



At Sidebar

by Gregory S. Arnold

Tribal Law and Order Act and Violence Against Women Act: Enhanced Recognition of Inherent Tribal Sovereignty Creates Greater Need for Criminal Defense Counsel in Indian Country

Starting with the Indian Civil Rights Act of 1968

("the ICRA"), Native American Indian tribes were limited in sentencing Indian criminal defendants to a maximum of only six months in jail and / or a \$500 fine, including murder and other violent felonies, and had no criminal authority over non-Indians. This was first strengthened by amendment in 1986, to one year in jail and/or \$5,000 per offense. Congress was concerned that these sentencing limits were little deterrent to criminal activity in Indian Country.

Now, with the Tribal Law and Order Act of 2010 ("the TLOA"),¹ and the Violence Against Women Act of 2013 ("the VAWA"),² tribes are authorized to use enhanced criminal sentencing provisions and to exercise limited criminal authority over non-Indians. The maximum sentencing was increased to three years in jail per offense (with stacking of offenses up to nine years per criminal proceeding) and/or \$15,000 per offense,³ but tribes must first meet specific requirements for protection of defendants before using the enhanced sentencing provisions. Those same sentencing provisions, and defendant protections requirements, will apply under the VAWA for exercising limited criminal authority over non-Indians.

The Tribal Law and Order Act of 2010

The TLOA was enacted because, according to Congress, the sentencing provisions under the ICRA were not sufficient deterrents to crime in Indian Country. The TLOA authorizes a means for tribal justice systems to combat violent crimes committed on Indian reservations, where the incidence of such crimes far exceeds the national average. The TLOA will hopefully be a greater deterrent to crime in Indian Country, tempered with the traditional tribal practices of restorative justice and community healing.

Before tribes can use the enhanced sentencing provisions of the TLOA, their tribal justice systems must be upgraded for the protection of defendants. The enhanced defendant protection requirements include a law-trained judge; "the assistance of a defense attorney

licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys";⁴ recorded proceedings; and public access to the tribe's criminal law, criminal procedure and rules of evidence prior to charging of a defendant. Whether a tribe elects to adopt and operate under the TLOA is a decision to be made by the leaders of each tribe.⁵ Some tribes would like to implement the new standards, but are held back by a lack of judges and defense counsel with the requisite qualifications, a lack of ability to make a permanent recording of the criminal proceedings, and/or an overall lack of funding.⁶

Thus far, the vast majority of tribes have not adopted the TLOA, with its enhanced sentencing provisions for violent crimes or felonies. These include the Warm Springs Tribe in central Oregon, where all offenses still carry a maximum sentence of just one year and/or \$5,000 per offense. According to former Warm Springs Tribal Court Chief Judge Susan B. Alexander, "a crime is simply a crime", with no reference in the Tribal Code as to whether an offense is a misdemeanor, felony, or otherwise designated as a violent crime.⁷ Some tribes have thus far resisted adoption of the TLOA, in part because it would be politically unpopular for the tribal leaders to expose the tribal members to enhanced sentencing provisions.

Other tribes are in the final process of updating their Constitutions and Codes to adapt the TLOA, including the Pascua Yaqui Tribe near Tucson, Arizona.⁸ As of October 2013, approximately twenty⁹ of the 566¹⁰ federally recognized Indian tribes have either adopted the TLOA or are in the process of implementation, and at least two¹¹ have already sentenced a defendant to prison for a term in excess of one year. For those tribes, and the many others that will eventually adopt it, the TLOA expands their ability to fight crime in their own tribal courts rather than having state and federal prosecutors try the cases in state or federal courts. In this way the TLOA is an important expression of increased federal recognition of the inherent sovereignty of Native

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Indian tribes. When it comes to sentencing violent Indian offenders on reservations, the TLOA allows more authority and flexibility for sentencing options to tribal prosecutors and tribal court judges.¹²

The Violence Against Women Act of 2013

The purpose of the VAWA is to decrease the incidence of crimes of domestic violence involving non-Indians in Indian country, to strengthen the ability of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that non-Indian perpetrators of domestic violence in Indian Country are held accountable for their criminal behavior. The tribal provisions were originally proposed years ago by the Department of Justice to address alarming rates of violence against Native women.¹³

Earlier attempts at implementation of the previously authorized VAWA failed because of a federal court's suggestion that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. The 2013¹⁴ passage of the VAWA overcame the court's concerns by clarifying that every tribe has full civil jurisdiction to issue and enforce protection orders against all persons regarding matters arising in Indian Country, and that such orders are entitled to full faith and credit by non-tribal jurisdictions.

Now, having been reauthorized, the VAWA¹⁵ makes several amendments to the ICRA. The most notable is its authorization of participating tribes (ones that have opted to exercise this special jurisdiction) to exercise "special domestic violence criminal jurisdiction" over non-Indians. Participating tribes will be able to use their inherent sovereign power to prosecute, convict, and sentence non-Indians who commit (a) acts of domestic violence, (b) dating violence, and/or (c) violate certain protection orders in Indian Country and who have certain connections to the tribe.¹⁶ This is a major advance in the ability of participating tribes to combat domestic violence, as prior to this legislation, tribal courts did not have the authority to prosecute a non-Indian, even one who lived on the reservation or was married to an enrolled tribal member. Despite historical civil jurisdiction over non-Indians, tribes have been selective in going forward with such civil matters because the penalty simply amounts to a fine and offenders fail to pay with impunity. Being able to bring criminal charges will make a big difference. Fred Urbina, Chief Prosecutor for the Pascua Yaqui Tribal Court, said "Having the ability to do it local and have the prosecution start soon after the offense, that's just going to be great for our victims."¹⁷

This provision of VAWA takes effect March 7, 2015,¹⁸ but autho-

rizes a voluntary pilot project to allow prepared tribes to begin exercising this authority sooner. As with the TLOA, and consistent with the case of *Williams v. Lee*¹⁹, a tribe's decision to participate in either the expansion of a tribe's authority in general, or the pilot program in particular, is entirely voluntary.

Two Strokes of a Pen Create Need for More and Better Qualified Defense Counsel in Indian Country

With two strokes of a pen, President Obama signed the TLOA and the VAWA into law. As more tribes adopt the TLOA and/or the VAWA, they will provide a more effective deterrent to crime in Indian Country. This is true of the TLOA because prison time and fines are increased. It is true of the VAWA because, for the first time, Congress has authorized tribal justice systems to exercise criminal jurisdiction over non-Indians for certain categories of crimes. Tribes that have adopted the TLOA have modernized their codes to designate violent crimes as felonies. Felonies are subject to the expanded sentencing provisions of the TLOA, and enumerated offenses under VAWA are subject to those same sentencing provisions. The result is a more complex adversarial system resembling that of a state or federal court, with concomitant motions practice; evidentiary hearings; scientific evidentiary analysis; expert testimony; habeas corpus petitions; and more frequent appeals.²⁰ Greater tension between prosecutors and defense counsel is fostered by the provisions for incarcerating convicts in the federal Bureau of Prison facilities, at federal expense, where sentences are for at least two years.²¹

The result is more opportunities for criminal defense counsel interested in assisting with that effort. Attorney Brent Leonhard²² of the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") notes that "with enhanced inherent sovereign authority under TLOA and VAWA there is a continued need to ensure the rights of defendants are protected. Zealous public defense is a critical aspect of that assurance." Mr. Leonhard goes on to point out that public defense "can also be a rewarding experience for any attorney looking to expand an existing practice or start a new legal career."

Attorney Preparation and Admission to Tribal Court Bars

Any attorney interested in practicing criminal law in a tribal court, as a response to the increased needs for counsel because of the TLOA and VAWA, will need to first satisfy the admission requirements²³ of each tribal court in which he or she wishes to practice. Tribal court



Modern Government Center that houses the Umatilla Tribal Court. Photo: Gregory S. Arnold.



Not-so-modern gavels in a modern courtroom. Photo: Gregory S. Arnold.

admission requirements include a good understanding of federal Indian law, plus knowledge of each tribe's respective constitution, codes, and ordinances.

This is an exciting time to be an attorney in a tribal court. Many tribal courts have already updated and modernized their tribal constitutions, codes and ordinances, and others are in that process now. Indian law is being taught in several law schools and is now tested as part of some state bar exams. The tribal courts on many reservations are as modern as those of state and federal courts.

The author of this article welcomes any inquiries from those with an interest in pursuing this field of legal practice. For those with an interest in following Indian law topics in general, please look ahead to our April issue of *The Federal Lawyer*, which is dedicated to Indian law. ☉

Endnotes

¹Pub. L 111-211, 124 Stat. 2258 (TLOA), July 29, 2010. *See also*, "Tribal Law and Order Act of 2010: A Primer, With Reservations", *The Champion*, National Association of Criminal Defense Lawyers, December 2010, Quintin Cushner and Jon M. Sands, *available at* www.nacdl.org/Champion.aspx?id=16249, last visited Nov. 21, 2013.

²Pilot projects are possible now, although the VAWA is not yet officially effective. *See* U.S. Department of Justice letter to U.S. Senate with its legislative proposals to address "violence against Native women", July 21, 2011 (hereafter "U.S. Department of Justice letter"), *available at* www.narf.org/cases/vawa/20110721-DOJ_letter.pdf (last visited Sept. 24, 2013).

³"No Indian tribe in exercising powers of self-government shall... impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both." Indian Civil Rights Act of 1968 as Amended by the Tribal Law and Order Act of 2010, 25 U.S.C. § 1302 (a) (7) (C). *See* Fahey, J., King, C., Kane, M. (2011). *Crime and Justice in Indian Country: A summary of talking circle findings and the Tribal Law and Order Act of 2010*. Crime and Justice Institute at Community Resources for Justice: Boston, MA. "Sentences of up to three years imprisonment and \$15,000 fine *per offense* are now allowable, with a maximum limit of nine years incarceration for combined offenses." *Available at* tloa.ncai.org/documentlibrary/2011/08/Talking_Circles_Report_Final_Jul11.pdf (last visited Sept. 23, 2013).

⁴Indian Civil Rights Act of 1968 as Amended by the Tribal Law and Order Act of 2010, 25 U.S.C. § 1302 (c) (2).

⁵*See* the landmark case of *Williams v. Lee*, 358 U.S. 217, 219 (1959), which recognized "...the right of reservation Indians to make their own laws and be ruled by them."

⁶*See* GAO-12-658R Tribal Law and Order Act, *Subject: Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain*

Grant Funds, May 30, 2012, *available at* www.gao.gov/assets/600/591213.pdf (last visited Sept. 23, 2013).

⁷Interestingly, the Warm Springs Tribal Code does make special mention of the criminal offense of sexual abuse, but only in the context of a longer statute of limitations, which is five years instead of the one year statute that applies to all other crimes. This underscores the importance of combatting crimes of sexual abuse in Indian Country. An ironic, yet natural first reaction to a reading of this Code, is that domestic violence is treated by Warm Springs as more heinous than murder. *See* Warm Springs Tribal Code, Criminal Procedure, § 202.105

Statute of Limitations. "Except as provided below, no complaint shall be filed for a criminal offense unless the offense shall have been committed within a one-year period from the date of filing. This one year limitation shall not apply to the criminal offense of sexual abuse (WSTC 305.345), and any other criminal offense committed concurrently with the offense of sexual abuse, which shall have a five year statute of limitations." *Available at* www.warmsprings.com/Warmsprings/Tribal_Community/Tribal_Government/Current_Governing_Body/Tribal_Code_Book/ (last visited Sept. 27, 2013).

⁸*See Pascua Yaqui Tribe – Tribal Law and Order Act Update Submitted to the Indian Law and Order Commission Field Hearing January 13, 2012, available at* www.indianlawandorder-commission.com/resources/documents/ILOCFH_PhxAZ_Testimony_PascuaYaquiTribe.pdf (last visited Sept. 24, 2013). "This is the most significant change in federal law that has affected Indian Country and the Pascua Yaqui Tribe in over 40 years. However, in order to fully benefit from the additional authority, the Pascua Yaqui Tribe must amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, incorporated as our 'Bill of Rights.' Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution currently limits punishment to one (1) year per offense."

⁹These include The Hopi Tribe in Arizona (*see* indiancountrytodaymedianetwork.com/article/a-leader-emerges%3A-hopi-tribe-adopts-new-criminal-code-according-to-tribal-law-and-order-act-standards-132160 (last visited Sept. 23, 2013)); the Eastern Band of Cherokee Indians in North Carolina (*see* turtletalk.files.wordpress.com/2012/10/ordinance-182-2012.pdf (last visited Sept. 23, 2013)); and The Confederated Tribes of the Umatilla Indian Reservation in Oregon (*see* Umatilla Tribal Court Hands Down 27 Month Sentence under TLOA's Enhanced Sentencing Rules, reported in Turtle Talk, *Indigenous Law and Policy Center Blog Michigan State University College of Law* (hereinafter "Umatilla Tribal Court"), *available at* turtletalk.wordpress.com/2012/11/27/umatilla-tribal-court-hands-down-27-month-sentence-under-tloas-enhanced-sentencing-rules/ (last visited Sept. 23, 2013).

¹⁰*See* Federal Register, Vol. 77, No. 155, Friday, August 10, 2012, Notices, page 87868, *available at* www.bia.gov/cs/groups/public/documents/text/idc-041248.pdf (last visited Sept. 23, 2013).

¹¹*See* Umatilla Tribal Court, *supra* at 9. The Umatilla Tribal Court was the first to use the enhanced sentencing limits. It is reported that the Eastern Band of Cherokee Indians also sentenced a tribal member to incarceration for more than one year under the authority of the TLOA.

¹²As stated in the preamble to the Eastern Band of Cherokee Indians' Ordinance No. 182 (2012), "There exists a need to modify the criminal code to increase the maximum penalties provided for by law in order to provide additional flexibility on the part of the prosecution as well as the Court in administering justice in criminal cases in this jurisdiction.", *available at* <http://turtletalk.files.wordpress.com/2012/10/ordinance-182-2012.pdf> (last visited Sept. 23, 2013).

¹³*See* U.S. Department of Justice, Violence Against Women Act (VAWA) Reauthorization 2013, *available at* www.justice.gov/tribal/vawa-tribal.html (last visited Sept. 24, 2013).

¹⁴*See* Section 905, Title IX of the Violence Against Women Act 2013.

¹⁵*See* GovTrack.us. S. 47 - 113th Congress, 2013–2015: Violence Against Women Reauthorization Act of 2013, GovTrack.us (database of federal legislation), *available at* www.govtrack.us/congress/

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anxious merchant how legitimate a pending transaction is likely to be:

For example, if you are a customer with an IP address in San Francisco but your billing address is in France, and you're shipping to New York City, but you live in Nigeria, Signifyd looks at the strength of your social profile and determines whether to approve the transactions.

Signifyd's algorithm mines personal data to gauge the worthiness and potential risk of an online transaction. For example, it collects data from an applicant's Facebook, Twitter, LinkedIn, and/or Pinterest posting habits. It also looks at the customer's purchase history and their location based on their IP addresses. To the extent it can do so, it also checks bank data and considers blacklists that already exist in the credit industry. And then, boom, it makes a recommendation to the merchant. It claims to have built a better mousetrap by penetrating social media websites and using information that consumers post there to evaluate their credit worthiness. And, the problem isn't just stopping fraudulent transactions. It is also a problem that legitimate transactions may be declined because, in the absence of the additional information that Signifyd analyzes, a transaction that is actually legitimate may be declined. The Signifyd website proudly comments that "merchants are estimated to lose 1 percent of revenue in fraud and lose an additional 3 percent annually in wrongly declined transactions. That means merchants are not only affected by losses, but are also losing billions in good revenue due to existing fraud solutions."

The *Wall Street Journal* reported on the anticipated launch of Signifyd last May and quoted Ramanand as saying, "Every new risk technology was built upon new data. ... We believe the next generation of risk technology will be around context detection (i.e., the ability to determine the intent or context of a transaction). The new underlying data layer to make context detection possible will be the Social Graph. That is what we're building at Signifyd—using the Social Graph to fight fraud—and we're excited about what that can do to protect our merchants."

Some are expressing concerns about the type of information being gathered and utilized by Signifyd to "protect its merchants." But, Ramanand points out that the information that contributes to the Social Graph was volunteered and the source had no reasonable expectation of privacy regarding it.

Conclusion

I would be willing to trade whatever privacy Ramanand may be depriving me of if it means that the number of form letters I receive from large corporations and banks diminishes appreciably and my credit identity remains my own.

However, I have to observe that the Cyberian world we live in is a different place than it was just a few years ago. That is something that all of us as Americans must be concerned about, of course. However, we as federal lawyers need to be even more concerned, not only for the sake of our credit rating but also for the sake of the data of our clients and the privilege that attaches to our online communications with them. ☉

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[bills/113/s47/text](#)) (last visited Sept. 23, 2013).

¹⁶See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and therefore may not assume such jurisdiction unless specifically authorized to do so by Congress. The VAWA makes some progress in softening the effects of this landmark case that, perhaps more than any other modern-day federal Indian law case, has been a source of frustration for Native Americans.

¹⁷See *Tribes Hope for Some Authority to Prosecute Non-Indians*, *Bend Bulletin*, Mar. 8, 2013, available at www.bendbulletin.com/apps/pbcs.dll/article?AID=/20130308/NEWS0107/303080389/0/SEARCH (last visited Sept. 27, 2013).

¹⁸See U.S. Department of Justice letter, *supra* at 2.

¹⁹See *Williams*, *supra*, at 5.

²⁰For a discussion of the implementing effects of the TLOA, including costs, resource needs and complexity, see *Pascua Yaqui Tribe – Tribal Law and Order Act Update Submitted to the Indian Law and Order Commission Field Hearing January 13, 2012*, available at www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_PascuaYaquiTribe.pdf (last visited Sept. 24, 2013). "Although, the Tribe has hired additional attorneys, there is still a deficiency in resources when considering the resulting complexity of a full blown adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, scientific evidentiary analysis, expert testimony, and other indirect costs."

²¹See DOJ Bureau of Prisons *Tribal Prisoner Pilot Program*,

available at www.bop.gov/inmate_programs/docs/tloa.pdf (last visited Sept. 27, 2013). "To be eligible, the offender must be...Sentenced to a term of 2 or more years of imprisonment with a minimum of 2 years left to serve at the time of referral to the Bureau for pilot participation." In the experience of some defense attorneys, tribal prosecutors are inclined to push for sentencing of at least two years in a misguided effort to have convicts incarcerated at federal expense, not tribal expense. As a result, plea negotiations have become less frequent and more protracted. Traditional notions of restorative justice and community healing, as alternatives to punishment, suffer in the process.

²²Attorney M. Brent Leonhard has had various legal positions in Indian Country. He headed the Public Defender's Office of the Coleville Reservation in northern Washington state, was previously the Deputy Attorney General for the CTUIR, and is currently Attorney for Office of Legal Counsel for the CTUIR. He is also a Special Assistant United States Attorney.

²³Being a member of a state bar does not qualify an attorney for practice in a tribal court. In addition to other tribal bar admission requirements, many tribes have a written bar exam, such as the Tulalip Tribe in northwest Washington (a two hour written exam) and the Warm Springs Tribe (a four hour written exam). To sit for the exams, or to meet other admission requirements, an attorney cannot be in trouble with any other bar of which he or she may already be a member, whether state, federal or tribal. Training opportunities can be found in law schools, which offer courses in federal Indian law, plus local, regional and national seminars and conferences.