



# JURISDICTION: BRINGING CLARITY OUT OF CHAOS

Under the United States' Federal system, States and localities, such as counties and cities, have primary responsibility for criminal justice. They define crimes, conduct law enforcement activity, and impose sanctions on wrongdoers. Police officers, criminal investigators, prosecutors, public defenders and criminal defense counsel, juries, and magistrates and judges are accountable to the communities from which victims and defendants hail. Jails and detention centers often are located within those same communities. It's the American Way: local communities address local criminal justice problems with locally controlled and accountable institutions. In contrast, the Federal government's role is limited to enforcing laws of general application,<sup>1</sup> and even then, Federal agencies often work in partnership with State and local authorities.

This familiar framework stands in stark contrast to the arrangements in federally recognized Indian country, where U.S. law requires Federal and State superintendence of the vast majority of criminal justice services and programs over local Tribal governments. In recent decades, as the Tribal sovereignty and self-determination movement endorsed by every U.S. president since Richard Nixon has taken hold, Tribal governments have sought greater management of their own assets and affairs, including recovering primary responsibility over criminal justice within their local Tribal communities.

**Table 1.1 Major Statutes and Cases Affecting Indian Country Criminal Jurisdiction**

ACT OR CASE	REFERENCE	YEAR	DESCRIPTION
Trade and Intercourse Act	1 Stat. 137 § 137	1790	Asserts that a State can punish crimes committed by non-Indians against Indians under the laws of the State.
General Crimes Act	18 U.S.C. § 1817	1817	General Federal laws for the punishment of non-Indian crimes are upheld on Tribal lands; Indian offenses remain under Tribal jurisdiction.
Assimilative Crimes Act	18 U.S.C. § 15	1825	Extends coverage through Federal enforcement of certain state criminal laws in certain Federal enclaves.
<i>Worcester v. Georgia</i>	51 U.S. (6 Pet.) 515	1832	State laws have no rule of force in Indian country
<i>United States v. McBratney</i>	104 U.S. 621	1881	Provides for exclusive State criminal jurisdiction over crimes between non-Indians for offenses committed in Indian country; rule later extended for “victimless” crimes.
<i>Ex parte Crow Dog</i>	109 U.S. 556	1885	Reaffirms Tribal self-governance and the absence of State jurisdictional authority in Indian country, as well as Federal jurisdiction in cases of intra-tribal crimes.
Major Crimes Act	18 U.S.C. § 1155	1885	Extends Federal jurisdiction to include authority over Indians who commit 7 (later amended to 16) felonies.
<i>United States v. Kagama</i>	118 U.S. 375	1886	Upholds the Major Crimes Act based on Congress’ plenary power over Indian affairs.
General Allotment Act (Dawes Act)	25 U.S.C. § 531	1887	Created individual Indian land parcels, held in trust by the Federal government for individual Indians and Indian households, out of reservation lands, eventually leading to so-called “checker-boarded” jurisdiction as some parcels moved from trust to fee status.
Indian Country Act	18 U.S.C. § 1151	1948	Defines the scope of Federal criminal jurisdiction over Indian lands.
Public Law 85-280	18 U.S.C. § 1162; 25 U.S.C. § 1360	1953	Transfers Federal jurisdiction over Indian lands to 5 mandatory States (Alaska added upon statehood), excepting 3 Tribes, without Tribes’ consent; optional for other States, also without Tribes’ consent.
Public Law 85-280, amended	18 U.S.C. § 1162; 25 U.S.C. § 1360	1968	Allows States to request retrocession of Indian country jurisdiction (a return of jurisdiction to the Federal government).
Indian Civil Rights Act (ICRA)	25 U.S.C. § 1301	1968	Details rights Tribes must provide defendants in their courts while restricting Tribal courts to misdemeanor sentencing only.
Indian Self-Determination and Education Assistance Act	25 U.S.C. § 450	1975	Allows for the reassertion of control over Tribal services through self-governance contracts and other mechanisms.
<i>Oliphant v. Susquamish Indian Tribe</i>	435 U.S. 191	1978	Holds that Tribal courts lack any criminal jurisdiction over non-Indians for offenses committed on Indian lands.
<i>United States v. Wheeler</i>	495 U.S. 313	1978	Double jeopardy does not apply in cases subject to concurrent Federal and Tribal criminal jurisdiction.
<i>Duro v. Reina</i>	495 U.S. 676	1990	Prevents Tribal courts from exercising criminal jurisdiction over Indians who are not members of that tribe.
ICRA, amended	25 U.S.C. § 1301	1991	So-called “Duro fix” reaffirms Tribal criminal jurisdiction over all Indians, not just member Indians.
Tribal governments’ consent for federal capital punishment	18 U.S.C. § 3598	1994	Requires that no Indian may be subject to a capital sentence unless the governing body of the Tribe has first consented to the imposition of the death penalty for crimes committed on the tribe’s lands.
<i>United States v. Lara</i>	541 U.S. 193	2004	Affirms that separate Federal and Tribal prosecutions do not violate double jeopardy when a tribe prosecutes a non-member Indian.
Tribal Law and Order Act	25 U.S.C. § 2801	2010	Enhances Federal collaboration with Tribal law enforcement agencies, expands Tribal courts’ sentencing authority to felony jurisdiction by amending ICRA to permit incarceration for up to three years per offense, while allowing multiple offenses to be “stacked”
Violence Against Women Reauthorization Act	127 Stat. 54	2013	Restores Tribal criminal jurisdiction over non-Indians in Indian country for certain crimes involving domestic and dating violence and related protection orders.

Disproportionately high rates of domestic violence, substance abuse, and related violent crime within many Native nations have called into question whether the current Federal and State predominance in criminal justice jurisdiction offers Tribal nations a realistic solution to continued social distress marked by high rates of violence and crime. Federal and State agencies can be invaluable in creating effective partnerships with Tribal governments, but there is no substitute for the effectiveness of locally controlled Tribal governmental institutions that are transparent and accountable. U.S. citizens rightly cherish the value of local control: that government closest to the people is best equipped to serve them. The comparative lack of localism in Indian country with respect to criminal justice directly contravenes this most basic premise of our American democracy.<sup>2</sup>

The Tribal Law and Order Act of 2010 (TLOA) instructs the Indian Law and Order Commission (Commission) to study jurisdiction over crimes committed in Indian country, including the impact of jurisdictional arrangements on the investigation and prosecution of Indian country crimes and on residents of Indian land. Additionally, TLOA calls for studying the Indian Civil Rights Act of 1968 and its impact on the authority of Indian Tribes, the rights of defendants subject to Tribal government authority, and the fairness and effectiveness of Tribal criminal systems. Finally, TLOA directs the Commission to issue recommendations that would simplify jurisdiction in Indian country.

The Commission's primary response is to request that the President and Congress act immediately to undo the prescriptive commands of Federal criminal law and procedure in Indian country and, with the assurance that the Federal civil rights of all U.S. citizens will be protected, recognize Tribal governments' inherent authority to provide justice in Indian country.

## **FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION OVER CRIMES COMMITTED IN INDIAN COUNTRY**

For more than 200 years, the Federal government has undertaken to impose Federal laws, procedures, and values concerning criminal justice on American Indian nations (Table 1.1). An oft-used justification for these jurisdictional modifications is that the overlay of Federal and State law will make Indian country safer. But, in practice, the opposite has occurred. Indian people today continue to experience disproportionate rates of violent crime in their own communities. An exceedingly complicated web of jurisdictional rules, asserted by Federal and State governmental departments and agencies whose policy priorities usually pre-date the modern era of Tribal sovereignty and self-determination, contributes to what has become an institutionalized public safety crisis. The symptoms of this systemic dysfunction are painfully apparent across Indian country.

*Institutional illegitimacy.* Because the systems that dispense justice originate in Federal and State law rather than in Native nation choice and consent, Tribal citizens tend to view them as illegitimate; these systems do not align with Tribal citizens' perceptions of the appropriate way to organize and exercise authority. The Commission heard this observation at virtually every one of its field hearings from the Eastern United States to Alaska. Generally, members do not willingly comply with decisions that have not won their consent.

Because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy. As widely reported in testimony to the Commission, nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust, resulting in diminished crime-fighting capacities. The consequences are many: victims are dissuaded from reporting and witnesses are reluctant to come forward to testify. In short, victims and witnesses frequently do not trust or agree with State or Federal justice procedures. Potential violators are undeterred.<sup>5</sup>

When Federal and State criminal justice systems treat Tribal citizens unfairly or are widely perceived as doing so, trust and confidence in the law erode further. Crime victims, witnesses, and defendants often must travel to far-off courthouses for their cases and testimony to be heard. Colorado is a case in point.<sup>4</sup> The two Indian nations headquartered within the State's boundaries, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, are located between 7 and 10 hours' drive across the Rocky Mountains from Denver, where the entire U.S. District Court is housed in a single Federal courthouse.<sup>5</sup>

Tribal citizens are transported, often at their own expense, to nonlocal court venues, where trials are conducted according to the procedures and methods of adversarial justice, and where the process of assigning punishments can be foreign to Tribal cultures. By contrast, justice in many Tribal communities is oriented toward restoring balance and good relations among Tribal members. Victims, if possible, are restored to economic and social well-being. Offenders and their relatives strive to provide restitution to offended persons and kin. When an agreed-upon payment is found, the offender's family makes this restitution to the offended family, and the issue is at an end. Of course, this is not the case with every kind of offense or every Tribe, but the principle holds: local control for Native communities means the ability to build and operate justice systems that reflect community values and norms.

In Federal and State courts, Native defendants often are not tried by a true jury of their peers. Federal and State jury pools are drawn with little consideration of where Native people live and work. This concern also was raised repeatedly at Commission field hearings across Indian

country. Misperceptions impact every step of the process. Prosecutors may be more skeptical of Indian victims. Judges might award harsher sentences to Indian defendants because of assumptions they make about Indian country crime and those individuals involved. In the case of Federal courts, criminal sentences for the same or similar offenses are systemically longer than comparable State systems because there is no Federal parole or good-time credit even for inmates who follow the rules.

Ultimately, the inequities of Federal and State authority in Indian country actually encourage crime. The Commission received extensive testimony from Indian and non-Indians alike that Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation. Because Tribal members or relatives could be sent to prison or jail, which would have negative social and economic impacts on the family or local group, they will not bear witness against perpetrators. The punishment outcomes of the adversarial Federal and State court systems do little to heal Tribal communities and may create greater and longer disruptions within the communities.

You're going to take the Western model and put it—impose it—on Indian Country? It's never going to work.

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California  
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation  
February 16, 2012*

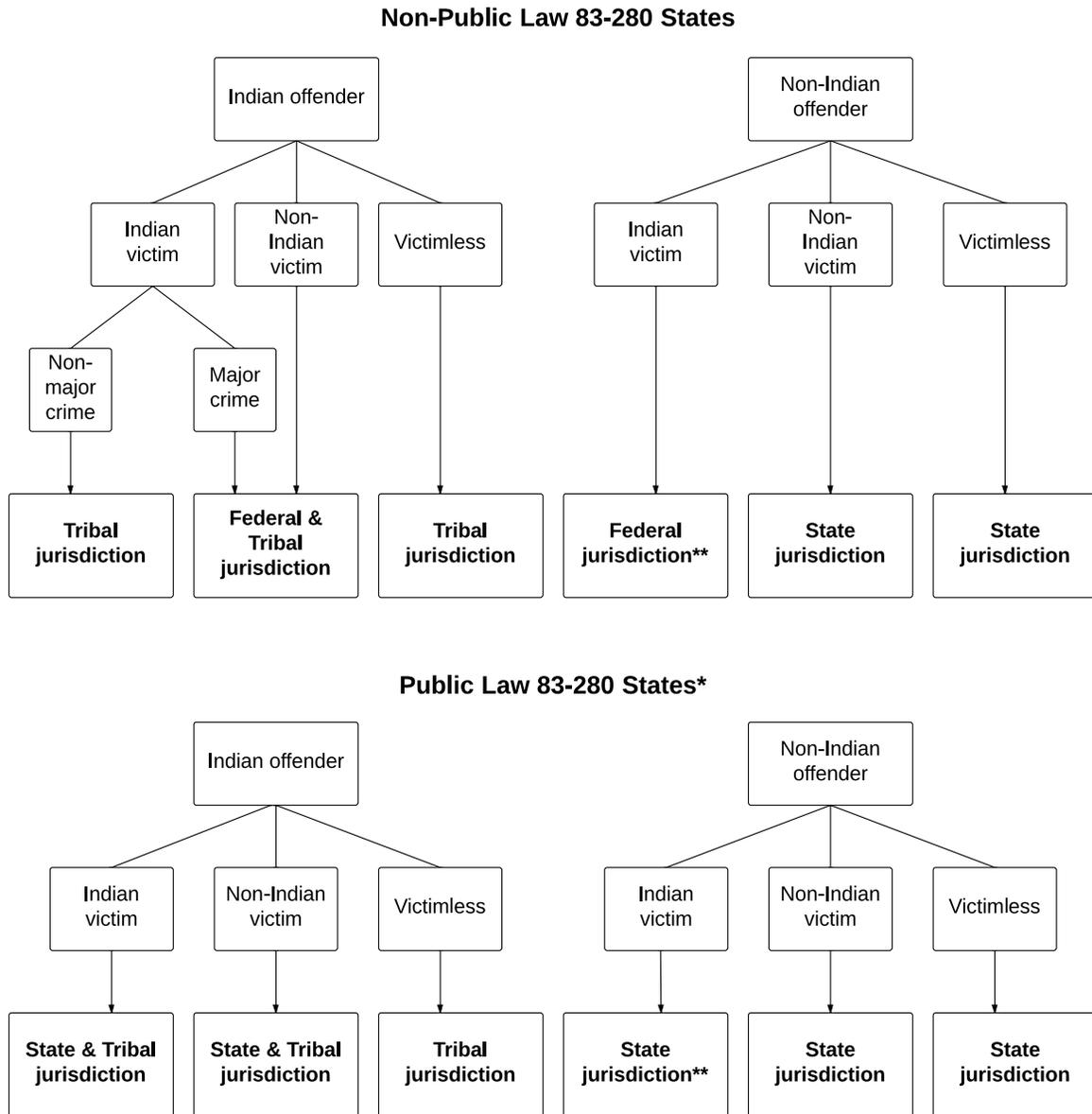
To be frank, State law enforcement in Indian country, as we learned, was viewed as an occupying force, invaders, the presence wasn't welcome. ...The common belief was that a deputy sheriff could come onto the reservation for whatever reason, [and] in handling a situation, if a condition [arose], the deputy could use any level of force necessary and then just drive away with no documentation, no justification, no accountability, and the Tribal community just had to take it.

*Ray Wood, Lieutenant, Riverside County Sheriff's Department  
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation  
February 16, 2012*

And I have argued, and I think it is a fair legal argument, that if you have an Indian country case, the jury must come from Indian country. That is what a jury means. A jury means representatives of the community. ...We ought to be drawing our jurors from Indian country, and we don't do that. We don't. We draw them the same way we draw every Federal jury in the Federal district courts, and that is problematic in many respects...because one of the ways that the Federal juries usually are drawn is from voter registration roles.

*Kevin Washburn, Dean, University of New Mexico School of Law  
Testimony before the Indian Law and Order Commission, Hearing at Pojoaque Pueblo, April 19, 2012*

**Figure 1.1 General Summary of Criminal Jurisdiction on Indian Lands**  
(Details vary by Tribe and State)



\* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of "Optional 280" status is shown in this chart.

\*\* Under the *Violence Against Women Act Reauthorization of 2013* (VAWA Amendments), after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.

*Institutional complexity.* Figure 1.1 summarizes the complexity that results from the overlay and predominance of Federal and State authority over Tribal authority. Yet, the seeming order of the figure fails to capture how difficult actual implementation of this imposed legal matrix can be. Jurisdictional questions and concerns arise at every step in the process of delivering criminal justice from arrest to criminal investigation, prosecution, adjudication, and sanctions. For instance:

- Is the location in which the crime was committed subject to concurrent State criminal jurisdiction under P.L. 83-280 or other congressional provisions?
- If the State shares criminal law jurisdiction, does the Tribe also have statutes or ordinances that criminalize or penalize the action?
- Under which government's law does a law enforcement officer have the authority to make an arrest?
- If this portion of Indian country is not subject to P.L. 83-280, is the crime subject to concurrent Federal jurisdiction under the Major Crimes Act?
- If the incident does not constitute a major crime, does the Tribal nation have arrest and prosecution authority under its own statutes?
- Is the suspect a non-Indian, does a Tribal officer have the authority not only to detain, but also to arrest and charge the offender under a cooperative agreement, special Federal commission, or conferral of State peace officer status?
- Which jurisdiction has the authority to prosecute the suspect, and to whose officers should the perpetrator be turned over?
- Are there double jeopardy issues as a matter of State or Tribal law if one jurisdiction prosecutes first and the other wants to follow?
- Does the crime involve violence against women?
- If so, does that change the authority of the Tribal officer, under Tribal law, to arrest a non-Indian, no matter where the offense occurred?
- Where jurisdiction is concurrent, do available sanctions or rehabilitation options affect the choice of venue?

Essentially, the delivery of criminal justice to Indian country depends on each identified government being able and willing to fulfill its Indian country responsibilities. Any delays, miscommunications, service gaps, or policy gaps—unintentional or otherwise—threaten public safety. For example, if Tribal law enforcement officers require assistance from nontribal authorities (to turn over a suspect for arrest, for example), but those authorities are substantially delayed, Tribal police may be unable to pursue a crime any further. If police, prosecutors, and judges do not have access to another government’s criminal history information, they may not be able to act appropriately. If Federal investigators begin work on a case that is later returned to the Tribe for prosecution but Federal officials cannot share evidence, Tribal investigators will have to expend unnecessary effort to recreate it. Or, if a case is returned only after the Tribe’s statute of limitations has expired, an offender may go free.<sup>6</sup> Again, the impact of federally imposed jurisdiction may likely be increased crime.<sup>7</sup>

The extraordinary waste of governmental resources resulting from the Indian country “jurisdictional maze” can be shocking, as is the cost in human lives. The jurisdictional problems often make it difficult or even impossible to determine at the crime scene whether the victim and suspect are “Indian” or “non-Indian” for purposes of deciding which jurisdiction—Federal, State, and/or Tribal—has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this raises a fundamental question: which agency is really in charge? This is the antithesis of effective government.

An actual case involving a tragic highway accident in Colorado illustrates how overly complicated jurisdictional rules can undermine criminal investigations and hinder effective prosecutions. In *United States v. Wood*, the U.S. Attorney’s Office for the District of Colorado prosecuted a case on the Southern Ute Indian Reservation where a non-Indian drunk driver smashed into a car driven by a Tribal member.<sup>8</sup> Both victims (an elderly woman—the Tribal member—and her 8-year-old granddaughter) burned to death. The child was not an enrolled member of the Tribe, but had a sufficient degree of Indian blood to be considered “Indian” for purposes of Federal criminal jurisdiction according to the legal requirements articulated over the years by the U.S. Court of Appeals for the Tenth Circuit, which hears appeals of Federal cases arising on the Southern Ute Indian Reservation. What was unclear based on the evidence available at the crime scene, however, was whether the little girl was also considered to be an “Indian” on the Southern Ute Indian Reservation—another Tenth Circuit legal requirement.

As the Federal case against the non-Indian defendant proceeded under the Major Crimes Act, defense counsel objected that the little girl, despite having Native blood, was still not considered to be an Indian by the Southern Ute Indian Tribe given her alleged lack of ties to that community. The factual record, which was unavailable to investigators in the field at the time of accident, was mixed on this issue. The girl had received

We have county law enforcement that assists the Bureau of Indian Affairs. The county is quite big. (W)e only have three county deputies who go back and forth between five different communities. So if one's on one end of the county and BIA needs assistance, they're without assistance.

*Billy Bell, Chairman, Fort McDermott Tribe, and Chairman, Intertribal Council of Nevada  
Testimony before the Indian Law and Order Commission, Hearing at Salt River Reservation, AZ  
January 13, 2012*

The Tribes still cannot get access to the CLETS information, which is the California Law Enforcement [Telecommunications System]. That's critical. If you are a law enforcement officer and you pull a vehicle over and...you run the plate, you are not going to get any California State information on that owner or driver that may be critical to you to better prepare yourself—to not only protect you, but the public. So not being able to get that information is critical.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office  
of the Director of National Intelligence  
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK  
June 14, 2012*

Indian Health Service benefits on the Southern Ute Reservation and was visiting her grandparents on the reservation at the time of the accident. However, the girl and her mother lived off-reservation. After literally dozens of people had weighed in, eventually the question of whether the Tribe considered the child victim to be a Tribal member was resolved by the Southern Ute Tribal Council. After several months of jurisdictional wrangling, the Tribal Council concluded that the child victim was not a Tribal member—unlike her grandmother, who also had perished in the accident. This meant two separate prosecutions for the same crime: One by the U.S. Attorney’s Office for the death of the grandmother, the other by the LaPlata County, Colorado District Attorney’s Office for the child. And because of *Oliphant v. Suquamish Tribe*,<sup>9</sup> the Tribe was deprived of any concurrent criminal jurisdiction because the defendant was a non-Indian.

*Public Law 83-280.* While problems associated with institutional illegitimacy and jurisdictional complexity occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P. L. 83-280 or similar types of State jurisdiction, the latter of which tend to be Tribes in the East and South. In part, this is because State government authority often appears even less legitimate to Tribes than Federal government authority. The Federal government has a trust responsibility for Tribes, many Tribes have a treaty relationship with it,<sup>10</sup> and there is an established government-to-government relationship between Tribes and the Federal government that has been affirmed in court decisions and through the self-determination policy declared by President Nixon in 1970.

More typically, Tribes’ widespread disenchantment with State criminal jurisdiction stems from the fact that States often have proven to be less cooperative and predictable than the Federal government in their exercise of authority. While there are exceptions, particularly within the past two decades, the general relationship can be strained to the point of dangerous dysfunction. Many States entered the Union with chartered boundaries that contained sizable Tribal lands and significant Indian populations. Tribal peoples signed treaties with the Federal government and were removed to reservations. Considerable amounts of Indian land were turned over to State governments and citizens. Memories that States and local governments actively sought reductions of Indian territories still engender distrust from Tribal governments and their citizens.

The Commission frequently was presented with official testimony (and unofficial statements during site visits and other meetings) that described how State and local governments failed to provide public safety services and actively prevented Tribal governments from exercising or developing their own capacities. This less-than-cooperative intergovernmental stance can be devastating in an environment where early misunderstandings about the stipulations of P.L. 83-280 stymied development of Tribal justice agencies through withdrawal of Federal funds (Chapter 3). The Bureau of Indian Affairs (BIA) will not fund Tribal

**Public Law 83-280: Concurrent Tribal and State Jurisdiction.** Public Law 83-280 (18 U.S.C. § 1162) removed Federal criminal jurisdiction over Indian country and replaced it with State criminal jurisdiction in select states. The mandatory P.L. 83-280 states are California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin, and Alaska. P.L. 83-280 permitted other States to assume criminal jurisdiction, either in whole or in part, over Indian country within their boundaries. The optional P.L. 83-280 states are Florida, Idaho, Iowa, Montana, and Washington.

I think the better scenario is to simply not have the State have jurisdiction and that doesn't mean that we wouldn't work with them because I think we live in a day and age where that's not possible. ... (W)e would prefer to deal with the Federal government on a government-to-government basis and then deal with the State as our neighbors, as we would do as opposed to them having jurisdiction.

*Carrie Garrow, Executive Director, Syracuse University Center for Indigenous Law, Governance, and  
Citizenship  
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN  
July 13, 2012*

They have an Indian law subcommittee of the [California] State-Federal Judicial Council level, and...I got on it. They were asking me about Tribal courts and what I thought about whether Tribal courts have an impact, etc. I said, "Well, it has a lot to do with 280." And I'm looking around at the panel of judges, and one person opened their eyes [and asked]... "What's 280?"

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California  
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA  
February 16, 2012*

courts, jails, and police departments within mandatory P.L. 83-280 jurisdictions. Consequently, Tribal criminal justice administration is severely underdeveloped in P.L. 83-280 jurisdictions. State and county agencies manage criminal justice administration, while Tribal courts, police, and incarceration capabilities are largely subordinate to State agencies, non-existent, or not recognized.

Testimony before the Commission reported distrust between Tribal communities and local, non-Indian criminal justice authorities, leading to communication failures, conflict, and diminished respect. Most frequently, the Commission heard that nonresponsive State and local entities often left Tribes on their own to face the current reservation public safety crises. These findings, while anecdotal, comport with more comprehensive research in the field.<sup>11</sup>

The testimony also indicated that Tribes subject to State criminal law jurisdiction through settlement agreements and other congressional enactments are obstructed from exercising any degree of local control. Witnesses from these communities, located mostly in the East and South, testified that State and local officials displayed a pronounced lack of cultural sensitivity, impatience with Tribal government authorities, and an attitude that Tribal members should assimilate with the surrounding non-Indian communities. Many Tribes reported that they have nearly given up hope they can establish their own criminal justice systems appropriate to the needs of their Tribal members or residents.

*Making do with current jurisdictional arrangements.* Many Tribal governments, State governments, and the Federal government have been active in making current jurisdictional structures work in this complex environment. They have developed a variety of approaches (discussed more fully in Chapter 4):

- **Cooperative agreements** (including deputization, cross-deputization, and mutual aid agreements) provide for shared law enforcement authority in and around Indian country. The most encompassing agreements cross-deputize officers, so that Federal, State, Tribal, municipal, or county officers are able to enforce a partner government's laws. For example, a Tribal police officer so cross-deputized can make an arrest based on Tribal law, certain Federal laws, or city ordinances. Such arrangements simplify law enforcement by supporting an officer's ability to intervene regardless of the crime's location or the perpetrator's or victim's identity.
- **Statutory peace officer status** is an across-the-board recognition of police officers who work for the public safety department of a federally recognized Tribe as State peace officers. Under Oregon's statute, for example, Tribal police are empowered to arrest non-Indians on the reservation for violations of State law and to continue

Here is a Federal mandate that we provide service to these communities, and yet we have no clue what we're doing, what our limits are. And we found that on a day-to-day basis, routinely, our officers were going into Indian country and making huge mistakes. Not just cultural mistakes, not just historical mistakes, but legal mistakes utilizing California regulatory law and enforcing it in Indian country because we didn't know.

*Lt. Ray Wood, Tribal Liaison Unit Commander, Riverside County Sheriff's Department  
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA  
February 16, 2012*

At the [Washington] State Supreme Court there was an initial decision finding the officer had authority to arrest in fresh pursuit of a crime that began on reservation. It was later reconsidered and amended, but sustained. Last week it was reconsidered again and reversed. This alone, just the result to have this happen, shows the level and depth of confusion caused by the jurisdictional maze.

*Brent Leonhard, Interim Lead Attorney, Office of Legal Counsel,  
Confederated Tribes of the Umatilla Indian Reservation  
Written Testimony for Indian Law and Order Commission, Hearing at Tulalip Indian Reservation, WA  
September 7, 2011<sup>12</sup>*

[There are] people that move into those areas for that reason: they want to engage in unlawful activity. They do so because they know that there is an absence of law enforcement.

*Paul Gallegos, Humboldt County District Attorney  
Testimony before the Indian Law and Order Commission, Hearing on the Agua Caliente Reservation, CA  
February 16, 2012*

California does not allow Tribes into the fusion centers and does not recognize Tribal law enforcement. We hope to get this taken care of in California. A model and test case is being developed by the Sycuan Tribe. This same issue is found in New York, where the State only lets one Tribe in, but not the rest.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office  
of the Director of National Intelligence  
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK  
June 14, 2012*

I think...that any time there's Federal law that [is] passed regarding Indian country, that it [should] apply to Settlement Act Tribes, plain and simple...Each Tribe doesn't have to be mentioned. That basically says, when there's Federal legislation passed, that it applies to all Indian nations, P.L. 83-280, Settlement Acts, however they want to word it. I think that is probably the first and foremost place to start. Because without that, you have different levels of sovereignty, and that's no more clear than when the State trumps the Federal government and trumps the Federal laws that are passed regarding the Indian country.

*Robert Bryant, Chief of Police, Penobscot Nation  
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN  
July 13, 2012*

pursuing a suspect onto an off-reservation jurisdiction and take action on crimes committed in their presence.<sup>15</sup>

- A **Special Law Enforcement Commission (SLEC)** is a type of cooperative agreement, authorized by Federal regulation, which provides authority for a State, Tribal, or local law enforcement officer to enforce certain Federal crimes committed within Indian country. Tribal or State officers who meet the SLEC requirements can be authorized to make Federal arrests. These officers are issued a SLEC card, which must be renewed (through retesting) every 3 years. To be eligible to receive SLECs, officers must be certified peace officers and pass a Federal background check. Their sponsoring agencies also must enter into an intergovernmental agreement with the Office of Justice Services (OJS), a part of BIA. The SLEC program can be enormously valuable for those Tribes that have entered into the required agreements with OJS. However, a major obstacle to the widespread use of the program—for both new SLEC cards and card renewals—has been the lack of access to SLEC testing and training, which historically was provided almost exclusively at the BIA Indian Police Academy in Artesia, NM. An off-site SLEC training program piloted in Colorado, which formed the basis for the expanded on-reservation SLEC training provisions contained in the Tribal Law and Order Act, resulted almost immediately in increased Federal prosecutions by Tribal officers who otherwise would lack the power to arrest non-Indians suspected of committing Federal crimes.<sup>14</sup> TLOA encourages all U.S. Attorney’s Offices to partner with OJS to provide expanded SLEC training and testing for Indian country.
- **Cooperative prosecutorial arrangements** allow Tribal, Federal, and State officials to share information and work together more closely on case investigations and prosecutions. One example is designating Tribal prosecutors to serve as “Special Assistant U.S. Attorneys” (Chapter 3).

These are promising practices. They can be vitally important for responding to the flow of crime across Indian country’s borders. For addressing public safety in Indian country, however, the Commission concludes that such practices will, at best, always be “work-arounds.” They tend to deliver suboptimal justice because of holes in the patchwork system, because bias or a lack of knowledge prevents collaboration, and/or because local politics shift.

*Conclusions concerning jurisdiction.* The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations. Ultimately, the imposition of non-Indian criminal justice institution in Indian country extracts a terrible

I believe that the State of Arizona is a model of how States should work with Indian country. The State under Arizona Revised Statutes 13-3874 authorizes Tribal police who meet the qualifications and training standards under Arizona Peace Officers Standards and Training (AZ POST) to exercise all law enforcement powers of peace officers in the State. ...This peace officer authority not only assists the Tribal governments it also adds more peace officers to the State.

*Edward Reina, (Ret.) Director of Public Safety, Tohono O'odham Nation  
Written testimony for the Indian Law and Order Commission, Hearing at Salt River Indian Reservation  
Jan. 13, 2012<sup>15</sup>*

price: delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice systems and players unfamiliar with or hostile to Indians and tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why is the crime rate so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority at the expense of local Tribal control and accountability.

When Tribal law enforcement and courts are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian country than their non-Native counterparts located elsewhere. After listening to and hearing from Tribal communities, the Commission strongly believes that for public safety to be achieved in Indian country, Tribal justice systems must be allowed to flourish, Tribal authority should be restored to Tribal governments when they request it, and the Federal government in particular needs to take a back seat in Indian country, enforcing only those crimes that it would enforce in any case, on or off reservation. The Federal trust responsibility to Tribes turns on the consent of Tribes, not the imposition of Federal will. The Commission also believes that what is not warranted is a top-down, prescriptive Federal solution to the problem.

## FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION AND THE INDIAN CIVIL RIGHTS ACT

In addition to its desire to protect public safety, Congress considered the overlay of Federal and State law (through P.L. 85-280) in Indian country to extend protections—similar but not identical to the Bill of Rights—to defendants, juveniles, victims, and witnesses. Its presumption was that Tribal criminal justice systems could not protect the rights of either Tribal or U.S. citizens, at least in a manner similar to the U.S. Constitution and Federal civil rights laws. The Commission has studied this and other issues in response to TLOA's directive to examine the effect of the Indian Civil Rights Act of 1968 (ICRA).

Without question, ICRA infringes on Tribal authority: it limits the powers of Tribal governments by requiring them to adhere to certain Bill of Rights protections, including the equal protection and due process clauses. At the same time, because ICRA does not incorporate certain other constitutional limitations—including the guarantee of a republican form of government, the prohibition against an established state religion, the requirement for free counsel for indigent defendants, and the right to a jury trial in civil cases—the Act may be viewed as a validation of Tribal self-government. Undoubtedly, the omissions reflect Congress' effort to respect some measure of Tribal sovereignty. Thus, while ICRA represents an

*“The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.”*

ntrusion on Tribal authority, it seeks to accommodate essential differences as well.

In terms of rights protections, ICRA has had both positive and negative effects. It has reinforced basic assumptions concerning the rights of defendants charged with crimes, thereby increasing community members' and outsiders' confidence in Tribal judicial systems. Tribal courts are mindful of ICRA's value in this respect and have been faithful in enforcing it. There is little or no scholarly research or other evidence showing significant violations of ICRA by Tribal courts that go uncorrected by Tribal appellate courts; in fact, what research exists, although limited, suggests that there is no systematic problem of under-protection.<sup>16</sup> More generally, ICRA respects the obvious reality that all Tribal citizens are likewise citizens of the United States and thereby entitled to constitutional protections against arbitrary governmental action of any kind, as (in the case of the 2013 Violence Against Women Act Amendments) are nontribal defendants whose prosecutions may now be adjudicated in Tribal criminal court proceedings.

In this regard, ICRA's failure to provide the assistance of counsel without charge to indigent defendants except for cases brought under TLOA's expanded sentencing authority is especially problematic. ICRA only bars a Tribe from denying "to any person" the right "at his own expense to have the assistance of a counsel for his defense."<sup>17</sup> When ICRA was enacted, Congress likely did not contemplate felony prosecutions by Tribal courts, so this right to counsel, normally afforded to indigent defendants charged with a felony,<sup>18</sup> was not included in ICRA. Similarly, the applicable Federal law at the time did not extend representation rights to misdemeanor offenders, so there was no reason for the Congress to require it of Tribes.

Since 1968, however, both Tribal and Federal practice have changed dramatically. Tribal concurrent jurisdiction over many felonies has been affirmed, and Tribes have been increasingly active in prosecuting felonies under Tribal law. On the Federal side, the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.<sup>19</sup>

Moreover, the Commission heard extensive testimony from public defenders, prosecutors, and judges alike, concluding that without the right to counsel, the right to due process itself is compromised. In sum, ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law. In at least these ways, and excepting those cases brought under the enhanced sentencing provisions in TLOA, the Commission finds that today ICRA is insufficient for the protection of Tribal citizen rights. Significantly, the Commission also finds that amending ICRA would dovetail with accepted procedure in a growing number of Tribal courts, especially those that are operating with an increasing degree of judicial independence.

*“ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law.”*

Congress' assumption that Tribal courts would handle only misdemeanors gives rise to another contemporary problem with ICRA: its limitation on Tribal court sentencing. The original limits of 6 months' imprisonment, a \$500 fine, or both have been modified to 1 year imprisonment, a \$5,000 fine, or both. Further, if a Tribe meets standards specified in TLOA, penalties can increase to 3 years' imprisonment for up to three offenses and a \$15,000 fine, plus the opportunity to "stack" or add multiple charges for longer potential periods of incarceration. These modifications are welcome; nonetheless they are insufficient.

While the Commission notes that some Tribes do not use incarceration as a punishment (Chapter 5), these limits prevent all Tribes from meting out sentences appropriate for a major crime. These limits affect Tribal sovereignty by giving a Native nation little choice. If a Tribe wants to access a more appropriate sentence and there is concurrent jurisdiction, it must cede prosecution to the Federal government or a State government. If a too-short Tribal sentence is the only option (for example, if a concurrent authority fails to prosecute or if there is only a Tribal case), public safety and victims' rights are affected. Ultimately, the sentencing restrictions erode Tribal community members' and outsiders' confidence in Tribal governments' ability to maintain law and order in Indian country.

A specific example underscores the issue. Under Federal law, the crime "assault with a dangerous weapon"<sup>21</sup> comes with the penalty of up to 10 years imprisonment. Even if a Tribe (in a non-P.L. 85-280 setting) were to adopt a statute that exactly matched the Federal crime, its prosecutor could only seek a sentence of up to 1 year in jail, or under TLOA enhanced sentencing, 3 years for a single offense. To access a longer sentence, the Tribal prosecutor must refer the case for Federal prosecution. If, however, the United States Attorney does not prosecute the crime, the only option left is for the Tribe to take the case back and prosecute with the lesser, ICRA-restricted sentence. After that short time, the perpetrator would again be at large in the community, free to commit more violence.

This is intolerable and fuels the public safety crisis in Indian country. Such disparities lead to widespread public disenchantment with the delivery of justice in Indian country, comparatively fewer Federal prosecutions, too many restrictions and constraints on the Tribal criminal justice system, and lack of confidence by victims and the Tribal community that crime will be vigorously pursued and deterred.

Several witnesses in Commission field hearings called on Congress to amend IRCA to respond to both the lack of access to indigent defense for persons charged with serious crimes in Tribal court and the limits on sentencing authority. The Commission's own recommendation, as detailed below, is to follow the path already laid down by TLOA, providing broader access to appropriate sentences to Tribes that are able to guarantee defendants' Federal constitutional rights.

Public defenders are as committed to principles of public safety as prosecutors are. We want to ensure that an individual's rights are protected all along the path of the justice system, the path for all of us, and we don't want to see people wrongfully convicted, certainly not wrongfully accused.... (W)e want to ensure that justice is done. And at Tulalip that's what we are trying to do.

*Janice Ellis, Prosecutor Tulalip Tribes  
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation  
September 7, 2012*

We don't want to mistreat anybody. We want to give due process, a fair trial.

*William Johnson, Chief Judge, Confederated Tribes of the Umatilla Indian Reservation<sup>20</sup>*

## RECOMMENDATIONS

In examining the complexities and deficiencies of criminal jurisdiction in Indian country (and other affected Native communities<sup>22</sup>), the Commission seeks to meet three objectives:

- To consider potential solutions that have the promise of practical, real-world success in reducing crime and improving the safety of all persons in Indian communities, especially for women and children;
- To proceed in a manner that respects the sovereignty and autonomy of Indian Tribes; and
- To respect and enforce the Federal constitutional rights of crime victims and criminal defendants.

Consistent with these objectives and keeping in mind the importance of Tribal consent, the Commission rejects more “work-arounds” and instead embraces a far-reaching vision of reform to Indian country criminal jurisdiction. All Indian Tribes and nations—at their own sole discretion, and on their own timetable, but consistent with the guarantees to all U.S. citizens afforded by the U.S. Constitution—should be able to “opt out” of existing schemes of imposed authority over criminal matters in Indian country and be restored to their inherent authority to prosecute and punish offenders.

*1.1: Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands as defined in the Federal Indian Country Act.<sup>23</sup> This recognition, however, would be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.*

*1.2: To implement Tribes’ opt-out authority, Congress should establish a new Federal circuit court, the United States Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian*

*country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings to ensure that defendants' Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.<sup>24</sup>*

The mirror of this special circuit court jurisdiction at the Tribal court level is this: Tribal courts do not become Federal courts for general purposes. Tribes retain full and final authority over the definition of the crime, sentencing options, and the appropriate substance and process for appeals outside of the narrow jurisdiction reserved for the new Federal circuit court.

It has been argued that the government-to-government relationships between Tribes and the U.S. government mean that the U.S. Supreme Court is the appropriate initial forum for any appeal of a Tribal court decision. While this may be true in concept, the Commission also seeks to ensure that Tribal court operations continue in the smoothest manner possible and that appeals are minimally disruptive to the ongoing delivery of justice services in Tribal communities.

With 566 federally recognized tribes in the United States, the U.S. Supreme Court might be asked to hear many appeals from Indian country, but choose only a few to remain responsive to the wide array other issues and subject matters brought to its attention. Tribal courts could become paralyzed by the wait and by the loss of confidence generated by the cloud of uncertainty resulting from dozens of denied appeals. Having a panel of Article III judges<sup>25</sup>—all with the highest expertise in Indian law, ruling in a forum designed in consultation between the U.S. government and Tribal governments—hear such cases first meets not only the demands of practicality, but also reinforces Tribal sovereignty.<sup>26</sup>

**1.3:** *The Commission stresses that an Indian nation's sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out*

*provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.*

*1.4: Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of Indian Civil Rights Act (ICRA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal sentencing authority. Like Federal and State governments, Tribal governments can devise sentences appropriate to the crimes they define. In this process of Tribal code development, Tribes may find guidance in the well-developed sentencing schemes at the State and Federal levels.*

The Commission recognizes that this vision of restored inherent authority for all Tribes that so choose expanded sovereignty and local control in a manner that fully protects all defendants' Federal civil rights is a long-term one. That the current system is entrenched and complex likely poses a challenge for even the most prepared Native nations. Some Tribes may decide never to go down that path. Others may prefer not to subject their justice systems to Federal judicial review. In light of this, the opt-out recommendation is designed to provide Tribes with enhanced autonomy and choice, as well as greater leverage in entering into intergovernmental agreements with Federal and State authorities. This recommendation aims to create space in Federal law for an individual Tribe to opt out of the current jurisdictional architecture at the scale and pace it chooses, based on its capacity, resources, and governance preferences.

The Commission also respects that restoration of Tribes' sovereign authority, taken away from them through a long process of subjugation and neglect, can occur only with the trust and respect of the non-Indian community, including Federal, State, and local governments, the general non-Indian population, and the urban and rural communities adjacent to or inside Indian country. That trust depends, in part, upon the sovereign Tribes protecting the rights of citizens of the Tribes, States, and the United States. Requiring Tribes that opt out in full or in part to meet the standards of the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution, as interpreted by Tribal and then Indian Circuit Court Federal judges, will go far in building that trust.

The Commission does not envision that every Tribe with the opportunity to choose which criminal jurisdiction arrangements will govern its territory will choose to operate a system entirely on its own. Choice includes the option not only to exit various federally imposed configurations, but also to collaborate with other governments. For example, if a Tribal government finds that it is serving a Tribe's needs appropriately, it may opt to continue its present cross-deputization, statutory State peace officer status, special commission, and other shared authority arrangements. Similarly, a Tribal government developing new capacity may opt for these current possibilities. The arrangements might

also include wholly new intergovernmental collaborations that Tribal governments and their partner governments devise. This is the essence of choice.

Choice also means that any expansion of jurisdiction and associated changes to Tribal justice systems need not result in the diminishment of effective, traditional components of those systems, nor diminish the opportunity to create them. Tribes would need to develop procedures by which defendants could, in a considered manner, waive their Tribal constitutional and ICRA rights—consenting to Tribal court jurisdiction—as a first step in participation on the alternative track. These alternative methods for delivering justice should be encouraged: research on the healing to wellness courts and other traditional processes suggests that they often provide the best chance to reduce recidivism and help defendants change their lives.<sup>27</sup> As a final note, nothing would prevent a Tribe from continuing to use traditional justice processes for those disputes and criminal violations that always have been under Tribal jurisdiction.

Several final comments on the Commission’s recommendations relate to applicability and funding.

First, the proposed mechanism under which Tribes can opt out of congressionally authorized State jurisdiction might appear to present an issue of federalism. The Commission believes that that is not the case; in P.L. 85-280, Congress gave more authority to the States than the U.S. Constitution requires or contemplates. Thus, the retrocession mechanism, wherein a State returns the jurisdiction back to the Federal government, was a congressionally created artifice that respected the States’ prerogatives, but was not required by any means. Indeed, in the Tribal Law and Order Act of 2010, Congress specifically allowed P.L. 85-280 Tribes to petition the Federal government to apply concurrent Federal criminal jurisdiction even while leaving the congressionally authorized State jurisdiction intact. Clearly, however, Congress has the power to take the grant of State jurisdiction over criminal prohibitory offenses back at any time. The Commission believes a Tribe should have the option of making this choice, and the Federal government should be obliged to respond.

Second, while the recommendation is for a process to be created that allows Tribes currently under Federal criminal jurisdiction, P.L. 85-280 criminal jurisdiction, or settlement State criminal jurisdiction to opt out of that jurisdiction, the Commission also recognizes the unique configuration of criminal jurisdiction in the State of Alaska. The extension of the recommendation to Alaska is that Tribes with Federal land should be afforded the same opportunities as Tribes in the lower 48 states. (More detail on Alaska and the Commission’s recommendations for that unique geographic and jurisdictional setting is provided in Chapter 2.)

Third, the Commission acknowledges that enhanced Tribal criminal justice capacities, such as law-trained judges, written codes, appropriate

jail space, etc. will increase costs for Tribes. Yet, the Commission also does not intend that only “well off” Tribes—those that could afford to develop expanded capacity on their own—be able to opt out of imposed jurisdictional arrangements. Indeed, throughout the course of its field hearings, the Commission was repeatedly struck by the number of Tribes that, despite extraordinary budget challenges, are nonetheless asserting enhanced criminal and civil jurisdiction in order to strengthen self-governance and to put even more Tribal sovereignty into action.

The Commission acknowledges the budget challenges our country faces. Nonetheless, the process Congress develops for opting out should include enhanced funding for Tribes. Over time, as less effective Federal and State systems are scaled down or even eliminated in areas where Tribes choose this path, locally controlled and accountable Tribal justice systems will save money. (More detail on the possible sources of funds is provided in Chapter 3.) However, the Commission points to the success of the Indian Self-Determination and Education Assistance Act of 1975 at transferring to Tribes money formerly spent by Federal personnel in Indian country. As Tribes reassert jurisdiction, there is broad scope across many Federal agencies to replicate these transfers.<sup>28</sup> Money should flow to the agencies and governments providing criminal justice services in Indian country, and as those agencies and government change, funding flows should change as well.

## CONCLUSION

Through TLOA and the VAWA Amendments, Congress set forth a path toward greater Tribal government authority over law and justice in Tribal communities. The Commission’s recommendations strive to continue this vital work. By balancing expansion of jurisdiction as Indian nations deem themselves ready, and by protecting defendants’ individual Federal constitutional rights, through the creation of the new U.S. Court of Indian Appeals, the Commission embraces the best aspects of all three systems—Federal, State, and Tribal. By removing mandates rather than prescribing responsibility, the Commission’s approach departs from the historical pattern of dictating to Tribes. Tribes must be free to choose. By recognizing the power in local control, these recommendations provide a tribally based, comprehensive solution to the problems with law and order in Indian nations that fully comports with the American Way: Local control for local communities instead of Federal command-and-control policies.

## ENDNOTES

<sup>1</sup>The term “laws of general application” refers to laws that apply to all persons in the United States, such as anti-terrorism and racketeering laws among other offenses.

<sup>2</sup>It also runs counter to long-standing Native traditions and views. For thousands of years, Indian nations provided local management of justice; this arrangement upheld and respected each nation’s specific rights and institutional ways of providing community order and justice.

<sup>3</sup>See Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 COLO. L. REV. 1027 (2010); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); AND STEWART WAKING, MIRIAM JORGENSEN, SUSAN MICHAELSON, & MANLEY BEGAY, *POLICING ON AMERICAN INDIAN RESERVATIONS* (2001), especially chapters 5 and 6, available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>4</sup>The Commission received similar information about Wyoming, where the Eastern Shoshone and Northern Arapaho Tribes’ reservation is located approximately 300 miles from where the U.S. District Court is based.

<sup>5</sup>OVERSIGHT HEARING ON FEDERAL DECLINATIONS TO PROSECUTION CRIMES IN INDIAN COUNTRY BEFORE S. COMM. ON INDIAN AFFAIRS, 110th Cong. 47 (2008) (statement of Janelle F. Doughty, Director, Department of Justice and Regulatory, Southern Ute Indian Tribe) available at 47 <http://www.indian.senate.gov/public/files/September182008.pdf> (“Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved”).

<sup>6</sup>U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-252, *INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS* (2011) at 17-18, available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>7</sup>See Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC, Feb. 22, 2013, available at <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273591/>, for an extended example of the Three Affiliated Tribes’ situation (on Fort Berthold Indian Reservation in North Dakota).

<sup>8</sup>This description is excerpted from S. 797, *THE TRIBAL LAW & ORDER ACT 2009: Hearing Before the S. Comm. on Indian Affairs* (2009) (statement of Troy A. Eid) at 40-41, available at <http://www.indian.senate.gov/hearings/hearing.cfm?hearingid=e655f9e2809e5476862f735da14c3a5f&witnessId=e655f9e2809e5476862f735da14c3a5f-1-5>. Chairman Eid had served as the United States Attorney for the District of Colorado when *United States v. Wood* was prosecuted.

<sup>9</sup>435 U.S. 191 (1978).

<sup>10</sup>The U.S. government negotiated more than 800 treaties with Indian nations from 1775 to 1871. Approximately 270 of these treaties were ratified by the U.S. Senate in compliance with the U.S. Constitution.

<sup>11</sup>DUANE CHAMPAGNE & CAROLE GOLDBERG, *CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280* (2012). Among those findings echoed in Commission hearings were (1) county-State police overstepping their authority through excessive force, disrespect of Tribal law, discrimination, and arrests without proper warrants; (2) a lack of county-State police presence or minimal patrolling; (3) inadequate county-State police response; (4) a perceived lack of thoroughness and timeliness in investigations; (5) perceived poor communications by county-State police with tribal communities; (6) a lack of respect by county-State police for Tribal culture and Tribal governmental authorities; and (7) overall perceptions of unfairness.

<sup>12</sup>Testimony of Brent M. Leonhard, September 7, 2011, Hearing of the Indian Law and Order Commission, Tulalip Indian Reservation, at 2, WA, available at [https://www.indian-lawandordercommission.com/resources/documents/ILOC%20Field%20Hearing\\_Tulalip-WA\\_090711\\_Testimony\\_BLeonhard.pdf](https://www.indian-lawandordercommission.com/resources/documents/ILOC%20Field%20Hearing_Tulalip-WA_090711_Testimony_BLeonhard.pdf).

<sup>15</sup> Oregon Senate Bill 412-C (2011), amending Or. Rev. Stat. § 135.005, et. seq.

<sup>14</sup> Doughty testimony, *supra* footnote 54 at 48 (detailing how the Southern Ute Indian Tribe and the U.S. Attorney’s Office for the District of Colorado created an on-site SLEC training program, approved by the BIA’s Indian Police Academy, that trained Tribal officers to make Federal arrests). Conducted in 2007-08, this pilot program trained Southern Ute law enforcement officers to act as Federal agents in investigating crimes committed on the Southern Ute Indian Reservation. The pilot program training sessions were held in the Tribe’s headquarters in Ignacio, Colorado, and taught by prosecutors from the U.S. Attorney’s Office in Denver. In her testimony, Doughty, then the Tribe’s chief law enforcement officer, describes how just months after the initial SLEC trainings were completed, Southern Ute Tribal criminal investigator Chris Naranjo used his SLEC card on May 24, 2008, to arrest a non-Indian who had serially abused his girlfriend, a Southern Ute Tribal member. Naranjo responded to a suspected domestic violence assault and was able to effectuate a Federal arrest, which the U.S. Attorney’s Office was then able to prosecute. The defendant was later convicted in U.S. District Court in Denver and imprisoned.

<sup>15</sup> Testimony of Edward Reina, Jr., Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, AZ, January 13, 2012, at 2, available at [https://www.indianlawandordercommission.com/resources/documents/ILOCFH\\_PhxAZ\\_Testimony\\_EReina.pdf](https://www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_EReina.pdf)

<sup>16</sup> THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds., 2012). See especially the chapter by Mark Rosen.

<sup>17</sup> 25 U.S.C. § 1302(a)(6).

<sup>18</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>19</sup> Following the decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Alabama v. Shelton*, 535 US 654 (2002), the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.

<sup>20</sup> Quoted in Sarah Cline, *Sovereignty under Arrest: Public Law 280 and Its Discontents*, (May, 20, 2013) (unpublished master’s thesis, Oregon State University) at 54, available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/39175>.

<sup>21</sup> 18 U.S.C. § 115(3)

<sup>22</sup> Most Alaska Native villages and towns may not currently meet the definition of Indian country, but ultimately suffer from similar problems and should be afforded similar opportunities.

<sup>25</sup> 18 U.S.C § 1151.

<sup>24</sup> To respect Tribal self-governance, the enabling legislation creating this new court could clarify that Federal jurisdiction shall not extend to matters relating to Tribal elections, membership enrollment, and other matters internal to Tribal self-governance. Determinations of what constitutes an “internal matter” of a Tribe can be accomplished through in-camera (confidential with the court) proceedings that protect the integrity of Tribal customs and tradition.

<sup>25</sup> As a practical matter, this means that the President nominates the judges, the Senate confirms them, and they serve for life. Nominations would be made in consultation with Tribes and each panel would consist of at least three judges. Ideally this new Federal circuit court should be located somewhere within Indian country itself.

<sup>26</sup> It might also be reasonably expected that in making nominations to the U.S. Court of Indian Appeals, Presidents should take into consideration expertise in Indian law and legal practice. In nominating such candidates, and in the U.S. Senate’s confirmation proceedings, it seems likely that many applicants will be Native American or Alaska Natives. This would be a welcome development in a Federal court system that, since its inception in the Judiciary Act of 1789 (1 Stat 75), has been virtually devoid of any Native American or Alaska Native judges. This, too, creates institutional integrity issues that the new court would help address.

<sup>27</sup> A full discussion of this result is available in Chapter 5.

<sup>28</sup> For a complete discussion, see Kevin K. Washburn, *Federal criminal law and tribal self-determination*, 84 N.C. L. Rev. 779 (2006).

