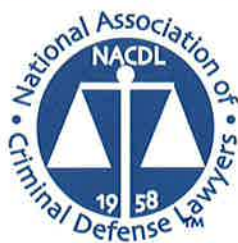


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November 9, 2011

The Honorable Daniel Akaka
Chairman
Committee on Indian Affairs
U.S. Senate

The Honorable John Barrasso
Vice Chairman
Committee on Indian Affairs
U.S. Senate

Re: SAVE Native Women Act (S. 1763) Title II -- tribal jurisdiction and criminal offenses

Dear Chairman Akaka and Vice Chairman Barrasso:

I am writing on behalf of the National Association of Criminal Defense Lawyers to provide our views on the SAVE Native Women Act. While domestic violence is a serious issue for Indian tribes, we believe any federal effort to bolster tribal law enforcement must be accompanied by measures to increase the quality of justice in tribal courts. For the reasons outlined below, we believe the SAVE Native Women Act fails to provide the requisite safeguards, including an adequate right to counsel, for the proposed fundamental change in tribal court jurisdiction.

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 more than 10,000 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.

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Title II of the S.1763 would (1) provide for the first time since *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), for tribal court jurisdiction over non-Indians, (2) provide that non-Indians have greater rights to due process and representation by counsel than do Indians charged with the same crimes and facing the same term of incarceration, (3) shift the burden of proof of an element of a crime from the prosecuting sovereign government to the defendant to assert lack of proof, contrary to historic American criminal procedures, and (4) increase penalties for various federal crimes and create new federal crimes.

Native Americans are, after all, U.S. citizens. When charged in state or federal court, Indians have the same rights to due process and right to counsel as do all other persons. When Congress enacted the Indian Civil Rights Act (ICRA) in 1968, the trade-off for not requiring appointment of counsel and other indicia of due process in tribal courts was to restrict tribes to maximum penalties of six months' incarceration and a fine of \$500. In 1986, ICRA was amended to provide for penalties of up to one year and a fine of \$5,000. Then in 2010, the Tribal Law and Order Act (TLOA) allowed tribal courts to impose sentences up to 3 years, but only where, if the sentence was to be more than one year, there is a right to counsel, a qualified judge, and certain other aspects of due process.

If Indian tribal courts had to adhere to the same constitutional standards and guarantees as all federal and state courts, there would be no objection to allowing tribal courts to prosecute anyone who comes into their physical jurisdiction, just as a resident of Arizona cannot object to the jurisdiction of the state courts of Kansas if that resident travels to Kansas. If this proposed bill extended tribal court jurisdiction to non-Indians who have a nexus to the tribe, and those non-Indians and also Indians had the same rights in tribal court as they do in state or federal court, NACDL would not object. However, this bill would not increase constitutional protections, but would lower them, and therefore we do object to the bill.

Argersinger v. Hamlin, 407 U.S. 25 (1972), guarantees an indigent defendant the right to counsel in any case where that defendant is facing incarceration. This bill purports to give the right to counsel to a non-Indian facing imprisonment, while an Indian facing the exact same penalty, possibly as a co-defendant in the exact same case, does not have that right if the maximum penalty is one year. How can that be fair? Instead of going to the least common denominator in terms of rights, Congress ought to raise the level of individual rights so that all persons who face incarceration, including in tribal court, have the right to counsel and full due process.

Section 204, the definitions section, should define "licensed defense counsel" (as used in section 204(g)(2)), to mean a lawyer licensed to practice law in any state or the District of Columbia, and section 204(e) should spell out specifically a right to "licensed defense counsel." Some tribes have tribal bar admission requirements that do not even include high school graduation, no less completion of law school; in these tribes, "tribal advocates" who are akin to paralegals and are not lawyers represent defendants. Such non-lawyer members of the tribal bar

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do not fulfill the requirement of representation by counsel in the sense of *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, *supra*, nor the Sixth Amendment to the U.S. Constitution.

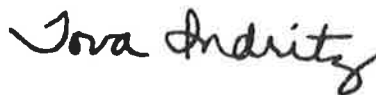
Section 204(e) should also spell out specifically the full right to counsel, due process, protection from illegal search and seizure, and all other rights that persons facing incarceration in state and federal courts are entitled to receive.

The burden of proof must always be on the prosecuting government to prove beyond a reasonable doubt every element of a charged offense. Section 204(d)(4) purports to shift the burden of proof of a reasonable nexus between the non-Indian defendant and the tribe to the defendant by providing that if the defendant does not file a pre-trial motion contesting that element, then the issue is waived. That is like shifting to a defendant the burden of raising any element of proof in a criminal case and is completely inappropriate. Also, the standard of proof should be spelled out in section 204(d)(B) as "beyond a reasonable doubt."

The creation of new crimes, in section 203, is unnecessary. If there is a special statute for assault by strangling or suffocating, why should there not be a special statute for assault by use of a knife, or a firearm, or a rock, or a chair as a weapon? The current assault statute, with various levels of harm imposed, is sufficient. In section 205, the increase in penalties for various assault statutes and the expansion of the 20-year penalty for any assault that is a felony again subjects those charged in federal court with Indian Country crimes to much greater penalties than are those persons charged in most state courts. This penalty scheme creates a disparity that is unwarranted and may ultimately undermine the federal role in maintaining the safety and welfare of those who reside in Indian Country.

Thank you for considering our views. We stand ready to assist the committee and its staff in improving this legislation so as to adequately ensure fairness and due process in tribal courts.

Sincerely,

A handwritten signature in black ink that reads "Tova Indritz". The signature is written in a cursive, flowing style.

Tova Indritz
Chair, NACDL Native American Justice Committee
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Albuquerque, NM 87102
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