U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 17, 2008

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. 3320, the "Tribal Law and Order Act of 2008". The Department supports the goals of the bill. We share the Committee's desire to improve safety and security 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 the legislation seeks to accomplish that end. Most notably, the Department has substantial issues with the bill's provisions regarding declination reports (section 102), expansion of tribal sentencing authority and the transfer of tribal offenders to Federal prison facilities (section 304), and the creation of the Office of Indian Crime within the Department's Criminal Division (section 104). We look forward to working with you and the Committee on Indian Affairs to address these important issues.

Sec. 2. Findings & Purposes.

Section 2(a)-(b) lists the findings and purposes of the Tribal Law and Order Act of 2008. The Department strongly supports the purposes of the bill. We can all agree on the need to improve public safety in Indian Country through greater coordination, communication, and accountability. Furthermore, the Department does not object to the vast majority of the section's findings. Nevertheless, we have a few concerns about the specific language in some of the findings.

Section 2(a)(3)(B) states that "Congress and the President have acknowledged that...tribal justice systems are ultimately the most appropriate institutions for maintaining law and order in tribal communities." While the Department agrees that tribal justice systems play a key role in maintaining law and order in tribal communities, the finding should also acknowledge the important role of Federal and State governments in this same mission. The Department suggests replacing section 2(a)(3)(B) with the following language:

"(B) while the Federal and State governments play an important role, tribal justice systems are key institutions for maintaining law and order in tribal communities;".

Section 2(a)(8)(A) states that "tribal courts—are the primary arbiters of criminal and civil justice for actions arising in Indian country." Again, the finding should acknowledge the

important role of Federal and State courts in providing the rule of law in Indian Country. To clarify this finding, the Department suggests replacing in section 2(a)(8)(A) "the primary" with "important and significant".

Section 2(a)(13) states that the rate of domestic and sexual violence against Indian and Alaska Native women greatly exceeds that of the national rate. While the Department does not oppose section 2(a)(13)(A), the Department disagrees with the statistics cited in sections 2(a)(13)(B)-(C). The studies that have created these statistics largely draw from a non-representative sample of respondents. Specifically, many of these studies draw from respondents who do not live in Indian country. As a result, these studies—and the statistics they produce—cannot be properly relied on. Until accurate statistics can be produced, the Department strongly suggests striking sections 2(a)(13)(B)-(C) and reclassifying (2)(a)(13)(A) as (2)(a)(13).

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 the limited law enforcement presence and jurisdictional confusion as reasons for the increased activity." This last clause overstates the current position of the Department. To accurately state the Department's position, the Department suggests replacing ", citing the limited law enforcement presence and jurisdictional confusion as reasons for the increased activity" in section 2(a)(17) with "for various reasons".

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

Section 101(b) permits Bureau of Indian Affairs (BIA) law enforcement officers to make an arrest without a warrant in Indian Country if "the offense is a Federal crime and the employee has reasonable ground to believe that the person to be arrest has committed, or is committing, the crime." The Department shares the goal of increasing BIA law enforcement's ability to effectively deter criminal activity and to bring perpetrators of serious crimes to justice.

The Department believes the authority should be limited to violations of certain Federal statutes such as drug, alcohol trafficking, violence, domestic violence, and firearms laws and is concerned about the lack of a definition for "Federal crime". Broadly permitting arrests for any "Federal crime" opens individuals to arrest for obscure misdemeanor violations and subjects the Federal government to greater civil liability. Furthermore, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Supreme Court upheld the warrantless arrests for misdemeanors committed in the presence of an officer with "probable cause." In order to survive any legal challenges, the provision should track the Supreme Court's holding. DOJ suggests amending section 101(b) by striking lines 14 through 19 on page 14 and inserting the following language:

"(A) the misdemeanor offense is committed in the presence of the officer;

(B) the offense is a felony and the officer has probable cause to believe that the person to be arrested has committed, or is committing, the felony; or

(C) the offense is a misdemeanor that is a crime of domestic violence as defined in 18 U.S.C. 921(a)(33), an offense involving Controlled Substances in violation of Title 21, United States Code, Chapter 13--Drug Abuse Prevention and Control, an offense involving firearms in violation of Title 18, United States Code, Chapter

44--Firearms ; an offense involving non-domestic violence in violation of Title 18, United States Code Chapter 7-Assault; or an offense involving alcohol trafficking in violation of Title 18, Chapter 59, and the officer has probable cause to believe that the person to be arrested has committed, or is committing said offense;"

Sec. 102. Declination Reports.

Section 102 requires Federal law enforcement agencies to submit declination reports and United States Attorneys to communicate "reasonable details" regarding a declined prosecution to tribal justice officials and requires the Department to maintain and publicize data on declination rates. The Department strongly opposes this section's provision requiring Federal law enforcement and prosecutors to submit declination reports or details to tribal justice officials – documents that the Department often does not provide to State and local prosecutors. First, by removing discretion and requiring U.S. Attorney's Offices (USAOs) and other investigative agencies to prepare detailed written reports that contain information about why an investigations were either declined or terminated, the legislation would create potentially discoverable material which could jeopardize any subsequent criminal case by highlighting weaknesses. Second, USAOs and investigative agencies are often precluded by statute from providing declination reports or any of the various types of protected information. For example, a declination may occur because there is an on-going investigation that requires the law enforcement agency to protect the investigation, such as when a grand jury investigation has been convened. Law enforcement officers and prosecutors can be subject to criminal liability for improper disclosure of information. Because of the statutory restrictions on the use of protected information, the usefulness of declination reports would be severely limited. Moreover, the very production of a declination report under this circumstance could lead to the inadvertent disclosure of protected information. Thus, the USAOs must have discretion in what information may be provided to tribal justice officials. Finally, the Department is vigilant that declination reports do not get into the wrong hands, jeopardizing investigations and the safety and privacy of witnesses and victims. This would particularly be a concern for districts with small tribal populations, in which even reports that have personally identifying information redacted could still be linked to victims.

Additionally, declination rates do not show the full picture of the Department's actions in a given case and the Department has some concerns about publicizing declination rates. Indeed, "declination" does not necessarily mean that the case will not be prosecuted at all. In many Indian Country cases, USAOs share jurisdiction with State and tribal prosecutors, working closely with them to ensure that each alleged crime is effectively and appropriately handled. "Declination" may mean that the case will be prosecuted in a different forum, that additional work-up is needed, that insufficient evidence exists to proceed with federal prosecution, or that no Federal crime was committed. A decision not to prosecute federally does not necessarily mean the end of the case, and for this reason, Federal declination figures cannot give a complete picture of how Indian Country crimes are prosecuted, and could lead to inaccurate conclusions.

DOJ suggests deleting the entire section and including a sense of Congress encouraging tribal liaisons to work more closely with the tribes in their jurisdictions to ensure that cases not prosecuted federally can be and are prosecuted in tribal courts. To that end, DOJ suggests that Section 10 of the Indian Law Enforcement Reform Act (25 U.S.C. § 2809) be amended as follows:

In subsection (a), by inserting at the end the following: "It is the sense of Congress that where law enforcement officers or employees of any Federal department or agency decline to initiate an investigation of an alleged violation of Federal law in Indian country, or terminate such an investigation without referral for prosecution, the officer or employee should coordinate with the United Sates Attorney's Office to communicate to appropriate tribal justice officials reasonable details regarding the investigation to permit tribal justice officials to pursue the matter in tribal court."

In subsection (b), by inserting at the end the following: "It is the sense of Congress that where such a declination or termination occurs, the United States attorney should coordinate and communicate with the appropriate tribal justice official reasonable details regarding the case to permit the tribal prosecutor to pursue the case in tribal court to the extent reasonable under the circumstances. Congress encourages United States Attorneys' Offices to publish reasonable information about the categories and statistics of Indian Country cases undertaken by the office."

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, as this has been an ongoing practice. The Department welcomes section 103(a)'s clarification of 28 U.S.C. § 543(a) to explicitly include tribal SAUSAs. DOJ suggests clarifying 18 U.S.C. § 209(a), which addresses State and local contributions to Federal employee's salaries, by amending it to explicitly permit contribution by tribal governments. To that end, in 18 U.S.C. § 209(a), DOJ suggests inserting "tribe" in between "State" and "county;".

The Department supports mandating "not less than 1 assistant United States Attorney to serve as a tribal liaison" in each district which includes Indian Country in Section 103(b). Nevertheless, the Department strongly opposes Section 103(b)'s codifications of the responsibilities of the tribal liaisons. The Department fully recognizes the importance of tribal liaisons and currently has 44 tribal liaisons in districts with some Indian Country within their jurisdiction. Each tribal liaison is an expert in Indian Country crimes, but each USAO handles varying types of crimes and in differing numbers. For example, in districts where Indian gaming occurs, the tribal liaison may focus more on embezzlement and fraud. Other districts have more cases and matters dealing with violent crime. This diversity would make the suggested codification of the duties of tribal liaisons difficult and could hamper the USAO's ability to respond to the unique needs of Indian Country in that district. It is essential that U.S. Attorneys maintain this discretion in tailoring the role and scope of the tribal liaison program in their districts.

Furthermore, Section 11(d) of the legislative proposal "authorize[s]" and "encourage[s]" the appointment of SAUSAs where "crime rates exceed[] twice the national average or where declination rate [sic] exceeds the national average." We believe tribal SAUSAs can be a great resource; however, tying their use to crime rates may limit the ability of USAO to utilize them in the future.

The Department suggests amending section 103(b) by replacing Section 11(b) with the following:

"(b) DUTIES.—A tribal liaison shall be responsible for conducting activities in the district of the tribal liaison as the applicable United States Attorney determines to be appropriate. A tribal liaison's responsibilities should include:

[insert Section 11(b)(1)-(6), (8)]."

Sec. 104. Administration.

Section 104 seeks to create an Office of Indian Crime within the Department's Criminal Division. The Department strongly opposes the creation of an Office of Indian Crime. While the Department understands and appreciates the concerns related to the prosecution of crimes in Indian Country, creating an office within the Criminal Division could have the practical effect of inhibiting the Department's efforts to combat violent crime. Foremost, creation of an Indian Crime office in the Criminal Division would take valued criminal justice experts away from the field. Currently, the Department's most experienced criminal prosecutors on Indian issues serve in Indian Country, where their expertise has the greatest impact. Staffing an office centralized in Washington, D.C. would necessitate transferring many of these experts out of Indian Country, resulting in a significant gap of experience in the field.

Within the Criminal Division, attorneys with experience in particular subject matters provide assistance and expertise on specific criminal matters. For example, gaming matters related to Indian Country are referred to our Organized Crime and Racketeering Section, matters involving child pornography on Indian Country are referred to the Child Exploitation and Obscenity Section, and matters involving violent crime on Indian Country referred to the Gang Squad. The proposed office would risk removing attorneys from their subject matter expertise and have the unintended effect of hampering the Criminal Division's efforts to support the prosecution of crimes in Indian Country. Furthermore, the bill does not provide the Attorney General the authority to restructure or reorganize the Office if future events warrant it. The Department also notes that any reports that are required to be submitted to Congress in connection with the activities of this Office should be submitted by the Attorney General or his or her designee, not directly by the Office.

Furthermore, Section 104 also seeks to establish the Office of Tribal Justice (OTJ) as a permanent division within the Department. 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. OTJ 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 believes that the Attorney General is in the best position to evaluate and adjust the staffing and roles of those offices internally, as needed to maintain the appropriate allocation of resources. Hence, the legislative proposal to elevate OTJ within the Department is unnecessary at this time.

Sec. 201. State Criminal Jurisdiction and Resources.

The Department supports Section 201(a)'s goal of streamlining the retrocession process for tribes in Public Law 280 (P.L. 280) States. While States will retain primary responsibility for

the prosecution of crimes in P.L. 280 jurisdictions, the United States may, at its discretion, take part in prosecuting some cases.

Section 201(b) would clarify a tribe's ability to seek retrocession of State P.L. 280 jurisdiction back to Federal and tribal governments. Under current law, tribes may seek retrocession of P.L. 280 jurisdiction to the Federal government only with concurrence of the state. The Department cautions, however, that a substantial increase in the number of retrocessions of P.L. 280 jurisdiction would result in a significant change in the Federal prosecution and law enforcement framework. Currently, in P.L. 280 States, all crimes are handled under State laws without regard to the location of the crime. If tribes opt to retrocede, major crimes could be prosecuted primarily by the Federal government and other crimes would be prosecuted by the Federal, State or tribal government depending upon the Indian or non-Indian status of the parties and the status of the land involved. Should retrocessions increase considerably, significant resources would have to be directed to the USAOs in affected districts to handle the additional case load, requiring the hiring of additional Assistant United States Attorneys (AUSAs) and other staff. Moreover, because of the specialization required for Indian Country, new AUSAs would need extensive training, and additional funding would have to be appropriated to pay for such expenses.

Increased retrocessions would also impact Federal law enforcement officers and agencies and the Federal judiciary. Substantial resources would have to be directed to the Federal Bureau of Investigation (FBI) and the Bureau of Indian Affairs, Office of Justice Services in the affected regions as primarily investigative responsibilities currently being handled by State and local agencies would revert back to the Federal law enforcement agencies. The Federal judiciary would also need additional resources to handle the additional caseload stemming from Indian Country; otherwise, retrocession may negatively impact an already heavily burdened judicial system.

Where retrocessions do occur, tribes will need to work with Federal and State law enforcement agencies to ensure a smooth transition and to ensure that adequate federal and tribal resources are available to protect public safety.

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 heighten cooperation between State, tribal and local governments. To ensure that this new grant program does not overlap with the current Community Oriented Policing Services (COPS) Tribal Resources Grant Program, the Department recommends amending Section 202(b)(1) by inserting the following language at the end:

"This program shall be administered through the Department of Justice COPS Office.".

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 (S.L.E.C.)

expands, where appropriate, the ability of tribal officers to make arrests under Federal law. This cross-deputization program is a force multiplier in Indians lands and is an important part of the Department's effort to improve safety and security in Indian Country. Already, the Department has trained well over one hundred officers under the cross-deputization program. The Department supports efforts to expand this effective program, but notes that there is a possibility of increased Federal Tort Claims Act (FTCA) liability. If and when FTCA claims arise, there needs to be coordination with 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 is defined as the ability to both view data and input data. The Department does not oppose provisions to increase tribal access to NCIC.

Sec. 304. Tribal Court Sentencing Authority.

Section 304 expands the authority of tribal courts to sentence offenders to up to three years imprisonment and establishes the authority of tribal courts to direct the transfer of prisoners convicted of crimes in tribal courts to Federal prisons. Both of these provisions are significant changes in the current legal and law enforcement framework.

With regard to expanded tribal sentencing authority, current law allows tribal courts to sentence offenders for up to one year, and increasing that authority to three years effectively grants tribal courts jurisdiction to adjudicate felony convictions. Historically, the division between misdemeanor and felony sentences has come to represent a line demarking much greater scrutiny by Federal courts of the conviction underlying the sentences. In particular, it is at this point in the sentencing spectrum that Federal courts begin to very rigorously review cases in regards to basic protections contained in the U.S. Constitution. Currently, unlike state courts, tribal courts are not required to adhere to all these protections. It is extremely likely that this change in sentencing authority will cause the Federal courts to re-examine the protections available in tribal courts.

The Department raises significant concerns that not all tribal courts currently provide the constitutional protections that Federal courts are likely to require, nor does the current legislative proposal provide for these protections. For instance, the legislation does not indicate whether any appellate system is necessary, whether the tribal courts must be independent from political bodies like a tribal council, or whether the trial counsel must be licensed attorneys. In order to survive constitutional challenges, the proposal at a minimum must specifically mandate that indigent defendants be provided effective assistance of defense counsel. In addition, the vast majority of states require jury trials to consist of twelve-persons for serious crimes; currently, the Indian Civil Rights Act guarantees a jury of only six persons.

Furthermore, the Department strongly opposes creating authority to transfer prisoners convicted in tribal court to Federal facilities. For purposes of maintaining family and community

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 managed by the tribes.

The Bureau of Prisons (BOP) attempts to designate an inmate to the appropriate security level institution that is within 500 miles of his or her release residence. Nevertheless, because of inmate population conditions and facility locations, tribal inmates would almost certainly be more than 500 miles from their homes. Visits by family and friends to these tribal offenders and other contacts with individuals from the community for reentry services would be severely restricted due to the great distance between the BOP institution and their homes. The BOP is currently operating overcapacity and could not adequately and safely incarcerate tribal offenders without a significant allocation of additional resources. System-wide, the BOP is operating at 36 percent above its capacity and there is no expectation that crowding will decrease in the next few years. Crowding is especially significant at high-security institutions (operating at 51 percent above capacity) and medium-security institutions (operating at 45 percent above capacity), where the majority of violent offenders and serious drug offenders are confined. Furthermore, BOP is designed to incarcerate long-term offenders with felony convictions. Since most tribal defendants are currently misdemeanor offenders, the BOP is not well-suited to handle these prisoners.

In addition, the proposed language directs the "United States" to incur the costs involved in the transfer, housing, medical care, rehabilitation, and reentry of transferred offenders. Nevertheless, the proposal does not specify which Federal agency should bear the costs. The BOP maintains a general concern with any legislation that would significantly increase the Federal prison population while the agency's institutions are experiencing such significant crowding. Additionally, any language specifying which Federal agency should bear such costs should be consistent with IHS' commitment to provide care to Indians eligible for IHS-funded services who are incarcerated in tribal detention facilities; and that Indian inmates housed in State or Federal prisons should be treated by the State government or Federal government to the same extent as other non-Indian inmates.

The Department strongly opposes requiring the BOP and tribal courts to enter into any memorandum of agreement (MOA) with statutorily-required conditions. Section 4(C) of the legislation requires that the MOA "shall not affect the jurisdiction, power of self-government, or any other authority of an Indian tribe over the territory or members of the Indian tribe." While the Department understands the need for tribes to maintain certain jurisdictional powers over tribal territory, the Department must oppose the notion of tribal autonomy being exercised over tribal members while they are in BOP custody. 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.

All prisoners transferred into the custody of the BOP are managed pursuant to sound correctional policies related to their custody, care, security, place of incarceration, discipline, reentry preparation, without regard for any special considerations of jurisdiction or sovereignty. Retaining tribal jurisdiction, governance, and authority over tribal prisoners would create problems in inmate management based on the different treatment of offenders in the same

facility. Therefore, the Department recommends striking section (4)(B) from the legislative proposal.

For the above reasons, in sum, the Department therefore cautions that the provision regarding expanded tribal sentencing authority has a number of legal implications that could undermine its effectiveness. Further, the Department strongly opposes the current proposal to house tribal offenders in BOP facilities outlined in Section 304.

Sec. 305. Indian Law and Order Commission.

Section 305 creates a 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 on 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 raises the following 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(e)(4) would allow the Commission to consider "changes to the tribal jails and Federal prison systems." The Commission's jurisdiction and expertise is limited to matter related to Indian Country and it should not be given such a broad grant over the "Federal prison systems" at large. If created, the Department suggests substituting the recommendation with the following language: "modifying and improving tribal jails with particular regard to the implications any modifications would have on Federal correctional and detention systems."

Third, 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 strongly opposes such a broad grant of authority to the Commission, particularly given the separation of power concerns raised by the hybrid nature of the Commission. Information generated by Federal agencies includes sensitive internal deliberative communications, law enforcement matters, and information subject to attorney-client, attorney

work product, and other privileges. The Department suggests amending 305(g)(3)(A) by inserting the following language at the end:

"Notwithstanding this section, the Commission may only secure from a Federal or State agency information which is reasonably related to carrying out this section and the Commission may not secure from a Federal agency internal deliberative communications, information subject to attorney-client privilege, information subject to attorney work-product privilege, or any other materials that such Federal agency deems privileged.".

Fourth, section 305(h)(3) requires that the Attorney General and Secretary of Interior "provide to the Commission reasonable and appropriate office space, supplies and administrative assistance." The Department believes that either the Attorney General or the Secretary of the Interior, not both, should be named in this subsection. The arrangement as currently drafted is unworkable and will create administrative difficulties and confusion both on the part of the federal agencies and the Commission. Because of the historic role of the Department of Interior in Indian affairs, the Department recommends the Secretary of the Interior be designated as the appropriate agency for administrative matters. Accordingly, the Department recommends striking "Attorney General and" from section 305(h)(3).

Fifth, section 305(i)(1)(A) states that the Commission may directly "select" researchers and experts. The status of these Commission-selected researchers and experts is not clear. It appears that these researchers and experts could be selected on an individual basis, which would mean they would be personal services contractors. Under Federal acquisition regulations, agencies are generally barred from awarding personal services contracts unless such contracts are specifically authorized by statute (e.g., 5 U.S.C. 3109, which allows experts and consultants to be appointed). (See 48 CFR 37.104.) The regulations state that the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by civil service laws, since obtaining personal services by contract would circumvent civil service laws. Thus, express Congressional authorization for personal services contracts is required.

If Congress intends to allow the Commission to employ personal services contractors, we recommend the bill be revised to expressly give that authority. We note that personal services contractors are not considered employees for the purpose of title 5 laws governing Federal employment, except as specifically provided in law. However, if there is an employer-employee relationship, a personal services contractor could be covered by the Fair Labor Standards Act, the Family and Medical Leave Act, and the Federal Insurance Contributions Act.

Alternatively, section 305 (i)(1) could contemplate NIJ contracting with researchers and experts selected by the Commission to provide funding in exchange for their services. Nevertheless, the type of arrangement described does not allow NIJ to assist with making research decisions, managing the grants to ensure that progress and financial reports are being submitted, or ensuring the scientific integrity of the research is being maintained. The Department recommends striking NIJ role in this area or broadening NIJ's responsibilities to include the aforementioned activities. The Department suggests amending 305(i)(1)(A) by adding the following sentence at the end:

"The officer specified in subsection (i)(1)(B) shall, on a reimbursable basis, contract with researchers and experts selected by the Commission for the provision of their services."

Furthermore, in section 305(i)(2), the Department suggest inserting ", consistent with subsection (i)(1)(B)," between "Commission" and "to enter" to maintain consistency with our change in 305(i)(1)(A).

Finally, section 305(l) specifies the conditions under which the Commission shall be terminated. The Department recommends inserting the following before the end of the sentence: "and any property of the Commission thereafter shall be the property of the Agency whose head is specified in subsection (h)(3)". This will clarify ownership of the Commission's property following the termination of the Commission. Additionally, section 305(l) refers to a report under subsection (c)(3), but the correct reference appears to be subsection (f).

In conclusion, the Department raises concerns that: 1) the commission's structure neither fully executive or legislative erodes the separation of powers and blurs clear lines of government accountability, 2) the scope of the commission ought to be appropriately narrowed to focusing on modifying and improving tribal jails and how changes would impact Federal correctional and detention systems, 3) the scope of information that the commission could request needs to be appropriately narrowed to reflect the scope of its work, 4) that responsibility for office space, supplies and administrative assistance needs to be clearly delegated to one agency, and 5) as drafted the Commission may not be able to legally hire researchers and experts as contemplated by Congress.

The Department suggests instead that the Congress include a Sense of the Congress requiring the Secretary of Interior to bring together a group of experts to discuss the problems facing the tribal criminal justice system and to recommend some possible solutions to the problems.

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 Department responsibilities under the Indian Alcohol and Substance Abuse Act. The Department offers the following technical amendments. On page 63, line 4, "Affairs" should be replaced with "Education" as the new Bureau of Indian Education now runs schools in Indian Country. On page 64, line 9, insert "and Immigration and Customs Enforcement" after "Protection".

The Department would also note that the language to establish "a grade of not less than GS-15" is in direct contrast to the principle of equal pay for substantially equal work, and employees being paid in proportion to the difficulty, responsibility and qualifications requirements of the work performed as provided for in section 5101 of title 5, United States Code. We recommend this language be amended to read as follows:

"(ii) at a grade, as provided for in section 5104 of title 5, consistent with the responsibilities and duties assigned to the position and with the qualifications established for such positions."

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 Acts. The Department supports the reauthorization of these programs.

Sec. 403. Tribal Resources Grant Program.

The Department generally supports the reauthorization of the Tribal Resources Grant Program (TRGP), as administered by the Department's COPS. Nevertheless, the Department offers the following comments.

Section 403(1)(H) (page 68, line 21) adds a new purpose area for the TRGP. New paragraph 17 would allow tribal grantees to pass TRGP funds to the BIA to hire BIA officers. This provision is not tenable because it directs COPS funds to BIA, which results in Department grant funds augmenting another Federal agency's appropriations. This is not necessary because the TRGP currently permits tribal governments to use COPS grant funds to hire local tribal officers, regardless of whether they receive other BIA law enforcement services or funds. DOJ suggests striking this new section as the intended purpose is allowable under current authority.

Section 403(2)(C) would require the Attorney General to base waivers of the local matching funds requirement on a demonstration of "financial hardship." Under current law, the Attorney General is provided general waiver authority with no financial hardship requirement. This change would allow the waiver of the local match requirements for other law enforcement grants for any reason, but would only allow waiver for tribes under the TRGP if financial distress is demonstrated. The Department finds this incongruity ineffective and unnecessary and suggests striking this section.

Furthermore, Section 403(4) in paragraph (j)(2), regarding "Priority for Funding," requires that crime rates be considered for applications for funding under TRGP. COPS is concerned that reliable and uniform crime data does not currently exist in most tribal jurisdictions. Until there is uniformity in the collection and analysis of data relating to crime in Indian Country, this requirement will be challenging to implement. Therefore, DOJ suggests striking this section.

Finally, Section 403(4) in paragraph (j)(2) also requires that "staffing needs" be considered for applications for funding under the TRGP. This information is not collected in a uniform way, and will likely be reported to COPS in an inconsistent manner and thus be difficult to evaluate effectively and uniformly across numerous applications. Consequently, DOJ suggests striking this language.

Sec. 404. Tribal Jails Program.

Section 404 reserves $35 million of tribal jails funds for the purposes of building, staffing, and maintaining tribal jails and alternatives to incarceration and for the construction of

regional detention centers for long-term incarceration where deemed appropriate by a consortium of tribes. While the BIA continues to serve as the primary agency with responsibility for funding and maintaining tribal jails, the Department's Bureau of Justice Assistance (BJA) currently administers the Tribal Correctional Facilities Planning and Construction Program. Funds are available to tribes under this program to plan and build warranted jail facilities. Through the program, BJA also has been providing grants and technical assistance to support a regional approach to the demands of long-term incarceration. The Department welcomes these proposals to improve and supplement its existing programs.

Sec. 405. Tribal Probation Office Liaison Program.

Section 405 authorizes the Administrative Office of U.S. Courts (AO) to appoint assistant parole or probation officers to monitor and provide services to Federal prisoners residing in Indian Country. While the AO should maintain this historic role of tribal parole and probation, the Department would also recommend that the current tribal corrections related programs, specifically the Tribal Correctional Facilities Planning and Construction Program, be enhanced to provide BJA with the ability to assist tribes with tribal non-facility related corrections needs, such as establishing an effective and culturally-appropriate probation and/or reentry program. The Department suggests amending section 405 by inserting the following language at the end of line 25:

"The Bureau of Justice Assistance shall have the ability to assist tribes with tribal non-facility-related corrections needs."

Sec. 406. Tribal Youth Program.

Section 406 reauthorizes and expands the Tribal Youth Program to include programs "to support and enhance tribal juvenile justice systems" and "to encourage accountability of Indian tribal governments with respect to juvenile delinquency responses and prevention. The Tribal Youth Program (TYP) effectively deals with the important issues dealing with tribal youth. The program's focus on delinquency prevention and truancy touches on all issues pertaining to children such as education, child abuse and neglect, and mental health. The Department welcomes this proposal to improve the existing TYP program.

Sec. 501. Tracking of Crimes Committed in Indian Country.

The Department supports the goal of improving tribal crime and arrest data collection. Law enforcement in Indian Country is complex and includes local, State, tribal and Federal law enforcement agencies such as BIA and FBI. Prosecution of offenders in Indian Country can involve the USAO, in conjunction with tribal and State law enforcement agencies. Indian Country crime data is usually very limited and not comprehensive. The Department is already focusing on ways to improve crime data collection. For example, the Bureau of Justice Statistics (BJS) and the FBI have already collaborated in the development and implementation of web-based technologies for displaying and analyzing Uniform Criminal Reporting (UCR) and Incident-Based Reporting System (NIBRS) data. Data supplied by additional reporting entities could be incorporated. Furthermore, through the allocation of limited discretionary funds, BJS has worked with tribal, State, and Federal agencies to develop, implement, and or improve tribal data collection systems.

The Department offers the following technical amendments. First, in Subsection 501(b)(2)(B), page 79, line 25, insert "Deputy" before "Director" as the Deputy Director runs the intended department. Second, in same subsection, page 80, line 1, replace "Law Enforcement" with "Justice" as the office was renamed the "Office of Justice Services" in 2005. Third, in Subsection 501(b)(5), the Department recommends (1) extending the deadline for the first report to Congress to at least two years after enactment to allow one year for the design and implementation of the data collection system and one year for actual data collection; and (2) including an authorization for appropriations of $1.0 million to meet the reporting mandate. The reporting mandate requires activities such as the build out and maintenance of an electronic system to transfer data between the tribes and the Federal partners, data processing, analyses, and report development.

Sec. 502. Grants to Improve Tribal Data Collection Systems.

Section 502 establishes a grant program to improve tribal data collection systems through the BIA's Office of Justice Services. The Department already administers a program with the goal of improving the completeness, quality, and accessibility of tribal criminal history records. The BJS has carried out the Tribal Criminal History Record Improvement Program (T-CHRIP) since 2004. T-CHRIP supports federally-recognized tribes to promote justice related data sharing across tribal, State, and national criminal records systems. The program has awarded about $3 million to tribal justice agencies of 12 tribes in six states to improve the quality of, access to, and ability of tribes to share criminal history records (Fiscal Years 2004-2007). The activities funded include: record automation, electronic fingerprinting equipment, and training and technical assistance.

The Department suggests amending section 502 by adding the following language after line 21:

"(3) APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as may be necessary for fiscal years 2009 through 2013.

"(4) USE OF GRANT FUNDS.—Grant funds which are appropriated through this section may be used by those relevant Department offices for the planning, design, and implementation of tribal data collection systems.".

Sec. 503. Criminal History Record Improvement Program.

The Department supports measures to improve the collection of criminal history records.

Sec. 601. Prisoner release and reentry.

Section 601(1) includes amendments to 18 U.S.C. § 4042 that adds "tribal" governments to the obligation of the BOP to provide technical assistance to State and local governments in the improvement of their correctional systems. The Department believes that tribal jurisdictions would be better served through technical assistance from another entity such as the National Institute of Corrections (NIC). Part of NIC's statutory mandate is to provide assistance to Federal, State, and local governments and other public and private agencies, institutions, and

organizations in the improvement of their correctional programs. The Department recommends striking Section 601(1) and replacing it with the following:

Section 4352 of title 18, United States Code, is amended --

(1) in subsection (a)(4) by inserting "tribal," after "State,";
(2) in subsection (a)(6) by inserting ", tribal," after "State";
(3) in subsection (a)(8) by inserting "tribal," after "State,"; and
(4) in subsection (a)(12) by inserting ", tribal," after "State".

Section 4353 of title 18, United States Code, is amended to read as follows:

"§ 4353. Authorization of appropriations

There are authorized to be appropriated to the Bureau of Prisons for each of fiscal years 2009 through 2013 such sums as may be necessary to carry out this Chapter."

The Department strongly supports the addition of tribal jurisdictions to the BOP's requirements to notify State and local law enforcement officials of the release of inmates convicted of violent crimes, drug offenses, and sex offenses, and to notify sex offender registry officials of the release of a sex offender and advise releasing sex offenders of their duty to register.

Nevertheless, the Department finds the current drafting of Section 601 problematic because BOP cannot itself carry out the initial registration of the sex offenders it releases – which would entail obtaining an extensive list of information relating to the sex offender and entering the information into a sex offender registry – nor can it affect 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) recognized the difficulty for inmates to register in sex offender registries due to their confinement and the difficulty for prison personnel to assist in effectuating such registration.

The existing procedures under SORNA 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. Nevertheless, Section 601(B) requires the BOP, with respect to released sex offenders who will be residing in Indian country, to "ensure that the person is registered with the law enforcement office of each appropriate jurisdiction before release from Federal custody." Such a proposal would require unnecessary and burdensome disparate treatment of prisoners intending to reside in Indian County after release from those prisoners intending to reside elsewhere after release. This provision would be untenable to implement.

Furthermore, the BOP would be able to improve in this area if tribal jurisdictions communicated with the BOP regarding their chief law enforcement officers and their sex offender registry contact information. The Department suggests requiring the tribes to provide this information to BOP.

The Department recommends replacing the language from page 83, line 22, to page 84, line 12, with the following:

> "(ii) PERSONS RESIDING IN INDIAN COUNTRY. ---- For a person described in paragraph (3) the expected place of residence of whom is potentially located in Indian country, the Director of the Bureau of Prisons or the Director of the Administrative Office of the United States Courts, as appropriate, shall make all reasonable and necessary efforts to determine whether the residence of the person is located in Indian country. Tribal jurisdictions shall make all reasonable and necessary efforts to communicate to the Bureau of Prisons and the Administrative Office of the United States Courts, through the Bureau of Indian Affairs, the chief law enforcement officer of the tribal jurisdiction and the agency responsible for the maintenance of sex offender registration information for the tribal jurisdiction."

Sec. 602. Domestic and Sexual Violent Offense Training.

Section 602 includes training for domestic and sexual violence for tribal and BIA law enforcement. The Department supports adequate family violence training for tribal and BIA law enforcement officers. The Office on Violence Against Women currently provides this type of training though its tribal consultants, and the USAOs provide such training as well. Based on this experience, the Department will continue to offer its expertise on improving tribal law enforcement on family violence issues. To this end, the Department suggests amending section 602 by inserting the following language at the end of line 23:

"This training shall be developed and delivered in partnership with tribal domestic violence and sexual assault coalitions and individuals or organizations who have an expert knowledge and understanding of the nature and dynamics of domestic violence and sexual assault committed against American Indian and Alaska Native women, as well as a demonstrated history of providing effective training on violence against American Indian and Alaska Native women to Indian country criminal justice professionals. Such training shall include—

(A) pre-service training at tribal and law enforcement academies;
(B) annual in-service training; and
(C) Training in specific courses, including but not limited to:.
(1) victim witness awareness;
(2) handling abnormal behavior;
(3) anti-social behavior;
(4) conflict management;
(5) verbal judo;
(6) conflict management skills;
(7) behavioral science;
(8) patrol skills;
(9) cross cultural communication;
(10) community policing in Indian country;
(11) communications and interviewing;
(12) Indian country criminal jurisdiction;
(13) Indian Civil Rights Act;

(14) Indian Child Welfare Act;
(15) chapter 109A Felonies;
(16) Indian Country Juvenile Law Act;
(17) domestic violence elder abuse
(18) domestic violence dynamics in Indian country;
(19) domestic violence sexual assault;
(20) domestic violence child abuse;
(21) domestic violence officer and victim safety in Indian country;
(22) domestic violence strangulation;
(23) domestic violence stalking;
(24) domestic violence evidence based prosecution; and
(25) missing and exploited children.".

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

Section 603 provides that the Director of Indian Health Services and (Deputy) Director of BIA Law Enforcement shall approve or disapprove, in writing, any request or subpoena of their employees regarding their duties to provide testimony in a deposition, trial, or other similar proceeding. The Department strongly opposes this provision. This Section's broad language may have the effect of preventing the prosecution of sexual assault cases in federal court. No other federal agency has authority to refuse to testify before a grand jury or trial jury. The Department opposes the section as currently drafted and suggests clarifying that this section only applies to testimony in a tribal court. Additionally, this provision is also partly duplicative of federal agencies' existing "Touhy" regulations regarding requests for testimony in private litigation and may conflict with those regulations, to the extent section 603 reaches cases where a federal agency is a party.

Thank you for the consideration of our views. 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,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Lisa Murkowski
Vice Chairman