



Federal Bar Association

Office of the President

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July 2, 2008

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

The Honorable Lisa Murkowski
Vice Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

**Re: June 19 Hearing on a Draft Bill to Address
Law and Order in Indian Country**

Dear Chairman Dorgan and Vice Chairman Murkowski:

The Federal Bar Association is pleased to submit these comments for inclusion in the June 19 record of the Committee's hearing on the draft bill addressing law enforcement in Indian Country. The FBA shares the Committee's concerns about this subject and supports its effort to develop legislation designed to address a longstanding problem of great importance to the health and well-being of tribal communities.

In particular, the FBA supports the collaborative approach the Committee has taken and its commitment to working with tribal leaders in developing the legislation. The FBA, too, supports the principles of tribal sovereignty and self-determination. Accordingly, FBA supports modification of the draft legislation to extend criminal jurisdiction to tribal courts over non-Indian offenders in cases of domestic and family violence in accordance with tribal criminal law where the offense occurs within the territorial jurisdiction of an Indian tribe.

The FBA is an association of legal professionals that run the gamut of federal practice from attorneys practicing in small to large legal firms, attorneys in corporations and federal agencies, and members of the judiciary. The FBA's

Indian Law Section is the largest organization in the United States devoted to federal Indian legal issues. What our members have most in common is dedication to the advancement of the science of jurisprudence and promoting the welfare, interests, education, and professional development of all attorneys involved in federal law. Our primary objectives are to:

- Promote and support legal research and education
- Advance the science of jurisprudence
- Facilitate the administration of justice
- Foster improvements in the practice of Federal law.

The FBA's Indian Law Section, one of the largest and most active of the Association, is comprised largely of attorneys who practice in the field of federal Indian law.¹ The Section has long been concerned about law enforcement problems in Indian Country. The FBA, through its legislative agenda, has expressed support for Congressional action that removes the limitation on the jurisdiction of tribal courts over non-Indian perpetrators of family violence in Indian Country. Because of the significant and harmful impact of family violence, we urge the Committee to modify the draft bill by conferring appropriate jurisdiction to tribal courts over non-Indian perpetrators of family violence arising in Indian Country. A practical jurisdictional void exists that must be addressed. We are pleased to have the opportunity to share our views on this aspect of the problems the Committee has identified.

Under present law, a tribal court is without criminal jurisdiction over non-Indians, even those residing in Indian Country and who have family or domestic ties to tribal members.² Furthermore, except in certain limited circumstances (P.L. 280 states), only the United States possesses criminal jurisdiction to prosecute non-Indians for crimes committed against Indians. Unfortunately, federal law enforcement resources are often stretched too thin to provide the level of support needed in tribal communities to adequately confront this problem. The result is that an offending non-Indian spouse, domestic partner, or parent may escape the criminal justice system unless and until the violence has escalated to tragic proportions. Many U.S. Attorneys offices remain understaffed and inadequately trained to deal with domestic violence, sexual assault and domestic counseling issues. Ironically, the governmental entity closest to the

¹ The FBA's Indian Law Section officers include: D. Michael McBride III, Section Chair, *Crowe & Dunlevy, P.C.*; Allie Greenleaf Maldonado, *Little Traverse Bay Band of Odawa Indians*; Prof. Elizabeth Kronk, *University of Montana School of Law*; Lloyd B. Miller, *Sonosky, Chambers, Sachse, Endreson & Perry, LLP*; and Lawrence R. Baca. The Section's Committee on Legislation includes: Elizabeth L. Homer, Chair, *Homer Law Chartered*; Mark Van Norman, *National Indian Gaming Association*; Jay Johnson, *Chickasaw Enterprises*; Patricia Zell, *Zell & Cox Law PC*; Shenan Atcitty, *Holland & Knight*; Jeff Davis, *Asst. U.S. Attorney (W.D. Mich.)*.

² See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

problem with the highest interest in redressing the situation is largely helpless to do anything about it given the current state of the law.

The Indian Child Protection and Family Violence Prevention Act,³ was enacted in 1990, nearly two decades ago, in response to Congressional concerns about the seriousness of the problem of family violence in Indian Country. In it, the Congress acknowledged the responsibility of the United States to assist tribal governments to address the problem, stating as follows:

...there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. *Id.*

Since then, we have uncovered much more in relation to the scope and incidence of family violence. According to a study prepared by the Justice Department's Bureau of Justice Statistics, American Indians experienced violence at a rate (101 violent crimes per 1,000 American Indians) more than twice the rate for the Nation (41 per 1,000 persons).⁴ Studies also indicate that Indian women suffer a disproportionate level of intimate partner violence and sexual assault.⁵

Family violence, including child physical and sexual abuse, child neglect and maltreatment, intimate partner violence, and elder abuse, takes place in homes across the country every day. It is far from unique in Indian Country, but there is one critical distinction. Current law undermines perhaps the most effective means of addressing it: utilization of the tribal criminal justice system. If tribal self-determination is to be meaningful, tribal governments must be free to not only enact law, but also to enforce it and punish wrongdoers, especially in relation to those who for all practical purposes have become an integral part of the tribal community and whose wrongful conduct has such a devastating and longstanding impact upon it. The only practicable means to remedy or even begin to ameliorate the problem is to empower tribal government to safeguard the most vulnerable members of tribal communities by providing effective law enforcement intervention and access to the tribe's criminal justice system.

There is no question that family and domestic violence has a devastating impact on both children and adults in violent households and communities,

³ 25 U.S.C. 3201.

⁴ Perry, Steven W., *American Indians and Crime*, Washington, D.C., Bureau of Justice Statistics, December 2004, NCJ 203097.

⁵ Tjaden, Patricia, and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence, Findings from the National Violence Against Women Survey*, Washington, D.C.: National Institute of Justice, July 2000, NCJ 181867, p. 25.

whether they are direct victims of abuse or simply helpless witnesses to it. The evidence is overwhelming. Numerous Justice Department studies reveal that children exposed to violence at an early age have a drastically increased propensity to become either perpetrators of abuse or victims of violence in adulthood. In May 2000, the Bureau of Justice Statistics (BJS) published a report based on data from the 1993-1998 National Crime Victimization Survey (NCVS), which compiles crime data throughout the U.S. The report stated that between 1993 and 1998, the average number of victims of intimate partner violence who lived with children under the age of 12 was 459,590.⁶ The researchers indicated that such incidence of family violence is sufficient to raise concerns about the very future of American society, even if only one child in each of those households is exposed to violence.

In a study commissioned by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the author of the report stated:

Contemporary social scientists agree that the continued maltreatment of children today is primarily the result of poorly trained adults who, in their roles as parents and caretakers, attempt to instill discipline and educate children within the context of the violence they themselves experienced as children.⁷

This and other reports describe a process through which abused children or witnesses to abuse often become violent offenders themselves, a phenomenon described as "cycle of violence." In a study conducted by the National Institute of Justice (NIJ) and conducted in a metropolitan Midwestern county area, arrest records of 908 abused and/or neglected children, age 11 or younger at the time of abuse/neglect, were compared with arrest records for 667 children who were not abused or maltreated. Initial results were gathered in 1988 and additional arrest data was gathered in 1994. The study found that "being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent."⁸

Additionally, children who do not become offenders or victims may face great obstacles in emotional, mental, and physical development. These obstacles include attention deficits, educational difficulties, substance abuse, mental health problems, symptoms of post-traumatic stress disorder, and lack of appropriate social skills.⁹ Another aspect of family violence includes the crime of elder

⁶ Intimate Partner Violence, Bureau of Justice Statistics, 2000.

⁷ Bavelock, Stephen, The Nurturing Parenting Programs, Bulletin, Office of Juvenile Justice and Delinquency Prevention Programs, 2000.

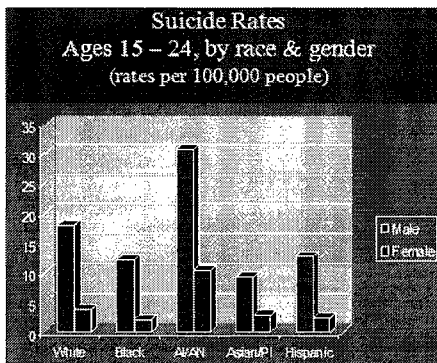
⁸ An Update on the Cycle of Violence, National Institute of Justice, 2001.

⁹ Safe From the Start: Taking Action on Children Exposed to Violence, Office of Juvenile Justice and Delinquency Prevention, 2000.

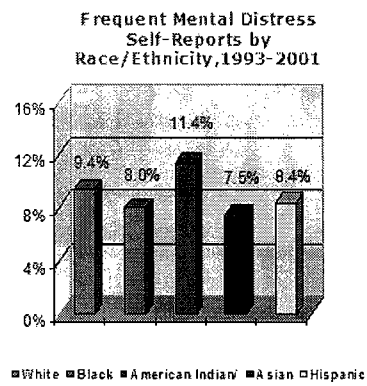
abuse. In 2004, the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program conducted a study on violence among family members and intimate partners. The data for this study came from the UCR Program's National Incident-Based Reporting System (NIBRS) database. The findings report that 444 elderly relatives were the victims of murder/non-negligent manslaughter between 1996 and 2001.¹⁰

Given the data and research findings, it is not difficult to recognize the likely connection between the high incidence of violent crime in Indian Country and the incidence of family violence, but there are other significant indicators as well. According to the Indian Health Service (IHS), more than one-third of the demand on health care facilities in Indian Country is related to mental health, alcoholism, and substance abuse. The IHS reports:

Considerable disparities exist in the psychological well-being of AI/AN people compared to the general population. The suicide rate for American Indians is 70% higher than the general population. Also, AI/ANs ages 15-24 have the highest rates of suicide of any racial group of the same age group in the U.S. Compared to the general population,



AI/ANs tend to underutilize services, experience higher therapy drop-out rates, are less likely to respond to treatment, and have negative opinions about non-Indian providers. Also, poverty continues to afflict AI/AN communities at significant rates.



Poverty often leads to a lack of housing and overcrowding in homes, as well as other socioeconomic, education, and health problems. Economic concerns are often related to domestic violence, sexual assault, and childhood sexual abuse. Studies have shown that AI/AN women are 2.5 times more likely to be sexually assaulted as other women in the United States. The potential for behavioral health concerns is evident.¹¹

During the recent June 19 hearing, the Committee heard excellent testimony from tribal leaders, law enforcement officials, each of whom confirmed through personal knowledge and experience, the very disturbing conditions that

¹⁰ Crime in the United States – 2003, Federal Bureau of Investigation, 2004.

¹¹ IHS Fact Sheet, Behavioral Health, <http://info.ihs.gov/Bhealth.asp>

federal researchers have confirmed through formal study. According the Justice Department's report on American Indians and Crime:¹²

The rate of violent victimization is well above that of other U.S. racial or ethnic subgroups and is more than twice as high as the national average.

American Indians are more likely than people of other races to experience violence at the hands of someone of a different race, and the criminal victimizer.

Approximately 60% of American Indian victims of violence, about the same percentage as of all victims of violence, described the offender as white.

The rate of violent victimization among American Indian women was more than double that among all women.

The Indian Health Service reports that homicide is the third leading cause of years of potential life lost before age 65 for Native Americans.¹³ It estimates an even higher percentage of inter-racial violence than the Bureau of Justice Statistics, reporting that "at least 70% of the violent victimizations experienced by American Indians are committed by persons not of the same race — a substantially higher rate of interracial violence than experienced by white or black victims."¹⁴

The FBA believes that conditions in Indian Country will not change unless tribal governments have the tools to address these problems. Regardless of the good intentions of people and agencies outside of tribal governments, there is no substitute for action by tribal government institutions when it comes to resolving problems within the tribal community. To paraphrase an old adage, the best government is the government closest to the people. To empower tribal law enforcement to handle these matters and tribal courts to entertain them will provide long delayed justice to some of this Nation's most vulnerable and neglected victims of violent crime.

Thank you for the opportunity to submit these comments for inclusion in the hearing record. Once again, we applaud the Committee for the collaborative approach toward the crafting of legislation to address the improvement of law enforcement efforts in Indian Country. The leaders of our Indian Law Section join

¹² Greenfield, Lawrence A. and Smith, Steven K., American Indians and Crime, <http://www.ojp.usdoj.gov/bjs/>

¹³ *Supra* at n.10.

¹⁴ *Id.*

me in extending our interest in continuing to work with the Committee on the legislation in the days ahead.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James S. Richardson, Sr.", with a long horizontal flourish extending to the right.

James S. Richardson, Sr.
President