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MEMORANDUM

February 3, 2014

TO: Sovereignty Protection Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: Indian Law and Order Commission Report

The Indian Law and Order Commission ("Commission") recently released "A Roadmap for Making Native America Safer" ("Report"), a 326-page report with over 40 unanimous recommendations to make Indian country safer and more just for all U.S. citizens, and to reduce the unacceptably high rates of violent crime in Indian country.[1]

THE FINDINGS OF THE COMMISSION

The Commission was created by the Tribal Law and Order Act of 2010 ("TLOA"), a law which took a major step forward to improve enforcement and justice in Indian country. For example, the Act allows tribal courts to increase the maximum sentences handed down in criminal cases, if certain prerequisites are met. The nine Commissioners, a bipartisan group appointed by the President and the Democratic and Republican leadership in Congress, were tasked with developing a comprehensive study of Indian country criminal justice, as a way to assess the effectiveness of the TLOA, and to recommend long term improvements to the structure of the justice system in Indian country. The Report does this comprehensively, but its overall theme "is to provide for greater local control and accountability while respecting the Federal constitutional rights of all U.S. citizens." [p. i]. The Commission summed up:

> "More lives and property can and will be saved once Tribes have greater freedom to build and maintain their own criminal justice systems. The Commission sees breathtaking possibilities for safer, strong Native communities achieved through home-grown, tribally based systems that respect the civil rights of all U.S. citizens, and reject outmoded Federal command-and-control policies in favor of increased local control, accountability, and transparency." [p. iii].

[1] This memo will focus on the jurisdictional elements of the Report. The Commission's Report covers a number of other aspects of Indian country criminal justice. The six chapters of the report are: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation; (5) Detention and Alternatives; and (6) Juvenile Justice. These are all important parts of the overall picture, but this Memo will cover only the first part, jurisdiction.

The Commission reviewed the status of law enforcement and criminal justice on Indian reservations, and concluded that it "is an indefensible maze of complex, conflicting, and illogical commands, layered over decades via congressional policies and court decisions, and without the consent of Tribal nations." [p. 15]. Rather than making Indian country safer, the Commission found that the overlay of federal and state law, which generally pre-date the era of recognition of tribal sovereignty and self-determination, contributes to what has become an institutionalized public safety crisis in Indian county.

The Commission identified two primary causes for the public safety crisis in Indian country: (1) institutional illegitimacy and (2) institutional complexity. Because the criminal justice systems originate in federal and state law rather than tribal government choice and consent, the Commission found that these systems are viewed by the Indian residents of the reservation community as illegitimate and that "the inequities of federal and state authority in Indian country actually encourage crime." [p. 5] The Commission also found that the institutional complexity, commonly called the "jurisdictional maze," created by the overlay and predominance of federal and state authority over tribal authority, often makes it difficult, or even impossible, to determine which government—tribal, federal, or state—has jurisdiction over a crime. Noting that Federal trust responsibility to tribes turns on the consent of tribes, not the imposition of federal will, the Commission explicitly rejected "a top-down, prescriptive Federal solution to the problem" [p. 17] and emphasized the need for federal government to take a back seat to local tribal control.

The Commission recommended that the President and Congress act immediately to give tribes the option to break free of federal and/or state prescriptive commands of criminal laws and procedure affecting public safety in Indian country, and to handle all criminal justice themselves. In particular, the Commission recommended the enactment of federal legislation offering Indian tribes, at their sole discretion, the authority to "opt out" of the existing federal Indian country jurisdiction and/or federally authorized state criminal jurisdiction, whereupon Congress would immediately recognize the tribe's inherent authority to prosecute and punish all offenders, implicitly including non-Indian offenders, within the tribe's Indian country, provided that tribal criminal proceedings are consistent with U.S. constitutional guarantees and subject to limited judicial review of such guarantees by a federal court of appeals.[2]

TRIBAL JURISDICTION OVER NON-INDIANS AND CONSTITUTIONAL CIVIL RIGHTS

A critical aspect of the Commission's recommendations is to restore to tribal governments the option to prosecute and punish non-Indian offenders. The Department of Justice (DOJ) has noted that, until the Oliphant ruling in 1978, dozens of tribes routinely exercised jurisdiction over non-Indians.[3] In 1978, however, in *Oliphant v. Suquamish Indian Tribe*,[4] the Supreme Court held that the exercise of a tribe's inherent sovereign power to prosecute non-

[2] This opt-out recommendation is intended to, for example, allow tribes to opt-out of all or part of the Major Crimes Act and Indian Country Crimes Act and, where applicable, to unilaterally opt-out of the jurisdiction granted to states under Public Law 280 without the state retrocession process required under existing law. The opt-out would not apply to federal laws of general application.
[3] Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence (Final Notice; Solicitation of Applications), 78 Fed. Reg. at 71647, November 29, 2013.
[4] 435 U.S. 191 (1978).

Indians was implicitly preempted by the superior sovereignty of the United States and that tribal governments therefore lack criminal jurisdiction over non-Indian offenders unless authorized by Congress.

Following *Oliphant*, tribal governments have been dependent on the federal government (or the state government, in Public Law 280 states), to prosecute and punish non-Indian offenders within the reservation. Public Law 280, passed in 1953, delegated federal criminal jurisdiction over Indian country to certain states without tribal consent,[5] and offered other states the option of accepting criminal jurisdiction over Indian country. The Commission found that Public Law 280 exacerbated the problems of jurisdictional illegitimacy and jurisdictional complexity, and that states have generally proven to be less cooperative and predictable than the federal government.

Congress has shown a willingness to relax the restrictions on a tribe's inherent criminal jurisdiction, and the Supreme Court upheld Congress' authority to recognize and affirm tribes' inherent criminal jurisdiction over non-member Indians.[6] In fact Congress recently approved a partial roll back of the *Oliphant* decision by recognizing and affirming the authority of tribes to prosecute non-Indians in the limited case of domestic violence, (see Violence Against Women Act (VAWA) discussion below). However, in doing so, it became apparent that there was a great deal of concern about the constitutional rights of defendants in tribal courts.

Indian tribes, as pre-United States governments, are not automatically subject to the Constitution's Bill of Rights (the first 10 amendments).[7] After several years of hearings, Congress in 1968 passed the Indian Civil Rights Act (ICRA) making tribal governments subject to almost all of the Bill of Rights,[8] but did not include a few of the established rights, for example the right of an indigent defendant to a lawyer paid by the tribe. Additionally, ICRA expressly limited tribal court sentencing authority to one year of incarceration per offense.

In 2010, Congress dealt with that gap between the ICRA and the rights guaranteed in the U.S. Constitution when it enacted the TLOA, which most notably, amended ICRA to allow tribes to exercise increased sentencing authority up to three years per offense and nine years per criminal transaction, as long as the sentencing tribe provides certain rights to the criminal defendant. Those rights are those already enumerated in the ICRA[9]; together with several new rights specifically applicable to a criminal proceeding in which the tribe imposes a sentence above one year: (1) the right of all defendants to effective assistance of counsel; (2) the right of an indigent defendant to a licensed attorney paid by the tribe; (3) a presiding tribal judge who is licensed in any jurisdiction to practice law and trained to preside over criminal trials; (4) public availability of tribal criminal laws, rules of evidence, and rules of criminal procedures prior to the defendant being charged; and (5) the tribal maintenance of a record of the criminal proceedings,

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[5] *See* 18 U.S.C. § 1162. The mandatory Public Law 280 states are: Alaska (except the Annette Islands with regards to the Metlakatla Indians), California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Spring Reservation), and Wisconsin.
[6] In 2004, the Supreme Court in *United States v. Lara*, the Court upheld a law recognizing and affirming tribes' inherent power to exercise criminal jurisdiction over all Indians, including non-member Indians. 541 U.S. 193 (2004).
[7] *See Talton v. Mayes*, 163 U.S. 376 (1896).
[8] 25 U.S.C. § 1302.
[9] 25 U.S.C. §§ 1302(a)(1)–(10).

including an audio or other recording of the trial.[10] Tribes that satisfy the requirements set out in the TLOA can currently exercise the enhanced sentencing authority affirmed in the TLOA.

Just last year, Congress restored a small part of tribal inherent criminal jurisdiction over non-Indians. In the VAWA Reauthorization Act of March, 2013, Congress included a section amending the ICRA to recognize, in certain circumstances, the inherent power of tribes to exercise special tribal criminal jurisdiction over any offender (implicitly including non-Indian offenders) who (a) commit domestic violence or dating violence, on the reservation against women with whom they have, or had, a relationship of a specific domestic, romantic, or intimate nature, such as a spouse or former spouse, cohabiting partner, or dating partner, or (b) violate certain types of protection orders within the Tribe's reservation.[11] Congress, however, included a special rule excluding all Alaska tribes, except for the Metlakatla Indian Community, from the provisions of the VAWA affecting tribal criminal jurisdiction over domestic violence and tribal protection orders, which the Commission recommended be repealed as inimical to effective public safety in Alaska.

To exercise this jurisdiction, defined in the VAWA as "special domestic violence jurisdiction," the tribe must provide any defendant in a criminal proceeding, the following rights, as codified in 25 U.S.C. § 1304(d), and made a part of the ICRA, as follows:

1304(d)(1) -- All applicable rights defined in the ICRA.[12]

1304(d)(2) -- If imprisonment of any length may be imposed, then the defendant is entitled to all rights defined in the 2010 amendments to the ICRA made in the TLOA (25 U.S.C.§1302(c)(1-5)) , set forth on the previous page above.

1304(d)(3) -- The right to a trial by an impartial jury that is drawn from sources that "reflect a fair cross section of the community; and . . . do not systematically exclude any distinctive group in the community, including non-Indians."

1304(d)(4) -- All other rights whose protection is necessary under the U.S. Constitution "in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise" the special domestic violence jurisdiction provided in this amendment.

The special domestic violence jurisdiction does not apply if neither the defendant nor the victim is Indian.[13] And such jurisdiction applies only if defendant has certain specific ties to the Tribe such as living or working on the reservation, or is a spouse, an intimate partner, or a dating partner of a member of the Tribe or of an Indian living on the reservation.[14] Although the

[10] *See* 25 U.S.C. §§ 1302(c)(1)–(5)
[11] 25 U.S.C. § 1304.
[12] A Tribe exercising special domestic violence jurisdiction over non-Indians would have to provide not only the defendant's rights defined in Section 1304, but all other rights defined in the ICRA, Section 1302(a)(1-10), such as speedy trial, unreasonable search and seizure, self-incrimination, etc., which have applied to any tribal governmental actions since the ICRA was enacted in 1968.
[13] 25 U.S.C. § 1304(b)(4)(A).
[14] 25 U.S.C. § 1304(b)(4)(B).

expanded special domestic violence jurisdiction in the VAWA will not generally be an available option until March 7, 2015, tribes may apply to the U.S. DOJ to exercise the authority immediately under a pilot program.

The VAWA amendments show Congress's concern with protecting the victims of domestic violence, balanced with protecting constitutional rights of criminal defendants in tribal courts, especially non-Indian criminal defendants. If a tribe wishes to pursue a goal of more complete control of criminal law enforcement generally, as the Commission recommends, the VAWA precedent suggests a general structure that Congress might approve again, for those tribes interested in pursuing it.

The Commission acknowledged the recent liberalizations made by the TLOA and the VAWA, but characterizes them as insufficient. The Commission explicitly rejected the idea of additional "workarounds," and instead embraced a "far reaching vision of reform . . . ." [p.23]. Although the Commission's recommendations to reform justice for Alaska Natives are beyond the scope of this paper, we note that they are similarly far reaching.

The reversal of the *Oliphant* decision, however, was the subject of considerable debate within the Commission. An attorney from this firm attended a recent symposium on the Report, and several of the Commissioners described the protection of civil rights and federal appellate review of tribal criminal proceedings as part of a "grand bargain"[15] in return for reversing the *Oliphant* decision. In addition to the protection of the civil rights of the defendants, the Commission's recommendation provides that the criminal proceedings of a tribe choosing to opt-out of federal and/or state jurisdiction would, following the exhaustion of tribal remedies, be subject to full federal judicial appellate review of appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution, interpretation of federal law, questions of tribal court jurisdiction, and federal habeas corpus petitions involving tribal courts. To establish a more consistent and uniform body of case law, the Commission also recommended that Congress establish a new federal circuit court (the United States Court of Indian Appeals) to hear the specified appeals from tribal criminal proceedings.

While the recognition of a tribe's inherent criminal jurisdiction over all people, and the other recommendations, would undoubtedly improve safety on the reservation, it would also require reasonable new funding -- for tribal law enforcement, lawyers for indigent defendants, increased facilities and staff, etc. Although recognizing the difficulty of securing such funding, the Commission recommends that Congress seriously consider establishing a base-level funding level to provide tribal law enforcement staffing levels comparable to similarly situated communities off-reservation.[16] Absent new funding, it is likely that most, if not all, of the expenses for implementation would fall to the tribes.

To provide a more rational federal administrative structure for the management of criminal justice programs in Indian country, the Commission also recommends the creation of a single "Indian country component" in the U.S. DOJ and consolidating the BIA's Office of Justice

[15] The UCLA American Indians Studies Center held a symposium on the Report on January 24, 2014, at which six members of the Indian Law & Order Commission provided presentations on the Report.
[16] The Report also recommends full funding for all program authorized in the TLOA, funding the Indian Tribal Justice Act of 1993, and a seven percent tribal set-aside for all discretionary programs administrated by the DOJ Office of Justice Programs.

Service programs and services, and all DOJ Indian country programs and services, into the new DOJ agency. Significantly, the Commission also recommends amending the Indian Self-Determination and Education Assistance Act to give Tribal governments the explicit opportunity to contract or compact with the new DOJ agency. In its last action before its authorization sunsets, the Commission submitted a supplemental letter to President Obama and Congressional leaders to provide additional guidance as to how the specific recommendations might be implemented by federal statute and Executive Branch policy.

CONCLUSION

In summary, the Commission found that the public safety crisis in Native America is "emphatically not an intractable problem," and that dramatic improvements to public safety in Indian country are possible. To achieve these goals the Commission offers bold jurisdictional recommendations to fully restore inherent tribal control of criminal justice and reduce federal and state authority.

We note that the Senate Committee on Indian Affairs has scheduled an oversight hearing on the TLOA Commission's November Report, on February 12 at 2:30 p.m. EST.

Please let us know if we may provide additional information or analysis regarding this Report.

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