



**INDIAN LAW**  
RESOURCE CENTER

# **Restoring Safety to Native Women and Girls and Strengthening Native Nations**

A Report on Tribal Capacity  
for Enhanced Sentencing and  
Restored Criminal Jurisdiction



FALL 2013



The Indian Law Resource Center is a nonprofit law and advocacy organization established and directed by American Indians. The Center provides legal assistance to Indian and Alaska Native nations who are working to protect their lands, resources, human rights, environment, and cultural heritage. The Center's principal goal is the preservation and well-being of Indian and other Native nations and tribes. For more information, visit [www.indianlaw.org](http://www.indianlaw.org).

The Center's Safe Women, Strong Nations project works to end the epidemic levels of violence against American Indian and Alaska Native women and its devastating impacts on Native communities. The project does so by raising awareness domestically and internationally to gain strong federal action, providing advice to Native nations and Native women's organizations regarding restoration of tribal criminal authority, and helping to increase tribal capacity to prevent and address such violence on their lands.

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## I. Introduction<sup>1</sup>

The Indian Law Resource Center's Safe Women, Strong Nations project works to end violence against Indian and Alaska Native women (Native women) and girls and its devastating effects on Indian nations and Native communities. The Center collaborates with Native women's organizations and Indian and Alaska Native nations<sup>2</sup> to end such violence by removing restrictions in United States law on the ability of these nations to investigate, prosecute, and punish all perpetrators of these crimes. Restoring tribal criminal authority will only end violence against Native women and girls if Indian nations have the institutional capacity and readiness to exercise such jurisdiction. Towards that end, this report assesses current tribal readiness to exercise restored criminal authority, offering suggestions to help build that capacity so that Native women and girls can be safe today and remain safe tomorrow.<sup>3</sup>

Native women and girls are not safe now. Violence against Native women and girls has reached epidemic levels in Indian country and Alaska Native villages—rates that are 2½ times higher than violence against any other group of women in the United States.<sup>4</sup> Native women are more than twice as likely to be stalked than other women.<sup>5</sup> One in three Native women will be raped in her lifetime, and six in ten will be physically assaulted.<sup>6</sup> The murder rate for Native women is ten times the national average on some reservations.<sup>7</sup> Alaska Native women are

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<sup>1</sup> Many contributed in various ways to the work that follows in this report including Indian Law Resource Center attorneys Jana L. Walker, Safe Women, Strong Nations project director, Karla General, and Christopher Foley; Center Executive Director Robert T. Coulter; Assistant Professor of Law Kirsten Matoy Carlson; Lucy Simpson, Executive Director of the National Indigenous Women's Resource Center; Center staff Lisa Myaya and Marilyn Richardson; former Center attorney Ethel Branch; and law students Kayleigh Brown, Darren Modzelewski, JoAnn Kintz, and Whitney Leonard.

<sup>2</sup> This report refers to the 566 federally recognized sovereign Indian entities in the United States as "Indian and Alaska Native nations" and sometimes as "Indian nations" or "Native nations." In the context of specific United States law or jurisdictional schemes, Indian and Alaska Native nations also may be referred to as tribes or tribal governments. This report does not deal with non-federally recognized or state recognized Native nations or the particular situation of the Native peoples of Hawaii.

<sup>3</sup> The report examines pertinent literature and reports through summer 2013. Notably, thereafter, the Indian Law and Order Commission released *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States* (Nov. 2013), available at <http://www.aisc.ucla.edu/iloc/report/index.html>.

<sup>4</sup> See, e.g., Pub. L. No. 109-162 § 901 (2006); see also U.S. Dep't of Justice, Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997); U.S. Dep't of Justice, Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998).

<sup>5</sup> See, e.g., Pub. L. No. 109-162 § 901 (2006); see also U.S. Dep't of Justice, Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997); U.S. Dep't of Justice, Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998).

<sup>6</sup> See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE: FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22, ex 7 (2000), at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

<sup>7</sup> See U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 5 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

subjected to the highest rate of forcible sexual assault in the country.<sup>8</sup> One in two Alaska Native women will experience sexual or physical violence, and "an Alaska Native woman is sexually assaulted every 18 hours."<sup>9</sup>

Unfortunately, data on the extent and nature of violence against Native girls is sorely lacking. However, a recently conducted national survey<sup>10</sup> tracking violence against children in the United States found that violence against Native girls may be disproportionately high as well—American Indian girls age infancy to 17 are almost 9 times as likely to be raped and 2 ½ times as likely to witness assault between their parents or other caregivers.<sup>11</sup> According to the survey, more than two out of five American Indian girls have witnessed a parent or caregiver being assaulted, and one in ten have been raped.<sup>12</sup> The survey data, however, is expected to have major shortcomings where Native girls in Indian country and Alaska Native villages are concerned.<sup>13</sup> Nevertheless, because the survey suggests an overall pattern of heightened vulnerability and risk for victimization in comparison to other U.S. youth, the report stands as a compelling call for more studies and data concerning violence against Native girls in Indian country and Alaska Native villages to be developed and reported as a national priority.

Native women and girls are protected less and denied meaningful access to justice by the United States legal system because they are Indian and Alaska Native and are assaulted on tribal lands. Federally recognized tribal governments have inherent sovereign authority and self-govern their territories and people; yet today, violence against Native women and girls cannot be addressed by Indian nations solely via local community action. This is because the root cause of this violence is embedded in United States law that denies Indian nations the jurisdictional authority needed to prevent violence against Native women and girls and to prosecute and punish perpetrators of such violence. Significantly, United States law has stripped Indian nations of

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<sup>8</sup> S. 1474, the Alaska Safe Families and Villages Act of 2013, § 2(a)(3).

<sup>9</sup> S. 1474, the Alaska Safe Families and Villages Act of 2013, § 2(a)(3), (4).

<sup>10</sup> THE NATIONAL SURVEY OF CHILDREN'S EXPOSURE TO VIOLENCE (National Survey) is a nationally representative survey of more than 4,500 youth conducted by David Finkelhor (Professor of Sociology and Director of Crimes against Children Research Center, U. of New Hampshire), Heather Turner (Professor of Sociology, U. of New Hampshire), and Sherry Hamby, (Research Associate Professor in Psychology at Sewanee, the University of the South and editor of the journal *Psychology of Violence*). The final report of the National Survey is now being written. See Sherry Hamby, Ph.D., *American Indian Girls Need Better Protection From Violence*, HUFFINGTON POST, June 19, 2012, at [http://www.huffingtonpost.com/sherry-hamby-phd/vawa-american-indians\\_b\\_1610315.html](http://www.huffingtonpost.com/sherry-hamby-phd/vawa-american-indians_b_1610315.html).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> The Center contacted Sherry Hamby, one of conductors of the survey and drafters of the report. The Center learned that the survey findings on violence against American Indian girls are not expected to identify whether these crimes were committed within or without Indian country, whether the perpetrator was an Indian or non-Indian, and whether the American girl survivors are citizens of a tribe. The survey also did not include Alaska within its sampling.

their criminal authority over non-Indians, who are responsible for committing some 88% of these crimes.<sup>14</sup>

Federal and state officials with the authority to protect Native women and girls are failing to do so at alarming rates. The federal government's own studies report that, between 2005 and 2009, U.S. Attorneys declined to prosecute 67% of the Indian country<sup>15</sup> matters referred to them involving sexual abuse and related matters.<sup>16</sup> A report released by the Department of Justice (DOJ) in May 2013 does report a reduction in overall declination rates from 37% in 2011 to 31% in 2012<sup>17</sup> and notes a near 54% increase in Indian country criminal caseloads between 2009 and 2012.<sup>18</sup> Still, in 2011 and 2012, nearly a third of all declinations were cases of sexual assault.<sup>19</sup>

Indian and Alaska Native nations are the only governments in the United States without legal authority to protect their own citizens from violence perpetrated by any person. United States law created and has perpetuated an unworkable and discriminatory, race-based system for administering justice in Native communities—a system highlighting the United States' continuing failure to meet its "federal trust responsibility to assist Indian tribes in safeguarding the lives of Indian women"<sup>20</sup> and its obligations under international human rights law.<sup>21</sup> These restrictions, coupled with the lack of serious enforcement by federal and state officials having jurisdiction to do so, perpetuate a cycle of extreme rates of violence against Indian and Alaska Native women.

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA 2013),<sup>22</sup> historic legislation restoring the inherent sovereignty of Indian nations to exercise concurrent criminal jurisdiction over certain non-Indians who commit domestic violence and dating violence against Native women in Indian country or who violate protection orders.

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<sup>14</sup> Native women experience a per capita rate of interracial violence far exceeding that of the general population. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE: FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN SURVEY 9, 22 (2000), at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

<sup>15</sup> Indian country is a legal term of art, defined by federal statute codified at 18 U.S.C. § 1151.

<sup>16</sup> See U.S. Government Accountability Office, *U.S. Dep't of Justice Declinations of Indian Country Criminal Matters* Report No. GAO-11-167R, 3 (Dec. 13, 2010), available at <http://www.gao.gov/assets/100/97229.pdf>.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> See U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions 2011-2012*, 5 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>19</sup> *Id.* at 51-52.

<sup>20</sup> Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title IX, § 901(6).

<sup>21</sup> See, e.g., Art. 22(2) of the U.N. Declaration on the Rights of Indigenous Peoples (G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007)); Art. 26 of the International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976); and Arts. 5(b) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan.4, 1969).

<sup>22</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, § 904 (Mar. 7, 2013).

Today, while VAWA 2013 stands as a victory for many Indian nations in the lower 48, it is not adequate to stop the epidemic of violence; significant legal gaps continue to threaten the safety of Indian and Alaska Native women in the United States. The status quo continues today because, unless approved to participate in a special pilot project, tribes may not prosecute non-Indian abusers until March 7, 2015. Even then, stringent requirements, coupled with lack of funding, may delay or even deter exercise of such jurisdiction by tribes. Because the special domestic violence criminal jurisdiction of tribes is limited under VAWA 2013 and turns on the status of the Indian lands where the crime is committed, it only applies to one of the 229 federally recognized tribes located in Alaska.<sup>23</sup> Further, tribes may not exercise criminal jurisdiction over non-Indians that commit domestic and sexual assaults against Native women on tribal lands unless the perpetrator has significant ties to the tribe.

The need for improvement of federal law to restore fuller criminal authority to tribes remains urgent. Persistent high crime rates, lack of adequate law enforcement, and changing demographics on Indian reservations and in Alaska Native villages<sup>24</sup> all emphasize the need for further changes in the law that will support stronger, fuller tribal criminal justice systems. After this report was completed, the Indian Law and Order Commission, an independent national advisory commission, issued its final report to the President and Congress making recommendations to improve criminal justice systems serving Native American and Alaska Native communities, including restoration of full “inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands. . . .”<sup>25</sup>

Native women and tribal governments across the country are demanding law reform as, unquestionably, ending the epidemic of violence against Native women and girls must involve changing federal laws and restoring appropriate criminal authority to the appropriate local governments—that is, to tribal governments. Indian nations have asked for and received the Indian Law Resource Center’s legal assistance in learning more about this crisis, analyzing relevant data and feasible options for legal change, and building various levels of capacity.

Indian nations are developing infrastructure within their tribal justice systems to enable the prosecution of perpetrators of violent crimes against Native women and girls within their territories. Many have domestic violence codes, provide domestic violence training for tribal

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<sup>23</sup> *Id.* at § 910. VAWA 2013 includes a special rule for Alaska, exempting all but one of the 229 Alaska Native tribes from its grant of expanded tribal criminal jurisdiction.

<sup>24</sup> Non-Indians now comprise more than 76% of the population in American Indian areas (Indian reservations and off-reservation trust lands), and 68% of the population in Alaska Native villages. Additionally, over 50% of Native women are married to non-Indians. See 2010 CENSUS BRIEFS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 14 (Jan. 2012), at <http://www.census.gov/population/www/cen2010/briefs/cph-t-4.html>. See also Kanya D’Almeida, *Laws ‘Not Enough’ to Tackle Violence Against Women*, INTER PRESS SERVICE (July 25, 2011), <http://www.ipsnews.net/2011/07/us-laws-not-enough-to-tackle-violence-against-native-women/> (quoting Kim Teehee, White House Senior Policy Advisor for Native American Affairs).

<sup>25</sup> On November 12, 2013, the Indian Law and Order Commission issued its final report making 40 substantive recommendations, *A Roadmap For Making Native America Safer: Report To The President And Congress Of The United States* ix (Nov. 2013), available at [www.aisc.ucla.edu/iloc/report/index.html](http://www.aisc.ucla.edu/iloc/report/index.html).



law enforcement, tribal courts, prosecutors, and probation officers, and offer various programs for domestic violence offenders.

This report assesses the current state of readiness among Indian nations to exercise enhanced sentencing authority under the 2010 Tribal Law and Order Act (TLOA)<sup>26</sup> and fuller criminal jurisdiction over all perpetrators of violent crimes against Native women under VAWA 2013 or other future legislation. It also identifies challenges facing Indian nations in exercising such authority and how some Indian nations are increasing their capacity to safeguard Native women in their communities. It concludes by offering ten recommendations aimed at ending violence against Native women and girls and strengthening the ability of Indian nations to address this crisis.

It is our ultimate hope that the report will guide the Center, and perhaps others, in better assisting and empowering Indian and Alaska Native nations to make their communities safe places for Native women and girls.

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<sup>26</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 111th Cong. (July 10, 2010).

## **II. Existing Criminal Jurisdictional Framework in Indian Country and Alaska Native Villages**

Criminal jurisdiction on Indian lands is divided among federal, tribal, and state governments. Ultimately, the determination of which government has jurisdiction depends on the location of the crime, the type and severity of the crime, the Indian status of the perpetrator, and the Indian status of the victim. This section summarizes the criminal jurisdictional scheme applicable to tribal, state, and federal governments in Indian country.

### **A. Tribal Criminal Jurisdiction**

#### **1. Inherent Sovereignty, Government-to-Government Relationship, and the Federal Trust Responsibility**

There are 566 federally recognized Indian (tribal) governments in the United States, including more than 200 Alaska Native villages.<sup>27</sup> These Indian nations are sovereigns, pre-existing the formation of the United States and retaining inherent authority over their people and territory<sup>28</sup> and any such additional authority as Congress may expressly delegate.<sup>29</sup>

The federal government recognizes Indian nations as unique political groups and deals with them on a government-to-government basis, as opposed to its interactions with the general public or other groups that are identified by strictly racial or ethnic classifications.<sup>30</sup> In recognition of tribal sovereignty and self-government, Executive Order 13175 directs all federal agencies to consult with tribes when developing policies that affect them.<sup>31</sup> Finally, the United States has a trust responsibility to Indian nations to act in their best interest. This trust responsibility imposes obligations on the United States to protect, defend, and provide services to Indian nations and Indian people. Significantly, Congress has explicitly recognized that “the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.”<sup>32</sup>

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<sup>27</sup> See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384 (May 6, 2013). There also are many state-recognized and unrecognized tribes in the United States, but an analysis of criminal jurisdiction pertaining to such groups is beyond the scope of this report.

<sup>28</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981). See also FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (2012 ed.); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 26 (1999) (describing the constitutional status of tribal governments, which existed prior to and independent of the United States Constitution).

<sup>29</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>30</sup> See, e.g., Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994).

<sup>31</sup> Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000).

<sup>32</sup> Violence Against Women and Dep’t of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title IX, § 901(6).

The basis for federal recognition of tribal authority is the inherent need to determine tribal citizenship, to regulate domestic relations among their citizens, and to legislate, regulate, and tax activities within their territories, including certain activities by non-citizens.<sup>33</sup> Indian nations generally have broad authority to protect the health, safety, and welfare of the tribe and community. This authority includes tribal civil and criminal responses to violence against Native women and girls, except as restricted by federal law. Indian nations also may exclude persons from Indian lands.<sup>34</sup>

## **2. Limitations on Indian and Alaska Native Nation's Criminal Authority**

Tribal law enforcement officials are often the first, and sometimes the only, available responders to violence against women committed within their communities. Unlike other governments in the United States, however, Indian and Alaska Native nations cannot investigate and prosecute most violent offenses that occur in their local communities because the United States has imposed several legal barriers on their jurisdictional authority. These limitations include:

- a. The federal assumption of jurisdiction over certain felony crimes under the Major Crimes Act (1885);<sup>35</sup>
- b. The transfer of criminal jurisdiction from the United States to certain state governments by the U.S. Congress through passage of Public Law 83-280 (1953) (PL 280) and other similar legislation;
- c. The imposition of a one-year, per offense, sentencing limitation upon tribal courts by the U.S. Congress through passage of the Indian Civil Rights Act (ICRA) (1968);<sup>36</sup> and
- d. The removal of tribal criminal jurisdiction over non-Indians by the U.S. Supreme Court in *Oliphant v. Suquamish Tribe* (1978).<sup>37</sup>

Tribal powers of self-government include the inherent power to exercise criminal jurisdiction over all Indian persons (member or non-member) in Indian country. VAWA 2013 acknowledges that participating tribes also have the inherent power to exercise limited concurrent criminal jurisdiction over non-Indians.<sup>38</sup> Indian and Alaska Native nations have concurrent criminal authority with the federal government under the Major Crimes Act and may

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<sup>33</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* 554 U.S. 316 (2008).

<sup>34</sup> *Id.* at 328 (citing *Duro v. Reina*, 495 U.S. 676, 696-697 (1990)).

<sup>35</sup> 18 U.S.C. § 1153.

<sup>36</sup> Codified at 25 U.S.C. § 1301 *et seq.* But see TLOA, Pub. L. No. 111-211 (2010) (expanding tribal court sentencing authority under ICRA to three years when specific conditions are met).

<sup>37</sup> But see Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, (Mar. 7, 2013) (restoring tribal court criminal jurisdiction over non-Indians for domestic and dating violence crimes when specific conditions are met).

<sup>38</sup> *Id.* at § 904(b)(1).

prosecute crimes committed by Indians.<sup>39</sup> Tribes retain exclusive jurisdiction over victimless crimes committed by Indians in Indian country.<sup>40</sup>

A key reason Indian and Alaska Native nations are unable to effectively protect Native women from violence within their lands is that they are prohibited from prosecuting non-Natives, who are the vast majority of such offenders. In 1978, in *Oliphant v. Suquamish Tribe*, the United States Supreme Court stripped Indian nations of inherent tribal criminal jurisdiction over non-Indians.<sup>41</sup> As a result, for the last thirty years, Indian nations have been denied the authority to investigate, arrest, and prosecute non-Indians committing crimes on Indian lands, including crimes involving domestic, sexual, and dating violence against Native women.

Even in the limited situations where prosecutions by Indian and Alaska Native nations can proceed, United States law unjustly limits tribal criminal authority.<sup>42</sup> Under ICRA, tribal courts can only impose penalties of one year in prison and a fine of up to \$5,000 for each offense.<sup>43</sup>

VAWA 2013 and TLOA are historic legislative victories that begin to address unfair limitations on Indian nations' inherent powers. VAWA 2013 restores tribal criminal jurisdiction over certain non-Indian offenders who commit acts of domestic violence or dating violence within Indian country, or who violate protection orders.<sup>44</sup> Such defendants must also have significant ties with the tribe.<sup>45</sup> Jurisdiction is concurrent with existing federal and state criminal jurisdiction and becomes open to all tribes to opt into on March 7, 2015, unless the tribe is approved to participate in a special pilot program.<sup>46</sup> TLOA amends ICRA to allow tribal courts to sentence Indian offenders to prison terms not greater than three years per offense (with a total of nine years for consecutive sentences for separate offenses) and a fine of up to \$15,000.<sup>47</sup>

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<sup>39</sup> 18 U.S.C.A. §§ 1152, 1153; *see also* United States v. Kagama, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act).

<sup>40</sup> United States v. Quiver, 241 U.S. 602 (1916).

<sup>41</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (holding that Indian nations lack the authority to impose criminal sanctions on non-Indian citizens of the United States who commit crimes on Indian lands).

<sup>42</sup> Under TLOA and VAWA 2013, enhanced tribal court sentencing authority and restored limited concurrent criminal jurisdiction comes with additional requirements for tribal court criminal proceedings that, as a practical matter, may be fiscally prohibitive for many Indian nations. These laws require that Indian nations: provide defendants with a right to effective assistance of counsel; at the expense of the Indian nation, provide indigent defendants with a defense attorney licensed to practice law by any jurisdiction in the United States; and provide legally trained and licensed judges to preside over such criminal proceedings. Tribal Law and Order Act of 2010, 25 U.S.C. § 1302.

<sup>43</sup> 25 U.S.C. § 1302(7) (2006).

<sup>44</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, §§ 904-905 (Mar. 7, 2013).

<sup>45</sup> *Id.* at § 904.

<sup>46</sup> The special pilot program is a voluntary program available to Indian tribes to exercise early special domestic violence criminal jurisdiction; *see* Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, Final Notice, Solicitation of Applications for Pilot Project, 78 Fed. Reg. 71,645 (Nov. 29, 2013).

<sup>47</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302.

Under both laws, however, tribal courts can only proceed when certain protections are provided to the accused.<sup>48</sup> While a tremendous step forward, the reality is that many tribes may not have the resources to meet the requirements under these Acts any time soon and will be effectively limited to prosecuting only Indian offenders with a one year sentencing cap.<sup>49</sup> Even after March 7, 2015, the effective date of VAWA 2013, it may take a significant amount of time before an appreciable number of Indian nations are able to take advantage of restored criminal jurisdiction and enhanced sentencing authority.<sup>50</sup> As a result, when someone commits violence against a Native woman, most Indian nations will only prosecute if the offender is Indian, and even then, limitations on sentencing mean that the woman will likely be denied an effective remedy.

## **B. Federal Criminal Jurisdiction**

### **1. Indian Country**

Indian country is defined and used by the federal government to refer “to the territory set aside for the operation of special rules allocating governmental power, including criminal jurisdiction, among Indian tribes, the federal government, and the states.”<sup>51</sup> It denotes the territory within which Indian and Alaska Native nation laws and customs and federal laws relating to Indian and Alaska Native nations generally apply.<sup>52</sup> Federal law statutorily defines Indian country as:

- All land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights of way running through the reservation;

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<sup>48</sup> The exercise of enhanced tribal court sentencing authority under TLOA, or expanded jurisdictional authority under VAWA 2013, requires that Indian nations: provide defendants with a right to effective assistance of counsel; at the expense of the Indian nation, provide indigent defendants with a defense attorney licensed to practice law by any jurisdiction in the United States; and provide legally trained and licensed judges to preside over such criminal proceedings. Notably, VAWA 2013 also requires that, when imprisonment may be imposed, tribes must provide jury trials drawn from sources that do not systematically exclude non-Indians. Tribal Law and Order Act of 2010, 25 U.S.C. § 1302; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, § 904(4)(d) (Mar. 7, 2013).

<sup>49</sup> For a fuller discussion of the implementation of TLOA’s enhanced sentencing authority, *see infra* Part III.

<sup>50</sup> The Confederated Tribes of the Umatilla Indian Reservation became the first nation to impose a sentence of more than a year under the TLOA in November 2012. *See* Anna King, *Northwest Tribes Begin to Try Reservation Crime Cases Under Tougher Laws*, NORTHWEST PUBLIC RADIO, Nov. 26, 2012, at <http://nwpr.org/post/northwest-tribes-begin-try-reservation-crime-cases-under-tougher-laws>. VAWA’s provisions go into effect on March 7, 2015, though qualifying tribes may participate in a pilot program before then. *See* Violence Against Women Reauthorization Act of 2013 at <http://www.justice.gov/tribal/vawa-tribal.html>.

<sup>51</sup> FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (2012 ed.).

<sup>52</sup> *Id.* at § 3.04[1].

- All dependent Indian communities within the borders of the United States; and
- All Indian allotments, the Indian titles to which have not been extinguished.<sup>53</sup>

Whether a specific piece of land is within Indian country is a legal question,<sup>54</sup> and a growing jurisprudence defines each of the categories of Indian country.<sup>55</sup>

The definition of Indian country has special ramifications for Alaska Native nations, which are recognized by the federal government as having the same status as Indian nations in the lower forty-eight states. However, in *Alaska v. Native Village of Venetie Tribal Government et al.*,<sup>56</sup> the Supreme Court held that Alaska Native Claims Settlement Act (ANCSA) lands are not Indian country, even if they have been transferred to an Alaska Native government and are held in fee simple. While federal law recognizes that Alaska Native nations exist as separate political entities, the Court noted that Alaska Native nations are “sovereigns without territorial reach.”<sup>57</sup>

## 2. Primary Federal Laws

Three federal statutes give the federal government criminal jurisdiction over certain crimes committed in Indian country: the Major Crimes Act,<sup>58</sup> the General Crimes Act,<sup>59</sup> and the Assimilative Crimes Act.<sup>60</sup> A final federal statute, ICRA, extends certain constitutional protections to criminal defendants in tribal courts and limits tribal sentencing authority.<sup>61</sup>

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<sup>53</sup> 18 U.S.C. § 1151 (1948).

<sup>54</sup> See *United States v. Roberts*, 185 F.3d 1125 (10<sup>th</sup> Cir. 1999).

<sup>55</sup> For a fuller discussion of this jurisprudence, see FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.04 (2012 ed.).

<sup>56</sup> 522 U.S. 520 (1998).

<sup>57</sup> See DAVID S. CASE AND DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS xii (2<sup>nd</sup> Ed. 2002) (noting that the reach of a sovereign without territory will likely remain a question in the years ahead). Even outside Indian country, however, tribes are recognized as having some authority over membership and matters related to internal tribal affairs. *Id.* at 392 (citing *Williams v. Lee*, 358 U.S. 217 (1959) (prohibiting state infringement on tribal self-government) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973) (suggesting the infringement test is important outside Indian country)).

<sup>58</sup> 18 U.S.C. § 1153.

<sup>59</sup> 18 U.S.C. § 1152.

<sup>60</sup> 18 U.S.C. § 13.

<sup>61</sup> 25 U.S.C. § 1301 *et seq.*

The Major Crimes Act authorizes the federal government to exercise jurisdiction over 15 major crimes committed by Indians in Indian country regardless of whether the victim is Indian or non-Indian.<sup>62</sup>

The General Crimes Act provides for federal jurisdiction over crimes by non-Indians against Indians and over non-major crimes committed by Indians against non-Indians. The Act creates three exceptions to federal jurisdiction: (1) offenses committed by an Indian against the person or property of another Indian; (2) offenses committed in Indian country by an Indian who has already been punished under tribal law; and (3) offenses where, by treaty, exclusive jurisdiction over such offenses lies with the Indian tribe.<sup>63</sup> Federal jurisdiction is concurrent with tribal criminal jurisdiction under both the Major Crimes Act and the General Crimes Act.

The Assimilative Crimes Act establishes that, in areas under territorial jurisdiction of the United States, state law is to be used to fill any gaps where there is no federal statute governing a crime.<sup>64</sup> It applies to Indian country due to its status as a “general law of the United States” under the General Crimes Act. Under the Assimilative Crimes Act, a defendant is charged with a federal offense in federal court, but the crime is defined and the sentence established by state law.

ICRA imposes most of the requirements of the U.S. Constitution’s Bill of Rights upon Indian nations. Under ICRA, tribal courts are required to afford due process and equal protection rights to all individuals. The Act also provides that persons detained by a tribal government may make claims for habeas corpus relief in federal court. The Act, however, does not extend the right of indigent counsel to criminal defendants in tribal courts. ICRA limits the sentencing of tribal courts to a maximum of one year of imprisonment and/or a \$5000 maximum fine unless the Indian nation has provided certain protections to the accused under the TLOA.

### **C. State Criminal Jurisdiction in Indian Country**

The ability of state governments to exercise criminal jurisdiction within Indian country depends on the Indian or non-Indian status of the individuals involved, and whether the federal government has delegated any criminal authority to the state government.

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<sup>62</sup> 18 U.S.C. § 1153. The fifteen major crimes are: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a juvenile under age 16, felony child abuse or neglect, arson, burglary, robbery, and felony embezzlement or theft.

<sup>63</sup> 18 U.S.C. § 1152.

<sup>64</sup> 18 U.S.C. § 13.

## **1. Indian Country Crimes Involving Only Non-Indians or Victimless Crimes by Non-Indians**

For crimes committed within Indian country, state criminal jurisdiction is limited in most states to those crimes that do not involve Indian persons or interests.<sup>65</sup> Most states have no authority to exercise jurisdiction over crimes committed by or against Indians in Indian country. States, however, have exclusive jurisdiction over crimes by non-Indian offenders against non-Indian victims in Indian country.<sup>66</sup> States also have exclusive jurisdiction over victimless crimes committed by non-Indians in Indian country.<sup>67</sup>

## **2. Delegations under Public Law 280**

Under the U.S. Constitution, governmental relations with Indian nations are the function of the federal government.<sup>68</sup> In 1953, in violation of this responsibility and without consultation with Indian nations, the United States Congress passed PL 280, delegating criminal jurisdiction over Natives on Indian lands to state courts in five (later six) states.<sup>69</sup> These “mandatory” PL 280 states are Alaska (except for the Annette Islands), California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin. Until the Act was amended in 1968, other states, known as optional PL 280 states, could opt to assume criminal jurisdiction over Indian nations. After 1968, states could only assume jurisdiction over existing reservations with the consent of the Indian nation. While this delegation of authority did not alter the authority of Indian nations in those states, it had a devastating impact on the development of tribal justice systems.<sup>70</sup>

The effect of PL 280 is extremely broad. PL 280 controls criminal justice and law enforcement for approximately 70% of all the Indian nations in the United States. That includes 51% of all the federally recognized Indian nations in the lower 48 states and, generally, almost all Alaska Natives and their nations.<sup>71</sup>

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<sup>65</sup> There is one narrow exception to this: states can prosecute Indian defendants for violations of state laws relating to liquor sales in Indian country. *Rice v. Rehner*, 463 U.S. 713 (1983).

<sup>66</sup> *United States v. McBratney*, 104 U.S. 621 (1881).

<sup>67</sup> *See, e.g.*, Op. Off. Legal Counsel, United States Dep’t of Justice, May 21, 1979, reprinted in the August 1979 issue of *Indian Law Reporter*, 6 ILR K-15ff.

<sup>68</sup> U.S. Const. Art. 1, § 8.

<sup>69</sup> PL 280, § 7, 67 Stat. 588, 590 (1953). For information on jurisdiction under PL 280, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535-94 (1975).

<sup>70</sup> Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century?*, 38 CONN. L. REV. 697 (2006).

<sup>71</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 12 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>. Metlakatla Indian Community, located on the Annette Islands Reserve, is a statutorily created Indian reservation and the only recognized Indian country in Alaska. Metlakatla Indian Community is not subject to PL 280.



In PL 280 states, the state government has the criminal jurisdiction normally exercised by the federal government over crimes on Indian lands. In mandatory PL 280 states, the General Crimes Act and the Major Crimes Act do not apply, and the state government has exclusive jurisdiction over non-Natives and felony jurisdiction over Natives. Accordingly, when a non-Native commits physical or sexual violence against a Native woman on Indian lands in a mandatory PL 280 state, the state has exclusive jurisdiction over the offender. When a Native person commits physical or sexual violence against a Native woman on Indian lands in a mandatory PL 280 state, only the state government has the criminal authority to impose a sentence of more than three years. In optional PL 280 states, the General Crimes Act, the Major Crimes Act, and TLOA apply, and the federal government has concurrent jurisdiction with the state and tribal governments.

**a. Retrocession of Jurisdiction by States**

The 1968 amendments to PL 280 allow for mandatory and optional states to retrocede “all or any measure of the criminal or civil jurisdiction” over Indian nations back to the federal government.<sup>72</sup> State governments must initiate the retrocession, and Indian and Alaska Native nations can neither initiate nor veto a retrocession. The Secretary of the Interior has the authority to accept a state’s request for retrocession after consultation with the Attorney General. The Secretary has accepted full or partial retrocession for more than 25 reservations covered by PL 280 or statutes linked to PL 280.<sup>73</sup>

**b. Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country—Requests by Indian Nations in Mandatory States under TLOA**

TLOA permits Indian nations in mandatory PL 280 states to request that the United States government accept concurrent jurisdiction to prosecute violations of the General Crimes Act and the Major Crimes Act within that Indian or Alaska Native nation’s Indian country.<sup>74</sup> At the Indian nation’s request and after consultation between the tribe and the Attorney General, the federal government can assume concurrent criminal jurisdiction with the state and tribal governments. The state does not have to consent to the federal government’s assumption of jurisdiction.<sup>75</sup> Requests received by the DOJ by February 21 of each year are to be prioritized for decision by August 31, if feasible; if denied, a tribe may submit a renewed request that addresses the basis for the prior denial.<sup>76</sup> On March 15, 2013, the DOJ announced that it had

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<sup>72</sup> 25 U.S.C. § 1323.

<sup>73</sup> FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][g] (2012 ed.).

<sup>74</sup> 18 U.S.C. § 1162(d). Concurrent federal jurisdiction already exists in the optional PL 280 states.

<sup>75</sup> DOJ published its final rule on the assumption process in 2011. *See* Final Rule on Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037 (Dec. 6, 2011).

<sup>76</sup> *See* Final Rule on Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,043 (Dec. 6, 2011).

granted a request to assume concurrent jurisdiction on the White Earth Nation reservation in Minnesota.<sup>77</sup> This is the first assumption of federal jurisdiction; additional requests are pending decision.

### **3. Other Federal Acts Conferring State Jurisdiction**

Prior to the enactment of PL 280, Congress had enacted special statutes delegating jurisdiction over Indian reservations to the states of New York, Kansas, North Dakota, and Iowa. In 1948, Congress delegated to the state of New York criminal jurisdiction over offenses committed by or against Indians on all reservations in the state, except for jurisdiction over hunting and fishing rights; the federal government retained concurrent criminal jurisdiction.<sup>78</sup> Congress enacted similar delegations of partial criminal jurisdiction to the state of Kansas for all reservations in the state, to the state of North Dakota over the Spirit Lake Reservation, and to the state of Iowa for the Sac and Fox Reservation.<sup>79</sup> Like the statute conferring partial criminal jurisdiction on the state of New York, these statutes retained concurrent federal criminal jurisdiction.

Congress has also authorized states to exercise criminal jurisdiction in acts recognizing or restoring specific Indian nations.<sup>80</sup> These acts vary in terms of tracking the language of PL 280, retaining federal criminal jurisdiction, and recognizing concurrent tribal criminal jurisdiction.

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<sup>77</sup> See Dep't of Justice Office of Public Affairs, *United States to Accept Concurrent Jurisdiction over White Earth Reservation in Minnesota* (Mar. 15, 2013), at <http://www.justice.gov/opa/pr/2013/March/13-Opa-315.html>.

<sup>78</sup> FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[4][a] (2012 ed.).

<sup>79</sup> *Id.* at § 6.04[4][b].

<sup>80</sup> *Id.* at § 6.04[4][c].

### III. General Considerations for Restoration of Tribal Authority

#### A. Enhanced Sentencing Options under TLOA

In 2010, TLOA was signed into law, amending ICRA to allow Indian nations to exercise enhanced sentencing authority over Indian defendants if certain conditions are met. As described in Part II, prior to the enactment of TLOA, ICRA severely limited sentencing in tribal courts to a maximum of one-year imprisonment and/or a fine of \$5000 per offense, no matter how egregious the crime. Tribal officials believed the limitation on sentencing did not serve as an effective deterrent for perpetrators of violent crimes against Native women and contributed to high crime levels and recidivism in Indian country.<sup>81</sup>

TLOA allows tribal courts to sentence offenders to up to three years of imprisonment and/or a fine of \$15,000 per offense with a nine-year cap when prosecuting for multiple offenses in a single criminal proceeding, but only where certain conditions are met.<sup>82</sup>

Despite its promise to improve safety and reduce crime in Indian country, implementation of TLOA has been incredibly slow. The GAO reported in May 2012 that 36 tribes had plans to implement enhanced sentencing authority.<sup>83</sup> Yet, due to TLOA's burdensome requirements, it was not until November 2012 that the first tribe—the Confederated Tribes of the Umatilla Indian Reservation—successfully imposed a sentence incarcerating a Native offender to more than one year of imprisonment under TLOA's enhanced sentencing authority.<sup>84</sup>

#### 1. Requirements

For tribal courts to exercise TLOA's enhanced sentencing authority over Indian defendants, they must meet several requirements. First, the offense must fall into one of the following categories: (1) either the defendant has previously been convicted of the same or a comparable offense by any jurisdiction; or (2) the offense is comparable to an offense that would be considered a felony by the federal government or any state.<sup>85</sup> Second, the tribal court must provide the defendant all of the following: (1) a right of effective assistance of counsel at least equal to that guaranteed by the United States Constitution; (2) in the case of an indigent

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<sup>81</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 1 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>82</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302.

<sup>83</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 3 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>84</sup> Anna King, *Northwest Tribes Begin To Try Reservation Crime Cases Under Tougher Laws*, NORTHWEST PUBLIC RADIO, Nov. 26, 2012, available at <http://www.nwpr.org/post/northwest-tribes-begin-try-reservation-crime-cases-under-tougher-laws>.

<sup>85</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(b).

defendant, licensed legal defense counsel at the expense of the Indian nation; (3) a tribal court judge that is licensed in any U.S. jurisdiction and has sufficient legal training to preside over criminal proceedings; (4) criminal laws, rules of evidence, and rules of criminal procedure that are publicly available; and (5) an audio or video recording of the criminal trial.<sup>86</sup>

## **2. Fiscal and Institutional Impacts on Indian Nations Seeking to Exercise Enhanced Sentencing**

Tribal governments face many fiscal and institutional challenges in seeking to exercise the enhanced sentencing authority under TLOA. To date, only a handful of Indian nations—the Confederated Tribes of the Umatilla Indian Reservation, Hopi Tribe, and Eastern Band of Cherokee Indians—have implemented all the necessary changes required to exercise the enhanced sentencing authority under TLOA.<sup>87</sup>

A 2012 GAO report highlights many of the problems faced by Indian nations in implementing TLOA’s enhanced sentencing authority. The GAO surveyed 171 Indian nations receiving funding for tribal courts from the federal government with 64% (109 Indian nations) responding to questions about implementation of TLOA’s enhanced sentencing authority.<sup>88</sup> The GAO found that 96% (86 of 90) of Indian nations cited funding limitations as a major challenge to implementing TLOA’s new enhanced sentencing authority.<sup>89</sup> Most (64%) of the Indian nations surveyed reported that they were already implementing at least half of the conditions for exercising enhanced sentencing authority under TLOA.<sup>90</sup> According to the GAO, “these tribes most frequently reported implementing the requirement to maintain a record of the criminal proceeding, and least frequently reported providing the defendant a licensed defense attorney.”<sup>91</sup> Indian nations mentioned other challenges to implementing TLOA’s enhanced sentencing authority, including the costs or availability of law trained judges, the need to change tribal codes or constitutions to comply with TLOA, concerns about funding ancillary services such as

<sup>86</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(c).

<sup>87</sup> See, e.g., Anne Minard, *A Leader Emerges: Hopi Tribe Adopts New Criminal Code According to Tribal Law and Order Act Standards*, INDIAN COUNTRY TODAY, Sept. 3, 2012, at <http://indiancountrytodaymedianetwork.com/2012/09/03/leader-emerges-hopi-tribe-adopts-new-criminal-code-according-tribal-law-and-order-act>; Anna King, *Northwest Tribes Begin To Try Reservation Crime Cases Under Tougher Laws*, NORTHWEST PUBLIC RADIO, Nov. 26, 2012, at <http://www.nwpr.org/post/northwest-tribes-begin-try-reservation-crime-cases-under-tougher-laws>; Office of the Tribal Prosecutor, *Tribal Court issues four year sentence on heels of Tribal Law and Order Act*, CHEROKEE ONE FEATHER, Apr. 18, 2013, available at <http://theonefeather.com/2013/04/tribal-court-issues-four-year-sentence-on-heels-of-tribal-law-and-order-act/>.

<sup>88</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep’t of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The Report noted that 52% of the Indian nations surveyed reported that they did not provide indigent services in any year from 2005 through 2010, and that during that time they did not have sufficient funding to provide these services. *Id.* at 8.

probation, fears about litigation over the constitutionality of the act, and the incompatibility of imprisonment with traditional notions of justice.<sup>92</sup> Based on the GAO report, it seems the largest challenges in implementing TLOA's enhanced sentencing authority stem from the fact that many Indian nations do not have adequate funding either to provide indigent counsel and/or to provide law trained judges as required by TLOA. These funding limitations are not surprising considering that for fiscal year 2012, Congress cut funding for tribal justice programs by over \$90 million.<sup>93</sup> Another blow to Indian nations came in March 2013 when Congress approved legislation for sequestration, the imposition of mandatory federal budget cuts. Though many federal programs benefitting low-income Americans were exempted from these reductions, none of the programs for American Indians and Native communities were on that list.<sup>94</sup>

The GAO survey only included Indian nations receiving federal funding. As a result, the GAO report does not provide any information about the challenges that Indian nations not receiving federal funding may face or whether these challenges differ from the ones faced by the tribes included in the GAO study. Further, Indian nations may face additional problems not mentioned in the GAO report in implementing TLOA's new enhanced sentencing authority. For example, Indian nations may not have adequate jail or prison facilities in which to house criminals sentenced for multiple-year sentences, or the resources to build or rent such facilities. Other Indian nations may have concerns about implementing a federal law that allows Indians to be imprisoned for longer periods.

## **B. Restoring Criminal Jurisdiction over Non-Indians**

### **1. Crafting Solutions Generally**

To restore tribal criminal jurisdiction over non-Indians, some type of federal legislation must address the gap created by *Oliphant v. Suquamish*<sup>95</sup> with respect to tribal criminal authority. VAWA 2013 is a limited *Oliphant*-fix, restoring only limited tribal criminal jurisdiction for certain crimes by non-Indians in Indian country. Several scholars who advocate expanding tribal jurisdiction over non-Indians suggest that Indian nations have the opportunity, but not an obligation, to "opt-in" or accept expanded jurisdiction.<sup>96</sup> VAWA 2013 uses such an

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<sup>92</sup> *Id.* at 8-9.

<sup>93</sup> Rob Capriccioso, *Do Congress and Obama Really Support the Tribal Law and Order Act?*, INDIAN COUNTRY TODAY MEDIA NETWORK, Dec. 19, 2011, at <http://indiancountrytodaymedianetwork.com/2011/12/19/do-congress-and-obama-really-support-the-tribal-law-and-order-act-68002>.

<sup>94</sup> Anne Lowrey, *Pain on the Reservation*, N.Y. TIMES, July 13, 2013, available at <http://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html?pagewanted=1&r=1>.

<sup>95</sup> 435 U.S. 191 (1978).

<sup>96</sup> On the "opt-in" solution see, e.g., Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y ISSUE BRIEF, Mar. 2009, at 8, available at [http://www.acslaw.org/files/Fletcher\\_%20Issue%20Brief.pdf](http://www.acslaw.org/files/Fletcher_%20Issue%20Brief.pdf); On the "opt-out" alternative, see, e.g., Amy Radon,

approach; tribes may elect to participate if they meet the mandated procedural prerequisites. The “opt-in” solution adopted by VAWA 2013 appears to be a viable approach as it allows Indian nations to begin exercising criminal jurisdiction over non-Indians when they are ready, have adequate capacity, and, importantly, choose to do so. While all tribes will have to make some adjustments in order to meet VAWA 2013 standards, some Indian nations are more prepared than others to assume restored jurisdiction.<sup>97</sup>

## **2. Summary of National Legislative Action**

The 113<sup>th</sup> Congress took an historic step toward protecting Native women from violence by passing VAWA 2013. This legislation contains important tribal provisions that restore limited concurrent tribal criminal jurisdiction over certain non-Indians who, while in Indian country, commit acts of domestic violence or dating violence, or who violate protection orders.

### **a. Progress in the 112<sup>th</sup> Congress**

Years of relentless efforts by grassroots Native women advocates and advocacy by other Indian organizations and Indian nations to combat violence against Native women began to bear fruit during the 112<sup>th</sup> Session of Congress. Three pieces of significant legislation aimed at restoring limited tribal criminal jurisdiction over non-Indian offenders in regards to domestic violence moved forward during one of the country’s worst periods of Congressional partisanship.

On October 31, 2011, long time Indian ally and then-Chairman of the Senate Committee on Indian Affairs, Sen. Daniel Akaka (D-HI 1990-2013), introduced S. 1763, the SAVE Native Women Act, to decrease violent crimes against Indian and Alaska Native women.<sup>98</sup> The bill was largely influenced by a DOJ proposal in 2011 on how best to protect Native women against epidemic levels of violence in Indian country<sup>99</sup> and other testimony given during Senate Committee on Indian Affairs hearings.<sup>100</sup> Rep. Dan Boren (D-OK2) introduced companion legislation in the House of Representatives.<sup>101</sup>

Although neither of these bills passed, the core provisions restoring tribal jurisdiction were incorporated into S. 1925, the Violence Against Women Reauthorization Act, introduced

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*Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J. L. REFORM 1275, 1311 (2004).

<sup>97</sup> See generally, Part IV of this report.

<sup>98</sup> S. 1763, Stand Against Violence and Empower Native Women Act (SAVE Native Women Act), 112<sup>th</sup> Cong. (Oct. 31, 2011).

<sup>99</sup> *Statement of Associate Attorney General Thomas J. Perrelli Before the Senate Committee on Indian Affairs*, (Nov. 10, 2011), at <http://www.justice.gov/iso/opa/asg/speeches/2011/asg-speech-111110.html>.

<sup>100</sup> U.S. Senate Committee on Indian Affairs Oversight Hearing on “Native Women: Protecting, Shielding, and Safeguarding our Sisters, Mothers, and Daughter” (July 14, 2011); U.S. Senate Committee on Indian Affairs Legislative Hearing on S. 1763, “Stand Against Violence and Empower (SAVE) Native Women Act” (Nov. 10, 2011).

<sup>101</sup> H.R. 4154, 112<sup>th</sup> Cong. (Mar. 15, 2012).

by the Chairman of the Senate Committee on the Judiciary, Sen. Patrick Leahy (D-VT) and cosponsored by Sen. Mike Crapo (R-ID). These tribal provisions sought to fill several gaps in federal law, including but not limited to the gap created by *Oliphant* with respect to criminal authority of Indian nations over non-Indians who commit domestic violence or dating violence against Native women in Indian country. S.1925 passed the full Senate on April 26, 2012 with strong bipartisan support. The House version, however, differed drastically and contained none of the key language restoring tribal jurisdiction; the conflicting House bill passed on May 16, 2012. Due largely to broad advocacy pressure from Indian country and national women's organizations, the Senate-side negotiators held firm to their positions, and the 112<sup>th</sup> Congress ended without passage of the VAWA reauthorization.

### **b. Victory in the 113<sup>th</sup> Congress**

Efforts to reauthorize a stronger VAWA immediately began anew in the 113<sup>th</sup> Congress. On January 22, 2013, Chairman Leahy introduced legislation, S. 47, to reauthorize VAWA including the vital tribal provisions.<sup>102</sup> It easily passed the Senate on February 12<sup>th</sup>, 2012 by a vote of 78-22.

Many doubted that S. 47 could pass the House with the tribal provisions intact. This was particularly so considering that, in 2011-2013, less than a quarter of all bills making it out of committee were enacted,<sup>103</sup> and this bill faced extremely strong partisan opposition.<sup>104</sup>

A groundswell of national action fueled by tribal and non-tribal movements, leaders, and organizations; widespread public and media pressure; and the support of key allies including, but not limited to Rep. Tom Cole (R-OK4) and Rep. Gwen Moore (D-WI4), led to an early vote in the House on the Senate version of the bill. On February 28, 2013, with unanimous Democratic support and 87 Republican votes, the House passed the bill by a vote of 286-138. Over 500 days after VAWA expired, President Obama finally signed VAWA 2013 into law on March 7, 2013.<sup>105</sup>

## **3. Overview of Tribal Jurisdictional Provisions in VAWA 2013**

VAWA 2013 reflects not only the United States' commitment to protect Native women, but also its restoration of Indian nations' inherent sovereignty to protect Native women from certain types of violence committed by any person—Indian or non-Indian—in Indian country.

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<sup>102</sup> S. 47, Violence Against Women Reauthorization Act of 2013, 113<sup>th</sup> Congress.

<sup>103</sup> See GOVTRACK.US at <https://www.govtrack.us/congress/bills/113/s47> (last visited Dec. 19, 2013).

<sup>104</sup> Opponents to the tribal jurisdictional provisions raised several unfounded criticisms, including: lack of Congressional authority to expand tribal criminal jurisdiction; unconstitutionality; violation of the Double Jeopardy Clause; and limitations of federal and state jurisdiction.

<sup>105</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress (Mar. 7, 2013).

VAWA 2013 amends ICRA, stating that “the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”<sup>106</sup> This special domestic violence criminal jurisdiction runs concurrent with the existing jurisdiction of the United States, a state, or both, and it covers domestic violence, dating violence, and violations of protection orders committed in the Indian country of a tribe.<sup>107</sup> Special domestic violence criminal jurisdiction means tribal authority that is limited to non-Indians.<sup>108</sup> Tribes may choose to exercise this restored special domestic violence criminal jurisdiction.<sup>109</sup> Participation is entirely voluntary.

Generally, VAWA 2013 is not effective until March 7, 2015.<sup>110</sup> Though tribes can issue and enforce civil protection orders, tribes cannot criminally prosecute non-Indian abusers before then unless they are participating in the pilot project described in VAWA 2013.<sup>111</sup> A tribe can start prosecuting non-Indians sooner if the tribe’s criminal justice system fully protects defendants’ rights under federal law; the tribe asks to participate in the pilot project; and the DOJ grants the request and sets a start date. By June 2013, 39 tribes had expressed preliminary interest in participating in the pilot project.<sup>112</sup>

VAWA 2013 requires that non-Indian defendants must have ties to the prosecuting tribe. Tribes may prosecute non-Indian defendants only if the defendant: (i) resides in the Indian country of the tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of (a) a member of the tribe, or (b) an Indian who resides in the Indian country of the participating tribe.<sup>113</sup> Tribes do not have jurisdiction over crimes between non-Indians or over crimes committed by strangers.<sup>114</sup>

Indian nations that choose to exercise the special domestic violence criminal jurisdiction are required to guarantee certain rights to defendants. If a term of imprisonment of any length may be imposed, tribes must guarantee those rights required under TLOA for the exercise of

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<sup>106</sup> *Id.* at § 904(b)(1).

<sup>107</sup> *Id.* at § 904(b)(2).

<sup>108</sup> *Id.* at § 904(a)(6) defining “special domestic violence criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.”

<sup>109</sup> *Id.* at § 904(a)(4).

<sup>110</sup> *Id.* at § 908(a)(1).

<sup>111</sup> The DOJ issued proposed procedures for an Indian nation to request designation as a participating tribe under the voluntary pilot project established in § 908(b)(2) of VAWA 2013. *See* Notice; Solicitation of Comments and Preliminary Expressions of Interest for Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35,961 (June 14, 2013); Final Notice; Solicitation of Applications for a Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 71,645 (Nov. 29, 2013).

<sup>112</sup> *See* Final Notice; Solicitation of Applications for a Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 71,645, 71,651 (Nov. 29, 2013).

<sup>113</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, § 904(b)(4)(B) (Mar. 7, 2013).

<sup>114</sup> *Id.* at § 904(b)(4).



enhanced sentencing. Namely, they must provide defendants with a right to effective assistance of counsel; provide indigent defendants with a licensed defense attorney at the expense of the Indian nation; and provide legally trained and licensed judges to preside over such criminal proceedings.<sup>115</sup>

Additionally, if a term of imprisonment of any length may be imposed, tribes must provide defendants with the right to a trial by a jury that is drawn from sources that (i) reflect a fair cross section of the community, and (ii) do not systematically exclude any distinctive group in the community, including non-Indians.<sup>116</sup> Tribes also must provide defendants with “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”<sup>117</sup>

Section 905 of VAWA 2013 clarifies that Indian nations have “full civil jurisdiction to issue and enforce protection orders involving any person.”<sup>118</sup> This includes authority “to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe or otherwise within the authority of the Indian tribe.” Under § 904(c)(2), a participating tribe may criminally prosecute any person for violating a protection order if the violation concerns the portion of an order that was issued “for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person.” Additionally, the order must have been issued against the defendant, be enforceable by the participating tribe, and consistent with the full faith and credit requirements under 18 U.S.C. § 2265(b), which include jurisdiction, notice, and an opportunity to be heard.<sup>119</sup>

#### **4. Remaining Jurisdictional Gaps Affecting Safety for Native Women**

VAWA 2013 is an affirmative step forward in restoring the inherent sovereignty of Indian nations to exercise criminal jurisdiction over non-Indian perpetrators. As such, it is a major victory for many Indian nations.

Today, however, VAWA 2013 is not adequate to stop the epidemic of violence and significant legal gaps continue to threaten the safety of Indian and Alaska Native women in the United States. The life-threatening status quo continues because, unless approved to participate in a special pilot project, tribes may not prosecute non-Indian abusers until March 7, 2015. Even then, stringent requirements, coupled with lack of funding, may delay or even deter the exercise

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<sup>115</sup> *Id.* at § 904(d).

<sup>116</sup> *Id.* at § 904(d)(3).

<sup>117</sup> *Id.* at § 904(d)(4).

<sup>118</sup> *Id.* at § 905.

<sup>119</sup> *Id.* at § 904.

of such jurisdiction by some tribes. Because the special domestic violence criminal jurisdiction of tribes is limited under VAWA 2013 and turns on the status of the Indian lands where the crime is committed, it only applies to one of the 229 federally recognized tribes located in Alaska. Yet, “Alaska Native women suffer the highest rate of forcible sexual assault in the United States and an Alaska Native woman is sexually assaulted every 18 hours.”<sup>120</sup> Further, tribal criminal jurisdiction over non-Indians that commit domestic and sexual assaults against Native women on tribal lands continues to be prohibited unless the non-Indian has significant ties to the tribe. In addition, VAWA 2013 is restricted to crimes of domestic or dating violence, thus leaving crimes of rape, sexual assault, and sex trafficking largely unprosecuted if committed by a stranger in Indian country.

## **5. Restoration of Tribal Criminal Authority in Other Unique Situations or to Specific Locations or Lands**

As noted in Part II.C.3, prior to PL 280, several federal acts conferred state jurisdiction through statewide enactments, restoration acts, or land claims settlement acts. In consideration of VAWA 2013,<sup>121</sup> each such enactment, restoration act, or land claims settlement act will need to be analyzed on a case-by-case basis to determine if the criminal jurisdiction of an Indian nation remains concurrent with any delegated criminal jurisdiction to a state or needs to be restored and, if so, whether Congressional actions beyond VAWA 2013 are needed.

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<sup>120</sup> S. 1474, Alaska Safe Families and Villages Act of 2013 at § 2(a)(3).

<sup>121</sup> VAWA 2013 states “notwithstanding any other provision of law . . . the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.” Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 113<sup>th</sup> Congress, § 904(b)(1) (Mar. 7, 2013).

#### IV. Current Tribal Court System and Law Enforcement Capacity

To assess tribal governments' capacity to exercise enhanced sentencing authority and expanded criminal jurisdiction, it is necessary to understand the existing institutional structures and capacities of tribal criminal justice systems. These vary widely from tribe to tribe. This part presents current data on tribal law enforcement, judicial, and correctional systems.

##### A. Tribal Law

Indian nations are sovereign peoples possessing an inherent right of self-determination, including the right to self-government.<sup>122</sup> Nothing is more fundamental to an Indian nation's self-determination and self-government than establishing and organizing its own government and legal institutions, and formulating and enforcing its own laws to govern its own affairs. Almost two centuries of federal court precedent recognize inherent tribal sovereignty, especially regarding internal tribal governance matters. While federal law has limited tribal sovereignty in some respects, generally as to nonmember activities, the United States Supreme Court's view concerning the inherent right of tribes to form their own governments and exercise internal self-governance has been virtually unwavering.<sup>123</sup>

Tribal governments exist as governments organized under the Indian Reorganization Act (IRA) of 1934,<sup>124</sup> as tribal governments that rejected or are otherwise outside the IRA model,<sup>125</sup> or as traditional tribal governments, some without a written constitution. Regardless of their origin, all tribal governments make and enforce laws governing their communities. Tribal law may be written or unwritten and can include tribal constitutions, statutes or codes, tribal court decisions and tribal customs or traditions.

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<sup>122</sup> See, e.g., *Cherokee Nation v. Georgia*, 31 U.S. 1, 32-38 (1831); see also United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007) (recognizing that indigenous peoples have a right to self-determination (art. 3), particularly as to self-government (art. 4)).

<sup>123</sup> See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008) (recognizing restricted tribal authority over nonmembers on the reservation, but affirming tribes retain power to determine tribal membership and to legislate on the reservation); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (tribes "remain 'a separate people, with the power of regulating their internal and social relations,'" including the right to prescribe enforce laws applicable to tribal members); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain power to govern "their members"); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (recognizing the sovereign power of tribes to regulate their internal and social relations).

<sup>124</sup> 25 U.S.C. § 461 *et seq.* "The IRA authorized Indian tribes to organize and adopt constitutions and to form business corporate under charters of incorporation issued by the Secretary," FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.04[3][a][i] (2012 ed.).

<sup>125</sup> Seventy-seven Indian nations rejected the IRA model of government. THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE INDIAN REORGANIZATION ACT, 2 (1947), available at <http://thorpe.ou.edu/IRA/IRAbook/tribalgovtp1-12.htm>.

## 1. Tribal Constitutions

Indian nations governed themselves for centuries before the United States was formed; some, such as the Haudenosaunee Confederacy, developed democratic constitutional governments.<sup>126</sup> In the 19<sup>th</sup> century, tribes began to adopt written constitutions, often based on the United States three-branch model. By 1934, at least 60 tribes were governing themselves under a written constitution.<sup>127</sup> Passage of the IRA in 1934 prompted more widespread tribal adoptions of written constitutions. Under the IRA, Indian nations could organize by either adopting a constitution approved by the Secretary of the Interior and a majority vote of their adult members,<sup>128</sup> or by incorporating under a charter issued by the Secretary and approved by a majority vote of their adult members.<sup>129</sup>

Since 1934, at least 160 Indian nations have adopted a constitutional form of government under the IRA, and more than 75 have developed constitutions outside of the IRA framework.<sup>130</sup> Most IRA constitutions were developed from a model constitution with limited changes.<sup>131</sup> In general, tribal constitutions establish the form and structure of the government, state the scope of governmental authority, define governmental powers and limits, and set out the method of selecting the officers or representatives of the government.

The IRA exempted tribes in Oklahoma from many of its provisions, but the Oklahoma Indian Welfare Act (OIWA), enacted a few years later, allows all Oklahoma tribes, except the Osage, to establish tribal governments and organizations in a manner similar to the IRA. It also provides tribes organized under the Act with the rights and privileges secured to Indian tribes organized under the IRA.<sup>132</sup> Some Indian nations in Oklahoma have not organized under either the IRA or OIWA, but do have a constitutional government. The Cherokee Nation, for instance, has had a constitutional government since 1827. Some Indian nations have constitutions modeled after IRA constitutions, even though they did not choose to organize under the IRA. It

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<sup>126</sup> Robert J. Miller, *Tribal Constitutions and Native Sovereignty* 2 (Apr. 4, 2011), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802890).

<sup>127</sup> *Id.* at 4.

<sup>128</sup> 25 U.S.C. § 476.

<sup>129</sup> 25 U.S.C. § 477.

<sup>130</sup> FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[3] (2012 ed.). See also Elmer R. Rusco, *Civil Liberties Guaranteed under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 270 (1989) (finding 154 IRA-derived constitutions for the lower 48 states, but not including at least 60 constitutions adopted under the Alaska Indian Reorganization Act). See also Robert J. Miller, *Tribal Constitutions and Native Sovereignty* 6 (Apr. 4, 2011), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802890), noting that counts of IRA constitutions range from 109 to 220.

<sup>131</sup> See generally WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL, 5<sup>TH</sup> ED., 66-70 (2009). IRA constitutions typically establish a tribal council with legislative powers, and a chairperson with executive powers; they require that the Secretary of the Interior approve tribal council ordinances and amendments to the tribal constitution.

<sup>132</sup> 25 U.S.C. § 503.

appears that many, perhaps even most, Indian nations, do not have written constitutions.<sup>133</sup> For example, the Navajo Nation is governed by an extensive set of governmental codes, customs, and traditions.<sup>134</sup> Still other Indian nations continue to be governed exclusively by custom and tradition, without a written constitution or code.<sup>135</sup>

## 2. Separation of Powers

Separation of powers refers to the apportionment of government powers among distinct branches, typically executive, legislative, and judicial. Judicial independence is concerned with protecting the judiciary from undue influence by the other branches. Judicial independence is maintained by rules dividing the appointment power for judges or establishing independent elections, and by provisions limiting the ability of the legislature to change the salary of judges, establishing judicial immunity, and restricting the ability of the executive or legislative branches to remove sitting judges.

When tribal governments appoint and remove tribal court judges, or serve as the appellate court or forum, judicial independence may be undermined. Courts may then be seen as subordinate to the political branches, and their integrity and ability to function as neutral adjudicators exercising inherent tribal sovereignty questioned.<sup>136</sup>

The IRA government model makes no explicit provisions for the separation of powers or for a separate judicial system.<sup>137</sup> Some tribal court systems are based on traditional models and do not have written foundational legal documents such as constitutions or codes that articulate a clear separation of powers or otherwise guide tribal court practices. Many tribal governments remain without a separate judicial branch, particularly Indian nations located in states affected by PL 280.<sup>138</sup>

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<sup>133</sup> Robert J. Miller claims “only about 230 of these [560 federally recognized tribes] have adopted written constitutions, but this is perhaps based on the Cohen/Rusco numbers (235) rather than an independent count. *See Tribal Constitutions and Native Sovereignty* 1 (Apr. 4, 2011) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802890). The National Indian Law Library states that they have “approximately 250 codes and 480 constitutions” on file, but it is unclear whether this count includes historical, amended or unapproved constitutions and/or the constitutions of non-federally recognized tribes. *See* DAVID SELDEN, BASIC INDIAN LAW RESEARCH TIPS—TRIBAL LAW 2 (Jan. 2012), at [http://www.narf.org/nill/resources/tribal\\_law\\_research\\_2012.pdf](http://www.narf.org/nill/resources/tribal_law_research_2012.pdf).

<sup>134</sup> Robert J. Miller, *Tribal Constitutions and Native Sovereignty* 5 (Apr. 4, 2011) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802890), citing RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 13-18 (2009).

<sup>135</sup> NATIONAL CONGRESS OF AMERICAN INDIANS, AN INTRODUCTION TO INDIAN NATIONS IN THE UNITED STATES 12 at [http://www.ncai.org/about-tribes/Indians\\_101.pdf](http://www.ncai.org/about-tribes/Indians_101.pdf).

<sup>136</sup> Sandra D. O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1, 5 (1997).

<sup>137</sup> THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 19 (2008). *See also* Richard Monette, *Imposing Communism*, 12:4 LEWIS & CLARK L. REV. 991, 996 (2008); Robert J. Miller, *Tribal Constitutions and Native Sovereignty* 9 (Apr. 4, 2011) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802890).

<sup>138</sup> FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][c] (2012 ed.).

In 2012, the GAO surveyed a non-representative sample of 12 tribal court systems in 4 states.<sup>139</sup> A third of these tribal court systems—the contemporary courts of the Gila River Indian Community, the Pueblo of Isleta, the Pueblo of Pojoaque, and the Pueblo of Taos—are not required by their tribal constitutions or statutes to operate under a separation of powers. Gila River and the Pueblo of Isleta are undergoing constitutional reform, in part to address this issue, but the Pueblo of Pojoaque and the Pueblo of Taos do not have written constitutions. The Pueblo of Pojoaque has no distinct branches of government, though a court official indicated that the tribal council does not intervene in cases before the court.<sup>140</sup> Of the four tribes that do not include a clear separation of powers in their laws, three allow the tribal council to serve as their court’s appellate body.

Many Indian nations do have constitutionally or statutorily mandated separation of powers; 8 of the 12 tribes surveyed by the GAO have codified separation of powers.<sup>141</sup> In practice, though, some governments may blur the lines of separation. The Pueblo of Laguna, for instance, has clear separation of powers in its constitution, but pursuant to tribal ordinances, allows the Governor and certain members of the tribal council to serve as their appellate court.<sup>142</sup> In many Alaska Native villages, the tribal council serves as the sole judicial forum, even at the trial level.<sup>143</sup>

Smaller tribal court systems seem more likely to lack separation of powers and judicial independence. All four of the courts that use their tribal council as their appellate review body indicated a full-time, trial-level judicial staff of one.<sup>144</sup> The Three Affiliated Tribes, the only other Indian nation in the sample with a judicial staff of two or less, refers its appeals to an intertribal appellate body, a politically neutral, external appellate forum.<sup>145</sup> More data is needed to assess how strongly a tribe’s judicial staff-size correlates with the independence of a tribe’s judiciary. However, the potential scope of the issue could be significant; in 2002, roughly 81

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<sup>139</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 39 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>140</sup> *Id.* at 66.

<sup>141</sup> The eight tribes include the Cheyenne River Sioux Tribe, Navajo Nation, Oglala Sioux Tribe, Pueblo of Laguna, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, and Tohono O’odham Nation. *Id.* at 48ff.

<sup>142</sup> *Id.* at 58.

<sup>143</sup> See JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 98 (2004).

<sup>144</sup> The four smaller tribal courts included the Pueblos of Isleta, Laguna, Pojoaque and Taos. The Pueblo of Taos has no formal appellate court, but appeals may be made to the Traditional Court Judge, usually the Lieutenant Governor. U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 54, 57, 67, 76 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>145</sup> *Id.* at 58.

tribal courts in the lower 48 states lack full-time tribal court judges, and roughly 51 have only one full-time tribal court judge.<sup>146</sup>

There is no available data on which, or how many, tribes currently operate legal systems without a clear separation of powers and independent judiciary, but this information will be needed in order to determine the scope of the issue.<sup>147</sup> Ambiguities surrounding the separation of powers between a tribe's judiciary and legislative or executive branches may need to be clarified through revision of tribal constitutions or codes in order to convey to outsiders that a court is capable of acting fairly and independently.

### 3. Civil Liberty Protections for Defendants

Although many tribal constitutions and laws already provided civil liberty protections for individuals within their jurisdiction,<sup>148</sup> in 1968, Congress enacted the ICRA to impose uniform minimum standards across Indian country. ICRA requires Indian nations to abide by most of the provisions of the Bill of Rights, and includes prohibitions against unreasonable searches and seizures, cruel and unusual punishments, and denials of equal protection and due process, among other rights. ICRA did not, however, extend *all* of the provisions of the Bill of Rights to Indian nations. For instance, tribes are not obligated to provide indigent defense counsel or to guarantee a right to a jury trial in civil cases. ICRA also provides habeas corpus review by a federal court to test the legality of any detention by a tribal court.<sup>149</sup> These protections extend to anyone, Indian or non-Indian, who is brought before a tribal judicial forum.

Under the enhanced sentencing authority of TLOA and the expanded special domestic violence criminal jurisdiction of VAWA 2013,<sup>150</sup> tribes are required to guarantee defendants

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<sup>146</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>147</sup> The 1999 American Indian Law Center, Inc. *Survey of Tribal Justice Systems and Courts of Indian Offenses*, available at [https://www.tribalcourtsurvey.org/\\_files/UNM%20Survey%20Results.pdf](https://www.tribalcourtsurvey.org/_files/UNM%20Survey%20Results.pdf), posed relevant questions but is dated, had a low response rate (84 tribes with tribal courts), and may be unrepresentative due to self-selection. For further discussion, see Catherine Struve, Tribal Immunity and Tribal Courts 36 ARIZ. ST. L.J. 137, 160 (n.146), 180 (n.226) (2004).

<sup>148</sup> See, e.g., Citizen Potawatomi Nation Const., art. 16, available at <http://thorpe.ou.edu/constitution/potawatomi/potawatconst.html>; Navajo Nation Tribal Code §§ 1-9, available at [http://dine.sanjuan.k12.ut.us/heritage/people/dine/organization/government/bill\\_rights.htm](http://dine.sanjuan.k12.ut.us/heritage/people/dine/organization/government/bill_rights.htm).

<sup>149</sup> 25 U.S.C. § 1303.

<sup>150</sup> In addition to imposing TLOA procedural requirements, VAWA 2013 additionally (i) affirms defendants' right to petition a federal court for habeas corpus to challenge any conviction and to stay detention prior to review; (ii) mandates that any non-Indian defendant has the right to a trial by jury drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians; (iii) holds that tribes have a duty to notify anyone detained under the special domestic violence criminal jurisdiction provision of all their rights; and (iv) states that defendants must be provided "all other rights whose protection is necessary under the Constitution of the US in order for Congress to recognize and affirm the inherent power of the participating tribe." See BUILDING TRIBAL CAPACITY TO EXERCISE TLOA ENHANCED SENTENCING AND/OR VAWA "SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION" OVER NON-INDIANS, TRIBAL LAW AND POLICY INSTITUTE (June 12, 2013), available at [http://www.tribal-institute.org/download/Drug\\_Court/WomenAreSacredConference.pdf](http://www.tribal-institute.org/download/Drug_Court/WomenAreSacredConference.pdf).



additional civil liberty protections. Specifically, tribes must (a) provide defendants with a right to effective assistance of counsel at least equal to that guaranteed in the U.S. Constitution; (b) at the expense of the tribe, provide indigent defendants with the assistance of a defense attorney licensed to practice by any U.S. jurisdiction; (c) ensure that the judge has sufficient legal training to preside over criminal proceedings and is licensed to practice law in any U.S. jurisdiction; (d) prior to charging the defendant, make publicly available the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and (e) maintain a record of the criminal proceeding, including an audio or other recording.<sup>151</sup>

While some of these requirements are burdensome, some tribes are well on their way towards TLOA enhanced sentencing readiness. A 2012 GAO report reveals that 70 tribes have implemented at least half of the heightened civil rights requirements necessary for exercising enhanced sentencing authority.<sup>152</sup> The survey was submitted to 171 tribes that used federal grant dollars from the Bureau of Indian Affairs (BIA) and the DOJ to fund their tribal courts; 109 (64%) responded.<sup>153</sup> Not every respondent answered every survey question, but the results of the responses that were submitted are illuminating:

- 41 of 100 tribes (41%) provide defendants a right to effective assistance of counsel at least equal to that guaranteed in the U.S. Constitution.
- 39 of 100 tribes (39%) provide indigent defendants the assistance of a defense attorney licensed to practice by any U.S. jurisdiction, at the expense of the tribal government.
- 73 of 102 tribes (72%) require that the judge presiding over the criminal proceeding have sufficient legal training.
- 53 of 101 tribes (53%) require that the judge presiding over the criminal proceeding be licensed to practice law in any U.S. jurisdiction.
- 66 of 101 tribes (65%) make their criminal laws, rules of evidence, and rules of criminal procedure publicly available.
- 85 of 102 tribes (83%) maintain a record of the criminal proceeding, including an audio or other recording.

These numbers indicate that many tribal legal systems are already providing enhanced levels of civil liberty protections. While most of TLOA and VAWA 2013 requirements are already being met by a majority of responding tribes in this survey, it is clear that substantial additional resources will be needed to bring tribes into full readiness to exercise enhanced sentencing authority.

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<sup>151</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(c).

<sup>152</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>153</sup> *Id.*



Many tribes struggle to staff their judiciary with licensed attorneys and to provide effective defense counsel to indigent defendants. In some cases Indian nations undoubtedly choose as a matter of policy to staff their judiciary with traditional leaders, elders, or other respected individuals rather than licensed attorneys. Some tribes may also choose not to provide indigent defense counsel. However, consistent underfunding of tribal justice systems means that tribes are frequently unable to offer competitive professional salaries, compounding the difficulty of attracting attorneys to often remote or rural jurisdictions.<sup>154</sup> While some of TLOA's requirements can be met with technical assistance and training programs alone, tribes will need access to additional funding to further develop their justice systems. Without an infusion of funds to support tribes in building the capacity to provide these additional protections for defendants, few tribes will be able to fully meet the requirements of TLOA and exercise enhanced sentencing or special domestic violence criminal jurisdiction under VAWA 2013.

#### **4. Incorporation of ICRA into Tribal Constitutions and Codes**

Many tribes will need to update their codes or constitutions to implement TLOA and VAWA 2013. Some tribal codes and constitutions make reference to ICRA,<sup>155</sup> or to federal law generally,<sup>156</sup> when describing the framework or limitations of tribal criminal jurisdiction. Other tribes actually incorporate significant amounts of the text of ICRA into their laws.<sup>157</sup> Tribal codes and constitutions that specifically reference ICRA, but do not include an “as amended” caveat may have to be changed. The May 2012 study by the GAO indicates that 40% of the Indian nations included in the study (36 of 90 respondents) reported that they would need to revise their tribal codes or constitutions in order to meet the standards of TLOA.<sup>158</sup> Revising a tribal code or constitution can be a lengthy, costly, and politically contentious process, and will present a barrier to many tribes; those nations with IRA constitutions will likely face the additional hurdle of Secretarial elections to approve amendments and obtaining approval of the Secretary of the Interior for these revisions.<sup>159</sup>

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<sup>154</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 22 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>155</sup> See, e.g., Absentee Shawnee Tribal Const. Art. X (Bill of Rights) (“The protections guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77), against actions of a tribe in exercising its powers of self-government shall apply to the Absentee-Shawnee Tribe of Indians of Oklahoma”), available at <http://www.absenteeshawneetriben-sn.gov/Constitution.aspx>.

<sup>156</sup> See, e.g., Siletz Tribal Const. Art. III (“The government shall not inhibit any person's right to enjoy freedom of worship, conscience, speech, press, assembly and association, and other rights enumerated by Federal Law”), available at <http://www.narf.org/nill/Constitutions/siletzconst/siletzconst.htm>.

<sup>157</sup> See, e.g., Colville Confederated Tribes Code 1-5-2, available at <http://thorpe.ou.edu/archives/colville/CHPT1-5.html>.

<sup>158</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>159</sup> Richard Monette, *Imposing Communism*, 12:4 LEWIS & CLARK L. REV. 991, 1002 (2008).



nations from exercising criminal authority over non-Indians committing crimes on their lands. Indian and Alaska Native nations are the only governments in the United States without legal authority to protect their own citizens from violence perpetrated by any person.<sup>167</sup>

All this, coupled with changing demographics on Indian reservations and in Alaska Native villages<sup>168</sup> and a lack of adequate basic law enforcement services, emphasizes the need for further law reform to support stronger, fuller tribal criminal justice systems including both law enforcement services and tribal courts. Improvements should consider the needs of both tribal courts (*see* Part IV.A., *supra*) and law enforcement services, including investigative and patrol staff and detention facilities. The DOJ has recognized that Indian nations themselves are best positioned to effectively investigate and prosecute crimes occurring in their communities.<sup>169</sup> Tribal law enforcement is local law enforcement directed by and for Indian nations, and Indian nations are in most cases the most appropriate body to take on local law enforcement responsibilities. This is consistent with a national law enforcement scheme that largely depends on state and local governments to ensure safety in their jurisdictions.

The federal, Indian nation, and sometimes state, local, and county governments, share responsibility for law enforcement on Native lands.<sup>170</sup> While major criminal investigations are generally handled by federal law enforcement in non-PL 280 states, state law enforcement may have primary authority over such cases in PL 280 states.<sup>171</sup> Because criminal jurisdiction is rarely exclusive to any one single government, it takes a coordinated and concerted effort from federal and tribal, and perhaps state and local, governments to provide effective public safety within Native communities.

Federal authority to investigate major crimes and enforce federal laws in Indian country is primarily vested in the Federal Bureau of Investigations (FBI), a Bureau within the DOJ, and in the BIA, a Bureau within the Department of the Interior (DOI).<sup>172</sup> DOJ and DOI provide

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<sup>167</sup> *See* Part I, *supra*.

<sup>168</sup> Non-Indians now comprise more than 76% of the population in American Indian areas (Indian reservations and off-reservation trust lands) and 68% of the population in Alaska Native villages. Additionally, over 50% of Native women are married to non-Indians. U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 14 (2012), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>; *see also* Kanya D’Almeida, *Laws ‘Not Enough’ to Tackle Violence Against Women*, INTER PRESS SERVICE, July 25, 2011, <http://www.ipsnews.net/2011/07/us-laws-not-enough-to-tackle-violence-against-native-women/> (*quoting* Kim Teehee, White House Senior Policy Advisor for Native American Affairs).

<sup>169</sup> U.S. Dep’t of Justice, *U.S. Dep’t of Justice Indian Country Investigations and Prosecutions 2011-2012*, 3 (May 2013), *available at* <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>170</sup> *See* Part II, *supra*, *generally*.

<sup>171</sup> PL 280 states include California, Minnesota (excepting the Red Lake Nation), Nebraska, Oregon (excepting the Warm Springs Reservation), Wisconsin (excepting the Menominee Indian Reservation), Alaska, Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah.

<sup>172</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 5 (2005), *available at* <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

financial support, training opportunities, technical assistance, and other support to restore public safety in Indian country. The FBI has investigative authority over certain major crimes in Indian country “committed by Indians against the persons or property of Indians and non-Indians, all offenses committed by Indians against the person or property of non-Indians and all offenses committed by non-Indians against the persons or property of Indians.”<sup>173</sup> The BIA is responsible for providing and assisting in “the enforcement of Federal law and, with the consent of the Indian nation, tribal law” in cases involving violations of 18 U.S.C. §§ 1152 and 1153.<sup>174</sup> The Office of Justice Services (OJS) within the BIA is responsible for the overall management of BIA’s law enforcement program.<sup>175</sup> Employees of the FBI and BIA are considered federal employees providing direct law enforcement services in Indian country.<sup>176</sup> Law enforcement services administered by the BIA are the second most common type of arrangement in Indian country, the first being direct law enforcement services provided by an Indian nation itself.<sup>177</sup> In 2011, the BIA administered 40 agencies that provided law enforcement services in Indian country.<sup>178</sup>

Federal agencies are responsible for enforcing laws regarding a certain set of crimes in Indian country. An increasing number of Indian nations are forming their own law enforcement agencies to address crimes falling within their retained criminal jurisdiction, and they are doing so in various ways.

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<sup>173</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 9-10 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>. Investigative authority, according to the FBI website, <http://www.fbi.gov/hq/cid/indian/safetrails.htm>, is found in the Indian Country Crimes Act (18 U.S.C. § 1152), the Major Crimes Act (18 U.S.C. § 1153), the Assimilative Crimes Act (18 U.S.C. § 13), and from 28 U.S.C. § 533, pursuant to which the FBI was given investigative responsibility in Indian country by the Attorney General.

<sup>174</sup> Indian Law Enforcement Reform Act, 25 U.S.C. § 2801(c)(1) (1990).

<sup>175</sup> U.S. Dep’t of Justice, *U.S. Dep’t of Justice Indian Country Investigations and Prosecutions 2011-2012*, 8 (May 2013), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>. The OJS has seven areas of activity: Criminal Investigation and Police Services, Detention/Corrections, Inspection/Internal Affairs, Tribal Law Enforcement and Special Initiatives, the Indian Policy Academy, Tribal Justice Support, and Program Management.

<sup>176</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 10 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>177</sup> STEWART WAKELING, ET AL., DEP’T OF JUSTICE, *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT’L INST. OF JUSTICE* 6 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>178</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 8 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>. This represents a decrease from 64 Bureau of Indian Affairs-administered agencies in 1995 (See HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 7 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>) and from 40 BIA-administered agencies in 2008 (See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, *TRIBAL LAW ENFORCEMENT*, 2008 (2011), available at <http://www.bjs.gov/content/pub/pdf/tle08.pdf>).

Indian nations can elect to establish their own law enforcement agencies either by contract or compact with the BIA. The majority of Indian nations *contract* with the BIA to operate their own law enforcement agencies. Through the self-determination provision of the Indian Self-Determination and Education Assistance Act (ISDEAA),<sup>179</sup> Indian nations can organize and apply for funding for their own law enforcement agencies by contracting with the BIA's Division of Law Enforcement (DLE) Services.<sup>180</sup> Such agencies are administered by the Indian nation, but are organized pursuant to a contract with the DLE.<sup>181</sup> The staff of tribal agencies organized under self-determination contracts are considered tribal employees.<sup>182</sup> In 1995, approximately 88 tribal law enforcement agencies were organized under this arrangement.<sup>183</sup> Of those Indian nations surveyed in 2001, approximately 73 (56%) of those operating under self-determination contracts were located in a mandatory or optional PL 280 state.<sup>184</sup>

Other Indian nations may choose to organize their law enforcement under a self-governance *compact* with the BIA, pursuant to the 1987 self-governance amendments to the ISDEAA.<sup>185</sup> By forming a compact instead of a contract, Indian nations receive their financial support in a block grant, as opposed to a line-item grant, thus providing them with more flexibility and greater control in determining how those funds are distributed for law enforcement services.<sup>186</sup> In 1995, approximately 22 (12% of non-PL 280 tribes) tribal law enforcement agencies were organized under this arrangement.<sup>187</sup> In 2001, 130 of 165 (80%) reporting Indian nations indicated that their law enforcement agencies operated through either a self-determination contract or a self-governance compact.<sup>188</sup>

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<sup>179</sup> Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

<sup>180</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 10-11 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 7 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>184</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 5 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>185</sup> Indian Self-Determination Amendments of 1987, Pub. L. 100-472, 102 Stat. 2285 (1988).

<sup>186</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 7 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>. (Note that data is from 1995).

<sup>187</sup> *Id.* at 8.

<sup>188</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 5 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>. (Note that data does not distinguish between the number of self-determination contracts and self-governance compacts).

Still other tribal police departments may be entirely tribally-funded, providing Indian nations with full control over law enforcement services.<sup>189</sup> This is the least likely arrangement, however, and only four departments were entirely tribally-funded in 1995.<sup>190</sup> Much more likely are situations where Indian nations make additional contributions to existing federal funding streams to meet law enforcement needs within their territories.

In order to navigate the jurisdictional maze created by federal law, federal, tribal, and sometimes state, local, and county governments must work together. Inter-governmental cooperation is critical to investigate and prosecute crimes committed in Indian country. Recognizing this, TLOA<sup>191</sup> requires federal investigators to coordinate with Indian nations regarding the status of criminal investigations in Indian country.<sup>192</sup>

## **1. Number of Tribal Law Enforcement Agencies Operating**

In 2011, there were 191 tribal law enforcement agencies, 151 of which were tribally-administered and 40 BIA-administered.<sup>193</sup> This represents an increase in tribal law enforcement agencies from September 2008, when there were 178 tribal law enforcement agencies, 157 of which were general purpose tribal police departments.<sup>194</sup> The largest numbers of tribal law enforcement agencies are located in Washington (24), Arizona (22), Oklahoma (19), and New Mexico (17).<sup>195</sup>

The number of tribal law enforcement agencies operating in mandatory or optional PL 280 states is much lower than in non-PL 280 states. Indian nations located in PL 280 mandatory states account for 40% of all Indian nations in the lower 48 states, yet they represent just 14-16% of all tribal police departments.<sup>196</sup> While 74% of Indian nations have tribal police departments,

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<sup>189</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>190</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 8 (2001), *available at* <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>191</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211 (2010).

<sup>192</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 28 (Feb. 2011), *available at* <http://www.gao.gov/new.items/d11252.pdf>.

<sup>193</sup> *Id.* at 8.

<sup>194</sup> Twenty-one of these tribal law enforcement agencies were special jurisdiction agencies, tasked with enforcing specific natural resources laws pertaining to hunting and fishing on tribal lands. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 7 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>195</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 28 (Feb. 2011), *available at* <http://www.gao.gov/new.items/d11252.pdf>.

<sup>196</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 14 (Nov. 1, 2007), *at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.



only 21% of Indian nations located in mandatory PL 280 states have such local control.<sup>197</sup> Even worse, just 11.5% of all Alaska Native villages have tribal police departments.<sup>198</sup> Most Alaska Native villages are patrolled by Village Public Safety Officers, concerned citizens residing in the community who are unarmed and provide public safety services at the local level.<sup>199</sup>

## **2. Number of Indian Nations without Tribal Law Enforcement Agencies that Rely Solely on BIA or State Law Enforcement Agencies**

While the majority of law enforcement agencies operating in Indian country are now tribally-administered, the federal government retains responsibility to investigate certain major crimes beyond the jurisdiction of an Indian nation and to enforce laws where no tribal agency exists. In 2011, the BIA operated 40 law enforcement agencies in Indian country, a modest decrease from 2008 when the BIA operated 42 such agencies.<sup>200</sup> In 2008, the BIA employed 277 full-time personnel<sup>201</sup> to patrol nearly 200 reservations.<sup>202</sup> More than 100 agents in 19 of the FBI's 56 field offices work full-time on Indian country matters,<sup>203</sup> and 90 BIA special agents work on investigating certain crimes involving violations of federal and tribal law.<sup>204</sup>

## **3. Tribal Police Forces**

Among the 66 largest tribal police forces, a typical department is one that is funded by a self-determination contract or the BIA. It consists of 32 employees, including 9 civilians, 6 detention officers, 16 police officers, and between one and three command staff.<sup>205</sup> Tribal police officers are high school graduates (100%) and graduates of certified law enforcement training academies (85%), numbers comparable to that of non-Native police departments. Two-thirds of

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<sup>197</sup> *Id.* Notably, even accounting for smaller tribal populations in mandatory PL 280 states, tribal police departments are still lacking in those states.

<sup>198</sup> *Id.*

<sup>199</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012 (2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>200</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>201</sup> *Id.*

<sup>202</sup> The Federal Bureau of Investigation, *Indian Country Crime: Overview*, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/indian/ic\\_overview](http://www.fbi.gov/about-us/investigate/vc_majorthefts/indian/ic_overview) (last visited Dec. 19, 2013).

<sup>203</sup> The Federal Bureau of Investigation, *Journey Through Indian Country, Part 1: Fighting Crime on Tribal Lands*, [http://www.fbi.gov/news/stories/2012/june/indian-country\\_060112](http://www.fbi.gov/news/stories/2012/june/indian-country_060112) (last visited Dec. 19, 2013).

<sup>204</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 8 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>205</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 9 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

officers are Native American, 56% are members of the Indian nations they serve, and 13% speak the Native language of the community served. Only 12% of officers are women.<sup>206</sup>

The duties of tribal police agencies vary widely and depend on the administration and organization of the tribal police agency. General purpose tribal police departments are typically responsible for traditional law enforcement functions such as routine patrol (100%), responding to citizen requests for service (100%), special events and crowd control (98%), criminal investigation (96%), traffic enforcement (96%), parking enforcement (80%), and dispatching calls for service (66%), as well as court-related functions, including executing arrest warrants (95%), enforcing protection orders (92%), serving process (89%), apprehending fugitives (88%), and providing court security (75%).<sup>207</sup> Many also provide public safety functions (almost 90%) and more than half perform a specialized function (58%).<sup>208</sup> The special jurisdiction agencies perform similar functions, including criminal investigation (82%), search and rescue (71%), apprehension of fugitives (59%), animal control (59%), traffic enforcement (59%), and dispatching calls for service (53%).<sup>209</sup> The majority (88%) of tribal police agencies are general purpose agencies as opposed to special jurisdiction agencies tasked with enforcing specific natural resources laws.<sup>210</sup> In 2008, 157 general purpose tribal police departments employed 4,294 full-time, and 129 part-time, personnel.<sup>211</sup>

One of the greatest needs of tribal police departments in Indian country is additional personnel, particularly patrol officers.<sup>212</sup> Although tribal police departments vary greatly in size, the vast majority—80 to 90%—are quite small. In 2001, there were approximately 150 small departments employing fewer than 9 officers.<sup>213</sup> Many times in these departments only one officer is on duty at any time, meaning he or she may be working without the necessary backup.<sup>214</sup> Small departments serve approximately 20 to 30% of all Indian country residents.<sup>215</sup>

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<sup>206</sup> *Id.* at 25.

<sup>207</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>208</sup> *Id.* at 5. Public safety functions include emergency management (64%), emergency medical services (31%), fire services (19%), and school crossing services (18%); specialized functions include search and rescue (43%), tactical operations (26%), or underwater recovery (10%).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Id.* at 7.

<sup>212</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 31 (Nov. 1, 2007), *at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf> (referring to the results of a Community Policing Consortium study, "To Protect and Serve: An Overview of Community Policing on Indian Reservations," ch. 2 (Police Foundation, ed., 1997), *available at* [http://www.communitypolicing.org/pf/am\\_ind/ch2.html](http://www.communitypolicing.org/pf/am_ind/ch2.html)).

<sup>213</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 23 (2001), *available at* <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*



There are approximately 75 medium-sized departments, employing between 10 and 50 officers.<sup>216</sup> These departments are more likely to provide around-the-clock coverage and to support specialized functions, such as search and rescue. Medium-sized departments serve about 60% of the Indian country population. In 2001, two large departments, administered by the Navajo Nation and the Oglala Sioux Tribe, each operated with more than 50 officers. These departments were more advanced in their organization and functionality. They tended to have more specialization, oversight mechanisms, and district-based organization.<sup>217</sup>

A 2011 study indicates that the size of tribal police departments is growing significantly, particularly within the last ten years.<sup>218</sup> There are now six tribal police departments with 50 or more officers, and 25 tribal police departments with 25 or more officers.<sup>219</sup>

Department size is important because the ability of tribal police departments to function effectively largely depends on the number of officers, both as a functional aspect of patrolling and policing lands, and as a matter of geography and population. As a matter of geography, law enforcement in tribal areas is needed within more than 56 million acres of Indian country with a service population of 1.2 million residents in 35 states.<sup>220</sup> Given the vast geographical scope of coverage, most tribal police departments struggle to provide adequate coverage for tribal citizens. Within Indian country, there are less than 3,000 tribal and BIA law enforcement officers, which is less than 2 officers per 1,000 residents.<sup>221</sup> On some reservations, there may be 100 or more miles between department offices and remote areas, requiring hours before a responding officer can reach a victim or crime scene.<sup>222</sup> The average tribal police department has less than 3 police officers, yet is still responsible for serving up to 10,000 residents and patrolling up to 500,000 acres.<sup>223</sup> Many times just one officer is on duty at any given time. This is far less than the 3.6 to 6.6 officers found in non-Indian areas.<sup>224</sup> Testifying before the Senate

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at vi.

<sup>218</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>219</sup> The report includes a listing of these police departments and the number of sworn personnel employed. *Id.* at 3.

<sup>220</sup> *Id.* at 3.

<sup>221</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 5 (Feb. 2011), *available at* <http://www.gao.gov/new.items/d11252.pdf>.

<sup>222</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 31 (Nov. 1, 2007), *at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>223</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE vi (2001), *available at* <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>224</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 5 (Feb. 2011), *available at* <http://www.gao.gov/new.items/d11252.pdf>. (cf. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/tle08.pdf> (Finding that tribal police departments employed 2.3 officers per 1,000 residents, "which was the national average for all local police departments as of 2007"))).

Committee on Indian Affairs, Joe Garcia, former president of the National Congress of American Indians, called the makeup of law enforcement officers in Indian country a tragedy: “Indian Country law enforcement officers make up .004% of all law enforcement in the United States. Yet they patrol 2% of the land of the United States and 1% of the population.”<sup>225</sup>

National statistics regarding levels of police coverage in Indian country do not yield entirely representative results and raise several issues that should be taken into account.<sup>226</sup> First, the numbers do not identify the extreme levels of violence that affect some Indian nations. There is a very real epidemic of violent crimes plaguing Indian country today. For example, although the Wind River Reservation in Wyoming faces a violent crime rate that is 3.58 times the national rate, its police department employs just six or seven officers, meaning that no more than three officers are on duty at any one time to patrol the entire 2.2 million acre reservation.<sup>227</sup> The violent crime rate on the Wind River Reservation is more like that found in urban areas rather than that of a remote, sparsely-populated rural area. Significantly, however, urban areas with similar crime rates enjoy far greater protection from police departments that employ between 3.9 and 6.6 officers per 1,000 residents.<sup>228</sup> Second, the numbers do not account for the high levels of non-resident and non-Indian populations served, including visitors to casinos and tourists. Of the 25 largest tribal law enforcement agencies, all had at least one casino operating within their jurisdiction.<sup>229</sup> Many casino patrons travel from neighboring towns. Third, the numbers do not take into account the sometimes vast areas patrolled, a condition often compounded by harsh reservation terrain and climates.<sup>230</sup> For example, while the Navajo Nation Department of Law Enforcement polices 22,000 square miles in Utah, Arizona, and New Mexico, the comparably staffed Reno, Nevada Police Department covers just 60 square miles.<sup>231</sup> Fourth, while the level of police coverage as a whole seems comparable to that of other rural areas, the number of officers employed by larger departments skew the national numbers drastically.<sup>232</sup>

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<sup>225</sup> *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 44 (2007), available at [http://www.indian.senate.gov/public/\\_files/June212007.pdf](http://www.indian.senate.gov/public/_files/June212007.pdf).

<sup>226</sup> See CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 25 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>. (“These ratios do not take into account the geographic size of the community or the availability of resources, such as 911 systems and police vehicles, that may determine whether officers can provide effective services to the community”).

<sup>227</sup> S. Rep. No. 111-93, at 6-7 (2009).

<sup>228</sup> Rebecca A. Hart & M. Alexander Lowther, *Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 211 (2008).

<sup>229</sup> BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 3 (2011), available at <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>230</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 76 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

<sup>231</sup> Rebecca A. Hart & M. Alexander Lowther, *Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 210-211 (2008).

<sup>232</sup> See EILEEN LUNA-FIREBAUGH, ET AL., *Law Enforcement and the American Indian: Challenges and Obstacles to Effective Law Enforcement*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 117, 125 (Jeffrey Ian Ross & Larry Gould, eds., 2006) (finding that 1 out of 31 reservations has a police population ratio of less than 1

It is no secret that the number of law enforcement personnel and their ability to adequately patrol Indian country, both in measures of geography and service population, falls far short of the national average. The DOJ has recommended that 4,300 officers, almost double the current number, are needed for tribal police departments to provide basic public safety in Indian country.<sup>233</sup>

Tribal police departments are responsible for an increasing degree of law enforcement, but lack the funding to fully provide the necessary services. Per capita spending on tribal law enforcement is approximately 60% of the national average, and many tribal police departments remain grossly underfunded and lack the resources and facilities to meet increasing law enforcement demands.<sup>234</sup> Often with an annual budget far lower than other comparable police departments, tribal police departments operate out of buildings that are more than 20 years old and officers rely on vehicles more than 3 years old.<sup>235</sup> Public waiting rooms, areas where officers can sit down and write their reports, and officer amenities such as locker rooms and storage are “virtually nonexistent.”<sup>236</sup> Computer infrastructure is often “outmoded, deficient, or absent.”<sup>237</sup> These financial circumstances present a wide variety of challenges for Indian nations seeking to provide adequate law enforcement services on their lands.

#### **4. Operations**

Indian nations work with federal and local law enforcement to provide for basic public safety on their lands, and sometimes use their services such as training opportunities and recordkeeping software. The DOJ and DOI share responsibilities for ensuring criminal justice in Indian country.

##### **a. Training**

The Indian Country Crimes Unit of the FBI provides training, in conjunction with the DOJ, for federal officer candidates working in Indian country.<sup>238</sup> Prior to enactment of TLOA in 2010, all BIA officer candidates were required to participate in basic federal law enforcement

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per 1,000, 11 have ratios of 1-3 per 1,000, 8 have ratios of 3-10 per 1,000, 7 have ratios of 11-25 per 1,000, 4 have ratios greater than 25 per 1,000, and 1 Indian nation had a ratio of 240 per 1,000).

<sup>233</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 76 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

<sup>234</sup> *Id.* at 68.

<sup>235</sup> STEWART WAKELING, ET AL., DEP’T OF JUSTICE, *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT’L INST. OF JUSTICE* 9 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>236</sup> *Id.* at 26.

<sup>237</sup> *Id.*

<sup>238</sup> *Indian Country Crime: Overview*, [www.fbi.gov](http://www.fbi.gov/about-us/investigate/vc_majorthefts/indian/ic-overview), [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/indian/ic-overview](http://www.fbi.gov/about-us/investigate/vc_majorthefts/indian/ic-overview) (last visited Dec. 19, 2013).

training in New Mexico. Under TLOA, officer candidates can now train through local, state, and tribal academies, tribal colleges, and other training centers that meet the appropriate federal training standards.

Pursuant to a Memorandum of Understanding entered into in 1993 between the DOI and DOJ, guidelines have been established to “provide for the effective and efficient administration of criminal investigative service in Indian country.”<sup>239</sup> The Memorandum clarifies that it is the Secretary of the Interior’s duty to “ensure that law enforcement personnel of the BIA receive adequate training, with particular attention to report writing, interviewing techniques and witness statements, search and seizure techniques and preservation of evidence and the crime scene.”<sup>240</sup> During that time, the United States Attorneys’ Office (USAO) designated at least one Tribal Liaison to serve as the point of contact for tribes within their district and to coordinate and train law enforcement agents, as well as BIA criminal investigators and tribal police presenting cases in Federal court.<sup>241</sup> The Tribal Liaison program was made permanent with the passage of TLOA.

Tribal and non-tribal police officers receive similar training and tribal officers are generally graduates of high school and certified law enforcement academies. In spite of this, at least some concerns persist “that [tribal] officers are not properly trained, do not have adequate oversight, and are not being disciplined.”<sup>242</sup> A recent study of 170 law enforcement departments, however, found that just one tribal police department did not require at least a high school degree or General Educational Development (GED) Test, and that tribal police officers were generally “well-trained.”<sup>243</sup> Another study showed that reservation residents in both PL 280 and non-PL 280 jurisdictions rated tribal police services higher than either state and county or federal and BIA police.<sup>244</sup>

Importantly, TLOA seeks to increase the effectiveness of tribal police departments and provides increased training opportunities for tribal law enforcement. Section 602 of TLOA requires the OJS to provide specialized training in interviewing victims of domestic and sexual

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<sup>239</sup> U.S. Attorneys’ Manual, Title 9, Criminal Resource Manual, 676 *MOU re Indian Law Enforcement Reform Act: Memorandum of Understanding Between the U.S. Dep’t of Interior Bureau of Indian Affairs and the U.S. Dep’t of Justice Federal Bureau of Investigation* (1993), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00676.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00676.htm).

<sup>240</sup> *Id.*

<sup>241</sup> U.S. Dep’t of Justice, *U.S. Dep’t of Justice Indian Country Investigations and Prosecutions 2011-2012*, 25 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>242</sup> Eileen Luna, *Seeking Justice: Critical Perspectives of Native People: Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUBLIC POL’Y REV. 149, 149 (1999).

<sup>243</sup> EILEEN LUNA-FIREBAUGH, ET AL., *Law Enforcement and the American Indian: Challenges and Obstacles to Effective Law Enforcement*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 117, 127 (Jeffrey Ian Ross & Larry Gould, eds., 2006).

<sup>244</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, ix (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

violence, and in collecting and preserving evidence. A 2011 survey indicated that this type of training remains a high priority in Indian country.<sup>245</sup> TLOA also provides that tribal police officers may be deputized to enforce federal laws in Indian country under the Special Law Enforcement Commission (SLEC) program. This authority may include the right to arrest non-Indians and to conduct investigations. Tribal officers need to satisfy DOI criteria before certification. The DOJ's Community Oriented Policing Services (COPS) program also provides grant funding to Indian nations to hire and train tribal police officers and to procure law enforcement equipment.<sup>246</sup>

## **b. Policies and Procedures**

Major criminal investigations in Indian country are generally handled by federal authorities in non-PL 280 states and by state authorities in PL 280 states, at least in mandatory PL 280 states.<sup>247</sup> Federal and tribal, and sometimes state and local, law enforcement share investigative authority over certain non-major crimes occurring in Indian country. Without effective policies and procedures on key issues such as employment, accountability, and reporting, shared criminal authority can adversely impact the overall effectiveness of law enforcement in Indian country.

For those tribal police departments administered by the BIA, law enforcement officers report to the BIA, which supervises the department's executive.<sup>248</sup> For tribal police departments administered under a self-determination contract, the department generally reports to tribal government directly, or through some other appointed body or committee.<sup>249</sup> The situation is more complicated for those departments employing both federal and tribal officers, which accounts for approximately 40% of all BIA-administered departments.<sup>250</sup> In these situations, the COPS program provides funding for tribal officers, who cannot be federal employees.<sup>251</sup> A major concern with this arrangement is perceived and actual inequity in compensation, training, and equipment. For instance, federal employees enjoy job security, competitive benefits packages, and protection from political pressure, as well as training opportunities; benefits that

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<sup>245</sup> JENNIFER FAHEY, ET AL., CRIME AND JUSTICE INST. AT COMMUNITY RESOURCES FOR JUSTICE, CRIME AND JUSTICE IN INDIAN COUNTRY: A SUMMARY OF TALKING CIRCLE FINDINGS AND THE TRIBAL LAW AND ORDER ACT OF 2010, 21-22 (2011).

<sup>246</sup> Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 NEW MEXICO L. REV. 239, 29 (2011).

<sup>247</sup> FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 604[3][d] (2012 ed.).

<sup>248</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 24-25 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>249</sup> *Id.* at 25.

<sup>250</sup> *Id.* at 25, n.3.

<sup>251</sup> *Id.* at 8.

may not be enjoyed by tribal employees.<sup>252</sup> Federal and tribal officers may also face different levels of scrutiny and accountability; while tribal officers are directly accountable to tribal government, federal officers may not be.<sup>253</sup>

Underreporting of crimes is a serious challenge to effective law enforcement in Indian country. Not only does underreporting occur between reservation residents and tribal police agencies, but also between tribal police agencies and federal, state, and local authorities.<sup>254</sup> Underreporting by residents is “attributable to cultural and demographic factors that are highly characteristic of Indian Country,” which may be, for example, distrust of police, shame or humiliation, or fear of retaliation.<sup>255</sup> A 2011 survey reveals a perceived lack of federal interest in tribal cases by reservation residents and concern that this results in less than vigorous investigation practices.<sup>256</sup> Reservation residents feel that tribal officials, rather than outside and foreign investigators, should be conducting interviews with victims, witnesses, and suspects.<sup>257</sup> In many cases, reservation residents may be physically unable to report criminal activity. As reflected in the 2000 decennial census, 69% of Native American households on tribal lands in the lower 48 states had telephone service, a level much lower than the national rate of about 98%. In Alaska Native villages, about 87% of Native American households had telephone service.<sup>258</sup>

Underreporting by tribal agencies, on the other hand, is due primarily to “staff shortages and time constraints, limited data-collection capacities, competing Federal and local priorities, and problems with department administration and management.”<sup>259</sup> Specialized administrative tasks, specifically data collection, generally lose out to departmental priorities, like providing emergency services and responding to calls.<sup>260</sup> Staff shortages compound the problem, particularly in those departments where officers serve dual duties as jail staff, as is the case in over 50% of surveyed departments.<sup>261</sup>

Even when crimes are reported and Indian nations refer cases to the appropriate federal authorities, the vast majority are not prosecuted and many are not even investigated. In 2006,

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<sup>252</sup> *Id.* at 43.

<sup>253</sup> *Id.* at 50.

<sup>254</sup> *Id.* at 13.

<sup>255</sup> *Id.* at 13.

<sup>256</sup> JENNIFER FAHEY, ET AL., CRIME AND JUSTICE INST. AT COMMUNITY RESOURCES FOR JUSTICE, CRIME AND JUSTICE IN INDIAN COUNTRY: A SUMMARY OF TALKING CIRCLE FINDINGS AND THE TRIBAL LAW AND ORDER ACT OF 2010, 17 (2011), available at [http://b3cdn.net/crjustice/0e28a1f65db004819d\\_nhm6bpxfu.pdf](http://b3cdn.net/crjustice/0e28a1f65db004819d_nhm6bpxfu.pdf).

<sup>257</sup> *Id.*

<sup>258</sup> U.S. Government Accountability Office, *Telecommunications: Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, Report No. GAO-06-189, 3 (2006), available at <http://www.gao.gov/new.items/d06189.pdf>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*



while 26% of reported rapes nationwide led to an arrest,<sup>262</sup> just 7% of reported rapes in Indian country led to an arrest.<sup>263</sup> Of those reported rapes that led to an arrest, even fewer will be prosecuted. According to a 2010 GAO report, federal authorities declined to prosecute 67% of Indian country matters referred to them that involved sexual abuse and related matters.<sup>264</sup> In light of this, some tribal police departments have developed creative methods to keep certain cases alive if federal authorities decline to investigate. For instance, sometimes tribal police and prosecutors will charge alleged Indian criminals with misdemeanors in addition to, or instead of, felonies, thus preserving tribal jurisdiction over the case.<sup>265</sup> In many cases, delays by federal agents in delivering evidence or notifying Indian nations of the decision not to prosecute can impede tribal investigation and prosecution of even a trivial misdemeanor charge.<sup>266</sup> However, according to a 2013 DOJ report, U.S. Attorneys' Offices with Indian country jurisdiction show a 54% increase in Indian country criminal prosecutions since 2009.<sup>267</sup> Some 37% of all Indian country cases were declined for prosecution in 2011, and just 31% in 2012. In 2011, DOJ reports that 67% of declinations were cases of assault (including domestic violence) and sexual assault; in 2012, assault and sexual assault cases comprised 63% of those declined.

Even if a case is prosecuted, there is still a good chance justice will be evaded. In 2010, for Indian nations meeting certain requirements, TLOA expanded the sentencing authority of their tribal courts up to 36 months and a \$15,000 fine, or both for each offense. Sentences may be stacked, but a 9-year cap applies. Nationally, the average sentence imposed for rape is 136 months and 92 months for other sexual assaults.<sup>268</sup> This means that today, even if Indian nations meet all of the requirements of TLOA, they are only able to impose one-third to one-quarter the penalty that would be imposed on an Indian offender if he or she had committed the same offense outside of Indian country.<sup>269</sup>

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<sup>262</sup> See Federal Bureau of Investigation, *Uniform Crime Reports, Crime in the U.S.*, 2006 (2007), <http://www.fbi.gov/ucr/cius2006/>.

<sup>263</sup> *Bill Moyers Journal* (PBS television broadcast Nov. 14, 2008) (transcript available at <http://www.pbs.org/moyers/journal/11142008/transcript2.html>).

<sup>264</sup> U.S. Government Accountability Office, *U.S. Dep't of Justice Declinations of Indian Country Criminal Matters*, Report No. GAO-11-167R 3 (2010), available at <http://www.gao.gov/new.items/d11167r.pdf>.

<sup>265</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE* 11, n.8 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>266</sup> Michael Riley, *Lawless Lands: Promises, Justice Broken*, DENVER POST, Nov. 11, 2007, available at [http://www.denverpost.com/ci\\_7429560](http://www.denverpost.com/ci_7429560).

<sup>267</sup> U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions 2011-2012*, 4 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>268</sup> Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 NEW MEXICO L. REV. 239, 44-45 (2011).

<sup>269</sup> *Id.*

**c. Recordkeeping for 911 Calls, Responses, Arrests, Investigations, and Referrals**

According to a 2002 BJS study, approximately 70% (213) of Indian nations recorded criminal incidents in Indian country either manually (29%) or electronically (24%), or both (47%). Comprehensive recordkeeping by tribal police departments is often lacking due to their smaller size, limited staff, and inadequate funding. These smaller departments frequently lack data collection methods and systems, as well as the capacity to analyze the data. According to a 2001 survey, approximately half of the Indian country police departments surveyed do not have automated call management, such as 911, systems.<sup>270</sup> However, even those departments that do have the equipment and technology may lack adequately trained staff to fully use them.<sup>271</sup>

Recent efforts have been directed at enhancing the criminal recordkeeping capacity of tribal law enforcement agencies, particularly through the 2004 Tribal Criminal History Records Improvement Program (T-CHRIP)<sup>272</sup> and the Tribal Violence Prevention Technology Assistance Program.<sup>273</sup> Through T-CHRIP, Indian nations receive direct funding to purchase and install electronic fingerprinting technology that meets state and FBI requirements, thus improving “the ability of justice agencies to identify individuals for criminal justice and noncriminal justice purposes.”<sup>274</sup>

Despite existing recordkeeping and information-sharing inadequacies, some Indian nations are providing law enforcement services for surrounding areas, particularly 911 dispatch services for local non-tribal communities. In 2008, for example, the Oneida Indian Nation of Wisconsin and Brown County entered into an agreement “designating the law enforcement arm of the Oneida Indian nation as the primary responsive agency to 911 calls originating within a 1,700 acre area of the village.”<sup>275</sup> The Village of Hobart challenged the agreement on the grounds that it violated state law and the Village’s mandatory obligation to provide such services

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<sup>270</sup> STEWART WAKELING, ET AL., DEP’T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT’L INST. OF JUSTICE 14 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>271</sup> *Id.*

<sup>272</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 1 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>273</sup> *Id.* at 2. The Tribal Violence Prevention Technology Assistance Program, established by the BJA, provides technical assistance to tribal authorities.

<sup>274</sup> *Id.* Other objectives include: “[p]roviding direct financial and technical assistance to improve criminal history records systems and facilitate background checks for criminal justice and authorized noncriminal justice purposes; [d]eveloping the infrastructure to connect tribal record systems to state or FBI records’ systems and criminal records databases of other Indian nations; [p]roviding training and technical assistance to Indian nations to ensure that record systems conform to state and FBI standards, use the most appropriate technologies, and adhere to privacy and confidentiality regulations; [e]valuating improvements in tribal and national record holdings and criminal records sharing.”

<sup>275</sup> Fox11, *Appeals court rules for Brown County: At issue is dispatching of 911 calls*, FOX 11 ONLINE (June 28, 2011), <http://www.fox11online.com/dpp/news/politics/appeals-court-rules-for-Brown-County-in-911-suit-by-Hobart>.



to Hobart. The Wisconsin Court of Appeals upheld the agreement, thereby affirming the Oneida Police Department as the primary responsive law enforcement agency in the area.<sup>276</sup>

TLOA also seeks to improve criminal recordkeeping and information-sharing amongst tribal law enforcement agencies. For instance, § 303 enhances tribal police officer access and ability to input information into the National Criminal Information Center (NCIC) and other similar federal databases; § 501(a) requires the National Gang Intelligence Center to collect, analyze, and distribute information on gang activity in Indian country; § 501(b) makes tribal governments eligible for federal grants to increase criminal data collection and reporting; and § 502 authorizes the OJS to aid tribal police in improving criminal data collection systems.<sup>277</sup> Section 212 provides that federal prosecutors must report to the Native American Issues Coordinator details regarding every case declined for prosecution, including type of crime, whether the victim or accused is Indian or non-Indian, and the reason for declining to investigate or prosecute. The Issues Coordinator must then submit an annual declination report to Congress. The first such report was submitted in 2013.<sup>278</sup>

## **5. Resources**

### **a. Funding**

Many Indian nations simply do not have enough resources to provide law enforcement and administer effective courts in Indian country. In spite of its trust responsibility, the United States has failed to provide adequate financial assistance to Indian nations for their criminal justice systems. Indian nations receive just a small percentage of the level of federal funding and assistance provided to non-Indian communities.

#### **i. Sources of Funding**

Sources of funding for law enforcement in Indian country, specifically policing, investigatory, and detention services, are as varied as the types of administrative arrangements that provide such law enforcement services. Generally, Indian nations located in non-PL 280 states rely on financial support from the federal government, particularly the DOI and DOJ. Within the DOI, the BIA provides funding directly to tribal law enforcement pursuant to self-determination contracts and self-governance compacts. The BIA also provides funding indirectly through its OJS, which in turn provides investigative support through the DLE and detention programs through its Division of Corrections. Of the 191 tribal law enforcement

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<sup>276</sup> Village of Hobart v. Brown County, No. 2010AP561, slip op. (Wis. Ct. App. June 28, 2011).

<sup>277</sup> S. Rep. No. 111-93, at 23, 25 (2009).

<sup>278</sup> U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions 2011-2012*, 8 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

agencies that the BIA supports, 151 are operated by the Indian nations through self-determination contracts or self-governance compacts, and 40 are operated directly by the BIA.<sup>279</sup> Of the 91 tribal detention programs that the BIA supports, 62 are operated by Indian nations through self-determination contracts or self-governance compacts, and 19 are directly operated by the BIA.<sup>280</sup>

While the DOI provides support for policing and detention, the DOJ is largely responsible for investigating and prosecuting certain Indian country crimes, through the FBI and the USAO.<sup>281</sup> The Bureau of Justice Assistance (BJA) within the Office of Justice Programs (OJP) administers the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, which is used to fund law enforcement, prosecution and courts, prevention and education, corrections and community corrections, drug treatment, planning, evaluation, and technology improvement, and crime victim and witness programs.<sup>282</sup> In 2011, 23 Indian nations were eligible for JAG funding.<sup>283</sup> The BJA also provides grant funding, training, and technical assistance for the planning, construction, and renovation of detention and correctional facilities.<sup>284</sup> Indian nations supplement available federal funding with self-determination contracts or self-governance compacts, and with tribal funds. Mandatory and optional PL 280 states, along with tribal governments, are financially responsible for providing law enforcement services in Indian country.

## **ii. Adequacy of Funding**

Funding for law enforcement in Indian country is grossly inadequate, with tribal law enforcement generally operating on 55 to 80% of the resources available to non-Indian communities.<sup>285</sup> The discrepancy in funding becomes clearer when comparing per capita spending in Indian communities to the national average. A 2003 study found that per capita

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<sup>279</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 8 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 9-10.

<sup>282</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 10 (2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>283</sup> *Id.*

<sup>284</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 28 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>. (In 2010, the Bureau of Justice Assistance awarded 25 grants to Indian nations totaling about \$9 million to support tribal correctional facilities, and \$220 million through the Recovery Act for 20 construction and renovation projects at correctional facilities on tribal lands).

<sup>285</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 27 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

spending on law enforcement in Indian communities is roughly 60% of the national average.<sup>286</sup> While Indian nations spent approximately \$83 in public safety funds per resident, non-Indian communities with comparable populations between 10,000 and 25,000 spent \$104 per resident.<sup>287</sup>

Inadequate funding challenges the effectiveness of tribal law enforcement and overall department staffing. In 2007, only “48% of BIA funded law enforcement agencies were staffed to the national average of 2.6 officers per 100,000 inhabitants in non-metropolitan communities.”<sup>288</sup> Lack of funding seriously restricts the ability of tribal law enforcement to develop and improve emergency response systems, particularly automated 911 call management. For those emergency calls that do get dispatched, many may not receive a response because tribal police departments tend to be severely understaffed. A 2009 report found a 40% unmet need in staffing for police officers working in Indian country.<sup>289</sup> As a practical matter, this means that tribal law enforcement officers must often operate without sufficient backup, leading to increased danger on the job and contributing to higher officer turnover.

There is a severe need for improved technology systems as well. For those calls dispatched, only a few may be received and even fewer answered. According to the Director of the BIA, “outdated radios and insufficient radio coverage place officers at risk and have led to a loss of lives in Indian country due to the inability of officers to radio for assistance.”<sup>290</sup> This presents a dangerous and even life-threatening situation for both the responding officers and victims.

Inadequate funding also presents challenges to the problem of detaining and incarcerating alleged and convicted criminals. Due to financial constraints, Indian country lacks sufficient facilities to meet demand, often resulting in overcrowded and unsafe jails. In 2001, the ten largest jails in Indian country were operating at 142% capacity, and nearly a third were operating above 150% capacity.<sup>291</sup>

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<sup>286</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 68 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

<sup>287</sup> STEWART WAKELING, ET AL., DEP’T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT’L INST. OF JUSTICE 27 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>288</sup> *The Needs and Challenges of Tribal Law Enforcement on Indian Reservations: Hearing Before the House Committee on Natural Resources*, 110<sup>th</sup> Cong. 2 (2007) (statement of Patrick Ragsdale, Director, BIA), available at <http://naturalresources.house.gov/uploadedfiles/ragsdaletestimony06.01.07.pdf>.

<sup>289</sup> S. Rep. No. 111-93, at 2 (2009).

<sup>290</sup> *The Needs and Challenges of Tribal Law Enforcement on Indian Reservations: Hearing Before the House Committee on Natural Resources*, 110<sup>th</sup> Cong. 2 (2007) (statement of Patrick Ragsdale, Director, BIA), available at <http://naturalresources.house.gov/uploadedfiles/ragsdaletestimony06.01.07.pdf>.

<sup>291</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 68 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

A 2001 study indicates that simple statistical comparisons may not represent the true needs of Indian country; the adequacy of police officer coverage in Indian country may be vastly understated because the comparison may not be between departments of similar size or take into account the high rates of violent crime. Additionally, reported numbers most likely fail to consider that Indian country police may be responsible for patrolling and investigating crimes in much larger areas than rural or local officers operating outside of Indian country.<sup>292</sup>

The vast majority of Indian nations with law enforcement responsibilities have reported substantial needs with respect to funding, training, and technical assistance.<sup>293</sup> In light of the heightened sentencing authority provided in TLOA, a number of Indian nations would like to increase their overall capacity to handle criminal jurisdiction. While some would like to build or expand a tribal detention facility, others would like to provide indigent defense counsel and hire a licensed, law-trained judge.<sup>294</sup> Many more would like technical assistance regarding the requirements to exercise the new sentencing authority.<sup>295</sup>

### **iii. Non-PL 280 and PL 280 Considerations**

The financial situation is even more dire for those Indian nations in mandatory and optional PL 280 states. In 1953, when PL 280 went into effect, states were vested with the authority to enforce the same laws within Indian country as they were able to enforce outside of Indian country. States, however, were provided no additional federal funding to enforce their new authority in Indian country. At the same time, because the self-determination contract process was not yet in place, Indian nations were unable to subsidize law enforcement on their lands and their authority to administer their own law enforcement services declined significantly.<sup>296</sup>

Beginning in the 1990s, however, some Indian nations in PL 280 states began exercising limited jurisdiction over their territories through contracts authorizing them to carry out federal enforcement of special federal laws such as those criminalizing liquor, trespass, gaming, and certain other criminal offenses.<sup>297</sup> This required conferral of federal peace officer status, which

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<sup>292</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 27 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>. See also discussion in Part IV.B.3.

<sup>293</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R 2 (2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>294</sup> *Id.* at 11.

<sup>295</sup> *Id.*

<sup>296</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 6 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>297</sup> *Id.*

many Indian nations welcomed, though conferral of such status did not mean additional funding to exercise such authority.<sup>298</sup>

PL 280 did not divest Indian nations of jurisdiction. However, for Indian nations desiring to exercise law enforcement authority in PL 280 states, funding has been largely nonexistent. Recently, four Indian nations located in California, a mandatory PL 280 state, brought an action against the Secretary of the Interior, alleging discrimination based on an unwritten policy “not to provide any money appropriated by Congress for law enforcement services by 638 Contract or otherwise in the state of California, on the grounds that California is a PL 280 state.”<sup>299</sup> In a similar case, a federal court in California concluded that the policy was arbitrary: “[T]he Court finds the Defendants may not decline Plaintiff’s 638 contract for law enforcement funding solely on the basis of Plaintiff’s location in a PL 280 state. Defendants’ policy violates the ISDEAA, the APA, and Plaintiff’s right to equal protection of the law.”<sup>300</sup> However, the Ninth Circuit reversed that favorable decision when it held that the Secretary of the Interior appropriately denied the Indian nations’ 638-contract proposal and did not violate their equal protection rights because the allocation of law enforcement resources “is an exercise of agency discretion.”<sup>301</sup>

The funding situation remains much worse for those Indian nations located in PL 280 states than in non-PL 280 states. For those Indian nations situated in mandatory PL 280 states, funding from the DOI was just 20% per capita of what it was for non-PL 280 Indian nations in 1998.<sup>302</sup> Although funding has increased substantially in the last decade, this has “not been nearly enough to compensate for a decline in spending power, which had been evident for decades before that, nor to overcome a long and sad history of neglect and discrimination.”<sup>303</sup> Many Indian nations in PL 280 states have taken it upon themselves to finance law enforcement in Indian country, particularly the Tulalip Tribes who successfully lobbied the State of Washington to retrocede from PL 280 jurisdiction.<sup>304</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> *Complaint*: Hopland Band of Pomo Indians, et. al. v. Salazar, No. CV-12-00556 CRB, slip op. at 7 (N.D. Cal., Feb. 2, 2012). Note: A decision on plaintiffs’ motion for summary judgment is pending.

<sup>300</sup> *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, 2011 WL 5118733, 3 (S.D. Cal. 2011).

<sup>301</sup> *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 2012, 1028 (9<sup>th</sup> Cir. 2013).

<sup>302</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, ix (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>303</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 9 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

<sup>304</sup> Leah Catherine Shearer, *Justice in Indian Country: A Case Study of the Tulalip Tribes* (2011) (unpublished manuscript), available at <http://turtletalk.files.wordpress.com/2012/02/justice-in-indian-country-a-casestudy-of-the-tulalip-tribes1.pdf> (The majority of funding provided to the Tulalip Tribal Court and related departments is internal with the tribes providing roughly 90% of the Tulalip Tribal Court budget each year).

## **b. Detention Facilities**

Detention facilities are in a state of crisis in Indian country, as they are throughout much of the country. Tribal jails are overcrowded, in disrepair, and lack the staffing and funding needed to meet the demands of the criminal justice system.<sup>305</sup>

In 2012, a total of 2,364 inmates were confined in 79 tribally-operated facilities, including jails, detention centers, confinement facilities, and other correctional facilities, representing an increase of 5.6% from 2011.<sup>306</sup> A 2011 survey noted a substantial increase in the number of jails and detention centers operating in Indian country in the last 10 years or so, from 69 facilities in 1998 to 80 facilities in 2011.<sup>307</sup> The percentage of convicted inmates in these jails increased from 57% in 2002 to 69% in 2009.<sup>308</sup>

Tribal jails varied in their stability in bed space use in 2011.<sup>309</sup> Of the 79 tribally-operated facilities in 2012, 14 jails held 51% of the total inmate population in Indian country.<sup>310</sup> In 2001, the 10 largest jails operated at 142% capacity. The Pine Ridge Correctional Facility housed 7.5 times its capacity; the Tohono O’odham Detention Center housed 3 times its capacity; the Navajo Department of Corrections exceeded its capacity for holding inmates by almost 65%.<sup>311</sup> By comparison, other tribal jails operated at 70% capacity in 2011.<sup>312</sup>

According to a more recent 2011 GAO report, Indian nations operated 62 detention programs pursuant to self-determination contracts or self-governance compacts, the BIA directly operated an additional 19 tribal detention programs, and, according to the BIA, 10 tribal detention programs were suspended or closed due to lack of adequate staffing.<sup>313</sup> In 2002, of the

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<sup>305</sup> S. Rep. No. 111-93, at 8 (2009).

<sup>306</sup> TODD D. MINTON, U.S. DEP’T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

<sup>307</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 12 (2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>308</sup> TODD D. MINTON, U.S. DEP’T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 8 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

<sup>309</sup> *Id.* at 3.

<sup>310</sup> *Id.* at 2.

<sup>311</sup> U.S. Comm’n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 9 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf> (“Prisons across the United States also are overcrowded, but not nearly to the extent of those in Indian Country. At year-end 1998, the most recent year for which data are available, the federal prison system was operating at 27% over capacity, and state prisons overall were operating at 13% above their highest capacity”).

<sup>312</sup> TODD D. MINTON, U.S. DEP’T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

<sup>313</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 8 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.



25 Indian nations with the largest tribal police departments, 14 (56%) operated at least one jail on their land in 2002.<sup>314</sup>

Many tribes do not operate juvenile detention facilities. In 2002, less than 10% of all Indian nations reported having their own juvenile residential facility, while 41% used a county facility and 17% used the facility of another Indian nation.<sup>315</sup> Of those with a tribal court system, 13% had their own juvenile residential facility.<sup>316</sup> However, even Indian nations with their own juvenile residential facility still elected to use the facilities of another Indian nation (26%) or county (68%).<sup>317</sup>

For those detained in Indian country in 2011, the expected average length of detention was just 5.5 days, even though 3 in 10 inmates were being confined for a violent offense.<sup>318</sup> The ratio of inmates to jail employees in Indian country jails decreased markedly since 2004<sup>319</sup> and is well below the national average.<sup>320</sup>

Indian country jails continue to suffer from overcrowding and understaffing. Half of Indian nations surveyed in 2011 noted that they lacked adequate detention space to house offenders convicted in tribal court.<sup>321</sup> Most tribal detention facilities were constructed to house offenders for a very short period of time, primarily because all Indian nations lacked the authority under federal law to imprison Native offenders for more than one year prior to enactment of TLOA. As a result, one survey noted that at midyear 2011, 43% of inmates in Indian country jails had not yet been convicted.<sup>322</sup> A few Indian nations have begun to exercise their enhanced sentencing authority under TLOA and have opted to take advantage of the Bureau of Prisons Pilot Program to house offenders convicted in tribal court. At least two tribes,

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<sup>314</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 44 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>. See also BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 5 (2011), available at <http://www.bjs.gov/content/pub/pdf/tle08.pdf> (This represents an increase from 2008 data which indicated that of the 25 Indian nations with the largest tribal police departments, one in six (17%) operated at least one jail, and one in ten (10%) operated at least one overnight lockup facility separate from the jail).

<sup>315</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 43 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 5-6 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

<sup>319</sup> *Id.* at 7 (The ratio of inmates to employees in Indian country jails was 2.1 to 1 in 2011 and 2.5 to 1 in 2004).

<sup>320</sup> Rebecca A. Hart & M. Alexander Lowther, *Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 213 (2008) (The ratio in comparable facilities in 1998 was 2.0 inmates per correctional facility staff).

<sup>321</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 18 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>322</sup> TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 7 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.

including the Confederated Tribes of the Umatilla Indian Reservation in Oregon and the Eastern Band of Cherokee Indians in North Carolina,<sup>323</sup> have elected to use the Pilot Program to have an inmate transferred to federal custody.

Due to overcrowding and understaffing, tribal courts are often “forced to make difficult decisions such as (1) foregoing sentencing a convicted offender to prison, (2) releasing inmates to make room for another offender who is considered to be a greater danger to the community, and (3) contracting with state or tribal detention facilities to house convicted offenders, which can be costly.”<sup>324</sup> An informal survey of tribal judges revealed that if more prison space were available, they would sentence up to 25% more offenders.<sup>325</sup> A recent BIA report revealed that, in 2008, “[o]nly half of the offenders are being incarcerated who should be incarcerated; the remaining are released through a variety of informal practices due to severe overcrowding in existing detention facilities.”<sup>326</sup> In PL 280 states, it is common for tribal court judges to impose monetary penalties or restitution as opposed to jail sentences due to lack of detention facilities.<sup>327</sup>

Perhaps most troubling is that the present conditions of tribal jails and detention centers leave survivors of domestic violence and dating violence vulnerable and at clear risk of further harm because only a small number of tribal facilities are equipped to detain offenders, or to provide rehabilitation services such as mental health and substance abuse counseling, domestic violence counseling, and sex offender treatment.<sup>328</sup> This contributes to a major gap between needs and services, which is especially stark considering that, in 2012, much of the Indian country inmate population was incarcerated for domestic violence (15%) and aggravated or simple assault (9%).<sup>329</sup>

The 2008 Report on a Master Plan for Justice Services in Indian Country acknowledged in its findings that: the character of offenses are changing from misdemeanors to violent crimes; 90% or more of existing justice facilities are older than five years and in need of extensive repairs; jail policies, if they exist, are lax; jails are understaffed and existing staff lack adequate

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<sup>323</sup> Office of the Tribal Prosecutor, *Tribal Court issues four year sentence on heels of Tribal Law and Order Act*, CHEROKEE ONE FEATHER, Apr. 18, 2013, available at <http://theonefeather.com/2013/04/tribal-court-issues-four-year-sentence-on-heels-of-tribal-law-and-order-act/>.

<sup>324</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 18 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>325</sup> See Bureau of Indian Affairs, U.S. Dep’t of the Interior, *Master Plan for Justice Services in Indian Country, Year 2007 to Year 2017, Draft Final Report 20* (2008), available at <http://www.indian.senate.gov/sites/default/files/upload/files/61908draft2.pdf>.

<sup>326</sup> Id. at 9.

<sup>327</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 14-15 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>328</sup> Rebecca A. Hart & M. Alexander Lowther, *Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 213 (2008) (The ratio in comparable facilities in 1998 was 2.0 inmates per correctional facility staff).

<sup>329</sup> TODD D. MINTON, U.S. DEP’T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2012, 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/jic12.pdf>.



training; contract beds at state and local jails are not readily available; only a few tribal jails provide rehabilitation programs; and little to no health care is provided for inmates.<sup>330</sup> The Report specifically found that of the jails older than five years, 90% should be replaced, and that many existing operational jails will soon become inoperable.<sup>331</sup>

TLOA attempts to address some of the shortcomings found in the Indian country detention system. Most significantly, § 304 of TLOA requires the federal Bureau of Prisons, through a Pilot Program, to imprison Indian offenders convicted of a violent crime in tribal court and sentenced to a term of imprisonment of two years or more.<sup>332</sup> The Pilot Program, which expires in 2014,<sup>333</sup> is limited to no more than 100 offenders at one time.<sup>334</sup> Likewise, TLOA mandates changes to the Special Law Enforcement Commission (SLEC) program to authorize the BIA to enter into agreements with other governments regarding use of their personnel or facilities to aid in the enforcement of federal or tribal law in Indian country.<sup>335</sup> Finally, § 404 of TLOA reauthorizes and amends the DOJ tribal jails construction program to encourage construction of facilities for long-term incarceration, to increase the efficiency of tribal justice systems, and to require DOJ and BIA to develop a long-term plan for tribal detention centers.<sup>336</sup>

To address some of the concerns with tribal detention facilities, Indian nations are creatively proposing alternatives such as multipurpose justice centers, regional facilities, and contracting out for facilities.<sup>337</sup> Some Indian nations provide services to local non-Indian communities, such as the Sault Ste. Marie Tribe of Chippewa in Michigan, whose juvenile facility is licensed by the state and provides contract beds to neighboring communities.<sup>338</sup>

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<sup>330</sup> See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Master Plan for Justice Services in Indian Country, Year 2007 to Year 2017, Draft Final Report* (2008), available at <http://www.indian.senate.gov/sites/default/files/upload/files/61908draft2.pdf>.

<sup>331</sup> *Id.* at 10.

<sup>332</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 24 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>333</sup> The four year limitation begins from the date of TLOA's enactment on July 29, 2010 unless reauthorized.

<sup>334</sup> S. Rep. No. 111-93, at 19 (2009).

<sup>335</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 26 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>336</sup> S. Rep. No. 111-93, at 25 (2009).

<sup>337</sup> U.S. Dep't of Justice, *Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems*, 31 (2011), available at [www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf](http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf). (For instance, the Shoshone-Bannock Tribes' multi-purpose center in Idaho houses an adult jail with 80 beds, a juvenile detention center with 20 beds, a medical examination room, classroom, dayrooms, office space, a multi-purpose room, visitation area, and outdoor recreation area, as well as a courtroom, court offices, police station, dispatch and other law enforcement functions. The Omaha, Winnebago, Ponca, and Santee Sioux Nation are working cooperatively in Nebraska to develop regional Adult and Juvenile Multi-Justice Centers. Other Indian nations such as the Reno-Sparks Indian Colony, Fallon Paiute Shoshone Tribe, and others in Nevada are developing a Regional Tribal Justice Facility through the Inter-Tribal Council of Nevada).

<sup>338</sup> *Id.*

### c. Victims Advocacy

Organizations seeking to end sexual and domestic violence are on the front lines of fighting the epidemic of violence against Native women today. Often the true first responders, these advocates are essential to the effort to end violence against Native women and, as such, “should be a priority for the federal government and foundations capable of supporting community-based organizations.”<sup>339</sup>

Indian governments are not alone in the struggle to protect Native women; there are many organizations working hard to end violence against Native women. Notably, the National Indigenous Women’s Resource Center is “[d]edicated to restoring safety to Native women by upholding the sovereignty of Indian and Alaska Native tribes”<sup>340</sup> and operates under a federal grant project to enhance the capacity of Indian nations to respond to domestic violence. There are dozens more tribally-run programs working to end domestic and sexual violence against Native women, but a full analysis is beyond the scope of this report.

Strengthening, streamlining, and helping to coordinate the work of the dozens of tribal organizations are tribal coalitions. One significant source of funding for tribal coalitions is the Tribal Domestic Violence and Sexual Assault Coalitions Grant Program. The Grant Program was first authorized in the Violence Against Women Act of 2000 and “builds the capacity of survivors, advocates, Indian women’s organizations, and victim service providers to form nonprofit, nongovernmental tribal domestic violence and sexual assault coalitions to end violence against American Indian and Alaska Native women.”<sup>341</sup> In 2008, the Program provided \$3 million for 11 new projects, increasing the number of tribal coalitions to 23 located in 13 states.<sup>342</sup> Some of the tribal coalitions include the Alaska Native Women’s Coalition (AK), the Hopi-Tewa Women’s Coalition to End Abuse (AZ), the Strong Hearted Women’s Coalition (CA), the Uniting Three Fires Against Violence Coalition (MI), the Minnesota Indian Women’s Sexual Assault Coalition (MN), Sacred Spirits (MN), First Nation’s Women’s Alliance (ND), Native Women’s Society of the Great Plains (SD), Sicangu Coalition Against Sexual Assault and Domestic Violence (SD), and American Indians Against Abuse, Inc.<sup>343</sup>

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<sup>339</sup> Rebecca A. Hart & M. Alexander Lowther, *Comment, Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 232 (2008) (The ratio in comparable facilities in 1998 was 2.0 inmates per correctional facility staff).

<sup>340</sup> National Indigenous Women’s Resource Center: National Resource Center to Enhance Safety of Native Women and their Children, *Mission, Work, and Philosophy*, [www.niwrc.org](http://www.niwrc.org), [www.niwrc.org/about-us/mission-work-and-philosophy](http://www.niwrc.org/about-us/mission-work-and-philosophy) (last visited Dec. 19, 2013).

<sup>341</sup> U.S. Dep’t of Justice, Office of Violence Against Women, *Tribal Communities*, [www.ovw.usdoj.gov/tribal.html](http://www.ovw.usdoj.gov/tribal.html) (last visited Dec. 19, 2013).

<sup>342</sup> *Id.*

<sup>343</sup> See List of Tribal Coalitions receiving grant funding from the Office of Violence Against Women, U.S. Dep’t of Justice, Office of Violence Against Women, *Tribal Awards*, [www.ovw.usdoj.gov/tribal-awards.html](http://www.ovw.usdoj.gov/tribal-awards.html) (last visited Dec. 19, 2013).

## C. Inter-Governmental Coordination

While the relationships between Indian nations and federal, state, and local governments have sometimes been adversarial, the importance of intergovernmental coordination and the use of intergovernmental agreements in combating violence in Indian country cannot be stressed enough. Which government has jurisdiction to investigate and prosecute a crime depends on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. In Indian country, police powers follow a determination of which government has criminal jurisdiction over the alleged crime - tribal, federal, or state. Authority for other law enforcement powers – i.e., to stop, detain, arrest, and investigate – are subject to nearly all the same jurisdictional complications associated with the authority to prosecute. To lessen the effects of this jurisdictional maze and to increase safety in Native communities, Indian nations are looking to increase intergovernmental cooperation, whether in the form of formal cross-deputation or other agreements, or simply through increased communication with local agencies. Intergovernmental agreements can offer important benefits, particularly in the area of law enforcement services where tribal resources are often scarce. Such agreements also allow governments to focus on addressing public safety concerns without necessarily conceding jurisdictional authority or definitively deciding jurisdictional questions.

Funding is a major issue for Indian nations working to improve public safety on their lands, particularly in PL 280 states. Indian nations located in PL 280 states have increasingly been using their own funds to establish tribal police forces and to fill gaps left by state law enforcement.<sup>344</sup> Lack of federal oversight over law enforcement in Indian country within PL 280 states creates even greater incentive for Indian nations to establish cooperative agreements with state and local agencies, particularly where tribal and state resources can be leveraged and used much more effectively.<sup>345</sup> A recent DOJ report indicates a new era of partnership between the federal government and Indian nations in collaborative law enforcement.<sup>346</sup>

### 1. Cross-Deputation

Cross-deputation agreements can help federal, tribal, and state and local law enforcement authorities navigate jurisdictional confusion. Such agreements allow tribal officers to enforce state and local law, and state and local officers to enforce tribal law, regardless of the race of the alleged perpetrator, the location of the alleged crime, or the race of the victim.<sup>347</sup> Generally,

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<sup>344</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 12 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>345</sup> *Id.* at 17.

<sup>346</sup> U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions 2011-2012*, 8 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>347</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 11-12

agreements are reduced to writing in a Memorandum of Agreement or Understanding between the governmental parties and pursuant to tribal and state or local law.<sup>348</sup> As a general rule, authority to enter into memoranda requires tribal authority, typically in the form of a tribal ordinance or resolution authorizing the tribe or a tribal entity to grant authority to outside law enforcement agencies, and state authority, typically in the form of a state statute authorizing state and/or local governments to enter into such agreements through commissioning or deputizing tribal officers. Such statutory authority presently exists in a growing number of states, including Wisconsin, Minnesota, Kansas, California, Nevada, Arizona, and New Mexico, among others.<sup>349</sup> To enforce provisions of federal law in Indian country, Indian nations may participate in the SLEC program, under which tribal officers may be deputized as federal law enforcement officers.<sup>350</sup>

Benefits of cross-deputation agreements include “increased crime control, the ability to use the other’s facilities and equipment, closure of jurisdictional cracks, mutual assistance, faster response times, and the ability to handle the others’ calls during staff shortages.”<sup>351</sup> Cross-deputation agreements between an Indian nation and local or state government also can be used to leverage limited tribal law enforcement funding and to facilitate sharing of finite resources. As noted, the SLEC program authorizes the BIA to enter into agreements with other governments regarding the use of their personnel or facilities to enforce federal or tribal law in Indian country.<sup>352</sup> Increasingly, police departments in Indian country are employing both tribal and BIA officers through the Community Oriented Policing Service (COPS) program. Through the COPS program, local police officers are funded as tribal employees while the BIA funds the federal officers operating in Indian country.<sup>353</sup>

One of the primary concerns with cross-deputation agreements is that they can be rescinded by either party at any time, so their use may be limited and even fleeting depending on

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(2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>348</sup> Paul Stenzel, *MOU’s and MOA’s: A Cooperative Approach to Law Enforcement on the Reservation*, 17<sup>th</sup> Annual Multi-Jurisdictional Conference, November 5, 2005, 2, available at <http://www.paulstenzel.com/multi-j-110305.pdf>.

<sup>349</sup> *Id.*

<sup>350</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 26 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>351</sup> EILEEN LUNA-FIREBAUGH, ET AL., *Law Enforcement and the American Indian: Challenges and Obstacles to Effective Law Enforcement*, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 117, 125 (Jeffrey Ian Ross & Larry Gould, eds., 2006).

<sup>352</sup> See Part IV.B.1 above.

<sup>353</sup> STEWART WAKELING, ET AL., DEP’T OF JUSTICE, *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT’L INST. OF JUSTICE* 8 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

(TLOA authorizes long-term COPS funding and makes Alaska Village Public Safety Officers eligible for COPS funding).

the will of tribal, state, and local officials.<sup>354</sup> Though Indian nations generally express support for cross-deputation agreements, there is concern that state authorities are overzealous in their prosecution of Indians.<sup>355</sup> Others have voiced concern that intergovernmental cooperation may not be culturally compatible with the values of Indian nations.<sup>356</sup> Recently, the authority of cross-deputized tribal officers has come into question, but that authority has generally been upheld.<sup>357</sup>

### a. Frequency of Use

Most Indian nations have cross-deputation agreements, often with state and local governments, and also with other tribal governments.<sup>358</sup> In 2002, 99% of the 165 tribal law enforcement agencies studied had cross-deputation agreements with BIA law enforcement, other local Indian nations, villages, non-tribal authorities, or federal law enforcement agencies other than the BIA.<sup>359</sup> Of those Indian nations that reported using cross-deputation agreements, over 50% (84) were with neighboring non-tribal authorities, and 53% (86) were in mandatory or optional PL 280 states.<sup>360</sup> In 2008, 7 of 11 (64%) PL 280 Indian nations surveyed had cooperative agreements with local law enforcement agencies.<sup>361</sup>

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<sup>354</sup> JENNIFER FAHEY, ET AL., CRIME AND JUSTICE INST. AT COMMUNITY RESOURCES FOR JUSTICE, CRIME AND JUSTICE IN INDIAN COUNTRY: A SUMMARY OF TALKING CIRCLE FINDINGS AND THE TRIBAL LAW AND ORDER ACT OF 2010, 17 (2011).

<sup>355</sup> *Id.* at 18.

<sup>356</sup> Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICHIGAN L. REV. 709, 735 (2006).

<sup>357</sup> See, e.g., *State of Oklahoma v. Ferguson*, No. S-2012-653 (Okla. Crim. App. Filed July 15, 2013) (upholding authority of tribal police with state peace officer status to execute search warrant off-reservation), *rev'g* *State of Oklahoma v. Ferguson*, No. CF-2011-103 (D. Ct. Ottawa County OK July 12, 2012); *Estate of Grace Kalama v. Jefferson County*, No. 3:12-cv-01755-SU (D. Or. May 21, 2013) (adopting magistrate's findings and recommendation to dismiss actions against Tribal Police Officer because an Indian tribe is subject to suit in state or federal court only "when Congress has authorized the suit or the tribe has waived its immunity"); *Maxwell v. County of San Diego*, 697 F.3d 941 (9<sup>th</sup> Cir. 2012) (holding tribal paramedics are not entitled to tribal sovereign immunity when the remedy operates against the individuals, and not the tribal treasury); *State v. Garrison*, No. 7747A-11D (Snohomish County D. Ct. WA July 19, 2012) (evidence obtained by a tribal police officer off-reservation suppressed despite state peace officer status because the required interlocal agreement was not in effect at relevant time and the agreement itself limits authority to within the reservation boundaries).

<sup>358</sup> See Jerry Gardner, Tribal Law and Policy Institute, *Improving the Relationship between Indian Nations, the Federal Government, and State Governments* (2003), <http://www.tribal-institute.org/articles/mou.htm> (last visited Dec. 19, 2013); Stanley G. Feldman and David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 *Judicature* 154 (1995); U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 26 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf> (noting that one of the primary hurdles to improved safety among Indian communities is better communication between federal, state, and tribal agencies).

<sup>359</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 5 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at ix.

In Michigan, 9 of the 12 federally-recognized Indian nations have a cross-deputation agreement with local law enforcement.<sup>362</sup> In Oklahoma, Indian nations have entered into 89 cross-deputation agreements with state and county law enforcement.<sup>363</sup> The Cherokee Nation Marshal Service alone is cross-deputized with 50 municipal, state, and federal agencies.<sup>364</sup> Washington recently passed state legislation granting cross-deputation to all tribal officers within the state, including authority to arrest non-Indians on tribal lands so long as certain training requirements are met and an appropriate MOU is entered into with neighboring jurisdictions.<sup>365</sup> The Confederated Kootenai and Salish Indian nations of Montana also have entered into several cross-deputation agreements with state and local authorities.<sup>366</sup>

Even if there is no formal cross-deputation agreement, or if it grants only unilateral authority, states may still recognize tribal police as having state peace officer authority, thus allowing them to arrest tribal offenders off-reservation and to detain non-tribal offenders on-reservation for violations of state law. According to 2002 data, 56% (93 of 165) of tribes that employed one or more full-time sworn officers with general arrest powers were also recognized by their state to possess state peace officer authority, meaning they have the authority to arrest Indians off-reservation or detain non-Indians committing violations of state law on the reservation.<sup>367</sup> While 45% (74 of 165) of tribes had arrest authority over tribal members off-reservation, a much greater percentage had arrest authority over non-Indians committing offenses on-reservation (62% or 101 of 165). Of the 93 tribes with state peace officer authority, 54% were located in PL 280 states.

## b. Other Agreements

Cross-deputation is just one of many possible administrative arrangements available. Cooperative intergovernmental agreements generally allow for a sharing of resources, mutual

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<sup>362</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 18 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>363</sup> Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, NATIVE ISSUES RESEARCH SYMPOSIUM, December 4-5, 2003, 11, n.22 (Revised 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=529084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=529084).

<sup>364</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/tle08.pdf>.

<sup>365</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 25 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>366</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 21 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>367</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 5 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf> (While officers of the Tulalip Tribal Police Services lack state peace officer authority, they still have arrest authority over non-Indians on the reservation).



assistance and support, and technical training among law enforcement entities.<sup>368</sup> TLOA explicitly authorizes grants, technical, and other assistance to encourage cooperative law enforcement agreements between tribal, state, and local law enforcement agencies.<sup>369</sup>

Cooperative agreements are just as varied as intergovernmental arrangements for law enforcement in Indian country. Indian nations may wish to pursue a security contract with state officers to provide extra law enforcement support for certain events or problems. Indian nations also may pursue a hybrid program that allows tribal, state, and local authorities to design their own agreements unique to their specific set of problems within their jurisdiction. For instance, Indian nations can already contract certain BIA police functions. While Indian nations may be responsible for patrol functions, BIA officers would be responsible for criminal investigations.<sup>370</sup>

Agreements may also take the form of mutual aid, allowing law enforcement officers to assist each other in a limited set of circumstances, usually emergencies. This arrangement is particularly common where the BIA takes on policing authority in Indian country.<sup>371</sup>

Another alternative is community policing, otherwise known as community oversight committees, by which Indian nations can work with local police agencies to pool resources and address crime in a way that reflects the values of the community.<sup>372</sup> Community policing also provides oversight and accountability, and a conduit to report police misconduct. Of the 49 Indian nations responding to a survey on community policing, 25 indicated using components of community oversight.<sup>373</sup> Indian nations may seek to enter into an agreement with state police and then to pursue a legislative fix to recognize the agreement.<sup>374</sup> Finally, there may be narrow agreements regarding a specific issue such as the doctrine of hot pursuit.

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<sup>368</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 29 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>369</sup> S. Rep. No. 111-93, at 23 (2009).

<sup>370</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE ix (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>371</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 12 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

<sup>372</sup> STEWART WAKELING, ET AL., DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NAT'L INST. OF JUSTICE 8 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

<sup>373</sup> Eileen Luna, *Seeking Justice: Critical Perspectives of Native People: Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUBLIC POL'Y REV. 149, 157 (1999).

<sup>374</sup> HANNAH BOBEE, ET AL., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputation*, in MICHIGAN STATE UNIV. COLL. OF LAW: INDIGENOUS LAW & POLICY CTR. OCCASIONAL PAPER SERIES 28-29 (2008), available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.

### c. Authority of Cooperative Agreements

Recently, there have been a number of legal challenges to the authority of state-tribal cooperative agreements. In the state of New York, the United States District Court for the Northern District of New York found tribal police officers without authority to conduct a search beyond the recognized boundaries of the St. Regis Mohawk Reservation where the tribal police officer was cross-designated as a federal customs officer.<sup>375</sup> The tribal police officers were cross-designated by Immigration Customs Enforcement pursuant to 9 U.S.C. § 1401(i) and through a Memorandum of Understanding between the ICE Special Agent in Charge and the St. Regis Mohawk Police Department, which authorized customs searches at the border or the functional equivalent of the border by authorized tribal police officers.

In the state of Washington, a tribal police officer who made a valid arrest on the Tulalip Reservation was found to be without authority to administer a breathalyzer test off-reservation.<sup>376</sup> The officers arrest authority was based on a Cooperative Law Enforcement Agreement Between the Tulalip Tribes of Washington and Snohomish County. The state of Washington had also enacted legislation authorizing tribal officers to act as “general authority state peace officers” with the ability to enforce state laws, but the court held that because the Cooperative Agreement was not in effect at the time of the arrest, the tribe lacked authority based solely on the state statute.

Likewise, in the state of Oklahoma, the District Court granted a motion to suppress evidence that was obtained by a tribal police officer off-reservation.<sup>377</sup> The tribal police officer, despite having state peace officer authority by Oklahoma statute, was held to be without authority in the absence of a cross-deputation agreement. That decision was later reversed when the court found tribal police officers had the requisite state peace officer authority.<sup>378</sup>

Mutual aid agreements have also recently come under attack. In the state of California, the Court of Appeals for the Ninth Circuit held that paramedics employed by the Viejas Band of Kumeyaay Indians Tribal Fire Department do not enjoy tribal sovereign immunity despite the existence of a mutual aid agreement between the Band and the local Alpine Fire Protection District.<sup>379</sup> The paramedics responded to a call off-reservation that, through no fault of theirs, resulted in a fatality. The court created a remedies-based test, finding that because any damages

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<sup>375</sup> United States v. Wilson, 754 F.Supp. 2d 450 (N.D.N.Y. 2010), *rev'd and remanded*, No. 11-915 (2d Cir. Oct. 25, 2012), available at <http://turtletalk.files.wordpress.com/2012/10/us-v-wilson-ca2-opinion.pdf>.

<sup>376</sup> State of Washington v. Garrison, No. 7747A-11D (Snohomish County Dist. Ct. WA, July 12, 2012), available at <http://turtletalk.files.wordpress.com/2012/07/state-v-garrison.pdf>.

<sup>377</sup> State of Oklahoma v. Ferguson, No. 2011-103 (Ottawa County Dist. Ct. OK, June 22, 2012), available at <http://turtletalk.files.wordpress.com/2012/07/order-granting-mot-to-suppress-6-22-12.pdf>.

<sup>378</sup> State of Oklahoma v. Ferguson, No. S-2012-653 (Okla. Crim. App. Filed July 15, 2013).

<sup>379</sup> Maxwell v. County of San Diego, 697 F.3d 941 (9<sup>th</sup> Cir. 2012), *rehearing denied*, 708 F.3d 1075 (9<sup>th</sup> Cir. 2013).



will come from the individual paramedics and not the tribe, the paramedics are being sued in their individual capacities and are not protected by tribal sovereign immunity.

## **2. Data Sharing and Other Collaborative Agreements between Indian Nations and Other Federal, Tribal, or State Governments**

Given the jurisdictional complexity involved in criminal justice systems in Indian country, inter-agency cooperation becomes all the more important to secure public safety on reservations and in surrounding areas. One of the most critical components of cooperation is data-sharing. Not only is data-sharing necessary to provide an accurate picture of the reality and needs of law enforcement in Indian country, but it is also “essential for the effective monitoring of released offenders, and for apprehension of suspected offenders.”<sup>380</sup> Unfortunately, Indian nations as well as federal, state, and local agencies routinely fail to share data with each other.

Although there are few studies on this issue, data from 2002 indicates that nearly 70% of Indian nations record the number and types of criminal incidents using manual (29%), electronic (24%), or both (47%) methods.<sup>381</sup> The 2002 statistics also indicate that while 55% of Indian nations had access to the National Criminal Information Center (NCIC) database, just 18% of Indian nations submitted criminal history records to the state and 17% to the FBI; 72% did not submit any criminal history records to state or federal repositories.<sup>382</sup> Likewise, just 18% of Indian nations submitted information to the FBI’s National Sex Offender Registry (NSOR).<sup>383</sup>

Indian nations remain largely unconnected with federal, state, and tribal justice agencies. In 2002, just 12% of Indian nations were electronically networked with external agencies.<sup>384</sup> Worse, less than 10% were electronically networked with other justice agencies on their reservation.<sup>385</sup> Of 314 Indian nations surveyed, just 12 reported that they routinely share crime statistics with local governments: 14 shared statistics with state governments, and 13 shared statistics with the FBI.<sup>386</sup> Even less common was information-sharing between Indian nations. Without accurate data and sharing of data, it is difficult to gain a clear idea of what the situation of criminal law enforcement in Indian country is and more importantly, where the most pressing needs exist.

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<sup>380</sup> Kimberly Cobb and Tracy Mullins, *Improving the Administration of Justice in Tribal Communities through Information Sharing and Resource Sharing*, THE AMERICAN PROBATION & PAROLE ASSOCIATION 3 (2010), available at [http://tloa.ncai.org/document\\_library/2011/01/Information\\_and\\_Resource\\_Sharing\\_FINAL\\_12-2010.pdf](http://tloa.ncai.org/document_library/2011/01/Information_and_Resource_Sharing_FINAL_12-2010.pdf).

<sup>381</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 57 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

Not only are Indian nations not collecting and sharing criminal data with local, state, federal, and other tribal law enforcement, but federal law enforcement agencies are failing to sufficiently coordinate with each other, and failing to share valuable information with the Indian nations concerned. In a 2011 GAO report, nearly 50% of the Indian nations surveyed said they were not notified whether the FBI or BIA had decided to refer a criminal investigation to the U.S. Attorney's Office for prosecution.<sup>387</sup> Several initiatives have been created to address the lack of inter-agency coordination amongst federal departments. For example, DOJ has begun to consult with BIA regarding construction of tribal jails, which has helped to avoid situations where the DOJ has provided funding for construction of the facility but BIA was unable to provide funding to operate the facility.<sup>388</sup> Likewise, BIA and BJA now serve on a government-wide coordinating body, the Planning Alternatives and Correctional Institutions for Indian Country Advisory Committee, to develop a strategic response to the situation of inadequate jails and alternative detention centers in Indian country.<sup>389</sup> The BIA and DOJ have established a task force to support the activities of the working group, as well as task forces on law enforcement training, violence against women, and crime data collection in Indian country.<sup>390</sup> To meet some of the challenges, the BIA and DOJ also recently issued a Tribal Justice Plan to address incarceration alternatives in Indian country.<sup>391</sup> Despite these initiatives, however, as of November 2010, communication and information-sharing inadequacies remained between the DOJ and the BIA.<sup>392</sup>

There are efforts to improve data sharing. Between 2009 and 2010, over 140 law enforcement officers representing 70 Indian nations received training on the FBI's Uniform Crime Reporting (UCR) Program<sup>393</sup> to encourage tribal reporting to the UCR and improve the accuracy of the reported data.<sup>394</sup> In addition, 21 of those tribal law enforcement agencies completed training on the FBI's National Incident Based Reporting System (NIBRS).<sup>395</sup> With

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<sup>387</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 28 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>388</sup> *Id.* at 31.

<sup>389</sup> *Id.* at 32-33.

<sup>390</sup> *Id.* at 33.

<sup>391</sup> U.S. Dep't of Justice, *Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems* 31 (2011), available at [www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf](http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf)

<sup>392</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 35 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>393</sup> The UCR Program is a national data collection system that captures criminal information. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 6 (2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>394</sup> *Id.*

<sup>395</sup> The National Incident Based Reporting System collects comprehensive and detailed information from local, state, and federal law enforcement agencies. *Id.*

more support and resources for tribal data collection, tribal law enforcement agencies are reporting more crimes more accurately. From 2008 to 2010, the number of tribal law enforcement agencies reporting criminal data to the UCR Program increased dramatically, from just 12 agencies reporting in 2008 to 144 agencies reporting in 2010.<sup>396</sup>

TLOA attempts to address some of the information-sharing and collaboration shortcomings. It does so through efforts to improve tribal reporting procedures to NCIC and criminal data collection and information-sharing systems, and also by requiring the Director of the Bureau of Prisons and the Director of the Administrative office of the U.S. Courts to notify the relevant tribal law enforcement when a person in federal custody will return or move to Indian country.<sup>397</sup> TLOA also requires that a declination report detailing the type of crime, Indian status of victim, and reason for declining to investigate or prosecute be submitted to Congress every year. Further, all USAOs with Indian country responsibility have at least one tribal liaison to serve as the point of contact with Indian nations.<sup>398</sup> Though this program has been in place since 1995, it was codified by TLOA in 2010. Relationships with tribal liaisons generally enhance information-sharing and help in the coordination of federal, state, and tribal criminal prosecutions.<sup>399</sup>

#### **D. Tribal Criminal Justice Systems**

Tribal criminal justice systems are extremely diverse due in part to the development of the unique historical and legal relationships between the individual Indian nations and federal and state governments.<sup>400</sup> Some tribes established courts even before the formation of the United States, some of which continue to function, such as the traditional courts of the Pueblos.<sup>401</sup> In the late 19<sup>th</sup> century, the traditional dispute resolution systems of many tribes were completely displaced by Congress' imposition of the Courts of Indian Offenses (CFR courts).<sup>402</sup> At present, more than 175 Indian nations have developed their own tribal criminal justice systems,<sup>403</sup> and tribal courts have replaced most CFR courts.<sup>404</sup> Some Indian nations are incorporating tradition into their legal systems—either by creating traditional justice forums or

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<sup>396</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 9 (2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>397</sup> S. Rep. No. 111-93, at 23-26 (2009).

<sup>398</sup> U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions 2011-2012*, 25 (May 2013), available at <http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf>.

<sup>399</sup> *Id.*

<sup>400</sup> See generally, JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 41-42 (2004).

<sup>401</sup> Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 299 (1998).

<sup>402</sup> Ryan Dreveskracht, *Tribal Court Jurisdiction and Native Nation Economies: A Trip Down The Rabbit Hole*, 67 NAT'L LAW GUILD REV. 65, 71 (2010).

<sup>403</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 3 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>404</sup> *Id.*

by supplementing their Western-based jurisprudence with traditional dispute resolution techniques or tradition and custom-based law.

## 1. Tribal Courts

### a. Types

Four main types of tribal justice systems operate in Indian country: CFR Courts, tribal courts, traditional justice systems, and intertribal courts. Although there is substantial debate in the literature on the precise number of tribal courts in Indian country, most estimates indicate that there are more than 300 tribal courts among the federally recognized tribes, including Alaska Native courts.<sup>405</sup>

The 2002 Census of Tribal Justice Agencies found that 188 (60%) of the 314 respondents located in the lower 48 have a tribal court system.<sup>406</sup> Among the lower 48 tribes that reported tribal legal systems, 46 (24%) indicated that they use CFR Courts; 178 (95%) operate tribal courts (some tribes use both a CFR Court and a tribal court);<sup>407</sup> 39 (21%) use traditional justice methods or forums;<sup>408</sup> and about 15 (8%) use inter-tribal court systems.<sup>409</sup> The 2002 Census of Tribal Justice Agencies had a response rate of 92%, meaning it probably showed a relatively accurate picture of tribal justice systems in the lower 48 for 2002, but its statistics are now ten years old and much has changed. For instance, as detailed in the following sections, only 20 tribes currently use CFR Courts, and there are now at least six intertribal court systems in operation, rather than the two identified in the 2002 Census of Tribal Justice Agencies.

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<sup>405</sup> A Bureau of Justice Statistics report from 2004 indicates that there are 309 tribal courts among the 562 then-federally recognized tribes—including Alaska Native courts. DAVID ROTTMAN AND SHAUNA STRICKLAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, 190 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>. Perry found 188 tribal courts among 314 participating lower 48 tribes. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, iii (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>. Rottman's number may be higher not only because it takes into account Alaska Native courts (left out by Perry due to low response rates), but also because Rottman counts various courts (e.g., juvenile, traditional, appellate) within a tribal legal system as separate courts, thus resulting in a higher tally than Perry. See also JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 98 n.1 (2004) (estimating 300-350 courts, and explaining the discrepancy of statistics as a difference of opinion based on whether or not to count courts presided over by the tribal council as tribal justice systems); Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 83 (2011) (finding 200 courts in the lower 48 and 160 in Alaska); and Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y ISSUE BRIEF (Mar. 2009), available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf> (finding more than 300 courts).

<sup>406</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 19 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>. With responses from the then 314 federally recognized tribes in the lower 48, the study had a participation rate of 92%. The study did not include statistics regarding Alaska Natives.

<sup>407</sup> *Id.* at 22-30.

<sup>408</sup> *Id.* at 20.

<sup>409</sup> *Id.*

The 2002 Census of Tribal Justice Agencies found most tribal justice systems heard traffic cases, juvenile cases, family law cases, domestic violence protective orders, civil matters, probate claims, and wildlife offenses.<sup>410</sup> More than half of the responding tribal legal systems had at least one general jurisdiction court, 25% had a juvenile court, and 16% had a separate family court.<sup>411</sup>

While additional data and research is forthcoming,<sup>412</sup> the 2002 Census of Tribal Justice Agencies, despite its limitations, still provides the most detailed and extensive data on tribal court systems.

### **i. CFR Courts**

CFR Courts, named after the Code of Federal Regulations which they administer, are remnants of a late 19<sup>th</sup> century court system designed during the era of assimilation for American Indians. CFR Courts were originally used to undermine traditional sources of law and authority, and to suppress traditional cultural and religious practices.<sup>413</sup> Between the 1880s and 1934, CFR Courts operated on about two-thirds of all reservations.<sup>414</sup> Since then, they have largely been replaced by tribal courts. Today, CFR Courts serve as the justice system for 20 tribes that have not yet established a tribal court to exercise criminal jurisdiction.<sup>415</sup>

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<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> Recently, the Bureau of Justice Statistics (BJS) announced that it is coordinating the 2012 National Survey of Tribal Courts to expand data collection and activities related to tribal criminal justice systems. *See* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 11 (2012), AVAILABLE at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>. Information to be gathered includes budgets, staffing, caseloads and case process, indigent defense services, implementation of various enhanced sentencing provisions of TLOA, and the types of traditional dispute forums operating in Indian country. Indian nations were asked to respond by July 2013, with the reported data to be available in 2014.

<sup>413</sup> Carole Goldberg, *Overview: U.S. Law and Legal Issues*, in THE NATIVE NORTH AMERICAN ALMANAC 470-473 (Duane Champagne, ed., 2001), in JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 62 (2004).

<sup>414</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 20 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>415</sup> Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 83 (2011). A CFR court also serves the Santa Fe Indian School Property serving 19 pueblos in New Mexico. The twenty tribes include: Te-Moak Band of Western Shoshone Indians (NV); Winnemucca Indian Tribe (NV); Ute Mountain Ute Tribe (CO); tribes located in former Oklahoma Territory (i.e., Apache Tribe of Oklahoma; Caddo Nation of Oklahoma; Comanche Nation (except Comanche Children's Court); Delaware Nation; Fort Sill Apache Tribe of Oklahoma; Kiowa Tribe of Oklahoma; Otoe-Missouria Tribe of Oklahoma; and Wichita and Affiliated Tribes of Oklahoma) and tribes located in the former Indian Territory (OK) (i.e., Choctaw Nation; Seminole Nation; Eastern Shawnee Tribe; Miami Tribe; Modoc Tribe; Ottawa Tribe; Peoria Tribe; Quapaw Tribe; and Wyandotte Nation. 25 C.F.R. § 11.100.

## ii. Tribal Courts

Tribal courts enforce tribal constitutions and codes, and are the judicial system of choice for the majority of tribes.<sup>416</sup> Tribal court systems vary widely in size. The Navajo Nation, with 15 trial judges and 3 appellate court justices, had the largest tribal court in 2002.<sup>417</sup> The next largest, at White Earth, employed 9 trial judges and 3 appellate court justices.<sup>418</sup> Only 14 tribes indicated having 5 or more judges on staff; 51 had just one full time tribal court judge, and 81 operated without a full time tribal court judge.<sup>419</sup>

Alaska tribal courts are excluded from this data, but the literature suggests that Alaska tribal courts deal mostly with ICWA matters<sup>420</sup> and are usually presided over by the village chief or tribal council.<sup>421</sup> The Village of Kake and the Metlakatla Tribe are the only Alaska Native communities that take on criminal cases beyond their ICWA caseload.<sup>422</sup> Roughly 58% of tribes in the lower 48 states reported having an appellate court in 2002.<sup>423</sup>

## iii. Traditional Courts and Traditional Methods

While most tribal courts are based on a Western model of justice, at least 39 tribes report using traditional methods and/or forums for dispute resolution.<sup>424</sup> Traditional courts are marked by non-adversarial and culturally distinct forms of dispute resolution.<sup>425</sup> Customary and tradition-based justice systems may take the form of peacemaker courts or councils of elders, and may use sentencing circles.<sup>426</sup>

Traditional courts often operate as adjuncts or alternative divisions within western-model tribal court systems, but at least one tribe, the Pueblo of Taos, inverts this relationship and operates its western-model tribal court as an alternative forum to its two traditional courts. One

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<sup>416</sup> Perry found that 56% (175 of 314 responding) of tribes have tribal courts. STEVEN W. PERRY, BUREAU OF U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 20 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>417</sup> *Id.* at 37-42.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> The Harvard Project on American Indian Economic Development, *Honoring Nation 2003 Honoree: Kake Circle Peacemaking*, 4, at <http://www.hpaied.org/images/resources/publibrary/Kake Circle Peacemaking.pdf>.

<sup>421</sup> See JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 98 n.1 (2004).

<sup>422</sup> The Harvard Project on American Indian Economic Development, *Honoring Nation 2003 Honoree: Kake Circle Peacemaking*, 4, at <http://www.hpaied.org/images/resources/publibrary/Kake Circle Peacemaking.pdf>.

<sup>423</sup> See STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 20 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>. (indicating that 103, or 58%, of lower 48 tribes with a tribal justice system have an appellate court).

<sup>424</sup> *Id.* at Appendix Question B2.

<sup>425</sup> JUSTIN B. RICHLAND AND SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 75 (2004).

<sup>426</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 19 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.



traditional court is dedicated to contract and family disputes; the other is responsible for resolving disputes over land, natural resources, fish, and wildlife.<sup>427</sup> As an alternative, parties may elect to use the tribal court. Decisions of the tribal court may be appealed to a traditional court judge.<sup>428</sup>

The Navajo Nation has a robust traditional justice system. The Peacemaking Division of the Navajo Nation court system has been operating as a division of the Navajo Nation's judicial system since 1982.<sup>429</sup> It is not intended to replace the Navajo Nation's formal court system, but to provide an alternative forum for resolving certain types of disputes.<sup>430</sup> Navajo peacemaking is a participatory, community-led, consensus-based dispute resolution system. It draws on the Navajo philosophy of K'e, which centers on responsibility, respect, and harmony in relationships.<sup>431</sup> The Navajo Nation indicates that it has a peacemaker staff of 13, and the Division remains very active.<sup>432</sup> In 2010, it received 951 new case filings.<sup>433</sup>

The Grand Traverse Band of Ottawa and Chippewa Indians and the Mississippi Band of Choctaw also operate peacemaker courts. The Peacemaker Courts at Grand Traverse Band complement the Band's western-styled courts. They facilitate the engagement of all parties in the dispute, and promote healing and resolution through the use of open conversation and listening.<sup>434</sup> The Peacemaker Court at Mississippi Band of Choctaw streamlines tribal court operations by matching court personnel and programs from other departments (like behavioral health and victim services) to case types, and applies Choctaw law in accordance with Choctaw

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<sup>427</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 76 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>. For more nuanced account of Pueblo court systems, including Taos, see also Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 301-2, especially notes 52 and 55 (1998).

<sup>428</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 76 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>429</sup> Harvard Project on American Indian Economic Development, *Honoring Nations 1999 Honoree: New Law and Old Law Together*, 1, available at [http://www.hpaied.org/images/resources/publibrary/New\\_Law\\_and\\_Old\\_Law\\_Together.pdf](http://www.hpaied.org/images/resources/publibrary/New_Law_and_Old_Law_Together.pdf).

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> It is unclear if all 13 staff members are peacemakers. U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 61 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>433</sup> *Id.* at 62.

<sup>434</sup> Harvard Project on American Indian Economic Development, *Honoring Nations 1999 Honoree: Tribal Court of the Grand Traverse Band*, 1-2, available at [http://www.hpaied.org/images/resources/publibrary/Tribal\\_Court\\_of\\_the\\_Grand\\_Traverse\\_Band.pdf](http://www.hpaied.org/images/resources/publibrary/Tribal_Court_of_the_Grand_Traverse_Band.pdf).

culture.<sup>435</sup> It is available to parties that agree to handle their dispute through a traditional process in accordance with traditional Choctaw values of cohesion, cooperation, and peace.<sup>436</sup>

The 2002 Census of Tribal Justice Agencies also identified another 15 peacemakers operating in 8 tribal communities.<sup>437</sup> Five of the twelve court systems reviewed in the Indian Country Criminal Justice Report operated traditional justice-based courts or dispute resolution procedures.<sup>438</sup>

Other tribes do not operate distinctly traditional courts. These tribes may incorporate culture and tradition by operating hybrid or blended court systems that combine Western and traditional approaches to justice, or they may apply traditional or customary law in their courts.<sup>439</sup> Additionally, some tribes use tradition-based approaches to sentencing through the use of sentencing circles and alternative sentencing programs. The extent to which tribes combine Western and traditional methods, customs or laws is unclear and presumably varies by tribe, judge and case. A 2008 study of 120 tribal court opinions from 23 tribes revealed that traditional or customary law was directly applied in no more than 5% of cases, and then only in cases exclusively involving tribal members.<sup>440</sup>

There is a wide range of tribal practice in this area. At one end of the spectrum, the Pueblo of Taos uses traditional courts as the primary venue of choice. At the other end, the Three Affiliated Tribes describe their judicial system as traditional because tribal members and court staff are personally acquainted, tribal members accept the application of tribal law in regulating their conduct, and the tribe's native language is sometimes used in court.<sup>441</sup> Given

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<sup>435</sup> Harvard Project on American Indian Economic Development, *Honoring Nations 2005 Honoree: Choctaw Tribal Court System*, at 2, available at <http://www.hpaied.org/images/resources/publibrary/Choctaw Tribal Court System.pdf>.

<sup>436</sup> *Id.*

<sup>437</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>. This data excludes Navajo Nation peacemakers, despite the establishment of Navajo peacemaker courts in 1982. Harvard Project on American Indian Economic Development, *Honoring Nations 1999 Honoree: New Law and Old Law Together*, 1, available at <http://www.hpaied.org/images/resources/publibrary/New Law and Old Law Together.pdf>.

<sup>438</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 50, 52, 67, 70, 76, (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>439</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 20 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>. See generally, U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 48-83 (Appendix III: Overview of Selected Tribal Courts) (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>440</sup> MATTHEW L.M. FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, MSU LEGAL STUDIES RESEARCH PAPER NO. 06-05, 6, 20 (Mar. 6, 2008), available at <http://dx.doi.org/10.2139/ssrn.1103474>.

<sup>441</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 76, 79 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.



this variety of practice and self-understanding, and the undefined nature of the 2002 survey question,<sup>442</sup> it is difficult to state the extent to which tribes use traditional courts or the nature of those courts. Further research into the use of distinct traditional forums as opposed to the incorporation of traditional methods, laws, or sentencing practices in a basically Western-model court would be helpful. Likewise, further data on relative caseloads and case-types heard in dual-forum systems would be welcome.

#### iv. Inter-Tribal Court Systems

Some tribes pool their economic and administrative resources in order to form and operate intertribal court systems. The 2002 Census of Tribal Justice Agencies identified 14 tribes that use intertribal court systems.<sup>443</sup> Today, over 50 tribes use intertribal court systems, generally pooling their economic and administrative resources to form and operate intertribal court systems.<sup>444</sup> The Northwest Intertribal Court System alone provides trial and appellate level services for 18 tribes in Washington, Oregon, and Northern California, allowing these tribes to pool prosecutors and other resources.<sup>445</sup> Other intertribal court systems include the Southwest Intertribal Court of Appeals (which provides appellate and some trial level services to 14 tribes in New Mexico, Arizona, Colorado, and West Texas);<sup>446</sup> the Northern Plains Intertribal Court of Appeals (a consortia court hearing appeals from seven tribes in North Dakota, South Dakota, and Nebraska);<sup>447</sup> the Inter-Tribal Court of Appeals of Nevada (a BIA-funded appellate

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<sup>442</sup> “Which type of tribal court system operates in your tribal jurisdiction? (Mark (X) all that apply): 1. Tribal Courts. 2. Appellate courts. 3. Circuit rider systems. 4. Traditional methods and/or forums of dispute resolution (e.g. peacemaking, circle sentencing). 5. Inter-tribal court system (Please list tribe(s) below). 6. Other (describe below).” STEVEN W. PERRY, U.S. DEPT OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, Appendix question B2 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>443</sup> *Id.* at 22-30.

<sup>444</sup> See, e.g., American Indian Law Center, Inc., *Southwest Intertribal Court of Appeals*, <http://ailc-inc.org>, <http://ailc-inc.org/SWITCA.htm> (last visited Dec. 21, 2013) (“Since its inception in 1989, SWITCA has allowed tribal courts to bring cases before a panel of experienced judges to render decisions at the appellate level for those tribes that do not have the financial means or governmental infrastructure to administer a court of appeals for tribal court decisions”).

<sup>445</sup> The Northwest Intertribal Court System is a court of appeals for Burns Paiute Tribe; Chehalis Confederated Tribe; Hoh Tribe; Hoopa Valley Tribe; Klamath Tribes; Jamestown S’Klallam; Lower Elwha Klallam Tribe; Muckleshoot Tribe; Port Gamble S’Klallam Tribe; Puyallup Tribe; Sauk-Suiattle Tribe; Shoalwater Bay Indian Tribe; Skokomish Tribal Nation; Snoqualmie Nation; Squaxin Island Tribe; Stillaguamish Tribe of Indians; Tulalip Tribes; and Yurok Tribe. It also provides appellate services to non-member tribes from the Northwest, Northern California, and Southeast Alaska on a fee-for-service basis and trial court services for Western Washington tribes. Northwest Intertribal Court System, *Tribal Court Contacts*, <http://nics.ws>, <http://www.nics.ws/tribes/tribes.htm> (last visited Dec. 21, 2013).

<sup>446</sup> Tribes that have granted the Southwest Intertribal Court of Appeals jurisdiction include Ak-Chin Indian Community; Cocopah Indian Tribe; Fort Mojave Indian Tribe; Hopi Tribe (for a short period); Hualapai Tribe; Jicarilla Apache Tribe; Kaibab-Paiute Tribe; Pueblo of Nambe; Ohkay Owingeh; Pueblo of Picuris; Santa Clara Pueblo; Southern Ute Indian Tribe; Ute Mountain Ute Tribe; Yavapai-Prescott Indian Tribe; and Zuni Tribe. American Indian Law Center, Inc., *Southwest Intertribal Court of Appeals*, <http://ailc-inc.org>, <http://ailc-inc.org/SWITCA.htm> (last visited Dec. 21, 2013).

<sup>447</sup> The Northern Plains Intertribal Court of Appeals provides services to Crow Creek Sioux Tribe, Omaha Tribe of Nebraska, Ponca Tribe of Nebraska, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Tribe, Three Affiliated Tribes,

court used by 14 Nevada tribes that have passed resolutions to do so);<sup>448</sup> the Intertribal Court of Southern California is a circuit court system that provides trial judges and other court personnel and applies each member tribe's own laws;<sup>449</sup> and the Intertribal Court of California (a circuit court that serves 8 tribes within the 3 Northern California counties of Lake, Mendocino, and Sonoma).<sup>450</sup>

## **v. Tribal Courts in PL 280 States**

PL 280 affects the criminal justice systems of 51% of federally-recognized tribes in the lower 48 states, and 70% of all federally-recognized tribes (including most Alaska Native villages and tribes).<sup>451</sup> Yet, it only affects 23% of the reservation-based tribal population in the lower 48 states.<sup>452</sup> When the PL 280 regime was established, there was disagreement between affected states and the DOI over responsibility for funding tribal law enforcement and judicial systems.<sup>453</sup> In the end, "the Department of Interior largely failed to include tribes in [PL 280] states in its growing support for tribal police and courts during the 1970s and 1980s."<sup>454</sup> With no financial backing from the federal government, the development of tribal court systems in PL 280 states was effectively halted. Nonetheless, according to 2001 BIA data, all ten Wisconsin PL 280 tribes have tribal courts, all seven Oregon PL 280 tribes have tribal courts, all nine Minnesota PL 280 tribes have tribal courts, and the one PL 280 tribe in Nebraska has a tribal court.<sup>455</sup> However, very few tribal courts in PL 280 states hear adult criminal matters; when they do, they usually impose monetary penalties or restitution because PL 280 tribes typically lack detention facilities.<sup>456</sup> These courts tend to limit their dockets to traffic, hunting and fishing, liquor control, environmental control, and juvenile matters.<sup>457</sup> The DOJ has recently increased

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and Yankton Sioux Tribe. U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 79 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>448</sup> Jill Greiner, *Appellate Law in Nevada Indian Country: The Inter-Tribal Court of Appeals*, 16 NEVADA LAWYER (Aug. 2011), available at <http://documents.scribd.com/s3.amazonaws.com/docs/731ctwgpog12fpqx.pdf?t=1366439946>.

<sup>449</sup> Intertribal Court of Southern California, <http://icsc.us> (last visited Dec. 21, 2013).

<sup>450</sup> See National Indian Justice Center, *Resources: The Regional Tribal Justice Center*, [HTTP://NIJC.ORG](http://nijc.org), <http://www.nijc.org/resources.html> (last visited Dec. 21, 2013).

<sup>451</sup> CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, 7 (Nov. 1, 2007), at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

<sup>452</sup> *Id.* at 7, 14. This includes about half of all California reservations and many reservations in Oregon and Minnesota that have fewer than 100 residents.

<sup>453</sup> *Id.* at 7.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 14.

<sup>456</sup> *Id.* at 14-15.

<sup>457</sup> *Id.* at 15.

funding of tribal courts in PL 280 states, which could increase the capacity of tribal courts in those states to exercise criminal jurisdiction.<sup>458</sup>

## **b. Funding and Resources**

The lack of adequate federal funding for tribal court systems is a longstanding problem.<sup>459</sup> Of the twelve tribes reviewed in the 2011 Indian Country Criminal Justice Report, eleven noted that since their tribal court budgets are “inadequate to properly carry out the duties of the court,” they must make trade-offs, often in the hiring of key staff, such as probation officers, or in providing key services, such as alcohol treatment programs.<sup>460</sup> Of the twelve tribes, each is reported to have relied in part (10) or in full (2) on federal funding to operate their judicial systems.<sup>461</sup>

The primary sources of federal funding for tribal court systems are the BIA and the DOJ. The BIA reported that it distributed \$24.5 million to support tribal court initiatives in 2010.<sup>462</sup> The BIA, through its OJS and its Division of Tribal Justice Support for Courts, works with tribes to establish and maintain tribal judicial systems, conduct assessments of tribal courts, provide training and technical assistance in areas such as law and order code drafting and the implementation of strategies for collecting and tracking caseload data, among other services.<sup>463</sup> The BIA also provides funding to tribal justice systems through its Tribal Priority Allocations (TPA),<sup>464</sup> distributing federal funding to tribes for their courts or other tribally-selected programs. “Tribes allocated approximately \$22 million through their Tribal Court TPA in each fiscal year from 2005-2010.”<sup>465</sup>

The DOJ administers funds to tribal justice systems through the OJP. The BJA within OJP reported that, in fiscal year 2010, it awarded 48 Tribal Courts Assistance Program (TCAP) grants to tribes totaling \$17 million for the establishment or enhancement of existing tribal court

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<sup>458</sup> *Id.*

<sup>459</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 21 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.* A breakdown of tribal justice system budgets by funding-source (tribal, state, federal), along with the extent to which each tribe estimates its justice systems is under-funded, would be helpful.

<sup>462</sup> *Id.* at 9.

<sup>463</sup> *Id.*

<sup>464</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep’t of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>465</sup> U.S. Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, Report No. GAO-12-569, 15 (May 2012), available at <http://www.gao.gov/assets/600/590736.pdf>.

functions.<sup>466</sup> TCAP grants help develop and enhance the operation of tribal justice systems through activities such as staff training, program planning and enhancement (such as peacemaking circles and wellness courts), and alternative dispute resolution methods.<sup>467</sup>

DOJ also administers Edward Byrne Memorial Justice Assistance Grants (JAG),<sup>468</sup> the Tribal Juvenile Accountability Discretionary Grant,<sup>469</sup> and the Tribal Criminal and Civil Legal Assistance Program (TCCLA). Launched in 2010, TCCLA is funded by a \$3 million dollar Congressional appropriation. TCCLA is intended “to improve the representation of indigent defendants in criminal cases and in civil causes of action under tribal jurisdiction” and also to fund technical assistance partners to collaborate with BJA on developing and enhancing tribal justice system personnel and practices.<sup>470</sup> Only 501(c)(3) entities, not tribal governments or courts, are eligible for TCCLA funding.<sup>471</sup>

Other potential revenue sources for tribal courts include state grants and tribal program partner funds, as well as the various fees and fines the courts collect. However, not all court-collected revenue directly benefits tribal courts. Half of the tribes reviewed in the Indian Country Criminal Justice Report indicated that fees and fines collected by their tribal court

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<sup>466</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 12-13 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>467</sup> *Id.*

<sup>468</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep’t of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>. The JAG Program provides states, tribes, and local governments with funding necessary to support law enforcement, prosecution and courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives. See, Bureau of Justice Assistance, Justice Assistance Grant (JAG) Program, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=59](https://www.bja.gov/ProgramDetails.aspx?Program_ID=59). JAG funding, as well as some other federal funding, is predicated in part on participation in the FBI’s Uniform Crime Reporting program (UCR). BJS, from 2009-2012 funded a project to increase tribal participation in the UCR. Between 2009 and 2010 nearly 70 nations received UCR training; as a result of increased tribal participation in the UCR, disaggregated crime data was published for 144 tribes in 2010; in 2008 data was available for only 12 tribes. The increase in tribal participation in UCR also increased tribal eligibility for JAG funding. In 2008 tribes received \$149,942; by 2011 that number increased to \$632,281. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, 6-10 (October 2012), available at <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf>.

<sup>469</sup> The Tribal Juvenile Accountability Discretionary Program to “combat delinquency” is funded as a \$1.1 million dollar discretionary program administered by the DOJ and includes hiring court-appointed defenders as one of its purpose areas. See U.S. Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, Report No. GAO-12-569, 13 (May 2012), available at <http://www.gao.gov/assets/600/590736.pdf>.

<sup>470</sup> Bureau of Justice Assistance, *Overview of the Bureau of Justice Assistance’s Tribal Civil and Criminal Legal Assistance Program and Resources* 1 (Mar. 2013), available at [https://www.bja.gov/Publications/TCCLA\\_Overview.pdf](https://www.bja.gov/Publications/TCCLA_Overview.pdf).

<sup>471</sup> *Id.* at 2.

systems were paid into the tribe's general fund, rather than remaining within the tribal court system.<sup>472</sup>

Tribes continue to face significant funding and resource challenges in developing and strengthening their justice systems, particularly with regards to reforming their justice systems to meet TLOA's requirements for the exercise of enhanced sentencing authority. GAO submitted a survey to the 171 tribes that reported allocating TPA to their tribal courts, receiving JAG funds, or both; 109 responded.<sup>473</sup> When asked about the challenges tribes face in exercising increased sentencing authority under TLOA, 86 of 90 (96%) of these tribes reported funding limitations.<sup>474</sup> Tribes reported the need for additional funding and technical assistance in order to reform their justice systems to meet TLOA standards for exercising enhanced sentencing authority.<sup>475</sup>

Some tribes may need additional funding simply to fully exercise existing jurisdiction in a manner consistent with ICRA. For instance, ICRA requires tribal courts to provide, on request, a six-person jury trial to defendants accused of an offense punishable by imprisonment. Yet, 7 of the 12 tribes studied in the Indian Country Criminal Justice Report reported "limited capacity to conduct jury trials due to limited courtroom space, funding, and transportation."<sup>476</sup>

In its fiscal year 2013 budget justification, the BIA responded to the critical need of tribal courts by requesting an additional \$1 million for tribal court TPA funding.<sup>477</sup> While the request was made in part to support tribes in reforming their justice systems to meet TLOA enhanced sentencing standards, the BIA acknowledged that "tribal court systems were struggling financially to operate under the pre-TLOA requirements."<sup>478</sup>

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<sup>472</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 21 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>473</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R, 2 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>474</sup> *Id.* at 3.

<sup>475</sup> *Id.*

<sup>476</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 23 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>477</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R, 11-12 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>478</sup> *Id.* at 12.

### c. Staffing

The data on tribal court staff is limited and dated. Key reports<sup>479</sup> have additional limitations such as inconsistencies in data and scope of coverage. The problem of dated information in this assessment is particularly important because growing tribal economies may serve to provide Indian nations that had little to no tribal justice resources in 2002 with the resources to develop or dramatically expand their justice systems.

Nonetheless, this report attempts to aggregate data and provide a sense of staffing realities and concerns of tribal criminal justice systems. Looking at the data on the 188 tribes assessed in the 2002 Census and the 12 tribes studied in the Indian Country Criminal Justice Report in 2011, 45 tribal courts are able to staff at least one judge, one prosecutor, and one public defender.<sup>480</sup> These courts have the minimum in-house staff necessary to exercise enhanced sentencing authority and restored criminal jurisdiction, although professional qualifications, training, caseloads, and staff turnover also must be considered.

Of these same 45 tribes with courts possessing necessary in-house staff, a PL 280 state has retroceded all or part of the criminal or civil jurisdiction back to the federal government over 13 of the tribes; moreover, only 2 tribes in PL 280 states report employing 10 or more critical court-related staff (*i.e.*, judges, prosecutors, and public defenders). The lack of funding for Indian nations in PL 280 states has left many without a basic judicial infrastructure. Those tribes lacking essential court staff face even more challenges in building the capacity required to exercise enhanced sentencing or restored criminal jurisdiction.

Many Indian nations struggle to keep tribal courts staffed. Seven of the twelve tribes studied in the 2011 Indian Country Criminal Justice Report stated that they were inadequately staffed and often had insufficient funding to employ key personnel such as public defenders,

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<sup>479</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 58 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>; U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 23 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>480</sup> The 45 tribal courts include Navajo Nation, Gila River Indian Community, Tohono O'odham Nation of Arizona, Salt River Pima-Maricopa Indian Community, Hopi Tribe of Arizona, Oglala Sioux Tribe, Red Lake Band of Chippewa Indians, Rosebud Sioux Tribe, San Carlos Apache Tribe, Confederated Salish & Kootenai Tribes, Mille Lacs Band of Ojibwe, Pascua Yaqui, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Confederated Tribes of the Colville Reservation, Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho, Fort McDowell Yavapai Tribal Council, Blackfeet Tribe, Confederated Tribes and Bands of the Yakama Nation, Kickapoo of Kansas, Minnesota Chippewa Tribe, Keweenaw Bay Indian Community, Turtle Mountain Band of Chippewa, Washoe Tribe of Nevada & California, Yavapai Apache, Coeur d'Alene Tribe, Fort Belknap Indian Community, Lummi Nation, Southern Ute Tribe, Jicarilla Apache Nation, Ak-Chin Indian Community of the Maricopa Indian Reservation, Shakopee Mdewakanton Sioux, Laguna Pueblo, Three Affiliated Tribes, Bois Forte Band of Chippewa, Confederated Tribes of the Umatilla Reservation, Fort Mohave Indian Tribe of Arizona, California, and Nevada, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Makah, Osage Nation, Sault Ste. Marie Tribe of Chippewa Indians of Michigan, and Winnebago Tribe of Nebraska.



prosecutors, and probation officers.<sup>481</sup> Eight of those tribes also indicated that they face difficulties in funding staff training and associated costs.<sup>482</sup> The Chief Judges at two pueblos that participated in the study reported that inadequate funding has forced them to bring on law enforcement officers to serve as prosecutors, despite their lack of formal legal or prosecutorial training.<sup>483</sup>

The BIA's fiscal year 2013 budget request recognizes the inadequacy of existing funding levels for tribal justice systems, particularly tribal court staff. The agency requested additional funding for tribal court staff salaries, in part because of the increased need for staff capacity building, specifically anticipating the need for additional training on the development of sentencing guidelines for tribes intending to exercise TLOA enhanced sentencing authority.<sup>484</sup> Yet, as noted above, the lack of adequate federal funding to support tribal justice systems is a longstanding problem, not simply a product of TLOA and VAWA 2013.

Funding challenges also plague tribal courts in their recruitment and retention efforts: tribal justice systems are often unable to pay competitive salaries; recruits regularly face housing shortages on the reservation; and working for a tribal court usually requires relocation to rural and remote geographic locations.<sup>485</sup> Some tribal justice officials noted that, even when the recruiting barrier is overcome, retention is difficult because recent hires become more marketable in non-Indian communities based on their tribal experience, and therefore have opportunities to move into higher paying positions off-reservation.<sup>486</sup>

Additionally, given the heavy reliance on federal funding, tribal justice systems face the risk that the expiration of a funding source may force the elimination of a position, regardless of need.<sup>487</sup> In a 2006 study, the U.S. Commission on Civil Rights identified the issue of inconsistent or discontinued federal funding for promising projects as a specific area of concern.<sup>488</sup> One tribe in South Dakota used time-limited grant funds to hire staff focused on domestic violence cases. During the grant period, the tribe saw a decrease in domestic violence cases, but when the grant expired and staff numbers fell, domestic violence cases again

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<sup>481</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 21 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>482</sup> *Id.* at 23.

<sup>483</sup> *Id.* at 22.

<sup>484</sup> The U.S. Dep't of the Interior, *Budget Justifications and Performance Information Fiscal Year 2013: Indian Affairs*, IA-PSJ-20 (2012), available at <http://www.bia.gov/cs/groups/xocfo/documents/text/idc016444.pdf>.

<sup>485</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 22 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 23.

<sup>488</sup> U.S. Comm'n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 79 (2003), available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>.



increased.<sup>489</sup> Tribes also are addressing the lack of funding for staff training by seeking scholarships from training providers and working with the National Judicial College to access more cost-effective web-based training.<sup>490</sup>

#### **d. Integration with Victim Services**

Some tribes, such as the Mississippi Band of Choctaw, are taking on an increased role in coordinating victim services with tribal courts. The Mississippi Choctaw created the Family Violence and Victim's Services Program (FVVS) in 1999, which coordinates agencies providing victim services (such as Choctaw Law and Order, Choctaw Social Services, Choctaw Health Center, Choctaw Behavioral Health, the Choctaw Attorney General's Office, and the U.S. Attorney's Office) and leverages the financial, human, and technical resources of five different grant projects.<sup>491</sup> FVVS is a domestic violence prevention program that seeks to protect victims, monitor and re-educate perpetrators, and break the cycle of silence; the program ensures that victims receive comprehensive care and that perpetrators are dealt with appropriately.<sup>492</sup> Since FVVS was implemented, the tribe has increased the identification and reporting of domestic violence crimes.<sup>493</sup>

#### **e. Full Faith and Credit for Tribal Court Judgments**

Some narrowly tailored federal laws grant full faith and credit to certain types of tribal judgments. For example, under VAWA 2005, states are to give full faith and credit to tribal domestic violence protection orders,<sup>494</sup> and some state legislatures have passed general statutes specifying when and how to apply full faith and credit or comity to tribal court judgments.<sup>495</sup> State and federal courts may play a role in resolving full faith and credit disputes, either by rule<sup>496</sup> or case law.<sup>497</sup> This is a state-by-state inquiry in a disputed area of the law that requires additional research.

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<sup>489</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 23 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>490</sup> *Id.*

<sup>491</sup> Harvard Project on American Indian Economic Development, *Honoring Nations 2003 Honoree: Family Violence & Victim's Services*, at 1-2, at [http://www.hpaied.org/images/resources/publibrary/Family\\_Violence\\_and\\_Victims\\_Services.pdf](http://www.hpaied.org/images/resources/publibrary/Family_Violence_and_Victims_Services.pdf).

<sup>492</sup> *Id.* at 1.

<sup>493</sup> *Id.* at 3.

<sup>494</sup> 18 U.S.C. § 2265; see FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07[2][b], n.53 (2012 ed.) The Indian Child Welfare Act, 22 U.S.C. §§1901-1963, and the Parental Kidnapping Prevention Act, 28 U.S.C. §1738A, contain similar provisions.

<sup>495</sup> See, e.g., Wis. Stat. Ann. § 806.245 mandating full faith and credit to Wisconsin tribal court judgments); 12 Okla. Stat. Ann. tit. 12 § 728 requiring it in relation to tribes who reciprocate.

<sup>496</sup> See, e.g., ARIZ. RULES OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT JUDGMENTS, available at [http://www.supreme.state.az.us/stfcf/handouts/rules\\_recognitn\\_tribajudgments.pdf](http://www.supreme.state.az.us/stfcf/handouts/rules_recognitn_tribajudgments.pdf).

#### **f. Maintenance of Records for Prosecutions and Convictions**

It is unclear how tribal courts maintain their records for prosecutions and convictions. Of the tribes that responded to the 2002 Census of Tribal Justice Agencies, only 18% (55) reported submitting criminal history records to a state and just 17% submitted records to the FBI.<sup>498</sup> Less than 16% (49) of the tribes indicated that their justice agencies were electronically networked with other justice agencies, either within or outside of the reservation.<sup>499</sup> In 2002, many tribes indicated that they had integration efforts underway to link tribal agencies with outside justice agencies (including state, federal, and other tribal agencies).<sup>500</sup> Although tribes today may be maintaining more records for their prosecutions and convictions and better integrating information with outside justice agencies, details on such efforts are not readily available. Data specific to Indian country crimes is starting to be compiled by federal law enforcement. In response to TLOA,<sup>501</sup> the DOJ recently issued its report<sup>502</sup> detailing investigations and prosecutions in Indian country, the first report to compile case information regarding the types of crimes alleged, the status of the accused as Indian or non-Indian, the status of the victim as Indian or non-Indian, and the reason for deciding against referring the investigation for prosecution or the reason for deciding to decline or terminate the prosecution.<sup>503</sup> Among the findings, the most common reason investigations were closed administratively without referral for prosecution was that the investigation concluded no federal crime had occurred.<sup>504</sup> In 2012, 658 (35%) of investigations were administratively closed.<sup>505</sup> The most common reasons for declining to prosecute some 31% (965) of all (3145) Indian country submissions were insufficient evidence (52% in 2012) and referral to another prosecuting authority (24% in 2012).<sup>506</sup>

#### **g. Maintenance of Audio or Video Record of Trials**

A 2012 GAO report reflects that, based on feedback from 102 respondents, 85 tribes (83%) currently maintain a record of their criminal proceedings including an audio or other

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<sup>497</sup> *Wilson v. Marchington*, 127 F. 3d 805 (9<sup>th</sup> Cir. 1997) (holding that in federal court, tribal court judgments are entitled to comity (discretionary deference)).

<sup>498</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 58 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>499</sup> *Id.* at 80.

<sup>500</sup> *Id.*

<sup>501</sup> 25 U.S.C. § 2802(c)(14).

<sup>502</sup> U.S. Dep't of Justice, *U.S. Dep't of Justice Indian Country Investigations and Prosecutions, 2011-2012* (2013), available at [www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf](http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf).

<sup>503</sup> *Id.* at 4-5.

<sup>504</sup> *Id.* at 5.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at 5-6.

recording.<sup>507</sup> Six other tribes (6%) indicated that they plan to implement a recordkeeping policy, five tribes (5%) indicated that they have no plans to implement a policy, and another six tribes (6%) were unaware of whether their court maintains such records.

## **h. Caseloads**

There is no clear data on how heavy tribal court caseloads are, but using information reported by the tribes reviewed in the Indian Country Criminal Justice Report for fiscal year 2010, it appears that tribal court dockets are overwhelmingly consumed by criminal matters. This data indicates that criminal cases occupy anywhere from 75 to 93% of tribal court dockets. The volume of cases each judge oversees varies greatly by tribe. For example, in 2010, the judge at the Pueblo of Taos had a criminal caseload of 235 cases, while the Three Affiliated Tribes had 3,000 criminal cases filed in a system with three judges.<sup>508</sup> For comparison, a recent report on the caseloads of state court judges found that “non-traffic cases per judge ranged from a low of 360 non-traffic cases per full-time general jurisdiction court judge in Massachusetts to a high of 4,374 non-traffic cases per judge in South Carolina.”<sup>509</sup>

## **2. Judges**

In 2002, there were an estimated 200 full-time judges presiding over courts in Indian country, excluding CFR Court judges.<sup>510</sup> Eighty-one tribal legal systems lacked full time tribal court judges, and 51 had just one full time tribal court judge.<sup>511</sup>

Recent data indicates that the majority of tribal court systems employ only one full time judge while others rely primarily on part-time judges.<sup>512</sup> Although complete data for Indian country is unavailable, comparative data from the 2012 Indian Country Criminal Justice Report

<sup>507</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep’t of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R, 17 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>.

<sup>508</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 77-80 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>509</sup> Bureau of Justice Statistics, *State Caseload Statistics*, [www.bjs.gov](http://www.bjs.gov), <http://www.bjs.gov/index.cfm?ty=tp&tid=30> (last visited Dec. 21, 2013).

<sup>510</sup> This figure generated by subtracting from the number of full time judges in Table 7 those judges working for tribes that indicated they only used CFR Courts in Table 5. STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>511</sup> *Id.* at 21-30, 37-42.

<sup>512</sup> This seems to be the case for the Pueblo of Isleta (1 trial judge was lost and 1 appellate judge was gained), Pueblo of Taos, and Three Affiliated Tribes. STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>; U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 56 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

and the 2002 Census of Tribal Justice Agencies is available for 10 tribes. This sample is small and unrepresentative, but reflects a general growth pattern: 4 of 10 tribes reported an increase in judicial staffing; 5 reported no change; and only one tribe reported a decline in staffing.<sup>513</sup>

Tribal governments use a variety of processes and criteria for selecting judges. Many Indian nations require judges to be certified by the tribal bar association<sup>514</sup> and require judges to have a working knowledge of tribal, state, and federal laws.<sup>515</sup> Other Indian nations, such as the Gila River Indian Community and Pueblo of Pojoaque, do not require any of their judges to be bar licensed, though Pueblo of Pojoaque does require its judges to have a law degree or undergo a specific training course in judicial proceedings within six months of appointment.<sup>516</sup> Other tribes, such as the Pueblo of Isleta and the Pueblo of Taos, have not yet established requirements regarding the selection, removal, and qualifications for their judges.<sup>517</sup> The Pueblo of Isleta is currently drafting its requirements, and the Pueblo of Taos expects to do so at some point in the future.<sup>518</sup>

Despite the significant variance among tribal courts in requirements for law-trained and bar-admitted judges, the 2012 GAO report indicates that almost three-quarters (73 of 102) of tribal respondents currently require judges to have sufficient legal training to preside over criminal matters, and that a little over one-half (53 of 101) require the judge to be licensed to practice law in any U.S. jurisdiction.<sup>519</sup>

The tribal courts reviewed in the Indian Country Criminal Justice report did not report clearly defined cultural competency requirements for their judges. The Pueblo of Taos has two

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<sup>513</sup> Gila River Indian Community, Navajo Nation, Standing Rock Sioux Tribe, Tohono O'odham Nation report an increase; Oglala Sioux Tribe lost one judge. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>; and U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 48ff (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>514</sup> For example, the Navajo Nation Bar Association requires a one-day essay exam on standard state subjects as well as federal Indian law and Navajo statutory and customary law. Navajo Nation Bar Association, Inc., *Bylaws*, [www.navajolaw.org](http://www.navajolaw.org), <http://www.navajolaw.org/New2008/bylaws.htm#III.QUALIFICATIONS> (last visited Dec. 21, 2013).

<sup>515</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 61 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>; [http://www.navajolaw.org/New2008/examination\\_4-2.htm](http://www.navajolaw.org/New2008/examination_4-2.htm).

<sup>516</sup> *Id.* at 52, 67.

<sup>517</sup> *Id.* at 55, 77.

<sup>518</sup> *Id.*

<sup>519</sup> U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Dep't of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, GAO-12-658R, 17 (May 30, 2012), available at <http://www.gao.gov/assets/600/591213.pdf>. The tribes that participated in the GAO report are held confidential, so it is difficult to tell whether, or to what extent, the sample pool for the tribes studied in the 2011 Indian Country Criminal Justice Report overlaps with the sample pool for the 2012 GAO report.

traditional courts overseen by two tribal officials (the Lieutenant Governor and the War Chief).<sup>520</sup> The Navajo Nation and the Rosebud Sioux Tribe have language requirements: Navajo language fluency serves as one of the qualifications for Navajo judicial service,<sup>521</sup> and the Rosebud Sioux Tribe requires at least one associate judge to be bilingual in English and Lakota.<sup>522</sup> Other tribal courts either require that their judges be tribal members, such as the Gila River Indian Community,<sup>523</sup> or give preference to tribal members, such as the Tohono O’odham Nation.<sup>524</sup> However, insofar as almost all of the twelve courts reviewed indicated that their courts seek to apply traditional laws where applicable or combine aspects of modern and traditional courts, a certain degree of general cultural competency seems to be implicitly required, even if left undefined.<sup>525</sup>

The length of judicial terms of office varies widely among tribal court systems. Of the twelve tribes surveyed, one indicated a term as short as one year for associate justices,<sup>526</sup> and two indicated that they have no defined terms of office.<sup>527</sup> The Navajo Nation has a two-year probationary period after which the Judicial Committee of the Navajo Nation Council can recommend a permanent appointment until the judge is 70.<sup>528</sup> Most other tribal court judges serve terms of three to six years.<sup>529</sup> Many tribes have different term lengths for different types of judges or courts.<sup>530</sup>

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<sup>520</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 76 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>521</sup> Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1070 (2005).

<sup>522</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 70 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>523</sup> *Id.* at 52.

<sup>524</sup> *Id.* at 82.

<sup>525</sup> *See generally, Id.* at 48-83 (Appendix III: Overview of Selected Tribal Courts). Only Gila River, Standing Rock and Tohono O’odham make no mention of the use of traditional law or methods.

<sup>526</sup> Three Affiliated Tribes. *Id.* at 79.

<sup>527</sup> Navajo Nation and Pueblo of Pojoaque. *Id.* at 61, 67.

<sup>528</sup> *Id.* at 61. Judges may be removed for cause however, see paragraph following. *See also* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 317 (1998).

<sup>529</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 52, 58, 64, 70, 73, 82 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>530</sup> The chief and associate judges of the Gila River Indian Community serve three year terms, while the judges of the tribe’s children’s court serve four year terms; the Oglala Sioux Tribe, Rosebud Sioux Tribe, and Three Affiliated Tribes have different term limits for their chief justices and associate justices (Oglala’s chief justice serves a shorter term than its other justices; the chief justices for Rosebud and Three Affiliated Tribes serve longer terms than associate justices). *Id.* at 52, 64, 70, 79.

In general, it appears tribal councils retain the power to remove tribal court judges. Exact procedures vary. Of the ten tribes providing information on this point in the Indian Country Criminal Justice Report, standards for removal ranged from “by council for any reason it deems cause”<sup>531</sup> to a 2/3 vote by Tribal Council for, *inter alia*, “unethical judicial conduct, persistent failure to perform judicial duties or gross misconduct that is clearly prejudicial to the administration of justice.”<sup>532</sup> Given the real and perceived importance of an independent judiciary to the fair administration of justice, some tribes may need to strengthen and clarify their standards and procedures for the removal of judges to further insulate their judiciary from undue political influence.<sup>533</sup>

### 3. Prosecutors

There are few prosecutors in Indian country. In 2002, 314 tribes employed just 153 full time prosecutors, averaging out to just under one-half of a prosecutor per Indian nation.<sup>534</sup> Insufficient funding may be responsible for the low number of prosecutors. In 2011, seven of the twelve tribes surveyed in the Indian Country Criminal Justice Report indicated that funding is often insufficient to support key positions such as prosecutors.<sup>535</sup> Despite challenges, the number of tribal prosecutors is increasing for some tribes; between 2002 and 2011, 4 of the 12 tribes for which comparative data is available reported adding prosecutors to their staff, while only 2 saw a decrease.<sup>536</sup>

From the limited data available in the Indian Country Criminal Justice Report, tribes do not appear to have rigorous qualification standards for prosecutors. Only a few tribes appear to require their prosecutors be law-trained or bar-licensed.<sup>537</sup> Some tribes indicate that they have one prosecutor who is bar-certified and law-trained, though they do not indicate whether this is a

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<sup>531</sup> *Id.* at 52.

<sup>532</sup> *Id.* at 64.

<sup>533</sup> See also THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 128 (2008) on positive economic results from establishment of independent dispute resolution body (“the combination of separations of powers and independent dispute resolution raised employment fully 15%”).

<sup>534</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 20 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>535</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 22 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>536</sup> *Id.* at 37, 42, 48; STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37ff (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>537</sup> For instance, Gila River requires its prosecutors to be law-trained or licensed by a state or tribal bar association and Navajo Nation requires its prosecutors to be Navajo Nation Bar Association-certified. U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 52, 61 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.



requirement. Other tribes authorize their law enforcement staff to serve as prosecutors.<sup>538</sup> Tribal prosecutors face a daunting caseload. Though data is limited and cannot be generalized across Indian country, it indicates that, at least for certain Indian nations, tribal prosecutors may face anywhere between 400 and 3,000 cases per year.<sup>539</sup> By comparison, an American Bar Association special committee on the criminal justice system recommended in 1989 that prosecutors handle no more than 150 felony cases or 300 misdemeanor cases per year.<sup>540</sup>

TLOA authorizes the appointment of qualified tribal prosecutors as Special Assistant United States Attorneys (SAUSAs). SAUSAs are vested with the authority to pursue prosecution of federal offenses in Indian country.<sup>541</sup> The first tribal prosecutor to receive a SAUSA appointment under TLOA serves the Rosebud Sioux Tribe.<sup>542</sup> Tribal prosecutors at four of the twelve tribes studied by the GAO are pursuing SAUSA appointments.<sup>543</sup> On June 5, 2012, the Office of Violence Against Women (OVW) in the DOJ announced a new initiative to support salary, travel, and training costs for tribal SAUSAs for the Pueblo of Laguna, Fort Belknap Tribe, Winnebago Tribe, and Standing Rock Sioux Tribe.<sup>544</sup> Given the tremendous financial barriers tribes face in building prosecutorial capacity, such OVW funding will likely accelerate or enable the process of tribal prosecutors becoming SAUSAs.

#### 4. Public Defenders

There are few public defenders in Indian country, and tribes attribute this in part to lack of adequate funding.<sup>545</sup> In 2002, just 108 full time public defenders were identified in Indian

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<sup>538</sup> Criminal investigators serve as prosecutors at Pueblo of Isleta and tribal police are authorized to serve as prosecutors at Pueblo of Pojoaque and Pueblo of Taos. *Id.* at 56, 67, 77. Information regarding requirements for prosecutors was not provided for Cheyenne River Sioux Tribe, Pueblo of Laguna, Standing Rock Sioux Tribe, and Tohono O'odham Nation.

<sup>539</sup> *Id.* at 61-62, 82-83.

<sup>540</sup> AMERICAN PROSECUTORS RESEARCH INSTITUTE AND BUREAU OF JUSTICE ASSISTANCE, HOW MANY CASES SHOULD A PROSECUTOR HANDLE: RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 1 (2002), available at [www.ndaa.org/pdf/How%20Many%20Cases.pdf](http://www.ndaa.org/pdf/How%20Many%20Cases.pdf).

<sup>541</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 27 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>542</sup> Archie Beauvais, *Rosebud Sioux Tribe Reaches Law Agreement*, NATIVE SUN NEWS, JUNE 16, 2011, available at <http://tloa.ncai.org/news.cfm?view=display&aid=51>.

<sup>543</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 27 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>544</sup> U.S. Dep't of Justice, *Office on Violence Against Women Announces Agreements to Cross-Designate Tribal Prosecutors in Nebraska, New Mexico, Montana, North Dakota and South Dakota* (June 5, 2012), available at <http://tloa.ncai.org/news.cfm?view=display&aid=79>.

<sup>545</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 22 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.



country.<sup>546</sup> The 2002 Tribal Census identified 107 tribes with at least one full time judge or prosecutor. Of those 107 tribes, only 41% (44) reported having at least one full time public defender on staff as well.<sup>547</sup>

As with prosecutors and judges, the number of tribal public defenders does appear to be increasing, at least for those nations responding to the Indian Country Criminal Justice Report. Comparative data is available for 10 tribes, 6 of which increased their staffing;<sup>548</sup> only the Pueblo of Isleta and Oglala Sioux Tribe<sup>549</sup> reported a reduction.

Gila River Indian Community and Navajo Nation are the only tribes among the twelve studied in the Indian Country Criminal Justice Report that reported requiring their public defenders to be law-trained or bar-licensed. Gila River requires its public defenders to be law-trained or licensed by a state or tribal bar association<sup>550</sup> and Navajo Nation requires its public defenders to be Navajo Nation Bar Association-certified,<sup>551</sup> but not necessarily law-trained.<sup>552</sup> The other tribes in the study did not provide information regarding training or bar-certification requirements for their public defenders.

Data on the caseloads of public defenders does not appear to be available. Without information about how many defendants use private attorneys, or forgo representation, it is impossible to extrapolate defender caseloads from the raw numbers of criminal cases filed in a tribal court. The Navajo Nation assigns members of its Bar Association to serve as indigent defense counsel when needed.<sup>553</sup> It is unclear to what extent other tribes may use alternative arrangements, such as law clinics or contract attorneys, to fill public defender staffing gaps.

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<sup>546</sup> STEVEN W. PERRY, U.S. DEPT OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 37-42 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>547</sup> *Id.*

<sup>548</sup> The six tribes reporting an increase in public defenders included the Gila River Indian Community, Pueblo of Laguna, Navajo Nation, Standing Rock Sioux Tribe, Three Affiliated Tribes, and Tohono O'odham Nation.

<sup>549</sup> Oglala Sioux Tribe's reported reduction in staffing from 30 defenders in 2002 to 1 in 2011 is surprising and unexplained in the sources.

<sup>550</sup> U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, Report No. GAO-11-252, 52 (Feb. 2011), available at <http://www.gao.gov/new.items/d11252.pdf>.

<sup>551</sup> *Id.* at 61.

<sup>552</sup> Navajo Nation Bar admission requirements do not require graduation from law school, or even college, if a candidate meets other training requirements and passes the Navajo Nation Bar Exam. See Navajo Nation Bar Association, Inc., *Bylaws*, WWW.NAVAJOLAW.ORG, <http://www.navajolaw.org/New2008/bylaws.htm#III.QUALIFICATIONS> (last visited Dec. 21, 2013).

<sup>553</sup> Navajo Nation Bar Association, Inc., Office of Pro Bono Services, *Summary of Pro Bono Rules for the Navajo Nation Judges*, Section III (Step 1)(a), WWW.NAVAJOLAW.ORG (December 1, 1997), [http://www.navajolaw.org/2007\\_PDF/Bono.pdf](http://www.navajolaw.org/2007_PDF/Bono.pdf).

## 5. Sentencing

ICRA limits Indian nations' sentencing authority to 1-year imprisonment, \$5,000 in fines, or both. TLOA amends ICRA to authorize qualifying tribes to impose sentences of up to 3 years or \$15,000 in fines, or both. Some Indian nations' tribal constitutions, many outdated, impose further sentence limitations. These sentencing limitations cause some tribal courts to use alternatives to imprisonment, such as probation. According to the 2002 Census of Tribal Justice Agencies, for those Indian nations operating their own tribal courts, 70% used probation for adults and 66% for juveniles.<sup>554</sup>

The Tlingit of the Organized Village of Kake in Alaska have taken creative measures to negotiate their involvement with the state criminal justice system that affects their people. The Village has incorporated a Healing Heart Council and Circle Peacemaking system into their justice system, which works closely with the Alaska state court system.<sup>555</sup> Because much of Alaska is not considered Indian country, Alaska Native villages and communities exercise extremely limited criminal jurisdiction; the state of Alaska oversees most aspects of criminal justice. Despite this, the Village of Kake sought to do something to break the cycle of youth alcoholism and criminal behavior developing into adult alcoholism and criminal behavior. Through their Circle Peacemaking system, the Village is able to intervene when a Kake juvenile enters a guilty plea within state court. The state judge, with the consent of the prosecutor, public defender, and offender, remits the case to the Healing Heart Council for sentencing. The Council then engages Circle Peacemaking by convening village volunteers, often including family members and friends as well as police and substance abuse counselors, to sentence the offender. The Keeper of the Circle encourages participants to engage in sincere and heartfelt dialogue to arrive at a sentence focused on healing, which targets the underlying causes of the bad behavior and seeks to repair the relationship between the offender and the victim. Circle participants remain engaged with the process after sentencing by monitoring the behavior of the offender. Sometimes there is a need for additional Circles; non-compliant offenders are returned to the Alaska state court for sentencing. The Circle Peacemaking system has expanded to host sentencing circles for adult offenders, healing circles for victims, and celebration circles for offenders who have served their sentences, among other programs. Circle Peacemaking has very low recidivism and a high sentence fulfillment rate. Over a four-year period, Circle Peacemaking experienced a 97.5% success rate in sentence fulfillment. By comparison, the State of Alaska's court system experienced just a 22% success rate. The model employed by the Village of Kake to circumvent legal restrictions, while creatively incorporating traditional

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<sup>554</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, 43 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>555</sup> The Harvard Project on American Indian Economic Development, *Honoring Nation 2003 Honoree: Kake Circle Peacemaking 1*, at <http://www.hpaied.org/images/resources/publibrary/Kake%20Circle%20Peacemaking.pdf>. See *supra*, Part IV.D.1.a.iii.

practices, may be of use to other Indian nations as they decide how to approach implementing TLOA, VAWA 2013, and other jurisdictional improvements.

## **V. Conclusion**

Indian nations and Native women have gained two recent legislative victories, the enactment of TLOA and VAWA 2013. Both of these laws are important steps towards ending the terrible epidemic of violence against Native women and girls and its devastating effect on Indian nations and Native communities. Both of these laws also are milestones in restoring the inherent criminal jurisdiction of Indian nations.

While removing some of the discriminatory, systemic jurisdictional restrictions that permeate existing law, Congress has placed significant new procedural requirements on Indian nations that want to exercise enhanced sentencing authority under TLOA and restored criminal jurisdiction under VAWA 2013.

These are requirements that many tribes will find difficult if not impossible to fulfill without increased federal funding and other support. Indian and Alaska Native nations rank at the bottom of every scale of economic and social well-being, making them the most impoverished group in the country. It will take a significant amount of time before most Indian nations are able to take advantage of enhanced sentencing authority and restored criminal authority, leaving many Native women without an adequate remedy and protection.

Nevertheless, there are modestly encouraging results. As of November 2013, several Indian nations—the Eastern Band of Cherokee Indians, the Hopi Tribe, and the Confederated Tribes of the Umatilla Indian Reservation—are implementing TLOA, and 40 more tribes are substantially compliant with TLOA. Nearly 1/3 of 109 tribes responding to a 2012 survey reported their intention to take the steps necessary to exercise enhanced sentencing authority under TLOA, and the vast majority of those tribes were implementing four of the six core TLOA requirements. More than 30 Indian nations have signed up to participate in the VAWA pilot project, which would allow them to begin exercising restored criminal jurisdiction sooner than March 7, 2015, the general effective date set by VAWA 2013.

Identifying a group of tribes exercising the advanced authority restored under TLOA and VAWA 2013 and monitoring their innovations and struggles in developing stronger justice systems can be invaluable in helping other Indian nations move forward. A track record of success also can stand as strong support not only for greater funding to enable broader implementation in Indian country, but also further restoration of Indian nations' inherent criminal jurisdiction.

While historic, TLOA and VAWA 2013 are only limited fixes. Many gaps and legal barriers to safety and justice for Native women, girls, and Indian nations remain. This is especially so for Alaska Native nations due to the special rule in VAWA 2013, exempting all but one of the 229 Alaska Native tribes from the special domestic violence tribal jurisdictional provisions. Further, tribal criminal jurisdiction over non-Indians that commit domestic violence,

rape, and sexual assault against Native women on tribal lands also continues to be prohibited unless the non-Indian has significant ties to the tribe. Indian nations also need criminal jurisdiction to combat sex trafficking of Native women now occurring within their territories.

It is clear that Indian nations must be able to effectively prevent and punish violent crimes against Native women and girls in their communities—something that most other local communities in the United States take for granted. This goal requires restoration of full criminal jurisdiction to Indian nations and may take years—even decades—to achieve. Indian nations, however, will only be able to protect Native women and girls from violence if they regain their inherent authority to investigate, prosecute, and punish all perpetrators of violent crimes in their territories and do not have to depend on federal or state governments to respond to these crimes.

Just after this report was completed, an independent national advisory commission, the Indian Law and Order Commission, published 40 recommendations to address some of the gaps and legal barriers of TLOA, VAWA 2013, and the criminal justice system as it concerns Indian nations.<sup>556</sup> The Commission's recommendations should be studied closely and taken into consideration in moving toward fuller tribal authority over all crime and all persons on Native lands.

This report offers ten recommendations for ending violence against Native women and girls and strengthening the ability of Indian nations to address this epidemic.

### **Recommendations**

1. Indian nations, Native women's organizations, and other advocates must raise awareness regionally, nationally, and internationally to gain sustained federal action and financial and technical support to end the epidemic levels of violence against Indian and Alaska Native women, consistent with the United States' trust responsibility to Indian nations and its international human rights obligations.
2. Congress, Indian nations, Native women's organizations, other advocates, and everyone concerned must press for stronger law reform that will restore full criminal authority to Indian nations and safety to Native women and girls, as well as eliminate discriminatory legal barriers and jurisdictional gaps that endanger Native women including, but not limited to expanding VAWA 2013 to restore tribal jurisdiction over crimes of rape and sexual assault committed by strangers and sex trafficking on Indian lands.
3. Congress, Indian nations, Native women's organizations, other advocates, and everyone concerned must ensure that VAWA is amended so that its legislative reforms, resources,

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<sup>556</sup> Tribal Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States* (November 2013), available at <http://www.aisc.ucla.edu/iloc/report/index.html>.

and services are available to Alaska Native nations and women, and that the Special Rule on Alaska in § 910 of VAWA 2013 is repealed.

4. Appropriate federal and state agencies and Indian nations must increase the safety of Native women living within tribal lands under concurrent tribal and PL 280 state jurisdiction. Congress and appropriate federal agencies should ensure adequate funding for tribal law enforcement services and criminal justice systems within tribal lands under concurrent tribal and PL 280 state jurisdiction. Appropriate federal agencies and advocates should assist interested Indian nations in making the necessary request for the federal government to assume concurrent criminal jurisdiction under TLOA.
5. Appropriate federal agencies must conduct studies and develop further data concerning violence against Native girls in Indian country and Alaska Native villages, including the location of the crime and the victim's and offender's Native status.
6. Appropriate federal, tribal, state, and local governments and agencies should use all available practices and structural means to prevent violence against Native women and to ensure the timely investigation, prosecution, and punishment of all perpetrators of such violence within Indian country and Alaska Native villages. Such practices and structural means include, but are not limited to cross-commissioning of law enforcement officers; inter-governmental agreements between tribal, federal, state, and local governments; cooperative prosecutorial arrangements; appointment of Indian country Special Assistant U.S. Attorneys (SAUSAs); and other service agreements.
7. Indian nations, advocates, other organizations, and appropriate federal agencies should support the review, development, and sharing among Indian nations of updated tribal laws, constitutions, inter-governmental and other cooperative agreements, and other policies and protocols that are compliant with implementation of enhanced sentencing under TLOA and advanced tribal jurisdiction under VAWA 2013.
8. Congress and appropriate federal agencies must provide sufficient, reliable technical assistance and financial base support for Indian nations to address violence against Native women and to develop and operate effective criminal and other justice systems including, but not limited to support for tribal court personnel (public defenders, prosecutors, and judges); publication of tribal criminal and procedural laws; record-keeping; law enforcement officers and equipment; culturally appropriate victim services; rehabilitation services; and detention facilities such as those offered by the Bureau of Prisons Pilot Program.
9. Appropriate federal agencies must ensure access by Indian nations and their tribal law enforcement departments to federal criminal databases and provide accurate data and reports to Indian nations regarding declinations, decisions to prosecute, and decisions to

release offenders, particularly those offenders who may return to Indian country or Alaska Native villages.

10. Appropriate federal agencies, Indian nations, Native women's organizations, and other advocates should ensure that victims and witnesses have access to federal courts and the necessary financial, technical, and emotional and cultural support to participate in criminal cases arising in Indian country and being prosecuted by the USAO.



## Appendix A – Acronyms

BIA	Bureau of Indian Affairs
BJA	Bureau of Justice Assistance
DLE	BIA Division of Law Enforcement Services
DOI	Department of the Interior
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
Indian nations	Federally recognized Indian and Alaska Native nations and tribes
ISDEAA	Indian Self-Determination and Education Assistance Act
ICRA	Indian Civil Rights Act
Native women	Indian and Alaska Native Women
OJS	Office of Justice Services
OJP	Office of Justice Programs
PL 280	Public Law No. 83-280
TLOA	Tribal Law and Order Act
USAO	United States Attorneys' Office
VAWA	Violence Against Women Act generally
VAWA 2013	Violence Against Women Reauthorization Act of 2013