

# The Promise of the Tribal Law and Order Act

By Christopher B. Chaney



Photo: Francis Canyon Pueblito Ruin, New Mexico. By Lawrence R. Baca.

The Tribal Law and Order Act (TLOA) is a new, broad, and comprehensive legislative package that attempts to improve the criminal justice system in Indian country.<sup>1</sup> Whether, in the eyes of our nation's indigenous people, the act actually fulfills its promise remains to be seen.

On July 29, 2010, President Barack Obama signed into law what is commonly referred to as the Tribal Law and Order Act (Public Law 111-211),<sup>2</sup> which seeks to improve the criminal justice system in Indian country in a variety of ways. In fact, it is probably safe to say that this is the most comprehensive legislation to address Indian country criminal justice in history.

Watershed legislation in this field is not new. For example, the Indian Country General Crimes Act (18 U.S.C. 1152), the Major Crimes Act (18 U.S.C. 1153), and the Indian Law Enforcement Reform Act (25 U.S.C. 2801, et seq.) have all had major impacts, yet none of that legislation affects criminal justice in Indian country as broadly as the TLOA does. The TLOA addresses criminal jurisdiction, policing, criminal intelligence information sharing, judicial services, corrections, probation, and training in Indian country. The act also deals with accountability and cooperation of federal and state law enforcement activities on tribal lands. The TLOA even dares to address the substance abuse problems that underlie and drive the majority of criminal activity in Indian country. Never before has one single piece of legislation attempted to address so many aspects of the criminal justice system in Indian country simultaneously.

The TLOA is so comprehensive that a full explanation of its ramifications is not possible in the confines of this article. For example, the act contains provisions that address such diverse issues as legal protection for Indian arts and crafts and tribal government access to explosives used in public fireworks displays. What follows is an explanation of some of the more important highlights of the TLOA. The discussion will provide brief explanations of various problems that existed prior to enactment of the law and will describe how the TLOA deals with those challenges. The conclusion will offer an assessment of the likely "big picture," "long-term" outcome of the TLOA on public safety in Indian country.

## Statutory Confirmation of Existing Federal Agency Policies and Practices

Prior to enactment of the TLOA, the U.S. Department of Justice (DOJ) and the U.S. Department of the Interior (DOI) had put into place a number of policies, practices, and initiatives designed to improve public safety in Indian country. Many of these practices were implemented without a legislative mandate, but rather had been put into practice under pre-existing authorities. A number of these practices apparently caught the attention of the authors of the legislation and were subsequently statutorily confirmed as best practices. Examples of pre-existing practices that now have specific statutory authorization include the following:

- designation of tribal prosecuting attorneys as special assistant U.S. attorneys so they can prosecute federal crimes that occur on the reservation in federal court (§ 213),
- designation of assistant U.S. attorneys as tribal liaisons (§ 213 also specifies duties of the designated tribal liaisons), and
- designation of a Native American issues coordinator at the Executive Office for U.S. Attorneys (§ 214(b)).

In addition, § 214(a) of the TLOA made the DOJ Office of Tribal Justice a permanent component of the Department of Justice. The Office of Tribal Justice had been in existence for some 15 years prior to enactment; however, it was not a statutorily confirmed freestanding component prior to the act. Section 211(a)(4) of the TLOA statutorily acknowledges the name change of the Department of the Interior, Bureau of Indian Affairs' (BIA) "Office of Law Enforcement Services" to that of "Office of Justice Services," (OJS) which had already been done administratively in 2005 in order to reflect the expansion of that office's authority from just law enforcement operations to the full panoply of criminal justice services in Indian country (including training, judicial services, and corrections). Another BIA practice confirmed by the TLOA includes the provision of police dispatch services (§ 211(b)).

## Improvement of Information Sharing Capabilities

Information sharing is critical to the provision of effective

tive, efficient, and professional criminal justice services in Indian country, and the TLOA recognizes this in a number of ways. First, § 233 amends 28 U.S.C. § 534 to allow tribal criminal justice agencies access to the FBI's National Crime Information Center (NCIC) databases and other databases that share federal criminal intelligence information. Although this had already been FBI policy for some time, there is now a statutory mandate to allow access.

Second, the TLOA significantly changes the way that Indian country's crime statistics are handled. Prior to the TLOA, the BIA's OJS collected crime data from tribal police departments and reported that data to the FBI; however, the data was reported in a lump sum and neither the FBI, BIA's OJS, nor tribal leaders were able to rely on any published results in order to make informed policy decisions. The act amends 25 U.S.C. § 2802 to make the BIA's OJS responsible for the collection, analysis, and reporting of crime data. The act goes further and mandates that the data reported to the BIA's OJS be reported separately on a tribe-by-tribe basis (§ 211(b)). Finally, § 251(b) of the TLOA requires the DOJ's Bureau of Justice Statistics, the FBI, and the BIA's OJS to work together to consult with tribes in order to establish and implement tribal data collection systems.

### **Changes in Criminal Law and Procedure**

The TLOA also addressed criminal procedure in Indian country. Prior to the enactment of the TLOA, BIA law enforcement officers were authorized to make warrantless arrests for certain enumerated crimes (mostly those related to domestic violence) based on "reasonable grounds." In § 211(c)(2)(B), the warrantless arrest standard was modified to that of "probable cause"—the same standard used by other law enforcement jurisdictions. In addition, § 211(c)(2)(D) expanded the list of enumerated crimes to which the warrantless arrest rule applied to include controlled substances offenses, bootlegging, firearms offenses, and assaults.

Federal employees from the BIA's OJS and from the federal Indian Health Service (IHS) are sometimes needed to testify in tribal courts or in state courts. Prior to the TLOA, nonfederal court subpoenas of BIA and IHS employees were reviewed via a time-consuming administrative process, and such subpoenas were not deemed valid unless the federal agency granted permission for the testimony to be taken. The result was that approval rarely came, or if it was granted, it was sometimes done after the court hearing had already taken place. The TLOA's § 263 institutes a new procedure whereby tribal court and state court subpoenas are deemed approved by operation of law if the agency does not act within 30 days.

### **Improvements in Criminal Justice Operations**

The TLOA includes a number of provisions that affect the operational "business end" of how the Department of the Interior and the Department of Justice do their work in Indian country. Prior to enactment of the TLOA, the BIA's OJS and the FBI were authorized, but not required, to report to tribal law enforcement authorities when an investigation was not referred for federal prosecution.

Similarly, U.S. attorneys offices were authorized, but not required, to report to tribal prosecutorial authorities when a case was declined for federal prosecution. The TLOA § 212 amends 25 U.S.C. § 2809, so that, in the case of nonreferrals and declinations, the FBI and U.S. attorneys offices "shall coordinate" with their tribal counterparts. It is noteworthy that the law enforcement nonreferral provision now not only covers the BIA and FBI but also applies to "any Federal department or agency," thus, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, inspector generals' offices, and other federal law enforcement agencies that investigate crimes in Indian country must coordinate with their tribal law enforcement counterparts.

Under § 245 of the act, the Office of U.S. Probation and Pre-Trial Services is authorized to appoint officers in Indian country. Under § 261(a), the Bureau of Prisons is required to notify a tribe's chief law enforcement official when a prisoner is being released into the tribal community if that prisoner had been convicted of a violent crime, drug trafficking, or a sex offense (the tribal sex offender registry must also be notified if the tribe operates such a registry).

In addition, § 211(b) of the TLOA authorizes the BIA's OJS to provide "E-911" emergency services. Section 231(a) requires the BIA's OJS to recognize officer training received at state and tribal police academies and also raises the maximum hiring age for law enforcement officers from 37 to 47 to allow for greater flexibility in hiring. Section 231(b) provides the BIA's OJS with greater direction regarding Special Law Enforcement Commission agreements (which allow the BIA's OJS to cross-deputize tribal police officers to enforce federal laws).

### **Other Administrative Changes Within Federal Agencies**

Section 211(b) of the TLOA amends 25 U.S.C. § 2802 to require the BIA's OJS to provide an annual report to Congress that addresses unmet budgetary needs for law enforcement, prosecution, judicial services, and corrections resources in Indian country. This report is required to cover not only those programs that the BIA's OJS administers directly but also those programs that tribal governments run on their own. Section 241(a)(2) reinvigorates 25 U.S.C. § 2412 (part of the Indian Alcohol and Substance Abuse Act), which authorizes and encourages the Department of Justice and the Department of Health and Human Services to assist tribes in developing "Tribal Action Plans" to address substance abuse in their communities. Prior to the enactment of the TLOA, 42 U.S.C. § 13709 limited certain grant funding programs to the construction of incarceration facilities and required that tribal matching funds be provided; Section 244 of the act makes changes to provide greater flexibility to allow such grant funds to be used to build "tribal justice centers" (which can include law enforcement and judicial facilities in addition to incarceration facilities) and eliminates the matching fund requirement under this grant program.

The development of tribal law enforcement programs in the state of Alaska has been hampered by two perceived legal impediments: (1) mandatory Public Law

280 (authorizing state criminal jurisdiction within Indian country located in Alaska) and (2) the Supreme Court decision in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) (holding that Native Village land was not “Indian country” for jurisdictional purposes).<sup>3</sup> Because of these two restrictions, law enforcement in many tribal communities in Alaska had been provided by State Village Public Safety Officer (VPSO) programs. In order to support tribal communities served by VPSO programs, § 247 of the TLOA made all VPSO programs eligible to apply for DOJ Community Oriented Policing Services grants (a common source of funding for tribal law enforcement agencies) and mandated the BIA’s OJS to accept VPSO officer candidates into the BIA’s Indian Police Academy for training.

Prior to the TLOA, most tribal community health facilities did not have effective sexual assault policies or protocols in place. Where they were in place, the content often differed greatly from tribe to tribe. Section 265 requires the federal Indian Health Service to coordinate with the DOJ, the BIA’s OJS, and tribes to develop standardized sexual assault policies and protocols. The BIA’s OJS is now authorized to provide training regarding NCIC access to the FBI’s National Crime Information Center databases (§ 211(b)). Section 231(c) authorizes the creation of an Indian Law Enforcement Foundation that will function as an independent nonprofit corporation to raise funds and grant awards to assist justice services programs run by tribes and the BIA’s OJS.

### Jurisdictional Reform

One of the more interesting changes to the criminal justice system in Indian country involves potential changes to the jurisdictional status of tribal lands that are subject to 18 U.S.C. § 1162 (commonly referred to as “mandatory Public Law 280”). Pursuant to mandatory Public Law 280, affected tribes were subject to state criminal jurisdiction and most nongeneral federal criminal jurisdiction was eliminated. Dissatisfaction with that state of affairs (on the part of both tribes and states) led to a number of jurisdictional retrocessions. Under 25 U.S.C. § 1323(a), states and tribes that concurred could petition the secretary of the interior to accept a transfer of criminal jurisdiction from the state to the federal government. Some states worked cooperatively with tribal governments to make that change in appropriate cases, but other states did not do so. If a tribal community was dissatisfied with state jurisdiction but the state would not agree to a transfer of authority, then public safety could suffer. Section 221 created an additional path for mandatory Public Law 280 tribes to change their jurisdictional status. Under the new provisions, a tribe can request the U.S. attorney general to accept concurrent (with the state and tribe) federal criminal jurisdiction over the reservation. State agreement is not required, because the state’s jurisdiction is not altered.

Perhaps the biggest change the TLOA made to the field of criminal justice in Indian country was an authorization to allow tribal courts to impose felony level sentences. In 1968, the Indian Civil Rights Act was enacted with a view toward protecting the rights of criminal defendants in tribal courts.<sup>4</sup> However, Congress took things one step further. Under 25 U.S.C. § 1302(7), the sentencing author-

ity of tribal courts was limited to the misdemeanor level (after subsequent amendment it was limited to no more than one year of incarceration and/or a fine of no more than \$5,000). Under § 234 of the TLOA, a tribe now has the option to impose felony level sentences of up to three years per count and up to nine years per case; the limit on fines has been raised to \$15,000. This enhanced sentencing authority is conditioned on the tribe making bar-licensed indigent defense counsel available, using a bar-licensed judge, making tribal criminal laws available for public inspection, and recording court proceedings.

Because most tribes do not have incarceration facilities and those that do exist are designed to handle prisoners serving short-term misdemeanor level sentences, the enhanced sentencing authority raised the question of what the tribes would do with long-term prisoners. In response to those concerns, § 234(c) of the TLOA creates a new option for tribal courts. Defendants sentenced under the new felony sentencing authority can be assigned to serve their time in the custody of the U.S. Bureau of Prisons at the expense of the federal government. This new “Tribal Prisoner Pilot Program” will accept up to 100 prisoners; per the TLOA, the prisoner must have been sentenced to serve at least two years’ incarceration and the offense of conviction must be for a violent crime.

### Studies for Future Improvement

The Tribal Law and Order Act authorizes a number of studies to be conducted that will provide information on which legislators and others can rely when making decisions on policy and resource allocation. Section 235 of the TLOA creates a new entity called the Indian Law and Order Commission, which will consist of a blue-ribbon panel of experts on the criminal justice system in Indian country. The goal of the commission is to study criminal jurisdiction, corrections, juvenile justice, the effects of the Indian Civil Rights Act, and other areas that the commission chooses to study. The Indian Law and Order Commission will produce a report containing recommendations for improvement that will be presented to the President and to Congress by July 2012. Section 211(b) of the TLOA requires the Department of the Interior, in conjunction with the Department of Justice, to develop a long-term tribal detention plan, and § 241(g)(1) requires the two departments to work together in consultation with tribes to develop long-term plans for juvenile detention, substance abuse treatment centers, and alternatives to detention.

### Conclusion

The Tribal Law and Order Act is watershed legislation for the criminal justice system in Indian country. The legislation spans the spectrum of crime prevention, training, law enforcement, information sharing, adjudication, probation, corrections, substance abuse treatment, and re-entry programs. The act has great promise to improve public safety in Indian country significantly. However, whether the TLOA actually fulfills that promise will depend on three things:

- adequate funding to build the facilities, purchase the equipment, and hire the personnel that the TLOA contemplates;<sup>5</sup>
- zeal and willingness by the Department of Justice, the Department of the Interior, and the Department of Health and Human Services to implement the act;<sup>6</sup> and
- interest, engagement, and input from the federally recognized tribes to ensure that implementation is done in a way that improves public safety in a professional and culturally appropriate way. **TFL**

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*Christopher B. Chaney is a member of the Seneca-Cayuga Tribe of Oklahoma and serves as a deputy director in the U.S. Department of Justice, Office of Tribal Justice. This article reflects the opinion of the author and may not necessarily reflect the opinions or positions of the U.S. Department of Justice or its components. The author thanks Tracy Toulou, Gaye Tenoso, and Leslie Hagen for their advice and support.*

#### Endnotes

<sup>1</sup>“Indian country” is defined at 18 U.S.C. § 1151 to include all land within the exterior boundaries of a reservation, “dependent Indian communities,” and allotments. In addition, other forms of Indian country have been recognized by Congress and by the U.S. Supreme Court. *See*,

*e.g.*, *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993).

<sup>2</sup>Technically, Public Law 111-211 is entitled, An Act to Protect Indian Arts and Crafts Through the Improvement of Applicable Criminal Proceedings and for Other Purposes. Title I of the act (§§ 101–103) amends certain provisions that deal with enforcement of laws designed to protect the Indian arts and crafts market from fraud. Title II of the act (§§ 201–266) is entitled the Tribal Law and Order Act of 2010.

<sup>3</sup>As explained above, there are a number of types of territory that can be considered to be Indian country for jurisdictional purposes; *Venetie* dealt only with Alaska Native Village land, not reservations, informal reservations, or allotments.

<sup>4</sup>The Supreme Court had held that the provisions of the Constitution do not apply in tribal courts; *see Talton v. Mayes*, 163 U.S. 376 (1896). Under the Indian Civil Rights Act, most—but not all—of the provisions of the Bill of Rights were made statutorily applicable to tribal courts.

<sup>5</sup>It should be noted that the TLOA provides significant statutory authorities, but it does not appropriate any funds for implementation.

<sup>6</sup>As of the time that this article was written, all three departments were actively engaged in working together on implementing the TLOA using existing available resources.

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## COMMENTARY *continued from page 43*

to Indian veterans appear to be appealed to the Board of Veterans Appeals. Therefore, TVRs must be trained as advocates so that they can directly represent Indian veterans before the VA at the regional offices as well as the Board of Veterans’ Appeals. It is essential in this regard to amend the inherently discriminatory language of 38 C.F.R. §§ 14.628 and 14.629, which limits certification and accreditation to state and county employees, with no provision for employees (or designees) of any other entity, such as tribal employees.

There is a concurrent need for lawyers to provide legal representation in complex cases in Indian country. At a minimum, there should be some education in veterans law available to lawyers who work in Indian country. There are considerable cultural ramifications inherent in PTSD cases, for example, as the impact of the type of experience that results in PTSD is as much the product of the culture from which the veteran came as it is of the event he or she experienced. One such case has gone before the Court of Appeals for Veterans’ Claims, but it was unsuccessful. It is essential to develop and pursue the theory espoused in that case—that the reservation culture in which the veteran grew up had a profound influence on the way in which he reacted to the situation that produced his PTSD, more so than it perhaps would have for someone from an urban culture. It is equally important for the Indian legal community to bring to the court issues that have strong cultural ramifications for Indian veterans.

There are currently three vacancies on the Court of Appeals for Veterans’ Claims, and it is incumbent upon the Indian legal community, including the Native American Bar

Association and the FBA Indian Law Section, to encourage the nomination of an American Indian, Alaska Native, or Native Hawai’ian individual for one of those vacancies.

It certainly makes economic sense to use advocacy skills to assist veterans in this regard. Every Indian family has been touched or affected by the military service of a family member. Many veterans returning from the current wars would not have survived the battlefield in any prior war. Devastating burns and multiple amputations are common. The signature wound of Iraq and Afghanistan is traumatic brain injury, which requires lengthy treatment and often never heals. Warriors in these conflicts have engaged in guerrilla warfare in close quarters that has left their minds and psyches badly damaged.

Surely, Indian veterans, their survivors, and their dependents are as deserving of adequate legal representation in obtaining the compensation and services earned by going in harm’s way as they are of representation in matters of water rights, gaming, economic growth, energy development, and the protection of sacred places. There is no more sacred place than the soul of a warrior. Indian veterans’ issues are Indian law issues. It is time for the Indian legal community to rise to the challenge. **TFL**

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*Carol Wild Scott has been deputy director of The Veterans Consortium Pro Bono Program since 1996, and is chair of the FBA Veterans Law Section. Her background over the last 40 years has been primarily in military law and veterans law.*