

TESTIMONY OF
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1ST VICE-PRESIDENT, NATIONAL AMERICAN INDIAN COURT JUDGES
ASSOCIATION
ASSOCIATE JUDGE, JICARILLA APACHE NATION COURTS
BEFORE
THE SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
“TRIBAL LAW AND ORDER ACT OF 2008”
JULY 24, 2008

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 US 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 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

On September 1, 2000, through the Bureau of Justice Assistance’s (BJA) Tribal Court Assistance Program. The Resource Center, through its clearinghouse and Internet Website capabilities has become the primary dissemination mechanism that meets the technical assistance needs of tribal justice systems.

Today, in carrying out its goals NAICJA through the National Tribal Justice Resource Center (NTJRC) with funding by the Department of Justice's Bureau of Justice Administration. We have been successfully awarded an annual or biannual grant since 2000. (2009 award is currently pending.) NAICJA through its Resource Center provides technical 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.

The Resource Center provides technical assistance to tribal justice systems through technology, to strengthen tribal sovereignty and to ensure judicial autonomy and independence. The Center recently relocated its office to Albuquerque, NM in July 2008, to better serve the needs of tribal courts throughout Indian Country.

NAICJA along with the NTJRC staff has successfully worked 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.

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 underfunded. 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 to the Federal Courts Budget and raises for Federal Court Judges, and the need to sustain a financially healthy judiciary; thereby maintaining a well educated and competent judiciary. The truth of the matter is that the tribal court systems are facing the very same issues as Justice Kennedy pointed out. Lack of adequate funding for tribal court systems also “threatens the excellence” of tribal justice systems; if properly funded it may have a direct result in reducing the number of appeals being filed in the federal courts. The fallacy 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 respecting their judicial independence) in light of being under-funded. The second fallacy is that the lack of funding tribal justice systems is the rule of power and hinders the rule of law for 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. That 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 functioning justice system, which gives a stark contrast in funding a fully functional justice system.

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 underfunded 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 due process for criminal defendant’s in tribal courts; which is relative to the language contained in the Indian Civil Rights Act and compounded with the lack of funds for public defenders, in addition to economic restrictions that would otherwise provide funding for such programs i.e. the revenue sharing under the Indian Gaming Regulatory Act. 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, with 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 jurisdictions face.

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, US 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," (hereafter "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.

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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 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.

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 multi-disciplinary task forces, and communicating with tribal leaders and law enforcement officials.

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 US 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 US 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. (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 limit 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 US 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 fingers 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.

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 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. More on that point later.

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 tribe for summer education and activity programs for tribal youth; (3) to develop tribal juvenile codes; and (4) 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 US 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 require a public defense for all defendants. 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.

The sentencing aspects under this section addresses the dire need for correctional facilities in Indian Country. Due to the lack of funds many 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, *in te se*, the Office of Indian Alcohol and Substance Abuse under SAMSHA. We generally support this office and its functions with regard to what SAMSHA does, however we emphasize that 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 to their advantage the myriad of jurisdictional issues.

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 programs 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 section 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.