

Data Sovereignty and the Tribal Law and Order Act

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The provision of criminal justice services in Indian country¹ is a key aspect of tribal sovereignty. These services, which may include policing, investigations, courts, corrections, sex offender registration, and probation/parole, are vital to the safety, vitality, and economic security of all communities. With the rapid development of technology in recent decades, criminal justice agencies find themselves evolving to meet old and new threats in ways that were mere science fiction a generation ago.²

Like all criminal justice agencies nationwide, tribal criminal justice providers have been thrust into a new age of data-driven solutions to protect the people who live, work, and recreate within their respective jurisdictions. Data has now become a key aspect of tribal sovereignty. Federally recognized tribes³ that understand this have begun the process of protecting this new tribal resource and are learning to control tribal data in ways that are consistent with tribal values, objectives, and laws.

The roots of the data sovereignty movement date back to pre-Columbian times but have taken on new context in the information age. In the pre-Columbian era, knowledge that sustained and protected indigenous tribes included orally communicated data about history, relationships with other tribes, religion, medicine, gathering places, hunting grounds, etc.⁴ According to Desi Rodriguez-Lonebear, “Data sovereignty deals with the right and ability of tribes to develop their own systems for gathering and using data and to influence the collection of data by external actors.”⁵ Today, tribal data includes information about land, water, people, health, finances, and crime. With the explosion of information now available through electronic means, such as the internet, the importance of managing tribal data has become paramount. Data supports and strengthens tribal sover-

eighty⁶ and tribes are finding new and appropriate ways to manage tribally maintained data.⁷ Rodriguez-Lonebear said it another way: “Tribal data are perhaps the most valuable tools of self-determination because they drive tribal nation-building by tribes for tribes.”⁸

The Tribal Law and Order Act (TLOA) was enacted in 2010.⁹ TLOA addressed tribal data issues in four main ways:

1. TLOA § 251(b) provided a mandate to the FBI, the Bureau of Justice Statistics, and the Bureau of Indian Affairs (BIA) Office of Justice Services to coordinate and consult with tribes to develop, establish, and implement tribal data collection systems.
2. TLOA § 211(b) amended 25 U.S.C. § 2802 to authorize the BIA Office of Justice Services to collect, analyze, and report crime data from Indian country.
3. TLOA § 233(a) amended 28 U.S.C. § 534 to statutorily allow tribal criminal justice agencies access to enter and retrieve data from federal criminal databases such as the FBI’s National Crime Information Center (NCIC).
4. TLOA § 233(b)(1), codified as 34 U.S.C. § 41107(1), states, “The attorney general shall ensure that tribal law enforcement officials that meet applicable federal or state requirements be permitted access to national crime information databases.”¹⁰

Federal efforts to implement TLOA's mandate to develop tribal data collection systems have taken form in a number of data collection activities. These efforts include planned surveys to obtain data regarding tribal law enforcement agencies, tribal court systems, state/local law enforcement activities on state jurisdiction reservations,¹¹ and jails in Indian country.¹² BIA Office of Justice Services activities regarding crime statistics will be discussed below. The FBI's Criminal Justice Information Services (CJIS) Division houses and is responsible for federal criminal databases that tribal, and non-tribal, criminal justice agencies utilize on a daily basis. In effect, TLOA § 233 statutorily confirmed the FBI CJIS' pre-existing, policy-based practices regarding tribal access and provided a more permanent statute-based authority. It is the relationship between tribes and FBI CJIS that is explored in this article to show how TLOA impacts data sovereignty in real-world application.

The roots of the FBI CJIS Division date back to the early years of the FBI. In 1924, the FBI established the Identification Division, which handled the FBI's fingerprint records.¹³ Interestingly, it was also during this time that the FBI established itself as a key player in Indian country law enforcement when it took a leading role in investigating a series of homicides on the Osage Tribe's reservation

as stolen. The 14 "person files" cover a variety of people, including fugitives, missing persons, registered sex offenders, respondents subject to domestic violence protection orders, and suspected terrorists.²⁰ NCIC gives tribal police officers the ability to check on the status of suspects virtually instantaneously. For example, a tribal police officer can do a roadside check of a driver who has been pulled over to determine if he or she is a fugitive from another jurisdiction that is willing to seek extradition. Additionally, tribal criminal justice agencies enter data into NCIC in order to expand their reach far beyond reservation boundaries to protect citizens nationwide. For example, off-reservation police are able to verify the existence of a tribal domestic violence protection order to aid a protected tribal member anywhere in the United States.²¹ One of the person files in NCIC is the National Sex Offender Registry (NSOR). The NSOR file holds information that tribal law enforcement officers need when investigating registry violations of the Sex Offender Registration and Notification Act.²²

The FBI CJIS National Instant Criminal Background Check System (NICS) is designed to keep firearms out of the hands of prohibited persons.²³ When a person purchases a firearm from a federally licensed firearm dealer, a NICS check is performed to determine

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in Oklahoma.¹⁴ In 1992, the Identification Division became CJIS. In 1995, CJIS moved from Washington, D.C., to Clarksburg, W. Va., where it resides today.¹⁵ The FBI CJIS Division maintains a number of federal criminal databases that are of vital importance to tribal criminal justice agencies.¹⁶

The exercise of effective tribal data sovereignty "will require meaningful and deliberate partnership, not just consultation."¹⁷ The management philosophy of CJIS can be best summarized as deference to the state, local, and tribal law enforcement agencies it serves. This philosophy, commonly referred to as the "shared management concept" allows tribal, and non-tribal, criminal justice agencies input to make recommendations on how CJIS should be managed.¹⁸ One expression of the shared management concept is the Advisory Policy Board (APB).¹⁹ The APB includes tribal representation in two ways: (1) the APB has four nonfederal regional working groups, each of which have a dedicated tribal criminal justice agency seat; and (2) the APB has a Tribal Task Force that takes into account issues and interests specifically pertinent to federally recognized tribes. Most importantly, tribal and non-tribal agencies decide what information to share with and to be maintained by CJIS. In other words, FBI CJIS defers to federally recognized tribes in a way that allows broad expression of tribal data sovereignty.

The FBI CJIS NCIC system consists of 21 databases that are of critical importance to police officers in the field and to criminal investigators. Seven "property files" pertain to vehicles, license plates, boats, firearms, and other property that have been reported

whether the purchaser is a convicted felon, a fugitive, is subject to a domestic violence protection order, has been convicted of domestic violence, or is otherwise prohibited by law from possessing a firearm.²⁴ If a determination is made that the purchaser is a prohibited person, then the sale is denied. People who have been convicted in tribal court for domestic violence and people restrained by a tribal court domestic violence protection order may not legally possess a firearm anywhere in the United States. Pursuant to TLOA, tribes can now prosecute felonies.²⁵ People convicted in tribal court of felony offenses are now prohibited from possessing a firearm nationwide. Additionally, tribal law enforcement agencies can access NICS for the purposes of issuing tribal firearms permits including "permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm."²⁶

The FBI CJIS Uniform Crime Reporting (UCR) Program²⁷ issues a variety of publicly available publications that are of great importance to the administration of criminal justice. Perhaps the report most often referred to and utilized by policy-makers and by members of the public is the annual Crime in the United States report. Tribal jurisdiction crime data can be accessed online by going to the most recent final Crime in the United States report, Offenses Known to Law Enforcement section, Table 9.²⁸ Tribal law enforcement programs that receive funding from the BIA Office of Justice Services are required to report crime data to the BIA.²⁹ The TLOA amended 25 U.S.C. § 2802 by requiring the BIA Office of Justice Services to pass along that data to the FBI CJIS UCR program on a tribe-by-tribe basis.³⁰

This provision was included in TLOA to ensure that tribal UCR data was not submitted in the aggregate but rather was available for each tribal jurisdiction individually.

Web-based FBI CJIS programs utilized by tribal criminal justice agencies include the National Data Exchange (N-DEx) and the Law Enforcement Enterprise Portal (LEEP). N-DEx provides a means for law enforcement agencies to exchange information including information pertaining to pending cases they may be working on.³¹ Criminal justice agencies have robust control over how that information is shared. LEEP³² is a resource that criminal justice agencies can use to obtain information about various topics and aspects of law enforcement; there are a number of special interest sites within LEEP that offer information pertinent to criminal justice agencies in Indian country, including the CJIS Tribal Outreach site and the Tribal Public Safety Net site.

Although beyond the scope of this article, it is noteworthy that FBI CJIS houses the Next Generation Identification (NGI) system that stores the FBI's fingerprint files.³³ NGI is utilized to generate criminal identity histories of individuals. These fingerprint-based criminal histories are used for noncriminal justice background checks. Where authorized by federal statute, tribal governments utilize these reports for background checks such as when hiring people who will have access to or control over children,³⁴ certain casino officials,³⁵ and applicants for employment or tenancy in tribal housing.³⁶

Conclusion

Opportunities for federally recognized tribes to submit and retrieve criminal justice data through FBI CJIS systems are broad and extensive. Subject to federal laws or policies that apply to all state, local, and tribal jurisdictions, FBI CJIS relies on tribes as sovereigns to determine what information to submit and what information to access. This deference to principles of tribal data sovereignty puts the tribe in control of its own data. The APB process allows tribes influence over the way that CJIS systems are managed nationwide. Federal agencies that are charged with assisting tribes in data sharing and management may find it instructive to look at the way that TLOA addresses tribal data sovereignty issues and how the FBI CJIS Division has met that challenge. ☉



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Endnotes

¹18 U.S.C. 1151; see also, *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

²See, e.g., *Maryland v. King*, 133 S. Ct. 1958 (2013) (supporting analysis of DNA of people arrested for serious crimes); *United States*

v. Jones, 565 U.S. 400 (2012) (requiring a search warrant to install a global positioning system device on a vehicle to monitor the vehicle's movements); *Kyllo v. United States*, 533 U.S. 27 (2001) (requiring a search warrant for police to use thermal imaging to look through walls of a home).

³82 Fed. Reg. 4915 (Jan. 17, 2017).

⁴Desi Rodriguez-Lonebear, *Building a Data Revolution in Indian Country*, in *INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA 254-255* (Tahu Kukutai & John Taylor eds., 2016).

⁵*Id.* at 259.

⁶Jennifer Lee Schultz & Stephanie Carroll Rainie, *Good Data Leads to Good Sovereignty*, *INDIAN COUNTRY TODAY* (June 3, 2014), <https://indiancountrymedianetwork.com/news/opinions/good-data-leads-to-good-sovereignty>.

⁷Jodi Bruhn, *Identifying Useful Approaches to the Governance of Indigenous Data*, 5 *INT'L INDIGENOUS POL'Y J.* (Apr. 2014), <https://ir.lib.uwo.ca/iipj/vol5/iss2/5/>.

⁸Rodriguez-Lonebear, *supra* note 4, at 265.

⁹Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

¹⁰One programmatic way that the DOJ is working to ensure tribal access is by expanding a program initiated in 2010 that allowed certain tribal criminal justice agencies access to FBI CJIS via a connection through the DOJ Office of the Chief Information Officer; the newly expanded program is known as the Tribal Access Program. See *Tribal Access Program*, DEP'T OF JUSTICE, <https://www.justice.gov/tribal/tribal-access-program-tap> (last visited Jan. 17, 2018).

¹¹See 18 U.S.C. § 1162 (mandatory Public Law 280) and 25 U.S.C. § 1321 (optional Public Law 280).

¹²See Devon B. Adams et al., *Tribal Crime Data Collection Activities*, 2017, BUREAU OF JUSTICE STAT. (July 27, 2017), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6006>.

¹³*Criminal Justice Information Services (CJIS)*, F.B.I., <http://www.fbi.gov/services/cjis>. (last visited Jan. 26, 2018).

¹⁴DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (2017).

¹⁵*Supra* note 13.

¹⁶28 C.F.R. §§ 20.3(b) & (g).

¹⁷Rodriguez-Lonebear, *supra* note 8, at 262.

¹⁸*Management of CJIS Systems Shared With Criminal Justice Community*, 16 *CJIS LINK* (Apr. 2014), <https://www.fbi.gov/services/cjis/cjis-link/management-of-cjis-systems-shared-with-criminal-justice-community>.

¹⁹*The CJIS Advisory Process: A Shared Management Concept*, F.B.I., <https://www.fbi.gov/services/cjis/the-cjis-advisory-process> (last visited Jan. 17, 2018). While non-FBI entities make recommendations regarding FBI CJIS criminal justice programs through the advisory policy board, FBI CJIS also receives recommendations regarding its noncriminal justice process through the National Crime Prevention and Privacy Compact Council. See 34 U.S.C. § 34 U.S.C. §§ 40311-40316, and *Compact Council Home*, F.B.I., <https://www.fbi.gov/services/cjis/compact-council> (last visited Jan. 17, 2018).

²⁰*National Crime Information Center (NCIC)*, F.B.I., <https://www.fbi.gov/services/cjis/ncic> (last visited Jan. 17, 2018).

²¹18 U.S.C. § 2265.

²²18 U.S.C. § 2250; see also DEP'T OF JUSTICE, *THE SEX OFFENDER*

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²⁸18 U.S.C. § 1152.

²⁹*Id.*

³⁰18 U.S.C. § 1153.

³¹*Ex parte KAN-GI-SHUN-CA* (otherwise known as *Crow Dog*), 3 S. Ct. 396 (1883).

³²*United States v. Kagama*, 118 U.S. 375 (1886).

³³18 U.S.C. § 1162.

³⁴*United States v. McBratney*, 104 U.S. 621 (1881).

³⁵*Draper v. United States*, 164 U.S. 249 (1896).

³⁶NAT'L CTR. FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org> (last visited Jan. 16, 2018).

³⁷*Who We Are*, TULALIP TRIBES, <https://www.tulaliptribes-nsn.gov/Home/WhoWeAre.aspx> (last visited Jan. 16, 2018).

³⁸PASCUA YAQUI TRIBE, <http://www.pascuayaqui-nsn.gov> (last visited Jan. 16, 2018). The author practices law in this court.

³⁹RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009).

⁴⁰See WESTLAW, <https://next.westlaw.com> (last visited Jan. 16, 2018).

⁴¹See VERSUSLAW, <http://www.versuslaw.com> (last visited Jan. 16, 2018).

⁴²See *Indian Law Section*, FED. BAR ASS'N, <http://www.fedbar.org/sections/indian-law-section.aspx> (last visited Jan. 16, 2018).

⁴³Model Rules of Professional Conduct, *Rule 8.5: Disciplinary Authority; Choice of Law*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law.html (last visited Jan. 16, 2018).

⁴⁴American Bar Association Model Rules of Professional Responsibility, Rule 8.5, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law.html (Last viewed April 25, 2017).

⁴⁵THOMAS MAUET, *MAUET'S TRIAL NOTEBOOK* (1994).

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REGISTRATION AND NOTIFICATION ACT (SORNA): A GUIDE ON SORNA IMPLEMENTATION IN INDIAN COUNTRY (2016), <https://smart.gov/pdfs/SORNA-IC-Guide.pdf>.

²²*National Instant Criminal Background Check System (NICS)*, F.B.I., <https://www.fbgov/services/cjis/nics> (last visited Jan. 26, 2018).

²⁴18 U.S.C. §§ 922(g) & (n).

²⁵25 U.S.C. §§ 1302(b)-(d).

²⁶C.F.R. § 25.6(j).

²⁷*Uniform Crime Reporting*, F.B.I., <https://ucr.fbi.gov> (last visited Jan. 17, 2018).

²⁸For example, 2016 tribal crime data can be found online listed under each state. See Table 9, *Offenses Known to Law Enforcement, by State by State, Tribal, and Other Agencies*,

2016, F.B.I., <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-9/table-9.xls/view> (last visited Jan. 17, 2018).

²⁹25 C.F.R. § 12.41.

³⁰25 U.S.C. § 2802(c)(15).

³¹*National Data Exchange (N-DEx) System*, F.B.I., <https://www.fbi.gov/services/cjis/ndex> (last visited Jan. 17, 2018).

³²*Law Enforcement Enterprise Portal (LEEP)*, F.B.I., <https://www.fbi.gov/services/cjis/leep> (last visited Jan. 17, 2018).

³³*Next Generation Identification (NGI)*, F.B.I., <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi> (last visited Jan. 17, 2018).

³⁴25 U.S.C. § 3207.

³⁵25 U.S.C. §§ 2706(b)(3) & 2710(b)(2)(F).

³⁶25 U.S.C. § 4138.



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