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REPORT NO. 2 OF THE
SECTION OF INDIVIDUAL RIGHTS
AND RESPONSIBILITIES

RECOMMENDATION*

BE IT RESOLVED, That the American Bar Association, without taking a position on the enactment of general federal death penalty legislation, supports in principle legislative measures which would prevent or minimize any disproportionate effects of general federal death penalty legislation on Native Americans subject to federal jurisdiction.

REPORT

I. ISSUE

Congress is now considering several crime reduction bills which would extend the death penalty to crimes, such as first degree murder, that are not currently punishable by death under federal law.

The bills are aimed at attacking a wide range of presently existing criminal offenses under federal law, but were not intended to be aimed at American Indians. Yet this unintended effect will cause American Indians to be exposed to the death penalty to a far greater extent than non-Indians and will result in egregious disparities between Indians and non-Indians unless the legislation specifically addresses the potential for this disproportionate and disparate impact on Indians.

**II. THE DISPROPORTIONATE
AND DISPARATE EFFECT OF
FEDERAL DEATH PENALTY
LEGISLATION ON NATIVE
AMERICANS**

Most murder cases in the United States are prosecuted in state courts. Those which are prosecuted in federal courts are a result of federal jurisdiction over federal lands or because the victim had some federally protected status. Although there are vast areas of federal land in the United States, most of it is not inhabited on a permanent basis. The exceptions are Indian Reservations, military bases, and federal prisons.

In the statistical year 1988, there were 64 cases of first degree murder prosecuted in federal court. Of those, 40 cases arose on Indian

*The recommendation was approved. See page 50.

Reservations. This constitutes just over 62 percent of all first degree murder cases prosecuted under the U.S. code. Thirty-nine of the 40 defendants were Indians. According to the U.S. Sentencing Commission's 1988 annual report, 77.8 percent of all persons sentenced in the federal courts for homicide between November 1, 1987 and February 28, 1989, were Indians and Alaskan Natives.

Under federal law, most states have no criminal jurisdiction over Indians on Indian lands. In certain states, such as Minnesota and Wisconsin, there is federal jurisdiction over some reservations but not others. In some states, where the federal courts have jurisdiction over crimes on Indian land, such as North Dakota, Minnesota, Wisconsin, and Kansas, there is no state death penalty. In other states, such as New Mexico and Utah, there is a death penalty but it is limited to certain very specific circumstances. For example, in New Mexico, it can be applied only in such limited instances as the killing of an active duty police officer or prison guard.

Federal legislation extending the death penalty to crimes committed over all lands under federal jurisdiction would subject Indians to the death penalty where non-Indians, charged with murder in the remainder of the state outside the reservations, would not be subject to a death penalty. In other states, members of some tribes would face the death penalty while other Indians around the state, as well as non-Indians, would not. For example, in Wisconsin, which has no state death penalty, the Menominee Indians are subject to federal jurisdiction whereas other tribes are not.

In addition, non-Indians can be prosecuted for the murder of a non-

Indian on Indian land in state courts. An Indian co-defendant charged with precisely the same offense would face the death penalty in a state which did not impose the death penalty on his non-Indian accomplice.

It is estimated that, if a federal death penalty were enacted for crimes committed under federal jurisdiction, two-thirds to three-quarters of the persons affected would be Indians, simply by virtue of their coming under federal jurisdiction on Indian lands.

III. PROPOSED LEGISLATIVE APPROACHES TO THE PROBLEM

Congress has been made aware of the problem of the disparate and disproportionate impact of federal death penalty legislation and a number of approaches have been considered. For example, S.618, introduced on March 12 by Senate Judiciary Committee Chairman Joseph Biden (D-Del.) includes a provision authorizing tribal governments to elect whether the expanded federal death penalty would apply to their reservations. A similar approach has been taken in HR.857, introduced by Representative George Gekas (R-Pa.).

An example of the language creating this exception is found in S.618, Section 2:

"Section 3600. Application In Indian Country. No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the federal jurisdiction for which is predicated solely on Indian country as defined in Section 1151 of this title and which has

occurred within the boundaries of such Indian country, *unless the governing body of the tribe has made an election that this chapter have effect over land and persons subject to its criminal jurisdiction.*" (Emphasis added.)

This approach would allow tribal governments to determine whether to "opt in" to a capital punishment system. It has been endorsed by many tribal governments as consistent with and sensitive to tribal sovereignty and the need for each tribe to determine for itself the best solution to its particular circumstances.

There is a great deal of urgency to adopting a position on this issue. General crime reduction bills were introduced in April in both the House and Senate. President Bush's anti-crime package was introduced by House Minority Leader Robert H. Michel (R-Ill.) on March 12, as HR.1400, and, on March 13, Senator Strom Thurmond (R-S.C.), the ranking Judiciary Committee member, introduced S.635 in the Senate. These two bills expand the death penalty to about 40 crimes, including first degree murder, without apparent consideration of the effect on Indian country. President Bush is urging prompt action on these measures and committee hearings have already been held.

IV. EXISTING ABA POLICY

The ABA has already gone on record as opposing discrimination in capital sentencing. The present position is contained in the ABA Policy and Procedures Handbook at Page 138 and provides as follows:

"Discrimination in Capital Sentencing. Oppose discrimina-

tion in capital sentencing on the basis of the race of either the victim or the defendant; support legislation that strives to eliminate discrimination in capital sentencing..."

Adopted August, 1988.

V. PROPOSED RESOLUTION

A. Proposed Resolution

The proposed resolution provides as follows:

BE IT RESOLVED, That the American Bar Association, while taking no position on the enactment of general federal death penalty legislation, supports in principle legislative measures which would prevent or minimize any disproportionate effects such legislation would have on Native Americans subject to federal jurisdiction.

B. The Effect of the Proposed Resolution

The proposed resolution would put the American Bar Association on record as supporting the principle of mitigating the disproportionate impacts which federal death penalty legislation would have on American Indians. It would not, however, commit the ABA to any particular legislative approach such as legislative exclusion of Indian lands, or permitting tribal governments to "opt out" or "opt in" to the death penalty provisions.

It would also avoid entanglement in technical jurisdictional issues. For example, in 1990, the Supreme Court de-

cided, in *Duro v. Reina*, 110 S. Ct. 2053, that Indian tribes did not have criminal jurisdiction over non-member Indians on their reservations. There are a number of bills now pending in Congress to remedy the *Duro v. Reina* decision by extending tribal jurisdiction to non-member Indians. However, the proposed resolution would bypass the issue by simply putting the ABA on record as supporting whatever measure is placed before Congress to reduce or eliminate these disparate impacts, whether they are limited to tribal members or are extended by Congress to include non-member Indians on the reservation.

A second technical issue which is avoided by the draft resolution is the applicability of the death penalty to crimes committed within "Indian country" but off reservations. Such lands include federal trust lands off reservations. The resolution simply puts the ABA on record as supporting mitigation measures that

would apply to any Native Americans who fall under *federal jurisdiction*, and that would include Indians on *federal lands*, whether on or off reservations.

VI. CONCLUSION

The resolution advances the American Bar Association goal of opposing discrimination in capital sentencing on the basis of race. It is an important issue for hundreds of thousands of Native Americans. The resolution takes no position on the desirability or undesirability of the death penalty. It would, however, give important support to members of Congress seeking to prevent American Indians from being unfairly exposed to the death penalty simply by virtue of their being on Indian lands.

Respectfully submitted,

ROBERT F. DRINAN
Chairperson
Section of Individual Rights
and Responsibilities

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