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Before the
United States Senate Committee on Indian Affairs
on
"A Roadmap For Making Native America Safer"

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Thank you for the opportunity to join you today. It is a privilege to discuss with you the Indian Law and Order Commission's November 2013 report, "A Roadmap for Making Native America Safer

Congress and the President created the Indian Law and Order Commission (the "Commission") by enacting the Tribal Law and Order Act of 2010 ("TLOA"). The Commission was charged by TLOA, and later the Violence Against Women Act Reauthorization Amendments of 2013 ("VAWA Amendments"), with assessing public safety challenges affecting all 566 federally recognized Indian tribes and nations. The Roadmap contains this assessment – perhaps the most comprehensive federal inquiry ever undertaken – and proposes reforms at the

federal, state and tribal level to make Native American and Alaska Native communities safer and more just for all U.S. citizens.

While the Roadmap speaks for itself, a few points may stand out. First, the Roadmap's findings and recommendations are unanimous. They reflect the consensus views of all nine Commissioners, appointed by the President and Majority and Minority leadership of the Congress, Democrats and Republicans alike. The Commission's shared assessment and vision for safer Native American and Alaska Native nations attest to the bi-partisan – indeed, *non-partisan* – character of these very important issues.

Second, this report was written from the ground up. This Commission has operated entirely in the field for much of the past three years. We've done it without any permanent office, traveling from the East Coast to the outer reaches of Alaska, taking testimony and talking with thousands of people, Native and non-Native alike. The Roadmap's assessment, conclusions and proposals reflect the ground-truth of what we experienced across our great country. The practical realities of what works and what doesn't informed the Commission's endeavors at every stage. All nine commissioners vowed not to avoid the hard issues because

we wanted to keep faith with the many inspirational people we met and learned from during this remarkable journey.

As this Committee well knows, American Indian and Alaska Native communities and lands are frequently less safe – and sometimes dramatically more dangerous – than most other places in our country. In short, the Commission found that throughout history, and continuing today, federal policies have displaced and diminished tribal institutions that are best positioned to provide trusted, accountable, accessible and cost-effective justice in Tribal communities.

In most U.S. communities, the Federal government plays an important but limited role in criminal justice. State and local leaders have the authority and responsibility to address virtually all other public safety concerns. Precisely the opposite is true in much of Indian country. The Federal government, and in some cases state governments, exercise substantial criminal jurisdiction on reservations. As a result, Native people – including juveniles – frequently are caught up in a wholly nonlocal justice system. This system is complex, expensive, and simply cannot provide the criminal justice services that Native communities expect and deserve.

It is time for a change. The idea that local communities should and indeed must have jurisdiction to make and enforce their own criminal laws, if they so choose, is a bedrock principle of the American justice system. The federal courts can and will be accessible to criminal defendants, as a crucial part of the Roadmap's recommendations, if and when needed so that the federal civil rights of all U.S. citizens are fully protected.

Public safety in Indian country can improve dramatically once Native nations and Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, stronger Native communities achieved through home-grown, tribally based systems that respect the civil rights of all. The Commission rejects outmoded command-and-control policies, favoring increased local control, accountability, and transparency.

The Roadmap contains six chapters addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation; (5) Detention and Alternatives; and (6) Juvenile Justice. Throughout these chapters, the Roadmap offers 40 substantive proposals for making Native American and Alaska Native nations safer and more just, while protecting the civil rights of all U.S. citizens, Native and non-Native alike.

This Committee has approved important legislation in recent years to make Native America safer and more just. These reforms, including TLOA and the VAWA Amendments, are making a difference and we greatly appreciate your leadership. But much more can be done. We respectfully urge this Committee, the Congress and the President to put this Roadmap into action by implementing its recommendations as expeditiously as possible. These improvements will enable U.S. citizens to travel together from today's stubborn reality – where far too many Native American and Alaska Native communities suffer from violent crime, – to a not-too-distant future where the public safety gap between Native America and the rest of the United States can finally be closed.

When the Commission first released the Roadmap last November, we were privileged to provide briefings to Members and professional staff from the Senate and the House, as well as The White House, U.S. Departments of Justice and the Interior, and other Executive Branch agencies. From these discussions emerged a request that the Commission provide even greater specificity as to how each of its 40 recommendations might be implemented – through legislation, Presidential executive order or Executive Branch policy directive, and so forth. The remainder

of this testimony steps through the Roadmap to provide this supplemental information.

Again, and on behalf of the entire Commission, thank you for the privilege of serving. We appreciate your continued leadership and commitment to making Native America safer and more just.

CHAPTER 1: JURISDICTION

Congress

1. Enact a statute amending 18 and 25 U.S.C. so that any tribe subject to federal and/or state criminal jurisdiction under 18 U.S.C. §§ 1152, 1153, or 1162 will have the option to exclude itself from such jurisdiction, either fully or partially, and from the sentencing limits of the Indian Civil Rights Act, so long as it affords federal constitutional rights to defendants, and subject to limited review of such constitutional guarantees by an Article III court, the United States Court of Indian Appeals. Under this statute, tribes could also opt to return to federal and/or state jurisdiction. To the extent tribes exercise this option to exclude themselves from federal and/or state criminal jurisdiction, this law would also acknowledge tribal criminal jurisdiction over all individuals who commit offenses within Indian country.

2. Enact a statute establishing a new specialized Article III court, the United States Court of Indian Appeals, whose appellate jurisdiction would extend to cases arising in the courts of all tribes that have exercised the option to be excluded from federal and/or state criminal jurisdiction and from the sentencing limits of the Indian Civil Rights Act. The Court of Indian Appeals would be authorized to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the United States Constitution by such tribal courts, to interpret federal law related to criminal cases arising in federal [and possibly tribal] courts in Indian country, to hear and resolve federal questions involving the jurisdiction of tribal courts, and to address federal habeas corpus petitions from defendants in tribal courts, whether or not from tribes that have exercised the jurisdictional opt-out. In all cases of appeals from tribal courts to the Court of Indian Appeals, the defendant would be required to first exhaust tribal remedies. The law would make the Court of Indian Appeals on the same level as the United States Circuit Courts of Appeal, and would authorize appeals from decisions of the Court of Indian Appeals to the United States Supreme Court, according to the current discretionary review process. Judges of the Court of Indian Appeals would be nominated by the President in consultation with tribes, and each panel of the Court would consist of at least three judges. The Court would have a

permanent location within Indian country, and additional temporary locations throughout Indian country.

3. Amend the Speedy Trial Act, 18 U.S.C. § 1361, to apply to tribal courts to the extent they have opted out of federal and/or state jurisdiction.

4. Amend 25 U.S.C. § 1323 to authorize tribes subject to state criminal jurisdiction under 18 U.S.C. § 1162 or any other federal statute to retrocede that state jurisdiction back to the federal government.

CHAPTER 2: ALASKA

Congress

1. Amend the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq., to: 1) provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country within the meaning of 18 U.S.C. § 1151, or, in the alternative, amend § 1151 to provide for a special Indian country designation for such lands; 2) clarify that Native allotments and Native-owned town sites in Alaska are Indian country within the meaning of the existing provisions of 18 U.S.C. § 1151; 3) clarify that the Secretary of Interior is authorized to take land into trust for Alaska tribes, including lands transferred to tribes from Regional Corporations or

otherwise acquired by tribes in fee; 3) allow transfer of lands from Regional Corporations to tribal governments; 4) direct more resources to tribal governments for the provision of government services in those communities.

2. Repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendment), which excluded all Alaska tribes, except for the Metlakatla Indian Community, from other provisions of the Act which address tribal criminal jurisdiction and tribal protection orders.

3. Enact a statute affirming the inherent criminal jurisdiction of Alaska Native tribal governments over all Indians within the external boundaries of their villages.

Executive Branch

1. The Department of the Interior should amend 25 C.F.R. part 151 to eliminate the exception for Alaska and to provide a process and decisional criteria for the exercise of the Secretary's discretion to acquire land in trust for Alaska Natives.

2. The Secretary of the Interior should seek a legal opinion from the Solicitors' Office regarding the Indian country status of Alaska Native allotments and Alaska Native Townsites.

CHAPTER 3: STRENGTHENING TRIBAL JUSTICE

Congress

1. In accordance with existing studies and any additional studies as needed, appropriate funds sufficient to bring Indian country law enforcement coverage into parity with the United States, including tribes under state as well as federal criminal jurisdiction, tribes that do or do not compact for federal services under P.L. 93-638, and tribes that opt for exclusion from federal and/or state jurisdiction.

2. Enact a statute requiring state and local law enforcement agencies to report annually on criminal offenses occurring within the Indian country that is subject to their jurisdiction through federal authorization.

3. Enact a statute requiring the United States Department of Justice to provide reservation-level victimization data from its annual crime victimization surveys.

4. Amend the Tribal Law and Order Act of 2010 to allow tribes to sue the Departments of Justice and Interior if they fail to produce and submit annual Indian country crime data and reports as required by the Act.

5. Amend 18 U.S.C. § 3006A to direct each federal district court whose district encompasses Indian country, in developing its plan for indigent defense, to include a program for the appointment of qualified tribal public defenders as special assistant public defenders in Indian country cases, similar to the program established under 18 U.S.C. § 2810(d) for the appointment of Special Assistant United States Attorneys.

6. Enact a statute encouraging United States District Courts that hear Indian country cases to hold more judicial proceedings and provide more judicial services (e.g., probation) in and near Indian country.

7. Commission the Congressional Research Service to study the value and desirability of expanding the current pool of United States Magistrates in order to improve criminal justice access and services to Indian country.

8. Enact a statute similar to the Transfer Act for Indian Health Services, P.L. 83-568, Aug. 5, 1954, transferring all of the functions, responsibilities, duties, and authorities of the Department of the Interior relating to the provision of law enforcement and justice services to Indian country, as set forth in 25 U.S.C. § 2802, to the Department of Justice, and consolidating them with existing services and programs for Indian country within DOJ. The law would establish a new Indian country entity within the Department of Justice, headed by an Assistant Attorney General, to house the new consolidated services and programs, including an appropriate number of FBI agents and their support resources. The statute should specify that Indian preference, as set forth in 25 U.S.C. § 472, applies to positions in the Department of Justice carrying out the transferred functions, and that the new entity exercises the trust responsibility of the United States toward Indian nations. It should also specify that the provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq., addressing contracts with tribes for federal services and Self-Governance agreements apply to the Department of Justice in carrying out its law enforcement and justice services for Indian country. The statute would direct cost savings from the consolidation to the new Indian country entity, and maintain at least that level of funding over time.

9. Enact a statute ending all grant-based, competitive Indian country criminal justice funding in DOJ, and pool the funds to establish a permanent, recurring base funding system for tribal law enforcement and justice services, administered by the new Indian country entity within DOJ. This base funding would be available on an equal basis to all tribes choosing to provide law enforcement and/or justice services, including tribes under state as well as federal criminal jurisdiction, tribes that do or do not compact for federal services under P.L. 93-638, and tribes that opt for exclusion from federal and/or state jurisdiction. The statute would also authorize DOJ to set aside 5% of the consolidated grant monies each year as a tribal criminal justice system capacity-building fund. Under the statute, the formula for distributing base funding and a method for awarding capacity-building dollars would be developed by DOJ in consultation with tribes.

10. Enact the funding requests for Indian country public safety in the National Congress of American Indians Indian Country Budget Request for FY 2014, and consolidate these funds within the new Indian country entity in DOJ. These requests include full funding of all provisions in the Tribal Law and Order Act of 2010, funding of the Indian Tribal Justice Act of 1993 ($50 million/year for seven years for tribal court base funding) and a 7% Indian country set-aside from all Office of Justice Programs.

11. Fund the Legal Services Corporation (LSC) at a level that will allow LSC to provide the public defense services in tribal court that it was authorized to provide under the Tribal Law and Order Act of 2010. Such appropriated funds shall be provided directly to tribal governments so tribes may have flexibility to provide criminal defense services separately, if they so choose, from existing civil legal aid agencies and organizations.

Executive Branch

1. In accordance with existing studies and any additional studies as needed, recommend appropriation of funds sufficient to bring Indian country law enforcement coverage into parity with the United States, including tribes under state as well as federal criminal jurisdiction, tribes that do or do not compact for federal services under P.L. 93-638, and tribes that opt for exclusion from federal and/or state jurisdiction.

2. The FBI should revise its NIBRS uniform incident reporting system to establish "Indian country" (or not) as a separate category within "Offense," apart from "Location" characteristics.

3. The United States Department of Justice, Bureau of Justice Statistics, should extract and report annual victimization data at the reservation level in its National Crime Victimization Survey.

4. The Attorney General should issue a directive affirming that federally deputized tribal prosecutors appointed as Special Assistant United States Attorneys pursuant to 25 U.S.C. § 2810(d) are entitled to all Law Enforcement Sensitive information needed to perform their jobs for their tribes. The United States Attorneys Manual and all training programs and manuals provided to the FBI and other federal law enforcement agencies should be updated to incorporate this directive.

5. The Attorney General should issue a directive creating a presumption that federal officials shall serve as witnesses in tribal court proceedings when subpoenaed by tribal courts to do so, and streamline the process for granting permission to such officials to testify when subpoenaed or otherwise directed by tribal court judges.

CHAPTER 4: INTERGOVERNMENTAL COOPERATION

Congress

1. Appropriate funds to support training costs and other requirements for tribes seeking to have their agencies and officers certified by state POST agencies for purposes of exercising state peace officer powers.

2. Enact a statute creating a federally subsidized insurance pool or similarly affordable arrangement for tort liability for tribes seeking to enter into a deputization agreement with state and/or local law enforcement agencies.

3. Amend the Federal Tort Claims Act, 28 U.S.C. § 1346(b), to include unequivocal coverage for tribal police, coverage that is not contingent on the exercise of discretion by U.S. Attorneys or other federal officials.

4. Enact a statute requiring state authorities to notify the relevant tribal government when they have reason to believe that they have arrested a tribal citizen who resides in Indian country, and when they have reason to believe that a tribal citizen who resides in Indian country is a criminal defendant in a state proceeding. When a tribal citizen is a defendant in a state proceeding, the relevant tribe should be notified at all steps of the process, be invited to have

representatives present at any hearing, and be invited to collaborate in choices involving corrections placement or community supervision. These obligations would be contingent on the arrestee/defendant providing his/her consent and the tribe informing state authorities of the appropriate point of contact with the tribe.

5. Enact a statute providing Byrne grants or COPS grants for data-sharing ventures to local and state governments, conditioned on the state or local governments entering into agreements to provide criminal offenders' history records to any tribe with an operating law enforcement agency that requests data sharing. State and local governments that did not make such agreements would be ineligible for Byrne and COPS grants.

Executive Branch

1. The Department of Justice should establish a model tribal-state law enforcement agreement program, to help states formulate uniform laws to enable MOUs and agreements with tribes, both in states that have jurisdiction under Public Law 280 or similar laws and in states that do not have such federally-authorized criminal jurisdiction.

2. The Departments of Justice and Interior should require their law enforcement officers to notify the relevant tribal governing when they arrest a

tribal citizen who resides in Indian country and when a citizen who resides in Indian country is a criminal defendant in a federal court proceeding, including the outcome of that proceeding. The United States Probation Department should establish a policy that when a tribal citizen has been convicted in a federal proceeding for an offense committed within Indian country, it will notify the relevant tribal government and invite that tribe to collaborate in choices involving corrections placement or community supervision.

3. The Departments of Justice and Interior should establish policies of providing written notice to the relevant tribal governing body regarding any tribal citizens who are reentering tribal lands from jail or prison or who are being released from jail or prison on tribal lands, whether or not that citizen formerly resided on the reservation. These obligations would be contingent on the tribe informing federal authorities of the appropriate point of contact with the tribal governing body.

CHAPTER 5: DETENTION AND ALTERNATIVES

Congress

1. All appropriations for reentry, second-chance, and alternatives to incarceration (funding, technical assistance, training, etc.) should include a commensurate amount set aside for Indian country. These funds should be

managed by the new Indian country entity within DOJ and administered using a permanent, recurring base funding system. This base funding would be available on an equal basis to all tribes exercising criminal jurisdiction, including tribes under state as well as federal criminal jurisdiction, tribes that do or do not compact for federal services under P.L. 93-638, and tribes that opt for exclusion from federal and/or state jurisdiction. Under the statute, the formula for distributing base funding and a method for awarding capacity-building dollars would be developed by DOJ in consultation with tribes.

2. All appropriations for construction, operation, and maintenance of jails, prisons, and other corrections programs should include a commensurate amount set aside for Indian country. Those funds, together with funds for existing programs for offenders convicted under tribal law, should be consolidated and administered by the Indian country entity within the Department of Justice.

3. Appropriate funds that supply incentives for development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing rehabilitative programming beyond "warehousing."

4. Convert the Bureau of Prisons pilot program created by the Tribal Law and Order Act into a permanent programmatic option that tribes can use to house prisoners.

Executive Branch

In budget requests, prioritize incentives for development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing rehabilitative programming beyond "warehousing."

CHAPTER 6: JUVENILE JUSTICE

Congress

1. Amend 18 and 25 U.S.C. so that any tribe subject to federal and/or state juvenile jurisdiction under 18 U.S.C. §§ 1152, 1153, or 1162 will have the option to exclude itself from such jurisdiction and from the sentencing limits of the Indian Civil Rights Act, so long as it affords federal constitutional rights to juveniles, and subject to limited review of such constitutional guarantees by an Article III court, the United States Court of Indian Appeals.

2. Amend the Federal Delinquency Act, 18 U.S.C. § 5032, to add "or tribe" after the word "state" in subsections (1) and (2). The effect will be that federal prosecution may not proceed against a juvenile for any offense under 18 U.S.C.

§§ 1152 and 1153 unless the prosecutor certifies, after investigation, that at least one of the following three conditions exists: 1) the Tribe does not have jurisdiction or refuses to assume jurisdiction over the juvenile; 2) the Tribe does not have programs or services available and adequate for the needs of juveniles; or 3) the offense is a violent felony or a specified drug offense in which there is a "substantial federal interest."

3. Amend the Federal Delinquency Act, 18 U.S.C. § 5032, to provide: "Notwithstanding §§ 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in § 1151), and which has occurred within the boundaries of such Indian country, shall be proceeded against as an adult unless the governing body of the Tribe has elected that federal law providing for transfer of juvenile cases for criminal prosecution shall have effect over land and persons subject to its criminal jurisdiction."

4. Amend the definition of "child custody proceeding" in the Indian Child Welfare Act, 25 U.S.C. § 1903(1), to delete the following language: "Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime...." The effect will be that in some juvenile

proceedings involving such acts (mainly those where the child resides or is domiciled in Indian country) tribal jurisdiction will be exclusive of the state, and in other such proceedings there will be a presumption in favor of transferring the matter from state to tribal court.

5. Enact a statute similar to the transfer act for Indian health services, P.L. 83-568, Aug. 5, 1954, transferring all of the functions, responsibilities, duties, and authorities of the Department of the Interior relating to the provision of juvenile justice services to Indian country, as set forth in 25 U.S.C. § 2802 and otherwise, to the Department of Justice.

6. Enact a statute modeled on the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., providing that in every Federal and State juvenile proceeding where the court has reason to believe the juvenile is an "Indian child" as defined in 25 U.S.C. § 1903(4), the state or federal court must seek verification of the juvenile's status from either the BIA or the juvenile's Tribe in accordance with BIA Guidelines for State Courts: Indian Child Custody Proceedings, November 26, 1979, 44 Fed. Reg. 67584, § B.1; must notify the juvenile's Tribe in the manner provided in 25 U.S.C. § 1912; and must afford the juvenile's Tribe the right to intervene as specified in 25 U.S.C. § 1911(c). This statute should also include a

requirement that state and federal courts exercising jurisdiction over "Indian children" for acts occurring in Indian country maintain records at every stage of the proceedings, including detention, noting the status of the juvenile as an "Indian child" and the juvenile's tribal affiliation(s).

7. Enact a statute, modeled on Section 712 of the U.S. Attorneys' Manual, directing federal courts to establish a pre-trial diversion program for Indian country juvenile cases that utilizes the tribal probation department of any participating tribe as the agency responsible for establishing a pre-trial diversion agreement and certifying compliance with that agreement.

8. Enact a statute providing that when an Indian juvenile is detained for treatment pursuant to state or federal court order for acts carried out in Indian country, the detaining agency must ensure that the treatment is informed by the most recent and best trauma research as applied to Indian country, as certified by the Department of Justice, and, consistent with provision of such treatment, is provided in a facility that is community-based or located within a reasonable distance from the juvenile's home.

Executive Branch

1. The Department of Justice, in consultation with tribal representatives, shall establish standards for treatment of Indian juveniles that is informed by the most recent trauma research as applied to Indian country.

2. Regulations governing federal law enforcement, probation, and prosecution agencies should be modified to ensure that at the time Indian juveniles are brought before federal juvenile justice agencies, those juveniles are provided with trauma-informed screening and care, carried out in consultation with tribal child welfare and behavioral health agencies.

3. The cost to the federal government of federal and state Indian country juvenile jurisdiction should be determined, and whenever a Tribe opts out of federal and/or state jurisdiction, the federal funds that would otherwise go to federal and/or state agencies should instead be directed to the Tribe.

4. Consolidate Department of Justice funding for Indian country juvenile justice as block funding rather than as grants, affording tribes the option to direct funds to treatment rather than detention.

5. In budget requests, funding levels for tribal juvenile justice should be established at a level of parity with state juvenile justice for every tribe exercising juvenile jurisdiction.

CONCLUSION

Again, the members of the Commission are committed to continuing to work with this Committee and the Congress to support the effective implementation of the recommendations contained in our Roadmap. The Roadmap reflects the unanimous bi-partisan consensus for how justice can be strengthened to benefit the lives of all people living and working in Native American and Alaska Native nations across our country. We look forward to supporting your continued efforts to make Native American and Alaska Native communities safer and more just for all U.S. citizens.