

National Association of Criminal Defense Lawyers
1660 L Street N.W. 12th Floor
Washington, DC 20036

National Association of Federal Defenders
P.O. Box 22223
Nashville, TN 37202

April 23, 2012

The Honorable Harry Reid
Majority Leader
522 Hart Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
317 Russell Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: The Violence Against Women Reauthorization Act of 2012 (S. 1925)

Dear Senators:

We write to express our concerns regarding certain provisions of S. 1925 as currently framed. We stress that these concerns are not intended to deny that domestic violence in Indian country is a problem that should be addressed. However, if the bill is enacted in its current form, a new category of citizens will be subjected to criminal prosecution and punishment in tribal court without being provided the same constitutional rights to which they would be entitled in any other criminal court in the Nation. As we explain below in parts I and II, the portions of the bill that would for the first time extend the criminal jurisdiction of tribal courts to non-Indians would deprive these defendants of basic constitutional rights with no effective remedy. Moreover, extension of tribal jurisdiction to the prosecution of non-Indians is constitutionally dubious under current Supreme Court law. At the same time, extensive measures to address the very same concerns that motivate this bill were adopted in the recently-enacted Tribal Law and Order Act (TLOA), and reports on TLOA's efficacy have not yet been completed.

As we explain below in parts III-VII, we also have concerns about a number of other provisions of the bill that would expand or alter the criminal code in ways that raise troubling questions of constitutionality and fairness and/or are unnecessary. First, the required use of tribal convictions to double the statutory maximum for certain offenses in federal court would be unconstitutional insofar as such convictions frequently result from proceedings that do not comply with the Constitution. Second, a new mandatory minimum for aggravated sexual abuse is unnecessary in light of the high sentences already imposed for this offense (an average of 193 months), and would apply most frequently to Native Americans (who represent 70% of defendants convicted of this offense). Third, treatment of a third conviction for driving under the influence as a "crime of violence" (regardless of whether the offenses are misdemeanors or felonies or how long ago they occurred) would require deportation of lawful permanent residents under the immigration laws, and would quadruple the punishment under the federal sentencing guidelines and the cost to taxpayers for undocumented aliens who are deported at the conclusion

of their prison terms in any event. Fourth, further broadening the federal stalking statute (which in its current form has already been invalidated under the First Amendment as applied) would raise serious overbreadth and void-for-vagueness concerns. Fifth, we oppose the addition of a new federal assault felony that would criminalize reckless conduct not intended to strangle, suffocate, or injure, and that results in no injury. Several federal statutes already cover intentional conduct involving attempted or actual strangling or suffocating.

We are hopeful that Congress can develop an approach to the concerns that underlie this bill that does not subject an entire new category of citizens to deprivations of constitutional rights in tribal court, and that will not unconstitutionally or unnecessarily expand crimes and punishment in federal court.

I. Background and history of federal regulation of tribal criminal justice

A. The legislative investigation underlying the enactment of the Indian Civil Rights Act of 1968 (“ICRA”) revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice.

In the early 1960s, the Senate Committee on the Judiciary’s Subcommittee on Constitutional Rights (“the Subcommittee”), noting that it had “for several years” been receiving complaints alleging that Indians “were being deprived of basic constitutional rights,”¹ convened a set of hearings and staff investigations to look into the matter. The Subcommittee’s investigation proved the accuracy of James Madison’s observation, in *The Federalist* Number 10, that small republics are inherently prone to factionalism and oppression. During the hearings, the Subcommittee heard allegations regarding tribal harassment and incarceration of political dissidents, restriction of religious freedom, and pervasive corruption.² Indians alleged that their tribal governments arbitrarily banished them from reservations, restricted their religious freedom, conducted tribal elections in violation of their own election rules, prevented them from holding office, misused tribal lands and land sale proceeds, and failed to provide decent conditions in tribal jails.³

The Subcommittee found that the system of justice in Indian country raised particularly grave concerns. Senator Ervin informed the Subcommittee that he was “much perplexed” by evidence indicating that “in all too many cases tribal courts were entirely subservient to the tribal council.”⁴ Senator Burdick of North Dakota reported that “in many cases the tribal courts [we]re

¹ *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) [hereinafter “1962 Hearings”] at 713 (statement of Sen. Burdick); see also *id.* at 511 (statement of Sen. Carroll) (“The field hearings and staff investigations are the result of numerous inquiries and complaints concerning conditions in various parts of the country emanating from Indians and other individuals and organizations working with Indians.”).

² Joseph de Raimes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. Rev. 59, 54 nn.24-30 (1975).

³ *Id.* at 73.

⁴ *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) [hereinafter “1961 Hearings”] at 135.

‘kangaroo courts.’”⁵ Witnesses testified that in tribal courts the privilege against self-incrimination was seldom respected, jury trials were rare, and tribal judges sometimes refused pleas of not guilty.⁶ Others reported that representation by attorneys in tribal courts was not only uncommon, but in many cases was prohibited.⁷ As the Supreme Court later observed, the Subcommittee’s “legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice.”⁸

B. ICRA provided limited civil rights protections along with a sentencing cap.

The Subcommittee drafted a set of legislative proposals to address these and other concerns.⁹ Initially it proposed to provide broadly that “any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution.”¹⁰ But after the Interior Department expressed concerns about this approach, the Subcommittee agreed to water down the Bill of Rights protections applicable to tribal governments.¹¹ In place of the straightforward application of constitutional protections initially proposed, the Subcommittee drafted an enumeration of legal protections that paralleled the Bill of Rights in many respects, but contained substantial modifications.

Perhaps most significantly, the bill guaranteed a criminal defendant in tribal court the assistance of counsel only “at his own expense,”¹² expressly rejecting any right to appointed counsel. The Subcommittee had looked into the prospect of guaranteeing appointed counsel in tribal court prosecutions pursuant to the recently-enacted Criminal Justice Act of 1964 – and the Director of the ACLU’s Washington office had recommended that it do so – but the Subcommittee was informed that this would be impractical because neither funding to pay appointed lawyers nor a bar of private attorneys practicing in tribal courts was available.¹³ Although it backed away from guaranteeing appointed counsel in tribal courts, the Subcommittee decided, in an apparent effort to counterbalance the bill’s omission of the right to appointed counsel,¹⁴ to “set an absolute limit of six months’ imprisonment and a \$500 fine on penalties which a tribe may impose.”¹⁵

As the Supreme Court later observed, ICRA was intended to strike a “balance” between the “dual statutory objectives” of protecting tribal sovereignty and “extending constitutional

⁵ *Id.* at 88.

⁶ De Raimes, *supra* note 2, at 73.

⁷ 1961 *Hearings* at 483 (statement of former San Juan Pueblo Governor Preston Keevana); *id.* at 487 (statement of R.A. Wardlaw, assistant to the President of the Mescalero Apache Tribe).

⁸ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

⁹ 113 Cong. Rec. 13473-78 (May 23, 1967).

¹⁰ *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965) [hereinafter “1965 *Hearings*”] at 5.

¹¹ *Id.* at 17-22; 113 Cong. Rec. 13473-78 (May 23, 1967).

¹² *Id.* at 13473.

¹³ 1965 *Hearings* at 92-93, 224.

¹⁴ *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

¹⁵ *Santa Clara Pueblo*, 436 U.S. at 63 n.14.

norms to tribal self-government.”¹⁶ Notably, this was before the Supreme Court decided in *Argersinger v. Hamlin* that an indigent defendant facing *any* period of incarceration is entitled to appointed counsel.¹⁷ Nonetheless, the sentencing cap was later raised from six months to one year, as part of the Anti-Drug Abuse Act of 1986.¹⁸

The Subcommittee’s proposals – now known as the “Indian Civil Rights Act” or “ICRA” – were eventually enacted as Titles II through VII of the Civil Rights Act of 1968.¹⁹ Although the Subcommittee had initially proposed a trial *de novo* in federal court following a tribal court conviction,²⁰ the final version of the law provided that the sole means by which tribal defendants could vindicate the rights guaranteed by ICRA in federal court was through a habeas corpus petition.²¹

C. ICRA has not been effective in guaranteeing fair treatment to defendants prosecuted in tribal court.

The passage of ICRA did little to protect the individual rights of Native Americans living on reservations. Since the law was passed, little legislative attention has been paid to the rights of Indians prosecuted in tribal courts, but it is clear to those familiar with the realities of tribal-court criminal litigation that one of the law’s major shortcomings was its failure to mandate the appointment of legal counsel for criminal defendants,²² particularly since the vast majority of tribal-court defendants are indigent. This failure unfortunately has not been cured by the tribes themselves. In Arizona, for example, although twenty of the State’s twenty-two tribes operate tribal courts,²³ only fifteen provide legal representation for indigent criminal defendants.²⁴ Only the Navajo Nation expressly guarantees the right to appointed counsel.²⁵ However, even in Navajo country, only a small portion of defendants receive representation because only a small handful of attorneys are available to represent defendants in the numerous and far-flung Navajo courts. Many tribes allow non-lawyer “advocates” to represent criminal defendants, and the requirements for non-lawyer “advocates” practicing in a tribal court vary. In order to be admitted to practice in the Navajo courts, a person must pass a bar exam. In order to be admitted

¹⁶ *Id.* at 62-66.

¹⁷ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁸ Pub. L. No. 99-570, § 4217 (1986).

¹⁹ Pub. L. No. 90-284, §§ 201-701 (1968), 82 Stat. at 77-81.

²⁰ *1965 Hearings* at 6-7.

²¹ 25 U.S.C. § 1303.

²² ICRA provides that a tribal-court defendant has the right to the assistance of counsel “at his own expense.” 25 U.S.C. § 1302(6); see Gary Fields, *Native Americans on trial often go without counsel*, Wall Street Journal, February 1, 2007.

²³ Pascua Yaqui Public Defender, *Directory of Tribal Justice Systems Contacts in Arizona* (2007).

²⁴ *Id.* The Akin-Chin, Colorado River, Fort Mohave, Gila River, Hopi, Hualapai, Navajo, Pascua Yaqui, Salt River Pima/Maricopa, San Carlos Apache, Tohono O’Odham, White Mountain Apache, and Yavapai Apache have established tribal departments which provide indigent defense. The Fort McDowell Yavapai and Havasupai tribes contract with private attorneys to provide representation to indigent tribal members. The Cocopah, Fort Yuma Quechan, Kaibab Paiute, Tonto Apache, and Yavapai-Prescott tribes do not provide legal counsel for indigent tribal members facing charges in tribal court.

²⁵ *Navajo Court Policy Policy on Appointment of Counsel and Indigency*.

to practice in the Colorado River Indian Tribes, a person must merely purchase a business license. In the Gila River Indian Community, an “advocate” need only be a member of the tribe and have some knowledge of tribal codes to represent criminal defendants in tribal court.²⁶

At the same time, tribes developed – and aggressively exploited – a technique for evading ICRA’s one-year sentencing cap. This technique, colloquially described in the defense community as “stacking” or “sentence stacking,” involves identifying multiple crimes deriving from a single criminal transaction, charging each crime separately in a multi-count indictment, and attaching consecutive one-year sentences to each count on which the defendant is convicted. Tribes found that they could amplify their ability to “stack” sentences by purposefully structuring their criminal codes to multiply the number of crimes that could be charged in connection with any given criminal event. In a friend-of-the-court brief recently filed in the Ninth Circuit, a central Arizona tribe candidly acknowledged that “many tribes” have deliberately structured their codes to facilitate the stacking of sentences beyond ICRA’s one-year cap.²⁷ Tribes exploited defendants’ lack of representation to shield “stacking” from judicial review, typically employing the technique only in cases involving unrepresented defendants.²⁸

A case recently tried in an Arizona tribal court illustrates how tribes aggressively employed “stacking” to circumvent ICRA’s sentencing cap and impose multi-year sentences even on defendants charged with relatively minor crimes. The case involved Beatrice Miranda, an enrolled member of Pascua Yaqui Tribe of southern Arizona, just south of Tucson. Ms. Miranda allegedly yelled threats and waved a knife at a pair of sisters, in a brief confrontation that ended when one of the sisters drove her away by hitting her in the face with a basketball.²⁹ Based on this incident, the tribe charged Ms. Miranda with eight separate violations of its criminal code, including two counts each (one for each sister) of aggravated assault, endangerment, threatening or intimidating, and disorderly conduct.³⁰

Ms. Miranda’s trial was a perfect illustration of the truth of the Supreme Court’s observation in *Gideon v. Wainwright* that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”³¹ The unrepresented Ms. Miranda did not request a jury trial. She made no opening statement. She called no witnesses. She presented no evidence. She raised no objections. She conducted no cross-examination. She made no closing argument. Although she was present throughout the trial, Ms. Miranda might

²⁶ See *Jackson v. Tracey*, No. CV-11-448-PHX-FJM (ECV) (D. Ariz.), Docket #20-5 at 19 (¶ 10).

²⁷ See *Miranda v. Nielsen et al.*, Nos. 10-15167, 10-15308 (9th Cir.), Docket #24-2 at 20.

²⁸ This strategy was effective: Although ICRA’s sentencing cap was in place for over four decades, and “stacking” was widely practiced for much of that time, only a small handful of federal court decisions assessing the legality of the practice were ever issued, with federal judges dividing on the question of the practice’s legality. See *Spears*, 363 F. Supp. 2d at 1180-81 (finding the practice unlawful); *Miranda v. Nielsen*, 2010 WL 148218 (D. Ariz. Jan. 12, 2010) (same); *Bustamante v. Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010) (finding the practice lawful); *Alvarez v. Tracey*, 2010 WL 6389592 (D. Ariz. Dec 13, 2010) (same); *Miranda v. Anchondo*, --- F.3d ---, 2012 WL 360767 (9th Cir. Feb. 6, 2012) (same).

²⁹ *Miranda*, --- F.3d at ---, 2012 WL 360767 at *1-*2.

³⁰ *Id.* at *2.

³¹ *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (internal quotation marks omitted).

just as well have been at home watching television while the tribe made its case against her. Unsurprisingly, her trial culminated in convictions on all eight counts.³²

According to the logic of “sentence stacking,” the tribe was then free to sentence Ms. Miranda to anywhere up to *eight years* of custody. Indeed, at the oral argument later held in the appeal in Ms. Miranda’s federal habeas corpus case, the tribe acknowledged that if Ms. Miranda had yelled and waved a knife at a group of fifty people, it would have considered itself free to impose a sentence of a *half century* in custody.³³ When the tribal court imposed a sentence of two-and-a-half-years in prison – or 250% of the ICRA “maximum”³⁴ – it may have viewed itself as exercising great restraint.³⁵

While criminal proceedings like Ms. Miranda’s, in which defendants receive imprisonment without legal representation, have been recognized as unconstitutional in federal courts since 1938,³⁶ and in state courts since 1963,³⁷ they remain commonplace in tribal courts – a glaring constitutional anachronism.

We understand that under TLOA, on its face, a sentence of more than one year may not be imposed unless the defendant was provided the assistance of counsel at least equal to that guaranteed by the United Constitution. The point here and in Parts II.C and D of this letter is that, regardless of what Congress might put on paper, many tribes have been unwilling or unable to provide adequate protections to the rights of criminal defendants prosecuted in their courts.

D. The Tribal Law and Order Act of 2010 (“TLOA”)

As we have noted above, none of these observations are intended to dispute the fact that tribes have legitimate concerns about their ability to maintain law and order on the reservations. Many tribes in recent years have experienced a “crisis of violent crime.”³⁸ The federal government has long borne the responsibility to prosecute such offenses under the Major Crimes Act, but tribes have complained that federal authorities too often decline to prosecute these crimes.³⁹ It was for these reasons that Congress in July 2010 readjusted the “balance” represented by ICRA by enacting the Tribal Law and Order Act, or “TLOA” – a law that substantially overhauled the structure of federal, state, and tribal prosecution of Indian-country crimes.

³² *Miranda v. Nielsen*, No. CV-09-8065-PGR (D. Ariz.), Docket ##33-44.

³³ June 16, 2011 Oral Argument in *Miranda v. Braatz*, Nos. 10-15167, 10-15308 (9th Cir.) (www.ca9.uscourts.gov/media/).

³⁴ *Miranda v. Nielsen*, No. CV-09-8065-PGR (D. Ariz.), Docket ##33-44.

³⁵ See also *Bustamante v. Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010) (tribal defendant charged with four separate offenses and sentenced to eighteen months’ imprisonment for “taking items from a camper in the backyard of his parents’ residence and . . . refus[ing] to leave after being told to do so”).

³⁶ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁸ S. Rep. No. 111-93, at 1 (2009).

³⁹ *Id.* at 12.

TLOA enacted extensive measures designed to combat sexual and domestic violence against American Indian and Alaska Native Women. It also amended ICRA to require tribes to provide certain additional rights (though still not co-extensive with those guaranteed by the Constitution) to defendants who receive a total term of imprisonment of more than one year. TLOA was enacted a mere twenty months ago. TLOA has not yet been evaluated to determine its success in combatting domestic violence, and its expansion of civil rights for criminal defendants unfortunately has not been broadly implemented by the tribes.

This brings us to the present day, and to the Senate majority's proposal in S. 1925 to dramatically revise the legal framework governing the prosecution of Indian-country crimes involving domestic violence. The history and legal background summarized above, as well as several troubling specific features of the bill, give us profound concerns about the changes this bill would enact.

II. The bill's expansion of tribal-court criminal jurisdiction to non-Indian defendants raises a number of serious concerns.

Section 904 of S.1925 would authorize tribes to prosecute and punish non-Indians for offenses involving domestic or dating violence and for violating protection orders, an unprecedented and constitutionally questionable expansion, even before it has been determined whether the improvements instituted by TLOA will be effective in addressing the problem.

The bill on its face would require a tribe exercising this jurisdiction to provide non-Indian defendants the rights described in ICRA as amended by TLOA, if a "term of imprisonment of any length is imposed." These protections, however, are narrower than the rights guaranteed to criminal defendants by the Constitution in state and federal court, and have thus far proved to be unenforceable by Indian defendants. Further, the bill would permit a tribal court to exercise this jurisdiction even if neither the defendant nor the alleged victim is an Indian or neither had sufficient ties to the tribe, unless the defendant filed a pretrial motion to dismiss on those grounds.

A. Section 904 would expand the scope of tribal courts' criminal jurisdiction in a manner that is unprecedented and constitutionally dubious.

S. 1925 would give tribal courts criminal jurisdiction over non-Indians – an authority that tribal courts have never before possessed. As the Department of Justice correctly acknowledges, "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."⁴⁰ Moreover, the Supreme Court has never indicated that Congress could constitutionally declare that tribal courts' "inherent power" extends to the prosecution of non-Indians.

In its 1978 decision in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Indian tribal courts have no criminal jurisdiction over non-Indians.⁴¹ The Court cited an earlier

⁴⁰ S. Rep. No. 112-153 (Mar. 12, 2012) at 222.

⁴¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

decision in which it had addressed the reverse situation, holding that federal courts had no criminal jurisdiction over an Indian who committed a crime against another Indian on reservation land.⁴² In that case, the Court had reasoned that permitting federal-court prosecution of Indians would subject them to “an external and unknown code . . . which judges them by a standard made by others and not for them,” and “tr[ying] them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception.”⁴³ The Court found that these same principles weighed against permitting non-Indians to be prosecuted in tribal courts, noting that “[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents’ contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.”⁴⁴ The Court acknowledged the existence of policy arguments in support of extending tribal court jurisdiction to the prosecution of non-Indians, noting that these were matters “for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians,”⁴⁵ but gave no indication as to whether such an extension of tribal-court authority would be constitutional.

Twenty-six years later in *United States v. Lara*, the Court held that Congress could legislatively expand the “inherent legal authority” of Indian tribes to cover the prosecution of “non-member” Indians – *i.e.*, defendants who are Indians but are not members of the prosecuting tribe.⁴⁶ The Court did not address the question of whether such “inherent legal authority” could be legislatively extended to *non*-Indians – and *Oliphant*’s language demonstrates that the rationale underlying that decision applies with particular force to non-Indians, who are likely to have little or no ancestral, political or social connection to or familiarity with an Indian tribe.⁴⁷ Notably, the Supreme Court in *Lara* specifically reserved the issues of whether a law expanding tribes’ inherent power to authorize the prosecution of non-member Indians violated the Constitution’s Due Process or Equal Protection Clauses, noting that its resolution of these issues would not affect its conclusion on the double jeopardy argument that the petitioner had presented.⁴⁸

In short, the Supreme Court has never stated that the extension of Indian tribes’ “inherent legal authority” to the prosecution of non-Indians would be constitutional.

Moreover, Section 904’s expansion of tribal courts’ criminal jurisdiction would make it possible for tribes to prosecute even non-Indian on non-Indian crime. It has been settled since 1881 that the power to prosecute Indian-country crimes involving a non-Indian defendant and a

⁴² *Oliphant*, 435 U.S. at 210 (discussing *Ex Parte Crow Dog*, 109 U.S. 556 (1883)). The Major Crimes Act, 18 U.S.C. § 1153, authorizes federal prosecution of enumerated crimes committed by Indians in Indian country.

⁴³ *Id.* (quoting *Crow Dog*, 109 U.S. at 571).

⁴⁴ *Id.*

⁴⁵ *Id.* at 208.

⁴⁶ *United States v. Lara*, 541 U.S. 193 (2004).

⁴⁷ See *Oliphant*, 435 U.S. at 210.

⁴⁸ *Lara*, 541 U.S. at 208-09.

non-Indian victim rests exclusively with the State in which the crime occurs.⁴⁹ S. 1925 would upend this entrenched principle by authorizing tribal courts to extend their criminal jurisdiction even to cases in which neither the defendant *nor* the victim is an Indian. The bill declares that a tribe’s “special domestic violence criminal jurisdiction” extends to “*all persons*” who commit acts of domestic (or “dating”) violence, or violate certain protective orders, within the tribe’s territory.⁵⁰ The bill would require a tribal court to dismiss a case in which neither the defendant nor the victim is an Indian – but *only* if the defendant files a pretrial motion highlighting this fact.⁵¹ Thus, while it is generally understood that parties to a case cannot by their actions or inaction confer upon a court jurisdiction it would not otherwise have,⁵² the bill would enact just such a protocol into law, allowing a tribal court to use a defendant’s failure to file a pretrial motion as justification for it to exercise a form of criminal jurisdiction it has never before possessed. To the extent that the bill would allow tribal courts to extend their criminal jurisdiction to cases that have been recognized as the exclusive province of the states for well over a century,⁵³ it would necessarily raise Tenth Amendment concerns.

The bill is constitutionally dubious in another respect as well, insofar as it would authorize tribal courts to exercise special domestic violence criminal jurisdiction on the basis of a defendant’s failure to affirmatively raise the absence of the factual circumstances that render the exercise of that jurisdiction lawful – *i.e.*, the facts that the alleged victim is an Indian and that the defendant and the alleged victim have sufficient ties to the prosecuting tribe.⁵⁴ The Supreme Court recognized in *Ring v. Arizona* that facts that must be proven to establish a court’s jurisdiction are effectively elements of the crime, and must be treated the same as other elements for constitutional purposes.⁵⁵ Because it is well established that the Constitution requires the prosecution to carry the burden to prove all elements of the crime,⁵⁶ a bill proposing to partially shift the burden to the defendant with respect to an element is constitutionally questionable at best.

B. It has not yet been determined that S. 1925’s expansion of tribal court criminal jurisdiction is justified.

Assuming that S. 1925’s unprecedented expansion of tribal court authority over non-Indians would be constitutional, it would still be appropriate to ask whether it would be a good idea. Only a compelling reason could justify enacting a law that would expand the authority of tribal courts in this fashion.

⁴⁹ *United States v. Langford*, 641 F.3d 1195, 1197-1200 (10th Cir. 2011) (*discussing United States v. McBratney*, 104 U.S. 621 (1881)).

⁵⁰ S. 1925, § 904 (new § 204(b)(1)) (emphasis added).

⁵¹ *Id.* (new § 204(d)(2)).

⁵² *Commodity Futures Trading Com’n v. Schor*, 478 U.S. 833, 851 (1986).

⁵³ *See supra* note 49.

⁵⁴ S. 1925 § 904 (new § 204(d)).

⁵⁵ *Ring v. Arizona*, 536 U.S. 584, 606-07 (2002).

⁵⁶ *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993).

The chief justification offered in support of S. 1925 is that tribes have had difficulty ensuring that non-Indians who commit domestic violence crimes against Indians on reservations are effectively prosecuted.⁵⁷ However, it has not yet been determined (1) that TLOA will not be effective in addressing this concern, or (2) that the tribes are yet providing Indian defendants the civil rights required by ICRA and TLOA.

First, the recently-enacted Tribal Law and Order Act promulgated extensive measures designed to achieve goals that included “combat[ing] sexual and domestic violence against American Indian and Alaska Native women.”⁵⁸ Among other things, the Act:

- authorized the Attorney General to appoint “qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country”,⁵⁹
- authorized each United States Attorney with Indian-country jurisdiction to appoint Special United States Attorneys “to prosecute crimes in Indian country as necessary to improve the administration of justice”,⁶⁰
- authorized the federal government to exercise concurrent federal jurisdiction in reservations subject to the criminal jurisdiction of states;⁶¹
- authorized the Attorney General to provide technical and other assistance to State, tribal and local governments that enter into cooperative law-enforcement agreements with tribes;⁶²
- required each United States Attorney with Indian-country jurisdiction to appoint a “tribal liaison” to communicate with tribes regarding law enforcement concerns;⁶³
- created an Office of Tribal Justice in the Department of Justice and an Office of Justice Services in the Bureau of Indian Affairs, giving both offices responsibility for monitoring and supporting the delivery of effective law enforcement in Indian country;⁶⁴ and
- provided for specialized training of Indian-country law enforcement officers “to properly interview victims of domestic and sexual violence and to collect, preserve, and present evidence to Federal and tribal prosecutors to increase the conviction rate

⁵⁷ S. Rep. No. 112-153 (Mar. 12, 2012) at 7-10.

⁵⁸ Pub. L. No. 11-211, tit. II, § 202(b)(4) (July 29, 2010).

⁵⁹ *Id.* § 213(a).

⁶⁰ *Id.* § 213(b)(1).

⁶¹ *Id.* § 221.

⁶² *Id.* § 222.

⁶³ *Id.* § 213(b)(1).

⁶⁴ *Id.* § 211(b).

for domestic and sexual violence offenses for purposes of addressing and preventing domestic and sexual violent offenses.”⁶⁵

All of these resources may be brought to bear upon domestic violence incidents occurring in Indian country under existing federal and state law.⁶⁶

Second, after only twenty months, it has not yet been determined whether these measures will be effective. Recognizing the magnitude of the changes that were to be made by TLOA, Congress provided for numerous reports after its enactment. The purpose of these reports is to evaluate the effect and implementation of different sections of TLOA after its enactment. Some of TLOA’s most important and comprehensive reporting requirements include:

- Section 212(b), which requires the Attorney General to submit annual reports to Congress explaining, among other things, the number of declined federal prosecutions of Indian country crimes and the reasons for such declinations;
- Section 234(b)’s provision requiring the Attorney General, in coordination with the Secretary of the Interior, to “[n]ot later than 4 years after the date of enactment” of TLOA, report on the “(1) effectiveness of enhanced tribal court sentencing authority in curtailing violence and improving the administration of justice on Indian lands;” and make “(2) a recommendation of whether enhanced sentencing authority should be discontinued, enhanced, or maintained at the level authorized” by TLOA;
- Section 234(c)(5)’s provision requiring the Attorney General to submit a report to Congress that evaluates the BOP Tribal Prisoner Pilot Program, not later than 3 years after the date of its establishment;
- Section 235, which requires the Tribal Law and Order Commission (hereinafter “Commission”) to conduct a “comprehensive study of law enforcement and criminal justice in tribal communities,” including an evaluation of jurisdiction over crimes committed in Indian country, tribal jail and federal prison systems, and tribal and federal juvenile justice systems.

Perhaps most relevant to the unprecedented changes that S. 1925 seeks to make, the Tribal Law and Order Commission is also charged with studying the impact that the Indian Civil Rights Act of 1968 had on the authority of Indian tribes, the rights of defendants subject to tribal government authority, and the fairness and effectiveness of tribal criminal systems. Further, the

⁶⁵ *Id.* § 262.

⁶⁶ *See* 18 U.S.C. § 13 (“Assimilative Crimes Act,” allowing federal government to prosecute state crimes committed in Indian country), 18 U.S.C. § 1152 (“General Crimes Act,” authorizing federal government to prosecute certain crimes committed by non-Indians against Indians in Indian country); 18 U.S.C. § 1153 (“Major Crimes Act,” authorizing federal government to prosecute certain Indian-on-Indian crimes and also Indian on non-Indian crimes, including assault, committed in Indian country); *United States v. McBratney*, 104 U.S. 621 (1881) (states may prosecute non-Indian-on-non-Indian crime occurring on reservations).

Commission is required to report detailed findings and conclusions, and to make recommendations for legislative and administrative action to Congress and the President, not later than two years after TLOA's enactment.

These reports have yet to be prepared. The Commission should be permitted to complete its study before more fundamental changes are made to tribal criminal justice systems. Making more changes without the benefit of the Attorney General's or the Commission's evaluations of the changes made less than two years ago by TLOA would amount to unnecessarily "flying blind."

In addition to the reports that TLOA itself mandates, Representatives Scott, Conyers, and Nadler, and Senators Leahy and Thune requested that the Government Accountability Office prepare a report regarding certain changes made by the TLOA. The report is to address the extent to which selected tribes exercise, or plan to exercise, TLOA's new sentencing authority and the challenges they face in exercising this authority. It will also address what types of assistance federal agencies provide or could provide to assist tribes in exercising TLOA's new sentencing authority, and what federal assistance the selected tribes would like to receive. The report is to be completed in May or June of this year.

It is unclear why Congress should speculate that the extensive measures to combat sexual and domestic violence against American Indian and Alaska Native women enacted in TLOA – which took effect only twenty months ago – will fail, or that they are so unlikely to succeed that Congress should take radical measures to supplement them, without at least waiting for the above-described reports to be issued. At the very least, Congress should take the time to assess whether the TLOA regime actually fails to achieve its goals -- and if so how -- before it contemplates undertaking unprecedented measures to "fix" it.

C. The tribes do not yet comply with ICRA, much less the higher standards of TLOA.

We are also concerned that S. 1925 displays little understanding of the reality of tribal-court criminal practice. We will first review what is required on paper, and then provide information demonstrating that these requirements are not being met and have no effective remedy.

In ICRA, Congress counterbalanced the lack of appointed counsel with a cap on the sentences that tribal courts could hand down (as discussed above, tribes effectively eviscerated the cap through the practice of "sentence stacking").⁶⁷ In addition, ICRA prohibited Indian tribes from, among other things, (1) depriving any person within its jurisdiction of liberty or property without due process of law, (2) denying any such person equal protection of the laws, and (3) denying an accused a trial by jury of at least six persons "upon request."⁶⁸ In TLOA, Congress authorized tribes to sentence above the one-year cap, but only on condition that they provide enhanced protections, including (1) affording the defendant "the right to effective assistance of

⁶⁷ *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

⁶⁸ 25 U.S.C. § 1302(a)(8), (10).

counsel at least equal to that guaranteed by the United States Constitution,” (2) providing the defendant with the assistance of an attorney licensed by a jurisdiction that “effectively ensures the competence and professional responsibility of its licensed attorneys,” (3) requiring that the presiding judge be licensed to practice law and have “sufficient legal training to preside over criminal proceedings,” (4) making their criminal laws and rules publicly available before charging the defendant, and (5) maintaining a recording of the trial proceeding.⁶⁹

All of these requirements are purportedly enforceable through a petition for a writ of habeas corpus in federal court.⁷⁰

Two of this letter’s signatories have experience in tribal-court criminal litigation in Arizona and New Mexico, and one was a tribe’s Chief Public Defender for six years and currently serves as a tribal judge pro tem. Their experience indicates that tribes still do not respect the restrictions imposed by ICRA, let alone the higher standards set out in TLOA. They report that, even today, some tribes refuse to make the code of laws publicly available, even to tribal members. Further, tribes impose fines that they know indigent defendants cannot pay and then hold them in contempt for failure to pay. Many tribes have no rules for discovery by defendants of the evidence against them or for disclosure of exculpatory evidence. Most tribes do not provide indigent defendants with funds for experts that are necessary to defend themselves. Here are several specific examples from recent years:

- In 2011 (after the effective date of TLOA), a defendant in tribal court was forced to go to trial without legal counsel. He was convicted and sentenced to 2,460 days in detention.
- In 2012 (after the effective date of TLOA), a law-trained tribal judge refused to allow defense counsel to have access to any copy of the tribal criminal code.
- In 2009, a tribal public defender was threatened with termination if he filed a habeas corpus petition in federal court on behalf of a client.
- In 2009, a tribe refused to provide its public defender with the names of tribal inmates who were being detained pre-trial.
- In 2012, a seriously mentally ill defendant was in pre-trial detention for more than one year because the tribe refused to pay for a mental health evaluation to determine whether or not he was competent to stand trial.
- In 2012, a tribal judge refused to allow a lawyer to appear on behalf of a client in a dependency matter (i.e., termination of parental rights) because the other party was not represented by legal counsel.

⁶⁹ 25 U.S.C. § 1302(c).

⁷⁰ 25 U.S.C. § 1303.

- In 2008, Ms. Miranda was tried without a lawyer or a jury, and sentenced to two and a half years in prison, 250% of ICRA's maximum.
- In 2003, a tribe informed defense counsel that it would draw jurors only from the tribal council, and since only men were permitted to serve on the tribal council, no women would be eligible to serve on the jury.
- In 2004, a former tribal chairman testified for a defendant. Thereafter, this witness, who had lived on the tribe's land all of his life, was banished from tribal land, losing his ability to work and to reside with his family on the reservation.
- In 2003, a tribe appointed a former tribal chairman as the judge in a case involving an individual whom the former chairman had fired for the same conduct involved in the case over which he was presiding.
- In 2002, when counsel for a tribal-court defendant asked the tribal court clerk for a copy of the statutes or ordinances that the defendant was accused of violating, counsel was told they would not be provided unless the Judge chose to provide them.
- In 2003, in a tribal-court prosecution involving multiple criminal charges, only one of the charges was based on an actual tribal law or regulation; the others were apparently invented for the purpose of prosecuting the individual defendant.
- In 2002-04, when a tribal judge left the bench to report for military duty, a case over which the judge was presiding made no progress until more than a year later when the judge returned. During this entire time, the defendant remained suspended from his employment.

D. Habeas corpus is ineffective to address these problems.

Proponents of the bill may not be troubled by expanding tribal court criminal jurisdiction to a new population of citizens because they believe that a defendant's right to file a petition for a writ of habeas corpus in federal court and seek relief for violation of the protections set forth in ICRA and TLOA would adequately safeguards his rights. But habeas corpus provides a woefully insufficient remedy, for three reasons.

First, people living on reservations typically have few resources and little education, and are unlikely to understand what "habeas corpus relief" means or how to pursue it, even if (as is not always the case) tribes are scrupulous about informing them of their right to do so. Indeed, even represented defendants encounter substantial obstacles: Some appointed tribal defenders – and all non-lawyer tribal "advocates" – are precluded from practicing in federal court because they are not licensed by a state, or because the tribal defenders' charter forbids it. Even those who are not precluded from practicing in federal court may fear retaliation from the tribe if they help an inmate file a habeas corpus petition. Indeed, as noted above, one tribal public defender was threatened with termination if he helped a defendant file a petition.

Moreover, if defendants do manage to file a petition, they typically must establish that they have “exhausted” their legal remedies in tribal court before they may proceed in federal court.⁷¹ Many tribes do not have functioning appellate courts, but may claim that they do because their codes provide for appellate courts, creating an illusory “remedy” for the petitioner to “exhaust.”⁷² In cases involving a tribe that does have an appellate court, it can take months or even years for the appellate court to hear a defendant’s appeal.

Even if a tribal-court defendant manages to clear all of these hurdles and prove that his claims have merit, his victory is likely to mean little in the end, because his sentence may be nearly or completely over before the district court issues its decision, and he is likely to remain in custody the entire time.⁷³ In short, the “protection” afforded by the availability of federal habeas corpus relief is not only after-the-fact, but also largely illusory.

Second, habeas corpus relief is an insufficient guarantee of a criminal defendant’s rights because the substance of the rights that S. 1925 would provide to non-Indian defendants prosecuted in tribal court – although they appear at a glance to be the same as or similar to the rights provided to state and federal criminal defendants by the United States Constitution – would actually be substantially different. One reason for this is that even with respect to rights that ICRA copies verbatim from the Bill of Rights – including the right to due process of law – the Supreme Court has recognized that ICRA rights are “not identical” to their constitutional cousins, and that tribal courts exercise “leeway” in applying them and take the view that they “need not follow the U.S. Supreme Court precedents ‘jot-for-jot.’”⁷⁴ Federal courts sometimes take a similar approach: The Ninth Circuit has held that when a tribal court’s procedures “differ significantly from those commonly employed in Anglo-Saxon society, courts weigh the individual right to fair treatment against the magnitude of the tribal interest [in employing those procedures] to determine whether the procedures pass muster under the [ICRA].”⁷⁵

Third, even if it were assumed that the rights referred to in ICRA and TLOA were understood to have the same meaning in tribal court as in federal or state court, and that habeas relief was speedy, efficient, and easily secured, many tribes simply are not equipped to provide defendants with these rights in any meaningful way. Many tribes do not have jury systems and lack the ability to assemble a jury “of the defendant’s peers” that would comply with

⁷¹ *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

⁷² See *Johnson v. Gila River Indian Community*, 174 F.3d 1032, 1036 (9th Cir. 1999) (noting that although tribe purported to have a court of appeals, “the lack of a briefing schedule, scheduled appellate argument, a meaningful response to the notice of appeal, or an answer to any of [petitioner’s] correspondence for an abnormally extensive period create doubt that a functioning appellate court exists”).

⁷³ When Ms. Miranda secured habeas corpus relief, in a ruling that the Ninth Circuit later overturned, she had only six months left to serve on her two-and-a-half-year sentence. *Miranda*, 2010 WL 148218 at *1. In another tribal defendant’s habeas corpus case in the same district, the court took over eleven months to decide the petitioner’s summary judgment motion after it was fully briefed. *Alvarez v. Kisto*, No. CV-08-2226-DGC (D. Ariz.), Docket ##86, 95.

⁷⁴ *Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (internal quotation marks omitted).

⁷⁵ *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1998).

constitutional requirements where the defendant is a non-Indian. No tribe of which we are aware enjoys a bar of criminal defense lawyers admitted to practice in the tribe's courts that is sufficiently numerous and well-trained to ensure that all criminal defendants receive representation meeting the Sixth Amendment standard. And while TLOA on its face requires that counsel satisfying the Sixth Amendment standard be provided to persons sentenced to more than a year of custody (and VAWA would require this for "a term of imprisonment of any length" for non-Indians), qualified counsel simply are not available in most tribal systems, meaning that tribal-court defendants are likely to receive constitutionally-insufficient counsel. They would technically be entitled to secure habeas corpus relief in federal court for the ineffectiveness of their counsel, but as we have noted above, this avenue is unlikely to provide effective relief.

In sum, we are profoundly concerned that S. 1925's unprecedented, constitutionally questionable, and not-yet-justified expansion of tribal courts' criminal jurisdiction would subject a new category of citizens to criminal prosecution and punishment in tribal court without being provided the same constitutional rights to which they would be entitled in any other criminal court in the Nation. We have drafted suggestions as to how these concerns might be addressed through amendments to the existing bill.

E. Amendments to the bill could help to address these concerns.

(1) Rights of defendants

We propose that new § 204(e) ("Rights of Defendants") be deleted and replaced with the following language:

(e) Rights of Defendants- Criminal cases proceeding in tribal courts pursuant to participating tribes' exercise of special domestic violence criminal jurisdiction shall be governed by the same constitutional rights and privileges that would govern if the cases were proceeding in the federal district court for the district in which the alleged crime occurred.

This language would plainly state that persons prosecuted pursuant to tribes' exercise of special domestic violence criminal jurisdiction may not be deprived of the same constitutional rights and privileges to which they would be entitled if prosecuted federally. The proposed language would also remove a problematic aspect of the current bill, which specifies that certain rights must be provided only if a term of imprisonment "is imposed" – something that is impossible to know until the trial is complete and the defendant has been sentenced, at which point it would be too late to ensure that the designated rights have been respected. The relevant term of imprisonment under Supreme Court law is that which "may be imposed,"⁷⁶ not that which "is imposed."

⁷⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

(2) Provision of Criminal Justice Act counsel

Because we are confident for the reasons stated above that the only truly effective way to ensure that a criminal defendant's rights receive meaningful protection is to provide the defendant with the effective assistance of qualified counsel at trial, we propose that a new provision be added specifying that Criminal Justice Act counsel will be provided to represent persons prosecuted pursuant to a participating tribe's special domestic violence criminal jurisdiction at trial. We suggest the following language:

Appointed counsel shall be made available to indigent non-Indian defendants prosecuted in tribal courts pursuant to participating tribes' exercise of special domestic violence criminal jurisdiction on the same terms and pursuant to the same policies that would govern if the prosecution were proceeding in the federal district court for the district in which the alleged crime occurred.

This provision would simply extend federal district courts' policies with respect to the provision of Criminal Justice Act counsel in federal court to trials in tribal court where the alleged offense took place.

(3) Notification of right to file habeas corpus action

We propose the following language requiring tribal courts to notify criminal defendants at sentencing of their right to file a habeas corpus action in federal court, and to provide them with the means of doing so:

Immediately after sentencing a criminal defendant to any form of custody following a trial or guilty plea, an Indian tribal court must –

- (i) notify the defendant of his or her right to file a habeas corpus petition in the federal district court for the district in which the defendant will be held in custody;*
- (ii) provide the defendant with a form habeas corpus petition for petitioners seeking relief pursuant to 28 U.S.C. § 2241 and/or 25 U.S.C. § 1303 and with adequate postage to enable the defendant to mail the form from the place of custody to the district court for filing;*
- (iii) advise a defendant who is unable to pay applicable filing fees of the right to ask for permission to file a habeas corpus petition in forma pauperis;*
- (iv) advise the defendant that his or her federal habeas corpus claims may be dismissed if they have not been exhausted in the tribal court system; and*
- (v) advise the defendant of all tribal court procedures through which he or she may exhaust his or her potential federal habeas corpus claims.*

This provision is patterned upon Federal Rule of Criminal Procedure 32(j), which requires federal district courts to notify defendants of their right to appeal, and of their right to ask for permission to appeal in forma pauperis (*i.e.*, without paying filing fees) if they are indigent. This language also effectuates defendants' constitutional right of access to the courts,

which the Supreme Court has held obligates the government to provide indigent inmates “at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them.”⁷⁷ This provision is appropriate because a federal habeas corpus action is the *only federal remedy* for the rights provided by ICRA as modified by this bill, and is the *only remedy at all* for defendants convicted in tribal court systems that do not provide a right of appeal. In addition, because district courts have developed forms for instituting habeas corpus actions⁷⁸ which the tribes can easily obtain, and because providing defendants with such forms would substantially further defendants’ ability to secure effective habeas corpus relief for infringements of their rights, this provision would require that such forms be provided to defendants at the time of sentencing.

(4) Burden of establishing tribal court jurisdiction

We propose that the provisions of the bill that effectively place the burden on the defendant to raise the absence of Indian status and/or sufficient ties to the prosecuting tribe by filing a pretrial motion be deleted. For the constitutional and other reasons we have stated, the burden of proving these jurisdiction-establishing facts should be placed upon the prosecuting tribe, rather than upon the defendant. We therefore suggest that new § 204(d) be deleted and replaced with the following new § 204(b)(4):

TIES TO INDIAN TRIBE - A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the tribe proves beyond a reasonable doubt that (i) the alleged victim is an Indian; and (ii) the defendant (A) resides in the Indian country of the participating tribe; (B) is employed in the Indian country of the participating tribe; or (C) is a spouse or intimate partner of a member of the participating tribe.

(5) Certification of tribe’s qualification to exercise special domestic violence criminal jurisdiction

We propose that language be added to the bill to ensure that participating tribes have undertaken the necessary analysis and assembled the necessary resources to exercise special domestic violence criminal jurisdiction without infringing upon defendants’ rights. We suggest that a certification process be instituted as follows:

Before exercising special domestic violence criminal jurisdiction, a tribe must submit a certification request to a Board attesting that the tribe’s judicial system complies with all of the requirements set forth in the Indian Civil Rights Act as amended by this Act. Upon receipt of the certification request, the Board shall determine whether the tribe’s judicial system complies with the Indian Civil Rights Act as amended by this Act, and shall grant or deny the request within 180

⁷⁷ *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977).

⁷⁸ See, e.g., United States District Court for the District of Arizona *Prisoner Form - Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. § 2241* (available at <http://www.azd.uscourts.gov/azd/courtinfo.nsf/forms?OpenView>).

days. The Board shall be appointed by the President or the President's delegate, and shall be composed of a representative from the Department of Justice, a representative of the Federal Public Defenders, and a representative of a federally-recognized tribal government.

This language would create a balanced review board representing the interested parties that would help to prevent tribes that are unprepared to exercise special domestic violence criminal jurisdiction from doing so, and in the process infringing upon defendants' rights in ways that may be impossible to fully remedy.

We believe that making these modifications to S. 1925 would go a long way toward mitigating the concerns that we have outlined above.

III. Section 906(c) would unconstitutionally require tribal-court convictions to be used to double the maximum punishment for a federal domestic violence or stalking offense.

Section 906(c) of the bill would require that tribal-court convictions be used to double the maximum term of imprisonment for defendants charged with a federal domestic violence or stalking offense. We oppose this amendment because, as we have just explained, tribal-court convictions are likely to have been the result of proceedings that failed to comply with federal constitutional standards. Notably, the bill does not specify that tribal-court convictions may trigger the sentencing enhancement only if they resulted from proceedings that complied with ICRA, TLOA, or the Constitution. The Ninth Circuit has held that an uncounseled tribal-court guilty plea, even if it complied with ICRA, is "constitutionally infirm" and may not be admitted in a federal prosecution.⁷⁹ The court's reasoning is sound and should be applied here. For tribal-court defendants, being subjected to the constitutional anachronism of conviction and imprisonment without representation and other basic rights is injustice enough; using such a conviction to trigger a substantial increase in the maximum punishment for a federal offense would only compound the unfairness.

IV. Section 1007's Five-Year Mandatory Minimum for Aggravated Sexual Abuse Is Unnecessary to Ensure Appropriate Punishment, and Also Raises Equal Protection Concerns Because the Vast Majority of Defendants Convicted Under 18 U.S.C. § 2241(a) are Native Americans.

Sec. 1007 of S. 1925, which was added during the Senate Judiciary Committee markup, would create a new five-year mandatory minimum for aggravated sexual abuse that occurs in the special maritime or territorial jurisdiction or in Federal prison. This new mandatory minimum would apply in cases of sexual assault involving force or threat.

This new mandatory minimum is not necessary. The guideline range for the least aggravated form of this offense for a first offender is 151-188 months.⁸⁰ If the offense involved

⁷⁹ *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

⁸⁰ U.S.S.G. § 2A3.1(a), (b)(1).

aggravating circumstances, such as injury, the guideline range for a first offender increases to 188-235 months, 210-262 months, or 292-365 months.⁸¹ The guideline range increases substantially if the defendant has prior criminal history of any kind. The average sentence imposed in the sixteen cases in which defendants were convicted under 18 U.S.C. § 2241(c) in fiscal year 2010 (the most recent year for which data is available) was *193 months*.⁸²

We are also concerned that the new mandatory minimum would have a disproportionate impact on Native Americans. Native Americans compose only 2% of the general population, but represent 70% of defendants convicted under 18 U.S.C. § 2241(a).⁸³ The vast majority of defendants convicted of this type of conduct are prosecuted in state court where sentences are generally lower than in federal court where Native Americans are prosecuted. Even a law that is neutral on its face and enacted without overt discriminatory purpose may violate the guarantee of equal protection if Congress acted in the face of evidence that the law would inevitably have a disparate impact on a protected group.⁸⁴

V. Section 1008’s Classification of Drunk Driving as a Crime of Violence Would Require Detention and Deportation of Legal Permanent Residents, and Would Quadruple the Punishment and Costs to the Taxpayers of Defendants Convicted of Illegal Entry or Remaining.

Section 1008 of S. 1925, also added during the Senate Judiciary Committee markup, would classify a third drunk driving conviction for which the term of imprisonment was at least one year (even if suspended) as an “aggravated felony” and a “crime of violence” under 8 U.S.C. § 1101(a)(43)(F), regardless of whether the offenses are misdemeanors or felonies under state or federal law. The result of this change would be to mandate detention and deportation, not only of persons without legal right to be in the United States, but also of lawful permanent residents. The bill would provide that prior drunk driving convictions – no matter how far in the past they occurred and regardless of whether they were classified as misdemeanors by the convicting jurisdiction – would require legal permanent residents to be detained and deported. This would be a harsh consequence for offenses the Supreme Court has correctly recognized do not involve “violence” as that term is commonly understood.⁸⁵

⁸¹ *Id.* § 2A3.1(a), (b)(4).

⁸² U.S.S.C. 2010 Monitoring Dataset.

⁸³ U.S.S.C. 2010 Monitoring Dataset (68.8 percent of defendants convicted under § 2241(a) were Native Americans).

⁸⁴ *See Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 & n.25 (1979) (noting that while, in order to prove an equal protection violation, there must be evidence that the legislature has “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,” “when the adverse consequences of a law upon an identifiable group are as inevitable as” the consequences of the law at issue here, “a strong inference that the adverse effects were desired can reasonably be drawn.”); *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring); *United States v. Irizarry*, 322 F. App’x 153, 155 (3d Cir. 2009).

⁸⁵ *Begay v. United States*, 553 U.S. 137 (2008); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

This change would also quadruple the punishment for defendants convicted of illegally entering or remaining in the United States, inflating the cost to the taxpayers of imprisoning such persons. Under current law, a person convicted of unlawfully entering or remaining in the United States who previously received a term of imprisonment of one year for a third drunk driving conviction (and had no other prior convictions) would be subject to a guideline range of 15-21 months.⁸⁶ If, however, a third drunk driving conviction were classified as a “crime of violence,” the guideline range would be 63-78 months.⁸⁷ Such a defendant would be deported at the conclusion of his sentence in any event. The cost of four additional years in prison -- \$116,000 at \$29,000 per year – therefore seems unwise.

VI. Section 107 would bring the federal stalking statute into sharp conflict with the First Amendment.

The amendments to the federal stalking statute (18 U.S.C. § 2261A) proposed by Section 107 of S. 1925 represent yet another troubling case of over-criminalization. This statute in its current iteration already raises serious overbreadth and void-for-vagueness concerns, and was recently struck down as unconstitutional as applied to certain speech protected by the First Amendment.⁸⁸ Whether the current statute can survive a facial constitutional challenge remains uncertain, but it could not survive such a challenge if the proposed amendments are enacted. While this statute certainly warrants amendment, Section 107 is not the change it needs.

Section 2261A is an interstate stalking statute that was enacted as part of the original Violence Against Women Act.⁸⁹ Prior to its amendment in 2006, the statute made it a crime to use the mail or any facility of interstate or foreign commerce to engage in a course of conduct with the intent to kill or injure a person, or with intent to place a person in reasonable fear of death or serious bodily injury personally or with respect to an immediate family member, spouse, or intimate partner. The 2006 amendments broadened both the intent and action requirements of § 2261A(2)(A) substantially, and added another mechanism for committing the offense.⁹⁰ Specifically, it broadened the requisite intent to include the intent to “harass or place under surveillance with the intent to . . . harass or intimidate or cause substantial emotional distress.” The requisite action was expanded to include a course of conduct that “causes substantial emotional distress.” And the use of an “interactive computer service” was added as a mechanism for committing the offense.

⁸⁶ USSG § 2L1.2(a), (b)(1)(D), (E). Such a person would be in Criminal History Category III under the guidelines.

⁸⁷ USSG § 2L1.2(a), (b)(1)(A).

⁸⁸ *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011) (holding the emotional distress via interactive computer service provision of 18 U.S.C. § 2261A(2)(A) is an unconstitutional content-based restriction on protected speech that failed to survive strict scrutiny as applied). The indictment in *Cassidy* came under § 2261A(2)(A), and thus the court only reviewed the constitutionality of that particular provision as applied to the defendant. Because the court struck down this provision as applied, it did not address its facial constitutionality.

⁸⁹ See Pub. L. No. 104-201, Div. A, Title X, § 1069(a), 110 Stat. 2422, 2655 (1996).

⁹⁰ See Pub. L. No. 109-162, Title I, § 114(a), 119 Stat. 2690, 2987.

These 2006 amendments took a narrow statute, aimed at actual culpable behavior, and extended it into the realm of protected First Amendment expression that happens to be uncomfortable, outrageous, or insulting. As a general rule, “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based” and must survive strict scrutiny to pass constitutional muster.⁹¹ As explained in *United States v. Cassidy*, “[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of the listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting [our] eyes.”⁹² This principle applies with equal force to speech that is communicated via the internet or through interactive computer services – regardless of whether the speech is read or heard, it can be ignored. The current statute restricts speech based on whether it is emotionally distressing – *i.e.*, based on the impact of the speech on the listener. This amounts to a content-based restriction for which the government has no compelling interest and is, therefore, unconstitutional.⁹³ And even if the statute could survive strict scrutiny, its far-reaching, overly broad application runs afoul of the constitution. “In the First Amendment context, [the Supreme Court] recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁹⁴ Section 107 could not survive scrutiny under this standard.

Section 107 not only exacerbates the constitutional problems created by the 2006 amendments, but also unnecessarily extends federal jurisdiction to purely intrastate conduct. The proposed amendments add conduct done with the intent to “intimidate” to the already-long list of prohibited conduct. The word “intimidate” can mean many things in many settings, including conduct done in a manner that is not only commonplace, but perfectly acceptable in both business and social settings. And yet the proposed amendments do not define or limit this term in any way. While this is troubling on its own, it raises significant constitutional red flags when considered alongside the proposal in Section 107 to remove the statute’s requirement that the conduct *actually* cause substantial emotional distress. Section 107 would extend the statute’s coverage to conduct that “attempts to cause, or *would be reasonably expected to cause*” substantial emotional distress – a tort-law standard that is out of place in this context.

Moreover, the proposed amendments would expand the statute even further. Section 107 would extend the statute’s coverage to conduct done on “any interactive computer service or electronic communication service [or] system of interstate commerce,” and would remove the interstate travel or communication requirement. Eliminating the requirement of actual interstate conduct, and adding more forms of communication, would allow federal prosecutors to reach purely intrastate conduct, without regard for state or local jurisdiction. Thus, even in the absence of actual harm or even actually intended harm, this vaguely defined, intrastate conduct would be subject to federal prosecution with a potential sentence of five years’ imprisonment. When there

⁹¹ *Cassidy*, 814 F. Supp. 2d at 583 (internal citations and quotation marks omitted).

⁹² *Id.* at 585.

⁹³ *Id.*

⁹⁴ *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (internal citations and quotation marks omitted).

is some harm, the possible sentences under this statute are significantly higher, including in some circumstances up to life imprisonment.

While the proposed amendments are for these reasons deeply troubling in the abstract, a few real-world examples demonstrate just how harmful the statute could be to innocent, law-abiding citizens if Section 107 were enacted. Consider the father who tells his daughter that he will use her cell phone GPS to confirm that she is actually going to the library, and not to a bar. If the father communicates this to his daughter with the intent to intimidate her into not going to a bar, or to cause her emotional distress should she disobey him, he would be guilty under the proposed amendment. The legitimate motives and well-meaning intent behind the father's communications would be irrelevant. The same can be said for the immature or emotional college student who lashes out on Facebook or sends angry text messages when she is dumped by her boyfriend for another woman. The proposed amendments would turn this into a federal offense punishable by a potentially-lengthy prison sentence. Finally, consider the political blogger who threatens to organize a protest or challenge the re-election of an elected representative should the representative not vote a certain way. The blogger's conduct could reasonably be expected to cause the elected representative substantial emotional distress. Regardless of the actual impact, this constitutionally protected expression would fall squarely under the proposed statute's prohibitions.

The current federal stalking statute has already been struck down as unconstitutional under the First Amendment when applied to certain speech, and the court strongly suggested that it could be struck down as facially overbroad in a case that did not involve political or religious speech. The changes proposed by Section 107 raise even more troubling constitutional red flags, not only with regard to the First Amendment, but also in terms of unconstitutional vagueness and overbreadth. We believe that there are alternative methods of deterring and punishing such behavior, such as education campaigns and tort liability, that would be more effective in achieving the sponsors' goals without trenching upon constitutional rights.

VII. Section 906(a) would add an unnecessary new form of assault to 18 U.S.C. § 113 to punish reckless conduct not intended to cause injury and resulting in no injury.

18 U.S.C. § 113 criminalizes seven kinds of assault committed “within the special maritime and territorial jurisdiction of the United States,” and 18 U.S.C. §§ 1152 and 1153 in turn provide for the federal prosecution of non-Indians and Indians who commit such assaults in Indian country.

Section 906(a) would add an *eighth* form of assault to § 113 defined as: “Assault upon a spouse or intimate partner or dating partner by strangling, suffocating, or attempting to strangle or suffocate.” The term “strangling” would be defined to mean “intentionally, knowingly, or *recklessly* impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, *regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.*” The term “suffocating” would be defined to mean “intentionally, knowingly, or *recklessly* impeding the normal breathing of a person *by covering the mouth of the person, the nose of the person, or both,*

regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.”

In other words, this new form of assault would criminalize reckless conduct with no intent to injure and no injury, including horseplay or a bear hug, and it would punish this conduct by imprisonment up to ten years. Although striking, beating or wounding is punishable by no more than six months, the bill would provide that recklessly impeding someone’s breathing, with no intent to kill or injure, for no matter how short a time, and with no injury in fact, would be punishable by up to ten years.

There is no need for this new offense. Assault by strangling or suffocating that is culpable enough to warrant punishment as a federal felony is already covered by several sections of the United States Code, including: 18 U.S.C. § 113(a)(1) (assault with intent to commit murder, punishable by up to 20 years); 18 U.S.C. § 113(a)(3) (assault with a dangerous weapon (e.g., a pillow or duct tape) with intent to do bodily harm and without just cause or excuse, punishable by up to 10 years); 18 U.S.C. § 113(a)(6) (assault resulting in serious bodily injury, punishable by up to 10 years); 18 U.S.C. § 1113 (attempted murder, punishable by up to 20 years); 18 U.S.C. § 1113 (attempted manslaughter, punishable by up to 7 years); 18 U.S.C. § 117(a) (domestic assault with at least two prior domestic violence convictions, punishable by up to 5 years or 10 years if substantial bodily injury results); and 18 U.S.C. §§ 2261(a)(1), 2261A(a)(1) (stalking (entering or leaving Indian country with the intent to kill, injure, harass, or intimidate, and in the course of or as a result of such travel causing a person to fear harm to himself or a family member), punishable by up to 5 years, 10 years if serious bodily injury results, or 20 years if permanent disfigurement or life threatening bodily injury results). Furthermore, the Major Crimes Act provides for the federal prosecution of assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, and assault against a person under 16 years old, when committed by an Indian in Indian country.⁹⁵

For these reasons, we are concerned that the bill’s new assault offense is unnecessary and would over-punish relatively innocent conduct.

Conclusion

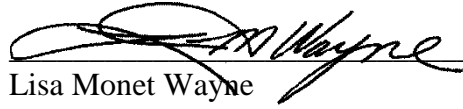
We reiterate that in raising these concerns, we do not intend to dispute that the concerns at which S. 1925 is directed are serious. We firmly believe, however, that the rights of individual citizens are equally weighty, and deserve equal consideration in the course of Congress’s consideration of the appropriate measures to take in addressing these concerns. We hope that the above comments will assist Congress in developing an approach that does not subject a new category of citizens to deprivation of their constitutional rights in tribal court, and that will not unconstitutionally or unnecessarily expand crimes and punishment in federal court.

⁹⁵ 18 U.S.C. § 1153.

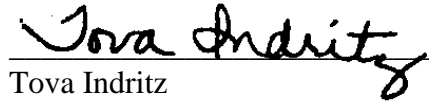
National Association of Criminal Defense Lawyers
1660 L Street N.W. 12th Floor
Washington, DC 20036

National Association of Federal Defenders
P.O. Box 22223
Nashville, TN 37202

Respectfully,



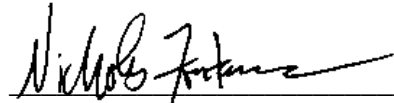
Lisa Monet Wayne
President
National Association of Criminal Defense Lawyers



Tova Indritz
Co-Chair, Native American Justice Committee
National Association of Criminal Defense Lawyers



Jon M. Sands
Past President and Member of the Board of Directors
National Association of Federal Defenders



Nicholas A. Fontana
Tribal Judge Pro Tem, State Representative, Former Tribal Public Defender
Law Office Of Nicholas Fontana, PLLC
Tucson, AZ

Cc: Members of the United States Senate