United States Senate Committee on Indian Affairs
Hearing on Draft Legislation to Address
Law and Order in Indian Country

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Honorable Chairman and members of the Committee, thank you for the opportunity to testify today. Almost one year ago NCAI provided testimony that outlined the complex causes and potential solutions to the public safety crisis facing Indian communities. We urged the Committee to write legislation, work with the tribes to gain their insights and support, and then pass legislation in this session of Congress. We have the draft legislation in hand, and I want to express my deepest appreciation to Chairman Dorgan, Vice Chair Murkowski and Senators Kyl, Johnson, Thune and Tester for taking up this important task. The legislation reflects first-rate work and provides common-sense solutions for many problems with the justice system in Indian country.

Indian communities have lived with high crime rates for many years, but this reality has finally gained broader attention. Much of the momentum on this issue was sparked by the efforts of the Indian women leaders who have pushed the agenda on domestic violence and sexual assault. We have also been aided by countless visits by tribal leaders to Washington to raise this issue, federal crime reports that demonstrate the dramatically higher rates of violent crime on Indian reservations, the Amnesty International Report "Maze of Injustice," and many news articles that have highlighted the problems – most recently the national series in the Denver Post and South Dakota coverage in the Argus Leader. There is a window of opportunity right now to make constructive change. I feel a tremendous responsibility as NCAI President to push forward on the legislation to make improvements when they are possible.

However, this is the stage in the process where we must listen to tribal leaders and other interested parties and take advantage of the insights they can provide. The draft legislation was circulated only last week, so we will need time for response. In particular, we have found that the best information often comes from people who work in the criminal justice system – tribal police officers, tribal prosecutors, tribal judges and the like. I would encourage the Committee to make a special effort to reach out for their views on how the legislation can be strengthened.

I am very pleased with the direction of the draft bill. It tackles a wide range of issues that have been raised by tribal leaders, including;

- Requiring the Department of Justice to track its declinations to prosecute Indian cases;
- Creating an Office of Indian Country Crime within the Criminal Division at DOJ;
- Amending P.L. 280 to permit an Indian tribe to request federal assistance;
- Creating incentives for state-tribal cooperation;
- Providing for Special Law Enforcement Commissions;

- Creating flexibility for training Indian country police officers;
- Ensuring BIA and tribal police access to the national crime databases;
- Expanding tribal court sentencing authority; and
- Creating a Juvenile Justice program to develop alternatives to incarceration.

There are many excellent provisions in the legislation and NCAI has had a significant opportunity to provide input, so I would like to limit our initial comments to raising four issues that are not in the legislation, and then providing additional information on some of the provisions that NCAI has supported.

Appropriations and Streamlined Funding -- First and foremost, at every meeting we have held on this topic the biggest message from tribal leaders is the need for more funding for law enforcement. The Bureau of Indian Affairs has documented a $200 million unmet need to bring reservation policing up to the same levels found in other rural communities. According to BIA testimony, tribal detention facilities are grossly overcrowded, in deplorable condition, and staffed at only 50%.[1] We understand that we need to reach out to the Appropriations and Budget Committees to ensure that adequate funding is provided so that this legislation can be effective. In addition, we believe there is a need to streamline the funding available through the Department of Justice, Department of Interior, and Department of Health and Human Services. Tribal law enforcement funds are divided up between the DOI and DOJ. Within the DOJ these funds are further divided into dozens of competitive grants for specific purposes. Moreover funding for prevention, rehabilitation, and treatment programs, which are key components of any community's approach to reducing crime, are located at IHS, SAMHSA, and elsewhere withing the DHHS.

This system requires a large grant writing capability and a good bit of creativity in order to access the funds. Millions could easily be spent providing the technical assistance tribes need just to navigate this overly complex system. Under this ad hoc system, tribal law enforcement will receive vehicles, but no maintenance. They will get a detention facility, but no staff. They will receive radios, but no central dispatch. The system doesn't make sense. We believe that tribal public safety funding should be streamlined into a single funding vehicle that would be negotiated on an annual basis and made more flexible to meet local needs.

Domestic Violence -- Secondly, we are disappointed that the legislation does not include a provision for tribal jurisdiction over all domestic violence offenders. Domestic violence rates against Indian women are three times the national average and, according to DOJ statistics, the vast majority of the offenders are non-Indian. As we have worked on this legislation, we have attempted to put ideology to the side and focus on the necessary solutions to very real law and order problems. We are pleased that the legislation contemplates improvement of the federal law enforcement response, but very doubtful that federal prosecutors will aggressively pursue domestic violence cases. We know that there are very devoted individuals working for the FBI and United States Attorneys, but the federal justice system simply is not designed or equipped to handle domestic violence cases.

[1] Testimony of Guillermo Rivera before the National Prison Rape Elimination Commission, March 26, 2007, *available at* http://www.nprec.us/proceedings_austintx.htm.

Domestic violence cases are best handled by local law enforcement. The cycle of domestic violence requires intervention at the earliest possible stage, long before it escalates to the very violent assaults that result in federal prosecution. In addition, domestic violence offenders require a different response than is found in the federal system. Most families will reunite and there is a much greater emphasis on counseling, training, and services related to substance abuse, parenting skills and job counseling. None of these services are available in the federal system, which is oriented to punishing very severe offenses. A modest adjustment of existing tribal authority limited only to those who consensually cohabitate with a tribal member on tribal land is absolutely necessary to regulate domestic relations within the tribe.

What is most disappointing is that it appears such legislation cannot be introduced even for purposes of discussion. We understand that the issue is sensitive, but we also know that reasonable solutions can be reached if the issues are aired for public debate. We acknowledge the efforts to seek alternatives. Section 601 of the bill is a proposal to create a federal crime for violating a tribal civil protective order. We want to continue to discuss this option, but we are concerned that it relies on the willingness of the U.S. Attorneys to prosecute the cases. We would ask the Committee to consider the development of a small pilot project for tribal domestic violence jurisdiction that would create a firmer basis for considering the issue in the future.

Alaska Native Villages – Third, we are concerned that the legislation in its current form does not address the unique law enforcement issues in Alaska Native communities. Alaskan tribal lands are not considered "Indian country" after the Supreme Court's decision in *Alaska v. Native Village of Venetie*. Tribal communities in Alaska experience high rates of domestic violence and sexual assault and significant problems with substance abuse. Most of the native communities are only accessible by plane or boat, and are completely dependent on state law enforcement. The Village Public Safety Officer program has had its budget slashed by the state, and many tribal communities in Alaska are terribly underserved by state police and other services. We know that the Committee is aware of these problems and would urge the Committee to reach out to Alaska tribal leaders to develop ways to improve law enforcement in Alaska. Our primary recommendations are that the federal government provide direct funding for rural law enforcement in Alaska, to strengthen tribal courts, and that tribal communities in Alaska be given greater control over alcohol and substance abuse policies.

Misdemeanors and Victimless Crimes Committed by Non-Indians - The general lack of tribal or federal jurisdiction for misdemeanors committed by non-Indians creates significant problems for law enforcement. Alcohol and drug related disturbances, traffic violations, domestic violence and gang activity commonly involve both Indians and non-Indians. The absence of tribal jurisdiction to deal effectively with non-Indians creates a perception that the likelihood of being caught and punished is low, and encourages a disregard for tribal law enforcement. This problem is compounded by the status of "victimless" crimes -- those committed on the reservation by a non-Indian that do not actually involve harm or threat to the person or property of an Indian. Neither the tribe nor the federal government has jurisdiction over victimless crimes, only the state. As a result, most routine disorderly conduct, traffic violations and other moral offenses committed by non-Indians within Indian country receive

little enforcement attention. These gaps in tribal and federal jurisdiction defeat community-based policing initiatives and create disorder and disregard for law enforcement in Indian country. [2]

One solution that has been suggested is to expand tribal and Bureau of Indian Affairs authority to cover a broader range of "non-major" crimes as well as misdemeanors and "victimless" crimes committed by non-Indians. This could be done in two ways. First, directly authorize tribes to prosecute misdemeanors. Second, the Bureau of Indian Affairs could be authorized to develop regulations governing misdemeanors and minor crimes committed by both Indians and non-Indians in a manner similar to the National Park Service. See 16 U.S.C. §1c and also the current regulations governing Indian offenses at 25 C.F.R. Part 11. Legislation and regulations would need to be carefully crafted not to "federalize" misdemeanor crimes that are committed to tribal government enforcement. Public Law 638 contracting could play a role, as well as an option for express consent to tribal court jurisdiction in lieu of federal prosecution.

Title I – Federal Accountability and Coordination

Under the Major Crimes Act and other federal laws, the Department of Justice has the sole authority for investigation and prosecution of violent crimes and other felonies committed on Indian reservations. Despite these laws and the federal trust obligation to protect Indian communities, the violent crime rate on Indian reservations is two and a half times the national average, Indian women are victims of rape and sexual assault at three times the national average, and tribes are faced with an epidemic of drug trafficking. These crime rates have been doubling and tripling in Indian country while crime rates have been falling in similarly low-income communities throughout the United States. Something is seriously wrong with the federal law enforcement response.

For many years, tribal leaders have raised the concern that the U.S. Attorneys do not consider Indian country crimes a priority and decline to prosecute an extraordinary percentage of cases. The Denver Post series from November of 2007 confirmed these concerns.

- Between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime.
- Investigative resources are spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave child sexual assault victims vulnerable and suspects free to commit other crimes.
- Many low-priority felonies never make it to federal prosecutors in the first place. Of the nearly 5,900 aggravated assaults reported on reservations in fiscal year 2006, only 558 were referred to federal prosecutors, who declined to prosecute 320 of them. Of more than 1,000 arson complaints reported last year on Indian reservations, 24 were referred to U.S. Attorneys, who declined to prosecute 18 of them.
- Congress has increased the amount of money allocated to the Bureau of Indian Affairs for tribal police, but that increase has been largely spent on patrol officers. Federal

[2] Testimony of John St. Claire, Chief Judge, Shoshone and Arapaho Tribal Court, Wind River Indian Reservation, Senate Committee on Indian Affairs, February 27, 2002.

investigators and prosecutors have also received sizable boosts in their budgets for work in Indian Country, but those increases have failed to produce a perceptible rise in the number of investigations or prosecutions from reservations. Federal prosecutors and investigators triage scarce resources to work on issues that are considered a higher priority.

- From top to bottom, the Department of Justice's commitment to crime in Indian Country is questionable. Former United States Attorney for the Western District of Michigan Margaret Chiara was quoted saying, "I've had (assistant U.S. attorneys) look right at me and say, 'I did not sign up for this'….They want to do big drug cases, white-collar crime and conspiracy." Comments from former United States Attorney for Arizona, Paul Charlton indicate that this attitude came from the top. Charlton has related a story where a high-level Department of Justice official asked him why he was prosecuting a double-murder in Indian Country in the first place.[3]

Some internal efforts have been made at the Department of Justice to improve the focus on Indian country crime, but these efforts have shown little in the way of results. Former Attorney General Janet Reno created the Office of Tribal Justice, but the status of this office has been diminished in recent years. Former Attorney General John Ashcroft supported the district priorities of the U.S. Attorneys, and under his leadership the Native American Issues Subcommittee of the Advisory Committee to the Attorney General worked to increase prosecutions and address problems with violent crime and drug trafficking in Indian country. However, six of the members of the Native American Issues Subcommittee were among those who were asked to resign in 2006, including both the former chair and vice-chairs Thomas Heffelfinger and Margaret Chiara. Monica Goodling, former aide to Attorney General Gonzales, stated in her House Judiciary Committee testimony that Thomas Heffelfinger was replaced because he spent "too much time" on the Native American Issues Subcommittee. Now we have a new cast of characters at DOJ and they seem to be committed to the status quo. According to U.S. Attorney Diane Humetewa's testimony, DOJ does a great job and there are no problems. No one is held accountable and the crime statistics continue to mount.

There is a serious concern that the Department of Justice central office places no priority on addressing crime in Indian country, and is subject to no oversight or accountability on its efforts or performance. Indian tribes do not wish to "federalize" more crimes and put more Indians in federal prison. However, serious felonies and dangerous criminals -- whether Indian or non-Indian -- are under the sole jurisdiction of the Department of Justice and this responsibility must be taken seriously. We strongly approve of the proposed reforms at the Department of Justice to ensure that Indian country crime is subject to consistent and focused attention. In particular:

- Section 102 would require the Department to maintain data on declinations of referred Indian country cases, and to report annually to Congress. Tribal leaders and Members of Congress have sought this data for decades, but have been rebuffed by a Department of Justice that hides behind broad claims of prosecutorial discretion and a steady unwillingness to release any internal data. This will provide an important tool for measuring responsiveness to referred cases.

[3] Mike Riley, *"Principles and Politics Collide: Some U.S. Attorneys who emphasize fighting crime on Indian lands have seen themselves fall out of favor in D.C.,"* DENVER POST, Nov. 14, 2007.

- Section 104 would create an Office of Indian Country Crime within the Criminal Division of the Department of Justice. We have attached a copy of the organizational chart of the Criminal Division, which has a section and prosecutors assigned to every sort of federal crime, except for Indian country crime. We believe this is a reflection of the low priority that Indian Country crime receives within the DOJ. Specialized prosecutorial units are very effective in focusing expertise and a response on particular types of crime. We strongly support this aspect of the legislation.

Title II – State Accountability and Coordination

Although the federal system of justice in Indian country has serious difficulties, there is a worse system. Under Public Law 280, state law enforcement has displaced federal enforcement and assumed full or partial jurisdiction over crimes committed within Indian Country in certain states and on certain reservations. Many tribes strongly opposed P.L. 280 because of the law's failure to recognize tribal sovereignty and the lack of consent of the affected tribes. States have focused on the failure of the Act to provide federal funding -- an unfunded mandate on lands that are not taxable. Even though tribes retain concurrent jurisdiction, the federal government has viewed P.L. 280 as an excuse to cut off tribal financial and technical assistance for law enforcement. The law has contributed to mistrust and hostility between state and tribal officials on many reservations. A common tribal perception is that state law enforcement refuses or delays when the tribe asks for assistance, but vigorously asserts their authority when the tribe does not want them to intervene. Professor Carole Goldberg has made a compelling case that the law has worsened the problem of lawlessness on reservations:

> Public Law 280 has itself become the source of lawlessness on reservation. Two different and distinct varieties of lawlessness are discernible. First, jurisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory have no institutional support or incentive for the exercise of that authority. *** Second, where state law enforcement does intervene, gross abuses of authority are not uncommon.[4]

Section 201 proposes a modest reform of P.L. 280. The statute distinguishes between the six "mandatory" P.L. 280 states, and the other states that elected to assert jurisdiction prior to 1968. In the mandatory states, the federal government has been divested of Indian country jurisdiction. For example, in Minnesota the U.S. Attorney has authority to prosecute major crimes only on the Red Lake Reservation, but could not prosecute a major crime on the other reservations within the state. This legislation would allow the tribe to request that the U.S. Attorney exercise concurrent jurisdiction over Indian country crimes and major crimes. We support this reform because it would increase tribal control and create another means to address unmet law enforcement needs. At the same time, we strongly advocate that Congress should amend P.L. 280 to allow tribes to retrocede without state consent.

[4] Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (UCLA American Indian Law Studies Center, 1997), p. 12.

Section 202 is also an extremely important part of this legislation. It is widely recognized that increased cooperation is vital to improving tribal, state and federal law enforcement responsiveness. There is already a significant amount of cooperation between tribes, states, and counties, and there are hundreds of cooperative law enforcement agreements. These agreements are grounded in the shared recognition that tribes, states and counties can enhance their law enforcement efforts working together. Recognition of these benefits is sufficiently widespread that a number of states such as Arizona, New Mexico, Nevada, North Carolina and Washington now provide for the deputization of tribal officers by statute. *See, e.g.,* Arizona Rev. Stat. Ann. § 13-3874 ("While engaged in the conduct of his employment any Indian police officer who . . . meets the qualifications and training standards adopted pursuant to section 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state).

Although law enforcement cooperation is common, it is not found everywhere. There are still a number of places where cooperation is minimal, and the relationships are sometimes antagonistic. In our experience, these poorer relationships are driven by the long histories of disrespect and indifference that have existed for many decades in the rural areas around some Indian reservations, and by a lack of support for individuals who would choose to forge stronger law enforcement ties.

The benefits of cooperative agreements are sufficiently strong that the federal government should encourage and provide incentives for the development of law enforcement cooperation among states, counties and tribes. Section 202 is modeled after a successful Wisconsin program that provides specific funding for joint tribal-state law enforcement efforts. Wis. Stat. § 165.90 provides for state grant funds to joint county-tribal law enforcement plans. This program has been evaluated as very successful in improving reservation law enforcement in Wisconsin. See, David L. Lovell, Senior Analyst, Wisconsin Legislative Staff, *Wisconsin's County-Tribal Law Enforcement Program*, (June 27, 2000).

NCAI would like to emphasize that cross-deputization agreements are not the only forms of cooperation and may not be appropriate in all locations. Another form is the mutual aid agreement, where the parties pledge to respond to requests for assistance in carrying out their respective law enforcement activities, but have this authority only on specific requests. In addition, there are also very important agreements that cover specific issues such as extradition, the execution of search and arrest warrants, and hot pursuit across jurisdictional boundaries.

In this vein, NCAI also strongly supports Section 302, which would create more flexibility in training tribal police officers. Experience has shown that cooperation is enhanced when state and tribal police officers have similar training at the same facilities. In fact, many of the cooperative agreements require that tribal officers train at state police academies. The BIA's training requirements become a duplicative barrier to recruiting and retaining tribal police officers. Instead, BIA training should be designed to supplement locally available police training.

Title III – Empowering Tribal Justice Systems

Sections 301 and 302 are extremely important provisions to eliminate barriers to law enforcement in Indian country. Special law enforcement commissions have long been available to tribal police, but the BIA has withheld the training and granting of commissions for bureaucratic reasons. As noted above, Section 302 addresses a severe problem that tribes have faced in recruiting and training police officers. The BIA trains police on an irregular basis at only one facility in New Mexico. The long distances are a barrier to recruitment, and the training is often duplicative of the training that tribal officers must receive under state-tribal agreements. The BIA should offer the unique "Indian country" components of training as a supplement to locally available training that meets National Peace Officer Standards.

Section 304 is also critically important. Criminal information databases are a fundamental tool of law enforcement. Tribal police are regularly denied access to the NCIC, although the Violence Against Women Act of 2005 has specifically authorized tribal access. The inability to check for criminal history compromises the safety of tribal police officers, and the inability to check for outstanding warrants and to enter information about fugitives undermines the entire national law enforcement network.

Section 305 would extend tribal sentencing limitations under the Indian Civil Rights Act to provide for appropriate sentences for more serious offenders. In the original 1968 law, tribal sentencing authority was limited to 6 months or $500. In 1986, the authority was expanded to 1 year or $5000. A 2003 report of the Native American Advisory Group to the U.S. Sentencing Guidelines Commission points out the disparity between tribal sentencing authority and the sentences that are imposed by the federal government for crimes committed under the Major Crimes Act. Assaults comprise the greatest percentage of crimes prosecuted under the Major Crimes Act, and the average federal sentence for Indians prosecuted for assault is three years. Because U.S. Attorneys rarely prosecute any crime in Indian country that is not a very significant assault, there is a large gap between the maximum sentencing authority of tribes and the average sentence for the least serious crime that is prosecuted by the federal government.

The key to this provision is that it would permit tribes to house prisoners at the nearest appropriate federal facility. Most tribes do not have the resources or facilities for longer term incarcerations and need the federal government to house violent criminals. We strongly support this aspect of Section 304. Overall, we need to have further discussion with tribal leaders before we can completely endorse this provision.

Another aspect of the Indian Civil Rights Act deserves consideration. The Act requires Indian tribes to provide juries to anyone accused of an offense punishable by imprisonment. The federal Constitution only recognizes such a right for persons subject to a term of imprisonment for "serious offenses," which primarily refers to non-petty offenses, or those offenses which carry a prison term of greater than six months. The requirement of a jury trial for petty offenses is an unnecessary burden on tribal justice systems. In tribal courts with limited budgets, savvy defendants use this provision to gain dismissal of otherwise meritorious prosecutions.

Title IV – Resources for Tribal Justice Programs

NCAI has long advocated for increased funding for law enforcement in Indian country because of the public safety crisis. Basic law enforcement protection and services are severely inadequate for most of Indian country. For example, a recent Bureau of Indian Affairs analysis indicates that in BIA Law Enforcement, 1,153 officers are needed but it has only 358. The gap is 795 officers (69% unmet need). In Tribal Law Enforcement – 3,256 officers are needed but tribes have only 2,197. The gap is 1,059 officers (33% unmet need). Total need is 1,854 law enforcement officers. To put this in perspective, these 2,555 Indian country law enforcement officers make up about 0.004 percent of the total of 675,734 state, city and county law enforcement officers in the United States, yet they patrol approximately 2% of the landmass of the United States and 1% of the population.

Increasing law enforcement funding is a top priority. We generally support the efforts to reauthorize the programs in this title, but will need time to review the details. As mentioned above, there is a need to streamline the funding available through the Department of Justice. DOJ law enforcement funds are divided up into many competitive grants for specific purposes. Department of Justice funding should be streamlined into a single funding vehicle that would be negotiated on an annual basis and made more flexible to meet local needs.

Section 407 is particularly important to support the development of the Juvenile Justice programs in Indian Country. There is a growing consensus among both tribal leaders and national justice system analysts that non-violent juvenile offenders should rarely be placed in detention. They need to stay in school and get more monitoring and mentorship. Our goal is not to put more Indians in jail and create more criminals, but to rehabilitate offenders so they can play a productive role in our communities. This will also be much more cost-effective, and the place to start is at the juvenile level. Upon our initial review, we may request that this program be expanded and created as a specific set-aside for tribal programs.

Title V – Indian Country Crime Data Collection and Information Sharing

Crime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have never been able to coordinate or accurately report on crime rates and prosecution rates in Indian country, making it extremely difficult to review their performance. In addition, it becomes very difficult to discern trends, set enforcement priorities, and formulate budget requests without crime data. This title would require all federal law enforcement officers responsible for investigating and enforcing crimes in Indian country to coordinate in the development of a uniform system of collecting and reporting data.

This provision should not allow any wiggle room. Congress should require that the Bureau of Indian Affairs and the Department of Justice devise a "Tribal Category" and coordinate to produce Indian country crime data and statistics comparable to data collected from state law enforcement by the Bureau of Justice Statistics. This effort should include state and county crime data from P.L. 280 and similar jurisdictions.

Title VI – Domestic Violence and Sexual Assault Enforcement and Prevention

NCAI will withhold comments on this section until we have a further opportunity to consult with tribal leaders and the Indian women's organizations that provide advocacy and services to victims of domestic violence and sexual assault.

Conclusion

Law enforcement has been the leading concern of tribal leaders throughout the country for at least the last five years that priorities have been measured by the BIA Budget Advisory Committee, and probably for much longer. NCAI strongly encourages Congress to take action on all of the fronts that we have identified above. Taken together – an improvement in the federal response, an increase in state-tribal cooperation, enhancements to tribal authority, and maximizing law enforcement resources – we can dramatically change the environment for criminal activity on Indian reservations. Our goal is to send a new message that the law will be vigorously enforced, and thereby create a deterrent to crime on Indian lands. This effort will bring great benefits to Indian communities and our neighbors in public safety, but also in health, productivity, economic development, and the well-being of our people. We thank you in advance, and look forward to working with you to move forward on the legislation as quickly as possible.

CRIMINAL DIVISION