HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
Oversight Hearing on H.R. 1924, The Tribal Law & Order Act of 2009
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and
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Honorable Chairman and distinguished members of the Committee, thank you for the opportunity to testify today. During the previous two years, NCAI has provided testimony multiple times on an array of public safety issues relevant to tribal communities. We are pleased with the legislative progress that has been made in that time and, particularly, we would like to thank Congresswoman Herseth Sandlin for her steadfast efforts to move the Tribal Law & Order Act forward. However, we are acutely aware that all of her efforts—and the hard work of so many others—may be lost if Congress does not act swiftly to pass the legislation.

Native Americans are victims of violent crime at rates more than double those of any other demographic in the United States.[1] One-third of our women will be raped in their lifetimes.[2] Crime rates have been increasing in Indian country while they have been falling in similarly low-income communities throughout the United States. Nearly 10 years ago, in October 1997, the Executive Committee for Indian Country Law Enforcement Improvements issued its final report to the Attorney General and the Secretary of the Interior. The report concluded that "there is a public safety crisis in Indian Country"[3]

These public safety problems have existed for many decades, continue today and are the result of decades of gross underfunding for tribal criminal justice systems, a painfully complex jurisdictional scheme, and a centuries-old failure by the federal government to fulfill its public safety obligations on Indian lands. Although there have been many federal reports and studies of these problems, Congress has rarely been able to address them. Too often, the policy community has taken an ideological approach to the federal criminal laws affecting Indian people and has been unable to find common ground.

With this legislation, Indian tribes and the legislative sponsors have taken a different approach. All agree that the crime statistics from Indian communities are shocking and unacceptable. Lives are at stake, and we have a duty to find solutions and move swiftly to implement those solutions. For two and a half years, NCAI has worked in a bi-partisan fashion with the Senate

[1] Bureau of Crime Statistics, U.S. Dept. of Justice, Violent Victimization and Race, 1993-98, at 1 (NCJ 176354, 2001).
[2] Tjaden, Patricia, and Nancy Thoennes, Full Report of the Prevalence, Incidents, and Consequences of Violence Against Women, Findings from the Violence Against Women Survey, Washington, DC; National Institute of Justice, November 2000, NCJ 183781, p.22.
[3] REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), *available at* http://www.usdoj.gov/otj/icredact.htm.

Committee on Indian Affairs and the Senate Judiciary Committee. This legislation has been well-vetted and we have achieved a remarkable degree of consensus on solutions that will go a long way toward addressing these problems. Congress has a unique opportunity to reverse the regrettable public safety trends that have existed on Indian lands for far too long.

NCAI and tribal leaders ask that the House Judiciary Committee take the same pragmatic approach. This is good legislation that will strengthen our law enforcement efforts, and it comes at a great time with an Administration that is fully committed to improving justice on Indian lands. We ask that the Judiciary Committee give full consideration to S. 797, the Senate version of the bill that has been marked up and modified after extensive dialogue with the Administration, tribes, prosecutors, public defenders and many Congressional offices representing a broad range of interests. A manager's amendment is under development that addresses a number of outstanding concerns, and we hope that the Senate will pass the bill by next week. We ask that the Judiciary Committee consider allowing the Senate bill to move to the House floor to be considered under suspension this year. We have discussed this matter with Speaker Pelosi, and she has committed to moving the legislation as soon as you have completed your work. Our goal is to make 2010 a safer and happier year for American Indian communities.

NCAI would like to highlight the following four areas addressed by the bill and explain their significance to native communities: 1) federal accountability; 2) amendments to P.L. 280; 3) empowerment of tribal law enforcement; and 4) reauthorization of critical tribal justice programs.

Federal Accountability

Under the Major Crimes Act and other federal laws, the Federal Government has the sole authority for investigation and prosecution of violent crimes and other felonies committed on Indian reservations. Despite these laws and the federal trust obligation to protect Indian communities, the violent crime rate on Indian reservations is two and a half times the national average, Indian women are victims of rape and sexual assault at three times the national average, and tribal lands are increasingly the target of drug trafficking and gang-related activity. These crime rates have been doubling and tripling in Indian country while crime rates have been falling in similarly low-income communities throughout the United States. Something is seriously wrong with the federal law enforcement response.

In the past, there has been a serious concern that the Department of Justice places no priority on addressing crime in tribal communities, and is subject to no oversight or accountability on its performance in this area. Those concerns are not unfounded. In December of 2006, the Bush Administration fired seven U.S. Attorneys, five of whom served on the Attorney General's Native American Issues Subcommittee and were viewed favorably by the tribes their respective jurisdictions. One of those individuals, former U.S. Attorney for the Western District of Michigan Margaret Chiara, openly admitted that employees within the Justice Department frowned upon her attentiveness to Indian Country crime.[4] She recounted that "[p]eople thought it was too much of my time and that it was too small of a population."[5]

[4] Michael Riley, *Principles, Politics Collide*, THE DENVER POST, Nov. 13, 2007, *available at*: http://www.denverpost.com/new/ci_7446439.
[5] *Id*.

In addition, what little hard data is available supports the theory that crime on Indian lands has not been a priority for the Department of Justice. Funding for U.S. Attorneys' offices has nearly doubled since 1998, yet the number of federal prosecutions of Indian Country crimes has actually fallen 26 percent since 2003.[6] These are not partisan concerns and are not confined to any one Administration. In November, 2007, *The Denver Post* reported that "over the past 10 years, U.S. attorneys have declined to prosecute nearly two-thirds of felony Indian Country cases nationally."[7]

This lack of accountability would not present a problem if tribes had some other form of recourse. However, when it comes to non-Indian offenders, tribal governments have no authority to prosecute, and they have only limited misdemeanor penal authority over Indians. In short, Indian tribes do not wish to "federalize" more crimes and put more Indians in federal prison. However, dangerous criminals that commit felonies on Indian lands—whether Indian or non-Indian—are under the sole jurisdiction of the Department of Justice and the Department must not ignore its responsibility to bring them to justice. The proposed reforms in H.R. 1924 would help ensure that Indian country crime is subject to consistent and focused attention. In particular:

- Section 102 would require the Department to maintain and compile data on declinations of referred Indian country cases and submit annual reports of such information to Congress. Tribal leaders and Members of Congress have sought this data for decades, but have been rebuffed by a Department of Justice that hides behind broad claims of prosecutorial discretion and a steady unwillingness to release any internal data. This will provide an important tool for measuring responsiveness to referred cases and guiding law enforcement policy in the future.

- Section 103 would authorize the Department to appoint special tribal prosecutors to assist in prosecuting Indian country crimes. Federal law (28 U.S.C. §543) authorizes the Attorney General to "appoint attorneys to assist United States attorneys when the public interest so requires." Tribal prosecutors appointed to handle Indian country crimes would fall within this category. With knowledge of federal Indian law and a familiarity with tribal justice systems, tribal prosecutors will be prepared and more adept at handling Indian country cases.

- Section 103 would also require each U.S. Attorney that serves a district which includes Indian country to appoint a tribal liaison to aid in the prosecution of Indian country crimes. Tribal liaisons would not only help coordinate the prosecution of these crimes, but they would play a significant role in developing relations and maintaining dialogue with tribal leaders and justice officials to help repair strained tribal/federal relations and more effectively prosecute.

NCAI believes that these proposals would help change the culture of federal neglect and give public safety in Indian country the attention it warrants.

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[6] *Id.*
[7] *Id.*

Amendments to P.L. 280

Under Public Law 280, the law enforcement of certain states has displaced federal enforcement and assumed full or partial jurisdiction over crimes committed in Indian Country within state borders. The law has contributed to mistrust and hostility between state and tribal officials on many reservations. Tribal opposition to P.L. 280 has focused on the law's failure to recognize tribal sovereignty and the lack of consent of the affected tribes. States have focused on the failure of the Act to provide federal funding. Even though tribes retain concurrent jurisdiction over P.L. 280 lands, the federal government has viewed P.L. 280 as an excuse to cut off the tribal financial and technical assistance for law enforcement which is mandated by its trust relationship with tribes.

As a result, tribes have no choice but to rely on state prosecution of crimes that occur on their lands. Yet, similar to the situation with the Federal Government, State police in P.L. 280 jurisdictions are often unresponsive to calls for criminal investigations and the public safety needs of tribal communities, and there is no mechanism to hold State governments accountable for their P.L. 280 obligations. This creates a serious dilemma for tribes. If the suspect is non-Indian, the tribe lacks the jurisdiction to prosecute. If the suspect is Indian, the tribe has jurisdiction to prosecute but very few law enforcement resources and minimal sentencing power. What tribes are left with is a system under which dangerous perpetrators often go unprosecuted. Victims, their families, and the tribal communities in which such heinous crimes occur should not be forced to accept such a weak system of justice.

H.R. 1924 proposes a modest reform to P.L. 280 that would help address these issues.

- Section 201 clarifies that the Federal Government retains concurrent authority over all P.L. 280 jurisdictions. P.L. 280 distinguishes between the six "mandatory" states and the other "optional" states that elected to assert P.L. 280 jurisdiction before 1968. In the mandatory states, the federal government has been divested of Indian country jurisdiction. This legislation would allow the tribe to request that the U.S. Attorney exercise concurrent jurisdiction over Indian country crimes and major crimes within a certain area.

Contrary to the criticism of H.R. 1924's opponents, this provision will not cause more confusion; rather, it will provide an alternative solution where states lack the resources to prosecute Indian country crimes. In other words, if states are adequately fulfilling their responsibilities in P.L. 280 jurisdictions, tribes will not request federal action. NCAI supports this reform because it would increase tribal control and create another means to address unmet law enforcement needs.

Empowerment of Tribal Law Enforcement

Criminal jurisdiction in Indian country is divided among federal, tribal, and state governments, depending on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. This "jurisdictional maze" is the result of over 200 years of federal legislation and Supreme Court precedent, and it creates significant impediments to law enforcement in Indian country.[8] Each criminal investigation involves a cumbersome procedure to establish who has

[8] See Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 508-13 (1976)

jurisdiction over the case based on: the nature of the offense committed, the identity of the offender, the identity of the victim, and the legal status of the land where the crime took place—none of which are consistently easy to determine.

Tribal law enforcement officers are usually the first responders to crime scenes on Indian lands, but their limited jurisdictional authority often prevents them from arresting the alleged perpetrators. Instead, their only option is to hold individuals until local, state, or federal law enforcement officers arrive, which is a difficult task—and not always successful—given the remoteness of Indian reservations and the poor coordination between government bodies.

- Section 301 would go a long way toward eliminating barriers to law enforcement in Indian country. Special law enforcement commissions have long been available to tribal police, but the BIA has withheld the training and granting of commissions for bureaucratic reasons. This section expands the special law enforcement commissions program, clarifies the standards required of tribal officers, and permits flexibility in reaching MOUs between the BIA and tribal governments that seek special commissions. Section 301 also addresses a severe problem that tribes face in recruiting and training police officers. Instead of insisting all BIA police officers receive training from the lone Indian Police Academy in Artesia, New Mexico, it allows tribal law enforcement personnel to obtain training at various state or local facilities, so long as the selected facility meets the appropriate Peace Officer Standards of Training.

Another significant concern for tribal governments is their inability to impose sentences proportionate to the crimes committed. When U.S. Attorneys (and States' Attorneys in P.L. 280 jurisdictions) decline to prosecute felonies in Indian Country, that responsibility falls to the tribes, despite their limited sentencing power. In an oversight hearing on tribal courts and the administration of justice in Indian country held by the Senate Committee on Indian Affairs on July 24, 2008, the Honorable Teresa Pouley, Tulalip Tribal Court Judge and President of the Northwest Tribal Court Judges Association testified that, "The reality on the ground is that Tribal Courts are often responsible for prosecuting felony crimes." She is a prime example—during her tenure as a tribal judge, she has presided over "cases involving charges of rape, child sexual assault, drug trafficking, aggravated assault and serious domestic violence." Judge Pouley went on to express her concern that tribal courts' lack of sentencing authority was placing the tribal community at risk.[9] Those views are echoed by tribal leaders across the United States.

- Section 304 would extend tribal sentencing limitations under the Indian Civil Rights Act to provide for appropriate sentences for more serious offenders. Current law restricts tribal sentencing authority to 1 year imprisonment, a $5000 fine, or both. Yet, a 2003 report of the Native American Advisory Group to the U.S. Sentencing Guidelines Commission points out the disparity between tribal sentencing authority and the sentences that are imposed by the federal government for crimes committed under the Major Crimes Act. Assaults comprise the greatest percentage of crimes prosecuted under the Major Crimes Act, and the average federal sentence for Indians prosecuted for assault

[9] The Testimony of Honorable Theresa M. Pouley, pg. 12, *Oversight Hearing on Tribal Courts & the Administration of Justice in Indian Country*, UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS (July 24, 2008), *available at*: http://indian.senate.gov/public/_files/TeresaPouleytestimony.pdf.

is 3.3 years. As such, there is a large gap between the maximum sentencing authority of tribes and the average sentence for the least serious crime that is prosecuted by the federal government. Section 304 would help remedy this problem by increasingly tribal sentencing authority to a term of 3 years in prison, a fine of $15,000, or both. Note, however, that if a tribe subjects a defendant to a crime that is punishable by more than one year in prison, H.R. 1924 ensures protection of defendants' civil rights by requiring the tribe to provide licensed defense counsel.[10]

The effectiveness of tribal law enforcement is further hindered by tribes' lack of access to criminal history information, including national databases such as the National Crime Information Center (NCIC), which provides criminal history data that is critical to effective law enforcement in tribal communities. NCIC is a centralized database of criminal information that interfaces with various local, state, tribal, federal, and international criminal justice systems,[11] and has been labeled by Congress as "the single most important avenue of cooperation among law enforcement agencies."[12]

But the problem doesn't stop there: most tribal law enforcement authorities lack access to the entire array of criminal justice data systems that are necessary to accomplish traditional policing activities. For example, access to the NCIC requires access to the National Law Enforcement Telecommunication System (NLETS), which is the platform by which all criminal justice data files are entered, transmitted, and accessed. NLETS not only facilitates access to NCIC, but to other criminal databases that are, likewise, critical to effective law enforcement, including the Integrated Automated Fingerprint Identification System (IAFIS) and the National Instant Criminal Background Check System (NICS). Denial of full access to these basic information sharing networks prevents tribal officers from fulfilling the most routine duties, like accessing stolen property information or running fingerprint scans, placing them and the communities they serve in grave danger.

- For the above reasons, section 303 of H.R. 1924 is critically important. This section grants tribes direct access to Federal criminal information databases. It allows tribal authorities to obtain data from, as well as enter data into these information systems, so long as they meet the applicable Federal or State requirements.

NCAI strongly supports these proposals that will help empower tribal law enforcement officers.

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[10]The licensing requirements are up for a proposed modification in the Senate bill to specifically require that tribal public defenders meet the Constitutional standards for "effective assistance of counsel," which include licensing and many other norms of legal practice. As sovereign nations, tribes have the inherent right to set their own licensing standards, though these standards would need to equal or exceed the standards set by federal courts. Although tribes may *choose* to adopt state licensing standards, it would be a gross infringement on tribal sovereignty, as well as antithetical to the federal policy that supports tribal self-governance, to *force* tribes to submit to state standards. These same principles apply to licensing of tribal judges.

[11] *Applying Security Practices to Justice Information Sharing*, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, at 3-21 (2004) *available at*: http://it.ojp.gov/documents/asp/ApplyingSecurityPractices.pdf.

[12] National Crime Information Center (NCIC) – FBI Information Systems, *available at* http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm; National Law Enforcement Cooperation Act of 1990, Pub. L. No. 101-647 §612, 104 Stat. 4823 (1990) (codified at 28 U.S.C. §534 note).

Reauthorization of Critical Tribal Justice Programs
In theory, the federal policy of tribal self-determination has made it legally possible for tribes to carry out their inherent rights as sovereign nations to develop and manage their own comprehensive justice systems for themselves. But in practice, the federal government has repeatedly failed to provide tribes the resources necessary to create a strong law enforcement infrastructure in tribal communities. Increasing law enforcement funding is a top priority. As such, NCAI supports the efforts of H.R. 1924 to reauthorize important tribal justice programs. Title IV of the bill is central to this effort.

- Section 401 reauthorizes the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2411), taking heed of the fact that more than 80% of reservation crime is drug or alcohol related. This act provides treatment for juveniles and adults alike but emphasizes the importance of juvenile programs through the creation of summer programs for tribal youth and the funding of emergency shelters, halfway homes, and juvenile detention centers.
- Section 403 reauthorizes and amends the tribal Community Oriented Policing (COPS) program (42 U.S.C. §3796dd) to provide a long-term, flexible grant program for tribal governments.
- Section 404 reauthorizes the Tribal Jails Program (42 U.S.C. §13709) and provides for use of funds to construct tribal justice centers, including tribal jails and court buildings. It also permits funds to be used for proposed alternatives to incarceration, which is crucial, especially for those tribal justice systems whose sentencing and rehabilitation methods may not align with traditional notions of American justice.
- Section 406 is particularly important to support the development of the Juvenile Justice programs in Indian Country. It reauthorizes and strengthens the DOJ's Tribal Youth Program and moves it to Title V of the Juvenile Justice and Delinquency Prevention Act.

In order to address the profound public safety needs in tribal communities, the additional law enforcement and criminal justice resources provided for by these provisions are badly needed.

Conclusion
NCAI supports swift passage of the Tribal Law and Order Act in the 111th Congress to address the critical shortcomings in federal support for tribal criminal justice. This is not some ill-conceived bill, thrown together at the last second to address the law enforcement needs of tribal communities. Rather, it is the product of more than two years of background hearings and careful crafting by congressional staff. The bill has been extremely well vetted and has received broad bi-partisan support in the Senate. NCAI urges the Committee to acknowledge the exigency of the public safety situation on Indian lands and advance H.R. 1924 as quickly as possible. Specifically, we ask that the House Committees of jurisdiction consider releasing the bill and support placement of the Senate version on the suspension calendar for passage before the year's end. Native communities cannot afford another year of the status quo when it comes to the federal response to their public safety needs.

Once again, on behalf of NCAI, I would like to thank the Committee for inviting us to testify today. I would be happy to try to answer any questions you may have.