

Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women

The Department of Justice has placed a high priority on combating violence against women in tribal communities. The Department is consulting with tribes to determine whether this effort might be significantly advanced by new Federal legislation.

The overarching question on which the Department wishes to consult is whether new legislation is needed and, if so, what it should encompass. To facilitate the consultation and frame the discussion with the tribes, the Department is circulating this framing paper. It begins by presenting some background on the problem, and then it focuses on three areas for possible solutions: tribal criminal jurisdiction, tribal civil jurisdiction, and Federal criminal laws.

Tribal recommendations in these areas, and others, are of course most welcome. This framing paper is designed merely to raise questions about options that tribal leaders might consider, comment on, and offer alternatives to. It is not intended to be, nor should it be construed as, a statement of Department policy.

BACKGROUND ON VIOLENCE AGAINST NATIVE WOMEN AND GAPS IN CURRENT LAW

Violence against American Indian and Alaska Native women has reached epidemic rates. Reservation-based research shows that nearly three out of five American Indian and Alaska Native women have been assaulted by their spouses or intimate partners. Congress recently found that one third of all American Indian women will be raped during their lifetimes. And surveys of murder rates analyzed by county, race, and gender show that Native American women living in some counties composed largely of tribal lands are murdered at a rate more than ten times the national average.

These crimes do not arise in isolation. Domestic violence has high recidivism rates, and the degree of violence often escalates as the offender recidivates. One study published by the National Institute of Justice found that women who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner. Moreover, research shows that prior physical and sexual abuse is often a precursor to intimate-partner

homicide and that frequent episodes of violence pose a high risk of future, deadly violence. A recent study found that 70% of women who were murdered had been physically abused before their deaths by the same intimate partner who killed them.

The current legal structure for prosecuting domestic violence in Indian country is not well-suited to handling these patterns of escalating violence. The types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from, say, six months to five years — precisely the sorts of offenses that frequently form the first several rungs on a ladder of escalating violence between spouses or intimate partners — too often fall between the cracks in the legal system when the conduct arises in Indian country.

Jurisdictional gaps have consequences for law enforcement, too. 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 believe they cannot even make an arrest. Not surprisingly, abusers who are effectively immune from arrest are more likely to repeat, and escalate, their attacks. And research shows that law enforcement's failure to arrest abusers deters victims from reporting future incidents.

With assistance from the Department of Justice's Office on Violence Against Women and other Federal entities, Indian tribes have recently made strides toward combating Indian-on-Indian domestic violence. But the absence of tribal criminal jurisdiction over non-Indian spouses and intimate partners leaves a sizable hole in the criminal-justice system in Indian country. According to Census Bureau data, well over 50% of all Native American married women have non-Indian husbands. And thousands of other Native American women cohabit with, formerly cohabited with, are divorced from, or share children in common with non-Indian men. When those relationships turn violent, the criminal-justice system does not currently function as it should. Non-Indians often go unpunished for committing crimes of domestic violence and violating protection orders issued by tribal and State courts.

The Department of Justice is therefore consulting with the tribes about possible Federal legislation to fill gaps in our criminal-justice system and to better protect women in tribal communities from violent crime.

GENERAL ISSUES

Legal gaps: What are the key gaps in current law with respect to issues of domestic violence that a Federal legislative proposal should attempt to fill?

Potential legislative solutions: Should a legislative proposal address ways to improve tribal criminal jurisdiction? To improve tribal civil jurisdiction? To create additional Federal criminal offenses? To effect other reforms?

TRIBAL CRIMINAL JURISDICTION

The central question: Should the Department of Justice recommend to Congress new 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?**

Background: In many parts of Indian country, this newly recognized tribal criminal jurisdiction would be concurrent with Federal jurisdiction under the General Crimes Act. In some parts of Indian country, however, it would be concurrent with State jurisdiction under Public Law 280 or an analogous statute.

The Department of Justice would appreciate feedback on the following specific questions, which may be relevant to both policy considerations and constitutional analysis.

Potential categories of covered criminal activity: Should such proposed legislation be narrowly tailored to address (1) domestic and dating violence (*i.e.*, violence against a spouse, intimate partner, or dating partner) in Indian country and (2) violations of protection orders in Indian country? (If neither the defendant nor the victim is Indian, there would be no tribal jurisdiction over the crime.)

Potential criminal offenses: Should the specific elements of covered criminal offenses be determined by Federal law or by tribal law?

Potential defendants: Should this newly recognized tribal criminal jurisdiction extend to all non-Indians who commit such crimes against Indians in Indian country?

Alternatively, should it extend only to non-Indians who commit such crimes against Indians in Indian country and also reside in or are employed in Indian country?

Potential tribes: Should the legislation establish a “pilot project” recognizing this criminal jurisdiction for a limited number of tribes at first (with possible expansion to other tribes in the future, based on specific criteria and procedures), or should the legislation apply to all tribes, so long as their tribal justice systems have certain due-process protections in place?

Potential rights of defendants: Which procedural and civil-rights protections should tribes be required to offer in order to exercise this criminal jurisdiction? For example, should a tribe exercising this jurisdiction be required to provide counsel for indigent defendants in all cases where imprisonment is imposed? What avenues for appellate or habeas review should be available to defendants?

Potential Federal grant funding: Should the legislation authorize Federal grants to tribes (1) to provide indigent criminal defendants with licensed defense counsel at no cost to those defendants, (2) to protect the rights of victims of domestic violence and dating violence, and (3) to generally strengthen tribal criminal-justice systems? Would the newly recognized tribal criminal jurisdiction discussed above be desirable even if Congress did not provide additional grant funds?

TRIBAL CIVIL JURISDICTION TO ISSUE AND ENFORCE PROTECTION ORDERS

The central question: Should the Department of Justice recommend to Congress new Federal legislation **clarifying that every tribe has full civil jurisdiction to issue and enforce protection orders involving any persons, Indian or non-Indian?**

Background: This reform 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.

NEW FEDERAL OFFENSES TO COMBAT VIOLENCE AGAINST NATIVE WOMEN

The central question: Should the Department of Justice recommend to Congress new Federal legislation **enabling 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?**

Background: Existing 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 a Native American victim. (A similar crime committed by an Indian would fall within the exclusive jurisdiction of the tribe.) Furthermore, a Federal prosecutor 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 prosecutors may lack jurisdiction altogether, given the strictures of the Major Crimes Act.

Assaults by striking, beating, or wounding: Should Congress amend the Federal Criminal Code to provide a one-year offense for assaulting a person by striking, beating, or wounding (a Federal crime that currently carries a six-month maximum, when committed by a non-Indian against an Indian in Indian country)?

Assaults resulting in substantial bodily injury: Should Congress amend the Federal Criminal Code to provide a five-year offense for assaulting a spouse, intimate partner, or dating partner, resulting in substantial bodily injury?

Assaults by strangling or suffocating: Should Congress 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?

Domestic assaults by strangling/suffocating or resulting in substantial bodily injury: If these two felonies should be included in the Federal Criminal Code, should Congress do so by amending the existing assault statute (18 U.S.C. 113)? Alternatively, should Congress create a new, freestanding statute (analogous to 18 U.S.C. 117) that would cover crimes in Public Law 280 jurisdictions and would cover crimes throughout Indian country regardless of the Indian or non-Indian status of the defendant or the victim — at the possible risk of spreading existing Federal law-enforcement resources more thinly?

The Major Crimes Act: Should the Major Crimes Act be amended expressly to cover any “felony assault under section 113” while deleting the specific references to “assault with intent to commit murder, assault with a dangerous weapon, [and] assault resulting in serious bodily injury (as defined in section 1365 of this title)”? Does the answer depend on the answer to the previous question, about the two alternative ways of enacting new Federal felony offenses for assault by strangling/suffocating and assault resulting in substantial bodily injury?

OTHER POTENTIAL AREAS FOR REFORM

Are there other Federal legislative reforms that the Department of Justice should recommend to Congress to help your tribal government and tribal community, and other tribal governments and communities, combat violence against Native women?