S. HRG. 114–347

S. 2785, A BILL TO PROTECT NATIVE CHILDREN AND PROMOTE PUBLIC SAFETY IN INDIAN COUNTRY; S. 2916, A BILL TO PROVIDE THAT THE PUEBLO OF SANTA CLARA MAY LEASE FOR 99 YEARS CERTAIN RESTRICTED LAND AND FOR OTHER PURPOSES; AND S. 2920, THE TRIBAL LAW AND ORDER REAUTHORIZATION ACT OF 2016

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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WEDNESDAY, MAY 18, 2016

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. John Barrasso, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

The CHAIRMAN. Good afternoon. I call this legislative hearing to order.

Today the Committee will examine three bills: S. 2785, the Tribal Youth and Community Protection Act of 2016; S. 2916, a bill to provide that the Pueblo of Santa Clara may lease for 99 years certain restricted land, and for other purposes; and S. 2920, the Tribal Law and Order Reauthorization and Amendments Act of 2016.

On April 12, 2016, Senators Tester and Franken introduced S. 2785, the Tribal Youth and Community Protection Act of 2016.

This bill seeks to expand tribal criminal jurisdiction over: crimes against children; drug-related crimes; and crimes against law enforcement and court personnel during the exercise of tribal criminal jurisdiction.

It would also provide funding for tribal substance abuse prevention programs and for building tribal jurisdictional capacity. I am going to turn to the bill's sponsors for their comments in a moment.

On May 11, 2016, Senator Udall, along with Senator Heinrich, introduced S. 2916, the Pueblo of Santa Clara 99 Year Certain Restricted Land Lease.

This bill would amend the Long Term Leasing Act to clarify that the Santa Clara and the Ohkay Owingeh Pueblos may lease their

restricted fee lands for up to 99 years. I will turn to Senator Udall for comments at a time convenient for him.

On May 11, 2016, Senator McCain and I introduced S. 2920, the Tribal Law and Order Reauthorization and Amendments Act of 2016. In 2010, Congress passed the Tribal Law and Order Act to improve criminal justice and public safety in Indian communities. This Committee held an oversight hearing on December 2, 2015 and a roundtable on February 25, 2016 regarding next steps to improving public safety in Indian communities.

Access to data, information sharing, public defense support, juvenile justice, and substance abuse were among the most significant challenges facing the tribes. This bill, S.2920, reauthorizes many of the needed programs in the Tribal Law and Order Act. It is intended to address some of the more pressing issues that can be passed this Congress.

Before I turn to the Vice Chairman, let me say that I am disappointed that the Department of Justice chose not to provide comments on S. 2920. It is hard to believe that the chief law enforcement agency of the Federal Government did not provide any recommendations or provide comments to this bill.

I can certainly understand the short timing, we introduced this bill last week, and the department probably wanted more time but to provide nothing is unacceptable. I now have to wonder about the commitment from the Department of Justice on Indian programs. Let me remind everyone that it was just last year that the Department of Justice failed to send a single witness to our budget hearing and failed to produce the required annual reports demanded by Congress.

Starting with this hearing, the members of this Committee fully expect the Administration, the Department of Justice in particular, to work diligently and expeditiously with this Committee on this and other bills. The tribes and their people deserve nothing less.

With that, I would like to turn to the Vice Chairman for any opening statement. Senator Tester.

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman.

Thanks for holding this legislative hearing to discuss the bills we have before us today.

These bills talk about two important issues to tribes, protection of tribal communities and management of public tribal lands.

I also want to thank the witnesses for being here to provide testimony. In particular, I welcome Councilman Dana Buckles. It is good to have you here.

Dana traveled all the way from northeast Montana, Fort Peck, I guess you call that God's country up there, to share their experience as one of the first tribes to begin exercising criminal jurisdiction restored by the Violence Against Women Act of 2013.

Tribal law enforcement and tribal courts are the first and sometimes the only line of defense for people living on Indian reservations. This is especially true in rural areas. It is vitally important to empower tribes to protect their communities and to ensure they

have the tools necessary to investigate and prosecute criminal offenses.

Just this month, the National Institute of Justice released a report on sexual and domestic violence against Native women and men. We all know that Native Americans are victims of violence way too often. The report found in some instances, 90 percent or more of these crimes are committed by non-Indians.

We cannot continue to sit back and fail to address these issues. That is why Senator Franken and I, along with Senator Udall, have introduced the Tribal Youth and Community Protection Act.

This bill would allow tribes to better protect their communities from folks who could cause harm, regardless of whether they are Indian or non-Indian. This bill builds on tribal provisions of the 2013 Violence Against Women Act by restoring tribal criminal jurisdiction over violent crimes committed against Native children and tribal law enforcement.

We are also starting to see that domestic violence in Indian Country is related to the increased use of drugs on Indian reservations. That is why my bill would also let tribes prosecute drug offenses occurring in their communities.

In Montana over the last year alone, three reservation communities have declared a state of emergency due to illegal drug epidemic. Criminals, including cartels of organized crime, know that gaps in police and prosecution make reservations easy targets to push their drugs.

That is why we have to recognize the tribes' sovereign authority to prosecute these crimes and ensure the safety of their communities.

To assist tribal courts, the Tribal Youth and Community Protection Act also reauthorizes several programs that address drug crimes and substance abuse and expands the VAWA 2013 grant program to help tribes build their criminal justice system.

Again, I want to thank you, Mr. Chairman, for elevating these very important issues and for holding this hearing. I look forward to the witness's testimony on each of these bills before us today.

The CHAIRMAN. Thank you, Senator Tester.

Senator Daines.

STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM MONTANA

Senator DAINES. Thank you, Mr. Chairman and Ranking Member Tester.

I would also like to welcome Councilman Dana Buckles of the Assiniboine & Sioux Tribes of the Fort Peck Reservation in Montana who will be testifying today. Councilman, it is great to have you here.

As our witnesses attest, when it comes to crime in Indian Country, the statistics are devastating. Montana's Indian reservations are no exception. I would like to share a story that Councilman Buckles alludes to in his testimony. That is the story of a four-year-old girl who lives on the Fort Peck Reservation in Wolf Point.

In February, this little girl was playing on a playground across the street from home when she was abducted. When she was found four days later, she was miraculously alive but a victim of sexual

assault. Such a crime against anyone is unthinkable, let against a four-year-old.

We get to hear from Councilman Buckles as he has served on the council. Councilman Dana Buckles, thanks for being here.

The CHAIRMAN. Thank you.

Senator Franken?

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Thank you Mr. Chairman and Vice Chairman Tester for holding this hearing and thanks to all the witnesses for testifying here today.

As a member of the Judiciary Committee and the Indian Affairs Committee, I am committed to making sure that we continue to update the Violence Against Women Act to more effectively address the unique needs of women and children in Indian Country which is why I co-sponsored Senator Tester's Tribal Youth and Community Protection Act.

This legislation helps to remove the jurisdictional obstacles that have prevented American Indian communities from prosecuting acts of sexual and domestic violence that occur in their territories.

I look forward to hearing from all of you on how we can continue to improve the Violence Against Women Act as well as the Tribal Law and Order Act in order to keep Native women and children safe.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Franken.

Senator Murkowski?

STATEMENT OF HON. LISA MURKOWSKI,
U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. Thank you for convening this very important hearing. Welcome to all of our witnesses.

It seems that it was just last year, just yesterday, that the Senate enacted the Tribal Law and Order Act and the 2013 reauthorization of VAWA.

I am tremendously invested in the success of both of these significant legislative accomplishments. Even though the Tribal Law and Order Act was signed into law in 2010, the heavy lifting, if you will, of that legislation occurred when I was Vice Chairman of the Committee and Senator Dorgan was Chair at the time. We had some pretty exceptional staff work by David Mullon and Allison Binney. Really the work that went into it was considerable.

I was an early co-sponsor of the VAWA reauthorization, working with Senator Leahy and Senator Crapo and consistently supported that partial Oliphant fix which today we refer to as the special domestic violence jurisdiction. That provision, which became known as Section 904 of the VAWA amendments, was very controversial in both Houses, but thanks to a lot of persistence and hard work, and a little bit of courage, it became law.

Today, Mr. Toulou and our witnesses will tell us how this all worked out. I am anxious to hear about that. I understand from the advance statement, it is working reasonably well.

Mr. Chairman, if I may, I would like to take just a minute to talk about the situation in Alaska. As a consequence of the U.S. Supreme Court's *Venetie* decision, most of the acreage of indigenous lands in rural Alaska occupied predominantly, if not overwhelmingly, by Alaska Natives is not Indian Country.

Thus, when we empower tribes to do more within the tribes' Indian Country, we effectively exclude Alaska. There is no consensus in Alaska that the *Venetie* decision should be wholesale overturned but neither is there consensus in Alaska that our tribes should be disempowered to maintain peace in the rural communities or to protect our people.

This is especially important because the State of Alaska maintains a very small State police force relative to the millions of acres of land they have to patrol. Oftentimes weather keeps our troopers from flying out into the communities where they need to be.

Over the past several years, it has been my impression that Alaskans are seeking a new paradigm for public safety protection in the rural communities and believe that tribes need to be empowered to be a part of that solution.

I have laid the foundation for these efforts in the Tribal Law and Order Act which brought new cops funding to rural Alaska. I have used my real estate on the Interior Appropriations Subcommittee to focus BIA on the need to support our tribal courts in the State, even though we are a P.L. 280 State.

It does not matter that we are a P.L. 280 State. Our tribal courts have jurisdiction notwithstanding P.L. 280 and need Federal support to exercise that jurisdiction. In VAWA, I asked the Justice Department to take the lead in reconstituting a major forum for Federal, State and tribal coordination on public safety issues, the Alaska Rural Justice Commission.

Unfortunately, we have not seen any progress on this but I am committed to pursuing new pathways for protection of our Native people, especially our Native women and our children. I have been impressed by the work of the Chairman and the Vice Chairman on this Committee.

As we move to mark on both of these issues, I hope to engage other Committee members on the specific challenges we face within Alaska which require perhaps a little more creative solutions going forward.

Again, Mr. Chairman and Vice Chairman, thank you. I thank the witnesses for your testimony in advance.

The CHAIRMAN. Thank you, Senator Murkowski.

We have five witnesses here today. We have: Mr. Michael S. Black, Director, Bureau of Indian Affairs, U.S. Department of the Interior; Mr. Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice; the Honorable J. Michael Chavarria, Governor, Santa Clara Pueblo, Espanola, New Mexico; the Honorable Dana Buckles, who has been introduced by our two Senators from Montana; and the Honorable Alfred Urbina, Attorney General, Pascua Yaqui Tribe of Tucson, Arizona. Thank you all for being with us.

I want to remind the witnesses that your full written testimony will be made a part of the official hearing record. Please try to keep

your statements to five minutes or less so we may have more time for questioning.

I look forward to hearing your testimony beginning with Mr. Black. Mr. Black, welcome back to the Committee. Please proceed.

STATEMENT OF MICHAEL S. BLACK, DIRECTOR, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. BLACK. Chairman Barrasso, Vice Chairman Tester and members of the Committee, thank you for the opportunity to provide testimony before this Committee on S. 2920, the Tribal Law and Order Reauthorization Act of 2016; S. 2785, the Tribal Youth and Community Protection Act of 2016; and S. 2916, a bill to provide a bill to provide that the Pueblo of Santa Clara Ohkay Owingeh Pueblos may lease for 99 years certain restricted lands.

S. 2920, the Tribal Law and Order Reauthorization Act brought about necessary and important changes in addressing public safety in Indian Country. Our experiences in implementing TLOA have highlighted additional areas that still need to be addressed.

In the six years since TLOA was passed in 2010, the Department of Interior still strongly supports the purposes of TLOA. We believe there is no substitute for having enough officers on the ground and will continue working to improve law enforcement in Indian Country.

I am pleased to be before the Committee today to provide the department's full support of and recommendations for S. 2920.

A major focus of TLOA was to address challenges related to reporting and data collection. We want to continue this effort to build robust data and provide the public with information it needs. Section 103 provides for sharing Federal data with the tribes. One gap we recognize is the lack of incorporation of tribally-owned data into State and Federal data bases.

To foster respect and reciprocity for tribally-collected data, the department would like to encourage the bills' authors to consider extending the Department of Justice's new tribal access program for national crime information which provides tribes access to national crime information for both civil and criminal purposes and to include a pilot program or other mechanism to support tribes interested in sharing tribal court criminal records with other law enforcement agencies.

In reviewing S. 2920, we note it does not address some of the issues such as those related to resumption of concurrent Federal jurisdiction in P.L. 280 States and extended sentences provisions for tribes. We would appreciate the opportunity to work with the authors to ensure the tribes can utilize our full authority and jurisdiction to prosecute crimes in Indian Country.

The department appreciates the inclusion of alternatives to detention in the bill as many of our offenders are engaging in criminal activity due to untreated mental health, alcohol and substance abuse issues. We want to continue to look for ways to get these individuals the help they need to break the cycle of recidivism.

We also recommend the following number of technical changes to TLOA in the areas of technical assistance and training, data sharing, annual reporting requirements, background checks and the

Bureau of Prisons pilot program. We look forward to working with the Committee on these recommendations.

Regarding S. 2785, the Tribal Youth and Community Protection Act of 2016, the Administration has made it a priority to improve the health, welfare and safety of tribal communities. The department supports S. 2785.

S. 2785 would authorize Section 4206 and 4218(b) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 to authorize funding for tribal action plans and training programs. The department supports this reauthorization.

The department, however, does recommend changing the tribal action plan to a tribal strategic plan based on feedback received from tribes regarding current tribal practices. Such a change would allow for plans driven by tribes rather than the Federal Government.

S. 2785 would also amend 25 U.S.C. Section 1304, tribal jurisdiction over crimes of domestic violence to include tribal jurisdiction over crimes of tribal violence and drug offenses, as well as amending the definitions for dating and domestic violence to include felony and misdemeanor violations of the tribe's criminal law within its own lands.

S. 2785 also amends the current authorized amount of appropriations from $5 million to $10 million for fiscal years 2016–2020 pursuant to DOJ grant programs for tribes under Subsection (f).

Since these amounts represent DOJ resources specifically authorized to strengthen and support tribal criminal justice systems, we are open to continued conversations about the appropriate reporting mechanism.

Regarding S. 2916, to amend the Act of August 9, 1955 to authorize the Pueblo of Santa Clara Ohkay Owingeh Pueblos 99 year lease authority for certain restricted lands.

The Administration strongly supports the principles of self determination and self governance, recognizing that intrinsic to these principles is tribal control over tribal resources, especially over tribal homelands and the welfare of Native people.

This concludes my testimony for today. I am happy to answer any questions.

[The prepared statement of Mr. Black follows:]

PREPARED STATEMENT OF MICHAEL S. BLACK, DIRECTOR, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Chairman Barrasso, Vice-Chairman Tester, and members of the Committee, my name is Mike Black and I am the Director for the Bureau of Indian Affairs (BIA) at the Department of the Interior (Department). Thank you for the opportunity to provide testimony before this Committee on S. 2785, the Tribal Youth and Community Protection Act of 2016. The Department supports S. 2785.

The Obama Administration has made it a priority to improve the health, welfare, and safety of Tribal communities. Two separate federal taskforces, the Indian Law and Order Commission and the Attorney General's Task Force on American Indian/Alaska Native Children Exposed to Violence, concluded local control is the key for promoting public safety in Indian Country. The tribal provisions in the Violence Against Women Reauthorization of 2013 employed this principle and since its enactment, a number of tribes are making strides in combatting domestic violence. S. 2785 continues to move in this direction by strengthening tribes' ability to protect their communities and prosecute non-Indian offenders.

S. 2785

S. 2785 would reauthorize Section 4206 and 4218(b) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. Section 2412 and Section 2451(b) respectively) to authorize funding for Tribal Action Plans (Section 4206) and Training Programs (Section 4218(b) for fiscal years 2016 through 2020. The Department supports this reauthorization.

S. 2785 would amend 25 U.S.C. Section 1304, Tribal jurisdiction over crimes of domestic violence, to include Tribal jurisdiction over crimes of child violence and drug offenses. S. 2785 amends 25 U.S.C. Section 1304 definitions for dating violence and domestic violence to include "felony and misdemeanor violations" of the Tribe's criminal law within its own lands. S. 2785 also amends Section 1304 by including definitions for "caregiver," "child violence," "drug offense," and "related conduct."

The Department recommends changing the "Tribal Action Plan" (TAP) to a "Tribal Strategic Action Plan" (TSAP) based on feedback received from Tribes regarding current tribal practices. Such change would allow for plans that are driven by tribes, rather than the Federal Government.

The Department recommends adding language to 25 U.S.C. Section 2412 (c) provisions that provide more deference to the Tribal Strategic Action Plan.

S. 2785 also amends the current authorized amount of appropriations from $5 million to $10 million for fiscal years 2016 through 2020 pursuant to DOJ grant programs for tribes under subsection (f). Since these amounts represent DOJ resources specifically authorized to strengthen and support tribal criminal justice systems, we are open to continuing conversations about the appropriate reporting mechanism.

Conclusion

Thank you for providing the Department the opportunity to prove input into S. 2785. The Department supports S. 2785 and recommends a few changes as noted above. I am available to answer any questions the Committee may have.

S. 2916

I am here today to provide the Department's position on S. 2916, a bill to provide that the Pueblo of Santa Clara and the Ohkay Owingeh Pueblo may lease for 99 years certain restricted land.

The purpose of S. 2916 is to amend the Act of August 9, 1955, to authorize the Pueblo of Santa Clara and the Ohkay Owingeh Pueblo a 99-year lease authority for restricted land. The Administration strongly supports the principles of self-determination and self-governance, recognizing that intrinsic to these principles is tribal control over tribal resources, especially over tribal homelands, and the welfare of Native people. In line with these principles, the Administration believes that tribal governments are in the best position to determine the duration of tribal leases. Accordingly, the Department supports S. 2916.

Background

Since the enactment of the Act of June 30, 1834, 4 Stat. 730, codified as 25 U.S.C. Sec. 177, and predecessor statutes, land transactions with Indian tribes were prohibited unless specifically authorized by Congress. This law is commonly known as the Non-intercourse Act. Congress enacted the Act of August 9, 1955, codified at 25 U.S.C. Sec. 415, commonly known as the Long-Term Leasing Act, to overcome the prohibition of the Non-intercourse Act. The Long-Term Leasing Act permitted some land transactions between Indian tribes and nonfederal parties—specifically, the leasing of Indian lands. The Act required that leases of Indian lands be approved by the Secretary of the Interior and limited lease terms to 25 years.

As business opportunities and economic considerations changed over time, leases longer than 25 years were desired. To facilitate economic development on Indian lands, over the years, a number of tribes have obtained amendments to the Long-Term Leasing Act so that they could enter into leases for terms longer than 25 years. Approximately 50 tribes have obtained these amendments and all are listed in the Long-Term Leasing Act as having authority to enter into leases for terms as long as 99 years.

S. 2916 would further amend the Long-Term Leasing Act by amending the Long-Term Leasing Act to add the Pueblo of Santa Clara and the Ohkay Owingeh Pueblo to the list of tribes that may enter into 99-year leases within the boundaries of their respective Pueblo lands. The Pueblo of Santa Clara and the Ohkay Owingeh Pueblo are currently listed in 25 U.S.C. Section 415(a), but the listing is restricted to "lands held in trust for the Pueblo of Santa Clara" and "lands held in trust for the Ohkay Owingeh Pueblo." There exists, and in the future there could exist, lands within the boundaries of either Pueblo's boundaries, owned by either Pueblo, but not held in

trust for the Pueblo of Santa Clara or Ohkay Owingeh Pueblo. Thus, S. 2916 seeks to include all the lands within the boundaries either Pueblo. The Department supports S. 2916.

S. 2920

Thank you for the opportunity to provide testimony before this Committee on S. 2920 the Tribal Law and Order Reauthorization Act (TLORA) of 2016.

The Tribal Law and Order Act (TLOA) brought about necessary and important changes in addressing public safety in Indian Country. Our experiences implementing TLOA have highlighted additional areas that still need to be addressed. TLOA was passed to clarify the responsibilities of Federal, state, tribal, and local governments with respect to crimes committed in Indian country; to increase coordination and communication among Federal, state, tribal, and local law enforcement agencies; to empower tribal governments with the authority, resources, and information necessary to provide public safety in Indian country effectively; to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence; to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, state, and tribal officials responsible for responding to and investigating crimes in Indian country.

In the six years since TLOA was passed in 2010, the Department of the Interior still strongly supports the purposes of TLOA. We believe there is no substitute for having enough officers on the ground, and we will continue working to improve law enforcement in Indian country. The Obama Administration has made it a priority to improve the health, welfare, and safety of tribal communities, and I am pleased to be here before this Committee today to provide the Department's full support of and recommendations for S. 2920.

A major focus of TLOA was to address challenges related to reporting and data collection. We want to continue this effort to build robust data and provide the public with the information it needs. Section 103 provides for sharing of federal data with tribes. One gap we recognize is the lack of incorporation of tribally-owned data into state and federal databases. For example, an individual may have prior tribal arrests that are not reflected in state and federal databases. To foster respect and reciprocity for tribally-collected data, the Department would like to encourage the bill's authors to consider extending the Department of Justice's new Tribal Access Program for National Crime Information, which provides tribes access to national crime information for both civil and criminal purposes, to include a pilot program or other mechanism to support tribes interested in sharing tribal court criminal records with other law enforcement agencies. The Department recognizes many tribes are currently doing this; however, we should encourage law enforcement agencies and courts to adopt this practice across Indian Country.

Even with the information improvement efforts of TLOA, Indian Country still lacks data on criminal justice, or, more accurately, the ability to identify and analyze the information needed to paint an accurate picture of law enforcement in Indian Country. This is a challenge in multiple sectors, including health, child welfare, and others, but it is particularly problematic in the context of criminal justice, in which Federal, state, tribal, and local governments share responsibilities.

Further, as the nation moves toward evidence-based policy making, there has been increased focus on the quality of information the Department and other agencies are required to collect in order to report back to Congress. This bill has numerous reporting requirements, but stops short of providing additional resources for us to effectively meet this direction effectively and in a timely manner. We would appreciate the opportunity to share more with the bill's sponsors about our capacity to analyze complex data sets in a way that is meaningful for Congress.

Tribal courts are an essential part of tribal governments, which provide local delivery of justice in tribal communities. We support Section 107, which reauthorizes tribal court training programs. Those training programs are critical to assisting tribes with building capacity.

We are encouraged by the tremendous progress some tribes are making to build their courts up. Many more tribes continue to face challenges. TLOA's Indian Law and Order Commission (ILOC) recognized that tribes in Public Law 280 states, particularly those in California and Alaska, have even greater hurdles to the development of their justice systems. Additionally, TLOA allowed for re-assumption of concurrent federal jurisdiction in Public Law 280 states and extended sentencing provisions for tribes, followed by the Violence Against Women Reauthorization Act of 2013, which contained special domestic violence criminal jurisdiction provisions. Despite their strong desire, relatively few tribes are able to take on these additional

responsibilities. In reviewing S. 2920, we note that it does not address these issues and would appreciate the opportunity to work with the authors to ensure that tribes can utilize their full authority and jurisdiction to prosecute crimes in Indian Country.

The Department appreciates the inclusion of alternatives to detention in the bill as many of our offenders are engaging in criminal activity due to untreated mental health and alcohol and substance abuse issues. We want to continue to look for ways to get these individuals the help they need to break the cycle of recidivism.

One detention issue not addressed in the bill is the disproportionately high costs of time and expense for transporting prisoners within the current system of facilities. We believe issues associated with transportation of prisoners contribute to the scarcity of detention funding. Transporting a prisoner requires two officers, and in remote areas this pulls officers off patrol and out of the community for days at a time. This creates severe safety risks across Indian County, where a tribe may have only two officers in its entire police force. Transporting juveniles presents an additional challenge, as it often requires traveling a longer distance in order for the individual to be housed at one of a very limited number of juvenile facilities. These high transportation costs soak up the already scarce resources available for detention. We believe one method to solve this problem may be to create incentives for intergovernmental cooperation with regard to bed space in detention facilities to allow tribal prisoners to be housed closer to home in local or county facilities.

TLOA's ILOC devoted an entire chapter to intergovernmental cooperation, noting that some tribal governments have seen success through partnerships with local counties and state agencies using cross-deputization agreements and memoranda of understanding. We know not every tribe, state, local, or county official will feel enough groundwork has been laid to foster a strong working relationship today. However, we believe encouraging them to pool their limited resources makes good fiscal sense, and can lead to better cooperation in other areas that face similar jurisdictional challenges, such as health care delivery, natural resources management, or road maintenance. Recognizing that all these entities have a role to play will ensure communities as a whole, Indian and non-Indian, are safer. With this in mind, we recommend additional bill language to create strong incentives toward intergovernmental cooperation.

Collaboration is also important within the Federal family. Federal interagency collaboration, breaking down silos within government, remains a priority for this Administration as it seeks to create an "all of government" approach to Indian Affairs. S. 2920 recognizes that public safety in Indian Country is an issue which needs attention from multiple agencies. Section 102 asks us specifically to work with Health and Human Services and the Department of Justice to integrate and coordinate around our respective criminal justice programs. We believe the fragmentation of programs across agencies is confusing for tribes and impedes our ability to care for tribal members once they enter into the criminal justice system. Interior stands ready to collaborate with its counterparts.

We also recommend the following technical changes to TLOA in addition to our views on TLORA:

Currently TLOA Section 211(c)(13) requires BIA to provide technical assistance and training to tribes on the DOJ National Crime Information Center (NCIC) databases. As this Committee is aware, the NCIC and other national crime information databases are maintained by the DOJ. It would be more appropriate if this responsibility were assigned to the Department of Justice, with input from BIA Office of Justice Services (OJS).

TLOA Section 211(c)(15) allows BIA to share with the Department of Justice all relevant crime data delivered to BIA by tribes. The BIA does share all relevant data including Uniform Crime Reports Data. To maximize this opportunity, the Department recommends language that allows FBI's Criminal Justice Information Services (CJIS) to work with OJS to ensure each tribal jurisdiction is assigned an ORI number for uniform crime reporting purposes.

Finally, Section 211 of TLOA provided for BIA–OJS to develop an annual report of unmet staffing needs of the law enforcement, corrections, and tribal court programs. The Department is concerned with the proposal to withhold funding in the event the reports currently required to Congress are delayed. All funding for law enforcement within the BIA–OJS is essential and withholding such funding would negatively impact the BIA's delivery of public safety needs to tribes and Indian Country. The Department acknowledges the delay in providing this report and is working to provide accurate and relevant data to the Committee. We hope to have an opportunity to work with the Committee to refine the annual reporting requirements.

Currently, Section 231(a)(4)(A) of TLOA states that if a request for a background check is made by an Indian Tribe that has contracted or entered into a compact for law enforcement or corrections services, OJS must complete the check no later than 60 days after the date it received the request. As the Office of Personnel Management (OPM) has the responsibility for completing background checks for the Federal Government, we recommend tribal background investigations be reassigned to OPM. If not reassigned, the 60-day requirement should be changed to 120 days, which would allow more time for completion.

Section 234(c)(1) of TLOA established a four-year pilot program under which the Federal Bureau of Prisons would accept up to 100 offenders convicted in tribal court. We agree that this program should be continued, and that a working group should be established to assist in streamlining a process in which tribal court judges can more easily sentence individuals into the program.

Conclusion

Thank you for inviting the Department to testify. We look forward to working with this Committee on S. 2920 Tribal Law and Order Reauthorization Act. We want to take full advantage of making TLOA stronger in order to make significant steps toward to the goals of TLOA, which was and continues to aim at improving and addressing law and order in Indian country.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you, Mr. Black.

Mr. TOULOU.

STATEMENT OF TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE, U.S. DEPARTMENT OF JUSTICE

Mr. TOULOU. On behalf of the Department of Justice, I want to thank Chairman Barrasso, Vice Chairman Tester and members of the Committee for focusing attention on the critically important issues of protecting Native American children and promoting public safety in Indian Country.

My name is Tracy Toulou. I am the Director of the Justice Department's Office of Tribal Justice.

Protecting Indian families from violence in their homes, whether committed by an Indian or non-Indian, has been a central concern of our department for years. Our conversations and consultations with tribes after passage of the Tribal Law and Order Act of 2010 and the 2013 VAWA reauthorization has underscored the urgent public safety issues facing tribal communities.

The department remains dedicated to working with tribes to identify and implement tribally-driven solutions to these problems.

I would like to focus on gaps in coverage that have been identified by tribes such as Mr. Urbina at the end of the table that have already begun exercising jurisdiction over non-Indians under Section 1304 of Title 25 and gaps that S. 2785 seeks to address.

Tribal efforts to implement Section 1304 have been impressive. Actual tribal experience prosecuting cases under Section 1304 has revealed three significant gaps in the Federal law. First, there has been some confusion about the scope of conduct covered by Section 1304's definition of domestic violence and dating violence. This confusion is compounded by dicta in the 2014 U.S. Supreme Court case, *United States v. Castleman.*

As a result, there is a need to clarify when a tribe can prosecute a non-Indian. Because tribes have been cautious not to exceed their authority under Section 1304, they have hesitated to prosecute non-Indians who have attempted or threatened to cause bodily injury without causing actual physical injury.

In a real world example of this, a non-Indian boyfriend in an intoxicated state attempted to punch his Indian girlfriend but missed and fell to the ground. Concerned that a case with no actual physical contact would not meet the definition of dating violence in Section 1304, the tribe declined to prosecute. That defendant later returned to assault his victim again and was arrested again by the tribe. Language in S. 2785 would amend Section 1304(a) to address this serious problem.

The second gap in law addressed by S. 2785 involves Indian children. Too often a child is victimized during an episode of domestic violence, yet the current version of Section 1304 allows a tribe to prosecute only the crime committed against the adult victim and not the equally serious crime committed against the child.

In one example, a non-Indian boyfriend, after a methamphetamine binge, forced both his Indian girlfriend and her child to sit in a chair while he threw knives at them. While this particular case was prosecuted federally, the tribe should also have the ability to prosecute these crimes.

The third gap in the law is that the law does not clearly recognize that tribes exercising this jurisdiction have authority to protect tribal law enforcement officers, prosecutors, judges and courtroom officials. For example, there is uncertainty about a tribe's authority to charge an offender for resisting arrest by a tribal police officer. This uncertainty threatens the tribe's power and practical ability to successfully prosecute domestic and dating violence crimes. The department supports S. 2785's efforts to address these problems.

The 2013 VAWA reauthorization that gave rise to Section 1304 was closely and carefully tied to problems caused by non-Indian perpetrators of domestic violence. We support Congress' efforts to empower tribal criminal justice systems to deal strongly and appropriately with all persons already subject to tribal jurisdiction under Section 1304.

While the department fully recognizes the terrible impact of drugs on Native American communities, we recommend against expanding the universe of potential tribal court criminal defendants beyond domestic violence offenders in this particular bill. We would be happy to work with Committee staff to more effectively target these non-DV related offenders.

Finally, the department is still in the process of working through the Tribal Law and Order Act reauthorization and amendments of 2016. We will provide our comments as soon as that process is finished.

That said, there are two important issues contained in the bill upon which the department has already commented. The department appreciates the support for the tribal access to Federal law enforcement databases or TAP program. Initial feedback from tribes using the program has been overwhelmingly positive. We appreciate the support for expansion of this program.

Second, as I mentioned in my December 2015 Tribal Law and Order Act testimony, the department supports extension of the Bureau of Prisons Pilot Project, another program which has broad tribal support.

Senator Barrasso, I want to apologize for the fact that these items did not make it to my written testimony but obviously they are very important. I thank the Committee for its willingness to address these important issues. I look forward to answering any questions you might have.

[The prepared statement of Mr. Toulou follows:]

PREPARED STATEMENT OF TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE, U.S. DEPARTMENT OF JUSTICE

On behalf of the United States Department of Justice, I want to thank Chairman Barrasso, Vice Chairman Tester, and the members of this Committee for focusing attention on the critically important issues of protecting Native American children and promoting public safety in Indian country. My name is Tracy Toulou, and I am the Director of the Department of Justice's Office of Tribal Justice. I also want to thank you for holding this hearing on pending legislation including S. 2785, the Tribal Youth and Community Protection Act of 2016. Protecting Indian families from violence in their homes, regardless of whether it is committed by Indians or non-Indians, has been a central concern of our Department for many years. Our conversations and consultations with tribes after the passage of the Tribal Law and Order Act of 2010, or TLOA, and the Violence Against Women Reauthorization Act of 2013, or VAWA 2013, have only underscored the urgent public-safety issues facing tribal communities. The Department remains dedicated to working with tribes to identify and implement tribally driven solutions to these problems. My testimony today will address S. 2785 and the specific issues that gave rise to it, as the Department of Justice is still in the process of formulating views on the other bills that are the subject of today's hearing.

S. 2785 primarily would amend Section 1304 of Title 25 of the United States Code, which is part of the Indian Civil Rights Act of 1968, as amended. Congress enacted Section 1304 as the tribal-criminal-jurisdiction provision of VAWA 2013. We commend the entire Committee, and Senators Tester and Franken in particular, for their willingness to listen to Indian tribal leaders and to take action to improve and strengthen VAWA 2013 and Section 1304.

Domestic Violence and the Jurisdictional Gap in Indian Country

Before describing in detail the Department's views on Section 1304, some background may be helpful. Criminal jurisdiction in Indian country generally is shared among the federal, state, and tribal governments, according to an extraordinarily complex matrix that depends on the nature of the crime, whether the crime has victims or is victimless, whether the defendant is Indian or non-Indian, whether the victim is Indian or non-Indian, and sometimes other factors as well. In 1978, in *Oliphant v. Suquamish Indian Tribe,* the U.S. Supreme Court held that, absent express Congressional authorization, tribes lack jurisdiction over crimes committed by non-Indians. Prior to VAWA 2013, even violent crimes committed by a non-Indian husband against his Indian wife, in the presence of their Indian children, in their home on the Indian reservation, could not be prosecuted by the tribe. Instead, these crimes fell within the exclusive criminal jurisdiction of the United States or, in some circumstances, of the state.

In the decades following *Oliphant,* too many cases of domestic violence and dating violence committed by non-Indians against their Indian spouses and dating partners went unprosecuted and unpunished. This was particularly true for misdemeanor crimes of domestic violence, which, absent a response from law enforcement, often escalated to domestic-violence felonies within weeks or months.

As a result of this jurisdictional gap, as well as other factors, Native American women have suffered some of the highest rates of violence at the hands of intimate partners in the United States. A recent National Institute of Justice analysis of 2010 survey data collected by the Centers for Disease Control and Prevention found that more than half (55.5 percent) of American Indian and Alaska Native women have experienced physical violence by an intimate partner in their lifetimes. Among these victims, 90 percent have experienced such violence by a non-Indian intimate partner. Over their lifetimes, American Indian and Alaska Native women are about five times as likely as white women to have experienced physical violence at the hands of an intimate partner who is of a different race.

The Department's 2011 Legislative Proposal

In 2011, the Justice Department took the unusual step of drafting and proposing to Congress legislation responding to this crisis. The Department's proposed legisla-

tion was designed to decrease domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior. Part of the legislation amended the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding.

Another part of the legislation focused on tribal, rather than federal, prosecution. Specifically, it proposed to amend the Indian Civil Rights Act by recognizing tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate certain protection orders, in Indian country.

While the Department focused tightly on the problems of domestic violence and dating violence in crafting this proposed legislation, the broad principles undergirding the proposal were clear: The division of labor between federal and tribal prosecutors should depend more on the nature and seriousness of the crimes and less on the Indian or non-Indian identity of the victim or of the defendant. U.S. Attorneys' Offices and the FBI will have the greatest positive impact on public safety in Indian country when they can concentrate on the most dangerous crimes. And local tribal prosecutors can be most effective when they focus on offenses that, if left unaddressed, can escalate to more dangerous crimes.

VAWA 2013 and Special Domestic Violence Criminal Jurisdiction

Following the Department's 2011 legislative proposal, this Committee held hearings and received extensive testimony on these issues. Its members ultimately played key roles in enacting, as part of VAWA 2013, the law that is now codified at 25 U.S.C. 1304. Section 1304 recognizes and affirms tribes' inherent power to exercise "special domestic violence criminal jurisdiction," or SDVCJ, over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. For the first time in decades, tribes therefore could prosecute non-Indian perpetrators of domestic violence and dating violence.

In broadening the set of persons who could potentially be prosecuted by tribes, Congress also carefully delineated the scope of tribal authority recognized by VAWA 2013. First, Congress included two important exceptions to tribes' exercise of SDVCJ. Tribes may exercise SDVCJ only if the defendant resides in the tribe's Indian country, is employed in the tribe's Indian country, or is a spouse, intimate partner, or dating partner of a member of the tribe or of an Indian who resides in the tribe's Indian country. Tribes also may not exercise SDVCJ over an offense with a non-Indian victim. These provisions ensure that the defendant has adequate ties to the tribe and its reservation and that this jurisdiction does not include cases involving only non-Indians, which typically fall within a state's exclusive criminal jurisdiction.

Second, Congress effectively ensured that the protections for a defendant's federal rights and civil liberties would be as robust in tribal court as they would be if the defendant were prosecuted in any state court. Specifically, in any case in which a term of imprisonment of any length may be imposed, the defendant is afforded all applicable rights under the Indian Civil Rights Act of 1968, all rights applicable to defendants charged with felony offenses under TLOA, and also the right to trial by an impartial jury chosen from a jury pool that reflects a fair crosssection of the community, including both Indians and non-Indians.

Third, to give tribes time to prepare to meet the requirements of the statute, Section 1304 generally did not take effect until March 7, 2015, two years after VAWA 2013 was signed into law by President Obama. In the interim, VAWA 2013 established a voluntary Pilot Project authorizing tribes to commence exercising SDVCJ on an accelerated basis, but only if the tribe could establish to the Attorney General's satisfaction that it would fully protect defendants' rights. Once the two-year Pilot Project concluded, other tribes were authorized to exercise SDVCJ without seeking the Attorney General's approval.

The Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

After enactment, the Department moved quickly to implement the Pilot Project, which we recognized would lay the groundwork for the success of SDVCJ in general. After consulting with tribal officials and requesting public comment, on November 29, 2013, the Department published a final notice establishing procedures for tribes to request accelerated designation, establishing procedures for the Attorney General

to act on such requests, and soliciting such requests from tribes. Two months later, on February 6, 2014, the Department of Justice announced that the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Confederated Tribes of the Umatilla Indian Reservation in Oregon were selected for the Pilot Project. On March 6, 2015, the Department announced the designation of two additional pilot tribes, the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana.

The three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period from February 2014 through March 2015. In this first year of implementation, the three pilot tribes had a total of 27 SDVCJ cases involving 23 separate offenders. Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution, and 1 offender was acquitted after a jury trial in tribal court.

Although these tribes moved swiftly to implement SDVCJ, they also acted with deliberation. They worked closely with their local United States Attorneys' Offices to identify which cases were best prosecuted by the tribes and which were more suitable for federal prosecution, with the common goal of holding offenders accountable and keeping tribal communities safe. And not one of their SDVCJ non-Indian defendants petitioned for habeas corpus review in federal court, which is a testament to the tribes' ability to safeguard the rights of all defendants in their tribal courts.

Statistics from the individual Pilot Project tribes reveal that many SDVCJ defendants have long histories with the police, underscoring how VAWA 2013 has empowered tribes to respond to long-time abusers who previously had evaded justice. The Pascua Yaqui Tribe reported that their non-Indian defendants had at least 80 documented tribal-police contacts, arrests, or reports attributed to them over the past four years. Similarly, the Tulalip Tribes reported that their non- Indian defendants had at least 88 documented tribal-police contacts, arrests, or reports in the past.

Ongoing Implementation of VAWA 2013 by Tribes and the Department

During the course of consultation about how to structure the Pilot Project, tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes. With these views in mind, in June 2013, the Department established the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction, or ITWG. Approximately 45 tribes have voluntarily joined the ITWG, sharing their experiences implementing or preparing to implement SDVCJ, attending six inperson meetings, and participating in numerous webinars on subjects such as jury pools and juror selection, defendants' rights, victims' rights, and prosecution skills. The Department is supporting the ITWG with training and technical assistance, including an award by its Office on Violence Against Women to the National Congress of American Indians to support the ITWG's ongoing work.

Since the end of the pilot period, we understand that five more tribes have implemented SDVCJ, including two in the last two months. In the ten communities that have now implemented SDVCJ, tribal governments are working to end impunity for non-Indian abusers and to bring safety and justice to Native American victims. Together, as of February 2016, the implementing tribes reported having made a total of 51 SDVCJ arrests (involving 41 separate offenders), resulting in 18 guilty pleas, 5 referrals for federal prosecution, 1 acquittal by jury, and 12 dismissals, with 13 cases pending.

Just as the implementing tribes have been working to hold non-Indian abusers accountable, the Department has stepped up prosecutions of felony-level domestic-violence offenders in Indian country. Since the passage of VAWA 2013, our United States Attorneys have been making good use of their new ability to seek more robust federal sentences for certain acts of domestic violence in Indian country, including the ten-year offense for assaulting an intimate partner by strangling or suffocating. Over the past three years, federal prosecutors have indicted more than 100 defendants on strangulation or suffocation charges.

Based on reports from tribal members of the ITWG, the Department anticipates that many more tribes will choose to implement SDVCJ in the coming year. We know, however, that tribes cannot be expected to shoulder this responsibility without the support of the federal government. To this end, United States Attorneys' Offices will continue to collaborate with tribes that exercise this jurisdiction, and the Department will continue to support peer-to-peer technical assistance to tribes. In addition, by the end of this fiscal year, the Office on Violence Against Women antici-

pates announcing awards under its new Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction program.

Gaps in Coverage of Special Domestic Violence Criminal Jurisdiction

Although tribal efforts to implement Section 1304 have been impressive, actual tribal experience prosecuting cases under Section 1304 has revealed three significant gaps in the federal law. Our reading of S. 2785 is that it is intended principally to address these gaps. While we applaud that effort, we believe it is important that any legislation effectively and precisely target the areas of greatest need. We would be happy to work with the Committee's members and staff to refine some of the bill's language to achieve that goal.

First, there has been some unfortunate confusion in the field about the scope of conduct covered by Section 1304's definitions of "domestic violence" and "dating violence." This confusion was exacerbated by dicta in footnotes in the majority and concurring opinions in a 2014 U.S. Supreme Court case, *United States v. Castleman.* As a result, there is a need to clarify whether a tribe can prosecute a non-Indian whose acts against an Indian spouse or partner arguably would fall short of constituting "violence" in a nondomestic context, but nonetheless use a sufficient degree of force to support a common-law battery conviction. Moreover, because tribes have been cautious not to exceed their authority under Section 1304, implementing tribes' prosecutors have hesitated to prosecute a non-Indian who attempts or threatens to cause his Indian spouse or partner bodily injury, without causing physical injury. In a real-world example of this, a non-Indian boyfriend, in a highly intoxicated state, attempted to punch his Indian girlfriend but missed and fell to the ground. Concerned that a case with no actual physical contact would not meet the definition of "domestic violence" in Section 1304, the tribe declined to prosecute. The defendant later returned to assault his victim again—and was arrested again by the tribe.

Given this uncertainty, the Department recommends legislation clarifying that Section 1304 covers the use, attempted use, or threatened use of physical force against the person or property of the victim, including any offensive touching of the victim (consistent with the common-law crime of battery). It appears that the language S. 2785 proposes to add to Section 1304(a) was intended to achieve this result, but it may inadvertently sweep in a far broader range of criminal conduct, including acts that do not even involve physical force (or an attempt or threat to use force). The Department would be glad to provide technical drafting assistance to ensure that this provision is properly tailored.

The second gap in the law involves Indian children. All too often, a husband or boyfriend who assaults or batters his Indian wife or girlfriend also assaults or abuses her children during the same incident. Yet Section 1304 allows the tribe to prosecute only the former crime (committed against the wife or girlfriend) and not the latter crime (committed against the children). In these circumstances, the only effective way to hold the perpetrator accountable for all his misconduct, including his crimes against the children, is to prosecute him federally, rather than tribally. In one example from a Pilot Project tribe, a non-Indian boyfriend, after a prolonged methamphetamine binge, forced both his Indian girlfriend and her child to sit in a chair while he threw knives at them. Given the tribe's inability to prosecute the defendant for crimes committed against the child, as well as the severity of the conduct, the tribe referred the case for federal prosecution.

The Department believes that Congress should close this gap in the law as well. And the Department would welcome the opportunity to work with the Committee to make sure that this fix is narrowly tailored to the circumstances we have just described—where the crime against a spouse, intimate partner, or dating partner goes hand-in-hand with a crime against the victim's children.

The third gap in the law, exposed by practical experience, is that it does not clearly recognize that tribes exercising SDVCJ have the authority to protect the tribal law-enforcement officers, prosecutors, judges, and courtroom officials who administer justice. For example, there is uncertainty about a tribe's authority to charge an SDVCJ offender for resisting arrest by a tribal police officer. In one case, an SDVCJ defendant attempted to escape mandatory court appearances and physically struck a tribe's bailiff in tribal court. Obviously, this sort of misconduct is a direct affront to the tribe's power and practical ability to successfully prosecute domestic- and dating-violence crimes under Section 1304.

The Department therefore believes that Section 1304 should be amended to protect tribal criminal-justice officers and employees from crimes that directly frustrate the successful arrest, detention, and prosecution of SDVCJ defendants and the adjudication of their criminal cases. This appears to be the intended focus of S. 2785's proposal for new Sections 1304(a)(12) and 1304(c)(3). The Department would be glad

to provide the Committee with technical drafting assistance to sharpen the focus of these provisions, as well.

At this time, the Department would recommend against expanding the universe of potential tribal-court criminal defendants, although we fully recognize the terrible impact of drugs on Native American communities. For now, we believe Congress's focus instead should be to empower tribal criminal-justice systems to deal strongly and appropriately with all persons who are already subject to tribal criminal jurisdiction under Section 1304.

As federally recognized Indian tribes, usually with financial support from Congress and the federal government, continue to build their capacity to effectively enforce their own criminal laws, Congress may well choose to expand the universe of potential criminal defendants in tribal courts, and also to expand the sentencing authority of those courts. Soon, it may make sense to vindicate the broad principles underlying VAWA 2013 and Section 1304 by expanding tribal criminal jurisdiction to cover additional non-Indian perpetrators, perhaps starting with those offenders who abuse Indian children (regardless of whether they also are abusing a spouse or intimate partner) and then considering other offenders, such as perpetrators of sexual assault, stalking, and sex trafficking, and criminals who bring illegal drugs into tribal communities.

But today, less than 15 months after the effective date of VAWA 2013, the Department believes the most important and timely legislative reforms should focus instead on clarifying and expanding tribal prosecutors' tools for bringing to justice the defendants who are already within the tribe's jurisdiction.

We thank the Committee for its willingness to undertake this important project. And we look forward to working with you and your staff as you shape properly targeted language to accomplish our common objectives. I will be happy to answer any questions you may have.

The CHAIRMAN. Thank you, Mr. Toulou.

Mr. CHAVARRIA.

STATEMENT OF HON. J. MICHAEL CHAVARRIA, GOVERNOR, SANTA CLARA PUEBLO

Mr. CHAVARRIA. [Greeting in Native Language.] Good afternoon, Chairman Barrasso, Vice Chairman, and members of the Committee.

My name is J. Michael Chavarria. I serve as Governor for Santa Clara Pueblo in New Mexico. I appreciate the opportunity to testify before this Committee regarding S. 2916, a bill which would allow the Pueblo to lease all of our lands for up to 99 years.

In 1992, Congress adopted an amendment to 25 U.S.C Section 415 that allowed 99-year leasing authority for lands held in trust for the Pueblo Santa Clara. Unfortunately, those lands consisted of forested lands, our spiritual sanctuary, which we would never lease to outsiders for any type of economic development ventures for such an amount of time.

The request in 1992 should have been inclusive of all our lands which include not only lands held in trust but also lands inclusive of what is known as the Santa Clara Pueblo grant. This is a square piece of land comprising about 17,300 acres that under Spanish colonial law dating back to the 1600s are considered to be the minimum area of land to which New Mexico Pueblo is entitled.

In 1851, Congress enacted legislation extending the terms of the Indian Non-Intercourse Act over Pueblo Indians. The Act prohibits any Indian tribe from disposing of its lands or any interest therein, except for authority granted by Congress. That made the Pueblo fee simple title to its lands restricted fee because it was subject to Federal law restrictions on alienation.

In 1858, Congress confirmed our title to the grant but it was subject to Federal law restrictions on alienation. That land is held in

trust whether the term uses restricted fee or ownership under Federal supervision.

These restrictive fee lands are extremely important for current and proposed future economic development ventures as we diversify our economic portfolio. Currently, 25 U.S.C. Section 415 generally restricts a lease of tribal land to a term of 25 years with the possibility of one renewal period for another 25 years. However, these terms are not economically feasible as the terms of these lengths are too short to allow for the amortization of substantial capital investments which means that big businesses are deterred from locating on tribal lands.

I do have a map here that shows our trust lands and the restrictive fee. The square in red is the 17,300 acres dating back to the colonial law. These are the Santa Clara Pueblo grant lands we want to utilize for commercial interests for economic development. Senator Udall's bill fixes that problem by allowing us to enter into long term leases with our commercially valid lands.

Again, I appreciate the opportunity to come before this Committee to testify to gain support not only from this Committee but also from Congress. Chairman, members of the Committee, I now stand for any questions.

[The prepared statement of Mr. Chavarria follows:]

PREPARED STATEMENT OF HON. J. MICHAEL CHAVARRIA, GOVERNOR, SANTA CLARA PUEBLO

Mr. Chairman, members of the Committee, thank you for considering and for allowing me to testify on S. 2916. This bill is extremely important for future economic development on Santa Clara lands, and we hope that it will be given favorable consideration by this Committee and by the Congress.

25 U.S.C. Sec. 415 generally restricts a lease of tribal land to a term of 25 years, with the possibility of one renewal period of up to 25 years. But in many commercial situations, terms of that length are too short to allow for the amortization of substantial capital investments, which means that big businesses are deterred from locating on tribal lands, even given otherwise favorable lease terms. Apparently recognizing that fact, over the years Congress has amended that section repeatedly, so as to allow nearly 60 tribes the ability to lease their lands for up to 99 years.

In 1992, Congress adopted an amendment to Sec. 415 that allowed 99-year leasing authority for "lands held in trust for the Pueblo of Santa Clara." I am unaware of who was responsible for that language, but whoever it was apparently was not aware of the fact that the lands owned by Santa Clara that are commercially valuable, and that we would want to lease for longer terms, are located within what is known as the Santa Clara Pueblo Grant. This is a square of land, comprising about 17,300 acres, that under Spanish colonial law dating back to the 1600s was considered to be the minimum area of land to which each New Mexico Pueblo was entitled. Congress confirmed our title to that Grant in 1858, but it was subject to federal law restrictions on alienation. So that land is not held in trust, rather, it is held in fee simple ownership by the Pueblo, but under federal supervision. Consequently, the language of the 1992 amendment to 25 U.S.C. Sec. 415, which only applied to lands "held in trust," did not allow us to lease our Grant lands for longer than 25 years. I should say that we do have lands that the United States holds in trust for us, but those lands consist of our forests and Santa Clara Canyon, lands that we would never lease to outsiders.

Senator Udall's bill would fix this problem, and allow us to enter into long-term leases on our commercially valuable lands in and near the City of Espanola. We strongly support the bill, and urge that the Committee back it.

I should add, as I know that it may be on the minds of some of you, that the recent lawsuit filed by the United States against the City of Espanola on behalf of Santa Clara, alleging that the City's water and sewer lines on Santa Clara's lands are in trespass, has nothing whatever to do with our seeking 99-year leasing authority. These matters are totally separate and unrelated.

Thank you for your time and attention. I would be happy to answer any questions.

The CHAIRMAN. Thank you so much for your testimony.
Mr. BUCKLES.

STATEMENT OF HON. DANA BUCKLES, COUNCILMAN, ASSINIBOINE AND SIOUX TRIBES, FORT PECK RESERVATION

Mr. BUCKLES. Good afternoon, Mr. Chairman, Vice Chairman and members of the Committee.

I am Dana Buckles, Councilman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I would like to thank the Committee for the invitation to testify.

I am pleased to testify in strong support of the Tribal Youth and Community Protection Act. This bill would recognize the inherent tribal authority to protect our children and our communities.

At Fort Peck, we have long believed that a strong tribal government is the way that we can best keep our communities safe. The Fort Peck Tribes have provided law enforcement and correction

services on our reservation since 1996 under an Indian Self-Determination and Education Assistance Act contract.

We are also one of the first Indian tribes in the Nation to enter into a cross-deputization agreement with State, county and city law enforcement agencies. Under this agreement, tribal officers are deputized to enforce State and local law on the reservation and State and local officers are authorized to enforce tribal law.

For more than 40 years, the Fort Peck tribes have had an independent judicial system, including an appellate court. It is through this system that we provide justice to our victims and our defendants. Currently, our judicial system includes law-trained judges, law-trained prosecutors, and law-trained public defenders.

Given the strong foundation of our court and the tribal council's desire to combat domestic violence with every tool possible, the tribes elected to pursue the opportunity presented by the Violence Against Women Act and exercise our inherent jurisdiction to prosecute non-Indian defendants who commit domestic violence on our reservation.

We did this not because we lack good partners in our U.S. attorney and local law enforcement, but because this is simply another avenue to provide justice to the victims. We are pleased to share that we are working with the U.S. Attorney to designate our special prosecutor as a Special Assistant U.S. Attorney, so he will be able to prosecute crimes not only in tribal court, but also Federal court. In short, we think providing justice to victims is an important step in providing them a pathway to heal and move on with their lives.

Unfortunately, violent crime is all too common in our community. A new study by the National Institute of Justice confirmed that violence in our community is a constant reality. According to this study, 84 percent of Indian women have experienced violence in their lifetime and 49 percent experienced violence in the past year. This violence is impacting our children.

Since 2012, over half of the clients served by the tribe' Family Violence Resource Center were children. This amounts to approximately 1,000 children who were in need of family crisis services as victims or witnesses to violence in their homes.

That is why we so strongly support the Tribal Youth and Community Protection Act. We know that prosecuting crimes against children is the highest priority for our U.S. Attorney. The Fort Peck Tribes recently experienced two horrible crimes against two little girls. We are thankful that our Federal partners came forward quickly to bring justice to the victims.

However, our children are victims of crime every day. In 2015, our tribal court had 329 criminal cases involving crimes against children. These cases included aggravated sexual assault of a child, felony abuse of a child and endangering the welfare of child.

These cases only reflect the cases where we had the jurisdiction to prosecute. These do not reflect the cases where the perpetrator was a non-Indian. Those cases must be addressed by the U.S. Attorney.

Our U.S. Attorney is a good partner, but he does not have the resources to prosecute all the crimes against children that our community experiences. Moreover, as the Department of Justice notes

in its 2014 declination report, there are structural barriers in the Federal system that make certain prosecutions like child molestation cases difficult.

These challenges include the fact that the victims and witnesses are reluctant to travel outside their communities to testify and that Federal investigators do not have a rapport in the community the same way local law enforcement officers do.

Our tribal law enforcement and our courts are the resources that are working on the ground every day in our community. They know the victims and they know the perpetrators. In order to respond to this tide of violence, Congress must empower tribes to recognize our inherent jurisdiction to prosecute non-Indians who commit crimes against our children.

I want to thank you for the opportunity to testify on this vitally important issue of making our communities and our children safer.

[The prepared statement of Mr. Buckles follows:]

PREPARED STATEMENT OF HON. DANA BUCKLES, COUNCILMAN, ASSINIBOINE AND SIOUX TRIBES, FORT PECK RESERVATION

I am Dana Buckles, Councilman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I would like to thank the Committee for the invitation to testify on these two important bills.

The Fort Peck Reservation is in northeast Montana, forty miles west of the North Dakota border, and fifty miles south of the Canadian border, with the Missouri River defining its southern border. The Reservation encompasses over two million acres of land. We have approximately 12,000 enrolled tribal members, with approximately 7,000 tribal members living on the Reservation. We have a total Reservation population of approximately 11,000 people.

I am pleased to testify in strong support of the Tribal Youth and Community Protection Act. This bill would recognize the inherent tribal authority to protect our children and our communities. Specifically, this bill would extend the exercise of the special jurisdiction recognized in the 2013 Violence Against Women Act, to include crimes against Indian children, drug offenses, and for crimes committed against our tribal officials that are connected to the exercise of this jurisdiction.

At Fort Peck, we have long believed that a strong tribal government is the way that we can best keep our communities safe. Furthermore, we have taken action to maximize our authorities to protect everyone living within our boundaries. In this regard, the Fort Peck Tribes have provided law enforcement and correction services on our Reservation since 1996 under an Indian Self-Determination and Education Assistance Act contract. We are also one of the first Indian tribes in the nation to enter into a cross-deputization agreement with state, county and city law enforcement agencies. Under this agreement, first ratified almost twenty years ago, tribal officers are deputized to enforce state and local law on the Reservation and state and local officers are authorized to enforce tribal law.

For more than forty years, the Fort Peck Tribes have had an independent judicial system, including an appellate court. It is through this system that we provide justice to our victims and our defendants. Currently, our judicial system includes law-trained judges, law-trained prosecutors, law-trained public defenders, probation officers, a published tribal code, and experienced court clerks and court reporters. Our court's opinions are published and available to the public. Our tribal courts and our court services are largely supported by tribal funds.

Given the strong foundation of our court and the Tribal Council's desire to combat domestic violence with every tool possible, the Tribes elected to pursue the opportunity presented by the Violence Against Women Act (VAWA) and exercise our inherent jurisdiction to prosecute non-Indian defendants who commit domestic violence on our Reservation. We did this—not because we lack good partners in our U.S. Attorney and local law enforcement—but because this is simply another avenue to provide justice to the victims. We are pleased to share that we are working with the U.S. Attorney to designate our special prosecutor as a Special Assistant U.S. Attorney, so he will be able to prosecute crimes not only in tribal court, but also federal court. In short, we think providing justice to victims is an important step in providing them a pathway to heal and move on with their lives. Thus, we are working hard to ensure that we fully utilize all the tools available to do this.

Unfortunately, violent crime is all too common in our community. We are all familiar with the statistics regarding domestic violence in tribal communities. A new study by the National Institute of Justice confirmed that violence in our community is a constant reality. According to this study, 84 percent of Indian women have experienced violence in their lifetime and 49 percent experienced violence in the past year. And while we are right to focus on violence against women; the men in our community experience violence as well. Eighty-one percent of Indian men have experienced violence, including 27 percent who experienced sexual violence. This violence impacts every aspect of our Tribes from the mental and physical health of our people to our economy. According to this study, 40 percent of the women and 9.7 percent of the men missed work because of the violence committed against them. Even more startling is that while Indian women are only 7 percent of the population in Montana, they are 13 percent of the intimate partner deaths in the State. During a one-year period, from October 1, 2013 to September 30, 2014, the Roosevelt County/Fort Peck Tribes' 911 Call Center received 718 reports of domestic violence. This means that nearly twice a day, every day, our law enforcement officers were responding to a domestic violence call. It is not known how many more incidents were not reported, but nationwide it is estimated that domestic violence is reported only 60 percent of the time.

Since 2012, over half of the clients served by the Tribes' Family Violence Resource Center were children. This amounts to approximately 1000 children, who were in need of family crisis services as victims or witnesses to violence in their homes. Every year brings new challenges that our families are facing, including meth and other drug-related violence. The latest challenge in this regard is Bath Salts. We have all heard the stories in the news of people essentially having psychotic breakdowns and committing horrendous acts of violence when they are under the influence of these drugs. We are now experiencing this on our Reservation.

According to the Indian Tribal Trauma Center, Indian children nationally are 2.5 times more likely to suffer trauma than non-Indian children, and violence accounts for 75 percent of the deaths of Indian children between the ages of 12 and 20. This is leaving a devastating legacy for our children. As stated in the November 2014 Report from the Department of Justice Task Force on American Indian/Alaska Native Children Exposed to Violence, Indian children experience Post Traumatic Stress Disorder (PTSD) at a rate of 22 percent. This is the same level as Iraq and Afghanistan war veterans. That means more than 1 in 5 Indian children in this country is suffering from battlefield PTSD.

That is why we so strongly support the Tribal Youth and Community Protection Act. We know that prosecuting crimes against children is the highest priority for our U.S. Attorney. The Fort Peck Tribes recently experienced two horrible crimes against two little girls. We are thankful that all of our federal partners came forward quickly to bring justice to the victims. We cannot commend enough the work of our U.S. attorney and all of our law enforcement partners in these two tragic cases.

However, our children are victims of crime every day. In 2015, our tribal court had 329 criminal cases involving crimes against children. These cases included aggravated sexual assault of a child, felony abuse of a child and endangering the welfare of child. These cases only reflect the cases where we had the jurisdiction to prosecute. These do not reflect the cases where the perpetrator was a non-Indian. Those cases must be addressed by the U.S. Attorney.

Our U.S. Attorney is a good partner, but he does not have the resources to prosecute all the crimes against children that our community experiences. Moreover, as the Department of Justice notes in its 2014 declination report, there are structural barriers in the federal system that make certain prosecutions like child molestation cases difficult. These challenges include the fact that the victims and witnesses are reluctant to travel outside their communities to testify and that federal investigators do not have a rapport in the community the same way local law enforcement officers do.

Our tribal law enforcement and our courts are the resources that are working on the ground every day in our community. They know the victims and they know the perpetrators. They do not have the same structural barriers to prosecuting these difficult cases encountered by the U.S. Attorney. In order to respond to this tide of violence, Congress must empower tribes by recognizing our inherent jurisdiction to prosecute non-Indians who commit crimes against our children and bring drugs into our communities.

It should be noted however, that none of this will be realized without the proper funding from Congress. We appreciate that last year Congress provided funding to assist tribes, like Fort Peck, as we exercise our inherent jurisdiction to prosecute individuals who commit domestic violence on our Reservation. If Congress expands

this to include violence against children, the funding will also have to increase. On that point last year, we testified about the need to expand tribal funding within the Victims of Crime Fund (VOCA). I want to thank Senator Tester and Senator Daines for their work this year in the Appropriations Committee to create a tribal set-aside for tribes in VOCA with an amendment to the Commerce, State and Justice Appropriations bill. This funding will go a long way to support the work that we do at the Family Violence Resource Center to serve the victims in our community.

Finally, we support the goals of S. 2920, a bill to reauthorize and expand the services and programs under the Tribal Law and Order Act. We are, in particular, supportive of the focus on tribal youth and addressing the reality that Indian youth are over-represented in the state and federal juvenile systems. We strongly support the provision in the bill that would allow federal juvenile cases to be referred to tribal courts, and the provision in the bill that would require states to provide notice to tribes when a tribal member youth enters a state or local justice system. We urge our two Senators from Montana to join the Chairman and Senator McCain in sponsoring this bill.

Thank you for the opportunity to testify on the vitally important issue of making our communities and our children safer. I would be pleased to answer any questions and to provide any additional information that may assist the Committee.

The CHAIRMAN. Thank you very much, Mr. Buckles, for your testimony. I am very grateful.

Now we will turn to Mr. Urbina.

STATEMENT OF HON. ALFRED URBINA, ATTORNEY GENERAL, PASCUA YAQUI TRIBE

Mr. URBINA. Good afternoon, Chairman Barrasso and distinguished members of the Committee.

My name is Alfred Urbina and I currently serve as the Attorney General of the Pascua Yaqui Tribe. It is an honor to be here today to provide testimony to the Committee regarding the need for public safety improvement and tribal law and order in Indian Country.

On behalf of my tribal council and our membership, thank you for this opportunity. I am pleased to offer support for the Tribal Youth and Community Protection Act and the Tribal Law and Order Reauthorization Act.

Both bills will go a long way to help tribes close lingering jurisdictional gaps regarding violence against families, help stop the spread of illegal drugs and provide additional tools for cross jurisdiction cooperation.

Before expanding on the need for the new proposed legislation, I will talk briefly about the current state of VAWA and TLOA implementation on the Pascua Yaqui Reservation because it provides relevant context to the bipartisan measures brought forward today.

Domestic violence is considered a serious crime against the tribe and our families. Recent tribal justice measures presented Indian Nations with an opportunity to restore and exercise additional authority and jurisdiction to protect their citizens from crime and violence.

However, aside from VAWA and TLOA and the crime fighting efforts of tribes, there still exists a super storm of injustice that has darkened Indian Country for decades. Today in 2016, a public safety and public health crisis is still present on most Native American reservations.

The Pascua Yaqui Tribe sought to afford victims of crime and domestic violence the maximum protection the law provides when we enacted the provisions of TLOA and VAWA. On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe began exercising

special domestic violence criminal jurisdiction over non-Indian perpetrators of domestic violence.

On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians, the Pascua Yaqui Tribe obtained the first conviction of a non-Indian, 26-year-old Hispanic male for the crime of domestic violence and assault committed on our reservation.

Since that time, the tribe has prosecuted a total of 22 non-Indian cases and 30 VAWA related criminal investigations. That has resulted in 8 criminal convictions. To us it is clear that the starting place to reverse historical jurisdictional problems and injustice in Indian Country is by empowering tribal justice systems.

Tribes are in the best position to close Indian Country safe havens being exploited by lawbreakers. Local tribal government is the best option to protect Indian Country mothers, daughters, sisters and brothers.

Regarding S. 2920, the reauthorization of the Bureau of Prisons pilot project is a critical part of any plan that will address tribal law and order. The current regime is unworkable, unreliable and jail conditions and programs are unacceptable.

Reauthorizing law enforcement and judicial training for the investigation and prosecution of illegal narcotics is also critical. Substance abuse problems brought on by illegal drug sales, drug manufacturing and the explosion of the opioid addiction epidemic is crippling Indian Country.

The implementation of VAWA 2013 confirms that tribes require access to NCIC and Federal background-check information both in the criminal and civil context. Data collection and sharing and criminal information database access is critical in a cross-jurisdiction environment.

Improving justice outcomes for Indian youth is long overdue. Juvenile justice issues are very important to the Pascua Yaqui tribe and the legislative provisions in S. 2920 provide the necessary starting points for understanding and coordinating future juvenile justice matters.

Creating tribal liaisons and special assistant Federal public defenders, similar to the U.S. attorney liaisons and special assistant U.S attorneys will be an important tool. However, tribes need direct funding to provide public defender services.

Regarding S. 2785, it is clear to the tribe that after exercising valid jurisdiction that several important provisions are still needed. First, when responding to domestic violence, there is a strong likelihood that children will be present as well as other family members. In our VAWA cases, a total of 20 children, all under the age of 11, were exposed to violence, were victims or reported crimes while they were in progress.

Without criminal jurisdiction to address this issue, the tribe had to remove the children from their homes in order to protect them. VAWA domestic violence jurisdiction must be expanded to include children.

The tribe is also unable to charge a VAWA offender with secondary crimes that were committed during the commission of a VAWA offense. For example, this applies in instances where a VAWA offender may be in possession of illegal drugs, assaults a po-

lice or detention officer, destroys property or commits a crime of child violence while being prosecuted for a VAWA offense.

Federal definition of domestic violence as defined by Federal case law stops tribes from properly addressing the full range of domestic violence offenses. The tribe had to dismiss VAWA cases and refrain from charging cases that did not meet the requisite Federal definition of violence.

S. 2785 provides a workable solution to this problem by the use of tribal code provisions that define domestic violence in corresponding crimes according to the community.

The Pascua Yaqui Tribe also supports S. 710, the SURVIVE Act, and the current efforts by Congress to set aside 5 percent of VOCA funding for tribal government victim programs.

As we work to strengthen measures for tribes to protect themselves and provide additional protections for defendants, it is important that we balance those efforts with enhanced rights and protections for victims and families who have suffered loss and injury.

Finally, tribes need permanent and direct funding to properly address crime and violence in a comprehensive and sustainable manner. Periodic and short term grant funding does not allow tribes to build the necessary capacity to operate robust court systems.

Thank you very much. This concludes my statement. Thank you, Mr. Chairman and members of the Committee. Thank you, staff, for your hard work on these important issues.

[The prepared statement of Mr. Urbina follows:]

PREPARED STATEMENT OF HON. ALFRED URBINA, ATTORNEY GENERAL, PASCUA YAQUI TRIBE

Chairman Barrasso and Distinguished Members of the Committee:

Good afternoon, my name is Alfred Urbina, and I currently serve as the Attorney General of the Pascua Yaqui Tribe, a Federally Recognized Tribe from the State of Arizona. On behalf of our Tribal Council and membership, thank you for this opportunity. It is an honor to be here today to provide testimony to the Committee regarding the need for public safety improvement and tribal law and order in Indian Country. I am pleased to offer support for the "Tribal Youth and Community Protection Act of 2016," and the "Tribal Law and Order Reauthorization Act of 2016." Both Bills will go a long way to help tribes confront lingering jurisdictional gaps regarding violence against tribal families, help stop the proliferation of illegal drugs, and provide additional tools for cross-jurisdiction cooperation.

First, I would like to thank the Committee and staff for your leadership on these matters. The drafting, passage, and implementation of the "Tribal Law & Order Act of 2010" (TLOA) and the "Violence Against Women Reauthorization Act of 2013," (VAWA 2013) is having a positive impact in Indian Country. Recent TLOA and VAWA authority provided measured tools that foster longstanding policies of tribal self-determination and tribal self-governance.

Before expanding on the need for the new proposed legislation, I will talk briefly about the current state of VAWA and TLOA implementation on the Pascua Yaqui Reservation because it provides relevant context to the bipartisan measures brought forward today.

The Success of TLOA & VAWA Implementation

To begin, the strength of the Pascua Yaqui Tribe flows directly from our people. Domestic violence is considered a serious crime against the Tribe, and our families. In enacting the provisions of TLOA and VAWA, the Tribe sought to afford the victims of domestic violence the maximum protection that the law provides. The safety of victims of domestic violence and drug related crimes, especially children, became easier to address through the intervention of Tribal law enforcement, Tribal Special Assistant U.S. Attorneys (SAUSA), and support from our federal partners and Tribal Liaisons. [1]

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes to begin exercising Special Domestic Violence Criminal Jurisdiction

(SDVCJ) over non-Indian perpetrators of domestic violence. On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians,[2] the Pascua Yaqui Tribe obtained the first conviction of a non-Indian, a twenty-six year old Hispanic male, for the crime of domestic violence assault committed on the Pascua Yaqui Reservation.

Since that time, the Pascua Yaqui Tribe has prosecuted a total of 22 non-Indian cases involving 15 males and 1 non-Indian female involved in 30 VAWA investigations that have thus far resulted in 8 criminal convictions. VAWA cases include crimes of domestic violence and violations of protection orders where 15 tribal females and 2 tribal male were victims. Most of the VAWA perpetrators have extensive criminal records in the State of Arizona.

- Two offenders had active state warrants for their arrests, one for armed robbery out of the State of Oklahoma.
- Four of the cases were serious enough to warrant referrals for federal prosecution.
- On average, VAWA offenders were contacted by Tribal police at least six times before VAWA authority existed on the Pascua Yaqui Reservation and VAWA offenders have been involved in close to 90 Pascua Yaqui police incidents, pre and post VAWA.
- Eleven of the cases involved children in the home. A total of 20 children, all under the age of eleven, were exposed to violence, were victims, or actually reported the crime while it was in progress.
- Three of the VAWA offenders have already reoffended with the same victim, demonstrating a pattern of abusive behavior that we know can be a part of domestic violence relationship dynamics.
- Thirteen (13) of the offenders are of Hispanic descent, 2 are "Legal Permanent Residents" from Mexico. Two (2) offenders are Caucasian males, 4 are African-American, 1 is of Asian descent, and 1 offender is a lineal tribal descendant who does not qualify for enrollment.
- Thirteen (13) of the incidents involved alcohol or drugs. Ten (10) of the offenders have been previously arrested for cases involving drug use, possession, DUI, or alcohol related offenses.
- Most of the offenders appeared to be unemployed and only 2 offenders did not have a criminal record in the State of Arizona. Seven of the offenders had previously been arrested for violent crimes, weapons, or threats in the State of Arizona. Two offenders are felons, both having been convicted for Burglary in the State of Arizona.
- Five cases remain open and in 2 cases, tribal warrants have been issued, one post-conviction (probation absconder) and one pre-trial for failure to appear. Seven (7) cases were declined after review.
- Seven (7) cases were dismissed for issues related to the *U.S. v. Castleman* case.[3]

Problems Persist

Recent and important Tribal justice measures presented some Indian Nations with an opportunity to restore and exercise selected authority to protect their people from crime and violence. However, notwithstanding VAWA, TLOA, and the crime fighting efforts of tribes, there still exists a super storm of injustice that has darkened Indian Country for decades. Today, in 2016, a public safety and public health crisis is still present on most Native American reservations. The long-term lack of security for women and children has brought on a "crisis of confidence" in both tribal and federal justice systems. The restoration of authority, new proposed legislation, and enhanced coordination with federal authorities represents a new dawn. Not only are we now able to address human rights abuses perpetuated for decades upon women, but we are also able to do this while guaranteeing the civil rights of the accused. On the other hand, just like when a major storm passes, our community will have to take time to survey the damage, reconcile with victims and families, and rebuild the trust that has been lost. There are shattered homes across our Reservation and across Indian Country. Many men, women, and children will continue to suffer through this storm of injustice. The new legal and jurisdictional framework, while slightly changed, will not work absent the proper funding for tribal courts, victims, and support services. The majority of tribes simply do not have the resources to provide comprehensive changes to their systems or guarantee suitable services for victims and their families.

Tribal Control Is the Key

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems. Criminal investigations occur at the local level. Local government is the best government to protect Indian Country's mothers, daughters, sisters and brothers. Tribes are in the best position to close jurisdictional gaps and safe havens for lawbreakers.

With a self-reported 500 non-Indian community members living on the Pascua Yaqui Reservation and approximately 800 Non-Indians working or attending school on the Pascua Yaqui Reservation, the probability that additional VAWA cases will arise is foreseeable and likely.

Regarding S. 2920, the reauthorization of the Bureau of Prisons pilot program is a critical part of any plan that will address tribal law and order. The current regime is unworkable, disorganized, and jail conditions are deplorable. Reentry programming will be unsuccessful without a strong primary detention system and a humane corrections option. Reauthorizing law enforcement and judicial training for investigation and prosecution of illegal narcotics is critical. Substance abuse problems brought on by illegal drug sales, manufacturing, and the explosion of the opioid addiction epidemic is crippling Indian Country. The implementation of VAWA 2013 SDVCJ confirms that Tribes require access to federal background-check information in the criminal and civil context. Data collection and criminal information database access is critical in a cross-jurisdiction environment. Also, given that access would allow for the sharing of tribal criminal justice information, increased data sharing would allow for the closure of criminal information gaps that now stretch across the tribal-federal landscape. The Shadow Wolves drug-trafficking-prevention program is an important tool for drug interdiction and the prevention of terrorism in our homeland. The Shadow Wolves are also an organization that operates in a traditional manner that respects the culture of the indigenous people who have inhabited the desert southwest for thousands of years. Improving justice for Indian youth is long overdue. When Native youth are prosecuted federally, there is a lack of programming and coordination. When youth are held in the State juvenile system, there is an absence of culturally relevant curriculum available. Creating tribal liaisons and special assistant federal public defenders, similar to the liaisons and special assistant U.S attorneys in the U.S. attorneys' offices is a great idea, however, Tribes also need direct funding to provide these critical services. A liaison will be helpful if Tribes have established the Public Defense infrastructure to begin with.

Regarding S. 2785, "A bill to protect Native children and promote Public Safety in Indian Country," it is clear to the Pascua Yaqui Tribe after exercising Special Domestic Violence Criminal Jurisdiction under VAWA 2013, that several important provisions were omitted. First, when addressing domestic violence, there is a strong likelihood that children will be part of most relationships, as will other family members who may live in the home. In our cases, we found that at least 13 of our incidents included children in the home. Some children were victims of violence or were exposed to violence. In three cases, tribal officials had to remove the children from the home and place them in a foster home for their protection. Also, the Tribe found that we could not charge a VAWA offender with ancillary crimes that were committed during the commission of a VAWA offense or during the prosecution of that offense. For example, in one case, a VAWA offender was brought in for violating a court probation order. Since the infraction was not an original DV VAWA offense, the Tribe could not proceed. This would apply to instances where the offender was in possession of illegal drugs, assaulted a police or detention officer, destroyed property, or committed any other crime while they were being prosecuted for a VAWA offense. Finally, in recent VAWA cases, criminal background checks of VAWA offenders found that many had criminal convictions for drug or alcohol offenses and many of our cases were alcohol related. If VAWA offenders are on the Reservation and they are associated with drug use, drug sales, or the facilitation of such conduct, Tribes require the necessary authority to address this behavior.

BACKGROUND INFORMATION

Pascua Yaqui VAWA Implementation

On March 7, 2013, VAWA 2013 was signed into law by President Obama. On Jun 26, 2013, the U.S. Attorney for the District of Arizona, John Leonardo, visited the Pascua Yaqui Tribe and toured our court facility. The Tribe expressed an interest in the implementation of Special Domestic Violence Criminal Jurisdiction. On July 09, 2013, the Tribal Chairman submitted a letter to the Department of Justice's, Mr. Tracy Toulou, as a preliminary expression of interest in exercising SDVCJ and asked to be designated as a participating Tribe. On July 15, 2013, the Pascua Yaqui Tribe was one of approximately 27 federally recognized Indian tribes that timely

sent "preliminary expressions of interest" in participating in the Pilot Project. By doing so, tribes expressed an interest in participating in both Phase One and Phase Two of the Pilot Project.

The Department of Justice launched the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG), as part of Phase One of the Pilot Project. The ITWG is a voluntary working group of designated tribal representatives who exchange views, information, and advice, peer to peer, about how tribes may best exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and safeguard defendants' rights. Between July, 2013 and December 2013, Tribal representatives participated in a series of teleconferences, participated as panelists, and participated in ITWG in-person meetings.

On December 30, 2013, the Tribe submitted an extensive application to the DOJ to be designated a Pilot Tribe and to start exercising SDVCJ (Phase II).[4] On February 6, 2014, the Tribe received official notice that the Tribe was designated a participating Pilot Tribe authorized to exercise SDVCJ.[5] The Pascua Yaqui Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House.[6] On February 12, 2014, VAWA Pilot information was posted for notice in the Federal Register by the Department of Justice.[7] Official Tribal notice was sent out via global e-mail to all tribal government and casino enterprise employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6th, 2014.[8] On February 10th, 2014, the Arizona Daily Star ran a front page story that circulated to 238,000 readers in Southern Arizona, including the City of Tucson. The story was also posted on their online news site. The online AZSTARNET has a reach of 1 million independent views per month and has approximately 12 million page views per month.[9] The Pascua Yaqui press release was shared online through a leading Internet Indian Country legal news blog called "Turtle Talk," it was posted on February 7, 2014.[10]

The Tribe conducted interviews with several news outlets to include, the Arizona Daily Star, the Seattle Times, the L.A. Times, Washington Post, Tucson KVOA television news, Colorlines, Aljazeera, NPR, 91.5 KJZZ, MintPress, the Arizona Daily Wildcat, and Cronkite News.[11] The Tucson area news story by KVOA ran on the nightly news on February 23, 2014 and on the morning of February 24, 2014, and was broadcast in the greater Southern Arizona area, to include the City of Tucson and the Pascua Yaqui Reservation.

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes to begin exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian perpetrators of domestic violence. On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians,[12] the Pascua Yaqui Tribe obtained the first conviction of a non-Indian, a twenty-six year old Hispanic male, for the crime of domestic violence assault committed on the Pascua Yaqui Reservation. The Tribe has had one jury trial where the jury found that there was not sufficient evidence of a dating relationship between the victim and defendant. The case, *PYT v. Garris,* ended in the acquittal of the defendant. Although we would have preferred a guilty verdict, this first full jury trial fleshed out many pre-trial arguments, and proved our system works. A non-Indian was arrested and held by Pascua Yaqui law enforcement, he was represented by two attorneys, and a majority Yaqui jury, after hearing evidence presented by a tribal prosecutor, in front of an Indian judge, determined that the Tribe did not have jurisdiction in a fairly serious DV Assault case.

Recently, after the Tribe started to exercise VAWA SDVCJ, a survey was administered by the Prosecutor's Office. 220 surveys were filled out by community members about VAWA and the Tribe's implementation. Of the 220 people surveyed, 130 respondents thought that DV/family disputes were a big problem. Thirty-six people knew someone who was a victim of domestic violence and the perpetrator was a non-Indian. An additional twenty-seven were the victims of DV and the perpetrator was Indian. An additional thirty-six knew someone who was a victim of DV and the ethnicity of the perpetrator was unknown. Twenty-five had been an actual victim of DV, of those, six were victims of non-Indian perpetrators. 140 respondents had heard of VAWA and 155 had heard of the tribe having VAWA jurisdiction.

Lessons Learned

Some offenders have had a long history of contact with Tribal Police & generally have a State criminal history:

1. NCIC access is required to properly assess who the offender is (DOJ TAP Program).

2. Offenders may have warrants or a history of harming the victim in another jurisdiction.

3. Offenders are using Indian Country to exploit jurisdictional gap and offenders are aware of jurisdictional gap.

4. Victims were reluctant to report DV incidents due to jurisdictional gap and no safety option from Tribal, State, or Federal system (no trust).

5. Difficult DV cases are increasingly difficult in VAWA SDVCJ context.

Multi-jurisdictional environment makes prosecution difficult:

1. Offenders can flee Tribal jurisdiction and Tribal Court process. Tribes may require a State/Tribal IGA/MOU to extradite, ensure comity to tribal court order, and domesticate & execute tribal warrants. Outreach between tribes and surrounding jurisdictions need to occur.

2. Proximity to Mexico raises issues of prosecuting Legal Permanent Residents, or undocumented aliens, must advise Border Patrol upon arrest. There is heightened scrutiny as a conviction can also trigger deportation. Tribes may be required to provide Spanish language court interpreters.

3. The limited nature of jurisdiction & the Supreme Court Castleman decision makes cross-deputization and jurisdictional flexibility important. This allows officers to arrest into surrounding State or Federal jurisdictions on ancillary charges (trespassing, drugs, non-victim crimes, etc.).

4. Criminal investigations are more difficult and police officers require additional training. Depending on the facts, an SDVCJ case can have several different matters evolve from one incident (Tribal criminal case, federal case, tribal dependency case, or a state criminal case).

5. Offender can have a state felony or misdemeanor warrants. Coordination, extradition and inter-jurisdictional movement of offenders have to occur.

6. Ethical issues arise if a Defendant is not provided effective assistance of counsel. Public Defenders must have a working knowledge of Indian Law and how to operate in a cross-jurisdictional environment.

Non-Indian offender issues:

1. There is no requirement from the VAWA law to collect offender or victim data.

2. VAWA convictions are not being entered into NCIC, national database (yet).

3. Preliminary profile of PYT VAWA offender is unemployed male in long term relationship with Tribal member, who may have drug or alcohol use history, previous criminal history and previous tribal police contact.

4. Healthcare costs are an issue. Who covers when a non-Indian is in Tribal custody? While in BIA custody? Jail costs & transportation?

5. Indirect costs have increased: Healthcare, case related investigative costs, expert witnesses, mental health evaluations, child welfare matters, ancillary cases, post-conviction costs, additional litigation.

6. Who funds Offender sanctioned classes and programming. There will be a requirement to loop in state services or contract for such services.

7. Equal protection and due process issues may arise, fairness & equal treatment in sentencing, pre-trial release determinations, and jury composition.

8. Composition of jury is difficult when attempting to hail non-Indian jurors and not excluding non-Indian jurors.

9. Non-Indians can be lineal tribal descendants who don't meet blood quantum requirements (1 case for Pascua Yaqui).

TLOA//VAWA authority maximized, gives tribes the flexibility to control crime:

1. The purpose of VAWA Pilot Program was to develop best practices.

2. Exercising integrated authority of TLOA and VAWA through Tribal SAUSAs, Tribal Law enforcement with SLEC cards, NCIC access, and State law enforcement & prosecution authority, provides 360 degree jurisdictional management and complete criminal data intelligence. This provides an opportunity for planning, prevention, and crime control policy creation.

3. Hybrid systems allow for better coordination with DOJ, BIA, and State authorities. The DOJ sponsored Inter-Tribal Working Group (ITWG), SAUSA Program, SLEC Cards, Central Violations Bureau (CVB) citations program, BIA Purpose Code X Program, and the DOJ Tribal Access Program (TAP), provides maximum jurisdictional flexibility for tribal justice systems.

4. The TLOA DOJ Bureau of Prisons (BOP) Pilot program must be reauthorized by Congress and expanded to include VAWA defendants and lower level crimes and convictions involving multi-year sentences related to Domestic Violence.

Victim issues:

1. VAWA victim Profile: Single tribal female with children, unemployed, living in Tribal housing as head of household or in a multi-generational household, in long term relationships with Non-Indian males. (Married, children in common, or residing in same household).

2. VAWA does not include funding for prevention services.

3. Tribal Orders of Protection are not being entered into NCIC, making it difficult to enforce off Reservation.

4. VAWA Offender Tribal Criminal history currently iscnot being added to NCIC.

5. Women, children, and non-intimate partners living in the household are not being fully protected by VAWA. (Grandparents, elders, cousins, etc.)

6. Many Domestic Violence crimes can't be prosecuted due to *Castleman* issues.

7. Sexual assault by a non-Indian "stranger" who is not in a relationship with the victim is not covered by VAWA 2013.

Challenges

There have been challenges during Pascua Yaqui's VAWA SDVCJ implementation. For example, on March 26, 2014, the Supreme Court decided *U.S. v. Castleman*.[13] *Castleman* had an immediate impact on the Tribe's criminal charging decisions when evaluating arrests under SDVCJ authority. In the *Castleman* case, James Castleman moved to dismiss his 2008 federal indictment under 18 U. S. C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his 2001 conviction in Tennessee did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force" required by 18 U. S. C. § 921(a)(33)(A)(ii). The Court held that the use of physical force was "satisfied by even the slightest offensive touching." What is problematic for new SDVCJ cases is that the VAWA defines the term domestic violence as "violence" committed by a current or former spouse or intimate partner of the victim. . ." 25 U.S. Code § 1304 (a)(2). The federal definition of a "misdemeanor crime of domestic violence" used to determine *Castleman,* will likely be used by federal and tribal courts to establish the charging boundaries under VAWA. The Tribe, like many other jurisdictions commonly charge crimes that arise early in the cycle of domestic violence relationships that may not include an "offensive touching" as an element to the crime, but nonetheless, they are violent and dangerous. These crimes can include Trespassing, Threatening and Intimidation, Tampering with Communications, Burglary, Breaking & Entering, Stalking, Disorderly Conduct, Unlawful Imprisonment, Harassment, Endangerment, Custodial Interference, and Malicious Mischief.

The dynamics and cycle of intimate partner violence is that offenders, in order to maintain power and control, will use escalating abusive and violent behavior against their partner. Over the life of a relationship, aggressive and hostile behavior increases in both frequency and severity. The cycle may end in the eventual separation of the couple, harm to the victim, or even the death of the victim. The Tribe's ability to address and prevent violent encounters through the limited authority of VAWA SDVCJ appears to be further restricted by the holding in *Castleman.*

VAWA Funding

The Pascua Yaqui Tribe is requesting that Congress or the Department of Justice, make sufficient funds directly available to Tribes to properly implement and sustain into the future VAWA, SORNA, and the Tribal Law and Order Act (TOLA), during and beyond the implementation phase. Tribes require permanent funding and access to resources and services that are available to state, county, and municipal governments. Within VAWA 2013, there is authorization for appropriations of up to $5,000,000 for each of fiscal years 2014 through 2018 for participating tribes that are exercising SDVCJ. The Pascua Yaqui Tribe has officially requested a proportional share of the funding for the 2015–2018 fiscal years, in order that we may carry out all of the many responsibilities that we have as a VAWA Pilot Project Tribe.

Section 904 of VAWA 2013, Public Law 113–4(2013) as codified in 25 U.S.C. 1304(f) allows the Attorney General to award grants to Indian Tribes for the following purposes:

(f) Grants to tribal governments
The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)-
(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including-
(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);
(B) prosecution;
(C) trial and appellate courts;
(D) probation systems;
(E) detention and correctional facilities;
(F) alternative rehabilitation centers;
(G) culturally appropriate services and assistance for victims and their families; and
(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;
(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;
(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and
(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(A) of title 18, consistent with tribal law and custom.

The Pascua Yaqui Tribe currently expends considerable resources on all of the above programs, through both federal grants as well as significant sums of tribal dollars. The Tribe had two cases arise that implicated SDVCJ within the first two weeks of implementation and have had a total of 30 VAWA investigations and filed 22 into Tribal Court. Significant resources have been dedicated to the cases. The Tribe would be better able to fund these programs as well as additional programs going forward if monies are appropriated under VAWA 2013, which are intended, pursuant to 25 USC 1304(g) to "supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section." A possible mechanism would be for the Department of Justice OVW Office to develop a Tribal Funding Plan and distribute the funds as tribal set-aside funding which could be added to existing Tribal 638 Contract as a modification. This method would allow the funding to be easily transferred to the Tribe. As such, we respectfully request that Congress or the Department of Justice provide a mechanism for disbursement of the funding provided for in VAWA 2013.

Costs: The implementation of some of the provisions of the Tribal Law & Order Act, and the Violence Against Women Act, have raised costs that have been fully covered by the Tribe, with virtually no additional federal assistance. Through the Office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to over 95 percent of all persons arrested on the reservation. All VAWA defendants who have been prosecuted have had a public defender or contracted defense attorney appointed at the Tribes expense in their cases to assist them.

Pascua Yaqui Justice System

Historically, the Yaqui people have always had some form of law enforcement and dispute resolution, most notably through our ceremonial societies. In 1982, the Tribe adopted a Criminal Code, some parts of our Civil Code, and adopted our Constitution in 1988, all of which helps spell out current Yaqui Law. In addition to our Constitution, our elders, chose to create a Tribal Court system as the arbiter of Yaqui justice and our forum for the resolution of disputes. Our official justice system has been operating in one form or another, for more than 25 years. Pursuant to its sovereign authority, our Tribal Council also created a law enforcement department and a tribal prosecutor's office as the representatives of the tribe in matters both criminal and civil in nature. The various functions performed by the Office of the Prosecutor, law enforcement, and the Tribal Court, are instrumental in ensuring that the Tribal Council can help guarantee the safety and protection of our people. A sustainable future for our government and people is largely dependent on a robust judiciary and a strong executive arm to enforce the mandates of our Constitution, en-

sure the protection of the people, and defend individual rights guaranteed by our laws.

In 1978, the Tribe was originally subject to Arizona State jurisdiction under 25 U.S.C. § 1300f(c) and PL280. In 1985, the State of Arizona retroceded criminal & civil jurisdiction.[14] Between 1985 and 1988, the Department of Interior operated the Pascua Yaqui tribal court system through a "Court of Indian Offenses," a "CFR" Court operated by the Bureau of Indian Affairs, (B.I.A.). In 1988, the Tribe took over the Tribal Court from the B.I.A. through a 638 contract.[15]

The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside the B.I.A. officers. In 1998, The Tribe signed a 638 agreement with the B.I.A. to direct its own law enforcement services. In 1997, the Tribe started the Pascua Yaqui Victim Services program. Currently, the Tribe employs twenty-six uniformed patrol officers who are certified by Arizona P.O.S.T as State certified officers and most are federal Special Law Enforcement Commissioned (SLEC) certified officers. Three of the officers are Criminal Investigators. The Tribe also employs a number of Victim advocates.

The Tribe is also served by the Federal Bureau of Investigation (F.B.I.) (Phoenix Division), for assistance with major criminal investigations. In 1993, the Tribe entered into a User Agreement with the Arizona Department of Public Safety (DPS) for limited NCIC[16] and ACJIS[17] criminal information access. In 2005, the Tribe entered into an Intergovernmental Agreement with Pima County to participate in the Pima County Regional Special Weapons and Tactics (SWAT) Team program for police SWAT services. In 2006, the Tribe approved an Intergovernmental Agreement with Arizona DPS for crime laboratory services for the purpose of examining and processing evidence collected during criminal investigations. In 2009, the Tribe entered into an Intergovernmental Agreement (IGA) with the Pima County Sheriff's Department for participation in the Spillman Records Management System and Computer Aided Dispatch System for enhanced access to ACJIS, NCIC, ALETS, NLETS, and MVD databases. In 2010, the Tribe entered into an IGA with Pima County to take part in the Pima County Wireless Integrated Network (PCWIN). PCWIN provides improved public emergency services and regionally coordinated mutual aid.

In 2011, through the American Reinvestment Recovery Act (ARRA), the Tribe constructed a $21 Million dollar, state-of-the-art multi-purpose justice/court complex. In May of 2012, the Tribe began operating the Pre-Trial Services (PTS) Division of the Tribal Court. Pre-Trial Services has effectively reduced the number of Yaqui defendants being held for pre-trial detention, kept some offenders employed, and monitors offenders in the community who are released during the pre-trial phase of their case. In 2011, the Tribe, in partnership with the Department of Justice (DOJ) and the U.S. Attorney's Office, appointed tribal prosecutors as federal Special Assistant United States Attorneys (SAUSA). The Tribe was also certified by the DOJ as substantially implementing the Sex Offender Registration and Notification Act (SORNA).

Adult and Juvenile Detention Services are mostly handled by the Bureau of Indian Affairs, (B.I.A.). Adult Tribal inmates, including Non-Indian VAWA defendants, are transported to a private regional B.I.A. contracted detention facility in San Luis, Arizona. On Dec 20, 2013, the BIA began delivering Tribal inmates to the B.I.A. detention Pilot program at Emerald Corporation in San Luis, Arizona. The contracted facility, while located far from the tribal Reservation, is sensitive to tribal detainee needs. The Tribe employs detention officers for short-term tribal detention, booking, transportation, and pre-trial detention needs.

Due Process

In 1995, the Tribe opened the Pascua Yaqui Public Defenders Office to provide public defense services to indigent tribal members. In 2010, the Tribal Council amended the Pascua Yaqui Court Rules to implement federal amendments to the Indian Civil Rights Act (ICRA),[18] which was modified by the 2010 Tribal Law & Order Act (TLOA). The 2010 amendment guaranteed tribal members, (including Indians from other tribes) the right to defense counsel at the Tribe's expense if the Tribe seeks any amount of jail time in their criminal cases. On Dec 18, 2013, the Tribal Council passed Ordinance 20–13, the Court Rules Amendments of 2013 to comply with VAWA 2013 implementation requirements. Ordinance 20–13 changed the Tribe's jurisdiction, ensured defense counsel for indigent non-Indian defendants, and changed the composition of the Tribe's jury pool to ensure that a fair cross-section of the community is included in the jury selection process. VAWA contains explicit language that requires tribes choosing to exercising authority under the new provisions, draw people from jury pools that reflect a fair cross-section of the com-

munity and do not systematically exclude any distinct group of people, including non-Indian community members.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state or federal court. The original Pascua Yaqui Constitution expressly incorporated the language of the Indian Civil Rights Act (ICRA) for the Tribe's own Bill of Rights. The tribe funds a full-fledged Public Defenders Office with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. Defendants are guaranteed all protections, including an indigent defendant's right to appointed counsel at the expense of the tribe. Our Tribal Court enforces the Indian Civil Rights Act (ICRA), fundamental due process, Tribal common law, U.S. Supreme Court case law, and fundamental human rights.

The right to counsel and due process that are products of American jurisprudence are deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on behalf of the accused. These concepts, teachings, and traditions pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law. As early as 1918, in the United States, the Yaqui formed a quasi-governmental body in charge of the "Yaqui Nation" within the United States, presided over by a "commandante-general" (captain) which is equated to a war chief, (wikoijaut) of a Yaqui Pueblo in present day Sonora, Mexico (it can also be equated to the executive branch of government).[19]

The Captain was responsible for maintaining order, recruiting a police force, preside over trial courts, and administering punishments. The Yaqui Nation also had a Kovanau, or, in Spanish, gobernador, (governor). The 'kovanau's duty was first, to administer the land of the pueblo, and, second, to concern himself in all disputes and difficulties that arose. The war chief presided over "trials" and the 'Kovanau gathered witnesses for defense and tried to uncover extenuating circumstances.[20] While courts generally enforce individual responsibility for crime and enforce individual rights, Pascua Yaqui historical cultural practices revolve around the principle of collective responsibility arising from a foundational social kinship system. Some concepts of traditional practices and norms included, "Lutu'uria," which translates to "truth." The phrase "yo'ora lutu'uria" refers to "elders truth" and the notion of senu noka (one word) was used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism was prominent.[21]

Demographics & Statistics

Approximately 4–5000 people reside on the 2,200 acre Pascua Yaqui Reservation, located in Pima County, Arizona, near the southwestern edge of the City of Tucson. The Reservation is approximately 60 miles north of the United States-Mexico International Border.[22] The Tribe is located near a major metropolitan city, while this is important for business ventures, it can have a negative impact on crime that occurs on the reservation. Crime does not respect borders and the influx of illegal drugs, guns, and wrongdoers from surrounding communities is a major issue that impacts the safety of our community and strains our criminal justice system. Tribal members are exposed to drug smuggling, drug cartels, human traffickers, and gang members. The most recent murder of a tribal member to occur on the Pascua Yaqui Reservation was a shooting that was committed by a non-Indian, Hispanic male.

According to U.S. Census data, Pascua Yaqui Reservation residents include non-Indians and a small number of individuals who are members of other tribes. Nearly 43 percent of all Pascua Yaqui households consist of a mother and children with no father present, making single mother households the most common type of household on the reservation. Approximately 800 Non-Indians work for the Tribal government, work for Tribal casino enterprises, or attend school on the Reservation. The 2010 U.S. Census, estimates that a large percentage of Tribal members on the Reservation live in poverty. Per capita income on the reservation is $9,039, a third of the per capita income in Pima County ($25,093) and the State of Arizona ($25,680). Pascua Yaqui households are four times more likely to receive Food Stamps (49 percent) and eight times more likely to receive public assistance than are residents of the county or state. Nearly forty percent of Pascua Yaqui adults, and forty-two percent of children, live at or below the federal poverty level, more than twice the county and state rates.

The Pascua Yaqui Police responds to approximately 6000 calls for service a year. A percentage of the criminal cases are referred to the Pascua Yaqui Prosecutor's office, the U.S. Attorney, or the Pima County Attorney for possible prosecution. The

cases referred are evaluated and the majority are independently charged into tribal court.

- In FY 2011–2012, the Tribal Prosecutor's Office filed a total of 684 cases. Of those, 650 were criminal and 267 were domestic violence cases. 121 cases were declined.
- In FY 2012–2013, the Tribal Prosecutor's Office filed a total of 698 cases. Of those, 600 were criminal matters and 155 cases were declined. A large percentage of the cases involved alcohol and domestic violence.
- In FY 2013–2014, the Tribal Prosecutor's Office filed a total of 934 cases. Of those, 610 were adult criminal matters and 176 cases were declined, (including 3 potential VAWA cases). A large percentage of the cases have been related to alcohol and domestic violence. Our recent VAWA cases increased the number of adult criminal cases filed by 5 percent.

The Pascua Yaqui Prosecutor's Office also routinely handles criminal extradition cases. In the past few years, the office has extradited murder suspects, sex offenders, burglary suspects, witnesses, and people who were evading justice in other jurisdictions by hiding on our reservation. The Tribe has conducted 30 criminal extraditions in the past few years. Over all we have conducted a total of 65 criminal extraditions, mostly to the State of Arizona through The Pima County Prosecutor's Office, and the Tucson Police Department.

Criminal Jurisdiction

The Pascua Yaqui Pueblo's criminal jurisdiction is divided into three separate prongs: tribal jurisdiction, federal jurisdiction, and state jurisdiction. The court system where a person is prosecuted depends on the accused person's citizenship status, status as an "Indian," and the status of any victims. The determination can be complex. Roughly speaking, the Tribe has jurisdiction over all Indians who commit crimes within the reservation boundaries. The federal government also has jurisdiction over major crimes committed by Indians in our community. The federal government and the State of Arizona, by and large retain jurisdiction over crimes committed by non-Indians on the reservation. However, the Tribe now has criminal jurisdiction pursuant to VAWA 2013 over non-Indians in crimes of domestic violence committed on our Reservation. In the near future, the Pascua Yaqui Tribe hopes to better coordinate all three prosecution prongs from the reservation. This coordination will ensure that the Tribe can seek better outcomes for victims and be more accountable to the members of our community. For example, four Pascua Yaqui tribal prosecutors now have the opportunity to prosecute reservation based crimes in federal court as Special Assistant United States Attorneys, (SAUSAs). The Tribal Council recently signed a historic agreement with the Arizona U.S. Attorney's Office that allows this to occur.

Tribal Law and Order Act of 2010

On September 22, 2010, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Rules of Criminal Procedure and Criminal Court Rules to implement the federal amendment to the Indian Civil Rights Act (ICRA), to benefit from the changes to Indian Country criminal justice by the Tribal Law & Order Act, (TLOA).[23] Prior to the signing of the Act, the Tribal Council and the Office of the Attorney General were actively involved in shaping the federal language and urging our federal representatives to pass the law. For years, the Pascua Yaqui Tribal Council worked to change the status quo and informed Congress and federal officials about our struggles with crime control, safety, and security.

Beginning on October 1, 2010, any Indian accused of a crime, including Indians from other tribes, have had the right to defense counsel at the Tribe's expense, if the Tribe will seek any amount of jail time in their criminal cases. Soon, the Tribe will also be able to take advantage of additional authority to sentence criminals up to three years of incarceration per offense, up to a maximum total of nine years. At the time, TLOA was the most significant change in federal law affecting Indian Country and the Pascua Yaqui Tribe in close to 40 years. However, in order to benefit from the additional sentencing authority, the Pascua Yaqui Tribe had to amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, and incorporated the provisions as our "Bill of Rights." Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution limited punishment to one (1) year per offense. On July 24, 2015, the Tribe held an election and removed the sentencing restrictions. In a few months, the Tribal Council will vote to consider changes to the criminal code that will adopt the enhanced sentencing authority found in TLOA.

Tribal Law and Order Act 2010 Implementation

The Pascua Yaqui Tribal Prosecutor's Office and the Office of the Attorney General took lead roles in providing input to federal authorities as they revised the ICRA. The Prosecutor's office sent a representative to Washington D.C. and Minneapolis, Minnesota, to speak to lawmakers and the U.S. Attorney General to advocate for changes to tribal criminal justice. The Prosecutor's office also worked closely with the U.S. Attorney's Office for Arizona to help create an Indian Country framework that was put into practice by the U.S. Attorney to combat crime on Arizona reservations. The Tribe aggressively sought to promote an enhanced coordinated response to crime on reservations. This led directly to a sharp increase in tribal, federal, and state prosecutions for crimes that occur on our reservation. This policy and work will continue and it will hopefully increase the federal prosecution and convictions of those who commit major crimes and prey on our people.

1. *Costs:* The implementation of some of the provisions of the Tribal Law & Order Act, namely, Title III, Section 304, has cost the Tribe approximately $300,000-$400,000 a year in additional attorney salaries and benefits by the hiring of 4 full time attorneys (2 prosecutors and 2 defense attorneys), and 4 defense conflict (contract) attorneys.
2. *Representation:* Through the office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to 95 percent of all Indians and non-Indians arrested on the reservation. Approximately 2.5 percent of individuals arrested do not qualify for free legal representation and approximately 2.5 percent waive representation.
3. *Resources and Complexity:* The majority of Pascua Yaqui criminal cases are appointed to the Pascua Yaqui Public Defender's Office. Although the Tribe has hired additional attorneys, there is still a deficiency in resources when considering the resulting complexity of a full adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, additional scientific evidentiary analysis, expert testimony, competency evaluations, and an increase in criminal trials.

Pascua Yaqui Tribal-Federal Sausa Program

Between October 31, 2011 and November 4, 2011, the United States Attorney's Office for the District of Arizona held a week-long course to train prosecutors from several of Arizona's tribal governments so they could participate in the federal prosecution of offenders from their communities. The training kicked off the U.S. Attorney's Office Tribal Special Assistant United States Attorney (SAUSA) program.[24] This cross-commissioning is encouraged by the Tribal Law and Order Act and mandated by the District of Arizona's Operational Plan for Public Safety in Indian Country. The goal of the Tribal SAUSA program is to train eligible tribal prosecutors in federal law, procedure, and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court, or both if necessary. The program also allows the tribal prosecutors to co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities. After completing training, each tribal SAUSA is mentored by an experienced federal prosecutor assigned to the District of Arizona's Violent Crime Section.

SAUSA Program Implementation

The early phase of implementing the SAUSA program has focused on coordination of cases through federal/tribal Multidisciplinary Team Meetings (MDT), advancing the timeline for presentation of cases for federal prosecution, and improving coordination and management of cases between Tribal and Federal authorities. Special attention is given to cases involving violent crimes, sex crimes, and habitual domestic violence offenders, even in cases where the Defendant is a non-Indian. The tribal program has been in operation since 2011. The U.S. Attorney's Office has been diligent in working cooperatively with the assigned tribal SAUSA and the Tribal Prosecutor's Office.

A primary challenge has become coordinating time and scheduling. The Tribal SAUSA has a full criminal case load with the Pascua Yaqui Prosecutor's Office in addition to the evaluation, follow-up, and assisting with the prosecution of cases at the federal level. As the program continues, it may be helpful for the SAUSAs to have dedicated support staff to help with logistics, coordination of calendars, and case management. Communication, coordination, and cooperation has been enhanced with several different agencies responsible for law enforcement on the Pascua Yaqui Reservation, to include, the U.S. Attorney's Office (Tucson), the F.B.I., tribal Law Enforcement, and federal victim services. Cases are being filed, reopened,

and appropriate cases are being declined after thorough review and coordinated follow-up investigations. Tribal criminal investigators, F.B.I. agents, and crime labs are working closely together to bring strong tribal and federal investigations. Defendants are being transferred and transported to tribal court and federal court via writ and arrest warrants. The charging and prosecution of federal crimes committed on the Pascua Yaqui Reservation has increased exponentially due to the SAUSA program and enhanced local MDT meetings. Although federal prosecution is not the ultimate answer to social problems in our community, the Pascua Yaqui Tribe will continue to work with our federal partners to develop a coordinated crime control policy for our community.

Adam Walsh Sex Offender Registration and Notification (SORNA)

The Tribe has recently enacted the Adam Walsh Sex Offender Registration and Notification Act (SORNA).[25] The Prosecutor's Office is working with the Tribal Council, Attorney General, and Law Enforcement to completely implement the new law. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification to the Tribal community. SORNA aims to close potential gaps and loopholes that existed under prior law and strengthens the nationwide network of sex offender registration and notification programs. The Pascua Yaqui Tribe has substantially implemented SORNA and is registering, monitoring, and informing the community about the presence of twenty-four (24) registered sex offenders who are living on the Reservation.

Office of the Prosecutor

The Prosecutor's Office performs several different functions for the Pascua Yaqui Tribe. The Office is responsible for representing our government in Tribal Court in all misdemeanor and felony type criminal matters, including adult and juvenile crimes. The Pascua Yaqui Police respond to approximately 6000 calls for service a year. A large percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The cases are evaluated and many are independently charged into tribal court. The Tribal Prosecutor also represents the tribe in civil related matters, to include civil forfeiture of property used in the transportation or sale of narcotics and all civil Child Welfare/Child Dependency matters that originate on the Reservation. The Prosecutor's office advises, coordinates, and collaborates with Pascua Yaqui Law Enforcement, Pre-Trial Services, Probation, Victim Services, Centered Spirit, Education, and Social Services. The Tribal Prosecutor's Office also handles victim notification in criminal cases. Victims are notified about the status of their case, the release conditions involving the defendant, plea agreements, provided transportation if needed, and advised of the terms of any sentence imposed by the court.

Department of Justice Indian Country Legal Fellow

On Thursday, December 4, 2014, the Department of Justice selected the First ever Indian Country Justice fellow Charisse Arce, of Bristol Bay, Alaska, to serve in the District of Arizona.[26] Arce will also serve a portion of her appointment in the Pascua Yaqui tribal prosecutor's office. This is the first Gaye L. Tenoso Indian Country Fellowship within the Attorney General's Honors Program, and it is awarded to an extraordinarily well-qualified new attorney with a deep interest in and enthusiasm for improving public safety in tribal communities.

"The Pascua Yaqui Tribe is pleased to have the opportunity to partner with the District of Arizona U.S. Attorney's Office and the Attorney General's Honors Program, through the Gaye L. Tenoso Indian Country Fellowship," said Pascua Yaqui Tribal Chairman Peter Yucupicio. "We welcome the new Department of Justice fellow and look forward to a productive partnership as we fight violent crime, work to keep our community safe, and continue to implement the Violence Against Women Act (VAWA), and Special Domestic Violence Criminal Jurisdiction (SDVCJ)."

Access to National Criminal Information Databases

On November 5, 2015, the Department of Justice announced that the Pascua Yaqui Tribe would participate in the initial User Feedback Phase of the Tribal Access Program for National Crime Information (TAP),[27] a program that provides federally recognized tribes the ability to access and exchange data with national crime information databases for both civil and criminal purposes. "TAP will support tribes in analyzing their needs for national crime information and help provide appropriate solutions, including a state-of-the-art biometric/biographic computer workstation with capabilities to process finger and palm prints, take mugshots and submit records to national databases, as well as the ability to access the FBI's Criminal Justice Information Service (CJIS) systems for criminal and civil purposes

through the Department of Justice. TAP will also provide specialized training and assistance for participating tribes."

Currently, the Tribe has limited NCIC "read only" access through an IGA with the Arizona Department of Public Safety (DPS). The TAP program will help the Tribe upload outstanding tribal warrants, orders of protection, and criminal conviction information.

Purpose Code X

The Pascua Yaqui Tribe has requested to formally participate in the Bureau of Indian Affairs' Office of Justice Services (BIA–OJS) Purpose Code X[28] program that was created in 2015 to assist our tribal Social Services Department when they are seeking to place children in safe homes. "The BIA–OJS Purpose Code X Program will provide tribal social service agencies with the information they need [through name-based checks] to protect the children they place into care in emergency situations when parents are unable to provide for their welfare." Currently, Pascua Yaqui social workers may be able to conduct a warrant check or private research of potential placement options, but warrant checks do not generally reveal criminal history. Also, the checks are impractical at night and after regular work hours in emergency situations.

Bureau of Indian Affairs Tiwahe (Family) Initiative

This year, the Pascua Yaqui Tribe was selected by the Bureau of Indian Affairs to participate in the federal Tiwahe initiative.[29] "The initiative promotes a comprehensive and integrated approach to supporting family stability and strengthening tribal communities by addressing interrelated issues associated with child welfare, domestic violence, substance abuse, poverty, and incarceration. Tiwahe means "family" in the Lakota language. The Tiwahe initiative directly supports the Generation Indigenous initiative, which is focused on addressing barriers to success for Native youth, by leveraging BIA programs in concert with other Federal programs that support family and community stability and cultural awareness."

The Pascua Yaqui Tribe will work with our federal partners to implement the Tiwahe program this fiscal year, through a tribal centered plan. The Tribe will attempt to address the interrelated problems of poverty, violence, and substance abuse faced by our community. The Tribe will do this through the coordination and integration of social service programs with our Tribal Court. We will work to strengthen and maintain family cohesiveness, prepare our family wage earners for work opportunities, and provide rehabilitative alternatives to incarceration for family members with substance abuse issues.

Federal Court Sentencing, Prior Convictions, and Disparity

Violent crime in Indian Country has created a public safety and public health crisis across the Nation. Although federal sentencing is not the main issue, it is a contributing factor when violent crime is not prosecuted, cases are declined, or when sentencing outcomes do not fit the crime. In order to help address this problem, counseled Tribal Court convictions should be recognized, considered, and applied to federal sentencing determinations of persons who commit crimes in Indian Country and additional data must be collected by all agencies responsible for criminal investigations.

Federal prosecutions of offenders from Pascua Yaqui Indian Country generally consist of dangerous felony level cases.[30] In Arizona, Tribal borders do not protect Reservations from crimes related to gangs, drug sales, human smuggling, and major drug cartel enterprises. We are on the front line. The majority of offenders prosecuted federally have lengthy tribal criminal histories. Their criminal acts and individual crime sprees have harmed tribal families, injured vulnerable children, and have disrupted the peace of our tribal community. Tribal criminal convictions are not included as part of the criminal history determination of the federal sentencing guidelines in our Indian Country cases, (particularly felony-level crimes) and sentences only average approximately 32 months in length (when outliers are removed). Our outcomes are certainly less than a Native or non-Native offender would receive in Arizona State court for similar serious and violent felony crimes. Thirty-two months is generally not a long enough period to properly consider punishment, rehabilitation, justice, job training, or other restorative practices and policies prior to an offender returning home to our Tribal community.

Criminal jurisdiction in Indian Country is evolving and many tribal Courts are as sophisticated as their state counterparts. Some of the arguments against recognition and reliance of tribal sentencing outcomes are outdated, paternalistic, do not afford comity and respect for tribal decisionmaking, and do not account for present day reality. There are now dozens of Tribes that are exercising either enhanced Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the Violence Against

Women Act, (VAWA) or that have implemented the Tribal Law and Order Act (TLOA) provisions. The Pascua Yaqui Tribe is one of those Tribes. The Tribe has investigated 30 different cases of domestic violence committed by Non-Indians on our Reservation. The cases involved incidents of strangulation, hair-dragging, physical assaults, and conduct that repeatedly victimized whole families. Of those cases, the offenders had close to 90 separate Tribal police contacts, pre and post VAWA implementation. The majority of the offenders also had lengthy state criminal histories that consisted of violent offenses, drug and alcohol related offenses, and weapons related offenses. Three of the offenders were felons. Three offenders had felony warrants, two for burglary and one for armed robbery out of the State of Oklahoma. Two of the offenders were Legal Permanent Residents (LPR) from Mexico. The Tribe has convicted eight of the non-Indian offenders in Tribal court for domestic violence related offenses. Tribal Court convictions of Non-Indians and Indians should be recognized by federal courts. This is the new reality and the future of Indian Country jurisdiction. Jurisdiction is changing, tribes are fighting hard to protect their community, crime is multi-jurisdictional in nature, and there is no reason the federal court process should not properly account for this.

Moreover, every person arrested and charged in the Pascua Yaqui Tribal Court is guaranteed legal representation if they face a day in jail, that has been the case now for many years. Most of the offenders that will be prosecuted in federal court will have a tribal criminal history and possibly, a State criminal history. The majority of their relevant Tribal court convictions will be counseled, unless they chose to waive legal representation. The actions of major crime offenders are not traditional, they are not cultural, and they are not the norm for our tribal community.

Policymakers should also consider the unique nature of each tribe and each federal district. The District of Arizona is different than the District of South Dakota. Likewise, the Pascua Yaqui Tribe differs from the Navajo Nation and any other Tribe. Although we may be faced with some of the same realities, crime is different, laws are different, and approaches to justice, punishment, restoration, and sentencing are different. For example, in Arizona, federal priorities and resources are largely spent on immigration related enforcement. Federal courts in Arizona are clogged with immigration reentry cases, drug smuggling matters, and criminal charges centered on the policies of Operation Streamline.[31] Although necessary, the result is that there are less resources devoted to Indian Country crime in Arizona. This means that less Indian Country cases are investigated, less cases are referred, more cases are declined, and the cases that are referred are more likely to be declined due to inadequate investigations and delayed indictments.[32] We should also consider jurisdictional realities and how each Federal District policy impacts sentencing outcomes.

In Arizona, generally, the U.S. Attorney's Office does not prosecute Indian Country drug cases. It is hard to recall the last federal drug case prosecuted from the Pascua Yaqui Reservation. Drug use and sales, including marijuana, cocaine, crack, heroine, and methamphetamine have reached epidemic levels on the Pascua Yaqui Reservation. There have been drop houses, drug related shootings, gang violence, drug related violence, and serious crimes related to the sale of drugs. Many of the social ills in our community are directly related to drug use. The reason given for the lack of federal prosecutions of street level drug sales in Indian Country is that there is a threshold issue concerning "drug mules" who smuggle large quantities of drugs into the Country from Mexico.

Disparity in sentencing is not an issue in Southern Arizona when comparing Indian defendants prosecuted for major violent felony crimes with similarly situated defendants prosecuted in Arizona. Often, federal "crack" conviction sentencing will be compared to sentences of tribal defendants to indicate that disparity that exists in Indian Country criminal outcomes. Because of the lack of federal drug prosecutions and our actual major crimes sentencing results, the analogy does not fit in the District of Arizona cases that flow from the Pascua Yaqui Reservation. However, if there is a glaring disparity, it may be in the justice received by victims and families. Victims may face language barriers, cultural barriers, discrimination, and inadequate federal jury representation. Largely, the Pascua Yaqui community and our victims were dissatisfied with our federal court outcomes, and our tribal court outcomes for that matter. Justice was hampered and limited by our tribal Constitution, our code, scarce resources, and decades enduring federal agencies who were not investigating or prosecuting our major crimes. This history helped to create a lawless atmosphere and a situation where the community simply does not trust our justice systems. Tribal Court outcomes should be respected and given as much weight as mitigating factors would have on downward departures during federal sentencing determinations. Tribal court criminal history should also play a factor when federal courts are considering pre-trial release of tribal defendants, especially if a court is

contemplating release back into the Tribal community. Federal policies, regional factors, and Reservation crime rates should be considered when allocating prosecution, victim, and investigative resources.

Federal Declinations

Any consideration of federal sentencing, federal prosecution, or Indian Country jurisdiction should include an analysis of federal declinations, as federal jurisdiction has been primary since the passage of the Major Crimes Act of 1885. Federal prosecutions and sentencing must be considered in light of federal declinations and federal resources for law enforcement investigations. On the Pascua Yaqui Reservation, the declination rate has actually risen dramatically. The U.S. Attorney advised the Tribe in 2008 that there was no crime on the Pascua Yaqui Reservation and no declinations. Although that may have been true when reviewing federal referrals and convictions, it was not an accurate representation of what was actually occurring on the ground. As expected, once federal crimes started to get prosecuted in earnest in 2009, the local declination rate increased. However, the rate is not as high as other places in Indian Country. Interrelated, less than half of the major crime incidents reported since 2008 have been officially referred for federal prosecution. However, in the major crime cases that have been officially referred since 2009, a majority have been indicted by the U.S. Attorney's Office. Most of the cases were investigated and referred by tribal detectives who have their federal Special Law Enforcement Commission (SLEC) and they were assisted by local F.B.I. agents in complex cases. The prosecution process was facilitated by tribal prosecutors who are tabbed as Special Assistant United States Attorneys, (SAUSAs). Attached is a recent breakdown of most of the Pascua Yaqui Tribe's Federal case outcomes from 2009–2014 (taken from federal Sentencing Orders and press releases). The attached spreadsheet notes thirty-two federal convictions and six revocations. When you remove outliers, the average federal sentence involving Pascua Yaqui defendants is between 32–36 months, with 36 months of federal Supervision. That is fairly low when you compare a federal sentence to a sentence from the State of Arizona for a comparable crime. The Tribe has had approximately sixty cases officially referred over this time span. Referred means that a Tribal investigator, tribal police officer, or a federal agent sent an investigation to the U.S. Attorney for prosecution. This is much higher than what was occurring prior to 2008. Approximately fifteen cases have been officially declined, three cases were dismissed, one person was found not guilty at trial, and one case was prosecuted by the State. Five non-Indians were prosecuted federally over this time span (two for domestic violence incidents). Twenty of these cases were also prosecuted tribally, some were joint prosecutions, and most outcomes were concurrent to each other. The investigation, timing, (Statute of limitations) evidence, and coordination issues impact when, how, and by who a case gets prosecuted by.

There were many potential federal (felony) cases, (probably close to 50 between 2008–2014) that were reported and investigated, but never officially referred, indicted, or prosecuted because the investigation did not yield the proper probable cause to support charges or there were witness issues or a lack of cooperation.

The Tribe has been working well with the F.B.I. and the U.S. Attorney's Office and the listed outcomes serve as evidence of overall improved cooperation and good work by police, victim services, and other support divisions in our criminal justice system. The Tribe believes that recent federal arrests and convictions have helped to lower the overall crime rate on the Reservation, increased the quality of life, and also helped to provide a general deterrent, now and for the foreseeable future.

Recommendations

- The Pascua Yaqui Tribe strongly recommends that Congress require that counseled tribal court convictions be considered in federal sentencing determinations.
- Federal Courts should also consider Tribal criminal history during pretrial release determinations.
- The Pascua Yaqui Tribe recommends that federal sentences, release dates, and timely notification occur to Tribal authorities and victims.
- The Tribe strongly recommends other sentencing alternatives, reentry programs, education, and or job related programming be included as part of criminal sentences, especially if the tribal defendant is going to return to the reservation.
- The Pascua Yaqui Tribe recommends that federal declinations by the U.S. Attorney's Office be broken out by Tribal jurisdiction, annually.

- The Pascua Yaqui Tribe recommends that all criminal investigations with a potential federal nexus that are opened by tribal law enforcement, B.I.A., and the F.B.I. be accounted for separately, aggregated annually, broken out by crime, and distinguished from investigations that are actually referred for prosecution.

Previous & Relevant Pascua Yaqui Habeas Matter

On August 17, 2011, the United States Court of Appeals for the 9th Circuit issued an Opinion in the case of *Miranda v. Anchondo*,[33] supporting the Pascua Yaqui Tribe's argument that our Tribal Court has the authority to sentence those convicted of multiple offenses to more than one year in jail. The case had wide ranging implications because it set precedent concerning the issue and affected tribes across the United States.

The Pascua Yaqui Tribal Court convicted Miranda of eight criminal violations. The Honorable Cornelia Cruz sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days imprisonment. While serving her sentence, Miranda, through Chief Public Defender, Nicholas Fontana, appealed her conviction and sentence to the Pascua Yaqui Tribe Court of Appeals, arguing, inter alia, that her 910-day sentence violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(7).The tribal appellate court rejected Petitioner's arguments and affirmed her conviction on all counts.

Miranda then sought redress through the federal court system via a writ of habeas corpus. On habeas review, by the U.S. District Court of Arizona, the court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction and ordered that Miranda be released." The United States, through the U.S. Attorney's Office, and the Pascua Yaqui Tribe, through the Office of the Attorney General, appealed the Arizona District court's order granting Miranda's petition for writ of habeas corpus. The 9th Circuit ultimately disagreed with the district court and held that the Indian Civil Rights Act § 1302(7), unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation and reversed the lower court's ruling. "Because § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation, and because it is undisputed that Petitioner committed multiple criminal violations, we reverse the district court's decision to grant Petitioner's amended habeas corpus petition."

Although the *Miranda* case never should have required federal court intervention, it cleared up any lingering doubt that tribal courts and our Tribal Council have the authority to impose punishments that are consistent with the Indian Civil Rights Act (ICRA), due process, and necessary to help keep our community members and visitors safe from harm.

Conclusion

The first responsibility of any government, tribal or otherwise, is the safety and protection of its people. For there can be no security or peace where there is insecurity and fear. Pascua Yaqui tribal officials no longer have to simply stand by and watch their people be victimized with no recourse. Violent behavior against intimate partners or vulnerable family members by tribal members or non-Indians is conduct that is no longer tolerated. Protecting victims of violent crime, domestic violence, and sexual assault is about justice and safety, and it is also about fairness, and dignity.

Full restoration of criminal jurisdictional authority for Tribal governments over all crimes and persons should be the next step. Currently, SDVCJ under VAWA 2013 is limited to only crimes of domestic violence, dating violence, or violations of an order of protection committed in Indian country, where the defendant is a spouse or intimate partner of a tribal member. VAWA does not permit tribal prosecutions unless the defendant has "sufficient ties to the Indian tribe," meaning he/she must either reside in the Indian country of the prosecuting tribe, be employed in the Indian country of the prosecuting tribe, or be the spouse or intimate partner of a member of the prosecuting tribe. The proposed "Tribal Youth and Community Protection Act of 2016" will help address some of the gaps to cover children and ancillary crimes a VAWA defendant may commit. However, more problems exist, like the fact that the law does not cover sexual assaults or stalking committed by strangers.

Full restoration would help ensure fairness, safeguard tribal communities, and help clear up long standing jurisdictional problems. When a resident of one State crosses the border to visit another, that individual is subject to the criminal jurisdiction of the State he or she is visiting, even though he or she cannot vote or serve on a jury there, his external criminal history may also be considered. Noncitizens

visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the political process.

Additional Tribal Empowerment and Support Is Key

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems that are supported with the required resources. Criminal investigations occur at the local level. Along with strong and meaningful federal prosecutions, our local government and court system is the best vehicle to protect Yaqui victims, mothers, and children from violent perpetrators. The recent Pascua Yaqui VAWA and TLOA implementation process bear those beliefs out. However, without the resources to fund robust court and victim services, the gains may only lead to the same revolving door of repeat violence and ineffective criminal prosecutions that we are all too familiar with. The Tribal Law & Order Act, the amendments to the Indian Civil Rights Act, the Adam Walsh Act, VAWA, and changes to the Pascua Yaqui code will enhance the safety and security of our community as the laws are implemented, followed, and properly enforced.

For several different reasons, the challenges facing law enforcement and the justice system in our community are substantial. However, a window of opportunity exists to revolutionize and strengthen our court system and heal our community. The Pascua Yaqui Tribal Council, law enforcement, the Tribal Court, the Prosecutor's office, technical assistance providers, and our federal partners have recognized our current needs and have taken the opportunity to work together to effect change. In short, the Tribe has taken significant steps to protect our people, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, federal legislation, resources, and dedication to continue to fully and effectively protect and support our victims who have been impacted by violence. We respectfully request additional Congressional assistance to help address the persistent violence and drug abuse that plagues our community. Additional support for Tribal Court systems will also further the current federal strategy that promotes the longstanding policies of Indian self-determination, tribal self-governance, and tribal self-sufficiency.

In closing, we thank the United States Congress, the Obama Administration, the Department of Justice (DOJ), our sister Tribes, advocacy groups, the National Congress of American Indians (NCAI), the Tribal Law & Policy Institute (TLPI), the National Indigenous Women's Resource Center (NIWRC), the Center for Court Innovation (CCI), and the National Council of Juvenile & Family Court Judges (NCJFCJ)[34] for the leadership, cooperation, and assistance during the past few years as we worked to better protect our Reservation community.

ENDNOTES

[1] Senior Litigation Counsel and Tribal Liaison, John Joseph Tuchi, 2009–2012 (now United States District Judge-District of Arizona), Tribal Liaison Rui Wang, Assistant U.S. Attorney, District of Arizona.

[2] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[3] The Supreme Court issued a decision in *United States v. Castleman,* 134 S. Ct. 1405 (2014) during the Pilot Project for tribal special domestic violence criminal jurisdiction. Both the majority opinion and Justice Scalia's concurrence included footnotes referencing the definition of the term "domestic violence" under the new federal law, 25 U.S.C. § 1304. The discussion of the VAWA statute by the Justices in dicta raised questions about the scope and severity of "violence" required for crimes that can be charged by tribes who have implemented special domestic violence criminal jurisdiction (SDVCJ) under VAWA. Several of the tribes who have implemented SDVCJ report that the *Castleman* decision had an immediate impact on their charging decisions. There have been several cases where the tribes felt it could not prosecute based on the dicta in Castleman and dismissed the cases only to have the offenders subsequently reoffend with a more serious crime.

[4] https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf

[5] http://www.justice.gov/tribal/docs/letter-to-pascua-yaqui.pdf

[6] (*http://www.whitehouse.gov/blog/2014/02/06/moving-forward-protect-native-american-women-justice-department-announces-vawa-2013-*), Department of Justice (Attorney General) (*http://www.justice.gov/opa/pr/2014/February/14-ag-126.html*), the U.S. Attorney for the District of Arizona, *http://www.justice.gov/usao/az/press_releases/2014/PR_02062014_Vawa.html*), and a Pascua Yaqui press release, that was sent to the following Southern Arizona news organizations: Television Stations: KOLD, KVOA, FOX, and KGUN; Newspaper: AZ Daily Star, Explorer News, Wick Publications, and the Tucson Weekly. *http://*

www.pascuayaqui-nsn.gov/index.php?option=com__content&view=article&id=144:pascua-yaqui-tribe-asserts-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence&catid=12:newa There was also some television coverage in Phoenix via a news video segment available at *http://www.azcentral.com/news/free/20140206tribes-authority-non-indians.html*

[7] Fed. Reg. Volume 79, Number 29 (Wednesday, February 12, 2014)][Notices][Pages 8487–8488] Federal Register Online via the Government Printing Office [www.gpo.gov] [FR Doc No: 2014–03023]*http://regulations.justia.com/regulations/fedreg/2014/02/12/2014-03023.html See also* 78 Fed. Reg. 71645 (Nov. 29, 2013)

[8] (*http://www.pascuayaqui-nsn.gov/*).

[9] *See* (*http://azstarnet.com/news/local/pascua-yaqui-gain-added-power-to-prosecute-some-non-indians/article__3417ac6e-c683–50d4–9a55-cc386524c468.html*)

[10] (*http://turtletalk.wordpress.com/2014/02/07/pascua-yaqui-press-release-revawa-pilot-program-selection/*)

[11] *http://www.kvoa.com/news/domestic-violence-not-tolerated-by-pascua-yaqui-tribe/*), (*http://colorlines.com/archives/2014/02/a__small__*victory__*for__*native__*women.html*), *http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american-tribesbeginpilotprogramtoprosecutedomesticviolen.html, http://n.pr/Nei2Mx, http://www.nativeamericacalling.com/, http://kjzz.org/content/24088/pascua-yaqui-begins-prosecuting-non-natives-under-vawa, http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3__story.html, http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-on-pascua-yaqui-tribe,http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribeachanceforjusticeafterdecadesoflegallimbo.html, http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-indian-tribe-in-suing-non-indians, http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-for-domestic-violence/*

[12] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

[13] *United States v. Castleman,* 134 S. Ct. 1405 (2014).

[14] 50 Fed. Reg. 34,555 (Aug.26, 1985)

[15] Indian Self-Determination and Education Assistance Act, Pub. L. 93–638

[16] *https://www.fbi.gov/about-us/cjis/ncic*

[17] Arizona Criminal Justice Information System (ACJIS)

[18] 25 U.S.C.§§ 1301–1304

[19] Spicer, Edward. Pascua: A Yaqui Village in Arizona, University of Chicago Press, 1940. Reprint: University of Arizona Press, 1984.

[20] *Id.*

[21] Via email, Dr. David Delgado Shorter.

[22] The Tribe has more than 19,000 members, many of whom have relatives residing on both sides of the border. Both the Pascua Yaqui Tribe and our Yaqui relatives in Mexico regularly visit each other for religious, cultural, and tribal purposes.

[23] *https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20%20Order%20Act%202010.pdf*

[24] *https://www.justice.gov/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning*

[25] *http://pascuayaqui.nsopw.gov/Home.aspx*

[26] *https://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship*

[27] *https://www.justice.gov/opa/pr/department-justice-announces-10-tribes-participate-initial-phase-tribal-access-program*

[28] *http://www.bia.gov/cs/groups/public/documents/text/idc1-031473.pdf*

[29] *http://www.bia.gov/cs/groups/xasia/documents/document/idc1-032110.pdf*

[30] Offenses like murder, manslaughter, aggravated assault, sexual offenses, child abuse, child molestation, gang related crimes, gun related offenses, burglary, home invasions, and arson make up a majority of Pascua Yaqui cases referred for federal prosecution.

[31] *https://www.oig.dhs.gov/assets/Mgmt/2015/OIG__*15–95*__May15.pdf*

[32] *https://www.justice.gov/tribal/file/796976/download*

[33] *Miranda v. Anchondo,* 684 F.3d 844 (9th Cir. 844), cert. denied, 2012 WL 2396988 (U.S. Oct. 1, 2012); *Bustamante v. Valenzuela,* 715 F.Supp.2d 960 (D.Ariz.2010). Tribes are allowed to impose consecutive one year terms for separate offenses charged in a single criminal proceeding.

[34] Humble thanks to the United States Congress for drafting and passing TLOA & the Reauthorization of VAWA, thanks to the Department of Justice, (DOJ) Deputy Associate Attorney General Sam Hirsch, Director Tracy Toulou, Counsel to the Director, Marcia Hurd, National Indian Country Training Coordinator Leslie Hagen, Native American Issues Coordinator Jeremy Jehangiri. And the U.S. Attorney's Office, District of Arizona. Thanks for the efforts of the Department of the Interior (DOI), Kevin Washburn, Associate Solicitor Michael Berrigan, Attorney Advisor Leta Hollon, Director of the office of Tribal Justice, Darren Cruzan, Associate Director Tricia Tingle, and Deputy Associate Director Steve Juneau. Thanks to Technical Assistance providers: The National Congress of American Indians, (NCAI) Natasha Anderson, Virginia Davis, and John Dossett. The Tribal Law & Policy Institute (TLPI), Chia Halpern Beetso & Jerry Gardner and the National Council of Juvenile & Family Court Judges (NCJFCJ), Jessica Singer and Steve Aycock. The University Of Arizona School Of Law, and Professor Melissa Tatum, Finally, thank you to all the members of the Intertribal Technical Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG).

Sentenced Date	Gender	Name	Offense	Class	Ordered	Supervised	Revoked
20-Oct-10	M	Jonathan Garcia	Aggravated Assault	D, C, C	10 months	3 yrs	———
22-Oct-10	M	Manuel Capis	Aggravated Assault (Drive-by shooting)	D, C, C	18 months	3 yrs.	———
27-Oct-10	M	Victorio Kaye Jaimez	Aggravated Assault-Domestic Violence	C	51 months	3 yrs	———
2-Dec-10	M	Estevan Miguel Estrella	Aggravated Assault (Drive-by shooting)	D, C, C	36 months	3 yrs.	———
25-Apr-11	M	Victoriano Valenzuela	Sexual Conduct with a Minor (statutory rape) - Domestic Violence	C	24 months	Lifetime	———
31-May-11	M	Juvenile	Arson X 3		6 months	24 months	———
29-Jun-11	M	Gerardo Benito Ramirez	Murder Homicide	F	210 months	5 yrs	———
4-Aug-11	M	Jonathan Garcia	Aggravated Assault	D, C, C	———	36 months	Time Served
19-Dec-11	M	Jose Conrado Madrid	Sexual Assault with Minor - Domestic Violence	A	96 months	Lifetime	———
12-Apr-12	M	Aaron James Delores	Aggravated Assault-Domestic Violence - Stabbing	C	48 months	3 yrs.	———
17-May-12	M	Gary A. Chavez	Theft - Fraud involving Tribal Funds	A	0	2 yrs.	———
29-May-12	M	Leandro Jesus Flores	Sexual Assault - Domestic Violence	A	60 months	5 years	———
17-Oct-12	M	Jonathan Garcia	Aggravated Assault	D, C, C	———	0	10 month
30-Nov-12	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C	24 months	36 months	———
31-Jan-13	M	Micheal Alvarez-Saurez	Aggravated Assault - Stabbing	C	18 months	3 yrs.	———
6-Mar-13	M	Avery Rupert Lopez	Aggravated Assault - Stabbing	C	44 months	36 months	———
22-May-13	M	Gilbert Casillas Jr.	Aggravated Assault - Domestic Violence - Stabbing	C	21 months	3 yrs.	———
12-Aug-13	M	Donald Lawerence Bustamante	Prohibited Possessor (Firearm)	C	18 months	3 yrs.	———
18-Nov-13	M	Peter Ron Acuna	Aggravated Assault	C	70 months	3 yrs.	———
25-Nov-13	M	Christopher Montana	Child Abuse		0	2 yrs.	———
2-Dec-13	M	Luis Gonzales	Dog Mauling (State Crime Assimilation case)		0	1 yr	———
26-Mar-14	M	Micheal Alvarez-Saurez	Aggravated Assault - Stabbing	C	———	24 months	4 months
31-Mar-14	M	Victoriano Valenzuela	Sexual Conduct with a Minor (statutory rape) - Domestic Violence	C	———	Lifetime	6 maths
30-May-14	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C	———	24 months	8 months

17-Jun-14	M	Francisco Garcia	Aggravated Robbery / Aggravated Assault	D, C, C	10 months	3 yrs.	———
13-Aug-14	M	Michael Madrid Jr.	Aggravated Assault	C	0	3 yrs	———
25-Aug-14	M	John Martin Griffith	Domestic Violence Aggravated Assault - Non Indian		0	3 yrs.	———
8-Sep-14	M	Garin Patrick Thomas	Aggravated Assault - Serious Injury	C	31 months	3 yrs	———
1-Oct-14	M	Sonny R. Lozano	Aggravated Robbery / Aggravated Assault	D	9 months	3 yrs.	———
28-Oct-14	M	Ramiro Osuna Bustamante	DV Aggravated Assault, X2 (DV Habitual Offender Case)	C	34 months	3 yrs.	———
13-Mar-15	M	Christopher Rene Koch	Prohibited Possessor (Drug Related)	C	24 months	3 yrs.	———
28-May-15	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C	———	0	10 months
16-Jun-15	M	Isaac Alvarez	Aggravated Assault (stabbing knife)	C	33 months	18 months	3 months
16-Jun-15	M	Isaac Tito Coronado	Prohibited Possessor	C	Time Served	2 yrs.	———
6-Aug-15	M	Victorio Kayo Jaimez	Aggravated Assault - Domestic Violence	C	———	24 months	6 mths
	M	Noah Espinoza	Aggravated Assault (Drive-by shooting)	D, C, C	36 months	3 yrs.	———
	M	Joseph Camargo	Murder Homicide				

The CHAIRMAN. Thank you very much for your testimony.

Senator Daines.

Senator DAINES. Thank you, Chairman Barrasso.

In Montana, the Northern Cheyenne and Fort Belknap Tribes, as well as the Fort Peck Tribes, recently declared states of emergency due to the increase in drug-related crimes on the reservations. This is how serious it is back home.

Clearly there is a strong need for additional measures to help keep tribal communities safe and secure. In the last Congress, I was proud to pass the Violence Against Women Act which created a number of grant programs designed to prevent violence, investigate crimes and prosecute offenders and provide victim services.

This piece of legislation was especially important for our tribes, as we know, which are disproportionately affected by domestic violence. However, we still have a lot to do.

I want to thank the authors of the two safety-related bills we are discussing today for their work on this legislation. In particular, I am pleased to see the Tribal Law and Order Reauthorization and Amendments Act include critical tools to better equip law enforcement officials, reduce crime and recidivism, increase the Federal Government's consultation with tribes and improve juvenile delinquency programs.

Councilman Buckles, welcome again. It is good to have another Montanan in Washington.

You shared in your testimony that while Indian women comprise only seven percent of the population in Montana, they represent 13 percent of the intimate partner deaths in the State. As you see it, from your position, what is the root of domestic violence against women in Indian Country?

Mr. BUCKLES. I think the main root of it is drugs. We see it so evident and so much more noticeable. It comes from all over and other communities. I think that is the root of what is happening to our Native American women, not only them but also our children.

Senator DAINES. You mentioned the shared importance of a strong tribal government in keeping our tribal communities safe. As a tribal council member, could further explain the link you see between a strong tribal government and also having a safe community?

Mr. BUCKLES. As far as us being legislators, we are trying to enhance our court system and help our court system. We are looking at the findings, stiffer sentencing to help build a stronger community.

Also, we are looking at avenues of hiring other help from law enforcement by hiring drug enforcement officers to make our communities better and to crack down on all the drugs on our reservation.

Senator DAINES. It is good to see that Fort Peck is seeing some success there. I think we can all agree that we have a long way to go to improve public safety in Indian Country. I am glad we are visiting some much needed solutions today such as Chairman Barrasso's Tribal Law and Order Act and the reauthorization bill.

I would like to know from your view what provisions in that bill are going to be most important to the Fort Peck Tribes?

Mr. BUCKLES. I guess the part to prosecute juveniles in Federal court is part of it. Overall, the court systems and hopefully we will see a lot of help from the Federal system.

Senator DAINES. You mentioned the kidnapping of the little girl and that she was rescued alive. Could you also share how the tribe worked with their Federal law enforcement partners to find her and bring her home? What can we learn from this successful operation?

Mr. BUCKLES. It worked well with not only the State but with the city officials, officers, along with the Federal officers and all the communication, also with the Montana Highway Patrol and game wardens too that really pushed the issue.

I think the Federal officials really helped out a lot and spent a lot of good time with the person that was arrested. With the Federal agency's help, it moved faster. I am glad they found the child alive.

With those agencies and our partnering together, we saw a good and fast recovery even though it took three or four days. I know the person did not really want to say but the Federal agency's experience in finding someone really helped us a lot. We are glad that child is safe. I am glad they found her.

Senator DAINES. Thank you, Councilman Buckles.

The CHAIRMAN. Thank you, Senator Daines.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Director Toulou, as you know, the opioid crisis has disproportionately affected American Indians in this country and certainly in Minnesota. Last month over the course of three days, the White Earth, a band of the Ojibwe in northwestern Minnesota, reported eight overdoses. All the victims survived but we need to do everything we can to prevent these.

Law enforcement agencies obviously have an important role to play in working to combat the opioid epidemic.

In June 2013, White Earth became the first reservation and still the only reservation to have the Department of Justice assume con-

current criminal jurisdiction on their land under the Tribal Law and Order Act.

This law is supposed to encourage development of more effective prevention programs to fight alcohol and drug abuse among at risk youth. Despite this goal, the White Earth has not received any funding to support their designation, nor have they been provided any FBI agents to patrol their land as tribes without this designation have received.

Director, after three years, why has White Earth not received funding under this designation? Why have FBI agents not been provided to White Earth? Why has White Earth not received funds from the Department of Justice to help address the opioid epidemic on the reservation?

Mr. TOULOU. I think one of the issues everyone at the table recognizes is we could use more funding in Indian Country, particularly around the opioid issue. I would say that I do know White Earth. I was involved in their designation when they applied for assumption of jurisdiction.

While there has not been the funding, you are absolutely correct, and I am sure that would be helpful, but there have been a number of things that have happened recently on the reservation that were at least tangentially related to the designation.

Within the last year, about a year ago, the FBI in conjunction with tribal law enforcement, had a raid on White Earth that took down 41 individuals involved in a heroin conspiracy ring. I think that probably would have happened, but the cooperation that the assumption of jurisdiction engendered helped in that matter.

Just in March, ONDCP, BIA, HHS, SAMHSA, the FBI, and the Department of Justice met with the tribe regarding a pilot project to set up a tribal action plan for drug abuse. They are the first tribe to get the kind of attention through ONDCP.

Again, that was not the direct result of the assumption of jurisdiction but it was in recognition of the relationship we have with the tribe and the problems they are having. There is a lot more to be done but we are aware and are interested.

Senator FRANKEN. Was some of that initiated by Erma Vizenor, the chairwoman?

Mr. TOULOU. She was a really strong partner as we went through all this. We miss her.

Senator FRANKEN. Thank you.

Attorney General Urbina, a one size fits all approach does not always work in correction systems or interventions. The interventions need to be targeted to the community.

Leech Lake Chief Judge Paul Day recently testified before this Committee regarding the importance of tribal healing to wellness courts which uses traditional healing practices and other cultural activities to help people recover from drug and alcohol addiction. The program incorporates the unique culture and history of each tribe and promotes community involvement.

Can you describe how the use of cultural activities and traditional healing methods have impacted recidivism rates and drug recovery in Indian Country? Have these methods impacted your work?

Mr. URBINA. Yes, sir, I think it has. I know of programs currently operating across Indian Country. I am not exactly sure of the outcomes. However, I think it is a good idea to focus on those issues.

For us, as offenders come into our system, I think it is important that we do an assessment of their needs. Trying to address their substance abuse issues is part of a healing to wellness court. We call it a drug court where we are in Pascua Yaqui.

I think the incorporation of cultural and traditional practices is important, along with the substance abuse treatment and also job training and various things that would help that person not come back into the system. Those are very important issues that need to be addressed.

I think we are focused on correction and on jail but I think the approach needs to be more holistic across the board.

Senator FRANKEN. When you say drug treatment, my understanding from the Minnesota tribes is that they try to do their drug treatment in a culturally sensitive way or in a culturally consonant way?

Mr. URBINA. I think you can do that. We have a BIA-funded program that is culturally relevant, a program within the system. They do what is called cognitive behavioral therapy but it is also culturally relevant to the people there. There are a number of tribes that filter into this jail system.

Senator FRANKEN. Thank you. Sorry, Mr. Chairman, for going over.

The CHAIRMAN. No, no, thank you, Senator Franken.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Senator Barrasso.

Mr. Toulou, I want to start with you. I appreciate your testimony. Our staff had very complimentary words about the statement you had placed in the record.

Your statement explains the concept of special domestic violence jurisdiction that originated in the legislative proposal the department submitted back in 2011. A tribe could only exercise that jurisdiction with respect to an offense which occurred within a tribe's Indian Country.

If a tribe does not have Indian Country under its jurisdiction, it could not utilize that jurisdiction, is that correct?

Mr. TOULOU. I did speak with your staff, Mr. Bergerbest, about this initially. I think that is correct. I would say there have been a lot of discussions about this.

In Alaska, as you know, jurisdiction is very different. I would appreciate the opportunity to talk further with your staff and the experts that I have dealt with when we develop the bill and get back to you. That seems consistent with my understanding.

Senator MURKOWSKI. I am trying to figure out where we were so that we know where we need to move to so that with Alaska, as we are talking about how we can make a difference within a State, that because it is different, because of the Supreme Court's decision in *Venetie* holding that these lands are not Indian Country.

We have this special domestic violence jurisdiction that is of very limited value to our Alaska tribes.

It would be helpful if you could let me know whether it is correct in your understanding that the department, in its 2011 legislative proposal, had no suggestion this should be a *Venetie* fix that would have made it more meaningful to the special domestic violence jurisdiction?

Mr. TOULOU. I think that is consistent with my recollection. Again, I really would like to talk with staff.

Senator MURKOWSKI. Know that I would like to work with you and others about this. As we are trying to provide for a process in a State that is different for a host of different reasons, I think we need to be looking beyond the world as we know it or as it is structured today.

If it means that we have to look to new jurisdictional definitions, these are some of the paths we want to explore.

Mr. Black, I want to ask you basically the same question I asked the Acting Assistant Secretary related to BIA law enforcement resources in the State.

Some in the Alaska Native community are of the impression that if the department would take land into trust for their tribes that we would see substantially greater BIA law enforcement resources that would follow with that.

When I asked the question, I was told, we are a P.L. 280 State and it might be somewhat overly optimistic to assume that additional resources come. The more direct question to you would be whether or not the BIA has any plans to put BIA police or tribally-compacted officers in our Native villages in the event that land encompassing that village would be taken into trust?

Can you speak to this impression that there would be resources that follow if, in fact, this land is taken into trust?

Mr. BLACK. Speaking to the 280 State status of Alaska, that would be something we would have to weigh into any decision we would make related to that and also working with the State under that 280 retrocession process or anything that potentially could come, I think there are a lot of questions around the jurisdictional authority that will come with any land into trust in Alaska.

That is just one of the many factors I think we have to consider if that were to happen and how we would apply that. Right now, I do not know that we have any immediate plans or available resources to put toward that right now.

Senator MURKOWSKI. That is where the huge frustration is. You have villages that simply lack any law enforcement presence. Our State is facing some very, very difficult financial pressures right now, so I think we are going to see a currently bad situation unfortunately possibly get worse.

We are kind of talking hypothetically here but if Vinati had come out differently and all of these ANCSA lands were Indian Country, granted different Indian Country in a P.L. 280 State, but you would be sitting in a situation where effectively you have to wonder if BIA would have been prepared to ramp up its support for law enforcement in public safety tribes and really at the cost of it.

When you think about the burden you have within BIA now or the responsibility you have for the substantial costs related to law enforcement, you have a situation in Alaska where because the courts have determined no Indian Country, because we are in this

P.L. 280 State status, we do not see the level of support from the Federal side when it comes to any level of enforcement in our States, a State that has more than half the tribes in the country.

I am kind of speaking again hypothetically but as we are thinking about a new paradigm for public safety in our Native villages, I think it may be time for us to explore with the BIA and the Department of Justice some avenues as to how we contribute to an on the ground public safety presence in rural Alaska as well as how we empower our tribes to protect their communities.

I think we know it does not come without cost. We recognize that. I certainly do. As Chairman of the Interior Appropriations Committee, believe me, I know the cost associated with it but it is a conversation that I think we need to be prepared to have in the future because we have a situation that is not getting better.

My fear is that we are going in the wrong direction. I would like to explore with both of you further how we work to address this.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murkowski.

Senator Heitkamp.

STATEMENT OF HON. HEIDI HEITKAMP,
U.S. SENATOR FROM NORTH DAKOTA

Senator HEITKAMP. Thank you, Mr. Chairman.

Mr. Toulou, who is responsible for protecting children against major crimes on the reservation in North Dakota?

Mr. TOULOU. I would say we all have a duty to protect children on any reservation but Major Crimes Act violations are prosecuted by the U.S. Attorney's office.

Senator HEITKAMP. And investigated?

Mr. TOULOU. And investigated by the FBI.

Senator HEITKAMP. I think the same is true on the Fort Peck Reservation in Montana as well?

Mr. TOULOU. That is absolutely correct.

Senator HEITKAMP. Let me read something to you from a recent Reuters' article, "Drug users are selling their babies, daughters and sisters for the potent stimulant that is ravaging Native American communities such as the Assiniboine & Sioux Tribes living in the desolate Plains," I dispute that, "of Fort Peck say community leaders. We are in crisis says the tribal chairman. We have mothers giving their children away for sexual favors for drugs. We have teenagers and young girls giving away sexual favors for drugs.

"No number records specific rates of local sex trafficking which can often be buried in crimes of sexual assault, abuse, prostitution, abandonment or kidnapping but it is a crime poorly documented in the field by drug abuse plaguing Indian reservations. The rate of meth use among American Indians is the highest of any ethnic group in our country and is more than twice as high as any group according to the National Congress of American Indians. The number of drug cases in Indian Country has risen sevenfold from 2009 to 2014."

It is a crisis and we somehow do not seem to get a crisis response from the Department of Justice. I am beyond frustrated. I asked the FBI Chairman in this room to come to North Dakota to actually give us a plan.

We get, well, let's put an FBI agent in Bismarck and hopefully they will get over to New Town sometime. In this story, six children in two weeks were born affected by methamphetamines. We do not know what the long term consequences of that is.

I agree with you that this is a community problem but we have to have a cop on the beat. I will tell you I do not think we have a cop on the beat in Indian Country. The National Congress of American Indians calls it the asterisk nation.

As I was just reminded at a hearing, Senator Kennedy once said, "Our first children have become our last children." They are last in peoples' minds and memories but they and their families are suffering. We need law enforcement. We need to have attention to this problem.

We cannot suffer another generation and sacrifice them to methamphetamines. It is beyond frustrating for me that in spite of our repeated requests, we do not seem to get the level of attention to this problem that we need to give to this problem.

I hope you take back to the Department of Justice that our Preamble to the Constitution says "to provide justice." Where is the justice in Indian Country for Native American children and families who are terrified by this epidemic? Where is the justice? Where is the accountability? Where is the law enforcement?

This is a major crime. You are the cop on the beat and you are absent. We have to get this fixed because we cannot begin to solve the cultural issues or the public health problems until we have a cop on the beat providing deterrence.

When you do not have a deterrence of any kind, you have rampant abuse. That is what we are seeing. The people who are suffering are children and families working very hard in very difficult situations.

You just happened to be the guy in the line of fire today but I hope you take that back to the Department of Justice where I know there are many people working. I have directly talked about this with the Attorney General. This is not a new issue for us.

This is a committee that sees it every day and we have to get some help. We have to have you treat it at the Department of Justice like the crisis it is.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Heitkamp.

Senator Heitkamp, would you like the article you referenced included in the record?

Senator HEITKAMP. Yes, I would.

The CHAIRMAN. Without objection, so ordered.

Thank you, Senator Heitkamp.

Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

Thank you, Senator Heitkamp for your question. Unfortunately, I did not hear an answer. I do want to find out what is going on.

Senator Heitkamp is right. You are in the line of fire today but she is also right that quite frankly, we have huge problems in Indian Country. There are a lot of reasons for them but why isn't the Department of Justice stepping up in Indian Country to meet the problems out there?

Mr. TOULOU. I want to say to both of you, Senator Tester and Senator Heitkamp, I appreciate the passion you bring to this important issue. I was a prosecutor in the U.S. Attorney's office in Montana and I worked on Fort Peck. I have a lot of friends there. I understand how important this issue is.

I think we do take it seriously but clearly there is more we need to do. I will take back those concerns and talk to the FBI and our folks who specifically focus on drug trafficking. Yes, it has gotten worse at least from what I am hearing from tribal leaders.

That is not something I would have expected to happen having seen methamphetamine abuse in Montana in the 1990s. We hear the problem and with the resources we have, we will move to address it as we can. I will take back that passion.

Senator TESTER. Is the problem where it is located? If this was going on in a place closer to an airport, would we be dealing with it in a different way?

Mr. TOULOU. I don't know that we would be dealing with it in a different way but I think law enforcement resources have something to do with this. Again, I am talking outside of my depth. I know Indian Country. I did violent crime. I did not do drug cases but when you see drugs coming into large cities, you have major suppliers.

What we have seen and what I have been told by tribal leaders is you have relatively small amounts diversely spread across Indian Country. That is harder to handle from a law enforcement perspective.

We all know that on the ground, first responders in Indian Country are limited as compared to other communities. Those are the guys who would initially deal with those crimes.

That is not an excuse. We need to figure out how to work with the reality we have but I think those are some of the explanations.

Senator TESTER. Not only that but are the statistics in the Reuters article right? Did you say six kids in the last two weeks?

Senator HEITKAMP. That is correct.

Senator TESTER. Six kids in the last two weeks is not insignificant.

Mr. TOULOU. No.

Senator TESTER. That is a huge problem.

We are not the committee that deals with your budget at least in the Department of Justice. I know oftentimes we use money as an excuse but it is also about prioritization quite frankly. Prioritization is really important.

You said you would take it back to the department. I hope you do. I would hope the department might give us, the Chairman and me, some sort of information so we can distribute to the Committee what we are doing proactively to stop this. I am telling you, it ain't going to get better.

Mr. TOULOU. No, and I will commit to getting the information.

Senator TESTER. We are talking about Fort Peck. I would suggest the Salish and Kootenai in the western part of the State have probably the least poverty. Still its poverty rate is probably 50 percent or higher, the unemployment rate, I mean. It is probably the least poverty stricken of any of the reservations in Montana. Seventy to

80 percent of those kids born on the reservation are born addicted to drugs. It is a problem all over.

Mike Black, the Santa Clara bill would allow you to lease up to 99 years on tribal lands. We have done this before for individual tribes. My question is, why don't we do it for all the tribes?

Mr. BLACK. I think on its face that sounds like probably a pretty good idea. I just do not know for sure unless we hear from all the other tribes whether or not they have issues or why they would not want to do it. I testified on a number of bills just like this.

Senator TESTER. Is there a reason we would not want to do it? From a Federal perspective, is there a problem with doing it?

Mr. BLACK. Nothing that comes to my mind right now.

Senator TESTER. It would be good to get your perspective on that after you do your due diligence.

Mike Chavarria, tell what extending the lease for 99 years does for you from a certainty standpoint for economic development?

Mr. CHAVARRIA. It gives us the option to go ahead and lease these lands for larger businesses. Right now, you have 25 which is an option of 25 years and that is 50 total. It is not good for us to go to the larger businesses because of the substantial capital investments. The bigger businesses are deterred from partnering with us in Santa Clara. That is very important.

That would allow us to do longer term leases. It is up to the tribe to determine which business they want to venture into. It is not going to be for all; it is going to be for certain projects.

Senator TESTER. Dana, thanks for being here. I really appreciate your testimony and being available to answer a few questions.

The Fort Peck tribal court was one of the first tribal courts to implement VAWA jurisdiction. Your tribe needs to be commended on that for being a leader.

Where do the resources come from for the tribe to have law-trained judges, prosecutors and defense attorneys?

Mr. BUCKLES. The tribes largely support their tribal court at the expense of other programs.

Senator TESTER. It came out of the tribal conference?

Mr. BUCKLES. Yes

Senator TESTER. What aspect of implementing VAWA has been the most resource intensive? What have you had to spend the most money on? If you do not know, that is fine. You can get back to me on that.

Mr. BUCKLES. Can I get back to you on that?

Senator TESTER. Absolutely you can.

If you had more dollars, if you had more resources, do you have any idea where the tribe might focus those resources?

Mr. BUCKLES. If we had more dollars, as well as the court system, but I think we would focus on law enforcement. Law enforcement is a biggie for us. I just heard the discussion here. That is what a lot of tribes are facing not only Fort Peck. A lot of the tribes in general lack more officers. That is what we need.

Senator TESTER. I want to thank you all for being here and for your testimony and I want to thank the Chairman for having this hearing.

Going back to the first line of questioning, I just want to say nobody expects the Department of Justice to do this alone. I do think

there is an expectation that you guys are leading the charge. There are other support groups around who will help you. I believe that to be the case.

We have someone I think is a very, very, very good U.S. Attorney in the State of Montana. I think we have a history of good U.S. Attorneys in the State of Montana.

I have to tell you, this has been going on for a while now. We really do need to get on it. It is a big problem. It is not made up; it is not imagined; and it is not someone trying to bilk money from the Federal Government. It is a problem we need to get fixed.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Tester.

Director Black, S. 2920 includes several provisions to improve justice for Indian youth. One of the key provisions would require State notice to tribes when one of their members enters the State or local juvenile justice system. That would also include a tribal representative on State advisory groups for juvenile justice.

I am wondering how you think these provisions would help Indian youth? Should the Office of Justice Services have a role in State notification or advisory group requirements?

Mr. BLACK. I think all of that would probably be beneficial to Indian Country and our ability to deal with the youth and some of the issues that are out there. Increased collaboration always leads to additional resources and additional data sharing.

I think there would be some questions as to the logistics of how that would work. Are we talking about communities located right near Indian Country? Are we talking about communities and Indian youth that are arrested in a large city, far away from Indian Country?

I do think that does give us a better picture of exactly what the issues are facing our Indian youth out there, whether they are in a big or small city. Improved data sharing of that kind of information would give us a lot better idea of those issues and how we can better address them by coordinating with all of our partners.

The CHAIRMAN. Violent crimes, we have heard, drug trafficking, it seems they affect Indian communities much more acutely than many other communities. Tribes have long sought help with these problems.

To address the problems, in part, my legislation would establish a new Federal crime of criminal trespass for violating tribal exclusion orders which arise from convictions of tribal violent crimes and drug trafficking.

Do you think this approach would help address the problem or is there another alternative to perhaps tackling violent crimes and drug trafficking?

Mr. BLACK. I would want to talk with my colleagues at the department but I think anything we can do to assist tribes in maintaining law and order on the reservation is important. It seems like a good strategy to me if that includes addressing crimes by people coming off the reservation or onto the reservation.

The CHAIRMAN. One of the provisions, based on circumstances, is a Federal referral to tribal court for juvenile cases. Is that something you think would be helpful?

Mr. BLACK. I think we talk quite a bit with tribes when we take Federal cases. There are not all that many juveniles who are in the Indian Federal system. It runs between 25, 30 to 35 in a given year. It is important that we take care of each of those children appropriately but it is a small number of very troubled offenders.

Yes, I think any communication is a good idea. We do have pretty extensive communication.

The CHAIRMAN. Mr. Urbina, the Pascua Yaqui Tribe is surrounded by the City of Tucson, Pima County, and the Tohono O'odham Nation. I am just looking at the map of the surroundings.

Can you identify the jurisdictional issues that you have encountered while trying to implement the Tribal Law and Order Act?

Mr. URBINA. It has been difficult. For us, crime does not respect borders. In addition to being outside of Tucson, we are about 60 miles from the U.S. and Mexican border. We are located on a major drug corridor. I think that impacts crime on our reservation.

The last homicide on our reservation was committed by a non-Indian male who shot a young tribal male. I went out to the scene that night to help with the search warrant. I still remember that night. I still see his mom. That is pretty much what we are dealing with jurisdictionally.

For our VAWA offenders, for the most part, probably almost 90 percent of those folks have significant criminal histories, have committed offenses on the reservation pre-VAWA, some of them had warrants, and one who had a warrant from the State of Oklahoma for armed robbery lived in tribal housing.

That is our biggest problem, encountering folks and not having the tools to address these issues on the reservation from both non-Indian offenders and tribal members who might offend in the State of Arizona.

The CHAIRMAN. Can you talk a bit about how the Tribal Law and Order Act helped the tribe work with Federal agencies to keep your community safer?

Mr. URBINA. For us, it has been night and day. I think shortly after 2010, we started our SAUSA program. We now have four SAUSAs working out of our prosecutor's office who help staff those cases with the U.S. Attorney's office.

The U.S. Attorney liaison is on the reservation quite often. It is fairly close to their Tucson office but she also has an office in our prosecutor's department. There is a lot of communication and a lot of working together.

Our MDP process is not simply looking at child-related crimes, but we look at all major crimes. We staff them as a group. Our SAUSAs are helping bring those cases to Federal court.

Along the same timeline, we also worked with the U.S. Attorney's office to set up our Special Law Enforcement Commission cards for our law enforcement. That gives them Federal authority. They also have State authority and are State certified. Our system has a lot of flexibility built into it.

When we encounter jurisdictional problems, we are able to address them on the front end by law enforcement or by our SAUSAs and our prosecutor's office. For us, the Tribal Law and Order Act has been fairly successful. It has caused our Federal cases to churn and be processed by the court system.

I personally believe it has reduced the crime on the reservation over the past few years. Anecdotally, I know that is true, so the whole process since 2010 until now, I think has been successful.

There are things we need to work on and things in the bill that will help. Certainly, the base has helped the Pascua Yaqui Tribe address crime.

The CHAIRMAN. Thank you.

Senator Hoeven.

STATEMENT OF HON. JOHN HOEVEN,
U.S. SENATOR FROM NORTH DAKOTA

Senator HOEVEN. Thank you, Mr. Chairman.

I would like to thank all of our witnesses for being here today.

My question relates to not only the Tribal Law and Order Reauthorization Act, which Chairman Barrasso has brought forward, which would allow tribes access to certain databases for criminal background checks which I think is a very good thing.

It also relates to legislation I have put forward, the Native American Children's Safety Act, which we passed through the Senate. It is now in the House. Actually, the House has passed their version which essentially is the same bill. I am working to get the bill finalized.

Essentially, the Native American Children's Safety Act would provide or require the tribal social service agencies conduct background checks on any adults living in a foster home before a foster child is placed in that foster home. I think Director Black is familiar with it.

That is actually a requirement we put at the State level when I was Governor in North Dakota. Many other States have done the same. It is not something applied or required consistently across reservations.

Starting with Director Black and then Director Toulou, I would like you to talk for a minute about the importance of being able to conduct these criminal background checks, first, on a more broad scale as related to the Tribal Law and Order Reauthorization Act of Chairman Barrasso and then also in regard to foster care, both the ability of the BIA to implement and support that, your willingness to support it and your feelings in regard to its efficacy both in terms of reducing crime and protecting children.

Mr. BLACK. I think this goes back to a lot of the discussion we have had here today related to data sharing. I think the more data we can make available, including criminal background checks and the opportunity for tribes to participate in all of that, will increase their ability to protect their citizens in Indian Country, especially when we talk about the kids.

We have implemented that in some areas on a pilot basis to make sure we have the necessary tools to do background checks on the foster families to ensure that when we are placing children in those homes, we are placing them in a safe environment.

I think we do support that because I think that is critical to ensuring those kids have a good, safe place to be while we are working through the other issues related to their family and whatever we can to try and reunite the family but in the meantime, we are providing a safe environment for those kids.

Senator HOEVEN. Thank you, Director. I want to note and express my appreciation for your help in this effort.

Mr. Toulou.

Mr. TOULOU. Thank you, Senator.

We believe that access to databases is absolutely critical on many different levels on the reservation. Clearly, it is a public safety issue, both for its citizens and for police officers responding to a crime on the macro level of calling in on the radio and being able to find out the car you are pulling over has somebody who just committed an armed robbery.

As we reached out to tribes about their data access issues, we found there were a lot of other things that were important that they did not have access to beyond pure criminal justice issues, for instance, tribal courts having the ability to put protection orders in databases to be recognized in nearby towns.

The issues involved in child placement were critical. One of the things we have done in conjunction with BIA is made BIA a portal. They have agreed to be a portal for tribes who want to use Program Category X which allows the placement officers in social services to go through a portal at BIA to find out whether the individual is on a name-based check system and have the criminal record before you put that child in the home. This could be in the middle of the night or at 2:00 a.m.

We also have the TAP Program, our tribal access program. The kiosk we put in allows tribes to automatically enter fingerprint information in order to quickly do a fingerprint check.

There are a lot of important issues beyond those kind of law enforcement issues we have talked about to make those communities safer.

Senator HOEVEN. Thank you.

Mr. Urbina, from the reservation side, do you see any concerns in terms of embracing use of background checks? Is this something the tribes are looking for, will embrace and use?

Mr. URBINA. Yes, sir. We are looking forward to that. We are part of the TAP Program being rolled out. We should have implementation in place for the tribe in the next few months. We are also looking to be a part of the Purpose Codex Program through the BIA. It is necessary for us.

We also get calls from the State folks looking to place tribal children on the reservation or in foster homes in the State. They can do those checks stateside but it is important for us to have that ability as well.

I can recall an incident where some children were placed in the home of a sex offender because we did not have these things in place. Right now, we have to wait a number of weeks before we get a fingerprint background check to see about those folks in the home. By that time they are already in the home for at least a month.

Senator HOEVEN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hoeven.

I want to thank all of the witnesses for being here today. I am very grateful that you took the time to visit with us and testify.

Members of the Committee may submit follow-up written questions for the record. The hearing record will remain open for two additional weeks.

I want to thank all of you for your time and your testimony.

The hearing is adjourned.

[Whereupon, at 3:44 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

Honorable Chairman and members of the Committee, thank you for the opportunity to provide testimony on two very important legislative efforts that will improve public safety in Indian Country. Nine years ago, the National Congress of American Indians passed a resolution at its Midyear conference in Anchorage, Alaska, and provided testimony to this Committee calling for Congress to redirect the law enforcement priorities of the Department of Justice on Indian reservations, and to empower tribal government law enforcement. This was followed by several years of hearings and legislative drafting in the Senate Committee on Indian Affairs. From that resolution, as well as a great deal of effort from many tribes and the leadership of this Committee, Congress enacted the Tribal Law and Order Act of 2010 (TLOA) and set the stage for expanded tribal jurisdiction under the Violence Against Women Act Reauthorization of 2013 (VAWA 2013). We recognize your commitment in introducing the legislation that is the subject of this hearing, and greatly appreciate your continuing efforts to build on those laws and improve public safety in tribal communities.

NCAI is the oldest and largest national organization representing American Indian and Alaska Native tribal governments in the United States. We are steadfastly dedicated to protecting the rights of tribal governments to achieve self-determination and self-sufficiency, and to the safety and security of all persons who reside or visit within Indian Country.

S. 2785, The Tribal Youth & Community Protection Act

We appreciate Senator Tester and Senator Franken's leadership in introducing the Tribal Youth and Community Protection Act, S. 2785. This legislation would amend the domestic violence criminal jurisdiction provision included as Section 904 of VAWA 2013, which established a framework for tribal prosecution of certain non-Indian domestic violence offenders . Since passage of VAWA 2013, NCAI has been providing technical assistance to the tribes who are implementing the law pursuant to a cooperative agreement with the DOJ. Through this work, we have witnessed the ways in which expanded tribal jurisdiction has transformed the criminal justice landscape in some tribal communities and also the ways in which it falls short. The lessons learned from implementation of VAWA 2013 are summarized in the attached "Special Domestic Violence Criminal Jurisdiction Pilot Project Report," which provides a comprehensive overview of the experience of the tribes implementing the new law during the pilot project period. While NCAI supports full reaffirmation of tribal authority on tribal lands, we welcome introduction of this bill, which would address some of the gaps in the existing law and make important strides toward restoring public safety and justice on tribal lands. We are particularly encouraged that this legislation recognizes that Native children are equally in need of the protections that were extended to Native women in VAWA 2013. We look forward to discussing this bill with tribes in more depth at our upcoming Midyear conference, and are pleased to share our preliminary thoughts about this important legislation.

Tribal communities continue to be plagued by the highest crime victimization rates in the country. A recent study by the National Institute of Justice found that over 80 percent of Native Americans will be a victim of violent crime in their lifetime. The study also found that 90 percent of these victims were victimized by a non-Indian perpetrator. [1] Sadly, Native children are particularly affected by this violence. Native children are 50 percent more likely to experience child abuse and sex-

[1] Rosay, André, Ph.D., *National Institute of Justice Research Report: Violence Against Indian and Alaska Native Women and Men 2010 Findings from the National Intimate Partner and Sexual Violence Survey,* p. 2–3 (May 2016) U.S. Dept. of Justice, Office of Justice Programs, available at: *https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.*

ual abuse than white children.[2] Rates of child maltreatment in certain states are even more alarming. According to data from the Department of Health & Human Services, Native children in Alaska experience maltreatment at a rate more than six and a half times the rate for white children.[3] In North Dakota, the rate of maltreatment for Native children is more than three times the rate for white children. Native children also experience extremely high rates of secondary victimization and exposure to violence. In 2013, Attorney General Holder appointed an Advisory Committee on American Indian and Alaska Native Children Exposed to Violence that held field hearings across the nation. In their final report the Committee concluded that service providers and policy makers should assume that all Native children have been exposed to violence and "the immediate and long term effects of this exposure to violence includes increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system. This chronic exposure to violence often leads to toxic stress reactions and severe trauma; which is compounded by historical trauma."[4]

Children who experience abuse and neglect are at higher risk for depression, suicidal thoughts, and suicide attempts. As this Committee knows, Indian youth have the highest rate of suicide among all ethnic groups in the U.S., and suicide is the second-leading cause of death (after accidental injury) for Native youth aged 15–24.[5] Due to exposure to violence, Native children experience post-traumatic stress disorder at a rate of 22%—the same levels as Iraq and Afghanistan war veterans and triple the rate of the rest of the population.[6]

One of the most important provisions of S. 2785 would reaffirm tribal jurisdiction over certain non-Indians who commit crimes against Native children in Indian Country. This is in line with one of the key recommendations of the AG's Advisory Committee who noted that "it is troubling that tribes have no criminal jurisdiction over non-Indians who commit heinous crimes of sexual and physical abuse of [American Indian and Alaska Native] children in Indian country," and called on Congress "to restore the inherent authority of AI/AN tribes to assert full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country including both child sexual abuse and child physical abuse."[7]

Although there are no statistics available on the number of non-Indians who abuse Native children on tribal lands, the Attorney General's Advisory Committee looked at available data and concluded that "it is clear from what we do know that it is a very substantial problem."[8] In drawing this conclusion, the AG's Advisory Committee relied on available statistics about the rates of non-Indian perpetrated violence against Native people aged 12 and older and national studies showing that men who batter their partners also abuse their children in more than half of the cases. This is consistent with the experience of the tribes who have implemented the criminal jurisdiction provision of VAWA 2013. The implementing tribes report that in most of their cases, Native children are present either as additional victims or witnesses. S. 2785 would untie the hands of tribal governments and allow them to protect Native children who are abused on tribal lands, regardless of the race of the perpetrator.

We cannot think of a single principled reason why Native children are less deserving of the protection that Congress extended to Native domestic violence victims in VAWA 2013, and we strongly support this provision of S. 2785. Those who suggest that Indian tribes are not ready for this responsibility or need more time to develop the capacity of their court systems leave Native children without the protection they desperately need. As with the SDVCJ provision, we recognize that not all tribes will chose to implement this expanded authority immediately. The experience of SDVCJ implementation over the past three years demonstrates that tribal governments take their responsibility to administer justice fairly for all involved seriously and will act with care and deliberation. Where tribes have the capacity and desire to exercise criminal jurisdiction over those individuals who commit violent crimes against Native children, federal law should not stand in the way.

S. 2785 would also reaffirm tribal criminal jurisdiction over drug offenses. The illegal manufacture, sale and use of illegal drugs on American Indian reservations

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[2] Children's Bureau, U.S. Department of Health and Human Services, Child Maltreatment 2011, 28 (2012).

[3] *http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf,* pg. 37.

[4] Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive (2014), pg. 6.

[5] SAMHSA, National Survey on Drug Use and Health, 2003.

[6] AG Advisory Committee, *supra,* note 12, at 38.

[7] *Id.*

[8] *Id.*

and in Alaska Native villages creates a dangerous environment with enormous costs for tribal communities. Many tribal communities are targeted by non-Indians as centers for distribution because of their geographic isolation and persistent poverty. This has a significant impact on overall health-care costs in tribal communities, where recovery treatment is largely unavailable, and access to primary care is limited. Drugs and alcohol abuse also are a contributing factor in far too many cases of domestic violence, sexual assault, and child abuse. As this legislation recognizes, Indian tribes need authority to protect themselves from those who bring drugs onto tribal lands.

S. 2785 would also address two a significant gaps in VAWA 2013. First, since tribal SDVCJ jurisdiction is limited to domestic violence, dating violence, and protection order violations, any other attendant crimes that occur fall outside the scope of the tribe's jurisdiction. The tribes that have implemented SDVCJ have reported cases, for example, where a domestic violence offender also committed a drug or alcohol offense or a property crime that the tribe was unable to charge. Tribes also lack jurisdiction to charge an offender for crimes that may occur within the context of the criminal justice process, like resisting arrest, assaulting an officer, witness tampering, juror intimidation, or obstruction of justice. This creates an obvious public safety concern. S. 2785's inclusion of "related crimes" would address this gap.

In addition, S. 2785 makes an important technical change to the definition of "domestic violence" that would clarify current confusion about the severity of violence that must occur for a tribe to have jurisdiction in the wake of the Supreme Court's decision in *U.S. v. Castleman*.[9] When *Castleman* was decided in March of 2014, it had an immediate impact on the tribal criminal charging decisions when evaluating misdemeanor arrests under SDVCJ authority. The Justices suggested in dicta in *Castleman* that the domestic violence crime in an SDVCJ case must involve actual "violence," which is not a defined term. As a result, some tribes have declined to prosecute certain offenses like emotional or financial abuse and harassment that would otherwise constitute "domestic violence" under tribal law, but may not be considered a "violent crime." S. 2785 would make clear that tribes who are exercising SDVCJ are able to reach the full range of crimes that may occur within the domestic violence context.

We appreciate Senator Franken and Senator Tester's effort to advance legislation that will fill some of the gaps in jurisdiction that continue to leave women and children without adequate protection on tribal lands. As the Committee continues its work, we ask you to also consider some of the other gaps in jurisdiction that implementation of SDVCJ have brought to light:

- Tribes have no criminal jurisdiction if a non-Indian commits an otherwise qualifying crime on tribal lands against an Indian woman from another tribe who is visiting the reservation. This is true even if the crime involved the violation of a protection order that was validly issued by the tribe.
- Tribes have no criminal jurisdiction if an Indian person is raped on tribal lands by a non- Indian, even if the offender lives on tribal lands and is employed by the tribe.
- Tribes have no criminal jurisdiction if an Indian person is stalked on tribal lands by a non-Indian, even if the offender lives on tribal lands and is employed by the tribe.
- Tribes have no criminal jurisdiction if an Indian person is trafficked on tribal lands by a non-Indian, even if the offender lives on tribal lands and is employed by the tribe.
- Tribes have no criminal jurisdiction if an Indian elder is assaulted by their non-Indian family member on tribal lands, even if the offender lives on tribal lands and is employed by the tribe.

S. 2920, Tribal Law and Order Act Reauthorization

We also extend great appreciation to Senator Barrasso for his leadership in introducing the reauthorization of the TLOA. Since 2010, NCAI has been deeply involved in the implementation of this critically important law. The TLOA is a comprehensive law designed to improve numerous facets of the public safety system in Indian Country: to increase coordination and communication among federal, state, tribal, and local law enforcement agencies; empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian Country; reduce the prevalence of violent crime in Indian Country, combat sexual and domestic violence; prevent drug trafficking and reduce rates of alcohol

[9] *U.S. v. Castleman,* 134 S. Ct. 1405 (2014)

and drug addiction in Indian Country; and increase and standardize the collection of criminal data to and the sharing of criminal history information among federal, state, tribal, and local officials responsible for responding to and investigating crimes in Indian Country. The TLOA authorizes expanded sentencing authority for tribal justice systems, clarifies jurisdiction in P.L. 280 states, and requires enhanced information sharing. In addition, the law authorizes programs for alcohol and substance abuse and programs for at-risk youth.

However, even when we began working on the law in 2007, tribal leaders knew that it wouldn't resolve every issue. This is why we so greatly appreciate a reauthorization that continues to address the problems and concerns regarding public safety on tribal lands. The introduced legislation includes a number of important provisions, particularly for juvenile justice, and serves as a strong foundation for continued work with tribal governments. All authorized funding under the TLOA expired in 2015 and it is important that Congress reauthorize this funding. Tribal justice systems also have more than five years of experience with implementing the law, and that implementation has led to proposals to continue to improve the law. In the following two sections we include comments on the introduced bill, as well as additional suggestions.

Section 101: Bureau of Indian Affairs Law Enforcement

Under this section, if the Director of the BIA Office of Justice Services fails to submit two reports required by the original Act in 2010, administrative funds would be withheld so long as the withholding does not adversely impact the capacity to provide law enforcement services in Indian Communities. The two missing reports are (1) annual reports to the appropriations committees on unmet tribal law enforcement needs, and (2) annual reports summarizing technical assistance and training provided to tribal law enforcement and corrections agencies that operate pursuant to self-determination contracts or self-governance compacts.

NCAI strongly supports the effort for completion of these vital reports. In particular, we need the annual report on unmet law enforcement needs in order to justify the deep need for increases in public safety funding. We have some concerns about withholding funds from the BIA as a mechanism to compel completion, because it seems likely that this will result in diminution of services. We urge communication with the Secretary of Interior, and that pressure be placed on the overall administrative budget. We believe this will lead more quickly to the desired result.

Section 102: Integration and Coordination of Programs

We appreciate the proposal to require consultation with tribes regarding the integration of diverse funding for law enforcement, public safety, and substance abuse and mental health programs. However, the DOJ has been under a similar consultation requirement in the Commerce, Justice, State appropriations reports for at least the last four funding cycles, and no consultation has been initiated. Instead, we encourage the Committee to move forward with legislation to accomplish this goal of funding integration and coordination. At the end of this testimony we attach a proposal for legislative language that would accomplish this goal, and we encourage the Committee to consult directly with tribal governments about it.

Currently, base funding for law enforcement is provided through the BIA and is entirely inadequate. Additional funding is provided through the Departments of Justice and Health and Human Services under a series of grant programs that have the typical problems of competitive grant programs. Within the DOJ these funds are further divided into dozens of competitive grants for specific purposes. Moreover funding for prevention, rehabilitation, and treatment programs, which are key components of any community's approach to reducing crime, are located at IHS, SAMHSA, and elsewhere withing the DHHS. In order to obtain this funding, tribes often must compete against each other under the priorities and guidelines set by the administering agency. These proposals are then peer reviewed by individuals who may or may not have experience with Indian tribes and tribal justice systems. In the end, the tribes that have the financial and human resources to employ experienced grant writers end up receiving funding, while the underresourced tribes may be left without. Moreover, tribes cannot count on funding continuing beyond the current grant period, and Indian Country has countless stories of successful programs disappearing at the end of a two- or three-year grant cycle.

This system requires a large grant writing capability and a good bit of creativity in order to access the funds. Millions could easily be spent providing the technical assistance tribes need just to navigate this overly complex system. Under this ad hoc system, tribal law enforcement will receive vehicles, but no maintenance. They will get a detention facility, but no staff. They will receive radios, but no central dispatch. The system doesn't make sense. We believe that tribal public safety fund-

ing should be streamlined into a single funding vehicle that would be negotiated on an annual basis and made more flexible to meet local needs.

We hope to develop a streamlined and consistent funding mechanism supported by tribes that would be acceptable to Congress. A proposal for statutory text that could be the basis for a discussion among tribal stakeholders and Congress is included as an appendix.

Section 103: Data Sharing with Indian Tribes

We strongly support these provisions to improve criminal database information sharing with tribal governments. In addition, we urge that the legislation address a specific problem with access to background checks for non-law enforcement purposes.

28 USC 534(d) authorizes release of criminal history information to tribal law enforcement agencies, but doesn't allow release of criminal information to other tribal agencies for important purposes, like child welfare background checks on foster parents, or teachers or childcare workers. The DOJ interprets the appropriations rider language from P.L. 92–544 as a permanent statute that prevents sharing this information with tribal governments. In their view, criminal history for licensing of foster parents can only be shared " if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing," We suggest to add a subsection to 534(d): "If authorized by tribal law and approved by the Attorney General, the Attorney General shall also permit access to officials of tribal governments for non-criminal justice, non-law enforcement employment and licensing purposes."

Section 104: Judicial Administration in Indian Country

This section extends the Bureau of Prisons Tribal Prisoner Program for seven years. This pilot project has already been successful as a temporary program, and then suddenly shut down. We urge the Committee to go further, and permanently authorize the program.

Permanently extending the TLOA Federal Bureau of Prisons Pilot Program is an essential part of overcoming the many challenges facing tribal criminal justice agencies. The Pilot Program, which expired on November 24, 2014, gives tribes the option to send highly violent offenders to federal corrections facilities. Many tribes do not have the resources or personnel to adequately and safely house these types of offenders. The federal system also offers greater access to treatment, rehabilitation, and reentry programs. The Bureau of Prisons also strongly supports extending the program.

When the BOP Pilot Project was authorized under the TLOA, NCAI believed that the program would be used sparingly for only the most violent offenders. However, some in Congress were concerned about costs, and imposed the limitations of only four years and up to 100 detainees. But in that short time the program had only begun to work. Tribal governments must develop new criminal codes and procedures and train staff to use the program, and generally take a steady approach to implementing change. Two tribes transferred a total of four prisoners to federal prisons, so it is clear that the floodgates are not a problem.

We urge that the program is made permanent and tribes continue to have the opportunity to exercise this option. Tribal governments are increasingly seeking to enhance their sentencing authority under the TLOA. Providing tribes this flexibility to house violent offenders will allow tribal governments to concentrate their resources on other pressing criminal justice and public safety needs. The Federal Bureau of Prisons has echoed all of these recommendations in its report to Congress required by the TLOA.

NCAI also supports the provision to require the Director of BIA, Director of Bureau of Prisons, Director of IHS, and the Administrator of the Substance Abuse and Mental Health Services Administration to consult with Indian Tribes regarding juvenile justice and incarceration. For decades tribal leaders have encouraged a more proactive and humane approach to juvenile justice that is focused on prevention and mentoring and rehabilitation rather than criminalization. Tribal leaders strongly believe that we owe it to our youth and future generations to focus resources on our young people right at the beginning, rather than waiting for them to go astray and then begin the cycle of institutionalization and incarceration that has proven to be so ineffective.

Section 105: Federal Notice

This section requires the Office of the United States Attorney's that convict any enrolled member of a federally recognized tribe shall provide notice of that conviction to the appropriate tribe. NCAI supports this provision, but also encourages that the Bureau of Prisons be required to provide notice when any tribal member is re-

leased from federal prison. This is the time when the community needs to be aware, and services need to be provided to released inmates.

Section 106: Detention Facilities

Under these provisions, a tribe may request to use any available detention funding from a contract or compact for appropriate alternatives to detention. NCAI supports this provision but urges removal of the requirement that the tribe, Secretary, and Director of the Office Justice Services mutually agree. The requirement of agreement will add significant costs and delay and will undermine the intention. Tribal governments must be trusted to implement programs for alternatives to incarceration, just as tribal courts are trusted to make decisions regarding guilt or innocence.

Section 108: Amendments to the Indian Civil Rights Act

The right to a jury trial would be amended to include only those crimes where there is a possibility of imprisonment of 180 days or more. This would match the federal and state constitutional requirements, and relieve tribal courts of the obligation to provide a jury trial for misdemeanors. Tribal courts suffer from a significant lack of resources. On some reservations, defendants have learned to act collectively and request a jury trial for every misdemeanor, and have succeeded in forcing the dismissal of many cases because the tribal court cannot afford the time or money for a jury trial for every petty crime. This provision would bring the Indian Civil Rights Act jury requirements into line with the federal constitutional rule.

Section 109: Special Assistant Public Defender Liaisons

NCAI supports the purpose of this section to provide greater coordination on indigent defense in Indian Country. However, the truly great need is for funding for indigent defense services. As background, the Indian Civil Rights Act of 1968 requires that defendants in tribal courts have the right to counsel, but at their own expense. Our testimony suggests a mechanism for Congress to finally provide funding for indigent defense in Indian Country, which would come at no additional costs to the federal budget.

First, tribes have strongly supported the provision of counsel to indigent defendants in tribal courts for many years, but have generally lacked adequate funding. Some tribes with greater resources provide indigent defense from their own funds, and have done so for many years. Tribes sought and welcomed the provision in the TLOA that although Legal Services Corporation grantees generally are prohibited from using federal funds to provide assistance in criminal proceedings, Congress specifically exempted tribal court proceedings from that ban. See 42 U.S.C.§ 2996f(b)(2). As a result, indigent defendants often can obtain counsel. In addition, tribes sought the provision in the Indian Tribal Justice Act that seeks to enhance tribal courts' capacity to provide indigent defense counsel. 25 U.S.C. § 3613(b). Tribes have also repeatedly urged Congress to appropriate the funds necessary to support indigent defense throughout Indian Country, as one component of support for tribal justice systems. See, NCAI Resolution #ABQ- 10–116, and NCAI Resolution SD–02–015.

Second, under the TLOA and VAWA 2013, tribes can exercise greater criminal authority and better protect their communities with extended sentencing authority and jurisdiction over non- Indian domestic violence offenders, but only if they provide indigent defense. Thus, the lack of resources for indigent defense is a barrier to greater public safety on tribal lands.

Third, at this moment the case of *U.S. v. Bryant* is pending before the Supreme Court. Mr. Bryant is challenging his conviction under 18 USC 117, Domestic Assault by an Habitual Offender, because he was not provided with indigent counsel in the tribal court convictions that serve as the predicate crimes. In passing Section 117, Congress acted with the goal of "safeguarding the lives of Indian women." Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109–162, § 901, 119 Stat. 2960, 3077–78 (2006). NCAI has urged the Supreme Court to uphold Mr. Bryant's conviction, but this case once again sheds light on the direct relationship between public safety and the provision of indigent defense in tribal courts. We believe that this can be accomplished, and suggest the authorization of a set-aside of 3 percent of Defender Services program in the Financial Services and General Government (FSGG) Appropriations bill. This account funds the operations of the federal public defender and community defender organizations, and compensation, reimbursements, and expenses of private practice panel attorneys appointed by federal courts to serve as defense counsel to indigent individuals. The FY2016 request is $1,057.6 million, an increase of 4.0 percent over the FY2015 enacted level. A 3 percent set-aside would result in approximately $30 million annually for tribal court indigent defense. If combined with the 4 percent increase, the set-aside would result

in no diminution of funding for the Federal Public Defenders, and would establish a greatly needed source of funding for indigent defense in tribal courts.

Section 110: Criminal Trespass on Indian Land

Under Section 1165 of Title 18, the misdemeanor offense of hunting, trapping, or fishing would be expanded to include felony offenses for violations of a tribal exclusion order. NCAI greatly appreciates this section as it would address a great source of harm on tribal lands. Indian reservations are experiencing increasing problems with serious criminal trespass and a lack of deterrence. Tribes are unable to address problems with sexual assault and stalking offenders who continue to return to the reservation to harass victims. Drug dealers are a perennial problem. Violating a tribal protection order or exclusionary order should be subject to more serious federal penalties. Tribes also have difficulties with former lease tenants who overstay agricultural and residential leases for many years and refuse to leave or pay rent. Tribes are also experiencing problems with timber theft, repeated poaching, illegal mining and illegal marijuana operations, serious crimes that are infrequently enforced because there is no relevant criminal statute. There are also repeat offenders who dump hazardous waste and serious property crimes and are warned again and again but refuse to respect tribal property rights.

Because of this, we would urge two amendments to this section to set an appropriate scale of criminal penalties for increasingly severe criminal trespass crimes. First, we suggest that an offense should be added for persons who commit serious property crimes on tribal lands with fines and penalties of up to $15,000 and three years imprisonment or both. We suggest consultation with the U.S. Attorneys to determine an appropriate range of penalties that will create deterrence for those who cause serious threats to persons or damage to property.

Secondly, we urge that the provision should include violation of tribal protection orders as well as exclusionary orders. Protection orders are often issued against persons who commit crimes of domestic violence, sexual assault or stalking. There is an existing crime at 18 U.S. Code § 2262—Interstate violation of protection order. However, this crime is rarely enforced because it requires proof beyond a reasonable doubt of intent: that the person traveled into Indian country for the specific purpose of violating a protection order. This is very difficult to prove, so even if a perpetrator traveled into Indian country and beat up his former girlfriend in violation of a protection order, it is difficult to show that he had this specific intent when he set out on his journey. Instead, we propose that the provisions for exclusionary orders would also include protection orders. We also suggest consultation with the U.S. Attorneys to determine an appropriate range of penalties that will create deterrence. The following is a proposal for statutory text:

18 U.S. Code § 1165—Hunting, trapping, or fishing on Indian land (to be retitled "Criminal Trespass on Indian Lands," the first section retained, and renumbered subsection (a) with additional subsections for escalating penalties for severe offenses).

b) Repeated trespassing offenses and persons who commit crimes against persons or property on tribal lands shall be subject to fines and penalties of up to $15,000 and three years imprisonment or both.

c) VIOLATION OF TRIBAL PROTECTION ORDER OR TRIBAL EXCLUSION ORDER—

(1) IN GENERAL.-It shall be unlawful for any person to knowingly violate the terms of a tribal protection order or exclusion order that was issued by a court or other tribunal of an Indian tribe in accordance with the requirements of paragraph (4).

(2) PENALTY.-Any person who violates paragraph (1) shall be guilty of a crime and fined up to $10,000, imprisoned for up to 5 years, or both.

(3) DEFINED TERMS.-For the purposes of this subsection, the term-

(A) "protection order" includes any order which

(i) satisfies the definitions set forth in 18 USC 2266(5);

(ii) satisfies the jurisdiction and notice provisions set forth in 18 USC 2265(b); and

(B) "exclusion order" means an order issued in a proceeding by a court or other tribunal of an Indian tribe which temporarily or permanently excludes a person from tribal land for violation of the criminal laws of the tribal government.

(4) REQUIREMENTS FOR ORDERS.-

(A) PROTECTION ORDERS—A violation of a protection order shall constitute an offense under paragraph (1) if the order includes a statement that

violation of the order will result in criminal prosecution under Federal law and the imposition of a fine, imprisonment, or both; and

(B) EXCLUSION ORDERS—A violation of an exclusion order shall constitute an offense under paragraph (1) if the respondent was served with or had actual notice of—

(i) a complaint setting forth a plain statement of facts which, if true, would provide the basis for the issuance of an exclusion order against the respondent;

(ii) the date, time and place for a hearing on the complaint; and

(iii) a statement informing the respondent that if he or she fails to appear at the hearing a order may issue, the violation of which may result in criminal prosecution under Federal law and the imposition of a fine, imprisonment, or both;

(iv) a hearing on the complaint was held on the record at which the respondent was provided an opportunity to be heard and present testimony of witnesses and other evidence as to why the order should not issue;

(v) the order temporarily or permanently excludes the respondent from Indian land under the jurisdiction of that Indian tribe;

(viii) the order includes a statement that a violation of the order may result in criminal prosecution under Federal law and the imposition of a fine, imprisonment, or both; and

(ix) the respondent was served with or had actual notice of the order.

(5) NO LIMITATION ON TRIBAL AUTHORITY; EFFECT OF SUBSECTION.—Nothing in this subsection limits or otherwise affects the application of the Violence Against Women Act, (18 U.S.C. 2261–2266).

Section 201: Federal Jurisdiction Over Indian Juveniles

The words "Indian Tribe" and "tribal" are added to Section 5032 of Title 18 of the U.S. Code, so that federal offenses could be referred to tribal court. NCAI supports this provision, but also recognizes that there are a relatively small number of serious felonies committed by youth that could result in referral for federal prosecution.

Section 203: Justice for Indian Youth

This section improves justice for Indian youth under the Juvenile Justice and Delinquency Prevention Act (JJDPA) by requiring notice to tribes when a member youth enters a state or local justice system, requiring tribal participation on advisory groups, coordinating services for tribal youth, and including tribal traditional or cultural programs which reduce recidivism as authorized activities for federal funding.

NCAI strongly supports these provisions, and particularly notice to tribes when a youth enters state or local justice system. In many cases, Indian tribes have developed programs and services for Native youth that are more culturally appropriate, and will be welcomed by county court judges as alternatives to incarceration. However, these programs and remedies cannot work unless the tribal government has notice and is able to communicate with the local court system.

Although the above amendments and additions to the Reauthorization of TLOA set a strong foundation towards improving public safety in Indian Country, we would still like to request consideration that the following provisions be added to the reauthorization.

1) *Annual declination reporting.* The TLOA was passed by Congress against a backdrop of criticism that far too many Indian Country crimes were never adequately investigated, and prosecution was too frequently declined. For many years, tribal leaders had raised the concern that the U.S. Attorneys did not consider Indian Country crimes a priority and declined to prosecute an extraordinary percentage of cases. A Denver Post investigative reporting series from November of 2007 raised these concerns:

- Between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime.
- Investigative resources spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave sexual assault victims vulnerable and suspects free to commit other crimes.
- Many low-priority felonies never make it to federal prosecutors in the first place. Of the nearly 5,900 aggravated assaults reported on reservations in fiscal year 2006, only 558 were referred to federal prosecutors, who declined to prosecute 320 of them. Of more than 1,000 arson complaints reported last year on

Indian reservations, 24 were referred to U.S. Attorneys, who declined to prosecute 18 of them.

- From top to bottom, the Department of Justice's commitment to crime in Indian Country was questionable. Former United States Attorney for the Western District of Michigan Margaret Chiara was quoted saying, "I've had (assistant U.S. attorneys) look right at me and say, 'I did not sign up for this'. . . .They want to do big drug cases, white-collar crime and conspiracy." Comments from former United States Attorney for Arizona, Paul Charlton indicate that this attitude came from the top. Charlton has related a story where a high-level Department of Justice official asked him why he was prosecuting a doublemurder in Indian Country in the first place. [10]

This dire and long-term institutional dysfunction required a response. Therefore a key feature of the TLOA requires both the FBI and the U.S. Attorneys to submit annual reports to Congress compiling information regarding decisions not to refer investigated cases, and all declinations to prosecute in Indian Country, including the types of crimes alleged and the reasons for declination. The law also requires coordination with tribal law enforcement if a federal law enforcement official terminates an investigation or declines to prosecute an alleged violation of Federal criminal law in Indian country. The annual reports to Congress are to be organized in the aggregate; and for the FBI, by Field Division; and for U.S. Attorneys, by judicial district; and including any relevant explanatory statements.

In general, we believe that the annual reports have led to an increased awareness of responding to Indian Country crime within the DOJ. However, there are a number of aspects of the reporting system that should be improved. The first is straightforward. The TLOA requires annual declination reporting on a calendar year, but the existing reporting system at the DOJ is on a fiscal year basis. Our understanding is that this creates unnecessary difficulty. We recommend consultation with the U.S. Attorneys and the EOUSA and resolve this difference to improve reporting.

Secondly, and more importantly, we recommend additional consultation with tribal leaders and prosecutors regarding specific improvements to the declination reporting system. For example, tribal prosecutors routinely request more case-specific and tribe-specific sharing of information between federal and tribal prosecutors so that they can use the data to allocate resources and prosecution efforts. In addition, the annual reports showed prosecution being declined in 50 to 60 percent of reported crimes due to "insufficient evidence." Although Congress has required the "reasons" for a declination, "insufficient evidence" is so broad as to provide little analytic value. Tribal leaders frequently describe cases with little or no investigation, or that occur many months after the crime. It is impossible to tell from the declination reports whether more robust investigations would have resulted in additional prosecutions.

Another example is that many referred crimes are declined because they "are not a federal crime." It is impossible to tell from the declination reports how often this designation is used for crimes such as theft, destruction of property; domestic violence and low-level gang activity that commonly involves both Indian and non-Indian defendants. We have also heard reports that many of these crimes are never compiled into the reports. In fact, these are federal crimes in Indian country under the Assimilative Crimes Act, 18 U.S.C. § 13, which makes state laws applicable to conduct occurring in federal territory. Despite this, the "no federal offense evident" category is used in a discretionary and informal manner. However, the absence of tribal jurisdiction to deal effectively with non-Indians in these cases creates a perception that the likelihood of being caught and punished is low, and encourages a disregard for tribal law enforcement.

Third, we urge greater engagement with the Federal Bureau of Investigations on its role in investigating Indian Country crimes. On May 30, 2013 the first report of statistics gathered under the Act was released by the DOJ. It covered 2011 and 2012 and showed a 54 percent increase in prosecutions in 2012 as compared to 2008. However substantial problems remained with prosecution being declined in 60 percent of reported crimes due to "insufficient evidence," which tribal leaders attribute, at least in substantial part, to inadequate and slow investigations.

Prior to the 1980's, the Bureau of Indian Affairs law enforcement had a significant budget for investigations, and they had their own investigators. In the late

[10] Mike Riley, *"Principles and Politics Collide: Some U.S. Attorneys who emphasize fighting crime on Indian lands have seen themselves fall out of favor in D.C.,"* DENVER POST, Nov. 14, 2007.

1980's responsibility for investigations in Indian country was transferred to the FBI, as well as the financial appropriations for that responsibility. We recall that approximately 90 million was transferred out of the Interior appropriations and into the FBI appropriations. At that time promises were made that the FBI would do far more professional work with investigations and it would result in greater public safety on Indian reservations.

However, over time the FBI leadership has lost sight of this commitment, diminishing its Indian country responsibilities and staffing, while keeping all the funding. In 1993, the FBI entered a Memorandum of Understanding with the BIA, stating that investigations were a "shared" responsibility, and that "determining which law enforcement agency, federal or tribal, has primary responsibility for investigation of a particular crime may depend on the nature of the crime committed and any applicable local guidelines, which vary across jurisdictions." A significant amount of resources were reprogrammed after 9/11, and smaller numbers of FBI agents have trickled away from Indian country on a continuous basis in almost every year. In May of 2008, FBI Director Mueller testified at a hearing of the House Judiciary Committee. In response to a question regarding the FBI's role in and commitment to fighting crime in Indian Country, he stated his hope was that other agencies would grow to fill that need and that the FBI would no longer have to provide services in Indian country. More recently, in the FY2011 budget, 20 million was transferred from the BIA law enforcement budget to the FBI to improve resources for investigations. Then, in the most recent President's budget, it initially included a proposed cut of seventeen FBI agents in Indian country. NCAI protested and it was quickly corrected, but the proposal demonstrates the lack of awareness among FBI leadership about their commitment to Indian country law enforcement. Meanwhile the declination data shows most federal declinations to prosecute are from insufficient evidence. While FBI agents are in short supply in Indian Country, the funds reprogrammed out of the BIA remain steadily in the FBI budget.

2) *Tribal Criminal Code Development Program, with focus on Juvenile Justice.* NCAI encourages the authorization of $10 million annually for a program to update tribal criminal codes and justice systems. The Department of Interior recently published a new model tribal juvenile justice code. The Model Indian Juvenile Code 2015 Revision reflects a core commitment to providing tribes with juvenile statutes assuring the fundamental rights of children and their parents, guardians and custodians, and allowing opportunities for restorative diversions at each stage of the juvenile justice process. Too many juvenile codes are nearly indistinguishable from adult criminal codes and provide too few diversions to rehabilitative services, and rely too heavily on detention. Many judges have voiced frustration with the lack of a comprehensive and flexible code which encourages the development of alternatives to standard juvenile delinquency, truancy, and child in-need-ofservices systems.

However, in general tribal governments lack the funding to go through the process of updating criminal codes. Most tribal criminal codes were developed by the BIA in the 1960's and 70's, and are growing painfully outdated. Tribal criminal codes need to be updated in many other areas, including domestic violence, sexual assault, protection of children, and a raft of procedural improvements needed to protect victims, improve rehabilitation and reduce recidivism. There have been many advances in criminal justice that need to be integrated into tribal codes, and that will not happen without some level of funding for code update projects.

3) *Access to Firearms for Tribal Police*—NCAI Resolution ABQ–10–029—NCAI supports legislation to amend the National Firearms Act of 1934 and the Gun Control Act of 1968 so that Tribal Police Departments are recognized as governmental entities similar to agencies of the United States government, or of a state government, or a political subdivision thereof without the requirement of special law enforcement commissions so that Tribal Police Departments are exempt from payment of the transfer tax for NFA firearms, are eligible to receive firearms interstate, and can possess a machine gun manufactured after May 18, 1986.

4) *Alaska Native Villages*—The legislation in its current form does not address the unique law enforcement issues in Alaska Native communities. Alaskan tribal lands are not considered "Indian country" after the Supreme Court's decision in *Alaska v. Native Village of Venetie.* Tribal communities in Alaska experience high rates of domestic violence and sexual assault and significant problems with substance abuse. Most of the native communities are only accessible by plane or boat, and are completely dependent on state law enforcement. The Vil-

lage Public Safety Officer program has had its budget slashed by the state, and many tribal communities in Alaska are terribly underserved by state police and other services. We know that the Committee is aware of these problems and would urge the Committee to reach out to Alaska tribal leaders to develop ways to improve law enforcement in Alaska. Our primary recommendations are that the federal government provide direct funding for rural law enforcement in Alaska, to strengthen victims services, to support the land to trust process in Alaska, to strengthen tribal courts, and that tribal communities in Alaska be given greater control over alcohol and substance abuse policies.

5) *Eliminate Requirement of "Indian" Status for Purpose of Major Crimes Act*— In cases such as *U.S. v. Zepeda,* defendants have repeatedly challenged their status as an "Indian" under the Major Crimes Act. However, given that 1152 covers non-Indian crimes, and 1153 covers Indian crimes, the provisions could be amended in a manner so that Indian status would be irrelevant for most crimes. Major crimes on tribal land are subject to essentially identical federal criminal prohibitions no matter the status of the defendant. The endless litigation over these common law definitions of Indian also pose a continuing threat to the political status of tribal citizens and threaten precedent such as *Morton v. Mancari* and *U.S. v. Antelope.* The following is an initial proposal for replacement language for 1153 that would eliminate the requirement of Indian status.

18 U.S. Code § 1153—Major offenses committed within Indian country

(a) Any person who commits against the person or property of another person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to federal law and penalties within the jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Conclusion

NCAI greatly appreciates the work of the Senators and the Committee on this important legislation. This is the stage in the process where we must listen to tribal leaders and other public safety professionals and take advantage of the insights they can provide. The proposed legislation was introduced recently so we will need time for response. In particular, we have found that the best information often comes from people who work in the criminal justice system—tribal police officers, tribal prosecutors, tribal judges and the like. I would encourage the Committee to make a special effort to reach out for their views on how the legislation can be strengthened. We urge continuing dialogue with tribal leaders on the proposals in this testimony, and those received from all tribal governments.

Proposal to Integrate and Coordinate Public Safety and Justice System Funding Intended for the purpose of providing concepts for consultation with tribal governments

Section 1. DEFINITIONS.

The following definitions apply:

(1) Indian tribe. The terms "Indian tribe" and "tribe" shall have the meaning given the term "Indian tribe" in section 4(e) of the Indian Self-Determination and Education Assistance Act.

(2) Indian. The term "Indian" shall have the meaning given such term in section 4(d) of the Indian Self-Determination and Education Assistance Act.

(3) Secretary. Except where otherwise provided, the term "Secretary" means the Secretary of the Interior.

Section 2. INTEGRATION OF SERVICES AUTHORIZED.

The Secretary of the Interior, in cooperation with the Attorney General and the Secretary of Health and Human Services shall, upon the receipt of a plan acceptable to the Secretary of the Interior submitted by an Indian tribal government, authorize the tribal government to coordinate, in accordance with such plan, its federally funded law enforcement, public safety, justice systems, and substance abuse and mental health programs in a manner that integrates the program services involved

into a single, coordinated, comprehensive program and reduces administrative costs by consolidating administrative functions.

Section 3. PROGRAMS AFFECTED.

The programs that may be integrated in a demonstration project under any such plan shall include any program under which an Indian tribe is eligible for receipt of funds under a statutory or administrative formula for the purposes of funded law enforcement, public safety, justice systems and substance abuse and mental health programs.

Section 4. PLAN REQUIREMENTS.

For a plan to be acceptable pursuant to section 4, it shall -

(1) identify the programs to be integrated;
(2) be consistent with the purposes of this Act authorizing the services to be integrated in a demonstration project;
(3) describe a comprehensive strategy which identifies the full range of law enforcement, public safety, justice systems and substance abuse and mental health program needs;
(4) describe the way in which services are to be integrated and delivered and the results expected from the plan;
(5) identify the projected expenditures under the plan in a single budget;
(6) identify the agency or agencies of the tribal government to be involved in the delivery of the services integrated under the plan;
(7) identify any statutory provisions, regulations, policies, or procedures that the tribal government believes need to be waived in order to implement its plan; and
(8) be approved by the governing body of the affected tribe.

Section 5. PLAN REVIEW.

Upon receipt of the plan from a tribal government, the Secretary of the Interior shall consult with the Secretary of each Federal department providing funds to be used to implement the plan, and with the tribal government submitting the plan. The parties so consulting shall identify any waivers of statutory requirements or of Federal departmental regulations, policies, or procedures necessary to enable the tribal government to implement its plan. Notwithstanding any other provision of law, the Secretary of the affected department shall have the authority to waive any regulation, policy, or procedure promulgated by that department that has been so identified by such tribal government or department, unless the Secretary of the affected department determines that such a waiver is inconsistent with the purposes of this Act or those provisions of the statute from which the program involved derives its authority which are specifically applicable to Indian programs.

SEC. 6. PLAN APPROVAL.

Within 90 days after the receipt of a tribal government's plan by the Secretary, the Secretary shall inform the tribal government, in writing, of the Secretary's approval or disapproval of the plan. If the plan is disapproved, the tribal government shall be informed, in writing, of the reasons for the disapproval and shall be given an opportunity to amend its plan or to petition the Secretary to reconsider such disapproval.

SEC. 7. FEDERAL RESPONSIBILITIES.

(a) Responsibilities of the Department of the Interior. Within 180 days following the date of enactment of this Act, the Secretary of the Interior, Attorney General, and the Secretary of Health and Human Services and the Secretary of Education shall enter into an interdepartmental memorandum of agreement providing for the implementation of the demonstration projects authorized under this Act. The lead agency for a demonstration program under this Act shall be the Bureau of Indian Affairs, Department of the Interior. The responsibilities of the lead agency shall include—

(1) the use of a single report format related to the plan for the individual project which shall be used by a tribal government to report on the activities undertaken under the project;
(2) the use of a single report format related to the projected expenditures for the individual project which shall be used by a tribal government to report on all project expenditures;
(3) the development of a single system of Federal oversight for the project, which shall be implemented by the lead agency; and
(4) the provision of technical assistance to a tribal government appropriate to the project, except that a tribal government shall have the authority to accept or reject the plan for providing such technical assistance and the technical assistance provider.

(b) Report Requirements. The single report format shall be developed by the Secretary, consistent with the requirements of this Act. Such report format, together with records maintained on the consolidated program at the tribal level shall contain such information as will allow a determination that the tribe has complied with the requirements incorporated in its approved plan and will provide assurances to each Secretary that the tribe has complied with all directly applicable statutory requirements and with those directly applicable regulatory requirements which have not been waived.

SEC. 8. NO REDUCTION IN AMOUNTS.

In no case shall the amount of Federal funds available to a tribal government involved in any demonstration project be reduced as a result of the enactment of this Act.

SEC. 9. INTERAGENCY FUND TRANSFERS AUTHORIZED.

The Secretary of the Interior, Attorney General, and Secretary of Health and Human Services, as appropriate, are authorized to take such action as may be necessary to provide for an interagency transfer of funds otherwise available to a tribal government in order to further the purposes of this Act.

SEC. 10. ADMINISTRATION OF FUNDS AND OVERAGE.

(a) Administration of Funds.—

(1) In general. Program funds shall be administered in such a manner as to allow for a determination that funds from specific programs (or an amount equal to the amount attracted from each program) are spent on allowable activities authorized under such program.

(2) Separate records not required. Nothing in this section shall be construed as requiring thetribe to maintain separate records tracing any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs.

(b) Overage. All administrative costs may be commingled and participating Indian tribes shall be entitled to the full amount of such costs (under each program or department's regulations), and no overage shall be counted for Federal audit purposes, provided that the overage is used for the purposes provided for under this Act.

SEC. 11. FISCAL ACCOUNTABILITY.

Nothing in this Act shall be construed so as to interfere with the ability of the Secretary or the lead agency to fulfill the responsibilities for the safeguarding of Federal funds pursuant to the Single Audit Act of 1984.

SEC. 12. REPORT ON STATUTORY OBSTACLES TO PROGRAM INTEGRATION.

(a) Preliminary Report. Not later than two years after the date of the enactment of this Act, the Secretary shall submit a preliminary report to the Select Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives on the status of the implementation of the demonstration program authorized under this Act.

(b) Final Report. Not later than five years after the date of the enactment of this Act, the Secretary shall submit a report to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources on the results of the implementation of the demonstration program authorized under this Act. Such report shall identify statutory barriers to the ability of tribal governments to integrate more effectively their services in a manner consistent with the purposes of this Act.

SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT—
OCTOBER 29, 2015

"The first responsibility of any government, tribal or otherwise, is the safety and protection of its people, for there can be no security or freedom for all, if there is insecurity and fear for any of us. Pascua Yaqui tribal officials no longer have to simply stand by and watch their women be victimized with no recourse."

— The Honorable Peter Yucupicio Chairman, Pascua Yaqui Tribe of Arizona

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Introduction

On March 7, 2013, President Obama signed the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) into law.[1] For the first time since the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians in *Oliphant v. Suquamish Tribe* (1978),[2] VAWA 2013 recognized and reaffirmed the inherent sovereign authority of Indian tribes to exercise criminal jurisdiction over certain non-Indians who violate protection orders or commit dating violence or domestic violence against Indian victims on tribal lands.[3] Known as Special Domestic Violence Criminal Jurisdiction (SDVCJ), this limited tribal criminal jurisdiction over non-Indians has fundamentally changed the landscape of tribal criminal jurisdiction in the modern era. Communities currently exercising SDVCJ have increased safety and justice for victims who had too often slipped through the cracks.

Although the law did not take general effect until March 7, 2015, VAWA 2013 created a "Pilot Project" that enabled Indian tribes who received prior approval from the United States Department of Justice (DOJ) to exercise SDVCJ on an accelerated basis.[4] After consultation with tribal governments, DOJ established a process for interested tribes to submit applications demonstrating that the tribe was in compliance with the federal law and afforded adequate due process to non-Indian defendants.[5] DOJ approved three tribes—the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon, the Pascua Yaqui Tribe in Arizona, and the Tulalip Tribes of Washington—to implement SDVCJ in February 2014. Two additional tribes—the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota—were approved to exercise SDVCJ on March 6, 2015, the last day of the pilot project period.

All five of the pilot project tribes participated along with 40 other tribes in an Inter-Tribal Technical- Assistance Working Group on SDVCJ Intertribal Working Group (ITWG), which is composed of tribes who expressed preliminary interest in exploring implementation of SDVCJ to DOJ and agreed to work peer-to-peer to answer questions about implementation of SDVCJ and develop best practices.

Tribes currently exercising SDVCJ have increased safety and justice for victims who have too often slipped through the cracks.

This report provides a brief report on activities during the Pilot Project period (February, 2014 through March 6, 2015) and shares recommendations for next steps.

Overview of Special Domestic Violence Criminal Jurisdiction

As of March 7, 2015, two years after Violence Against Women Reauthorization Act of 2013 (VAWA 2013) was enacted, Indian tribes across the country can exercise criminal jurisdiction over non-Indians for certain acts of domestic violence or dating violence and protection order violations so long as the statutory requirements of VAWA 2013 are met.[6] The full text of the statute is included as Appendix A to this report. In summary, for a tribe to exercise jurisdiction over a non-Indian offender:

- the victim must be Indian;
- the crime must take place in the Indian country of the participating tribe; and
- the non-Indian defendant must have "ties to the Indian tribe," which means the defendant:

  —resides in the Indian country of the participating tribe;
  —is employed in the Indian country of the participating tribe; or
  —is a current or former spouse, intimate partner, or dating partner of a member of the participating tribe, or an Indian who resides in the Indian country of the participating tribe.[7]

VAWA 2013 requires that any tribe exercising SDVCJ must provide certain due process protections to defendants. Specifically, the tribe must provide all of the protections that have long been guaranteed by the Indian Civil Rights Act, many of which mirror the U.S. Bill of Rights.[8] In addition, VAWA 2013 requires imple-

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[1] Pub. L. No. 113–4, 127 Stat. 54 (2013).
[2] *Oliphant v. Suquamish,* 435 U.S. 191 (1978).
[3] 25 U.S.C. 1304.
[4] Pub L. No. 113–4, 127 Stat. 54 (2013), Sec. 908(b).
[5] 78 Fed. Reg. 35,961 (June 14, 2013); 78 Fed. Reg. 71,645 (Nov. 29, 2013).
[6] 25 U.S.C. 1304; see also id. at 1304 note.
[7] 25 U.S.C. 1304(b)(4).
[8] 25 U.S.C. 1304(a)'s protections include: freedom of speech and religion; freedom from illegal or warrantless search or seizure; a prohibition on double jeopardy; the right not to be compelled

menting tribes, in any SDVCJ case where a term of imprisonment may be imposed, to provide a number of additional rights. Many of these rights are the same as those that were required of tribes in order to exercise felony jurisdiction under the Tribal Law and Order Act of 2010:

- "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution";[9]
- "at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys";[10]
- "require that the judge presiding over the criminal proceeding has sufficient legal training to preside over the criminal proceedings and is licensed to practice law in any jurisdiction in the United States";[11]
- make publicly available the tribe's "criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)";[12] and
- "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding."[13]

VAWA 2013 also guarantees a defendant in a SDVCJ case:

- "the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians";[14] and
- "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise SDVCJ over the defendant."[15]

Overview of the Pilot Project

Although the tribal criminal jurisdiction provision of VAWA 2013 was generally not effective until March 7, 2015,[16] tribes could implement SDVCJ on an accelerated basis before that date with approval from the Attorney General during a "Pilot Project" period.[17] The DOJ developed a Pilot Project Application Questionnaire, which interested tribes used to request that the Attorney General designate them as "participating tribes" and approve their accelerated implementation of SDVCJ.[18] This Application Questionnaire was DOJ's final notice and solicitation of applications for the pilot project, which was published in the Federal Register on November 29, 2013.[19]

Five tribes received approval to implement SDVCJ during the Pilot Project Period

Three tribes received approval to implement SDVCJ in February 2014—the CTUIR in Oregon, the Pascua Yaqui Tribe in Arizona, and the Tulalip Tribes in Washington. These tribes exercised SDVCJ for a little more than a year during the Pilot Project period before the law took general effect on March 7, 2015. Two additional tribes' applications were approved during the Pilot Project period on March 6, 2015—the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. Since these tribes

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to be a witness against oneself; the right to a speedy trial and to confront witnesses; the right to a jury trial; and the right not to be subjected to cruel or unusual punishment, excessive fines, or excessive bail.

[9] 25 U.S.C. 1302(c)(1).
[10] 25 U.S.C. 1302(c)(2).
[11] 25 U.S.C. 1302(c)(3).
[12] 25 U.S.C. 1302(c)(4).
[13] 25 U.S.C. 1302(c)(5).
[14] 25 U.S.C. 1304(d)(3).
[15] 25 U.S.C. 1304(d)(4).
[16] Pub. L. No. 113–4, 127 Stat. 54 (2013), Sec. 908(b)(1).
[17] Pub. L. No. 113–4, 127 Stat. 54 (2013), Sec. 908(b)(2).
[18] Although completing the Application Questionnaire is no longer required for a tribe who wants to implement SDVCJ, it is a useful guide for a tribe to conduct a self-assessment prior to implementing SDVCJ. In addition, the completed Application Questionnaires from the Pilot Project tribes provide helpful information about options for meeting the requirements of the statute. The completed questionnaires can be found at *www.ncai.org/tribalvawa.*
[19] Fed. Reg., vol. 78, no. 230, p. 71645, Nov. 29, 2013.

received approval the day before VAWA 2013 took general effect nationwide, these tribes did not have any SDVCJ cases during the Pilot Project period.

Exercise of Special Domestic Violence Criminal Jurisdiction during Pilot Period

While ultimately five tribes were approved to exercise SDVCJ during the pilot period, only the first three tribes were approved early enough to have any SDVCJ cases before the conclusion of the Pilot Project on March 7, 2015. During the first year of SDVCJ implementation, the three original pilot tribes had a total of 27 SDVCJ cases involving 23 separate offenders. Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution and 1 offender was acquitted by a jury. None of the SDVCJ non-Indian defendants have petitioned for habeas corpus review in federal court. All of the Pilot Project tribes have had additional cases since the conclusion of the Pilot Project period. This report, however, only discusses those cases that occurred between February 20, 2014 and March 7, 2015.

Pilot Project Statistics:
- 28 arrests of 24 offenders
- 13 guilty pleas
- 2 referrals for federal prosecution
- 1 acquittal
- 11 dismissals
- 1 outstanding warrant
- No habeas corpus appeals

Pascua Yaqui Tribe

The Pascua Yaqui Tribe submitted its final Pilot Project Application Questionnaire to DOJ on December 30, 2013. The Tribe received approval to begin exercising SDVCJ on February 6, 2014, and jurisdiction went into effect on February 20, 2014. The Tribe immediately issued a press release and formal notice to the community regarding implementation of the new law. After the Pilot Project concluded, the Tribe released an Implementation Timeline and comprehensive Pilot Project Summary of SDVCJ implementation at Pascua Yaqui. All of these materials are available online at *www.ncai.org/tribal-vawa.*

The Pascua Yaqui Tribe is located on a 2,200-acre reservation in southwest Arizona near Tucson, Arizona, approximately 60 miles north of the United States-Mexico border. The Tribe has approximately 19,000 members, with 4–5,000 members living on the reservation. Approximately 90 percent of the reservation population is American Indian and the most common household demographic on the reservation is single-mother households, which account for nearly 43 percent of all Pascua Yaqui households. The vast majority of criminal cases filed in the Pascua Yaqui Tribal Court are domestic-violence related offenses. Several of the Pascua Yaqui prosecutors are designated as Special Assistant United States Attorneys (SAUSAs), which allow them to also serve as prosecutors in federal court. The Tribe funds a full-fledged Public Defenders Office (originally opened in 1995) with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. The Tribe has employed law-trained judges and recorded its court proceedings since long before VAWA 2013.

Of the three original Pilot Project tribes, Pascua Yaqui has had the highest number of SDVCJ cases. Between February 20, 2014 and March 6, 2015, the Tribe handled 18 SDVCJ cases, involving 15 separate offenders. Four of these cases resulted in guilty pleas, four were referred for federal prosecution due to the seriousness of the violence, 10 cases were declined for jurisdictional, investigative, or evidentiary problems, and one resulted in an acquittal. Significantly, the 18 cases at Pascua Yaqui involved 18 children as either witnesses or victims. In the four-year period prior to their arrest, the 15 non-Indian defendants charged under SDVCJ had more than 80 documented tribal police contacts, arrests, or reports attributed to them.

> In the four-year period prior to the implementation of the VAWA Pilot Project and during the Pilot Project period, the 15 non-Indian defendants charged under SDVCJ had more than 80 documented tribal police contacts, arrests, or reports attributed to them.

Because of jurisdictional limitations in place at the time under federal law, the tribal court could not prosecute any of these prior incidents that involved criminal violations.

Pascua Yaqui is the only tribe to have had a jury trial for a SDVCJ case during the Pilot Project period.[20] The case was a domestic violence assault involving two men allegedly in a same-sex relationship. The defendant was acquitted by the jury. Interviews with the jurors suggest that the jury was not convinced that the two individuals had a relationship that would meet the requirements for tribal jurisdiction under VAWA 2013, which limits tribal jurisdiction to "domestic violence" defined as "violence committed by a current or former spouse, or intimate partner of the victim, by a person with who the victim shares a child in common, by a person who is cohabitating or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic or family violence laws of an Indian tribe that has jurisdiction over the Indian country where the violation occurs."[21] There was no question that the assault occurred. In fact, if the defendant had been an Indian, the prosecutor would not have had to prove any particular relationship between the offender and the victim. But because SDVCJ is limited to the specific crimes of domestic or dating violence, both of which require a particular relationship, that was not an option in this case. The non-Indian defendant was subsequently extradited to the State of Oklahoma on an outstanding felony warrant.

Pascua Yaqui: Pilot Project Stats-at-a-Glance

- 18 SDVCJ cases, involving 15 separate offenders.
  - —1 jury trial resulted in an acquittal and subsequent extradition to Oklahoma
  - —5 guilty pleas
  - —1 referral for federal prosecution
  - —10 dismissals
  - —1 defendant on warrant status
- The 15 non-Indian defendants had over 80 documented tribal police contacts, arrests, or reports attributed to them over the past 4 years.
- 11 defendants had criminal records in Arizona.
- 2 of the defendants had outstanding felony arrest warrants.
- 18 children involved as witnesses and/or victims.

PASCUA YAQUI: CASE STUDY

Defendant, a non-Indian, Hispanic male, was charged with Domestic Violence Assault and Domestic Violence Threatening and Intimidating. On March 4, 2015, Defendant was arrested for threatening to harm his live-in girlfriend and mother of his six children. This was Defendant's third VAWA arrest. In this instance, a relative of the victim witnessed the Defendant dragging the victim by her hair across the street back towards their house. Defendant pled guilty to Domestic Violence Assault and was sentenced to over two months of detention followed by supervised probation and domestic violence counseling.

Defendant had at least 7 prior contacts with Pascua Yaqui Law Enforcement and 3 felony convictions out of Pima County, Arizona. This was the defendant's second domestic violence conviction, and the first on the Pascua Yaqui Reservation. Because of the tribal conviction, if the defendant reoffends, he will now be eligible for federal domestic violence prosecution as a habitual offender.

TULALIP TRIBES

The Tulalip Tribes submitted their final Pilot Project Application Questionnaire to the DOJ on December 19, 2013. The Tribes received approval to implement SDVCJ on February 6, 2014, and jurisdiction took effect on February 20, 2014. The Tribes issued a press release regarding implementation of the new law on February 6, 2014. All of these materials are available online at *www.ncai.org/tribal-vawa.*

The Tulalip Tribes are located on a 22,000-acre reservation in western Washington State, approximately 30 miles north of Seattle. The Tribes have 4,533 members, about 2,500 of whom live on the reservation. The Tulalip Tribal Court operates a separate Domestic Violence Court docket and SDVCJ cases are handled there. The Tribe also employs a specialized domestic violence and sexual assault prosecutor, who was approved as a Special Assistant United States Attorney (SAUSA) at the beginning of the Pilot Project. The Tribes obtained retrocession in 2001 and created a police department and criminal court shortly thereafter.

[20] As of the date of this report, the Pascua Yaqui case discussed here is still the only jury trial in a SDVCJ case.

[21] 25 U.S.C. 1304(a)(2).

The Tribes implemented the Tribal Law and Order Act enhanced sentencing provisions prior to the passage of VAWA 2013 and have provided indigent defense, included non-Indians in the jury pool, recorded court proceedings, and employed law-trained judges in the criminal court since 2002.

Between February 20, 2014 and March 6, 2015, the Tulalip Tribes had a total of six SDVCJ cases. Four cases resulted in guilty pleas, one was dismissed for insufficient evidence, and one was transferred for federal prosecution because the injuries were so severe and children were also involved as victims. All of the SDVCJ offenders are ordered to undergo tribally-certified batterer's intervention programs.

Tulalip Tribes: Pilot Project Statistics At-A-Glance

- 6 SDVCJ cases
  - —4 cases resulted in guilty pleas.
  - —1 referral for federal prosecution because the injuries were so severe and children were involved as victims
  - —1 dismissal
- Those who have been convicted are subject to tribal probation, including the requirement to undergo batterer intervention programming.
- The 6 non-Indian defendants had over 88 documented tribal police contacts, arrests, or reports attributed to them in the past.
- 4 defendants had criminal records in Washington.
- 6 children involved as witnesses and/or victims

TULALIP TRIBES: CASE STUDY

Defendant was charged with Assault in the First Degree Domestic Violence and Rape Domestic Violence, but was not immediately apprehended. Based on the conduct alleged, victim/wife petitioned for a civil Order for Protection, which was granted. Prior to defendant's arraignment on the violent crimes, he was served with, and twice violated, the Order for Protection. At the scene of these violations, the defendant was taken into custody. Defendant had nineteen contacts with Tulalip Police prior to these incidents, however, after the implementation of VAWA 2013 SDVCJ the defendant was held accountable for his crimes. Defendant served a significant jail sentence, and is now supervised by Tulalip Probation. He is getting the treatment intervention he needs. The victim and her children were finally able to make a life for themselves away from the violence and abuse.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) submitted their final Pilot Project Application Questionnaire to the DOJ on December 19, 2013. The Tribes received approval to implement SDVCJ on February 6, 2014, and jurisdiction went into effect on February 20, 2014. In conjunction with the U.S. Attorney's Office for the District of Oregon, the Tribes issued a press release regarding implementation of the new jurisdiction on February 6, 2014. All of these materials are available online at *www.ncai.org/tribal-vawa.*

The CTUIR are located on a land base of 173,470 acres in southeast Oregon with a population of approximately 3,280 people, 46 percent of whom are non-Indian. The Confederated Tribes have exercised expansive criminal jurisdiction since the State of Oregon retroceded Public Law 280 criminal jurisdiction in 1981. The CTUIR implemented felony sentencing under Tribal Law and Order Act (TLOA) in 2011, and the tribal prosecutor serves as a SAUSA. CTUIR has provided indigent counsel, recorded tribal judicial proceedings, employed law-trained judges, and included non-Indians on tribal juries since long before VAWA 2013 was enacted. The Tribes report that in 2011, over 60 percent of the cases seen by the Umatilla Family Violence Program involved non-Indian.

Between February 20, 2014 and March 6, 2015, there were four SDVCJ cases involving 3 defendants filed in the CTUIR court. The Tribes report that this is double the amount ever prosecuted by the U.S. Attorney's Office. All four cases resulted in guilty pleas. Those who have been convicted are subject to tribal probation, including the requirement to undergo batterer intervention treatment, which the CTUIR provide free of charge. The CTUIR Court issues an automatic protection order in every pending domestic violence criminal case.

Confederated Tribes of Umatilla Indian Reservation: Pilot Project Statistics At-A-Glance

- 4 SDVCJ cases involving 3 offenders

—4 guilty pleas

—Those who have been convicted are subject to tribal probation, including the requirement to undergo batterer intervention treatment provided by the Tribes.

—At least 3 children involved as witnesses.

CONFEDERATED TRIBES OF UMATILLA INDIAN RESERVATION: CASE STUDY

On October 21, 2014, during an argument with his girlfriend, a male non-Indian defendant ripped her clothes off, pushed her to the bed, and strangled her while a comforter was over her face, all while repeatedly delivering death threats. All of this occurred in front of their infant child. The police found the victim with scratch marks on her neck and in such fear that she was only partially dressed, hyperventilating, and unable to maintain balance. The defendant is an Iraq war veteran who suffers from PTSD, and he reportedly missed taking his medication immediately preceding the assault. He wished to take responsibility at arraignment; however, the Tribe suggested that they appoint him an attorney. After being appointed an attorney, the defendant ultimately pled guilty to felony DV assault with terms consistent to what he would see if prosecuted in the State. Specific terms include compliance with his VA treatment recommendations and completion of a tribally funded 12-month batterer's intervention program. He is currently on track to graduate from the batterer's program in February and will be the first tribal VAWA defendant to graduate, while otherwise remaining under tribal supervision for another 2 years.

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation submitted their initial Pilot Project Application Questionnaire to the DOJ on December 26, 2013. After amending their application, the Fort Peck Tribes received approval to implement SDVCJ on March 6, 2015. Jurisdiction took effect on March 7, 2015. Articles have appeared in tribal and county newspapers explaining the jurisdiction. All of these materials are available online at *www.ncai.org/tribal-vawa.*

The Fort Peck Indian Reservation is home to the Assiniboine and Sioux Tribes, which are two separate Nations comprised of numerous bands and divisions. Located in northeast Montana, the Reservation extends over four counties and is the 9th largest Indian reservation in the United States. The Assiniboine and Sioux Tribes of Fort Peck have an estimated 10,000 enrolled members with approximately 6,000 members living on the Reservation. The population on the reservation is 60 percent Indian and 40 percent non-Indian. The Fort Peck Tribal Court operates a domestic violence docket. The Tribes implemented felony sentencing under TLOA in 2012. The Tribes did not have any SDVCJ cases prior to the end of the Pilot Project period on March 7, 2015.

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation submitted its final Pilot Project Application Questionnaire to DOJ on March 4, 2015. The Tribe received approval to implement SDVCJ on March 6, 2015. All of these materials are available online at *www.ncai.org/tribal-vawa.*

The Sisseton-Wahpeton Oyate is comprised of two subdivisions of Dakotah Indians that reside on the Lake Traverse Reservation, established by treaty in 1867. This reservation extends into five counties in northeast South Dakota and two counties in southeast North Dakota. The Tribe has 13,177 enrolled members with approximately 9,894 members living on the Reservation. According to the 2010 Census, more than 6,000 non-Indians also reside on the Lake Traverse Reservation. The Tribe has implemented felony sentencing under TLOA. The Tribe did not have any SDVCJ cases prior to the end of the Pilot Project on March 7, 2015.

Comparing the Implementing Codes of the Five Pilot Tribes

Each of the five Pilot Project tribes submitted an application to the DOJ demonstrating how they met the statutory requirements of VAWA 2013 and subsequently received approval from the Attorney General to implement SDVCJ. Because the tribal codes, policies, and procedures from the Pilot Project tribes had the benefit of review by DOJ, they provide particularly instructive examples of how other Indian tribes can implement the statutory requirements in VAWA 2013. This section analyzes the codes and procedures of the five Pilot Project tribes and highlights areas of major difference. Two primary areas of difference that emerge are how each

tribe has approached the jury pool and indigent defense requirements of VAWA 2013.

JURY POOLS

In order to exercise SDVCJ, a tribe must ensure that non-Indian defendants have the right to a trial by an impartial jury that is drawn from sources that—

1. reflect a fair cross section of the community; and
2. do not systematically exclude any distinctive group in the community, including non-Indians. [22]

Both the Tulalip Tribes and CTUIR included non-Indians in their jury pools for a number of years prior to the passage of VAWA 2013. For the other Pilot Project tribes, implementation of VAWA 2013 required them to change their tribal codes and procedures to include non-Indians in their jury pools. Pascua Yaqui chose to include non-Indians in their jury pool for all cases. The Fort Peck Tribes and Sisseton Wahpeton, in contrast, include non-Indians in the jury pool only for SDVCJ cases.

Although VAWA 2013 requires the jury pool to reflect a "fair cross section of the community," it is left to the tribe to define their "community" for these purposes. There are slight variations in the approaches taken by the Pilot Project tribes. All of the Pilot Project tribes include non-Indian residents on the reservation in the jury pool. Some also include, non-Indians employed by the tribe, non-Indian spouses of tribal members, or non-Indian leaseholders. These differences are discussed below.

Fort Peck Tribes: The Fort Peck Tribes have devised two separate jury pools, utilizing a process that incorporates non-member residents of the reservation for SDVCJ cases only. [23] The Tribes' Jury Management Plan for SDVCJ cases states that the jury pool will be drawn from a master juror list utilizing the list of enrolled members of the Tribes and a jury source list prepared by the clerk of the 15th Judicial District of Montana, which comprises 98 percent of the Reservation. In order to avoid underrepresentation of non-Indians, who make up 40 percent of the reservation population, the Tribes will select 50 non-Indian residents for the jury pool and 50 enrolled members. The Tribes will randomly summon 21 people from each list for each jury trial, and then choose six persons to serve on each jury. The tribal code requires unanimous verdicts for six person juries.

The tribal code sets out a process to issue subpoenas for jurors in order to compel non-member resident attendance. Jurors will be compensated at the rate paid by Roosevelt County, which overlays a significant portion of the reservation. The presiding judge has discretion to compensate jurors for mileage.

Sisseton-Wahpeton Oyate: The Sisseton-Wahpeton Oyate Codes of Laws also creates two separate jury pools. For cases outside of SDVCJ, jurors must be an adult resident member of the Tribe. For SDCVJ cases, potential jurors may be selected from a variety of sources including but not limited to enrolled members of the Sisseton-Wahpeton Oyate, residents within the jurisdiction of the Lake Traverse Reservation, full-time employees of the Tribe or its entities, and persons leasing lands from the Tribe. A list of at least 21 potential jurors is prepared and maintained by the Clerk. Each voting district on the Reservation is to be represented on the list. Defendants have the right to a trial by a jury made up of at least six persons. [24]

Pascua Yaqui: Pascua Yaqui uses the same jury pool for all crimes, and empanels its juries using enrolled members, spouses of tribal members, employees of the Tribe, and permanent residents of the reservation. In order to qualify for jury duty, enrolled members must be residents of Arizona, with preference given to those living in nearby counties. The Tribe draws its jury pools from the Tribal Census Roll, Housing Department records, and Human Resources records of the Tribe. Failure to appear for jury duty constitutes contempt of court and every jury summons includes a warning to this effect. The Tribe also incorporates a "severe hardship" exception for jury duty and jurors may be excused from service for limited reasons, including having to travel more than 150 miles one-way. [25]

Tulalip Tribes: The Tulalip Tribes use the same jury pool for all crimes. The Tribes include tribal members living on or near the reservation, residents within the boundaries of the reservation, and employees of the Tulalip Tribes. The Tribes de-

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[22] 25 U.S.C. 1304(d)(3).

[23] This process is set out in the Fort Peck Tribes' Comprehensive Code of Justice (CCOJ) at Title 6, Section 507, available at *http://www.fptc.org/ccoj/title_6/title_6.html*.

[24] SWO Codes of Law, Chapter 23, Sections 23–10–01 through 23–10–10, *available at http://www.swonsn.gov/departments/justice-department/legal-department/*.

[25] Pascua Yaqui Tribe, SDVCJ Application Questionnaire, *available at http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf*.

vise the juror list from the tribal Enrollment Department and the Human Resources departments of the Tulalip Resort Casino and Quil Ceda Village. The Tribes then compare these numbers with census data to ensure the jury pool reflects a fair cross section of the community. The Tribes randomly select 25 names from the jury pool and issue a jury summons by mail or personal service. Those who fail to appear for jury duty are held in contempt of court. [26]

Confederated Tribes of the Umatilla Indian Reservation (CTUIR): The CTUIR Court uses the same jury pool for all crimes. Even before SDVCJ implementation, CTUIR had incorporated non-Indians in tribal jury pools by including residents within the boundaries of the reservation. The Court empanels all tribal juries from a voter registration list provided by the local county, which represents a rough overlay of the reservation boundaries. The judge chooses 50 names per year to serve as prospective jurors and 18 names are summoned per trial. [27]

Jury Pools

Same Jury Pool For All Crimes	Non-Indians Included Only In Special Domestic Violence Criminal Jurisdiction Cases
Confederated Tribes of Umatilla Indian Reservation	Fort Peck Tribes
Pascua Yaqui Tribe	Sisseton-Wahpeton Oyate
Tulalip Tribe	

Indigent and Effective Assistance of Counsel

Under VAWA 2013, tribes must afford non-Indian offenders with effective assistance of counsel and pay for defense counsel for indigent offenders whenever a term of imprisonment may be imposed. [28] Such counsel must be "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." [29] All of the Pilot Project tribes were providing indigent counsel before VAWA 2013 was enacted. In the case of Ft. Peck, the tribal public defender office was staffed by experienced lay advocates and a licensed attorney was hired to comply with VAWA 2013's requirements.

Fort Peck Tribes: The Fort Peck Tribes guarantee indigent counsel for any person charged with the following three separate offenses: special domestic violence criminal offense, severe physical domestic abuse, and domestic abuse. [30] The Tribes screen for indigence, with a presumption of indigence if the defendant's household income is less than 125 percent of the federal poverty guidelines. The Tribal Public Defender Office is staffed both by a licensed attorney and by experienced lay advocates. If the Public Defender is not available, a licensed attorney will be hired on contract. All SDVCJ defendants will be represented by a licensed attorney. [31]

Pascua Yaqui: The Tribe affords state-licensed indigent defense in all SDVCJ cases, as well as to indigent Indian offenders in "any criminal proceeding in which the Tribe is seeking punishment by loss of liberty." [32] Representation is generally provided by the Pascua Yaqui Public Defender Office. The Tribe also provides for contract attorneys in cases where a conflict of interest arises. All such attorneys must also be barred in the Pascua Yaqui Tribal Court. The Tribe screens for indigence, with a presumption of indigence if the defendant's household income is less than 125 percent of the federal poverty guidelines.

Confederated Tribes of the Umatilla Indian Reservation(CTUIR): The Tribes appoint state-licensed public defenders to any criminal defendant that requests one, including on appeal. Although the Tribes' indigence standard is set at 150 percent

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[26] Tulalip Tribal Code, Title 2, Sec. 2.05.110 *available at http://www.codepublishing.com/wa/tulalip/*.

[27] CTUIR, SDVCJ Application Questionnaire, *available at http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-vawa.pdf.*

[28] 25 U.S.C. 1302(c)(1) and (2).

[29] 25 U.S.C. 1302(c)(2).

[30] Ft. Peck Tribes, SDVCJ Application Questionnaire, submitted Dec. 26, 2013, *available at http://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/fortpeckapp322015.pdf.*

[31] Ft. Peck Tribes, SDVCJ Application Questionnaire, submitted Dec. 26, 2013, *available at http://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/fortpeckapp322015.pdf.*

[32] Pascua Yaqui Tribal Code, Title 3, Part II, Ch. 2–2, Sec. 310 *available at http://www.pascuayaquinsn.gov/—static__pages/tribalcodes/*.

of the federal poverty guidelines, as a matter of practice the Tribes provide indigent counsel regardless of income to anyone who requests it.[33]

Sisseton-Wahpeton Oyate: The Tribe does not distinguish between Indians and non-Indians, or between those who are indigent or not, for purposes of representation by the Tribal Public Defender's Office, which was first established in 2000. The tribal code states that all defendants will be provided "with assistance of counsel if requested and if available."[34]

Tulalip Tribes: The Tribes provide indigent defense to all criminal defendants, regardless of race. Defense services are primarily provided by the Tribal Court Public Defense Clinic at the University of Washington Native American Law Center. The clinic has handled over 2000 cases in Tulalip Tribal Court since 2002. All clinic advocates must pass the Tulalip Court Bar Exam and be admitted to practice by the Tribal Court. The Tribes also hire attorneys on contract when the clinic is not available because of a conflict. Such attorneys must also be barred in the Tulalip Tribal Court. The Tribes screen for indigence, with a presumption of indigence if the defendant's household income is less than 200 percent of the federal poverty guideline.[35]

Right to Counsel

Indigent Counsel For All	Confederated Tribes of the Umatilla Indian Reservation; Pascua Yaqui Tribe; Tulalip Tribe
Counsel Guaranteed for SDVCJ and Domestic Abuse	Fort Peck Tribes
Indigent Counsel for all "If Available" but Guaranteed for SDVCJ	Sisseton-Wahpeton Oyate

Court Processes & Reforms

VAWA 2013 requires that a tribal judge overseeing a SDVCJ case has:

1. "sufficient legal training to preside over criminal proceedings"; and be
2. "licensed to practice law by any jurisdiction in the United States."[36]

All five of the Pilot Project tribes have at least one state-barred judge. Although the Fort Peck Tribes hired a state-barred judge to meet this requirement, the longtime chief judge of the Fort Peck Tribal Court is not state-barred. Instead, this judge has an undergraduate degree, is licensed in tribal court, and has two certificates from judicial college for "Tribal Judicial Skills" and "Special Court Trial Skills." This judge also completes 40 hours of annual training and presides over criminal trials on a weekly basis.

Victim's Rights & Safety

The Pascua Yaqui, Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and Tulalip Tribes have comprehensive codes that account for victims' rights and promote victims' safety. The CTUIR Court issues automatic protection orders in all pending criminal domestic violence cases. The Tulalip and Fort Peck Tribes have instituted a domestic violence docket to handle all cases involving domestic violence, dating violence, or violation of protection orders. This domestic violence docket is separate from the existing criminal docket and allows the court to have an increased focus on victim safety and offender accountability.

The five Pilot Project tribes also have a host of other programs aimed at ensuring the rights and safety of victims. For example, the Umatilla Family Violence Program provides community-based advocacy to domestic violence victims. The Fort Peck Tribes also have a well-established Family Violence Resource Center that provides comprehensive services to domestic violence and sexual assault victims. This program offers a court advocate, housing, counseling and other support services for any victim. The Fort Peck Tribal Court issues a "Hope Card" in conjunction with any orders of protection it grants. This card is wallet-sized and allows the person

[33] CTUIR, SDVCJ Application Questionnaire, *available at http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-vawa.pdf.*

[34] SWO Codes of Law, Chapter 23, Section 23–08–02, *available at http://www.swo-nsn.gov/wpcontent/uploads/2015/03/law3.pdf*

[35] Tulalip Tribal Court, Rule 6.

[36] 25 USC 1302(c)(3).

who has been granted an order of protection to easily prove this in other jurisdictions.

Definition of Offenses

The Pilot Project tribes have chosen slightly different ways to define VAWA 2013's covered offenses.

Fort Peck Tribes: The Tribes incorporate the VAWA 2013 statutory definitions of domestic violence and dating violence, but the tribal code also includes two other offenses of "severe physical domestic abuse" and "domestic abuse" as domestic violence.[37]

Pascua Yaqui: The Tribe does not use VAWA 2013's definitions of domestic and dating violence in its tribal code. These offenses are defined by language devised by the Tribe. The tribal code includes a maximum statement of jurisdiction that it has authority over "all subject matters which, now and in the future, are permitted to be within the jurisdiction of any Tribal Court of any Indian tribe recognized by the United States of America."[38]

Confederated Tribes of the Umatilla Indian Reservation (CTUIR): The Tribes incorporate the VAWA 2013 statutory definitions to define offenses of domestic violence, dating violence and violations of protection orders.[39]

Sisseton-Wahpeton Oyate: The Tribe does not use VAWA 2013's definitions of domestic and dating violence or protection order violations in its tribal code. These offenses are defined by language devised by the Tribe.[40]

Tulalip: The Tribes largely track the federal statutory definitions of domestic and dating violence. However, the tribal code provides illustrative examples of behaviors that constitute domestic violence under tribal law.[41]

Intertribal Technical-Assistance Working Group

All five of the tribes that were approved to exercise SDVCJ during the Pilot Project period participated in the ITWG on SDVCJ. In its June 14, 2013 Federal Register Notice, the DOJ asked tribes to indicate interest in joining the ITWG, which is a voluntary working group of designated tribal representatives intended to help exchange views, information, and advice, peer-to-peer, about how tribes may best implement SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and safeguard defendants' rights.[42]

This peer-to-peer technical assistance covers a broad set of issues, from drafting stronger domestic violence codes and victim-centered protocols and policies, to improving public defender systems, to analyzing detention and correctional options for non-Indians, to designing more broadly representative jury pools and strategies for increasing juror compliance with a jury summons. The objective of the ITWG is to develop not a single, one-size-fits-all "best practice" for each of these issues, but rather multiple successful examples that can be tailored to each tribe's particular needs, preferences, and traditions.

Tribes participating in the ITWG have also had opportunities to engage with DOJ and the Department of Interior (DOI), both of whom have made key staff available to provide technical advice to the working group as a whole and work with individual tribes to address specific issues or concerns as needed.

ITWG TRIBES:

1. Cherokee Nation
2. Cheyenne River Sioux Tribe
3. Chickasaw Nation
4. Colorado River Indian Tribes of the Colorado River Indian Reservation
5. Confederated Tribes of the Umatilla Indian Reservation
6. Eastern Band of Cherokee Indians
7. Eastern Shawnee Tribe of Oklahoma
8. Fort Peck Assiniboine & Sioux Tribes
9. Gila River Indian Community

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[37] Ft. Peck Tribal Code, Title 7, Sec. 249(c), *available at http://www.fptc.org/ccoj/title_7/title_7.html.*

[38] Pascua Yaqui Tribal Code, Title III, Part I, Ch. 1–1, Sec. 20 *available at http://www.pascuayaquinsn.gov/__static__pages/tribalcodes/.*

[39] CTUIR Criminal Code, Sec. 1.01, *available at http://ctuir.org/criminal-code.*

[40] SWO Codes of Law, Chapter 52, Section 52–01–04, *available at http://www.swo-nsn.gov/wpcontent/uploads/2015/03/law3.pdf.*

[41] Tulalip Tribal Code, Title 4, Sec. 4.25.050 *available at http://www.codepublishing.com/wa/tulalip/.*

[42] 78 Fed. Reg. 35,961 (June 14, 2013).

10. Hopi Tribe of Arizona
11. Iipay Nation of Santa Ysabel
12. Kickapoo Tribe of Oklahoma
13. Little Traverse Bay Band of Odawa Indians
14. Menominee Indian Tribe of Wisconsin
15. Mississippi Band of Choctaw Indians
16. Muscogee (Creek) Nation
17. Nez Perce Tribe
18. Nottawaseppi Huron Band of Potawatomi
19. Oneida Tribe of Indians of Wisconsin
20. Pascua Yaqui Tribe of Arizona
21. Passamaquoddy Tribe
22. Pauma Band of Mission Indians
23. Pawnee Nation of Oklahoma
24. Penobscot Nation
25. Pokagon Band of Potawatomi Indians
26. Port Gamble S'Klallam Tribe
27. Prairie Band Potawatomi Nation
28. Pueblo of Isleta
29. Pueblo of Laguna
30. Pueblo of Santa Clara
31. Quapaw Tribe of Oklahoma
32. Quinault Indian Nation
33. Sac and Fox Nation
34. Salt River Pima-Maricopa Indian Community
35. Sault Ste. Marie Tribe of Chippewa Indians
36. Seminole Nation of Oklahoma
37. Sisseton-Wahpeton Oyate
38. Spokane Tribe of Indians
39. Standing Rock Sioux Tribe
40. Suquamish Indian Tribe
41. Swinomish Indian Tribal Community
42. Three Affiliated Tribes of the Fort Berthold Reservation
43. Tulalip Tribes of Washington
44. White Earth Nation
45. Winnebago Tribe of Nebraska

The ITWG has met in-person four times[43] and has also participated in a series of teleconferences and webinars and produced white papers and other resources on a range of topics. As of August 2015, 45 tribes participate in the ITWG (see column).

The first formal in-person meeting of the ITWG was hosted at DOJ's National Advocacy Center in Columbia, South Carolina on August 20–21, 2013. The ITWG divided into topical breakouts on: code development and publication; jury selection, judicial requirements, and recording proceedings; and victims' rights, law enforcement training and detention. Defender issues and defendants' rights were focused into a "Tribal Defender Advisory Group." The ITWG also divided into tracks based on readiness: getting started; ramping up; and final stages. Tribal participants from justice systems that were already equipped to implement SDVCJ readily shared information with others who were in more preliminary stages of planning.

The second formal in-person meeting of the ITWG was held on October 29–30, 2013, in Bismarck, North Dakota. The Bismarck meeting included a round-robin from ITWG tribes of their implementation updates; a habeas corpus response panel; a panel on improving communication and coordination with U.S. Attorneys; discussion of arrest authority and detention issues; and a discussion on access to the federal criminal information databases.

The third formal in-person meeting of the ITWG was held on May 28–29, 2014, on the Pascua Yaqui reservation in Arizona. The meeting included a panel discussion from the three approved Pilot Project tribes as well as updates from ITWG tribes on their implementation efforts; a discussion of jurisdictional requirements and habeas responses; a session on prosecution best practices in domestic violence cases; a discussion of access to federal criminal information databases; and a mock first appearance at the Pascua Yaqui Justice Center.

The fourth in-person meeting of the ITWG was held on December 9–10, 2014 on the Agua Caliente reservation in California. The meeting included an update from the two tribes with pending applications for Pilot Project approval; an update from

[43] A 5th in-person meeting will be held November 2–3, 2015 at the Squaxin Island reservation in Washington.

the three Pilot Project tribes; an update from the Bureau of Indian Affairs on law enforcement arrest authority and detention guidance; an update and discussion on access to the National Crime Information Center; and a presentation on risk assessment and lethality in domestic violence cases. The meeting also included in-depth discussion sessions on complaint drafting and jury instructions; jury selection and composition; pleas agreements; data collection; and code development.

Intertribal Technical-Assistance Working Group Resources

In conjunction with a team of technical assistance providers, the ITWG has produced a number of resources to aid tribes seeking to implement SDVCJ. Many of these resources are maintained on the National Congress of American Indians (NCAI) VAWA Implementation website.[44] Additional implementation resources can also be found on the Tribal Law and Policy Institute's (TLPI) VAWA website.[45] The ITWG has produced a "Code Development Checklist," which is designed as a tool to assist tribal governments seeking to develop tribal codes that comply with VAWA 2013's statutory requirements. It includes citations to existing tribal codes implementing the new law. The ITWG has also produced a sample tribal code, sample complaints, sample jury instructions, a sample law enforcement pocket card, a sample press release for community notification, training materials, and papers on the following topics:

- Jury Issues
  - —Fair Cross Section Requirement
  - —Jury size & unanimity
  - —Constitutionality of maintaining two jury systems
  - —Practical Considerations for Jury Selection in SDVCJ
    - *Creating a master jury list
    - *Selecting the Jury Pool
    - *Summoning Jurors/Venire
    - *Terms of Service & Paying for Juries
- Tribal Court Exhaustion
- Habeas Corpus
- Ideas for implementing SDVCJ cost efficiently

The ITWG has also facilitated an ongoing webinar series on key areas of SDVCJ implementation, including defendants' rights issues; VAWA 2013's fair cross-section requirement and jury pool selection; and victims' rights. The full webinar series includes the following topics:

- Jury Pools & Selection
  - —Part I—Developing an Effective and Defensible Jury Plan for Tribal Courts
  - —Part II—Jury Selection Plans
- Defendants' Rights
  - —Part I—Competency of Defenders & Timing of Appointment
  - —Part II—Use of Contract Attorneys for Primary and Conflict Counsel
  - —Part III—Indigency
- Victims' Rights
  - —Part I—Victims' Rights Overview
  - —Part II—Confidentiality and Privilege
- Protection Orders
  - —Crafting, Serving, and Enforcing Protection Orders
- Prosecution Skills
  - —Jury Instructions
  - —Improving Victim Participation While Preparing for Non-Participation
- Pilot Project Application Questionnaire
  - —Application Questionnaire Overview (VAWA Pilot Project)
- Lessons Learned
  - —Lessons Learned from the VAWA Pilot Period
- Code Revision and Drafting
  - —VAWA Code Drafting
  - —Law School Clinical Assistance: Tribal Violence Against Women Act

[44] *www.ncai.org/tribal-vawa.*
[45] *http://www.tribal-institute.org/lists/vawa__2013.htm*

TLPI, one of the technical assistance providers supporting the work of the ITWG, has also developed an in-depth guide for implementation of Tribal Law and Order Act and VAWA 2013.[46] In addition, representatives of the Pilot Project tribes and the technical assistance team have presented at numerous conferences and meeting across Indian country with the goal of educating other tribes about implementation of VAWA 2013.

Lessons Learned from the Pilot Project & Recommendations

The Pilot Project proved incredibly successful in allowing the participating tribes to prosecute many long-time repeat offenders who had threatened the tribal community. At the same time, however, the Pilot Project revealed a number of inherent limitations in SDVCJ, as well as unforeseen obstacles in implementation. These issues are discussed in more detail below.

1. Non-Indian domestic violence is a significant problem in tribal communities

When VAWA 2013 was pending before Congress, many policy-makers and commentators questioned whether the tribal jurisdiction provision was needed and whether a significant number of non-Indians were committing domestic violence crimes in Indian country. The experience of the three original Pilot Project tribes provides an unequivocal answer to that question. Since beginning to exercise SDVCJ, Pascua Yaqui has found that 25 percent of its domestic violence caseload involves non-Indians. The statistics collected by Pascua Yaqui and Tulalip about the prior police contacts of their SDVCJ offenders demonstrate that the non-Indian offenders menaced the tribal community for years and had been a drain on the tribes' law enforcement resources. Where SDVCJ was implemented during the Pilot Period, impunity has ended for non-Indian domestic abusers.

2. Most Special Domestic Violence Criminal Jurisdiction defendants have significant ties to the tribal communities

Most SDVCJ offenders had established themselves in the tribal community. For example, Pascua Yaqui reports that at least 9 of the SDVCJ offenders were living on the reservation in tribal subsidized housing; two of the incidents involved married couples who lived on the reservation; four incidents involved children who belonged to the non-Indian offender. At least two of the SDVCJ arrests involved unenrolled Indians from either the U.S. or Canada.

3. Children are impacted by non-Indian domestic violence at high rates All three of the Pilot Project tribes report that children are usually involved as victims or witnesses in SDVCJ cases. A majority of SDVCJ incidents involved children who were at home during the domestic violence that occurred. These children have been assaulted or have faced physical intimidation and threats, are living in fear, and are at risk for developing school related problems, medical illnesses, post-traumatic stress disorder (PTSD), and other impairments.[47] Although children are frequently witnesses to domestic violence or victims themselves, SDVCJ currently only applies to crimes committed against romantic or intimate partners or persons covered by a qualifying protection order. The implementing tribes are unable to prosecute non-Indians for many of the crimes against children that co-occur with domestic violence. Instead, they are left to refer these cases to state or federal authorities, who may not pursue them.

Case Study: A non-Indian boyfriend, engaged in a 3-day methamphetamine bender, refused to let his Indian girlfriend and her children leave the home. The non-Indian forced both the woman and her child to sit in a chair while he threw knives at them. Because of the severity of the violence, and because SDVCJ does not provide accountability for the crimes committed against the child, the case was referred to the U.S. Attorney for prosecution.

4. Training is critical for success

While much of the work as tribes prepare to implement SDVCJ focuses on revising tribal codes, policies, and procedures, the Pilot Project tribes all devoted considerable resources to training for tribal law enforcement officers, prosecutors, judges, and other key stakeholders. Oftentimes the need for training became evident as the

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[46] Tribal Law and Policy Institute, "Tribal Legal Code Resource: Tribal Laws Implementing TLOA *Enhanced Sentencing and VAWA Enhanced Jurisdiction*," (2015), *available at http://www.tribalinstitute.org/download/codes/TLOA_VAWA_3–9-15.pdf.*

[47] See Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, U.S. Department of Justice, Report of the Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive (November 2014).

tribes encountered an unexpected obstacle of one kind or another. For example, the day after SDVCJ was enacted on one reservation, a non-Indian offender was arrested and delivered to the county authorities where he was promptly released.

That incident served as a reminder that tribal and Bureau of Indian Affairs (BIA) officers needed to be fully trained about the scope of the tribe's authority. Similarly, Pascua Yaqui's experience with its jury trial demonstrated the importance of training law enforcement about how to properly investigate whether there is a qualifying relationship sufficient to trigger SDVCJ in a particular case.

5. Federal partners have an important role

The implementing tribes have worked closely with Bureau of Indian Affairs (BIA) and DOJ officials to address challenges that have come up as a result of the complicated and fragmented criminal justice system at work in Indian Country. It has been important, for example, to clarify that BIA detention facilities are permitted to house non-Indian SDVCJ offenders and that tribes can use their 638 contract funds to pay for costs associated with housing non-Indian SDVCJ offenders. Likewise, the Pilot Project tribes have all worked closely with their local U.S. Attorney's Offices to make decisions about which jurisdiction is most appropriate to prosecute a particular case.

6. Peer-to-Peer learning is important

The ITWG has proven to be an incredibly productive and useful mechanism for tribes to share information and best practices among themselves, to discuss challenges, and to jointly strategize about how to overcome obstacles. With the logistical support and substantive expertise of a group of DOJ funded technical assistance providers,[48] the tribes participating in ITWG have tackled many difficult questions and have developed a collection of resources that will make it easier for tribes who wish to implement SDVCJ in the future. The ITWG continues to serve as an important resource for the implementing tribes as they encounter new questions and challenges.

The success of the ITWG has been driven by the engagement of dedicated and knowledgeable attorneys and tribal representatives from across Indian country. This engagement has been possible because of the travel support provided by DOJ, which allowed many of the members to participate in productive in-person meetings. The engagement and expertise of the technical assistance team has provided important coordination and leadership to the ITWG, while also helping the ITWG to track issues as they arise and to connect with necessary resources.

7. Special Domestic Violence Criminal Jurisdiction is too narrow

One area of major concern among the Pilot Project tribes is the narrow class of crimes covered under SDVCJ.[49] The limitations with regard to children who are victimized by domestic abusers was discussed above. Additionally, since tribal jurisdiction is limited to domestic violence, dating violence, and protection order violations, any other attendant crimes that occur also fall outside the scope of the tribe's jurisdiction. The Pilot Project tribes reported, for example, cases where the offender also committed a drug or alcohol offense or a property crime that the tribe was unable to charge. There is also uncertainty about a tribe's authority to charge an offender for crimes that may occur within the context of the criminal justice process, like resisting arrest, assaulting an officer, witness tampering, juror intimidation, or obstruction of justice. Because tribal prosecutors are unable to charge the full range of criminal conduct that may occur in a domestic violence incident, they may be more dependent on victim cooperation and the offenders' criminal history may not accurately reflect the severity of his actions.

> *Case Study:* At 2:00 am, the tribal police were called to a domestic violence incident involving a non-Indian man. Methamphetamines were found on the premises, and tribal police requested an oral search warrant from the tribal judge to perform a urine analysis on the non-Indian. While being under the influence could be relevant to a DV investigation, the tribal judge ruled against issuing the search warrant. Some state case law has held that tribal police lack the au-

[48] The National Congress of American Indians and the National Center for Juvenile and Family Court Judges have been supporting the work of the ITWG and providing technical assistance to implementing tribes through grants from the Office on Violence Against Women. The Tribal Law and Policy Institute has also partnered in this effort with support from the Bureau of Justice Assistance

[49] We note that there are many crimes, in addition to the ones discussed in this section, that also fall outside the scope of SDVCJ and leave tribal victims without access to justice in too many cases. Sexual assault committed by a stranger or acquaintance and elder abuse, for example, are also not covered by SDVCJ.

thority to investigate crimes where they do not have jurisdiction, and the judge did not want to compromise a potential state case for drug possession.

8. There is confusion about the statutory definition of "domestic violence"

Tribal prosecutors from the Pilot Project tribes also report uncertainty regarding the definition of "domestic violence"[50] in the wake of the Supreme Court's decision in United States. v. Castleman.[51] When Castleman was decided in March of 2014, it had an immediate impact on the three original Pilot Project tribes' criminal charging decisions when evaluating misdemeanor arrests under SDVCJ authority.

The Justices suggested in dicta in *Castleman* that the domestic violence crime in an SDVCJ case must involve actual "violence," which is not a defined term. As a result, the original Pilot Project tribes have declined to prosecute certain offenses like offensive touching, harassment, or interference with domestic violence reporting that would otherwise constitute "domestic violence" under tribal law, but do not include an element of "offensive touching" or may not be considered a "violent crime." DOJ and the technical assistance team have provided guidance to the ITWG about what type of conduct likely constitutes "violence" for SDVCJ purposes, but confusion persists.

The prosecutors for the Pilot Project tribes report that SDVCJ will be more effective if it is amended to (1) clarify that Indian tribes possess the authority to prosecute a non-Indian for the types of offenses that often occur in the cycle of domestic abuse that might not qualify as "violence" in isolation; (2) reaffirm tribal jurisdiction over crimes that frequently co-occur with domestic violence; (3) reaffirm tribal jurisdiction over all crimes of violence against women or that occur within the family, including child abuse.

Case Study: A woman called the police to remove her highly intoxicated partner from her home. The defendant returned an hour later. He was so intoxicated that when he swung to punch the victim, he missed and fell to the ground. The tribal prosecutor declined to prosecute because there was no actual physical contact, and they were concerned the incident did not meet the definition of domestic violence in the federal law. The defendant subsequently assaulted the victim again and was arrested.

9. Tribes need resources for SDVCJ implementation

VAWA 2013 authorized $5,000,000 for each of fiscal years 2014 through 2018 for SDVCJ implementation.[52] Unfortunately, Congress has not appropriated these funds and no resources have been made available specifically for tribal implementation of SDVCJ. While 45 tribes have been actively participating in the ITWG, as of the date of this report, only 8 tribes have implemented the law. The primary reason tribes report for why SDVCJ has not been more broadly implemented is lack of resources. During and beyond the implementation phase, Tribes need funding and access to resources and services to support implementation.

SUMMARY OF 9 LESSONS LEARNED

1. Non-Indian domestic violence is a significant problem in tribal communities
2. Most Special Domestic Violence Criminal Jurisdiction defendants have significant ties to the tribal communities
3. Children are impacted by non-Indian domestic violence at high rates
4. Training is critical for success
5. Federal partners have an important role
6. Peer-to-peer learning is important
7. Special Domestic Violence Criminal Jurisdiction is too narrow
8. There is confusion about the statutory definition of "domestic violence"
9. Tribes need resources for Special Domestic Violence Criminal Jurisdiction implementation

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[50] For purposes of SDVCJ, VAWA defines domestic violence as "violence committed by a current or former spouse or intimate partner of the victim, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian Country where the violence occurs." 25 U.S.C. 1304 (a)(2).

[51] *United States v. Castleman,* 134 S. Ct. 1405 (2014)

[52] 25 U.S.C. 1304(h)

APPENDIX A

Indian Civil Rights Act, 25 U.S.C.§§1301–1304, as amended by VAWA 2013:
§1301. Definitions: For purposes of this subchapter, the term

1. "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.
2. "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
3. "Indian court" means any Indian tribal court or court of Indian offense, and
4. "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 19, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§1302. Constitutional Rights: No Indian tribe in exercising powers of self-government shall:

(a) In general

No Indian tribe in exercising powers of self-government shall—

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
7.
   (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
   (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;
   (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or
   (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

1. Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

2. Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
1. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
3. require that the judge presiding over the criminal proceeding—
   (A) has sufficient legal training to preside over criminal proceedings; and
   (B) is licensed to practice law by any jurisdiction in the United States;
4. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
5. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

1. to serve the sentence—
   (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
   (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010
   (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
   (D) in an alternative rehabilitation center of an Indian tribe; or
2. to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction over Crimes of Domestic Violence

(a) Definitions.—In this section:

1. *Dating Violence*.—The term 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

2. *Domestic Violence.*—The term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.
3. *Indian country.*—The term 'Indian country' has the meaning given the term in section 1151 of title 18, United States Code.
4. *Participating tribe.*—The term "participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.
5. *Protection order.*—The term 'protection order'—
   (A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
   (B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.
6. *Special domestic violence criminal jurisdiction.*—The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
7. *Spouse or intimate partner.*—The term 'spouse or intimate partner' has the meaning given the term in section 226 of title 18, United States Code.

(b) Nature of Criminal Jurisdiction.—

1. In general.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USC § 1301 and 1303, respectively], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.
2. Concurrent jurisdiction.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
3. Applicability.—Nothing in this section—
   (A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or
   (B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.
4. Exceptions.—
   (A) Victim and defendant are both non-Indians.—
      i. In general.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.
      ii. Definition of victim.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.
   (B) Defendant lacks ties to the Indian tribe.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—
      i. resides in the Indian country of the participating tribe;
      ii. is employed in the Indian country of the participating tribe; or
      iii. is a spouse, intimate partner, or dating partner of—
         1. a member of the participating tribe; or
         2. an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

1. Domestic violence and dating violence.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
2. Violations of protection orders.—An act that—
   (A) occurs in the Indian country of the participating tribe; and
   (B) violates the portion of a protection order that—
      i. prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
      ii. was issued against the defendant;
      iii. is enforceable by the participating tribe; and
      iv. is consistent with section 2265(b) of title 18, United States Code.

d) Rights of Defendants.—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

1. all applicable rights under this Act;
2. if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [25 USC 1302(c)];
3. the right to a trial by an impartial jury that is drawn from sources that—
   (A) reflect a fair cross section of the community; and
   (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
4. all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention.—

1. In general.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.
2. Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—
   (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
   (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
3. Notice.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC § 1303].

APPENDIX B

Helpful Resources

Resource Center for Implementing Tribal Provisions of VAWA 2013 was developed and is maintained by the National Congress of American Indians (NCAI) to provide information, news, resources, notice of events, and funding opportunities on the implementation of tribal provisions of VAWA 2013. It also contains information on the *Intertribal Technical-Assistance Working Group (ITWG)*, a group of tribal representatives that met to discuss issues and best practices relative to tribal VAWA 2013 implementation. See: *www.ncai.org/tribal-vawa*

Tribal VAWA Resource Page is housed on the *Tribal Court Clearinghouse* website. This page contains the language of VAWA, videos from the VAWA signing ceremony, publications, reports, articles and other important resources on VAWA's SDVCJ, as well as relevant upcoming and past events focusing on SDVCJ. See: *http://www.tribal-institute.org/lists/vawa_2013.htm*

Tribal Protection Order website was developed and is maintained by TLPI. It is a clearinghouse of information and resources on tribal protection orders and tribal enforcement. See: *www.TribalProtectionOrder.org*

Federal Register, vol. 78, no. 115, p. 35961, June 14, 2013 This notice proposes procedures for an Indian tribe to request designation as a participating tribe under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, pursuant to the voluntary pilot project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 ("the Pilot Project"), and also proposes procedures for the Attorney General to act on such a request. This notice also invites public comment on the proposed procedures and solicits preliminary expressions of interest from tribes that may wish to participate in the Pilot Project.

Federal Register, vol. 78, no. 230, p. 71645, Nov. 29, 2013 This final notice establishes procedures for Indian tribes to request designation as participating tribes under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, under the voluntary pilot project described in the Violence Against Women Reauthorization Act; establishes procedures for the Attorney General to act on such requests; and solicits such requests from Indian tribes.

The U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), held that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non- Indian for crimes committed in Indian country.

Public Law 113–4, 127 Stat. 54 (2013) The Violence Against Women Reauthorization Act of 2013 (VAWA 2013), recognized and reaffirmed the inherent sovereign authority of Indian tribes to exercise criminal jurisdiction over certain non-Indians who violate protection orders or commit dating violence or domestic violence against Indian victims on tribal lands.

25 U.S.C. 1304 Tribal jurisdiction over crimes of domestic violence.

The Tribal Law and Order Act (Public Law 111–211, Congress passed the legislation as part of another bill regarding Indian Arts and Crafts. See Title II.) enhanced tribal authority to prosecute and punish criminals. However, tribes are required to provide certain due process requirements. The requirements are listed in the amended *Indian Civil Rights Act* (25 U.S.C.§ § 1301–1304).

Tribal Law and Order Act Resource Center is a website specifically developed by NCAI to share information and resources relative to TLOA. It contains many of the resources described in this resource sections and many more, as well as news, events, webinars, and other helpful information. See: *tloa.ncai.org*

The five tribes' applications to participate in the pilot project permitting early use of jurisdiction over non-Indians may also be helpful, as the applications look for compliance with the VAWA 2013 requirements and provide the tribes examples of their compliance. The applications are publically available: *Confederated Tribes of the Umatilla Indian Reservation application, Pascua Yaqui Tribe application, Tulalip Tribes application, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation application and Sisseton-Wahpeton Oyate of the Lake Traverse Reservation application.* See: *www.justice.gov/tribal/vawa-2013-pilot-project*

"Considerations in Implementing V AWA's Special Domestic Violence Criminal Jurisdiction and TLOA 's Enhanced Sentencing Authority—A Look at the Experience of the Pascua Yaqui Tribe," compiled by Alfred Urbina, Attorney General, Pascua Yaqui Tribe and Melissa Tatum, Research Professor of Law, The University of Arizona James E. Rogers College of Law. See: *indianlaw.org/safewomen/resources*

28 U.S.C. 543(a) Special Assistant United States Attorneys (SAUSAs), appointed by the Attorney General, who assist in prosecuting Federal offenses committed in Indian country.

The five pilot project codes: *http://ctuir.org/criminal-code*

Two articles by M. Brent Leonhard, Attorney in the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation, on implementing VAWA 2013. The Federal Lawyer, October/November 2015 and *ABA Human Rights Magazine Volume 40 Number 4.*

Tulalip Tribal Court Rules including rules regarding indigency standards and rights afforded under VAWA special domestic violence criminal jurisdiction. See: www.codepublishing.com/wa/Tulalip/ITWG Code Development Checklist for implementing VAWA 2013. This checklist is designed as a tool to assist tribal governments seeking to develop tribal codes that comply with VAWA 2013's statutory requirements. It includes citations to existing tribal codes implementing the new law. See: *www.ncai.org/tribal-vawa*

Simple checklist for Law Enforcement Officers. Implementation of VAWA 2013 may require changes in law enforcement policies and procedures. Training for law enforcement officers will be an important part of implementation. See: *www.ncai.org/tribal-vawa* requirement and jury pool selection; and victims' rights.

The full webinar series can be found on the NCAI website *Resource Center for Implementing Tribal Provisions of VAWA 2013*. See *www.ncai.org/tribal-vawa.*

TLPI, one of the technical assistance providers supporting the work of the ITWG, has also developed an *in-depth guide for implementation of Tribal Law and Order Act and VAWA 2013*, which includes a model code that the ITWG tribes developed. See: *www.tlpi.org* and *www.Home.TLPI.org.*

The final report of the *Attorney General's Task Force on American Indian and Alaska Native Children Exposed to Violence—"Ending Violence So Children Can Thrive*," US Senator Byron Dorgan et al. The task force is part of Attorney General's Defending Childhood Initiative, a project that addresses the epidemic levels of exposure to violence faced by our nation's children. The task force was created in response to a recommendation in the Attorney General's National Task Force on Children Exposed to Violence December 2012 final report. The report noted that American Indian and Alaska Native children have an exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience. See: *www.justice.gov/defendingchildhood*

PREPARED STATEMENT OF THE CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

Dear Senate Select Committee on Indian Affairs:

The Central Council of Tlingit and Haida Indian Tribes of Alaska ("Central Council") offers written comments to supplement the hearing held on May 18, 2016 on Senate Bills 2920 and 2785. We are appreciative that the Senate Select Committee on Indian Affairs is proactively looking at reauthorization of Tribal Law and Order Act (TLOA) and also to close jurisdictional gaps of 25 USC 1304, the Special Domestic Violence Court Jurisdiction over non-Indians section.

This letter will begin with a brief overview of our Tribe, followed by general comments about the unique legal issues to Alaska, and specific recommendations about the proposed bills. It is worth stating upfront that the Supreme Court case in the Native Village of Venetie, along with the Alaska Native Claims Settlement Act (ANCSA) have created a challenging situation for Alaska Native Villages and Tribes to address village safety issues, especially as it relates to accountability of criminal defendants and domestic violence perpetrators. We ask that the Senate consider a legislative fix to these jurisdictional issues.

Who We Are

Central Council is a federally recognized Tribal government for Alaska's Tlingit and Haida population, with more than 30,000 tribal citizens worldwide. Central Council is one of approximately 229 federally recognized tribes in the State of Alaska. Alaska tribes comprise nearly 40 percent of all federally recognized tribes in the United States.

On September 4, 2007, Central Council began operating a formal, regional tribal court, located in Juneau, Alaska, to provide child support services to 20 villages and communities that are spread over 43,000 square miles within the Alaska Panhandle. The region encompasses a 525-mile strip of coastline and interior waterways, bordered by Canada on the north, south, and east, with the Gulf of Alaska on the west. There is no road system linking Southeast Alaska communities; therefore, communities can only be reached by airplane, boat or ferry.

Prior to 2007, the tribal court had elected judges but no budget for staffing or operation of tribal court. This all changed when the Tribe applied for and received Title IV–D funding to open a tribal child support agency. This funding source allowed the tribe to hire one judge and one court clerk to hear paternity, child support order establishment and enforcement for cases involving children enrolled or eligible for enrollment with the tribe. Since that time, despite continued limited grant funding, the tribe has expanded its services to include domestic violence, child custody, divorce, guardianship, adoption and is currently in the process of expanding services to include juvenile justice and child welfare cases.

Central Council's tribal court is located in Juneau, as part of a tribal government office building. Juneau has the highest concentration of tribal citizens in Alaska, but Central Council has citizens all across Southeast, and out of state. Central Council compacts with a few Southeast Tribes for social services, such as Indian Child Welfare Act (ICWA).

Unique Status of Alaska Tribes

Historically, Alaska tribes, for various reasons, have been treated differently than lower 48 tribes, often making fundamentals of tribal court jurisdiction difficult to understand or ascertain. In a rather remarkable turn of events, the federal govern-

ment settled its land claims with the aboriginal people of Alaska not by compensating the tribal governments of the aboriginal people, but rather by establishing corporations whose shareholders would be the aboriginal people and bestowing on those corporations the goal of leveraging the land and money received in compensation to operate for-profit businesses. With the passage of the ANCSA in 1971. the only remaining reservation in the state is the Annette Island Reserve in Southeast Alaska. Rather than recognize sovereign tribal lands, ANCSA tasked the for-profit corporations to manage more than 40 million acres of fee land. ANCSA divided the state into 12 regional corporations and over 200 village corporations that would identify with their regional corporation. Many of these villages had corresponding tribal village governments. but with the passage of ANCSA. no meaningful land base. As a result, unlike most court systems that have defined territorial jurisdiction and personal jurisdiction. Alaska Tribal courts generally exercise jurisdiction through tribal citizenship. and not through a geographic space defined as "Indian Country" because of ANCSA and in part due to a United States Supreme Court case.

As a result of the United States Supreme Court's unfavorable decision in *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520 (1998), most of the Tribe's traditional territory is not considered "Indian Country". Without the ability to tax. without Indian gaming, and without consistent and predictable tribal court appropriations. Alaska Tribes lack the revenue typically available to other tribal governments to fund and sustain essential governmental programs. All Alaska Tribes are in a similar position. and must find innovative ways to raise governmental revenue and to leverage other resources to sustain their Tribal Courts and public safety programs. As a result of this resource dilemma, available grants for developing and sustaining programs are incredibly important for Alaska Tribes.

As mentioned, Alaskan tribal governments are not positioned to take advantage of the traditional tools local governments use to generate revenue. Except for Metlakatla, Alaskan tribal governments have no taxable land base and subsistence economies—also known as non-cash economies—are unable to generate strong steady revenues in the form of a sales tax. property tax, or other taxes.

Making matters worse, in 2003, Alaska's own Senator Ted Stevens singled out Alaska Tribes for exceptionally harsh financial restrictions through legislative riders to the FY 04 Consolidated Spending Bill (Sec. 1 12 of HR 2673). The riders eliminated funds to tribal courts and tribal law enforcement programs in Alaska Native Villages, and specifically excluded certain Southeast Alaska communities from receiving any Department of Justice funding. Although Congress recently eliminated these restrictions, they set back Alaska Tribes even further while they were in place. Without adequate resources, tribal court jurisdiction and law enforcement floundered.

All told, these funding restrictions have severely hindered the approximately 78 tribal justice systems in Alaska from developing. The vast majority of Alaska tribal courts are not able to operate on a full-time basis or hire full-time employees. Central Councirs tribal court staff are funded by a delicate balance BIA compact funds and temporary grants.

Against the backdrop of this funding desert, Alaskan tribal citizens are suffering. The absence of an effective justice system has disproportionately harmed Alaska Native women who are continually targeted for all forms of violence. Alaska Natives comprise only 15.2 percent of the state's population, but make up 47 percent of victims of domestic violence and 61 percent of victims of sexual assault are Alaska Native. And among other Indian Tribes, Alaska Native women suffer the highest rates of domestic and sexual violence in the country.

Although, in a PL 280 state, Alaska tribal communities should have access to state justice services, those services are centered in a handful of Alaskan urban areas, making them often more theoretical than real. Many communities have no law enforcement, no 91 1, no state official they could conceive of raising a complaint to, given the separation of geography, language, and culture. Also, because Alaska is a mandatory PL 280 state and because of other factors identified below, jurisdictional issues in Alaska create extremely dangerous conditions for our small, remote communities. The TLOA of 2010 created the Indian Law and Order Commission and authorized the Commission to conduct an extensive study of jurisdictional issues in Alaska. The Commission devoted an entire chapter to Alaska and found that:

> "The strongly centralized law enforcement and justice systems of the State of Alaska . . do not serve local and Native communities adequately, if at all. The Commission believes that devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to

do so-or to work out voluntary agreements with each other, and with local governments and the State on mutually beneficial terms." [1]

While there have been recent gains that benefited Alaska, we still have laws and policies that make support for strong Alaska Native Judicial systems erratic. if not impossible. For example, the U.S. Department of Justice's support for repeal of the Special Rule for the State of Alaska included in section 910 of VAWA 2013 was applauded in Alaska. but the issue of Indian Country, described further below, remains. The Obama administration has supported our tribal governments in ways not seen for years. In a July 28, 2014, letter from Associate Attorney General Tony West to the Alaska state Attorney General, West reminded him of the State's obligation to give full faith and credit to tribal court orders of protection. Prior to this time, enforcement and recognition of Alaska tribal court orders was essentially nonexistent. Basically, Alaska law required orders of protection issued by tribal courts to be registered with the state before enforcement would be available. As a result of Associate Attorney General West's assistance, the State of Alaska has recently evaluated its role in supporting Alaska Native protection orders. While still encouraging registration of tribal and foreign protection orders, in 2015, the State recognized that it must enforce unregistered Alaska tribal orders.

Senate Bill 2920

We greatly appreciate the introduction of this bill. We ask that the Senate look to recent studies such as the newly released, National Institute of Justice. *Research Report on the Violence Against American Indian and Native Women and Men,* that document the dire safety circumstances that Alaska native villages are in as a result of their unique geographic situation, the 229 tribes state wide and the inability for the state to address the public safety state of emergency for Alaska Tribes.

Solutions to Solve the Jurisdictional Quagmire

The repeal of section 910 of VAWA 2013 was a victory as it was a necessary step towards removing a discriminatory provision in the law that excluded all but one Alaska tribe from ever being able to enhance their response to violence against Native women in ways afforded all other federally recognized tribes. Nevertheless, because of the *Venetie* decision, additional reforms are needed before Alaska tribes will be able to increase safety for Alaska Native women and hold all offenders accountable. This is because section 904 of VAWA 2013 limits the exercise of the special domestic violence criminal jurisdiction restored to tribes to certain crimes committed in "Indian Country." Yet, at the same time, the State does not have the resources to provide the level of justice needed in our communities. A legislative fix is necessary to address this injustice. Such a fix could be inserted in the Tribal Law and Order Act, or the next reauthorization of VAWA, or as an amendment to ANCSA, which recognizes a tribe's territorial jurisdiction equivalent to the corresponding Village Corporation's land base and traditional territory, or to other federal laws such as the statute defining Indian Country, [2] or accomplished through other changes in federal policy allowing the Department of the Interior to accept land into trust for all federally recognized Alaska tribes. [3]

We fully support the recommendations of the Tribal Law and Order Act Commission and ask that they all be priorities for inclusion in the reauthorization of TLOA. Specifically, we ask that the Senate Select Committee on Indian Affairs:

- Craft a legislative fix for the U.S. Supreme Court's Venelle decision.

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[1] *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States* (November 2013), *available at http://www.aisc.ucla.edu/iloc/report/*.

[2] 18 U.S.C. § 1 151. Section 1151 provides in pertinent part that: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government. notwithstanding the issuance of any patent. and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[3] A federal regulation was developed after the U.S. District Court for the District of the Columbia held that exclusion of Alaska tribes from the land-into-process was not lawful. *See Akiachak Native Community v. Salazar,* 935 F. Supp. 2d 195 (D.D.C. 2013). The State of Alaska has appealed the decision and its motion to stay was granted to prevent the Interior Department from considering specific applications or taking lands into trust in Alaska until resolution of the appeal. On December 18, 2014, the Interior Department published its final rule rescinding the "Alaska Exception," which became effective on January 22, 2015. 79 Fed. Reg. 76888. This regulatory change could help some Alaska tribes exercise local governance to address violence against Native women.

- Amend the definitions of Indian Country- to include Alaska native allotments and native owned town sites.
- Support land into trust applications by Alaska Native Tribes.
- Channel more resources directly to Alaska Native Tribal governments for the provision of governmental services.
- Support Alaska Native Tribes and Villages with the exercise of criminal jurisdiction within their communities.

As described by the TLOA Commission:

"problems in Alaska are so severe and the number of Alaska Native communities affected, so large, that continuing to exempt the State from national policy change is wrong."

We ask that the Commission's specific recommendation to the federal government "to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities" be supported in legislation and through appropriations. We further ask that S. 2920 include specific findings by the Law and Order Commission that demonstrates the vast uniqueness of our communities as well as the dire circumstances we find ourselves in. We ask for specific findings within the Bill unique to Alaska's public safety crisis.

Indian Country in Alaska

Sprinkled throughout the TLOA Reauthorization, is the reference to "Indian Country." As mentioned with the Native Village of Venetie case, there is virtually no "Indian Country" in Alaska to be afforded the advantages intended within this bill. We need a legislative fix to this issue.

> "Alaska's approach to providing criminal justice services is unfair. Alaska Natives, especially those living in rural areas of the State, have not had access to the level and quality of public safety services available to other State residents or that they should rightly expect as U.S. citizens. Given the higher rates of crime that prevail in Alaska Native communities, the inequities are even greater in relative terms. The State of Alaska's overarching lack of respect for Tribal authority further magnifies fairness concerns."
>
> But yet without a meaningful and identifiable land base, jurisdictional boundaries will prevent a meaningful solution to solving the public safety crisis in our villages.

The TLOA commission's first recommendation is:

2.1: Congress should overturn the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government,* by amending ANCSA to 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.

We need to begin a dialogue that gets at the heart of community safety issues and concerns. We ask that a commission or task force be created to develop a solution to the jurisdictional issues found in Alaska.

Data Sharing With Indian Tribes

We need a legislative fix that addresses the concerns of the Criminal Justice Information System (CJIS) about tribal access to federal databases for governmental purposes. Currently access is piecemeal, with federal statutes providing some access to tribes and then deferring to state law to define and provide access. Such checkerboard access places some of our most vulnerable citizens in jeopardy.

28 USC 534(d) authorizes release of criminal history information to tribal law enforcement agencies, but doesn't allow release of criminal information to other tribal agencies for important purposes, Emergency Placement of Children, or "Purpose Code X," employees that work with elders and vulnerable adults, etc.

CJIS interprets the appropriations rider language from 92–544 (and in the notes of 28 USC 534) as a permanent statute that prevents sharing this information with tribal governments. In their view, criminal history for licensing of foster parents can only be shared "if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing,"

We need to amend federal law to authorize the sharing of this information with tribal governments for any legitimate purpose.

One solution is to renumber 534(d) and add a new subsection: "If authorized by tribal law and approved by the Attorney General, the Attorney General shall also permit access to officials of tribal governments for non-criminal justice, non-law en-

forcement employment, licensing purposes or any other legitimate government purpose identified in tribal legislation."

We ask that Civil authority be included to so that once and for all the piecemeal inefficient barriers to full legitimate access is resolved.

Senate Bill 2785

While we appreciate that the Senate recognizes the gaps in the Special Domestic Violence Court Jurisdiction (SDVCJ) of VAWA 2013. in that crimes against children and drug crimes attendant to the SDVCJ crimes remained unpunishable, until the issues of "Indian Country" in Alaska are addressed, we are largely left without inclusion in this important legislation that recognizes the inherent authority of a tribe to prosecute violent crimes against women. Again, we ask that a Commission or Task Force be created to provide a meaningful solution. This situation is especially dire with the economic strain the state of Alaska is currently in. As Senator Murkowski noted during the hearing, we need to look at "new jurisdictional definitions" or some other remedy to include Alaska villages. The state lacks resources to address the concerns of the village. The federal government needs to step in through the trust relationship to address these catastrophic issues that leave our communities unsafe. Again as Senator Murkowski noted, it's time to explore different avenues to address the public safety issues and empower tribes to protect their communities.

Summary

Alaska tribal governments are unique among indigenous American tribes in their lack of access to the same type of government revenues available to nearly every other sovereign entity in the country. We ask that the Senate Select Committee on Indian Affairs take this disadvantage into account to get Alaskan Tribes on an equal playing field, and to make a truly meaningful investment in tribal justice by including the jurisdictional challenges that have plagued meaningful justice to Alaska Native communities.

PREPARED STATEMENT OF JERRY GARDNER, EXECUTIVE DIRECTOR, TRIBAL LAW AND POLICY INSTITUTE

I write on behalf of the Tribal Law and Policy Institute to support the two Senate bills, S. 2785, The Tribal Youth and Community Protection Act; and S. 2920, The Tribal Law and Order Reauthorization Act of 2016.

S. 2785, The Tribal Youth and Community Protection Act

The extension of tribal criminal jurisdiction to prosecute all persons for crimes committed in Indian country is a much needed fix to the jurisdictional maze, and was called for by the Indian Law and Order Commission.[1] S. 2785 is a welcome step in the right direction. Since tribal criminal jurisdiction was abruptly curtailed in 1978 in the *U.S. v. Oliphant* decision, tribes have been without the means to hold non-Indians accountable for their criminal behavior on Indian lands. VAWA 2013 was the first partial-*Oliphant* fix, finally acknowledges the devastating realities of violence being committed against Native women by non-Indians. S. 2785 is the natural extension, acknowledging tribal sovereignty, the horrific nature of crime in Indian country and its under-prosecution, and the plain-sense approach of enabling local criminal justice systems to respond to their communities.

S. 2785 most notable affirms tribal criminal jurisdiction to include crimes committed against Native children. As the Attorney General's Advisory Committee on American Indian and Alaska Native (AI/AN) Children Exposed to Violence noted, "it is troubling that tribes have no criminal jurisdiction over non-Indians who commit heinous crimes of sexual and physical abuse of [AI/AN] children in Indian country."[2] After enacting the special domestic violence criminal jurisdiction (SDVCJ) of VAWA 2013, the pilot project tribes experienced first-hand the cruel absurdity of prosecuting offenders for their crimes against their domestic partners, but not for

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[1] INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, RECOMMENDATION 1.1 (2013).

[2] ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, U.S. DEP'T OF JUSTICE, REPORT OF THE ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (November 2014).

the crimes committed against children.[3] Like Native women, Native children are deserving of protection and the reliability that their offenders will be held accountable.

S. 2785 additional reaffirms tribal criminal jurisdiction over drug offenses and over crimes that may occur within the context of the criminal justice process. VAWA 2013 has been a unique lesson in limited jurisdiction, such that lesser included crimes and attendant crimes are not included. Jurisdiction over such attendant crimes, including resisting arrest, assaulting an officer, witness tampering, and obstruction of justice are necessary components of the criminal justice and will greatly empower tribes to effectively hold offenders accountable.

However, through our lessons learned since VAWA 2013, there are other significant gaps in jurisdiction for which S. 2785 is primed to fill. Most significantly, tribes still lack jurisdiction over all persons for the crime of sexual assault. SDVCJ was originally conceived to include sexual assault. The disturbing Congressional findings within the Tribal Law and Order Act of 2010, including that 34 percent of AI/AN women will be raped in their lifetimes and 39 percent of AI/AN women will be subject to domestic violence,[4] stem from the Amnesty International report, *Maze of Injustice*.[5] In analyzing the devastating nature of sexual violence committed against AI/AN women, the report specifically identified sexual assault, including its finding that 86 percent of reported cases of rape or sexual assault against AI/AN women were perpetrated by non-Native men.[6] The report called for a full *Oliphant* fix.[7] SDVCJ has proven to be an effective tool against offenders. It is critical, however, that tribes are empowered to respond to all sexual violence, and not just violence perpetrated by offenders in a domestic or dating relationship with their victim. Reaffirming jurisdiction over sexual assault will provide a much needed tool, and end a bizarrely cruel distinction between offenders that sexually assault their victims.

S. 2920, The Tribal Law and Order Reauthorization Act of 2016

The Tribal Law and Order Act (TLOA) of 2010 was a paramount, comprehensive law designed to improve numerous facets of the public safety system in Indian country, including by expanding sentencing authority for tribal justice systems, clarifying jurisdiction in P.L. 280 states, and requiring enhanced information sharing across jurisdictions. The Tribal Law and Policy Institute thanks Senator Barrasso for his leadership in introducing this reauthorization, and strongly support its passage. The National Congress of American Indians has developed extensive comments regarding the TLOA reauthorization, including recommendations for amendments and expansions based on experience with tribes. We strongly support their comments, including their recommendations, and urge Congress to implement their suggested changes.

Thank you for your consideration of TLPI's views.

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[3] National Congress of American Indians, "Special Domestic Violence Criminal Jurisdiction Pilot Project Report," 28 (Oct. 29, 2015).

[4] Tribal Law and Order Act of 2010, H. R. 725, Sec. 202(5)(B)–(C).

[5] Amnesty International USA, *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA* (2007).

[6] *Id.* at 4.

[7] *Id.* at 90.

PREPARED STATEMENT OF HON. MELVIN R. SHELDON, JR., CHAIRMAN, TULALIP TRIBES OF WASHINGTON

Dear Senate Select Committee on Indian Affairs:

The Tulalip Tribes offers written comments to supplement the hearing held on May 18, 2016 on Senate Bills, 2920 and S. 2785. We are appreciative that the Senate Select Committee on Indian Affairs is proactively looking at reauthorization of TLOA and also to close jurisdictional gaps of 25 USC 1304, the Special Domestic Violence Court Jurisdiction over non-Indians section.

Introduction

The Tulalip Tribes is the successors in interest to the Snohomish, Snoqualmie, Skykomish, and a number of allied bands, who have occupied the Puget Sound region in Washington State since time immemorial, and were signatory to the 1855 Treaty of Point Elliot. Under the terms of the treaty, these tribes moved to the Tulalip Indian Reservation and in 1934 under the Indian Reorganization Act, chose to use the name the "Tulalip Tribes" which is named for a bay on the Reservation.

Tulalip initially expanded its justice system in 2001 when it retroceded criminal jurisdiction from the State of Washington. In the last decade, the Tulalip justice system has made great strides, developing a full service police department and court system as well a strong support system of prosecutors, probation officers and public defenders. During the same period, Tulalip incorporated Quil Ceda Village (Village) to promote Reservation-based business development. The success of this economic development has created thousands of new jobs and brought in millions of new visitors to the Reservation. However, our government is still unable to collect the necessary taxes to support critical governmental functions that other state, federal and local governments enjoy. The imposition, assessment, and collection of taxes by the state and county undermine and prevent Tulalip and the Village from exercising its own sovereign taxing authority. As a direct result, the Tribes must subsidize and finance, with millions of tribal hard dollars each year, the necessary governmental infrastructure and services to the Village

businesses. The end result is that the Tribes cannot devote those revenues to the needs of the tribal community, including its criminal justice system. Although it has been difficult to expand the justice system to cover these increased responsibilities with finite tribal resources, a strong public safety system is vital for the continued growth of the Tulalip community. Much of the recent success Tulalip has had would not have been possible without an effective tribal justice system that community members, visitors, and businesses can rely on.

After the passage of the TLOA, Tulalip amended its criminal codes to increase sentencing authority for major felony crimes. As other tribes experienced, these amendments to our tribal code took time. In addition, our system was geared to prosecution of misdemeanor crimes, and we had to address changes to our corresponding infrastructure needs. Furthermore, pursuant to the TLOA, with the support of the Executive U.S. Attorney's office and after many discussions with the Western District U.S. Attorney, one of our Tulalip tribal prosecutors is designated as a Special Assistant U.S. Attorney (SAUSA) to prosecute reservation crimes in federal court. This SAUSA appointment has improved collaboration and communication between our respective agencies, resulting in increased prosecutions of sexual predators. We hope that this program can continue to be expanded and the process modified so it is easier for tribes to request the appointment of their qualified prosecutor for this status.

Since Tulalip received retrocession and years prior to implementing greater criminal justice authority under the TLOA, it has been committed to protecting the rights of the accused. All of the Tulalip judges, prosecutors and criminal defense lawyers are highly qualified attorneys. Tulalip provides all indigent defendants with legal counsel without charge. All basic rights of defendants are recognized and codified into the Tulalip criminal justice codes. All defendants have the right to appeal to the Tulalip Court of Appeals. Just as important, the Tulalip court is best suited to address crime and impose sentences in a culturally appropriate way, which includes exploring alternatives that help offenders, victims and the community heal. As a result of this robust justice system and increased jurisdictional authority, we have seen an increase in victims coming forward to report crimes as they are seeing that their perpetrators will be held accountable.

S. 2920

There is no question that the Tribal Law and Order Act has enabled Tulalip to better protect its community. Although the TLOA still leaves the tribes reliant on federal prosecution for most serious crimes, even with the addition of another tribal liaison as TLOA authorized, the U.S. Attorney will still decline to prosecute some major offenses for a variety of reasons. In these situations, it is vital for the Tribal Court to have the authority and capacity to appropriately sentence violent offenders. Under the TLOA enhanced sentencing guidelines, Tulalip has filed approximately 33 charges carrying a sentence of more than one year. Federal and state prosecutors are often unwilling to pursue domestic violence and sexual assault cases on the Reservation because they are time consuming and inherently difficult to prosecute.

Section 103: Data Sharing with Indian Tribes

While in the Tribal Law and Order Act of 2010 Congress required the Attorney General to ensure that tribal agencies that met applicable requirements be permitted access to national crime information databases, the ability of tribes to fully participate in national criminal justice information sharing via state networks has been dependent upon various regulations, statutes and policies of the states in which a tribe's land is located. The Washington State Patrol is the CSA for the state of Washington, and it is also the administrator for the state database. Under Washington law, the Tulalip Tribes' access to the national crime information databases has been so limited, that it has endangered officer safety and our community at large. Late last year, we began participation in the Tribal Access Program (TAP) and will receive our TAP machines and access in the next few weeks. In this process we have continued to discover that tribal access is piecemeal.

We need a legislative fix that addresses the concerns of the Criminal Justice Information System (CJIS) about tribal access to federal databases for governmental purposes. Currently access may be authorized through federal statutes providing some access for certain situations to tribes and then deferring to state law to define and provide access. Such access is difficult for tribes to map out, determine who at what agency needs to authorize, develop a process, get User Agreements, Memoranda of Understandings or Management Control Agreements in place just to ensure that those who are employed in positions of trust are safe to be around our most vulnerable populations.

28 USC 534(d) authorizes release of criminal history information to tribal law enforcement agencies, but doesn't allow release of criminal information to other tribal agencies for important, legitimate civil purposes, such as Emergency Placement of Children or "Purpose Code X," employees that work with elders and vulnerable adults, etc.

CJIS interprets the appropriations rider language from 92-544 (and in the notes of 28 USC 534) as a permanent statute that prevents sharing this information with tribal governments. In their view, for example, criminal history for the emergency placement of children (Purpose Code X) can only be shared "if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing."

We need to amend federal law to authorize the sharing of this information with tribal governments for any legitimate purpose. One solution is to renumber 534(d) and add a new subsection: "If authorized by tribal law and approved by the Attorney General, the Attorney General shall also permit access to officials of tribal governments for non-criminal justice, non-law enforcement employment, licensing purposes or any other legitimate government purpose identified in tribal legislation." Another possible solution is to insert on Page 10, line 5, the addition "civil" before "background checks" and adding after "background checks," "if authorized by Tribal law and approved by the Attorney General."

We believe it critical that *civil* authority be included within this section too, so that once and for all the piecemeal, inefficient barriers to full legitimate access is resolved.

Section 104. Bureau of Prisons Program

The TLOA enhanced sentencing guidelines have proven especially useful as a tool for addressing these crimes on the Tulalip Reservation. We have one person convicted of rape of a child who is serving three years (the max available) in federal prison, through the Bureau of Prisons (BOP) Pilot Project.

The Tribes request that the Bureau of Prisons (BOP) pilot project be expanded and made permanent. The TLOA provided for the use of the federal prisons with the expanded sentencing. However, by the time tribes were able to exercise the TLOA measures, the BOP pilot project was nearly over. In addition, it was limited to violent crimes and sentences greater than 2 years and 1 day. With the passage and implementation of VAWA 2013, the ITWG Tribes have raised issues and challenges around detaining SDVCJ defendants in tribal or BIA facilities using self-governance funds, and providing health care for non-Indian defendants. Expanding the program to cover SDVCJ defendants and other felony level crimes would significantly help tribes in keeping their communities safe.

Section 109: SAUSA and TRIBAL LIASONS

The Tulalip Tribes values its relationship with the U.S. Attorney's Office, which has been an important partner in fighting crime on the Reservation. The provisions of the TLOA providing for better reporting and communication between the U.S. Attorney's Office and Indian tribes have proved helpful in improving this relationship. Since the passage of the TLOA, Tulalip prosecutors have developed a better working relationship with the Assistant U.S. Attorneys in the Seattle Office, and the Tulalip Police Department has forged a better relationship with federal law enforcement.

Specifically, the TLOA reauthorization is now including provisions expanding public defense resources and creating special Liaison positions. While the Tulalip Tribes values a defendant's right to counsel and has provided public defense to its criminal defendants since 2002, adding Federal Public defense to our communities may not be the best model. Tribal justice systems thrive on the ability to attract individuals who have an interest in the advancement and safety of their community under a shared value system. Federal public defenders, unlike the United States Attorney Office, have rarely demonstrated any interest in tribal forums. Any public defender system should be created with tribal input and should ensure that the Tribal Liaisons for the United States Attorneys are not forgotten. We need more resources towards these existing systems and want to ensure their needs are being addressed and not overlooked. We have seen a remarkable increase in criminal prosecution of federal felony level offenders as a result of the Tribal Liaison program. Such progress should be expanded upon.

Section 110. Exclusion provisions

The proposed amendment in this section recognizes, as Tulalip does, the seriousness of drug dealing and serious violent crime on the reservation with this section. We have a few people in who are habitual exclusion order violators and tribal court exclusion order violation criminal cases against them have done nothing to deter them. Trespass charges filed in state court for non-Indian violators have not been handled as urgent or priority cases and likewise have not been an adequate deterrent to non-Indian offenders.

We propose specific changes to the law as follows on page 22, lines 24-25: change "because of a conviction under the criminal laws of the tribal government– . . ." to "because of a criminal conviction for:"

Except for special domestic violence jurisdiction under the Violence Against Women Act, tribal courts lack criminal jurisdiction against non-Indian offenders. Therefore, exclusion orders have been used as civil remedies to protect the health, safety and welfare of the tribal community against non-Indian drug dealers and/or violent offenders. Therefore, the criminal convictions shouldn't be narrowed to only tribal convictions.

On page 23, lines 1-2, section (A), we propose to use the federal definition of "crime of violence" under 18 USC section 16 (instead of violent crime as defined under applicable tribal law). Using the federal definition would provide for some consistency---some tribes may not have a definition for "violent crime" and obviously the definition would not be uniform across the various tribes. A federal offense should offer some consistency to avoid disparate results. The last change we would recommend is to expand section (B) on page 23, lines 3-4 from just the sale or distribution of controlled substances to include manufacturing and attempts/conspiracy/intent to sell, manufacture, deliver a "controlled substance" as defined under the Uniform Controlled Substances Act.

SENATE 2920

We greatly appreciate the introduction of this bill. We ask that the Senate look to recent studies such as the newly released, National Institute of Justice, *Research Report on the Violence Against American Indian and Native Women and Men*, that document the dire safety circumstances of Indian Country. Often times the violence committed against our Indian community is at the hands of non-Indians. VAWA 2013 recognized this problem, but with the limitations on Special Domestic Violence Court Jurisdiction (SDVCJ), we have seen crimes still go unpunished and victims, mostly children, whose crimes against them are not being prosecuted given the limitations in the law. On May 6, 2016, the Tulalip Tribes tried to address this concern and passed resolution 2-16-249, entitled "COMBATTING NON-INDIAN DOMESTIC VIOLENCE AND SEXUAL ASSAULT: A CALL FOR A FULL OLIPHANT FIX." In this resolution, we recognize that domestic violence is not a singular crime, but is often accompanied with a variety of other crimes as well as other victims besides the intimate partner. We ask the Senate to consider a full fix to *Oliphant v. Suquamish*, 435 U.S. 191 (1978). See Attached.

The Tulalip Tribes is an original Pilot tribe exercising SDVCJ. We urge that the law be expanded to fulfill its potential and are encouraged by S. 2920. As mentioned, even where the law has been implemented, tribal prosecutors are limited in their authority and cannot charge an offender who simultaneously abuses or endangers his children; or who commits a drug or alcohol offense or property crime; who interferes with the reporting of the domestic violence; or who physically or sexually assaults someone other than an intimate partner. We can only charge for physical assault and violations of protection orders—the two crimes that place the heaviest burden on victimized persons to participate in prosecution. The proposed legislation attempts to

fix these issues. We request the Senate Committee on Indian Affairs hold hearings on the success of SDVCJ jurisdiction to hear directly about the impact on our communities.

Current Cases since February 20, 2014

- 13 cases with 11 defendants:
- Status: 6 convictions, 2 dismissals, 1 transferred, charged and pled in Federal Court and 4 pending.
- Defendants multi-racial—4 Caucasian, 2 African American, 4 Hispanic, 1 unenrolled Canadian Indian
- Age range between 21 and 35.
- Since 2008, tribal law enforcement has had over 100 contacts with these individuals
- Relationships: 9 girlfriends, 1 spouse and 1 ex-spouse
- 6 defendants have children with the intimate partner
- 5 cases a child was assaulted or endangered. Thus far only case charged for crimes against a child.

Comments:
Many crimes that we would normally charge that are typical of DV crimes go uncharged because of limitations in the law: Damage to property, interfering with reporting of DV, criminal endangerment, etc.

SUMMARY

t'igwicid, or thank you for taking the time to listen to our concerns, the voices and needs of our tribe, and for considering our recommendations. We believe in the continuation of building alliances to enhance and promote the needs of tribal justice agencies. By working together, we stand stronger in our advocacy efforts for equal access to justice, local based solutions to local problems, and access to services and advocacy designed by and for Native communities.

Attachments follow

THE TULALIP TRIBES
Resolution No. 2016 - 249

COMBATTING NON-INDIAN DOMESTIC VIOLENCE AND SEXUAL ASSAULT: A CALL FOR A FULL OLIPHANT FIX

WHEREAS the Board of Directors is the governing body of the Tulalip Tribes under the Constitution and Bylaws of the Tribes approved by the United States Commissioner of Indian Affairs and the Secretary of the Interior on January 24, 1936, pursuant to the Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. §476); and

WHEREAS, pursuant to the Tulalip Tribes Constitution Art. VI. Section 1, the Board possesses the authority to safeguard and promote the peace, safety, morals, and general welfare of the Tulalip Reservation; and

WHEREAS, pursuant to the Tulalip Tribes Constitution Art. VI. Section 1 the Board possesses the authority to adopt resolutions regulating the procedures of the Board itself and of other tribal agencies and tribal officials of the reservation; and

WHEREAS, domestic violence in Indian country is at epidemic levels, including criminal acts by non-Indians against tribal members; and

WHEREAS, the 2013 Re-authorization of the Violence Against Women Act permitted tribes to exercise limited inherent criminal jurisdiction over non-Indian domestic violence perpetrators in narrow circumstances; and

WHEREAS, the experience of those tribes that have implemented non-Indian domestic violence jurisdiction has highlighted its limitations, particularly in light of certain United States Supreme Court cases; and

WHEREAS, domestic violence is not a singular crime but can encompass any criminal activity including property crimes (e.g. malicious mischief, burglary, trespass, etc.), financial crimes (e.g., theft, intentional destruction of credit, etc.), drug crimes (e.g. involuntary drugging etc.), traffic crimes (e.g., drunk or drugged driving, reckless driving, particularly where the victim is an involuntary passenger), and personal crimes (e.g. assault, rape, reckless endangerment, kidnapping, unlawful imprisonment, etc.), and can be directed at third parties such as children, family members, boyfriends/girlfriends, or other persons the primary victims have relationships with; and

WHEREAS, it is impossible to craft a fix to the 2013 Violence Against Women Act non-Indian domestic violence provisions in a way that can encapsulate all potential domestic violence criminal acts and attendant crimes because domestic violence can take the form of virtually any direct or indirect crime against a spouse or intimate partner and is frequently accompanied by a pattern of criminal behavior such as drug crimes, theft, and violence that are damaging to the entire tribal community; and

WHEREAS, the 2013 Re-authorization of the Violence Against Women Act does not provide protections for stranger, acquaintance, or first date sexual assault or domestic violence related crimes; and

WHEREAS, the tribes that have implemented the non-Indian provisions of the 2013 Re-authorization of the Violence Against Women Act have proven that tribes can and do afford non-Indians the equivalent of their full panoply of rights under the United States Constitution, complete with a right of review in federal court on a habeas corpus petition; and

WHEREAS, communities in which crimes occur are the best jurisdictions to investigate and prosecute those crimes regardless of who it involves; and

WHEREAS, tribal nations have a moral obligation to ensure the protection of their entire community regardless of race, citizenship, or relations to tribal citizens, which in turn mandates that tribes have the ability to hold all criminals accountable for crimes committed in their communities; and

WHEREAS, the United States government has the ability to restore tribal jurisdiction in a manner that ensures due process protections and allows for full local criminal justice protections by enhancing inherent tribal criminal jurisdiction over all crimes within a tribe's Indian country regardless of race, citizenship, or relationship of those committing crimes; now

THEREFORE BE IT RESOLVED, that the Tulalip Tribes does hereby call on the United States government to expand inherent tribal criminal jurisdiction over all persons committing any crime in their Indian country in a manner that ensures the defendants have the same due process protections as required under the Tribal Law and Order Act of 2010 and the 2013 Re-authorization of the Violence Against Women Act; and

BE IT FURTHER RESOLVED that Tulalip Tribes does hereby call on all presidential campaigns to make the expansion of inherent tribal criminal jurisdiction over all persons and crimes within a tribe's Indian country a central part of their Native American policy.

ADOPTED by the Board of Directors of the Tulalip Tribes of Washington at a regular meeting assembled on the 6 of May, 2015, with a quorum present, by a vote of 5 for and 0 against.

THE TULALIP TRIBES OF WASHINGTON

Melvin R. Sheldon Jr., Chairman

ATTEST:

Bonnie Juneau, Secretary

VAWA 2013 AND THE TULALIP TRIBES JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE

Who We Are: The Tulalip (pronounced Tuh'-lay-lup) Tribes, is a federally-recognized Indian tribe located on the Tulalip Reservation in the mid-Puget Sound area north of Everett Washington, bordered on the east by Interstate 5 and the city of Marysville. The Tulalip Reservation exterior boundaries enclose a land-base of 22,000 acres, with approximately 15,000 acres in federal trust status. Our Reservation is rich with natural resources: marine waters, tidelands, fresh water creeks and lakes, wetlands, forests and developable land. The Tulalip Reservation was reserved for the use and benefit of Indian tribes and bands signatory to the Treaty of Point Elliott of January 22, 1855. Its boundaries were established by the 1855 Treaty and by Executive Order of President U.S. Grant dated December 23, 1873. It was created to provide a permanent home for the Snohomish, Snoqualmie, Skagit, Suiattle, Samish and Stillaguamish Tribes and allied bands living in the region. Today, we have 4,533 enrolled tribal members and approximately 2,500 of these members reside on the reservation.

Tulalip Justice System: The Tulalip Tribal Court supports the Tribes' vision, "together we create a healthy and culturally vibrant community," in its practice of judicial excellence. The Tulalip Tribes has always provided a forum for Tribal members to resolve issues. Some of the first issues heard by the court involved fishing, employment and child welfare cases. The Tribal Court has grown substantially since that time. In 2001, the Tribe requested and received retrocession over reservation lands from the state of Washington. The Tribes expanded its police department the same year. In 2003, the Tribes developed an institutional relationship with the University Of Washington School Of Law Native American Law Center for the Tribal Court Defense Clinic, which is designed to provide representation to low-income Tulalip Tribal members charged with crimes on the reservation. The Clinic is funded in part through Tulalip casino-derived revenue.

Key Stats of SDVJ Cases since February 20, 2014: 13 cases, with 11 defendants, age range: 21-35; race: 4 Caucasian, 2 African American, 4 Hispanic and 1 non-enrolled Canadian Indian. 6 defendants have children in common with the victim of the crime. Defendants have had a combined number of 109 contacts with Tulalip Tribal Law Enforcement since 2008. Information about the Victim: 9 girlfriends, 1 spouse and 1 ex-spouse. During 6 of incidents, children were present; 5 children were victims of crime.

Outcomes: 6 plead guilty, 4 pre-trial, 2 dismissed, and 1 transferred to Federal Court. Of the crimes in which children were victims of crime, only 1 case will be prosecuted because underlying crime transferred to federal court. State has not taken action on other 4 crimes in which children were victims.

Collaborative Relationships: Tulalip collaborated with the federal government and other tribal organizations which proved to be invaluable in this effort. We worked with the Intertribal Work Group, which consisted of tribal attorneys, judges, council member, the National Congress of American Indian (NCAI), the National Council of Juvenile and Family Court Judges and Tribal Law and Policy Institute, and the Department of Justice. We promote continuing this type of collaboration and cooperation for future expansion of laws and programs.

Costs to Tulalip: Tulalip absorbed all costs using its tribal revenues. Congress authorized up to $25 million to implement this program through 2018, but Congress has yet to appropriate any of those funds.

Key SDVJ Requirements, Tulalip Tribal laws and readiness (Tribal Retrocession in 2001):

- General Application of ICRA 25 USC 1304 (d) (1) (Rights of the defendant) (code implementation 2002)
- Jury Drawn from Fair Cross Section 25 USC 1304 (d) (code implementation 2002)
- Notice of Right to Habeas Corpus and Petition for Stay of Detention 25 USC 1304 (e) (3) (code implementation 2002)
- Rights to Counsel 25 USC 1302 (c) (code implementation 2002)
- Qualifications of Judges 25 USC 1302 (b) (code implementation 2002)
- Recording of Proceedings 25 USC 1302 (c) (since inception of court)
- Publication of Laws 25 USC 1302 (c) (online 2010, before that available through Court, Law Schools, etc.)

Next steps:

- Authority to charge crimes against child victims and other attendant Crimes
- Authority to charge stranger rape
- Reauthorize, expand and make permanent Bureau of Prisons Pilot Project (approved in TLOA)
- Implement the NCIC-TAP Program as a "Permanent Program" and create an ITWG for this purpose
- Full funding for all aspects of implementation

Albuquerque Journal

Man arrested in SE ABQ parking lot homicide

Guest Columns

Time to empower tribal authorities

By Kevin Washburn / Professor, UNM School of Law

Wednesday, May 11th, 2016 at 12:01am

When a Navajo tribal member commits a serious felony against another Navajo on the remote Navajo Indian Reservation, the crime sets in motion not a tribal criminal investigation and tribal court proceeding but a federal investigation and a federal court proceeding under the federal Major Crimes Act.

For trial, the Navajo defendant, the Navajo victim, and the witnesses (all of whom are also likely to be Navajo) will be summoned to a federal district court far away from the reservation and the specific community where the crime occurred.

Unlike a felony involving only non-Indians, which would be routinely adjudicated at the local county courthouse, the Navajo felony will be tried in a distant federal court in Phoenix, Salt Lake City or Albuquerque.

Hundreds of miles of desert landscape and lonely highways separate the small, mostly rural Navajo communities where these federal crimes occur from the urban federal courts where they are tried. But even though this physical distance is tremendous, it is dwarfed by an even greater distance: The vast cultural gulf between the federal court and the tribal community.

The federal court operates in a language that is foreign to many Navajos, thus the Navajo defendants, victims and witnesses may require interpreters to translate the proceedings.

Neither the judge, the court reporter, the prosecutor, the court security officers or the deputy marshals, nor the defense attorney or investigator are likely to be Navajo or understand or speak the Navajo language.

Perhaps even more importantly, the federal jury that hears the evidence is unlikely to include a Navajo, an Indian, or any other member of the community where the crime occurred.

I wrote those words more than 10 years ago and the justice system on the Navajo Reservation is just as alien to the Navajo people now as it was then.

For more than a century, it has been primarily the responsibility of the federal government to address crimes like the vicious murder of 11-year-old Ashlynne Mike. And to these crimes keep occurring.

For decades, our laws have emasculated tribal governments and tribal authority. If tribal officials are denied the opportunity to solve these problems, and are not held accountable when they continue to occur, they will keep happening. The crimes on the Navajo Reservation cannot be addressed in Albuquerque or Phoenix. They must be addressed at the local level.

Only recently has Congress begun to recognize the importance of increasing tribal authority over reservation crimes.

During the Obama Administration, appropriations have increased by billions of dollars for Indian programs and health services, but tribes need money for public safety. In 2010, President Obama signed the Tribal Law and Order Act, which extended tribal criminal authority from misdemeanors to felonies, but tribal authority is still limited to only three years in prison per offense.

In 2013, Obama signed the Violence Against Women Act, which allowed tribes limited criminal authority over non-Indians, but only if the non-Indian victimizes a bona fide domestic partner on a reservation, such as a spouse.

The Navajo Nation has not had the opportunity to fully implement either law because they, frankly, lack adequate financial resources to do it.

As a result, crimes like the murder of Ashlynne Mike continue to occur and continue to be prosecuted in Albuquerque or Santa Fe, more than 200 miles from where the crime occurred.

This is the outcome when the chief law enforcement officer for the Navajo Nation is a U.S. Attorney in Albuquerque or Phoenix. Federal law enforcement is not the answer to tribal crime — it is an impossible task for outsiders.

The problem of violence on Indian reservations will be solved only when tribal officials are given the authority and the resources to address these problems, and only when they are then held accountable by the press and their communities for seeing this important work done. Until then, tribal leaders are justified in pounding the table and blaming the federal government for these tragedies.

The remnants of **relocation** are strong. It will take years to undo. But the solution to this problem is tribal self-governance.

Albuquerque Journal

BREAKING NEWS

Man arrested in SE ABQ parking lot homicide

Editorials

Editorial: Police agencies should work on working together

By Albuquerque Journal Editorial Board

Monday, May 7th, 2011 at 12:35am

It's disconcerting that the tragedy of 11-year-old Ashlynne Mike's rape and murder near Shiprock is followed by claims that the various law enforcement agencies failed to communicate effectively while they scrambled to find the girl and her killer.

Communications between the San Juan County Sheriff's Office, Navajo Police and State Police were so poor that two sheriff's detectives had stopped and were talking to suspect Tom Begaye Jr. while the girl's body was being recovered Monday morning.

Lacking information they should have had from Navajo Police – and thus the probable cause needed to arrest Begaye – the detectives let him go.

Fortunately, a tip later that day led police to Begaye, who is now charged with murder and two counts of kidnapping. Without that tip, Begaye, who may have become desperate, could still be on the loose, despite the best efforts of the sheriff's office, the police in Shiprock, State Police and the FBI.

Sheriff Ken Christesen said poor communication and a "lack of leadership and responsiveness" on the part of tribal police has been a problem between the two agencies for years. A reporter's attempts to get a response to Christesen's claims from Shiprock Police Capt. Ivan Tsosie were unsuccessful.

In the aftermath of this horrific incident, it's imperative the law enforcement agencies involved come together to work out relations and protocols for future incidents. Lives depend on communication and cooperation.

While we're on the topic of protocols, it needs to be pointed out that the federal Amber Alert system worked as it was designed to – despite claims that it went out too late and calls by San Juan Chapter President Rick Nez for the Navajo Nation to create its own Amber Alert system.

State Police spokesman Sgt. Chad Pierce correctly responded that well-reasoned Amber Alert protocols are in place to ensure they remain effective.

"If an Amber Alert went out all the time without the vetting process, it would be like a car alarm" that everyone ignores, he said.

He's right. But interagency cooperation would help.

This editorial first appeared in the Albuquerque Journal. It was written by members of the editorial board and is unsigned as it represents the opinion of the newspaper rather than the writers.

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