

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
CRIMINAL JUSTICE SECTION
NATIONAL NATIVE AMERICAN BAR ASSOCIATION

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts all of the recommendations contained
2 in the Indian Law and Order Commission's November 2013 Report to the President and
3 Congress of the United States, entitled *A Roadmap for Making Native America Safer*,
4 ("Commission's Report");
5
- 6 FURTHER RESOLVED, That the American Bar Association urges the Administration,
7 Congress, state governments, and tribal governments to promptly implement the
8 recommendations of the Commission's Report; and
9
- 10 FURTHER RESOLVED, That the American Bar Association, through its appropriate bodies,
11 should work with governmental entities, law schools, bar associations, and legal service
12 providers to promote improvements to criminal justice in Indian country, and help implement
13 and promote the recommendations proposed in the Commission's Report.

INDIAN LAW AND ORDER COMMISSION RECOMMENDATIONS¹**Chapter 1 – Jurisdiction: Bringing Clarity Out of Chaos**

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

1.2 To implement Tribes’ opt-out authority, Congress should establish a new Federal circuit court, the United State Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th, Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings to ensure that defendants’ Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.

1.3 The Commission stresses that an Indian nation’s sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.

1.4 Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of the Indian Civil rights Act (ICRA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal

¹ INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES (2013), found at: www.aisc.ucla.edu/iloc/report/.. Please note that all of the recommendations of the Indian Law and Order Commission (ILOC) Report are listed here, and that this ABA resolution adopts all of these recommendations. However, notes and other commentary to these recommendations, which can be found in the ILOC Report, have been omitted here.

111A

43 sentencing authority. Like Federal and State governments do, Tribal governments can devise
44 sentences appropriate to the crimes they define. In this process of Tribal code development,
45 Tribes may find guidance in the well-developed sentencing schemes at the State and Federal
46 levels.

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48 **Chapter 2 – Reforming Justice for Alaska Natives: The Time is Now**

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50 2.1 Congress should overturn the U.S. Supreme Court’s Decision in *Alaska v. Venetie Tribal*
51 *Government*, by amending ANCSA to provide that former reservation lands acquired in fee by
52 Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA
53 are Indian Country.

54

55 2.2 Congress and the President should amend the definitions of Indian country to clarify (or
56 affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

57

58 2.3 Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands
59 from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust
60 and included within the definition of Indian country in the Federal criminal code; to allow
61 Alaska Native tribes to put tribally owned fee simple land similarly into trust; and to channel
62 more resources directly to Alaska Native tribal governments for the provision of governmental
63 services in those communities.

64

65 2.4 Congress should repeal Section 910 of Title IX of the Violence Against Women
66 Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native
67 communities and their courts to address domestic violence and sexual assault, committed by
68 Tribal members and non-Natives, the same as now will be done in the lower 48.

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70 2.5 Congress should affirm the inherent criminal jurisdiction of Alaska Native tribal
71 governments over their members within the external boundaries of their villages.

72

73 **Chapter 3 – Strengthening Tribal Justice: Law Enforcement, Prosecution, and** 74 **Courts**

75

76 3.1 Congress and the executive branch should direct sufficient funds to Indian country law
77 enforcement to bring Indian country’s coverage numbers into parity with the rest of the United
78 States. Funding should be made equally available to a) Tribes whose lands are under Federal
79 criminal jurisdiction and those whose lands are under State jurisdiction through P.L. 82-280 or
80 other congressional authorization; b) Tribes that contract or compact under P.L. 93-638 and its
81 amendments or not; and c) Tribes that do or do not opt out (in full or in part) from Federal or
82 State criminal jurisdiction as provided in Recommendation 1.1 of this report.

83

84 3.2 To generate accurate crime reports for Indian country; especially in Tribal areas subject to
85 P.L. 83-280, Congress should amend the Federal Bureau of Investigation (FBI) Criminal Justice
86 Information Services reporting requirements for State and local law enforcement agencies’ crime
87 data to include information about the location at which a crime occurred and on victims’ and
88 offenders’ Indian status. Similarly, it should require the U.S. Department of Justice (DOJ) to
89 provide reservation-level victimization data in its annual reports to Congress on Indian country

90 crime. Congress also should ensure the production of data and data reports required by the Tribal
91 Law and Order Act of 2010, which are vital to Tribes as they seek to increase the effectiveness
92 of their law enforcement and justice systems, by allowing Tribal governments to sue the U.S.
93 Departments of Justice and the Interior should they fail to produce and submit the required
94 reports.

95
96 3.3 The Attorney General of the United States should affirm that federally deputized Tribal
97 prosecutors (that is, those appointed as Special Assistant U.S. Attorneys or “SAUSAs” by the
98 U.S. Department of Justice pursuant to existing law) should be presumptively and immediately
99 entitled to all Law Enforcement Sensitive information needed to perform their jobs for the Tribes
100 they serve.

101
102 3.4 The U.S Attorney General should clarify the ability and importance of Federal officials
103 serving as witnesses in tribal court proceedings and streamline the process for expediting their
104 ability to testify when subpoenaed or otherwise directed by Tribal judges.

105
106 3.5 To further strengthen Tribal justice systems, the Commission suggests that Federal public
107 defenders, who are employees of the judicial branch of the Federal government within the
108 respective judicial districts where they serve, consider developing their own program modeled on
109 Special Assistant U.S. Attorneys.

110
111 3.6 Congress and the executive branch should encourage U.S. District Courts that hear Indian
112 country cases to provide more judicial services in and near Indian country. In particular, they
113 should be expected to hold more judicial proceedings in and near Indian country. Toward this
114 end, the U.S. Supreme Court and the Judicial Conference of the United States should develop a
115 policy aimed at increasing the Federal judicial presence and access to Federal judges in and near
116 Indian country.

117
118 3.7 Congress and the executive branch should consider commissioning a study of the usefulness
119 and feasibility of creating Special Federal Magistrate Judges.

120
121 3.8 Congress should eliminate the Office of Justice Services (OJS) within the Department of the
122 Interior Bureau of Indian Affairs, consolidate all OJS criminal justice programs and all
123 Department of Justice Indian country programs and services into a singles “Indian country
124 component” in the U.S. Department of Justice (including an appropriate number of FBJ agents
125 and their support resources), and direct the U.S. Attorney General to designate an Assistant
126 Attorney General to oversee this unit. The enacting legislation should affirm that the new agency
127 retains a trust responsibility for Indian country and requires Indian preference in all hiring
128 decisions; amend P.L. 93-638 so that Tribal governments have the opportunity to contract or
129 compact with the new agency; and authorize the provision of direct services to Tribes as
130 necessary. Congress also should direct cost savings from the consolidation to the Indian country
131 agency and continue to appropriate this total level of spending over time.

132
133 3.9 Congress should end all grant-based and competitive Indian country criminal justice funding
134 in DOJ and instead pool these monies to establish a permanent, recurring base funding system
135 for tribal law enforcement and justice services, administered by the new Tribal agency in DOJ.
136 Federal base funding for Tribal justice systems should be made available on equal terms to all

111A

137 federally recognized Tribes, whether their lands are under Federal jurisdiction or congressionally
138 authorized State jurisdiction and whether they opt out of Federal and/or State jurisdiction (as
139 provided in Recommendation 1.1). In order to transition base funding, the enacting legislation
140 should:

141 a. Direct the U.S. Department of Justice to consult with tribes to develop a formula for
142 the distribution of base funds (which, working from a minimum base that all federally
143 recognized Tribes would receive, might additionally take account of tribes' reservation
144 populations, acreages, and crime rates) and develop a method for awarding capacity-
145 building dollars.

146
147 b. Designate base fund monies as "no year" so that tribes that are unable to immediately
148 qualify for access do not lose their allocations.

149
150 c. Authorize the U.S. Department of Justice to annually set aside five (5) percent of the
151 consolidated former grant monies as a designated Tribal criminal justice system capacity-
152 building fund, which will assist Tribes in taking maximum advantage of base funds and
153 strengthen the foundation for Tribal local control.

154
155 3.10 Congress should enact the funding requests for Indian country public safety in the National
156 Congress of American Indians (NCAI) "Indian Country Budget Request FY 2014," and
157 consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among
158 other requests, NCAI directs Congress to fully fund each provision of the Tribal Law and Order
159 Act of 2010 that authorizes additionally funding for Tribal nation law and order programs, both
160 for FY 2014 and future years; to finally fund the Indian Tribal Justice Act of 1993, which
161 authorized an additional \$50 million per year for each of seven (7) years for Tribal court base
162 funding; and to create a seven (7) percent Tribal set-aside from funding for all discretionary
163 Office of Justice Programs (OJP) programs, which at a minimum should equal the amount of
164 funding that Tribal justice programs received from OJP in FY 2010. In this spirit of NCAI's
165 recommendations, Congress also should fund the Legal Services Corporation (LSC) at a level
166 that will allow LSC to fulfill Congress' directives in the Tribal Law and Order Act of 2010 and
167 Violence Against Women Act 2013 reauthorization.

168 169 **Chapter 4 – Intergovernmental Cooperation: Working Relationships that** 170 **Transcend Jurisdictional Lines**

171
172 4.1 Federal policy should provide incentives for States and Tribes to increase participation in
173 deputization agreements and other recognition agreements between State and Tribal law
174 enforcement agencies.

175 Without limitation, Congress should:

176 a. Support the development of a model Tribal-State law enforcement agreement program
177 that addresses the concerns of States and Tribes equally; to help State legislature and
178 Governors to formulate uniform laws to enable such MOUs and agreements, in both P.L.
179 83-280 and non-P.L. 83-280 States;

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

- 182 c. Create a federally subsidized insurance pool or similar affordable arrangement for tort
 183 liability for tribes seeking to enter into a deputization agreement for the enforcement of
 184 State law by Tribal police;
- 185 d. For Tribal officers using a SLEC, amend the Federal Tort Claims Act to include
 186 unequivocal coverage (subject to all other legally established guidelines concerning
 187 allowable claims under the Act), not subject to the discretion of a U.S. Attorney or other
 188 Federal official; and
- 189 e. Improve the SLEC process by shifting its management to the U.S. Department of Justice
 190 and directing DOJ to streamline the commissioning process (while retaining the
 191 requirements necessary to ensure that only qualified officers are provided with SLECs).
 192 (Also see Recommendation 4.8)

193
 194 4.2 Federal or State authorities should notify the relevant Tribal government when they arrest
 195 Tribal citizens who reside in Indian country.

196
 197 4.3 When any Tribal citizen resident in Indian country is involved as a criminal defendant in a
 198 State or Federal proceeding, the Tribal government should be notified at all steps of the process
 199 and be invited to have representatives present at any hearing. Tribes should similarly keep the
 200 Federal or State authorities informed of the appropriate point of contact within the Tribe. These
 201 mutual reporting requirements will help ensure the effective exercise of concurrent jurisdiction,
 202 when applicable, and the provision of wrap-around and other governmental services to assist the
 203 offender, his or her family, as well as the victims of the crime.

204
 205 4.4 All three sovereigns—Federal, State, and Tribal—should enter into voluntary agreements to
 206 provide written notice regarding any Tribal citizens who are reentering Tribal lands from jail or
 207 prison. This requirement should apply regardless if that citizen formerly resided on the
 208 reservation. This policy will allow the Tribe to determine if it has services of use to the offender,
 209 and to alert victims about the offender’s current status and location

210
 211 4.5 Congress should provide specific Edward J. Byrne Memorial Justice Assistance Grants
 212 (Byrne grants) or COPS grants for data-sharing ventures to local and State governments,
 213 conditioned on the State or local government entering into agreements to provide criminal
 214 offenders’ history records with federally recognized Indian Tribes with operating law
 215 enforcement agencies that request to share data about offenders’ criminal records; any local,
 216 State, or Tribal entity that fails to comply will be ineligible for COPS and Byrne grants.

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 218 **Chapter 5—Detention and Alternatives: Coming Full Circles, From Crow Dog to**
 219 **TLOA and VAWA**

220
 221 5.1 Congress should set aside a commensurate portion of the resources (funding, technical
 222 assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to
 223 incarceration monies for Indian country, and in the same way it does for State governments, to
 224 help ensure that Tribal government funding for these purposes is ongoing. In line with the
 225 Commissions’ overarching recommendations on funding for Tribal justice, these resources
 226 should be managed by the recommended Indian country unit in the U.S. Department of Justice
 227 and administered using a base funding model. Tribes are specifically encouraged to develop and
 228 enhance drug courts, wellness courts, residential treatment programs, combined substance abuse

111A

229 treatment-mental health care programs, electronic monitoring programs, veterans' courts, clean
230 and sober housing facilities, halfway houses, and other diversion and reentry options, and to
231 develop data that further inform the prioritization of alternatives to detention.
232

233 5.2 Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to
234 require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the
235 relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country; 2) to
236 collaborate if the Tribal government so chooses, in choices involving corrections placement or
237 community supervision, and 3) to inform the Tribal government when that offender is slated for
238 return to the community.
239

240 5.3 Recognizing that several Federal programs support the construction, operation, and
241 maintenance of jails, prisons, and other corrections programs that serve offenders convicted
242 under Tribal law, appropriate portions of these funds should be set aside for Tribal governments
243 and administered by a single component of the U.S. Department of Justice. This includes any
244 funds specifically intended for Tribal jails and other Tribal corrections programs (e.g., those
245 available through the Bureau of Indian Affairs) and a commensurate Tribal share of all other
246 corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and
247 Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that
248 alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen
249 offenders, savings should be reinvested in Indian country corrections programs and not be used
250 as a justification for decreased funding.
251

252 5.4 Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to
253 have a need for detention space:

- 254 a. Congress and the U.S. Department of Justice should provide incentives for the
255 development of high-quality regional Indian country detention facilities, capable of
256 housing offenders in need of higher security and providing programming beyond
257 "warehousing," by prioritizing these facilities in their funding authorization and
258 investment decisions; and,
- 259 b. Congress should convert the Bureau of Prisons pilot program created by the Tribal Law
260 and Order Act into a permanent programmatic option that Tribes can use to house
261 prisoners.
262

263 **Chapter 6—Juvenile Justice: Failing the Next Generation**

264
265 6.1 Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction
266 entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of
267 general application.
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269 6.2 Congress should provide Tribes with the right to consent to any U.S. Attorney's decision
270 before Federal criminal charges against any juvenile can be filed.
271

272 6.3 Because resources should follow jurisdiction, and the rationale for Tribal control is especially
273 compelling with respect to Tribal youth, resources currently absorbed by the Federal and State
274 systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.
275

276 6.4 Because Tribal youth have often been victimized themselves, and investments in community-
277 oriented policing, prevention, and treatment produce savings in costs of detention and reduced
278 juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be
279 reorganized in the same way this Commission has recommended for the adult criminal justice
280 system. That is, they should be consolidated in a single Federal agency within the U.S.
281 Department of Justice, allocated to Tribes in block funding rather than in unpredictable and
282 burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes
283 should be able to redirect funds currently devoted to detaining juveniles to more demonstrably
284 beneficial programs, such as trauma-informed treatment and greater coordination between Tribal
285 child welfare and juvenile justice agencies.

286
287 6.5 Because Tribal communities deserve to know where their children are and what is happening
288 to them in State and Federal justice systems, and because it is impossible to hold justice systems
289 accountable without data, both Federal and State juvenile justice systems must be required to
290 maintain proper records of Tribal youth whose actions within Indian country brought them in to
291 contact with those systems. All system records at every stage of proceedings in State and Federal
292 systems should include a consistently designated field indicating Tribal membership and location
293 of the underlying conduct within Indian country and should allow for tracking of individual
294 children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country
295 is in fact a Tribal member, they should be required to make inquiries, just as they are for
296 dependency cases covered by the Indian Child Welfare Act.

297
298 6.6 Because American Indian/Alaska Native children have an exceptional degree of unmet need
299 and the Federal government has a unique responsibility to these children, a single Federal agency
300 should be created to coordinate the data collection, examine the specific needs, and make
301 recommendations for American Indian/Alaska Native youth. This should be the same agency
302 within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar
303 recommendation can be found in the 2013 Final Report of the Attorney General's National Task
304 Force on Children Exposed to Violence.

305
306 6.7 Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before
307 juvenile authorities for behavior that took place in Tribal communities should be provided with
308 trauma-informed screening and care, which may entail close collaboration among juvenile justice
309 agencies, Tribal child welfare and behavioral health agencies. A legal preference should be
310 established in State and Federal juvenile justice systems for community-based treatment of
311 Indian country juveniles rather than detention in distant locations, beginning with the youth's
312 first encounters with juvenile justice, Tribes should be able to redirect Federal funding for
313 construction and operation of juvenile detention facilities to the types of assessment, treatment,
314 and other services that attend to juvenile justice.

315
316 6.8 Where violent juveniles require treatment in some form of secure detention, whether it be
317 through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdiction, or
318 BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's
319 home and informed by the latest and best trauma research as applied to Indian country.

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111A

321 6.9 The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation
322 and coordination only with States and U.S. territories, should be amended to add “or tribe” after
323 the word “state” in subsections (1) and (2).

324
325 6.10 The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal
326 election to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles
327 subject to discretionary transfer, regardless of age or offense.

328
329 6.11 Federal courts hearing Indian country juvenile matters should be statutorily directed to
330 establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.

331
332 6.12 The Indian Child Welfare Act should be amended to provide that when a State court
333 initiates any delinquency proceeding involving an Indian child for acts that took place on the
334 reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all
335 other Indian children involved in State delinquency proceedings, ICWA should be amended to
336 require notice to the Tribe and a right to intervene.

REPORT

Introduction

In July 2010, the Indian Law and Order Commission, an independent national advisory commission, was created as part of the Tribal Law and Order Act (“TLOA”) of 2010.² The Commission was extended by the Violence Against Women Reauthorization Act (“VAWA”) of 2013.³ The Commission was charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities, including criminal jurisdiction, the tribal jail and Federal prisons systems, tribal and federal juvenile justice systems, and the impact of the Indian Civil Rights Act on tribes, defendants, and the overall tribal criminal system.⁴

As part of that comprehensive study, the Commission was charged with assessing justice in Indian country and developing long-term recommendations on necessary modifications and improvements to justice systems at the tribal, federal, and state levels. In November 2013, after months of hearings and listening sessions around the country, the Indian Law and Order Commission’s findings and recommendations were released as a single report, entitled *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* (“ILOC Report”). The ILOC Report contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation (5) Detention and Alternatives; and (6) Juvenile Justice.

Many of the recommendations made by the Commission *are directly aligned with policies previously approved by the American Bar Association House of Delegates*. For this reason, the ABA urges prompt implementation of all of the forty recommendations of the ILOC Report as a policy matter and as a signal of their importance. All forty recommendations of the ILOC Report are timely and significant; each is specifically referenced in Appendix I. This report highlights major themes found within the recommendations, focusing on recommendations closely tied to ABA work and existing policies. However, the resolution associated with this report adopts *all* of the ILOC recommendations as ABA policy.

Importance of Locally-Controlled Criminal Justice Systems

A major theme of the ILOC Report is that public safety in Indian country can improve dramatically once Native nations and tribes have greater freedom to build and maintain their own criminal justice systems. In contrast to the majority of American communities, federal or state governments control the vast majority of criminal justice services over local tribal governments in Indian country.⁵ Through a 200 year old exceedingly complicated web of jurisdictional rules and sentencing limitations, tribes lack meaningful decision making about their own criminal justice.

² Tribal Law and Order Act of 2010, Public L. No. 111-211, Sec. 235; 25 U.S.C. § 2812.

³ Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, tit. IX, § 909.

⁴ INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES i (2013) [*hereinafter* ILOC REPORT], found at: www.aisc.ucla.edu/iloc/report/.

⁵ ILOC REPORT, 1.

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Jurisdiction over a crime in Indian country currently depends upon the Indian status of the offender, the Indian status of the victim, the location of the crime, the nature of the crime, and within what state the tribe is located.⁶ Even if a tribe does have jurisdiction over a crime, sentencing limitations prevent tribes from meting out sentences appropriate for major crimes.⁷ Tribes are subsequently forced to cede prosecution to a concurrent jurisdictional sovereign, oftentimes encountering a lack of accountability and an unwillingness to prosecute.⁸ Parties must often travel far outside of their communities to access criminal justice; Native defendants are often not tried by a jury of their peers; and tribal community members and outsiders lack confidence in tribal governments' ability to maintain law and order in Indian country.⁹ The result is that Indian people today experience disproportionate rates of violent crime in their communities.¹⁰

The ILOC Report recommends that tribes, as sovereigns, should have the option to fully or partially opt out of this jurisdictional maze.¹¹ Upon a tribe so doing, Congress would immediately recognize, much like all other local governments, the tribe's inherent criminal jurisdiction over all persons within the tribe's territory¹² without any sentencing limitations.¹³ In furtherance of informed, localized justice, the Commission further recommends that in order to implement this opt-out authority Congress should establish a new federal circuit court, the United States Court of Indian Appeals.¹⁴ This specialized circuit court would offer a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of federal law interpretation arising in Indian country.¹⁵

As part of the recommendation to create a specialized federal circuit court, the Commission recommends that the Federal Speedy Trial Act, 18 U.S.C. § 3161, be amended to also apply to

⁶ The General Crimes Act, 18 U.S.C. § 1152 (providing that federal courts have jurisdiction over interracial crimes committed in Indian country); the Assimilative Crimes Act, 18 U.S.C. § 1; the Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction over ten enumerated major crimes committed in Indian country that is exclusive of the states); Public Law 83-280, 18 U.S.C. § 1162 (delegating federal jurisdiction to six states over most crimes throughout most of Indian country within their state borders); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, Title IX (2013) (expanding tribal criminal jurisdiction to non-Indians for the crimes of domestic violence, dating violence and the violation of protection orders so long as the defendant has certain ties to the community and the tribe provides certain due process protections).

⁷ ILOC REPORT, 21. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (limiting a tribe's sentencing authority to a term of imprisonment of 1 year, or up to 3 years so long as the tribe provides five additional due process protections).

⁸ From 2005-2009, the Government Accountability Office (GAO) found that U.S. Attorneys declined to prosecute nearly 52% of violent crimes in Indian country. U.S. GAO, *U.S. Department of Justice Declinations of Indian Country Criminal Matters*, Report No. GAO-11-167R, 3 (2010). Prior to the enactment of TLOA, United States Attorneys were not required to report their declination rates. Section 212 of TLOA now requires that they submit an annual report to Congress detailing their declination rates. According to their first report, United States Attorney Offices declined to prosecute 37% of all Indian country submissions for prosecution in 2011, and 31% in 2012. U.S. Dep't of Justice, *Indian Country Investigation and Prosecutions 2011-2012* 5 (2013).

⁹ ILOC REPORT 21.

¹⁰ ID. at 3.

¹¹ ILOC REPORT, 23; Recommendation 1.1.

¹² ILOC REPORT, 23.

¹³ ID. at 25.

¹⁴ ID. at 23-24.

¹⁵ ID.

tribal court proceedings.¹⁶ As part of the recommended “opt-out” authority, the Commission recommends that opt-out tribes provide all defendants (Indian and non-Indian) protections equivalent to those guaranteed by the U.S. Constitution, in contrast to the current protections guaranteed by the Indian Civil Rights Act. To buttress these added due process protections, the additional statutory protection of the Federal Speedy Trial Act would provide further assurances that all defendants receive their day in court. Additionally, the Commission recommends that before defendants can appeal their convictions to this new federal circuit court, they be required to first exhaust tribal court remedies, just as Indian defendants are currently required to do.¹⁷ The Federal Speedy Trial Act does not provide constitutional protections.

These recommendations fall in step with the ABA’s long history of supporting tribal justice systems as the primary and most appropriate institutions for maintaining order in tribal communities. In August 2013, the ABA passed a resolution to urge the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§ 1901-63),¹⁸ noting that “Tribal-State Collaborations, and Tribal capacity-building are critical to ensuring that the Act aids tribes and state governments in meaningfully carrying out its intentions and edicts.”¹⁹ In an August 2008 resolution, the ABA urged Congress to “support quality and accessible justice by ensuring adequate, stable, and long-term funding for tribal justice systems.”²⁰ The report to the resolution specifically noted that

Tribal courts play an important role in Native American communities, confronting not only issues of self-determination and sovereignty, but also many of the same problems as state and federal courts, but often with considerably fewer resources. In fact, the federal, state, and tribal court systems are interconnected, and when tribal courts are unable to deal with tribal jurisprudence, some of these matters end up being adjudicated in either the state or federal courts, sometimes with disparate results for Native Americans.²¹

The ABA provided support for the enactment of the Tribal Law and Order Act,²² which aimed to provide greater freedom for Indian tribes and nations to design and run their own justice systems by, among other provisions, enhancing tribal sentencing limitations.²³ Similarly, the ABA passed a resolution in 2012²⁴ to support the inclusion of the tribal provisions within the Violence

¹⁶ ILOC REPORT, 23-24; Recommendation 1.2.

¹⁷ *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that exhaustion of tribal remedies is required before federal courts may exercise federal question jurisdiction over matters arising in Indian country) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 13, 18 (1987) (holding that exhaustion of tribal remedies is required before federal courts may exercise diversity jurisdiction over matters arising in Indian country).

¹⁸ ABA, *Recommendation, Report No. 111A* (2013).

¹⁹ *Id.* at 13.

²⁰ ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar Association, *Recommendation, Report No. 117A*, 4 (Aug. 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems).

²¹ *Id.* at 2.

²² See Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725, specifically because it “provide[s] tools to tribal justice officials to fight crime in their own communities.”).

²³ Tribal Law and Order Act (TLOA), Public Law 111-211, 25 U.S.C. § 2801, et. seq. (among other provisions, extending tribal sentencing limitations from 1 year imprisonment to 3 years imprisonment, if the tribe provides certain due process protections).

²⁴ ABA *Recommendation, Report No. 301* (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided).

111A

Against Women Reauthorization Act.²⁵ Those provisions expanded tribal criminal jurisdiction to non-Indian offenders, for the first time since 1978,²⁶ for the crimes of domestic violence, dating violence, and the violation of protection orders. These expressions of support are the latest iterations of a long line of ABA policy supporting tribal sovereignty and the ability of tribes to improve justice in Indian country.²⁷

In addition to supporting tribal justice, the Commission also draws attention to the federal and state justice systems that operate concurrently in Indian country. In noting the numerous instances in which these sovereigns interact to serve Indian communities, the Commission highlighted several small areas in which federal and state officials can assist the facilitation of justice, including encouraging Federal officials to serve as witnesses in tribal court proceedings;²⁸ and that U.S. District Courts should be expected to hold more judicial proceedings in and near Indian country.²⁹ Justice, regardless of its sovereign origin, should be more accessible to Indian peoples.

Enable Tribes to Effectively Address Gender-Based Violence

The ILOC Report, created as part of the Tribal Law and Order Act (TLOA),³⁰ and extended by the Violence Against Women Reauthorization Act (VAWA) of 2013,³¹ stems directly from concerns of the devastating and disproportionate effects of gender-based violence in Indian country. One of TLOA's six purposes is "to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women".³² Similarly, an entire title of VAWA is devoted to combatting the inability of tribal governments to effectively address gender-based violence due to jurisdictional limitations. Within this context, the ILOC Commission found that gender-based violence continues to afflict Indian country in part because "criminal jurisdictional in Indian country is an indefensible maze

²⁵ Violence Against Women Reauthorization Act (VAWA), Pub. L. No. 113-4, tit. IX (2013).

²⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants).

²⁷ See generally ABA, *Recommendation, Report No. 111A* (2013) (urging the full implementation of and compliance with the Indian Child Welfare Act); ABA, *Recommendation, Report No. 108B* (Feb. 2006) (supporting federal recognition for a native Hawaiian governing entity); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 103C* (Feb. 2004) (urging Congress to address the inadequacy of health care for many American Indians and Alaska Natives); ABA Section of Environment, Energy, and Resources, *Recommendation, Report No. 110* (Aug. 2002) (endorsing the use of settlement to resolve Indian reserved water rights claims); ABA Commission on Homelessness and Poverty Steering Committee on Unmet Legal Needs of Children, *Recommendation, Report No. 105C* (Aug. 2001) (urging equitable access for foster care and adoption services for Indian children under tribal court jurisdiction); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 117B* (Aug. 1991) (concerning disproportionate effects of general federal death penalty legislation on Native Americans); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 106A* (Feb. 1990) (supporting the American Indian Religious Freedom Act); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report* (Feb. 1980) (urging strict adherence to Indian treaty obligations).

²⁸ ILOC Recommendation 3.4.

²⁹ ILOC Recommendation 3.6.

³⁰ TLOA, Pub. L. No. 111-211, Sec. 235; 25 U.S.C. § 2812 (2010).

³¹ VAWA, Pub. L. No. 113-4, tit. IX §909.

³² TLOA, Pub. L. No. 111-211, Sec. 202(b)(4).

of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.”³³

The ABA has a long history of supporting legislation (1) addressing domestic, sexual and stalking violence,³⁴ and (2) supporting tribal sovereignty and providing tribes with every available resource and tool needed to improve justice in Indian country to hold perpetrators accountable.³⁵ In 2010, the ABA provided vigorous support for the enactment of TLOA, with then-ABA President Carolyn B. Lamm stating “there are numerous ways the [Tribal Law and Order Act] will work against gender-based violence, including the promise of better funding, community based projects and efforts that better hold perpetrators accountable.”³⁶ In 2012, the ABA then supported the inclusion of the tribal provisions within VAWA, expanding tribal criminal jurisdiction to non-Indian offenders for gender-based violence.³⁷

Unfortunately, VAWA 2013 only expanded tribal criminal jurisdiction over non-Indian offenders for the crimes of domestic violence, dating violence, and the violation of protection orders. The ILOC Report recommendations, however, would extend tribal criminal jurisdiction over non-Indians to cover a more broad range of criminal actions, including, most importantly, the crimes of *sexual violence*, which were regrettably not included in the initial VAWA 2013 expansion of tribal criminal jurisdiction.

Furthermore, the Commission draws special attention to Alaska Natives, who were excluded from the protections provided in Title IX of VAWA, including most disturbingly, the ability to enforce a tribal civil protection order. The Commission specifically calls for this reprehensible exclusion to be repealed.³⁸ Similarly, the Commission calls for equality in the tools that are provided to tribes in order to more effectively and competently address gender-based violence in all of Indian country.³⁹

³³ ID. at 15.

³⁴ See *ABA Recommendation, Report No. 115* (Feb. 2010) (urging Congress to re-authorize and fully fund VAWA); ABA Commission on Domestic Violence and Commission on Immigration, *Recommendation, Report No. 109* (Aug. 2008) (urging federal, state, and tribal governments to strengthen protection and assistance for victims of gender-based violence); ABA Section of Criminal Justice, *Recommendation, Volume 103* (Feb. 1978) (supporting efforts to combat family violence).

³⁵ See note 24.

³⁶ Statement by Carolyn B. Lamm, President of the American Bar Association (Aug. 3, 2010) (urging appropriation of funds for the Tribal Law and Order Act as a tool against gender-based violence).

³⁷ *ABA Recommendation, Report No. 301* (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided).

³⁸ ILOC Recommendation 2.4, calling for Congress to permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives.

³⁹ These include equal funding as compared to states for law enforcement (ILOC Recommendation 3.1); require the U.S. Department of Justice to provide reservation-level victimization data in its annual reports to Congress (ILOC Recommendation 3.2); entitle tribal prosecutors to Law Enforcement Sensitive information that federal prosecutors currently receive (ILOC Recommendation 3.3.); encourage federal officials to serve as witnesses in tribal court (ILOC Recommendation 3.4); encourage U.S. District courts to provide more judicial services in and near Indian country (ILOC Recommendation 3.6); encourage agreements between sovereigns to provide notice when a tribal citizen is reentering tribal lands from jail or prison (ILOC Recommendation 4.4 and 5.2); and condition state grants on State or local governments entering into agreements to provide criminal offenders’ history records with tribes (ILOC Recommendation 4.5).

111A

Particular Needs of Alaska Natives

The Commission specifically highlights the unique needs of tribes within the State of Alaska. Alaska Natives represent 229 of the 566 federally recognized tribes in the country.⁴⁰ However, most Alaska Native communities, meaning half of tribes generally, lack regular access to police, courts, and related services. At least 75 communities lack *any* law enforcement presence whatsoever.⁴¹ Alaska Natives are subsequently disproportionately affected by crime.⁴² The Commission found that due to the State of Alaska's centralized criminal justice system and to outdated conceptions of tribal sovereignty, Alaska Native regions suffer from a dramatic under-provision of criminal justice services.⁴³

The Commission therefore makes several Alaska-specific recommendations. First, Congress should take legislative action to ensure that Alaska Native lands are treated as Indian country, like most other tribal land in the United States.⁴⁴ Secondly, the Commission recommends that Alaska Native tribal governments enjoy the same inherent criminal jurisdiction as other tribes in the lower 48 states, including the ability to opt out of the current Indian country criminal jurisdiction scheme.⁴⁵ These changes would allow tribes to locally and immediately attend to violence and criminal activity.

While the ABA has not enacted policy specific to Alaska Natives, the ABA has repeatedly identified Alaska Natives as distinct peoples in possession of inherent sovereignty.⁴⁶ In synchrony with ABA support for tribal sovereignty,⁴⁷ the ABA has been a long-time advocate for local justice generally. In 2012, the ABA called for support, including tribal support, to address the decline in the number of attorneys practicing in rural America.⁴⁸ In 2011, the ABA drew attention to the devastating financial burden on local and state courts due to the recession, stating that “[s]trong, effective, and independent justice systems are a core element of our democracy.”⁴⁹ Bringing local justice to Alaska Natives is the necessary next step.

⁴⁰ ILOC REPORT, 35.

⁴¹ ID. at 39.

⁴² ID. at 41 (noting that Alaska Native women are over-represented in the domestic violence victim population by 250 percent; Alaska Natives were 2.5 times more likely to die by homicide than non-Native Alaskans; and that Alaska Natives' representation in the Alaska prison and jail population is twice their representation in the general population).

⁴³ ID. at 43 (noting that the Alaska State government is more centralized than any other U.S. state).

⁴⁴ ILOC Recommendations 2.1, 2.2, and 2.3.

⁴⁵ ILOC Recommendations 2.4 and 2.5.

⁴⁶ See ABA, *Recommendation, Report No. 108B* (Feb. 2006) (supporting federal recognition for a native Hawaiian governing entity by arguing for Hawaiian self-determination and self-governance at least equal to that which Alaska Native governments possess under the Constitution to govern and provide for the health, safety, and welfare of their members). See also ABA, *Recommendation, Report No. 103C* (2004) (identifying the United States trust responsibility to Indians to include obligations to Alaska Natives).

⁴⁷ See note 22.

⁴⁸ ABA *Recommendation, Report No. 10B* (2012).

⁴⁹ ABA, *Recommendation, Report No. 302 17* (2011).

Due Process Protections Are Prioritized

In assessing the effectiveness of criminal justice in Indian country, the Commission examined the Indian Civil Rights Act.⁵⁰ Tribes, as distinct sovereigns, are not bound by the due process protections guaranteed by the Bill of Rights. Rather, tribes are bound by the Indian Civil Rights Act (ICRA). ICRA requires due process protections similar to, but not exactly the same as the Bill of Rights. These protections include the free exercise of religion, free speech, press, and the right to assemble, a right against double jeopardy, and the right to a speedy trial.⁵¹ However, the ICRA does not require the right to a jury trial in civil cases, or, at least for tribes that have not adopted TLOA's enhanced sentencing provisions, the right of indigent defendants to appointed counsel in criminal cases.

The ICRA has recently undergone several amendments that have included substantial due process protection additions.⁵² The ABA has expressed explicit support for all of these added due process protections for defendants in tribal court.⁵³ However, in recommending that tribes should have the choice to opt out of the current criminal jurisdictional maze, the Commission notes that this opt-out should “be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review...”⁵⁴ Essentially, in what is described as the “great bargain,” the Commission recommends that in exchange for full territorial criminal jurisdiction, tribes should be held to the same due process standards as federal and state courts, despite not having been members of the Constitutional Convention.

This leap in due process accountability extends far beyond current ABA policy that supports tribal criminal jurisdiction under ICRA.⁵⁵ Moreover, it is not only in line with American civil rights law for federal and state courts, but it is also in line with numerous ABA policies

⁵⁰ Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1304.

⁵¹ ICRA, 25 U.S.C. § 1302(a)(1), (3), and (6).

⁵² In order for tribes to sentence a criminal defendant to a term of imprisonment longer than one year, up to three years, a tribal court must (1) provide the defendant the right to counsel at least equal to that guaranteed by the Constitution; (2) provide indigent defendants licensed defense counsel; (3) require that the presiding judge is licensed and has sufficient legal training; (4) ensure the criminal laws are made publicly available; and (5) maintain a record of the criminal proceeding. ICRA, 25 U.S.C. § 1302(c), as amended by the TLOA of 2010, Public L. No. 111-211. In order for tribes to prosecute a non-Indian defendant for domestic violence, dating violence, or the violation of protection order, the tribal court, in addition to the added due process protections required above, must additionally provide (1) the right to a trial by an impartial jury that reflects a fair cross section of the community and does not systematically exclude any distinctive group, and (2) all other rights whose protection is necessary under the Constitution. ICRA, 25 U.S.C. § 1304(d), as amended by VAWA of 2013, Pub. L. No. 113-4, tit. IX, § 904.

⁵³ See Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725 (TLOA) see note 37). Also see ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to extend tribal criminal jurisdiction to non-Indian perpetrators, so long as the defendants are provided the due process protections required by TLOA, and are provided a right to a jury trial that reflects a fair cross section of the community and does not systematically exclude any distinctive group.).

⁵⁴ ILOC Recommendation 1.1

⁵⁵ See note 37.

111A

supporting indigent defense, well trained judges, prosecutors, and defense counsel, appellate review of sentences, access to a speedy trial, access to a jury trial, and so forth.⁵⁶

Need for Consistent and Equal Funding

The Commission makes alarming findings regarding the funding of tribal justice systems. Indian country data in 2010 show a need for at least 2,991 additional law enforcement officers—a 50 percent staffing shortfall.⁵⁷ Federal investment in tribal justice systems under state criminal jurisdiction has been even more limited than elsewhere in Indian country.⁵⁸ The Commission recommends that Congress should direct funds for Indian country law enforcement, and that these funds should be made equally available to all tribes, regardless of their jurisdictional nuances.⁵⁹

The Department of Justice has become a major funder of Indian country criminal justice infrastructure, in addition to the Department of Interior. However, their use of short-term, competitive grants for specific activities is not a good match for Indian country's needs.⁶⁰ Further, the Department of Justice and the Department of Interior do not appear to coordinate their funding efforts, creating costly duplication, confusion, and wasteful outcomes.⁶¹ The Commission recommends that tribal justice system funding should be consolidated, that competitive grants should be substituted for recurring base funding, and that the Indian Tribal Justice Act of 1993 should finally be funded.⁶²

The ABA has provided explicit support for adequate tribal justice system funding.⁶³ In the ABA's 2008 resolution supporting adequate funding for tribal justice systems, the report specifically noted that

Since Congress enacted the Indian Tribal Justice Act in 1993, the needs of tribal court systems have continued to increase, but there has been no corresponding increase in funding for tribal court systems. In fact, the Bureau of Indian Affairs funding for tribal courts has actually decreased substantially since the Indian Tribal Justice Act was enacted in 1993.⁶⁴

This specific support for funding in Indian country is in addition to the ABA's long-standing support for the need for consistent and reliable justice system funding generally.⁶⁵

⁵⁶ See ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: PROSECUTION FUNCTION AND DEFENSE FUNCTION (1993); ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: SENTENCING (1994); ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: DISCOVERY AND TRIAL BY JURY (1996); ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE (2000); ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: PLEAS OF GUILTY (1997); and ABA, STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: PROVIDING DEFENSE SERVICES (1992).

⁵⁷ ILOC REPORT 67.

⁵⁸ ILOC REPORT, 69.

⁵⁹ ILOC Recommendation 71.

⁶⁰ ILOC REPORT, 83. The Commission found that the competitive nature of grant writing often excluded tribes with fewer resources, was too inconsistent to be relied upon, and did not allow tribes the freedom to determine their own spending priorities.

⁶¹ ILOC REPORT, 85.

⁶² ILOC Recommendations 3.8, 3.9, and 3.10.

⁶³ ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar Association, *Recommendation, Report No. 117A*, 4 (Aug. 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems).

⁶⁴ *Id.* at 5-6.

⁶⁵ ABA, *Recommendation, Report No. 302 17* (2011) (urging state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately).

Alternatives to Incarceration

Like other aspects of American criminal justice, the Commission found a need for new and updated detention facilities in Indian country, while also finding unique opportunities for alternatives to incarceration. The Commission called for increased resources for reentry, second-chance, and alternative to incarceration programs, “in the same way [Congress] does for State governments.”⁶⁶ The ILOC Report highlights both the “considerable amount of data demonstrat[ing] the effectiveness of some alternatives to detention”⁶⁷ as well as the “strong similarity between alternative sentencing and tribes’ traditional approaches to justice—which, ... focus on making reparations, healing victims and offenders, and restoring community.”⁶⁸

The ABA has an extensive policy collection supporting alternatives to incarceration. In 2004, the ABA urged states, territories, and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction. This included that alternatives to incarceration be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.⁶⁹ In 2007, the ABA furthered this resolve, urging governments to develop, implement, and fund programs that enable an offender to be placed under community supervisions, including sentencing/diversion options, community-based treatment, and in-patient treatment.⁷⁰ Also in 2007, the ABA supported policies and programs that use targeted evidence-based programs that provide juveniles family-focused, and strength-based early intervention and pre-court prevention services and treatment, including programs provided by *tribal governments*.⁷¹ The ABA has continued this support for more and more alternatives to incarceration programming.⁷²

Juvenile Justice

The Federal court system has no juvenile division,⁷³ yet Native youth are disproportionately incarcerated in the Federal system. Between 1999 and 2008, 43-60 percent of juveniles held in Federal custody were American Indian.⁷⁴ While those numbers are staggering, the added context of frequent declinations from U.S. Attorneys⁷⁵ means there are even more Native youth who receive no form of intervention from the state or federal systems. The jurisdictional maze is even more troubling in the juvenile context, given that Native youth in the Federal *adult* system are not receiving any classroom teaching or other educational instruction or services.⁷⁶

⁶⁶ ILOC Recommendation 5.1.

⁶⁷ ILOC REPORT, 129.

⁶⁸ ID. at 131.

⁶⁹ ABA Justice Kennedy Commission, *Reports with Recommendations, No. 102A* (2004).

⁷⁰ ABA, *Recommendation, Report No. 103A* (2007).

⁷¹ ABA, *Recommendation, Report No. 104C* (2007).

⁷² See ABA, *Recommendation, Report No. 105A* (2010) (supporting the development of Veterans Court programs); ABA, *Recommendation, Report No. 107B* (2011) (supporting Youth, or Teen Courts, that divert youth from juvenile justice sanctions); and ABA *Recommendation, Report No. 104D* (2011) (supporting the use of electronic monitoring as a beneficial alternative to juvenile detention).

⁷³ ILOC REPORT, 155.

⁷⁴ ID. at 151.

⁷⁵ ID. at 155. See also note 7.

⁷⁶ ILOC REPORT, 156.

111A

The Commission's recommendation that tribes be empowered to opt out of this jurisdictional maze⁷⁷ would allow for a meaningful intervention. For juveniles that remain in the federal and state systems, the Commission recommends that tribes at least be able to find and communicate with these youths.⁷⁸ Finally, like adults, the Commission recommends that governments should seek to provide alternatives to incarceration for youth, and that all youths should be provided trauma-informed screening and care.⁷⁹

The ABA has made similar findings. In 2013, the ABA supported the implementation of the December 2012 Report of the U.S. Attorney General's National Task Force on Children's Exposure to Violence.⁸⁰ That report highlighted the importance of early and culturally-competent interventions with youths in the juvenile justice system. Among its 56 recommendations, the Attorney General's Task Force recommended trauma-informed youth screening, consideration of a child's ethno-cultural background, and the importance of utilizing juvenile facilities.⁸¹ The ABA resolution notes

Thousands of youths are tried as adults and held in adult prisons every year in the United States. But adult prisons are not appropriately equipped to address the safety or needs of juvenile offenders. Youth in adult prisons are significantly more likely to commit suicide and are five times as likely to be sexually abused or raped compared to a juvenile facility.⁸²

Due to the particular issues facing American Indian and Alaska Native youth, the Task Force was compelled to recommend that a distinct federal task force or commission be established to examine the needs of American Indian/Alaska Native children exposed to violence.⁸³ In direct response to this recommendation, Attorney General Eric Holder announced the creation of the Attorney General's Task Force on American Indian and Alaska Native Children Exposed to Violence.⁸⁴ The Task Force will conduct four hearings, with the fourth and final hearing scheduled for Anchorage, AK on June 11-12, 2014. The Advisory Committee on American Indian Alaska Native Children Exposed to Violence will issue a final report to the Attorney General presenting its findings and comprehensive policy recommendations in the fall of 2014.⁸⁵

Also in 2013, the ABA passed a resolution urging legislation for increased programming for youth in the juvenile justice system with co-occurring mental health and substance abuse disorders.⁸⁶ The resolution notes that as opposed to centralized systems, young people with co-

⁷⁷ ILOC Recommendation 6.1.

⁷⁸ ILOC Recommendation 6.2 (recommending that tribes have the right to consent with U.S. Attorneys before Federal criminal charges against any juvenile is filed); and ILOC Recommendation 6.5 (recommending that state and federal juvenile justice systems be required to maintain records of which youths are tribal members).

⁷⁹ ILOC Recommendation 6.7.

⁸⁰ ABA, *Recommendation, Report No. 111B* (2013).

⁸¹ REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention (Dec. 12, 2012) [*hereinafter* DEFENDING CHILDHOOD INITIATIVE REPORT], available at: <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>

⁸² ABA, *Recommendation, Report No. 111B*, 10 (2013).

⁸³ *Id.*, Recommendation 1.2.

⁸⁴ Establishment of the Attorney General's Advisory Committee of the Task Force on American Indian/Alaska Native Children Exposed to Violence, 78 Fed. Reg. 54,678 (Sept. 5, 2013).

⁸⁵ See www.justice.gov/defendingchildhood/aian.html.

⁸⁶ ABA, *Recommendation, Report No. 113B* (2013).

occurring disorders require “locally-accessed treatment” that “avoids the costly and potentially detrimental effect of removing a juvenile from family and community to provide access to more comprehensive treatment...”⁸⁷ Like its support for due process, the ABA has extensive policy supporting meaningful and culturally-appropriate intervention, support, and under-reliance on incarceration for juveniles.⁸⁸

Conclusion

The recommendations of the ILOC Report regarding justice in Indian country seek to make Native America safer and more just, as well as to save taxpayers’ money by replacing outdated and top-down bureaucracies with locally based approaches. These approaches align with ABA policy that has long stood for both robust civil rights and meaningful tribal self-determination. These recommendations address ills that have afflicted Indian country for over 200 years. It is incumbent that we enable tribal governments to provide justice in their own communities in order to address the disproportionate amount of violence occurring in Indian country today.

Respectfully Submitted,

Mark I. Schickman
Chair, Section of Individual Rights and Responsibilities

James Felman and Cynthia Orr, Chairs
Criminal Justice Section

Mary Smith
President, National Native American Bar Association

February 2015

⁸⁷ Id. at 5.

⁸⁸ See ABA Recommendation, Report No. 104D (2011) (urging the use of electronic monitoring for juvenile offenders); ABA Recommendation, Report No. 107A (2011) (urging school official to discourage inappropriate referral of youths to the juvenile justice system and inappropriate use of expulsion and out-of-school suspension); and ABA Recommendation, Report No. 105B (2011) (urging the federal government to cut funding to any detention facility that does not protect the life, health, safety, and human dignity of its prisoners, or facilitate prisoners’ successful reintegration into their communities).

GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities
Criminal Justice Section

Submitted By: Mark I. Schickman, Chair
ABA Section of Individual Rights and Responsibilities

James Felman and Cynthia Orr, Chairs
Criminal Justice Section

Mary Smith, President
National Native American Bar Association

1. Summary of Resolution(s).

This Resolution urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement all the recommendations contained in the Indian Law and Order Commission's November 2013 Report to the President and Congress of the United States, entitled *A Roadmap for Making Native America Safer*, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to promote improvements to criminal justice in Indian country, and help implement and promote the recommendations proposed in the Commission's Report.

2. Approval by Submitting Entity.

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report on November 8, 2014.

The Council of the Criminal Justice Section approved the filing of this Resolution and Report on October 22, 2014.

The Board of the National Native American Bar Association approved the filing of this Resolution and Report on November 20, 2014.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

Although this Resolution will not affect any existing ABA policies, it is consistent with and builds upon: the ABA's history of supporting tribal justice systems as the primary and most appropriate institutions for maintaining order in tribal communities; the ABA's

history of supporting legislation addressing domestic, sexual and stalking violence; the ABA's identification of Alaska Natives as distinct peoples in possession of inherent sovereignty; ABA policy that supports tribal criminal jurisdiction under the Indian Civil Rights Act; the ABA's explicit support for adequate tribal justice system funding; the ABA's extensive policy supporting alternatives to incarceration; and the ABA's extensive policy supporting meaningful and culturally-appropriate intervention, support, and under-reliance on incarceration for juveniles.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

The report is not late filed, but the Resolution should be considered at the 2015 Midyear meeting because many of the recommendations made by the Indian Law and Order Commission in its report are directly aligned with policies previously approved by the ABA's House of Delegates and prompt implementation of the forty recommendations would serve as a signal of their importance.

6. Status of Legislation. (If applicable)

There is no relevant legislation pending.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The sponsoring entities will work with the ABA's Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

8. Cost to the Association. (Both direct and indirect costs)

None..

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest.

10. Referrals.

By copy of this form, the Resolution and Report will be referred to the following entities:

Section of Administrative Law and Regulatory Practice
 Section of Business Law
 Section of Family Law
 Section of Litigation
 Section of State and Local Government Law
 Government and Public Sector Lawyers Division
 Judicial Division
 Law Practice Division

111A

Law Student Division
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Young Lawyers Division
Center for Racial and Ethnic Diversity
Commission on Law and Aging
Commission on Disability Rights
Commission on Racial and Ethnic Diversity in the Profession
Commission on Women in the Profession
Native American Bar Association

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

Walter White, Delegate

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement all the recommendations contained in the Indian Law and Order Commission's November 2013 Report to the President and Congress of the United States, entitled *A Roadmap for Making Native America Safer*, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to promote improvements to criminal justice in Indian country, and help implement and promote the recommendations proposed in the Commission's Report.

2. Summary of the Issue that the Resolution Addresses

In July 2010, the Indian Law and Order Commission, an independent national advisory commission, was created as part of the Tribal Law and Order Act ("TLOA") of 2010. The Commission was extended by the Violence Against Women Reauthorization Act of 2013. The Commission was charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities, including criminal jurisdiction, the tribal jail and Federal prisons systems, tribal and federal juvenile justice systems, and the impact of the Indian Civil Rights Act on tribes, defendants, and the overall tribal criminal system.

As part of that comprehensive study, the Commission was charged with assessing justice in Indian country and developing long-term recommendations on necessary modifications and improvements to justice systems at the tribal, federal, and state levels. In November 2013, after months of hearings and listening sessions around the country, the Indian Law and Order Commission's findings and recommendations were released as a single report, entitled *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* ("ILOC Report"). The ILOC Report contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation (5) Detention and Alternatives; and (6) Juvenile Justice.

3. Please Explain How the Proposed Policy Position will address the issue

This Resolution will encourage Congress, as well as state, local, and tribal governments, to promptly implement all the recommendations offered in the Indian Law and Order Commission's 2013 Report, which should directly lead to improvements in criminal justice in Indian country.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.