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STAND AGAINST VIOLENCE AND EMPOWER NATIVE WOMEN ACT

DECEMBER 27, 2012.—Ordered to be printed

Mr. AKAKA, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1763]

The Committee on Indian Affairs, to which was referred the bill (S. 1763) to decrease the incidence of violent crimes against Indian women, to strengthen the capacity of Indian tribes to exercise the sovereign authority of Indian tribes to respond to violent crimes committed against Indian women, and to ensure that perpetrators of violent crimes committed against Indian women are held accountable for that criminal behavior, and for other purposes, having considered the same, reports favorably with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

PURPOSE

S. 1763 would decrease the incidence of violent crimes against Indian women, strengthen the capacity of Indian tribes to exercise the sovereign authority of Indian tribes to respond to violent crimes committed against Indian women, and ensure that perpetrators of violent crimes committed against Indian women are held accountable for that criminal behavior, and for other purposes. The legislation would recognize inherent tribal jurisdiction over domestic violence against Indian women to include acts committed by non-Indian offenders. The legislation also would seek to improve victim protection and information gathering on sex trafficking.

BACKGROUND AND HISTORY

The Stand Against Violence and Empower Native Women (SAVE) Act, S. 1763, attempts to combat domestic violence on res-

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ervations by increasing awareness of domestic violence and sexual assault against Indian women,[1] by enhancing the response to violence against Indian women at the Federal, State, and Tribal levels, by identifying and providing technical assistance to coalition membership and Tribal communities to enhance access to essential services to Indian women victimized by domestic and sexual violence, including sex trafficking, and by assisting Indian tribes in developing and promoting legislation and policies that enhance best practices for responding to violent crimes against Indian women, including the crimes of domestic violence, dating violence, sexual assault, sex trafficking, and stalking.

1. Indian women are not adequately protected under current law: a brief overview of the Violence Against Women Act

In 1994, Congress enacted the Violence Against Women Act (VAWA).[2] It was founded on the basic premise that every woman deserves to be safe from violence. This groundbreaking legislation was the result of many years of dedication by women's advocates and the incredible leadership of then-Senator Joseph Biden. VAWA created the first Federal legislation acknowledging domestic violence and sexual assault as crimes, and provided Federal resources to encourage community-coordinated responses to combating violence.[3] VAWA was reauthorized in 2000 and improved the foundation established in 1994 by creating a much-needed legal assistance program for victims and by expanding the definition of crime to include dating violence and stalking. Its subsequent reauthorization in 2005 created new programs to meet the emerging needs of communities working to prevent violence. VAWA's reauthorization in 2005, for the first time, contained a specific provision designed to improve safety and justice for American Indian and Alaska Native women.[4]

Since the passage of VAWA, annual incidents of domestic violence have dropped by more than 60 percent.[5] While tremendous progress has been made, violence is still a significant problem facing women, men, families, and communities. On average, three women die every day as a result of domestic violence.[6] One in five women has been sexually assaulted at some time in their lives.[7] Stalking affects one in six women.[8]

VAWA creates and supports comprehensive, effective, and cost saving responses to the crimes of domestic violence, dating vio-

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[1] Currently, there are 566 federally recognized American Indian and Alaska Native tribes in the United States. While no single term is universally accepted by all indigenous peoples in the United States, the terms American Indian, Alaska Native, Indigenous, and Native or Native American, are used somewhat interchangeably. The use of one term over the other in this report is not meant to minimize, exclude, generalize the individuals involved, or endorse one term over the other.

[2] VAWA was first passed in 1994 as Title IV, §§ 40001–40703 of the Violent Crime Control and Law Enforcement Act (Pub. L. 103–322,108 Stat. 1796).

[3] Deidre Bannon, *VAWA at the Crossroads,* The Crime Report, Jan. 31, 2012 (*quoting* Statement of Susan Carbon, Director of the Department of Justice's Office on Violence Against Women) ("When VAWA was originally passed in 1994, it was seen as a landmark piece of legislation—people tended to look at these crimes and blame the victim for causing the violence. We needed to have a comprehensive national approach to address these crimes—and that's an ongoing need we still have.").

[4] Title IX (commonly referred to as the Tribal Title), 18 U.S.C. § 2265.

[5] Lynn Rosenthal & Kimberly Teehee, *Strengthening the Violence Against Women Act*, The White House (Apr. 25, 2012).

[6] *Id.*

[7] *Id.*

[8] *Id.*

lence, sexual assault, and stalking. The VAWA programs, administered by the Departments of Justice and Health and Human Services, have dramatically changed and improved Federal, Tribal, State, and local responses to these crimes. More victims are coming forward and receiving lifesaving services to help them move from crisis to stability, and the criminal justice system has improved its ability to keep victims safe and hold perpetrators accountable.

> Since VAWA'S passage in 1994, no other law has done more to stop domestic and sexual violence in our communities. The resources and training provided by VAWA have changed attitudes toward these reprehensible crimes, improved the response of law enforcement and the justice system, and provided essential services for victims struggling to rebuild their lives. It is a law that has saved countless lives, and it is an example of what we can accomplish when we work together.[9]

VAWA has also helped improve the response to violence against Native women by funding critical research and establishing a Tribal registry to track sex offenders and orders of protection. While such VAWA programs have encouraged systemic changes to meet the needs of Native victims and help save countless lives, VAWA expired in 2011 and more work still needs to be done.[10]

2. The need for additional legislation: the Stand Against Violence and Empower Native Women Act

Across the nation, homicides and other violent crimes have been on the decline.[11] States have reformed their laws to take violence against women more seriously by passing more than 660 laws to combat domestic violence, sexual assault and stalking. All States have passed laws making stalking a crime and strengthened laws addressing date rape and spousal rape.[12] As a result of efforts such as these, the rate of intimate partner violence declined 67 percent.[13] The number of individuals killed by an intimate partner has decreased by 35 percent for women[14] and the rate of non-fatal intimate partner violence against women has decreased 53 percent.[15] Since VAWA was first enacted in 1994, reporting of domestic violence has increased by as much as 51 percent.[16]

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[9] 157 Cong. Rec. S8071 (daily ed. Nov. 30, 2011) (statement of Sen. Patrick Leahy, for himself and Sen. Mike Crapo).

[10] In his report, United Nations Special Rapporteur James Anaya says Congress should make legislation protecting Native women an "immediate priority" and he recommends the United States immediately address violence against women through legislation. His report points to the fact that Native women suffer at horrendous rates of domestic and sexual violence compared to the rest of the country. James Anaya, United Nations, *Report of the Special Rapporteur on the Rights of Indigenous Peoples* 10–11, 21–22 (Aug. 30, 2012) (A/HRC/21/47/Add.1).

[11] *See Crime in the United States 2011, Violent Crime,* FBI (Nov. 6, 2012) ("When considering 5- and 10-year trends, the 2011 estimated violent crime total was 15.4 percent below the 2007 level and 15.5 percent below the 2002 level.").

[12] *See also Factsheet: The Violence Against Women Act,* The White House (Nov. 5, 2012, 12:56 PM).

[13] *Id.* (between 1993 to 2010).

[14] *Id.* (between 1993 to 2007).

[15] Monica McLaughlin, National Network to End Domestic Violence (NNEDV), Reauthorization of the Violence Against Women Act 1 (citing National Crime Victimization Survey (NCVS), U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics) (noting that the decrease is based on data collected between 1993 and 2008).

[16] Native women are more unlikely to personally report their victimization to the police. *See* Ronet Bachman, et al., Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known 5 & 39, Table 10 (Aug. 2008) (noting that while 49

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While the national crime rate has been on the decline in the last decade, Native Americans experience violent crimes at a rate much higher than the general population.[17] This trend carries over to violent crimes against Native American women and is particularly troubling for Native American women who live on reservations within the United States. Native American women experience domestic and dating violence at a rate that is more than twice the rate of non-Indian women.[18] This is the highest rate of victimization from violent crime of any group in the United States.[19] Forty-six percent, nearly half of all Native American women have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.[20] These statistics are staggering.

These epidemic rates[21] mean that one in three Native American women will be raped in her lifetime.[22] Three out of five Native American women will be physically assaulted.[23] Native American women are more than twice as likely to be stalked as other

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percent of Native women victimization is reported to the police, only 17 percent is reported directly by the victim, "[A]t worst, less than one in four [intimate partner violent crimes] are ever reported.") (citations omitted). *See also* Stewart Wakeling, Miriam Jorgensen, Susan Michaelson & Manley Begay, Policing on American Indian Reservations, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice 13 (July 2001) (noting that the under-reporting, between reservation citizens and their police agencies and between these tribal police agencies and such Federal agencies as the FBI and the Bureau of Indian Affairs (BIA), on reservations may contribute to the poor crime data in Indian country).

[17] Stewart Wakeling, Miriam Jorgensen, Susan Michaelson & Manley Begay, Policing on American Indian Reservations, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice 13 (July 2001). Steven W. Perry, American Indians And Crime, A BJS Statistical Profile, 1992–2002, U.S. Department Of Justice, Bureau Of Justice Statistics at iv (2004). "The BJS statistics do have some limitations. They are based primarily on nationwide victimization surveys, administered through interviews of individuals at a nationally representative number of households. These data fail to distinguish between Indian reservations and other rural and urban settings. The BJS victimization data encompasses the more than 60 percent of all Indians who live outside reservations, including large urban Indian populations in places such as Los Angeles and Minneapolis." Carole Goldberg & Kevin Washburn, *Lies, Damn Lies, and Crime Statistics,* Turtle Talk (July 31, 2008). However, because rape is still an under-reported crime, the data collected from crime victims should not be ignored. "If Indian women do not believe that their reports will be investigated, they are much less likely to report." *Id.* (responding to a South Dakota study questioning BJS statistics regarding the race of the defendants).

[18] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs,* 112th Cong. 24 (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP) (citing Amnesty International, *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA* 4 (2007)).

[19] *Id.* (noting that "[t]he sheer volume of violence inflicted upon Native American women is largely attributable to violence by non-Native men").

[20] Bea Hanson, *Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month, OVW Blog,* The United States Department of Justice (Nov. 29, 2012) (citing statistics from the National Center For Injury Prevention and Control of the Centers For Disease Control and Prevention, The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report 3, 39 (Nov. 2011)).

[21] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 7 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice). *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs,* 112th Cong. 7 (Nov. 10, 2011) (statement of Sen. Lisa Murkowski) ("[W]hen we realize these rates of violence and abuse that we see that are perpetuated against Native women and children, it is well past time that we make it a national priority.").

[22] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 7 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice). "Advocates state that these statistics provide a very low estimate and that rates of sexual assault against American Indian women are actually much higher." *Serving Ethnic and Racial Communities: American Indian Victims, Put the Focus on Victims, SART Toolkit,* Office of Justice Programs (last visited Dec. 10, 2012). These numbers are based on an old definition of rape and that the number of rapes may actually be much higher. The Obama administration announced on January 6, 2012 that the federal government would be changing the definition of rape to include other forms of bodily intrusion.

[23] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 7 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice).

women.[24] On some Indian reservations, the murder rate for Native American women is 10 times the national average and accounts for the third leading cause of death for Native American women.[25] Sexual assault remains the most underreported violent crime in the country with recent statistics indicating that 70–80 percent of sexual assaults in Indian country are not reported.[26]

Rape and sexual assault in the general population are usually intra-racial.[27] Of course, rape and sexual assault may also be interracial. Under Federal law, Tribal authorities do not have jurisdiction over cases in which the defendant is non-Indian. In many states, State authorities do not have jurisdiction on Tribal lands. Therefore, rape and domestic violence cases are deferred to Federal authorities.

The Supreme Court decided *Oliphant v. Suquamish* in 1978 and ruled that tribes do not possess the authority to fully prosecute these kinds of violent crimes that occur within their territories.[28] *Since Oliphant*, and unlike all other local communities, Indian nations and Alaska Native villages are legally prohibited from prosecuting non-Indians. The *Oliphant* decision created a jurisdictional gap that has had grave consequences for Indian women. When the perpetrator is non-Indian, Indian women are frequently left without any criminal recourse.[29] According to one Tribal official, "This leaves Indian nations, which have sovereignty over their territories and people, as the only governments in America without jurisdiction and the local control needed to combat such violence in their communities."[30]

Since *Oliphant*, the United States Attorney's office has been the principal prosecutor of criminal cases for violation of Federal laws in Indian country. Domestic violence and sexual abuse against Native women fall within this realm. Unfortunately, the need to investigate and prosecute these crimes, often on many different reservations (or Tribal lands), creates a burden on Federal authorities who are often located far from any reservations and stretched too

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[24] Patricia Tjaden & Nancy Thoennes, U.S. Department of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women 22 (2000) (noting that seventeen percent of Native women are stalked each year, twice that of other populations).

[25] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 7 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice). *See also* Ronet Bachman, et al., Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known 37 (Aug. 2008) (noting that American Indian and Alaska Native women are over 2 times as likely to face an armed offender compared to other women).

[26] Press Release, The United States Department of Justice, Acting Associate Attorney General Tony West Speaks at the Press Conference Regarding Sexual Assault Response Team Initiative (June 6, 2012) (noting that one of the major contributing factors to underreporting is a lack of faith in criminal justice system).

[27] Ronet Bachman, et al., Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known 38 (Aug. 2008).

[28] 435 U.S. 191, 195 (1978). *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 22–23 (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP) (noting that because the *Oliphant* decision deprived tribes of the jurisdiction over non-Indians, this "has had a dramatic and detrimental impact upon public safety in Indian country").

[29] *See Hearing on Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Before the S. Comm. on Indian Affairs*, 112th Cong. 98 (July 14, 2011) (Appendix, prepared statement of the National Congress of American Indians (NCAI) Task Force on Violence Against Women) (calling on Congress to restore optional, concurrent tribal criminal jurisdiction over non-Indian perpetrators of domestic violence, sexual assault, and related crimes that are committed within the exterior boundaries of the reservation).

[30] Terri Henry, Co-Chair, NCAI Task Force on Violence Against Women, Councilwoman, Eastern Band of Cherokee Indians, and Board member for the Indian Law Resource Center, *Violence Against Native Women Gaining Global Attention*, Indian Law Resource Center (last visited Nov. 3, 2012).

thin to be effective. Federal law also does not provide the tools and the types of graduated sanctions that are found in State laws across the country. This lack of capacity results in many cases of domestic violence on reservations being delayed or untried. Already, United States Attorneys decline to prosecute 60–70 percent of all Indian country matters referred to them.[31] Assault and sexual abuse charges were the leading types of charges in Indian country, comprising 55 percent of all matters referred to U.S. attorneys.[32] Federal prosecutors declined to prosecute 67 percent of crimes sexual abuse and more than 46 percent of assault matters in Indian country.[33]

These declinations leave an entire group of offenders who are essentially immune from the law because tribes must rely on Federal prosecutors, people who are outside of the community and remote from the community, to provide the support they need to protect their citizens.[34] The absence of an adequate legal framework to address this problem has undercut law enforcement efforts to stop countless acts of violence against Native women and has left victims unable or unwilling to seek help.[35]

Tribal law enforcement is not in a position to fully address these crimes because tribes do not have jurisdiction over all offenders in their communities. "Tribal governments, police, and prosecutors and courts should be in a central part of the response to these crimes, but under current law throughout the Country they lack the authority to be part of that response."[36]

A tribe's ability to protect its citizens from violence should not depend on the race of the assailant. The SAVE Act would restore jurisdiction to tribes so they can prosecute crimes of violence against women committed by non-Indians within their territories.[37] The restoration of inherent Tribal authority to investigate, prosecute, convict, and sentence perpetrators of violence against women would allow tribes to protect victims of violence and address these pervasive crimes against Native American women.

"Incest, child sexual assault, domestic violence, sexual abuse, sex trafficking, these are all forms of a systemic exploitation of those who have the least power, and that needs to be addressed as a sys-

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[31] Final Report, National Advisory Committee on Violence Against Women 22 (June 2012) ("[A]pproximately 60–70 percent of crimes by non-Indians are not prosecuted because of declination by U.S. Attorneys."); *see Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country? Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (Sept. 22, 2011) (statement of Sen. Tester).

[32] U.S. Government Accountability Office, GAO–11–167R, U.S. Department of Justice Declinations of Indian Country Criminal Matters 3 (2010).

[33] *Id.* at 3, 9.

[34] *See Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 70–71 (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP).

[35] *See id.* at 8 (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice).

[36] *Id.* at 8–9.

[37] "Even when Indian nations exercise criminal jurisdiction, the Indian Civil Rights Act (ICRA) generally limits the sentencing authority of tribal courts to no more than a year of imprisonment, no matter how heinous the offense. In 2010, the Tribal Law and Order Act (TLOA) was enacted to improve criminal justice on Indian lands, including amendments to ICRA that allow tribal courts to extend sentences, but only if tribes meet certain requirements. Indian nations now face substantial setbacks in implementing TLOA after some $90 million was cut from FY 2012 funding for tribal justice programs and crime fighting efforts in Native communities." Jana Walker, Senior Staff Attorney and Director of the Indian Law Resource Center's Safe Women, Strong Nations Project, *Using the Declaration to End Violence Against Native Women*, Indian Law Resource Center (Feb. 1, 2012).

temic matter."[38] Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system.[39] Without the authority to prosecute crimes of violence against women, a cycle of violence is perpetuated that allows, and even encourages, criminals to act with impunity in Tribal communities and denies Native women equality under the law by treating them differently than other women in the United States.[40] The SAVE Act will help Tribal communities break this cycle.[41]

> The SAVE Native Women Act makes important updates to the law to ensure that Native American communities have the tools and resources they need to stop acts of violence against Native Women. . . . It provides Native Americans in Indian country the legal authority they need to prosecute acts of violence committed in their communities. And it updates the Federal assault statute applicable in Indian country.[42]

The SAVE Act addresses these three key areas where legislative reform is critical: Tribal criminal jurisdiction, Tribal civil jurisdiction, and Federal criminal offenses.

The SAVE Act closes the jurisdiction gap by restoring tribes inherent authority to hold offenders accountable for their crimes against Native women, regardless of the perpetrator's race. "Together, by filling these three holes, the [SAVE] Act will take many steps forward in our ability to combat violence in Alaska Native and American Indian communities."[43] The SAVE Act builds on current law to improve the effectiveness and efficiency of Tribal justice systems and will provide additional tools to Tribal and Federal prosecutors to address domestic violence in Indian country.

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[38] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 20 (Nov. 10, 2011) (statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center).

[39] Statement of Juana Majel-Dixon, Vice President of the National Congress of American Indians and Co-Chair of the NCAI Task Force on Violence Against Women. *Violence Against Native Women Gaining Global Attention; Congress Encouraged to Act*, Indian Country Today (Oct. 11, 2012) ("Congress can act now and NCAI is calling on members of the House and Senate to not let this crisis continue for one more day.").

[40] Jana Walker, Senior Staff Attorney and Director of the Indian Law Resource Center's Safe Women, Strong Nations Project, *Using the Declaration to End Violence Against Native Women*, Indian Law Resource Center (Feb. 1, 2012).

[41] Letter from Troy A. Eid, Chairman, Indian Law and Order Commission and Former United States Attorney for the District of Colorado & Thomas B. Heffelfinger, Former United States Attorney for the District of Minnesota, to the Senate (Mar. 13, 2012).

[42] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 18 (Nov. 10, 2011) (statement of Sen. Al Franken) (noting that the Act also authorizes services for victimized youth and for victims of sex trafficking).

[43] *Id.* at 9 (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice).

3. The SAVE Act closes jurisdictional gaps to better address crimes against Native women

Although Federal laws such as VAWA, Trafficking Victims Protection Act (TVPA),[44] and the Tribal Law and Order Act (TLOA)[45] address crime in Indian country, these laws leave unaddressed the lack of Tribal authority to prosecute non-Indians committing violent crimes on the reservation. This jurisdictional void means that some crimes committed by non-Indians in Indian country can still go unpunished.[46] "The lack of tribal jurisdiction over non-Indian offenders on Indian lands may be the key reason for the creation and perpetuation of disproportionate violence against American Indian and Alaska Native women."[47]

In 1978, the Supreme Court ruled that Indian tribes do not have criminal jurisdiction over non-Indians who commit crimes on Indian lands.[48] As such, Indian women—most of whom describe the offender as non-Indian[49]—often have no criminal recourse against non-Indian offenders.[50] This leaves a sense of lawlessness on Indian reservations and a perpetuation of victimization of Native women, a perception which is at odds with the purposes of VA WA that have guided our nation since its enactment over fifteen years ago.[51] The SAVE Act, "by providing Tribes with jurisdiction over domestic violence committed by all offenders, recognizes Tribal sovereignty and Tribal responsibility."[52]

a. The SAVE Act recognizes the inherent authority of tribes to prosecute any person who commits domestic violence or dating violence against a Tribal member in Indian country

The current legal framework for criminal jurisdiction in Indian country is complicated and often produces an inadequate and de-

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[44] Pub. L. 106–386, 114 Stat. 1464 (2000) (codified as 22 U.S.C. §§ 7101–7112). Confronted with the unique nature of human trafficking in the United States, Congress promulgated the Trafficking Victims Protection Act (TVPA) of 2000. TVPA criminalizes human trafficking and is the first comprehensive federal law to address trafficking in persons. The TVPA does not only provide legal tools for prosecution of traffickers and those who aid traffickers, it also provides valuable protection for victims of trafficking. The law provides a three-pronged approach that includes prevention, protection, and prosecution. The TVPA was reauthorized through the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 2005, and 2008.

[45] Pub. L. No. 111–211, 124 Stat. 2258 (2010) (codified as amended in various sections of 25 U.S.C.). In July 2010, the President signed the Tribal Law and Order Act, which helps to address crime in tribal communities and places a strong emphasis on decreasing violence against American Indian and Alaska Native women.

[46] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 9 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice) ("[T]he current jurisdictional framework has left many serious acts of domestic and dating violence unprosecuted and unpunished.").

[47] *Hearing on Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 63 (Sept. 22, 2011) (statement of Jacqueline Johnson-Pata, Executive Director, National Congress of the American Indian (NCAI)).

[48] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

[49] *See* Steven W. Perry, American Indians and Crime, A BJS Statistical Profile, 1992–2002, U.S. Department of Justice, Bureau of Justice Statistics 9 (2004) (noting that nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white).

[50] *See Hearing on Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 63 (Sept. 22, 2011) (statement of Jacqueline Johnson-Pata, Executive Director, National Congress of the American Indian (NCAI)).

[51] *Hearing on Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. (Sept. 22, 2011) (statement of Jacqueline Johnson-Pata, Executive Director, National Congress of the American Indian (NCAI)) (citations omitted).

[52] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 22 (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP).

layed response to Indian women victims, further undermining their safety.[53] "The patchwork of Federal, State, and Tribal criminal jurisdiction in Indian country has made it difficult for law enforcement and prosecutors to adequately address domestic violence—particularly misdemeanor domestic violence, such as simple assaults and criminal violations of protection orders."[54] In the 112th Congress, the Committee has received testimony from 17 witnesses during three hearings on how necessary it is for tribes to exercise concurrent criminal jurisdiction over domestic-violence cases, regardless of whether the defendant is Indian or non-Indian.[55]

Under current law, Tribal governments—police, prosecutors, and courts—lack the authority to address many of these crimes.[56] The SAVE Act builds on the Tribal Law and Order Act (TLOA) by recognizing certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders in Indian country. TLOA supports the idea of tribes addressing violence in their own communities and it offers additional authority to Tribal courts and prosecutors if certain procedural protections are established.[57] "[D]omestic violence is among those types of criminal offenses which are most properly handled as close to the community, as close to the act level as you possibly can."[58] Local Tribal officers and justice systems are more capable and more accountable to victims of violence and their communities.

> [T]he current legal structure for prosecuting domestic violence in Indian country is not well-suited to combating this pattern of escalating violence. Federal resources, which are often the only ones that can investigate and

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[53] *See, e.g., Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 9 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice). *See also* Ronet Bachman, et al., Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known 8–9 (Aug. 2008) (noting that cross-deputization agreements with state police authorities can serve to alleviate the jurisdictional confusion, but that the complicated jurisdictional issues still produce many unique barriers for Indian women seeking help from a criminal justice authority on tribal lands).

[54] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 19 (July 14, 2011) (attachment to prepared statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice, entitled *Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women). See also Hearing on Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Before the S. Comm. on Indian Affairs*, 112th Cong. 82–83 (July 14, 2011) (prepared statement of the Cherokee Nation) (noting that the "confusion as to whether local, state, federal, or tribal law enforcement agencies possess criminal jurisdiction" often results in "acts of violence against women often fall[ing] through the cracks and are never prosecuted").

[55] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 8 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice) (noting that such legislation would build on the intent of the Tribal Law and Order Act).

[56] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 11 (July 14, 2011) (letter from Ronald Welch, Assistant Attorney General, included as an attachment to prepared statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice).

[57] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 8 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice).

[58] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 70–71 (Nov. 10, 2011) (statement of Thomas B. Heffelfinger, Attorney, Best & Flanagan LLP) ("What is wonderful about [the SAVE Native Women] Act is that it lets the courts and the law enforcement and the prosecutor, who are right there in the community and have the ability to respond immediately and directly to the violence going on in that community. And that is not simply making arrests and initiating prosecutions. It is also the ability to give the courts jurisdiction to fashion a sentence that can not only punish, but prevent and deter.").

> prosecute these crimes, are often far away and stretched thin. Federal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years.[59]

Neither the Federal Government nor any State would lose any criminal jurisdiction as a result of restoration of criminal jurisdiction for Tribal lands.[60] Without impinging on any other government's jurisdiction, the SAVE Act recognizes that a tribe has concurrent jurisdiction over a tightly defined set of crimes committed in Indian country: domestic violence, dating violence, and violations of enforceable protection orders.[61] To the extent those crimes can be prosecuted today by Federal or State prosecutors, that jurisdictional scheme would not be changed by the SAVE Act. Similar to TLOA, this additional Tribal authority under the SAVE Act would be available only to those tribes that guarantee sufficient protections for the rights of the defendants.

For example, if a Native woman is a victim of violence committed on a reservation by a non-Indian with whom she does not have a relationship, the tribe will not have jurisdiction to prosecute that crime. Additionally, the SAVE Act allows non-Indian defendants to have their case dismissed if the defendant files a pretrial motion to dismiss and the tribe does not prove that the victim is Indian.[62] Tribes exercising this statutorily recognized jurisdiction over crimes of domestic violence would be required to protect a robust set of rights, similar to those protected in State court criminal prosecutions. Tribes that choose not to provide these protections would not have this additional authority.

Because restoring Tribal criminal jurisdiction over all perpetrators of domestic violence would tax the already scarce resources[63] of most tribes that might wish to exercise this jurisdiction under the SAVE Act, the Act also authorizes grants to support participating tribes by strengthening their criminal justice systems, providing indigent criminal defendants with licensed defense counsel at no cost to those defendants, ensuring that jurors are properly summoned, selected, and instructed, and according crime victims' rights to victims of domestic violence.

It is important that the United States consider recommendations from experts with the United Nations and the Organization of American States as it begins to take action. A report to the U.N. General Assembly in 2011 concluded that the United States should

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[59] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 7 (July 14, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice).

[60] Sen. Harry Reid, Majority Leader, *The Violence Against Women Reauthorization Act* (S. 1925), United States Senator for Nevada Harry Reid (last visited Dec. 12, 2012) (noting that the expanded jurisdiction "was designed with the Department of Justice over several years of consultation").

[61] *See* SAVE Native Women Act, S. 1763, 112th Cong. §§ 201(a)–201(d) (2011). The SAVE Act would allow tribes to exercise concurrent criminal jurisdiction over all persons committing acts of domestic violence on Indian reservations because of tribes' inherent power of self-government. SAVE Native Women Act, S. 1763, 112th Cong. §§ 201(b)(1) (2011).

[62] *See* SAVE Native Women Act, S. 1763, 112th Cong. §§ 201(a)–201(d) (2011).

[63] *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice throughout Indian Country? Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (Sept. 22, 2011) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs) ("Native justice systems are also extremely underfunded and lack adequate data, training and coordination with State and Federal agencies to deal with the problem.").

"consider restoring, in consultation with Native American tribes, Tribal authority to enforce Tribal law over all perpetrators, both native and non-native, who commit acts of sexual and domestic violence within their jurisdiction."[64] The global reach and international human rights law is a strong push on Congress to act and remove the legal barriers in the United States that affect Native women. According to one advocate, "Native women must not continue to suffer disproportionately higher rates of rape, sexual assault, and murder, and lower rates of enforcement, prosecution, and punishment just because they are Indian and live on an Indian reservation or in an Alaska Native village."[65]

b. The SAVE Act clarifies that Tribal courts have full civil jurisdiction to issue and enforce protection orders against Indians and non-Indians alike

The SAVE Act addresses Tribal civil jurisdiction. Specifically, it confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every Tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.[66] "Without the ability to issue and enforce protection orders and to get full faith and credit for those protection orders, there is a real risk to Native women to be threatened again."[67] To help tribes better protect victims, Tribal courts should have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian.[68] Because Native communities are often located in rural areas, physically distant from State courts and police stations, Tribal courts are often in the best position to best meet the needs of the residents of the community. "Orders of protection can be a strong tool to prevent future violence, but they are only as strong as their recognition and enforcement."[69]

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[64] Rashida Manjoo, U.N. Special Rapporteur on Violence Against Women, United Nations Human Rights Council, *Report of the Special Rapporteur on violence against Women, its causes and consequences* 30 (June 6, 2011).

[65] Jana Walker, Senior Staff Attorney and Director of the Indian Law Resource Center's Safe Women, Strong Nations Project, *Using the Declaration to End Violence Against Native Women*, Indian Law Resource Center (Feb. 1, 2012).

[66] This would effectively reverse a 2008 decision from a Federal district court in Washington, which held that an Indian Tribe lacked authority to enter a protection order for a nonmember Indian against a non-Indian residing on non-Indian fee land within the reservation. Martinez v. Martinez, No. C08–5503 FBD, 2008 WL 5262793 (D. Wash. Dec. 16, 2008).

[67] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 13–14 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice).

[68] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 8 (July 14, 2011) (attachment to prepared statement of Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice). *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country? Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 47 (Sept. 22, 2011) (statement of Troy A. Eid, Chair, Indian Law and Order Commission) (noting that the Commission had received testimony indicating that state court judges do not always enforce a restraining order issued by a tribal court and the lack of protection that occurs without full faith and credit). "Domestic violence perpetrators don't care where the victim is. They are going to hunt that victim down. So we have to try to protect that person." *Id*.

[69] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 96 (July 14, 2011) (appendix, prepared statement of Jana L. Walker, Senior Attorney, Indian Law Resource Center).

c. The SAVE Act amends Federal law to enable Federal prosecutors to more effectively combat three types of assault that are frequently committed against Native women in Indian country: assault by strangling or suffocating, assault resulting in substantial bodily injury; and assault by striking, beating, or wounding

The SAVE Act involves Federal criminal offenses rather than Tribal prosecutions. By amending the Federal Criminal Code to make it more consistent with State laws in this area where the Federal Government (and not the State) has jurisdiction, the SAVE Act simply ensures that perpetrators will be subject to similar potential punishments regardless of where they commit their crimes. To assist Federal prosecutors in combating domestic violence in Indian country, the SAVE Act amends the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding. All of these are in line with the types of sentences that would be available in State courts across the Nation if the crime occurred outside Indian country.[70]

The SAVE Act simplifies the Major Crimes Act[71] to cover all felony assaults under section 113 of the Federal Criminal Code. This includes the two new felony offenses discussed above—assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner; and assaults upon a spouse, intimate partner, or dating partner by strangling or suffocating—as well as assault with intent to commit a felony other than murder, which is punishable by a maximum ten-year sentence. Without this amendment to the Major Crimes Act, Federal prosecutors could not charge any of these three felonies when the perpetrator is an Indian. Under the SAVE Act, assault by striking, beating, or wounding remains a misdemeanor and is not covered by the Major Crimes Act. The SAVE Act would strengthen Tribal jurisdiction over crimes of domestic violence, Tribal protection orders, and Federal assault prosecutions. "These measures, taken together, have the potential to significantly improve the safety of women in Tribal communities and allow Federal and Tribal law enforcement agencies to hold more perpetrators of domestic violence accountable for their crimes."[72]

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[70] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 12–13 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice) ("Existing Federal law provides a six-month misdemeanor assault or assault-and-battery offense that can be charged against an Indian or a non-Indian defendant only if the victim's injuries rise to the level of 'serious bodily injury,' which is significantly more severe than 'substantial bodily injury.' . . . Federal prosecutors today often find that they cannot seek sentences in excess of six months. And where both the defendant and the victim are Indian, Federal courts may lack jurisdiction altogether.").

[71] 18 U.S.C. § 1153. Federal prosecutors use the Major Crimes Act to prosecute Indians for virtually all violent crimes committed on tribal lands against Indian and non-Indian victims.

[72] Hearing on S. 1763, S. 872, & S. 1192 before the S. Comm. on Indian Affairs, 112th Cong. 13–14 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice) (noting that these amendments to the Federal assault statute will stop domestic violence at its earlier states and prevent it from reaching its most severe levels).

4. The SAVE Act addresses the growing problem of the sex trafficking of Indian women

"Historical trauma and multi-generational grief and loss, compounded by high rates of poverty and sexual violence make American Indians extremely vulnerable to sexual predators."[73] Sex trafficking is defined in the Trafficking Victims Protection Act as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[74]

Trafficking is a growing problem in Indian country, but the depth of the sexual exploitation of American Indian women is only now beginning to be uncovered.[75] "[T]his is due in large part because many of the women do not identify as victims. They do not report these crimes to authorities."[76] The SAVE Act would improve data gathering programs to better understand and respond to the sex trafficking of Native American women. Trafficking is a crime that is "very difficult to investigate and get a handle on"[77] and "[t]here are many challenges to identifying and responding to [the] sex trafficking" of Native women.[78] The scope of the problem needs to be better understood in order to offer more effective services.[79] "We know . . . very clearly that this issue [trafficking of Native women] exists and we know it has a terrible effect on communities where this occurs. . . . [A] big part of [addressing trafficking] is education. It is training for both law enforcement, as well as the community."[80]

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[73] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 123 (July 14, 2011) (appendix, prepared statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center). *See also Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. (Nov. 10, 2011) (statement of Sen. Al Franken, noting that sex traffickers tend to target homeless Native women and children).

[74] 22 U.S.C. § 7102(9). Some States, such as Minnesota, have trafficking laws that do not require traffickers to use "force, fraud or coercion." *See* Minnesota Indian Women's Resource Center, Shattered Hearts 21 (Aug. 2009) ("Minnesota law recognizes that a person can never consent to being sexually exploited and considers individuals who have been prostituted by others as trafficking victims. Federal law requires an assessment of the level of 'consent' of the prostituted person in determining whether the crime of trafficking has occurred.") (citations omitted).

[75] Melissa Farley, et al., Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota 56 (Oct. 27, 2011) (noting that it is important that organizations that provide services to Native women educate their staff members to recognize, empathize, and support victims of trafficking). "In the U.S., very little research has been published on the sex trafficking or commercial sexual exploitation of Native women and youth. What exists is specific to two states, Minnesota and Alaska. A number of publications have addressed trafficking and prostitution of Native women and youth in Canada, but in both countries, most of these describe small local studies, are produced by organizations serving victims, or are press releases and interviews citing law enforcement personnel. To date, no U.S.-based research has been published in peer-reviewed journals." Alexandra (Sandi) Pierce & Suzanne Koepplinger, *New Language, Old Problem: Sex Trafficking of American Indian Women and Children*, National Online Resource Center on Violence Against Women 3 (Oct. 2011).

[76] *Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 20 (Nov. 10, 2011) (statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center) (noting that victims of trafficking are much more likely to disclose their assault to frontline advocates).

[77] Id. at 15 (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep't of Justice).

[78] *Id.* at 20 (Nov. 10, 2011) (statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center) ("[C]ollecting data on the scope of sex trafficking is a challenge. And this is due in large part because many of the women do not identify as victims. They do not report these crimes to authorities.").

[79] "[The arrest and prosecution of victims is counter-productive and exacerbates the problems." Melissa Farley, et al., Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota 56 (Oct. 27, 2011).

[80] *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 31–32 (Sept. 22, 2011) (statement of Brendan Johnson, U.S. Attorney, District of

Continued

Forty states have already passed State laws criminalizing sex trafficking. However, these State laws vary in criteria for establishing victimization.[81] Trafficking cases that arise from within the United States, as compared to international trafficking, also tend to be more difficult to prosecute and provide challenges to helping the victims. There is currently no dedicated Federal funding for services to aid or protect domestically-trafficked U.S.-born adults. The SAVE Act includes research for, as well as grants towards understanding and addressing sex trafficking. Because domestically-trafficked U.S.-born adult victims are offered fewer protections than international victims while the case is being heard, adult domestic victims often refuse to testify, fearing potentially lethal retribution by the trafficker.[82]

Ending human trafficking should not be a political issue, but a human responsibility.[83]

> Investing in the safety of women and children is an investment in the wellbeing of our families and communities. It is not only the right thing to do, it is fiscally prudent thing to provide preventive and healing services to those in need. The trauma of unreported or untreated sexual violence leads to higher end-use of social services, multi-generational abuse, increased rates of homelessness, and other costs.[84]

NEED FOR LEGISLATION

Some question the ability of Congress to restore the inherent criminal authority of Indian tribes over all individuals who commit crimes of domestic and dating violence, regardless of their status as Indian or non-Indian. Congress has exercised, and the United States Supreme Court has affirmed, broad plenary authority over Indian affairs for more than two centuries. In the recent past, Congress restored the inherent criminal jurisdiction of Indian tribes over non-member Indians. The Supreme Court upheld the law. Provisions to restore Tribal government authority over on-reservation acts of domestic and dating violence by non-Natives with ties to the reservation are well within Congress' constitutional authority over Indian affairs.

Prior to contact with European nations, Indian tribes were separate sovereigns possessing full authority to investigate and prosecute crimes committed by all who entered their lands. These nations and the United States, upon its formation, acknowledged the

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South Dakota, U.S. Department of Justice) (emphasizing the importance of training Federal law enforcement in Indian country because, what might look like a prostitution case at first could be a much larger human trafficking operation).

[81] Alexandra (Sandi) Pierce & Suzanne Koepplinger, *New Language, Old Problem: Sex Trafficking of American Indian Women and Children*, National Online Resource Center on Violence Against Women 3 (Oct. 2011) (noting that Arizona "requires adult victims to prove the trafficker used force, fraud, or coercion" while Minnesota "does not require victims of any age to prove the means by which they were induced"). "In. . . federal law, sexually trafficked minors are automatically considered to be victims, but trafficked adults are required to prove that the trafficker used force, fraud, or coercion to become eligible for victim services." *Id.* at 5.

[82] *Id.* at 6 (noting that although "a handful of programs, such as Breaking Free and PRIDE in Minneapolis, offer shelter, transitional housing, and support services to domestically trafficked adults, none receive federal trafficking dollars for these services.") (citations omitted).

[83] United States Department of State, Trafficking in Persons Report 3 (June 2011) (*quoting* Ambassador Richard Holbrooke).

[84] *Hearing on S. 1763, S. 872 & S. 1192 Before the S. Comm. on Indian Affairs*, 112th Cong. 20 (Nov. 10, 2011) (statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center).

full realm of Tribal government criminal jurisdiction in Indian treaties. The United States added acknowledgement of Tribal self-governing authority through several references to Indian tribes in the Constitution. Through these acknowledgements, Congress has exercised, and the Supreme Court has affirmed as constitutional, broad plenary authority over Indian affairs.

Specifically regarding criminal justice on Indian lands, the Court in *U.S.* v. *Kagama* found that Congress had the constitutional authority to enact the Major Crimes Act of 1885, which restricted Tribal authority over crimes committed by Indians on the reservation.[85] The Court found that due to Congress' "course of dealing with [Indian tribes], and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[86] For nearly 130 years since *Kagama*, based on this authority, Congress has enacted hundreds of laws impacting Indian affairs, including laws taking Tribal homelands, authorizing the boarding of Indian children against parental consent, suppressing of the practice of Native religions and prohibition on speaking Tribal language, and much more. No Federal court has questioned or struck down these laws.

In the 1978 *Oliphant* v. *Suquamish Indian Tribe* case, the Court held that Congress "implicitly divested" Tribal authority over non-Indians.[87] The Court reasoned that various Federal laws enacted over the past 150 years "demonstrated an intent to reserve jurisdiction over non-Indians to the Federal courts."[88] An additional part of the rationale was that non-Indians could not participate in jury pools or Tribal politics. The Oliphant Court acknowledged that the "prevalence" of non-Indian crime on Indian reservations, but noted that "these are considerations for Congress to weigh. . . ."[89]

In 1990, the Court in *Duro* v. *Reina*, similarly held that Congress implicitly restricted Tribal criminal authority over non-member Indians.[90] Non-members Indians also cannot vote in Tribal elections or otherwise participate in Tribal politics. Congress legislatively reversed *Duro*, relaxing the restriction by amending the Indian Civil Rights Act (ICRA) to "recognize and affirm" the inherent Tribal government criminal authority over "all Indians."[91]

In 2004, the Supreme Court in *United States* v. *Lara*, upheld the ICRA amendment acknowledging Tribal inherent criminal authority over all Indians.[92] The central question raised in *Lara* was whether Congress has the constitutional power to recognize Indian tribes' "inherent" under the Constitution rested on six considerations, all of which apply to the proposed VAWA Tribal jurisdiction provision: (1) "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes"; (2) "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"; (3) "Congress' statutory goal—to modify the degree of auton-

[85] 118 U.S. 375 (1886).
[86] *Id* at 384.
[87] 435 U.S. 191 (1978).
[88] *Id.* at 204.
[89] *Id.* at 212.
[90] 495 U.S. 676 (1990).
[91] 25 U.S.C. § 1301(2).
[92] 541 U.S. 193 (2004).

omy enjoyed by a dependent sovereign that is not a State—is not an unusual legislative objective"; (4) there is "no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches"; (5) "the change at issue here is a limited one, . . . [largely concerning] a tribe's authority to control events that occur upon the tribe's own land"; and (6) the Court's "conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with [the Supreme Court's] earlier cases."

While the ICRA provision at issue in *Lara* was broad criminal authority over all types of crimes committed by any non-member Indian who acts on Indian lands, the proposed VAWA Tribal provision is limited to misdemeanor crimes of domestic and dating violence committed on a reservation by a non-Indian who either lives or works on the reservation and who has a pre-existing relationship with the victim. In addition, the proposal requires that Tribal courts provide the suspect of abuse with a full list of protections that mirror protections offered defendants before State courts. These protections were not required in the ICRA amendment at issue in *Duro.*

Opponents of restoring inherent Tribal authority have proposed a delegation of Federal criminal authority to Indian tribes over non-Native crimes of domestic and dating violence. Delegating Federal criminal authority to Tribal governments will raise more constitutional questions that it could possibly answer. Indian tribes and Tribal officials are neither appointed by the President nor subject to his removal authority. Tribal prosecutors (unlike United States Attorneys) are not controlled (hired and fired) by the President. Such a system, at minimum, would be required in order for a delegation to be found constitutional.

Justice Thomas, in his concurrence in response to Justice Souter's dissent, laid out the argument against Federal delegations of criminal authority to Indian tribes.

> The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power. Congress cannot transfer federal executive power to individuals who are beyond "meaningful Presidential control." And this means that, at a minimum, the President must have some measure of "the power to appoint and remove" those exercising that power.[93]
>
> It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests. That is, reading the "*Duro* fix" as a delega-

[93] *Id.* at 216–17 (Thomas, J., concurring in the judgment) (citing Morrison v. Olson, 487 U.S. 654, 691 (1988)).

> tion of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties. Accordingly, the Court has only two options: Either the "*Duro* fix" changed the result in *Duro* or it did nothing at all.[94]

"[Justice Thomas] cogently explained that any delegation of that sort would be constitutionally suspect in any event, for it would transfer a core executive function—the prosecution of crime—to an entity not simply beyond the President's appointment and removal authority, but entirely outside the executive branch."[95]

Just as important, a Federal delegation would prove unworkable on-the-ground and would do little to address the epidemic of violence faced by many Tribal communities. It would place significant additional burdens on Tribal governments, courts, and police—as opposed to exercising the restored authority listed in the Issa bill[96] even with the added requirements and protections that they must provide to suspects of abuse. In addition, a delegation of Federal authority—if it can ever be found constitutional—must come with an entirely new Federal bureaucracy and regulatory regime to oversee local Tribal law enforcement, prosecutors, public defenders, judges, and other justice officials, all of which must be funded by Congress.

Congress has much broader plenary authority to legislate over Indian affairs than it does delegating criminal enforcement powers that are reserved for the Federal Government. Recognizing and affirming a tribe's inherent power to exercise criminal jurisdiction over certain nonmembers is exactly what Congress did in the "*Duro* fix," which the Supreme Court upheld in *United States* v. *Lara*.

LEGISLATIVE HISTORY

In developing S. 1763, the Committee worked to continue the tradition of strong bipartisan support for the Violence Against Women Act (VAWA). S. 1763 includes a Department of Justice proposal submitted to Congress on July 21, 2011 in anticipation of the reauthorization of the VAWA. That proposal was the product of extensive of previous work developing the Tribal Law and Order Act, which became law in 2010.

The Committee held a hearing on the proposal on July 14, 2011. Three critical priorities emerged from the July hearing: (1) To reauthorize and improve the Native programs under VAWA; (2) To strengthen Tribal governments so that they have the authority to address these crimes; and (3) To examine the increasing problem of sex trafficking of Native women. These priorities were then incorporated into draft legislation which was widely circulated in August, 2011, and posted on the Committee's website.

In response to the feedback the Committee received, Senator Akaka modified the draft bill and introduced the Stand Against Violence and Empower Native Women (SAVE Native Women) Act on October 31, 2011, along with Senators Baucus, Begich, Bingaman, Franken, Inouye, Johnson, Murray, Tester, and Udall. Senators

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[94] *Id* at 216 (Thomas, J., concurring in the judgment).

[95] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harvard L. Rev. 431, 471 n. 223 (2005).

[96] H.R. 6625.

Conrad, Crapo, Murkowski, Reid, and Sanders were later added as co-sponsors. The Committee held a hearing on November 10, 2011 to further review and evaluate the legislation. The Committee reported S. 1763 on December 8, 2011 by voice vote with bipartisan support. The Committee ordered the bill be reported with an amendment in the nature of a substitute favorably.

The Committee on Indian Affairs worked closely with the Committee on the Judiciary. The Committee on the Judiciary accepted the provisions in S. 1763 and the bill was incorporated into S. 1925, the Violence Against Women Reauthorization Act of 2012. S. 1925, also known as the "Leahy-Crapo bill," was introduced on November 30, 2011 by Senator Leahy and has 60 cosponsors. Judiciary reported S. 1925 with an amendment in the nature of a substitute on February 7, 2012. Judiciary filed a written report with minority views, Report No. 112–153, on March 12, 2012. On April 26, 2012, S. 1925 passed the Senate with an amendment by Yea-Nay recorded vote of 68–31.

A companion bill, H.R. 4154, was introduced by Congressman Boren on March 7, 2012 in the House of Representatives. The bill was referred to the House Subcommittee on Indian and Alaska Native Affairs and the Subcommittee on Crime, Terrorism, and Homeland Security.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Senator Akaka offered a substitute amendment and the amendment was accepted by the Committee on December 8, 2011.

This amendment:

Amends the Omnibus Crime Control and Safe Streets Act of 1968 to include sex trafficking as a target of the grants to Indian Tribal governments to combat violent crime against Indian women. Allows those grants to be used to: (1) address the needs of youth who are victims of, or exposed to, domestic violence, dating violence, sexual assault, sex trafficking, or stalking; and (2) develop and promote best practices for responding to domestic violence, dating violence, sexual assault, sex trafficking, and stalking.

Allows Tribal coalition grants to be used to develop and promote legislation and policies that enhance best practices for responding to violent crimes against Indian women. Requires the Attorney General to award such grants annually to: (1) each Tribal coalition that meets certain criteria under the Violence Against Women Act of 1994 (VAWA), is recognized by the Office on Violence Against Women, and serves Indian tribes; and (2) organizations that propose to incorporate and operate a Tribal coalition in areas where Indian tribes are located but no Tribal coalition exists.

Amends the Violence Against Women and Department of Justice Reauthorization Act of 2005 to: (1) include the Secretary of the Interior, in addition to the Secretary of Health and Human Services (HHS) and the Attorney General, as a participant in consultations with Indian tribes regarding the administration of Tribal funds and programs, enhancement of Indian women's safety, and Federal response to violent crimes against Indian women; and (2) require the National Institute of Justice to include women in Alaska Native Villages and sex trafficking in its study of violence against Indian women. Reauthorizes appropriations for the study for FY2012–FY2013.

Amends VAWA to define or revise definitions of "native village," "sex trafficking," and "tribal coalition."

Restores Indian tribes criminal jurisdiction over domestic violence, dating violence, and violations of protective orders that occur on their lands. Provides that a participating tribe shall exercise special domestic violence criminal jurisdiction concurrently, not exclusively. Authorizes the Attorney General to award grants to assist Indian tribes in exercising such jurisdiction, providing indigent defendants with free legal counsel, and securing the rights of victims of such crimes. Authorizes appropriations for such grant program and to provide participating Indian tribes with training, technical assistance, data collection, and an evaluation of their criminal justice systems.

Gives Indian courts civil jurisdiction to issue and enforce protection orders.

Amends the Federal criminal code to increase the maximum Federal penalties for assault convictions. Subjects individuals who: (1) commit an assault resulting in substantial bodily injury to a spouse, intimate partner, or a dating partner to a fine or imprisonment for up to five years, or both; and (2) assault a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine or imprisonment up to 10 years, or both. Makes Federal felony assault penalties applicable to Indians.

Makes Indian tribes' criminal jurisdiction over domestic violence, dating violence, and violations of protection orders that occur on their lands effective two years after this Act's enactment. Gives Indian tribes the opportunity to participate in a pilot project that allows them to exercise that jurisdiction sooner.

Amends the Federal criminal code to subject individuals convicted under Tribal law of repeat domestic violence or stalking offenses to maximum Federal penalty provisions for repeat offenders.

Makes violations of civil protection orders issued by a Tribal court or other judicial tribunal of an Indian tribe a federal crime.

Amends the Indian Law Enforcement Reform Act to require a report to Congress within 90 days of enactment, and each fiscal year thereafter, to provide details on implementation of the high priority performance goal pilot program carried out by the Secretary of the Interior to reduce violent crime in Indian communities.

Amends the Indian Law Enforcement Reform Act to extend the Indian Law and Order Commission's reporting deadline by one year.

Amends the Indian Civil Rights Act of 1968 to (1) authorize a discretionary four-year pilot project whereby the Secretary of the Interior shall promulgate regulations for misdemeanor crimes with penalties (of no more than a $1000 fine, one year imprisonment, or both) that apply to Indian country, and select up to five tribes for each of fiscal years 2012 to 2018 for participation; (2) require publication of requirements and selection criteria for the project within 180 days of enactment for the Secretary, after consulting with tribes; (3) cross-deputize Tribal officers to issue citations into the applicable Federal district court—the Central Violations Bureau. Enforcement of the regulations would be concurrent with any State or local law enforcement efforts; and (4) require a report to Con-

gress within five years, assessing and evaluating the effectiveness of the project.

Senator Murkowski also offered an amendment. The amendment clarifies that nothing in section 202 (Tribal Protection Orders) would limit, alter, expand, or diminish the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska. This amendment was also accepted by the Committee on December 8, 2011.

SECTION-BY-SECTION ANALYSIS OF THE BILL, AS AMENDED

Title I—Grants

Sec. 101. Grants to Indian Tribal governments

This section amends the Violence Against Women Act to add the following as authorized grant activities: (1) services to sex trafficking victims; (2) services to address the needs of victimized youth and support services for nonabusing parents or the child's caretaker; and (3) drafting and conducting outreach on Tribal codes and best practices for responding to violent crimes and other crimes (including stalking and dating violence) against Indian women.

Sec. 102. Tribal Coalition Grants

For grants to Tribal coalitions, this section: (1) adds drafting and conducting outreach on Tribal codes and best practices for responding to violent crimes and other crimes (including stalking and dating violence) against Indian women as authorized grant activities; (2) limits grants to coalitions, not individuals, as eligible grantees; and (3) authorizes grants, cooperative agreements, and contracts for technical assistance and training to Tribal coalitions and Tribal organizations whose primary purpose is serving Tribal coalitions.

Sec. 103. Consultation

This section amends VAWA to: (1) require the participation of the Secretary of the Interior in consultations. (Previously only the Secretary of HHS and Attorney General were required); (2) require notice of consultation at least 120 days prior; and (3) include preventing the sex trafficking of Native American women as a consultation topic for the Attorney General.

Sec. 104. Analysis and research on violence against women

This section amends VAWA to: (1) add women in Alaska Native Villages and Native Hawaiian women to the required scope of the national baseline study of violence against Indian women; (2) add "sex trafficking" to the scope of the national baseline study; and (3) reauthorize appropriations of $1 million for the study for fiscal years 2012 and 2013.

Sec. 105. Definitions

This section amends VAWA to: (1) add an area or community associated with a "federally recognized Indian tribe" to the definition of a "rural area" and "rural community" so that tribes may be eligible for the DOJ Office of Violence Against Women's Rural Grant Program; (2) include a definition of "sex trafficking" to the VAWA consistent with the definition under Federal criminal statutes; (3)

clarify and streamline the definition of "Tribal coalition" for purposes of DOJ grants; and (4) add nonprofit, nongovernmental "Native Hawaiian organizations" to the definition of "Tribal coalition."

Title II—Tribal Jurisdiction and Criminal Offenses

Sec. 201. Tribal jurisdiction over crimes of domestic violence

This section amends the Indian Civil Rights Act of 1968 to: (1) recognize any participating tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence persons (including non-Indians) who assault Indian spouses, intimate, partners, or dating partners, or who violate protection orders, in Indian Country; (2) require a participating tribe exercising "special domestic violence criminal jurisdiction," to provide certain additional constitutional rights to any defendant prosecuted under this section; and (3) authorize grants to Indian tribes to assist in exercising special domestic violence jurisdiction, including, among other purposes, providing indigent defense counsel, and authorize such sums as are necessary to carry out this section.

Sec. 202. Tribal protection orders

This section amends 18 U.S.C. § 2265 to: (1) clarify provisions in prior amendments to the VAWA, enacted in 2000, that Indian tribes have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian, in matters arising in the Indian country of the tribe "or otherwise in the authority of the tribe." (At least one Federal district court has interpreted the language in current law to be ambiguous regarding jurisdiction of an Indian tribe to enter a protection order for a nonmember Indian against a non-Indian residing on non-Indian fee land within the reservation. This amendment would clarify that tribes have full civil jurisdiction over these matters.); and (2) clarify that nothing in this section limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska or any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.

Sec. 203. Amendments to the Federal assault statute

Amends the Federal assault statute (18 U.S.C. § 113) to: (1) establish a new crime with a penalty of imprisonment up to 10-years for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating, or attempting to strangle or suffocate; (2) provide a 5-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury, adding the type of victim; (3) provide a 1-year offense for assaulting a person by striking, beating, or wounding, increased from six months.

This section also amends the Indian Major Crimes Act (18 U.S.C. § 1153(a)) to: (1) include any felony assault under 18 U.S.C. § 113, as amended by Section 203 and 205 of this proposed legislation, to the list of major crimes over which the Federal Government has exclusive jurisdiction, if committed by an Indian in Indian country.

These changes will enable Federal prosecutors to more effectively combat three types of assault frequently committed against women in Indian country and to appropriately address the gradual esca-

lation of seriousness often associated with domestic violence offenses.

Sec. 204. Effective dates; pilot project

This section provides that the concurrent Tribal jurisdiction over crimes of domestic violence shall take effect two years after the enactment of this proposed legislation. This section establishes a new pilot project for tribes wishing to exercise concurrent jurisdiction over crimes of domestic violence on an accelerated basis. Tribes wishing to participate would apply to the Attorney General, who would coordinate with Department of Interior, and consult with affected Indian tribes.

Sec. 205. Assaults; repeat offenders

This section amends the Federal assault statute (18 U.S.C. § 113(a)) to provide a term of imprisonment of up to 20 years, a fine, or both, for assault with intent to commit a felony of aggravated sexual abuse; and it removes the self-defense of "just cause or excuse" from the crime of assault with a deadly weapon with intent to commit bodily harm.

This section also amends 18 U.S.C. § 2265A(b)(1)(B) to recognize within the Federal system, Tribal convictions for domestic violence or stalking offenses for purposes of repeat offender sentencing.

Sec. 206. Violations of Tribal civil protection orders

This section amends the Indian Major Crimes Act (18 U.S.C. § 1153) to: (1) provide a punishable Federal offense for a violation of a Tribal civil protection order, if the order meets the procedural due process requirements contained in Section 2265 of Title 18 in order to be afforded full faith and credit under that section; (2) provide a maximum 1-year sentence, a fine of up to $1,000, or both, for first violations; (3) provide a maximum 3-year sentence, a fine of up to $5,000, or both, for subsequent violations; and (4) require that the Tribal order include a statement that violation of the order may result in criminal prosecution and penalty under Federal law.

Sec. 207. High priority performance goal pilot program reporting

This section amends the Indian Law Enforcement Reform Act (25 U.S.C. § 2802(c)) to require a report to Congress within 90 days of enactment, and each fiscal year thereafter, providing details on implementation of the high priority performance goal pilot program carried out by the Secretary of the Interior to reduce violent crime in Indian communities.

Title III—Indian Law and Order Commission

Sec. 301. Indian Law and Order Commission

This section extends the Indian Law and Order Commission reporting deadline from two years to three years.

Title IV—Safety Enhancement Study and Demonstration Projects

Sec. 401. Safety enhancement study and demonstration projects

This section amends the Indian Civil Rights Act of 1968 to (1) authorize a discretionary four-year pilot project whereby the Sec-

retary of the Interior shall promulgate regulations for misdemeanor crimes with penalties (of no more than a $1000 fine, one year imprisonment, or both) that apply to Indian country, and select up to five tribes for each of fiscal years 2012 to 2018 for participation; (2) require publication of requirements and selection criteria for the project within 180 days of enactment for the Secretary, after consulting with tribes; (3) cross-deputize Tribal officers to issue citations into the applicable Federal district court—the Central Violations Bureau. Enforcement of the regulations would be concurrent with any State or local law enforcement efforts; and (4) require a report to Congress within five years, assessing and evaluating the effectiveness of the Project.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on December 8, 2011, the Committee on Indian Affairs, by voice vote, adopted S. 1763 with an amendment in the nature of a substitute and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 1763 as reported.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated May 10, 2012, was prepared for S. 1763:

MAY 10, 2012.

Hon. DANIEL K. AKAKA,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1763, the Stand Against Violence and Empower Native Women Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 1763—Stand Against Violence and Empower Native Women Act

Summary: S. 1763 would amend various laws and programs related to violence against Native American women. The legislation would expand grants to tribal governments and tribal coalitions for programs to strengthen criminal justice and law enforcement capabilities related to violence against women. Additionally, S. 1763 would expand penalties for certain violent crimes.

Based on information from the Department of Justice and the Department of the Interior, CBO estimates that implementing S. 1763 would cost $192 million over the 2012–2017 period, subject to appropriation of the necessary funds.

Enacting S. 1763 also would affect direct spending and revenues because those prosecuted and convicted under the bill could be subject to criminal fines; therefore, pay-as-you-go procedures apply. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely affected.

S. 1763 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1763 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—						
	2012	2013	2014	2015	2016	2017	2012–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Estimated Authorization Level	39	40	39	40	40	41	239
Estimated Outlays	6	28	39	39	40	40	192

Basis of estimate: For this estimate, CBO assumes that S. 1763 will be enacted in 2012, that the necessary funds will be provided for each year, and that spending will follow historical patterns for similar programs.

Spending subject to appropriation

S. 1763 would authorize $1 million for each of fiscal years 2012 and 2013 for a baseline study of violence against Native American women to be completed within three years of enactment. The legislation also would authorize whatever sums are necessary for grants to tribal governments or their designees to improve law enforcement, the court system, and detention facilities. In 2012, about $38 million was appropriated for similar grants to tribal governments.

Assuming that spending for grants under S. 1763 would be in line with existing grant programs, that they would supplement rather than supplant those grants, and that appropriations would be provided as necessary each year, CBO estimates that implementing the bill would cost $192 million over the 2012–2017 period.

Direct spending and revenues

S. 1763 would establish new federal crimes, broaden the coverage of existing crimes related to violence against women in tribal areas, and expand existing penalties. Enacting the bill could increase collections of criminal fines (which are recorded in the budget as revenues) for violations of the bill's provisions. CBO estimates that any additional collections would not be significant because of the relatively small number of additional cases likely to be affected. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and subsequently spent without further appropriation.

Intergovernmental and private-sector impact: S. 1763 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Previous CBO estimate: On March 29, 2012, CBO transmitted a cost estimate for S. 1925, the Violence Against Women Reauthorization Act of 2011, as ordered reported by the Senate Committee on the Judiciary on February 7, 2012. Title IX of S. 1925 contains provisions very similar to those in S. 1763, and the cost estimates reflect the difference in the authorized levels of funding.

Estimate prepared by: Federal Costs: Martin von Gnechten; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1763 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letters from the Department of Justice in support of S. 1763:

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 2011

The Honorable Joseph R. Biden, Jr.
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

In anticipation of this year's reauthorization of the Violence Against Women Act (VAWA), the Department of Justice has been engaging in comprehensive discussions, including formal consultations with Indian tribes, about how best to protect the safety of Native women. As you know, the Department has placed a high priority on combating violence against women in tribal communities. We now believe that this goal could be significantly advanced by new Federal legislation.

Violence against Native women has reached epidemic rates. One regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners. According to a nationwide survey funded by the National Institute of Justice (NIJ), one third of all American Indian women will be raped during their lifetimes. And an NIJ-funded analysis of death certificates found that, on some reservations, Native women are murdered at a rate more than ten times the national average. Tribal leaders, police officers, and prosecutors tell us of an all-too-familiar pattern of escalating violence that goes unaddressed, with beating after beating, each more severe than the last, ultimately leading to death or severe physical injury.

Something must be done to address this cycle of violence. For a host of reasons, the current legal structure for prosecuting domestic violence in Indian country is not well-suited to combating this pattern of escalating violence. Federal resources, which are often the only ones that can investigate and prosecute these crimes, are often far away and stretched thin. Federal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years — precisely the sorts of prosecutions that respond to the early instances of escalating violence against spouses or intimate partners.

Tribal governments — police, prosecutors, and courts — should be essential parts of the response to these crimes. But under current law, they lack the authority to address many of these crimes. Until recently, no matter how violent the offense, tribal courts could only sentence Indian offenders to one year in prison. Under the Tribal Law and Order Act (TLOA), landmark legislation that Congress enacted last year, tribal courts can now sentence Indian offenders for up to three years per offense, provided defendants are given proper procedural protections, including legal counsel. But tribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic-violence call, only to discover that the accused is non-Indian and therefore

outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate, their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents.

In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.

The Department of Justice is therefore asking Congress to consider proposals to address the epidemic of domestic violence against Native women. Draft legislative language and an explanatory document are attached to this letter. The legislation we propose would:

- Recognize certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders, in Indian country.

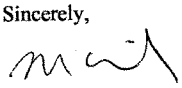
- Clarify that tribal courts have full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.

- Amend the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding.

We believe that these changes in Federal law will significantly improve the safety of women in tribal communities and allow Federal and tribal law-enforcement agencies to hold more perpetrators of domestic violence accountable for their crimes. We look forward to working with you on these critically important issues.

Thank you for the opportunity to present these proposals. The Office of Management and Budget has advised us that there is no objection to submission of this legislative proposal from the standpoint of the Administration's program.

Sincerely,



Ronald Weich
Assistant Attorney General

Attachments

IDENTICAL LETTER SENT TO THE HONORABLE JOHN A. BOEHNER, SPEAKER OF THE U.S. HOUSE OF REPRESENTATIVES

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 2011

The Honorable John A. Boehner
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

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outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate, their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents.

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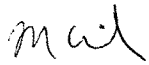

Ronald Weich
Assistant Attorney General

Attachments

IDENTICAL LETTER SENT TO THE HONORABLE JOSEPH BIDEN, PRESIDENT OF THE UNITED STATES SENATE

Title: To decrease the incidence of violent crimes against Indian women, to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women, and to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TABLE OF CONTENTS.

The table of contents for this new title of the Violence Against Women Act of 2011 is as follows:

Sec. 1. Table of contents.

Sec. 2. Tribal jurisdiction over crimes of domestic violence.

Sec. 3. Tribal protection orders.

Sec. 4. Amendments to the Federal assault statute.

Sec. 5. Effective dates; pilot project.

Sec. 6. Severability.

Sec. 7. Technical amendments.

SEC. 2. TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

Subchapter I of chapter 15 of title 25, United States Code (25 U.S.C. 1301 et seq.), is amended by adding at the end the following new section:

"SEC. 1304. TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

"(a) DEFINITIONS.—In this section, the term—

"(1) 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship;

"(2) 'domestic violence' means violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction where the violence occurs;

"(3) 'Indian Civil Rights Act' means sections 1301 to 1303, as amended;

"(4) 'Indian country' has the meaning given that term in section 1151 of title 18, United States Code;

"(5) 'participating tribe' means an Indian tribe that elects to exercise special domestic-violence criminal jurisdiction over the Indian country of such tribe;

"(6) 'protection order' means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection;

"(7) 'special domestic-violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe can exercise pursuant to this section but could not otherwise exercise; and

"(8) 'spouse or intimate partner' has the meaning given that term in section 2266(7) of title 18, United States Code.

"(b) NATURE OF THE CRIMINAL JURISDICTION.—

"(1) Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by the Indian Civil Rights Act, the powers of self-government of participating tribes include the inherent power of those tribes, hereby recognized and affirmed, to exercise special domestic-violence criminal jurisdiction over all persons, subject to the limitations set forth in this subchapter.

"(2) A participating tribe shall exercise special domestic-violence criminal jurisdiction concurrently, not exclusively.

"(3) Nothing in this section creates or eliminates any Federal or State criminal jurisdiction or affects the authority of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

"(c) CRIMINAL CONDUCT.—A participating tribe may exercise special domestic-violence criminal jurisdiction over a defendant only for criminal conduct that falls into one or both of the following categories:

"(1) DOMESTIC VIOLENCE AND DATING VIOLENCE.—Any act of domestic violence or dating violence that is occurring or has occurred in the Indian country of the participating tribe.

"(2) VIOLATIONS OF PROTECTION ORDERS.—Any act that is occurring or has occurred in the Indian country of the participating tribe and that violates or violated the relevant portion of a protection order that was issued against the defendant, is

enforceable by the participating tribe, and is consistent with section 2265(b) of title 18, United States Code. In this paragraph, the term 'relevant portion of a protection order' means the portion of such order that prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person.

"(d) DISMISSAL OF CERTAIN CASES.—

"(1) In a criminal proceeding in which a participating tribe exercises special domestic-violence criminal jurisdiction, if the defendant files a pretrial motion to dismiss on the ground that the crime did not involve any Indian, the case shall be dismissed if the prosecuting tribe fails to prove that the defendant or an alleged victim, or both, is an Indian.

"(2) In a criminal proceeding in which a participating tribe exercises special domestic-violence criminal jurisdiction, if the defendant files a pretrial motion to dismiss on the ground that the defendant and the alleged victim lack sufficient ties to the tribe, the case shall be dismissed if the prosecuting tribe fails to prove that the defendant or an alleged victim, or both, resides in the Indian country of the prosecuting tribe, is employed in the Indian country of the prosecuting tribe, or is a spouse or intimate partner of a member of the prosecuting tribe.

"(3) A knowing and voluntary failure to file a pretrial motion under paragraph (1) or paragraph (2) shall be deemed a waiver.

"(4) In any criminal proceeding in which a participating tribe exercises special domestic-violence criminal jurisdiction based on a criminal violation of a protection order, the 'victim' shall be deemed to be the person or persons specifically protected by the provision of the order that the defendant allegedly violated.

"(e) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which a participating tribe exercises special domestic-violence criminal jurisdiction, the tribe shall provide to the defendant—

"(1) all rights protected by the Indian Civil Rights Act;

"(2) if a term of imprisonment of any length is imposed, all rights described in paragraphs (1) through (5) of section 1302(c); and

"(3) all other rights whose protection would be required by the United States Constitution in order to allow the participating tribe to exercise criminal jurisdiction over the defendant.

"(f) PETITIONS TO STAY DETENTION.—Any person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further execution of his tribal detention. The court shall grant the stay if it finds that there is a substantial likelihood that the habeas corpus petition will be granted and, after giving the alleged victim or victims of the petitioner an opportunity to be heard, also finds by clear and convincing evidence that, under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or to the community if

released.

"(g) GRANTS TO TRIBAL GOVERNMENTS.—The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments) to—

"(1) strengthen tribal criminal-justice systems, including law enforcement (including the capacity to enter information into and obtain information from national crime information databases), prosecution, trial and appellate courts, probation, detention and correctional facilities, alternative rehabilitation centers, culturally appropriate services and assistance for victims and their families, criminal codes, and rules of criminal procedure, appellate procedure, and evidence, to assist tribes in exercising special domestic-violence criminal jurisdiction;

"(2) provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to those defendants, in criminal proceedings in which a tribe is prosecuting a crime of domestic or dating violence or a criminal violation of a protection order;

"(3) ensure that, in criminal proceedings in which a participating tribe exercises special domestic-violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all legal requirements; and

"(4) accord victims of domestic violence, dating violence, and protection-order violations a set of crime victims' rights similar to those described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

"(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary for the grants described in subsection (g) and to provide training, technical assistance, data collection, and evaluation to improve the criminal-justice systems of participating tribes.

"(i) NONSUPPLANTATION.—Amounts made available under this subchapter shall be used to supplement and not supplant other Federal, State, tribal, and local funds expended to further the purposes of this subchapter.".

SEC. 3. TRIBAL PROTECTION ORDERS.

Section 2265 of title 18, United States Code, is amended by striking subsection (e) and inserting the following:

"(e) For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any persons, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151 of title 18) or otherwise within the authority of the Indian tribe.".

SEC. 4. AMENDMENTS TO THE FEDERAL ASSAULT STATUTE.

(a) ASSAULTS BY STRIKING, BEATING, OR WOUNDING.—Section 113(a)(4) of title 18, United States Code, is amended by striking "six months" and inserting "1 year".

(b) ASSAULTS RESULTING IN SUBSTANTIAL BODILY INJURY.—Section 113(a)(7) of title 18, United States Code, is amended by striking "substantial bodily injury to an individual who has not attained the age of 16 years" and inserting "substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years".

(c) ASSAULTS BY STRANGLING OR SUFFOCATING.—Section 113(a) of title 18, United States Code, is amended by adding at the end the following new paragraph:

"(8) Assault upon a spouse or intimate partner or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title or imprisonment for not more than ten years, or both.".

(d) DEFINITIONS.—Section 113(b) of title 18, United States Code, is amended—

(1) by striking "As used in this subsection" and inserting "As used in this section";

(2) in paragraph (1), by striking "and";

(3) in paragraph (2), by striking the period and inserting a semicolon;

(4) by adding at the end the following new paragraphs:

"(3) the term 'dating partner' has the meaning given that term in section 2266(10);

"(4) the term 'spouse or intimate partner' has the meaning given that term in section 2266(7);

"(5) the term 'strangling' means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether such conduct results in any visible injury and regardless of whether there is any intent to kill or protractedly injure the victim; and

"(6) the term 'suffocating' means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether such conduct results in any visible injury and regardless of whether there is any intent to kill or protractedly injure the victim.".

(e) INDIAN MAJOR CRIMES.—Section 1153(a) of title 18, United States Code, is amended by striking "assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title)" and inserting "a felony assault under section 113".

SEC. 5. EFFECTIVE DATES; PILOT PROJECT.

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this new title shall take effect on the date of enactment of this Act.

(b) EFFECTIVE DATE FOR SPECIAL DOMESTIC-VIOLENCE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—Except as provided in paragraph (2), subsections (b), (c), (d), and (e) of section 1304 of title 25, United States Code, as added by section 2 of this new title, shall take effect on the date 2 years after the date of enactment of this

Act.

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time within 2 years after the date of enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe on an accelerated basis. The Attorney General (or his designee) may grant such a request after coordinating with the Secretary of the Interior (or his designee), consulting with Indian tribes, and concluding that the criminal-justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 1304(e) of title 25, United States Code, as added by section 2 of this new title.

(B) EFFECTIVE DATES FOR PILOT-PROJECT TRIBES.—An Indian tribe whose request is granted may commence exercising special domestic-violence criminal jurisdiction pursuant to subsections (b), (c), (d), and (e) of section 1304 of title 25, United States Code, as added by section 2 of this new title, on a date established by the Attorney General, after consultation with such tribe, but in no event later than the date 2 years after the date of enactment of this Act. The tribe may continue exercising such jurisdiction thereafter.

SEC. 6. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such a provision or amendment to any individual, entity, or circumstance, is determined by a court of competent jurisdiction to be invalid, the remaining provisions of this Act, the remaining amendments made by this Act, and the application of those provisions and amendments to individuals, entities, or circumstances other than the affected individual, entity, or circumstance shall not be affected.

SEC. 7. TECHNICAL AMENDMENTS.

(a) ASSAULTS.—Section 113(a) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking "Assault with intent to commit murder, by imprisonment for not more than twenty years" and inserting "Assault with intent to commit murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than twenty years, or both";

(2) in paragraph (3), by striking "and without just cause or excuse" and by striking the comma immediately following those words; and

(3) in paragraph (7), by striking "fine" and inserting "a fine".

(b) REPEAT OFFENDERS.—Section 2265A(b)(1)(B) of title 18, United States Code, is amended by inserting "or tribal" after "State".

Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women

The Department of Justice is proposing new Federal legislation to better protect women in tribal communities from violent crime. The following Questions and Answers explain the proposed legislation's overall purposes and its substantive provisions, section by section.

OVERVIEW

What are the key gaps in current law that the proposed legislation would fill?

The Department of Justice sees three major legal gaps that Congress could address, involving tribal criminal jurisdiction, tribal civil jurisdiction, and Federal criminal offenses.

First, the patchwork of Federal, state, and tribal criminal jurisdiction in Indian country has made it difficult for law enforcement and prosecutors to adequately address domestic violence — particularly misdemeanor domestic violence, such as simple assaults and criminal violations of protection orders. The Department therefore is proposing Federal legislation recognizing certain tribes' power to exercise concurrent criminal jurisdiction over domestic-violence cases, regardless of whether the defendant is Indian or non-Indian. Fundamentally, such legislation would build on the Tribal Law and Order Act of 2010 (TLOA). The philosophy behind TLOA was that tribal nations with sufficient resources and authority will be best able to address violence in their own communities; it offered additional authority to tribal courts and prosecutors if certain procedural protections were established.

Second, at least one Federal court has opined that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. That ruling undermines the ability of tribal courts to protect victims. Accordingly, the Department is proposing Federal legislation to confirm the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian.

Third, Federal prosecutors lack the necessary tools to combat domestic violence in Indian country. So the Department is proposing Federal legislation to provide a one-year offense for assaulting a person by striking, beating, or wounding; a five-year offense for

assaulting a spouse, intimate partner, or dating partner, resulting in substantial bodily injury; and a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate.

How significant a problem is domestic violence in tribal communities?

Violence against Native women has reached epidemic rates. One regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners. According to a nationwide survey funded by the National Institute of Justice (NIJ), one third of all American Indian women will be raped during their lifetimes. And an NIJ-funded analysis of death certificates found that, on some reservations, Native women are murdered at a rate more than ten times the national average. Tribal leaders, police officers, and prosecutors tell us of an all-too-familiar pattern of escalating violence that goes unaddressed, with beating after beating, each more severe than the last, ultimately leading to death or severe physical injury.

Something must be done to address this cycle of violence. For a host of reasons, the current legal structure for prosecuting domestic violence in Indian country is not well-suited to combating this pattern of escalating violence. Federal resources, which are often the only ones that can investigate and prosecute these crimes, are often far away and stretched thin. Federal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years — precisely the sorts of prosecutions that respond to the early instances of escalating violence against spouses or intimate partners.

Tribal governments — police, prosecutors, and courts — should be essential parts of the response to these crimes. But under current law, they lack the authority to address many of these crimes. Until recently, no matter how violent the offense, tribal courts could only sentence Indian offenders to one year in prison. Under the Tribal Law and Order Act (TLOA), landmark legislation that Congress enacted last year, tribal courts can now sentence Indian offenders for up to three years per offense, provided defendants are given proper procedural protections, including legal counsel. But tribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic-violence call, only to discover that the accused is non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate, their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents.

In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.

Has the Department of Justice consulted with Indian tribes about this proposal?

Yes. Consistent with Executive Order 13175 and President Obama's November 5, 2009 Memorandum on tribal consultation, the Department of Justice has been consulting with tribal leaders about public safety generally and about violence against women specifically. We have discussed these issues at many sessions, including the Attorney General's listening conference in 2009, the tribal consultations that we held on Tribal Law and Order Act implementation in 2010, and our annual tribal consultations under the Violence Against Women Act in Prior Lake in 2006, in Albuquerque in 2007, in Palm Springs in 2008, in St. Paul in 2009, and in Spokane last October.

Moreover, the Department held tribal consultations focused on this legislative proposal in Milwaukee on June 14, 2011, and by conference calls with tribal leaders on June 16 and 17, 2011. The Department also received extensive written comments on the proposal from tribal leaders and domestic-violence experts throughout the country.

All of these consultations — indeed, all of the Justice Department's work in this area, especially in the wake of the TLOA's enactment last year — has also involved close coordination across Federal agencies, including the Departments of the Interior and of Health and Human Services.

What were the main points that tribal leaders made during these consultations?

The common thread that ran through nearly all the tribal input focused on the need for greater tribal jurisdiction over domestic-violence cases — very much along the lines of what the Department of Justice is proposing here.

Specifically, tribal leaders expressed concern that the crime-fighting tools currently available to their prosecutors differ vastly, depending on the race of the domestic-violence perpetrator. If an Indian woman is battered by her husband or boyfriend, then the tribe typically can prosecute him if he is Indian. But absent an express Act of Congress, the tribe cannot prosecute a violently abusive husband or boyfriend if he is non-Indian. And recently, one Federal court went so far as to hold that, in some circumstances, a tribal court could not even enter a civil protection order against a non-Indian husband.

Faced with these criminal and civil jurisdictional limitations, tribal leaders repeatedly have told the Department that a tribe's ability to protect a woman from violent crime should not depend on her husband's or boyfriend's race, and that it is immoral for an

Indian woman to be left vulnerable to violence and abuse simply because the man she married, the man she lives with, the man who fathered her children is not an Indian.

TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE (SECTION 2)

What would section 2 of the proposed legislation — on "Tribal Jurisdiction over Crimes of Domestic Violence" — accomplish?

Section 2 would recognize certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence persons who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders, in Indian country.

Could any tribe be a "participating tribe"?

Any federally recognized Indian tribe could elect to become a "participating tribe," so long as (1) it exercises powers of self-government over an area of Indian country and (2) it adequately protects the rights of defendants. Those two requirements follow long-standing principles of Federal Indian law.

Why does the proposed legislation state that exercising this criminal jurisdiction is an "inherent power" of the tribe?

Under this proposed legislation, when a tribe prosecutes an accused perpetrator of domestic violence, it would be exercising an inherent tribal power, not a delegated Federal power. One practical consequence would be to render the Double Jeopardy Clause inapplicable to sequential prosecutions of the same act of domestic violence by the tribe and the Federal Government (just as the Clause is inapplicable to sequential prosecutions by a State and the Federal Government). For example, if a tribe unsuccessfully prosecuted a domestic-violence case under the authority recognized in this legislation, the Federal Government would not then be barred from proceeding with its own prosecution of the same defendant for a discrete Federal offense. That is the normal rule when prosecutions are brought by two separate sovereigns.

What does the proposed legislation mean in stating that tribes will exercise this jurisdiction "concurrently, not exclusively"?

Neither the United States nor any State would lose any criminal jurisdiction under this proposed legislation. The Federal and State governments could still prosecute the same crimes that they currently can prosecute. But in addition, tribes could prosecute some crimes that they cannot currently prosecute. In many parts of Indian country, this statutorily recognized tribal criminal jurisdiction would be concurrent with Federal jurisdiction under the General Crimes Act (also known as the Indian Country Crimes

Act). In some parts of Indian country, however, it would be concurrent with State jurisdiction under Public Law 280 or an analogous statute.

Without this proposed legislation, do tribes have any criminal jurisdiction over domestic-violence cases?

Yes. Even without this new legislation, generally tribes already have criminal jurisdiction over domestic-violence and dating-violence crimes committed by Indians (but not by non-Indians) in Indian country. Because existing jurisdiction is expressly excluded from the proposed legislation's definition of "special domestic-violence criminal jurisdiction," existing tribal jurisdiction over crimes committed by Indians would be unaffected by this legislation.

What types of crimes would this proposed legislation cover?

The proposed legislation is narrowly tailored to cover three types of crimes:

- Domestic violence.
- Dating violence.
- Violations of protection orders.

Could a tribe use this new law to prosecute crimes that occur off the reservation and outside of Indian country?

No.

Why would protection orders need to be "enforceable" and "consistent with section 2265(b) of title 18, United States Code," to form the basis of a tribal criminal offense?

That language ensures that the person against whom the protection order was issued was given reasonable notice and an opportunity to be heard, which are essential for protecting the right to due process. If the accused had no chance of learning that a protection order was being issued against him, a violation of the order, by itself, would not be a criminal offense.

For a crime involving domestic violence, dating violence, or the violation of an enforceable protection order, would the specific elements of the criminal offense be determined by Federal law or by tribal law?

Tribal law.

What is the purpose of the subsection on "Dismissal of Certain Cases"?

This subsection clarifies that tribes would not have criminal jurisdiction over cases in which neither the accused nor the victim is Indian. Since at least the late nineteenth

century, criminal cases involving only non-Indians have been understood to rest within the exclusive jurisdiction of the State where the offense occurred. This legislation would not alter that long-standing rule. Likewise, this subsection states that tribes would not have criminal jurisdiction over cases in which neither the accused nor the victim has sufficient ties to the tribe.

What rights of criminal defendants are protected by the Indian Civil Rights Act and therefore would be protected under this proposed legislation?

Since Congress enacted it in 1968, the Indian Civil Rights Act has protected individual liberties and constrained the powers of tribal governments in much the same ways that the Federal Constitution, especially the Bill of Rights and the Fourteenth Amendment, limits the powers of the Federal and State governments. The Indian Civil Rights Act protects the following rights, among others:

- The right against unreasonable search and seizures.
- The right not to be twice put in jeopardy for the same offense.
- The right not to be compelled to testify against oneself in a criminal case.
- The right to a speedy and public trial.
- The right to be informed of the nature and cause of the accusation in a criminal case.
- The right to be confronted with adverse witnesses.
- The right to compulsory process for obtaining witnesses in one's favor.
- The right to have the assistance of defense counsel, at one's own expense.
- The rights against excessive bail, excessive fines, and cruel and unusual punishments.
- The right to the equal protection of the tribe's laws.
- The right not to be deprived of liberty or property without due process of law.
- The right to a trial by jury of not less than six persons when accused of an offense punishable by imprisonment.
- The right to petition a Federal court for habeas corpus, to challenge the legality of one's detention by the tribe.

What are the "rights described in paragraphs (1) through (5) of section 1302(c)," which also would be protected under this proposed legislation?

In 2010, Congress passed the Tribal Law and Order Act, which (among other things) amended the Indian Civil Rights Act to allow tribal courts to impose longer sentences. In return, the 2010 amendments require tribal courts imposing longer sentences to undertake additional measures to safeguard defendants' rights. The Department's proposed legislation would apply these additional safeguards to domestic-violence cases with shorter sentences, as well:

- The right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.
- The right of an indigent defendant to the assistance of a licensed defense attorney at the tribe's expense.
- The right to be tried by a judge with sufficient legal training who is licensed to practice law.
- The right to access the tribe's criminal laws, rules of evidence, and rules of criminal procedure.
- The right to an audio or other recording of the trial proceeding and a record of other criminal proceedings.

Under the proposed law, would a tribe exercising this jurisdiction be required to provide counsel for indigent defendants in all cases where imprisonment is imposed?

The proposed legislation would require participating tribes to provide all indigent non-Indian domestic-violence and dating-violence defendants with licensed defense counsel in any criminal proceeding where imprisonment is imposed, regardless of the length of the sentence. It is also quite possible that the Indian Civil Rights Act or tribal law would be interpreted to require that those same tribes then must provide appointed counsel to similarly situated Indian defendants.

Although certain indigent defendants would not have to pay for an attorney, the proposed legislation would authorize Federal grants to help tribes cover these costs.

What is the purpose of the constitutional catch-all provision?

In addition to the rights described in the Indian Civil Rights Act and the Tribal Law and Order Act, paragraph (3) of proposed section 1304(e) would require a participating tribe to provide the defendant with all rights whose protection would be required by the United States Constitution in order to allow that tribe to exercise criminal jurisdiction over the defendant. Given that paragraphs (1) and (2) of this proposed section would already protect most of the rights that a criminal defendant in State (or Federal) court has under the Federal Constitution, the set of additional rights, if any, that would be captured by this paragraph will ultimately be fleshed out by tribal courts and by Federal courts reviewing habeas corpus petitions. One indirect effect of this constitutional catch-all provision might be to encourage participating tribes (and tribes that aspire to participate) to provide all the same protections that would be provided in Federal and State courts.

What avenues for appellate or habeas review would be available to defendants?

Defendants typically would have a direct right to appeal to a tribal (or intertribal) appellate court. And the Indian Civil Rights Act gives any defendant detained by order

of an Indian tribe the right to seek release by petitioning a Federal district court for a writ of habeas corpus. There would, however, be no direct right of appeal to a Federal court.

What is the purpose of the subsection on "Petitions to Stay Detention"?

This subsection, which would apply to any habeas corpus proceeding under the Indian Civil Rights Act, would clarify the current legal standards for determining whether a person can be released from tribal detention prior to final resolution of his habeas petition.

Why does the bill authorize Federal grants to tribal governments?

Expanding tribal criminal jurisdiction to cover more perpetrators of domestic violence would tax the already scarce resources of most tribes that might wish to participate. Therefore, the proposed legislation would authorize a new grant program to support tribes that are or wish to become participating tribes.

TRIBAL PROTECTION ORDERS (SECTION 3)

What would section 3 of the proposed legislation — on "Tribal Protection Orders" — accomplish?

Section 3 would confirm the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every tribe has full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian. This section would effectively reverse *Martinez v. Martinez*, 2008 WL 5262793, No. C08-55-3 FDB (W.D. Wash. Dec 16, 2008), which held that an Indian tribe lacked authority to enter a protection order for a nonmember Indian against a non-Indian residing on non-Indian fee land within the reservation.

AMENDMENTS TO THE FEDERAL ASSAULT STATUTE (SECTION 4)

What would section 4 of the proposed legislation — on "Amendments to the Federal Assault Statute" — accomplish?

Section 4 would amend the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding. (The amendments would not directly affect tribal prosecutions.)

Why are amendments to the Federal assault statute needed?

The proposed legislation would enable Federal prosecutors more effectively to combat three types of assault frequently committed against women in Indian country — assault by strangling or suffocating; assault resulting in substantial bodily injury; and assault by striking, beating, or wounding.

Existing Federal law provides a six-month misdemeanor assault or assault-and-battery offense that can be charged against a non-Indian (but not against an Indian) who commits an act of domestic violence against an Indian victim. (A similar crime committed by an Indian would fall within the exclusive jurisdiction of the tribe.) A Federal prosecutor typically can charge a *felony* offense (against either an Indian or a non-Indian defendant) only if the victim's injuries rise to the level of "serious bodily injury," which is significantly more severe than "substantial bodily injury."

So, in cases involving any of these three types of assaults — (1) assault by strangling or suffocating; (2) assault resulting in substantial (but not serious) bodily injury; and (3) assault by striking, beating, or wounding — Federal prosecutors today often find that they cannot seek sentences in excess of six months. And where both the defendant and the victim are Indian, Federal courts may lack jurisdiction altogether.

How would the proposed amendments to the Federal assault statute compare to State criminal laws?

In general, Federal criminal law has not developed over time in the same manner as State criminal laws, which have recognized the need for escalating responses to specific acts of domestic and dating violence. Amending the Federal Criminal Code to make it more consistent with State laws in this area where the Federal Government (and not the State) has jurisdiction would simply ensure that perpetrators would be subject to similar potential punishments regardless of where they commit their crimes. The maximum sentences proposed here are in line with the types of sentences that would be available in State courts across the Nation if the crime occurred other than in Indian country.

What would the language on "Assaults by Striking, Beating, or Wounding" accomplish?

This language would increase the maximum sentence from six months to one year for an assault by striking, beating, or wounding, committed by a non-Indian against an Indian in Indian country. (Similar assaults by Indians, committed in Indian country, would remain within the tribe's exclusive jurisdiction.) Although the Federal offense would remain a misdemeanor, increasing the maximum sentence to one year would reflect the fact that this is a serious offense that often forms the first or second rung on a ladder to more severe acts of domestic violence.

What would the language on "Assaults Resulting in Substantial Bodily Injury" accomplish?

These assaults sometimes form the next several rungs on the ladder of escalating domestic violence, but they too are inadequately covered today by the Federal Criminal Code. Under current law, an assault resulting in "serious" bodily injury is subject to a maximum ten-year sentence; and an assault resulting in "substantial" bodily injury (which is less severe) is subject to a maximum five-year sentence if the victim is less than 16 years old. But if an adult Indian victim suffers a substantial bodily injury at the hands of her spouse or intimate partner or dating partner, typically the sentence will be capped at six months if the perpetrator is non-Indian and there will be no Federal jurisdiction at all if the perpetrator is Indian. The proposed legislation would fill this gap by amending the Federal Criminal Code to provide a five-year offense for assault resulting in substantial bodily injury to a spouse, intimate partner, or dating partner.

What would the language on "Assaults by Strangling or Suffocating" accomplish?

It would amend the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate. Strangling and suffocating — conduct that is not uncommon in intimate-partner cases — carry a high risk of death. But the severity of these offenses is frequently overlooked because there may be no visible external injuries on the victim. As with assaults resulting in substantial bodily injury, Federal prosecutors need the tools to deal with these crimes as felonies, with sentences potentially far exceeding the six-month maximum that often applies today.

Why would the proposed legislation amend the Major Crimes Act?

Federal prosecutors use the Major Crimes Act to prosecute Indians for major crimes committed against Indian and non-Indian victims. This amendment would simplify the Major Crimes Act to cover all felony assaults under section 113 of the Federal Criminal Code, as amended. That would include the two new felony offenses discussed above — assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner; and assaults upon a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate. It also would include a felony assault that currently is omitted from the Major Crimes Act: assault with intent to commit a felony other than murder (which is punishable by a maximum ten-year sentence). Without this amendment to the Major Crimes Act, Federal prosecutors could not charge any of these three felonies when the perpetrator is an Indian. Assault by striking, beating, or wounding, which would have a maximum sentence of twelve months under the proposed legislation, would remain a misdemeanor and would not be covered by the Major Crimes Act.

EFFECTIVE DATES AND THE PILOT PROJECT (SECTION 5)

What would section 5 of the proposed legislation — on "Effective Dates" and a "Pilot Project" — accomplish?

Section 5 would set the effective dates for each part of the proposed legislation and establish a pilot project for tribes wishing to exercise jurisdiction over crimes of domestic violence on an accelerated basis.

When would the reforms in this proposed legislation take effect?

Most of the proposed legislation would take effect immediately upon enactment. But four subsections that form the core of the provision on tribal criminal jurisdiction would generally take effect two years after enactment, to give tribes time to amend their codes and procedures as necessary to exercise this expanded jurisdiction. However, if a tribe believes it is ready to proceed in less than two years, it can request an earlier start date from the Attorney General, as part of a pilot project.

How would the pilot project work?

The tribes wishing to participate in the pilot project would apply to the Attorney General, who then would coordinate with the Department of the Interior and consult with the tribes. If the Attorney General concluded that a particular tribe's criminal-justice system had adequate safeguards in place to protect defendants' rights, then he could grant an earlier starting date for the tribe's exercise of this statutorily recognized criminal jurisdiction.

CHANGES IN EXISTING LAW

In the opinion of the committee, it is necessary to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.

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