12-10-2009

Testimony on H.R. 1924, the Tribal Law and Order Act of 2009 Before the Subcommittee on Crime, Terrorism and Homeland Security United States House of Representatives, 111th Congress, 1st Session (December 10, 2009)

Barbara L. Creel
University of New Mexico - School of Law

Statement of

Barbara L. Creel
Assistant Professor of Law
University of New Mexico School of Law

Hearing on H.R. 1924, the Tribal Law and Order Act of 2009
Before the Subcommittee of Crime, Terrorism and Homeland Security
United States House of Representatives

December 10, 2009

Good Morning, Mr. Chairman, Mr. Gohmert, and Distinguished Members of the Subcommittee,

I am grateful for the opportunity to provide testimony on the Tribal Law and Order Act of 2009. My name is Barbara Creel. I am an enrolled member of the Pueblo of Jemez, one of the 22 Federally Recognized Tribes with land holdings in New Mexico. I am a law professor at the University of New Mexico School of Law, where, in addition to teaching in the Southwest Indian Law Clinic, I teach Evidence and a course I designed entitled, Criminal Law in Indian Country. Prior to teaching, I served as the Tribal Liaison to the United States Army Corps of Engineers, and from 1999 to 2006 I was an Assistant Federal Public Defender in Portland, Oregon. The latter position is one of the most important in my career as an advocate for Native peoples.

I am here today in my capacity as a Native American woman, a former federal criminal defense attorney, and an advocate for Native American individuals and Tribes. My words are not spoken on behalf of my employer or my Tribe. I speak for those caught in the 'strange tangle of laws' that make up criminal jurisdiction in Indian country; for those individuals who may be accused of a crime in the future who are subject to Tribal and federal criminal justice systems simultaneously; and those who may be subject to incarceration by order of the Tribal government in a local, state or federal facility without adequate representation.

I applaud the federal government's efforts in protecting Indians in Indian Country. Before proceeding to the analysis of the Act, I must observe that goals of the Act seem deceptively simple by the manner in which it defines the problem.

Despite record poverty, unemployment, suicide, violence and incarceration rates suffered by Natives across Indian Country, the issue is defined as one of lawlessness on the part of Native American Indians. Defining the problem as one of violence and lawlessness on the part of the individual Indians in Indian country suggests the only and best answer is to capture, detain and incarcerate more Native Americans. With Natives disproportionately represented among the prison population in county, state and federal facilities – this cannot be the answer. So, I must insist on a different approach to and frame for the problem.

I. THE ACT SHOULD ALSO INCLUDE FUNDING FOR EFFECTIVE SUBSTANCE ABUSE TREATMENT PROGRAMS, EDUCATION AND JOB TRAINING, AND CULTURALLY-BASED RE-ENTRY PROGRAMS TO PREVENT CRIME AND VIOLENCE AND PREVENT RECIDIVISIM

I acknowledge the need for and support Congressional efforts to address the gaps in criminal jurisdiction in Indian Country, to require the Department of Justice to coordinate law enforcement and investigation with Tribal governments, and to fix the serious lack of funding for law enforcement, Tribal courts, and Tribal sovereignty efforts to provide culturally-based justice systems. The failure to protect these needs is a failure of the federal government's unique role in criminal justice and a failure of the Trust Responsibility.

While I cannot disagree with the need to make the protection of Native American women, children, families and communities from rampant crime and violence a priority, I cannot agree that incarceration alone will address the problem. There needs to be funding and access to effective treatment programs, education programs, job training, and re-entry programs for Native Americans, as well.

Incarceration as a way of life

Most Native people from reservation communities have been touched by violence and incarceration and the collateral effects of both in some way. In my own family and experience, incarceration has never been more than one degree of separation from poverty, substance abuse, unemployment or depression. I have had a cousin die from a gunshot wound, and another die from unnatural causes while in jail for drunkenness. I can tell you that one loss was not easier to take than the other, but one was easier to punish.

II. INDIAN DEFENDANTS FACING IMPRISONMENT IN TRIBAL COURT SHOULD BE AFFORDED THE RIGHT TO COUNSEL, INCLUDING THE RIGHT TO COURT APPOINTED COUNSEL, AND DUE PROCESS OF LAW

Tribes, as political entities predating the U. S. Constitution and the United States itself, are not bound by the Fifth Amendment due process guarantees nor by the Sixth Amendment right to counsel. Rather, Tribes are subject to the procedural protections established by Congress under the Indian Civil Rights Act of 1968 (ICRA). Under ICRA, Indian defendants have the right to counsel, at their own expense. In other words they are entitled to a defense, if they can afford one.

There must be a right to appointed counsel for Native defendants facing criminal charges in Tribal court, just as in federal court. If the indigent defendant is facing potential jail time, even if it is just one day, the court should appoint counsel in his or her defense.

Although the argument against a Tribal right to counsel has been couched in terms of Tribal sovereignty, this has not been the case since the late 1800's. In 1883, the Supreme Court decided *Ex Parte Kan-gi-shu-ca, (Crow Dog)*, 109 U.S. 556. In *Crow Dog*, the Supreme Court determined that the United States federal courts did not have criminal jurisdiction over a Native American who murders another on reservation lands. Instead, the Court held that Tribes had exclusive jurisdiction over their own internal affairs, including murder cases. The Court's decision prompted a swift and violent act of its own. In 1885, in response to *Crow Dog*, Congress passed the Major Crimes Act, 18 U.S.C. §1153, authorizing the federal courts to punish Natives for major crimes committed in Indian Country. Since that time, Congress has exercised plenary power over Tribal jurisdiction. Exercise of this federal power has led to the displacement of Tribal traditional justice systems. In addition, the creation of CFR courts or Courts of Indian Offenses denigrated the preexisting Tribal traditional justice systems that had previously been thought of as sovereign acts of Tribal self-government.

III. FUNDAMENTAL FAIRNESS AND DUE PROCESS REQUIRES PARITY IN TRIBAL COURT SYSTEMS ADOPTING THE ADVERSARY SYSTEM IN WHICH THE TRIBE IS REPRESENTED BY A LAW-TRAINED AND FEDERALLY-FUNDED ATTORNEY

There must be an advocate for the defenseless

Many Tribes have advocated for the defenseless by excluding certain crimes from their jurisdictional authority. Over time and through federal funding, Tribes have expanded their justice systems to embrace the adversarial system. But because no two Tribes are alike, and no Tribe is required to have a particular justice system, there is not a consistent standard for criminal law, procedure or defense. Congressional wisdom opted to apply most of the U.S. Bill of Rights to Tribes and Tribal courts, but declined to apply the right to counsel in the name of Tribal sovereignty.

While Tribal sovereignty and the inherent right to self government may be a reason not to impose the right to counsel on Tribes of vastly different history, geography, language or tradition, it is not implicated in the same way among Tribes that have chosen a Western-style form of retributive justice, and adopted an American-style adversary court system. A Tribe is free to choose its justice system based on its own practices, Tribal values, customs, tradition, language and beliefs, which then shape its notions of justice, fairness, process, and how to control unwanted behavior and unwarranted danger, risks and harm. The sovereign nation can choose restorative justice, peacemaking, sentencing circle, even banishment. However, if the choice is punishment and deterrence in the form of imprisonment in a county, state or federal jail – the order to imprison must be Constitutional.

IV. INDIANS AS DUAL CITIZENS ARE ENTITLED TO PROTECTIONS OF THE UNITED STATES CONSTITUTION, WHEN BEING INVESTIGATED FOR CRIMES THAT OCCUR WITHIN THE TRIBE'S JURISDICTION BUT ARE SUBJECT TO FEDERAL COURT JURISDICTION

This is not simply a matter of Tribal sovereignty, as the individual Indian defendant is also a dual citizen subject to separate sovereigns. Under the dual sovereignty doctrine, the Native defendant can be prosecuted for the same offense or course of conduct in both Tribal and federal courts without running afoul of the Double Jeopardy Clause. Questions remain as to what triggers the Indian defendant's right to counsel in a successive prosecution and what happens when the Tribal and federal investigations overlap. Without a Tribal right to counsel, there is a potential for serious constitutional and civil rights violations in cases where an Indian defendant is being investigated for a Tribal prosecution in conjunction with a federal prosecution. Such a scenario should be intolerable under U.S. standards of justice and fundamental right to counsel.

Thank you again for the opportunity to comment on the Act and provide testimony on this important but under-served and overlooked area of Indian law.

/s/ Barbara Creel

_____

Barbara L. Creel
Assistant Professor of Law
Southwest Indian Law Clinic
UNM Clinical Law Programs