S. 797, THE TRIBAL LAW & ORDER ACT 2009

Testimony of
Troy A. Eid
Greenberg Traurig LLP
Denver, Colorado

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Mr. Chairman, Committee members, thank you for the opportunity to testify in support of S. 797, the Tribal Law & Order Act. My name is Troy Eid and I live in Golden, Colorado. I recently returned to private life after serving as the United States Attorney for District of Colorado. I've worked in and around Indian country for more than two decades. This includes public service as an aide to former U.S. Representative Jim Kolbe of Arizona, a cabinet secretary to former Governor Bill Owens in my home state of Colorado, and most recently as Colorado's U.S. Attorney.

Currently I'm a shareholder in the Denver office of Greenberg Traurig LLP, where I co-chair our American Indian Law Practice Group. The firm's tribal clients include the Ute Mountain Ute Tribe of Colorado, which I represent as Special Counsel, and the Seminole Tribe of Florida. We also advise organizations and individuals doing business with Indian nations, operating on tribal lands, and investing in Native American-owned assets.

Besides practicing law, I teach as an Adjunct Professor in the American Indian Law Program at the University of Colorado School of Law in Boulder. I'm also active in the Navajo Nation Bar Association and serve on its Training Committee. This includes

teaching Continuing Legal Education classes for tribal judges, attorneys and advocates, along with the semi-annual bar review course for candidates seeking admission to practice law before the Navajo Supreme Court and district courts. Additionally, I'm a consultant to Fox Valley Technical College of Appleton, Wisconsin. Fox Valley is a contractor to the U.S. Department of Justice and develops law enforcement training curriculum and programs for nearly 200 federally recognized Indian tribes and nations. My own work for Fox Valley focuses on the implementation by tribal justice departments of the National Sex Offender Notification and Registration Act or SORNA, which as you know is Congressionally mandated by the Adam Walsh Act of 2006.

S. 797 & the Challenges it Addresses

I'm very encouraged by this bill and strongly support it. S. 797, the Tribal Law & Order Act of 2009, is a necessary first step toward strengthening criminal justice for people living and working on Indian lands. After brief introductory remarks, my testimony will discuss how this legislation can address three of the most significant challenges to making Indian country safer:

1. *Overly complicated jurisdictional rules* that undermine criminal investigations, preventing far too many prosecutions from going forward and, in the memorable phrase of an April 2007 by Amnesty International, can create a "maze of injustice."

2. *A chronic resource deficit* in which Indian tribes have access on average to less than one-half of the law enforcement resources available to comparable off-reservation communities, and which extends to the entire criminal justice system.

3. *A lack of respect for tribal sovereignty* and how it can reinforce the fundamental American value of localism – the expectation that governmental decisions, including those involving public safety, are best made closer to citizens by officials who are directly accountable to them.

My testimony will explore how specific provisions of S. 797 can help address each of these challenges in order to make Indian country safer. This legislation is vitally important and long overdue. Yet it is still just a first step on a much longer journey that has never been and will never be easy. So I will conclude my remarks today by raising some additional ideas that this Committee might consider in its quest to make equal access to justice a reality for *all* Americans, including First Americans.

Before I begin, Mr. Chairman, let it be said that you are a true champion in honoring the federal government's trust responsibility to Indian tribes and nations through enhanced public safety. Your sustained commitment to meaningful reform, and that of your co-sponsors and supporters – Democrat and Republican alike – is refreshing to many of us serving in the field. Your continued leadership is also essential to reversing the circle of violence and despair that prevails on far too many Indian reservations. It is also my observation that this Committee is very well-served by its professional staff.

In terms of fulfilling Congress' federal trust obligations, this Committee has repeatedly recognized that there is no more urgent priority than strengthening criminal justice for people living and working on Indian lands. Much has been accomplished to make Indian Country safer, under both Republican and Democratic Administrations, since President Richard M. Nixon formally adopted Tribal Self-Determination as national policy. Yet far too much of the federal criminal justice system that is supposed to serve Indian Country – designed as it was to keep Native people isolated on reservations, with the real political power elsewhere – remains stubbornly frozen in the Termination Era.

The need to make Indian country safer has also been a priority for President Obama, who declared during the last fall's campaign:

> The most fundamental function of all governments is to ensure the safety of their citizens and maintain law and order. The federal government has a legal trust responsibility to aid tribal nations in furthering self-government in recognition of tribes' inherent sovereignty. Unfortunately, the government has failed to live up to its obligation to help tribes maintain order.

There are plenty of statistics to illustrate the President's point, but it is perhaps more meaningful for me as a former United States Attorney to relate it in human terms. We're talking, after all, about a federal criminal justice system in which one of the most basic legal questions of all – jurisdiction – depends on determining the *ethnicity* of the perpetrator as well as the victim, along with the intricacies of land status. This breathtaking inconsistency – using the ethnicity of an *American citizen* to decide which laws apply and who investigates and prosecutes a crime – gives rise to the so-called "jurisdictional maze," a web of confusing and sometimes contradictory rules that attempt to determine who does what in Indian country.

Navigating the Jurisdictional Maze

The breathtaking jurisdictional complexity of federal Indian law – with both the adjudicative forum and applicable laws depending on the type of crime, status of the land where the offense occurred, and identity of the victim and the suspect – seriously impedes the effective administration of justice. There is also a perverse irony in the fact that people living in some of the poorest and most geographically isolated parts of our country must confront some of the most complicated legal rules anywhere during the ordinary course of their lives.

Since 1885, United States Attorneys and tribal governments have had the primary responsibility for prosecuting violent crimes in Indian country. Yet even this basic division of labor has its arcane exceptions. For instance, crimes involving only non-Indians in Indian country are ordinarily subject to exclusive *state* jurisdiction. However, in states where Public Law 280 applies, state governments may or may not exercise criminal jurisdiction over Indians and non-Indians alike depending on the specific reservation and criminal offense at issue. Federal court decisions often add still another layer of complexity. For instance, in the 2001 case of *Nevada v. Hicks*, the U.S. Supreme Court ruled against tribal court jurisdiction over tribal court claims against state game officers who exceeded the scope a state-issued, tribal court-approved search warrant. Despite its narrow holding, widespread misperceptions about *Hicks* and its importance have seriously undermined the often-delicate cooperative policing arrangements forged among local, state and tribal law enforcement officers.

In some investigations, it can be difficult or even impossible to determine at the crime scene whether the victim, the suspect, or both is an "Indian" or a "non-Indian" for purposes of deciding which jurisdiction – federal and/or tribal, or state – has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this can raise a fundamental question – which agency is really in charge? This is the antithesis of effective government.

By way of illustration, Colorado's U.S. Attorney's Office recently prosecuted a case on the Southern Ute Indian Reservation where two victims of a vehicular homicide were hit by a non-Indian drunk driver and tragically burned to death in their vehicle. The victims were an elderly woman, an enrolled member of the tribe, and her eight-year-old granddaughter. The child was not an enrolled member of the tribe, but had a

sufficient degree of Indian blood to be considered an "Indian" for federal jurisdictional purposes so long as the community in which she lived also considered her to be an "Indian."

As our federal prosecution proceeded, defense counsel countered that despite having Native blood, the child victim was still not considered to be an Indian within the particular reservation where the crime occurred. It turned out that the little girl had received Indian Health Service benefits on the Southern Ute Reservation and was visiting her grandparents there at the time, but legally resided with her mother off-reservation. Literally dozens of people, ultimately including the tribal council, got involved to decide whether the child was really an "Indian" or not. There was considerable disagreement. After several months of jurisdictional gymnastics, the case involving the child's death was referred to the local District Attorney as a matter of exclusive state jurisdiction. Meanwhile, the U.S. Attorney's Office prosecuted the non-Indian driver of the vehicle for the death of the little girl's grandmother. The Southern Ute Tribe, incidentally, had no criminal jurisdiction whatsoever to vindicate its interest in the death of its own tribal member by a non-Indian defendant. This was because of the U.S. Supreme Court's 1978 ruling in *Oliphant v. Suquamish Indian Tribe*, which held that absent express authorization from Congress, Indian tribes lack criminal jurisdiction over non-Indians.

As prosecutors we actually got a break in that case, in a way, because the defendant – a non-Indian drunk driver – happened to be operating his vehicle in a Colorado state right-of-way at the time of the accident. The reservation in question, the Southern Ute Indian Reservation, has its very own federal jurisdictional statute, Public Law 290, limited solely to that reservation, which clarifies when state jurisdiction applies

within highway rights-of-way. This made it easy for two of the first-responders, a Colorado state trooper and a LaPlata County Sheriff's deputy, to make a valid state arrest. In other so-called "checkerboard" Indian reservations such as the Eastern Agency of the Navajo Nation, where Indian trust and allotted land parcels alternate with private fee lands and various other landholdings, highway rights-of-way are typically exclusive *federal* jurisdiction pursuant to the Indian country statute, 18 U.S.C. § 1151. This means that a Navajo Nation tribal police officer responding to a similar accident on the Eastern Agency ordinarily could not arrest a non-Indian defendant without being trained and federally deputized by the Bureau of Indian Affairs.

S. 797 addresses the jurisdictional maze in at least two ways. First, Section 305 of the bill creates an Indian Law and Order Commission ("the Commission"). This nine-member Commission is charged with undertaking a comprehensive study of law enforcement and criminal justice in Indian communities and reporting back to Congress within two years of the date of the bill's enactment. This includes an analysis of jurisdiction over offenses committed in Indian country and how the current rules affect criminal investigations and prosecutions. The Commission is expressly charged in Section 305(e)(1) with making recommendations to Congress for "simplifying jurisdiction in Indian country[.]" Such an approach is welcome news.

Second, another part of the bill, Section 301, takes direct aim at the maze of injustice by helping ensure that more tribal, state and local law enforcement officers are commissioned as federal officers – that is, federally deputized – to fight Indian country crime. There is already reason to believe that encouraging U.S. Attorney's Offices and the Bureau of Indian Affairs to provide expanded federal deputation training and

commissioning, in full partnership with the Indian nations they serve, can increase law enforcement cooperation, strengthen prosecution, and save lives.

I say this from direct personal experience as a United States Attorney. Between February 2007 and December 2008, the U.S. Attorney's Office in Colorado partnered with the Southern Ute Indian Tribe's Justice Department and its visionary director, Janelle Doughty. Together with our respective offices and the Bureau of Indian Affairs' Indian Police Academy, we developed a model curriculum and training program to teach and test tribal, state and local law enforcement officers on-site in Southwestern Colorado. Our goal was for these officers to be federally commissioned by the Bureau of Indian Affairs to enforce federal laws in Indian Country, thereby strengthening "boots-on-the-ground" law enforcement and fostering inter-jurisdictional collaboration. The curriculum focused on Indian Country jurisdiction, the federal judicial process, investigative techniques, officer criminal and civil liability, and other challenges routinely encountered by tribal, state and local law enforcement officers.

The genesis of this unique partnership between a U.S. Attorney's Office and an Indian tribal justice department is worth noting because it attests to how Section 301 can reasonably be expected to help law enforcement officers navigate the jurisdictional maze and increase cooperation among different agencies. Ms. Doughty, who testified before this Committee last September on a previous version of this bill, is the first tribal member – and first woman – ever to direct the Southern Ute Indian Tribe's 100-employee Department of Justice & Regulatory, which includes the tribal police, wildlife rangers, corrections, and division of gaming. Her challenge to me as a new U.S. Attorney in 2006 was to find a way for the federal government to conduct on-site law enforcement training and testing on the Southern Ute Indian Reservation and invite

neighboring non-Indian agencies to participate in this effort. Qualified law enforcement officers who completed this training and passed the standard test administered by the BIA Indian Police Academy could then receive their Special Law Enforcement Commissions or "SLEC" cards from the BIA to enforce federal laws on the reservation.

Ms. Doughty, a law enforcement officer with a master's degree in social work, had previously been the Crime Victims' Advocate for the Southern Ute Tribe. She knew that without valid SLECs cards, tribal law enforcement officers could not legally arrest non-Indian defendants who committed crimes against Native American victims there. In far too many instances, domestic violence laws on the reservation were under-enforced to the point that many victims failed to report crimes. Precious few Southern Ute law enforcement officers were federally commissioned by the BIA and therefore could not investigate crimes allegedly committed by non-Indians, to whom exclusive federal jurisdiction applies under the Indian Country Crimes Act, 18 U.S.C. § 1152.

Working together with our respective offices, Ms. Doughty and I gained the support of veteran Indian country prosecutor Christopher Chaney, who at the time directed the Bureau of Indian Affairs' Office of Justice Services. Chris proposed partnering with the BIA and its Indian Police Academy to develop our training as an on-site "pilot" program. We began in February 2007 by successfully training and federally deputizing the first group of 40 tribal, state and local law enforcement officers on the Southern Ute Indian Reservation in Ignacio, Colorado.

Word of our efforts quickly spread. What started as a local partnership in Colorado eventually led to the nationally recognized "Criminal Justice in Indian Country" pilot training program, a combined effort that included:

- Bureau of Indian Affairs/Indian Police Academy.

- National Congress of American Indians.
- Deputy District Attorney Bernadine Martin of the McKinley County-New Mexico District Attorney's Office.
- U.S. Department of Justice/National Advocacy Center.
- The U.S. Attorney's Office in Colorado, New Mexico and South Dakota.

In less than two years, what began as a pilot training program limited to the Southern Ute Indian Reservation and surrounding communities had grown into 14 separate training sessions across the country, attended by more than 400 law enforcement officers and tribal leaders representing 35 Indian tribes and 17 states. Many of the officers who graduated from the program have since been federally deputized.

In Colorado, the Criminal Justice in Indian Country program has already strengthened inter-agency cooperation and federal criminal prosecutions, including domestic violence cases. Last fall, Ms. Doughty testified before this Committee about how the program had succeeded. As an example, she described how a Southern Ute tribal officer had responded to a crime scene in a domestic-violence case on the reservation. The officer, Chris Naranjo, had received on-site training to renew his SLEC card, which otherwise would have expired long before he could have left his job to attend a week-long refresher course a full days' drive away at the Indian Police Academy in Artesia, New Mexico. "Because he was federally deputized," Doughty told the Committee, "Chris could arrest the non-Indian suspect who had allegedly victimized one of our Tribal members in that case, which is now being prosecuted by the U.S. Attorney's Office." A conviction has since been obtained in that case.

S. 797 has the potential to build on such successes and increase SLEC training exponentially. Section 301(b) of the bill directs the Secretary of the Interior to develop a

plan within 180 days of the bill's enactment "to enhance the certification and provision of special law enforcement commissions to tribal law enforcement officials." This expressly includes regional SLEC training sessions such as those we developed in Colorado and later conducted in other states. As this plan takes shape, there would be minimal additional cost to enabling U.S. Attorney's Offices to offer such training in partnership with BIA and with the approval and support of the affected Indian tribes. This training should not be limited to tribal officials, but should include neighboring border communities for effective interagency collaboration, back-up and emergency response. In this way, law enforcement officers on and near reservations can have the tools to help navigate the jurisdictional maze.

Closing the 'Resource Gap'

The maze of injustice is not the only nemesis facing criminal justice professionals in Indian country. The chronic lack of federal resources has become a way of life on far too many reservations. S. 797 addresses this problem in several important ways. Let me briefly discuss just two.

1. Measuring the resource deficit

First, Section 101 includes detailed reporting requirements to track federal criminal justice expenditures and programs provided to Indian country every fiscal year. These annual reporting obligations extend across the system to include law enforcement, corrections and judicial human and financial resources. Section 101 is a critical tool to help address the resource deficit that has plagued much of Indian country for decades. On average, Indian country has roughly half as many police officers per capita as similarly situated rural communities. This was the case in 1997, according to a report that year by the Clinton Justice Department, and in 2006, when the BIA commissioned

its own analysis by a private consultant. While economic times are tight, it is essential that Congress work with the Obama Administration work to close this gap in a systematic and sustained way.

Section 101 can and should be used as part of an internal process to estimate what it would actually take for Congress to erase the resource gap entirely, in all major categories, by a reasonable date certain, and then budget accordingly. The resource deficit is all too familiar across much of Indian country. This includes the Ute Mountain Ute Reservation in Southwestern Colorado, which borders the Southern Ute Indian Reservation I spoke of earlier. The name of the Ute Mountain Ute Tribe comes from a local landmark called Sleeping Ute Mountain, which resembles a giant warrior lying on his back. It is said that one day this warrior will arise and defend the remnant of his people. For the time being, members of the Ute Mountain Ute Tribe, unlike their neighbors at Southern Ute, must rely exclusively on the Bureau of Indian Affairs Office of Justice Services for their law enforcement, corrections and judicial services.

The people of the Ute Mountain Ute nation live in an area of remarkable natural beauty that is home to the world-famous Ute Mountain Tribal Park. For those who have visited nearby Mesa Verde National Park, the Ute Mountain Tribal Park and its extensive ancestral Pueblo ruins are among the most spectacular places in the American West. In terms of criminal justice services, however, the Ute Mountain Ute people deserve far better than what the federal government provides them. On any given day or night, there are just one or two BIA law enforcement officers on duty to patrol the entire reservation, which extends into three states and is bigger than Rhode Island. The life-and-death mission performed by these and other BIA law enforcement officers, and the many sacrifices by their families, deserves our gratitude and respect. The entire BIA

Police Department for Ute Mountain usually consists of just five officers who often work 12-hour shifts for days at a time. Nationally, the average police response time in the United States is about six minutes. On Ute Mountain Ute, response times of an hour or more are the norm.

The same resource deficit extends to the entire criminal justice system. As I testify here today, the BIA has failed to provide a public defender on the Ute Mountain Ute Reservation for more than two years. This means that virtually all criminal defendants appearing before the Court of Indian Offenses lack any legal representation, and cases are routinely dismissed, resulting in an almost total lack of misdemeanor law enforcement. Earlier this decade, the BIA detention center on the reservation also shut down entirely for several months due to lack of federal funds. Other key positions, including the BIA tribal prosecutor, have been unfilled during much of this same time. Section 101 can help Congress to quantify and address this continuing mockery of the federal trust obligation.

2. Reporting case declinations by U.S. Attorneys

S. 797 addresses another symptom of the larger criminal justice resources deficit: Case declinations by federal prosecutors. The term "declination" in this context means a decision by a United States Attorney's Office not to seek criminal charges after being presented with the confidential findings of a law enforcement investigation of a suspected federal offense arising in Indian country. Section 102 of the bill establishes mandatory reporting requirements for all U.S. Attorneys when cases are declined in such instances. What is now Section 102 has been criticized in previous versions of this legislation by several former and current U.S. Attorneys for whom I have great respect, and by the Justice Department in the previous Administration in which I served. I

respectfully disagree with these former colleagues and strongly encourage this Committee to support Section 102. At the same time, it is vitally important for this Committee to explain to the American why declination reports have useful but limited value so that the entire matter is kept in proper perspective.

I support Section 102 as a way to bring greater accountability to U.S. Attorney's Offices, and to individual U.S. Attorneys themselves as Presidential appointees serving as temporary stewards of the federal trust responsibility. Declination reports that respect individual privacy and the legal confidentiality of investigative information, as the language of Section 102 clearly envisions, would be extremely valuable in helping U.S. Attorneys set Indian country enforcement priorities and make the case for additional resources in specific areas. These reports would also assist the Justice Department in its supervisory role of monitoring case trends and aligning national prosecution priorities based on more complete criminal justice information than currently exists today.

Rather than fear such enhanced accountability, U.S. Attorney's Offices should embrace it as an opportunity to ease suspicions among some critics that Indian country cases are somehow treated less seriously than other federal criminal prosecutions. Such rumors are unfounded. In my experience, the vast majority of Assistant U.S. Attorneys serving Indian country are committed to achieving equal justice for all Americans, including First Americans living and working on Native lands. Tracking case declinations and developing other ways to measure the performance of the criminal justice system can assist AUSAs and their offices by helping educate the public as to what prosecutors in the field really face.

As I discussed earlier, the pervasive lack of available federal law enforcement officers is only a symptom of the relative lack of criminal justice resources in Indian country as compared with off-reservation communities. As Colorado's U.S. Attorney, I faced this problem frequently, especially in cases arising on the Ute Mountain Ute Reservation. The on-the-ground reality was sometimes ludicrous, as when I joined a police ride-along where the BIA officer had to leave the patrol vehicle motor running for his entire shift because it wouldn't start if he shut off the engine. The officer's innovative approach worked well until the vehicle ran out of gas.

More often, the situation was grim or even tragic. I especially remember one night at Ute Mountain where BIA police dispatch received a report of an apparent homicide. By the time a patrol officer arrived, a crowd had converged at the crime scene. As often happens, the lone BIA officer simply could not establish a perimeter by himself. The mob broke into the apparent victim's home, some people literally climbing through the windows. The crime scene was hopelessly contaminated. It bears mentioning that the resident agent from the Federal Bureau of Investigation was 400 miles away in Denver at the time – preparing to testify before the nearest Article III federal judge – in another Indian country case. This cold case remains an "unexplained death," and it is doubtful that sufficient legally admissible evidence will ever be collected to solve the crime.

I mention this in context of declinations and what they can and cannot measure. According to the official *U.S. Attorney's Manual*, United States Attorneys may only bring a criminal prosecution if there is a reasonable probability of obtaining a conviction at trial. Such was not the case here, where the crime scene was compromised – again as so often happens – in the critical hours immediately after the crime. Reporting declinations

is important to reinforcing the accountability of individual U.S. Attorneys and the vitally important offices with which they are temporarily entrusted. Unlike elected local prosecutors, U.S. Attorneys obtain their positions by political appointment – Presidential nomination, with the advice and consent of the Senate – are not directly accountable to voters.

This lack of institutional accountability is magnified when U.S. Attorneys essentially function as local officials in the prosecution of major crimes. When I was teaching tribal law enforcement officers, I used to start my classes by asking how many had voted for me as their United States Attorney. The confused looks and occasional display of hands from the audience spoke volumes about the lack of direct institutional accountability between me as a politically appointed chief federal criminal prosecutor, acting in effect as a local district attorney, and my "constituency" hundreds of miles from Denver.

This lack of local accountability means it is vital for Congress to enact meaningful performance measures for Indian country investigations and prosecutions. This leads to Section 102 and mandatory case-declination reporting. By definition, declinations can never tell the full story. Investigative information is highly sensitive and must be protected by law in order to safeguard Constitutional rights. An obvious example is grand jury information, the unauthorized release of which is appropriately punishable by criminal sanction, including imprisonment. It can be unreasonable, unethical and illegal for a federal prosecutor to attempt to explain why he or she declined to prosecute someone.

Focusing on case declinations in and of themselves, without putting them into the larger context of the criminal justice system, can be of limited value for another

reason. As I discussed earlier, the jurisdictional maze can wreck havoc in Indian country investigations. Not knowing which agency is supposed to what in a given set of circumstances means that too many crimes fall through the cracks. And much of Indian country suffers from scarce resources at every step in the process, including law enforcement, prosecution, indigent defense, courts and corrections. A weak link in any part of this chain can undermine the integrity of the entire system, to the point where victims simply fail to report crimes in the first place. This tracks with the findings of scholarly researchers, such as professor Barbara Perry of the University of Ontario, who recently estimated that no more than 5 to 10 percent of victims of all domestic violence in Indian country report their abuse to the relevant authorities.

In sum, declinations are an under-inclusive metric that can never measure crimes that go unreported or investigations that fail to take place or are compromised. Yet that does not mean declination reports are somehow unimportant, especially in reinforcing the local accountability of U.S. Attorneys and their offices. During testimony on previous versions of this bill, it was suggested that mandatory case-declination reports might raise concerns with the Constitutional separation of powers by intruding on prosecutorial discretion and therefore Executive Branch authority. There can be legitimate debate on that issue. But even if a legal impasse does arise over this portion of the bill, I see no barrier to the U.S. Department of Justice simply adopting Section 102 as an internal policy statement and operating accordingly.

Respect for Tribal Sovereignty

Let me briefly address one final aspect of S. 797: Section 304, which deals with tribal court sentencing authority. Among other things, this section amends the Indian Civil Rights Act of 1968 to give tribal courts the sentencing option to impose terms of

incarceration for up to three years, a fine of up to $15,000, or both for conviction of a single tribal offense. This compares with a maximum penalty of one year imprisonment, a $5,000 fine, or both under current law. Consistent with the Supreme Court's *Oliphant* decision, tribal courts could not impose these increased penalties on non-Indians. With respect to Indians, Section 304 would only permit tribal courts to impose these enhanced penalties if they guarantee the defendants' due process of law. The bill further requires that the presiding judge and defendants' defense attorney be "licensed to practice law in any jurisdiction in the United States."

This language attempts to strike a balance between respect for criminal defendants' federal Constitutional rights and the sovereignty of tribal courts to enforce their own laws. However, it is reasonable to expect that should the provision pass, the ball would be hit into federal court. Increasing the maximum sentence of imprisonment that tribal courts could impose would almost certainly be interpreted by federal judges to expand tribal court jurisdiction over Indians beyond misdemeanor sentences to include felonies. Additionally, Section 304 purports to permit tribal courts to "stack" offenses to increase aggregate penalties for multiple offenses. There is a significant legal question, in my judgment, as to whether the U.S. Supreme Court would uphold tribal criminal jurisdiction over felonies in cases involving non-member Indians and perhaps all Indians. Rather than test these legal waters and obtain an adverse interpretation of federal Constitutional law that could not be amended later by statute, the Committee should consider amending Section 304 to retain the current one-year cap under the Indian Civil Rights Act – thus continuing to limit tribal courts to misdemeanor sentencing authority only – but increase the maximum fines.

Another issue concerns the representation of criminal defendants and the judges who preside over their cases. I read the text of Section 304(b)((1)(C)(2)(A) as enabling tribal court judges who are tribally-licensed but not necessarily attorneys to impose the enhanced penalties permitted by the bill. In contrast, no Indian tribe may deny a criminal defendant the assistance of a defense *attorney*, as opposed to lay advocate, but that the attorney need not *be state-licensed* so long as he or she is admitted to practice in tribal court.

What the bill is really trying to do here is not just ensure that criminal defendants receive due process of law, but also specify how much process is actually *due*. Here again, it seems likely that the federal courts will ultimately confront the issue of tribal judges' and defense attorneys' professional qualifications if this portion of Section 304 passes. For those of us practicing in tribal court and our clients, the point is critically important on several levels. For one thing, not all tribal bar admission processes and licensing requirements are alike. On the Navajo Nation, for example, just one of 20 tribal court judges is a state-licensed attorney. One Navajo District Court judge is an attorney but not state-licensed. The rest of the bench consists entirely of non-lawyers who were admitted to practice before the Navajo Nation Supreme Court after passing the required eight-hour examination administered by the Navajo Nation Bar Association ("NNBA").

As a member of the Training Committee of the NNBA, I can attest that the Navajo bar examination is rigorous. While lawyers and lay advocates may both take the test, the bar passage rate for non-attorneys is comparatively low. The admission and continuing legal education requirements closely track state attorney licensing requirements in some respects and differ in others. And the integrity and

professionalism of the Navajo Nation judiciary is admired throughout Indian country. Yet it is also true that the approach taken at Navajo bears little resemblance to some other tribal court admission requirements with which I am familiar, in which a non-attorney need only fill out a form and pay a fee. Section 304 should be amended to reflect such realities. One way might be to set minimum qualifications for tribal admission requirements for those tribal courts that decide to adopt the heightened sentencing provisions.

Despite these concerns, Section 304 properly seeks to reinforce the critical importance of tribal courts in misdemeanor enforcement. This section could be further strengthened in two ways. First, I suggest adding language encouraging support for tribal sentencing based on the traditional and customary law of each Indian community. Second, the expanded sentencing authority in Section 304, no matter what form it eventually takes, ought to be extended to the BIA Courts of Indian Offenses, which serve as the primary source of misdemeanor adjudication on "BIA-only" reservations such as Ute Mountain Ute. This section, like the rest of the bill, will also require reasonable funding. In recent years, the BIA court and detention center at Ute Mountain have functioned only sporadically. Besides preventing misdemeanor enforcement, violent crimes sometimes go unpunished under federal law because potential witnesses cannot be detained locally while investigations are completed and federal charges filed. Such systemic neglect must not continue.

S. 797 has many other worthwhile provisions. Time does not permit a comprehensive analysis, but I welcome the Committee's questions either at this hearing or later in writing.

Looking forward

The Tribal Law & Order Act merits the strong support of the Congress and the Obama Administration. Looking forward, several related issues are also worthy of continued attention by this Committee, either as additions to S. 797 or in the days ahead.

1. U.S. Attorney qualifications

While the Senate Judiciary Committee handles the confirmation process for United States Attorneys and federal judges, the perspective of the Committee on Indian Affairs on such appointments is absolutely critical, as is the role of Indian tribes and nations in informing that process. Perhaps a personal story helps illustrate this point.

As Colorado's U.S. Attorney, I vowed to make Indian country a top priority. I had worked extensively in Indian Country and vowed to act like a local District Attorney when dealing with the two Indian nations headquartered in Colorado. This meant meeting every month with both tribal councils and working daily with tribal justice department leaders. I asked the Governor of our state to appoint me to the Colorado Commission of Indian Affairs and participated actively in that body. The U.S. Attorney's Office partnered with the Southern Ute Indian Tribe as discussed above and became actively involved in teaching tribal law enforcement officers and their state and local counterparts, negotiating inter-governmental agreements for mutual assistance and emergency response, and cutting through bureaucratic red tape. Our office secured funding from the Justice Department for an additional Assistant U.S. Attorney position to increase Indian Country prosecutions, as well as a second Victim Witness Coordinator position to support our cases. I traveled to Albuquerque, Washington, DC and elsewhere to seek more BIA law enforcement resources. Each quarter, I invited a senior

law enforcement leader to join me in visiting the two Indian nations headquartered in Colorado. Supervisory Agents-in-Charge from the Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Marshal's Service, Bureau of Alcohol Tobacco and Firearms, Bureau of Land Management, the Internal Revenue Service, U.S. Environmental Protection Agency, and other federal agencies all participated in these site visits and briefings.

Yet the fact remains that my Indian country agenda as a United States Attorney was largely self-imposed. I could just as easily have taken a limited interest in the topic and perhaps not experienced any adverse repercussions. This became perfectly clear to me during my nomination and confirmation process to become Colorado's U.S. Attorney. Not once was I questioned by anyone in Washington as to how I would prioritize Indian Country law enforcement and prosecution. I then asked to meet with members of the two tribal councils after my nomination but prior to my Senate confirmation. The response from officials in both the Executive and Legislative branches of government was that it would be inappropriate for me to meet with Indian tribal leaders prior to taking the oath of office.

To me this is exactly backwards. The Constitutional separation of powers properly places the confirmation process with the Senate. However, as part of the government-to-government consultation process required by executive order, each President should consult directly with the affected tribal governments *before* nominating any U.S. Attorney. The same process should apply to all potential nominees for other Presidential appointments requiring Senate confirmation, including candidates for the federal bench. Once a candidate is nominated, both the Justice Department and the Senate should actively encourage tribal leaders to meet and question the nominees who

aspire to become their next chief federal prosecutor or judge. The U.S. Constitution recognizes three sovereigns: The federal government, states and Indian tribes. Tribal governments should be guaranteed a full and fair opportunity to meet face-to-face with would-be U.S. Attorneys and federal judges *before* they are confirmed by the Senate and take the oath of office, and regularly thereafter.

2. Expanding federal judicial access

A second vitally important issue concerns expanded federal judicial access on and near Indian reservations. On December 13, 2005, a federal criminal trial was held on the Navajo Nation. This little-noticed trial, convened in Shiprock, New Mexico and involving tribal members, apparently marked the first time a U.S. District Court had heard a case on the country's largest Indian reservation. The Navajo Nation covers an area nearly the size of West Virginia – a state, incidentally, with nine separate federal courthouses for the convenience of its citizens.

The lack of federal judicial access for Native people living on Indian lands is one of the great civil rights issues of our time. As discussed earlier, American citizens rightly value *localism* – having government officials who are accountable and accessible to them, and who live and work in their communities. It would be unthinkable off-reservation for a crime victim to travel hundreds of miles just to participate in a criminal case. Yet this is commonplace in Indian Country, as is the lack of jury pools with meaningful Native American representation. As Janelle Doughty of the Southern Ute Tribe testified to the Senate last fall:

> It is totally unacceptable that the nearest U.S. District Court Judge in Colorado is 350 miles away from the Southern Ute Indian Reservation, and even farther from our sister tribe to the west, the Ute Mountain Ute Reservation. We have been pushing for a federal courthouse and judgeship in our area. Trying cases that meet the

> elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved. Federal juries in Colorado rarely include a single American Indian, yet they decide purely local crimes. And we have never had a federal grand jury in Western Colorado in my lifetime.

The federal judiciary is a separate branch of government responsible for administering its own affairs. Yet Presidents and the Congress influence judicial policy through authorizing legislation and appropriations for judges and judicial resources. It is time to recognize and start reversing this injustice.

3. Thinking beyond *Oliphant*

A final topic concerns tribal criminal jurisdiction over non-Indians and the limits of federal deputation. As an *Oliphant* jurisdictional work-around, Special Law Enforcement Commission ("SLEC") agreements are not nearly as practical or plentiful as one might conclude from reading about them in federal court decisions. Effective law enforcement over non-Indians who commit crimes in Indian Country varies widely depending on the reservation, and in practice sometimes does not exist. In New Mexico, for example, just three of 22 Indian tribes and pueblos currently have SLEC agreements with the BIA that permit federal deputation. One of those is the country's largest Indian reservation, the Navajo Nation, which has entered into some state cross-deputation arrangements but which still lacks an SLEC agreement with the BIA even though *Oliphant* was decided more than 30 years ago.

This, in turn, has prompted a searching review by several commentators into whether *Oliphant* itself should be modified or repealed. There are deeply held and often passionate views on both sides. Certainly a Congressional repeal of *Oliphant* would give non-Indians a far greater stake in the future of Indian country than would otherwise

exist during our lifetimes. The possibility that a non-Indian might someday face criminal proceedings in tribal court, unlikely though it might be for most Americans, would nonetheless be *real.* Over time, that potential exposure of non-Indians to tribal courts and police departments, and federal and tribal policymakers' concern about such matters, will time will create an invaluable off-reservation constituency to support tribes in improving their criminal justice systems. But we must also be realistic about the scope, magnitude, and difficulty of what we are talking about. To me, ending *Oliphant* means extending tribal court jurisdiction to all citizens in a way that fully protects their rights under the U.S. Constitution.

In my view, any serious discussion of what a post-*Oliphant* world might look like starts with a simple premise: The depth and consistency with which tribal courts protect criminal defendants' civil rights must be on a par with that of defendants in state court criminal proceedings. Otherwise, federal *habeas corpus* relief from tribal court decisions alleged to have violated federal constitutional rights might not realistically be a sufficient remedy. Defendants would presumably expect to be retried *de novo* in U.S. District Court on tribal criminal code violations – essentially imposing a costly and frustrating exhaustion requirement for all concerned and, from the tribes' perspective, a serious infringement on tribal courts' sovereignty, with federal judges applying tribal law.

A better approach would be to ensure that the tribal courts themselves – based on their own assessment of their sovereign interests – meet federal Constitutional requirements in terms of due process and providing a full and fair forum by an independent, neutral arbiter. Several tribal court systems, such as the Navajo Nation Supreme Court and District Courts, are already meeting that threshold standard in some

respects but not all, such as judicial independence. This is promising given that these court systems were not designed, and are not currently configured, to adjudicate criminal matters involving non-Indian defendants. Others could probably make the transition in time, provided the tribe's leadership decided it was priority. Still other tribal courts are not ready and may not be for the foreseeable future, whatever their intentions.

All this suggests that tribes might be given the freedom to opt-in to a post-*Oliphant* world on a case-by-case basis. Those tribal courts wishing to exercise criminal jurisdiction over non-Indian defendants could be supported in doing so starting on a certain date, provided they agree voluntarily to integrate federal constitutional substantive and procedural protections into their justice systems. This would mean, as in state courts, that the definition of what constitutes a permissible search and seizure under tribal case law, say, would be separate and distinct from its federal counterpart, provided again that all federal constitutional requirements were met as a "floor" on permissible rights. The Indian Civil Rights Act would necessarily need to be modified in several critical respects, such as providing under tribal law (unlike ICRA) that indigent criminal defendants are entitled to legal representation. Another concern – one raised by the *Oliphant* Court – involves jury pools. At the time the case was decided, the court for the Suquamish Tribe did not allow non-Indians to participate in juries. That situation has changed dramatically for some tribal courts, which now require a "fair cross-section of the community" standard for jury selection and service.

Still another matter that might arise should *Oliphant* be repealed is the sovereign immunity of government officials in the civil context. The combined effect of Section 1303 of the Indian Civil Rights Act and the U.S. Supreme Court's 1978 decision in *Santa*

Clara Pueblo v. Martinez is to limit federal review of tribal court decisions to *habeas corpus*. This expansive definition of tribal sovereign immunity is greater than that afforded to the states, where defendants have the alternative remedy under 42 U.S.C. § 1983 to challenge alleged misconduct by state and local police and other governmental officials. In conjunction with repealing *Oliphant*, *Santa Clara Pueblo* might be modified to provide a waiver of qualified sovereign immunity in such cases, again to ensure greater governmental accountability and protection of defendants' civil liberties.

Conclusion

Whatever reforms this Committee ultimately chooses to pursue, the dialogue is timely and extraordinarily important given the disproportionately high violent crime rates in Indian Country and the need for expanded law enforcement. A greater emphasis on reinforcing tribal sovereignty and self-determination in tribal criminal justice policy is the same approach that has so dramatically improved the delivery of many other essential governmental services on Indian reservations in recent years. That approach holds enormous promise for making Indian Country safer for all, provided there is no compromise on the rights of the accused in federal criminal proceedings. The status quo – and the lingering public-safety gap between Indian Country and similarly situated rural communities – was never acceptable, and the time to end it is now.

Thank you.