



# STRENGTHENING TRIBAL JUSTICE: LAW ENFORCEMENT, PROSECUTION, AND COURTS

Many Tribal justice systems are undergoing unprecedented change as Native nations consider extending their inherent criminal jurisdiction over non-Indians in domestic violence cases as provided by the Violence Against Women Act Reauthorization Act of 2013 (VAWA Amendments), and as they implement the advanced sentencing options for Indians provided by the Tribal Law and Order Act of 2010 (TLOA). The jurisdictional reforms that the Indian Law and Order Commission recommends (Chapter 1)—up to and including the ability of Indian nations to exit the Federal criminal justice system, except for Federal laws of general application and to retrocede from State criminal jurisdiction in P.L. 83-280 States—will present ever greater opportunities for strengthening locally accountable, tribally based criminal justice systems.

The Commission proposes specific reforms in three areas: law enforcement, prosecution and legal services, and increased cooperation with the Federal judiciary. When these reforms are implemented with the jurisdictional, juvenile justice, and other proposals detailed in this report, Tribal justice systems can close the public safety gap between Indian country and the rest of the United States. An examination of the technical issues related to Federal funding in Indian country, including grant programs, results in recommendations to speed these resources to the Tribal nations that need them with less delay and bureaucratic red tape.

## FINDINGS AND CONCLUSIONS: POLICE POWER AND DATA STRENGTHEN TRIBAL LAW ENFORCEMENT

*What works: boots on the ground.* 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. There is strong empirical support for this common-sense assumption.

For approximately 24 months spanning 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:

- The Wind River Indian Reservation of Wyoming, home to the Eastern Cheyenne and Northern Arapaho Tribes
- The Rocky Boy's Chippewa-Cree Reservation in Montana
- The Mescalero Apache Reservation in New Mexico
- The Standing Rock Sioux Reservation in South Dakota

BIA's "High Priority Performance Goal (HPPG)" Initiative<sup>1</sup> was intended to raise law enforcement staffing levels on those four reservations to a level commensurate with comparable off-reservation communities. In addition to raising force levels, by supporting crime prevention and deterrence, rather than relying on crisis and emergency response, the HPPG Initiative took more assertive steps to reduce disproportionately high crime rates on all four reservations.

This strategy included data-driven intervention planning, crime tracking, and ongoing evaluation of officer deployment. In other words, HPPG concentrated on raising force levels to parity and shifting those officers' emphasis to more proactive missions. Importantly, however, HPPG had self-designed limitations. Perhaps most significantly, only law enforcement levels were increased. Due to budget restrictions and divided authority between OJS (part of the U.S. Department of the Interior) and the U.S. Department of Justice (DOJ), staffing for other components of these Tribal justice systems, including prosecution and judicial staff, were not increased.

At the outset of HPPG, OJS and its director, Darren Cruzan, had a modest goal for this initiative: to reduce crime on each of these reservations by 5 percent. Yet despite its limitations, the HPPG Initiative's results more than exceeded expectations. On average, violent crime rates across the four reservations in the HPPG Initiative fell 35 percent over 2 years—by 68 percent at Mescalero alone.<sup>2</sup> In each case, crime rates initially

went up, as local citizens, responding to a more visible and active law enforcement presence, gained the confidence to report more crimes, and then declined nearly across the board.

Reminiscent of “hotspot policing,” an approach that has been effective in America’s urban areas, the simple premises behind HPPG—parity in force levels, coupled with more emphasis on crime prevention and deterrence, attests to what can happen when Tribal authorities have the comparable resources needed to do the job.<sup>5</sup> As one HPPG participant noted, “We knew from the very beginning that the numbers [would be] the key to being successful. You’ve got to get people on the ground to start making a difference.”<sup>4</sup>

*Federal resource constraints.* 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.

Even in the midst of HPPG, OJS provided congressionally appropriated funds to just 3,268 total law enforcement positions in all of Indian country. Of that total, FY 2010 data show 434 positions within OJS itself, the majority of them not sworn peace officer positions, and 2,834 positions with Tribal law enforcement agencies. The latter may receive funding not only from OJS, through agreements under P.L. 93-638, but also from DOJ through Community Oriented Policing Services (COPS) grants, and/or directly from their Tribal governments. Of the remaining OJS employees, those who are sworn as peace officers are expected to provide services to 191 separate law enforcement programs (40 BIA-operated and 151 tribally operated) and police a staggering 56 million acres of Indian lands.<sup>5</sup> This staffing level is obviously much too low to pursue effective strategies such as HPPG in very many places, let alone across the board. In fact, to avoid reducing law enforcement coverage elsewhere in Indian country, BIA had to borrow officers from other law enforcement services within the U.S. Department of the Interior (the National Park Service and U.S. Fish and Wildlife Service, for example) just to implement HPPG.

Despite the current budget reality, the Commission believes it is absolutely imperative that the results of the HPPG Initiative not be forgotten. The findings are real, the results validated, and the lessons clear: Parity in law enforcement services prevents crime and reduces violent crime rates. At a minimum, Congress should seriously consider projecting the results of HPPG to the other 566 federally recognized Indian Tribes to establish a base-level funding level for boots-on-the-ground law enforcement staffing levels and services.

Even if those funding levels cannot be achieved in the near term, increases might nonetheless be phased in over time until actual parity is achieved. Nor, of course, should law enforcement be the only

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consideration; the rest of the criminal justice system, along with social service departments and other wrap-around service providers, must also be considered for funding enhancements. Preventing violent crime not only saves lives, but, as economists the world over can attest, also can greatly reduce economic loss.

As congressional appropriators consider how parity-based criminal justice resources might reduce both direct and indirect costs to Federal and State justice systems, and as Tribal governments take on more fiscal responsibility and authority for keeping law and order on their reservations, lawmakers should also take into account just how serious the current disparities between Indian country and the rest of the United States have become:

- For FY 2010, OJS staffing levels for sworn personnel providing direct services within the six OJS Districts were estimated at approximately 1.08 officers per 1,000 residents.
- Using the Indian Tribes' current sworn personnel staffing levels, Tribal law enforcement were estimated in FY 2010 at approximately 2.16 officers per 1,000 residents.
- Combining the current funded OJS and Tribal law enforcement forces, the total ratio for Indian country law enforcement (OJS and Tribal), based upon their reported service populations, was approximately 1.91 officers per 1,000 residents in FY 2010. Thus, all of these staffing ratios are below the comparable national average of 3.5 officers per 1,000 residents.<sup>6</sup>

**In fact, when funded but unfilled positions are counted in the mix, Indian country data in 2010 show a need for at least 2,991 additional law enforcement officers—a 50 percent staffing shortfall.<sup>7</sup>**

Since 2010, these staff shortages have not been addressed in any substantial, across-the-board fashion. The U.S. Department of the Interior (DOI) has asked for and received incremental increases to its Indian country law enforcement budget. DOJ funding available through the COPS program actually has fallen.<sup>8</sup> The deficits remain; the vast majority of law enforcement and public safety departments in Indian country do not have the coverage capacity and flexibility they need to implement the strategies they know will work to fight crime.

*State and local law enforcement.* The forgoing discussion applies primarily to Tribes whose land remains under Federal criminal jurisdiction—yet a Tribe's ability to implement what works in Indian country law enforcement is even more constrained if it is subject to P.L. 83-280<sup>9</sup> or to the dictates of a particular congressional settlement act.<sup>10</sup> In these cases, Congress 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.

What we do see is an absence of law enforcement on Tribal property. There's not law enforcement for two reasons. One is geographical area. It's a remote area, at least in our county. The other is lack of resources. Now, I know our Tribes have reached out to the Federal government for resources, looked out to the State. California is a P.L. 280 State; we have the responsibility of enforcing criminal laws. But when rural counties lack the resource to even have effective law enforcement in their urban population, it's virtually impossible to have law enforcement in our rural areas, including Tribal areas. The Tribes have looked to develop their own Tribal law enforcement agency. But you have the same issues that the State faces, the lack of resources...at the end of the day, without resources to have staff, you're going to continue to have an absence of law enforcement in Tribal areas.

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

And we lack manpower, we lack equipment, and we lack other resources right down through the level ... to assist with victim witness advocates, Tribal courts. So it's like working with strings and tin cans at times. And if it weren't for some of the grants that we have to go out and try to be awarded from year to year, to be honest with you, I probably wouldn't have even cruisers to operate for the patrol officers....I look at the grant process as another piece that to me it's almost who can beg the loudest and who can paint the picture of the worst of the worst. And I think that's a shame. Because, again, I think the government is stepping away from their responsibility to provide the resources we need.

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

The Commission has addressed many of the significant problems with P.L. 83-280 and other conferrals of State jurisdiction (Chapter 1). The point here is more specific and targeted. As a consequence of P.L. 83-280 and the 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.

For example, while P.L. 83-280 “did not eliminate or limit Tribal criminal jurisdiction, the Department of the Interior often used it as justification for denying funding support to Tribes in the affected States for law enforcement and criminal justice.”<sup>11</sup> As recently as September 2013, the U.S. Court of Appeals for the Ninth Circuit denied a Tribe in California (a mandatory P.L. 83-280 State) access to OJS law enforcement funds via a P.L. 93-638 contract,<sup>12</sup> noting: “We have serious doubts that the funding of law enforcement on the Los Coyotes Reservation is adequate, but that problem is unfortunately not unique to this Tribe.”<sup>13</sup> Consequently, the majority of Tribes in the P. L. 83-280 States and the “settlement Tribes” continue to be denied eligibility for Federal grants or direct contract funds to finance their own police forces (which non-P. L. 83-280 Tribes regularly seek and obtain).

Although the six States in which the stipulations of P.L. 83-280 were mandatory were presumed capable of fulfilling new administrative commitments, the States “often did not have funding to provide for public safety.”<sup>14</sup> “Suddenly required to hire more police, more judges, more prison guards, more probation and parole officers...and to build new police stations, courthouses, and jails, [States] tottered under their new financial obligations.”<sup>15</sup>

The results were immediate and posed significant challenges to maintaining law and order on the ground in Tribal communities. In Nebraska, for example, the State government faced such financial hardship that the “Omaha and Winnebago reservations [were] left without any law enforcement once federal officers withdrew.”<sup>16</sup> Even today, 60 years after the passage of P.L. 83-280, the Commission heard testimony about these gaps in law enforcement. Particularly in remote, rural areas, calls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded with high-crime environments that they must somehow manage on their own. To the extent that States and localities do provide law enforcement, witnesses testified that there is deep distrust between local non-Indian law enforcement and these Tribal communities, which is evidenced by frequent conflicts, communication failures, and disrespectful actions.

As the Commission has noted elsewhere, a more locally based Tribal police force, accountable and accessible to the communities they serve, could do better. In fact, examples drawn from P.L. 83-280 settings show that they do: resources matter. Tribes that have been able to raise

government revenue from Tribal gaming or other economic activities and have invested in creating a Tribal police force realize overall public safety improvements. Tribal police are able to provide rapid response. They are able to arrest Indians and either detain or arrest non-Indian suspects. The mere presence of Tribal police, visible on the reservation or rancheria, especially when able to patrol the Tribal lands, has an undeniable deterrent effect. Critically, they are an agency that the Tribal community can trust.

*Data deficits.* OJS’s handbook of lessons learned and “how-to’s” for HPPG stresses the importance of both quantitative and qualitative data to the initiative. Perhaps because the pilot HPPG Initiative had a dedicated crime statistics expert, each of the sites was able generate monthly data on a variety of violent crimes. At least to some extent, they were able to track crimes by location and time of day. That may sound unremarkable, but given the spotty or non-existent statistical information available to understand and address Indian country crime, such data compilation and interpretation was nothing short of remarkable to the Tribes that participated in the HPPG Initiative.

The departments participating in the HPPG pilot initiative were trained in Uniform Crime Reporting (UCR) methods, able to collect and share activity data among shifts, and even designed several site-specific data collection tools. They also had access to peer group information, which allowed them to compare progress across the HPPG participant group and to develop realistic goals. Having local and comparative data has been an important aspect of all similar (and similarly successful) problem-oriented policing approaches outside Indian country as well.<sup>17</sup>

Most Tribal police departments do not have these advantages. In fact, the systems for generating crime and law enforcement relevant data about Indian country either are nascent or undeveloped. The Federal Bureau of Investigation (FBI) did not consistently train Tribal law enforcement agencies in UCR methods until 2009, after several U.S. Attorneys vocally complained that even the annual FBI Crime in America reports lacked such basic information. In recent years, personnel in a number of Tribal departments have been trained; but, nothing close to a comprehensive, longitudinal dataset is available for Indian country.

The National Crime Victimization Survey did not sample on Tribal lands until 1999, and even now, victimization data are not reported by reservation or for Indian country as a whole. Many Tribes lack electronic systems that could ease crime data collection and reporting. And, there is still no system that collects and aggregates data from Tribal, State, and Federal authorities concerning crimes committed on Indian lands, an omission that is particularly crippling for P.L. 83-280 Tribes. In fact, it is unclear whether some of the systems used for crime reporting, particularly at the State level, could support the necessary disaggregation.

To plan and assess their law enforcement and other justice activities, Tribes also need other kinds of data. In particular, they need information about:

- the progress in UCR implementation across Indian country
- DOJ's efforts, via the FBI and U.S. Attorney's Offices, to either investigate and prosecute crime or return cases to the Tribal government for action
- technical assistance and training provided and "what works"

Information about these and other markers of the Federal government's efforts to partner with Indian country in fighting crime and promoting justice are essential.

All of these data are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems. Significantly, providing much of this aggregate, national-level data is addressed in TLOA, and the Federal government has begun to produce it. (Appendix G contains a list of reports required by TLOA.) For example, for the first time, Tribes have data about the number of and reasons for U.S. Attorneys' case declinations and the efforts DOJ is undertaking to improve data collection across Indian country. But Tribes also need assurance that they will have this planning and policy-critical information on an ongoing basis or else their own efforts at crime control will be less effective.

## RECOMMENDATIONS

*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.*

HPPG put a spotlight on what works in Indian country law enforcement: more "boots on the ground." What Indian country needs are more cops on the beat, in the community, providing deterrence and interdicting crime, and more and better criminal investigators. Significantly, simply moving Indian country toward parity with the rest of the United States in terms of police coverage would go far toward providing Indian country law enforcement with the resources Tribes need to fight crime. Law enforcement staffing levels are just one indispensable component of Tribal justice systems; the others deserve parity resourcing as well.

*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 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.*

Reservation-level and aggregate Indian country data are critical to replicating the HPPG Initiative. When Tribes have accurate data, they can do their part in implementing similar strategies across their jurisdictions; but, without it, community assessment, targeted action, and norming against standards is impossible. This recommendation makes it possible for Tribes to hold their partner Federal agencies accountable in generating needed law enforcement information. Even for the four Native nations already experienced in HPPG methods, this recommendation provides tools that will help them improve further still.

## **FINDINGS AND CONCLUSIONS: IMPROVING INFORMATION SHARING STRENGTHENS PROSECUTION OF INDIAN COUNTRY CRIME**

*What works: 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. A similar program has long been used to boost Federal prosecution on military bases and other Federal enclaves. Indian country SAUSAs have been used sporadically by U.S. Attorney's Offices in Indian country for 20 years. In 2009, however, DOJ made the use of SAUSAs in Indian country a policy priority—a welcome development that is strengthening Tribal governments' ability to prosecute cases and, in particular, accelerating Tribes' transition to the VAWA Amendments and TLOA.

The SAUSA model is a positive and worthwhile development in making Indian country safer. SAUSAs boost Tribal prosecutors' ability to protect and serve in at least two important ways. First, they 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 when the evidence permits Federal charges to be filed. Second, where Federal prosecution is not an option or may be less desirable, Tribal

prosecutors who also are SAUSAs can move forward more quickly with criminal charges under Tribal law. While SAUSAs don't have the final say, they do have increased leverage in some cases to ensure that matters are addressed.

Second, all Tribal SAUSAs are required to undergo a rigorous FBI background check prior to their appointment by a U.S. Attorney. This vetting allows SAUSAs to legally obtain access to Law Enforcement Sensitive (LES) information, such as Federal criminal investigative reports concerning cases arising in their communities. Especially in the many instances where Federal and Tribal jurisdiction may be concurrent, a Tribal prosecutor's access to LES information is vitally important. It determines how Tribal prosecutors are allocating resources and determining and implementing their public safety priorities.

In sum, the Commission finds that independent Tribal prosecutor's offices, consisting of attorneys who operate independently from Tribal councils or other governing bodies, and who are federally deputized as SAUSAs to ensure that LES information is protected, can be key assets for ensuring the timely and successful prosecution of Indian country crime. Federally deputized Tribal prosecutors are especially well-positioned to ensure that police service calls in the field are quickly and thoroughly reviewed; investigations proceed based on admissible evidence; criminal charges are evaluated and filed based on which jurisdiction (Federal, State, and/or Tribal) is involved; and justice is pursued through the appropriate judicial system in a way that respects victims and defendants' rights while appropriately allocating scarce resources.

The Hopi Indian Tribe, located in rural northeastern Arizona, provides an example of how important SAUSAs can be in improving the prospects of criminal prosecution in Indian country. Hopi has about 14,000 enrolled members with roughly 8,000 people living in 12 villages spread over 1.5 million acres. OJS is the primary law enforcement agency providing services to the Hopi people. The OJS organizational chart for the Hopi Tribe specifies 17 officers, 2 special agents, and a chief of police, but as of May 2013, there were just 9 patrol officers, 1 special agent, and a police chief providing services on the Hopi Reservation. According to the DOJ Nationwide Case Management Database, in 2011 alone there were more than 7,000 service calls by OJS at Hopi. Those same statistics report 15 major felonies committed in that same year. Among all of these cases, just 17 in total (felony and misdemeanor) were referred to the U.S. Attorney's Office, District of Arizona for review for Federal prosecution. Significantly, however, even these 17 cases represented a major increase in case referrals over the immediately preceding years. In all of 2006, for instance, DOJ reports show that only one Federal criminal case of any type was referred by the OJS Hopi Agency to the U.S. Attorney's Office, District of Arizona. Importantly, this progress coincided with the first-ever appointment of the tribe's chief prosecutor to serve as a SAUSA.<sup>18</sup>

*The hurdle: poor information flows.* Welcome as it is, the recent policy focus on SAUSAs often has not addressed a more fundamental issue: Federal agencies' stingy support of Tribal court proceedings. Many Federal officials still see information sharing with Tribal prosecutors' offices as more or less optional. The 2013 VAWA Amendments and the TLOA felony sentencing provisions clearly expand the role of Tribal prosecutors by providing more tools to address crime in their own courts. Undeniably, the VAWA Amendments and TLOA also contemplate that Tribal prosecutors will have access to timely, accurate, and comprehensive criminal justice information from the FBI, OJS, and other Federal agencies to be able to exercise Tribal concurrent criminal jurisdiction effectively.

Unfortunately, some Federal officials have yet to adjust to this new reality. The Commission has repeatedly received detailed reports that the FBI, OJS, and U.S. Attorney's Offices are either reluctant to provide Federal criminal investigative information to appropriately certified Tribal prosecutors or refuse to do so entirely. FBI cooperation with Tribal prosecutors' offices is often non-existent, and some OJS officials at the district or agency level (the very Federal officials who are supposed to serve as supporters and enablers of tribal TLOA and the VAWA Amendments implementation), are instead responding with indifference or even hostility when Tribes actually assert their sovereign rights.

In one particularly egregious instance earlier in 2013, the OJS Director became directly involved after an agency official refused to provide any criminal justice information to a Tribal prosecutor in a Federal jurisdiction where the Tribe had concurrent criminal jurisdiction. According to emails provided to the Commission, the local OJS official insisted that the Tribal prosecutor "fill out a Freedom of Information Act request." While absurd, Federal foot-dragging is too often the norm.

The Commission is encouraged that to correct such injustices, OJS national leadership has recently begun collaborating with Tribes to develop protocols for criminal justice information sharing with Tribal prosecutors' offices. Such collaborations have been driven by Tribal prosecutors who are understandably frustrated by OJS' inability to keep pace with expanded assertions of Tribes' concurrent jurisdiction.<sup>19</sup> The resulting information-sharing protocols between Tribes and OJS are intended to ensure that Federal officials immediately disclose evidence in criminal cases to Tribal prosecutors who have been federally deputized as SAUSAs. The underlying assumption guiding these protocols is that the confidentiality and integrity of information is protected, and Tribal governments should have much greater use and control over criminal justice information regarding their citizens. Tribal prosecutors deputized as SAUSAs to ensure that the confidentiality of criminal justice information is protected are the key to enabling this process. Similarly, Tribal prosecutors' offices that function independently of their governing Tribal councils and other sources of political authority are vital to the information-sharing environment.

Another information flow problem that stymies the successful prosecution of Indian country crime is the routine refusal by many Federal law enforcement officials to testify as witnesses in Tribal court proceedings. Especially when a SAUSA has succeeded in bringing a case declined by the U.S. Attorney's office into Tribal court, testimony by Federal line officers and FBI agents may still be necessary. Yet, Federal guidelines have long restricted Federal law enforcement officials from testifying in Tribal or State courts without advanced permission. Some U.S. Attorneys have addressed this situation in recent years by developing protocols with Tribal courts to ensure that Federal law enforcement officials are available to testify in Tribal judicial proceedings when called upon to enforce Tribes' criminal laws. Creating and adhering to such protocols is especially important on Indian reservations that are primarily served by Federal police, and where, by definition, protecting the community means reinforcing a Tribe's exercise of its concurrent jurisdiction in criminal proceedings.

Still another information flow problem arises from the lack of criminal justice competence is that some Federal law enforcement officials, including the OJS officers, bring to investigations occurring in Indian communities. The Commission was provided with records of various cases demonstrating the importance of timely investigation to bringing charges in the relevant jurisdiction. This is primarily an OJS or FBI (i.e. Federal) responsibility. In other words, if Federal investigators do not move quickly or effectively to do their jobs, prosecutors cannot do theirs.

An all-too-typical example is illustrative. According to OJS and Tribal records, an adult Native American female was found in the bedroom of a reservation home; she was unconscious, naked, and appeared to have been raped. Her boyfriend also was in the room, fully clothed, and unconscious. Upon arrival at the hospital, the victim was in shock, suffering from lacerations to her vagina and had a blood alcohol content level of 0.5. According to the dispatch record, the OJS special agent ("SA Smith," a pseudonym) was called to investigate this case at 7:58 p.m. Only after receiving a directive from his supervisor did SA Smith arrive at this home at 12:21 a.m., nearly 4.5 hours later. By the time SA Smith got to the crime scene, the victim was at the hospital, and the three occupants of the house had been arrested and booked into the OJS detention center. The responding patrol officer had taken pictures and collected the victim's clothing; SA Smith had asked through dispatch that the suspects' clothing be collected at booking. SA Smith collected no evidence from the scene, though there were clearly blood and fluids in the carpet. SA Smith did not conduct any interviews. He did not interview anyone present at the home upon his arrival, nor the three intoxicated suspects at the home when the patrol officer arrived.

During the critical "golden hour" when (absent extenuating circumstances) evidence should be collected to preserve the viability of a potential criminal prosecution or prosecutions, by all accounts, SA Smith

did nothing. The local OJS office did not inform the Tribal prosecutor of the case for days. By the time the FBI was alerted—6 days later—the occupant of the house where the crime occurred had ripped out the carpeting and replaced it with tile. Whoever committed the crime has gone unpunished. Unfortunately, incidents like this happen all too frequently in Indian country. Where OJS provides primary policing on Indian lands, training and performance standards aimed at increasing professional competency can and must be improved.

A related obstacle facing Tribal reformers is the routine refusal by many Federal law enforcement officials to recognize the subpoena authority of a Tribe and testify as witnesses in Tribal court proceedings. Federal guidelines have long restricted Federal law enforcement officials from testifying in Tribal or State courts without advanced permission, according to extensive testimony provided to the Commission. In recent years, some U. S. Attorneys have addressed this situation by developing protocols with Tribal courts to ensure that Federal law enforcement officials are available to testify in Tribal judicial proceedings when called upon to enforce Tribes’ criminal laws. Creating and adhering to such protocols is especially important on Indian reservations that are primarily served by Federal police (OJS), and where, by definition, protecting the community means reinforcing Tribes’ exercise of their concurrent jurisdiction in criminal proceedings.

## RECOMMENDATIONS

*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.*

SAUSAs appointed by U.S. Attorneys to prevent and punish violent crime within Indian country are the best available means for Indian Tribes and nations to effectively exercise concurrent jurisdiction under TLOA and the VAWA Amendments, and as provided by the Major Crimes and General Crimes Acts. But to do their jobs well, Indian country SAUSAs need full information. SAUSAs serving in other capacities (on military bases and other Federal enclaves, and with State and local anti-narcotics trafficking, gang prevention, and other task forces) already reap the benefit of LES information in their prosecutions; SAUSAs in Indian country should as well.

Given this clarified authority, Tribal governments and U.S. Attorneys (who are accountable to the U.S. Attorney General) can work to ensure that every federally recognized Indian Tribe that chooses to do so and invests in the requisite legal and professional requirements can have their Tribal prosecutors federally deputized. Federal criminal information will be presumptively made available as needed as soon as it is available, so

that these Tribal prosecutors can effectively assert their respective Tribes' concurrent criminal jurisdiction to make their communities safer and more just. Over time, as Tribes extend the exercise of their own criminal jurisdiction, the Federal government's direct role in dealing with many crimes may well diminish, while Tribes' comparative ability to police their own communities and enforce their own laws increases. This is as it should be in a country that values local governmental transparency, accessibility, and accountability.

*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.*

Specifically, each Federal Public Defender's Office serving Indian country should be permitted to designate Tribal "Special Assistant Federal Public Defenders." This intriguing concept, which arose during testimony to the Commission by former Federal public defender Barbara Creel, now a law professor, is designed to facilitate closer working-level cooperation between Tribal and Federal public defenders.<sup>20</sup> This issue that only grows in importance as the VAWA Amendments and TLOA enhanced sentencing are implemented more widely. Tribal public defenders who are deputized federally could also enhance the protection of confidential criminal justice information, thereby encouraging even greater information sharing by Federal law enforcement agencies and U.S. Attorney's Offices at earlier stages in a given proceeding.

To summarize these recommendations, in terms of chain of command, the Commission recommends that the system be reformed so that it works this way: The U.S. Attorney, who is accountable to the U.S. Attorney General, deputizes the Tribal prosecutor to ensure confidential federally obtained information is respected. Finally, the Tribal prosecutor—as quarterback or expeditor—decides how concurrent jurisdiction over the defendant(s) should be exercised. As an SAUSA, he or she reports to the U.S. Attorney's Office if Federal charges are filed; otherwise allegiance flows directly to the Tribe, just as it would with a military SAUSA (i.e., a Judge Advocate General who wears two hats and serves simultaneously in two justice systems, civilian and military) or a federally deputized State prosecutor on a joint Federal-State task force. In either sphere of sovereignty, chain of command and sovereign prerogatives are protected. The Tribe's governing council, in turn, enacts its own laws and policies to guarantee that the Tribal prosecutor's office operates independently from any political or outside influence.

Tribal leaders should be able to look to U.S. Attorneys (Presidential appointees with political accountability), and their offices as the chief point of contact for their day-to-day Federal criminal justice needs and requirements. In turn, U.S. Attorneys can work to ensure that every federally recognized Indian Tribe that chooses and invests in the requisite legal and professional requirements can have their Tribal prosecutors federally deputized. Federal criminal information from the FBI, OJS, and other Federal law enforcement agencies should be presumptively made available as needed, as soon as it is available, so that these Tribal prosecutors can effectively assert their respective Tribes' concurrent criminal jurisdiction to make their communities safer and more just.

Over time, as Tribes extend the exercise of their own criminal jurisdiction, the Federal government's direct role in dealing with many crimes may well diminish, while Tribes' comparative ability to police their own communities and enforce their own laws increases. This is consistent with our country's criminal justice system, which values local governmental transparency, accessibility, and accountability. The Commission looks forward to that day and in working to speed its coming.

## FINDINGS AND CONCLUSIONS: EXPANDING FEDERAL JUDICIAL SERVICES

*Recognizing the vital importance of Federal magistrate judges.* TLOA states that the Commission “shall develop recommendations on necessary modifications and improvements to justice systems at the Tribal, Federal, and State levels, including consideration of...(4) the enhanced use of chapter 43 of title 28, United States Code (commonly known as ‘the Federal Magistrates Act’) in Indian country.”

During the course of its fieldwork, the Commission was privileged to hear public testimony from several U.S. magistrate judges who preside over Indian country cases. As provided by the Federal Magistrate Judges Act,<sup>21</sup> U.S. magistrate judges are appointed on either a full- or part-time basis by the Chief U.S. District Court Judges within their respective Federal judicial districts. U.S. magistrate judges serve 8-year terms in the case of full-time positions or 4-year terms in the case of the many part-time positions that serve less-urban areas, especially in the West. This differs from U.S. District Court judges, who are appointed for life by the President of the United States and must be confirmed by the U.S. Senate pursuant to Article III of the U.S. Constitution. U.S. magistrate judges have limited criminal jurisdiction. Their authority in criminal justice matters is limited by statute to Class A misdemeanor jurisdiction (where the defendant has consented) and petty offenses.

Besides handling busy court dockets, U.S. magistrate judges provide often essential pre- and post-trial services, including initial appearances. Rule 5 of the Federal Rules of Criminal Procedure requires that officers

making arrests for violations of Federal law must take the arrested person “without unnecessary delay” before the nearest available Federal magistrate judge.<sup>25</sup> At the time, the defendant must be informed of the criminal charges as set forth in the complaint. Even in instances where the offenses charged can only be tried by a U.S. District Court judge, the U.S. magistrate judge’s role at this Rule 5 initial appearance is still extremely important. At the initial appearance, the U.S. magistrate judge “must inform the defendant of . . . the complaint against the defendant . . . [his] right to retain counsel or to request that counsel be appointed . . . the circumstances, if any, under which [he] may secure pretrial release . . . any right to a preliminary hearing; and [his] right not to make a statement, and that any statement made may be used against [him].”<sup>24</sup>

The Commission received substantial testimony from representatives of all three sovereigns (Federal, State, and Tribal) regarding the tremendous importance of full- and part-time U.S. magistrate judges in and near Indian country. Without these positions, misdemeanor enforcement on many Indian reservations would be seriously degraded. Given the vital role that U.S. magistrate judges play at the initial appearance stage, felony dockets would suffer in both pre- and post-trial services. This includes expanding the Federal grand jury process, which is constitutionally required for any U.S. Attorney’s Offices to file criminal charges, to serve areas closer to Native communities.

For example, veteran U.S. Magistrate Judge David L. West explained how the District of Colorado recently seated the first-ever Federal grand jury in Durango, in part to enhance access for citizens of the Ute Mountain Ute and Southern Ute Indian Tribes. These Tribes are headquartered 400 miles and 360 miles away, respectively, from the U.S. District Courthouse in Denver. Magistrate Judge West worked with U.S. District Court Judge R. Brooke Jackson in Denver to establish this Durango grand jury as a means of creating a more representative pool in cases arising on Colorado’s Western Slope. The reaction from both Tribes, the U.S. Attorney’s branch office in Durango, and State and local authorities has been very positive. Magistrate Judge West’s considerable expertise in Indian country cases has also been a key asset to the District of Colorado’s current initiative, under Chief District Court Judge Marcia C. Krieger and her predecessor, Wiley E. Daniel, to hold more Federal criminal trials and other judicial proceedings in Durango, especially cases involving Tribal citizens. Finally, Judge West frequently travels to the Ute Mountain Ute and Southern Ute Reservations to conduct periodic training for Tribal, State, and local officials on Indian country criminal justice issues.

The Commission strongly supports the use of U.S. magistrate judges in and near Indian country, as well as the deployment of additional full- and part-time positions in underserved areas. Yet, there are obviously a great many other instances where only an Article III Federal judge can perform the roles in Indian country that are required by Federal law. The Commission notes that not one U.S. District Court judge is permanently

At least in the District of New Mexico, it's the magistrate judges who will do that initial analysis on any habeas corpus petitions, and do recommendations to the district judges of the ultimate outcome.

*Karen Molzen, Chief Magistrate Judge, U.S. District Court for the District of New Mexico  
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque  
April 19, 2012*

I think we were remiss in the way we handled Indian country. I am not saying we are home free, but I am saying we are closer than we have ever been. The grand jury has Native American members to it. The panel had Native American members. We have made some progress.

*David L. West, Magistrate Judge, U.S. District Court for the District of Colorado  
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque  
April 19, 2012*

I think that the nature of the business requires our holding court on Federal Indian country, but to do that I have to provide notice to the Senate and the House Judiciary Committees of what I did and why I did it. I went to our chief judge and I got her approval to do this if I would write the reports. But the report must contain, one, reasons for the order for the special session; two, how long the order lasted for; the impact of the order on the litigants; and the costs of the order to the judiciary.

*G. Murray Snow, Judge, U.S. District Court for the District of Arizona  
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque  
April 19, 2012*

I know you wanted me to talk about the trial I held in Shiprock. The reason for that is because I wanted to take the mystery out of what is involved in a Federal trial. I wanted to take the mystery out of what you do as a witness, what you do as a juror. We had simultaneous interpreting and we had earphones for everybody...We used the trial courtroom, and you know, the quarters were not the gorgeous quarters of the Federal courthouse, but I got no complaints from any of the jurors. The Tribal judge was absolutely wonderful. The jurors were great sport about it. We had a full courtroom. I mean we had visitors coming in and out. Navajo Nation President Joe Shirley was there to welcome everybody on the first day, and on the last day he shook all the jurors' hands and thanked them all for coming. It was a great experience.

*Martha Vazquez, Judge, U.S. District Court for the District of New Mexico  
Testimony before the Indian Law and Order Commission, Hearing at the Pueblo of Pojoaque  
April 19, 2012*

based in Indian country, nor are there any Federal courthouses there. Several distinguished U.S. District Court judges testified to the Commission about the need to bring more of a Federal judicial presence to Native communities.

Magistrate judges play a vitally important role in and near Indian country. Other witnesses who represented all three sovereigns testified to the difficulties posed when Federal court services are offered so far from Indian country. This is both a problem of cost and of a fair hearing venue (Chapter 5). One important solution—emphasized by Federal judges themselves—is to hold more trials, hearings, and other judicial proceedings on or near reservations.

In 2005, U.S. District Court Judge Martha Vazquez pioneered this approach in the District of New Mexico. At that time, she was the Chief Judge, and she held what was apparently the first-ever Federal criminal trial in Indian country in Shiprock, NM, on the Navajo Nation.<sup>25</sup> More recently, in September 2013, U.S. District Court Judge G. Murray Snow of the District of Arizona, who also testified before the Commission, announced plans to hold a portion of a Federal criminal trial in Tuba City, again on the Navajo Nation.<sup>26</sup>

Such efforts should be strongly encouraged. While the Commission supports the transition of those Indian nations that so choose to exit Federal criminal jurisdiction except for crimes of general application, some Tribes may not go that direction, while other may take years or decades to do so. Strengthening Federal judicial access for Native people benefits all U.S. citizens.

*Exploring the option of Special Federal Magistrate Judges.* In 2008, National American Indian Court Judges Association President Eugene Whitefish proposed the concept of cross-deputizing Tribal court judges to serve as “Special Federal Magistrate Judges” to address several areas such as:<sup>27</sup>

- Expediting the Federal criminal investigations, arrests, and indictments of crimes occurring in Indian country.
- Reducing the caseload of the U.S. magistrate judges regarding the initial appearances, and detention and probable cause hearings by establishing a new special division in Indian country.
- Supporting the law enforcement and prosecution of crimes committed in Indian country, along with the supporting the notion of appointing special prosecutors.
- Assisting in the creation of educational and training opportunities for both Federal and Tribal court personnel.
- Strengthening the Tribal, State, and Federal justice systems.

This proposal raises the question of whether and how Special U.S. magistrate judges should be used. The Commission notes that potential to expand the current U.S. magistrate judges' pool may present potential detriments as well as benefits that have not been studied or examined. Despite repeated attempts by the Commission to garner opinions on this topic, there was literally no public testimony or even correspondence from the Federal judiciary or Tribes on this concept. The use of Special U.S. magistrate judges may be an area where the Congress commissions an official governmental study, perhaps by the Congressional Research Service, to assess the pros and cons of this idea. As a practical matter, the Commission lacks subpoena power and was unable to obtain relevant information from the Judicial Conference of the United States or any other source to support any substantive recommendation.

## RECOMMENDATIONS

*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.*

## FINDINGS AND CONCLUSIONS: FEDERAL FUNDING AND FEDERAL ADMINISTRATIVE REFORM

The Indian Law and Order Commission views Tribal governments as having the lead role in strengthening Tribal justice. Among other things, they must continue to develop the internal capacity to become more self-determined across all Tribal justice functions. They must be able to recruit and retain talented employees who can help them exercise greater local control in law enforcement, prosecution, and judicial processes. They must be able to communicate clearly and effectively with their Federal and State government partners about their justice capabilities and needs.

As the Commission's recommendations also indicate, most Tribal governments cannot accomplish these tasks on their own. They need two things: 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 OJS HPPG Initiative. The need for reform is signaled in the difficulties SAUSAs experience with information flows.

The Commission also heard testimony about many other concerns that Tribes have about the current Federal structure, and intriguingly, these problems point an opportunity. 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.

*The problems with grant funding.* Since the late 1980s, DOJ has become a major funder of Indian country criminal justice infrastructure. In FY 2012, for example, Congress allocated \$316 million to DOJ Native American programs, with the largest shares to the Office of Justice Programs (\$134 million) and Bureau of Prisons (\$114 million).<sup>28</sup> By comparison, in FY 2012 Congress provided the U.S. Department of Interior \$346 million for law enforcement and justice programming, with the largest shares to law enforcement officers and criminal investigators (\$185 million), detention (\$82 million), and Tribal courts (\$23 million).<sup>29</sup>

DOJ’s involvement has been of great benefit to Tribes. In some cases, it has developed programs explicitly for Tribal applicants; in others, it has opened funding streams formerly available only to State and municipal governments to Tribal governments. Tribes have taken advantage of these funds to, among other key investments, enhance their criminal codes, develop victim support programs, practice community-oriented policing, design wellness courts (Tribal drug courts), and create intertribal judicial bodies.

Despite these benefits, DOJ’s funding approach leaves much to be desired. Short-term, competitive grants for specific activities are not a good match for Indian country’s needs:

- Small Tribes and Tribes with thinly stretched human capital lack the capacity to write a “winning” application. These Tribes often have disproportionate criminal justice needs, and the grant process can prevent them from accessing DOJ funds altogether.
- To construct a full-bodied criminal justice system, a Tribe must apply for and win many single-issue grants with different deadlines and reporting requirements, which is a significant management challenge.
- Tribal governments legitimately query why they—unlike their State and local counterparts and in contradiction to the trust responsibility—should have to rely on such inconstant sources to pay for core governmental functions.<sup>50</sup>
- Many Tribes are uncomfortable with the idea that for one Tribal government to “win” grant funds, other Tribes must “lose.”

Section 202(b)(3) of the Tribal Law and Order Act states that it is a central purpose of the Act is “to empower Tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country.” As the Federal government continues to implement the Tribal Law and Order Act, this purpose *must* be at the core of its programming and funding initiatives. If grant programs diminish sovereignty or discourage healing in any way, the programs need to be redesigned before the grants are ever announced. These types of ‘opportunities’ are merely a façade that serve only to pit us against each other and redirect our paths on a course that will likely lead to failure...

*Bernard Stevens, Vice-President of the Wisconsin Inter-Tribal Alliance for Justice  
Written testimony for the Indian Law and Order Commission, Hearing at Santa Ana Pueblo, NM  
December 14, 2011*<sup>32</sup>

- Because grant funding is not renewable, it creates uncertainties in system planning, fuels costly employee turnover in Tribal criminal justice programs, and generates gaps in law enforcement and judicial processes that offenders can exploit.
- Grants reflect the Federal government's ideas about what kinds of investments and programs make sense in Tribal communities. Even "comprehensive" grant programs have tended only to stitch individual grants together onto a single application rather than allow Tribes freedom to determine their own spending priorities.<sup>51</sup>

The Commission has concluded that a mechanism other than grant funding must be found. Base funding from pooled resources, for example, may be a way to more permanently and stably fund criminal justice in Indian country.

Significantly, prior changes point toward fund consolidation. Beginning in the 1990s, DOJ undertook several pilot programs (for example, Tribal Strategies Against Violence and Comprehensive Indian Resources for Community and Law Enforcement) to test the process of making multiple grants accessible on a single application. With evidence that the strategy worked and was preferred by Tribes, DOJ institutionalized cross-program cooperation with the Coordinated Tribal Assistance Solicitation (CTAS). CTAS makes it possible for Tribes to use a single application and reporting system to access nine different competitive grant programs.

Pooling funds is the next logical step toward a more effective means of providing criminal justice funding to Tribes. Looking further afield, making block grants form a single pool of funds is the approach the U.S. Department of Housing and Urban Development implements through the *Native American Housing Assistance and Self-Determination Act of 1996*.

*Overlapping functions.* Grant funding is one of two major problems with the Federal administration structure for the management of Indian country programs. The other is even more fundamental: two Federal departments have substantial and substantially similar roles in the administration of Indian country justice programming. Both the U.S. Departments of the Interior and Justice provide funding for law enforcement, criminal investigation, prosecution, Tribal courts, and detention. Both offer technical assistance and training programs to strengthen these functions. Both are engaged in some direct service activities. Both sustain large and bureaucratic management structures for their programming in Indian country.

These arrangements create costly duplication, confusion concerning lines of accountability, and wasteful outcomes.<sup>55</sup> The problems that SAUSAs, as prosecutors deputized within the DOJ chain of command experience with OJS personnel, are just one aspect of a larger set of coordination problems.

The [Tribal Law and Order] Act does not provide an effective operational and developmental connection between the DOJ and DOI funded portions of the Tribal law enforcement systems programs.

*Ron Tso, Chief of Police, Lummi Nation  
Testimony before the Indian Law and Order Commission, Hearing on Tulalip Indian Reservation  
September 7, 2011*

For example, the Commission learned of:<sup>54</sup>

- Detention facilities built with DOJ funds that once complete, could not be staffed because they were not included in the BIA budget for facilities operations and maintenance. (This problem is so common that it was the focus of a National Congress of American Indians General Assembly resolution in October 2012.<sup>55</sup>);
- Duplicate grant awards that leave other critical tasks unfunded; for example, BIA and DOJ both provided a Tribe with funds for a computerized case management system, but neither agency provided for training, so the system went unused;
- A lack of collaboration concerning assessment and training programs, which create opportunities for conflicting instruction and advice; and
- A lack of coordination in the investigation function, such that FBI agents, OJS criminal investigators, and Tribal investigators frequently duplicate efforts, have access to different pieces of information, may not share the information they have, dispute the appropriate disposition of cases, and allow criminal investigations to be slow-tracked or disappear entirely.

Some of these problems could be resolved if Tribal governments were able to access DOJ Indian country resources via P.L. 93-638 contracts, self-governance compacts, or P.L. 102-477 funding agreements, all of which allow Tribal governments to take over the management of Federal funds. Tribal governments could then address coordination issues directly and save money by assuring more appropriate uses of funds in their communities. At present, they cannot: P.L. 93-638 and its amendments apply only to DOI and the U.S. Department of Health and Human Services' Indian Health Service, and P.L. 102-477 applies narrowly to formula-funded employment and training grants administered by the U.S. Departments of Education, Health and Human Services, Interior, and Labor. However, legislative amendments that expanded Tribes' contracting opportunities to include DOJ still would not reduce the waste inherent in maintaining two Federal Cabinet departments with nearly identical functions nor solve chain-of-command and accountability problems among personnel whose positions are not available for contracting (FBI agents, for example).

An alternative route would be to merge or combine these Federal responsibilities for Indian country criminal justice in a single Federal department. In fact, conversations about the possibility of merging DOI and DOJ Indian country criminal justice functions were begun nearly 20 years ago. In 1997, a proposal to do so was the central recommendation of the Executive Committee on Indian Country Law Enforcement Improvements.<sup>56</sup> The Executive Committee had gained substantial support for the change among Tribal governments, at DOJ, and within the BIA

And I know, as radical as this sounds, I would really see sort of the dismembering of the Bureau of Indian Affairs. ...Indian housing is pretty much handled through ONAP, Office of Native American Programs... Indian Health Service provides the Indian health component; Education Department handles the educational aspects of it; and I really firmly believe that Tribal law enforcement and Tribal court should go under the Department of Justice. ...I really do believe that the Bureau needs to get out of Tribal court and get out of law enforcement and leave it to the Department of Justice or the Department of Courts, I don't know. But I really think that those are better suited to address law enforcement and court systems in the United States Tribes.

*Dorothy Alther, Senior Staff Attorney with California Indian Legal Services  
Testimony before the Indian Law and Order Commission, Hearing on Agua Caliente Reservation, CA  
February 16, 2012*

*Theresa Pouley, Commissioner: “Do you have an idea of what that better funding source would look like? So take the competitive grant funds and do what?”*

*Connie Reitman, Executive Director, Inter-Tribal Council of California: “Just a basic allocation and then the ability to access other funding to support that basic funding. I think that's one approach that we would really appreciate because then we get at least something.”*

*Hearing of the Indian Law and Order Commission at Agua Caliente Reservation, CA  
February 16, 2012*

But I think that part of the solution is that we are going to have to—all of the Tribes, all of the Feds, and all of the are going to have to look at working together collaboratively to seek the authorization from Congress to fund some of these elements because we're all neighbors. It affects all of us. And the better job we can do to accomplish that, I think the better it will be for law enforcement and justice.

*Ron Suppah, Vice Chairman, Confederated Tribes of Warm Springs  
Testimony before the Indian Law and Order Commission, Hearing in Portland, OR  
November 2, 2011*

Division of Law Enforcement Services. Ultimately, the then-Assistant Secretary for Indian Affairs' reported concerns about the loss of budget dollars apparently ended action on the proposal. Unlike the budget surpluses of the 1990s, such a decision is no longer affordable for the Federal government, and it has never been affordable for Tribes.

## RECOMMENDATIONS

**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 of 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.

*“The institutionalized Federal under-funding and over-control of Tribal justice systems has resulted in unacceptably high rates of violent crime and social alienation whose tragic effects extend well beyond Indian country into every State in the Union. By embracing the quintessential American value of local control and responsibility, and by targeting resources to achieve true baseline funding parity in Native communities, as Tribes do more for themselves and their citizens, Federal and State taxpayers throughout the United States will benefit.”*

- 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 for FY 2014<sup>37</sup> and consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among other requests, NCAI encourages 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.*

## CONCLUSION

All of the recommendations in this chapter are designed to strengthen Tribal justice and close the public safety gap that afflicts Native people and communities. These recommendations lay the groundwork—through policy and financial support—for the implementation of promising practices that *fight crime and increase Tribal local control and accountability*. In particular, the Commission intends them to provide Tribal governments with:

- The wherewithal to implement of strategies, based in part on the successful HPPG Initiative, which achieve force-level parity within all parts of Tribal justice systems.
- The confidence that Tribal prosecutors will have the very best information available to them and that Federal officials will share information on timely basis, and cooperate in Tribal and judicial proceedings, so Tribes can effectively assert their criminal jurisdiction.
- The capacity to expand the responsibilities and accountability of Tribal court systems and to make Federal judicial services more accessible to Tribal citizens.

By seeking to strengthen Tribal justice systems, Federal and State leaders will not only enhance public safety on Tribal nations, but also save taxpayers' money throughout the United States. The institutionalized Federal under-funding and over-control of Tribal justice systems has resulted in unacceptably high rates of violent crime and social alienation whose tragic effects extend well beyond Indian country into every State in the Union. By embracing the quintessential American value of local control and responsibility, and by targeting resources to achieve true baseline funding parity in Native communities, as Tribes do more for themselves and their citizens, Federal and State taxpayers throughout the United States will benefit.

Treating all groups of U.S. citizens equally, rather than systematically depriving Native communities of commensurate levels of funding, is the right thing to do. Denying them the ability through the State and Federal laws to secure adequate funding streams and develop their own reliable Tribal tax bases sufficient to fund basic governmental services and infrastructure is a failed policy that hurts rather than helps Federal taxpayers.

The era of Federal command-and-control policies over Native Americans living on Tribal homelands, set aside at great sacrifice for their perpetual benefit, has made Indian communities more dangerous, not less. The Commission was inspired by how Tribal governments continue to develop and implement effective, home-grown justice systems notwithstanding these challenges. Funding parity, reduced red tape, in conjunction with law enforcement, prosecution, and judicial services that are more directly accountable to the citizenry, are proven policies that achieve positive results. By focusing on what works, the Federal government can finally become part of the solution.

## ENDNOTES

<sup>1</sup> U.S. Department of the Interior, Bureau of Indian Affairs, Office of Justice Services, *Lessons Learned, High Priority Performance Goals, 2009-2011: Mescalero, Rocky Boy's, Standing Rock, Wind River* (2012), 12-13, <http://www.bia.gov/cs/groups/xojs/documents/text/idc-018679.pdf>.

<sup>2</sup> U.S. Department of the Interior, Bureau of Indian Affairs, Office of Justice Services, *Lessons Learned, High Priority Performance Goals, 2009-2011: Mescalero, Rocky Boy's, Standing Rock, Wind River* (2012), 12-13, <http://www.bia.gov/cs/groups/xojs/documents/text/idc-018679.pdf>.

<sup>3</sup> John Tierney, *Prison Population Can Shrink When Police Crowd Streets*, N.Y. TIMES, January 26, 2013, at A1, available at <http://www.nytimes.com/2013/01/26/nyregion/police-have-done-more-than-prisons-to-cut-crime-in-new-york.html?pagewanted=all&r=0>.

<sup>4</sup> Julie Zauzmer, *Crime Fighter Cut Violent Incidents on Reservations*, WASHINGTON POST, June 26, 2013, [http://articles.washingtonpost.com/2013-06-26/local/40202689\\_1\\_violent-crime-reservations-numbers-game](http://articles.washingtonpost.com/2013-06-26/local/40202689_1_violent-crime-reservations-numbers-game).

<sup>5</sup> *Examining Bureau Of Indian Affairs And Tribal Police Recruitment, Training, Hiring, And Retention: Hearing before the U.S. Senate Committee on Indian Affairs*, 111th Cong. 596 at 6-7 (2010) (statement of Senator Tim Johnson and testimony of Wizipan Garriott, Policy Advisor to the Assistant Secretary for Indian Affairs).

<sup>6</sup> S. Hrg. 111-596 at 7, March 18, 2010, testimony of Wizipan Garriott.

<sup>7</sup> *Id.*

<sup>8</sup> The Department of the Interior received \$2.5 million in additional law enforcement funding in FY 2013, bringing its total spending for Indian country law enforcement to \$187.5 million; it has requested a \$5.5 million increase in FY 2014. See U.S. DEPARTMENT OF THE INTERIOR, BIA, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FISCAL YEAR 2014 at IA-OVW-2, available at <http://www.bia.gov/cs/groups/xocfo/documents/text/idc1-021730.pdf>. The Department of Justice received \$44 million for Community Oriented Policing Services grants to Indian country in FY 2011, a figure that fell to \$55 million in FY 2012. The Department's requests for 2013 and 2014 also are for \$55 million. See U.S. DEPARTMENT OF THE INTERIOR, FY 2013 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY, at 3 (2013), <http://www.doi.gov/budget/upload/FY2013NativeAmericanCrosscut.pdf>, and U.S. DEPARTMENT OF THE INTERIOR, FY 2014 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY at 5 (2013) <http://www.doi.gov/budget/upload/FY2014NativeAmericanCrosscut.pdf>.

<sup>9</sup> P.L. 85-280 eliminated most Federal-Bureau of Indian Affairs Indian Country criminal jurisdiction in six states (California, Minnesota, Nebraska, Oregon, Wisconsin, and later Alaska) and mandated State criminal jurisdiction in Indian Country instead; other states could opt into the law. Chapter 1, "Jurisdiction," offers a more complete discussion.

<sup>10</sup> "Settlement act tribes" typically had early contact with colonizers—often before founding of the United States. Many of Tribes gained Federal recognition and negotiated settlement terms with the Federal and relevant State governments only in the mid- to late-20th century; they include some or all of the Tribes in Maine, Rhode Island, Connecticut, and Florida, among others.

<sup>11</sup> DUANE CHAMPAGNE AND CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS UNDER PUBLIC LAW 280 (2012), 7.

<sup>12</sup> In *Los Coyotes Band of Chahuilla & Cupeno Indians v. Salazar et al.*, the Tribe argued that P.L. 85-280 did not extinguish Tribe's criminal jurisdiction or the Federal government's law enforcement responsibility, making the tribe eligible for a P.L. 95-638 law enforcement contract. The Department of the Interior took the position that it was entitled to establish its public safety funding priorities for non-P.L. 85-280 tribes, as P.L. 85-280 Tribes already have States providing criminal justice services. The U.S. Court of Appeals for the Ninth Circuit upheld the Department's position. No. 11-57222, 2013 WL 4734037 (9th Cir. 2013.) available

at, <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/04/11-57222.pdf>.

<sup>15</sup> *Los Coyotes Band*, *supra*, slip op. at 50.

<sup>14</sup> M. Brent Leonhard, *Returning Washington PL-280 Jurisdiction to its Original Consent-Based Grounds*, GONZAGA L. REV. 663, 719 (2012), available at [http://www.law.gonzaga.edu/law-review/files/2012/06/Leonhard.final\\_revised.pdf](http://www.law.gonzaga.edu/law-review/files/2012/06/Leonhard.final_revised.pdf).

<sup>15</sup> Ross Naughton, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. REV. 489, 498-99 (2007) (internal quotation and citation omitted) available at, <http://www.uclalawreview.org/pdf/55-2-5.pdf>.

<sup>16</sup> Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, (1975)(emphasis added).

<sup>17</sup> Andrea Nagy and Joel Podolny, *William Bratton and the NYPD*, Yale Case 07-0115, Yale School of Management (2008), [http://som.yale.edu/sites/default/files/files/Case\\_Bratton\\_2nd\\_ed\\_Final\\_and\\_Complete.pdf](http://som.yale.edu/sites/default/files/files/Case_Bratton_2nd_ed_Final_and_Complete.pdf)

<sup>18</sup> The prosecutor, Jill Engel, who now serves with the State District Attorney's Office in Colorado Springs, notes the importance of tribal SAUSAs working cooperatively with their respective U.S. Attorney's Offices in order to modernize outmoded tribal criminal laws so as to take advantage of TLOA enhanced sentencing. In one recent case, a 62-year-old medicine man was convicted of raping one of his patients. The U.S. Attorney's Office lacked sufficient evidence to prosecute the case federally, so it was prosecuted by the Hopi Tribal Prosecutor's Office. Under the Tribe's pre-TLOA criminal code, the only applicable tribal offense, an outdated crime requiring proof of the "unlawful carnal knowledge" of a woman, meant that the defendant could only be sentenced to 5 years' detention, compared with a national average of 14 years for similar offenses elsewhere according to U.S. Department of Justice statistics. The Hopi Tribe has since modernized its Law and Order Code, consistent with TLOA, to provide a penalty in future cases of up to 9 years' imprisonment. Laura Morales, *From Cops to Lawyers, Indian Country Copes with High Crime*, ALL THINGS CONSIDERED, NATIONAL PUBLIC RADIO, Aug. 5, 2013, <http://www.npr.org/2013/08/05/207067518/from-cops-to-lawyers-indian-country-cope-with-high-crime>.

<sup>19</sup> In one notable example, prosecutor Engel, *supra* note 18, representatives of the United States Attorney's Office for the District of Arizona, and the Indian Law and Order Commission drafted a model prosecution information-sharing protocol to ensure that the BIA-OJS officers be required to provide case-specific information immediately to Tribal prosecutors for use in Tribal charging-decisions under Tribal law. The BIA-OJS reports that this protocol is now being used nationally as a best practice with various Indian tribes to enable them to more effectively assert concurrent jurisdiction under TLOA and the VAWA Amendments. Commission interview with Darren Cruzan, Director, BIA-OJS, Sept. 3, 2013, on file with the Commission.

<sup>20</sup> Testimony of Barbara Creel, Hearing of the Indian Law and Order Commission, Pueblo of Pojoaque, NM, April 19, 2012, on file with the Commission.

<sup>21</sup> 28 U.S.C. § 631 et seq.

<sup>22</sup> 28 U.S.C. §636 provides in pertinent part:

- (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—
- (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
  - (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of Title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;
  - (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
  - (4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

<sup>25</sup> Fed. R. Crim. P. 5(a). If a U.S. Magistrate Judge is unavailable, state or local judicial officers may perform this function as provided by 18 U.S.C. § 3041.

<sup>24</sup> Fed. R. Crim. P. 5(d)(1).

<sup>25</sup> Testimony of Martha Vazquez, Hearing of the Indian Law and Order Commission, Pueblo of Pojoaque, NM, April 19, 2012, on file with the Commission.

<sup>26</sup> See *Navajo Nation courthouse to host federal trial*, Associated Press, Sept. 4, 2013, <http://wrwb.membercenter.worldnow.com/story/23333393/navajo-nation-courthouse-to-host-federal-trial> (viewed September 12, 2013).

<sup>27</sup> This concept arose on February 20, 2008, when National American Indian Court Judges Association (NAICJA) President Eugene Whitefish met with U.S. Attorney General Michael B. Mukasey, Gretchen C.F. Shappert, U.S. Attorney for the Western District of North Carolina, Tracey Toulou, Director, Office of Tribal Justice, and several Tribal leaders, to discuss the issues of law enforcement and crime in Indian Country. For a description of this meeting, see *Hearing on Tribal Courts and the Administration of Justice in Indian Country, Before the U.S. Senate Committee on Indian Affairs*, 110th Cong. 576 (2008) (prepared statement of Hon. Roman J. Duran, First Vice President, National American Indian Court Judges Association), 14, available at [http://www.indian.senate.gov/public/\\_files/July242008.pdf](http://www.indian.senate.gov/public/_files/July242008.pdf).

<sup>28</sup> U.S. DEPARTMENT OF THE INTERIOR, FY 2014 NATIVE AMERICANS/TRIBES CROSSCUT FUNDING SUMMARY at 4-5 (2013), <http://www.doi.gov/budget/upload/FY2014NativeAmericanCrosscut.pdf>.

<sup>29</sup> U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION, FISCAL YEAR 2013, at IA-PSJ-1, <http://www.bia.gov/cs/groups/public/documents/text/idc016442.pdf>.

<sup>30</sup> State and local governments also compete for grants from the U.S. Department of Justice. The point, however, is that these governments usually do not rely on DOJ funds for core services. Instead, States and localities often use DOJ funds to expand existing services or to test a new idea.

<sup>31</sup> See the description of CTAS, the Coordinated Tribal Assistance Solicitation at <http://www.justice.gov/tribal/grants.html>.

<sup>32</sup> Bernard Stevens, Testimony to the Indian Law and Order Commission, Hearing Santa Ana Pueblo, NM, December 14, 2011, 4-5, [http://www.indianlawandordercommission.com/resources/documents/ILOC%20FH\\_AibuNM\\_Testimony\\_BStevens.pdf](http://www.indianlawandordercommission.com/resources/documents/ILOC%20FH_AibuNM_Testimony_BStevens.pdf).

<sup>33</sup> See also, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS, GAO-11-252 (February 2011), <http://www.gao.gov/assets/320/315698.pdf>. In fact,

the problem is not just a DOI-DOJ problem; in 2005 and 2010 the DOJ Office of the Inspector General criticized DOJ for poor coordination among its own programs serving Native communities as well. Since 2010, DOJ has made strides in program coordination—including creation of a single grant application for multiple tribal opportunities—but the process is far from complete, since these grant opportunities still are not co-located within a single office of DOJ nor are they available for P.L. 93-638 style contracting.

<sup>34</sup> Examples are drawn from field hearings, Commissioner experiences, and U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS, GAO-11-252 (February 2011), <http://www.gao.gov/assets/320/315698.pdf>.

<sup>35</sup> Request that the Bureau of Indian Affairs Provide Consistent, Full, and Adequate Funding to Sustain Tribal Justice Programs, including Tribal Detention Facilities, National Congress of American Indians Resolution #SAC-12-055 (2012), available at [http://www.ncai.org/attachments/Resolution\\_jSvZtuCynZtzdmitVPOXQKcZkACuPIALulmgsEoYGwlbQhlorON\\_SAC-12-055.pdf](http://www.ncai.org/attachments/Resolution_jSvZtuCynZtzdmitVPOXQKcZkACuPIALulmgsEoYGwlbQhlorON_SAC-12-055.pdf)

<sup>36</sup> U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION. REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS: FINAL REPORT TO THE ATTORNEY GENERAL AND THE SECRETARY OF THE INTERIOR, (1997), <http://www.justice.gov/otj/icredact>.

<sup>37</sup> National Congress of American Indians, *Public Safety and Justice, in* INDIAN COUNTRY BUDGET REQUEST FY 14 at 25-32, accessed August 28, 2013, [http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2014/04\\_NCAI\\_2014\\_Budget\\_Request\\_Public\\_Safety.pdf](http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2014/04_NCAI_2014_Budget_Request_Public_Safety.pdf)

