Pima Maricopa Indian Community
Bureau of Indian Affairs, Office of Justice Services

STATEMENT OF

DORMA L. SAHNEYAH
HOPI TRIBAL CHIEF PROSECUTOR
REPRESENTING
AN INTERTRIBAL WORKGROUP

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

CONCERNING
THE TRIBAL LAW AND ORDER ACT

JULY 24, 2008

Thank you Chairman Dorgan and members of the committee for taking the time to seriously consider the needs of tribal justice systems in Indian Country.

My name is Dorma Sahneyah. I am an enrolled member of the Hopi Tribe. I have a law degree from Arizona State University School of Law and have served as Hopi Chief Prosecutor for the past 12 years.

I represent a workgroup consisting of tribal government leaders, chief justices and judges, lawyers, and behavioral health experts from the Hopi Tribe, Navajo Nation, Salt River

Pima-Maricopa Indian Community, Ft. McDowell Yavapai Nation, and the BIA Tribal Courts Program. Navajo Nation Chief Justice Herb Yazzie, Hopi Chairman Benjamin Nuvamsa and Salt River President Diane Enos are the workgroup leaders.

The workgroup submitted two memoranda to the Committee on April 21 and July 10. The first addresses what Indian justice is, and what it needs. The second addresses interagency provisions in the Indian Alcohol and Substance Abuse Prevention and Treatment Act. Both memoranda will be included as addenda to my written statement.

The core responsibilities of Indian justice are broader and more community-oriented than American justice. In addition to determining guilt and punishment, tribal courts have the responsibility for the overall well-being of the entire community. As a result, Indian justice demands that offenders take personal responsibility. Indian justice is not soft on crime and does not exclude detention and penalty fines. The responsibility of bringing restoration to our communities is a vital duty.

In all tribes, restoration generally requires that the offender be given real opportunity to make right the wrong and to become a productive member of the community. Community participation should be a given. Salt River takes community inclusion seriously so as to have located their detention center in the heart of their community, both for community access and to maintain the sense of community membership in inmates.

It is ironic that restoration under the American justice system is becoming increasingly important as an alternative to incarceration while tribes, eager for legitimacy, have for years been taught to unlearn these core duties of Indian justice or address them outside of the tribal court system.

Tribal courts typically are underfunded. Funding that is allocated for restoration programs is often given in piecemeal fashion through limited grants. Problem-solving courts which should be the pillar of Indian justice systems are considered alternative programming. Rehabilitative sentencing tools have been in short supply. We need treatment resources and facilities for alcohol and substance abuse, behavioral health counseling, meaningful

interagency collaboration, and the ability to control an offender's time in detention and rehabilitation facilities with the goal of full acceptance of personal responsibility for criminal behavior.

Our court systems are the principal players in the process of achieving restoration. Yet, our judges are constrained by limits on sentencing authority and fear of overstepping roles defined for them according to modern court systems. These constraints stem largely from more than a century of being told what is right and what will best work in Indian Country by others, who live lives far removed from Indian reservations and culture.

Restoration responsibilities cannot be incorporated into core tribal court functions without adequate resources in personnel, facilities, and funding.

We recommend that federal interagency coordination and collaboration in Indian alcohol and substance abuse presentation and treatment be given full focus and encouragement. The approach so far has been to compartmentalize responsibilities and services, discourage resource and information sharing, yet require that services be somehow jointly applied. The Hopi Healing to Wellness Court lacks federal agency collaboration partly for this reason. We recommend first that a consistent framework be established for interagency coordination and collaboration, that justice and health consolidate their playing field in Indian Country, and that programs be fully funded. I understand that some recommendations of the workgroup have already been incorporated into the bill and that funding remains an issue.

I would like to emphasize that our courts must be legitimate to *our* people. For many years, tribal court practitioners have strived to make tribal courts legitimate in the eyes of non-Natives. Seemingly, no matter how dedicated tribal courts are to their function, they are doomed to being perceived as substandard even when compared to local justice courts in some states like New York where part-time plumbers and retirees who lack any understanding of law have authority to sentence wrongdoers up to 2 years.

Our judges receive compulsory on-going trainings. Training is provided by tribal, state and federal programs and the National Judicial College at the University of Nevada, which is affiliated with the American Bar Association. All Hopi justices must be law school graduates. All Navajo Nation judges must be members of the Navajo Nation Bar. In our tribal courts, witnesses are sworn, records of court proceedings are maintained and accessible to the public, written, reasoned judgments must be produced for appeal purposes, and avenues exist for appeal in our appellate courts. Individuals in our respective courts are afforded all the basic rights guaranteed under the Indian Civil Rights Act.

We give great weight to due process of law. Additionally, our courts strive to meet greater and more encompassing rights based on our own common values of fundamental fairness.

I expect that persons with little or no knowledge of how tribal courts operate would be surprised at how similar tribal court procedures are to those of state and federal courts.

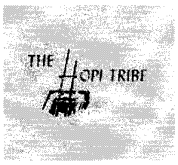
We acknowledge that much work lies ahead, and we stand ready to continue to work closely with the Committee and staff.

On behalf of the workgroup, thank you for the opportunity to testify today on these critically important issues.

Addenda:

1. "Accountability and Returning the Offender to the Community: Core Responsibilities of Indian Justice," April 21 Memorandum to the Senate Committee on Indian Affairs on the Proposed Indian Country Crime Bill, submitted by the Navajo Nation, The Hopi Tribe, and Fort McDowell Yavapai Nation.

2. "Workgroup Memorandum on the June 12 Discussion Draft of Indian Law and Order Bill, with Special Focus on the Indian Alcohol and Substance Abuse Prevention and Treatment Act (IASAPTA), Interagency Coordination Provisions," dated July 10, 2008, submitted by the Navajo Nation, the Hopi Tribe, Salt River Pima Maricopa Indian Community, and the BIA Office of Justice Services.



Accountability and Returning the Offender to the Community: Core Responsibilities of Indian Justice

April 21, 2008

Memorandum to the Senate Committee on Indian Affairs on the proposed Indian Country Crime Bill

Submitted by an Inter-Tribal Workgroup comprised of the following Tribes:

The Navajo Nation
The Hopi Tribe
Fort McDowell Yavapai Nation

RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE

21st NAVAJO NATION COUNCIL - Second Year, 2008

AN ACTION

RELATING TO JUDICIARY, PUBLIC SAFETY, AND INTERGOVERNMENTAL RELATIONS; APPROVING THE SUBMISSION OF A MEMORANDUM TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON THE PROPOSED INDIAN COUNTRY CRIME BILL FROM AN INTERTRIBAL WORKGROUP COMPRISED OF THE NAVAJO NATION, THE HOPI TRIBE AND THE FORT MCDOWELL YAVAPAI NATION

BE IT ENACTED:

1. The Navajo Nation hereby approves the submission of a Memorandum to the Senate Committee on Indian Affairs on the Proposed Indian Country Crime Bill entitled, "Accountability and Returning the Offender to the Community; Core Responsibilities of Indian Justice", from an intertribal workgroup comprised of the Navajo Nation, the Hopi Tribe and the Fort McDowell Yavapai Nation, as set forth in the attached Exhibit A.

2. The Navajo Nation hereby authorizes the President, the Speaker and the Chief Justice, or their respective designees, to submit the Memorandum attached as Exhibit A and advocate on behalf of the Navajo Nation consistent with the Memorandum approved hereby.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Intergovernmental Relations Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 7 in favor and 0 opposed, this 19th day of May, 2008.

LoRenzo Bates, Chairperson Pro Tem
Intergovernmental Relations Committee

Motion: Ervin M. Keeswood, Sr.
Second: Kee Allen Begay

JUDICIARY COMMITTEE

THENCE

PUBLIC SAFETY COMMITTEE

THENCE

INTERGOVERNMENTAL RELATIONS COMMITTEE

PROPOSED STANDING COMMITTEE RESOLUTION

21st NAVAJO NATION COUNCIL -- Second Year, 2008

INTRODUCED BY

(Kee Allen Begay)

(Sponsor)

TRACKING NO. 0225-08

AN ACTION

RELATING TO JUDICIARY, PUBLIC SAFETY, AND INTERGOVERNMENTAL RELATIONS; APPROVING THE SUBMISSION OF A MEMORANDUM TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON THE PROPOSED INDIAN COUNTRY CRIME BILL FROM AN INTERTRIBAL WORKGROUP COMPRISED OF THE NAVAJO NATION, THE HOPI TRIBE AND THE FORT MCDOWELL YAVAPAI NATION

BE IT ENACTED:

1. The Navajo Nation hereby approves the submission of a Memorandum to the Senate Committee on Indian Affairs on the Proposed Indian Country Crime Bill entitled, "Accountability and Returning the Offender to the Community: Core Responsibilities of Indian Justice," from an intertribal workgroup comprised of the Navajo Nation, the Hopi Tribe and the Fort McDowell Yavapai Nation, as set forth in the attached Exhibit A.

2. The Navajo Nation hereby authorizes the President, the Speaker, and the Chief Justice, or their respective designees, to submit the Memorandum attached as Exhibit A and advocate on behalf of the Navajo Nation consistent with the Memorandum approved hereby.

JUDICIARY COMMITTEE REPORT

21th NAVAJO NATION COUNCIL – SECOND YEAR 2008

INTRODUCED BY
Kee Allen Begay, Jr., Council Delegate

LEGISLATION NO. 0225-08

AN ACT

RELATING TO JUDICIARY; PUBLIC SAFETY, AND INTERGOVERNMETNAL RELATIONS; APPROVING THE SUBMSSION OF A MEMORANDUM TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON THE PROPOSED INDIAN COUNTRY CRIME BILL FROM AN INTERTRIBAL WORKGROUP COMPRISED OF THE NAVAJO NATION, THE HOPI TRIBE AND THE FORT MCDOWELL YAVAPAI NATION

The Judiciary Committee has had it under consideration and reports the same with the recommendation that it DO PASS with ONE amendment, and refers to the same to the Public Safety Committee of the Navajo Nation Council.

1. Line 11, strike the word "~~APPROVING~~" and insert the word "RECOGNIZING"; Line 19 Strike the word "~~approves~~" and insert the word "recognizes".

CERTIFICATION

I hereby certify the foregoing legislation was duly considered by the Judiciary Committee of the Navajo Nation Council at a duly called Special Meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 04 in favor and 00 opposed, this 16th day of April 2008.

Edward Y. Jim, Sr., Presiding Chairperson
Judiciary Committee
Navajo Nation Council

Motion: Leonard Tsosie
Second: Lena Manheimer

Benjamin H. Nuvamsa
Chairman

vacant

Vice-Chairman

April 21, 2008

Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

Committee members:

On behalf of The Hopi Tribe, I endorse and support the attached *Memorandum to the Senate Committee on Indian Affairs on the proposed Indian Country Crime Bill.*

I want to emphasize our investment in the work efforts of our tribal representatives in this workgroup. Our hope is that the federal government will implement the recommendations for the good of Northern Arizona tribes and all tribes.

Sincerely,

Benjamin H. Nuvamsa
Chairman/CEO
Hopi Tribe

cc: President, Navajo Nation
President, Fort McDowell Yavapai Nation

Introduction

This Memorandum is submitted by an inter-tribal workgroup formed following a listening session held by the Senate Committee on Indian Affairs on January 14, 2008 in Phoenix, Arizona. Leaders and staff from the Navajo Nation, Hopi Tribe, and Ft. McDowell Yavapai Nation are the core workgroup. The purpose of the workgroup is to address the following:

a. Assist the Senate Committee by defining the unique sense of Indian Justice that requires offender accountability and facilitation of return to the community through a holistic approach;

b. Review the Concept Paper on the Indian Crime Bill in order to make recommendations on restorative justice concerns;

c. Review the Indian Alcohol and Substance Abuse Prevention and Treatment Act and make recommendations on needed amendments upon reauthorization.

Workgroup Sessions Summary

There have been several workgroup discussion sessions attended by the leadership and staff of all branches of government of the core workgroup tribes, including the judiciary and healthcare. The workgroup focused on problems previously brought up in testimony or comments before the Senate Committee, and reached consensus on effective solutions, based on the Indian sense of justice, that are not presently included in the Indian Country Crime Bill Concept Paper.

As a result of cross-branch and cross-agency participation, the workgroup took a more systemic view point than the previous focus on more officers and more detention facilities, which is the acknowledged need of the law enforcement component.

The workgroup very quickly reached consensus that there are unique components of a fully functioning and effective Indian justice system as contrasted with the American justice system. The workgroup agreed that the term "restorative justice" in the justice context aptly describes the basis and objectives of justice in Indian societies.

"Restorative justice" as used here is distinct from the term as commonly understood and applied. Whereas the term in the American justice system has become greatly simplified and come to mean non-convictions, no jail and no fines, restorative justice in traditional Indian justice is used in the literal sense, to "restore" in conformity with justice principles. Wrongdoers, those who are harmed, and their affected communities are engaged in search of solutions that promote repair and rebuilding. Convictions, detention, and penalties in support of personal responsibility and community safety are not excluded.

Indian justice responsibilities include accountability and return of offenders to the community. These are in addition to community safety responsibilities already addressed by the Committee in its Concept Paper. These three are core elements of all traditional justice systems notwithstanding a tribe's diverse specific customs. All agencies and community members necessary to fulfill these responsibilities are part of the Indian justice system. The workgroup

recommended that the term as used in the Indian justice context be clarified to the Senate Committee.

The workgroup unanimously agreed on what tools are urgently needed in order to make the Indian justice system more effective as a whole. Integrated and coordinated strategic approaches across justice and treatment systems and multi-purpose detention-treatment facilities under joint justice and healthcare leadership may be a solution. Judges and probation and parole services should be consulted and included in comprehensive partnerships with law enforcement and healthcare. As the solutions include public safety, accountability and healthcare components, they must be addressed in both the Indian Country Crime Bill and the reauthorized Indian Alcohol and Substance Abuse Prevention and Treatment Act.

Indian Country Crime Bill Concept Paper Recommendation

The workgroup strongly recommends that the following section be included in the Concept Paper and relevant Congressional reports:

ISSUE # 6: LACK OF TOOLS FOR RESTORATIVE JUSTICE SENTENCING

Indian justice is unique in that restorative justice is not simply an option; it is a responsibility of the Indian justice system. "Justice system" includes law enforcement, judiciary, corrections, probation/parole, and healthcare departments whose services are necessary for comprehensive solutions.

Restorative justice" as used here is distinct from the term as commonly understood and applied. Whereas the term in the American justice system has become greatly simplified and come to mean non-convictions, no jail and no fines, restorative justice in traditional Indian justice is used in the literal sense, to "restore" in conformity with justice principles. Wrongdoers, those who are harmed, and their affected communities are engaged in search of solutions that promote repair and rebuilding. Convictions, detention, and penalties in support of personal responsibility and community safety are not excluded.

Indian justice responsibilities include accountability and return of offenders to the community. These are in addition to community safety responsibilities already focused on by the Committee in its Concept Paper. These three are core elements of all traditional justice systems notwithstanding a tribe's diverse specific customs. All agencies and community members necessary to fulfill these responsibilities are part of the Indian justice system.

In Navajo, there is a term, ná bináhaazláo which means providing parties with a sense of completeness or comprehensiveness. It also means fairness and doing whatever is necessary in coming to a comprehensive solution. The tribal courts are charged with ná bináhaazláo through restorative justice. In Hopi, the offender's accountability – QaHopit qa'antipu'at – and bringing the offender back into the community – QaHopit ahoy kiimmi pavnaya -- are deep-rooted justice principles.

This means there is a circle of responsibilities, beginning with law enforcement and prosecution, the judiciary being responsible for accountability and bringing the offender back into the community through sentencing, and probation and parole services ensuring that the judiciary's

conditions are fulfilled. These components integrate and coordinate with mental health, social service, behavioral health professionals and traditional counselors where necessary; given the very high rate of alcohol and substance abuse disorders implicated in Indian Country crime, integration is needed in almost all instances.

Past federal initiatives in controlling and combating alcohol and substance abuse related crime and violence have attempted to employ a comprehensive approach that has been limited in its reach. Partnerships between law enforcement and treatment agencies have been encouraged for interdiction and prevention, but not for restoration. Federally-funded drug courts that attempt restoration are generally available only for non-violent crimes and clean-record offenders. Grants for such courts are typically of very short duration. Tribal judiciaries are seldom included in multi-agency and multi-year strategic planning efforts to control and prevent alcohol and substance abuse-related crime and violence.

In the Indian justice context, there is a high level of accountability required by the community of an offender. This is coupled with a great burden on the Indian justice system to rehabilitate and bring the offender back into that community according to traditional principles.

The Indian view of restorative justice, a comprehensive inclusive approach, is becoming recognized in the American justice system and in justice systems around the world as a workable, effective method to reduce prison populations and challenge recidivism. However, in many states, the offer of diversion as an incentive in restorative justice programs has made the term confusing. In the Indian justice context, restorative justice is not necessarily equated with diversion or non-convictions. In this context, restorative justice requires full accountability, community participation, and the necessary resources to bring an offender back. Indian justice throws no one away.

Under the present scheme of justice in Indian Country, accountability and rehabilitation are split between the justice system and healthcare without overlap of primary responsibilities. While partnerships are encouraged between agencies, e.g., IHS and the BIA, primary responsibility for treatment lies with healthcare, while justice pursues accountability. This split does not work in Indian Country where, according to the Arizona Attorney General, 99% of all violent crimes in Indian Country in the Southwest is attributable to alcohol or substance abuse. 40% of all violent crime which occurs on Indian reservations happens in the northern half of Arizona. The violent-crime rate on the Navajo Nation is six times the national average of 25 violent crimes per 1,000 U.S. residents in 2001, according to DOJ statistics, and in some towns, like Tuba City, Kayenta and Chinle, the per capita violent-crime rate is much higher than that. [1]

There is a continuum between healthcare and justice remedies. Originally, American law enforcement departments had broader responsibilities than do modern law enforcement agencies, including some healthcare functions.[2] Tribal police today are perceived by communities also as having some community-based responsibilities beyond their policing function. While partnerships or coordination is needed between tribal justice and healthcare

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[1] Mark Shaffer, Indian Country Today, *Special Report: Violent crime increasing on Arizona reservations,* May 30, 2003.

[2] Edward P. Richards, Emerging Infectious Diseases, *Collaboration between Public Health and Law Enforcement: the Constitutional Challenge,* Vol. 8, No. 10, October 2002.

programs, it has not been clear that Indian justice systems bear any responsibility. This lack of clarity has led to a fragmented and ineffective approach in the dispensation of Indian justice.

Ultimately, the tribal judiciary that performs sentencing oversees the healing and return phases which complete the Indian justice circle. The tribal courts have jurisdiction over the offender until all supervision conditions are met. Tribal judges are deeply invested in their communities and are engaged in meetings and conferences on a range of community matters. Tribal judges are not external adjudicators, separated from communities by a robe and bench. Tribal judiciaries should be included in policy making and strategic planning for healing and return. SAMHSA has advocated for strengthened partnerships with Indian Country law enforcement, including police and correctional organizations as well as DOJ.[3] Input from tribal judiciaries, including inclusion of tribal judiciaries in partnership, should also be sought.

There is an inescapable link between addiction, mental illness and crime in Indian Country. [4] Tribal judges are fully cognizant of this connection but lack the sentencing tools to fully address rehabilitation as a reliable option. Sentencing offenders to treatment is often a futile exercise. IHS is so short-staffed in psychiatrists that Hopi and Navajo adults and children with mental health issues, referred to IHS from tribal courts, receive no substantial treatment. The lack of treatment facilities on or near the reservations causes long delays when offenders are sentenced to residential treatment. When available, the beds are often located in major cities like Albuquerque and Phoenix. When children are taken there for treatment, they do not have the benefit of cultural connections and are removed from local supervision. Sex offenders receive no specialized treatment, often not even the benefit of general counseling.

It is essential that Indian justice systems have the tools to accomplish the holistic requirements of Indian justice. As a whole, the Indian justice system needs adequate law enforcement and healthcare personnel, adequate corrections and treatment facilities, adequate presence in the community, adequate community participation, involvement of all components of the Indian justice system in policy making and strategic planning, and clarification of the system's responsibility to complete the circle of Indian justice.

In addition, the one-year imprisonment limit on tribal court convictions under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302(7) may be taken as also limiting tribal judges' control over cumulative sentencing to accommodate long-term residential treatment that may exceed one year. This needs clarification.

The following is a summary of possible legislative solutions to address the lack of tools needed in restorative justice sentencing.

Recommendations

- **Establish that accountability and bringing offenders back into the community are core Indian justice components.** Ensure that these components are included in any strategy to combat Indian Country crime, and include the requirement that grant-funded

[3] Testimony of H. Westley Clark, Dir., SAMHSA, on *Creating Healthier Tribal Communities,* to the Senate Committee on Indian Affairs, August 15, 2007.
[4] Id.

strategies have a holistic and synergizing, as opposed to a fragmented approach, that is necessary to complete the circle of Indian justice. Provide for training and education that support the holistic responsibilities of Indian justice.

- **Require that tribal judiciaries and healthcare departments be included in consultations with tribal governments in determining policy, guidelines and regulations for combating Indian Country crime.** Ensure that the timing, participation, and goals of these consultations are substantially detailed and defined in order to maximize tribal input.

- **Establish a permanent funding stream for restorative justice education, training and implementation.**

- **Encourage inter-agency integration with a holistic approach to Indian justice system responsibilities.** Innovative and integrated multi-agency programs addressing core Indian justice responsibilities without undue restrictions on the type of offender population to be served should be authorized and funded. Funding should be flexible and of a duration longer than one year. The Crime Bill should emphasize the comprehensive approach.

- **Permit DOJ and DOI to enter arrangements for sharing facilities and services with IHS;**

- **Authorize use of DOI/DOJ funds for the leasing, purchase, construction, expansion or modernization of multi-purpose detention-treatment facilities in Indian Country.** Services at these facilities would include counseling for those in detention, and culturally appropriate treatment modalities. This would redress the severe shortage of both detention and residential treatment beds for adults and juveniles near Indian communities. Presently, DOI and DOJ are authorized to fund detention facilities. They should also be enabled to fund a treatment facility on the same site.

  Healthcare funding for treatment facilities in Indian Country remain scarce. They come under "specialized facilities" and must stand in line behind national healthcare facility needs in the health care facility priority system. Under the proposed Indian Health Care Improvement Act (S.1200), Indian Country healthcare facilities would have priority in the ranking system.[5] However, specialized facilities must still stand in line.

  In 1986, Congress found that less than 1% of the Indian Health Service budget was spent on alcohol and substance abuse treatment facilities.[6] The proposed IHCIA permits outside funding for IHS facilities, including specialized facilities in Indian Country.[7] Funding through the DOJ for multi-purpose detention-treatment facilities would emphasize that treatment of offenders in Indian Country is a justice responsibility.

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[5] S.1200 IHCIA, Section 301.
[6] Findings, Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. §2401(9).
[7] S.1200 IHCIA, Sections 304(a), 310, 311(a) and 316 regarding the acquisition, planning, design, construction, lease, expansion, renovation, or modernization of treatment facilities in Indian Country.

IHCIA does not authorize multi-purpose detention-treatment facilities.

- **Establish a Joint Venture Multi-Purpose Detention-Treatment Facility Demonstration Project in Northern Arizona.** The demonstration project would expedite construction of a much-needed regional facility in northern Arizona using DOJ and/or DOI detention-treatment facilities funding. The facility would be maintained under proposed IHCIA joint venture provisions at S.1200, Section 311.

  The IHCIA proposed joint venture provision permits tribes to expend tribal, private, or other available funds for acquisition or construction of a health facility for a minimum of 10 years under a no-cost lease in exchange for IHS providing equipment, supplies, and staffing.

- **Clarify the ICRA one-year limit on imprisonment.** The one-year limit should not prevent tribal courts from imposing cumulative sentences to long-term residential treatment in excess of one year for a single offense until the court determines that the full needs of an offender suffering from mental health or addiction disorders are adequately being addressed.

- **Reauthorize and amend the Indian Alcohol & Substance Abuse Act** (25 U.S.C. §§ 2401-2471), as follows:

  - Inter-departmental MoAs under Section 2411 presently permitted between BIA and IHS should also include SAMHSA and DOJ, and partnerships include tribal judiciaries, tribal behavioral health, and probation and parole services;

  - The scope of MoAs should be expanded according to recommendations of this workgroup to be submitted shortly;

  - The core elements of Indian justice, including accountability and return of offenders to communities, should be included;

  - Flexibility should be permitted in IASA programs, including extending one-year grants to flexible five-year cycles;

  - Reciprocal language permitting IHS to enter arrangements for sharing facilities and services with DOJ and BIA. Note that Section 406 of proposed IHCIA permits IHS to enter arrangements for sharing facilities and services between the Services, tribes, Department of Veterans Affairs, and the Department of Defense.

Detailed recommendations for the Indian Alcohol and Substance Abuse Act will be submitted to the Committee shortly.

Attachments

Attachment_1 is suggested legislative language on restorative justice and multi-purpose detention-treatment facility construction for inclusion in the Indian Country Crime Bill.

Workgroup Participants

Navajo Nation
Herb Yazzie, Chief Justice
Ben Shelley, Vice President
Patrick Sandoval, Chief of Staff to President Joe Shirley
Cheron Watchman, Legislative Services Director, Speaker's Office, Navajo Nation Council
Delores Greyeyes, Director, Department of Corrections
Deswood Tome, Gov't & Legislative Communications Director, Navajo Nation Washington Office
Randall Simmons, Gov't & Legislative Affairs Associate, Navajo Nation Washington Office
Allen Sloan, Window Rock District Judge
Albert Long, Senior Program Project Specialist, Navajo Behavioral Health
Rita Cantsee, Eastern Agency Manager, Navajo Behavioral health
Selena Applewhite, Office of President and Vice-President
Sherrick Roanhorse, Staff Assistant to Vice-President Shelley
Josephine Foo, Associate Attorney, Office of the Chief Justice
Martha Shelley

Hopi Tribe
Benjamin Nuvamsa, Hopi Tribal Chairman
Delford Leslie, Acting Chief Judge
Dorma Sahneyah, Chief Prosecutor
Dr. Robert Robin, Director, Hopi Behavioral Health Services
Milton Poola, Staff Assistant to Chairman Benjamin Nuvamsa
Emma L. Anderson, Hopi Tribal Council Rep. and Member, Law Enforcement Team
Wilbur Maho, Hopi Judicial Administrator

Ft. McDowell Yavapai Nation
Diandra Benally, Special Counsel

Workgroup Contact Information

Direct correspondence to:

Inter-Tribal Workgroup on the Indian Law and Order Bill
c/o Josephine Foo, Navajo Nation Judicial Branch, P. O. Box 520, Window Rock, AZ 86515
Tel: (928) 871-7669 Fax (928) 871-6761
Email: josephinefoo@navajo.org

ATTACHMENT 1

PRELIMINARY DRAFT
language for inclusion in the Indian Country Crime Bill

TITLE ____--RESTORATIVE JUSTICE DEVELOPMENT

SEC.___. PURPOSE.

It is the purpose of this Title to acknowledge the responsibility of the United States to encourage and fund restorative justice solutions through the Department of the Interior and the Department of Justice for tribes that have declared the implementation of those solutions as a core responsibility of their justice systems.

SEC. ___. DEFINITIONS.

For purposes of this Title—

(a) The term "detention facility" means a facility mandated to hold individuals convicted of misdemeanors by a tribal court. The facility may detain both adult and juvenile offenders provided there is sight and sound separation between adult and juvenile populations.

(b) The term "long-term treatment facility" means a residential treatment facility providing non-hospital care in a program lasting between three to twelve months and is focused on the "resocialization" of the individual. The programs offered by these facilities may include alternative and traditional treatment methods.

(c) The term "multi-purpose detention-treatment facility" means a detention facility and long-term treatment facility at a single site.

(d) The term "Northern Arizona" means Apache, Coconino, Mohave, Navajo and Yavapai counties in the State of Arizona.

(e) The term "restorative justice" as used here is distinct from the term as commonly understood and applied. As used here, the term means restorative justice in the context of Indian justice broadly including full accountability of the offender and meaningful efforts to bring the offender back into the community as part of a comprehensive and coordinated approach to administering justice. Whereas the term in the American justice system has become greatly simplified and come to mean non-convictions, no jail and no fines, restorative justice in traditional Indian justice is used in the literal sense, to "restore" in conformity with justice principles. Wrongdoers, those who are harmed, and their affected communities are engaged in search of solutions that promote repair and rebuilding. Convictions, detention, and penalties are not excluded.

SEC. ___. ACKNOWLEDGEMENTS.

Congress acknowledges:

(1) Intrinsic in the inherent sovereignty of Indian tribes is a tribe's power to create and administer a justice system.

(2) American Indian culture and traditions have survived an unusual amount of oppressive federal and state policies intended to assimilate Indian people, including the administration of justice in Indian Country.

(3) American Indian culture and traditions are inclusive of Indian principles of justice and make up the unique cultural identities of Indian tribes that should be preserved, developed, and transmitted to future generations.

(4) American Indian laws and principles of justice are fundamental to the spiritual health and well-being of tribal communities in many aspects of Indian life.

(5) The Indian concept of restorative justice in the justice context requires meaningful efforts to hold an offender accountable and return the individual to the community; the concept is widely applied in Indian tribes notwithstanding culture and traditions that may vary from tribe to tribe.

(6) Accountability in the context of Indian justice does not simply mean a finding or admission of guilt, but refers to a sense of personal responsibility for an offense and its consequences on others.

(7) Meaningful efforts to return an offender to a community is an intrinsic characteristic of Indian justice, without which Indian justice is not complete.

(8) Given the inescapable linkage between addiction, mental illness and crime and the high rate of addiction and alcohol abuse on Indian reservations, meaningful efforts for the return of offenders to their communities are vital to the survival of Indian communities.

(9) Indian laws and principles of justice universally call for accountability and return of the offender to be included in any strategy to combat Indian Country crime.

(10)Congress has the responsibility to be sufficiently educated as to the traditional Indian sense of justice before fashioning solutions to combat Indian Country crime.

(11)The healthcare concerns of mental illness, alcoholism and addiction are so inextricably linked to Indian Country crime as to be joint federal and tribal justice and healthcare responsibilities.

(12)Regional multi-purpose detention-treatment facilities with the capacity to hold both adult and juvenile offenders near their culture and communities are the most comprehensive solution to further public safety, accountability, and return of offenders to their communities in the best interest of Indian tribes.

SEC. ___. DECLARATION OF POLICY.

It is the policy of the United States to encourage and invest in the application of Indian justice principles in order to ensure the well-being, safety and survival of Indian communities.

SEC. ___. FINDINGS.

Congress makes the following findings:

(1) Given the inextricable linkage of mental health and addiction disorders to Indian Country crime, multi-purpose detention-treatment facilities, culturally sensitive detention personnel and professional healthcare personnel are the most important resources needed by tribal courts in restorative justice sentencing.

(2) There is a scarcity of both detention facilities and long-term treatment facilities in Indian Country, and healthcare professionals willing to live and work on geographically remote reservations.

(3) In Northern Arizona, an area inhabited primarily by the Navajo Nation and Hopi and Hualapai tribes, offenders suffering serious mental or addiction disorders have few sentencing options: they go untreated, or suffer lengthy wait periods before they are sent hundreds of miles out of the region to facilities in Phoenix and Albuquerque, NM.

(4) For maximum benefit to Native populations, long-term treatment resources should incorporate cultural values, utilize traditional healthcare practitioners, and be located at the same site or adjacent to detention facilities near tribal communities in order to maintain cultural and community connections.

(5) Under present healthcare funding schemes, treatment facilities in Indian Country are considered "specialized health care facilities" that compete for limited federal funding under a "healthcare facility priority system" in which the need for specialized facilities is ranked for funding purposes against hospitals, clinics, staff quarters, and other facilities.

(6) The high rate of alcohol and substance abuse disorders among offenders in Indian Country requires direct investment by the Department of the Interior and the Department of Justice in the acquisition, planning, design, construction, lease, expansion, renovation, or modernization of treatment facilities in Indian Country.

SEC.___. CONSULTATIONS WITH TRIBES.

(a) IN GENERAL—All actions under this Act shall be developed and carried out with active and meaningful consultation on an ongoing basis with Indian Tribes and Tribal Organizations to implement this Act and the national policy of Indian self-determination.

(b) INDIAN JUSTICE COMPONENTS—Tribal law enforcement, judiciaries, and the relevant healthcare service providers shall be included in the above consultations.

SEC.___. TRADITIONAL JUSTICE PRACTICES.

(a) PROMOTION—The Secretary of the Interior shall ensure that programs established pursuant to this Act involve the use and promotion of the traditional practices of the Indian Tribes to be served.

(b) EDUCATION AND TRAINING—The Secretary shall develop and implement or assist Indian Tribes and Tribal Organizations to develop and implement, a program of education and training which shall be designed to provide education about traditional responsibilities in law enforcement, justice and behavioral health issues, including traditional health care practices, to political leaders, Tribal judges, law enforcement personnel, members of tribal health and education boards, health care providers and other critical members of each tribal community. Such program may also include community-based training to develop local capacity and tribal community training on community responsibilities in restorative justice solutions in the Indian justice system.

(c) GRANTS FOR RESTORATIVE JUSTICE PROGRAMS—The Secretary may make grants to individual Tribes and to Tribes organized as multi-tribe consortiums for the design, planning, and implementation of innovative multi-agency and multi-departmental programs that comprehensively address restorative justice as defined under this Title.

SEC.___. GRANTS FOR MULTI-PURPOSE DETENTION-TREATMENT FACILITIES.

(a) GRANTS—The Secretary of the Interior and the Attorney General may make grants to individual Tribes and to Tribes organized as multi-tribe consortiums for the lease, purchase, renovation, construction, expansion, or modernization of multi-purpose detention-treatment facilities.

(b) RULES AND REGULATIONS—The Secretary and Attorney General shall formulate rules and regulations for administration of the grants no later than 90 days after enactment of this Act, and in consultation with the impacted Tribes or multi-tribe consortiums.

(c) OPERATIONS AND MAINTENANCE—Operations and maintenance of these facilities shall be an obligation of departments and services of the federal government under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.), including where relevant, the Bureau of Indian Affairs Office of Facilities Management.

(d) PROFESSIONAL TREATMENT PERSONNEL—Tribes or tribal consortiums who are recipients of a grant under this section may staff the treatment portion of the facility using federal and non-federal sources of funding.

(e) COUNSELING AND CULTURAL EDUCATION—Tribes or tribal consortiums who are recipients of a grant under this section shall implement a program of counseling and cultural education for inmates and residents of the facility geared toward reentry and resocialization, funding for which may be from both federal and non-federal sources.

(f) FACILITIES SHARING—The Department of Justice and the Department of the Interior may enter into facilities sharing arrangements with other federal agencies, tribes, and non-profits under this section.

(g) MEMORANDUM OF AGREEMENT—The Secretary and/or Attorney General may enter into a Memorandum of Agreement with other federal agencies, tribes, or tribal consortiums for the operations and maintenance of these facilities.

(h) ELIGIBILITY—To be eligible to receive a grant under this Title, a Tribe or Tribes organized as multi-tribe consortiums shall submit an application to the Secretary of the Interior or the Attorney General which includes—

(1) assurances that the service area for which funds are requested under this Title lacks adequate detention bed space that comply with national standards.

(2) assurances that the service area for which funds are requested under this Title lacks a needed long-term treatment facility for the rehabilitation of offenders with mental health and/or addiction disorders.

(3) assurances that the long-term treatment time served is appropriately related to the determination that the offender suffers from a mental health, alcohol or substance abuse disorder and for a period of time deemed necessary for rehabilitation;

(4) assurances that the Tribe or Tribes have implemented policies that provide for the recognition of the rights and needs of crime victims, particularly in regards to violent offenders sentenced to long-term treatment;

(5) assurances that funds received under this section will be used to construct, develop, expand, modify, operate, or improve multi-purpose detention-treatment facilities to ensure that bed space is available for detention of offenders and the rehabilitation of offenders and other individuals suffering from mental health, alcohol and/or substance abuse disorders;

(6) assurances that culturally appropriate education and counseling will be available to inmates and residents of the facility;

(7) assurances that the Tribe or Tribes have a comprehensive rehabilitation and reentry plan which represents an integrated approach to the management and operation of detention and long-term treatment facilities and programs, including a Memorandum of Understanding or Agreement between the Tribe or

Tribes with a treatment provider that will be administering the long-term treatment facility; such plan to contain provisions for prioritizing sentenced offenders, job skills programs, traditional educational programs, a pre-release assessment to provide risk reduction management, post-release assistance, and an assessment of recidivism rates;

(8) assurances that the Tribe or Tribes have involved States, counties and non-profits, when appropriate, in the construction, development, expansion, modification, operation or improvement of long-term treatment facilities designed to ensure the treatment and rehabilitation of violent offenders, and that the Tribe or Tribes will share funds received under this section with States and counties, taking into account the burden placed on States and counties when they are required to treat sentenced prisoners because of lack of available space in Tribal treatment facilities;

(9) assurances that funds received under this section will be used to supplement, not supplant, other Federal, State, Tribal, and other funds;

(10)assurances that the Tribe or Tribes have implemented, or will implement within 18 months after the date of the enactment of this Act, policies to determine the veteran status of offender patients and to ensure that veterans receive the veterans benefits to which they are entitled; and

(11)if applicable, documentation of the multi-tribe consortium that specifies the construction, development, expansion, modification, operation, or improvement of long-term treatment facilities.

SEC.___. NORTHERN ARIZONA JOINT VENTURE DEMONSTRATION PROJECT.

(a) IN GENERAL—The Secretary and Attorney General, through grant or contract with Tribes organized as a multi-tribe consortium, shall fund the construction of 1 regional multi-purpose detention-treatment facility in Northern Arizona, where no regional detention facility or long-term treatment facility presently exists.

(b) IHS JOINT VENTURE—The treatment facility portion of the demonstration project shall be a joint venture demonstration project pursuant to Section 311 of the proposed Indian Health Care Improvement Act under which the Department of Justice and Department of the Interior will fund the acquisition or construction of a health facility for a minimum of 10 years, under a no-cost lease, in exchange for the Indian Health Service to provide the equipment, supplies, and staffing for the operation and maintenance of such a facility.

(c) OPERATIONS AND MAINTENANCE, DETENTION—Operations and maintenance of the detention portion of this facility shall be an obligation of the federal government under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.), including the Bureau of Indian Affairs Office of Facilities Management.

(d) COUNSELING AND EDUCATION—Implementation of counseling and cultural education programs are required pursuant to Section ____ of this Title.

(e) RULES AND REGULATIONS—The Secretary and Attorney General shall formulate rules and regulations for the joint venture demonstration project no later than 90 days after enactment of this Act, and in consultation with the impacted multi-tribe consortium.

(f) REPORTING REQUIREMENT— Not later than 90 days after the date on which the demonstration project terminates, the Secretary shall submit to Congress a report on the demonstration project.

SEC.___. EFFECTIVE DATE.

This title shall take effect beginning on the date of enactment of the Act.

SEC.___. TECHNICAL ASSISTANCE AND TRAINING.

The Attorney General in collaboration with the Secretary of the Interior may request that the Secretary of Health and Human Services and the Director of the Substance Abuse and Mental Health Services Administration provide technical assistance and training to a Tribe or Tribes that receive a grant under this Title to achieve the purposes of this Title.

SEC.___. EVALUATION.

The Secretary of the Interior and Attorney General may request the Administrator of the Substance Abuse and Mental Health Services Administration to assist with an evaluation of programs established with funds under this Title.

SEC. ____. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary for each fiscal year through fiscal year 2018 to carry out this title.

SEC. ___. AVAILABILITY OF FUNDS.

The funds appropriated pursuant to this Title shall remain available until expended.

SEC. ___. RESULTS OF DEMONSTRATION PROJECT.

The Secretary shall provide for the dissemination to Indian Tribes and Tribal Organizations of the findings and results of the demonstration project conducted under this Title.

SEC. ___. CLARIFICATION OF INDIAN CIVIL RIGHTS ACT.

The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302(7) is hereby clarified as to exclude single or cumulative sentences to long-term treatment in excess of one year for purposes of restorative justice as defined under this Title.

Inter-Tribal Workgroup Participants:

The Navajo Nation
The Hopi Tribe
Salt River Pima-Maricopa Indian Community
& The Bureau of Indian Affairs, Office of Justice Services

July 10, 2008

Workgroup Memorandum on the June 12 Discussion Draft of Indian Law and Order Bill, with Special Focus on the Indian Alcohol and Substance Abuse Prevention and Treatment Act (IASAPTA), Interagency Coordination Provisions

Submitted to the Senate Committee on Indian Affairs:

The Honorable Byron Dorgan, Chairman
The Honorable Lisa Murkowski, Vice-Chairman
The Honorable Daniel Inouye
The Honorable John McCain
The Honorable Kent Conrad
The Honorable Tom Coburn
The Honorable Daniel Akaka
The Honorable John Barrasso
The Honorable Tim Johnson
The Honorable Pete Domenici
The Honorable Maria Cantwell
The Honorable Gordon Smith
The Honorable Claire McCaskill
The Honorable Richard Burr
The Honorable John Tester

Cc: The Honorable John Kyl
730 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Pete Domenici
328 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Ken Salazar
702 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Orrin G. Hatch
104 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Bingaman
703 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Wayne Allard
521 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Robert F. Bennett
431 Dirksen Senate Office Building
Washington, D.C. 20510

PUBLIC SAFETY COMMITTEE REPORT

21ST NAVAJO NATION COUNCIL – Second Year, 2008

Mr. Speaker:

The Public Safety Committee, to whom has been assigned,

Navajo Legislation No. 0384-08

RELATING TO JUDIARY, PUBLIC SAFETY AND INTERGOVERNMENTAL RELATIONS; APPROVING THE INTER-TRIBAL WORKGROUP MEMORANDUM TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON THE DRAFT INDIAN LAW AND ORDER BILL

Has had it under consideration and reports the same with the recommendation that it **DO PASS.**

And thence referred to the **INTERGOVERNMENTAL RELATIONS COMMITTEE.**

Respectfully Submitted,

Rex Lee Jim, Chairperson
PUBLIC SAFETY COMMITTEE

PSC SUMMARY:

Date: July 14, 2008

Adopted: _____
Advisor

Main Motion: Mr. Kee Yazzie Mann Second: Mr. Benjamin Curley Vote: 3-0

JUDICIARY COMMITTEE

THENCE

PUBLIC SAFETY COMMITTEE

THENCE

INTERGOVERNMENTAL RELATIONS COMMITTEE

PROPOSED STANDING COMMITTEE RESOLUTION

21st NAVAJO NATION COUNCIL – Second Year, 2008

INTRODUCED BY

(Kee Allen Begay)

(Prime Sponsor)

TRACKING NO. 0384-08

AN ACTION

RELATING TO JUDICIARY, PUBLIC SAFETY AND INTERGOVERNMENTAL RELATIONS; APPROVING THE INTER-TRIBAL WORKGROUP MEMORANDUM TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON THE DRAFT INDIAN LAW AND ORDER BILL

BE IT ENACTED:

1. The Navajo Nation hereby approves the Inter-Tribal Workgroup Memorandum to the Senate Committee on Indian Affairs on the Draft Indian Law and Order Bill, attached hereto as Exhibit A.

2. The Navajo Nation authorizes the Navajo Nation President, the Speaker of the Navajo Nation Council, the Judiciary Committee, the Public Safety Committee and their designees to advocate for the positions in Inter-Tribal Workgroup Memorandum to the Senate Committee on Indian Affairs on the Draft Indian Law and Order Bill, as amended, until such time as the Inter-Tribal Workgroup Memorandum may be further amended by resolution.

JUDICIARY COMMITTEE REPORT

OF THE 21st NAVAJO NATION COUNCIL - Second Year 2008

INTRODUCED BY

Hon. Kee Allen Begay Jr.

LEGISLATION NO: 0384-08

An Action
Relating to Judiciary, Public Safety and Intergovernmental Relations; Approving the Inter-Tribal Workgroup Memorandum to the Senate Committee on Indian Affairs on the Draft Indian Law and Order Bill

Mr. Speaker;

The Judiciary Committee to whom it has been assigned has had it under consideration and reports the same with the recommendation that it DO PASS, with no amendments.

The LEGISLATION NO. 0384-08 was duly considered by the Judiciary Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 6 in favor, 0 opposed and 0 abstained, this 03rd day of July, 2008.

Edward T. Jim Sr., Chairperson
Judiciary Committee
NAVAJO NATION COUNCIL

MOTION: Lena Manheimer
SECOND: Harold Wauneka

Benjamin H. Nuvamsa
CHAIRMAN

VICE-CHAIRMAN

July 9, 2008

Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510

Committee Members:

On behalf of the Hopi Tribe, I endorse and support the attached Memorandum to the Senate Committee on Indian Affairs on the proposed Indian Country Crime Bill.

I want to emphasize our investment in the work efforts of our tribal representatives in this workgroup. Our hope is that the federal government will implement the recommendations for the good of Northern Arizona tribes and all tribes.

Sincerely,

Benjamin H. Nuvamsa
Chairman/CEO
THE HOPI TRIBE

cc: President, Navajo Nation
President, Salt River Pima-Maricopa Indian Community

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5. Workgroup Findings
6. Recommendations
7. Workgroup Participants
8. Workgroup Contact Information
9. Attachment

Dear Senator Dorgan and Members of the Committee:

This intertribal workgroup was formed following a listening session on the proposed Indian Country Crime Bill held by the Senate Committee on Indian Affairs on January 14, 2008 in Phoenix, Arizona. The task was to develop recommendations on sentencing tools needed by tribal courts to be included in the proposed Indian Country Crime Bill. On April 21, 2008, the workgroup submitted to the Senate Committee a memorandum entitled *Accountability and Returning the Offender to the Community: Core Responsibilities of Indian Justice* which detailed the sentencing tools needed, in addition to law enforcement and detention resources, to fully address Indian Country crime.

At the request of Committee staff, the workgroup worked next on interagency coordination provisions in the Indian Alcohol and Substance Abuse Prevention and Treatment Act (IASAPTA), reauthorized in the June 12, 2008 Crime Bill Discussion Draft. IASAPTA's interagency coordination provisions involving justice and health departments of the federal government are contained in 25 U.S.C. §§ 2411 – 2416.

This memorandum contains the workgroup's findings and recommendations on IASAPTA's interagency provisions. Also included is the workgroup's consensus position on the Discussion Draft.

The workgroup is uniquely positioned to address the interagency provisions from the perspective of both rural and metropolitan southwest tribes. The workgroup includes governmental, judicial, justice and health leaders of participant tribes who are committed to maximizing alcohol and substance abuse prevention and treatment through justice and public health interagency coordination. Participants are the Navajo Nation, the Hopi Tribe, Salt River Pima Maricopa County Indian Community and the BIA Office of Justice Services. It is important to note that the participant tribes are PL93-638 contract or self-governance tribes that have empowered our tribal governments to better serve our tribal and community members.[1]

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[1] The workgroup participant tribes reserve the right to file additional comments to the proposed bill to provide a more detailed analysis of issues that may be specific to self-governance tribes or to the tribes themselves.

Workgroup Sessions Summary

On April 22, 2008 the BIA and Navajo Nation Behaviorial Health provided a history of Southwest region attempts at implementing the interagency coordination provisions. On April 29, the workgroup convened and visited the Salt River Pima Maricopa Indian Community program-driven detention facility. Finally, on May 16 and July 3 and via electronic communication, the workgroup discussed extensively the interagency provisions and wording of the memorandum and reached a consensus position on the June 12 Discussion Draft of the Indian Law and Order Bill.

Consensus on the Discussion Draft

The workgroup supports the general thrust of the Discussion Draft which strives to address pressing law enforcement and detention concerns in Indian Country while fully comprehending that these must be complemented by rehabilitative sentencing tools that preserve our tribal communities.

Given the inescapable link between crime and drug/alcohol addiction in Indian Country, rehabilitative and alternative punishment sentencing tools are important and urgently needed.

We strongly support enhancement of tribal court sentencing authority from 1 year to 3 years, and the increase in fines up to $15,000. Furthermore, while we recognize that tribal courts possess the inherent authority to impose alternative and rehabilitative sentencing, we nevertheless support, as part of the expanded time and fines scheme, the inclusion of language in Section 304 that specifically authorizes tribal courts to sentence certain offenders to a rehabilitation center or other alternative forms of punishment. The inclusion of such alternative sentencing language in the Discussion Draft would expand the flexibility of tribal justice sentencing to meet the unique problems of different tribal nations. We believe under the current sentencing scheme, there is insufficient time to achieve meaningful offender rehabilitation, particularly when offenders have complex, underlying issues. Previously, alternative sentencing has been addressed as supplemental to core tribal court functions. Section 304 and related provisions in the bill reorient the emphasis and will lead to greater integration and development of critical and innovative sentencing tools.

We recommend also that certain provisions be revised to better support coordinated efforts to fight Indian Country crime and drug/alcohol addiction. These recommendations will be discussed later in this Memorandum.

Interagency Coordination Provisions in the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (IASAPTA)

The interagency provisions of IASAPTA are at 25 U.S.C. §§ 2411-1416. (*See* summary at Attachment "A.") Section 2411 calls for the covered agencies, namely, the Indian Health Service (HIS) and Bureau of Indian Affairs (BIA) to develop and enter into a Memorandum of Agreement (MoA). The Secretary of Health and Human Services and Secretary of the Interior share

implementation responsibility. Section 2412 calls for a Tribal Action Plan (TAP) to be developed and established by tribes or, by default, coordination agreements entered into by the covered agencies on the tribe's behalf.

Under IASAPTA, the following are established or made available to support development and implementation of the MoA and TAP:

- information is provided to tribes and agencies on systems-wide resources and programs via a review report;
- a quarterly newsletter on exemplary programs is distributed by the Secretary of the Interior
- facilities for interagency program use may be leased or converted from existing buildings;
- an Office of Alcohol and Substance Abuse is established to coordinate and review BIA programs and serve as a tribal point of contact;
- technical support is provided for development of the Tribal Action Plan and for community and youth program development and implementation; and
- funding for technical assistance and development is provided.

Covered Agencies under IASAPTA in the Discussion Draft

The Discussion Draft expands the covered agencies to include the Bureau of Justice Assistance (BJA), and the Substance Abuse and Mental Health Administration (SAMHSA) and extends shared responsibility to the Attorney General. Otherwise, no substantive changes have been made to the interagency provisions.

Workgroup Findings

IASAPTA failed to institutionalize interagency coordination.

Early attempts at implementing an interagency MoA foundered. On March 26, 1987, an MoA was signed by DHHS and DOI. The MoA established that IHS and BIA "shall outline both long and short-term goals; ... shall coordinate existing programs; ... (and) shall bear equal responsibility for implementation of IASAPTA in cooperation with Indian tribes ... and the coordination of resources made available under the MoA through implementation of Tribal Action Plans." The MoA was reviewed in 1988. There were no further MoAs, and none of the MoA provisions were implemented.

In the Southwest region, Navajo Nation attempts at implementing a TAP also foundered. Early on, the Navajo Nation passed a resolution authorizing the development of a TAP. Development was attempted without information, support, review, or follow-up by the covered agencies. The attempted TAP development was unaided by important and necessary information that would have resulted from a systems-wide program and facilities review, had it been completed, and without support or covered agency follow-up. The newsletter concept likewise was not helpful due to lack of useful information, and-technical assistance for TAP development remained an unfunded mandate. A Tribal Coordinating Committee comprised of tribal and agency

representatives never convened for reasons that cannot be fully identified. In 2004, the Office of Alcohol and Substance Abuse disappeared without explanation. The regional BIA office recently informed the workgroup that it has continued to draft interagency agreements without IHS participation. These drafts are stored in the BIA office.

We agree generally that Interagency coordination has great advantages. This is especially evident in ASA prevention and treatment where information and resource sharing is critical to effectively and efficiently address both public health and public safety needs in Indian Country. There is great need for a "big picture" strategic approach to issues that cannot be captured by stand-alone agency objectives—in sharing facilities, funding, personnel, and knowledge resources; in maximizing cost-effectiveness of service delivery; and in assisting prioritization and policy-making. However, before coordination can effectively happen, there must be a consistent framework.

The workgroup finds:

(a) IASAPTA failed to provide a consistent framework for joint decision-making, shared responsibility, and assessments.

(b) The strategic burden was placed at the local level, perhaps due to an assumption that this approach was necessary for tribal and local control,[2] while information development and sharing was centralized in individuals who lacked practical knowledge of what information was needed and how it would, or could, be used.

(c) Prior to IASAPTA, ad hoc field coordination efforts between agencies and tribes were tied to grant funding cycles, and when the project cycle ended, established relationships typically also disintegrated. In requiring bi-annual Tribal Action Plans, IASAPTA failed to recognize the importance of grant cycles.

(d) While the alcohol and substance abuse (ASA) problem was clearly identified, no interagency mission and goals were articulated.

(e) Other than stating the ASA problem, IASAPTA did not identify outcomes clearly aligned with the purposes of the covered agencies or linked to the agencies' management and services. Defining shared outcomes is a basic step in pursuing interdepartmental or interagency collaborations. Agencies need to be clear about the outcome—what they are trying to maximize—before deciding what they will do, through interagency arrangements, to achieve the desired outcome. Instead, IASAPTA placed an unreasonable burden on service-unit and area offices to come up with ad hoc outcomes.

(f) Funding was insufficient, and limited funding that was available was grossly mismanaged by the agencies. [3]

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[2] in accordance, respectively, with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) and Section 1130 of the Education Amendments of 1978 (25 U.S.C. 2010).

[3] BIA and IHS Inspector General Reports on Indian Alcohol and Drug Abuse Programs Hearing Before the Senate Select Committee on Indian Affairs, 102d Cong., 2d Sess. 73 at 13 (July 30, 1992)(statement of

(g) IASAPTA failed to adequately define the collaborative playing field. It failed to provide guidelines for the sharing of justice and health information, which is a threshold requirement for the development of programs and program review, for developing policies and strategies, and for service design, delivery, evaluation and adjustment. Information sharing invariably requires a deep financial investment as well as the sharing of expertise and information. Legislative provisions necessary for effective interagency collaboration were not established for mutual sharing of information between health and justice departments and tribes.

(h) IASAPTA failed to provide for joint resources or funding for collaborative personnel, work and facilities. Aside from simply stating that departmental heads would share responsibility for developing and implementing the MoA, there was no provision for shared or joint responsibilities for policy development, strategic planning and progam/service design, delivery, evaluation and adjustment. We believe that sharing responsibility involves much more than simply sharing work or outcomes. It also includes the combined sharing of mandated authority, accountability and management.

(i) The covered agencies were at different readiness levels and neither had the requisite capability to take the lead. Although, ideally the proposed Office of Alcohol and Substance Abuse would ensure that internal BIA programs are coordinated, this first step has not yet been established to support coordination between external programs. Meanwhile, IHS lacks the mission or funding to extend its Resource and Patient Management System (RPMS) information sharing capability to PL93-638 contract tribes that manage their own facilities. Ironically, IHS, readily accessible to tribes, has no incentive to perform or manage beyond current operation levels in its 50 facilities. RPMS is vital in coordinating treatment services, particularly with the promise of telemedicine, and it has been described as indispensable to tribal involvement in ASA management.[4]

Recommendations

1. **Develop a consistent framework for IASAPTA interagency coordination.**

   A framework should:

   - describe clearly the outcomes desired under IASAPTA;
   - prioritize strategic outcome(s) that are well aligned with the purposes of the covered agencies;

George Grob, Assistant Inspector General for Analysis and Inspections, Department of Health and Human Services) at 12 (Sen. Daschle said that "In this day and age, how any agency can lose $70 million-plus is beyond me ... to have that money go unaccounted for is just a phenomenal indictment about the way we run the system).

[4] The primary clinical component of RPMS, Patient Care Component (PCC), was launched in 1984. In the mid-1990s the Mental Health/Social Services (MH/SS) software application was developed. Behavioral Health System (BHS) was released in 2003 and an enhanced graphical user interface version, BH GUI in Patient Chart, was deployed in 2004.

- provide guidelines for resource and information sharing;
- provide technical assistance to the covered agencies to establish effective and permanent interagency coordination;
- identify players who can make critical contributions to the outcome;
- assess what outcomes are best pursued by interagency collaboration;
- determine whether collaboration is feasible, cost-effective, and within agency capability.

Such a framework could be developed by a consultant or by a permanent planning and assessment body. Shared outcomes, information, resources, work, responsibilities should be fully addressed.

2. Establish a planning and assessment body for interagency coordination.

A planning and assessment~~s~~ body is necessary to perform regular and ongoing systemic assessments across multi-levels of departments and programs. The object is to maximize effective collaborations between agencies toward clearly defined shared outcomes.

We recommend that this body be independent of existing departments. In the alternative, limit its function to planning and assessment of interagency coordination of Indian Country justice and addiction programs and locate it within the Indian Health Service, which has addiction treatment knowledge, established management infrastructure, and physical presence in Indian communities.

The body should be mandated to solicit information, comment, input and participation from tribes.

3. Authorize and fund interim local, tribal and service-unit level collaborative efforts.

As a framework is being developed, ad hoc tribal and service-unit level collaborations should be encouraged and funded. Tribal and interagency agreements that may be developed and entered into at the service-unit level should be authorized and supported. Funding to implement programs pursuant to such agreements should be simplified—direct funding or simplified grant processes. Independent funding through the agencies would remove the grant cycle burden from such field collaborations.

The tribal and interagency agreements should be permitted to include community health resources (CHR), alternative juvenile detention initiatives, design of local community college training programs for traditional healing alternatives or alternative certifications; social services; schools; local, tribal and state collaborative partnerships; consolidation of tribal problem solving courts; and, required resources for alternative and rehabilitative sentencing; etc.

4. Simplify and consolidate program grants; authorize post-grant interagency sustainability funding.

The grant application processes are presently highly compartmentalized in terms of available program funding and reporting requirements. Tribal and interagency

collaborations are invariably dependent on grant processes. As presently structured, funding ends with the grant period. Tribes are expected to self-sustain, and agencies lack authorization to make post-grant contributions.

Compartmentalized grants place a great burden on justice and addiction programs. It maintains separation of programs and limits program life. Therefore, program effectiveness is limited while costs and management complexity are high. For example, the Hopi Healing-to-Wellness courts are reaching the end of a grant period and funds are lacking to sustain coordination and counseling personnel. At the same time, the Wellness courts are separate from the mainstream court and also separate from other problem-solving court programs that receive separate, finite grants.

Consolidation of grants should be permitted, the application and reporting processes simplified, grant terms lengthened, and funding for post-grant sustainability provided to sustain the interagency relationship.

5. **Fund tribal RPMS information sharing and access.**

There is an urgent need for tribes to access the IHS RPMS electronic information system for purposes of telemedicine, behavioral health management, and interagency program planning. Extension of RPMS access to tribes has been stymied due to lack of funding and lack of electronic infrastructure in some tribes. Information sharing is a threshold requirement for coordinated services. Funding should be allocated for this purpose.

6. **Allocate at least $150 million for tribal justice systems and tribal jails facilities.**

Discussion Draft Sections 402 and 404 authorize funding at $50 million and $35 million respectively for construction and renovation of tribal justice systems facilities and tribal jails. The allocations for tribal court facilities and jails are insufficient as provided for under Sections 402 and 404. There is ample evidence in the Congressional record of the need being multiple times these amounts.

It is a given that the physical infrastructure of courts, detention, and rehabilitation facilities combined must be adequate to support collaborative tribal and agency planning. Tribes such as the Navajo Nation have asked experts to assist in developing Master Plans to address their facilities need by devising cost-saving and efficient multi-purpose justice complexes. Multi-use complexes are established priorities for the Navajo Nation. The consultant's projected cost for a regional 388-bed corrections-rehabilitation center is $41,544,210. The total Master Plan facilities need of the Navajo Nation alone totals $372 million.

We strongly recommend that the allocation for tribal justice systems and jail facilities throughout Indian Country be raised to at least $150 million combined pending publication and Congressional review of the BIA jails report, recently received by the Senate Committee on June 19.

7. Expand definition of "Tribal Justice Official" in the Indian Law Enforcement Reform Act.

In the Discussion Draft amendments to the Indian Law Enforcement Reform Act at Section 3, the Bureau of Indian Affairs Division of Law Enforcement would have additional responsibilities that include the development of methods and expertise to resolve conflicts and solve crimes, reduction of recidivism rates and adverse social effects, development of preventive programs and regulatory policies and other actions that affect public safety and justice in Indian Country. The Division must consult with "tribal justice officials" in performing the above additional functions, and declination reports are also to be submitted to "tribal justice officials."

The Discussion Draft proposes that "Tribal Justice Official" be narrowly defined as tribal law enforcement, investigative, and prosecutorial personnel. This definition excludes judges, probation/parole officers, and corrections officers who oversee the rehabilitative portion of tribal justice from being consulted in policy-making decisions regarding the very programs they oversee.

We strongly recommend that the definition of "tribal justice official" be corrected to include judges, corrections and probation officers. However, it should be clarified that the tribal officials who would receive declination reports are limited to prosecutorial and investigative personnel.

8. Require that federal employees respond to tribal subpoenas.

It is imperative that this legislation include a provision mandating that BIA, IHS, and other federal agency employees timely respond to tribal subpoenas to testify in tribal court. At present, agencies may ignore such subpoenas, citing lack of tribal jurisdiction over federal officials. Otherwise, they may take extensive time in reviewing the subpoena to determine whether or not to permit a federal employee to testify in tribal court. Tribal court judges who attempt to deal with non-appearing federal employees have been threatened by federal field solicitors with arrest by U.S. Marshalls and prosecution by the U.S. Attorney.

This lack of cooperation by federal employees in cases before tribal courts is a great hindrance to successful prosecution. When evidence gathered in an Indian country crime is deemed insufficient for federal felony prosecution or the case is otherwise declined, the case file is rarely made available to the tribal prosecutor within tribal statutes of limitations. Without the testimony or evidence collected by federal agencies, tribal prosecution is hindered. Language is needed that would require federal agents who are indispensible witnesses to appear in tribal court when served a tribal subpoena. Victims and tribal communities have a right to tribal justice, regardless of the fact that the investigation was conducted by federal investigators.

9. Add interagency coordination duties to the Office of Tribal Justice.

The Discussion Draft Section 106(c) places additional duties on the Office of Tribal Justice (DOJ) for inter-program coordination only within BIA to ensure meaningful consultation with tribal leaders. This, again, ignores interagency coordination support needs across all covered agencies under IASAPTA.

It should be a priority to ensure that actual assistance, capacity building and funding are delivered to Indian tribes and communities on combined public safety and addiction issues in an integrated fashion. We further recommend that this Office, serve as an inter-departmental program coordinator on justice and addiction services as contemplated under IASAPTA. It would be a shame if the expansion of the Office of Tribal Justice meant only the expansion of federal bureaucracy.

10. Fund IASAPTA programs.

An obvious reason for IASAPTA's failure was the lack of adequate funding. Congress did not appropriate the full $130 million that had been authorized to carry out the policy, while $70 million designated for IASAPTA programs could not be adequately accounted for.[5] Upon reauthorization, IASAPTA programs, as well as TAP and MoA development, must be fully funded with strict accounting required.

11. Strengthen tribal input and participation.

Tribal input and participation under IASAPTA's interagency provisions should be strengthened. In particular, PL93-638 contract or self-governance tribes who have empowered their tribal governments to better serve tribal and community members would have tremendous input on how interagency coordination would best benefit Indian communities.

Under Discussion Draft Section 305(g)(3), the new Indian Law and Order Commission <u>may</u> solicit information from tribal and state agencies in order to conduct a comprehensive study of the Criminal Justice System Relating to Indian Country.

We recommend that the Commission's solicitation of information from tribal agencies should be clarified to include tribal governments, and that the solicitation be made mandatory when the Commission examines crime, jail systems, reducing crime, and rehabilitation of offenders.

12. Authorize federal parole officers to be physically situated in and share information and services with tribal probation and parole service offices.

Discussion Draft Section 203 requires the appointment of residents of Indian Country as Assistant Parole and Probation Officers.

We recommend that the physical field office of these Officers be permitted to be located in offices of local tribal probation services so that federal parolees, and tribal parolees and probationers, are given similar reentry and restoration opportunities. The sharing of information should be mandated. The sharing of services should be permitted.

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[5] See note 3, above.

13. Permit tribes to set local program evaluation standards.

In keeping with the established policy supporting tribal and local control, tribes should be permitted to establish local program evaluation standards to measure program effectiveness and tribal and agency coordination efforts.

14. Expand crime data collection to include health-related statistics.

Discussion Draft Sections 501 and 502 pertaining to tracking crime data and funding crime data collection should be expanded to also require information sharing between health and justice agencies, as alcohol and substance abuse issues generally are the primary focus of rehabilitative sentencing.

15. Term "Tribal Citizen" should not be used.

Use of the term "Tribal Citizen" in the Discussion Draft should be dropped in favor of more traditional terms. Federal statutes and case law use the terms "Indians," "Non-Indians," "nonmembers" and "members" to describe persons who may or may not be subject to tribal jurisdiction. Use of the term "tribal citizen" in a piece of legislation may create unnecessary confusion. One possible interpretation of such language may be that Congress intended to limit jurisdiction to the "citizens" of a particular tribe, and therefore jurisdiction over non-member Indians would again be the subject of debate.

16. "Statutes of limitations" should be clarified as "tribal statutes of limitations."

When the term "statute of limitation" is used throughout the Discussion Draft, e.g. at Section 102(a)(2)(A), it appears that tribal statutes of limitation are intended. The meaning of the term should be made clear. The bill rightly creates a duty on Federal officials to be aware of tribal statutes of limitations. Currently, declinations are often received beyond the tribal statute of limitations, while many tribes have only a one (1) or two (2) year statute of limitations.

17. Establish violations of tribal protection orders involving violence as a federal felony.

Discussion Draft Section 601 states that a provision is under consideration to establish a Federal felony for violation of tribal protection orders.

We strongly support inclusion of such a provision. Chronic domestic violence offenses wreak havoc on the quality of life for families and communities. Obtaining felony convictions for violations of tribal protection orders that involve violence would be recommended.

IASAPTA is an important legislation that recognizes the great need for programs and services in Indian Country. However, it lacks sufficient foundational processes for successful interagency collaboration on a systemic scale.

We hope the recommendations in this memorandum will assist the Senate Committee on Indian Affairs to address and correct IASAPTA's flaws and make interagency coordination with tribes effective and workable.

Thank you for the opportunity to submit this memorandum on IASAPTA's interagency coordination provisions and other provisions in the draft bill related to public safety and public health.

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ATTACHMENT "A"

Detailed Summary of Interagency Coordination Provisions in IASAPTA (25 U.S.C. && 2411-2416) As Amended in the June 12 Draft Bill

Sec. 2411 Memorandum of Agreement. In IASAPTA, the named agencies are directed to develop and enter into a Memorandum of Agreement:

(a) within 120 days of enactment; and which shall:
(b) define and determine the scope of alcohol and substance abuse (ASA) in Indian tribes;
(c) identify program and other federal, state and local resources and programs;
(d) develop and establish minimum standards for program responsibilities;
(e) coordinate ASA programs;
(f) delineate central, area, agency, and service unit level responsibilities;
(g) direct full agencies cooperation with tribal requests in Tribal Action Plans;
(h) annually review the Memorandum of Agreement;
(i) require consultation with interested Indian tribes, individuals, organizations, and ASA treatment professionals;
(j) requires publication of the MoA.

Sec. 2414(a) **Review of Programs.** In development of the MoA, the following shall be reviewed and considered by (the named departmental heads):

(a) programs established under federal law providing health services to Indian tribes, including those relating to MH and ASA prevention and treatment;
(b) tribal, state, local and private health resources and programs;
(c) where treatment facilities are or should be located;
(d) effectiveness of such programs in operation on Oct 27, 1986; and
(e) provide results of the review to Indian tribes as soon as possible for their consideration and use in developing and modifying a Tribal Action Plan.

Sec. 2413(a) **Responsibility for Implementation** is equally shared between (the named departmental heads).

Sec. 2413(b) **Responsibility for Coordination of BIA programs** is in the "Office of Alcohol and Substance Abuse" established in the Office of the Assistant Secretary of the Interior for Indian Affairs. The Office also reviews performance and serves as a tribal point of contact. At minimum, staff includes a director and an Indian Youth Programs Officer.

Sec. 2416 **Newsletter**. The Secretary of Interior shall publish an ASA newsletter to report on Indian ASA projects and programs, as follows:

(a) published each quarter;
(b) include reviews of and information on exemplary programs by the Secretary of the Interior;
(c) be circulated free of charge to schools, tribal offices, BIA offices, IHS offices and programs, and other entities providing ASA services and resources to Indian people;
(d) $500,000 is authorized to carry out this section.

Sec. 2415 **Provision of facilities.** (The named departmental heads) shall make available for community use as permitted by law and as provided in a Tribal Action Plan, local

federal facilities, property and equipment. Costs for use may be borne by (the named departmental heads), tribal, state, local or private funds. (The named departmental heads) are not required to expend additional funds to meet these costs. (The named departmental heads) are authorized to enter into long-term leases if no federal facility is available and cost of construction is in excess of lease.

Sec. 2412 Tribal Action Plan. In IASAPTA Section 2412, Tribal Action Plans ("Plan"):

(a) are authorized at tribes' discretion by resolution to coordinate available resources and programs, which shall serve as the basis of implementation of IASAPTA and the Memorandum of Agreement in Sec. 2411. if no resolution is adopted within 90 days after publication of the MoA, the named agencies shall enter into an agreement to identify and coordinate the available programs and resources for that tribe, after which the tribe may adopt a resolution;

(b) are established at the option of tribes to coordinate available resources and programs to combat ASA;

(c) developed with the assistance of BIA, IHS, BJA and SAMHSA;

(d) springboard an implementation agreement of the Plan between BIA, IHS, BJA and SAMHSA with the tribe;

(e) shall provide for a Tribal Coordinating Committee comprising representatives of the tribe, BIA, IHS, BJA and SAMHSA which is responsible for implementation and on-going review of the Plan, for scheduling training in ASA prevention, and incorporating minimum standards for programs and services; and

(f) may provide for assessment of the scope of the ASA problem; identification and coordination of resources and programs; establishment and prioritization of goals and efforts needed to meet the goals; identification of community and family roles in efforts under the Plan; establishment of procedures to revise and amend the Plan; and evaluation of the Plan; and

(g) updated every 2 years; and

(h) Grants are provided as follows:

i. $2,000,0000 per year administered by the Secretary of the Interior for technical assistance;

ii. $500,000 per year to develop and implement tribal programs for youth employment, recreation and cultural activities; and community awareness, training and education programs.

The CHAIRMAN. Thank you very much for your testimony.

Mr. Ragsdale, let us first address this issue. Judge Flies-Away has raised the issue of a detention facility in his State that has been vacant for—Judge Flies-Away, how long?

Mr. FLIES-AWAY. About nine months or so.

The CHAIRMAN. So we have a detention facility that is, I assume, desperately needed.

Mr. RAGSDALE. Juvenile.

The CHAIRMAN. A juvenile detention facility that has been vacant for nine months, brand new, sitting empty in a circumstance where they desperately need that facility. Tell me what is happening there.

Mr. RAGSDALE. Actually, it has been longer than nine months, Senator. It has been over a year. We have not been able to adequately staff that particular facility. Hualapai sits in a remote location in the State of Arizona and we have not been able to recruit qualified staff. Now, the tribe has recently within the last 30 to 60 days proposed to contract to do the service itself.

The CHAIRMAN. Do you have money in that facility?

Mr. RAGSDALE. Yes, sir.

The CHAIRMAN. How much?

Mr. RAGSDALE. We have money for operations that is for staffing, and we have money for operation and maintenance. I don't know what the number is.

The CHAIRMAN. But the judge indicated they have put $4 million into building this facility. My question is, does the Bureau of Indian Affairs have money in the construction of this facility?

Mr. RAGSDALE. No, sir. That was a Department of Justice grant funded facility, as were the 21 other facilities that are either under construction or have been constructed.

The CHAIRMAN. And was the expectation when that facility was built that the Bureau of Indian Affairs would be participating in the staffing of it, judge?

Mr. FLIES-AWAY. The hope was that IHS and BIA would do it together and have it more of a restorative-type healing place, but then the funding doesn't do that.

The CHAIRMAN. That is unbelievable to me. So we have a facility that would hold 43, 46 juveniles. We desperately need the beds in the facilities, and it is sitting there empty over a year. Is there some emergency action that we can take, or that you can take, to resolve this?

Mr. RAGSDALE. Well, the problem has not been the funding, although the tribe believes that the funding is too low for staffing, but nonetheless they have decided to contract the operation out. We have money for operation and maintenance. We have money for staffing. The difficulty in opening that particular facility is we have not been able to recruit the qualified staff. The tribe believes that they can, and we intend to provide them with all the assistance that we can do to make that operation successful.

The CHAIRMAN. Judge, would you keep in touch with this Committee over the next two months? I want to try to find out how this works.

Mr. FLIES-AWAY. Yes, sir.

The CHAIRMAN. Judge, I read last evening, I believe there was a story about your work. Was it The Wall Street Journal?

Mr. FLIES-AWAY. Yes.

The CHAIRMAN. I read the story in The Wall Street Journal about your work, and they described essentially a day in the life of a tribal court judge. One of the things that occurred to me was you had people come in front of you, in many cases young people, apparently guilty of some very violent crimes, crimes perpetrated against mothers, sisters, brothers, strangers, assault and battery, very vigorous assault. And it appeared to me that they came to your court, in some cases they had been previously convicted of violent crimes against other people, and you didn't have a place to put them. I mean, you didn't have a cell to send these people to, particularly juveniles. Is that correct?

Mr. FLIES-AWAY. That is correct. We actually had a stabbing two weeks ago when I was here in D.C. and those individuals could not be taken because our juveniles have to go to Gallup, Tajique, or Globe, Arizona, which are five, six, seven hours away, and they will only take them on certain things, and the BIA can't transport them.

I have many warrants for minors and adults and they are not served for the minors because they can't take them. This is funny.

They say, well, we could do it next Tuesday, because they are going to do a transport. So we have to do our detention stuff on a schedule, so it doesn't work. But yes, it is not good, not good at all.

The CHAIRMAN. You know, you heard in the opening statement, we have 50 percent of the murders committed on reservations are declined for prosecution by the U.S. Attorneys, 76 percent of rapes and sexual assaults are declined for prosecution by the Federal authorities.

Now, I assume when there is declination on the part of the Federal authority, some of that comes to your tribal courts, Judge Pouley and Judge Duran and others. When that happens, you are limited at this point to imposing a one-year sentence on someone who committed a violent rape. You have an opportunity, I assume—and you can answer this—if there is a declination by U.S. Attorney on something that you think clearly needs to be prosecuted, let's say it is a murder or a violent rape, you can bring them into tribal court at that point if they are an Indian, Native American. And then the most significant sentence you can impose is one year incarceration. Is that correct, Ms. Pouley?

Ms. POULEY. That is absolutely correct. And we actually do those cases, a number of them, every year, regardless of the seriousness of the crime, regardless of the injury, regardless of the fact that it is a rape of a child, we are absolutely limited to one year in jail as a maximum penalty.

I wanted to address, though, Mr. Chairman, the concept that the Department of Justice would even provide tribes with information that they had declined prosecution. We are actually in a bit of a catch–22. We don't receive that information at all. So tribal prosecutors and tribal courts are left with trying to decide whether they should use their resources to prosecute without any information from the Department of Justice.

The CHAIRMAN. Well, the legislation we introduced yesterday is going to change all of that. But as you all watch, you are a prosecutor and we have three tribal judges here, as you all watch this process, is it your impression that U.S. Attorneys' offices put this sort of in the back of their office? It is not front-shelf to try to go out to a reservation to determine what is our responsibility, what should we prosecute? What is your impression of the cooperation of the U.S. Attorneys' offices?

Ms. SAHNEYAH. Well, the U.S. Attorney's office in Arizona is located in Phoenix. The Hopi reservation is a good five-hour drive from there. So you know, we are in a very remote area. And as Judge Pouley indicated, we don't share a lot of information. I have a jury trial that is scheduled on a murder, a homicide case on the end of this month, on the 30th. We just finished a trial on a juvenile who was convicted of homicide in our court. And like Judge Flies-Away said, we don't have any detention facility at all. What we are going to do with this juvenile in sentencing, we are going to have to come up with some alternative kinds of things. So we are having those kind of issues.

The CHAIRMAN. Mr. Ragsdale, in Operation Dakota Peacekeeper, you have put some folks, 20 people, down into the Standing Rock Reservation. We have a violent crime rate that is five times the national average. I appreciate the work you have done. I know that

my colleagues from North and South Dakota do as well. It is a 90-day proposition. I am going to do a hearing down on the Standing Rock Reservation August 4, or August 3 perhaps, August 3. But I want to ask a question about that.

You put in BIA folks down on the reservation. Let's assume that there is a crime they observe on the reservation and the tribal court is going to prosecute the crime. Can your BIA law enforcement official testify at the tribal court?

Mr. RAGSDALE. Yes, sir. And I have met with the tribal court officials at Standing Rock, and have assured them that even though many of the people are detailed from long distances, that if it is a serious case, we will make that officer available.

The CHAIRMAN. Is that true across the Country? Or is it just true with respect to Operation Peacekeeper?

Mr. RAGSDALE. It should be true across the Country. I mean, our duties and responsibilities, whether it is a tribal police operation or a Federal police operation, are to honor the requests of the court. Now, there are maybe logistical or staffing problems involved in certain instances, but the instructions and the policy of the Bureau of Indian Affairs is that we are officers of the tribal court and unless there are unusual circumstances, we should obey the orders of the court and cooperate with them fully in the prosecution.

The CHAIRMAN. There is no prohibition against a BIA law enforcement official testifying in a tribal court?

Mr. RAGSDALE. I have testified a number of times in tribal court, as well as BIA police officers do that routinely. Now, there are some circumstances that arise that there is a conflict with the court, and it is fairly unusual, but in those instances we consult with our attorneys and advise the court that there is an intrusion into the Federal duty responsibility and we cannot cooperate.

The CHAIRMAN. Let me frame it another way. Is it your policy to cooperate with the tribal courts and testify when necessary?

Mr. RAGSDALE. Absolutely.

The CHAIRMAN. And do the tribal judges experience that?

Mr. FLIES-AWAY. Well, let me just read you a letter from Solicitor Quinn from Arizona. Subpoenas or court orders requiring DOI employees to appear are controlled by 43 CFR 2(H)2007ED. Forty-three CFR Section 2.81 provides that no officer or employee of the DOI may give testimony in any administrative or judicial proceeding relating to the business of the government without the permission of the head of the appropriate bureau or his designee.

So, I mean there is a little bit of holding back.

The CHAIRMAN. That would imply it is not routine, that they have to get special permission in order to testify.

Mr. FLIES-AWAY. Yes.

The CHAIRMAN. Mr. Little or Mr. Ragsdale, is that your impression?

Mr. RAGSDALE. No. I don't think that is—we routinely testify in tribal courts throughout this land.

The CHAIRMAN. Can we straighten this out?

Mr. RAGSDALE. I think that he may be referring to an administrative determination.

Mr. FLIES-AWAY. A judicial proceeding, it is not an administrative one.

The CHAIRMAN. We need to resolve this, because if a solicitor is writing that, that is at odds with your testimony. I mean, this shouldn't be a question for us. We should be able to resolve it.

Judge Pouley, did you have a response to that? Did you wish to comment on it?

Ms. POULEY. I didn't in particular wish to comment, except to say that I know there have been problems with tribal courts in the State of Washington and the Northwest tribal courts to get Bureau of Indian Affairs officials to testify in tribal court, and we don't have any ability to enforce it.

The CHAIRMAN. It shouldn't be a problem and you should be able to enforce it. In fact, the legislation we introduced yesterday will solve this problem. In the meantime, before this legislation is enacted, we really should resolve this.

Mr. LITTLE. I think, Mr. Chairman, we have two different issues here. In terms of the officers, they are always required to respond to the tribal courts issues and they generally do. In fact, in many instances the BIA officer is actually the prosecutor, where you don't have a tribal prosecutor to deal with the case.

I think what the judge is referring to is that there is a written policy, at least from the solicitor's standpoint, in dealing with other Federal employee as witnesses, especially social workers, where they are being required to come into the court for different issues. Those are the ones that tend to have, I don't want to call it an exemption, but those are the ones that are saying without proper clearance they can't come before the court. I think it is a different issue with law enforcement.

The CHAIRMAN. We will try to resolve that. We will ask our staff to try to figure out what is happening and try to resolve it. As I said, our legislation will resolve it for sure.

Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman. We both have had an opportunity to speak a little bit about the legislation, but as you point out, it is not enacted into law yet and so we are not operating under that.

But Judge Flies-Away, you mention that it would be a good thing to allow for increased sentencing to three years, but if you don't have the detention facilities, then, as you indicated, Ms. Sahneyah, you have to be creative in looking at the alternatives.

But what do you do? The situation that you mentioned was a juvenile and convicted of a homicide. What is your alternative with that young person? You don't have the bed space. You don't have the detention facility. One of the fixes, if you will, in our legislation allows for the tribes to send those that have been convicted to the U.S. Bureau of Prisons system. Well, that will help down the road, but what are you doing now?

Ms. SAHNEYAH. What we are doing right now is we have sent an order, we have requested an order and the judge issued it to our Behavioral Health Department, looking at the background of this juvenile who has a lot of issues in his growing up years. We have gone toward a treatment-type of focus. We asked them to do assessments to see if we could actually place this juvenile into a treatment facility in lieu of detention, hoping that we could go ahead and start maybe some process of rehabilitation.

Now, you know, that is better than nothing. He will be in some sort of a confined treatment facility where he would begin to address his issues, things like that.

Senator MURKOWSKI. What do some of the others of you do? Judge Pouley? Judge Duran? What have you had to do as you deal with the fact that you simply don't have the detention spaces available?

Ms. POULEY. Tulalip has had the opportunity to utilize a couple of alternative sentencing mechanisms. So, for example, we can use electronic monitoring or home detention. We can exclude people from the boundaries of the reservation that pose a danger to our communities. Not for the serious, violent offenders, but because of the rampant rates of substance abuse in Indian Country, our goal really is to address the underlying issue that causes the criminal activity.

So regular meeting with the judges, maybe coming to visit with the judge one time a week, to hold that offender immediately accountable, with short-term jail sentences instead of long-term jail sentences is really a solution. But there is a lot of sort of creative mechanisms, none of them really address the issue where you have serious, violent offenders that need to be incarcerated and punished.

Senator MURKOWSKI. Let me ask you, Mr. Ragsdale, you had mentioned in your comments that when it came to the BIA and the focus, you mentioned, first, funding, and then technical assistance and training. What kind of technical assistance and training to you make available to the tribal courts? We recognize that we have a serious problem with the funding component, but are there other things that you can be doing more of to help assist the tribal courts here?

Mr. RAGSDALE. Allow me to ask Mr. Little to address that because he is directly involved in it. But if I may, I would like to come back to the juvenile justice system. I can tell you first-hand as a former tribal police officer, the juvenile justice system in America is generally inadequate. If you take, first of all, a child under 18, if you are going to put them in a lock-down facility, the court first has to adjudicate whether or not they are going to be treated as an adult or as a juvenile. But there is generally across America a lack of adequate bed space and treatment for juveniles that have been adjudicated in court, whether it is a tribal court or a State court or Federal system. So it is a problem that we all share.

What happens is the police officer, when you have to take a child into custody, you are stuck with that child until you can find a facility and have a judge make a facility, and those are very difficult instances. I dealt with a homicide perpetrator that in a fit of rage accidentally killed his best friend. We adjudicated that child as a juvenile, which means he needed to be treated. We farmed him out to various facilities throughout the State of Oklahoma because he had fully served his sentence and could be placed in a foster home.

Another instance I dealt with was a very young, an eight-year-old that was a child molester, and had a very troubled background. There was absolutely no place to put that child. We finally ended

up moving him to a treatment center for young juveniles for alcohol addiction, because that was the best place that we could find.

Senator MURKOWSKI. Can you speak a little bit about what technical assistance is available?

Mr. LITTLE. Yes. In relation to that, currently I have just hired a couple more attorneys on staff, and myself when I was working in the technical assistance area, a lot of the issues are calls from the various tribal courts and the tribes themselves asking for specific help. A good example of this would be two tribes we are working with right now.

I have an associate up in Blackfeet right now talking to the tribal community and the council. There may be some issues in their constitution in terms of amendments to accommodate some of the needs within the tribal court system. We are getting ready to go down to a tribe in southern New Mexico, hopefully next week, to sit down with the judges and some detention facilities in the region and help them develop a telephonic arraignment system and maybe even a televised arraignment system. And through that technical assistance, showing the judges how to do that, as well as maybe providing them equipment with which to do it. This way we keep the officers on the reservation for longer period of time and they are not taking long transport because we detain them in about three different facilities down in that area.

So it is kind of a day-by-day issue on the technical assistance. We also help in that process through our court review process where we have several current and past tribal and CFR judges on contract that go out and do our court reviews. At the same time they do the court reviews, they provide technical assistance to that court.

The training is quite new. Back in the 1970s, the Bureau of Indian Affairs actually provided national training to all the judges. That was changed over the years and it was felt that the tribal courts could select their own training components. So DOJ has basically filled a lot of that gap. They do quite a bit of the training.

We are just entering into the training area. I have hired an individual that has a lot of experience in legal training. That is why, as we indicated in our testimony, that we have opened up discussions with the Judicial College in Reno. We are looking more at filling gaps that DOJ is not performing right now in the sense of more on-site training that many judges are asking for.

If you do the judicial training, you are talking about two or three weeks away from the court systems during the training cycle. What the judges are somewhat interested in, and especially their clerical staff, is something a little more on-site, where we would actually go out, send people out to the field and do some on-site training.

So we are just getting into that arena right now. We don't really have a track record in that regard. It is just more of a project we are getting into. But in the interim, I think the Department of Justice provides quite a bit of training in that area.

Senator MURKOWSKI. Let me ask one last question, and this is as it relates to VAWA, the Violence Against Women Act and the full faith and credit that is to be extended to all tribal protection orders. What is your experience with how that is working? Is the

full faith and credit extended, then? Are you satisfied with how this works? Judge Pouley? Judge Duran?

Ms. POULEY. I am just lucky sometimes not only to be a tribal court judge, but to be on in the State of Washington. Shortly after the passage of VAWA, tribal court judges were invited to several meetings with the Washington State Supreme Court and State court judges.

I am happy to say that particular provision in VAWA means that tribal court protection orders protecting victims of domestic violence are routinely given full faith and credit in Washington State court and Washington State court orders are routinely given full faith and credit in all tribal courts in the State of Washington.

Senator MURKOWSKI. Judge Duran?

Mr. DURAN. Speaking specifically for New Mexico, we have come a long way with regards to the Violence Against Women Act. More specifically, I don't know if any of you are aware of the Project Passport. That was initiated through the Center for State Courts to develop a uniform first-page order of protection. The State of New Mexico Supreme Court, I currently serve as a co-chair for the Tribal-State Consortium for New Mexico. We have quarterly meetings. We completed three regional meetings, two specifically on Project Passport.

The Supreme Court, by and through a task force on domestic violence, has at this point completed a comment period for the development of a first-page order of protection for the State of New Mexico courts. The Supreme Court is looking at adopting that uniform first-page order for protection to apply to all the district courts in the State of New Mexico, whereby all the district courts are to recognize that particular format.

In addition to that, the tribes and pueblos of New Mexico are also looking at following suit and using that same or similar form to assist law enforcement for enforcement of orders for protection. Through this consortium, we have accomplished a lot of things throughout the years, especially the Indian Child Welfare Act, notice provisions to the tribes regarding placements of Indian children following State custody. So that is just one example of what you are inquiring about.

Senator MURKOWSKI. It is good to hear that.

Mr. DURAN. So New Mexico is in the forefront of accomplishing the full faith and credit provision under the Violence Against Women Act.

Senator MURKOWSKI. Good. I am pleased to hear that.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso?

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman. Thank you for holding the hearing, and thank you also for extending the kind invitation to Judge John St. Clair, who is our Chief Judge for the Shoshone and Arapaho Tribal Court. As you mentioned, he wasn't able to be here due to the storm, but thank you very much for including his remarks as part of the record.

Listening, Judge Pouley, to you talk about your daughter 15 years old and the fear that she lives in, one in three young women and the possibility of rape. I also have a 15-year-old daughter, and I know all the members of the Committee join me in thinking that no 15-year-old girl in this Nation should live with that fear. We want to do everything we can to help you and to help your daughter be raised without that kind of fear every day and every night. So I appreciate your comments.

Mr. Chairman, the Federal Government has a significant role in providing the resources for the tribal justice system. The justice system runs full circle, and if we don't have adequate law enforcement, we don't have order. If we don't provide our courts with the necessary resources, how can justice be served?

If the Federal Government does not step up, how can we expect our tribal courts to do their job? Today, our BIA law enforcement officers are dramatically understaffed. I see it in Wyoming. Our current resources allow only two officers to patrol 2.2 million acres of Indian Country on any given shift in Wyoming. However, according to the Wind River prosecutor, the BIA has allotted 21 law enforcement slots for the Wind River Reservation and has never filled them.

We must also provide the necessary correctional facilities. We hear about when there is not a juvenile detention facility, and the Wind River Reservation does not have one either. Same problem, same issues, and we appreciate your comments.

We have been in a position before where our judges and prosecutors get calls about releasing prisoners, for a number of reasons. We have had it with funding issues, instances where the prison heating system goes down, all the problems that you are dealing with.

To all of us, these situations are unacceptable and of a great concern. I do hope we can get the Department of Justice and BIA to step up their efforts in assisting our tribes. As we move closer to considering the Tribal Law and Order Act, I look forward to improving the justice system in Indian Country.

We do not, Mr. Chairman, need a Washington one-size-fits-all approach. We just need to provide the appropriate resources. With that, I must say that the Wind River courts and specifically Judge St. Clair, with their limited resources, do an incredible job with carrying out justice.

Mr. Chairman, I did have several questions for Judge St. Clair, and I ask permission to submit those to the judge in writing and to include those answers as part of the record.

The CHAIRMAN. Without objection.

Senator BARRASSO. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman.

I am sorry for being late. This is a critically important issue. I think that from a safety standpoint, it speaks for itself. I can't speak for tribes in other parts of the Country, but I can tell you tribes in Montana from an economic standpoint, it is tough to get

people to come and work in a place that is not safe. Those are pretty basic things.

I have a couple of questions. The first one is for anybody who can answer it. The Chairman talked about 50 percent of the murders in Indian Country being turned away by the U.S. Attorney, and 76 percent of rapes being turned away by the U.S. Attorneys. We don't have a U.S. Attorney rep here. Can anybody shed any light as to why that is occurring?

Ms. SAHNEYAH. Some of the reasons that we perceive—I am a prosecutor in Arizona for the Hopi Tribe—is that they have very high standards in terms of evidence. It is pretty much the attitude that the case—they have to be assured that they are going to win. So a high level of evidence needs to be received by them.

Senator TESTER. Excuse me, I don't mean to interrupt, but is that standard consistent with off-reservation crime?

Mr. RAGSDALE. I believe, so, Senator. She is correct. I have been an officer and have sat in Federal grand jury proceedings. There is a higher standard of evidence that you must present with a case. I think that the U.S. Attorneys by and large that serve Indian Country are very diligent in the prosecution of cases. But the Federal system is different. We ask our U.S. Attorneys essentially to act like a State prosecutor and the system is not set up that way, as I understand it. The U.S. Attorneys could answer that better than I can.

Senator TESTER. Okay. Go ahead, Dorma. You can continue if you want.

Ms. SAHNEYAH. Okay. And some of the other things are the distance. Like, for example, the Hopi reservation is about five hours one-way. Them being able to meet with witnesses that are on the reservation, meeting with law enforcement officers, sometimes that distance presents issues. A lot of the times the law enforcement officers, the criminal investigators, have huge caseloads, and being able to get out to interview witnesses presents issues, too.

So those are some of the reasons. The places where they have to send evidence to be analyzed, the homicide case that we have scheduled for trial, the reason we have been given for them not taking the case has been that they haven't received analysis back from back east somewhere—Virginia?—wherever the location is that the U.S. Attorney's office sends their evidence to be analyzed. It takes a large amount of time, so we are just sitting and waiting.

Our statute of limitations is one year, so in order to get that individual off of the streets on the reservation, we took the case and have him in jail so that the family of the victim is at least believing that something is happening.

Senator TESTER. Okay. So if the U.S. Attorney doesn't take the case because of what they perceive as a lack of evidence or a lack of a slam-dunk, then it falls into the tribal court's hands.

Ms. SAHNEYAH. Right. Well, generally, it is all sent to the prosecutor's hand. We decide that we are going to go forward with it, and then we bring it before the tribal court judge.

Senator TESTER. And is the tribal court limited—and if you covered this in your testimony, my apologies. Is the tribal court limited as far as the sentences go, to one year?

Ms. SAHNEYAH. And a $5,000 fine.

Senator TESTER. And a $5,000 fine if they are convicted of murder.

Ms. SAHNEYAH. Correct.

Mr. DURAN. Senator Tester, specifically for Hickory Apache Nation Court, the tribal council legislative body has limited the maximum sentence with the old requirement of the six months incarceration, as opposed to bumping it up to the one year. So for Hickory specifically, they have now made that transition to one year incarceration.

Senator TESTER. Got you. I know there is a separation of powers here, but does this seem right to you, Patrick?

Mr. RAGSDALE. No, it doesn't seem right to me that we have an appearance of a second-rate justice system in America, one for all Americans and one for tribal Americans. That doesn't seem fair.

Senator TESTER. How would you recommend we solve it?

Mr. RAGSDALE. Well, the Department has not taken a position on your bill, as you know, but I will tell you, I mean, I commend the Committee for the effort. But from a personal standpoint as a former law enforcement officer, unless the tribes and the law enforcement providers have the capacity to totally administer a three-tiered justice system, it is nice to have provisions to give the tribes more flexibility and restore some of the powers that they historically had until the United States took them away from them. But without the capacity to do that correctly, it is not going to mean a whole lot as far as I am concerned.

Senator TESTER. Yes.

Mr. DURAN. Senator Tester?

Senator TESTER. Yes?

Mr. DURAN. Also with regard to some of those issues, I had the opportunity throughout my judicial career to work with several Assistant U.S. Attorneys over the years. They did express that there is a threshold issue when dealing with cases. The major factor, especially with law enforcement, is that the first 24 hours is very critical. Oftentimes, law enforcement agencies are not adequately serviced or certified to conduct a lot of the investigations that are needed as well. And so a lot of the evidence that Ms. Sahneyah has pointed out from the prosecutor's standpoint, there is not enough evidence to move forward with the Federal prosecution.

The bill would address the appointment of special prosecutors which would assist in expediting a lot of those cases and moving them forward to a probable cause hearing, also for an indictment. In addition to that, in NAICJA's written testimony, we are proposing a similar concept, which would be a cross-deputization of tribal court judges as special magistrate judges to handle Federal cases for the initial appearance, and also for detention and probable cause hearings. That might also expedite.

Senator TESTER. Okay. Let's move to a different topic for a second. I have a ton of questions here, but I just kind of want to go off of what Senator Barrasso said about resources.

Patrick, are you in contact with the tribal courts, yes, the tribal courts themselves to find out what they need for resources?

Mr. RAGSDALE. Mr. Little is more than I am, but yes, I am, when I have the occasion to talk to tribal prosecutors, judges, as well as law enforcement officers and others.

Senator TESTER. Can you generally encapsulate what they tell you? Do they have enough money? Too much money? Not enough money? What do they tell you?

Mr. RAGSDALE. As I testified, the amount that we provide is a very modest amount of financial assistance. If you look in the President's green book budget, there is a shortfall report, at least for the self-governance tribes, where the tribes report what—and generally what we did at the Cherokee Nation is we put the amount the BIA provided us, and then the shortfall was what the actual court operation was at the Cherokee Nation.

Senator TESTER. Got you. So where are they supposed to come up with the additional money if they are funded at a nominal level?

Mr. RAGSDALE. What the tribes do is rely on other Federal grants or they provide their own tribal funds to support the justice system, and most tribes do.

Senator TESTER. Okay. Well, I mean, it seems like kind of a crazy system to me. If your job is to fund it at a less than adequate level—is that what I heard you say?

Mr. RAGSDALE. No, sir, that is not what I said. What I will say is that tribal courts law enforcement detention, programs that I have responsibility for, compete with all of the other deserving programs that are administered by the Bureau of Indian Affairs.

Senator TESTER. You are talking, like, Indian Health Service?

Mr. RAGSDALE. For the Department of Interior, I mean, all of us compete at the end of the day for the funds that the United States appropriates to run the Federal Government. You know, so tribal leaders and Federal leaders have to make very hard choices of how to balance those disciplines and responsibilities to provide funding to because they are all in competition.

Senator TESTER. Do you think that more funds for the tribal court system would result in a safer environment?

Mr. RAGSDALE. Yes, I do.

Senator TESTER. Okay. So who does the fighting? This isn't the first time we have asked this question. I may have asked it to you before, but there are other people who have been up here. Who gets down and gets their knuckles scraped up when it comes to getting money? Because the truth is, the truth is, and I can't speak for this whole Committee, but I bet I can speak for a fair number of them, that what we want is self-sufficiency in Indian Country. As long as the environment is safe, economically they are trashed. It ain't going to happen. It ain't going to happen.

So who sits down and gets their knuckles dirty that we make an investment earlier, and hopefully it will save us money later because their economic structure will get better and will require less Federal dollars?

Mr. RAGSDALE. Well, in our Federal system, we have one President of the United States, and we have people, and all of us that work in the Federal workforce at the end of the day, I think are pretty good about advocating our program requirements and responsibilities. At the end of the day, a decision is made as to what the allocations are going to be made. I know the Appropriations Committees have a similar responsibility in determining what their targets are going to be.

Senator TESTER. Do you think—and this is my last question, I don't want to continue on this—but do you think the Administration cut this by $2.3 million in 2009 because they thought we would restore it?

Mr. RAGSDALE. I can't answer that, Senator.

Senator TESTER. Okay. Thank you very much.

The CHAIRMAN. Mr. Ragsdale, did the BIA going up through the budget process recommend at least level funding or more funding for the tribal court system?

Mr. RAGSDALE. I believe so.

The CHAIRMAN. So that proposal was cut somewhere after it left Interior.

Mr. RAGSDALE. Somewhere.

The CHAIRMAN. You know, this is a matter of priority, and I do think all the evidence suggests that we do need some additional resources. We certainly don't need a cut in funding. My expectation is the Congress will restore, and my hope is we will try to adequately fund this. Part of our issue is to change the law so that we make some sense of this system. The system isn't working. And then the second part is to adequately fund some of these issues.

So we propose changing the law to give the tribal courts some more authority, for example, three year sentencing. My understanding is that the Administration and the department oppose that. Is that correct?

Mr. RAGSDALE. We have not taken a position on that, Mr. Chairman. We in the Bureau of Indian Affairs have not.

The CHAIRMAN. The Department of the Interior has, I believe, on June 19 testimony from the Department of Interior is that they oppose that, worried about some constitutional protections. We have included in the legislation a requirement for public defenders, a whole series of things that we believe offers that constitutional protection. Do you have something else, Mr. Ragsdale?

Mr. RAGSDALE. No, I was just trying to check to verify that position. I am told that we indicated that we had issues with that as a concept, but I don't think we have taken a formal position on the extension of the sentencing.

I did want to say that on behalf of my Secretary, and I wouldn't say it if it wasn't true, is Secretary Kempthorne has been very much of a champion for us since the day that he first came to office. We briefed him and we are going to have a short time to brief him, and he took a couple of hours. It was his initiative to get the Safe Indian Communities funding started. I don't think that we got everything we wanted. I know we didn't get everything that the Secretary wanted, but it was his leadership that at least gave us a modest increase to our public safety budget. He has been a very firm supporter of it.

The CHAIRMAN. Yes, Secretary Kempthorne is an awfully good guy. I have worked with him. He is a colleague of ours in the Senate prior to becoming a Governor and Secretary. So I have great respect for him, but he has very little running room, I think. I don't think Secretary Kempthorne is the one who is saying, you know what, let's cut the tribal courts. I think that runs through the Office of Management and Budget and the White House, and they decided to cut the funding for tribal courts when all the evidence sug-

gests that it is a pretty foolish decision if you want to strengthen tribal courts.

But I understand your point about the Secretary. I think he is—but I would say this, however. When he came to town, when he was appointed, we had had a two-year vacancy in the Assistant Secretary for Indian Affairs, running the BIA. So he came up with a candidate and I supported that candidate very strongly. We worked very hard to get the nomination complete, and a year later he is gone. We are not quite sure of the reasons for all of that. And now the position is vacant again.

It is very hard for an agency that is part of this bureaucracy, and the BIA, you know, I feel is unbelievably bureaucratic. It is pretty hard for an agency to have good leadership when you don't have someone at the head. You have acting people in this area and that area. But I accept your point about the Secretary. I think the Secretary means well and wants to do well. I think he has precious little running room to do that, given the Office of Management and Budget and the White House.

Senator Cantwell?

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman.

If I could put a statement into the record, I appreciate it.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Cantwell follows:]

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, I would like to thank you for your continued leadership of this Committee and your dedication to the pressing issue of the administration of justice in Indian Country.

These are issues that are paramount in our nation's responsibility to our Native American neighbors.

I would like to begin by welcoming the Honorable Theresa M. Pouley Associate Judge of the Tulalip Tribal Court, an Associate Justice of the Colville Court of Appeals in Eastern Washington, and the former Chief Judge of the Lummi Tribal Court.

As a Judge for the Northwest Intertribal Court System, she also serves as a trial judge and appellate court justice for several other Northwest tribes.

I thank her for making the 3,000 mile journey to discuss the incredibly important issue of justice in Indian country. I also appreciate you sharing your expertise on how the proposed reauthorization of tribal court programs and expansion of sentencing authority will allow tribal courts to prosecute more felony crimes. This will ultimately improve the safety of those living on reservations.

In October 2006, the Tulalip Tribal Court's Alternative Sentencing Program was awarded High Honors by the Harvard Honoring Nations Board–one of only seven programs to receive this honor. This program uses best practices of drug courts and adds a native "healing" philosophy into criminal procedure that focuses on correcting behavior, not just punishing the offender. And it has had promising results.

Twenty-five percent of the participants in the program do not re-offend.

The police chief reports violent crime is dropping drastically.

Cases of resisting arrest are few and far between.

Gang activity is down.

And there is a significant decrease in the number of outstanding warrants.

The program is an example of a culturally appropriate justice system that has worked. It is also an example of why tribal courts are the most appropriate venue for prosecuting Indian Country crimes within their jurisdiction.

Unless we give tribes the authority to sentence tribal offenders to longer terms, their abilities are limited. Unless we provide funding for tribal court judicial personnel, public defenders, facilities, and other needs of the courts, their abilities are limited. And unless we make a commitment to cooperation and a sense of partnership with tribal courts, their abilities are limited.

And the people that depend on them will suffer.

To successfully fight the problem of crime in Indian Country, we must provide a stable source of funding for tribal justice and other law enforcement and prevention programs.

I have fought for this in the past and I continue this fight today.

We've seen how programs that are culturally aware can serve justice for these communities.

And if we continue to fight for the resources and funding, we can give this kind of success story to more Native American tribal courts and communities in America.

Once again, my thanks to Chairman Dorgan for his dedication to these issues. Again, Judge Pouley, thank you for being here with us today.

Senator CANTWELL. I appreciate you and Senator Murkowski holding this hearing.

I want to welcome Judge Pouley to Washington. Thank you for being here. Obviously, the Tulalips have had some success in bringing down the crime rate on the reservation. I know you talked about that in your testimony, and talked about using a variety of tools to do that—cooperative agreements, increased police presence, use of drug courts. So you have used a variety of tools to do that.

How would the Tribal Justice Support Act help you in furthering those efforts to improve the tribal court system?

Ms. POULEY. In a variety of ways. First of all, of course, stable funding is really one of the keys for tribal court systems. The Tulalip Tribal Court has been very fortunate to have a very supportive tribal government that funds the $970,000 it takes to run a court that hears 1,100 cases, because we only get $30,000 from the Bureau of Indian Affairs.

So the court has been very lucky in having Tulalip sponsor those resources as a result of its economic gains. We have also been very fortunate in having the tribal court support continued economic gains at Tulalip, but of course all of those gains are fragile. They are contingent upon Tulalip's ability to attain stable funding for its justice system.

So prioritizing tribal courts as the place to be able to resolve disputes that happen in Indian Country, funding tribal courts at a level that has been recommended, or providing alternative stable funding for tribal courts, providing a concerted, coordinated law enforcement effort, which includes all of the services that we think of in tribal justice systems. All of those provisions in the bill are going to help Tulalip continue to address the violent crime rate on our reservation in particular, but in all of Washington State and the rest of the Country.

Senator CANTWELL. Thank you.

And how would increased tribal sentencing authority from one to three years help the Tulalip Tribe in the Northwest in our tribal system?

Ms. POULEY. It is the first step towards giving us the ability to actually sentence offenders for murder or rape, to amounts of time that are actually proportionate to the crime that they have committed. By removing those offenders from the reservation and from

the community, we make all of the community members, Indian and non-Indian, safer.

We have the ability by using a three-year sentence to encourage offenders to change their behavior, where that is appropriate. It is just the first step towards addressing serious crime when the Department of Justice and other agencies can't. One of the things, and no disrespect intended to Mr. Ragsdale, but it is one of the things that has been repeated in the testimony before these hearings that somehow tribal courts are not competent to do that. I really have to take issue with that.

Washington State tribal courts and tribal courts in the United States absolutely are. The statistics bear it out. If you take a look at the number of writs of habeas corpus filed in Federal court, that would the time that a tribal court had violated somebody's due process, I have not seen one in any of the courts that I serve. So the idea that somehow tribal courts aren't ready or aren't competent is just absolutely untrue.

And given the sentencing authority from one year to three years just helps tribal courts develop in their own competency and address the issues that really face their communities.

Senator CANTWELL. If I could follow up on that, Mr. Chairman, have you served as a tribal court judge for rural tribes and urban areas, and some of those without reservations? I mean, do you think we can achieve this across those various differences of Indian Country?

Ms. POULEY. I think almost all of the experts from Amnesty International to Justice Sandra Day O'Connor to Janet Reno to the U.S. Commission on Human Rights report in 2003, all say that Indian tribal courts are the best mechanism to be able to address this issue. The Amnesty International report in 2007 specifically recommended this kind of coordinated Federal, State and tribal program as the only way to address the absolute rampant violent crime rates in Indian Country, and specifically wanted to encourage State and tribal cooperative agreements, as well as making sure that tribal courts as institutions are respected and properly funded.

Senator CANTWELL. Well, thank you.

And thank you, Mr. Chairman. I know that I have talked to our Supreme Court justices before when they have visited Washington State, and looked at the tribal court system and have been impressed. I am glad you brought that up, as some of those who have endorsed having a stronger, robust system. So thank you, Judge, for being here.

Thank you, Mr. Chairman.

Mr. RAGSDALE. Mr. Chairman?

The CHAIRMAN. Yes. Mr. Ragsdale?

Mr. RAGSDALE. Can I just clarify so that it is clear. When I talked about capacity, I was not talking about the institution of the tribal courts and judicial forums of tribes, which are older than America. What I was referring to is if we do not have adequate detention and policing systems to handle additional responsibility, in terms of capacity. Not that I think that the tribal courts are less than State or Federal courts or anything of that nature, because I don't believe that is so.

The CHAIRMAN. All right. I have visited the Tulalip Tribe, and I understand the aggressive and robust economic development that goes on in that tribe, and can only occur if you have a tribal justice system for enforcement of contracts, diminished crime and so on. So it seems to me that that is a success story, and I appreciate very much, Judge Pouley, your being here. Senator Cantwell, of course, speaks often and well of what you are doing in the Tulalip Tribe.

This is a very important issue because if you are not safe, you know, a lot of other things in life cannot be accomplished. We talk a lot about if you don't have your health, that is a serious problem. So we do a lot on Indian health care.

Crime, housing, these are the essentials of life, to address these issues. Today, we talked about the tribal court system. We appreciate the fact that you make the tribal court system work in many cases with far less revenue than you need.

Again, Judge Flies-Away, I will encourage all of my colleagues to read the piece that was done about your work in The Wall Street Journal. It just describes a day in the life of a tribal court judge. You are someone with a substantial background and have gone back to the reservation to try to make the tribal justice system work. This Committee deeply admires that, and I hope all of us recognize the restrictions under which you work. Inadequate detention facilities, inadequate funding, you know, and yet you are trying to make this system work. So we appreciate that.

I would say to Judge Duran and Judge Pouley and Prosecutor Sahneyah, we thank you very much for your work.

Mr. Ragsdale and Mr. Little, thank you very much for being here today and providing the perspective of the BIA and the Department of the Interior.

This hearing is adjourned.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JOHN ST. CLAIR, CHIEF JUDGE, SHOSHONE AND ARAPAHO TRIBAL COURT

Mr. Chairman and members of the Committee on Indian Affairs, my name is John St. Clair and I have been the Chief Judge of the Shoshone and Arapaho Tribal Court since its creation in 1988; and prior to that Chief Judge of the Code of Federal Regulations (CFR) Court since 1983.

I wish to thank you for invitation to testify today regarding the Indian Law and Order Bill.

The Wind River Indian Reservation is in west central Wyoming consisting of approximately 2 million acres set aside by the Treaty of Fort Bridger, 1968. The Northern Arapaho and Eastern Shoshone (the Tribes) jointly occupy and own it. These are about 6,000 enrolled Arapahos and 4,000 enrolled Shoshones, many of whom live on the reservation along with non-enrolled Indians and non-Indians. Within the exterior boundaries there are about 35,000 people.

In 2007 the Tribal Court processed 3,939 criminal, traffic and civil cases. The Court exerts criminal jurisdiction over all Indians who commit offenses prohibited in the Shoshone and Arapaho Law and Order Code and civil jurisdiction over all persons who have significant contacts with the reservation. The Court was created in 1988 by the Tribes exercising their inherent authority to administer justice that derive from their substantive powers of self government which fall within the domain of tribal sovereignty.

Budgetary needs for 2007 totaled $490,000. Funding by the Bureau of Indian Affairs (BIA) was $137,844 pursuant to a P.L. 93–638 contract, while the Department of Justice (DOJ) provided about $170,000 in grants and the Wyoming State Bar Foundation awarded an $8,000 grant for criminal defense. When this funding is combined, there exists an unmet need of $174,000. Because of this deficiency in funding, the court system cannot employ adult probation or sentence accountability officers to supervise, monitor and enforce the terms and conditions contained in probation agreements, deferred prosecutions agreements, suspended sentences, temporary releases and restitution orders. This directly affects the courts ability to address Title III Section 304 of "Tribal Justice Improvement Act" where a tribal court may require a convicted offender to serve an alternative form of punishment. Since grants are not secured funding the court is concerned with the proposed amendment of the Indian Civil Rights Act (25 U.S.C. 1302) to replace the present language of ". . . at his own expense to have the assistance of counsel for bill defense;" with, ". . . to deny any person in a criminal proceeding the assistance of defense counsel;". The concern is that tribes may be required to provide for a tribal defender, thus creating a financial obligation that did not exist prior to this proposed bill.

In 1995 the State of Wyoming passed legislation giving full faith and credit to civil orders of the Tribal Court and in compliance with the Violence Against Woman Act (VAWA) (18 U.S.C. 2265 and 2266) enacted provisions to extend full faith and credit and registration of tribal protection orders (W S 35–21–108 and 111). The Tribes have in the Shoshone and Arapaho Law and Order Code (SALOC) procedures for recognizing foreign judgments from outside jurisdictions at Title I Chapter 9 and under rule-making authority of the Chief Judge found at Rule 4–6–17 *Rules of Criminal Procedure* in 1999 Rule CU–109 *Recognization and Enforcement of Foreign Protection Orders* was made to recognize and register outside protection orders.

The Tribes have operated adult and juvenile drug courts since 2001. The courts were created pursuant to the same rule making authority of the chief judge utilized to comply with VAWA. An associate judge was assigned to carry out the duties in both courts. This has worked well because there is no conflict or competition with the existing court since the judge has the authority to sit in either court. The average number of clients in the drug courts are about 50 participants and approximately 10 of these successfully complete the program.

Law enforcement services are provided by the BIA and there exists a lack of enough officers to adequately patrol the reservation. Compared to the state law en-

forcement system, the Wind River Reservation's resources are only about 60 percent. This impacts not only on how the department is able to deliver services, but knowledge in the communities that response may be inadequate or non existent. As a result many crimes are not investigated or not even reported.

In conclusion, the goal of providing tools for tribal governments to address public safety concerns in Indian Country proposes $35,000,000 for jails and $10,000,000 for emergency shelters, but nothing for tribal courts who have vast unmet needs such as the Shoshone and Arapaho Tribal Court which totals $350,000 without considering grants. In addition, increased resources for law enforcement will result in a corresponding increase in tribal court caseloads which will also increase with the proposed increase in sentencing authority from a year and $5,000 to three years and $15,000 or both. The impact of increased sentencing authority will be far less federal prosecution and more tribal prosecutions. Should ICRA be amended so that tribes must provide legal defense this will be an additional cost to tribal courts.

Finally ITJA authorized but did not appropriate $50,000,000 base support funding each fiscal year for tribal justice systems. I recommend and request that the Tribal Justice Improvement Act of 2008 include an appropriation of $50,000,000 each fiscal year for 2009 through 2013.

On behalf of the Shoshone and Arapaho Tribal Court System I want to thank the Committee for this opportunity to testify before you and express my support for this important legislation.

ATTACHMENT A

FY 2007 PL 93-638
ANNUAL REPORT OF THE SHOSHONE AND ARAPAHOE TRIBAL COURT

Introduction

Tribal courts are of growing significance in Indian Country and constitute a key tribal entity for tribal rights of self-government, according to Frank Pommarshein, Braid of Feathers: American Indian Law and Contemporary Tribal Law 57 (1995). They agonize over the very same issues state and federal courts confront such as child sexual abuse, alcohol and substance abuse, gang violence and violence against woman, with far fewer financial resources. In 1991 the United States of Civil Rights Commission found that failure of the United States Government to provide proper funding for the operation of tribal judicial systems has continued for more than twenty years. The Commission strongly supported congressional initiatives to authorize funding of tribal courts in an amount equal to that of an equivalent state court. It found that tribal justice systems are important forums for ensuring public health, safety and political integrity of tribal governments.

The Eastern Shoshone and Northern Arapahoe Tribes of the Wind River Indian Reservation jointly operate the Tribal Court. The Court exerts criminal jurisdiction over all Indians who commit offenses in the Law and Order Code and civil jurisdiction over all persons who have significant contacts with the reservation. The Tribal Court was created in 1988 by the tribes exercising their inherent power to administer justice that derive from their substantive powers of self-government which fall within the domain of tribal sovereignty. In 1995 the State of Wyoming passed legislation giving full faith and credit to civil orders.

Justification for PL 93-638 Funding

The Shoshone and Arapahoe Tribal Judicial Programs provides fair and equal services to the residents of the Wind River Indian Reservation in administering justice. The caseloads have increased, as well as the need for adequate court personnel to fulfill these duties.

The Shoshone and Arapahoe Joint Business Council is desirous of a strong judicial system to exercise its judicial power to the fullest extent possible, limited only by Federal Law, as one of the essential elements of the exercised of powers of Tribal self government. Virtually all areas of Tribal and individuals business, needs a sound legal forum to hear cases and administer justice. The Tribes have structured a court that will uphold their civil authority other Indians and non-Indians.

The objectives of the Tribal Court are to enforce the Tribal Law and Order Code and to strengthen the customs and traditions of the Shoshone and Arapahoe Tribes; to comply with the Indian Civil Rights Act, to provide due process to all individuals coming before the Tribal Court, to provide basic staff for the Tribal Court system for the implementation and execution of the policies and directives of the Tribal Court; to preside over civil and criminal actions in a fair and impartial manner; to maintain and upgrade the appellate court system; and to operate from an adopted Law and Order Code.

CHIEF WASHAKIE

ATTACHMENT B
RESOLUTION
OF THE
SHOSHONE & ARAPAHO TRIBES
P.O. BOX 217
FORT WASHAKIE, WY 82514

CHIEF BLACK COAL

Resolution No. 2007-9313

A RESOLUTION TO RENEW THE P.L. 93-638 CONTRACT FOR THE SHOSHONE AND ARAPAHO TRIBAL COURT FOR FISCAL YEARS 2008, 2009 AND 2010.

WHEREAS, the Joint Business Council ("JBC") of the Shoshone and Arapaho Tribes ("Tribes") is the governing body duly authorized by the General Council of each Tribe to conduct business on behalf of the Tribes; and,

WHEREAS, virtually all areas of Tribal and individual business requires a sound legal forum to and administer justice; and

WHEREAS, the Joint Business Council is desirous of a strong judicial system to provide these essential services; and

WHEREAS, the Tribes desire to continue to structure a court to extend their authority over Indians criminally and non-indians civilly;

NOW THEREFORE BE IT RESOLVED, that the Joint Business Council of the Shoshone and Arapaho Tribes will contract through P.L. 93.638 in the amount of $519,567.00 to operate and manage their Shoshone and Arapaho Tribal Court System for Fiscal years 2008, 2009 and 2010.

BE IT FINALLY RESOLVED, that the Chairman of the Eastern Shoshone Business Council and the Northern Arapaho Business Council are directed and authorized to execute any documents necessary to implement this resolution.

ATTACHMENT C

TITLE I
GENERAL PROVISIONS

CHAPTER 1 PRELIMINARY PROVISIONS

Section 1-1-1 Inherent Tribal Authority

The power to legislate for the administration of justice for an Indian tribe extends back to time immemorial if not limited by Congress or itself. This exercise of inherent tribal sovereignty provides the basis upon which this Code is enacted. It is a general act intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if it can be reasonably avoided.

Section 1-1-2 Name of Code

This law and order code shall be known as the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation and may be referred to as the Code and abbreviated as S&A LOC. Subcodes and rules included herein may be cited by the name given in the Subcode or rule heading.

Section 1-1-3 Prior Inconsistent Resolutions and Ordinances Repealed

Any and all resolutions and ordinances of the Joint Business Council, Shoshone and Arapaho Tribes which conflict in any way with the provisions of this Law and Order Code are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this Law and Order Code. Those which do not conflict will remain in effect.

Section 1-1-4 Enforcement of Code; Service of Notices, Orders; Warrants

(1) The Indian Police of the Bureau of Indian Affairs (BIA) shall carry out the orders of the Shoshone and Arapaho Tribal Courts and in the community enforce the letter and spirit of this Code in an impartial manner until the Shoshone and Arapaho Tribes create their own police department.

(2) The Indian Police of the BIA shall also promptly serve all notices which the courts request.

(3) Warrants of arrest and for search and seizure based on probable cause are to be executed to insure justice by the Indian police and carried out in a manner that promotes fairness to all parties.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN BARRASSO TO HON. JOHN ST. CLAIR

Question 1. It is understood that BIA Law Enforcement is severely understaffed. How does this affect the unit's ability to enforce the law?

Answer. With approximately 40 percent of the officers needed to patrol the 2.3 million acre reservation, many crimes go uninvestigated while others are not even reported because the community is aware of the situation. When more than one crime is reported, the department must choose which will take priority and the other must wait until someone is available.

Question 1a. How does this shortcoming affect the tribal court?

Answer. Police Officers aren't always able to attend trials or serve court papers because calls need to be responded to immediately. Because of speedy trial requirements cases have to be dismissed. Defendants know this and enter a plea of not

guilty knowing that there is a good chance of dismissal. Another reason for non attendance is when an officer just goes off duty.

Question 1b. What would you recommend to improve this situation?

Answer. Increased funding to make more officers available or for the tribes to contract law enforcement and become eligible for additional funding outside the Interior Department.

Question 2. The Shoshone and Arapaho Tribal Court cannot afford to employ probation and sentence accountability officers. What effect does this have on the effectiveness of the system?

Answer. The effect is to undermine the system because defendants know that there will be no one to monitor and follow up on the terms of their probations. Any accountability is initiated by the judge or criminal clerk on a catch-as-catch-can basis which is inconsistent and unfair. This deficiency also inhibits the courts ability to collect fines paid on a monthly basis, to supervise a community service program and to follow-up orders to pay restitution.

Question 2a. How does this affect the crime rate?

Answer. It renders the justice system a "paper tiger" because the public knows that once they leave the court, no one is watching. They can forget their obligations until they commit another crime. Treatment requirements for drug and alcohol abuse and for domestic violence aren't being met by defendants, and as a result their underlying problem is never addressed. These kinds of violations continue and increase.

Question 3. What if BIA would budget properly and fully meet the needs of law enforcement and tribal courts? Wouldn't it be more effective?

Answer. Yes, the reservation needs to be adequately patrolled, then all calls need to be responded to immediately and fully investigated. Full funding would also mean that crimes could be fully prosecuted by the attendance at trial of the officer who is the complaining witness. Finally notices and subpoenas could be served in a timely manner.

Question 3a. Wouldn't the rule of law be more consistent?

Answer. Yes, presently, enforcement is haphazard and inconsistent due to lack of funding. There is no follow-up to requirements after conviction. With adequate funds these shortcomings could be corrected and the public would respect the justice system rather than just to try and find ways to avoid responsibility. This would result in the system having a deterrent effect on crime rather than little or no effect.

Question 3b. Wouldn't the people of the Eastern Shoshone and Northern Arapaho Tribes have more confidence in their community?

Answer. Yes, the public needs to feel safe in their homes with the knowledge that crimes involving violence, drugs and alcohol will be fully investigated and prosecuted. That's not the case today. Three young girls were found dead in a housing complex June 4, 2008. As of today no information has been released as to the cause of death. One parent stated that the BIA police refused to look for her daughter when she reported her missing earlier. If this is true, this refusal may be due to inadequate services or it may be due to neglect of duty. In any case this did little to bolster community confidence.

Question 4. Is the BIA meeting its obligation to the people of the Eastern Shoshone and Northern Arapaho Tribes?

Answer. No it is not. Resources for law enforcement and courts have historically been woefully inadequate to meet existing needs. Resources have ranged from 25–40 percent of need and as a result this reservation has one of the highest rates of crime in the nation. A major drug bust in 2005 revealed the existence of a major operation with sources out of Mexico. This was ale to develop due to inadequate law enforcement presence, lack of authority of tribes to prosecute non Indians, lack of sentencing authority of tribes which is limited to one year and a fine of $5,000 and to lack of co-ordination and even communication across jurisdictional lines.

A Comparison of State Low Level Felony Sentencing Authority

by M. Brent Leonhard and Cisco Minthorn [1]

The Tribal Law and Order Act of 2008 is a significant step forward in curbing crime in Indian Country. Among its provisions is the expansion of tribal sentencing

[1] Brent Leonhard is the Deputy Attorney General of the Confederated Tribes of the Umatilla Indian Reservation. Cisco Minthorn is a summer law clerk for the Confederated Tribes of the

authority from a maximum of 1 year to a maximum of 3 years. While this is laudable, for the reasons set out in this memo it may be more appropriate to permit tribes to sentence individuals who commit serious crimes to a maximum of 5 years.

The 3 year timeframe was initially selected based on the 2002 report of the Committee to the U.S. Sentencing Commission, which showed that the most common federally prosecuted crime was assault, and that the most common sentence was 34 months. However, it may be more relevant to look at how states define their lowest level felonies to determine what tribal sentencing authority ought to be. Furthermore, the 3 year time frame fails to take into account that prisoners are often given good time, such that the actual sentence served may be significantly less than that imposed.

Most states define felonies by statute, just as the proposed bill will do for Indian Country. Rather than basing tribal sentencing authority on a given federal sentence, it might be more appropriate to look at how states define their lowest level felonies as a guide to determine an appropriate expansion of tribal sentencing authority. Furthermore, it stands to reason and fairness that a tribe ought to at least have the same sentencing authority as a state does with respect to the state's lowest level felonies. This is particularly true given that a tribe's use of such enhanced sentencing authority will typically be for very serious crimes that have not been prosecuted through the federal system. Examples include rape, attempted homicide, serious child abuse, and aggravated assault. While it is unlikely that a state would include such crimes within their lowest level felonies given the serious nature of the offenses we are talking about, tribes ought to at least be able to sentence someone committing these crimes up to the maximum allowed by a typical state's *lowest* level felony.

In that regard, this memo examines how each state defines its lowest level felony. As it turns out, of the states that define felonies, the majority define their lowest level felony as having a maximum sentence of 5 years. And most states that define low level felonies as less than 5 years categorize aggravated assault (presumably, the typical crime to be covered by expanded jurisdiction) as falling within a felony class that has at least a 5 year maximum sentence.

11 states are left out of this calculation because they don't define a felony and we have been unable to find an equivalency. Of the remaining 39 States we have found the following:

25 states define their lowest level felony as carrying a maximum sentence of 5 years in jail or more (18 of these define the lowest level felony at 5 years.) 4 states define the lowest level felony as 4 years, 3 States as 3 years, and 7 as 2 years or less. However, 6 of the 7 that have low level felonies defined as 2 years or less actually treat aggravated assaults (the typical type of offense to be covered by expanded jurisdiction) as 5 years or more. So, it might be more accurate to say, in regard to offenses of concern in Indian Country and the need to expand jurisdiction, at least 31 of 39 states define their lowest level felony as 5 years or more.

So, 64 percent define a low level felony as 5 years or more, and if we include relevant felony crimes for Indian Country, it is more like 79 percent. In addition, of the 11 states that do not define felonies, 9 sentence aggravated assaults to mare than 5 years. As for the other 2 states, 1 sentences aggravated assault to 4 years and the other uses a complex sentencing grid for all offenses. So, in regard to offenses of concern in Indian Country, 46 of the 50 states, or 92 percent, allow for a sentence of 5 years or more.

The actual breakdown is as follows:

10 years: Alabama, Montana, and Texas.

7 years: New Hampshire and Pennsylvania.

6 years: Arkansas and Tennessee.

5 years: Alaska, Connecticut, Florida, Hawaii, Idaho, Iowa, Kentucky, Maine, Massachusetts (appears to be), Minnesota, Nebraska, New Jersey (appears to be), North Dakota, Oregon, South Carolina, Utah, Virginia and Washington.

4 years: Michigan, Missouri (note: first degree assault is 15 years), Nevada (note: battery with substantial bodily harm is 5 years) and New York (note: first degree assault is 25 years).

3 years: Illinois, Indiana, and Wisconsin (technically 3½ years).

2 years: Delaware (note: felony assault is 8 years), Oklahoma (note: aggravated assault is 5 years), and South Dakota (note: aggravated assault is 15 years).

18 months: Arizona (note: felony assault is 5 years), Colorado (note: first degree assault is 8 years), New Mexico, and Ohio (note: felonious assault is 8 years).

Umatilla Indian Reservation, and an enrolled member. He is also a Spring 2009 candidate for a dual JD/MUP at the University of Michigan Law School.

Not defined: California, Georgia, Kansas, Louisiana, Maryland, Mississippi, North Carolina, Rhode Island, Vermont, West Virginia, and Wyoming.

The following is a list of states along with how and where they define their lowest level felony.

Alabama. In Alabama the lowest level felony is classified as class C, and carries a maximum sentence of 10 years. Ala.Code 1975 § 13A–5–6.

Alaska. AS 12.55.125(e) defines a class C felony, the lowest level felony, as having a maximum sentence of 5 years.

Arizona. In Arizona there is a numbered class system, with 6 being listed as the lowest level felony. However, a class 6 felony has a maximum sentence of one year, which is what most states consider a gross misdemeanor. The next highest level, a class 5, has a maximum sentence of 18 months. A.R.S. § 13–701. However, aggravated assaults involving serious physical injury, use of a deadly weapon or dangerous instrument, or one causing temporary but substantial disfigurement or temporary but substantial loss or impairment of any body organ (including the fracturing of any body part) are sentenced between at the low end (breaking an arm, say) at 2½ years to serious bodily injury at 3½ to 5 years.) ARS 13–1204.

Arkansas. A class D felony is the lowest level in Arkansas and it carries a maximum sentence of 6 years. A.C.A. § 5–4–401.

California. California does not have a classification system in place for the punishment of felonies. Rather, each felony defined by statute has a specific punishment tied to it. Assault with a deadly weapon or force likely to produce great bodily injury for instance, carries a maximum prison sentence of four years. West's Ann.Cal.Penal Code § 245.

Colorado. The lowest level felony in Colorado is a class 6, with a maximum sentence of 18 months. CO 18–1.3–401. Assault in the first degree however, is a class 3 felony and as such is punishable by a maximum sentence of up to 8 years. C.R.S.A. § 18–3–202(2)(b), 18–1.3–401.

Connecticut. A class D felony is the lowest level in Connecticut, and has a maximum sentence of 5 years. C.G.S.A. 53a–35a.

Delaware. In Delaware the lowest level felony is a class G, with a maximum sentence of 2 years. 11 Del. C. 4205. However, the lowest level felony assault is a class D felony in Delaware and carries a maximum sentence of 8 years. 11 Del. C. 612, 4205.

Florida. Florida's third degree felony is its lowest, and it carries a maximum sentence of 5 years. F.S.A. 775.082.

Georgia. Georgia does not have classes of felonies. However, aggravated assault carries a sentence of up to 20 years. Ga. Code Ann. § 16–5–21.

Hawaii. A class C felony is Hawaii's lowest, which caries a maximum sentence of 5 years. HRS 706–660.

Idaho. Every felony that is not otherwise prescribed a different punishment in Idaho is punishable by a maximum 5 year sentence. I.C. 18–112.

Illinois. Class 4 felonies are the lowest level in Illinois and have a maximum sentence of 3 years. 730 ILCS 5/5–8–1. Aggravated assault, depending on the circumstances, can be a class 4 felony or a class 3 felony. 720 ILCS 5/12–2. If it is considered a class 3 felony, it can be sentenced to up to 5 years imprisonment.

Indiana. Class D felonies are Indiana's lowest level with a maximum sentence of 3 years. IC 35–50–2–7. Aggravated battery is a class B felony and is punishable by a maximum 20 year prison sentence. IC 35–42–2–1.5.

Iowa. In Iowa the lowest level felony is class D, with a 5 year maximum sentence. I.C.A. § 902.9.

Kansas. Kansas does not define felonies, but appears rather to rely on a sentencing grid.

Kentucky. The maximum sentence for a class D felony in Kentucky is 5 years, which is the lowest level felony in that state. KRS § 532.060.

Louisiana. While Louisiana does not classify felonies, if punishment is not otherwise defined in a statute, the sentence is left to the discretion of the court up to 2 years. LSA–R.S. 15:303. However, aggravated battery carries a maximum sentence of 10 years. LSA–R.S. 14:34.

Maine. Maine makes no distinction between felonies and misdemeanors. "Crime" is used as a blanket term. However, class C crimes are the next highest after those carrying a maximum sentence of one year (a typical gross misdemeanor) and are punishable by a maximum of 5 years. 17–A M.R.S.A. § 1252.

Maryland. It does not appear that Maryland classifies felonies, but rather gives a specific sentence for a given offense. Felony assault is punishable by up to 25 years in prison. MD Code, Criminal Law, § 3–202.

Massachusetts. While Massachusetts operates under a sentencing grid, it looks like low level felonies are punishable by a maximum sentence of 5 years. See, for example, M.G.L.A. 265 § 13A with regard to aggravated assaults.

Michigan. The default felony in Michigan is punishable by a maximum 4 year sentence. M.C.L.A. 750.503.

Minnesota. Pursuant to M.S.A. 609.03 the default felony sentence in Minnesota carries a maximum sentence of 5 years.

Mississippi. In Mississippi it appears that punishment is defined by each specific crime. Aggravated assault carries a maximum 20 year prison term. Miss. Code Ann. § 97–3–7.

Missouri. The class D felony is the lowest in Missouri, with a maximum sentence of 4 years. V.A.M.S. 558.011. Assault in the first degree without the infliction of serious physical injury is sentenced to a maximum of 15 years imprisonment. V.A.M.S. 565.050

Montana. Montana does not define felonies other than crimes with a sentence greater than one year (MCA 45–2–101), but the default punishment is a maximum of 10 years. MCA 46–18–213.

Nebraska. Class 4 felonies are Nebraska's lowest level felonies, and they carry a maximum punishment of 5 years. Neb.Rev.St. § 28–105.

Nevada. Category E felonies are Nevada's lowest, with a maximum sentence of 4 years. N.R.S. 193.130. Battery with substantial bodily harm is sentenced to a maximum of 5 years. N.R.S. 200.481.

New Hampshire. In New Hampshire the lowest level felony, a class B, carries a maximum sentence of 7 years. N.H. Rev. Stat. § 651:2.

New Jersey. New Jersey has four classes of crimes and does not use the term "felony", however, high misdemeanors are designated as class 3 crimes. A class 3 crime has a maximum sentence of 5 years, whereas a class 2 has a maximum sentence of 10 years. N.J.S.A. 2C:43–1; 2C:43–6.

New Mexico. 4th degree felonies are New Mexico's lowest, with a maximum sentence of 18 months. N.M.S.A. 31–18–15. Aggravated battery resulting in great bodily harm, however, is a 3rd felony punishable by up to 3 years imprisonment. N.M.S.A. § 31–18–15.

New York. Class E felonies in New York carry a maximum sentence of 4 years and are the state's lowest level. McKinney's Penal Law § 70.00. However, assault in the first degree is a class B felony and is sentence to a maximum of 25 years imprisonment. McKinney's Penal law § 120.10.

North Carolina. North Carolina uses a combination of a sentencing grid (See N.C.G.S.A. § 15A–1340.17 which incorporates a classification system. To give a better idea of how this state punishes its felons, aggravated assaults can be punished by up to 145 months imprisonment. See N.C.G.S.A. § 14–30.

North Dakota. North Dakota's lowest level felony is a class C, with a 5 year maximum sentence. N.D.C.C. 12.1–32–01.

Ohio. A 4th degree felony in Ohio carries a maximum sentence of 18 months. While Ohio technically defines a 4th degree felony as a maximum sentence of 1 year, that is what is otherwise typically referred to as a gross misdemeanor. However, felonious assault (R.C. § 2903.11) is a 2nd degree felony in Ohio, punishable by up to 8 years imprisonment.

Oklahoma. The default penalty for a felony in Oklahoma carries a maximum sentence of 2 years. 21 Okl.St.Ann. § 9. However, an aggravated assault carries a maximum sentence of 5 years. § 681.

Oregon. In Oregon a class C felony has a maximum sentence of 5 years, and is the lowest level felony in the state. ORS 161.605.

Pennsylvania. 7 years is the maximum sentence for a 3rd degree felony in Pennsylvania, which is the state's lowest. 18 Pa.C.S.A. § 1103.

Rhode Island. It doesn't appear that Rhode Island defines felonies. However, felony assault is punishable by up to 20 years imprisonment. Gen. Laws 1956, § 11–5–2.

South Carolina. A class F felony in South Carolina carries a maximum sentence of 5 years, which is its lowest. Code 1976 § 16–1–20.

South Dakota. Class 6 felonies are the lowest in South Dakota, with a maximum sentence of 2 years. SDCL § 22–6–1. However, an aggravated assault is a class 3 felony with a maximum sentence of 15 years, whereas a 3rd misdemeanor assault within 5 years constitutes a class 6 felony. SDCL § 22–18–1.1; 22–18–1.

Tennessee. A class E felony is Tennessee's lowest level felony and carries a maximum sentence of 6 years. T.C.A 40–35–111.

Texas. Texas' lowest level felony is a 3rd degree felony, which carries a maximum sentence of 10 years. Although, in 1993, a lower level felony class was created to address non-violent, non-sex offense cases (unlike those likely to be prosecuted in

Indian Country under expanded jurisdiction), which is called a "state jail felony" and carries a maximum sentence of 2 years in an effort to reduce prison overpopulation. V.T.C.A., Penal Code § 12.34; 12.35.

Utah. A 3rd degree felony is the lowest level in Utah, with a maximum sentence of 5 years. U.C.A. 1953 § 76–3–203.

Vermont. Vermont has no felony classification system; punishment is defined in each offense. First degree aggravated domestic assault, for example, carries a maximum sentence of 15 years imprisonment. 13 V.S.A. § 1043.

Virginia. In Virginia, the lowest level felony is a class 6, carrying a maximum sentence of 5 years. Va. Code Ann. § 18.2–10.

Washington. A class C felony in Washington carries a maximum penalty of 5 years, which is the lowest level felony. RCW 9A.20.021.

West Virginia. West Virginia does not have a felony classification system and the maximum punishment is indicated in each offense. West Virginia's penalty for aggravated assault is up to 10 years imprisonment. See W. Va. Code, § 61–2–9.

Wisconsin. In Wisconsin a class I felony is the lowest, with a maximum punishment of 3 years and 6 months. W.S.A. 939.50. While battery is a class I felony in Wisconsin, if the victim sustains great bodily harm, the battery is considered a class H felony and is punishable by up to 6 years imprisonment. W.S.A. 940.19.

Wyoming. There is no felony classification system in place in Wyoming, as punishment is defined in each offense. For reference, however, aggravated assault and battery is punishable by up to 10 years imprisonment. W.S. 1977 § 6–2–502.

PREPARED STATEMENT OF HON. MYRA PEARSON, CHAIRWOMAN, SPIRIT LAKE TRIBE

The Spirit Lake Tribal Court has been a functioning tribal court system for more than 50 years, adjudicating a number of legal issues for tribal members, non-member Indians and non-Indians. The Spirit Lake Tribal Court is comprised of three divisions: Civil Division, Criminal Division and a Juvenile Division. The Tribal Court is staffed with a Chief Judge, Associate Judge, three Clerks of Court and a Receptionist. OF this core staff only the Associate Judge and the Clerks of Court are funded through the 638-contract process. The Tribe funds the Chief Judge, the Tribal Prosecutor and the Juvenile Intake Officer positions. The Tribal Court processes more than 3000 cases per year including, but not limited to, various civil lawsuits, child custody cases, divorce, child deprivation and protection, adoption, juvenile delinquency, and criminal cases. The Tribal Court addresses issues stemming from a variety of societal ills such as drug trafficking, substance abuse, child abuse and neglect, domestic violence, sexual violence and other such violent crimes.

Tribal Courts are tasked with the very same responsibilities as state and federal courts and have managed to administer justice on less than a shoestring budget. Tribal Court Judges and employees are expected to administer justice with little to no access to legal research tools and in many cases with outdated technology. While advances are made in courtrooms around the country Tribal Courts are left to piece together funding through unreliable grant programs in an effort to cover the very basic costs of court operations. Basic funding is lacking for court databases, adequate computers, court recording devices and personnel costs such as bailiffs, court process servers, public defenders and probation officers. These are technological resources and personnel resources that state and federal courts are provided as a basic need for the administration of justice yet in tribal justice systems many of these basic needs are not available due to lack of reliable and ongoing funding. It is essential that sustainable funding be made available for tribal courts to meet these basic needs.

When Tribe's such as Spirit Lake opted to 638 contract the Tribal Court services the funding that came along with that contract was not adequate to meet the basic needs of the Tribal Court. This fact remains true today. Tribal Courts are not provided the administrative costs that would have been made available to the BIA had they continued to operate courts of Indian Offenses. In other words it is expected that Tribal Courts do more to administer justice with less money. Even more troublesome is the fact that these very deficiencies I have identified are often used against tribes to further reduce tribal sovereignty. Attorneys are constantly making arguments that Tribal Courts are not adequate to adjudicate cases and are using arguments like lack of access to governmentally funded public defenders to make such challenges.

It has been proven time and again that Tribal Courts are in the best position to administer justice in Indian Country in a meaningful and cost-effective way. In fact if Tribal Courts ceased to operate the burden for administering justice would simply fall to the federal and state systems, a burden which those jurisdictions clearly do

not want. Innovative Court programs such as the Shunka Wakan Ah Ku (Bringing Back the Horse Project) at the Spirit Lake Tribe are the very types of justice based programs that will make a long-term difference in our community and it is of the utmost importance. Additionally courts such as wellness courts and peacemaking courts incorporate methods of traditional dispute resolution that have proven very effective in resolving familial disputes and addressing substance abuse problems. The Spirit Lake Tribe had a functioning juvenile wellness court that was very helpful to the youth in our community but loss of funding meant the program came to an end. It serves little good to the long term betterment of our communities to plan and implement such programs only to seem them dissipate due to lack of funds.

It is for these reasons that direct non-competitive funding is needed to support the daily operational courts for tribal courts and technological advancements for tribal courts. Through such funding initiatives Tribal Courts will become more effective and efficient at administering justice in tribal communities. Additionally, competitive funding resources such as the many grants administered through the Bureau of Justice Assistance and other Department of Justice Agencies need continued funding and need to be flexible enough to enable tribal courts to incorporate their culture and traditions into their tribal justice initiatives.

PREPARED STATEMENT OF ALBERTA IRON CLOUD MILLER, CHIEF PROSECUTOR, OGLALA SIOUX TRIBAL COURT

Mr. Chairman:

My name is Alberta Iron Cloud Miller and I am the Attorney General, our name for the Chief Prosecutor, of the Oglala Sioux Tribal Court. Our Oglala Tribal Court is facing a serious crisis, and for that reason I would like to thank you for this opportunity to present our concerns.

BACKGROUND ON OUR COMMUNITY—As you are aware, the Pine Ridge Indian Reservation, located in southwestern South Dakota, is one of the largest in the United States. Its' 4,353 square miles makes it approximately the size of the State of Rhode Island. Our Court has an on-reservation service population of approximately 50,000, but that number is misleading low because we also have another 10,000 people who reside in nearby Rapid City and other communities just off our reservation, and many of those people travel on and off of Pine Ridge almost every day. As our housing shortage continues to increase, more of our people are forced to live off the reservation and commute onto the reservation to work and see their families. Unfortunately, once they move off to live, they stop being counted in our service population, even though they are on-reservation almost every waking hour of the work week. It's also important to remember that you do not have to live on our reservation to be a party to litigation in our Tribal Court and in civil cases, you don't even have to be a member of the Tribe.

At present, our community suffers from a lack of jobs, a non-existent economy and a lack of services. We have an unemployment rate of well over 50 percent, and many of those who are working having only seasonal or non-secure jobs. Those who are fortunate enough to be employed are often caring for two or three other households, as many of the young adults with families have no income or no housing. We have a drop out rate of over 60 percent, giving us a serious juvenile problem, and our average per capita income is below $7,000 a year. As a result, our court handles all of the various types of criminal and civil problems that poverty brings with it.

ABOUT OUR TRIBAL COURT—Because of the size of our reservation, we are forced to operate two separate Tribal Courts, one at Pine Ridge and the other at Kyle. These two Courts are over 60 miles apart. Because of our lack of communications equipment and the distance between our two locations, these Courts are often forced to operate independent of each other, which is something we are striving hard to avoid.

We also have a Youth and Family Court. This handles child protection orders, juvenile offenders, juveniles in need of care and other youth related matters. Finally, our Tribal Supreme Court hears appeals. Because of the volume of domestic violence cases we are called upon to decide, and the danger of misjudging the case, we desperately need a Domestic Violence Court, but we have no space to house it and inadequate funds to set it up. We average 20 new domestic violence criminal prosecutions a month and this does not count the equal number of protective orders and follow up cases that we are ask to decide each month through our civil court system.

Currently, our Tribal Court hears approximately 2,470 criminal cases per year and a civil case load in excess of 2,000 cases. These numbers are also unrealistically low. Because of our current and ever increasing inability to hear criminal cases in a timely manner, many of our local law enforcement officers chose to paper a sizable

percentage of alcohol related misdemeanors as Public Intoxication offenses. Papering a case as a Public Intoxication offense leads to the automatic release of the prisoner eight hours after arrest and incarceration, rather than into our Tribal Court system. Just to show you what our real numbers should be, our police officers made a total of 23,000 arrests last year, but we were only able to prosecute 2,470 cases. We would also have a sizable increase in civil cases if our members believed that our Court could resolve their disputes in a timely manner. But, because our dockets have become so backlogged, we have actually had members try to file civil cases in non-Indian courts, simply because they feared that we could not resolve their matter fast enough to meet their needs.

Even with this artificially low number of cases, all of our Court staff are seriously overworked. In fact, all of the 2,470 criminal cases and 2,000 civil cases I just mentioned are handled by our one Chief Judge, and three Associate Judges and 3 prosecutors and the Attorney General. Remember these individuals are not only handling a ridiculously large case load, they are also forced to serve two separate court houses which are 60 miles apart and which have no workable electronic communication with each other. This results in a lot of lost time traveling back and forth and shipping documents. We are in the process of installing an electronic filing system, however, lack of resources in the form of servers, computers, etc. have delayed the installation of this critical system.

The Judges and Prosecutors also have a totally inadequate number of support staff. We currently have only two criminal clerks, two civil clerks and two juvenile clerks in Pine Ridge, and 2 clerks total to handle the case load at our Kyle Court. This is a nightmare, because we have no case tracking software and inadequate filing capability. This leads to the dismissal of cases because of our inability to meet speedy trial requirements, dismissal because of lost or unavailable records, and we have even on occasion lost track of prisoners. In one case this year, a young man sat in jail from February until July simply because someone misplaced his trial record and we have no tracking software to pick up the error. That's five months of a young man's life.

OPERATIONAL PROBLEMS—Despite the huge number of cases we are confronted with each year, our Court is so broke that it is forced to operate on old outdated and often broken computers that were purchased at Wal–Mart. To make matters worse, our software is so outdated that it does not even allow us to open many of the files we receive from attorneys, and other jurisdictions. Our computers also have no virus protection software, no spam blockers, no security firewalls and we have no off-site backup for our files, so if a tornado were to hit, as it has done in some of our more outlining communities this year, we could lose all of our current records.

Because we have no commercial scanners, inadequate file cabinets and inadequate filing space, most of our files, over six years old, are stored in cardboard boxes that are stacked in our basement. Because our Court is located in a condemned building, which has leaky floors and leaky wall and exposed asbestos, our Court records, especially those stored in these boxes are regularly subjected to mold, mildew, water leaks, dust and decay. We also have no computer software to track the whereabouts of a particular file. This creates a major problem for those appearing before our court and for those seeking to perform background checks for employment. I cannot imagine any state judge or prosecutor having to use a hair blow-dryer to make a soaked official court record usable in a case, if they can even find the file in time, but that is the world in which we work at Pine Ridge. And, this is a federally owned, federally funded building!

I also cannot imagine a federal or state court staff working in an environment where the papers that they handle every day are making them sick, but given the mold and mildew in our building and our lack of air conditioning in the summer, that too is the environment in which our staff is forced to work. Our former Chief Judge left her position in large part because she was allergic to the mold and dust in our building and because working there was forcing her to seek medical attention for respiratory disease on a regular basis. Others get stuffy noses, watery eyes and sneezing, and more than one person has been forced to seek another job altogether simply because they could not work in our building because of respiratory problems. The former clerk of our Supreme Court developed arthritis from the cold and damp environment she was working in because her office was in our unheated basement and from lifting boxes off the floor. She is now on social security disability for that problem.

Things are no better for our prosecutors who work in the condemned Pine Ridge jail. That building loses heat in the winter and air conditioning in the summer and it is as damp and dirty as the court house. Our current Supreme Court clerk works in two small rooms in our basement. She shares that space with the boxes of court

records that we have had to store there. Her office has virtually no heat in the winter and no air conditioning in the summer. The leaks from the wall soaked and damaged the carpet so badly that the BIA was finally convinced to tear it out because it was making people sick. Unfortunately, they then failed to replace it, so she now has nothing but a concrete floor to work on in the cold of winter. In preparing this testimony, she commented that there were actually times when she was glad that her office had no heat during the winter, because the frozen walls were the only thing that seemed to stop the leaks that were making her sick and damaging her files and computer and the frozen floor was keeping the smell down on the carpet. Again, this is in a federally owned and funded facility!

Our tribal judges and prosecutors have no law clerks, inadequate funding for new law books and publications, and no funding to train the court staff. Westlaw doesn't work; because we can't afford it, and when we do get some funding to go online, our Internet is so bad that we get cut off 4 and 5 times a search, making legal research a nightmare. Additionally, when staff training is available, we regularly lack the travel funds to send anyone to the training site. Then, even if we can find the travel funds funds, we are so understaffed that we have to decide how much of an additional backlog we can accommodate, when deciding if we can afford to send one or more of our staff to attend that training. Our Supreme Court Clerk, for example, is the only one working in that office. If she is ill, or out for a meeting or training session, there is no one there to assist the public.

While we have a dedicated team of judges, prosecutors and Court staff, we simply cannot manage the workload that we are faced with and still afford our people with the legal protections they are entitled to. Our case backlog is becoming longer by the day. Right now we have at least 1,200 criminal cases from 2007–2008 which have been awaiting trial for over 12 months and more are being added to this list every day. Our docket is already full through February 2009 and we dare not schedule past that date because we do not know what our funding will be for next year.

We have been lucky of late that very few of our people have requested jury trials, because we simply have no money to pay for them. We don't even have enough funds to cover travel costs or lunch for jurors, even if we could get them to serve for nothing. Our lack of funds has also impacted our appellate process, since we have limited funds to pay appellate judges or their staff and no space to house them when they need to hear a case.

Mr. Chairman, while we strongly support the increase in tribal court sentencing authority that is proposed in your new law enforcement improvement legislation, I have to be honest when I tell you that I cannot imagine any tribe in North or South Dakota taking advantage of that provision, not because we do not want to, but simply because we cannot afford to pay for jury trials and right to counsel. So, if more money is not added to the tribal court budgets, and that provision is enacted into law, the only tribal courts operating with expanded sentencing authority will be the tribes in states to the far east and far west of us with large successful gaming operations, because they will be the only ones who can afford to supplement their tribal courts budgets to provide these legal protections. This will leave the large land based treaty tribes in the mid west and southwest with less ability to administer justice. I'm sorry, I see your reasoning behind the jury trial and right to counsel pre-requisites, but I still think that a person's right to justice and a tribe's ability to exercise its sovereignty should be based on more than which tribe has money and which does not.

ABOUT YOUR NEW LAW ENFORCEMENT LEGISLATION—As Officers of the Oglala Sioux Tribal Court, and as members of the Oglala Sioux Tribe, we are very aware of the difficulties facing our tribal police and the dangers our people live with because of inadequate law enforcement. Thus, we were thrilled to learn of the introduction of your new law enforcement legislation and of the Senate's recently past increase in law enforcement funding authorizations. While your new bill has many positive attributes, we must be honest in saying that we remain only cautiously optimistic. This is because we have seen new authorizations come and go before, but we have never seen the funding delivered to implement what is promised by the authorizing committees. And that is certainly now because past Authorizing Committee Members did not fight hard for those appropriations. They just lost those fights.

This is also not to say that we do not appreciate the hard work that you and your staff are putting in. It's just that our experiences with the Appropriations and Administrative Budgeting processes have not been good. For example, while your reauthorization of the Indian Tribal Justice Support and Technical & Legal Assistance Acts looks wonderful on paper, it very hard for us at the OST Tribal Court to get our people really excited about it, because that exact same program did not do much for us the last time it was authorized. This is not because of the way the authoriza-

tion was written, it was fine, it is because no one ever appropriated the funding necessary to implement that program in the manner intended. Thus, it made some minor improvements for a few tribes that have long since deteriorated. The same is true for the reauthorization of the Indian Alcohol and Substance Abuse Act. We, at Pine Ridge, have a serious alcohol abuse problem. Almost 95 percent of the criminal cases that come before our Tribal Court involve alcohol in one way or another. Thus, were so excited when that program was authorized the last time, that we spent months putting together a tribal plan, developing our substance abuse task force/committee and working with everyone involved. Unfortunately, when we were done, we received none of the funding necessary to implement any of the ideas that came from all of that hard work, and we, like many other Sioux Tribes, found ourselves worse off than before because we had devoted so much time and money to putting that plan together. People's expectations go up and it's a big let down when nothing positive happens. In 2006 the Judiciary Committee and the justice agencies developed a five year strategic plan to reduce crime and enhance community safety, however, the plan will remain in paper form due to our lack of resources to implement it.

Mr. Chairman, you cannot address law enforcement and criminal justice on reservations like ours without adequately addressing alcohol abuse. If a prosecutor or a judge has no adequate detoxification or treatment programs to refer a person to, they are left with two choices in a criminal case: send an alcoholic to jail to detox without medical support, or put them back on the street to be arrested again in a few days. It's a no win situation.

If you really want to see a difference in the testimony that you are receiving today, you need to work towards stable, reoccurring, long term tribal court funding from the BIA, which arrives, in some form, on October 1st of each year. Discretionary grants are appreciated, but they are never large enough to complete the task at hand, they never reach the program on time, and they often leave us with a huge mess when the funding dries up. Let me give you one example. Some years ago, we received discretionary funding for a micro fiche machine under a one year grant. We got very excited and we used this machine to film all of our old divorce, adoption, child placement and a variety of other court records. Then, the grant funding dried up, and our BIA funding was inadequate to maintain or replace the machine. Today, that machine is still broken, and it is so old that no one can obtain parts. This makes all of these old files unusable and we now in need new funding to retrieve and revert those files back to paper. This is a real problem for tribes. Because we lack the funding to keep up with the changing computer software acquired with these one year grants, we often find ourselves with disks and files that our new computers, when and if we ever get them, cannot open. Anyone who has a computer knows that you cannot upgrade from Word 1998 to Vista Word 2008 unless you have installed all of the software upgrade programs in between.

Mr. Chairman, our courts have to operate 365 days a year, and I cannot shut down a case merely because a federal agency decided not to renew a discretionary grant or because it has no mechanism of getting the funding out to us at the beginning of the fiscal year. How can I plan a prosecution when I do not know what I will have to work with, and if I have no idea of if I will be able to hire and pay an expert witness at trial time, or what staff will be available to me on October 1st of each year.

DOJ grants have also created some serious financial problems for the Tribe. Under those authorizing statutes, DOJ has traditionally been required to seek a match, and they have never paid indirect cost. Thus, the bottom line is that is usually costs the tribe 50 percent of what we receive just to operate one of those programs. DOJ's inability to pay indirect cost is a real problem for poor tribes without large gaming incomes. Assume for a minute that we receive a DOJ grant of $200,000 and we have an indirect cost rate of 25 percent. That means that we need to come up with $50, 0000 in tribally funded indirect cost dollars, just to operate a program that we only applied for because we were broke. Now add a 10 percent or a 20 percent match on top of that and you can begin to see our dilemma. If we can't pay that indirect cost out of our own tribal income, the Inspector General simply determines that we have over-recovered on indirect cost from that grant and lowers our indirect cost rate for every program that we operate at the next negotiation.

You can solve a big problem for many of us and make these DOJ grants much more helpful and accessible by simply eliminating the DOJ match requirements altogether and requiring DOJ to pay negotiated indirect cost. The match waiver language in your bill is helpful, but why do we need to spend money to prove that we have no money. If the match and indirect cost problem is not solved, many tribes like Oglala will no long be able to apply for the DOJ grants that you are reauthor-

izing because we will not have an indirect cost rate high enough to manage them. It's just that simple!

The timing of these discretionary grants is also a big problem. In December of 2007, Congress awarded us a DOJ earmark for our Tribal Court system and we added some minor national increases in BIA law enforcement appropriations, but this is now July 2008—seven months later—and despite repeated promises, none of those dollars have actually reached us at Pine Ridge. I cannot speak about the BIA funding, but I can tell you that the delay in the release of the DOJ funding is not the fault of anyone at the DOJ COPS office. It is the nature of the discretionary grants and the irregular timing of Congressional appropriations. Unlike 638 contracts, which are funded at least in part, even when we have a continuing resolution, DOJ discretionary grants are generally shut down pending the passage of a final year long budget.

Also, when and if some of the additional BIA law enforcement dollars that Congress appropriated do reach Pine Ridge for 2008; they will be used to put more law enforcement officers on the street. While this will be a great thing for our community, from our Tribal Court's perspective it will merely increase our case load, and we have no new funds, at the Tribal Court level, to address the additional cases that these new officers will bring in. That is why we were gratified to see that your bill recognizes that on reservation law enforcement, courts, prosecutors, jails and tribal diversion programs all need to be funded in concert in order to address what we really face on a day to day basis. Increasing the manpower for law enforcement without increasing the funding for judges, prosecutors, probation officers and diversion programs will simple lead to the revolving door of justice that Americans and Pine Ridge Tribal members are already complaining about.

OUR COURT BUILDING—No court which handles the kind of caseload that we face can operate properly in the building that we are housed in. Our Pine Ridge Tribal Court House is housed in an old un-renovated BIA building that was built in the 1800s. It has been condemned for years, yet the BIA has done nothing to solve the problem. As I described above, it has a leaky basement and leaky roof, exposed asbestos, air quality that is below anything close to OSAH requirements and no heat or air conditioning for the basement offices that it houses. It also has no storage space, wiring that is inadequate and in some cases dangerous to use because of the leaks. That wiring is also unable to handle modern equipment. In short, this building is making everyone who works there sick many days per year. This is the federally owned and federally funded building. This is the building we invite our people to come to for Justice!

Over the last ten years, we have lobbied, begged, threatened and tried every other method that we can think of to attract the BIA and the DOJ's attention to this building problem, but to no avail. The people we have been meeting with insist that they are powerless to help us unless the Congress decides to appropriate the required funds to build new tribal court buildings, because our building simply cannot be repaired. And, unlike tribes who are located closer to urban areas, we have no place else that we can move to. There are no suitable unoccupied buildings in Pine Ridge, nothing to rent nearby, and no money to move if we actually found one.

Mr. Chairman, I would think that the Administration would be embarrassed by these facts, but they don't seem to care. I am not singling out President Bush. These problems have been around for years, but they have clearly become worse in the last ten years because of the lack of attention. I know that this Committee and this Congress are facing some serious funding problems and a serious backlog in construction needs for tribal schools, hospitals, clinics, and jails, but I implore you not to leave tribal courts out of the mix when monies are finally handed out.

We at the Oglala Sioux Tribal Court have recognized the financial problems facing the United States and for that reason, we have worked with our counterparts in Oglala Law Enforcement to support the construction of a new tribal department of justice building which could house our Tribal Court, Tribal Prosecutors, OST Law Enforcement and one of our tribal jails. This would be far cheaper than building three or four separate buildings, as it would make it unnecessary to bring utilities to three or four different sites, build multiply parking lots and construct multiple access roads. I, therefore, hope that in your new authorizing legislation you will allow for funding for multi purpose tribal justice buildings of this nature. It makes great sense programmatically and we believe it could lead to a big savings in total construction outlays, where a tribe has a need for a court, a jail and office space for its public safety related programs.

Mr. Chairman, I have attached a serious of photo graphs which will help you understand what we are faced with a Pine Ridge and again thank you for taking on this very important problem.

PREPARED STATEMENT OF DONNETTE J. PATTERSON, ADMINISTRATOR, YANKTON SIOUX TRIBAL COURT

Greetings Mr. Chairman and the Senate of Indian Affairs Committee:

My name is Donnette J. Patterson and I am the Yankton Sioux Tribal Court Administrator, I have held this position since January 24, 2002. I find my job to be exciting and a great need for the people of my reservation. The Court helps people who have been victims of a crime, children who need support from the non-custodial parent, A & N (abused and neglected children) cases and people in need of a guardian or power of attorney. We are facing a serious need here on the Yankton Sioux Reservation, and that is funding, or lack thereof.

We are in the old community building, which is approximately 35 years old and in need of a new roof, new plumbing, new heating and cooling and general contracting repairs. The Yankton Sioux Reservation is growing with jobs, housing and services offered on the reservation are becoming more and more scarce. The Yankton Sioux Tribal Court sees approximately 100 people in criminal court a month and 20 to 25 civil cases per month (ranging from child support, child custody, mental health hearings, divorces, adoptions, emergency custody and power of attorneys).

We also have Juvenile Court only once a month and Jury Trials once a month due to lack of funding and personnel, to be held on a weekly basis. The court caseload is so overbooked and backlogged that we are approximately three weeks behind, where we should be in juvenile and civil matters.

With the lack of funding the Yankton Sioux Tribal Court to date has court only 2 days per week. The Court has one Chief Judge (2 days—1 civil and 1 criminal), one Prosecutor (1 day) and 1 Court Administrator/Clerk of Court (40 hour week). The Yankton Sioux Tribe has squeezed some funds to be able to have a Deputy Clerk of Court for the minimum wage $6.50 per hour. I do know of other court systems which have a Civil Judge, a Criminal Judge, Juvenile Judge and an Emergency Judge for after hour and weekend matters. Some of these courts also have a Court Administrator, Civil Clerk, Criminal Clerk, Head Clerk, Deputy Clerk of Courts, Juvenile Clerk, Process Servers, Bailiffs and Receptionist/Mail Clerk.

With the Yankton Sioux Reservation, we have cases that get taken over by the Federal Bureau of Investigations on the more serious matters, the Charles Mix County Sheriff's Office for matters with Native Americans within their jurisdiction and the Department of Criminal Investigations for the more serious matters within their jurisdiction of Native Americans. Not all of the cases the Yankton Sioux Tribal Police and Bureau of Indian Affairs Law Enforcement get brought into tribal court, due to lack of participation from witnesses and sometimes even the victim due to fear of retaliation, because of the small size of our reservation, everybody knows everybody and so on. There are also civil cases that do not get to see their day in court due to family and friends hiding out the Respondent, stating to police (who do our process service) that they do not know where "John Doe" is or where he is living or when he/she will be back. If we had a process server, I do believe that would solve some of our problems, just because some people are fearful of law enforcement for whatever their reasons are, do not like to talk or even cooperate with them. Lack of Law Enforcement is another issue; right now we have a Supervisory Lead Officer/Acting Chief of Police and one BIA Law Enforcement Officer. On the Yankton Sioux Tribal Police Department we have 3 Police Officers and 2 Highway Safety Officers. They patrol our reservation, trying to keep the peace and protect the people of the Yankton Sioux Tribe. I know that if we had sufficient man power there would be a little less crime and violence on the Reservation.

Old, outdated, and lack of computers, software, printers are also a big problem in the Yankton Sioux Tribal Court. We do not even have a backup plan in place for our records, if we were to have a fire, flood or natural disaster happen to the court building, all of the records (civil and criminal) would be a total loss. This would include adoption, marriage certificates, divorce decrees, child custody and support orders, power of attorney documents and all criminal matters. Our Tribal Court is in such a small space that we have to rent a place to store the documents and office supplies in and then comes the hassle of having to drive over there and go through all the boxes to find the sealed juvenile file, to find an old document from when this was a FRC Court. We do have some documents in our filing cabinets out there because they are a danger to Court Personnel as the drawers have to be hung on to so they do not fall on you while you are searching for a file. I have not been in very many state or federal courts that have old, dilapidated, dangerous office equipment, furniture or lack thereof these things. It is such a shame that we have to work in such conditions and with such equipment. I feel that we should be able to have the same equipment and furniture and funding that is found in Wash-

ington, DC as we are part of the government also. If we cannot have some of the same equipment, furniture or funding the Tribal Court would sure appreciate more funding than what is there now. This does not even begin the health and safety issues of the Court, with lack of heat in the winter, air conditioning in the summer, plumbing problems year round and mold and mildew due to the leaky roof. We have to learn to deal with: runny noses, itchy and watery eyes, sneezing and coughing all adding up to respiratory problems, and with the limitation of jobs here on the reservation, all that can be done is to see the doctor and get a quick fix for those health issues. Asbestos being present, because it is such an old building that it was never removed.

The Yankton Sioux Tribal Court has not received an increase in the 638 Budget since I have been employed in January of 2002 and now Congress is talking about a decrease in the budget for the Tribal Court programs. The Yankton Sioux Tribe is aware of the introduction of your new law enforcement legislation and of the Senate's recently passed increase in law enforcement funding authorizations. We realize your bill has positive attributes and can make differences on our reservation, we still caution our hopes, due to the actual funds implemented and delivered to the Yankton Sioux Tribe for Law Enforcement. The Authorizing Committee Members, that were set to task, have not seemed to be as experienced as other AC Members while fighting with the Appropriations and Administrative Budgeting processes. Due to the previous lack of program assistance from the Indian Tribal Justice Support and Technical Assistance Acts, we will patiently await for assistance, although with not a lot of excitement or anticipation, due to past broken promises for help with funding many different programs. We have a great need for a Jail/Detention Facility on the reservation also, and the funding from Indian Tribal Justice Support and Technical Assistance Acts would just be the place to start. We have the building partially completed, BUT due to lack of funding we cannot finish the building and therefore we do not have a place to house adult and juvenile offenders, they are released to the general public due to lack of space for housing.

Mr. Chairman I feel that if a few members of Congress and the Senate were to come to the Yankton Sioux Reservation to see the need for funding for Tribal Courts and Law Enforcement they would realize that we are in dire need for more funding. The problem has been around for years and it does not seem to be going away it seems to be getting worse. If Congress could take some of the money that has been set aside for the war going on (instead of spending millions of dollars destroying a country and then millions of dollars rebuilding that country, not to mention the young men and women that have given their lives for their country) and offered a portion of that for Tribal Courts and Law Enforcement that would be a beginning in the healing process of the unfair treatment Native Americans received and are still receiving (lack of health care, lack of education, lack of housing, etc. . .). There has to be a solution out there and cutting and cutting of funds does not make it go away it makes it worse. I am not saying this to embarrass you or the Administration, I am trying to get you to realize it is not a perfect world out there, all is not well, nobody has everything and some have nothing.

Our 638 funding has the basic funding that barely covers the needs of the Yankton Sioux Tribal Court and if we were to have an increase in crime, which is steadily happening, and a rush of people returning to live on the reservation, we might not have the man power in the Court and Law Enforcement to handle such an increase. The lack of funding is putting our Court Personnel and Law Enforcement in danger due to lack of man power. When Law Enforcement is not available for process service, either the Deputy Clerk or myself the Court Administrator do service, which has once proven to be dangerous (for me) and many times for Law Enforcement as we can only manage to have one officer per shift and on special occasions have two and they are then working 12 hour shifts.

In closing Mr. Chairman the Tribal Courts and Law Enforcement do not shut down for holidays, for special occasions or for vacations. We work 24/7/365 because criminals forgot it's a holiday, don't know you are sick or on vacation. Abused and Neglected Children cannot help to be on schedule for a beating or such crime. We also realize that federal agencies did not renew grant applications due to technicalities or end of fiscal years and have to wait until October 1st of the each year. Indirect Costs also is determined from the grants and sometimes the rate of such can be negotiated, but ultimately so much money can be found for the 638 contracts due to irregular timing of the Congressional Appropriations Committee. Even with lobbying and begging Congress for additional funding there has not been a way to get the BIA and DOJ's attention to see to this matter. I do hope that you can take the time to read the Testimony of the Yankton Sioux Tribal Court to see how we work on a daily basis in the dilapidated building with, plumbing problems, leaky roofs, shortage of storage cabinets, shortage of other office furniture and having to use a

garage as the waiting area for Court. I would like to thank you for your time and concern in this matter. Any cooperation you can give in additional funding would be more appreciated than you can begin to realize. On behalf of a grateful nation on the Yankton Sioux Reservation, I thank you, again.

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. JOHN ST. CLAIR *

Question 1. Judge St. Clair, what effective alternatives to incarceration has your court system employed?

Question 2. The Tribal Law and Order Act would permit Tribes to access criminal history databases. Does your court system have access to these databases? If not, what are the primary barriers?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. JOHN ST. CLAIR *

Question 1. Your written testimony states that your court system cannot employ adult probation or sentence accountability officers due to lack of funding. What alternative measures is the court taking to ensure that offenders are complying with their sentencing or probation agreements?

Question 2. The Committee has been informed that in many cases the BIA law enforcement officers and Indian Health Service professionals have been reluctant to testify in tribal court. How has your court been able to work with these federal employees in securing their testimony before your court?

Question 3. How will the recent Supreme Court ruling in *Plains Commerce Bank v. Long Family Land & Cattle* affect the cases pending before your courts or the ability of tribal members to seek relief against non-Indian parties?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO DORMA L. SAHNEYAH *

Question 1. Ms. Sahneyah, your written testimony discussed "restorative justice" as an alternative to incarceration. You also discussed the significant unmet needs to employ such as system. Can you provide us with more details about the use of restorative justice in your court system? What is needed to make the system work?

Question 2. We hear from other tribal prosecutors about the inconsistent coordination or communication from the U.S. Attorneys offices. Some tribal prosecutors have to wait a number of months, and some more than a year to receive information on a case that is eventually declined. What has been your experience as a prosecutor? Does the Law and Order bill address the issue, or should more be done?

Question 3. The Tribal Law and Order Act would permit Tribes to access criminal history databases. Does your court system have access to these databases? If not, what are the primary barriers?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO DORMA L. SAHNEYAH *

Question 1. The Violence Against Women Act requires the full faith & credit recognition of tribal court protection orders. What has been your tribe's experience with this full faith & credit requirement?

Question 2. The lack of detention facilities affects tribal judges' ability to sentence offenders. How has the lack of detention facilities affected the exercise of your prosecutorial discretion?

Question 3. How will the recent Supreme Court ruling in *Plains Commerce Bank v. Long Family Land & Cattle* affect the cases pending before your courts or the ability of tribal members to seek relief against non-Indian parties?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. THERESA M. POULEY *

Question 1. Judge Pouley, I am a supporter of drug courts both in and out of Indian country. Can you provide us with more on your Healing to Wellness Court, and if possible share any information on your recidivism rates?

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

Question 2. Incarceration may be a necessary punishment for violent offenders, but may not be an option available to tribal judges in imposing sentences for any number of reasons, including the lack of space. What effective alternatives to incarceration have you employed? Have these alternatives been successful in reducing recidivism and rehabilitating offenders?

Question 3. Your written statement mentioned that offenders can appeal their convictions in Federal district court. Do you believe that process adequately protects the constitutional rights of defendants that go before tribal courts?

Question 4. The Tribal Law and Order Act would permit Tribes to access criminal history databases. Does your court system have access to these databases? If not, what are the primary barriers?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. THERESA M. POULEY*

Question 1. Your written testimony states that Congress has a role in authorizing an expansion of tribal government taxing authority to raise revenues for tribal justice systems. Can you elaborate on what manner the tribal government authority should be expanded?

Question 2. Your written testimony states that your drug court has received an award for excellence in addressing the combined problems of substance abuse and crime in the criminal justice system. Can you elaborate on some of the successes your drug court has experienced in addressing these problems?

Question 3. How will the recent Supreme Court ruling in *Plains Commerce Bank v. Long Family Land & Cattle* affect the cases pending before your courts or the ability of tribal members to seek relief against non-Indian parties?

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. JOSEPH THOMAS FLIES-AWAY*

Question 1. Judge Flies-Away, you made significant points about the need for greater cooperation, and the lack of it that you have experienced in dealing with the IHS and the BIA. The Tribal Law and Order Act seeks to increase cooperation, consultation, and transparency in federal law enforcement. Specifically, Section 603 would force the hand of cooperation by requiring federal officials to testify in tribal court. The bill also requires the United States to notify and register with tribal courts and law enforcement officials prior to releasing sex offenders. How do you think those provisions in S. 3320 could be strengthened?

Question 2. Incarceration may be a necessary punishment for violent offenders, but may not be an option available to tribal judges in imposing sentences for any number of reasons, including the lack of space. What effective alternatives to incarceration have you employed? Have these alternatives been successful in reducing recidivism and rehabilitating offenders?

Question 3. Regarding juvenile offenders, does your court system have a separate juvenile court? If so, can you provide some details on that part of your court system?

Question 4. The Tribal Law and Order Act would permit Tribes to access criminal history databases. Does your court system have access to these databases? If not, what are the primary barriers?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. JOSEPH THOMAS FLIES-AWAY*

Question 1. Your written testimony mentioned that with further development and funding, tribal courts will provide the same necessary components and legal procedures as any state or federal court. In so doing, business entities may become more comfortable with tribal courts, laws and processes, particularly for commercial enterprises and economic development. What types of tribal laws and processes has your tribe developed to support economic development on your reservation?

Question 2. How will the recent Supreme Court ruling in *Plains Commerce Bank v. Long Family Land & Cattle* affect the cases pending before your courts or the ability of tribal members to seek relief against non-Indian parties?

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

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. ROMAN J. DURAN*

Question 1. Incarceration may be a necessary punishment for violent offenders, but may not be an option available to tribal judges in imposing sentences for any number of reasons, including the lack of space. What effective alternatives to incarceration have you employed? Have these alternatives been successful in reducing recidivism and rehabilitating offenders?

Question 2. The Tribal Law and Order Act would permit Tribes to access criminal history databases. However, there may be some infrastructure needs that will prevent full access. Does NAICJA have an indication of how many tribal court systems have access to such databases? Of the Tribes that do not have access, what are the primary barriers?

Question 3. You described the complete failure in funding for the Tribal Justice Support Act. From the National perspective, what is the most vital need for tribal court systems to succeed?

Question 4. What type of technical assistance are the BIA and Justice Department providing to help train tribal judicial personnel, and develop tribal codes?

WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON. ROMAN J. DURAN*

Question 1. Can you elaborate on the types of due process protections that tribal courts afford to defendants under current law?

Question 2. The Violence Against Women Act mandated full faith & credit be extended to tribal court protection orders. In general, what kind of full faith & credit recognition has been extended to these tribal court orders?

Question 3. How will the recent Supreme Court ruling in *Plains Commerce Bank v. Long Family Land & Cattle* affect the cases pending before your courts or tribal members' ability to seek relief against non-Indian parties?

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

Question 1. Please provide the Committee with copies of the 40 tribal court reviews that the Tribal Justice Support Division has completed.

Question 2. As you know, section 304 of S. 3320, the Tribal Law and Order Act of 2008, would authorize tribal courts to sentence offenders up to 3 years in jail. Tribes must provide a public defender to exercise the additional authority. In addition, defendants may seek habeas review in federal court of their detention or conviction. Your previous testimony indicated that the Department had constitutional concerns with this provision. Can you please expand on those concerns?

Question 3. A number of Tribes in the Great Plains other areas of Indian Country rely on the BIA to provide direct law enforcement services. BIA police enforce federal laws, but it's equally important that they enforce violations of tribal law. Tribal courts rely on the BIA's work to afford basic due process, and the right to confront witnesses to defendants before their courts. What is the Department's policy on BIA police testifying in tribal court? Will BIA police respond to a subpoena or order to appear to testify issued by a tribal court?

Question 4. In Fiscal Year 2008, Congress appropriated $23.7 million for the Secretary's Safe Indian Communities Initiative. The President asked for an additional $26 million in Fiscal Year 2009. Please provide the Committee with a spending report to date in FY 2008, and a plan for the remainder of FY 2008 with regard to the Department's use of FY 2008 funding for the Safe Indian Communities Initiative.

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

Question 1. The biggest challenge for tribal courts appears to be the lack of funding. The lack of comprehensive data on unmet needs seems to frustrate the problem. How can the BIA coordinate with both the Department of Justice and Indian tribes to secure solid data supporting adequate funding levels?

Question 2. The Tribal Law and Order Act of 2008 would expand tribal sentencing authority from one year to three years for incarceration. Would the increased sen-

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

tencing authority affect the BIA detention facilities or staffing levels of the BIA corrections officers?

Question 3. Would incarcerating offenders convicted in tribal courts into the Federal Bureau of Prisons system provide some relief to the BIA detention facilities?

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