



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

The Honorable Joseph R. Biden, Jr.
Page Two

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.

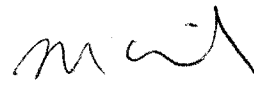
The Department of Justice is therefore asking Congress to consider proposals to address the epidemic of domestic violence against Native women. Draft legislative language and an explanatory document are attached to this letter. The legislation we propose would:

- 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

1 Title: To decrease the incidence of violent crimes against Indian women, to strengthen
2 the capacity of Indian tribes to exercise their sovereign authority to respond to violent
3 crimes committed against Indian women, and to ensure that perpetrators of violent crimes
4 committed against Indian women are held accountable for their criminal behavior, and
5 for other purposes.
6
7

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

10 SECTION 1. TABLE OF CONTENTS.

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

13 Sec. 1. Table of contents.

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

15 Sec. 3. Tribal protection orders.

16 Sec. 4. Amendments to the Federal assault statute.

17 Sec. 5. Effective dates; pilot project.

18 Sec. 6. Severability.

19 Sec. 7. Technical amendments.

20 SEC. 2. TRIBAL JURISDICTION OVER CRIMES OF 21 DOMESTIC VIOLENCE.

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

24 “SEC. 1304. TRIBAL JURISDICTION OVER CRIMES OF 25 DOMESTIC VIOLENCE.

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

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

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

1 “(3) ‘Indian Civil Rights Act’ means sections 1301 to 1303, as amended;

2 “(4) ‘Indian country’ has the meaning given that term in section 1151 of title 18,
3 United States Code;

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

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

14 “(7) ‘special domestic-violence criminal jurisdiction’ means the criminal
15 jurisdiction that a participating tribe can exercise pursuant to this section but could
16 not otherwise exercise; and

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

19 “(b) NATURE OF THE CRIMINAL JURISDICTION.—

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

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

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

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

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

37 “(2) VIOLATIONS OF PROTECTION ORDERS.—Any act that is occurring or has
38 occurred in the Indian country of the participating tribe and that violates or violated
39 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

1 released.

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

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

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

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

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

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

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

28 SEC. 3. TRIBAL PROTECTION ORDERS.

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

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

37 SEC. 4. AMENDMENTS TO THE FEDERAL ASSAULT 38 STATUTE.

- 1 (a) ASSAULTS BY STRIKING, BEATING, OR WOUNDING.—Section 113(a)(4) of title 18,
2 United States Code, is amended by striking “six months” and inserting “1 year”.
- 3 (b) ASSAULTS RESULTING IN SUBSTANTIAL BODILY INJURY.—Section 113(a)(7) of title
4 18, United States Code, is amended by striking “substantial bodily injury to an
5 individual who has not attained the age of 16 years” and inserting “substantial
6 bodily injury to a spouse or intimate partner, a dating partner, or an individual who
7 has not attained the age of 16 years”.
- 8 (c) ASSAULTS BY STRANGLING OR SUFFOCATING.—Section 113(a) of title 18, United
9 States Code, is amended by adding at the end the following new paragraph:
- 10 “(8) Assault upon a spouse or intimate partner or dating partner by strangling,
11 suffocating, or attempting to strangle or suffocate, by a fine under this title or
12 imprisonment for not more than ten years, or both.”.
- 13 (d) DEFINITIONS.—Section 113(b) of title 18, United States Code, is amended—
14 (1) by striking “As used in this subsection” and inserting “As used in this section”;
15 (2) in paragraph (1), by striking “and”;
16 (3) in paragraph (2), by striking the period and inserting a semicolon;
17 (4) by adding at the end the following new paragraphs:
- 18 “(3) the term ‘dating partner’ has the meaning given that term in section 2266(10);
19 “(4) the term ‘spouse or intimate partner’ has the meaning given that term in
20 section 2266(7);
- 21 “(5) the term ‘strangling’ means intentionally, knowingly, or recklessly impeding
22 the normal breathing or circulation of the blood of a person by applying pressure to
23 the throat or neck, regardless of whether such conduct results in any visible injury
24 and regardless of whether there is any intent to kill or protractedly injure the victim;
25 and
- 26 “(6) the term ‘suffocating’ means intentionally, knowingly, or recklessly impeding
27 the normal breathing of a person by covering the mouth of the person, the nose of the
28 person, or both, regardless of whether such conduct results in any visible injury and
29 regardless of whether there is any intent to kill or protractedly injure the victim.”.
- 30 (e) INDIAN MAJOR CRIMES.—Section 1153(a) of title 18, United States Code, is
31 amended by striking “assault with intent to commit murder, assault with a
32 dangerous weapon, assault resulting in serious bodily injury (as defined in section
33 1365 of this title)” and inserting “a felony assault under section 113”.

34 SEC. 5. EFFECTIVE DATES; PILOT PROJECT.

- 35 (a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this new title
36 shall take effect on the date of enactment of this Act.
- 37 (b) EFFECTIVE DATE FOR SPECIAL DOMESTIC-VIOLENCE CRIMINAL JURISDICTION.—
38 (1) IN GENERAL.—Except as provided in paragraph (2), subsections (b), (c), (d), and
39 (e) of section 1304 of title 25, United States Code, as added by section 2 of this
40 new title, shall take effect on the date 2 years after the date of enactment of this

1 Act.

2 (2) PILOT PROJECT.—

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

11 (B) EFFECTIVE DATES FOR PILOT-PROJECT TRIBES.—An Indian tribe whose
12 request is granted may commence exercising special domestic-violence criminal
13 jurisdiction pursuant to subsections (b), (c), (d), and (e) of section 1304 of title
14 25, United States Code, as added by section 2 of this new title, on a date
15 established by the Attorney General, after consultation with such tribe, but in no
16 event later than the date 2 years after the date of enactment of this Act. The
17 tribe may continue exercising such jurisdiction thereafter.

18 **SEC. 6. SEVERABILITY.**

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

25 **SEC. 7. TECHNICAL AMENDMENTS.**

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

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

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

33 (3) in paragraph (7), by striking “fine” and inserting “a fine”.

34 (b) REPEAT OFFENDERS.—Section 2265A(b)(1)(B) of title 18, United States Code, is
35 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.