



United States Department of Justice

**Office on Violence Against Women**

*Working Together to End the Violence*

**2011 Update on the Status of  
Tribal Consultation Recommendations**

*prepared for*

**DOJ's Annual Tribal Consultation on  
Violence Against American Indian and Alaska Native Women**

**Santa Ana Pueblo, NM**

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## Introduction

On October 4, 2010 the Department of Justice (DOJ) hosted its fifth annual government-to-government consultation on violence against American Indian and Alaska Native women. DOJ received recommendations from tribal leaders on the three consultation topics statutorily-mandated by Title IX of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005):

- Administering tribal funds and programs;
- Enhancing the safety of Indian women from domestic violence, dating violence, sexual assault, and stalking; and
- Strengthening the Federal response to such crimes.

In addition, DOJ specifically asked tribal leaders for input on possible legislative proposals for reauthorization of the Violence Against Women Act (VAWA), which is anticipated to take place in 2012. Earlier this year, OVW issued a report on the 2010 consultation that includes a summary of the recommendations that were received from tribal leaders. In drafting the report, OVW reviewed the official record from the event, as well as the written testimony and comments submitted by tribal leaders. This report is available online at [www.ovw.usdoj.gov](http://www.ovw.usdoj.gov).

The purpose of this follow-up report is to provide tribal leaders with a comprehensive update on activities undertaken by DOJ in the past year to respond to the recommendations made by tribal leaders at last year's consultation session. This report includes three sections: 1) a review of progress made on implementation of the existing tribal provisions included in VAWA; 2) an update on DOJ legislative proposals for the upcoming reauthorization of VAWA; and 3) an update on other DOJ activities over the past year related to violence against Native women.

## Part One: Implementation of the existing tribal provisions in VAWA

The reauthorization of VAWA in 2005 included a number of provisions specifically aimed at ending violence against American Indian and Alaska Native women. Title IX, “The Safety for Indian Women Act,” honors the government-to-government relationship between the Federal government and tribal governments and aims to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes against Indian women.

At the 2010 consultation session, many tribal leaders commented on the importance of full implementation of the tribal provisions in VAWA. This document provides a summary of what DOJ has done to implement the tribal provisions in VAWA.

### *Administering VAWA grant programs*

VAWA authorizes three programs that are specifically designed for tribal communities: 1) the Grants to Tribal Governments Program (“Tribal Governments Program”); 2) the Tribal Sexual Assault Services Program (“TSASP”); and 3) the Tribal Coalitions Program. The Tribal Governments Program and TSASP are both included in DOJ’s Coordinated Tribal Assistance Solicitation (“CTAS”), which is discussed in more detail below.

#### Tribal Governments Program

The Tribal Governments Program, which was created by Sec. 906 of VAWA 2005, provides funding to tribal governments or their designees to: 1) develop and enhance effective governmental strategies to curtail violent crimes against women; 2) increase tribal capacity to respond to domestic violence, dating violence, stalking, and sexual assault crimes against Native women; 3) strengthen tribal justice interventions including tribal law enforcement, prosecution, courts, probation, correctional facilities; 4) enhance services to Indian women who are victims; 5) develop prevention and education strategies; 6) provide supervised visitation services; and 7) provide transitional housing to victims.

OVW has issued a solicitation for the Tribal Governments Program each year since FY 2007. In FY 2010 and FY 2011, OVW partnered with other DOJ grant-making components to issue a Coordinated Tribal Assistance Solicitation (CTAS), which included OVW’s Tribal Governments Program as “Purpose Area 5.”

#### TSASP

Section 202 of VAWA 2005 created the Sexual Assault Services Program (SASP), which encompasses five different funding streams, including a program specifically for tribal communities. By statute, 10 percent of the amount appropriated for SASP is directed towards the TSASP Grant Program. Overall, the purpose of SASP is to provide intervention, advocacy, accompaniment (e.g., accompanying victims to court, medical facilities, police departments, etc.), support services, and related assistance for adult, youth, and child victims of sexual assault, family and household members of victims, and those collaterally affected by the sexual assault. OVW made awards for TSASP for the first time in FY 2010 as part of the Coordinated Tribal Assistance Solicitation. No

TSASP awards were made in FY 2011. By statute, tribal governments, tribal organizations, and tribal non-profits are the only eligible entities for TSASP. However, for the purposes of the FY 2010 CTAS, eligible applicants were limited to tribal governments or consortiums. In FY 2011, CTAS also permitted applications from tribal designees.

#### Tribal Coalitions

OVW's Tribal Coalitions Program provides funding to certain nonprofit organizations to effect social change and systemic reform related to ending violence against American Indian and Alaska Native women. Grant funds can be used to increase awareness of domestic violence and sexual assault; enhance the federal, state, and tribal response to violence against women; and provide technical assistance to tribal communities to enhance access to essential services for victims of domestic violence and sexual assault. VAWA authorizes two funding streams for tribal coalitions. The first is a formula distribution of 1/56<sup>th</sup> of the STOP appropriation. The second is not less than 1% of the total appropriation for the Sexual Assault Services Program, and is available only to those coalitions that are involved in sexual assault work.

An analysis of the funding levels for each of the three tribal-specific programs is included in Appendix A. In addition, tribal governments are eligible to apply directly to a number of the other grant programs authorized by VAWA, and OVW continues to receive applications from tribes to those programs. In FY 2011, OVW made a total of 82 awards to individual tribal governments, tribal government consortia, nonprofit tribal organizations, and tribal domestic violence or sexual assault coalitions, totaling more than \$43 million. A comprehensive list of all of OVW's tribal awards for FY 2011 is included in Appendix B.

#### *OVW Tribal Funds and the Coordinated Tribal Assistance Solicitation*

For the second year, DOJ issued a single Coordinated Tribal Assistance Solicitation (CTAS) for its tribal-specific grant programs for FY 2011. As noted above, CTAS included both OVW's Tribal Governments Program and TSASP as Purpose Area #5. CTAS also includes the tribal-specific programs from the Department's Office of Justice Programs (OJP) and Community Oriented Policing Services (COPS).

Prior to implementation of CTAS, tribes seeking funding from multiple DOJ tribal grant programs were required to submit multiple grant applications. With CTAS, tribes are able to submit a single application while selecting multiple purpose areas, ranging from juvenile justice to violence against women.

#### **OVW Tribal Grants—CTAS Purpose Area 5**

The CTAS process led to several changes in the application process for OVW's tribal grants.

- **Tribal resolution requirement:** In FY 2010 and FY 2011, all CTAS applicants were required to submit a tribal resolution in support of their applications. In previous years,

OVW had required only tribal consortia and authorized-designee applicants to submit an authorizing tribal resolution in order to establish eligibility for funding.

- **Eligibility of current OVW grantees:** In a change from OVW's past policies, all tribes were permitted to apply for OVW funding through CTAS regardless of whether they had an existing Grants to Tribal Governments or TSASP award, so long as the new application was for different activities. This change in policy resulted in a significant increase in the number of applications in FY 2011. OVW is seeking input from tribal governments about whether this change should be continued.
- **Consolidation of TSASP and Grants to Tribal Governments:** In FY 2010, OVW's TSASP and Grants to Tribal Governments Programs were included as two separate purpose areas in CTAS. This meant that a tribe seeking funding under both programs was required to submit two separate purpose area narratives. While the Grants to Tribal Governments is a very broad and flexible program that permits a wide range of activities, TSASP is much more narrowly focused on providing services to victims of sexual assault. All of the activities authorized under TSASP can also be undertaken under the Grants to Tribal Governments Program, with two exceptions: TSASP funds may be used to provide services to child sex abuse victims and to family members and others who may be collaterally impacted by a sexual assault.

Because of the significant overlap in the two programs, OVW combined TSASP and Grants to Tribal Governments into a single purpose area in CTAS for FY 2011. OVW did not receive any applications that met the program requirements for TSASP last year, however, and did not make any awards in 2011.<sup>1</sup> OVW is seeking input from tribal leaders at this year's consultation about whether we should seek legislative consolidation of the TSASP with the Grants to Tribal Governments Program in order to allow tribes greater flexibility in using these resources.

As in previous years, in FY 2011 new applicants to OVW's tribal program were able to request up to \$450,000. Although there was no explicit limit on the amount of funding that current grantees could request, OVW offered guidance in CTAS to current grantees that it might not be able to offer awards to them in excess of \$900,000 due to the anticipated demand for funding. These budget guidelines were first adopted in FY 2008.

In FY 2011, OVW received 106 applications for CTAS Purpose Area #5 requesting a total of \$70,632,560. Thirteen of the applications were submitted by new applicants and 93 applications were submitted by current grantees who were seeking funding to enhance or continue their existing OVW-funded projects. Applicants were subject to an initial review to determine whether the applicant had satisfied the basic minimum requirements in the program solicitation. Five applications were determined to be substantially incomplete during the initial review and were removed from further consideration. The remaining 101 applications included 90 applications from individual Federally-recognized Indian tribes, four applications from organizations or

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<sup>1</sup> The money available for awards in 2011 will be made available for grants in 2012. OVW plans to administer TSASP and the Grants to Tribal Governments program as two separate purpose areas this year, as was done in FY 2010.

agencies acting as the authorized designee of a Federally-recognized Indian tribe, and seven applications from tribal consortia.

Applications that met the basic minimum requirements of the program solicitation were forwarded for external peer review. Each application sent to external peer review was evaluated and scored by a three person panel composed of individuals with expertise in violence against women and the unique needs of tribal communities.

Following receipt of the scores from the external peer review, each application was reviewed internally by OVW Program Specialists. During the internal review, OVW staff evaluated each application taking into account whether their applications contained activities that might compromise victim safety and how well applicants for continuation funding had complied with the administrative requirements of their current OVW grant award.

The following criteria were used to evaluate the prior performance of applicants for continuation funding:

- Whether progress reports submitted by the applicant, in conjunction with monitoring conducted by OVW, demonstrate the effectiveness of the current project, indicating progress toward meeting project goals and objectives, and demonstrate that the current project has progressed in a timely manner as outlined in the original proposal;
- Whether the grantee has demonstrated that past activities supported with OVW funds have been limited to program Purpose Areas;
- Whether the grantee has complied with all special conditions of its existing grant award from the Department of Justice;
- Whether the grantee has adhered to programmatic and financial reporting requirements;
- Whether the grantee has complied with the Office of Management and Budget audit requirement (if applicable); and
- Whether there is an excess of funding remaining in the current award and funds have been spent in a timely manner.

Based on the internal and external review of the applications, OVW made 61 awards through the Grants to Tribal Governments Program for FY 2011 for a total of \$36,326,664. Reasons that applications did not receive funding included low peer review scores, incomplete applications, poor past performance, and excessive funds remaining from previous grants.

### *Implementation of VAWA's substantive tribal provisions*

#### **Sec. 903 Consultation**

Section 903 of VAWA 2005 requires the U.S. Attorney General to conduct an annual consultation with Indian tribal governments to address the federal administration of all tribal funds and programs established under VAWA. The statute further directs the U.S. Attorney General to solicit recommendations from the Indian tribes at an annual consultation concerning the following items:

1. Administering tribal funds and programs;
2. Enhancing the safety of Indian women from domestic violence, dating violence, sexual assault, and stalking; and
3. Strengthening the federal response to such violent crimes.

The Department of Justice held annual consultation sessions with tribes on violence against American Indian and Alaska Native women in 2006, 2007, 2008, 2009, and 2010. In June of 2011, DOJ hosted a consultation with tribal governments to discuss a possible legislative proposal intended to address violence against Native women. In addition, DOJ's annual consultation is scheduled to take place on December 15, 2011 at the Santa Ana Pueblo in New Mexico.

### **Sec. 904 Analysis and Research on Violence Against Indian Women**

Section 904(a) of VAWA 2005 authorizes NIJ, in consultation with the U.S. Department of Justice's Office on Violence Against Women, to conduct research on violence against American Indian and Alaska Native women in Indian Country. NIJ is actively developing a research program to examine domestic violence, dating violence, sexual assault, stalking and murder, and identify factors that place American Indian and Alaska Native women at risk for victimization. This will be the first national effort to collect information of this kind from enrolled American Indian and Alaska Native people in Indian Country and in Alaska Native communities. As part of the overall research program, NIJ also intends to conduct studies evaluating the effectiveness of the federal, state, tribal, and local response to violence against Indian women in Indian Country. In addition, NIJ also commissioned a study of the existing literature on violence against American Indian and Alaska Native women in order to build upon prior research and address gaps in the research. This study is available on the NIJ website.

Section 904 also directed the Attorney General to establish a Task Force to assist NIJ in the development and implementation of this program of research and to help guide implementation of the recommendations resulting from the studies. The initial 17-member task force held four meetings with NIJ and OVW staff and concluded its work in December 2009. A final report providing feedback on NIJ's proposed program of research was submitted by task force members in March 2010. The Section 904 Task Force was re-chartered in 2010 and members were appointed for the re-chartered Task Force earlier this year. The Task Force is scheduled to be convened on December 14, 2011.

### **Sec. 905 Tracking of Violence Against Indian Women**

Section 905 of VAWA 2005 included two provisions. The first, section 905(a), requires the Attorney General to permit Indian law enforcement agencies, in cases of domestic violence, stalking, sexual assault, and dating violence, to enter information into Federal criminal information databases and to obtain information from the databases. This responsibility was effectively expanded by Section 233(a) of the Tribal Law and Order Act of 2010 which, among other things, amends 28 USC 534 to permits tribal law enforcement agencies "to access and enter information into Federal criminal information databases..."

DOJ's Office of Tribal Justice, Community Oriented Policing Services (COPS) office, Office of Intergovernmental and Public Liaison, and other components have launched a pilot project with a number of tribal police departments who did not have NCIC access. As a result of the Department's outreach efforts, 28 tribal law enforcement agencies were identified that needed NCIC access but were unable to obtain it. Ten of these tribes are in California, 3 are in Nevada, 9 are in PL-280 (or similar) state jurisdictions other than California, and 6 are federal jurisdiction tribes in states other than Nevada.

Current status:

- NCIC access equipment has been installed at 17 sites.
- 11 tribal law enforcement agencies either decided to opt-out or failed to provide information needed to implement the program.

The second provision, section 905(b), authorizes the establishment of a national tribal sex offender registry and a tribal protection order registry containing civil and criminal orders of protection issued by Indian tribes and participating jurisdictions. OVW hosted a focus group on developing the registries in September of 2008. During this meeting, OVW heard from representatives from tribal law enforcement, the Federal Bureau of Investigation, Federal prosecutors, and others with expertise in the area of criminal justice information-sharing. OVW has also engaged in discussions with the DOJ SMART Office to discuss how this provision intersects with that Office's work to implement the Adam Walsh Act.

At last year's consultation session, OVW announced that because of limited available funding and the significant cost of creating secure databases of this kind, OVW will be implementing the databases sequentially and will develop the National Tribal Order of Protection Registry first. A solicitation has been developed and is currently under review at DOJ. We anticipate that the solicitation will be released early next year.

### **Sec. 907 Office on Violence Against Women Deputy Director for Tribal Affairs**

Section 907 of VAWA 2005 establishes in OVW a Deputy Director for Tribal Affairs with a portfolio of statutory responsibilities relating to violence against Indian women, including administering tribal grants, coordinating development of Federal policy, providing support to other Departmental offices, and ensuring the availability of tribal technical assistance. In late 2006, OVW hired Lorraine Edmo, who is an enrolled member of the Shoshone-Bannock Tribe, to serve as the Deputy Director for Tribal Affairs. She oversees a staff of four grant program specialists,<sup>2</sup> coordinates implementation of the tribal provisions of VAWA within OVW, and meets with tribal leaders nationwide to gain a better understanding of the needs and challenges that tribes face.

### **Sec. 908 Enhanced Criminal Law Resources**

Section 908 of VAWA 2005 extended the federal firearms prohibition in 18 U.S.C. 922(g)(9) to reach persons convicted of qualifying *tribal* misdemeanor crimes of domestic violence. Such cases have proven difficult to pursue because tribal convictions do not qualify as predicate

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<sup>2</sup> OVW is in the process of filling a vacancy on the tribal unit and anticipates that the new grant program specialist will be on board in January 2012.

offenses unless the conviction meets statutory requirements that include right to counsel and right to a jury trial or waiver of those rights.

In 2010, DOJ created a National Indian Country Training Initiative; the training coordinator has hosted training focused on all federal domestic violence crimes and has also partnered with other federal agencies, like the BIA, in the development and delivery of violence against women training for tribal communities across the country. Each of these trainings has included information on legal requirements for a successful investigation and prosecution of a violation of 18 U.S.C. 922(g)(9).

### **Sec. 909 Domestic Assault by an Habitual Offender**

Section 909 of VAWA 2005 created a new federal crime, “Domestic Assault by an Habitual Offender,” which enables Federal prosecutors to charge any person who commits a domestic assault within Indian Country and who has a final conviction on at least two separate prior occasions in Federal, State, or Indian tribal court for a previous assault, sexual abuse, or serious violent felony against a spouse or intimate partner. Several defendants have challenged the constitutionality of this provision arguing that tribal court convictions cannot be used as predicate offenses in cases where the defendant was not provided with appointed counsel. DOJ has vigorously defended the constitutionality of the habitual offender statute, and in 2011, both the 8<sup>th</sup> and 10<sup>th</sup> Circuit Courts of Appeal upheld the provision. A petition for certiorari in one of these cases is currently pending before the Supreme Court. *United States v. Cavanaugh*, 643 F.3d 592 (8<sup>th</sup> Cir. 2011), *petition for cert. filed* (Nov. 10, 2011); *United States v. Shavanaux*, 647 F.3d 993 (10<sup>th</sup> Cir. 2011).

A review of DOJ’s case management data shows that this offense is used infrequently. One of the reasons for the low number of prosecutions under this provision is that very few cases are referred by law enforcement officers, who are most often the first responders, to the U.S. Attorneys’ Offices for prosecution. In an effort to increase the awareness of tribal and BIA law enforcement to potential federal prosecution options, EOUSA has been funded by DOJ’s Office for Victims of Crime to create a training DVD. The DVD, and companion facilitator’s manual, cover applicable federal statutes, evidence necessary to successfully prosecute a case in federal court, lethality assessments, safety planning, restitution, victim issues, and offender accountability. The training DVD is in the final production phase and will be released very soon. The recently appointed national Indian Country training coordinator will also be partnering with OVW in FY 2012 to conduct trainings for tribal and federal prosecutors about this provision.

## Part Two: Legislative Proposals for VAWA Reauthorization

DOJ has consulted extensively with Indian tribes about addressing violence against women in tribal communities, including at the Attorney General's listening conference in 2009, the tribal consultations we held on TLOA implementation in 2010, our annual tribal consultations under VAWA, and a series of tribal consultations focused on potential legislative reforms in June of this year. The consensus that emerged from these tribal consultations was the need for greater tribal jurisdiction over domestic-violence cases. 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 Indian husband or boyfriend, then the tribe typically can prosecute him. 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 DOJ 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. The concerns raised by tribal leaders and experts led DOJ to propose new Federal legislation on July 21, 2011. DOJ's proposals have been incorporated into Title II of S. 1763, the Stand Against Violence and Empower Native Women Act, also known as the SAVE Act, which was recently introduced by Senator Akaka. It has also been included in S. 1925, a bill to re-authorize the Violence Against Women Act that was recently introduced by Senators Leahy and Crapo. DOJ's proposal to Congress is included in Appendix C.

Specifically, DOJ's proposals are intended to fill three major legal gaps, involving tribal criminal jurisdiction, tribal civil jurisdiction, and Federal criminal offenses.

### 1. *Tribal Criminal Jurisdiction.*

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. DOJ's proposal recognizes certain tribes' power to exercise concurrent criminal jurisdiction over domestic-violence cases, regardless of whether the defendant is Indian or non-Indian. Fundamentally, this legislation builds on the Tribal Law and Order Act (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.

Similar to TLOA, the additional tribal authority contemplated in DOJ's proposal would be available only to those tribes that guarantee sufficient protections for the rights of

defendants. Tribes exercising this statutorily recognized jurisdiction over crimes of domestic violence would be required to protect a robust set of rights, similar to the rights protected in State-court criminal prosecutions. This approach thus builds on the Indian Civil Rights Act of 1968, as amended in 1986 and 1990, and on TLOA. Tribes that choose not to provide these protections would not have this additional authority.

DOJ recognizes that expanding tribal criminal jurisdiction to cover more perpetrators of domestic violence would tax the already scarce resources of most tribes that might wish to exercise this jurisdiction. Therefore, DOJ's proposal would authorize grants to support these 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.

## ***2. Tribal Civil Jurisdiction***

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, DOJ's proposal confirms the intent of Congress in enacting VAWA 2000 by clarifying that tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian.

## ***3. Federal Criminal Offenses***

Federal prosecutors lack the necessary tools to combat domestic violence in Indian country. 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. 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, DOJ's proposal would ensure that perpetrators will be subject to similar potential punishments regardless of where they commit their crimes.

Specifically, DOJ proposes amending 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.

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 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.

DOJ’s proposal increases 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.

Assaults resulting in substantial bodily injury 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. DOJ’s proposal fills this gap by amending the Code to provide a five-year offense for assault resulting in substantial bodily injury to a spouse, intimate partner, or dating partner.

DOJ also proposes amending the Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating. 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.

Finally, DOJ has proposed simplifying the Major Crimes Act (which Federal prosecutors use to prosecute Indians for major crimes committed against Indian and non-Indian victims) to cover all felony assaults under section 113 of the Federal Criminal Code. 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 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 DOJ’s proposal, assault by striking, beating, or wounding remains a misdemeanor and is not covered by the Major Crimes Act.

The tribal-criminal-jurisdiction and Federal-assault-statute sections of the DOJ proposal work in tandem, enabling tribal investigators and prosecutors to focus on misdemeanors (including protection-order violations) and low-level felonies, regardless of the perpetrator’s

Indian or non-Indian status, while Federal investigators and prosecutors focus on the more dangerous felonies involving strangling, suffocation, and substantial bodily injury, again regardless of the perpetrator's Indian or non-Indian status. 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.

### **Part Three: Strengthening the Federal Response to Violence Against Women**

In addition to the work described above, the Attorney General has launched a Department-wide initiative on public safety in tribal communities, with a particular focus on combating violence against women. DOJ has made combating violence against women in tribal communities a priority and is committed to providing training and resources to enhance federal investigations and prosecutions of crimes against Native women. As a part of this initiative, DOJ has taken a number of actions that respond to concerns and recommendations from past consultation sessions. These activities are discussed below.

- On January 11, 2010, the Deputy Attorney General sent a memo to the United States Attorneys whose districts include Indian Country directing them to work closely with law enforcement to pay particular attention to violence against women, including misdemeanor crimes committed by non-Indians, in Indian Country and make these crimes a priority. The memo also directed the U.S. Attorneys to engage in consultation with the tribes located within their districts and develop an operational plan to improve public safety for those tribes. The U.S. Attorneys were specifically directed to focus on violence against women in these consultations and in drafting their district-specific operational plans. A number of the United States Attorneys have already initiated these consultations. A copy of the memo to U.S. Attorneys is included in Appendix D.
- DOJ added 28 new Indian Country Assistant United States Attorneys in FY 2010 to increase prosecution of serious crime.
- The Department's FY 2012 appropriation included an additional \$9 million to support 40 additional FBI positions (including 24 agents) to investigate violent crimes in Indian country.
- At the suggestion of tribal leaders, the Department has created a Violence Against Women Federal/Tribal Prosecution Task Force that will facilitate dialog and coordinate efforts between the Department and tribal governments regarding the prosecution of violence against women crimes in Indian country. Task Force membership includes Assistant United States Attorneys and prosecution representatives from tribal governments. The Task Force is assisting the Department in the development of best practice recommendations and resource materials concerning the prosecution of violence against women crimes in Indian country.
- OVW has provided funding for the establishment of a national clearinghouse on the sexual assault of Native women. The National Indian Country Clearinghouse on Sexual Assault (NICCSA) is in the research and development phase of a comprehensive, user friendly website ([www.NICCSA.org](http://www.NICCSA.org)). The site will be a valuable tool for professionals promoting safety, justice, and healing for American Indian/Alaska Native victims of sexual violence. Among the many features of the site is a listing of all certified Sexual Assault Nurse Examiners in the country (searchable by state) and updated listings of all Sexual Assault Nurse Examiner certification courses in the United States. The NICCSA website will provide access to sexual violence case law, federal statutes, tribal codes,

important journal articles from a wide variety of disciplines, updates from the field, downloadable audio and video lectures from leading tribal healthcare and criminal justice experts, links to federal agencies and non-profit organizations, as well as original content detailing successful strategies to improve outcomes for victims and tribal communities.

The NICCSA clearinghouse is designed as a one stop shop for information on sexual violence against American Indian/Alaska Native women and teen girls and includes a toll-free hotline to provide personalized assistance in problem solving complex legal, forensic, and programmatic challenges for tribal callers.

The project also includes offering technical assistance to individual tribes in assessing the feasibility of developing and implementing a SANE/SART response in their communities. A limited number of tribes will be able to receive on-site assistance with developing and implementing a systemic response to sexual assault.

- In FY 2009, OVW provided funding for a project to address the issue of collecting and preserving sexual assault evidence in rural and geographically isolated tribal communities. The SAFESTAR Project features a novel approach to this issue by highlighting the use of community-based lay health care providers, such as traditional midwives, medicine people, and community health aides to collect and preserve forensic evidence in sexual assault cases. A 40-hour training curriculum to train lay health care providers on how to collect and maintain forensic evidence has been developed. A companion training curriculum for tribal victim advocates, healthcare professionals, law enforcement officers, and prosecutors on their role in responding to sexual assault cases was also produced.

The SAFESTAR pilot project was successfully launched on the Tohono O'odham Nation this past summer. On July 29, 2011, 13 women from districts and villages throughout the Tohono O'odham Nation completed the 40-hour training course and became the first graduating class of SAFESTARs. The new class of SAFESTARs included an elected tribal official, young mothers, traditional healers, grandmothers, and an alcohol/substance abuse counselor. All became lifelong, committed resources for the women and teen girls of the Tohono O'odham Nation as well as powerful voices for ending sexual violence. In the four months since the program has become operational, SAFESTARs have served adult women and teens in their communities by providing emergency sexual assault first aid, referrals for services, forensic examinations, arrangements for traditional healing ceremonies, and community outreach and education. They have linked with off-reservation Sexual Assault Nurse Examiners to ensure that all O'odham victims who opt to travel the many miles and hours to the nearest city receive culturally appropriate SANE exams and are then referred back to the SAFESTARs for follow-up care. The SAFESTAR project has received tremendous cooperation and support from Tribal, state, and federal criminal justice and healthcare allies. On August 25, 2011 representatives from the United States Attorney's office, Tribal law enforcement, the office of the Tribal prosecutor, the Arizona Department of Public Safety, the Arizona Criminal Justice Commission, the Tohono O'odham Nation sexual assault advocacy program, Southern Arizona Coalition Against Sexual Assault, and the FBI were cross-trained on the

effective use of the SAFESTAR project. This cross-training has led to increased collaboration between federal, state, and tribal criminal justice and advocacy partners.

- Through the American Indian and Alaska Native (AI/AN) Sexual Assault Nurse Examiner (SANE)–Sexual Assault Response Team (SART) Initiative, the Office for Victims of Crime (OVC) provides support to enhance AI/AN communities’ capacity to provide high-quality multidisciplinary services and support for adult and child victims of sexual assault. In the first year of this program, OVC consulted with federal and tribal partners, and convened a focus group that included tribal representatives at the local, regional, and national levels with expertise in sexual assault. By listening to diverse perspectives, OVC learned about many significant challenges—including jurisdictional complexity and the diversity of tribes in terms of culture, geography, and resources — that can undermine the establishment of effective interventions. To date OVC has funded 3 demonstration sites—Mississippi Band of Choctaw Indians, Southern Indian Health Council, Inc., and Tuba City Regional Health Care Corp.—a Training and Technical Assistance provider—Tribal Law & Policy Institute, and 2 federal coordinating positions—one at FBI and one at IHS.
- On May 25-27, 2011, the Office for Victims of Crime (OVC), in collaboration with the SANE-SART Resource Service of Minneapolis, Minnesota, organized the Sixth National SART Training Conference in Austin, Texas. The event drew more than 1,000 participants from around the world, as well as almost 200 from tribal communities. Among those attending were a number of individuals supported by conference scholarships, which included 168 individuals through tribal team scholarships. Among the more than 60 workshops, 8 were tribal-specific workshops offered through the inaugural tribal training track. Those workshops addressed issues unique to Native American victims of sexual assault and violence.

**Appendix A – Analysis of OVW Tribal Grant Programs for FY 2011**

At past consultation sessions, tribal leaders have requested that DOJ provide a table showing how funds appropriated for tribal programs are spent by OVW. The table below, along with the list of grant recipients in Appendix B, responds to this request.

	<b>Tribal Governments</b>	<b>Tribal Coalitions</b>	<b>Tribal Sexual Assault Services</b>
<b>FY 2011 Appropriation</b>	\$37,395,060.00	\$3,772,440.00	\$1,537,000.00
<i>Technical Assistance &amp; Evaluation Reduction</i>	-\$2,991,605.00	-\$600,796.00	\$0
<b>Prior Year Carry Forward<sup>3</sup></b>	\$1,935,443.00	\$4,656.00	\$0
<b>Amount available for FY 2011 grants</b>	\$36,338,898.00	\$3,176,300.00	\$1,537,000.00
<b>Amount awarded in FY 2011</b>	\$36,326,664.00	\$1,649,929.00	\$0 <sup>4</sup>
<b>Remaining balance</b>	\$12,234.00	\$1,526,371.00 <sup>5</sup>	\$1,537,000.00

<sup>3</sup> The Prior Year Carry Forward amount includes both funds that were not obligated in the prior year and funds that were deobligated. Deobligated funds are funds that are returned under a grant award for any number of reasons.

<sup>4</sup> No awards were made because OVW did not receive any applications that met the program requirements for the Tribal Sexual Assault Services Program. These funds will be available for awards in FY 2012.

<sup>5</sup> In FY 2012, it is anticipated that the Tribal Coalition Program will see twice the number of applicants as it did in FY 2011 based on the number of awards that were made in FY 2010. In anticipation of these greater needs for FY 2012, the Tribal Unit recommended holding this balance to allocate as grant awards in FY 2012.

**Appendix B – FY 2011 OVW Tribal Grant Awards**

<b>Applicant Name</b>	<b>OVW Grant Program</b>	<b>Award Amount</b>
Cook Inlet Tribal Council, Incorporated	Children Exposed to Violence	\$ 410,000
Nooksack Indian Tribe	Children Exposed to Violence	\$ 400,000
Little Traverse Bay Bands of Odawa Indians	Courts	\$ 100,000
Absentee Shawnee Tribe of Oklahoma	Grants to Tribal Governments	\$ 888,640
Bay Mills Indian Community	Grants to Tribal Governments	\$ 241,470
Bishop Indian Tribal Council	Grants to Tribal Governments	\$ 750,000
Bristol Bay Native Association, Incorporated	Grants to Tribal Governments	\$ 898,131
Choctaw Nation of Oklahoma	Grants to Tribal Governments	\$ 897,553
Chugachmiut, Incorporated	Grants to Tribal Governments	\$ 600,000
Coeur d' Alene Tribe	Grants to Tribal Governments	\$ 300,085
Comanche Nation	Grants to Tribal Governments	\$ 1,044,887
Confederated Tribes of Siletz Indians	Grants to Tribal Governments	\$ 419,325
Confederated Tribes of the Umatilla Indian Reservation	Grants to Tribal Governments	\$ 886,640
Flandreau Santee Sioux Tribe	Grants to Tribal Governments	\$ 450,000
Forest County Potawatomi	Grants to Tribal Governments	\$ 645,827
Fort Belknap Indian Community	Grants to Tribal Governments	\$ 682,247
Fort McDowell Yavapai Nation	Grants to Tribal Governments	\$ 411,441
Fort Mojave Indian Tribe	Grants to Tribal Governments	\$ 900,000
Fort Peck Assiniboine & Sioux Tribes	Grants to Tribal Governments	\$ 625,191
Hoh Tribal Business Committee	Grants to Tribal Governments	\$ 450,000
Hoop Valley Tribe	Grants to Tribal Governments	\$ 450,000
Hualapai Tribe	Grants to Tribal Governments	\$ 900,000
Inter-Tribal Council of California, Incorporated	Grants to Tribal Governments	\$ 450,000
Inter-Tribal Council of Nevada	Grants to Tribal Governments	\$ 427,367
Karuk Tribe of California	Grants to Tribal Governments	\$ 452,620
Ketchikan Indian Community	Grants to Tribal Governments	\$ 898,767
Keweenaw Bay Indian Community	Grants to Tribal Governments	\$ 450,000
La Jolla Band of Luiseno Indians	Grants to Tribal Governments	\$ 450,000
Lac Courte Oreilles Band of Lake Superior Chippewa Indians	Grants to Tribal Governments	\$ 900,000

Lac du Flambeau Band of Lake Superior Chippewa Indians	Grants to Tribal Governments	\$ 847,902
Legal Aid of Nebraska	Grants to Tribal Governments	\$ 535,861
Menominee Indian Tribe of Wisconsin	Grants to Tribal Governments	\$ 541,748
Mississippi Band of Choctaw Indians	Grants to Tribal Governments	\$ 642,780
Muscogee Creek Nation	Grants to Tribal Governments	\$ 699,474
Native Village of Nulato	Grants to Tribal Governments	\$ 200,000
Nez Perce Tribe	Grants to Tribal Governments	\$ 524,518
Nisqually Indian Tribe	Grants to Tribal Governments	\$ 500,000
Omaha Tribe of Nebraska	Grants to Tribal Governments	\$ 450,000
Organized Village of Kake	Grants to Tribal Governments	\$ 443,799
Osage Nation of Oklahoma	Grants to Tribal Governments	\$ 900,000
Pascua Yaqui Tribe	Grants to Tribal Governments	\$ 900,000
Pauma Band of Mission Indians	Grants to Tribal Governments	\$ 450,000
Ponca Tribe of Oklahoma	Grants to Tribal Governments	\$ 350,000
Port Gamble S'Klallam Tribe	Grants to Tribal Governments	\$ 529,872
Prairie Band Potawatomi Nation	Grants to Tribal Governments	\$ 311,541
Pueblo of Acoma	Grants to Tribal Governments	\$ 436,959
Pueblo of Jemez	Grants to Tribal Governments	\$ 892,244
Pueblo of Nambe	Grants to Tribal Governments	\$ 570,000
Pueblo of Pojoaque	Grants to Tribal Governments	\$ 400,000
Puyallup Tribe of Indians	Grants to Tribal Governments	\$ 897,691
Rosebud Sioux Tribe	Grants to Tribal Governments	\$ 325,000
Round Valley Indian Tribes	Grants to Tribal Governments	\$ 145,380
Saginaw Chippewa Indian Tribe of Michigan	Grants to Tribal Governments	\$ 856,037
Santee Sioux Nation of Nebraska	Grants to Tribal Governments	\$ 370,485
Sault Ste. Marie Tribe of Chippewa Indians	Grants to Tribal Governments	\$ 514,218
Seneca-Cayuga Tribe of Oklahoma	Grants to Tribal Governments	\$ 789,700
Shoshone-Paiute Tribes	Grants to Tribal Governments	\$ 250,000
Skokomish Indian Tribe	Grants to Tribal Governments	\$ 399,372
Squaxin Island Tribe	Grants to Tribal Governments	\$ 534,585
St. Croix Chippewa Indians of Wisconsin	Grants to Tribal Governments	\$ 600,177
The Tulalip Tribes of Washington	Grants to Tribal Governments	\$ 900,000
White Earth Reservation Tribal Council	Grants to Tribal Governments	\$ 562,300

Wiconi Wawokiya, Incorporated	Grants to Tribal Governments	\$ 760,200
Yurok Tribe	Grants to Tribal Governments	\$ 824,630
Minnesota Indian Women's Sexual Assault Coalition	Engaging Men	\$ 300,000
White Buffalo Calf Woman Society, Incorporated	Engaging Men	\$ 300,000
Alaska Native Justice Center	Legal Assistance for Victims	\$ 397,106
Choctaw Nation of Oklahoma	Legal Assistance for Victims	\$ 491,843
Sitka Tribe of Alaska	Legal Assistance for Victims	\$ 475,000
Choctaw Nation of Oklahoma	Rural	\$ 997,662
Confederated Salish & Kootenai Tribes	Rural	\$ 308,092
Gila River Indian Community	Rural	\$ 450,000
Tewa Women United	SASP-CSS	\$ 300,000
Native American Youth and Family Center	STEP	\$ 350,000
Cook Inlet Tribal Council	Supervised Visitation	\$ 400,000
Coalition to Stop Violence Against Native Women	Tribal Coalitions	\$ 300,000
First Nations Women's Alliance	Tribal Coalitions	\$ 300,000
Mending the Sacred Hoop	Tribal Coalitions	\$ 300,000
Our Sister's Keeper Coalition	Tribal Coalitions	\$ 150,000
Southwest Indigenous Women's Coalition	Tribal Coalitions	\$ 300,000
Uniting Three Fires Against Violence	Tribal Coalitions	\$ 299,929
Nooksack Indian Tribe	Youth Services	\$ 300,000
<b>TOTAL</b>		<b>\$ 43,956,296</b>

**Appendix C – DOJ Legislative Proposal on Addressing Violence Against Native Women**



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.

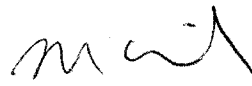
The Department of Justice is therefore asking Congress to consider proposals to address the epidemic of domestic violence against Native women. Draft legislative language and an explanatory document are attached to this letter. The legislation we propose would:

- 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

1 enforceable by the participating tribe, and is consistent with section 2265(b) of title  
2 18, United States Code. In this paragraph, the term ‘relevant portion of a protection  
3 order’ means the portion of such order that prohibits or provides protection against  
4 violent or threatening acts or harassment against, sexual violence against, contact or  
5 communication with, or physical proximity to, another person.

6 “(d) DISMISSAL OF CERTAIN CASES.—

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

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

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

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

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

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

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

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

34 “(f) PETITIONS TO STAY DETENTION.—Any person who has filed a petition for a writ of  
35 habeas corpus in a court of the United States under section 1303 may petition that court  
36 to stay further execution of his tribal detention. The court shall grant the stay if it finds  
37 that there is a substantial likelihood that the habeas corpus petition will be granted and,  
38 after giving the alleged victim or victims of the petitioner an opportunity to be heard, also  
39 finds by clear and convincing evidence that, under conditions imposed by the court, the  
40 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.