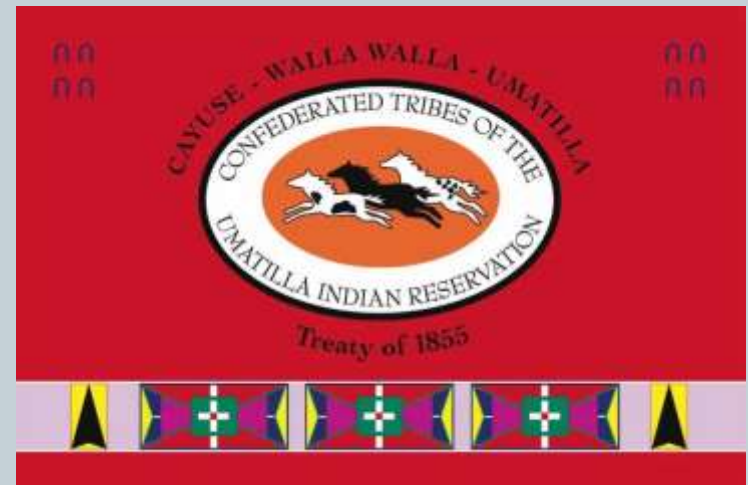


TLOA, VAWA 2013, and Future Needs



**PRESENTED BY:
M. BRENT LEONHARD**



TLOA and VAWA Build On Each Other



- TLOA has 6 key areas that need to be addressed for a tribe to exercise felony sentencing.
 1. Felony crime or previous conviction (not necessary for VAWA)
 2. Effective assistance of counsel same as US Constitution (*Strickland*: 1. *not objectively reasonable*, 2. *reasonably likely effected outcome*)
 3. Licensed attorneys for indigent defendants (tribal licensing possible: must apply standards that ensure competence and professional responsibility)
 4. Law trained and licensed judges (sufficient training to preside over criminal proceeding; tribal licensing possible, but no *explicit* competence/professional responsibility provision)
 5. Laws, rules of evidence, and procedures publicly available
 6. Recorded proceedings

TLOA and VAWA Build On Each Other



- VAWA requires that TLOA defense rights areas be given non-Indians regardless of whether or not a felony, and adds 2 (or more) requirements:
 1. Jury pool includes non-Indians (fair cross-section/no systematic discrimination)
 2. Timely notice of *new* habeas corpus privileges/rights
 3. Catchall: Any other constitutional right necessary to exercise inherent authority (included before the non-Indian jury pool became a requirement at SCIA, not likely to require grand juries as 5th amendment has not been incorporated against states)

VAWA 2013's Limited Scope

4

- Only covers domestic violence, dating violence, and violations of protection orders.
- Defendant must have close ties to tribe:
 - Resides in the Indian country of the tribe;
 - Employed in the Indian country of the tribe; or
 - A spouse, intimate partner, or dating partner of a tribal member or an Indian who resides in the Indian country of the tribe.
- Domestic and Dating violence requires “violence committed” by a person who is in a social relationship of a romantic or intimate nature with the victim, or is the spouse, intimate partner, shares a child with, or cohabited with the victim.
- Does not cover any attendant crimes, even crimes against children or based on child presence. No false imprisonment, malicious mischief, trespass, burglary, DUI, assaults against 3rd persons, theft, fleeing law enforcement, assaulting an officer, witness intimidation, lying to police, menacing (threats of future violence to victim), etc.
- Most any crime can be domestic violence based on the intent of the perpetrator and effect on the victim.

Implementation of TLOA as of 10/19/2018



- 16 tribes have implemented felony sentencing.
- 11 tribes are close to implementing.
- CTUIR has had many felony prosecutions and convictions including non-Indians.
- 3 CTUIR convicts housed in federal prison under BOP Pilot Project, 5 total before it ended. Need to make permanent in TLOA Reauthorization.
- SRPMIC has had 1 individual jailed for 9 years. A second (homicide) is pending, also 9 years.
- Sometimes tribal convictions can get more time than federal and stay under tribal supervision.

Implementation of VAWA 2013 as of 10/19/2018



- 22 tribes have implemented non-Indian criminal jurisdiction.
- 2 are close to implementation.
- Several non-Indians convicted of felonies.
- No federal habeas petitions.
- Does not cover attendant crimes. Serious problem. Need a full Oliphant fix in next reauthorization.

PL-280 Criminal Jurisdiction



- Enacted weeks after House Concurrent Resolution 101 (tribal termination as federal policy).
- Mandatory PL-280 (State has delegated federal authority but covers all crimes, Feds do not have concurrent jurisdiction).
- Optional PL-280 (State can request criminal jurisdiction, Feds retain concurrent jurisdiction but usually don't exercise it, no tribal consent required until 1968) .
- PL 280 “like” states (specific federal statutes delegating federal authority to state, often does not clarify if “like” optional or mandatory).

PL-280 Criminal Jurisdiction



- Often resulted in tribes not obtaining funding to establish criminal justice systems (police, courts, attorneys, etc.). Sometimes led tribes to believe they lacked jurisdiction (appears to have been the case at CTUIR).
- Research shows it made crime worse, even though the supposed reason for adoption was perceived lawlessness on reservations. Certainly true at CTUIR until retrocession in 1980.
- TLOA allows for Federal re-assertion of authority. Hope was to increase likelihood of federal funding for tribal criminal justice systems. (White Earth in 2013 and Mille Lacs in 2017).