

## U.S. Department of Justice

### Tribal Law and Order Act Report on Enhanced Tribal-Court Sentencing Authority

#### Background:

The Tribal Law and Order Act (TLOA), Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (2010), was signed into law by President Obama on July 29, 2010. In part, Congress intended TLOA to empower tribal law enforcement agencies and tribal governments. To that end, Section 234(b) of TLOA (amending the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*) requires the Attorney General, in coordination with the Secretary of the Interior, to submit a report to the appropriate committees of Congress that includes:

- 1) A description of the effectiveness of enhanced tribal-court sentencing authority in curtailing violence and improving the administration of justice on Indian lands; and
- 2) A recommendation of whether enhanced sentencing authority should be discontinued, enhanced, or maintained at the level authorized by TLOA.

#### Tribal Court Sentencing Authority:

Tribes have jurisdiction to prosecute member and non-member Indians for any offense addressed in the tribe's criminal code. However, the tribe's authority to punish an offender convicted in tribal court is limited by ICRA, 25 U.S.C. § 1302. When originally enacted in 1968, ICRA limited the punishment a tribe could impose to a maximum of six months' imprisonment and/or a \$500 fine. In 1986, an amendment to ICRA increased the maximum sentence to one year of imprisonment and/or a \$5,000 fine. Tribal leaders deemed it inadequate that tribes could legally prosecute offenses up to and including homicides, but could only give offenders misdemeanor-level sentences even for the most serious crimes. These concerns led to further changes in TLOA.

#### TLOA Felony Due-Process Protections:

TLOA further amended ICRA and restored limited felony sentencing authority to tribes that meet certain conditions. Specifically, TLOA allows tribes to impose sentences of up to three years' imprisonment and/or a \$15,000 fine per offense for a combined maximum sentence of nine years per criminal proceeding. 25 U.S.C. § 1302(b). To qualify as a felony, a tribal offense must be either a repeat offense or an offense considered to be a felony by any state or by the federal government. For a tribe to charge a defendant with a felony-level offense, the defendant must be afforded the following five due-process protections provided in ICRA, 25 U.S.C. § 1302(c), as amended by TLOA:

- 1) The right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;
- 2) The right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government;
- 3) The right to a criminal proceeding presided over by a judge who is licensed to practice law and has sufficient legal training;

- 4) The right to have access, prior to being charged, to the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
- 5) The right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Under TLOA's amendments to ICRA, these five rights must be provided to a defendant in any criminal proceeding in which the tribe imposes on the defendant a total term of imprisonment of more than one year. Therefore, these five rights are sometimes referred to as the "TLOA felony sentencing" requirements.

#### TLOA Felony Sentencing Options:

In addition to the requirements described above, TLOA provided a number of sentencing options for defendants sentenced as felons in tribal court. Specifically, a tribal court may require the defendant to serve the sentence in one of the following facilities:

- 1) a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after TLOA's enactment;
- 2) the nearest available and appropriate federal facility, at the expense of the United States, pursuant to the Bureau of Prisons' (BOP) tribal-prisoner pilot program;
- 3) a state or local government-approved detention or correctional center, pursuant to an agreement between the Indian tribe and the state or local government;
- 4) an alternative rehabilitation center of an Indian tribe; or
- 5) an alternative form of punishment, as determined by the tribal court under tribal law.

TLOA does not require the Department of Justice (Department) to review or certify a tribe's use of felony sentencing authority or the status of a tribe's efforts to amend its codes and court processes to provide defendants with the five TLOA felony sentencing requirements. Nor does the Department believe it would be appropriate for it to have oversight authority over the criminal justice system of a federally recognized tribe, given tribal nations' sovereign status. However, in some cases, the Department of the Interior (Interior) may be required to review a tribe's efforts to amend its codes and court processes based upon the requirements of federal statutes other than TLOA.

The Department is aware of three tribes that fully implemented felony sentencing because they successfully transferred defendants sentenced in tribal court to the federal BOP pilot program, also established by TLOA. Under this pilot program, BOP could accept a maximum of 100 offenders at any time. Since implementation of the BOP pilot program on November 29, 2010, tribes have submitted requests for six tribal offenders to be confined under BOP's pilot program. BOP accepted all six offenders. The BOP pilot program expired in November 2014, as it was a four-year pilot program. As a result, the BOP is currently unable to accept new inmates ordered to serve a prison sentence by a tribal court. The chart below describes each of the six pilot participants.

<b>Tribal Law and Order Act Pilot Program</b>				
<b>Inmate</b>	<b>Tribe</b>	<b>Charge</b>	<b>Sentencing Information</b>	<b>Bureau Facility</b>
1	Confederated Tribes of the Umatilla Reservation	Felony Assault and Felony Conspiracy to Commit an Assault	Sentence Imposed: 2 years and 3 months  Released on 4/3/2015	Federal Correctional Institutions (FCI) Herlong – initial designation. Transferred to United States Penitentiary (USP) Victorville.
2	Confederated Tribes of the Umatilla Reservation	Assault	Sentence Imposed: 2 years and 2 months  Released on 2/13/2015	FCI Sheridan – initial designation. Transferred and released from a residential reentry center in Seattle.
3	Eastern Band of Cherokee Nation	DWI; DWLR; Assault on a Female; Injuring Public Property; and Failure to Obey a Lawful Order of the Court	Sentence Imposed: 4 years  Projected Release Date: 11/16/2016	USP McCreary – initial designation. Transferred to USP Hazelton.
4	Eastern Band of Cherokee Nation	Assault Inflicting Serious Bodily Injury and Assault with a Deadly Weapon	Sentence Imposed: 3 years  Projected Release Date: 5/3/2016	FCI Butner II
5	Tulalip Tribes	Sexual Abuse of a Minor	Sentence Imposed: 2 years, 11 months, 30 days  Projected Release Date: 11/18/2016	FCI Sheridan – initial designation. Transferred to FCI Pollock.

6	Confederated Tribes of the Umatilla Reservation	Felony Assault	Sentence Imposed: 2 years, 1 month, 25 days Projected Release Date: 11/17/16	USP Atwater – initial designation. Transferred to USP Victorville.
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Additional information concerning the identification of tribes considering implementing felony sentencing authority is available in the context of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54. Title IX of VAWA 2013, entitled “Safety for Indian Women,” contains section 904 (“Tribal jurisdiction over crimes of domestic violence”) and section 908 (“Effective dates; pilot project”). The purposes of sections 904 and 908 of VAWA 2013 are to decrease the incidence of crimes of domestic violence in Indian Country, to strengthen the capacity of Indian tribes to exercise their sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior. Section 904 recognizes the inherent power of “participating tribes” to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants—regardless of those defendants’ Indian or non-Indian status—who commit acts of domestic violence or dating violence or violate certain protection orders in Indian Country. Section 904 also specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.

VAWA 2013’s section 904(d) specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.<sup>1</sup> Specifically, a tribe must provide all applicable rights of defendants under ICRA, as amended, which largely tracks the United States Constitution, including the right to due process. If a term of imprisonment of any length may be imposed, the tribe must provide defendants the due-process protections described in TLOA. In addition, participating tribes must provide the defendants 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. The tribe must also provide any persons detained by a tribal order timely notice of their rights and privileges to petition a federal court for a writ of habeas corpus and for release from detention pending resolution of the habeas petition. Finally, the tribe must provide all other rights whose protection is necessary under the Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise SDVCJ over the defendant.

Recognizing that many tribes might need time to implement these due-process requirements, Congress set an effective date two years after the enactment of VAWA 2013 (*i.e.*, March 7, 2015), while giving tribes that were ready sooner the opportunity to participate in a pilot project at the Attorney General’s discretion. On February 6, 2014, the Department announced that the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Confederated Tribes of the Umatilla Reservation of Oregon were selected for the pilot project. On March 6, 2015, the Department announced that the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana and the Sisseton Wahpeton Oyate of the Lake Traverse

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<sup>1</sup> Codified at 25 U.S.C. § 1304(d).

Reservation of South Dakota and North Dakota were also selected for pilot-project status. Prior to their designation as a pilot project tribe, each submitted a detailed application and copies of relevant tribal codes. Multiple components within the Department as well as the Department of the Interior reviewed each application and supporting documentation to ensure that all SDVCJ due-process requirements were available to non-Indian defendants in the tribal court. The Department also consulted with affected tribes, as required by VAWA 2013. As of March 7, 2015, by statute, no tribe is required to apply for SDVCJ status or submit an application and documentation to the Department. Any tribe can exercise SDVCJ, so long as the required due-process protections are in place. The Department is aware of three tribes that have implemented SDVCJ either on or after March 7, 2015: the Eastern Band of Cherokee Indians of North Carolina, the Seminole Tribe of Oklahoma, and the Little Traverse Bay Band of Odawa Indians of Michigan.

Between the tribes that have participated in the BOP pilot program and the tribes that participated in the SDVCJ pilot program, at least six tribes have fully satisfied the requirements that TLOA demands for exercising enhanced sentencing authority, as of November 2015.

Improving public safety and the fair administration of justice in Indian Country is a significant priority for the Department. The Department recognizes that in many cases tribal governments are best positioned to effectively investigate and prosecute crime occurring in their own communities. That is why the Department has supported congressional efforts to increase tribal courts' legal authority to address crime in their own jurisdictions, such as the expansion of tribal sentencing authority in TLOA and the recognition of SDVCJ in VAWA 2013.

The Department continues to support the tribal and federal criminal justice systems to further equip them with both the authority and much-needed resources to properly address crime in Indian Country. To this end, the Department works through its components to strengthen relationships with federally recognized tribes, improve the coordination of training and information sharing, and enhance tribal capacity:

- Through its Tribal Civil and Criminal Legal Assistance Program, the Bureau of Justice Assistance has provided resources to tribes to: 1) enhance the operations of tribal justice systems and improve access to those systems; and 2) provide training and technical assistance (TTA) for developing and enhancing tribal justice systems. The TTA services under this program help tribal communities provide procedural justice in tribal civil and criminal legal procedures, legal infrastructure enhancements, and public education. Specifically, TTA services have included the following: indigent legal-defense services; civil legal assistance; public defender services; and strategies for developing and enhancing tribal-court policies, procedures, and codes.
- During consultation regarding the implementation of the SDVCJ pilot project, tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes. In June 2013, with these views in mind, the Department established an Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) to exchange views, information, and advice about how tribes can best exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights. To date, 45 tribes have voluntarily joined the ITWG, and almost all of them have remained actively engaged in ITWG

meetings, webinars, and information exchanges. The Department is supporting the ITWG with training and technical assistance, including a three-year award by OVW to the National Congress of American Indians (NCAI) to support the ITWG's ongoing work. The ITWG is scheduled to hold its fifth in-person meeting in November 2015 at Squaxin Island Reservation in Washington.

- In July 2010, the Executive Office of U.S. Attorneys (EOUSA) launched the National Indian Country Training Initiative (NICTI) to ensure that federal prosecutors and agents, as well as state and tribal criminal-justice personnel, receive the training and support needed to address the particular challenges relevant to Indian Country prosecutions. Since 2010, the NICTI has delivered residential training at the National Advocacy Center (NAC) in Columbia, South Carolina, webinars, and regional training for federal agencies, tribes, and technical assistance providers to thousands of federal, state and tribal stakeholders on a host of criminal-justice issues, including implementation of TLOA and VAWA 2013. Importantly, the Office of Legal Education covers the costs of travel and lodging for tribal attendees at classes sponsored by the NICTI. This allows many tribal criminal-justice officials to receive cutting-edge training from national experts at no cost to the tribe.
- In March 2010, the Department established the Access to Justice Initiative (ATJ) to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ's staff works within the Department, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance, and to improve the justice delivery systems that serve people who are unable to afford lawyers. ATJ remains actively involved in the implementation of TLOA and VAWA 2013.

#### Conclusion:

Working together through meaningful collaboration as exemplified by the work of the ITWG, tribal, state, and federal governments can help keep Indian Country safe. According to [NCAI](#), as of September 1, 2015, the eight tribes now exercising SDVCJ have made 42 SDVCJ arrests, resulting in 18 guilty pleas, 5 referrals for federal prosecution, 1 acquittal by jury, and 12 dismissals, with 6 cases still pending. See <http://www.tribal-institute.org/download/Training/handout.pdf>. Not one of the non-Indian defendants in these SDVCJ cases has filed a habeas petition in federal court challenging his arrest or prosecution.

At this early stage of implementation, it is too soon to definitively determine the effectiveness of enhanced tribal-court sentencing authority in curtailing violence and improving the administration of justice on Indian lands. In the near term, the Department recommends the continuation of enhanced sentencing authority at the level authorized by TLOA. The Department would also be supportive of tribal interest to extend the BOP tribal-prisoner pilot program, which expired in 2014. That program can play a helpful role in making enhanced sentencing affordable for tribes that have sophisticated criminal justice systems with due-process protections but lack the budgetary resources to adequately fund longer terms of incarceration.

With assistance on this and other fronts, tribes in the medium to long term can be expected to increasingly exercise enhanced sentencing authority, likely at levels well beyond those currently authorized by TLOA, and thereby both improve the administration of justice and curtail violence against victims who live or work on Indian lands. The Department of Justice and the Department of the Interior look forward to engaging with tribal governments as they work to implement this sentencing authority.