TESTIMONY OF
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## Introduction

Greetings, Your Honor and Members of the Committee. Thank you for inviting me to participate in this public review of the Criminal Justice Act (CJA) and testify today on the CJA and access to justice in Indian Country.[1] My comments reflect my experiences, as a former Assistant Federal Public Defender, a tribal defender, a clinical law professor and legal aid attorney, and, of course, as a Native American woman. My ideas flow from my work with Native American Indians in tribal, federal and state court, and my own grappling with jurisdiction under Major Crimes Act and habeas corpus statutes, and federal laws of general applicability on and off the reservation.

Native Americans are uniquely brought under federal criminal jurisdiction, and the CJA. While the law requires equal treatment for Indians in our justice system, the unique person and the unique path that defines the Indian relationship poses a challenge to the fair and just representation of Native Americans in criminal cases under the CJA.

The following are key recommendations to adequate representation of Native Americans under the CJA: 1) Parity with the federal prosecution efforts in Indian Country – including additional defenders and other personnel, programs and resources; 2) Training in Indian law – including specialized training in the intersections with criminal and constitutional law involved in representing Native American Defendants, and; 3) Cultural literacy in the issues that arise in working with Tribal Peoples and the Tribal Nations, and; 4) employment of Native American personnel in all of aspects the federal defender organizations.

These recommendations are based upon the following information and observations.

[1] The term "Indian country" is both a legal term and a term of art. As defined in statute, it refers to all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all existing Indian allotments, including any rights-of-way running through an allotment. See 18 U.S.C. § 1151.

## Background

Native Americans are uniquely brought under federal criminal jurisdiction like no other race,[2] status or group within the American polity. The exercise of federal criminal jurisdiction on the Indian reservation is basically found in two statutes—the General Crimes Act, 18 U.S.C. § 1152,[3] and the Major Crimes Act, 18 U.S.C. § 1153.[4]

The Major Crimes Act of 1885 applies only to Native Americans. It hales Indians into the federal courts for prosecution and sentencing for certain offenses in Indian Country.[5] They face prosecution under the General Crimes Act for interracial and other types of crimes, and the Central Violations Bureau for federal violations on the reservation. Indians may also seek federal habeas corpus review of Tribal Court orders in the federal courts under the Indian Civil Rights Act of 1968, 25 U.S.C. 1303.[6]

## Unique Nature of Indian Country Cases Presents Challenges to Competent Representation for Indians in Federal Court

Native Americans receive the same protections and guarantees of the United States Constitution,[7] including the Sixth Amendment Right to Counsel, and access to appointed counsel and services under the CJA if financially unable to hire counsel. Despite this guarantee, there are serious obstacles to equal treatment in the criminal justice system and just and fair

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[2] The treatment of Indians as part of the federal trust responsibility is soundly based upon the separate and unique political status of the Native American Indian. Morton v. Mancari, 417 U.S. 535 (1974). In the federal criminal justice system, however, I (and others) argue that separate treatment is a racial classification and constitutes discrimination in the administration of justice. See Troy Eid & Carrie Doyle, Separate but Unequal: The Federal Criminal Justice System in Indian Country, 81 U. Colo. L. Rev. 1067 (2010) (exploring the historical underpinnings and racist origins of the Major Crimes Act as violative of the Equal Protection guarantees).

[3] The General Crimes Act arose out of the Trade and Intercourse Acts to generally extend federal criminal laws into Indian country. The General Crimes Act applies to Indians and non-Indians, but specifically exempts offenses committed by one Indian against another Indian, any Indian committing an offense in Indian country who has been punished by the local law of the Tribe, and cases where treaty stipulations designate exclusive jurisdiction in the Tribe. It is also known as the Indian Country Crimes Act.

[4] A third statute, Public Law 280, conferred all criminal jurisdiction over offenses committed in Indian country to the governments of six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, except as specified by statute, waived federal jurisdiction in Indian country under the General and Major Crimes Acts, and subjected Indians to prosecution in state court, originally without the permission of the Tribes involved. Passed during the termination era of Federal Indian law, it is codified now at 18 U.S.C. § 1162.

[5] The enumerated offenses are: murder; manslaughter; kidnapping; maiming; felony provisions of the Sexual Abuse Act of 1986, as amended; incest; assault with intent to commit murder; assault with a dangerous weapon; assault resulting in serious bodily injury; assault against an individual who has not attained the age of 16 years; felony child abuse or neglect; arson; burglary; robbery; and felony larceny, theft, and embezzlement. See 18 U.S.C. § 1153(a).

[6] The Indian Civil Rights Act is codified at 25 U.S.C. §§ 1301, et. seq. In addition, the federal government has jurisdiction to prosecute crimes of general applicability, such as violations of the Controlled Substances Act of 1970, 21 U.S.C. § 801 et seq. on and off the reservation. These laws apply to all, not just Native American Indians.

[7] "All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242.

results.[8] This is true, in part, because of the complex nature of the Indian political relationship of the Native American Indian and the federal government, and the complexities of tribal law and federal Indian law.

Prior to 1885, offenses were dealt with by the Tribal sovereign nations within their own systems of justice whether reflecting traditional Native practices[9] or assimilated systems patterned after the United States federal and state courts.[10] Federal criminal jurisdiction was thus narrowly confined to specific offenses defined in Trade and Intercourse Acts, and treaty language, and under the General Crimes Act, which exempted intra-racial offenses and Indians who were prosecuted under the local law of the Tribe.[11]

Native Americans are culturally different and politically distinct. They possess a different history, geography, culture, and language. They also have different relationships and among the tribes and with outsiders. Often little is known about Tribal Nations and Tribal peoples beyond their close communities and among the general public. Natives are "seen" only movies or popular culture as stereotypes or caricatures of themselves and their culture. That culture, rich in culture, language and community is often exploited or derided as a throwback and not relevant or currently in existence. The (ig)noble savage character portrayed on screen over the years becomes reflected in this nation's justice system. Native Americans make up a small percentage of the United States population, yet they are overrepresented in the federal courts and over incarcerated in the state and federal prison system.

The impact of crime on Native Americans is also unique – and devastating. According to DOJ, approximately 25 percent of all violent crime cases opened each year by district USAOs nationwide occur in Indian country. The rates of violent victimization of males and females were higher among American Indians than for all races. [12] Natives American Indians experienced a per capita rate of violence greater than that of the rest of the U.S. resident population. Violent crime rates in Indian country are more than 2.5 times the national rate; some reservations face more than 20 times the national rate of violence.[13] Disturbingly, in the data from the Bureau of Justice Statistics shows that at least 70% of the violent victimizations experienced by American Indians were committed by persons not of the same race — a substantially higher rate of

[8] Eid & Doyle, Separate but Unequal: The Federal Criminal Justice System in Indian Country, 81 U. Colo. L. Rev. 1067 (2010).
[9] *See*, *e.g.*, Ex Parte Crow Dog, 109 U.S. 556 (1883).
[10] *See*, *e.g.*, Talton v. Mayes, 163 U.S. 376, 380-383 (1896) (analyzing treaty provisions describing Cherokee Nation inherent sovereignty, self-government and criminal and civil jurisdiction in the Indian Nation courts.)
[11] 18 U.S.C. § 1152; Ex Parte Crow Dog (109 U.S. 556) (1883). For an overview, See Barbara Creel, Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing, 46 *U.S.F. L. Rev*. 37, 58-67 (2011) and Barbara L. Creel, The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative, 18 *Mich. J. Race & L.* 317, 334-335 (2013).
[12] Steven W. Perry, U.S. Dep't of Justice, A BJS Statistical Profile, 1992-2002: American Indians and Crime (2004), p. iv-v and 3-8. See also, Lawrence A. Greenfeld & Stephen K. Smith, U.S. Dep't of Justice, American Indians and Crime (1999) summary tables, p. vi., 1-5. The rate of violence experience by American Indian women was 50% higher than African American males. *Id.*
[13] Steven W. Perry, American Indians and Crime, A BJS Statistical Profile, 1992-2002, U.S. Department of Justice, Bureau of Justice Statistics (2004), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=386.

interracial violence than experienced by white or black victims.[14] At least 70% of the violent victimizations experienced by American Indians committed by persons not of the same race — a substantially higher rate of interracial violence than experienced by white or black victims. [15]

Native American individuals have a political relationship with their own Tribes and with the federal government. The 566 different and distinct Federally Recognized Indian Tribes possess a unique government-to-government relationship with the United States.[16] The federal government has a trust responsibility to the Tribal Nations and Tribal peoples that encompasses public safety, civil rights and justice in Indian country. In the one hundred years since the passage of the Major Crimes Act, the federal government has interpreted its responsibility as one of crime and punishment.

The laws applicable to Native Americans are different. The United States Constitution does not apply to sovereign Indian tribal governments.[17] However, the U.S. Constitution and laws do apply to Tribal people in state, federal and Bureau of Indian Affairs (Code of Federal Regulations or C.F.R) courts. Tribal justice systems are the most appropriate institutions for maintaining law and order in Indian country. There are tribal governments that have adopted federal and state court models of the adversary system with and without the right to counsel. There are also tribal justice systems which maintain traditional methods of systems of dealing with offenses. Congress passed the Indian Civil Rights Act to impose statutory protections for Indians through the Indian Civil Rights Act, and specifically granted federal review federal habeas jurisdiction in federal court. In sovereign tribal courts, tribal internal law and process applies to all cases. Under Supreme Court precedent, however, tribal internal law and jurisdiction can only be applied to other Indians, with the only exception being Special Domestic Violence Criminal Jurisdiction over non-Indians in specific domestic violence cases brought in a limited number of tribes under the VAWA reauthorization of 2013.

Congress and the executive departments have interpreted its federal trust responsibilities in Indian Country as improving the fair administration of justice through prosecution and incarceration.[18] Most recently, Congress passed the Tribal Law and Order Act of 2010 (TLOA),[19] and the Violence Against Women Act Reauthorization of 2013 (VAWA). TLOA and VAWA are comprehensive pieces of legislation designed to address violence against Native American women and coordinate crime and punishment efforts in Indian Country. TLOA enhanced tribal authority to prosecute and punish criminals; expanded efforts to recruit, train and keep Bureau of Indian Affairs (BIA) and Tribal police officers; and authorized access to criminal information sharing databases for BIA and Tribal police. It also authorized new guidelines for handling sexual assault and domestic violence crimes to better training for law enforcement and court officers and boost conviction rates.

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[14] *Id*. 1999 report.
[15] *Id*. 1999 report, p. vi-v, and 7-8. 2004 Report p. 9-10.
[16] Department of Interior list of Federally Recognized Tribes, 80 Fed. Reg. 1942, published January 14, 2015.
[17] *Talton*, 163 U.S. at 383.
[18] U.S. Department of Justice, Indian Prosecutions and Investigations 2013 [DOJ 2013 Report], available at http://www.justice.gov/sites/default/files/tribal/legacy/2014/08/26/icip-rpt-cy2013.pdf.
[19] Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261.

The Indian provisions of the VAWA Reauthorization of 2013 amended the statutory language and increased penalty provisions for certain crimes of domestic violence, such as strangulation and stalking. The Act also recognized "special domestic violence criminal jurisdiction" over non-Indians in tribal court, as opposed to federal court under the General Crimes Act or in state court, which have failed to pursue such cases.[20]

There are two primary federal agencies responsible for law and order in Indian Country– the Department of the Interior (DOI) and the Department of Justice (DOJ). Both play major roles in prosecutorial responsibilities in implementing the TLOA and VAWA provisions.

The Department of Justice boasts of an "unprecedented level of collaboration with tribal law enforcement, consulting regularly with them on crime-fighting strategies in each District, joining in Federal/tribal task forces, sharing case and grant information, training investigators, and cross-deputizing tribal police and prosecutors to enforce Federal law and to allow those deputized individuals to bring cases directly to Federal court."[21]

A review of these prosecutorial initiatives reveals the need for more personnel, training and resources on the defense side to secure an adequate defense.

Additional Prosecutors in Indian country

> Prior to the passage of the Tribal Law and Order Act of 2010, the DOJ announced the addition of 30 Assistant U.S. Attorneys (AUSA) to serve as tribal liaisons in 21 USAO district offices that contain Indian country including the four states with significant Indian Country caseload--Arizona, New Mexico, North Dakota, and South Dakota. DOJ allocated the additional prosecutors in the four district offices as follows: Arizona (5), New Mexico (2), North Dakota (1), and South Dakota (2). The remaining 20 prosecutors were allocated among 17 district USAOs across the United States.

Tribal Special Assistant United States Attorneys (SAUSA) program

> Since the passage of the TLOA, the DOJ has implemented the Tribal Special Assistant United States Attorneys (SAUSAs) program. [22] Under the program, the DOJ employs Tribal SAUSAs who are cross-deputized tribal prosecutors, and thus able to prosecute crimes in both tribal court and federal court. According to the DOJ, these new Tribal SAUSAs serve to strengthen a tribal coordination with tribal law enforcement personnel, and help to accelerate a tribal criminal justice system's implementation of TLOA and VAWA 2013.[23]

[20] The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26.
[21] DOJ 2013 Report, p. 5.
[22] Tribal Law and Order Act, provides that United States Attorneys may cross designated tribal prosecutors under an enhanced Tribal Special Assistant United States Attorney (SAUSA) program. See Section 213 b of the Tribal Law and Order Act of 2010, codified as 25 USC § 2810.
[23] DOJ 2013 Report, p. 5.

United States Attorney Tribal liaisons in Indian Country

Within 94 judicial districts located throughout the United States and its territories, there are 48 judicial districts with Indian Country responsibility. In addition to the additional prosecutors the DOJ has increased coordination in Indian Country through the appointment of Tribal Liaisons.[24] Recently, the DOJ announced that, "[e]very U.S. Attorney [within those 48 districts] with Indian Country jurisdiction has appointed at least one tribal liaison to serve as the U.S. Attorney's Office's (USAO) primary point of contact with tribes in the district." [25]

Increased Coordination and Collaboration

- The DOJ established the Office of Tribal Justice as a permanent component of the Department, and;
- Appointed a Native American Issues Coordinator to assist the United States Attorneys, and;
- U.S. Attorneys from 25 districts with Indian Country serve on the Native American Issues Subcommittee (NAIS) to discuss issues in Indian country and provide support for USAO bringing charges in Indian Country under VAWA. As of the end of February 2015, DOJ reported federal prosecutors had charged 210 defendants under VAWA 2013's enhanced federal statutes and obtained 164 convictions. [26]

Enhanced Training for Prosecutors and Law Enforcement in Indian Country

- In July 2010, the Executive Office of the U.S. Attorney launched the National Indian Country Training Initiative (NICTI) to train DOJ prosecutors, as well as state and tribal criminal justice personnel in challenging areas of Indian country prosecutions.
- The Department's National Indian Country Training Coordinator is based at the National Advocacy Center (NAC) in Columbia, SC. According to the DOJ, the NICTI has delivered dozens of training opportunities at the NAC or in the field, including well over 100 lectures for other federal agencies, tribes, and tribal organizations held around the country. The NICTI had reached the 48 United States Attorneys' Offices with Indian country responsibility and over 200 tribes, federal, and state agencies. [27]
- The Justice Department also initiated an Indian Country fellowship as part of the Attorney General's Honor Program, designed "to create a new pipeline of legal talent with expertise and deep experience in federal Indian law, tribal law, and Indian Country

[24] See 25 U.S.C. § 2810 (requiring the USAO in each district that includes Indian country to appoint not less than one AUSA to serve as a tribal liaison for the district).
[25] Dep't. of Justice: Indian Country Accomplishments of the Justice Department, 2009-Present, available at www.justice.gov/sites/default/files/tribal/legacy/2014/02/21/ic-accomplishments.pdf (highlighting DOJ progress in enhanced prosecution and training efforts; implementation of the Tribal Law and Order Act of 2010).
[26] See http://www.justice.gov/tribal/accomplishments.
[27] *Id*.

> issues."[28] The fellow is offered a 36-month appointment in a United States Attorney's office with significant Indian Country issues, and expected to be deployed to build tribal prosecution capacity, combat crime, and bolster public safety from the enforcement side.[29]

While the DOJ has marshalled resources under the trust responsibility to provide for support and resources for the prosecution of Indians – so too does there exist a responsibility to ensure equal rights and protections for Native American Indians in both tribal and federal courts. Justice requires parity in resources allocated to the United States Attorneys' Offices and the Federal Defender program.

**Parity in personnel, training and access to resources is required under the Criminal Justice Act to mount an adequate defense**

Parity is foundational to the American adversary system of justice. A well-supported defense is just as important as a well-resourced prosecution. The 1963 report supporting the proposed Criminal Justice Act[30] eloquently described the essential nature of the defense function in our adversary system:

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends on a constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.[31]

Thus, the Criminal justice Act is founded upon parity between prosecution by the U.S. Attorney and the defense, and the noble ideal that finances should not impact access to justice.[32] Fairness in our adversary system is based upon the fundamental idea that the poor man is entitled to equal justice the same as the rich man. Not only is the defense function vital to the adversary system, but the protection of the rights of those who are financially unable hire an attorney are vital to a free society. The Allen Report, continued:

> It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions

[28] The Gaye L. Tenoso Indian Country Fellowship, See DOJ website: http://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship. The First Indian Country Legal Fellow was appointed in 2014 to serve in the District of Arizona.
[29] *Id*.
[30] REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF THE FEDERAL CRIMINAL JUSTICE (1963), also known as, and hereinafter, "The Allen Report."
[31] The Allen Report at 10. See Geoffrey T. Cheshire, A History of the Criminal Justice Act of 1964, Federal Law 67 (October/November 2015)
[32] 18 USC 3006A(g) (2)(A); the ALLEN REPORT Ch. 3.

> produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.[33]

This requirement of parity is reflected in our Supreme Court precedent. In *Gideon v. Wainwright*, the Court pronounced:

> Reason and reflection require us to recognize that 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. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.[34]

Later in *Argersinger v. Hamlin*, the Court extended Gideon's rule that lawyers in criminal courts are necessities, not luxuries, and held, "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[35] Chief Justice Burger concurred, noting that, "society's goal should be 'that the system for providing the counsel and facilities for the defense should be as good as the system which society provides for the prosecution.'"[36]

Congress has funded and the executive agencies have executed training and access to personnel for federal and tribal courts to support prosecution of crime in Indian Country. The federal tribal trust responsibility an equal measure of attention to the rights and Indian people in federal court. Justice requires, at the very least, parity in personnel, training and resources to equal those described above.

**Parity in Defenders and Defense**

Within the excellent services provided by the Defender Services Organizations there is not an equivalent response to the additional personnel and special prosecutors, nor is there any other parity with Department of Justice initiatives in Indian Country. Additional Assistant Federal Defenders should be allocated and appointed among the jurisdictions within Indian Country.

With the appointment of SAUSA's authorized to prosecute tribal court and represent the United States in federal court, the appointment of AFPD's to address collateral tribal court proceedings maintains some parity. Tribal investigations and tribal court prosecutions are critical stages for the right to counsel and trigger the Fifth and Sixth Amendment protections when federal investigators and SAUSAs are involved. Representation at all critical stages is required to adequately represent Native Americans in Indian Country. Clarification of the CJA and its application to ancillary matters in Indian Country and tribal courts is required. Assistant Federal Public Defenders and panel attorneys should be allowed under the local plan to represent Indian

[33] *Id*. at 11.
[34] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
[35] 407 U.S. 25, 37 (1972).
[36] 407 U.S. 25, 43 (1972) (concurring, citing ABA Standards Relating to Providing Defense Services).

individuals in ancillary matters in tribal court under their federal appointment to protect the federal constitutional rights of Indians. [37] This would require additional personnel and resources so as not to overburden defenders who are already over-worked in and outside of Indian Country. This means appearance in tribal court ancillary to the federal matter, where justice in US Court would require, including trial and habeas matters. Federal defenders in tribal court would be required to meet specific tribal court or tribal bar admission requirements where applicable.

**Federal Tribal Liaison**

In addition to more Indian country defenders, the creation of a Tribal Liaison to serve in the Administrative office of the Court and within the Office of the Federal Public Defender (FPD) is needed to serve the defense in Indian Country. In my testimony before the Indian Law and Order Commission in 2012, I advocated for a Federal Defender Tribal Liaison to assist with the coordination of defense services for Native Americans facing federal prosecution from Indian Country jurisdiction. [38] I renewed this call in the 2013 article, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*.[39] There is a tribal liaison in the Office of the United States Attorney designed to serve the prosecution, yet no one is provided to assist the Indian Country defense. Indian defendants facing federal criminal charges under the Major Crimes Act are entitled to an attorney under 18 U.S.C. § 3006a, and yet there is no formal or communication or coordination between the tribal investigation and prosecution and the federal defender.

A tribal liaison position within the Federal Defender Organizations would reflect the needs of the defense community and bridge the gap between the two cultures and judicial systems. Under federal criminal law and procedure, Indian law, and the dual sovereignty doctrine, Indians can be tried in tribal court and federal court without double jeopardy problems.[40]

In my work as a tribal defense attorney, the assistance of the Tribal Advocate was invaluable to the defense of each defendant. The Tribal Advocate was a tribal member who could provide crucial information on processes, parties, witnesses, location, geography, relationships and other factors that proved to be key to understanding the case and assisting the client. A tribal liaison would allow for communication with the defendant when picked up by law enforcement under the coordinated law enforcement systems whether it be BIA, FBI or tribal police or other entities. Importantly, the tribal liaison could coordinate the legal proceedings between tribal and federal court under the major crimes act. A number of important issues come up in the maneuvering between the two justice systems. These specialized issues raise the need for coordination and training defenders and investigators in the substantive law and process in Indian Law, and cultural differences on the reservation.

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[37] 18 U.S.C. 3006A(c) provides for appointment at "initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings."
[38] Indian Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States,* 77, November 2013.
[39] Barbara L. Creel, The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative, 18 *Mich. J. Race & L.* 317, 359-361 (2013).
[40] See United States v. Lara, 541 U.S. 193 (2004); United States v. Wheeler, 435 U.S. 313 (1978).

## Training to Ensure Competent Representation

The important corollary to parity in personnel is parity in training. Within the Department of Justice, there is enhanced training for all AUSA and Law enforcement in Indian country both for these new SAUSAs, and for all Prosecutors and law enforcement in Indian country. The National Indian Country Training Initiative has trained thousands of federal and tribal criminal justice professionals. According to the DOJ, the efforts have resulted in a notable increase in overall law enforcement in Indian Country. In fact, in just the last three years, U.S. Attorneys' Offices with responsibility for Indian Country prosecutions have seen their caseload of prosecutions for crimes committed on tribal lands increase by more than 54 percent. [41]

Public defenders need access to training resources to the same degree as that federal and tribal prosecutors. CJA panel attorneys and federal defenders require specialized training as well.

Federal defenders, panel attorneys and others working under the CJA must have competent and appropriate training in basic Indian law and jurisdiction; complex issues under the General Crimes Act and the Major Crimes Act, tribal law and federal sentencing in Indian country. In addition, they must have cross-cultural training and access to and certified interpreters in and out of the courtroom.

The model rules for Professional Responsibility and the ABA guidelines on defense services require basic competence in the field. However, in the highly specialized area of criminal defense in Indian country this experience and expertise is required to reach this level of competence to be qualified to take IC cases under the CJA at all stages in the defense in marshalling a pretrial strategy, representation at trial, and in plea negotiations, sentencing, appeals and habeas corpus review. This degree of specialized knowledge and expertise is akin to required qualifications in immigration cases and death penalty.

For example, the Indian defendant suffers dual investigation and double jeopardy punishment, uncounseled guilty pleas or conviction in tribal court and then faces extensive collateral and direct consequences in federal court, under the U.S. justice system that holds the right to counsel as fundamental to fairness. The following are some of the areas of specialized training in criminal defense in Indian country for defenders and panel attorneys representing Native Americans:

## Complex Jurisdiction - Dual sovereignty and double jeopardy

The application of federal law and constitutional principles are different in Indian Country than they are off the reservation. The dual sovereignty doctrine provides for prosecution in both federal and tribal courts for the same offense. Because Indian tribes are separate sovereigns with inherent powers of self-government predating the existence of the United States, the Supreme Court has upheld dual prosecution for the same offense. Under these principles, the Double Jeopardy Clause is not violated, and the Indian may legally be punished twice: once in tribal

[41] Attorney General Eric Holder's Remarks at the White House Tribal Nations Conference, November 13, 2013. See http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarksat-white-house-tribal-nations-conference.

court and in federal court for the same offense. To further complicate matters, there is no law proscribing a tribal and federal conviction as in the state/federal courts. There is no tribal equivalent to the federal dual or successive prosecution policy ("Petite Policy").[42] Additionally, there exists no sanctioned policy to allow for a deferral to Tribal prosecution or other handling of a case arising on the reservation. There is, however, a requirement under the TLOA for increased consultation with Tribal Nations and access to alternatives to incarceration. These areas have not been adequately explored by the defense or by any for that matter.

**Protecting Constitutional Rights in Investigation and Sentencing**

Dual investigation and prosecution for the same offense means that the tribal and Federal prosecutions can overlap. This impacts an Indian defendant's Fifth and Sixth Amendment guarantees under the U.S. Constitution.

When tribal prosecution is initiated a defendant may not be entitled to counsel under internal tribal law. In a subsequent federal investigation and prosecution, an Indian enjoys constitutionally protected Fifth and Sixth Amendment rights. However, federal prosecutions have ignored those federal constitutional protections by initiating investigation in tribal court and using that information and evidence in the subsequent federal proceeding. Tribal court investigation and prosecution may proceed without defense counsel as defined by internal tribal law. in a subsequent prosecution in federal court, when the right to counsel would have been triggered under the Fifth Amendment or Sixth Amendment right to counsel attaches in a federal prosecution. This confusion allows for overreaching in federal criminal investigations.

Additionally, federal sentencing involves unique issues under the Major Crimes Act. The federal consequences of a prior tribal uncounseled conviction and include impeachment in future proceedings.

Another disturbing issue, is the use of a prior uncounseled tribal court conviction as an element of a federal offense. Under 18 U.S.C. § 117, a federal habitual offender statute, it is a felony offense for a person who has had two or more prior domestic assault convictions to commit a domestic assault within Indian country. The law provides that state tribal or federal prior convictions are eligible. Two circuits have held that uncounseled tribal convictions, resulting in incarceration, can be used as a predicate offense under the habitual offender statute. This issue is currently pending review in the United States Supreme Court in *United States vs. Michael Bryant*.[43]

**Cultural Competence and Expertise**

Additional defenders, training and understanding of Indian law issues in criminal defense are required to improve access to justice for Native American Indian defendants under the Criminal Justice Act, but that is not enough. There must be a Native American Federal Defender serving

[42] USAM 9-2.031: Dual and Successive Prosecution Policy ("Petite Policy").

[43] Docket No. 15-420, filed October 5, 2015.

in and among the federal defender organizations. Until the Major Crimes Act is repealed or otherwise replaced, Indians are needed to help with understanding impact and issues related to federal criminal jurisdictions on the Indian reservation. Who better to take the lead in this complex area of constitutional, criminal and Indian law than a Native American lawyer who is invested the administration of justice for Indians in Indian Country?

Diversity in the administration of the Criminal Justice Act should include Native Americans recruited and hired to serve as Assistant Federal Public defenders and panel attorneys. There should also be non-Indians who are experts in the area of Indian law and criminal defense and who are culturally literate in the representation of Native Americans to assist all across the jurisdictions.

In the Southwest Indian Law Clinic at the University of New Mexico School of Law, we teach cultural literacy as an essential skill to representing individuals and groups across differing cultures. This type of training and understanding is not a luxury, but a necessity when representing Tribal people. The Administrative Office of the Courts and the Federal Defender Training Program should lead the way, and coordinate regionally specific trainings in Indian Country for Assistant Federal Public Defenders and panel attorneys order to ensure access to competent representation under the CJA. The training must include these cultural and legal issues to fully protect the rights of Native American defendants in federal criminal cases.

**Conclusion**

As criminal defense attorneys and advocates for justice, we are all responsible for the protection of the rights of Native Americans and equal access to justice under the Criminal Justice Act, but individual advocacy is not enough. Those responsible for the administration of justice under the CJA also play an important role in ensuring justice for Native American criminal defendants through protection of the right to counsel. Those responsible for the administration of the CJA in Indian Country should ensure ethical and competent representation of Native American in federal court. This includes ensuring diversity – that Native Americans are not just seen as defendants in the courtroom; that federal defenders and panel attorneys are trained in Indian law and the cultural competence; that there is coordination between investigations and prosecutions in tribal court and federal court to protect the Indian defendant's rights and meaningful access to counsel. These are a few areas of critical need.

Again, I thank the Ad Hoc Committee for their time and attention to this studying the Native American issues under the scope of this review. I am honored to be present and am happy to answer any questions that the Committee may have.