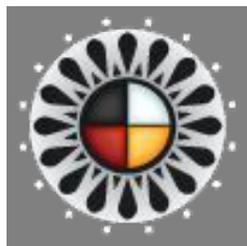


A ROADMAP FOR MAKING NATIVE AMERICA SAFER

Report to the President &
Congress of the United States



Indian Law & Order Commission
November 2013



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PREFACE

The Indian Law and Order Commission is pleased to transmit its final report and recommendations—A ROADMAP FOR MAKING NATIVE AMERICA SAFER—as required by the Tribal Law and Order Act of 2010, Public Law 111-211 (TLOA). These recommendations are intended to make Native American and Alaska Native nations safer and more just for all U.S. citizens and to reduce the unacceptably high rates of violent crime that have plagued Indian country for decades. This report reflects one of the most comprehensive assessments ever undertaken of criminal justice systems servicing Native American and Alaska Native communities.

The Indian Law and Order Commission is an independent national advisory commission created in July 2010 when the Tribal Law and Order Act was passed and extended earlier in 2013 by the Violence Against Women Act Reauthorization (VAWA Amendments). The President and the majority and minority leadership of the Congress appointed the nine Commissioners, all of whom have served as volunteers. Importantly, the findings and recommendations contained in this Roadmap represent the unanimous conclusions of all nine Commissioners—Democratic and Republican appointees alike—of what needs to be done now to make Native America safer.¹

As provided by TLOA, the Commission received limited funding from the U.S. Departments of Justice and the Interior to carry out its statutory responsibilities. To save taxpayers' money, the Commission has operated entirely in the field—often on the road in federally recognized Indian country—and conducted its business primarily by phone and Internet email. The Commission had no offices. Its superb professional staff consists entirely of career Federal public officials who have been loaned to the Commission as provided by TLOA, and we are grateful to them and the Departments of Justice and the Interior.

TLOA has three basic purposes. First, the Act was intended to make Federal departments and agencies more accountable for serving Native people and lands. Second, TLOA was designed to provide greater freedom for Indian Tribes and nations to design and run their own justice systems. This includes Tribal court systems generally, along with those communities that are subject to full or partial State criminal jurisdiction under P.L. 83-280. Third, the Act sought to enhance cooperation among Tribal, Federal, and State officials in key areas such as law enforcement training, interoperability, and access to criminal justice information.

In addition to assessing the Act's effectiveness, this Roadmap recommends long-term improvements to the structure of the justice system in Indian country. This includes changes to the basic division of responsibility among Federal, Tribal, and State officials and institutions. The theme here is to provide for greater local control and accountability while respecting the Federal constitutional rights of all U.S. citizens.

Tribal governments, like all governments, have a moral duty to their citizens and guests to ensure the public's safety. They are also the most appropriate and capable government to ensure such safety—they employ the local police, they are the first responders, and understand the needs of their community better than all others. Unfortunately, the American legal system—through legislation and case law—has significantly hamstrung their ability to ensure safety in Indian country.

*Brent Leonhard, Interim Lead Attorney, Confederated Tribes of the Umatilla Indian Reservation
Written testimony for the Indian Law and Order Commission, Hearing on the Tulalip Reservation, WA
September 7, 2011*

Some of the Commission's recommendations require Federal legislative action. Others are matters of internal executive branch policy and practice. Still others must be addressed by the Federal judiciary. Finally, much of what the Commission has proposed will require enlightened and energetic leadership from the State governments and, ultimately, Native Americans and Alaska Native citizens and their elected leaders.

The Commission finds that the public safety crisis in Native America is emphatically not an intractable problem. More lives and property can and will be saved once Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, strong Native communities achieved through home-grown, tribally based systems that respect the civil rights of all U.S. citizens, and reject outmoded Federal command-and-control policies in favor of increased local control, accountability, and transparency.

With this Roadmap, the Commission completes its official work as provided by TLOA and the VAWA Amendments and extends its best wishes to everyone who helped with this journey. Thank you for the privilege of serving.

Respectfully,

A handwritten signature in black ink that reads "Troy A. Eid". The signature is fluid and cursive, with a large, sweeping arch over the first name.

Troy A. Eid
Chairman
Indian Law and Order Commission

¹Due to federal budget limitations, the Commission could not begin its work until the late summer 2011, so its one-year extension by the VAWA Reauthorization was a great asset in finishing our report on time and under budget.

A ROADMAP FOR MAKING NATIVE AMERICA SAFER

EXECUTIVE SUMMARY

American Indian and Alaska Native communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country. Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for this public safety gap. Federal government policies have displaced and diminished the very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities.

In most U.S. communities, the Federal government plays an important but limited role in criminal justice through the enforcement of laws of general application—that is, those laws that apply to all U.S. citizens—creating drug-control task forces, anti-terrorism and homeland security partnerships, and so forth. Under this system of federalism, State and local leaders have the authority and responsibility to address virtually all other public safety concerns.

Precisely the opposite is true in much of Indian country. The Federal government exercises substantial criminal jurisdiction on reservations. As a result, Native people—including juveniles—frequently are caught up in a wholly nonlocal justice system. This system was imposed on Indian nations without their consent in the late 19th century and is remarkably unchanged since that time. The system is complex, expensive, and simply cannot provide the criminal justice services that Native communities expect and deserve.

It is time for change.

Now is the time to eliminate the public safety gap that threatens so much of Native America. The United States should set a goal of closing the gap within the next decade. By 2024, coinciding with the centennial of the Indian Citizenship Act of 1924,¹ Native Americans and Alaska Natives should no longer be treated as second-class citizens when it comes to protecting their lives, liberty, and pursuit of happiness.

“A Roadmap for Making Native America Safer” (Roadmap) provides a path to make Native American and Alaska Native communities safer and more just for all U.S. citizens and to reduce unacceptably high rates of violent crime rates in Indian country.

The Roadmap is the culmination of hearings, meetings, and conversations between the Indian Law and Order Commission (Commission) and numerous Tribal, State, and Federal leaders, non-profit organization representatives, and other key stakeholders across our country.

ABOUT THE COMMISSION

In 2010, Congress passed, and the President signed, the Tribal Law and Order Act, P.L. 111-211 (TLOA), which created the Indian Law and Order Commission. The Commission is an independent national advisory commission comprised of nine members who have all served as volunteers in unanimously developing the Roadmap. The President and the majority and minority leadership of Congress appointed these commissioners.

TLOA directed the Commission to develop a comprehensive study of the criminal justice system relating to Indian country, including:

1. jurisdiction over crimes committed in Indian country and the impact of that jurisdiction on the investigation and prosecution of Indian crimes and residents of Indian land;
2. the Tribal jail and Federal prison systems with respect to reducing Indian country crime and the rehabilitation of offenders;
3. Tribal juvenile justice systems and the Federal juvenile justice system as it relates to Indian country and the effect of those systems and related programs in preventing juvenile crime, rehabilitating Indian youth in custody, and reducing recidivism among Indian youth;
4. the impact of the Indian Civil Rights Act of 1968 on the authority of Indian Tribes, the rights of defendants subject to Tribal government authority, and the fairness and effectiveness of Tribal criminal justice systems; and
5. studies of such other subjects as the Commission determines relevant to achieve the purpose of the Tribal Law and Order Act.

TLOA directed the Commission to develop recommendations on necessary modifications and improvements to the justice systems at the Tribal, State, and Federal levels. TLOA prescribed consideration of:

1. simplifying jurisdiction in Indian country;
2. improving services and programs to prevent juvenile crime on Indian land, to rehabilitate Indian youth in custody, and to reduce recidivism among Indian youth;
3. adjusting the penal authority of Tribal courts and exploring the alternatives to incarceration;
4. enhancing use of the Federal Magistrates Act in Indian country;
5. identifying effective means of protecting the rights of victims and defendants in Tribal criminal justice systems;
6. recommending changes to the Tribal jails and Federal prison systems; and
7. examining other issues that the Commission determines would reduce violent crime in Indian country.

TLOA provided the Commission with 2 years in which to complete this task, making the report due in 2012. However, due to Federal budget

limitations, the Commission could not begin its work until late summer 2011. Congress provided the Commission a 1-year statutory extension when it passed the Violence Against Women Reauthorization Act of 2013, P.L. 113-4.

As provided by TLOA, the Commission received limited funding from the U.S. Departments of Justice and the Interior to carry out its statutory responsibilities. To save taxpayers' money, the Commission operated entirely in the field—often in federally recognized Indian country—and completed its business primarily by phone and email. The Commission had no offices. Its professional staff consists entirely of career Federal public officials who have been loaned to the Commission as provided by TLOA. The Commission recruited each of its three staff members; when asked to serve, all three graciously did so.

Upon completing these field hearings and meetings, the Commission developed this report. The report is called a “Roadmap” because the Commission has a particular destination in mind—to eliminate the public safety gap that threatens so much of Native America.

ABOUT THE ROADMAP

TLOA has three basic purposes. First, it was intended to make Federal departments and agencies more accountable for serving Tribal lands. Second, the Act was designed to provide greater freedom for Indian Tribes and nations to design and run their own justice systems. This includes Tribal court systems generally, along with those communities that are subject to full or partial State criminal jurisdiction under P.L. 83-280. Third, the Act sought to enhance cooperation among Tribal, Federal, and State officials in key areas such as law enforcement training, interoperability, and access to criminal justice information. This Roadmap assesses the effectiveness of these provisions.

Additionally, the Roadmap recommends long-term improvements to the structure of the justice system in Indian country. This includes the basic division of responsibility among Federal, State, and Tribal officials and institutions. Some of these recommendations require legislative action. Others are matters of executive branch policy. Still others will require action by the Federal judiciary. Finally, much of what the Commission has proposed will require enlightened and energetic leadership from the governments of the several States and, ultimately, Indian Tribes and nations themselves.

A major theme of this Roadmap is that public safety in Indian country can improve dramatically once Native nations and Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, strong Native communities achieved through homegrown, tribally based systems that respect the civil rights of all U.S. citizens. The Commission rejects

outmoded command-and-control policies, favoring increased local control, accountability, and transparency.

The Roadmap contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation; (5) Detention and Alternatives; and (6) Juvenile Justice.

Each chapter contains a full discussion of the aforementioned topics, providing background information, data, and on-the-ground examples about the current challenges facing Indian country. Below is a summary of each chapter. **All recommendations in this Roadmap represent the unanimous views of all nine members of the Commission, Republicans and Democrats alike.**

CHAPTER 1 - JURISDICTION: BRINGING CLARITY OUT OF CHAOS

Under the United States' Federal system, States and localities 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 are often located within those same communities.

This framework contrasts with Indian country, where U.S. law requires Federal or State governments' control of the vast majority of criminal justice services and programs over those of local Tribal governments. Federal courts, jails, and detention centers are often located far from Tribal communities.

Disproportionately high rates of crime have called into question the effectiveness of current Federal and State predominance in criminal justice jurisdiction in Indian country. Because the systems that dispense justice in their communities originate in Federal and State law, rather than in Native nation choice and consent, Tribal citizens tend to view them as illegitimate: they do not align with Tribal citizens' perceptions of the appropriate way to organize and exercise coercive authority.

The current framework is institutionally complex. Deciding which jurisdiction delivers criminal justice to Indian country depends on a variety of factors, including but not limited to: where the crime was committed, whether or not the perpetrator is an Indian or non-Indian, whether or not the victim is Indian or non-Indian, and the type of crime committed.

The extraordinary waste of governmental resources resulting from the so-called Indian country "jurisdictional maze" can be shocking, as is the cost in human lives.

While problems associated with institutional illegitimacy and jurisdictional complexities occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P.L. 85-280 or similar types of State jurisdiction. Distrust between Tribal communities and criminal justice authorities leads to communication failures, conflict, and diminished respect.

Many Tribal governments have been active in seeking ways to make do with the current jurisdictional structure. However, working around the current jurisdictional maze will continue to deliver suboptimal justice because of holes in the patchwork system and these “work-arounds” still do not provide Tribal governments with full authority over all crime and all persons on their lands.

The Commission has concluded that criminal jurisdiction in Indian country is an indefensible morass 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 price: limited law enforcement; delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system 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 the crime rate is 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 and often makes Tribal law enforcement meaningless.

The Commission strongly believes, as the result of listening to Tribal communities, that for public safety to be achieved effectively 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 otherwise enforce on or off reservation.

Accordingly, the Commission recommends:

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.² This recognition, however, would be based on the

“When Congress and the Administration ask why the crime rate is 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 and often makes Tribal law enforcement meaningless.”

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 so as 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.*

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 the Indian Civil Rights Act (IRCA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal sentencing authority. Like Federal and State governments do, 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.*

CHAPTER 2—REFORMING JUSTICE FOR ALASKA NATIVES: THE TIME IS NOW

Congress exempted Alaska from legislation aimed at reducing crime in Indian country, such as the Tribal Law and Order Act of 2010 and the Violence Against Women Act 2013 reauthorization (VAWA Amendments). Yet, the 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. It sets Alaska apart from the progress that has become possible in the rest of Indian country. The public safety issues in Alaska—and the law and policy at the root of those problems—beg to be addressed. These are no longer just Alaska’s issues; they are national issues.

The strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern. 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 the State and local governments on mutually beneficial terms.

Forty percent of the federally recognized tribes in the United States are in Alaska, and Alaska Natives represent one-fifth of the total State population. Yet these simple statements cannot capture the vastness or the Nativeness of Alaska. The State covers 586,412 square miles, an area greater than Texas, California, and Montana combined. Many of the 229 recognized tribes in Alaska are villages located off the road system, often resembling villages in developing countries. Frequently, Native villages are accessible only by plane, or during the winter when rivers are frozen, by snow-machine. Food, gasoline, and other necessities are expensive and often in short supply. Subsistence hunting, fishing, and gathering are a part of everyday life. Villages are politically independent from one another, and have institutions that support that local autonomy—village councils and village Corporations.⁵ Unsurprisingly, these conditions pose significant challenges to the effective provision of public safety for Alaska Natives.

Problems with safety in Tribal communities are severe across the United States—but they are systemically worst in Alaska. Most Alaska Native communities lack regular access to police, courts, and related services. Alaska Natives are disproportionately affected by crime, and these effects are felt most strongly in Native communities. High rates of suicide, alcohol abuse, crimes attributed to alcohol, and alcohol abuse-related mortality plague these communities.

In Alaska’s criminal justice system, State government authority is privileged over all other possibilities: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes, and it exercises this jurisdiction through the provision of law enforcement

and judicial services from a set of regional centers, under the direction and control of the relevant State commissioners. This approach has led to a dramatic under-provision of criminal justice services in rural and Native regions of the State. It also has limited collaboration with local governments (Alaska Native or not), which could be the State's most valuable partners in crime prevention and the restoration of public safety.

This is emphatically not to criticize the many dedicated and accomplished State officials who serve Alaska Native communities day in and day out. They deserve the nation's respect, and they have the Commission's.

Nonetheless, it bears repeating that the Commission's findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike, that Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize—and frequently ignores—the potential of tribally based justice systems, as well as intertribal institutions and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer. If given an opportunity to work, Tribal approaches can be reasonably expected to work better—and at less cost.

Because of the Alaska Native Claims Settlement Act of 1971 (ANCSA) and *Alaska v. Native Village of Venetie Tribal Government*⁴, the Alaska Attorney General takes the view that there is very little Indian country in Alaska and thus, its law enforcement authority is exclusive throughout the State because Tribes do not have a land base on which to exercise any inherent criminal jurisdiction.

The Commission respectfully and unanimously disagrees.

Accordingly, the Commission recommends:

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.*

2.2: *Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.*

2.3: *Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned*

fee simple land similarly into trust; and to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

2.4: *Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.*

2.5: *Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.*

CHAPTER 3—STRENGTHENING TRIBAL JUSTICE: LAW ENFORCEMENT, PROSECUTION, AND COURTS

Parity in Law Enforcement. A foundational premise of this report is that Indian Tribes and nations throughout our country would benefit enormously if locally based and accountable law enforcement officers were staffed at force levels comparable to similarly situated communities off-reservation. From 2009-2011, the Office of Justice Services (OJS) in the Bureau of Indian Affairs (BIA) increased staffing levels on four Indian reservations to achieve such parity. This approach—through a “High Performance Priority Goal” (HPPG) Initiative—on average, reduced crime significantly on the selected reservations.

While the HPPG Initiative demonstrates what can work in Indian country, the Commission hastens to note that HPPG’s results can neither be replicated nor sustained on very many other Tribal reservations due to the extremely limited Federal and State funding options currently available to Indian country. Despite the current budget reality, the results of the HPPG Initiative should not be forgotten: parity in law enforcement services prevents crime and reduces violent crime rates.

In P.L. 85-280 States, the Federal government has transferred Federal criminal jurisdiction on Indian lands to State governments and approved the enforcement of a State’s criminal code by State and local law enforcement officers in Indian country. As a consequence of P.L. 85-280 and similar settlement acts, Federal investment in Tribal justice systems has been even more limited than elsewhere in Indian country. Nor is much help forthcoming from State governments; they have found it difficult to satisfy the demands of what is essentially an unfunded Federal mandate.

Accordingly, the Commission recommends:

3.1: Congress and the executive branch should direct sufficient funds to Indian country law enforcement to bring Indian country's coverage numbers into parity with the rest of the United States. Funding should be made equally available to a) Tribes whose lands are under Federal criminal jurisdiction and those whose lands are under State jurisdiction through P.L. 83-280 or other congressional authorization; b) Tribes that contract or compact under P.L. 93-638 and its amendments or not; and c) Tribes that do or do not opt out (in full or in part) from Federal or State criminal jurisdiction as provided in Recommendation 1.1 of this report.

Data Deficits. When Tribes have accurate data, they can plan and assess their law enforcement and other justice activities. Without data and access to such data, community assessment, targeted action, and norming against standards are impossible. The Commission found that systems for generating crime and law enforcement data about Indian country either are nascent or undeveloped.

Accordingly, the Commission recommends:

3.2: To generate accurate crime reports for Indian country, especially in Tribal areas subject to P.L. 83-280, Congress should amend the Federal Bureau of Investigation (FBI) Criminal Justice Information Services reporting requirements for State and local law enforcement agencies' crime data to include information about the location at which a crime occurred and on victims' and offenders' Indian status. Similarly, it should require the U.S. Department of Justice (DOJ) to provide reservation-level victimization data in its annual reports to Congress on Indian country crime. Congress also should ensure the production of data and data reports required by the Tribal Law and Order Act of 2010, which are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems, by allowing Tribal governments to sue the U.S. Departments of Justice and the Interior should they fail to produce and submit the required reports.

Special Assistant U.S. Attorneys (“SAUSAs”). The Indian country SAUSA program makes it possible for U.S. Attorneys to appoint appropriately qualified prosecutors to work in the capacity of an Assistant U.S. Attorney for the prosecution of certain Indian country cases. The SAUSA model is a positive and worthwhile development in making Indian country safer. SAUSAs boost Tribal prosecutors' ability to protect and serve. SAUSAs sometimes work with their respective U.S. Attorney's Offices to refer cases arising on Indian lands so that the investigations do not fall through the cracks. Further, all Tribal SAUSAs are required to undergo a rigorous FBI background check prior to their appointment. This vetting allows SAUSAs to legally obtain access to Law Enforcement Sensitive information. Such information helps determine how Tribal prosecutors allocate resources and implement their public safety priorities.

Despite better utilization of the SAUSA program in recent years, a more fundamental issue remains: Federal agencies' stingy support of Tribal court proceedings. Many Federal officials still see information sharing with Tribal prosecutors' offices as more or less optional. Routine refusal by many Federal law enforcement officials to testify as witnesses in Tribal court proceedings stymies the successful prosecution of Indian country crime.

Accordingly, the Commission recommends:

3.3: The Attorney General of the United States should affirm that federally deputized Tribal prosecutors (that is, those appointed as Special Assistant U.S. Attorneys or "SAUSAs" by the U.S. Department of Justice pursuant to existing law) should be presumptively and immediately entitled to all Law Enforcement Sensitive information needed to perform their jobs for the Tribes they serve.

3.4: The U.S. Attorney General should clarify the ability and importance of Federal officials serving as witnesses in Tribal court proceedings and streamline the process for expediting their ability to testify when subpoenaed or otherwise directed by Tribal judges.

3.5: To further strengthen Tribal justice systems, the Commission suggests that Federal public defenders, who are employees of the judicial branch of the Federal government within the respective judicial districts where they serve, consider developing their own program modeled on Special Assistant U.S. Attorneys.

Federal Magistrate Judges. TLOA directs the Commission to consider enhanced use of Federal magistrate judges to improve justice systems. The Commission has considered the concept of cross-deputizing Tribal court judges to serve as "Special Federal Magistrate Judges" to help expedite Federal criminal investigations, arrests, and indictments of crimes occurring in Indian country. However, despite repeated attempts to garner opinions on this topic, there was no public testimony on this topic.

While Federal magistrate judges play an important role in Indian country, there are obviously many instances where only an Article III judge can perform certain functions in Indian country that are required by law. Yet, not one U.S. District Court Judge is permanently based in Indian country, nor are there any Federal courthouses there.

Accordingly, the Commission recommends:

3.6: Congress and the executive branch should encourage U.S. District Courts that hear Indian country cases to provide more judicial services in and near Indian country. In particular, they should be expected to hold more judicial proceedings in and near Indian country. Toward this end, the U.S. Supreme Court and the Judicial

Conference of the United States should develop a policy aimed at increasing the Federal judicial presence and access to Federal judges in and near Indian country.

3.7: Congress and the executive branch should consider commissioning a study of the usefulness and feasibility of creating Special Federal Magistrate Judges.

Federal Funding and Federal Administrative Reform. The Roadmap sets forth a vision of Tribal governments having the lead role in strengthening Tribal justice. To achieve this goal, they must be able to communicate clearly and effectively with their Federal and State government partners about their justice capabilities and needs.

Most Tribal governments need financial support and a more rational Federal administrative structure for the management of criminal justice programs in Indian country. The need for resources is obvious if Tribes are to pursue successful strategies such as the HPPG Initiative. Administrative changes at the Federal level should make it possible to redirect spending that at present is duplicative, over managed, and misallocated. Thus, reform may not only improve information sharing, but also generate savings so that less “new money” is needed for investment in ideas that work.

Since the late 1980s, the U.S. Department of Justice (DOJ) has become a major funder of Indian country criminal justice system activities. DOJ’s involvement has been of great benefit to Tribes in areas such as program development and opening certain funding streams.

Despite these benefits, DOJ’s grant-based funding approach creates uncertainties in system planning; Tribal governments legitimately ask why—unlike their State and local counterparts—should they rely on such inconsistent sources to pay for governmental functions. Grant funding also requires Tribal governments to compete for and “win” grant funds, which means other Tribes did not. Further, small Tribes and Tribes with thinly stretched human capital lack the capacity to write a “winning” application, yet these Tribes often have disproportionate criminal justice needs. Finally, many grants awarded to Tribes contain so much bureaucratic red tape that the balance of the Federal funds awarded goes unused.

Additionally, Tribes must navigate the separate DOJ and U.S. Department of Interior (DOI) systems, which have substantial roles in the administration of Indian country justice programming. This arrangement creates costly duplication, confusion concerning lines of accountability, and wasteful outcomes. For example, the Commission learned of detention facilities built with DOJ funds that, once completed, could not be staffed because they were not included in the DOI budget for facilities operations and maintenance.

Some of these problems could be resolved if Tribal governments were able to access DOJ Indian country resources that allow Tribal governments to manage Federal funds. An alternative and preferred route would be to merge or combine these Federal responsibilities for Indian country criminal justice in a single Federal department.

Accordingly, the Commission recommends:

3.8: Congress should eliminate the Office of Justice Services (OJS) within the Department of the Interior Bureau of Indian Affairs, consolidate all OJS criminal justice programs and all Department of Justice Indian country programs and services into a single “Indian country component” in the U.S. Department of Justice (including an appropriate number FBI agents and their support resources), and direct the U.S. Attorney General to designate an Assistant Attorney General to oversee this unit. The enacting legislation should affirm that the new agency retains a trust responsibility for Indian country and requires Indian preference in all hiring decisions; amend P.L. 93-638 so that Tribal governments have the opportunity to contract or compact with the new agency; and authorize the provision of direct services to Tribes as necessary. Congress also should direct cost savings from the consolidation to the Indian country agency and continue to appropriate this total level of spending over time.

3.9: Congress should end all grant-based and competitive Indian country criminal justice funding in DOJ and instead pool these monies to establish a permanent, recurring base funding system for Tribal law enforcement and justice services, administered by the new Tribal agency in DOJ. Federal base funding for Tribal justice systems should be made available on equal terms to all federally recognized Tribes, whether their lands are under Federal jurisdiction or congressionally authorized State jurisdiction and whether they opt out of Federal and/or State jurisdiction (as provided in Recommendation 1.1). In order to transition to base funding, the enacting legislation should:

- a. Direct the U.S. Department of Justice to consult with Tribes to develop a formula for the distribution of base funds (which, working from a minimum base that all federally recognized Tribes would receive, might additionally take account of Tribes’ reservation populations, acreages, and crime rates) and develop a method for awarding capacity-building dollars.*
- b. Designate base fund monies as “no year” so that Tribes that are unable to immediately qualify for access do not lose their allocations.*
- c. Authorize the U.S. Department of Justice to annually set aside five (5) percent of the consolidated former grant monies as a designated Tribal criminal justice system capacity-building fund,*

which will assist Tribes in taking maximum advantage of base funds and strengthen the foundation for Tribal local control.

3.10: *Congress should enact the funding requests for Indian country public safety in the National Congress of American Indians (NCAI) “Indian Country Budget Request FY 2014,” and consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among other requests, NCAI directs Congress to fully fund each provision of the Tribal Law and Order Act of 2010 that authorizes additional funding for Tribal nation law and order programs, both for FY 2014 and future years; to finally fund the Indian Tribal Justice Act of 1993, which authorized an additional \$50 million per year for each of seven (7) years for Tribal court base funding; and to create a seven (7) percent Tribal set-aside from funding for all discretionary Office of Justice Programs (OJP) programs, which at a minimum should equal the amount of funding that Tribal justice programs received from OJP in FY 2010. In the spirit of NCAI’s recommendations, Congress also should fund the Legal Services Corporation (LSC) at a level that will allow LSC to fulfill Congress’ directives in the Tribal Law and Order Act of 2010 and Violence Against Women Act 2013 reauthorization.*

CHAPTER 4—INTERGOVERNMENTAL COOPERATION: WORKING RELATIONSHIPS THAT TRANSCEND JURISDICTIONAL LINES

Stronger coordination among Federal, State, and Tribal law enforcement can make Native nations safer and close the public safety gap with similarly situated communities. It also is a proven way to combat off-reservation crime. The Federal government cannot and should not force Tribal and State leaders to work together. Local priorities and concerns ought to drive cooperation, and it needs to be voluntary. But the President and Congress can take steps to promote and support the conditions in which more positive forms of collaboration can take root.

A principal goal in intergovernmental cooperation is to find the right mechanisms to facilitate the entry into Tribal-State and Tribal-Federal law enforcement agreements and Memoranda of Understanding, including Special Law Enforcement Commission and local deputization and cross-deputization agreements.

Special Law Enforcement Commission (SLEC). With a SLEC, a Tribal police officer, employed by a Tribal justice agency, can exercise essentially the same arrest powers of a Bureau of Indian Affairs (BIA) officer assigned to Indian country without compensation by the Federal government. The SLEC enables a Tribal police office to make an arrest for a violation of the General Crimes Act or the Major Crimes Act in the non-P.L. 83-280 States or Tribal jurisdictions. While the SLEC appears to be precisely the kind of intergovernmental cooperation that would greatly enhance public safety in

Indian country, the Commission heard testimony that the BIA certification of the SLEC commissions is often delayed far too long.

State and Local Agreements. The Commission believes the recognition of Tribal government and jurisdictional powers through agreements with State and local jurisdictions will develop partnerships, allow the sharing of knowledge and resources, and result in better chances to coordinate police enforcement. Greater intergovernmental cooperation often results in better services for Indian country, is more cost effective, culturally compatible, and provides better arrest and prosecution rates.

The use of Memoranda of Understanding (MOUs) or other similar agreements between local law enforcement agencies and Tribal public safety permit, or “deputize,” the Tribal officers to enforce State criminal law. In most cases, this mechanism has served to ease the burden on non-Indian police forces. It also allows a full arrest of a suspect, which is necessary to secure a crime scene, protect evidence and witnesses, and ensure an appropriate arraignment and prosecution. However, liability concerns can hinder adoption of such agreements.

Accordingly, the Commission recommends:

4.1: Federal policy should provide incentives for States and Tribes to increase participation in deputization agreements and other recognition agreements between State and Tribal law enforcement agencies.

Without limitation, Congress should:

a) Support the development of a model Tribal-State law enforcement agreement program that addresses the concerns of States and Tribes equally, to help State legislatures and Governors to formulate uniform laws to enable such MOUs and agreements, in both P.L. 83-280 and non-P.L. 83-280 States;

b) Support the training costs and requirements for Tribes seeking to certify under State agencies to qualify for peace officer status in a State in a deputization agreement;

c) Create a federally subsidized insurance pool or similar affordable arrangement for tort liability for Tribes seeking to enter into a deputization agreement for the enforcement of State law by Tribal police;

d) For Tribal officers using a SLEC, amend the Federal Tort Claims Act⁷ to include unequivocal coverage (subject to all other legally established guidelines concerning allowable claims under the Act), not subject to the discretion of a U.S. Attorney or other Federal official; and

e) Improve the SLEC process by shifting its management to the U.S. Department of Justice and directing DOJ to streamline the commissioning process (while retaining the requirements necessary to ensure that only qualified officers are provided with SLECs). (Also see Recommendation 4.8.)

Tribal Notification of Arrest, Court Proceedings, and Reentry. On the Federal side, United States Attorney's Offices sometimes do not communicate effectively, or at all, with Tribal jurisdictions when declining cases for Federal prosecution. Without notification, local Tribal courts often do not take up the case in Tribal court by exercising their concurrent jurisdiction.

Tribal government notification at the time of a Tribal citizen's arrest—and appropriate Tribal government involvement from that point forward (during trial, detention, and reentry)—can reasonably be expected to improve outcomes for the offender and for the offender's family and Tribe, as well as improve law enforcement outcomes overall.

4.2: Federal or State authorities should notify the relevant Tribal government when they arrest Tribal citizens who reside in Indian country.

4.3: When any Tribal citizen resident in Indian country is involved as a criminal defendant in a State or Federal proceeding, the Tribal government should be notified at all steps of the process and be invited to have representatives present at any hearing. Tribes should similarly keep the Federal or State authorities informed of the appropriate point of contact within the Tribe. These mutual reporting requirements will help ensure the effective exercise of concurrent jurisdiction, when applicable, and the provision of wrap-around and other governmental services to assist the offender, his or her family, as well as the victims of crime.

4.4: All three sovereigns—Federal, State, and Tribal—should enter into voluntary agreements to provide written notice regarding any Tribal citizens who are reentering Tribal lands from jail or prison. This requirement should apply regardless if that citizen formerly resided on the reservation. This policy will allow the Tribe to determine if it has services of use to the offender, and to alert victims about the offender's current status and location.

Intergovernmental Data Collection and Sharing. Good criminal justice information—and, as necessary, sharing of information—are key to the effective operation of a criminal justice program. Indian country is seen as a data gap. Some Tribes are working with State and Federal law officials on innovative ways to collect and distribute data. However, more can and should be done to encourage data sharing, particularly at the State and local level.

Accordingly, the Commission recommends:

4.5: Congress should provide specific Edward J. Byrne Memorial Justice Assistance Grants (Byrne grants) or COPS grants for data-sharing ventures to local and State governments, conditioned on the State or local government entering into agreements to provide criminal offenders' history records with federally recognized Indian Tribes with operating law enforcement agencies that request to share data about offenders' criminal records; any local, State, or Tribal entity that fails to comply will be ineligible for COPS and Byrne grants.

CHAPTER 5—DETENTION AND ALTERNATIVES: COMING FULL CIRCLE, FROM *Crow Dog* TO TLOA AND VAWA

In August 1881, *Crow Dog*, a Brule Lakota man, shot and killed Spotted Tail, a fellow member of his Tribe. The matter was settled according to long-standing Lakota custom and tradition, which required *Crow Dog* to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket. After a public outcry that the sentence was not harsher, Federal officials charged *Crow Dog* with murder in a Dakota Territory court. He was found guilty and sentenced to death. The U.S. Supreme Court ultimately affirmed Tribal jurisdiction in this case, noting that the territorial court had inappropriately measured Lakota standards for punishment “by the maxims of the white man's morality.”⁶ Members of Congress, outraged by the Supreme Court's ruling, overturned the decision by enacting the Major Crimes Act of 1885, which for the first time extended Federal criminal jurisdiction to a list of felonies committed on reservations by Indians against both Indians and non-Indians.

In the 130 years since, detention and imprisonment have risen in prominence as responses to crime in Indian country, and Tribal governments have struggled to reassert their views about the value of reparation, restoration, and rehabilitation.

In recent years, the TLOA and VAWA Amendments have allowed Tribal governments to regain significant authority over criminal sentencing. But more could be done. By investing in alternatives to incarceration, the Commission also is hopeful that significant cost savings in Federal and State resources can be realized.

Deficiencies in Detention. Indians who offend in Indian country and are sentenced to serve time may be held in Tribal, Federal, or State facilities. While there are hardships associated with any incarceration, American Indians and Alaska Natives serving time in State and Federal detention systems experience a particular set of problems. One is systemic disproportionality in sentencing. The other is distance from their homes.

Further, such detention systems fail to provide culturally relevant support to offenders and community reentry becomes more difficult and may be ill coordinated.

Indians offenders also could be placed in an Indian country detention facility. There is an increasing number of exemplary facilities that serve as anchors along a continuum of care from corrections to community reentry and that are able to connect detainees with core rehabilitation services. For many Tribes, financial assistance from the Federal government for facility planning, renovation, expansion, staffing, and operations has been important in these efforts.

On the other hand, eight Tribal detention facilities permanently closed between 2004 and 2012. In most cases, deficiencies in funding, staff, and appropriate space proved their undoing. Indeed, the Commission visited detention facilities with deplorable living conditions. Funding for new jails and funding for operations remains a challenge. And while the number of violent offenders in Indian country detention facilities has fallen slightly in recent years, new sentencing authorities provided by TLOA and the VAWA Amendments may result in an increased the number of violent offenders in Indian country detention facilities.

Opportunities in Alternatives. “Alternatives to incarceration” or “alternatives to detention” are programs in which a judge may send criminal offenders elsewhere instead of sentencing them to jail. By addressing the core problems that lead offenders to crime (which may include substance abuse, mental health problems, and limited job market skills) and by helping them develop new behaviors that support the choice to not commit crimes, alternative sentencing aims to create pathways away from recidivism. Jail may still be part of an offender’s experience with an alternative sentence, but it would be used more sparingly and as a shorter-term measure, functioning as a component in a more comprehensive program involving intensive supervision, coordinated service provision, and high expectations for offender accountability.

A considerable amount of data demonstrates the effectiveness of some alternatives to detention across a wide range of court settings and offense categories. Effectiveness can translate to cost savings. Governments save money by diverting offenders away from jail and into alternative programs.

Accordingly, the Commission recommends:

5.1: Congress should set aside a commensurate portion of the resources (funding, technical assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to incarceration monies for Indian country, and in the same way it does for State governments, to help ensure that Tribal government funding for these purposes is ongoing. In line with the Commission’s overarching

recommendation on funding for Tribal justice, these resources should be managed by the recommended Indian country unit in the U.S. Department of Justice and administered using a base funding model. Tribes are specifically encouraged to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse treatment-mental health care programs, electronic monitoring programs, veterans' courts, clean and sober housing facilities, halfway houses, and other diversion and reentry options, and to develop data that further inform the prioritization of alternatives to detention.

To increase intergovernmental collaboration, as suggested elsewhere in this report, Tribal, State, and Federal governments should collaborate to ensure that Tribal governments are knowledgeable about which of its citizens are in the custody of non-Tribal governments. This would afford each offender's Tribal government the option to be engaged in decision making regarding corrections placement and supervision and allow the nation to be informed about, and prepared for, the offender's eventual reentry to the Tribal community.

Accordingly, the Commission recommends:

5.2: Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country; 2) to collaborate, if the Tribal government so chooses, in choices involving corrections placement or community supervision, and 3) to inform the Tribal government when that offender is slated for return to the community.

Tribes must receive a fair share of funds available at the Federal level for corrections systems creation and operation. While some corrections funds are specifically designated for Tribes, most are allocated in a manner that privileges State and local governments above Tribal governments. Savings realized through the creation and increased use of alternatives to detention should not be lost to Tribal governments, which is the case today. Instead, funding should “follow the offender,” so that if an offender's time served is reduced, money that would have been spent on detention is then available for service provision.

Accordingly, the Commission recommends:

5.3: Recognizing that several Federal programs support the construction, operation, and maintenance of jails, prisons, and other corrections programs that serve offenders convicted under Tribal law, appropriate portions of these funds should be set aside for Tribal governments and administered by a single component of the U.S. Department of Justice. This includes any funds specifically intended

for Tribal jails and other Tribal corrections programs (e.g., those available through the Bureau of Indian Affairs) and a commensurate Tribal share of all other corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen offenders, savings should be reinvested in Indian country corrections programs and not be used as a justification for decreased funding.

5.4: *Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to have a need for detention space:*

a) Congress and the U.S. Department of Justice should provide incentives for the development of high-quality regional Indian country detention facilities, capable of housing offenders in need of higher security and providing programming beyond “warehousing,” by prioritizing these facilities in their funding authorization and investment decisions; and,

b) Congress should convert the Bureau of Prisons pilot program created by the Tribal Law and Order Act into a permanent programmatic option that Tribes can use to house prisoners.

CHAPTER 6—JUVENILE JUSTICE: FAILING THE NEXT GENERATION

Indian country juvenile justice exposes the worst consequences of our broken Indian country justice system. Native youth are among the most vulnerable group of children in the United States. In comparison to the general population, poverty, substance abuse, suicide, and exposure to violence and loss disproportionately plague Native youth. Not surprisingly, and detailed in the Roadmap, these conditions negatively influence how Native children enter adulthood.

The same complexities and inadequacies of the Indian country adult criminal justice impair juvenile justice as well. The Federal court system has no juvenile division—no specialized juvenile court judges, no juvenile probation system. The U.S. Bureau of Prisons has no juvenile detention, diversion, or rehabilitation facilities. For Indian country youth who become part of State juvenile justice systems, there is generally no requirement that a child’s Tribe be contacted if an Indian child is involved. Thus, the unique circumstances of Native youth are often overlooked and their outcomes are difficult to track. Juveniles effectively “go missing” from the Tribe.

Although data about Indian country juveniles in Federal and State systems are limited, the available data reveal alarming trends regarding processing, sentencing, and incarceration of Native youth. Native youth are overrepresented in both Federal and State juvenile justice systems and receive harsher sentences.

Jurisdiction Reforms for Native Youth. Just as Tribal self-determination and local control are the right goals for adult criminal matters, they are the right goals for juvenile matters.

Accordingly, the Commission recommends:

6.1: *Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of general application.*

Analogous to the mechanism set forth in Chapter 1 (Jurisdiction: Bringing Clarity Out of Chaos), for any Tribe that exercises this option, Congress would recognize the Tribe's inherent jurisdiction over those juvenile matters, subject to the understanding that the Tribe would afford all constitutionally guaranteed rights to the juveniles brought before the Tribal system, and the juveniles would be entitled to Federal civil rights review of any judgments entered against them in a newly created United States Court of Indian Appeals. As in adult criminal court, the Tribe opting for this exclusive jurisdiction could offer alternative forms of justice, such as a juvenile wellness court, a teen court, or a more traditional peacemaking process, as long as the juvenile properly waived his or her rights.

If Tribes choose not to opt out entirely from the Federal criminal justice system for offenses allegedly committed by their juvenile citizens, Tribal governments should still be provided with a second option:

6.2: *Congress should provide Tribes with the right to consent to any U.S. Attorney's decision before Federal criminal charges against any juvenile can be filed.*

The U.S. Criminal Code already provides for such Tribal governmental consent in adult cases where Federal prosecutors are considering seeking the death penalty. The same reasoning ought to apply to U.S. Attorneys' decisions to file Federal charges against Native juveniles for Indian country offenses.

Strengthening Tribal Justice for Native Youth. Similarly, in the interests of achieving parity between Tribal and non-Indian justice systems, resources for Indian country juvenile justice must be more effectively deployed.

Accordingly, the Commission recommends:

6.3: *Because resources should follow jurisdiction, and the rationale for Tribal control is especially compelling with respect to Tribal youth, resources currently absorbed by the Federal and State systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.*

6.4: *Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies.*

6.5: *Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them into contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is in fact a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.*

6.6: *Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be created to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General's National Task Force on Children Exposed to Violence.*

“... data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. Furthermore, conditions of detention often contribute to the very trauma that Native children experience. Detention is often the wrong alternative for Indian country youth and should be the last resort.”

Detention and Alternatives for Native Youth. Alternatives to detention are even more imperative for Tribal youth than for adult offenders. Experts in juvenile justice believe detention should be a rare and last resort for *all* troubled youth, limited to those who pose a safety risk or cannot receive effective treatment in the community. More specifically, data show that Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. Furthermore, conditions of detention often contribute to the very trauma that Native children experience. Detention is often the wrong alternative for Indian country youth and should be the last resort.

Accordingly, the Commission recommends:

6.7: *Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth's first encounters with juvenile justice. Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile trauma.*

6.8: *Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdictions, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's home and informed by the latest and best trauma research as applied to Indian country.*

Intergovernmental Cooperation for Native Youth. Where juveniles are involved, intergovernmental cooperation can enable Tribes to ensure that their often-traumatized youth receive proper assessment and treatment that is attentive to the resources and healing potential of Tribal cultures. Yet, Federal law, as prescribed by the Federal Delinquency Act, limits the ability to consider Tribal law and the unique needs and circumstances of a juvenile offender, particularly if that offender may be tried as an adult.

Accordingly, the Commission recommends:

6.9: *The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add "or tribe" after the word "state" in subsections (1) and (2).*

6.10: *The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal election to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.*

6.11: *Federal courts hearing Indian country juvenile matters should be statutorily directed to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.*

Finally, there are two key mechanisms of enhanced Tribal-State cooperation: notice to Tribes when their children enter State juvenile justice systems and opportunities for Tribes to participate more fully in determining the disposition of juvenile cases.

Accordingly, the Commission recommends:

6.12: *The Indian Child Welfare Act⁷ should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.*

CONCLUSION

These recommendations are the result of Commission field hearings and site visits to all 12 of the Bureau of Indian Affairs' regions across the United States, along with hundreds of letters, emails, and other input from every corner of our country. They are intended to make Native America safer and more just for all U.S. citizens and to save taxpayers' money by replacing outdated top-down policies and bureaucracies with locally based approaches that are more directly accountable to the people who depend on them most and can make them work.

Many of these recommendations will require Federal legislation. Others are matters of internal executive branch policy. Still others will require action by the Federal judiciary. And much of what the Commission has proposed will demand enlightened and energetic leadership from the affected State governments. This includes the development of model and uniform State codes and best practices. Ultimately, Indian Tribes, nations, pueblos, villages, and rancherias must choose if and when to implement these reforms.

This is a defining moment for our nation and for this generation. How we choose to deal with the current public safety crisis in Native America—a crisis largely of the Federal government's own making over more than a century of failed laws and policies—can set our generation apart from the legacy that remains one of great unfinished challenges of the Civil Rights Movement.

Public safety in Indian country can and will improve dramatically once Native American nations and Alaska Native Tribes have greater freedom to build and maintain their own criminal justice systems. We see breathtaking possibilities for safer, strong Native communities achieved through home-grown, tribally based systems, respectful of the civil rights of all U.S. citizens, systems that reject outmoded command-and-control policies in favor of increased local control, accountability, and transparency. Lives are at stake, and there is no time to waste.

ENDNOTES

¹ Also known as the Snyder Act, the Indian Citizenship Act, 43 Stat. 253, conferred U.S. citizenship on “all non-citizen Indians born within the territorial limits of the United States,” thereby enabling Native Americans to vote in Federal elections.

² 18 U.S.C. § 1151.

³ Alaska Native Corporations are discussed in Chapter 2, notably at endnote 9.

⁴ 522 U.S. 520 (1998).

⁵ 28 U.S.C. § 1546(b)

⁶ *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).

⁷ 25 U.S.C. § 1901 *et seq.*

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The views expressed in this Roadmap by the nine appointed Commissioners of the Indian Law and Order Commission are theirs alone and do not necessarily reflect those of any other contributor. Nonetheless, the Commission wishes to acknowledge and thank the many talented and dedicated individuals who contributed to it.

Of particular note are the professional staff who were detailed from their permanent Federal employment to temporary tours of duty with the Commission. The Commission recruited each of them personally and then negotiated their public service as loaned executives:

- Jeff J. Davis, Executive Director, on leave from the United States Attorney's Office for the Western District of Michigan, Grand Rapids, MI, where he serves as an Assistant United States Attorney
- Eileen M. Garry, Deputy Executive Director, who remarkably never secured a formal detail and has continued to serve simultaneously in her permanent, full-time role as the Deputy Director of the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Washington, DC.
- Laurel Iron Cloud, the Commission's Deputy Director, detailed from the Bureau of Indian Affairs-Office of Justice Services in Albuquerque, NM

Jeff, Eileen, and Laurel have provided enlightened and indispensable leadership throughout this project, and the Commission deeply respects their willingness to commit to such a challenging assignment.

The Commission's Advisory Committee also provided invaluable public service. Members were selected by the Commission based on dozens of applications from all 12 Bureau of Indian Affairs regions. Appendix C lists them individually. Their assistance along this journey is deeply felt and respected.

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Finally, the Commission honors the many Native American and Alaska Native nations it was privileged to visit and learn from. Every one of their stories from across our great country made a profound difference in helping the Commission think about the most positive approaches to addressing public safety in Indian country.

The risk in thanking the literally thousands of people who assisted the Commission is that naming names will cause many contributors to be overlooked. The Commission expresses sincere appreciation to everyone else who helped.

