The Tribal Law and Order Act: An "Aggressive Fight" Worth Winning

By Troy A. Eid

PHOTO: THREE RIVERS PETROGLYPH SITE, NEW MEXICO. BY LAWRENCE R. BACA.

Congress is currently considering the most significant reform of the federal criminal justice system in Indian country in a generation. The Tribal Law and Order Act (S. 797) would improve how the federal government delivers law enforcement, prosecution, and correctional services. Introduced last year with bipartisan support by retiring U.S. Sen. Byron L. Dorgan, chair of the Senate Committee on Indian Affairs, S. 797 is long overdue. But time may be quickly running out.

A window has opened to achieve what could be the most significant reform of federal criminal justice in Indian country in a generation: the passage of landmark legislation to strengthen public safety on tribal lands. But that window may close quickly unless we act to transform promises into real results.

The Tribal Law and Order Act would make much-needed improvements to how the federal government delivers law enforcement, prosecution, and correctional services in Indian country. In April 2009, Sen. Byron Dorgan (D-N.D.), chair of the Senate Committee on Indian Affairs, introduced the bill (S. 797 in the Senate, H.R. 1924 in the House of Representatives) with bipartisan support. S. 797 would also ease some federally imposed limits on tribal courts, such as the current one-year cap on tribal courts' sentences for violent crimes, which have come to inhibit the ability of many federally recognized Indian tribes and nations to meet their public safety needs since the limits were passed in 1968.[1]

Dorgan's unsuccessful attempt to pass similar legislation in 2008 is just one reminder that the window for serious reform might shut as this fall's congressional elections approach. Dorgan, who, as chair of the Committee on Indian Affairs, has championed the issue more effectively than any of his predecessors in recent memory have, is not seeking re-election this November. In an open letter to Native Americans, which he issued on Jan. 13, 2010, Dorgan discussed the decision he had reached after serving in Congress for 30 years and pledged to keep pushing for the passage of the act this year, vowing to put on an "aggressive fight" to enact the legislation. Concerns about the federal government's effectiveness in protecting Indian lands are as old as the United States itself, however. Law-and-order issues can be complex and politically charged even in the best of political times, and the opportunity that Dorgan helped create might not survive his own tenure.

It also matters that President Obama is under increasing pressure to demonstrate progress in keeping his campaign promises to Native American voters heading into this fall's congressional elections. During his 2008 presidential campaign, these voters were an important—if not critical—political constituency in several swing states. Then-Sen. Obama decried the federal government's persistent failure to honor its treaty and trust responsibilities to protect Indian tribes and nations, equating the government's failure to an attack on tribal sovereignty: "The most fundamental function of all governments is to ensure the safety of their citizens and maintain law and order. … The federal government has a legal trust responsibility to aid tribal nations in furthering self-government in recognition of tribes' inherent sovereignty. Unfortunately, the government has failed to live up to its obligation to help tribes maintain order."[2] As the fall election approaches, courting Native American voters will also be vital in several races that are certain to be hotly contested by congressional candidates from both parties.

Political prognosticating aside, strengthening the federal criminal justice system in Indian country is a promise we should *all* help President Obama keep. The systemic breakdown of federal criminal justice services for too many Indian tribes and nations is a national disgrace—despite the undeniably good intentions of many extraordinarily capable professionals who serve within that system and deserve our enduring appreciation and respect.

I say this as a former U.S. attorney appointed by President George W. Bush, who last summer—at Sen. Dorgan's invitation—testified in support of the Tribal Law and Order Act as a way to make the federal criminal justice system more accountable. Americans should not walk away from those Indian tribes and nations that, since at least 1885 and through no choice made by their own members, must often rely on inadequate federal governmental services to protect their lives and property.

What S. 797 Does

The bill under consideration in Congress helps address at least three significant challenges to making Indian country safer:

- Overly complicated jurisdictional rules that undermine criminal investigations, preventing far too many federal criminal prosecutions from going forward and, in the memorable phrase of a report issued by Amnesty International in 2007, perpetuate a "maze of injustice."
- Insufficient respect for tribal courts and judges and how they can reinforce the fundamental value of *localism*: the expectation that government decisions, including those involving public safety, are best made by officials who are directly accountable to citizens in jurisdictions that are closer to them.
- A chronic resource deficit is Indian tribes and nations' access to less than one-half of the law enforcement resources available to comparable off-reservation communities. This imbalance is fundamentally inconsistent with the federal government's most basic treaty and trust obligations to protect Native American people and lands.[3]

Admittedly, the bill suffers from its status as authorizing legislation: S. 797 does not appropriate any new funds. Even in this respect, however, S. 797 improves the status quo by the requirement included in § 301, which mandates that the executive branch undertake a comprehensive analysis of the resource gap that pervades the federal criminal justice system and report back to Congress. S. 797 does a much better job in addressing jurisdictional complexity and some of the current obstacles to stronger tribal court adjudication.

Navigating the Jurisdictional Maze

The breathtaking jurisdictional complexity of federal Indian law—with both the adjudicative forum and applicable laws depending on the type of crime, status of the land where the offense occurred, and identity of the victim and the suspect—seriously impedes the effective administration of justice. There is also a perverse irony in the fact that people living in some of the poorest and most geographically isolated parts of our country must confront some of

the most complicated legal rules anywhere during the ordinary course of their lives.

Since the passage of the federal Major Crimes Act in 1885—as an appropriations rider that apparently never received a single public hearing in either house of Congress—U.S. attorneys' offices and tribal governments have had the primary responsibility for prosecuting violent crimes in Indian country.[4] Yet even this basic division of labor has its arcane exceptions. For instance, crimes involving only non-Indians in Indian country are ordinarily subject to the exclusive jurisdiction of the state.[5] Federal court decisions often may add still another layer of complexity. In some investigations, it can be difficult or even impossible to determine at the crime scene whether the victim, the suspect, or both are "Indian" or "non-Indian" for purposes of deciding which jurisdiction—federal and/or tribal or state—has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this issue can raise a fundamental question: Which agency is really in charge? This situation is the antithesis of good government.

By way of illustration, the U.S. attorney's office in Colorado recently prosecuted a case on the Southern Ute Indian Reservation where two victims of a vehicular homicide had been hit by a non-Indian drunk driver and tragically burned to death in their vehicle.[6] The victims were an elderly woman, who was an enrolled member of the tribe, and her eight-year-old granddaughter. The child was not an enrolled member of the tribe but had a sufficient degree of Indian blood to be considered an "Indian" for federal jurisdictional purposes as long as the community in which she lived also considered her to be an "Indian."

As our federal prosecution proceeded, defense counsel countered that, despite having Native American blood, the child victim was still not considered to be an Indian within the particular reservation where the crime had occurred. It turned out that the little girl had received Indian Health Service benefits on the Southern Ute Reservation and was visiting her grandparents there at the time, but she legally resided with her mother off the reservation. Literally dozens of people, ultimately including the tribal council, got involved in deciding whether the child was really an "Indian" or not, and there was considerable disagreement among them. After several months of jurisdictional gymnastics, the case involving the child's death was referred to the local district attorney as a matter of exclusive state jurisdiction. Meanwhile, the U.S. attorney's office prosecuted the non-Indian driver of the vehicle for the death of the little girl's grandmother. The Southern Ute Tribe, incidentally, had no criminal jurisdiction whatsoever to vindicate its interest in the death of a member of its own tribe caused by a defendant who was not an Indian because of the U.S. Supreme Court's 1978 ruling in *Oliphant v. Suquamish Indian Tribe*, which held that absent express authorization from Congress, Indian tribes lack criminal jurisdiction over persons who are not Indians.[7]

As prosecutors we actually got a break in that case in a way, because the defendant—a non-Indian drunk driver—happened to be operating his vehicle in a Colorado state right of way at the time of the accident. The reservation in question, the Southern Ute Indian Reservation, has its own federal jurisdictional statute, Public Law 290, limited solely to that reservation, which clarifies when state jurisdiction applies within highway rights of way, making it easy for two of the first responders—a Colorado state trooper and a LaPlata County sheriff's deputy—to make a valid state arrest. In other so-called checkerboard Indian reservations, such as the Eastern Agency of the Navajo Nation, where Indian Trust and allotted land parcels alternate with private fee lands and various other landholdings, highway rights of way typically fall under exclusive federal jurisdiction pursuant to the Indian country statute.[8] Therefore, a Navajo Nation tribal police officer responding to a similar accident on the Eastern Agency's reservation ordinarily could not arrest a non-Indian defendant without being trained and federally deputized by the Bureau of Indian Affairs.

The bill addresses the jurisdictional maze in at least two ways. First, § 305 of S. 797 creates a nine-member Indian Law and Order Commission, which is charged with undertaking a comprehensive study of law enforcement and criminal justice in Indian communities and reporting back to Congress within two years of the date of the bill's enactment. The commission's work includes an analysis of jurisdiction over offenses committed in Indian country and how the current rules affect criminal investigations and prosecutions. In § 305(e)(1), the commission is expressly charged with making recommendations to Congress for "simplifying jurisdiction in Indian country. …" Such an approach is welcome news.

The second attempt to deal with the jurisdictional problem is found in § 301, which takes more direct aim at the maze of injustice by helping ensure that more tribal, state, and local law enforcement officers are commissioned as federal officers—that is, federally deputized—and authorized to fight crime in Indian country. There is already reason to believe that encouraging U.S. attorneys' offices and the Bureau of Indian Affairs to provide expanded federal deputation training and commissioning—in full partnership with the Indian nations they serve—can increase cooperation among law enforcement agencies, strengthen the prosecution of violations of the law, and save lives.

As an example of the benefits of such cooperation, between February 2007 and December 2008, the U.S. Attorney's Office in Colorado partnered with the Southern Ute Indian Tribe's Justice Department and its former director, Janelle Doughty. These respective offices and the Bureau of Indian Affairs' Indian Police Academy developed a model curriculum and training program to teach and test tribal, state, and local law enforcement officers on-site in southwestern Colorado. The goal was to have the Bureau of Indian Affairs federally commission these officers to enforce federal laws in Indian country, thereby strengthening "boots-on-the-ground" law enforcement and fostering collaboration among jurisdictions. The curriculum focused on the jurisdiction of Indian country, the federal judicial process, investigative techniques, criminal and civil liability of officers, and other challenges routinely encountered by

tribal, state, and local law enforcement officers.[9]

The genesis of this unique partnership between a U.S. attorney's office and an Indian tribal justice department is worth noting, because it attests to how § 301 can reasonably be expected to help law enforcement officers navigate the jurisdictional maze and increase cooperation among different agencies. Doughty was the first tribal member—and first woman—ever to direct the Southern Ute Indian Tribe's 100-employee Department of Justice and Regulatory, which includes the tribal police, wildlife rangers, corrections officers, and members of the division of gaming. Her challenge to me, a newly appointed U.S. attorney in 2006, was to find a way for the federal government to provide on-site law enforcement training and testing on the Southern Ute Indian Reservation and invite neighboring non-Indian agencies to participate in this effort. Qualified tribal law enforcement officers who completed this training and passed the standard test administered by the Bureau of Indian Affairs' Indian Police Academy could then receive their Special Law Enforcement Commissions or SLEC cards from the bureau, authorizing them to enforce federal laws on the reservation.[10]

Doughty, a law enforcement officer with a master's degree in social work, had previously been the crime victims' advocate for the Southern Ute Tribe. She knew that without valid SLEC cards, tribal law enforcement officers could not legally arrest non-Indian defendants who committed crimes against Native American victims there. In far too many instances, laws related to domestic violence on the reservation were underenforced to the point that many victims failed to report crimes. Precious few Southern Ute law enforcement officers were federally commissioned by the Bureau of Indian Affairs and therefore could not investigate crimes allegedly committed by non-Indians, to whom exclusive federal jurisdiction applies under the Indian Country Crimes Act.[11]

Working together with our respective offices, we gained the support of Christopher Chaney, a veteran prosecutor in Indian country, who directed the Bureau of Indian Affairs' Office of Justice Services at the time. Chaney proposed partnering with the bureau and its Indian Police Academy to develop our training as an on-site pilot program. We began in February 2007 by successfully training and federally deputizing the first group of 40 tribal, state, and local law enforcement officers on the Southern Ute Indian Reservation in Ignacio, Colo. Word of our efforts quickly spread, and what had started as a local partnership in Colorado eventually led to the nationally recognized Criminal Justice in Indian Country pilot training program—a combined effort that included the following partners:

- Bureau of Indian Affairs' Indian Police Academy;
- National Congress of American Indians;
- Bernadine Martin, then the deputy district attorney of McKinley County in New Mexico, who currently serves as the chief prosecutor for the Navajo Nation;
- U.S. Department of Justice's National Advocacy Center; and
- U.S. attorneys' offices in Colorado, New Mexico, and South Dakota.

In less than two years, what began as a pilot training program limited to the Southern Ute Indian Reservation and surrounding communities had grown into 14 separate training sessions across the country, which were attended by more than 400 law enforcement officers and tribal leaders representing 35 Indian tribes and 17 states. Many of the officers who graduated from the program have since been federally deputized.[12]

In Colorado, the Criminal Justice in Indian Country program has already strengthened interagency cooperation and federal criminal prosecutions, including domestic violence cases. In September 2008, Doughty testified before the Senate Committee on Indian Affairs in support of Chairman Dorgan's previous version of the Tribal Law and Order Act and explained how the federal cross-deputation pilot program had succeeded. As an example, she described an incident in which a Southern Ute tribal investigator had responded to a crime scene in a case of domestic violence on the reservation. The investigator, Chris Naranjo, had received on-site training to renew his SLEC card, which otherwise would have expired long before he could have left his job to attend a week-long refresher course that was conducted a full day's drive away at the Indian Police Academy in Artesia, N.M. "Because he was federally deputized," Doughty told the committee, "Chris could arrest the non-Indian suspect who had allegedly victimized one of our Tribal members in that case, which is now being prosecuted by the U.S. Attorney's Office." A federal conviction has since been obtained in that case.[13]

The bill has the potential to build on such successes and increase SLEC training exponentially. Section 301(b) of S. 797 directs the secretary of the interior to develop a plan within 180 days of the bill's enactment "to enhance the certification and provision of special law enforcement commissions to tribal law enforcement officials." This plan expressly includes regional SLEC training sessions, such as those that were developed in Colorado and later conducted in other states. As this plan takes shape, there would be minimal additional cost for enabling U.S. attorneys' offices to offer such training in partnership with the Bureau of Indian Affairs and with the approval and support of the Indian tribes that would be affected. This training should not be limited to tribal officials but should include neighboring border communities to ensure effective interagency collaboration, backup, and emergency response. In this way, law enforcement officers on and near reservations can have the tools to help navigate the jurisdictional maze.

Reporting Case "Declinations" by U.S. Attorneys

The bill addresses another unfortunate side effect of the jurisdictional maze and the gap in criminal justice services: case declinations by federal prosecutors. The term "declination" means a decision by a U.S. attorney's office not to seek criminal charges after being presented with the confidential findings of a law enforcement investigation of a

suspected federal offense arising in Indian country. Section 102 of S. 797 establishes mandatory reporting requirements for all U.S. attorneys when cases are declined in such instances. What is now § 102 had been criticized in previous versions of this legislation by several former and current U.S. attorneys for whom I have great respect and also by the Bush administration's Justice Department, in which I served. The current leadership of the Justice Department initially took a dim view of the concept, even testifying against § 102 at the Senate Committee on Indian Affairs' public hearing on the bill on June 25.[14] Since then, however, the Justice Department and Sen. Dorgan have agreed to compromise language.

My own experience is that declination reports often have limited value but can still be very useful in making the federal criminal justice system more accountable. Such reports that respect individual privacy and the legal confidentiality of investigative information, as the current language of § 102 clearly envisions, would be valuable in helping U.S. attorneys set enforcement priorities in Indian country and would make the case for additional resources in specific areas. These reports would also assist the Justice Department in its supervisory role of monitoring case trends and aligning national prosecution priorities based on more complete criminal justice information than currently exists today. Rather than fear such enhanced accountability, U.S. attorney's offices should embrace the reports as an opportunity to ease suspicions among some critics that cases that arise in Indian country are somehow treated less seriously than other federal criminal prosecutions are. In practice, the vast majority of assistant U.S. attorneys serving Indian country is committed to achieving equal justice for all Americans, including Native Americans living and working on Indian lands. Tracking case declinations and developing other ways to measure the performance of the criminal justice system can assist federal prosecutors by helping educate the public as to what they really face in the field.

Having said that, it is vital to understand what declinations can and cannot accurately measure. According to the official U.S. Attorney's Manual, U.S. attorneys may bring a criminal prosecution only if there is a reasonable probability of obtaining a conviction at trial. Such is not the case, for example, if a crime scene has been compromised—as often happens on tribal lands that are served by too few investigators and patrol officers—in the critical hours immediately after the crime, thereby rendering potentially useful evidence inadmissible. More generally, investigative information is highly sensitive and must be protected by law in order to safeguard a perpetrator's constitutional rights. An obvious example is information obtained by a grand jury, the unauthorized release of which is appropriately punishable by criminal sanction, including imprisonment. It can be unreasonable, unethical, and illegal for a federal prosecutor to attempt to explain why he or she declined to prosecute someone.

Section 102 recognizes that, on balance, measuring case declinations can be an underinclusive metric that can never measure crimes that go unreported, investigations that fail to take place or are compromised, or legitimate concerns about sharing information that is sensitive as far as law enforcement is concerned. Yet that does not mean that declination reports are somehow unimportant, especially in reinforcing the local accountability of U.S. attorneys and their offices.

Greater Flexibility for Tribal Courts

Another provision of the Tribal Law and Order Act, which is found in § 304, deals with the sentencing authority of tribal courts. Among other things, this section amends the Indian Civil Rights Act of 1968 to give tribal courts the sentencing option to impose incarceration for up to three years, a fine of up to $15,000, or both, for conviction of a single tribal offense, as compared with a maximum penalty of imprisonment for one year, a $5,000 fine, or both, under current law. Consistent with the Supreme Court's *Oliphant* decision, tribal courts could not impose these increased penalties on convicted defendants who are not Indians.

With respect to Indians, § 304 would permit tribal courts to impose these enhanced penalties only if the courts guaranteed the defendants' due process of law. The bill further requires that the presiding judge and the defendants' defense attorney be "licensed to practice law in any jurisdiction in the United States." This language attempts to strike a balance between respect for criminal defendants' federal constitutional rights and the sovereignty of tribal courts to enforce their own laws. In addition, § 304 purports to permit tribal courts to "stack" offenses as a way to increase aggregate penalties for multiple offenses.

The criminal defense bar and some groups that advocate civil liberties have objected to these provisions and have raised additional concerns about the representation of criminal defendants and the judges who preside over their cases. Specifically, § 304(b)((1)(C)(2)(A) permits tribal court judges who are licensed by the tribal bar but not necessarily attorneys to impose the enhanced penalties that the bill permits. In contrast, no Indian tribe may deny a criminal defendant the assistance of a defense attorney, as opposed to a lay advocate, but that attorney need not be licensed by the state as long as he or she is admitted to practice in tribal court.

What the bill is really trying to do here is not just to ensure that criminal defendants receive due process of law but also to specify how much process is actually due. It seems likely that the federal courts will ultimately confront the issue of tribal judges' and defense attorneys' professional qualifications if this portion of § 304 passes. This point is critically important on several levels for those practicing in tribal court and their clients. For one thing, not all tribal bars' admission processes and licensing requirements are alike. On the Navajo Nation, for example, only one of 20 tribal court judges is a state-licensed attorney. One Navajo District Court judge is an attorney but is not state-licensed; the rest of the bench consists entirely of persons who are not lawyers but were admitted to practice before the Navajo Nation Supreme Court after passing the required eight-hour examination administered

by the Navajo Nation Bar Association.

As a member of the association's Training Committee, I can attest that the Navajo bar examination is rigorous. Both lawyers and lay advocates may take the test, but the bar passage rate for those who are not attorneys is comparatively low. The admission and continuing legal education requirements closely track states' attorney licensing requirements in some respects and differ in others. And the integrity and professionalism of the Navajo Nation's judiciary is admired throughout Indian country and beyond. Yet it is also true that the approach taken by the Navajo Nation bears little resemblance to the admission requirements of some other tribal courts, which require non-attorneys only to fill out a form and pay a fee.

One way to reconcile this current discrepancy is to pass § 304 with the reasonable expectation that those tribal courts wishing to impose longer sentences of incarceration for criminal defendants will first establish their own minimum legal qualifications and bar admission requirements. This might be done individually, tribe by tribe, or collectively through tribal judges' professional organizations and tribal bar organizations—perhaps in partnership with the Federal Bar Association. Certainly, the possibility of having the issue litigated in federal court, which opens up the possibility that expanded sentencing by tribal courts could be invalidated on federal constitutional grounds if just one tribal judge is found to have overreached his or her authority, is a powerful incentive for tribes to strike the right balance. In practice, many tribes are moving away from longer sentences out of practical necessity—the Navajo Nation has just 144 available jail beds but has more than 235,000 tribal members living or near the reservation—and toward reinvigorating traditional nonretributive forms of justice, such as restitution and peacemaking.[15]

Current Status of the Bill

The Tribal Law and Order Act currently has 11 co-sponsors, including Sen. John Barrasso of Wyoming, the ranking Republican on the Senate Committee on Indian Affairs. The committee held a public hearing on the bill on June 25, 2009, in which several current and former tribal and federal officials testified. Committee members unanimously voted in favor of the bill on Sept. 10, 2009. On Nov. 2, 2009, Chairman Dorgan sought unanimous consent that the full Senate agree to final passage, but his effort fell short, reportedly because of various holds placed on the bill by some senators. Dorgan has recently vowed to seek the Senate's unanimous consent again with a manager's amendment that would address concerns prompting the holds, which sources on the committee's staff report are either unrelated to the bill itself or in the nature of technical corrections.

It appears that such aggressive Senate action will be key to moving S. 797 forward. Last April, Rep. Stephanie Herseth Sandlin (D-S.D.) introduced a companion bill in the House (H.R. 1924), which was referred to four separate committees: the Judiciary, Natural Resources, Energy and Commerce, and Education and Labor Committees. Thus far, only one hearing has been held—by the Judiciary Committee's Subcommittee on Crime, chaired by Rep. Bobby Scott (D-Va.), on Dec. 17, 2010. A House aide reports widespread support for the bill, and it is possible the other three committees could agree to discharge it without holding hearings. Sen. Dorgan is clearly in the driver's seat as far as this bill is concerned, and his continued leadership is important if not indispensible.

Sen. Dorgan and his staff have done an impressive job building and maintaining momentum for the bill despite formidable institutional challenges. Nonetheless, the challenge of enacting any serious reform of the federal criminal justice in Indian country cannot be underestimated. Several of Dorgan's predecessors as chair of the Committee on Indian Affairs—including former senator from Colorado Ben Nighthorse Campbell nearly a decade ago—proposed their own criminal justice reforms that, despite initial enthusiasm and plenty of hard work, did not go the distance.

The White House's leadership will also be essential to the passage of S. 797. The signals from the Obama administration are promising, but the results are by no means assured. One event that helped the cause was the strong support voiced by numerous tribal leaders when Attorney General Eric Holder convened a Tribal Listening Conference on Law Enforcement and Public Safety in St. Paul, Minn., last October, which prompted the attorney general to reiterate his support for the bill. Whether President Obama's decision to endorse S. 797 will trigger a determined lobbying effort by the executive branch in support of passage remains to be seen and the administration's actions may even depend in part on what the rest of us do. I say this after talking with Senate and House legislative aides from both parties, who report that they are encountering concerns from both the criminal defense bar and civil rights groups, such as the American Civil Liberties Union, about the bill's provisions that expand tribal courts' authority when it comes to sentencing as well as the specific legal credentials that may or may not be required of tribal judges and public defenders in such circumstances. The majority staff counsel to one the four House committees to which H.R. 1924 has been referred even privately warned me that, *unless more proponents of the bill get involved in these discussions*, even a compromise version of the act may not be possible.

Of course, Indian tribes and nations aren't waiting for the White House and Congress to make Indian country safer. Tribal governments are already pushing the limits of what federal law allows them to do in creating and running their own criminal justice systems on Indian lands. The trend includes tribal judges' expanded use of customary law in criminal sentencing, tribal courts' "stacking" of successive terms of incarceration for violent crimes beyond the one-year cap imposed by the Indian Civil Rights Act, and tribal prosecutors' insistence that federal officials share criminal justice information pertaining to tribal members and obey tribal extradition laws. But when it comes to passing S. 797, tribal leaders cannot get the job done by themselves.

This leads to the Federal Bar Association and each of us. The active involvement of the FBA and its members in supporting a reasonable and workable compromise version of the Tribal Law and Order Act—that is acceptable to both the Senate and the House and involves challenging and contentious issues will be key to passing the bill. Too much of the current federal justice system that is supposed to serve Indian country is ailing or broken, as virtually anyone who has worked in or around that system—or who has relied on it for protection—can attest. Every president since Richard Nixon has issued an executive order vowing to respect tribal sovereignty.[16] But no sovereign entity can reasonably be expected to endure without the ability to apply and enforce the rule of law or provide for the safety of its citizens.

Whatever our personal politics, the federal government's litany of broken promises to Native Americans on issues of public safety is undeniable and untenable, and this generation certainly can't right every accumulated wrong. Nevertheless, the confluence of political forces that has carried S. 797 this far is extraordinary and may not be repeated any time soon. Therefore, it is vital for FBA members as well as the general public to contact the members of Congress who represent them and urge them to pass the Tribal Law and Order Act. **TFL**

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Endnotes

[1]Tribal Law and Order Act of 2009, S. 797, 111th Congress. (2009), available at thomas.loc.gov/cgi-bin/query/z?c111:S.797.RS.

[2]Organizing for America, First Americans for Obama, *Barack on the Issues: Law Enforcement and Justice*, available at my.barackobama.com/page/content/firstamslaw (last visited Jan. 29, 2010).

[3]Gap Analysis, *Technology and Management Services Inc., Report to the U.S. Department of the Interior, Bureau of Indian Affairs, Office of Law Enforcement Services* (April 18, 2006) (unpublished), quoted in Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country,* 54 Fed. Law. 40, 42 (March/April 2007), available from the Denver Public Library, 40(6) LegalTrac Gale Document A162284130, at find.galegroup.com.ezproxy.denverlibrary.org:2048/itx/start.do?prodId=LT.

[4]Major Crimes Act of 1885, 18 U.S.C. § 1153 (2006).

[5]*United States v. McBratney*, 104 U.S. 621 (1881). This analysis obviously does not apply in states covered by still another federal statute, Public Law 280, which generally extends state criminal jurisdiction to tribal lands in so-called covered states and is beyond the scope of this article.

[6]Jamie L. Wood, a non-Indian man from Aztec, N.M., was indicted by the U.S. attorney's office, District of Colorado, in January 2007 for causing a car crash on the Southern Ute Indian Reservation that claimed the lives of tribal member Lorraine Duran, 69, and her eight-year-old granddaughter, Jacklyn. Lorraine's non-Indian husband, Jack Duran, was injured in the accident; *see Grand Jury Indicts Aztec Man for Role in Car Wreck*, Farmington Daily Times (Jan. 25, 2007). Wood, who admitted to police officers that he had smoked marijuana on the day of the accident, later pled guilty to a federal charge of involuntary manslaughter for causing Lorraine Duran's death.

[7]*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[8]Major Crimes Act of 1885, 18 U.S.C. § 1153 (2006). The term "Indian country" includes rights of way running through those lands, such as highways where many crimes and accidents take place. The U.S. Congress has long used the term "Indian" to refer generically (and imperfectly) to various categories of indigenous people, although a few more recent statutes alternatively use the term "Native Americans." *See, e.g.*, the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, codified at 18 U.S.C. § 1170 (criminalizing the trafficking in Native American human remains and cultural items). This article uses the terms "Indian," "Native American," and "Native people" interchangeably.

[9]Troy A. Eid, *Making Indian Country Safer: Colorado's "Admirable" Experiment (Essay)*, 38 Colo. Law. 10, 21 (2009).

[10]The Special Law Enforcement Commission program is codified in the Indian Law Enforcement Reform Act of 1990, 25 U.S.C. §§ 2801-09 (2006), and at 69 Fed. Reg. 6321 (Feb. 20, 2004).

[11]Indian County Crimes Act, 18 U.S.C. § 1152 (2006).

[12]Eid, *supra* at 21, n.9.

[13]Oversight Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country Before the S. Comm. on Indian Affairs, 110th Cong. (2008) (statement of Janelle F. Doughty, director, Southern Ute Indian Tribe's Department of Justice) available at www.indian.senate.gov/public/_files/JanelleDoughtyREVISEDtestimony.pdf.

[14]Tribal Law and Order Act of 2009, Hearing on S. 797 Before the S. Comm. on Indian Affairs, 111th Cong. (2009), available at indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d7ebfb3c-d3c7-4341-a625-cbfb150d0211; see especially the testimony of Associate Attorney General Thomas J. Perrelli.

[15]Tribal Law and Order Act of 2009: Hearing on S. 797 Before the S. Comm. on Indian Affairs, 111th Cong. (2009) (statement of Troy A. Eid, Greenberg Traurig LLP, available at indian.senate.gov/public/_files/TroyEidtestimony.PDF.

[16]Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 196 (W.W. Norton & Co. 2005).