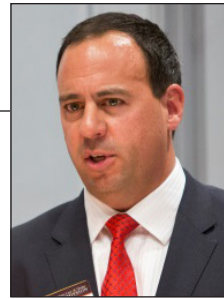


Focus on Indian Law

by Troy A. Eid and Affie Ellis



Indian Law and Order Commission Proposals Gain Ground

These are historic times for America's 567 federally recognized Indian tribes, thanks to the Tribal Law and Order Act of 2010 (TLOA) and the Violence Against Women Act Amendments of 2013 (VAWA Amendments). These landmark reforms make federal officials more accountable to Native American and Alaska Native communities, ease congressionally imposed restrictions on tribal governments' ability to protect people on Indian lands, and enhance civil rights protections for Natives and non-Natives alike.

Now the Federal Bar Association, which endorsed both TLOA and the VAWA Amendments, is taking another step forward through its continued support of the bipartisan Indian Law and Order Commission (ILOC). An independent advisory board to the president and Congress, ILOC was created by TLOA and charged with developing comprehensive legal and policy reforms to make Native America safer and more just.

In November 2013, after conducting more than 100 field hearings and site visits from the East Coast to Alaska, the nine ILOC commissioners released their unanimous, bipartisan report, "A Roadmap for Making Native America Safer" (www.aisc.ucla.edu/iloc/). The 324-page Roadmap proposes more than 40 reforms in areas such as criminal jurisdiction, intergovernmental cooperation, juvenile justice, public safety funding, and other key areas. The Roadmap's findings and recommendations constitute perhaps the most comprehensive blueprint for strengthening justice in Indian country.

On Feb. 12, 2014, the U.S. Senate Committee on Indian Affairs (SCIA) held an oversight hearing on the Roadmap. A substantial portion of this initial hearing focused on the second chapter of ILOC's report, which is devoted to the state of Alaska. The Roadmap, noting that reported domestic violence rates in Alaska are as much as 12 times higher than the national average, decries the categorical exclusion of all but one of Alaska's 229 federally recognized Native tribes from the VAWA Amendments' Special Domestic Violence Criminal Jurisdiction over non-Indian offenders, calling this failure to protect Alaska Native women "unconscionable."

At the SCIA oversight hearing on the Roadmap, U.S. Sen. Lisa Murkowski (R-Alaska), who had sponsored the so-called Alaska Exclusion, announced that she had reconsidered her position. She later introduced a bipartisan bill, co-sponsored by U.S. Sen. Mark Begich (D-Alaska), to extend VAWA's Special Domestic Violence Criminal

Jurisdiction to all Alaska Native women. President Barack Obama signed the bill into law last December.

Another Roadmap recommendation was to allow nontribal lands in Alaska to be taken into federal trust for the benefit of Alaska Native nations, thereby creating the predicate for concurrent federal-tribal criminal jurisdiction over these lands. In 1978, the solicitor of the U.S. Department of the Interior issued an opinion that Congress meant to permanently remove all Native lands in Alaska from federal trust status when it enacted the Alaska Native Claims Settlement Act (ANCSA) in 1971. Interior codified what became known as the Alaska Exception in 1980 at 25 C.F.R. Section 151.

On June 9, 2014, Kevin Washburn, assistant secretary of the Interior for Indian Affairs, traveled to Anchorage to present the proposed new Section 151 land-into-trust regulations repealing the Alaska Exception. Interior had determined that the Alaska Exception was in error, finding that it violated the Indian Reorganization Act of 1934 and did not reflect Congress' intent in enacting ANCSA. See Transcript, Department of Interior Office of the Assistant Secretary-Indian Affairs, "Land into Trust in Alaska," Proposed Rule – 25 CFR 151, Government-to-Government Consultation, The Dena'ina Center, Anchorage, AK, June 9, 2014.

At the rule-making hearing, ILOC Chairman Troy Eid testified in support of the revised Section 151 regulations:

The public safety crisis here is absolutely unacceptable and flows from the fact that there's no recognition consistently from the State of Alaska for the territorial integrity of these Alaska Native nations. And this [rule] will help do that. It won't do everything, but it's a step forward. ... The more territorial integrity that can be recognized and applied, the more intergovernmental agreements can be entered into, the more police forces can be stood up by tribes themselves, and the more tribal courts can adjudicate disputes both civil and criminal in their territories.

Id. at 27-28.

In addition to federal reforms, states have responded to ILOC recommendations. For example, the Roadmap called on the state of Alaska to allow village public safety officers (VPSOs)—unarmed

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field officers who live and work in the Alaska Native villages and report to the Alaska State Troopers—to be trained and equipped to carry firearms in order to protect themselves and lawfully arrest and detain criminal suspects. The ILOC repeatedly testified before the Alaska General Assembly in support of this reform. Alaska enacted a law last year to this effect, and the Alaska State Troopers have begun a pilot program to train and arm VPSOs as a first step toward full implementation.

Beyond Alaska, public support for the Roadmap grows. On Feb. 10, the American Bar Association (ABA) endorsed the Roadmap's 40 recommendations in their entirety. The ABA's support lends additional credibility and governmental-affairs resources to the effort to reform the outmoded federal laws and policies that have shackled much of Native America with some of the highest crime rates in the United States.

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Criminal justice remains the single most glaring exception to the tribal self-determination policy that has been a hallmark of federal policy toward Indian tribes and nations for more than a generation. All three branches of the federal government are to blame. In 1978, the U.S. Supreme Court ruled that unless and until Congress decides otherwise, Indian tribes may not assert criminal jurisdiction over non-Indians on reservation lands—no matter how serious the alleged offense and even when a tribe's own citizens are the victims. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). As a result, federal, state and tribal officials have to determine the ethnicity of the offender and the victim and whether the crime occurred on tribal lands before they decide who has jurisdiction, a process that creates confusion and delay.

Instead of modifying or overturning *Oliphant*, Congress allowed *Oliphant* to stand in its entirety for 35 years, thereby making an underserved public-safety environment even worse. Tribal homelands have become increasingly vulnerable to criminal activity, aided by non-Indians benefiting from inadequate federal law enforcement. Jurisdictional conflicts can lead to criminal investigations slipping through the cracks, and the *Oliphant* rule making non-Indians all but untouchable to tribal police creates safe havens for criminals. As former U.S. Sen. Ben Nighthorse Campbell (R-Colo.) put it: “The word has gotten out that people can get off the hook, so to speak, if they are not Indian.”

As a result, Native Americans and Alaska Natives on tribal lands today suffer disproportionately high rates of violent crime: 2.5 times the national average or higher. This inequity stems in part from



Oliphant and various other federal restrictions on tribal self-governance. Rather than rely on more experiments that place greater law enforcement authority with the federal government or states, presuming that tribes are incapable of managing their own affairs, the ILOC and others believe that now is the time to invest in tribal governments. And the time is now to act.

The average life expectancies for Native people are among the lowest in the Western Hemisphere: fewer than 50 years old on some reservations. Native women confront domestic violence rates that exceed all other racial and ethnic groups: One out of three Native American women and two out of three Alaska Native women will be raped in their lifetimes. Native juveniles are likewise at extreme risk due to failed federal laws and policies. The ILOC's Roadmap found that one in four Native American and Alaska Native young people suffers from post-traumatic stress disorder (PTSD) because they are so routinely exposed to violence. This level of PTSD exceeds those of U.S. combat veterans returning from Afghanistan and Iraq.

TLOA and the VAWA Amendments seek to halt and reverse these trends. TLOA was intended to make certain federal officials serving Indian country, including U.S. attorneys and FBI agents, more directly accountable to Native communities. TLOA requires U.S. attorneys to inform tribal authorities when declining cases for federal prosecution. This requirement exposes federal prosecutors' decisions to closer scrutiny and helps tribal prosecutors decide whether and when to file cases of their own in tribal court.

TLOA also strengthens tribal court systems by giving tribal judges and juries more flexibility in sentencing criminal offenders. Prior to TLOA's enactment in 2010, federal law restricted tribes' abilities to sentence Indians to not more than a year in jail, even for the most serious crimes. TLOA enables tribes to impose sentences of up to

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three years per offense, not to exceed a maximum of nine years, provided that tribal courts afford defendants with legal counsel and other due-process protections to safeguard their federal constitutional rights.

The VAWA Amendments, which recognize tribal courts' criminal jurisdiction over non-Indian defendants in certain dating and domestic violence cases, is a narrow but important repeal of *Oliphant*. For the first time since 1978, the VAWA Amendments permit tribes to enact dating and domestic violence laws covering non-Indians and to enforce civil restraining orders intended to keep perpetrators from victims. As part of a statutorily authorized pilot project, three tribes—the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe in Arizona, and the Tulalip Tribes in Washington—have already moved forward to implement the special domestic violence jurisdiction. Other Native nations are expected to follow. As with the enhanced sentencing provisions in TLOA, only those tribes that provide civil rights protections to criminal defendants will be permitted to assert jurisdiction over non-Indians in such cases.

Looking forward, the heart of the ILOC's Roadmap seeks to expand on these congressional reforms. The Roadmap recommends that all Indian nations be permitted to opt out of the federal criminal justice system except for federal criminal laws of general application (i.e., laws which apply nationwide rather than only in Indian country or on federal land). If a given tribe wants to develop and run its own justice system, it should be able to that, as long as defendants' federal civil rights are respected. Included within this approach, Native

nations should also be free to negotiate voluntary agreements with federal and state governments as needed to protect their communities and surrounding areas. In this manner, tribes may assert jurisdiction over all persons within the boundaries of their reservations, fostering local accountability and interagency cooperation while denying safe havens for criminal activity.

However, the Roadmap insists that all Indian nations respect the federal civil rights of criminal defendants, Native and non-Native alike. Specifically, the Roadmap proposes a “grand bargain” in that all defendants subjected to the tribe's criminal laws should be afforded the same right to legal counsel and other constitutional protections applicable in state and federal courts. Because justice delayed is justice denied, the procedural timelines mandated by the Federal Speedy Trial Act should be required in all tribal court criminal proceedings. *See* 18 U.S.C. § 3161 *et seq.* Further, if a federal civil rights issue arises, the defendant would pursue a direct appeal into federal court on any constitutional claims after exhausting tribal court remedies but according to strict federal timelines to prevent delay.

Jurisdictional reform and other recommendations proposed by the ILOC's Roadmap will take time but are well worth fighting for. “We see breathtaking possibilities for safer, stronger Native communities,” the ILOC concludes in its report, “achieved through homegrown, tribally based systems, respective of the civil rights of all U.S. citizens, systems that reject outmoded command-and-control policies in favor of increased local control, accountability, and transparency. Lives are at stake, and there is no time to waste.” ☉



Second Annual Alaska Federal Bar Conference

Presented by the Alaska Chapter of the Federal Bar Association, Co-hosted with the Alaska Bar Association

Introduction by Matthew Moreland
2015 National President of the Federal Bar Association

August 21, 2015
9:00 a.m.—5:00 p.m.

Reception Following
5:00—6:30 p.m.

	EARLY BIRD REGISTRATION (ON OR BEFORE 7/21/15):	REGULAR REGISTRATION (AFTER 7/21/15):
Alaska & FBA Members	\$159	\$199
Government Lawyers	\$99	\$125
Non-Bar Members	\$185	\$225

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