



June 17, 2021

The Honorable Merrick Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Legal Aid Interagency Roundtable topic:

INDIGENT NATIVE AMERICANS FACING UP TO A YEAR OF IMPRISONMENT BY A TRIBAL COURT ARE NOT CURRENTLY PROTECTED BY THE SIXTH AMENDMENT AND ARE NOT ENTITLED TO APPOINTED COUNSEL; THEY SHOULD RECEIVE THE SAME RIGHT TO APPOINTED COUNSEL THAT IS AFFORDED TO EVERYONE ELSE IN THE UNITED STATES WHO IS FACING ANY TERM OF INCARCERATION.

Dear Attorney General Garland:

On Friday, May 21, President Biden issued a memorandum, Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable, which reestablishes the Legal Aid Interagency Roundtable (LAIR). NACDL is writing to you, as the head of LAIR, to suggest a very important access to counsel issue for this group to consider: LAIR should recommend that Congress amend the Indian Civil Rights Act (ICRA), 25 U.S.C. §1302, to provide for the right to appointed counsel for indigent persons in tribal courts who are facing incarceration.

Fifty-eight years ago, the U.S. Supreme Court held in *Gideon v. Wainwright* that a person facing imprisonment who is indigent is entitled to appointed counsel, because it is "an obvious truth" that "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," and that having an attorney is a "fundamental right essential to a fair trial."¹ And 49 years ago, the U.S. Supreme Court held in *Argersinger v. Hamlin* that even for a misdemeanor or a petty misdemeanor, a person who is facing any jail

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

time at all and is indigent is entitled to appointed counsel,² writing that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."

Yet an indigent Native American who is charged in tribal court, facing up to a year in jail, with all the consequences of confinement, including loss of employment and housing, is NOT currently entitled to appointed counsel, only counsel at his or her own expense.

This is because ICRA, when first passed in 1968, allowed tribal courts to only sentence people up to 6 months in jail and a maximum fine of \$500; at that time, prior to *Argersinger*, Congress decided not to require appointed counsel for indigent persons but, as a tradeoff, to limit the term of punishment. Thus, ICRA provides that,

No Indian tribe in exercising powers of self-government shall-
(6) deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense.

The truth, then and now, is that the vast majority of persons facing tribal court charges are indigent and unable to afford counsel.³ Navigating the criminal legal process is a daunting prospect for persons with no training in the rules of evidence, applicable statutory or common law, constitutional protections, and other rudiments of the American criminal legal process. Yet, they face very serious direct and collateral consequences.

It is also true that the provision of defense counsel is expensive and most tribes cannot afford that cost. Some tribes do have public defenders; some have non-lawyer advocates who may not be subject to educational requirements; some tribes that provide representation do so for only a very small percentage of defendants; and some provide no representation at all. Practices vary widely from tribe to tribe.

In 1986, Congress extended tribal courts' sentencing authority to one year in jail and a fine of \$5,000, but did not require appointed counsel for indigent persons in tribal court.

In 2010, Congress passed the Tribal Law and Order Act (TLOA), which amended ICRA to provide a greater punishment power (up to 3 years imprisonment) for the tribes. Testimony at the 2009 Congressional hearings on TLOA described problems in tribal court ranging from tribal laws that are not accessible to the public, to lack of appointed counsel and state-licensed lawyers (as opposed to non-lawyer advocates who may be licensed by a tribe), to lack of law-trained judges. Testimony urged that if the penalties were to be increased, at least there should be a right to appointed counsel. Congress' compromise between these concerns – individual rights versus

² *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

³ The majority of defendants in the hundreds of tribal courts are without counsel. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AMERICAN INDIAN LAW REVIEW, 117, 119 & 123 (2000-2001).

some tribes' desire to impose greater punishment – now allows sentences up to 3 years with certain additional rights to defendants.⁴

Still today, the Sixth Amendment right to counsel does not apply in tribal court proceedings, and ICRA provides for a right to retained counsel only,⁵ unless the tribe has adopted TLOA jurisdiction in order to impose sentences exceeding one year.⁶ In *United States v. Percy*, involving an individual who had been arraigned on tribal charges but not yet arraigned on federal charges arising from the same facts, the Court held:

It is well established that tribal proceedings do not afford criminal defendants the same protections as do federal proceedings. The protections of the United States Constitution are generally inapplicable to Indian tribes, Indian courts and Indians on the reservation.

⁴ The current ICRA law provides as follows:

- (b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000. A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who-
 - (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
 - (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.
- (c) Rights of defendants. In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall-
 - (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
 - (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
 - (3) require that the judge presiding over the criminal proceeding-
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
 - (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
 - (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

⁵ *United States v. Percy*, 250 F.3d 720, 724-25 & n.2 (9th Cir. 2001).

⁶ Prior to TLOA, there was litigation over whether the one year limit was per count or per occurrence. A prosecutor would have to be quite unimaginative not to see how one event could result in more than one charge. In one case a man had a restraining order not to go to his parents' home; he went there and stole a bottle of shampoo, which resulted in charges of violating the restraining order, burglary, and theft, and received separate sentences that totaled more than one year, *Bustamante v. Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010). In *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2018), where Miranda, who had no lawyer, was charged with "eight criminal violations arising from a single criminal transaction," the Ninth Circuit held that ICRA, section 7, "unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation," at 847.

See *Talton v. Mayes*, 163 U.S. 376, 381-82, 41 L. Ed. 196, 16 S. Ct. 986 (1896); *Tom v. Sutton*, 533 F.2d 1101, 1102-3 (9th Cir. 1976). The underlying rationale is that Indian tribes are quasi-sovereign nations. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172-73, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). This Circuit has held the Sixth Amendment right to counsel does not apply in tribal court criminal proceedings. *United States v. Ant*, 882 F.2d 1389, 1392 (9th Cir. 1989); *Settler v. Lameer*, 507 F.2d 231, 241 (1974). Thus, Percy's Sixth Amendment right to counsel had not attached for the purposes of the tribal proceedings flowing from the tribal arraignment.

United States v. Percy, 250 F.3d 720, at 725.

This lack of a right to counsel in tribal court also impacts Native Americans facing federal felony charges; an example is Lezmond Mitchell, a Navajo in Arizona, who was suspected of killing two Navajos on Navajo land 19 years ago. He was 20 years old at the time and had no prior criminal record. When the case was first being investigated, the FBI asked the U.S. Attorney for approval to arrest Mitchell. The AUSA said they didn't have enough evidence to arrest Mitchell, but to see if the tribe would arrest him. The tribe did arrest him, never charged him with any crime in tribal court, never enabled him to have counsel, kept him in tribal jail for 25 days during which time the FBI interviewed him multiple times without counsel, and then again interrogated him on the ride from tribal jail to federal court. A non-Indian would have been entitled to the prompt appointment of a lawyer and prompt presentation to a judge. All the statements Mitchell made without counsel were used against him in federal court, but could not have been used against a non-Indian.⁷ The federal government executed Lezmond Mitchell for this crime on August 26, 2020.

The other factor is that since 2015, the tribes can choose to exercise domestic violence jurisdiction over non-Indians (see 25 U.S. Code §1304 (b)(4)(8)). In those criminal prosecutions in tribal court where the defendant is a non-Indian, that defendant has the right to appointed counsel if indigent, and the tribe would have to pay for that, whereas an indigent Indian charged with the same crime (even as a co-defendant) does not have the right to appointed counsel if facing a sentence of a year or less. How can that be fair?

It cannot be said that the sovereignty of the federal or state governments is diminished when individuals charged by those governments have rights to due process and to appointed counsel when indigent. Nor would it diminish tribal sovereignty to provide individual Native Americans with those same rights when they are facing incarceration.

Indians are, after all, U.S. citizens, who when charged in federal or state courts, have the same rights as other persons to appointed counsel and full due process. There should be a right to appointed counsel for any indigent person facing imprisonment anywhere in the United States,

⁷ *United States v. Mitchell*, 502 F.3d 931, at 959-962, and dissent at 997-1003 (9th Cir. 2007).

including in tribal courts, and ICRA should be amended accordingly. NACDL asks that the Legal Aid Interagency Roundtable consider recommending legislation addressing the right to appointed counsel for indigent persons in tribal court criminal cases. Federal funding is also needed for tribes to hire public defenders or pay defense counsel on a case-by-case basis. Interim steps that would be helpful include Department of Justice funding for training and technical assistance to incentivize and facilitate increased access to counsel in tribal courts.

Thank you for considering NACDL's views on this matter, a critical component of the Department's mission to "to ensure fair and impartial administration of justice for all Americans."

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher W. Adams". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher W. Adams
President