

TOVA INDRITZ
ATTORNEY AT LAW
2040 FOURTH STREET, N.W.
ALBUQUERQUE, NEW MEXICO 87102
TELEPHONE (505) 242-4003
FACSIMILE (505) 243-6735

September 12, 2008

Senator Byron Dorgan
322 Hart Senate Office Building
Washington, DC 20510

Senator Lisa Murkowski
709 Hart Senate Office Building
Washington, DC 20510

Senator Joseph Biden
201 Russell Senate Office Building
Washington, DC 20510

Senator Pete V. Domenici
328 Hart Senate Office Building
Washington, DC 20510

Senator Max Baucus
511 Hart Senate Office Building
Washington, DC 20510

Senator Jeff Bingaman
703 Hart Senate Office Building
Washington, DC 20510

Senator Joseph Lieberman
706 Hart Senate Office Building
Washington, DC 20510

Senator Jon Kyl
730 Hart Senate Office Building
Washington, DC 20510

Senator Tim Johnson
136 Hart Senate Office Building
Washington, DC 20510

Senator Gordon Smith
404 Russell Senate Office Building
Washington, DC 20510

Senator Maria Cantwell
511 Dirksen Senate Office Building
Washington, DC 20510

Senator John Thune
493 Russell Senate Office Building
Washington, DC 20510

Senator Jon Tester
204 Russell Senate Office Building
Washington, DC 20510

RE: Senate Bill 3320

Dear Sponsors of Senate Bill 3320:

I am the chair of the Native American Justice Committee of the National Association of Criminal Defense Lawyers (NACDL), and I write you in that capacity to express concerns NACDL has about Senate Bill 3320, the Tribal Law and Order Act of 2008, of which you are a co-sponsor.

Our primary concern is that, although the intent of this bill is to provide Indian Country necessary resources to improve justice systems, there is no provision for funding or training defense counsel. Resources for defense counsel must be an essential component of the improvement of tribal justice systems, especially if the tribes' authority to sentence goes from the current maximum one year imprisonment and \$5,000 fine up to 3 years and \$15,000, and Native American defendants must be afforded due process and the right to counsel in tribal courts.

1. Native American defendants in tribal court deserve due process and the right to counsel.

Native Americans, like all other U.S. citizens, deserve all the protections and benefits of the Constitution and due process. Like anyone else facing incarceration in the United States, the accused in tribal courts should be entitled to due process of law and effective representation by defense counsel. As one tribal court judge complained to the Wall Street Journal last year, "99.9 percent" of the defendants in his court cannot afford a lawyer; these individuals must defend themselves against a trained prosecutor with a better education, more resources, and far more courtroom experience.

We note the mandate in Sec. 304 that a tribe may not "deny any person in . . . a criminal proceeding the assistance of defense counsel" where the defendant is subject to more than one year of imprisonment for any single offense. Current law, the Indian Civil Rights Act, 25 U.S.C. § 1302, requires that tribes allow a defendant to have a lawyer if he can pay for one; there is no provision for the appointment of counsel, even if the defendant is facing one or more charges which carry a penalty of up to a year imprisonment. This bill proposes that the tribe's sentencing authority would be raised to three years per count, with the possibility of incarceration in the Federal Bureau of Prisons. Enactment of the requirement for defense counsel should carry with it funding explicitly earmarked for defense counsel and such defense services as investigators, paralegals, office staff, expert witnesses, training, and support.

While some tribes use a traditional peacemaker/mediation model designed to restore harmony among neighbors, most have adopted the American remedy of incarceration. The consequences to the individual defendant who is convicted in tribal court are extensive and long lasting. These include the loss of liberty, the use of the tribal court conviction to revoke a licence (such as a drivers' licence), or to enhance a subsequent sentence. Note that tribes sometimes "stack" or make consecutive the one year sentences they can now impose without benefit of counsel, so that a defendant may be serving multiple one year sentences. Extension of tribal authority to impose sentences of up to three years presumably allows the imposition of multiple three year sentences. Indigent Indians, who would be entitled to appointed lawyers if they were facing the same amount of jail or prison time in federal or state courts, need the right to the help of lawyers, investigators, and expert witnesses when they are charged in tribal courts.

Moreover, there are examples of the federal law enforcement agents using the tribal justice system to detain or incarcerate a person without rights in order to obtain evidence for a subsequent federal prosecution. The most extreme example of this is a young Navajo with no prior record who was sought for a double homicide on the Arizona portion of the Navajo reservation; when the FBI had no probable cause to arrest him it asked the tribal police to arrest him, United States v. Lezmond Mitchell, 502 F.3d 931, 959-960 (9th Cir. 2007). Although there were no tribal charges against him, Mitchell was held for 25 days in tribal jail, during which time he was questioned by the FBI multiple times without any federal charges being filed and without any defense counsel, either federal or tribal. The Ninth Circuit affirmed the admission of his statements at the federal capital trial, on the ground that "The Sixth Amendment right to counsel does not apply in tribal court proceedings. See United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001). The Indian Civil Rights Act, 25 U.S.C. § 1302, provides for a right to retained counsel only." Id. at 960. At this time Mitchell, a Navajo, sits on federal death row, even though the Navajo Nation opposed seeking the death penalty against him.

2. This bill contains no funding whatsoever for criminal defense services in tribal courts and may make unavailable the one source of funds currently available.

NACDL asks Congress to provide funding specifically for the defense of Native Americans facing incarceration in Indian tribal court prosecutions when those defendants cannot afford to hire counsel on their own. This bill has a section on prosecution (sec. 103 at page 18), but none for defense; it focuses on help for courts, police, prosecution, and incarceration, but does not take into consideration the individual rights of defendants and the funding required for those rights to be meaningful. The criminal justice system has often been described as a “three-legged stool”, because stability is impossible without all three legs, namely the courts, the prosecution and law enforcement, and the defense. Funding only two legs destabilizes the system – a stool cannot stand on two legs. Qualified defense counsel insure that due process is provided and no innocent person is convicted and can promote alternative resolutions of a case.

Yet Congress has never allocated funds specifically for representation of defendants in tribal criminal cases. Currently federal law provides for up to \$15 million a year in grants by the U.S. Department of Justice’s Office of Tribal Justice to address the serious needs of tribal law enforcement. Other funding is available for tribal prisons, probation officers, and other services. Some funds are available to tribal courts, about 30% of which is set aside for training and technical assistance; the remainder is quite inadequate to meet all the needs of tribal courts, such as judges, court clerks, computers, and facilities. The tribes can choose to use some of their grant money for prosecutors and public defenders, but the dollars do not stretch that far, and defense services are usually at the bottom of the priority list for the meager tribal court funds. No federal funds are earmarked for criminal defense in tribal courts, either under existing law or in this bill.

Although the bill provides funding for police, jails (\$35 million per year for Fiscal Years 2009 through 2013 for tribal jails alone), and other resources, such as the use of the Federal Bureau of Prisons for housing persons convicted in tribal courts, there is no provision whatsoever for the funding of defense counsel. General grants authorized in this bill do not assure any defense funding, and it is unlikely that tribes, quite strapped for resources, would use much of this money to provide defense to the accused, just as is the case with general grants currently available to tribal courts. Thus this bill would exacerbate the existing imbalance, giving much needed resources to the prosecution, law enforcement, court, and incarceration components of the criminal justice system that deals with crime in Indian Country, but paying no attention to the defense function. So long as the defendant is facing incarceration, he or she must have the same rights for defense counsel as do others facing incarceration in this country, and that requires funding in this bill.

PROPOSED CHANGE: Add significant funding earmarked specifically for defense funding for licenced lawyers and their staffs (including investigators and other support staff), training, and expert witnesses.

Moreover, not only does the bill provide no funding for defense counsel, but it appears that it will eliminate one of the few funding sources now available for representation of criminal defendants in tribal court. Currently recipients of funding from the Legal Services Corporation (LSC) may represent defendants in tribal courts. That is so even though LSC regulations generally prohibit recipients of grant funds from representing criminal defendants because the current limitation of one year imprisonment makes tribal court convictions "misdemeanors", which if prosecuted in tribal court are exempt from the prohibition on use of LSC funds for criminal defense. 45 CFR § 1613.1 entitled "Purpose", states "This part is designed to insure that Corporation funds will not be used to provide legal assistance with respect to criminal proceedings..." and the Definitions section, 45 CFR § 1613.2, states "A misdemeanor or lesser offense tried in an Indian tribal court is not a "criminal proceeding'." If the tribal court can sentence to up to three years, offenses charged with a penalty of greater than one year will no longer be considered misdemeanors and it will no longer be possible to use LSC funds to provide representation for defense on those charges.

PROPOSED CHANGE: Include language that would continue to allow LSC funds to be used for criminal defense in Indian Country regardless of potential penalty.

3. Defense counsel in tribal courts must be licenced lawyers, especially if tribal courts are to have the capacity to impose sentences of up to three years, as this legislation proposes.

Section 304 provides that the judge must be licensed to practice law, but does not specify that defense counsel must be so licenced; many tribes now have "tribal advocates" who are not lawyers but act as defense counsel. Where the defendant would now be facing up to three years imprisonment, clearly the provision of counsel requires competent trained lawyers, with adequate support resources, who can provide effective assistance of counsel. There is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Defendants sometimes believe that an advocate is a lawyer, when in fact the advocate is not a lawyer. But having a lay representative does not constitute effective assistance of counsel within the meaning of the Sixth Amendment. United States v. O'Neil, 118 F.3d 65, 70-71 (2nd Cir. 1997); United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986); United States v. Dumas, 796 F. Supp. 42, 46 (D. Mass 1992); United States v. Tools, ___ F. Supp. ___, 2008 U.S. Dist. LEXIS 49490 (D. S. D. June 27, 2008). Having a law school trained lawyer who has passed a bar exam is not only a quality control with respect to initial qualifications, but also serves as a continuing control with requirements for

continuing education and the possibility of discipline or disbarment for ineffective assistance of counsel or other wrongdoing by a lawyer. Such quality control and increased level of skill and education is needed even more when the stakes rise to three years per count. Due process in tribal courts requires no less.

PROPOSED CHANGE: Require defense counsel in tribal courts to be law school graduates who are licenced by a State to practice law in order to qualify for the defense counsel funding to be provided in the bill, and that counsel be provided to indigent defendants in tribal courts where the defendant faces the possibility of incarceration.

4. Other concerns with the bill include this lack of consideration of the rights of individual Native American defendants in tribal courts.

(A) The "findings" section makes no finding concerning individual rights (page 3-7), although the future study commission is asked to report on the impact of the bill, after passage, on the rights of defendants (page 47).

PROPOSED CHANGE: We suggest an additional finding that Native Americans are U.S. citizens and that all persons charged with crimes in Indian Country, whether charged in federal, state or tribal courts, are entitled to the full panoply of rights and due process, including the right to counsel, as are all other persons charged with crimes in the United States.

(B) Likewise, one of the stated "purposes" of the act should be to insure that as part of tribal safety, all persons charged in tribal court have the same constitutional rights as persons charged in federal and state courts.

PROPOSED CHANGE: Purpose paragraph (3) (at pages 7-8) should be amended so that it reads "(3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide for the safety of the public in tribal communities and to fully provide for the protection of individual rights, including the right to counsel and to due process and all other constitutional rights, of the accused." (Underlined language proposed to be added.)

PROPOSED CHANGE: Requirements for reporting on the number of employees and amounts spent, at page 11, should include reporting on the category of public defenders and their support staff.

(C) This bill provides that tribes would have to opt-out of allowing state law enforcement to operate in Indian Country, page 36, where at the moment state law enforcement agencies in non-Public Law 280 states have no jurisdiction to enforce any law, let alone federal or tribal

laws. One problem is that currently it is often hard to determine what tribal law IS, insofar as tribes do not make public their statutes and ordinances. Once when representing someone in tribal court I had a hard time getting the tribe to let me see a copy of the specific laws my client was charged with violating!

PROPOSED CHANGE: Tribes who seek to expand their jurisdiction should be required to make their tribal laws and any documents interpreting those laws publicly available.

5. Federal Courts must also provide fairness to Native American defendants.

(A) The "sense of Congress" statement at page 20 regarding encouraging "the aggressive prosecution of all crimes committed in Indian country" fails to recognize that in any jurisdiction there needs to be a variety of considerations in determining what crimes to prosecute; resources are one consideration but there are many other factors as well, for example, the strength and quality of evidence, mitigating circumstances, and availability of witnesses.

PROPOSED CHANGE: We suggest changing "aggressive" to "appropriate", removing the word "all", and requiring the prosecuting authority to consider the nature and circumstances of the offense, the history and characteristics of the defendant, the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. Note that this last sentence comes directly from the factors Congress has determined must be considered in imposing a federal sentence under 18 U.S.C. § 3553(a). This change will allow both the tribes and federal prosecutors to both secure order and take advantages of recent innovations in early intervention programs and specialized courts, such as drug courts, and take into account tribal values and customs.

(B) If "trials and other proceedings" are held in Indian country (page 21, lines 23-24), how does that interact with the composition of federal jury panels, on which Indians are currently underrepresented, even by the federal courts' own statistics?

PROPOSED CHANGE: Federal courts should be required to use supplemental source lists, such as drivers' licences, to supplement voter rolls in order to insure that Native Americans and other minorities are not underrepresented in federal jury pools.

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(C) If there is concurrent federal and state and tribal jurisdiction, see section 401, there needs to be some thought as to how that would work, especially since all three jurisdictions could prosecute without any double (or triple) jeopardy, as each jurisdiction derives its sovereignty separately, United States v. Wheeler, 435 U.S. 313, 329-30 (1978). For other crimes which are both federal and state crimes (such as drug law violations or bank robberies, for example), there are some policies about separate sovereigns not prosecuting the same person for the same acts, and those should be in place in this context as well.

PROPOSED CHANGE: The bill should provide that “no person shall be prosecuted by a second or subsequent sovereign for the same conduct, without the express consent of the tribe on whose land the crime occurred.”

Thank you for considering our concerns. If you desire more detail or specific proposals from us, please advise.

Sincerely,

Tova Indritz
Attorney at Law