

SENATE COMMITTEE ON INDIAN AFFAIRS
**Oversight Hearing on Tribal Law and Order Act One Year Later: Have We
Improved Public Safety and Justice Throughout Indian Country?**

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Honorable Chairman and distinguished members of the Committee, thank you for the opportunity to testify today. Leading up to the passage of the Tribal Law & Order Act (TLOA), NCAI provided testimony multiple times on an array of public safety issues relevant to tribal nations. We commend Congress for passing this historic legislation last year, and we applaud the Administration's implementation efforts thus far. However, we are acutely aware that these steps are just the first of many that must be taken to remedy the broken system of justice found on most tribal lands. It is imperative that we sustain this momentum, not only on TLOA implementation, but on other Indian Country public safety initiatives as well. Today, I will briefly highlight progress made since enactment of the Tribal Law & Order Act, and—most importantly—I will discuss the hard work that is yet to be done.

Before I do that, I want to first thank the members of the Senate Committee on Indian Affairs for their efforts in developing the Act. In the tradition of this committee, it was a bi-partisan effort that involved a great deal of outreach and consultation with tribal leaders. In particular, I would like to thank Senator Barrasso and the former chairman Senator Dorgan for their efforts in shepherding the bill. Chairman Akaka, I want to thank you for following up and ensuring that the statute is implemented. Implementation and oversight are critical to improving reservation law enforcement.

So far, the results of the TLOA have exceeded our expectations in at least one very significant way. The passage of the Act has placed focus and attention on law enforcement problems that had flown under the radar for many years. It has made people think about ways to improve the system. The implementation schedule in the Act has been very helpful because it holds agencies accountable for creating change. Today we are looking at the federal government's implementation efforts, but the TLOA is also having a significant impact among tribal governments. Tribes are given more choices under the Act, and it is creating an opportunity for tribal councils to work through their law enforcement codes and develop their own solutions.

Although NCAI is pleased with the implementation so far, we will not be satisfied until reservation crime rates have dropped significantly and every person in Indian country lives in a safe community. So I would like to begin there – the next steps we need to take to continue to improve reservation law enforcement.

Work To Be Done

Despite all of the progress that has resulted from passage of the Tribal Law & Order Act and the Obama Administration's commitment to public safety in Indian Country, there is still a lot of work to be done before tribal nations can achieve a level of safety comparable to non-Native

communities in the United States. I respectfully urge the Committee to pay special attention to the following three areas.

Funding

The intended ends of the TLOA cannot be achieved unless tribes have the means to implement them. This requires adequate federal funding for critical tribal justice programs that will support the overarching TLOA vision of comprehensive law enforcement reform. Native Americans—like all Americans—deserve to live free of fear in their communities, where their basic rights are protected and they can trust the justice system that serves them.

We are particularly concerned about the Budget Control Act of 2011 which requires Congress to reduce the deficit under an uncertain process, or cut discretionary spending from FY 2012 through FY 2021, with across the board cuts of 14 to 15%. Most of the funding that fulfills the federal trust responsibility for reservation law enforcement is categorized as domestic discretionary spending. We are tremendously concerned that impending federal budget cuts will devastate reservation law enforcement.

Tribes stand united in reminding Congress that the federal government's trust obligation to sustain funding for tribal programs in the federal budget is absolute. This obligation is the result of treaties negotiated and agreements made between tribes and the United States in exchange for land and resources. It must be honored and protected within each act of Congress, including those acts pursuant to the Budget Control Act of 2011.

Not only must current budgets be maintained, reservation law enforcement and justice systems that have been underfunded and understaffed for decades must be given a boost. Increased and targeted funding in the following program areas will help combat the violent crime epidemic on Indian lands and strengthen tribal justice systems for future generations.

The Senate Committee on Commerce, Justice, and Science recently included language in its appropriations bill for a 7% tribal set-aside from all discretionary Office of Justice Programs (OJP) programs to address Indian country public safety and tribal criminal justice needs. This 7% set-aside would provide a more flexible grant structure to tribes, which would complement the Department of Justice's Coordinated Tribal Assistance Solicitation (CTAS). CTAS attempts to streamline the application process for tribes, enabling them to submit a single application and select multiple purpose areas (ranging from juvenile justice to violence against women), as opposed to previous years in which they would have been required to submit multiple grant applications. However, this streamlined application model will not achieve its intended success unless and until it is accompanied by a streamlined funding mechanism. NCAI strongly supports the creation of a 7% tribal set-aside of OJP programs and urges Congress to do the same.

NCAI supports an increase in the number of FBI agents assigned to Indian Country. Funding for additional FBI agent positions, whose sole job would be to focus on investigating crimes on Indian reservations, would go a long way toward addressing both the perception and the reality of lawlessness that exist in some tribal communities. The BIA and DOJ Native American Issues Subcommittee have already indicated that adding more agents is a priority. This personnel

enhancement would enable the FBI to be more proactive in its approach to addressing crime on reservations.

We also urge Congress to continue to fund the Community Oriented Policing Services (COPS) Program to fund tribal law enforcement expenses, as well as the COPS Hiring Program used for the hiring and rehiring of tribal law enforcement officers. These programs are being threatened with significant cuts in the upcoming appropriations cycle which would be devastating to tribes. These and other federal programs, including those within the Department of Interior's Bureau of Indian Affairs, are critical to the administration of justice on tribal lands.

In this difficult fiscal climate, as Congress weighs various options to reduce the federal deficit, NCAI urges Congress to pay attention to its most basic responsibilities, and among the most fundamental are the responsibilities to provide for public safety on federal Indian reservations. The authority to fund programs that fulfill this responsibility is founded in the Constitution. Funding for Indian Country public safety programs is just one of the many sources of domestic discretionary spending dedicated to tribes that should be held harmless during the budget process.

Violence Against Women Act Reauthorization

I would like to commend the Committee for your efforts to draw attention to the plight of Native women fleeing violence—first, by hosting an oversight hearing on these issues on July 14, 2011, and next, by releasing a discussion draft of proposed statutory changes aimed at protecting Native women in August. NCAI strongly supports these efforts and hopes that the Committee will work collaboratively with the Senate Judiciary Committee to ensure that the legislative proposals found within the SCIA's discussion draft are included as a part of the upcoming Violence Against Women Act Reauthorization.

No one denies that violence against Native women in the U.S. has reached epidemic proportions: 34 % of Native women will be raped in their lifetimes and 39 % will be the victim of domestic violence.¹ According to a 2010 GAO Study, U.S. Attorneys decline to prosecute 67% of sexual abuse and related matters that occur in Indian country.² The TLOA takes steps to improve the safety of Indian women, but there are still several issues that it leaves unaddressed, namely the lack of tribal authority to prosecute non-Indians committing heinous crimes on the reservation.

The lack of tribal jurisdiction over non-Indian offenders on Indian lands may be the key reason for the creation and perpetuation of disproportionate violence against American Indian and Alaska Native women. The 1978 U.S. Supreme Court decision in *Oliphant v. Suquamish Tribe* stripped Indian tribes of their inherent criminal jurisdiction over non-Indians unless such jurisdiction is specifically authorized by Congress. As such, Indian women—4 out of 5 of whom describe their offenders as white—often have no criminal recourse against non-Indian offenders. These non-Indian perpetrators are well aware of the lack of tribal jurisdiction over them, the vulnerability of Indian women, and the unlikelihood of being prosecuted by the Federal Government (or state government in P.L. 280 states) for their actions. This jurisdictional gap

¹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, §202(a)(5) (2010).

² U.S. GOVERNMENT ACCOUNTABILITY OFFICE, U.S. Department of Justice Declinations of Indian Country Criminal Matters, REPORT NO. GAO-11-167R, at 3 (2010).

feeds the epidemic of violence against Indian women and is at odds with the United States' recognition of tribal sovereignty and the policy of tribal self-determination. Further, it is in stark contrast to the purposes of the Violence Against Women Act that have guided our nation since its enactment over fifteen years ago.

This past summer, the Department of Justice released a legislative proposal that not only seeks to address the jurisdictional problem described above, but goes beyond that to ensure Native women receive the same protection and equal access to justice as other women in America. The DOJ's proposal addresses three major gaps in the current system that too often leave Native women vulnerable to violent crimes of domestic violence and sexual assault. First, it recognizes the inherent authority of tribes to prosecute any person who commits domestic violence or dating violence against a tribal member in Indian country; second, it clarifies that tribal courts have full civil jurisdiction to issue and enforce protection orders against Indians and non-Indians alike; and third, it amends federal law so as to enable federal prosecutors to more effectively combat three types of assault that are frequently committed against Native women in Indian country: assault by strangling or suffocating, assault resulting in substantial bodily injury; and assault by striking, beating, or wounding. NCAI's membership recently passed a resolution that supports inclusion of legislative proposals to enhance the safety of Native women in the upcoming VAWA reauthorization and we strongly support DOJ's proposed language.

Under the current scheme, non-Indian perpetrators in Indian country are often shielded from accountability at the expense of the safety of Indian women. The power to reverse this disastrous trend and restore safety in tribal communities lies with Congress. The DOJ's proposal is the product of true government-to-government consultation and collaboration with tribes, and if included in the Violence Against Women Act Reauthorization and enacted into law, it would go a long way toward protecting the safety and security of Native women and their access to justice under the law. That is why I respectfully request your active support to ensure inclusion of the DOJ's proposal or similar language in the upcoming VAWA reauthorization legislation.

Land Status Confusion (Carcieri)

Finally, we would like to direct the Committee's continued attention to the problems created by the Supreme Court's decision in *Carcieri v. Salazar*, which is creating significant confusion and litigation over the status of reservation lands.

The Indian Reorganization Act (IRA) was created by Congress in 1934 to reorganize tribal governments and restore land bases for Indian tribes that had been greatly harmed by prior federal policies. The passage of the IRA marked a dramatic change in federal Indian policy. Congress shifted from assimilation and allotment policies in favor of legislation to revitalize tribal governments and restore tribal lands. In a decision that runs contrary to these purposes, the Supreme Court held the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" limits the Secretary's authority to provide benefits of the IRA to only those Indian tribes "under federal jurisdiction" on June 18, 1934, the date the IRA was enacted.

The *Carcieri* decision does not address what it means to be "under federal jurisdiction" in 1934, and is already creating costly and protracted litigation on an esoteric and historic legal question that serves no public purpose. Some of this litigation is aimed at Indian tribes who were on

treaty reservations in 1934. Over the last 75 years under the authority of the IRA, entire Indian reservations have been restored, and significant amounts of land have been returned to tribal governments. The *Carcieri* decision is creating litigation and uncertainty on long settled actions taken by the Department pursuant to the IRA, as well as on the Secretary's ability to make future decisions that are in the best interests of tribes.

While *Carcieri* addressed only land in trust, there will be further negative consequences if the IRA is not clarified. The IRA is the legal foundation for most tribal constitutions and serves as a framework for tribal self-government. Future litigation could threaten the integrity of tribal organizations, tribal reservations and lands, and provision of services. It is only a matter of time before criminal defendants seeking to avoid federal or tribal jurisdiction attempt to invoke *Carcieri*, and this would negatively affect public safety on reservations across the country.

When the Supreme Court has narrowly interpreted an act of Congress in a manner that is fundamentally unfair and not in accordance with its original purposes, Congress should move quickly to amend and clarify the law. NCAI urges Congress to amend the IRA to the effect that all federally recognized tribes are included in the definitions section. We greatly appreciate your leadership and efforts with Senate Bill 676, which will clarify the status of existing tribal lands and ensure that IRA benefits are available to all federally recognized Indian tribes.

Implementation Update

July 29, 2011 marked the one year anniversary of enactment of the Tribal Law & Order Act (TLOA), and this new law continues to gain momentum. The Indian Law & Order Commission, authorized by the Act, was recently funded, the long-term plan for detention in Indian Country has been finalized, some key provisions have been implemented, and consultations are ongoing. Below is a brief update on implementation of some of the TLOA's most significant provisions.

Concurrent Federal Jurisdiction

Section 221 of the TLOA makes a significant amendment to P.L. 83-280 (PL 280) to allow tribal governments located in PL 280 states to request that the federal government exercise concurrent jurisdiction over reservation crimes, with consent by the Attorney General. The purpose of this change is to address long standing concerns that some states and local governments have not fully addressed reservation crime under P.L. 280.

NCAI is aware of several tribes who have placed formal requests with the Department of Justice to have the Attorney General exercise concurrent jurisdiction over their reservations under this provision. No action has yet been taken on these requests.

On March 1, 2011, the Department of Justice issued a letter to tribal leaders in which it simultaneously announced its plan to consider implementing Section 221 through federal regulations and provided tribes with a draft of such regulations. The draft regulations propose a framework and procedures for an eligible Indian tribe to request the assumption by the United States of concurrent Federal criminal jurisdiction within the Indian country of the tribe and describe the process to be used by the Attorney General in deciding whether to consent to such a request.

Subsequently, the DOJ held a tribal consultation on Lac Courte Oreilles Chippewa tribal lands in Wisconsin on March 23rd to focus on the process for implementation of Section 221. Since that time, the Section 221 proposed regulations have been published in the Federal Register for comment and publication of the final rule should be forthcoming. NCAI is encouraging the Department to make prompt decisions on all tribal requests submitted thus far, notwithstanding the delay in getting the final rule published.

Indian Law & Order Commission

Section 235 of the TLOA mandates establishment of an Indian Law and Order Commission made up of tribal, federal, and state/local justice officials, and other experts, tasked with reviewing the current justice system on tribal lands and providing recommendations for improvement.

Although the September 27, 2010 (60 days from enactment) deadline for creation was not met, membership selection for the commission has since been completed by Congress and the President, and includes the following:

- Presidential appointments: Ted Quasula, Carole Goldberg, Theresa Pouley
- Senate appointments: Jefferson Keel, Troy Eid, Affie Ellis
- House appointments: Stephanie Herseth-Sandlin, Earl Pomeroy, Tom Gede

The Commission held its first in-person meeting on April 6, 2011 at the Buffalo Thunder Resort in Santa Fe, New Mexico, where they appointed Troy Eid, former U.S. Attorney for the District of Colorado, as the Commission Chair and commenced their work. The Commission has acquired a small staff of federal detailees to assist with their work. Assistant United States Attorney Jeff J. Davis, a member of the Chippewa Tribe, recently joined the Commission as its Executive Director, and Eileen Garry, the Deputy Director of the Justice Department's Bureau of Justice Assistance, is serving as its Deputy Executive Director. The Commission held its first field hearing at the Tulalip Reservation in Washington State on September 7, 2011 and intends to hold its second at NCAI's upcoming Annual Convention in Portland, Oregon on November 2, 2011.

The Commission was a bit slow in getting off the ground due to delay in passing the FY2011 appropriations bill. However, now that it is funded, the Indian Law and Order Commission has the potential to be an important source of new recommendations for policy changes, as well as a body that can continue oversight on implementation of the Tribal Law and Order Act.

Office of Tribal Justice

Section 214 of the TLOA requires the Attorney General to establish the Office of Tribal Justice as a permanent component of the Department of Justice within 90 days of the law's enactment. On November, 17, 2010, Attorney General Eric Holder announced that the Office of Tribal Justice is now its own, stand-alone component of the Justice Department. Making OTJ permanent was a simple, yet critical, step for tribes. Bestowed with the responsibility to develop and direct the Department's Indian affairs policies and coordinate and consult with tribal leaders, OTJ is and will continue to be an important resource for tribes on justice matters.

Tribal Court Sentencing Authority

Section 234 of the TLOA amends the Indian Civil Rights Act to allow tribal courts to sentence offenders for up to three years imprisonment, a \$15,000 fine, or both for any one offense. (The previous ICRA language limited the sentencing authority of tribal courts to one year imprisonment, a \$5,000 fine, or both). It also authorizes tribal courts to “stack” sentences for up to nine years total imprisonment. However, in order to utilize this enhanced sentencing authority, tribes must provide a number of defendant protections, including: defense counsel for indigent defendants, legal trained and licensed judges, publicly available tribal codes, and detention facilities certified for long term detention. Utilizing the enhanced sentencing provisions of the TLOA will require additional resources for the majority of tribes. In addition, it was always assumed that tribes would use this authority relatively rarely. As a result, it will likely take time before tribal courts utilize this new authority.

Long Term Plan to Address Incarceration in Indian Country

One of the most significant requirements of the TLOA, and included in multiple locations throughout the act, is the requirement that the Department of Justice and the Bureau of Indian Affairs coordinate, in consultation with tribal leaders, courts, law enforcement officers, and corrections officials, to develop a long-term plan to address incarceration in Indian country. The plan was to be submitted to Congress within one year of the TLOA’s enactment.

DOJ and BIA held numerous consultations with tribes on the long term detention plan. Several regional tribal consultations were held last fall, including one at NCAI’s Annual Convention in Albuquerque in November. These were subsequently followed by more at the Interdepartmental Tribal Justice, Safety & Wellness Sessions #12 and #13 in Palm Springs, California in December and Scottsdale, Arizona in May. The Bureau of Justice Assistance (BJA) and the Bureau of Indian Affairs (BIA) have also co-hosted three separate focus groups with tribal leaders and justice stakeholders at various locations throughout the country (Rapid City, SD; Phoenix, AZ; and Billings, MT). Comments on the long term plan were also solicited via e-mail at TellTLOA@usdoj.gov.

On July 15, 2011, the Departments of Interior and Justice released an initial draft of their “Tribal Law and Order Act (TLOA): Long Term Plan to Build and Enhance Tribal Justice Systems.” Comments and feedback on the plan were to be submitted to DOJ by July 21, 2011, which left tribal leaders less than a week to submit additional feedback before the plan was finalized. On August 8, just over a week past the one-year deadline, DOJ and DOI released the final version of their long term plan and submitted it to Congress.

While we commend DOJ and DOI staff for taking their responsibilities under the TLOA seriously, as well as their obligation to consult with tribal leaders and justice experts, I would be remiss not to flag our two major concerns with the long term detention plan for the Committee. First of all, we think that the plan’s heavy reliance on evidence-based solutions to problems faced by tribes is problematic. Requiring that federal funding for tribal alternatives and reentry programs be contingent on use of evidence-based models is a recipe for failure for many tribes. The plan should explicitly accept and promote successful practices and models that may not have yet received the benefits of costly studies.

Second, we feel that the final plan lacks the strategic long-term vision for the future that Congress intended by including it in the TLOA. It assesses the current landscape of alternatives to incarceration, detention, and reentry in Indian Country and explains to tribes the federal resources currently available to tribes for those purposes. The plan makes only minor recommendations for small improvements to the status quo over the next year. We do not believe that this type of a report was what Congress intended when it passed the TLOA. This was to be a thorough, carefully constructed plan that would guide detention in Indian Country and tribal justice systems for the next 25 years to a half century. In particular, Indian tribes are looking for a new approach to juvenile justice and alternatives to incarceration so that the detention system is not a factory for creating hard core criminals.

We recognize that the development of a long term detention plan raises a number of complex problems, and we are encouraged that the Departments of Interior and Justice see their initial plan as only the first iteration. We would urge the Committee to continue its oversight in this area, particularly on juvenile justice and alternatives to incarceration.

Declinations and Investigations

Perhaps the main driving force behind the creation of the TLOA was the concern that tribal leaders have had for many years about high rates of declinations to prosecute major crimes in Indian country by U.S. Attorneys. I have been around the National Congress of American Indians since the 1980's, and we have consistently heard the same message from tribal leaders for over 30 years. Tribes are very alarmed that crimes occur and are often neither investigated nor prosecuted. We have seen statistics showing that over two thirds of all Indian country crimes are declined. This Administration is working hard to do a better job, but we need to be able to keep track of investigations and prosecutions to make sure that that the improvements really happen, so that we can target problems. That is why the TLOA included Section 211, which mandates that the Attorney General submit to Congress annual reports that contain all relevant investigation and prosecution data regarding alleged violations of Federal criminal law that occurred in Indian country that were referred for federal prosecution by law enforcement agencies. This is one of the most critical components of the TLOA, and tribal prosecutors will need to coordinate closely with their U.S. Attorney counterparts to ensure that it is implemented. The first reports will be due at the end of this calendar year, and we want to make sure that the reports are useful to Congress and to tribal leaders in addressing the causes of declinations.

There are many legitimate reasons to decline to prosecute a crime, as well as questionable reasons. For example, one of the most cited reasons for declining to prosecute is the inadequacy of the investigation. If there are problems with the police work, Congress needs to know that so that the issues can be addressed. Do we need more investigators, or more training, or more access to crime labs? The collected data from declination reports should help answer these questions. Another commonly cited concern is the creation of arbitrary "thresholds," particularly in drug cases. We understand that all prosecutors have limited resources, but we cannot let non-Indian drug dealers run free on Indian reservations when the tribe has no jurisdiction and the U.S. Attorney refuses to prosecute. The collected data and related Congressional oversight should assist Congress and the Department of Justice in determining the necessary resources to dedicate to Indian country prosecutions.

NCAI would like to begin more communications with the U.S. Attorneys on declination reporting. These reports will be a useful crime fighting tool if tribes know how to refer crimes for investigation and prosecution and are able to track the results. The first reports are due by the end of this year. So far, this dialogue with the U.S. Attorneys is only beginning, and we have a lot of work to do.

Bureau of Prisons Tribal Prisoner Pilot Program

As part of the enhanced tribal court sentencing provisions in Section 234, the Department of Justice Bureau of Prisons (BOP) is required to establish a four-year pilot program within 120 days of enactment, under which the BOP shall accept offenders convicted in tribal court of a violent crime and sentenced to more than two years imprisonment. On Friday, November 26, 2010, the BOP met this key TLOA deadline by launching its pilot program. However, no tribes have used it to sentence offenders yet.

Indian Alcohol and Substance Abuse

Under Section 241 of the TLOA, the Substance Abuse and Mental Health Services Administration (SAMHSA) is to lead the effort on interagency communication by developing a framework and MOA on the issue. A draft of the MOA was released for tribal comment in November 2010, and on July 29, 2011, exactly one year after President Obama signed the Tribal Law and Order Act (TLOA) into law, DOJ, DOI, and HHS entered into a Memorandum of Agreement to combat Alcohol and Substance abuse among American Indian/Alaska Native Tribes. The Memorandum of Agreement was formally published in the Federal Register on August 5, 2011 and individual notification was mailed to all 565 federally-recognized tribes.

Other Advances

Of equal importance to TLOA implementation benchmarks are the new initiatives and improvements to public safety in Indian Country that are developing largely as a result of TLOA enactment. Over the past two years, the Obama Administration has demonstrated an increased commitment toward improving public safety on tribal lands. The Department of Justice, in particular, has shown extraordinary leadership on these issues by launching new law enforcement initiatives in Indian Country, proposing much-needed legislation that would enhance tribal sovereignty and protect Native women, and advocating for increased funding for tribal programs within the federal budget. At the core of this multi-faceted approach is DOJ's pledge to work together with tribal nations to improve the overall administration of justice in Indian Country. U.S. Attorney for the District of South Dakota, Brendan Johnson, perhaps said it best when he remarked that "the best ideas for making tribal communities safer come from tribes, not from Washington, D.C." NCAI commends DOJ for staying true to that message, and we look forward to continued collaboration and dialogue with the administration on public safety issues in the future.

Progress is also being made on the local level to combat crime on reservations, due in large part to guidance from the Attorney General's office to build permanent infrastructure in Indian Country that will sustain tribal nations long after President Obama's time in office. Attorney General Holder's and Associate Attorney General Perrelli's leadership on these issues has influenced U.S. Attorney's offices across the country, and resulted in more communication between tribal and federal justice officials, stronger working relationships, and increased tribal

capacity for investigating and prosecuting reservation crimes. There has also been a surge in the number of tribal prosecutors appointed as Special Assistant U.S. Attorneys under the TLOA, enabling them to try cases in federal courts. These are just some of the local successes that have resulted from TLOA passage and the leadership of this Justice Department.

Conclusion

Public safety problems in Indian Country remain a critical concern, particularly domestic violence and violence against women, drug crimes, and gang related crimes. While national efforts like implementation of the Tribal Law & Order Act and the DOJ's public safety initiatives in Indian Country are giving tribes a renewed sense of hope that much needed improvements to the current administration of justice on tribal lands are forthcoming, we must continue to advocate for progress until crime rates drop and every tribal community is safe. NCAI looks forward to our continued work to improve public safety within tribal nations, increase access to justice for Native peoples, and protect the health and wellbeing of all Native people. We hope Congress will join us in these efforts.

Once again, on behalf of NCAI, I would like to thank the Committee for inviting us to testify today. I would be happy to try to answer any questions you may have.