

1 STATEMENT OF NEIL FULTON, FEDERAL PUBLIC DEFENDER,
2 DISTRICT OF SOUTH DAKOTA AND NORTH DAKOTA, PIERRE, SOUTH
3 DAKOTA
4

5 Mr. Fulton. Thank you, Mr. Chairman, Ranking Member
6 Franken and Senator Durbin, for your interest in the
7 issue and the invitation.

8 In North and South Dakota, with 13 Indian
9 reservations and approximately two-thirds of our cases in
10 any given year arising from Indian country and the
11 concurrent Federal and Tribal jurisdiction over many
12 offenses, our interaction with Tribal courts in the
13 Federal defenders office is frequent and the issue of
14 misdemeanor representation in Tribal courts is critical
15 to our practice.

16 Many of the problems we encounter are similar to
17 those you will hear from ~~from~~ State practitioners, but
18 some are unique to the interplay of Federal law and
19 Tribal jurisdiction.

20 A first and critical unique aspect about Tribal
21 courts is that there is no Sixth Amendment right for
22 Native American offenders in Tribal courts. Sentences of
23 up to 1 year of incarceration can be imposed with no
24 right to appointed counsel in Tribal courts.

25 In instances where tribes allow counsel under their

1 laws, in many instances, counsel is provided by lay
2 advocates, not law trained individuals. That problem is
3 exacerbated by the rural nature of most reservation
4 areas. There simply are no lawyers.

5 In South Dakota, the Chief Justice has initiated a
6 program to draw more lawyers to rural areas because
7 regardless of whether you are in Tribal or State court,
8 there just is no lawyer available. But in Tribal court,
9 the problem is unique because there is no protection and
10 no guarantee of a lawyer.

11 As a result, guilty pleas without counsel are common,
12 I would say typical, in my experience in Tribal courts.
13 Why? It is the ultimate rational choice. You plead
14 today, you get out; you assert your right to counsel and
15 a defense, you will stay in jail.

16 Additionally, because of concurrent Federal
17 jurisdiction, many of our clients, unfortunately, believe
18 that a guilty plea will provide them with double jeopardy
19 protection against Federal charges down the road. That
20 belief is mistaken.

21 In fact, the concurrent Federal and Tribal
22 jurisdiction exacerbates that problem because in many
23 instances, Tribal misdemeanors are used as entry points
24 to a Federal prosecution. As an example, an individual
25 may be initially arrested for a simple assault or for a

1 public intoxication or a liquor violation for a more
2 serious assault charge or even a homicide.

3 That individual is detained. Statements are obtained
4 and the case is developed with that individual not
5 realizing that Federal charges are available, not
6 realizing the right to counsel and no guarantee thereof.

7 Admissions are made. No global plea agreements are
8 worked out. And in some instances, the appointment of
9 special ~~attorney generals~~ ^{United States Attorneys} deputized in both Tribal and
10 Federal court, the prosecution is initiated and driven by
11 the person who will eventually pursue it in Federal court
12 and the individual has no counsel at any point while they
13 make critical admissions.

14 Collateral consequences are severe. You have heard
15 from other people about that and will hear more, but it
16 is particularly acute in Indian country. Six of the 10
17 lowest per capita income counties are in North and South
18 Dakota. They are all Indian country. Employment is
19 unavailable endemically. If you have disqualifying
20 misdemeanor convictions, it is even worse.

21 Student aid is unavailable to lift people out of
22 poverty and if you are ineligible for government
23 subsidized housing in Indian country, that is to say you
24 are ineligible for housing, period.

25 In many instances, heads of households will plead

1 guilty to misdemeanors, thus becoming ineligible to
2 retain their housing and displacing both them and their
3 family.

4 Additionally, a disturbing collateral consequence is
5 that un-counseled Tribal convictions can serve as
6 predicates for certain Federal offenses. As an example,
7 the Eighth Circuit Court of Appeals has affirmed the use
8 of un-counseled Tribal domestic assault convictions as
9 predicate offenses for habitual domestic offender
10 convictions under 18 USC 117.

11 The efforts by Congress to address these issues in
12 Tribal courts under the Indian Civil Rights Act, the
13 Tribal Law and Order Act and VAWA have not solved the
14 problem, at least not yet.

15 My compatriots in other places have described
16 instances where the Indian Civil Rights Act or the Tribal
17 Law and Order Act protections have been ignored, either
18 by mistake or bad faith; individuals receiving up to
19 2,500 days in detention post the enactment of TLOA,
20 individuals receiving almost 2.5 years after TLOA was
21 enacted, without counsel.

22 The problem is the remedies to address these issues
23 are very cumbersome. One has the right to pursue habeas
24 corpus in Federal court, but you have to first exhaust
25 your remedies in Tribal court. That is a cumbersome

1 First, I think that in no circumstance should an un-
2 counseled conviction be an element, a sentencing
3 enhancement, or a predicate offense for a subsequent
4 offender statute under Federal law. It seems improper
5 for our Federal laws to capitalize on unrepresented
6 convictions, wherever they come from, Tribal or State
7 court.

8 The Violence Against Women Act and Tribal Law and
9 Order Act, whether through lack of information or
10 whatever basis, I have heard from people where tribes
11 have exercised that expanded jurisdiction, but the
12 protections under those statutes are not being provided
13 and individuals are receiving sentences that are greater
14 than they should receive.

15 The remedy to fix that is to go to Federal court and
16 pursue habeas corpus. I think that one thing the
17 Committee could look at there is to eliminate a
18 requirement to exhaust Tribal court remedies before
19 seeking habeas under TLOA or VAWA. That would expedite
20 that and make it a meaningful remedy so the individual
21 would not have to sit in jail and go there.

22 And lastly, I think going back and looking at whether
23 an expansion of Tribal court jurisdictions when resources
24 may not be available to non-Natives and sentencing
25 enhancements when there are existing Federal offenses

1 And I think a lot of the magistrates and the judges
2 and the prosecutors in small misdemeanor cases work in
3 that direction thinking that they are providing an
4 outcome that will work for the offender.

5 It does not. And so what we are trying to do is
6 educate the people involved in our process so that our
7 courts work in a way that it solves the problems of
8 people that come into its courtroom instead of piling on
9 to the problem.

10 So I think our focus has been for judicial education.

11 Chairman Grassley. I am going to go to Mr. Fulton,
12 please.

13 How does the expansion of Tribal courts'
14 jurisdiction, for instance, under the Violence Against
15 Women Act and particularly for non-Native Americans,
16 impact the problem of indigent representation for
17 misdemeanor defendants, especially as it affects Federal
18 proceedings?

19 Many of us had concerns regarding the expansion of
20 this jurisdiction when we reauthorized that legislation.
21 Are there particular remedies the Committee could
22 consider to address the right to counsel issues arising
23 from Tribal court proceedings?

24 Mr. Fulton. I think there are some things that
25 could be done, Mr. Chairman.