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Before the
United States Senate Committee on Indian Affairs
On
"The Tribal Law and Order Act One Year Later:
Have We Improved Public Safety and Justice throughout Indian Country?"

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Thanks for the opportunity to testify on how the Tribal Law and Order Act of 2010 ("the Act" or "TLOA") is affecting Indian Country. My name is Troy Eid and I chair the Indian Law and Order Commission ("the Commission"). This is the independent national advisory commission Congress created when passing the Tribal Law and Order Act in July of last year. The President and Congress appointed the nine Commissioners, who are all volunteers, last winter. The Commission received funding from the U.S. Departments of Justice and Interior late this summer to carry out our statutory responsibilities. Our role is not just to assess how the Tribal Law and Order Act is being implemented, but to recommend additional ways to strengthen justice and public safety for people living and working on and near Native American communities and lands throughout the United States.

Introduction

By way of brief introduction, the Senate Majority Leader, Senator Harry Reid of Nevada, appointed me to the Commission, and the other Commissioners elected me Chair. I returned to private law practice in January 2009 after serving as the United States Attorney for the District of Colorado, appointed by President George W. Bush. I'm a

partner in the Denver office of the law firm of Greenberg Traurig LLP, where I co-chair our American Indian Law Practice Group, which represents both Indian tribes and companies doing business with them. I'm also an Adjunct Professor at both the University of Colorado School of Law in Boulder and at the University of Denver College of Law, where I teach civil and criminal justice and jurisdiction in Indian Country as well as energy, natural resource, and environmental law. My other volunteer activities include the Navajo Nation Bar Association ("NNBA"), where I chair the NNBA Training Committee. This includes preparing tribal court judges, attorneys and lay advocates to sit for the semi-annual Navajo Nation bar examination in order to gain admission to practice law before the Navajo Supreme Court and district courts.

The Commission does not have offices. We operate virtually – by teleconference, email and the web at www.indianlawandordercommission.com – and on the road by convening field hearings in Indian Country, as we did earlier this month at the Tulalip Tribes of Washington, north of Seattle. The U.S. Department of Justice has graciously loaned us two distinguished career federal employees, recruited by the Commission, to discharge our statutory duties. Assistant United States Attorney Jeff J. Davis, a member of the Turtle Mountain Band of Chippewa Tribe, recently joined the Commission as our Executive Director. He is a veteran Indian Country prosecutor and tribal liaison with the United States Attorney's Office for the Western District of Michigan in Grand Rapids. Eileen Garry, the Deputy Director of the Justice Department's Bureau of Justice Assistance, is also graciously serving as the Deputy Executive Director of the Commission. We're grateful to the Justice Department for the support of these two extraordinarily talented and hard-working public servants. The Tribal Law and Order

Act likewise provides that the U.S. Department of the Interior is to detail one or more loaned officials to the Commission, and we look forward to having that conversation with my friend Assistant Secretary Larry Echohawk and his team.

Finally, I want to acknowledge the tremendous bipartisan support that the Commission has received from this Committee. The professional staff has encouraged our work at every stage, providing ongoing advice and counsel and enabling us to navigate unfamiliar waters while maintaining the Commission's independence as envisioned by the Act. We are exceedingly grateful.

Keeping in mind our gratitude for the support that the Commission has received, we face a very short deadline for our final report to the President and Congress. Due to funding and budget restrictions, we were not able to organize until last month. This means we have just one year to accomplish our mission, instead of the two years envisioned by the Tribal Law and Order Act. We respectfully ask this Committee to consider extending the life of the Commission, at no additional cost to taxpayers, another year to meet the goals of all involved. We will send a letter to you at the earliest opportunity to set forth our request more formally, and thank you for your consideration.

Is TLOA Working?

Now to the business at hand: Has the Tribal Law and Order Act improved public safety and justice throughout Indian Country?

The answer is yes, but we're just getting started.

The Act's passage last year took many people by surprise, not only among the usual Beltway skeptics here in Washington, DC but across Indian Country, where a generation of leaders had been disappointed by previous reform efforts. Given these very

low expectations, the enactment of the Tribal Law and Order Act was something of a watershed.

I don't say this lightly. On the contrary, I know from my own experience over the past 25 years that making meaningful changes to law and policy concerning Indian Country can be extremely difficult. We're dealing with the intersection of all three sources of sovereign power recognized by the U.S. Constitution: The federal government, the several states, and Indian tribes and nations that pre-date the Constitution itself but have been shaped and reshaped radically over the years by the other sovereigns. The relationships among the three sovereigns never remain static for very long. Even within each sovereign, different constituencies may result in competing or contradictory priorities.

Against that backdrop, TLOA's enactment was no small achievement. The Act attempts to do many things. Yet having been involved with it as a volunteer since 2007 when the then-Chairman of this Committee, Senator Byron L. Dorgan, and his staff first invited me to get involved in what became TLOA, I believe its basic purpose is threefold. First, TLOA was intended to make federal departments and agencies more accountable for serving tribal lands. Second, the Act was designed to provide greater freedom for Indian tribes and nations to design and run their own justice systems. This includes tribal court systems generally, along with those communities that are subject to full or partial state criminal jurisdiction under Public Law 280. Third, TLOA sought to enhance cooperation among tribal, federal and state officials in key areas such as law enforcement training, interoperability, and access to criminal justice information. Let me briefly address these three areas and look to the future.

Federal Transparency and Accountability

TLOA's first major purpose was to bolster the federal government's accountability to Indian tribes and nations that, since the passage of the Major Crimes Act in 1885, have largely depended on federal police, prosecutors and judges for protection from the most serious crimes. It is in this area, among the three major purposes of the Act that I've just listed, where the federal government appears to be making the most progress. Nearly everywhere I travel in Indian Country – and I do so most weeks of the year, and have since 2004 – tribal and federal officials say they're getting more encouragement from Washington to make Indian Country issues a priority. Extending this awareness to state and local officials in neighboring jurisdictions is perhaps the most urgent priority, as I'll discuss a little later. The Tribal Law and Order Act, and the many follow-up activities it requires of the Executive Branch, is contributing to this larger trend among federal and tribal officials. This positive energy, and the perception of forward motion from Washington in at least acknowledging problems that were often previously dismissed as intractable, is refreshing.

Yet we must also be realistic about how difficult it will be to achieve lasting reform in this area. The issue of publicly reporting so-called "case declinations" by federal prosecutors in Indian Country cases, as the Tribal Law and Order Act requires, is just one example. Achieving meaningful accountability and transparency in this area is harder than it looks. The underlying statutory responsibilities are split between two cabinet departments. The Department of Justice through the Federal Bureau of Investigation and the United States Attorney's Offices and the Bureau of Indian Affairs

("BIA") Office of Justice Services, which provides law enforcement on many reservations, are both responsible for serving Indian Country.

Simply put, the Justice Department's assessment of whether a given case should be publicly reported as "declined" for prosecution may differ markedly from that of the BIA which is administratively housed in the Department of the Interior. Despite the manifest good intentions of Darren Cruzan, who directs the Office of Justice Services, the BIA often lacks enough patrol officers and investigators to build criminal cases that are sufficiently strong to survive the rigors of federal court. BIA officers and investigators are not always properly trained and are frequently detailed or transferred from one community to another. Overall staffing levels for patrol and investigations, which TLOA did nothing to address, remain woefully inadequate on many, if not most, Indian reservations that are subject to primary BIA jurisdiction and the federal Courts of Indian Offenses.

Consequently, case intake and reporting can be inconsistent, and even the most serious felony investigations often languish. Last summer, the BIA Police Department on the Ute Mountain Ute Reservation in my home state of Colorado delivered investigative files for five previously unknown criminal cases to the U.S. Attorney's Office in Durango. The files in all five BIA felony investigations, ranging from arson to sexual assault, were more than three years old and had never been previously disclosed to the Justice Department. They just "fell through the cracks," as one Assistant U.S. Attorney told me last week as so often happens in Indian Country.

In such instances, the U.S. Attorney might understandably conclude that the admissible evidence obtained during these BIA investigations is either so minimal or

stale that it does not establish a reasonable likelihood of the defendant's conviction at trial. That is the legal and ethically required standard that guides U.S. Attorneys in determining whether to proceed through the federal judicial process. In terms of case-declination reporting, is there really a prosecutable "case" to decline?

This example attests to how challenging it can be to bring greater accountability and transparency to federal agencies serving Indian Country as TLOA requires. Department of Justice leaders are grappling with these issues, and they should be commended for doing so. Let me especially thank Brendan Johnson, the United States Attorney for the District of South Dakota and Chair of the Native American Issues Subcommittee of the Attorney General's Advisory Committee. U.S. Attorney Johnson has reached out to the Commission and invited us to engage with his colleagues in a dialogue on the case-declination issue.

The stakes are high. To victims of violent crime in Indian Country, who depend on federal officials to perform what would otherwise be purely local policing and prosecution decisions, seemingly arcane issues such as case-declination reporting and accurate tribal crime data collection and reporting systems have profound real-world consequences. Crime statistics help drive federal criminal justice resources throughout Indian Country. Just last week, a senior BIA official assured me that the official crime statistics on the Ute Mountain Ute Reservation do not seem to justify additional federal resources there. Underreporting of criminal justice information at Ute Mountain and many other reservations remains a chronic problem, along with the BIA's frequent inability to keep accurate and readily accessible records for those offenses that are actually reported.

This is changing in some parts of Indian Country, but slowly. TLOA requires the Bureau of Justice Statistics ("BJS") of the U.S. Department of Justice to establish and implement a tribal data collection system and to support tribal participation in national records and information systems. In June, BJS issued its first required report summarizing the Department's efforts to improve tribal law enforcement reporting to the FBI's Uniform Crime Reporting ("UCR") Program. Bear in mind that accurate crime reporting in Indian Country has been the exception to the rule. 2009 was the first year when BIA submissions to the UCR were actually broken down according to Indian tribe and reported in the FBI's Crime in the United States report. I participated last year in one of several training sessions that BJS held for tribal leaders, in conjunction with the FBI and the BIA Office of Justice Services, on the use of UCR systems. Such training is vital, especially for tribes that are not meeting FBI data quality guidelines or are not submitting complete crime data to the BIA. In this and many other ways, the Departments of Justice and the Interior are working to make tribal criminal justice data more accurate, complete and accessible, and more effectively integrated with state and federal records and reporting systems. Some of these initiatives probably would have moved forward even without the Tribal Law and Order Act. But the Act is focusing and accelerating these efforts far beyond what would have otherwise occurred.

More Flexibility for Tribal Courts

A second major purpose of TLOA was to strengthen tribal justice systems, especially through enhanced sentencing such as longer terms of incarceration for the most serious criminal offenses under tribal law. On balance, these provisions appear to be

working, but only for the relatively small number of Indian tribes and nations that are in a position to take advantage of them in the foreseeable future.

The Act amended the Indian Civil Rights Act of 1968 to give tribal courts the sentencing option to impose terms of incarceration for up to three years, a fine of up to $15,000, or both for conviction of a single tribal offense. This compared with the previous maximum penalty of a year in jail and/or a $5,000 fine. The statutory language attempted to strike a balance between respect for criminal defendants' federal Constitutional rights and the sovereignty of tribal courts to enforce their own laws. In time, the federal courts may review and recalibrate that balance based on the efforts by those comparatively few tribes that might be expected to assert what amounts to felony sentencing jurisdiction over Indian offenders.

The ground truth in most of Indian Country is that only a minority of tribal courts currently imposes jail sentences of even up to one year. The Tribal Law and Order Act required the Departments of Justice and the Interior to develop a long-term plan to build and enhance tribal justice systems. The most striking feature of the August 2011 report produced as a result of that statutory mandate is the number of tribal courts that are pursuing alternative sentencing options, such as wellness courts and restitution programs, as opposed to longer terms of incarceration. Many of these programs hold the potential of reducing recidivism and saving public money. This is extremely important within the context of corrections where, according to a 2009 estimated by the National Institute for Corrections, for every one dollar spent on building detention facilities, between nine and 15 dollars is spent on continued operations and maintenance.

Because TLOA did not change any aspect of the U.S. Supreme Court's 1978 *Oliphant* decision, tribal courts still cannot assert any criminal jurisdiction over non-Indians. With respect to Indians, TLOA permits tribal courts to impose these enhanced sentences of incarceration through licensed judges who are not necessarily lawyers. However, tribes must provide licensed *attorneys*, at tribal expense, to all indigent Indian defendants facing jail sentences of more than one year, the traditional threshold for felony jurisdiction at common law.

Inter-Government Cooperation

A third key purpose of the Tribal Law and Order Act was to enhance cooperation among tribal, state and federal officials in order to create a more seamless and effective criminal justice system. On the positive side, U.S. Attorneys and the BIA Indian Police Academy both report that TLOA has resulted in a greater emphasis on Indian Country law enforcement training. This includes ensuring that more tribal, state and local law enforcement officers are commissioned as federal officers – federally deputized – to fight Indian Country crime. Based on past experience, there is every reason to believe that encouraging U.S. Attorney's Offices and the BIA to provide expanded federal deputation training and commissioning, in full partnership with the Indian nations they serve, can increase law enforcement cooperation, strengthen prosecution, and save lives.

I say this from direct personal experience as a United States Attorney. Between February 2007 and December 2008 – and as described in the report of this Committee that accompanied the Tribal Law and Order Act – the U.S. Attorney's Office in Colorado partnered with the Southern Ute Indian Tribe's Justice Department and its visionary former director, Janelle Doughty. Together with our respective offices and the BIA

Indian Police Academy, we developed a model curriculum and training program to teach and test tribal, state and local law enforcement officers on-site in Southwestern Colorado. Our goal was for these officers to be federally commissioned by the Bureau of Indian Affairs to enforce federal laws in Indian Country, thereby strengthening boots-on-the-ground law enforcement and fostering inter-jurisdictional collaboration. The curriculum focused on Indian Country jurisdiction, the federal judicial process, investigative techniques, officer criminal and civil liability, and other challenges routinely encountered by tribal, state and local law enforcement officers working in the field.

We started by training officers in Southwestern Colorado, but with assistance from the National Congress of American Indians, the program eventually went national. In less than two years, our pilot program expanded into 14 training sessions across the country attended by more than 400 law enforcement officers representing 35 Indian tribes and 17 states. Testifying before this Committee, Director Doughty described how a tribal officer had responded to a domestic violence case on the Southern Ute Indian Reservation. The officer had been deputized through our pilot program and earned his Special Law Enforcement Commission ("SLEC") card. He used his federal arrest power to apprehend a non-Indian who had repeatedly terrorized a tribal member. As a direct result, the U.S. Attorney's Office prosecuted that case. The perpetrator went to prison.

These and many other successes attest to what can be done when the federal and tribal law enforcement officer and prosecutors work more closely together and have the tools they need to serve the public regardless of land status or the race or ethnicity of victims and defendants. Yet TLOA is doing little to improve law enforcement

cooperation between Indian tribes and nations, on the one hand, and state and local officials on the other.

Earlier this month, for instance, the Washington Supreme Court ruled that tribal police officers in that state lack "fresh-pursuit" authority. This means that tribal officers in that Public Law 280 jurisdiction are prohibited from arresting criminal suspects who flee the reservation, even for the limited purpose of detaining them under a mutual aid agreement until the proper jurisdiction can arrive at the scene. In the actual case, *State of Washington v. Eriksen*, No. 80653-5 (Sept. 1, 2011), the suspect's blood alcohol content ("BAC") exceeded the legal limit in both jurisdictions. Yet the effect of the Court's decision is to prevent tribal officers from engaging in fresh-pursuit even when it means apprehending suspected drunk drivers who are no less dangerous on- or off-reservation.

As a former state cabinet official, I'm profoundly respectful of state and local law enforcement prerogatives. Yet we simply must do more – much more – to encourage tribes and states to work more closely together. Just a few days ago, a tribal police officer in PL-280 jurisdiction contacted the Commission to report the following:

> One of our officers pulled over a driver, on the reservation, for DUI. The driver was a non-Indian. The State Patrol was unable to respond. The County Sheriff's Office was then requested. They refused to come out. Their watch commander then ordered us to let the suspect go – on the reservation. I took a breath sample in the field prior to the person being released. He blew a .133 BAC. He also had two children in the car with him. Instead of having him drive off as we were ordered to do by the County, one of our officers took the keys from him and gave him a ride so that he wouldn't kill himself, the kids or someone else.

For too many communities, scenarios like this are the rule, not the exception. The same goes for domestic violence cases. The Commission has already received hours of public testimony from state and tribal court judges about the lack of

reciprocal enforcement of restraining orders in domestic violence cases. We cannot rest until we find more effective ways to promote and reward tribal-state cooperation on criminal justice issues.

Looking Forward

Legislation is always the art of the *possible* – the specific improvements that can be achieved in the near future. The passage of TLOA was indeed a milestone. But many of the greatest challenges to securing equal justice for Native Americans living and working on Indian lands are structural. They're rooted in a system of federal institutions, laws and practices that pre-date the modern era of tribal sovereignty and self-determination, and which TLOA does little or nothing to change.

That's why TLOA created the Indian Law and Order Commission: to look beyond the status quo and recommend long-term structural improvements in Indian Country criminal justice.

We all know that there have been times when reports by blue-ribbon panels do little but gather dust. Yet national commissions have sometimes been vitally important to the development of law and public policy concerning Native Americans and tribal homelands. For instance, a nine-member national commission in 1928 published a landmark report, *The Problem of Indian Administration*. Commissioners visited 95 Indian reservations, documented deplorable conditions and failed federal policies, and advocated systemic changes ranging from education to tribal self-governance. The "Meriam Report," named for chief investigator Lewis Meriam, prompted President Franklin D. Roosevelt and the Congress to enact the Indian Reorganization Act of 1934. This signaled a critical policy shift, despite many later setbacks, from the longstanding

national policy of forced assimilation and the unrelenting assault on Native American people, culture and institutions by federal and state governments.

In our own time – and with the continued support of this Committee, the Congress, and this Administration – the Indian Law and Order Commission has the potential to "think big," strengthening justice in Indian Country.

Juvenile justice is a case in point. At least one-half of all juveniles held in federal criminal detention are Native American. This is due in large part to two federal laws: The Major Crimes Act of 1885, covering felonies involving Indians on reservations, and the Juvenile Delinquency Act of 1938, which transfers jurisdiction over most felonies involving tribal youth from Indian nations to the federal government.

In contrast to the vast majority of state and local governments in the United States, which have separate justice systems and programs for youth offenders, there is no separate juvenile justice system at the federal level. Tragically, Native American youth often enter the federal criminal justice system by operation of these outmoded federal statutes – based solely on their ethnicity and where they live – and often do not have access to diversion, drug court, and other rehabilitative programs. They're transferred from tribal justice systems to *federal* criminal custody based on purely local offenses – even when tribal courts assert jurisdiction and have rehabilitative programs available for them.

Once confined to the federal criminal justice system, Native American juveniles face harsher punishments for the same or very similar offenses. There is no parole in the federal system and no "good time" credits, which means comparatively longer sentences. On average, federal sentences for juveniles are about twice as long as those imposed by

state courts. And because there is no separate juvenile justice system at the federal level, Native American youth are disproportionately sentenced as adult offenders. Less than 2 percent of all juveniles processed in state courts are sentenced as adults, compared to an amazing *one-third* of all juveniles in the federal courts.

In addition to the ongoing national tragedy involving Native American juvenile offenders, there are many other significant challenges to making Indian country safer. They include:

1. Overly complicated jurisdictional rules that undermine criminal investigations, preventing far too many prosecutions from going forward and, in the memorable phrase of an April 2007 by Amnesty International, can create a "maze of injustice."

2. A chronic resource deficit in which Indian tribes have access on average to less than one-half of the law enforcement resources available to comparable off-reservation communities, and which extends to the entire criminal justice system.

3. A lack of respect for the importance of tribal sovereignty in our federal Constitutional system and how it can reinforce the fundamental American value of *localism* – the expectation that governmental decisions, including those involving public safety, are best made closer to citizens by officials who are directly accountable to them.

To gain insight into these and other systemic challenges, the Indian Law and Order Commission is visiting communities throughout Indian Country to develop recommendations for continuing reform and continuous improvement. In addition to support from the Department of Justice and the Interior as required by the Tribal Law and Order Act, the University of California at Los Angeles has voluntarily stepped forward with a generous gift of research support to assist our efforts. The breadth and depth of experience of the Commission's members is its greatest asset:

- Former U.S. Representatives Stephanie Herseth-Sandlin (SD) and Earl Pomeroy (ND), who were instrumental in writing and enacting TLOA.

- Jefferson Keel, Lieutenant Governor of the Chickasaw Nation and President of the National Congress of American Indians

- Chief Judge Theresa Pouley (Colville) of the Tulalip Tribal Court

- UCLA Law Professor Carole Goldberg, Indian law scholar and a Justice of the Hualapai Tribal Appellate Court

- Affie Ellis (Navajo), public policy expert and a former Assistant Attorney General for Wyoming

- Attorney Tom Gede, the former head of the Conference of Western Attorneys General

- Ted Quasula (Hualapai), the General Manager of Grand Canyon Skywalk Development Corporation and the former leader of the BIA Office of Justice Services

Time does not permit me to address the many other issues affecting criminal justice in Indian Country, such as the retrocession process for tribes in PL-280 jurisdictions; the implementation of the Adam Walsh Act's Sex Offender Notification and Registration System, and other challenges. I welcome your questions and thank you again for your support and the opportunity to testify today.