



Department of Justice

STATEMENT

OF

THOMAS J. PERRELLI
ASSOCIATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

HEARING ENTITLED

"S. 797, TRIBAL LAW AND ORDER ACT OF 2009"

PRESENTED ON

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**STATEMENT OF THOMAS J. PERRELLI
ASSOCIATE ATTORNEY GENERAL
U.S. Department of Justice
Before the
Senate Committee on Indian Affairs
Hearing entitled
"S. 797, the Tribal Law and Order Act of 2009"
Presented on
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Chairman Dorgan, Vice-Chair Barrasso and members of the Committee:

I appreciate this opportunity to appear before the Committee on behalf of the Department of Justice to offer the Department's perspective on law enforcement issues affecting Indian Country. In particular, I'm grateful for the chance to convey the Department's position on S.797, the Tribal Law and Order Act of 2009. This comprehensive legislation would significantly improve the delivery and administration of criminal justice services in Indian Country, but it also contains several provisions to which the Department objects and which we believe must be modified. The Department's position on this legislation is contained in a letter conveyed to the Committee in advance of today's hearing. I will reiterate today some, but not all, of the expressions of support and concern contained in that letter.

Before addressing specific parts of the legislation, however, I want to express the Department's unequivocal commitment to the mission of fostering public safety in Indian Country. As this Committee knows well, law enforcement in Indian Country is a shared responsibility. Whether a crime will be investigated and prosecuted by the Federal government, a state government, or the tribe itself depends upon the nature of the crime, where the crime is committed, against whom, and whether the perpetrator is Indian or non-Indian. This jurisdictional patchwork can lead to inconsistent results, and often times frustration by those who perceive the Department's commitment to enforcing criminal law in Indian Country as itself

being inconsistent. I want to assure you today from Attorney General Holder, Deputy Attorney General Ogden, and myself that such perceptions are wrong. Just last week, the Department announced that the Attorney General would convene a Tribal Nations Listening Conference later this year, at which we can consult with tribal leaders on how to address the growing public safety crisis in Indian Country and other important issues affecting tribal communities. Both the Deputy Attorney General and I plan to participate personally in smaller planning sessions, at which we will seek tribal representatives' input in setting the agenda for that Conference. Tribal communities have long-time supporters and friends in the Department's leadership.

Our commitment to seeking justice for Indian Country communities and victims of crime is reflected in the myriad resources we devote to investigating Indian Country crime within the FBI, ATF, and DEA. Everyday, often in concert with their tribal police counterparts, federal agents operating in Indian country are pursuing cases involving violent crime, illegal drugs, and incidents of sexual assault and domestic violence. Everyday, in one or more of the 37 U.S. Attorney's Offices that have Indian Country within their boundaries, federal prosecutors are taking the results of those investigations and obtaining convictions that remove dangerous predators from Indian communities. In fact, in a typical year, approximately 25 percent of all violent crime cases opened by U.S. Attorneys nationally occur in Indian Country. Everyday, victim specialists employed by the Department and the tribes are working with Indian victims of crime, helping them rebuild their lives.

I would like to offer a few relevant facts that demonstrate the depth of the Department's ongoing efforts to investigate and prosecute cases arising in Indian country. The FBI is the main federal law enforcement authority in Indian Country. Even with the heightened demands placed upon the FBI by its primary role in the fight against terrorism, Indian Country law enforcement

remains a key priority for the FBI. The FBI's Safe Trails Task Force initiative -- which focuses entirely on Indian Country crime -- has grown steadily since its inception in 1994. There are now 17 Safe Trails Task Forces operating in Indian Country, and the FBI stands ready to expand that number as necessary.

The FBI's Indian Country Special Crimes Unit routinely works with the Bureau of Indian Affairs (BIA) - Indian Police Academy in Artesia, New Mexico, to sponsor and promote core training for investigators. Each fiscal year, the FBI provides more than 20 training conferences for local, tribal, and federal investigators regarding gang assessment, crime scene processing, child abuse investigations, forensic interviewing of children, homicide investigations, interviewing and interrogation, officer safety and survival, crisis negotiation, and Indian gaming. Furthermore, the FBI's Office for Victim Assistance dedicates 31 Victim Specialists to Indian country, representing approximately one-third of the entire FBI Victim Specialist workforce.

Also, the FBI recently deployed the Law Enforcement National Data Exchange (N-DEx) system with participation from tribal governments. N-DEx is a criminal justice information sharing system that will provide nationwide connectivity to disparate local, state, tribal, and federal systems for the exchange of criminal justice information. The N-DEx system provides law enforcement agencies with a powerful new investigative tool to search, link, analyze and share criminal justice information on a national basis to a degree never before possible. This information covers the criminal justice life-cycle and includes incident/case reports, incarceration data, and parole/probation data. Participating criminal justice agencies contribute copies of data from their record management systems to the N-DEx system. Agencies continue to "own" and are responsible for the data they submit, including updating the information on a regular basis. Utilizing a secure link via the internet through the Law Enforcement Online service, participating

agencies access the system without continuing costs beyond the reasonable start-up cost associated with data conversion and connectivity.

The Law Enforcement N-DEx has been endorsed and is supported by the International Association of Chiefs of Police, the National Sheriffs Association, the Major City Chiefs Association, and the Major County Sheriffs Association. The Oneida Nation Police Department (PD) is the first tribal law enforcement agency to participate in the N-DEx project. Currently, the Oneida Nation PD contributes data by manually entering incident information in the N-DEx system. The N-DEx Program Office is developing relationships with other tribal agencies to submit data to the N-DEx system. Toward that end, the office has met with various tribal law enforcement agencies, including those of the Paiute, Mashantucket Pequot, Mohegan, Eastern Band of Cherokee, and Navajo Tribes.

My colleagues at the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) have also been committed to reducing violence in Indian Country. ATF has assisted tribal governments in combating firearms and gang violence through the Project Safe Neighborhoods (PSN) initiative. Project Safe Neighborhoods is a nationwide program aimed at reducing gun and gang crime in America by networking existing local programs that target gun and gang crime and providing these programs with additional tools necessary to be successful. This funding is being used to hire new federal and state prosecutors, support investigators, provide training, distribute gun lock safety kits, deter juvenile gun crime, and develop and promote community outreach efforts as well as to support other gun and gang violence reduction strategies. In early 2009, EOUSA and ATF launched a Project Safe Neighborhoods Indian Country Pilot Project in the Eastern Navajo Nation Dlo'ayazhi community located in western New Mexico. The Navajo Nation PSN Pilot Project will allow the community, in partnership with the New Mexico U.S.

Attorney's Office, ATF, BIA and FBI, to develop critical interdiction and prevention programs that will specifically address the problems experienced in that community.

In addition, ATF has entered into Memoranda of Understanding (MOUs) with several tribes in order to increase cooperation with local tribal law enforcement and address the problem of gun violence in tribal areas. ATF also works closely with tribes in providing training and instruction on firearms and gang related issues. This training includes information on domestic violence and its impact on firearms possession.

Furthermore, the Drug Enforcement Administration ("DEA") proactively investigates significant national and international Drug Trafficking Organizations operating in, and within proximity to Indian Country. For example, in December of 2008, DEA concluded an investigation on the Tohono O'odham Indian Reservation which resulted in thirty-six arrests, seizure of more than six tons of marijuana, eleven pounds of methamphetamine, one kilogram of cocaine, \$491,000 in U.S. currency, and thirteen weapons. The DEA brings a number of investigative techniques to its Indian country operations, including the use of Title-III wire intercepts.

While I have detailed the extensive investigative and prosecutorial work that the Department is doing in Indian Country, that is not intended to suggest that there is not more to be done or that the problems facing tribal communities are not enormous. We must do more, and the only way we will be successful is if we work in true partnership with tribal communities and the states.

The American Recovery and Reinvestment Act (Recovery Act) is one way in which we are doing so. As the Committee is aware, through the Recovery Act, the Office of Justice

Programs (OJP) will provide \$225 million for correctional facilities on tribal lands. These new facilities not only provide needed infrastructure for the criminal justice system on tribal lands, but provide additional benefits by offering employment opportunities, and by helping inmates' ties with family and other community members, which may have a rehabilitative effect, and may not be possible when the facilities are further away. OJP is also using Recovery Act funds to improve the quality of tribal crime data gathering and information sharing. In addition, OJP has encouraged tribes to apply for other Recovery Act funding to support tribal law enforcement agencies and court systems.

Together with the U.S. Marshals Service, which assists tribes in locating and apprehending sex offenders who fail to comply with their sex offender registration requirements, and serves as the lead agency responsible for investigating violations of 18 U.S.C. § 2250 and related offenses, OJP is also helping Tribes implement the Adam Walsh Child Protection and Safety Act. OJP provides, free of charge, access to the Tribe and Territory Sex Offender Registry System, which includes software that will allow tribes to meet all of the requirements for a public sex offender registry. OJP also worked with tribal lawyers to develop a Model Tribal Sex Offender Registration Code, which offers tribes sample language to help tribes comply with the key provisions of the Adam Walsh Act.

OJP's Bureau of Justice Assistance (BJA) awarded grants to more than 100 tribal project grantees for drug courts, tribal courts assistance and court enhancements, gang resistance programs, alcohol and substance abuse programs, Safe Neighborhoods Initiative, justice assistance grants, tribal correctional facilities planning and renovation grants. Additionally, BJA provided \$2.8 million for targeted training and technical assistance grants to support tribal projects, for more than \$26.7 million.

OJP's Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides training and technical assistance through the Tribal Youth Program, the Tribal Juvenile Accountability Discretionary Grant Program, the Amber Alert Program and a National Tribal Youth Training and Technical Assistance Program. In addition, in FY 2009, OJJDP released a solicitation for the Tribal Juvenile Detention and Reentry Green Demonstration Program. This program furthers the Department's mission by enhancing opportunities for federally recognized tribes to provide comprehensive and quality programs for tribal youth who reside within or are being released from a tribal juvenile detention center. For the first time OJJDP is sponsoring an initiative that encourages funding recipients to partner with institutions and organizations to incorporate green technologies and environmentally sustainable activities as part of their educational, training, and reentry activities for youth participants. As part of this effort, OJJDP has also released a FY 2009 solicitation for Training and Technical Assistance for Tribal Juvenile Detention and Reentry Green Program. This program will provide training and technical assistance to help federally-recognized tribes reduce delinquency and recidivism among tribal juvenile detainees and will assist tribes as they develop partnerships with organizations to incorporate green technologies and environmentally sustainable activities into their reentry programs.

OJP's Office for Victims of Crime awarded 47 tribal project grants to help develop and sustain crime victim assistance programs in American Indian and Alaskan Native communities. These resources are used to provide direct services to victims of crimes such as child abuse, homicide, elder abuse, driving while intoxicated, and gang violence. Additionally, the Office for Victims of Crime provided approximately \$1.3 million for targeted training and technical assistance grants to support tribal projects, totaling over \$6.4 million.

Finally, OJP's Bureau of Justice Statistics awarded 3 grants with over \$200,000 for assistance in improving the quality, access, and ability of tribes to share criminal records. It also helped enable tribes to identify individuals for criminal justice and non-criminal justice programs. In addition, the Bureau of Justice Statistics provided over \$300,000 for targeted training and technical assistance grants to support tribal projects, totaling more than \$550,000

The Department acknowledges that more needs to be done. More resources, more research, and more training will help. Some jurisdictional provisions should be re-examined, and perhaps modified to allow greater law enforcement options in Indian country. The Tribal Law and Order Act of 2009 takes meaningful steps towards enhancing public safety for Native Americans and we look forward to working with the Committee to improve this legislation and help achieve that goal. With those thoughts in mind, I would like to address several specific provisions of the bill.

Section 101(c) would allow the Secretary of Interior to authorize BIA law enforcement officers to make arrests without a warrant for offenses committed in Indian Country if "the offense is a Federal crime and [the officer] has reasonable grounds to believe that the person to be arrested has committed, or is committing, the crime." Currently, BIA officers without a warrant are not authorized to arrest persons for Indian Country offenses that are not committed in their presence, unless the offense is a felony, or among certain misdemeanors involving domestic violence, dating violence, stalking, or the violation of a protective order. The Department would support increasing the categories of misdemeanors for which a warrantless arrest may be authorized by BIA officers when the offense is committed outside their presence. In particular, we support expanding BIA's warrantless arrest authority for misdemeanor controlled substances offenses, in violation of Title 21, U.S. Code, Chapter 13; misdemeanor firearms offenses, in

violation of Title 18, U.S. Code, Chapter 44; misdemeanor assaults, in violation of Title 18, U.S. Code, Chapter 7; and misdemeanor liquor trafficking offenses, in violation of Title 18 U.S. Code, Chapter 59. We do not support expanding BIA's warrantless arrest authority to encompass all "Federal crimes" committed in Indian Country, but outside the officer's presence. For minor offenses not involving a measureable risk to public safety, the Department believes an arrest warrant should be obtained.

The Department also recommends that the standard for a warrantless arrest contained in 25 U.S.C. § 2803(3) be modified to more closely track U.S. Supreme Court precedent. Currently, the statute requires that an officer possess "reasonable grounds" to believe that the person to be arrested committed the offense. We suggest that the officer should be required to possess "probable cause" to believe that the person to be arrested committed the offense. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

Section 102 requires that, when a federal law enforcement agency or a U.S. Attorney decides not to pursue an investigation or prosecution of an alleged violation of federal law committed in Indian Country, the agency and/or the U.S. Attorney provide its "evidence," and "related reports" to "appropriate tribal justice officials." For U.S. Attorneys, the obligation must be complied with "sufficiently in advance of the tribal statute of limitations." The apparent intent is to allow tribal authorities to pursue the case in tribal court, should they choose to do so.

It appears that the section is also intended to address the perception that U.S. Attorneys decline Indian country cases that should be prosecuted.

The Department is both mindful of and attentive to the fact that certain cases may be more appropriately pursued in tribal court; or in some cases in both federal and tribal court. To that end, federal authorities routinely coordinate and cooperate with tribal authorities to ensure

that, subject to applicable rules and regulations, any other jurisdiction with prosecution authority has the information and evidence it needs to pursue its case. The Department therefore believes that section 102 is designed to fix a problem – a perceived lack of federal, state, and tribal law enforcement coordination – that is atypical.

However, to the extent there are instances in which coordination is lacking, this is not a problem that will be cured through legislative mandates. Only through the development of improved information sharing and strengthened intergovernmental relationships will we successfully address this issue. Likewise, we believe that the perception that U.S. Attorneys decline meritorious criminal cases is in general a misperception. Again, only by building improved lines of communication between federal and tribal law enforcement, as well as tribal communities, will these misperceptions be addressed.

The Department is committed to improving communication between federal and tribal law enforcement and, more generally, is actively focused on criminal justice in Indian country. In the coming months we will work closely and collaboratively with tribal law enforcement to improve the exchange of information. While Section 102 is intended to address declination issues, the Department believes that the best solutions will come through discussions and communication between the parties. We are concerned that any solution that does not involve meaningful collaboration between the parties will, in the final analysis, not really address the issue. The leadership of the Department would like the opportunity to work through this issue with tribal leadership before we endorse legislation. To that end, we oppose section 102 at this time.

Conversely, the Department is fully supportive of section 103(a), which will clarify that the categories of persons who can be appointed by the Attorney General to serve as Special

Assistant U.S. Attorneys (SAUSAs) include tribal prosecutors. The Department has relied upon the assistance of SAUSAs employed by other federal agencies and state and local governments for decades in meeting its obligation to enforce federal criminal law. Clarifying that the pool should include tribal prosecutors is warranted. We know that many tribal prosecutors possess enough talent and experience to be valuable additions to the resources we can draw upon to prosecute Indian country crime. We also agree that before exercising this authority the Department should consult with tribal justice officials. While the Attorney General must retain the ultimate authority to decide who will represent the United States in court, it is inconceivable to me that a tribal prosecutor would be appointed as a SAUSA without the consent of the tribe with which he or she is otherwise employed.

Section 103(b) addresses the use of tribal liaisons by U.S. Attorney's Offices with responsibility for Indian Country. This section would codify the duties and responsibilities of tribal liaisons, but it does so in a manner that fails to acknowledge or accommodate the diversity of tribes, issues, and resources that exist across the districts that work in Indian Country.

As the Committee knows, tribal liaisons are Assistant United States Attorneys (AUSAs) who, in addition to prosecuting cases, are also responsible for coordinating Indian Country relations within a district. The Department fully recognizes the importance of tribal liaisons and currently has 44 tribal liaisons in districts with some Indian Country within their jurisdictions. Tribal liaisons have been effectively serving U.S. Attorney's Offices since we began designating them 1995.

The key to successfully using tribal liaisons, however, is to recognize that one size does not fit all. While each tribal liaison may be an expert in Indian Country issues, those issues can vary greatly from tribe to tribe, and from district to district. Some districts may deal with only

one tribe; others will be responsible for many. Some tribes have fewer than 200 members; others will have more than 100,000. Some districts contain vast amounts of Indian Country, others have relatively little. In some districts Indian gaming is prolific; in others it may be insignificant. Some districts have a multitude of AUSAs with substantial Indian Country experience; others may have few, or just one. These multiple layers of diversity make nationwide codification of the duties of tribal liaisons counterproductive, by reducing the discretion that each U.S. Attorney's Office must have to best serve the Indian community(s) in their districts. It is important to note that while the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian Country, they are not the only AUSAs doing these prosecutions. The sheer volume of cases from Indian Country requires these prosecutions in most USAOs to be distributed among numerous AUSAs

The Department believes that each individual district is in the best position to evaluate the challenges presented by Indian Country crime within the district, the backgrounds, talents, and experiences of its AUSAs, and how the latter should best be employed to meet the former. It is essential that U.S. Attorneys maintain this discretion in tailoring the role and scope of the tribal liaison program in their districts, and the Department is therefore opposed to section 103(b). However, we do agree with the sentiment expressed in section 103(c) that the performance of tribal liaisons should be evaluated fairly on the full scope of their assigned duties, including those duties that are not case-related. We also support section 103(d), which encourages U.S. Attorneys to rely upon SAUSAs to provide enhanced attention to minor crimes occurring in Indian Country. The Department notes, however, that focusing these efforts in districts where "declination rates" exceed the national average is not a viable measuring stick. As we have conveyed to the Committee in the past, reliable statistics about "declination rates" in the federal

system are unknown and realistically unknowable. The decision-making process that can result in an Indian Country case not being accepted for federal prosecution is too complex and individualized to produce meaningful comparative statistics.

Section 104 of the Tribal Law and Order Act of 2009 is focused on reorganizing the Department's approach to managing its Indian Country responsibilities in Washington. Section 104(a) would direct the Attorney General to establish the Office of Tribal Justice (OTJ) as a "permanent division" within the Department, with specific assigned responsibilities. Section 104(b) would create the Office of Indian Country Crime within the Criminal Division of the Department.

OTJ, which has been recognized in statute (25 U.S.C. 3653(6)), has functioned for some time with staff detailed to it by other components of the Department. We understand Section 104(a) as an effort to give prominence to OTJ by making it a separate component of the Department. The Department strongly supports Section 104(a) with some modification. First, OTJ should remain an "office" within the Department, not a "division." Divisions within the Department are generally large litigating components. Instead, OTJ – like the Office of Legal Counsel or the Office of Legal Policy – should remain an "Office."

Second, because OTJ exists in statute, the Department recommends that Section 104(a) direct that the Attorney General establish OTJ as a separate component. That would have the effect of placing it on the Department's organizational chart and giving it greater prominence. This may be accomplished by amending the directive in proposed Subsection 106(a) (the provision to be inserted into the Indian and Tribal Justice Technical and Legal Assistance Act of

2000) to read: “the Attorney General shall establish the Office of Tribal Justice as a component within the Department.”

Third, the Department recommends striking Subsection 106(b) (of the provision to be inserted) which addresses personnel and funding. The Department will continue the current personnel and funding arrangements until appropriations are provided.

Finally, the duties identified in Subsection 106(c) (of the provision to be inserted) reflect what are currently OTJ’s core functions. Accordingly, the Department recommends that the heading of this Subsection be changed from “Additional Duties” to “Duties of the Office of Tribal Justice.” In addition, the opening paragraph of proposed Subsection 104(c) should be replaced with “The Office of Tribal Justice shall –”

With the above modifications, the Department actively supports Section 104(a). OTJ has been effectively serving Indian Country for many years. OTJ was established to provide a single point of contact within the Department of Justice for meeting the broad and complex Department responsibilities related to Indian tribes. The Office facilitates coordination between Departmental components working on Indian issues, and provides a constant channel of communication for Indian tribal governments with the Department. The Department agrees that it is time to recognize OTJ as a critical and permanent entity within DOJ.

We oppose, however, the creation of an Office of Indian Country Crime in the Criminal Division at the Department of Justice. Transferring resources would not make a measureable contribution to addressing the very real problems that the Committee is trying to deal with by this legislation. Those problems occur on the ground, in the districts containing Indian Country, and that, we believe, is where the focus of effort should be.

Instead, creating an Office of Indian Country Crime in Washington could have the practical effect of weakening the Department's efforts to combat violent crime in Indian Country, not strengthening them. Foremost, creation of an Office of Indian Country Crime in the Criminal Division would take valued criminal justice resources away from the field, where they are needed most. Currently, a large majority of the Department's most experienced Indian Country professionals serve in Indian Country, where their expertise has the greatest impact. Bringing some number of those persons to DOJ headquarters will produce an experience gap in the field.

Existing structures in the Department are more than sufficient to address Indian Country issues. In the fall of 2008, EOUSA created a permanent Attorney Advisor position titled Native American Issues Coordinator. The Coordinator was placed within EOUSA's Legal Initiatives Staff and serves as a principal legal advisor on all matters pertaining to Native American issues, among other law enforcement program areas; provides management support to the United States Attorneys' Offices (USAOs); and coordinates and facilitates the resolution of important legal issues. In addition, the Attorney General's Advisory Committee (AGAC), Native American Issues Subcommittee (NAIS), is a powerful voice for the U.S. Attorneys' community on all matters having to do with Indian Country, especially Indian Country crime. The NAIS is the longest-tenured subcommittee of the AGAC, and one of its most active. It consists of U.S. Attorneys whose districts include significant amounts of Indian Country, and it regularly holds meetings in Indian Country. The NAIS has historically dealt with the most pressing issues facing Indian Country, and often produces well thought out policy recommendations based upon what works in the field.

We support Title II of the Tribal Law and Order Act of 2009, but would like to work with the Committee to ensure that section 201 accomplishes its intended purpose. We understand that

section 201 is intended to streamline the process by which tribes with land located in Public Law 280 states may retrocede concurrent criminal jurisdiction to the federal government. We support the concept, but are concerned with two aspects of section 201 as drafted.

We are concerned that section 201 may inadvertently and automatically retrocede criminal jurisdiction to the United States in all P.L. 280 states upon enactment. We believe that was not the drafter's intent, and minor changes to the wording will remove any ambiguity. We are also concerned, however, that section 201 requires that tribes consult with the Attorney General before effecting a retrocession, but does not expressly require the Attorney General's consent. To ensure an orderly and methodical transition, the Attorney General must be allowed to determine the circumstances under which concurrent jurisdiction will be accepted. This is particularly important because federal criminal law cannot be enforced adequately without dedicating resources to that effort.

Investigators, prosecutors, staff, and judicial resources are all necessary to the enforcement of federal criminal law. The Attorney General should be allowed to ensure that sufficient assets are available before having new enforcement responsibilities thrust upon the Department.

Section 202 authorizes monetary incentives for enhanced cooperation between state, local and tribal governments to improve law enforcement effectiveness and reduce crime, both in Indian Country and in nearby communities. The Department is fully supportive of this initiative, and believes it holds great promise.

Title III of the Tribal Law and Order Act of 2009 is directed at increasing a tribe's ability to respond to Indian Country crime. The Department supports those provisions of Title III that

are directed at improving the quality, resources, training, and competence of tribal law enforcement professionals.

Section 303 seeks to grant qualified tribal police officers access to national criminal databases. The FBI's Criminal Justice Information Services Division (CJIS) has long recognized tribal law enforcement agencies as qualified criminal justice agencies and has consequently assigned Originating Agency Identifier (ORI) numbers to tribal law enforcement agencies upon request. The ORI enables access to the National Crime Information Center (NCIC), which includes the ability to both view data and input data.

The Department supports efforts to increase tribal access to NCIC, and believes such efforts are critical for public safety. The Department, however, requests the following modification to Section 303(b) to insure that the provision is not interpreted to impose an affirmative, mandatory duty on the Attorney General to provide each tribe seeking to access the NCIC with the technical resources the tribe would need to do so: that Section 303(b)(1) be revised with the language used in Section 303(a), to read, "The Attorney General shall ensure that tribal law enforcement officials that meet applicable Federal or State requirements be permitted access to national crime information databases."

Section 304 increases the authority of tribal courts to sentence offenders to up to three years in prison (the current limit is one year), and authorizes tribal courts to direct that defendants convicted in tribal court serve their sentences in federal prisons. These provisions are significant changes to the *status quo*.

The Department further notes that increasing the maximum tribal court prison sentence to three years may invite greater scrutiny if those convictions are challenged in federal court, unless indigent defendants are provided with counsel. As drafted, section 304 would prohibit tribes

from denying defendants the assistance of counsel, but does not provide for such assistance if the defendant is unable to afford counsel.

Moreover, the Department opposes section 304(a) to the extent it would permit tribal courts to direct that offenders convicted by tribal courts serve their sentences in federal prisons. The Bureau of Prisons (BOP) is responsible for the incarceration of inmates who have been sentenced to imprisonment for federal crimes. Based on continuing federal law enforcement efforts and limited resources for construction of new institutions, federal prisons continue to be overcrowded. System-wide, BOP is operating at 37 percent above its capacity, and it does not expect crowding to decrease substantially in the next few years. Crowding is especially significant at high-security institutions (operating at 49 percent above capacity) and medium security institutions (operating at 48 percent above capacity), where the majority of violent offenders are confined.

Moreover, based on the location of BOP institutions and Federal inmate population pressures, confining tribal offenders in BOP facilities would frequently mean that such offenders would be confined at least several hundred miles, if not more than a thousand miles from their communities. For purposes of maintaining family ties, and to effect an optimal reentry back into the community after release, the Department believes that the incarceration of tribal court offenders is best handled by tribal detention centers or correctional facilities. The Department understands that the quantity and quality of existing tribal detention and correctional facilities are inadequate. Even so, the answer is to improve those facilities, not send tribal offenders to BOP facilities that are experiencing such significant crowding. As previously noted, the Recovery Act provided \$225 million for the construction and renovation of tribal correction and detention facilities. Grant applications for that money have already been received by the Office of Justice

Programs and award decisions should be forthcoming. The Department believes that this money will go a long way towards rectifying existing shortfalls in tribal facilities.

The Department is generally supportive of Titles IV, V and VI of the legislation, which focus on monetary and non-monetary assistance to tribal law enforcement agencies, improving the manner in which Indian Country crime is reported and tracked, and prisoner release and re-entry issues. The Department has mostly technical concerns about these provisions, which are identified in our June __, 2009 letter. However, the obligations imposed upon the BOP by section 601 with respect to sex-offender registration are both impractical and inconsistent with SORNA, the law that imposes registration obligations for offenders. Because we believe that the existing system works well, and will work well with offenders being released to tribal communities, section 601 should be amended to be consistent with SORNA.

Section 603 provides that the Director of Indian Health Services and the Director of the BIA's Office of Justice Services must approve or disapprove, in writing, any request or subpoena of their employees to provide testimony in a deposition, trial, or other similar proceeding regarding the performance of their duties. This provision, which fails to distinguish between requests or subpoenas for testimony in federal court, or in cases where the United States is a party, is too broad. It would treat these employees differently than their counterparts in other federal agencies, is likely to conflict with existing agency regulations, and could hamper the federal prosecution of sexual assault cases arising in Indian Country. We recommend that this provision be limited to subpoenas or requests for employee testimony arising in or from cases pending in tribal courts. Additionally, we note that HHS has concerns about this provision and we understand will be communicating those separately.

Conclusion

Chairman Dorgan, Vice Chair Barrasso, this concludes my statement. While the Department has a variety of significant concerns with the legislation that is pending before this Committee, we share the Committee's ultimate goal of increasing public safety in Indian Country. We look forward to working with the Committee in order to address our concerns and achieve that goal.

I will be happy to attempt to answer any questions you may have.