Testimony for January 13, 2012 Field Hearing

Law and Order Commission

Submitted by:

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Good Afternoon Commissioners,

On behalf of the Community I serve, I would like to welcome you to the Salt River Pima-Maricopa Indian Community. I am the Chief Prosecutor here in Salt River, and have been such for the past seven years. In my words to you today, I hope to convey some recommendations that are shared by the other tribal communities as it relates to some of the challenges of the Tribal Law and Order Act.

My recommendations and comments cover three main points:

1) Funding and resources is the primary barrier to the implementation of the Tribal Law and Order Act.
2) Cultural understanding is critical in understanding why the implementation of the TLOA and VAWA provisions is not only inhibited by funding issues.
3) The Major Crimes Act should also be reviewed and amended where the offense listed are not defined by federal law.

1. Funding and resources is the primary barrier for tribes with the implementation of the Tribal Law and Order Act.

Tribes lack funds and resources to implement the requirements.

I know that every tribal representative will likely be able to address the issues of funding and how the lack of funds is the main barrier to moving forward with the Tribal Law and Order Act. This new grant of authority, loosening the handcuffs of a one year cap to a three year, is not without a lot of challenges. Without a doubt, the funding issue is the most significant barrier. Most tribes are small, and are more on par with a towns and cities than to States as it relates to size and government. In general, major crimes or felony offenses are handled by States who have bigger budgets and governments. Building a criminal justice system that essentially must parallel that of a State, to a community with extremely small populations is simply not practicable. Even the tribes who are arguably financially able to create such a system with the enormous expense are struggling.

For the majority, SRPMIC is self-funded. SRPMIC also has been successful in securing grants to support the justice system, including grant money to build a detention facility that would likely be able to house any offenders convicted in the SRPMIC court, even for three years. However, by and large, the cost of the tribal justice system is bore by the tribal government.

The law enforcement for this Community is entirely operated by eh Community. That is our officers are all employees of the SRPMIC government SRPMIC officers are SLEC holders and can directly file criminal matters with the US Attorney's Office. The ability to fund these types of officers undoubtedly increases the ability of SPRMIC to keep the community safe, but at quite a budgetary expense.

The effectiveness and the ability of tribes to successfully implement the TLOA will likely essentially break out into two groups: the haves and the have-nots. Tribes who are not able to employ a wide variety of professionals, in all disciplines, due to lack of funds or based on location, are a significant disadvantage as it comes to grants. I would like to request support for the recommendations made by Chief Judge Pouley in his testimony in November, regarding the grant process and the current process.

Tribes are now in a position to have to recruit attorneys. The ideal candidates, in addition to having the law degree and bar admission, understand Indian country, the community they serve, and are competent in legal anlaysis and cultural application. All tribes will tell you they prefer their own members to apply the tribal laws and justice. The next best type of candidate is often other Native Americans who understand the culture. The same is true of judges. Most tribes are in rural settings, and far from an employment pool of qualified attorneys. SRPMIC has many advantages that other tribes do not. Based on locale, the Community has the ability to recruit outside attorneys to work in the Justice System. SRPMIC is close to several law schools, who can offer interns, professors, legal experts, training and presentation. SRPMIC assists its own members in obtaining education, including law degrees and other professional degrees. While there are numerous qualified Native American Attorneys who are committed to serving Indian country, the demand far outweighs the supply. Of course, the ability to pay a competitive wage is a huge barrier as well.

Yet what are the choices that tribes have? Forego the chance to seize this gift of Congress which begins to allow tribes to exercise sovereignty and self-regulate and to protect their members we know that the reliance on the federal government to prosecute crimes is has been ineffective. Tribes need to be able to handle these matters, but it is not going to happen without more funding.

The Lack of Resources and Funding Inhibits Federal Initiatives from Being Effective.

We, as tribal prosecutors were excited with the passing of the Tribal Law and Order Act, and especially some of the initiatives that were born of it. For example, the use of tribal attorneys as Special Assistant United States Attorneys[i] and the creation of the Attorney General's Federal and Tribal

Prosecution Task Force for Violence Against Women are both great initiatives that could significantly improve safety in Indian Country if they are supported ad follow-through.

Here in Arizona, the United States' Attorney's Office is making good progress on implementing the SAUSA program. Several of the tribes have had their prosecutors designated as Special Assistant Untied States Attorney's, including SRPMIC. However, the training of those prosecutors, getting the necessary background checks and developing processes for this program has been time intensive. The Deputy United States Attorneys who work on this project still carry their own heavy case loads and in addition to those duties, must find time and ways to assist the SAUSAs. Good intentions and dedicated personnel only go so far. One benefit I anticipated of the SAUSA program was that by the federal prosecutors working closely with the tribal prosecutors who work with these communities every day on an intimate basis, would be that the federal prosecutors would gain cultural understanding and appreciation for the tribes they serve. Such an understanding of the cultural nuances by the prosecutors is key to helping victims and communities improve safety. However, such a result would take time that the federal prosecutors simply do not have.

We are very pleased with the program and are especially thankful to the United States Attorney's office in Arizona for the dedicated staff here. We know that all that has been achieved is due to their willingness to go above and beyond their assigned duties. We know, from the limited time with the program we have had, that we as tribal prosecutors have benefitted from having two of our own tribal prosecutors being trained on the federal practices and helping our own law enforcement improve with this knowledge. Yet, if Congress wanted this program to have real teeth, there must be support for resources to get these initiatives moving in a meaningful and ongoing way.

Another development out of the implementation of the Tribal Law and Order Act was the creation of the Attorney General's Federal and Tribal Prosecution Task Force for Violence Against Women. I am honored to be a member of this Task Force. However, the barrier here is lack of resources, just as it is for tribes. The Task Force has met only once since it formed. The Task Force has a lot of work to do that could be of great impact in Indian Country, yet it is supported by virtually no resources. The Chair of the Task Force, as a Deputy United States Attorney has her own duties and her own responsibilities that the Task Force must be a second priority, which is true for the other members as well. There is no practical way for this committee to be productive without support of the federal agencies, by making the time and resources available. What I believe would encourage progress in these initiatives is a continued mandate from the leaders of the Administration, congress and the

Department of Justice to communicate the importance to all the departments and divisions find ways to support them with funds and resources.

2. Cultural understanding is critical in understanding why the implementation of the TLOA and VAWA provisions is not only inhibited by funding issues

One particular challenge is to implement Community values and tradition within the justice system. Cultural sovereignty and fairness and justice are not mutually exclusive concepts, yet it seems that the drafters of the TLOA view them as such. I respect those who lobby for the protection of civil liberties, and accept that they are committed to ensuring that all persons are able to enjoy the Constitutional protections. Yet, these same people often lack a full appreciation of the history and the trust responsibility of the federal government to tribes. Tribes, as sovereigns, should not be forced to follow all federal and state practices. Fairness and justice are not only achievable by processes and methods derived from the United States Constitution and judicial interpretation of such through the western perspective.

The requirement that tribal judges for three-year offenses be licensed in any jurisdiction should be clear to include tribal-licensing.

While there has been no federal judicial review of the requirements for due process as to the judicial requirements under TLOA, there remains significant concern among tribes and their justice systems that the language of the TLOA may be interpreted to require the tribal judges to be licensed only in State or Federal court. [ii]If the TLOA is interpreted as such, this requirement could potentially require many tribes, including SRPMIC to bring in outsiders, or non-tribal members to preside over these matters.

As judges are the ones who ultimately impose sentence, a non-member who may have no cultural connection to the Community or tribe may be required to determine to what extent the offense and the offered evidence meet the Community's standard for what is egregious behavior. These persons who will sit in judge met as to the ultimate disposition of the offender will often have only written tribal code to guide their decision.

Currently, the judges of the SRPMIC are Community members or members of related tribes, who share a history and culture. These judges use their own personal life experience and cultural values when they apply the tribal laws. How can someone be trained in culture and values? While is often attempted, it is difficult to achieve. Tribal communities should not have to compromise being judged by their own community or tribal members simply due to a lack of tribal member attorneys. This vagueness in TLOA is overly paternalistic and seems almost paranoid, that even with the appellate process

of tribes, the habeas review availability, and being represented by lawyers, the persons accused in tribal courts are still at risk of violations of due process. As a tribal prosecutor, I strongly recommend that this section of TLOA be clarified to permit tribal-licensing, therefore leaving more room for Community to tribal members to be judged by one another.

TLOA and VAWA amendments could be better drafted to support cultural sovereignty and self-determination.

The tribal nations are now home to many non-Indian offenders (including a growing number of tribal descendants who are culturally Native American, but do not meet blood quantum) and yet the tribes remain handcuffed to protect the communities from those who offend in Indian Country. Domestic violence continues to dominate Indian country, and tribal prosecutors handle these matters with a distinct understanding of the communities they serve.

One other challenge for tribes to overcome before they can implement TLOA is tribes will be educating their own community members about the effects of such changes, both as a financial burden but also as an explanation as to why their tribal courts may end up looking different then they are used to. There may even be some resistance on behalf of the tribal members based on complicated reasons. A phenomenon that I have observed that is often hard to articulate, is the attitude that justice equates to a few months jail or none at all. While it is true that many tribal communities traditionally focused on forgiveness and making one whole, there are possibly other explanations. I believe that in the forty plus years since the enactment of the Indian Civil Rights Act, the tribal peoples have only seen such minor punishments and even when they don't' like it, they have grown accustomed to these punishments. I think this is most common in domestic violence offenses. Victims have adopted a need to forgive and forget, to move on, and to achieve harmony again. Not always as a traditional value, but as a matter of necessity. If no justice is coming, the abused learn to survive, tolerate, and accommodate the offenders.

Of course there are countless victims who can explain the impact that the insufficient punishments have been, those are often on the offenses that give rise to felony prosecution. But there are so many offenses, such as domestic violence where repeat offenders are in the tribal revolving door. It is from this practice I think some communities have developed an acceptance of this justice system. Finally, I suggest that with the requirement of legally-trained attorneys for defense and judges, the odds are that tribal courtrooms will look less like the Community courts and the community members may lack faith in such.

Tribal prosecutors understand the recanting victim dynamic as it lives in Indian Country. We see the effect of a closed community and the strong connectedness community members have. Members of Indian country are much less likely to "ex-patriate" than it appears is often assumed. Leaving a

community can mean turning away from your culture, your history, your family, and much more. As a former domestic violence prosecutor of a state system, I have seen the difference between a victim who can move across town, or even to another state and not face the same sorts of "loss" that a tribal victim does if that victim chooses to leave the tribal community. This dynamic is not one that can be overcome, but rather it must be understood. For many Indian people, to be a member of their tribe, or nation, or family, or clan, is to be with those other members, even when someone in that Community has violated them. Yet, often we rely on the majority society's solutions for victims, such as advising victims to move away to an undisclosed/hidden shelter where no one can no where you are. A common truth of tribal members is that even when they have committed crimes and harms, in the end, those offenders all come home. While some communities banish or exclude these people, such actions are not universally done and are usually reserved for the worst of the worst. What this translates to for the majority of domestic violence offenses, is that the victim knows where both the victim and the offender are likely to be for the rest of their lives, and the probability of wanting to just move beyond the offense is more common. Tribal prosecutors understand this, and the community that they serve. For these reasons, tribal prosecutors and tribal justice systems are best equipped to truly find remedies to protect thru tribal members.

Without the amendments to VAWA allowing the tribal prosecutors to handle this area, the continued system of the exclusive jurisdiction of the federal prosecutors for non-Indian offenses against Indian victims in Indian country will continue to threaten tribal communities, by resulting in fewer prosecutions. The tribal prosecutors' ability to understand the dynamics and create systems to address those is the best solution

Proving Indian status as a VAWA requirement is impracticable.

The requirement that the bill includes that tribes prove Indian status of the offender and the victim is yet another example of the federal system leaking into the tribal systems. Functionally, to make a domestic violence arrest, the arresting officer establishes probable cause. In today's world, when that offender is believed to be a non-Indian, the police agent will need to validate the victim's status as an Indian to invoke federal jurisdiction. For major offenses, the officers need Certificates of Indian Blood and/or Enrollment to seek charges in the federal courts. In tribal courts, as a matter of policy and practice, most tribes trust that anyone who holds themselves out as an Indian is consenting to jurisdiction, or that jurisdiction exists based on Indian status. Since many Indians who live in tribal communities belong to other tribes, the ability for the investigating officer to investigate with all other tribes in the middle of the night, is not practicable. Tribes, as sovereign nation, should have the presumption of jursidictions, and the lack of Indian status should be treated

as an affirmative defense. I recommend this requirement be deleted from the new VAWA requirements.

3. The Major Crimes Act should also be reviewed and amended where the offense listed are not defined by federal law.

25 U.S.C. § 1302 (b) should be amended or deleted. Congress should enact a definition for federal child abuse or neglect, or permit the tribal definitions of child abuse or neglect to be applied for the Major Crimes Act.

In most Indian Communities, one of the most egregious offenses is that of child abuse. To violate a child, to breach the duty of caring and protecting that child and to willfully abuse a child, is one of the most reviled acts a person can do. If anything is to warrant severe punishment, it is inflicting pain to a child without justification. Of course, child rearing and the care of children are greatly subjective to cultural norms. No two cultures agree exactly as to what good parenting looks like. It seems Congress accepted this premise with the enactment of ICWA. While TLOA allows for an increased felony sentencing for some offenses, there is a limitation in that the only offenses that are eligible for more than one year are when those offenses are subject to more than one year by a state or by the federal government[iii].

Felony child abuse or neglect was added to the Major Crimes Act in 2006. Since child abuse is not defined by federal law, each District of the United States Attorney's Office must apply the state law wherever that may be.[iv]. For federal prosecution, this means Native American child victims are only victims of the felony child abuse if the State they live in agrees, not their community or their tribe.

Under the TLOA, tribes can now exercise felony jurisdiction over offenses when those offenses are subject to felony treatment by another state or the federal government[v]. This means to tribes that regardless of what the tribes find to be morally inexcusable and egregious enough to be given felony treatment is meaningless, unless by chance another state or the federal government agrees and has such a law. Such a system does not support tribal sovereignty or cultural distinctions. Therefore, we recommend that the reference to another state law or federal law be omitted, or a federal child abuse definition be adopted.

Every state defines child abuse differently. The conduct that gives rise to child abuse offenses is greatly disparate across the country. In Arizona, in order for a person to be eligible for more than one year of jail when abusing a child a person has to cause a physical injury, or cause or permit the child to be endangered (at risk of death or serious physical injury).[vi] Therefore, as an example, a child who is kept naked a closet, and who is given minimal amounts

of food and water, and a bucket to use as a toilet, but who doesn't actually have evidence of injury cannot be prosecuted but the State of Arizona, or the District of Arizona for that conduct as a felony. Such conduct may be eligible in other States, but based on the complicated web of laws that exist, a child in SPRMIC who suffers this treatment cannot acquire justice in the federal system. For the Community to address this treatment with a felony child abuse law, the Community would need to adopt a law from some other state that may define child abuse in a way that covers this treatment. With the enactment of this portion of the TLOA, the children of this community will only be as protected as some other State determines by definition, and not by their own cultural understanding. By forcing the tribes to limit to federal or state laws, assimilation lives on.

Since the addition of the felony child abuse and neglect to the Major Crimes Act in 2006, it is my understanding that only a handful of these cases have been prosecuted by the District of Arizona. Yet, we know in the tribal communities, the incidence rate of cases where the tribes would view the facts as "felony" offenses is much higher. Tribes therefore need to be able to determine for themselves what constitutes felony child abuse, and not be forced to find a state that agrees.

A community who addresses its own crime, by its own cultural standards, with a review by peers, is what was intended by the Untitled States Constitution. Justice is achieved when the evidence is presented in a style that is consistent with the community understanding. Persons accused of crimes should be judged by the facts and the community understanding of the cultural values when they are tried. The Community should decide if the conduct is below what is acceptable, by the values and culture of that community, not by the State they happen to be located within, or by some other state that has no cultural ties to the tribe. If this is not the goal, then Congress may as well have enacted PL 280 across the board. Therefore, out of respect for cultural sovereignty, I again recommend that the TLOA requirement that requires offense eligible for three years mirror that of a State or the federal government be amended or deleted.

Of course, tribes are still limited to only prosecuting Native Americans, and all persons who are detained by a tribe are able to seek federal habeas review. Therefore, there is no justifiable need to limit a tribes' defining of their laws to that of States or the federal government.

Conclusion,

The Tribal Law and Order act, while greatly needed and acknowledged has some sections that are not in line with respect for cultural and tribal sovereignty and needs to be amended. We are grateful that you all have been selected to

serve on this important Commission and trust that you will make the appropriate recommendations.

[i] Hereinafter referred to as SAUSAs.
[ii] See 25 U.S.C. § 1302(b)(3).
[iii] 25 U.S.C.§ 1302 (b)(1).
[iv] "Major crimes not defined by federal law shall be "defined and punished in accordance with the law of the State in which such offense was committed." See 18 U.S.C.A. § 1153(b).
[v] 25 U.S.C.§ 1302 (b)(1)..
[vi] A.R.S. § 13-3623.