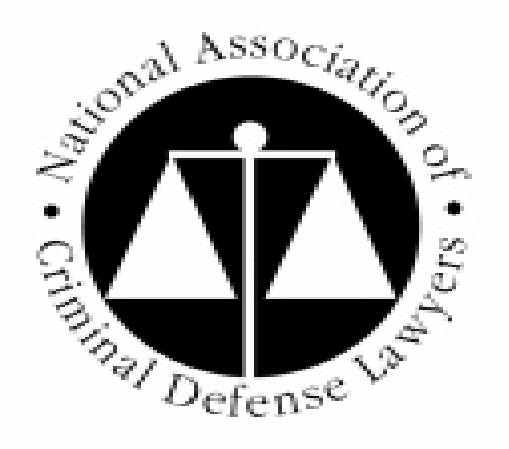

Written Statement of
Tova Indritz
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Chair, Native American Justice Committee
of the National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 1924
The "Tribal Law and Order Act of 2009"

December 10, 2009

Mr. Chairman, Mr. Gohmert, and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and often neglected issue of tribal justice. My name is Tova Indritz. I am a criminal defense lawyer in Albuquerque, New Mexico. I graduated from Yale Law School in 1975, and after one year of clerking for a judge here in Washington, DC, I have been a criminal defense lawyer my entire legal career. I was in the office of the Federal Public Defender for New Mexico for 18 years, 13 of which I headed the office. Since 1995 I have been in private practice, where I represent persons accused of crime in trials, appeals, and post-conviction petitions. I practice in federal, state, and Indian tribal courts. I am the chair of NACDL's Native American Justice Committee.

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's over 11,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

My testimony is also endorsed by the National Association of Federal Defenders and by the New Mexico Criminal Defense Lawyers Association.

I. NATIVE AMERICANS FACING IMPRISONMENT IN THE UNITED STATES SHOULD BE ENTITLED TO THE RIGHT TO COUNSEL, THE RIGHT TO APPOINTED COUNSEL IF THE ACCUSED CANNOT AFFORD TO HIRE A LAWYER, AND DUE PROCESS.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to counsel, Johnson v. Zerbst, 304 U.S. 458 (1938), and applies that right to state court trials. Gideon v. Wainwright, 372 U.S. 335 (1963). This is a right guaranteed to all U.S. citizens, including Native Americans, who are, after all, U.S. citizens, and also to non- U.S. citizens who are charged with crimes and face the loss of their liberty. It equally applies in the misdemeanor context, if a person faces the possibility of imprisonment. Argersinger v. Hamlin, 407 U.S. 25 (1972).

Yet the Indian Civil Rights Act does not extend to Indians in tribal courts the protections of the Sixth Amendment, nor of the 1963 Supreme Court decision in Gideon v. Wainwright, which guarantees the right to a lawyer to persons unable to afford counsel. Rather, that Act of Congress provides that "No Indian tribe in exercising powers of self-government shall … deny to any person in a criminal proceeding the right … at his own expense to have the assistance of counsel for his defense." 25 U.S.C. §1302(6). Tribal courts are not required to provide public defenders or appointed counsel to those defendants who cannot afford to hire a lawyer.

As you know, currently the Indian Civil Rights Act limits tribes to imposing sentences of up to one year and a fine of up to $5,000, 25 U.S.C. §1302(7). This bill contemplates raising that allowable penalty to three years imprisonment and a fine of up to $15,000, section 304 of HR 1924.

We oppose that increase to three years, unless and until persons prosecuted in tribal courts have the same rights to counsel, appointed counsel, and all aspects of due process as are afforded to other persons in the United States. The Sixth Amendment to the Constitution should not stop at the reservation's edge.

As documented in NACDL's recent report "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," due to lack of funding, unethical caseloads, lack of training and standards, and the outright denial of appointed counsel, "misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution." All of these problems are greatly magnified within the tribal court systems.

The House version of H.R. 1924 provides that if the criminal trial subjects a defendant to more than one year imprisonment for any single offense, the tribe may not deny the assistance of a defense attorney. That is a good start, but there are several problems that NACDL asks you to address:

A. <u>H.R. 1924 does not clearly set out a right to appointed counsel; it should do so.</u>

The Senate version of this bill states that "if the defendant is not able to afford defense counsel, the tribal government shall provide one at the tribal government's expense". We urge you to adopt that language also, and to make clear that a person facing imprisonment, indeed, any length of loss of liberty, has the right to appointed counsel if he or she cannot afford counsel.

While we recognize and respect the importance of tribal sovereignty, and the right of tribes to follow traditional methods of dispute resolution, our position is this: If a tribe utilizes its court system for restorative justice, to mediate between parties, to accomplish making the parties whole such as through reconciliation, restoration of harmony among neighbors, and restitution, as is done in a Peacemaker court, then counsel may not be necessary. But when a tribe chooses the path of incarceration, or potential incarceration, then the Sixth Amendment must apply to all persons. Federal and State courts have long been able to balance the need for social order and the rule of law to protect society with the rights of individuals to counsel and due process, and we believe that Indian tribes can also do that.

As the U.S. Supreme Court held over 37 years ago, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair

trial unless counsel is provided for him. This seems to us to be an obvious truth." Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 31, quoting Powell v. Alabama, 287 U.S. 45, at 68-69 (1932).

NACDL urges Congress to guarantee Native Americans charged in tribal court who face any term of imprisonment the right to counsel, and the right to appointed counsel at the expense of the tribe if the person cannot afford counsel, and to include that language in this bill.

B. H.R. 1924 includes no funds earmarked for tribes to provide appointed counsel; the bill should specifically authorize funds for appointed counsel in tribal prosecutions.

According to the U.S. Census Bureau, 24.3 percent of our 2.1 million Native Americans live at or below the federal poverty level. For the 400,000 or so Indians who live on reservations, where opportunities are few and unemployment high, the percentage of persons living in poverty is much higher. The majority of Native American defendants charged in tribal court cannot afford to hire an attorney. As one tribal court judge complained to the Wall Street Journal, "99.9 percent" of the defendants in his court cannot afford a lawyer. These individuals must defend themselves against a trained prosecutor with a better education, more resources, and far more courtroom experience, and more importantly, they face a real loss of liberty through incarceration.

While Congress provides some money for tribal judges and prosecutors, year after year, poor defendants often face the judge and the prosecutor, and potential jail sentences, completely alone, with no champion to defend them.

Some tribes have used their own funds to establish full-time, part-time, or contract public defenders. A lone public defender can only represent one defendant in a case with multiple defendants, and sometimes there is no provision for counsel for the other accused people. Some tribes require lawyers wanting to appear in tribal court on civil cases to accept criminal defense appointments, usually without compensation. Other tribes use non-lawyer advocates or law school clinic students to represent the accused. But the majority of tribes with criminal courts have no funds and no provision at all for counsel for the accused.

In New Mexico, where I live, none of the 19 Pueblo tribes has a public defender; one formerly had a public defender who was a young lawyer, but that Pueblo fired both their lawyer-prosecutor and their lawyer-public defender at the same time several years ago. One of the two Apache tribes has a public defender. The Navajo Nation, the largest tribe in the US, has a small public defender office with only two lawyers and four paraprofessional tribal advocates; together they represent less than 10% of the Navajos charged in eleven tribal courts scattered across a reservation that spans three States and is the size of West Virginia.

Congress can remedy this injustice by balancing distribution of resources among the judges, the prosecutors, and defender services. Funding only two prongs imbalances the system – a stool cannot stand on two legs. Congress should provide in this bill funding specifically for the defense of Native Americans facing incarceration in Indian tribal court prosecutions when those defendants cannot afford to hire counsel on their own.

Congress has codified its past formal findings that "the provision of adequate ... legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." Yet Congress has never allocated funds specifically for representation of defendants in tribal criminal cases.

As recently as November 16, 2009, Attorney General Holder described in a speech to the Brennan Center that deficiencies in indigent defense are to him "an issue of personal importance and national conscience". He stated ,"Ours is an adversarial system of justice -- it requires lawyers on both sides who effectively represent their client's interests, whether it's the government or the accused. When defense counsel are handicapped by lack of training, time, and resources -- or when they're just not there when they should be -- we rightfully begin to doubt the process and we start to question the results. We start to wonder: Is justice being done? Is justice being served?" NACDL agrees with Attorney General Holder on that. He referred to "the right to have truly effective defense counsel" as the "most basic constitutional protection ", and again, we agree with him on that as well.

Attorney General Holder also said "I want to emphasize education, because I believe that if more Americans knew more about how some of their fellow citizens experience the criminal justice system, they would be shocked and angered." NACDL believes that if more Americans knew that First Americans could be imprisoned without ever having the right to appointed counsel, they would also be shocked and angered.

Although this bill provides for $35 million per year for each of fiscal years 2010 through 2014 for prisons (see page 79, section 404), and although money might be usable for defense counsel (page 74, 76), there is not one cent dedicated for the purpose of defense counsel.

We urge this committee to add into this bill funding earmarked for the provision of defense services. This could be set up similar to the Criminal Justice Act, 18 U.S.C. §3006A, which allows for either the establishment of public defender offices, or a legal aid agency with its own board of directors, or a method to appoint individual lawyers who would be paid hourly, at each tribe chooses. Enactment of the requirement for defense counsel should carry with it funding explicitly earmarked for not only defense counsel but also such defense services as investigators, paralegals, office staff, expert witnesses, training, and support. Providing federal funds so that tribes can hire public defenders or contract counsel to defend the accused who cannot afford to hire their own, along with necessary ancillary defense services, will, as in federal and state courts, protect individual liberties, while still allowing the tribes to shape their own laws and judicial processes and protect public safety on tribal land.

Funding for defense counsel is a matter of basic fairness and equality. Native Americans charged with crime and facing incarceration are deserving of no less protection under the U.S. Constitution than are other persons in the United States.

C. The qualifications for appointed counsel must require lawyers who have graduated from law school and are licenced to practice law in a State or the District of Columbia.

The right to counsel requires the effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

> The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

Some tribes allow persons who have not graduated from law school, or even from college, and sometimes who have not even graduated from high school, who are in effect paralegals, to be members of the tribal bar. While we do not express any view as to whether this is appropriate in the civil or mediation context, NACDL urges that the bill require defense lawyers to have graduated from law school and become a member of the bar of any State or the District of Columbia.

The use of non-lawyer paralegal tribal advocates leads to a question of what happens, for example, when a defendant has a non-lawyer tribal advocate rather than a "real" lawyer for counsel. See for example, United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussing whether a statement made by a defendant should be suppressed in this context, and noting:

> . . . several courts have determined that representation by an individual who is not a licensed attorney is a per se violation of the Sixth Amendment right to effective counsel. See United States v. O'Neil, 118 F.3d 65, 70-71 (2d Cir. 1997) (stating that it is a per se violation of the Sixth Amendment "where the attorney was not licensed to practice law because he failed to satisfy the substantive requirements of admission to the bar"); United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986) (stating that an individual who had never been admitted to practice law and thus "who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment"); Solina v. United States, 709 F.2d 160, 168-69 (2d Cir. 1983) (finding the graduate of an accredited law school who had failed the New York bar examination twice and had not been admitted to any other bar provided ineffective counsel under the Sixth Amendment); United States v. Myles, 10 F. Supp. 2d 31, 35 (D.D.C. 1998) (noting the "per se rule [under the Sixth Amendment] applies where the defendant is represented by an individual who has never been admitted to any court's bar"); and United States v. Dumas, 796 F. Supp. 42, 46 (D. Mass. 1992) (determining that "if a defendant is convicted while represented by someone who has never been admitted to any court's bar, that defendant is deemed to have been denied counsel as a matter of law"). Thus, if this court found the appointment of lay counsel to trigger the protections afforded by the appointment of "counsel" within the meaning of the Sixth Amendment, it would be fundamentally inconsistent with the general rule that an individual must be a licensed professional attorney before he can be considered effective counsel under the Sixth Amendment.
>
> Id., footnote 1 at 16-18.

> There is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (stating "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects . . . [r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients . . . in court."). The United States Supreme Court did not extend the Sixth Amendment to encompass the right to be represented in court by a layman. Id. Additionally, every circuit which has considered the question, including the Eighth Circuit, has held there is no right to representation by persons who are not qualified attorneys. See Pilla v. American Bar Ass'n, 542 F.2d 56, 58-59 (8th Cir. 1976) (affirming the district court opinion which determined that individuals in civil and criminal cases do not have a constitutional right to be represented by lay counsel). See also United States v. Anderson, 577 F.2d 258, 261 (5th Cir. 1978) (stating "[t]here is no sixth amendment right to be represented by a non-attorney"); United States v. Scott, 521 F.2d 1188, 1191-92 (9th Cir. 1975) (determining that the word "counsel" in the Sixth Amendment guaranteeing an accused the right to have the assistance of counsel for his defense does not include friends or advisors of an accused who declines an attorney and represents himself); United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976) (stating " '[c]ounsel' as referred to in the Sixth Amendment does not include a lay person, rather 'counsel' refers to a person authorized to the practice of law"); and United States v. Jordan, 508 F.2d 750, 753 (7th Cir. 1975) (stating "[t]he district court is not obligated to appoint counsel of defendant's choice where the chosen attorney is not admitted to practice"). 1

Id. at 15-16. See also United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

Even in those tribal courts where the tribal prosecutor is not a law school graduate, the individual who faces loss of liberty and consequent inability to support his or her family needs a law-trained defender.

We urge this committee to amend H.R. 1924 to provide that "a defense lawyer is defined as an attorney licensed to practice law by any State of the United States or the District of Columbia."

D. Due process must be provided in tribal courts.

Currently, the Indian Civil Rights Act requires that no tribe "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law", 25 U.S.C. §1302 (8). Yet without defense lawyers, and the

right to appointed counsel at the expense of the tribe, and with non-lawyer judges, and non-lawyer tribal advocates, tribes are now sentencing Native Americans to terms of imprisonment without due process.

I represented in a tribal court a young Native American woman who had been employed by an Indian tribe and was alleged to have taken tribal funds by taking checks that should have gone to other people or companies and depositing those funds into her own bank account or making "direct deposit" transfers of tribal money to her own account. In fact, before I became her lawyer she had plead guilty in tribal court to a charge that was broad and general and covered "direct deposit" and also "checks", with no allegation of any specific check on any specific date; the tribe sent her to serve six months in jail. She paid restitution in full. The plea agreement included language that "if other discrepancies are found via audit, those will be treated separately from this case". While she was in jail serving that sentence, she voluntarily advised the tribe of a specific taking that had not been previously presented to her and was not found by audit. After her release from the six month sentence, the tribe then charged her with three counts regarding that specific additional taking on a date which preceded her previous plea and was encompassed within it, and she hired me to represent her.

One of the charges against her was supported by a tribal ordinance. The other two charges were not defined or described by any tribal law, ordinance, or regulation, but were being prosecuted nonetheless.

If the case were to be tried to a jury, that jury would consist of the tribal council. The tribal council included only men; no women are allowed to be on the tribal council. Once appointed to the tribal council, a man serves for the rest of his life. There were at that time at least 40 members of the tribal council. I called the opposing counsel to ask whether, if we had a jury trial, the jury would have to be unanimous. He replied, "That's a good question. Let me find out and call you back." In other words, there were no rules of procedure; the rules were being made up as we went along.

The man initially appointed to be the judge was the previous year's tribal governor, who was the person who had fired my client for this same conduct. He was not a lawyer, and in fact, had minimal education. This was a fairly small tribe, which over the years had evolved into two political "factions"; my client's family came from one "faction" and this appointed judge from the other "faction".

After I filed a number of written motions, the tribal council voted to hire an outside person, a law school graduate, to be the judge for this case only.

At the hearing on my motions, there were times when I would object to testimony, and the Judge would rule "sustained" or "overruled"; since there were no rules of evidence that applied, the legal basis for either my objections or his rulings was unclear.

During the course of negotiations, the prosecutor reminded me that, as this particular tribe had elected not to participate in a multi-tribal appeal process, there was no appeal from the judge's ruling, for either side.

However, what bothered me most about this case was that a few months after the judge had dismissed the charges, the tribe chose to retaliate against one of my witnesses. This witness was a former Governor of the tribe, a full-blooded member of the tribe who had lived on tribal land all of his life. The tribe was upset that he testified for the defendant, who was a relative of his, and they punished him by banning him from tribal land. This meant that he lost his job on tribal land, and had to leave his home and family. What kind of court system will this create, when others who might be witnesses in the future know that if they testify for the accused, they risk their home, livelihood, and all the connections they hold dear? If this retaliation had occurred in a federal or state court, I could have immediately gone to the judge to rectify it, but there was no remedy in the tribal context.

In another case, I represented a Native American man in a different tribal court. Originally the FBI had investigated the case, but after a detailed and lengthy consideration, the U.S. Attorney determined that there was not sufficient evidence to prosecute my client. A few weeks later, my client called me and said he had to appear in tribal court to face charges. These tribal charges arose out of the same event, on the same night, as the events that the federal government had investigated and declined to prosecute. I told my client that I did not want to meet him at the tribal courthouse, but somewhere else, and we settled on meeting at a gas station. From there we went together to the tribal court. The FBI agent was quite well aware that I was this man's lawyer, as the FBI agent had come to my office to execute the federal search warrant for my client's head hair. But when we got to the tribal court, literally standing on the courthouse steps were two FBI agents and a Bureau of Indian Affairs police officer. They were quite disappointed to see me, since they had planned to interview my client when he appeared for the tribal court arraignment. Their pretext that this was a "different" case was an effort to end-run my client's right to counsel. And then they had the temerity to argue that they should not have to turn over the results of their investigation into the incident, because it was a "different" case from the federal investigation.

In small tribes, the Judge knows or is related to everyone who will come before him or her. I recall when I was a young and inexperienced lawyer asking a Native American client if he was related to a particular witness in our case. He looked at me as if that was the silliest question anyone ever asked him, and said, "Yes, of course; I'm related to everyone in the Pueblo." In one case I had in a tribal court, the alleged victim was the abusive ex-boyfriend of the Judge's sister; the Judge declined to find he had any conflict of interest.

E. The provision of counsel, or failure to provide counsel, and the provision of due process, or the failure to provide due process in tribal court often impacts the rights of Native Americans later charged with serious felonies in federal or state court.

Cases that start out in tribal court are sometimes then referred to federal court or state court. Deprivations of counsel, of qualified counsel, and of due process that occur in the tribal court process then spill over into the federal or state case. Frequently in the case of a serious crime in Indian Country, especially where the tribal lands are isolated or geographically distant from a large city, the tribal police are the first to respond and the FBI doesn't arrive until days, weeks, or months later. When the tribal police encounter a serious situation, such as a dead body, an allegation of rape or child abuse, they need to take immediate action but they already know that the case will become a felony charge in state or federal court. Yet they still must adhere to tribal processes, and give their modified Miranda warning that "you have a right to counsel if you can afford a lawyer", or they simply do not provide counsel at all.

Thus, for example, a Native American who is arrested by tribal police on a tribal charge of "assault", when there was a mutual fight that resulted in a death, will be initially charged in tribal court with assault, but later charged with a murder or manslaughter in federal or state court. How matters are handled at the initial steps can permanently impact the defendant's rights in terms of interviews without counsel, failure to promptly present the defendant to a judge, searches, collection and preservation of evidence, and every aspect of the case with the more serious penalty. See, for example, the cases of United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussed above, and United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

But a far more egregious case of this problem of denial of Sixth Amendment rights in a tribal context where the case is then to be transferred to federal court is United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007), cert. den. Mitchell v. United States, 128 S. Ct. 2902 (2008). The FBI manipulated the tribal court system's lack of counsel to question a defendant detained for 25 days without any counsel or any arraignment to secure multiple confessions that led to a federal death sentence. In Mitchell, the Ninth Circuit affirmed, 2 to 1, the federal death sentence on a Navajo who was convicted of murder of two Navajos on Navajo land. Despite the tribe having not opted-in to the federal death penalty for murders of Indians on Indian land, and the Navajo Nation's stated opposition to the death penalty on religious and cultural grounds, the federal prosecutors chose to prosecute a 20-year old Navajo with no prior criminal record under a law of general jurisdiction (carjacking resulting in death) to obtain the death penalty.

Mr. Mitchell remained in tribal custody from November 4 to November 29, 2001, fully 25 days, with no counsel appointed and no arraignment in any court (tribal or federal). Indeed, the Assistant US Attorney consulted by the FBI thought there was insufficient evidence for an arrest warrant, but suggested getting the tribe to arrest, based on the AUSA's

supposition that the Navajo Nation would have a lesser standard for an arrest. And then the FBI took advantage of the tribal custody and lack of counsel to interview Mitchell multiple times, and take a polygraph, over those 25 days before taking him into federal custody (and again interviewed him on the way to the federal courthouse). The problem of failing to appoint counsel, in a circumstance when everyone involved knew there was a homicide and therefore a federal prosecution forthcoming, and no real likelihood of tribal prosecution, illustrates yet another reason why defendants in tribal court need appointed counsel. For Lezmond Mitchell the lack of appointed counsel in tribal court is a matter with life or death consequence.

F. Consecutive sentences for multiple offense counts for a single course of conduct currently result in sentences longer than one year, without counsel; this should be prohibited by Congress.

Some tribes "stack" multiple uncounseled misdemeanor sentences to impose multi-year sentences without counsel. See, for example, a case from the Pascua Yaqui Court of Appeals, Pascua Yaqui Tribe v. Beatrice Miranda, No. CA 08-015, at 21-26, decided March 29, 2009, attached hereto, and Fort Peck Assiniboine and Sioux Tribes v. Marvin Bull Chief, Sr., Appeal No. 062, May 31, 1989, www.tribal-institute.org/opinions/1989.NAFP.0000006.htm. For example, it is not uncommon for indigent Indians in Arizona tribal courts to be sentenced to four or five years of imprisonment, all without having had appointed counsel, even where the individuals have requested the appointment of an attorney.

A single event, such as an assault, can result in prosecution for multiple offense counts. Thus, a person charged with multiple offenses arising out of a single course of conduct can now face multiple one-year consecutive sentences without having any counsel at all. To correct this problem, NACDL recommends changing the language "any single offense" in Section 304(b)(1) to "a single course of conduct". This would, in effect, codify the interpretation of the phrase "any one offense" in 25 U.S.C. §1302(7) adopted by the District Court for the District of Minnesota in Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005).

G. Tribal judges who can impose expanded sentences should also be required to be lawyers who are members of a bar of any State or the District of Columbia.

The bill requires tribal judges to be "licenced to practice law in any jurisdiction". For the same reasons that counsel should be a "real lawyer", discussed above, when the penalties are as high as are contemplated in this bill, judges who have the capacity to imprison people should be required to be a member of a bar of "any State of the United States or the District of Columbia", not just a member of a tribal bar that does not require graduation from law school.

II. NACDL OPPOSES INCREASING THE TRIBAL COURT PENALTY TO IMPRISONMENT OF UP TO THREE YEARS.

For reasons detailed in Point I above, because most tribes do not provide qualified appointed counsel to indigent defendants and due process, NACDL urges that Congress
1) not expand tribal jurisdiction beyond the current one year, and
2) limit the one year maximum to one year per a single course of conduct.

As discussed above, some tribes interpret the one year limitation as one year per count and therefore impose multiple-year sentences for a single event without the appointment of counsel. We also know of tribes that charge multiple counts for a related series of events, and without the indigent defendant having appointed counsel, impose a sentence of, at least in one case, nine years.

III. SENDING INDIANS CONVICTED IN TRIBAL COURT TO THE FEDERAL BUREAU OF PRISONS, WITHOUT ANY COST TO THE TRIBES, CREATES MULTIPLE PROBLEMS.

The Department of Justice, in Principal Deputy Assistant Attorney General Keith B. Nelson's letter of September 17, 2008, to Senator Byron Dorgan, at page 7, "strongly opposes creating authority to transfer prisoners convicted in tribal court to Federal facilities." We agree.

There are several reasons that allowing tribal courts to send convicted defendants to the Federal Bureau of Prisons without cost to the tribe is problematic:

1. The federal BOP is currently about 136% over capacity.

2. As the DoJ letter expresses, Indians would be incarcerated far from their homes, and unable to have family visits. They also would be unable to benefit from re-entry programs in their communities.

3. Tribes would have a financial disincentive to offer reasonable treatment alternatives to incarceration or treatment options that are more likely to help the community in the long run; under this bill the tribe would have to pay for education, drug treatment, counseling, or supervision near the tribe, but could send prisoners at no cost to the BOP.

4. Would tribal prisoners serving time in federal prison be entitled to good time under varying plans set forth by each individual tribe, or would they accrue good time in the same way, governed by federal statute, as their fellow federal prisoners? Would tribal prisoners be eligible, for example, as federal prisoners for time off their sentences for participating in drug treatment or other programs?

5. If a tribal prisoner wanted to challenge conditions of confinement, who is the respondent: the warden or the tribe? And, if the tribe, where does venue and jurisdiction lie? Would the Native American tribal prisoner be able to file a habeas corpus petition against the warden of the prison where he was being held in federal court in the district of confinement, as do other federal prisoners? Or would he have to file against the tribe that ordered the sentence, and if so, under Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which holds that violations of the Indian Civil Rights Act can only be litigated in tribal court, would that have to be in the tribal court which sentenced him but has no control over the functioning of the Federal Bureau of Prisons? If that is the case, an Indian raising conditions of confinement claims would have no remedy whereas his/her cellmate who was sentenced in federal court has at least a forum for filing suit.

IV. THE "FINDINGS" SECTION OF THIS BILL SHOULD ALSO CONSIDER THE RIGHTS OF THE ACCUSED.

Both in the findings section (Section 2, starting at page 3) and in the "purpose" section (Section 2, starting at page 7), there should be added considerations concerning the rights of the accused. NACDL suggests adding a finding that indigent Indians (who are, after all, U.S. citizens) who are facing incarceration are currently not entitled to appointed counsel and most are not represented by a lawyer. (Note that the commission is to study "the rights of defendants subject to tribal government authority", page 53.) And in the purpose section, we suggest adding a purpose "to protect the rights of the accused in tribal courts".

V. REQUIRING THE FBI/OTHER LAW ENFORCEMENT AGENCIES AND THE U.S. ATTORNEY TO SEND DECLINATION REPORTS TO THE TRIBE RAISES A VARIETY OF CONCERNS.

This is particularly so where the investigation showed that the target was not involved in any crime, where tribal officials have familial relationships with the accused or the victim, and under other circumstances.

VI. REQUIRING TRIALS IN TO BE HELD IN INDIAN COUNTRY REQUIRES MORE THOUGHT ABOUT THE JURY POOL.

We know that, even by the Courts' own statistics, Native Americans are currently underrepresented in federal jury pools, especially in those districts where the courts have chosen to use only the voter lists and refused to use supplemental source lists (primarily drivers' license lists). Congress should take this opportunity to make federal jury pools more representative of the population, including correcting the underrepresentation of Hispanics, Native Americans, and other minorities, rural residents, and other underrepresented populations. If the courts are to hold jury trials on Indian land, there should be a requirement that if the representation of Native Americans on the district's jury pool is less than the

percentage of Native Americans over age 18 in that district, the court should be required to use a supplemental source list so as to bring the representation of Native Americans to at least the same percentage of Native Americans within the over-age 18 population of the district.

VII. CONCURRENT FEDERAL, STATE, AND TRIBAL JURISDICTION WILL ALLOW FOR TRIPLE PROSECUTION OF THE SAME CONDUCT WITHOUT DOUBLE/TRIPLE JEOPARDY.

Under United States v. Wheeler, 435 U.S. 313 (1978), prosecution in tribal and federal court for the same conduct is not double jeopardy because prosecution is by two sovereigns who do not derive sovereignty from each other. If all three jurisdictions can prosecute, we believe there should be some limitation on multiple prosecutions for the same conduct.

VIII. THE INDIAN LAW AND ORDER COMMISSION ESTABLISHED BY SECTION 305 OF THE BILL SHOULD INCLUDE MEMBERSHIP FROM THE DEFENSE BAR AND THE FEDERAL SENTENCING COMMISSION.

Section 305 of the bill establishes an Indian Law and Order Commission with various appointees by the Administration, House, and Senate, tasked to "conduct a comprehensive study of law enforcement and criminal justice in tribal communites" including issues of jurisdiction over Indian Country crimes, jails and prisons, prevention, rehabilitation and "the rights of defendants subject to tribal government authority", and other important issues, and to make recommendations.

We suggest adding representation from the defense bar or persons or organizations who represent Native Americans charged with crime, such as for example, a Federal Public Defender whose office represents Indians charged in federal courts or a lawyer public defender in a tribal court setting, and at least a liaison to the Federal Sentencing Commission, as that organization still controls the Sentencing Guidelines that apply to Indian Country crimes prosecuted in federal court.

NACDL much appreciates the opportunity to be heard before this Subcommittee. We thank you for considering our views.

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Tova Indritz, Chair
Native American Justice Committee
National Association of Criminal
Defense Lawyers