U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 23, 2009

The Honorable Byron Dorgan
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (the Department, or DOJ) on S. 797, the "Tribal Law and Order Act of 2009." The Department shares the Committee's desire to improve public safety in Indian Country, and we are committed to working with the Committee to accomplish that goal. However, we have a number of concerns about the manner in which this draft legislation seeks to accomplish that end. The Department objects to section 102 at this time. We also oppose certain parts of the legislation that impose organizational and structural changes on how the Department responds to Indian Country crime, expand tribal court sentencing authority, and mandate the transfer of tribal court offenders to the custody of the Bureau of Prisons. Our specific concerns are described below. We look forward to working with you and the Committee on Indian Affairs to address these important issues.

Sec. 2. Findings & Purposes.

The Department disagrees with several of the findings contained in section 2(a) of the legislation. In particular, sections 2(a)(3)(B) and 2(a)(8)(A) fail to recognize the important role that Federal and State courts play in maintaining public safety and the rule of law – both criminal and civil – in tribal communities. Section 2(a)(10) would find that a "significant percentage of cases referred to Federal agencies for prosecution of crimes allegedly occurring in tribal communities are declined to be prosecuted." This wrongly implies that the Department regularly refuses to proceed with Indian Country cases that otherwise meet the Department's standards for prosecution, that is, that the prosecutor believes that the conduct at issue constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. The Department disputes that implication.

Sections 2(a)(13) (B) and (C) recite percentages of Indian and Alaska Native women who will be raped or subjected to domestic or sexual violence in their lifetimes. The Department certainly agrees that the incidence of rape and sexual or domestic violence perpetrated against

Indian and Alaska Native women requires immediate attention and a long term commitment. However, these particular figures are not drawn from research studies that included statistically representative samples of women living in Indian Country and therefore should not be relied upon in the findings section of the Act. Finally, section 2(a)(17) states that "the Department of Justice has reported that drug organizations have increasingly targeted Indian country to produce and distribute methamphetamine, citing limited law enforcement presence and jurisdictional confusion as reasons for the increased activity." This overstates the Department's position. The Department does not believe that drug organizations are producing significant amounts of methamphetamine in Indian Country, but we do acknowledge that methamphetamine is being smuggled and distributed there. The level of smuggling and distribution of methamphetamine in Indian Country has been increasing for various reasons. The Department does not believe that the lack of law enforcement resources or jurisdictional confusion is the driving force behind those increases.

Title I, Sec. 101. Office of Justice Services Responsibilities - Law Enforcement Authority

Section 101(c) would allow the Secretary of Interior to authorize Bureau of Indian Affairs (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).

Sec. 102. Declination Reports.

Section 102 requires that, when federal law enforcement agencies or a U.S. Attorney decide 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.

While we do not support this section, we note that the section has an internal inconsistency. Sections 102(a)(1) and (2) provide that investigators and prosecutors "shall" submit "evidence relevant to the case" whereas section 102(c) states that the reports under those subsections "may include the case file, including evidence collected and statements taken. . . ." Finally, section 102(a)(1)(B) should be amended in two ways. Instead of referring to

declinations, the body of that subsection should address the submission of "relevant information regarding the decisions by federal investigative agencies to not investigate or to terminate an investigation without referring it to the appropriate prosecutor." Subsection 102(a)(1)(B)(iv) should be amended to require that submissions include "the reason for deciding not to initiate or open an investigation, or for deciding to terminate an investigation." Both of these changes are intended to clarify that "declination" is a term of art associated with prosecutorial decision making, not investigative decision making.

Sec. 103. Prosecution of Crimes in Indian Country.

The Department strongly supports the appointment of tribal Special Assistant United States Attorneys (SAUSAs) under the Department's current procedures and guidelines. We welcome the clarification in section 103(a) that the authority contained in 28 U.S.C. § 543(a) includes tribal SAUSAs. We agree, moreover, that SAUSA appointments should be made in consultation with the tribe(s) expected to be serviced by the SAUSA. However, we suggest a coordinate clarification in 18 U.S.C. § 209(a), which addresses state and local contributions to a federal officer or employee's salary. DOJ recommends an amendment to 18 U.S.C. § 209(a) that inserts "tribe," between "county," and "or municipality;".

The Department also supports the practice of having an Assistant United States Attorney serve as a tribal liaison in each federal district that includes Indian Country. In practice, this already occurs in almost every federal district that includes Indian Country. Because we believe that the U.S. Attorney in the district is best suited to determine the needs, priorities and personnel assignments of the Assistant U.S. Attorneys in his or her district, we do not believe it is necessary for this to be statutorily mandated at this time.

The Department also opposes the codification of the duties, obligations, and assignments that a tribal liaison must perform within a U.S. Attorney's Office. Section 103(b) would amend The Indian Law Enforcement Reform Act by adding a list of nine functions for which tribal liaisons "shall be responsible." The Department fully recognizes the importance of tribal liaisons and currently has 44 tribal liaisons in districts that include Indian Country within their jurisdiction. In fact, earlier this year, the Director of the Executive Office for U.S. Attorneys sent a memorandum to the 26 U.S. Attorneys whose districts include Indian Country reminding them of the value of their tribal liaisons and suggesting that they be used for many of the same duties listed in the bill.

As the Director noted in that memorandum, however, it is important that tribal liaisons are best employed in the context of local needs and conditions. The Department has learned through long experience that the public safety problems facing Indian Country do not lend themselves to a one-size-fits-all approach. The problems facing tribes in one district may not mirror those in a neighboring district, much less a district hundreds or thousands of miles away. Often, tribes within the same district face fundamentally different challenges. Tribes have access to differing levels of resources, are subject to different forms of governance, range in size from

hundreds to hundreds of thousands of enrolled members, and have reservations of all shapes, sizes, configurations, uses, and locations.

As a technical matter, the proposal in section 103(b), amending 25 U.S.C. § 2801 et seq., should read, in section 11(c)(2)(A), that the Attorney General should take all appropriate actions to "encourage the aggressive prosecution of all federal crimes," not "all crimes."

Sec. 104. Administration.

Section 104(a). Office of Tribal Justice: The Office of Tribal Justice (OTJ) has been recognized in statute 25 U.S.C. 3653(6), and 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 proposed Subsection 106(a) (the provision to be inserted into the Indian and Tribal Justice Technical and Legal Assistance Act of 2000) to read as follows:

"(a) IN GENERAL.--Not later than 90 days after the date of the enactment of the Tribal Law and Order Act of 2009, 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 106(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.

Section 104(b). Office of Indian Country Crime: Section 104(b) would create an Office of Indian Country Crime within the Department's Criminal Division, to be overseen by a Deputy Assistant Attorney General. The Office would be assigned responsibility for directing and coordinating the Department's policies and prosecutions with respect to Indian Country crime. The Department is opposed to this provision, which will consume DOJ resources without measurably improving public safety in Indian Country.

First, the Department objects to one of the duties this legislation would assign to the Office of Indian Country Crime: the responsibility to "develop and implement criminal enforcement policies for United States Attorneys and investigators of Federal crimes regarding cases arising in Indian Country." The authority to "develop and implement" policies directed to presidentially appointed U.S. Attorneys should be reserved to the Attorney General or the Deputy Attorney General. At most, the Office of Indian Country Crime may be assigned a coordination function.

More importantly, the vast majority of the Department's most experienced Indian Country professionals now serve where they are most needed – in Indian Country. Bringing some number of them to Washington, D.C., to staff the Office of Indian Country Crime would degrade the Department's capability, not enhance it. Whatever problems exist in the Department's approach to public safety in Indian Country, those problems are not attributable to a lack of coordination or direction from Washington. Indian Country criminal justice issues are already coordinated from the Executive Office for U.S. Attorneys, which recently hired a full-time career employee as its Native American Issues Coordinator. Last year the Deputy Attorney General created the Advisory Council on Tribal Justice, made up of representatives from all DOJ components with Indian Country responsibilities. The Council meets periodically, and advises senior leadership on the entire spectrum of issues the Department faces in Indian Country. Moreover, the Office of Tribal Justice continues its long history of being DOJ's primary conduit between tribes and the Department on criminal justice policy matters. Creating an Office of Indian Country Crime would simply add a layer of bureaucracy, without any coordinate benefit to the Department or the residents of Indian Country.

In that regard, the Criminal Division already plays an important role in Indian Country prosecutions. Criminal Division expertise has long been applied to specific Indian Country cases involving gaming, child pornography, and public corruption. Indeed, the entire range of Criminal Division expertise is available to Indian Country prosecutors when needed. An Office of Indian Country Crime will not add to this role.

Title II, Sec. 201. State Criminal Jurisdiction and Resources.

The Department supports the objective of Section 201, which purports to clarify and streamline the process by which concurrent criminal jurisdiction in Public Law 280 (P.L. 280) states may be retroceded to the United States. The Department is concerned, however, that as drafted Section 201 may have the unintended consequence of automatically creating concurrent federal jurisdiction in all P.L. 280 states. Section 1162(c) of title 18 now makes sections 1152 and 1153 inapplicable in P.L. 280 states. Section 201 would replace section 1162(c) with language delineating the circumstances under which sections 1152 and 1153 "shall remain in effect" in P.L. 280 states. But upon elimination of the existing language of section 1162(c), there will be no provision of law exempting the application of sections 1152 and 1153 in those states, thus negating the intended purpose of Section 201, which is to provide a mechanism for selective retrocession of concurrent jurisdiction.

In addition, the statutory amendments effected by Section 201 would require a tribe to consult with the Attorney General before retrocession occurs, but does not hinge retrocession on the Attorney General's consent. The Department is concerned that individual tribes not be allowed to retrocede jurisdiction to the United States without the consent of the Attorney General. The decision whether and on what time frame to accept concurrent criminal jurisdiction in a P.L. 280 state is likely to raise difficult resource and policy issues.

The Attorney General is the chief law enforcement officer of the Unites States. As such, the Attorney General is in the best position to evaluate and balance the competing federal law enforcement needs of communities across the country. This expertise and perspective is particularly important when working with Indian Country, as each Indian community's law enforcement needs are unique. To ensure that retrocessions are accomplished methodically, and in the best interests of public safety, tribes should be allowed to request a jurisdictional retrocession, but it should only be effective upon the consent of the Attorney General.

To accommodate the Department's dual drafting concerns, we recommend that Section 201 be changed to more clearly ensure that sections 1152 and 1153 of title 18, U.S. Code, continue to be exempted from application in P.L. 280 states except upon a tribe's request, and that retrocessions of concurrent jurisdiction only occur with the express consent of the Attorney General.

Moreover, the Department observes that for every tribe seeking concurrent federal jurisdiction, there will be the need for a concomitant increase in federal law enforcement resources. That is, additional agents, prosecutors, and judicial staff will need to be authorized, funded, hired, and trained. Any retrocession of jurisdiction to the federal government should be conditioned on the prior identification of such resources. Without the necessary additional resources, an increase in prosecutorial authority cannot produce an increase in prosecutions, except at the expense of other competing public safety priorities.

Sec. 202. Incentives for State, Tribal, and Local Law Enforcement Cooperation.

Section 202 develops a grant program to encourage cooperation on law enforcement issues between tribes and state or local governments. The Department supports efforts to enhance cooperation between state, tribal, and local governments. Rather than creating duplicative programs aimed at accomplishing identical or very similar goals, the Department recommends providing additional funding for the existing current Community Oriented Policing Services (COPS) Tribal Resources Grant Program.

Title III, Sec. 301. Tribal Police Officers.

Section 301 mandates that the Attorney General and the Secretary of Interior "develop a plan to enhance the certification and provision of special law enforcement commissions to tribal law enforcement officials." The use of special law enforcement commissions allows tribal officers to make arrests under federal law, and is a bonafide force multiplier in Indian Country. DOJ supports efforts to expand this effort, which has already resulted in the training of several hundred tribal officers.

Sec. 303. Access to National Criminal Information Databases.

Section 303 seeks to grant qualified tribal police officers access to national criminal databases. The FBI's Criminal Justice Information Services Division (CJIS) has always 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 ~~have~~ be permitted access to national crime information databases."

Sec. 304. Tribal Court Sentencing Authority.

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.

Furthermore, the Department strongly opposes the transfer of persons convicted in tribal court of crimes of violence, serious drug crimes, or sex offenses, to Bureau of Prisons (BOP) facilities to serve their sentences. DOJ understands that BIA and tribal detention facilities may be inadequate in quantity and quality to accommodate the number and type of defendants being sentenced in tribal court. The Department supports an upgrade and expansion of those facilities to meet the current shortfall. In fact, the American Recovery and Investment Act of 2009 provided $225 million for the construction or renovation of tribal correctional and detention facilities. The Office of Justice Programs has already solicited and received grant applications for this money, and preference will be accorded to projects that can be started and completed expeditiously. This money and the construction it funds present a far better solution to the problem of inadequate tribal facilities.

In addition, BOP attempts to designate an inmate to the appropriate security level institution that is within 500 miles of his or her release residence. But because of inmate population conditions and facility locations, inmates serving tribal court sentences would almost certainly be housed more than 500 miles from their communities. As a result, visits by family and friends are likely to be difficult, expensive, and infrequent. Pre-release community contact designed to facilitate reentry will be all but impossible. Instead, offenders will be reintegrated into their communities with few of the pre-release support mechanisms that can increase the prospects of success and reduce recidivism. This is counterproductive to the reentry needs of the inmate and the public safety goals of the community.

The implementation provisions contained in section 304 also raise concerns. That section requires that the costs of tribal court inmate incarceration, including the costs of "transfer, housing, medical care, rehabilitation, and reentry" be borne by the "United States." But there are a number of federal entities – BIA, BOP, the U.S. Marshals Service, the Indian Health Service – that might logically be expected to pick up some or all of these costs, and the legislation does not specify which entity should bear which costs. We believe this will generate confusion and conflict. Moreover, regardless of which federal entities bear the burden, the additional costs associated with housing tribal offenders in BOP facilities will be substantial, and this legislation should not transfer the responsibility for those costs without authorizing appropriations to meet them.

The Department is also concerned about being required to execute a memorandum of agreement that may be construed as limiting BOP's authority to deal with categories of inmates entrusted to its custody. Section 304 would amend 25 U.S.C. § 1302 by adding subsection (b)(4). That new section dictates that BOP recognize continuing tribal jurisdiction over tribal members serving tribal court sentences in BOP facilities. The Department is opposed to this

provision.

To maintain the safety and welfare of staff and inmates, the BOP must have jurisdiction and authority over all inmates in its institutions. In order to operate safe, secure, and uniform prisons, the BOP must be able to designate, impose administrative discipline, and control the provision of programs for all inmates in the agency's custody. In addition, the Federal government must be able to charge, prosecute, and sanction any offender for a crime committed while the offender is confined in a BOP facility. Section 1302(b)(4) undermines that authority, and it should be stricken from the bill.

Sec. 305. Indian Law and Order Commission.

Section 305 creates the Indian Law and Order Commission composed of members selected by the President, the Senate Majority and Minority Leaders, and the Speaker of the House and the Minority Leader of the House to conduct a comprehensive study of law enforcement and criminal justice in tribal communities and to develop recommendations for necessary modifications and improvements to tribal, state, and Federal justice systems. The Department agrees that bringing together a group of experts to discuss the problems facing the tribal criminal justice system and to recommend some possible solutions to the problems would provide valuable insight into these issues. Nevertheless, the Department has several concerns.

First, the Commission would include three members appointed by the President and six members appointed by congressional leaders. While this provision does not raise Appointments Clause concerns insofar as the Commission would serve only in an advisory function, the Department has consistently objected to such hybrid entities as inconsistent with the Constitution's separation of powers into three distinct branches. The creation of a commission that is neither clearly legislative nor clearly executive tends to erode the structural separation of powers and blurs clear lines of government accountability, raising concerns that the Department has long noted with such provisions. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 251-52 (1989). Moreover, the size and composition of the Commission under the amended bill would result in representation of the Executive and Legislative Branches lacking proper balance. As the Department has frequently advised, the proper relationship between the co-equal branches requires that they be equally represented on the Commission if this hybrid commission is to exist at all. *See id.*

Second, section 305(g)(3) permits the Commission to "secure directly from a Federal agency such information as the Commission considers to be necessary to carry out this section." The Department does not interpret this authorization as purporting to limit DOJ's ability to protect sensitive internal deliberative communications, law enforcement matters, and information subject to attorney-client, attorney work product, and other privileges from inappropriate disclosure. Subject to that understanding, the Department does not object to this section, and in responding to any request for information from the Commission DOJ will apply, in spirit, the principles of disclosure and transparency announced by the Attorney General on March 19, 2009.

Third, section 305(h)(3) provides both the Attorney General and the Secretary of Interior with the competing responsibility of providing administrative support to the Commission. To avoid confusion and conflict, that responsibility should rest with one agency, not two. Because of its historic role supervising the administration of tribal justice that entity is most appropriately the Department of Interior.

Finally, Subsection 304(i)(1)(B) provides that the National Institute of Justice (NIJ) may contract with researchers and experts selected by the Commission to provide funding in exchange for services. The Department does not object to providing NIJ with this discretion, but notes that in exercising its discretion NIJ will evaluate Commission proposals using sound analytical principles regarding research decisions, grant management, progress and financial reporting, and scientific integrity. As a result, the Department recommends that Commission proposals for research funding be developed and selected in consultation with NIJ.

Title IV, Sec. 401. Indian Alcohol and Substance Abuse.

The Department recognizes the legal and community problems caused by alcohol and substance abuse in Indian Country. The Department does not object to establishing certain DOJ responsibilities under the Indian Alcohol and Substance Abuse Prevention and Treatment Act. However, in section 401(e), amending 25 U.S.C. §2442(a)(2), the phrase "Immigration and Customs Enforcement and the Drug Enforcement Administration" should be inserted after "United States Custom and Border Protection."

Sec. 402. Indian Tribal Justice: Technical and Legal Assistance

Section 402 reauthorizes the Indian Tribal Justice Act and Indian Tribal Justice Technical and Legal Assistance Act of 2000. The Department supports the reauthorization of these programs.

Sec. 403. Tribal Resources Grant Program.

The Department generally supports reauthorization of the Tribal Resources Grant Program (TRGP), as administered by the Department's Office of Community Oriented Policing Services (COPS).

However, section 403 would amend the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3796dd(b)) to allow tribes to obtain TRGP funds "on behalf" of BIA. This provision would violate fiscal law restrictions on using funds appropriated to one federal agency (in this case COPS grants) to augment another agency's budget. The provision is also unnecessary. The TRGP already permits tribal governments to use COPS grant funds to hire tribal police officers, regardless of whether the tribes also receive BIA law enforcement services or funds. This provision should be stricken.

Title V, Sec. 501. Tracking of Crimes Committed in Indian Country.

The Department actively supports the goal of improving crime and arrest data collection in Indian Country. DOJ offers the following technical amendments to section 501. First, in Subsection 501(b)(2), adding 42 U.S.C. § 3732(d)(2), "Office of Law Enforcement Services" should be changed to the office's current name, the "Office of Justice Services." Second, in section 501(b)(5), DOJ recommends extending the deadline for the first report to Congress to at least two years from the date of enactment, to allow one year for the design and implementation of the data collection system and one year for actual data collection. The Department also recommends an authorization for appropriations of $1 million to meet the reporting mandate, because the mandate requires activities such as the build-out and maintenance of an electronic system to transfer data between tribes and their federal partners, data processing, analysis, and report development.

Title VI, Sec. 601. Prisoner Release and Reentry.

Section 601 includes an amendment to 18 U.S.C. § 4042(a)(4) authorizing the Bureau of Prisons (BOP) to provide technical assistance to tribal governments in the improvement of their correctional systems. The Department believes that tribal jurisdictions would be better served by obtaining technical assistance from BOP's National Institute of Corrections (NIC). NIC's statutory mandate includes providing assistance to State and local governments and other public and private agencies, institutions, and organizations in the improvement of their correctional programs. *See* 18 U.S.C. § 4352. Instead of amending 18 U.S.C. § 4042, the Department recommends adding tribal entities to the organizations authorized to receive assistance from NIC pursuant to 18 U.S.C. § 4352.

The Department strongly supports the addition of tribal jurisdictions to the list of entities that BOP must notify concerning the release of inmates convicted of violent crimes, drug offenses, and sex offenses. The Department also favors notifying sex offender registry officials of the release of a sex offender, and advising released sex offenders of their duty to register.

However, BOP cannot effectuate the initial registration of the sex offenders it releases to tribal communities. Nor can it effect the registration of sex offenders in tribal registries *before* the offender is released. The Sex Offender Registration and Notification Act (SORNA), within the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248), recognizes this reality, and existing SORNA procedures are designed to ensure that sex offenders released from federal custody will be fully registered in the jurisdictions where they will be residing shortly after their release from custody.

Section 601 imposes an unworkable requirement upon BOP that would treat Indian offenders being released into tribal jurisdictions disparately from all other offenders, and would not substantially enhance public safety. The Department believes that the regulatory process it currently employs to inform jurisdictions about the imminent release of sex offenders works well

with State and local jurisdictions, and will also work well with tribal jurisdictions. No new process is necessary, and creating and implementing a new process for tribal offenders will simply divert resources from protecting all communities, without making tribal communities more safe.

Sec. 603. Testimony By Federal Employees in Cases of Rape and Sexual Assault.

Section 603 provides that the Director of Indian Health Services and the Director of the 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.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable John Barrasso
Vice Chairman