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May 3, 2012

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
U. S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
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Washington, DC 20515

The Honorable James F. Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism
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2138 Rayburn House Office Building
U. S. House of Representatives
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The Honorable Bobby C. Scott
Ranking Member
Subcommittee on Crime, Terrorism
and Homeland Security
2138 Rayburn House Office Building
U. S. House of Representatives
Washington, DC 20515

Re: H.R. 4970, the “Violence Against Women Reauthorization Act of 2012”

Dear Representatives:

We understand that the Judiciary Committee is going to mark up H.R. 4970, the “Violence Against Women Reauthorization Act of 2012” on May 8, 2012. We support the efforts of this Committee to address the problem of domestic violence, but write to express concerns regarding certain provisions that would expand or alter the criminal code in ways that raise troubling questions of constitutionality and fairness and/or are unnecessary. (See pages 1-8). We support efforts to continue to address domestic violence problems in Indian Country through the substantial mechanisms provided in the Tribal Law and Order Act, including increased federal investigation and prosecution of such crimes, as opposed to expanding tribal jurisdiction over non-Indians in the unprecedented and constitutionally dubious manner proposed in S. 1925, the Senate version of VAWA Reauthorization. (See pages 8-16).

I. We Oppose the New Mandatory Minimums and New Death Penalties Under Sections 1001 and 1005.

Section 1005 would create a new ten-year mandatory minimum for aggravated sexual abuse “by force or threat” under 18 U.S.C. § 2241(a), and a new five-year mandatory minimum for sexual abuse “by other means” (i.e., rendering the person unconscious or impairing the person’s ability to appraise or control conduct through involuntary administration of a drug or intoxicant) under 18 U.S.C. § 2241(b), that occurs in the special maritime or territorial jurisdiction or in Federal prison.

Section 1001 would provide that a person convicted of violating 18 U.S.C. § 2243 (sexual abuse of a minor or ward) would be subject to the penalties under § 2241 if the offense “would constitute” a violation of § 2241 “if committed in the special maritime and territorial

jurisdiction of the United States.” These penalties would include the new 5- and 10-year mandatory minimums under § 2241(a) and (b), the 30-year mandatory minimum under § 2241(c), and apparently the death penalty under § 2241(c) and § 2245.

Section 1001 would also make it unlawful, in the course of committing an offense under 18 U.S.C. §§ 241-249 (Civil Rights) or 42 U.S.C. § 3631 (Fair Housing Act), to engage in conduct that “would constitute” an offense under Chapter 109A if it had been “committed in the special maritime and territorial jurisdiction of the United States,” subject to the penalties under the provision of Chapter 109A that “would have been violated.” Again, these would include the new 5- and 10-year mandatory minimums under § 2241(a) and (b), the 30-year mandatory minimum under § 2241(c), and apparently the death penalty under § 2241(c) and § 2245.

We oppose all mandatory minimums because they transfer sentencing authority from judges to prosecutors, and prevent appropriate individualized sentences. Mandatory minimums function as a bargaining chip for prosecutors and prevent rational and just sentences in many cases. As the Supreme Court recently noted, “our tradition of judicial sentencing” is accompanied by the “desideratum that sentencing [is] not to be left to employees of the same Department of Justice that conducts the prosecution.”¹

Section 1005’s mandatory minimums are entirely unnecessary. The guideline range for the least aggravated form of these offenses for a first offender is 151-188 months.² If the offense involved aggravating circumstances, such as injury, the guideline range for a first offender increases to 188-235 months, 210-262 months, or 292-365 months.³ 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(a) in fiscal year 2010 (the most recent year for which data is available) was 193 months.⁴ According to our review of the Sentencing Commission’s data for the past four years, no cases of aggravated sexual abuse “by other means” under 18 U.S.C. § 2241(b) have been brought.

We are also concerned that the 10-year mandatory minimum under § 2241(a) would have a disproportionate impact on Native Americans. Native Americans compose only 2% of the general population, but 70% of defendants convicted under § 2241(a).⁵ 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. A law that is neutral on its face and enacted without overt discriminatory purpose may nonetheless 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.⁶

¹ *Setser v. United States*, 132 S. Ct. 1463, 1471-72 (2012).

² U.S.S.G. § 2A3.1(a), (b)(1).

³ *Id.* § 2A3.1(a), (b)(4).

⁴ U.S.S.C. 2010 Monitoring Dataset.

⁵ U.S.S.C. 2010 Monitoring Dataset (68.8% of defendants convicted under § 2241(a) were Native Americans).

⁶ 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

Finally, as reported by the National Task Force to End Sexual and Domestic Violence Against Women, “[l]ong mandatory minimum sentences can keep victims who were assaulted by someone they know from reporting the crime.”⁷

We oppose any new federal death penalty provision.

II. Section 1003 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 1003 of H.R. 4970 represent 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.⁸ 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. This statute warrants amendment, but Section 1003 is not the change it needs.

Section 2261A was enacted as an interstate stalking statute as part of the original Violence Against Women Act.⁹ 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 significantly broadened both the statute’s intent and action requirements, and added the use of an “interactive computer service” as another mechanism for committing the offense.¹⁰ Specifically, the amendments 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,” and expanded the requisite action to include a course of conduct that “causes substantial emotional distress.”

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).

⁷ National Task Force to End Sexual and Domestic Violence Against Women, *The Grassley-Hutchinson Substitute Harms Victims, Increases Costs, Creates Inefficiency*.

⁸ *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.

⁹ *See* Pub. L. No. 104-201, Div. A, Title X, § 1069(a), 110 Stat. 2422, 2655 (1996).

¹⁰ *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 insulting or outrageous in the listener's view. 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.¹¹ 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."¹² This principle applies with equal force to speech that is communicated via the internet or computers—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.¹³ 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."¹⁴ Section 1003 could not survive under this standard.

Section 1003 exacerbates the constitutional problems created by the 2006 amendments. 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. Yet Section 1003 does not define or limit this term in any way. Section 1003 also adds as a punishable result that the conduct "attempts to cause . . . serious emotional distress," and does not define "serious emotional distress." Moreover, the proposed amendments would no longer require interstate travel, thereby reaching purely local, intrastate conduct.

Further, Section 1003 would arbitrarily increase the statutory maximum by five years based solely on the age of the victim. Section 1003 would also increase the statutory maximum by five years if the offense "involves conduct in violation of a protection order." Title 18 U.S.C. § 2262 criminalizes the violation of a "protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person" and requires that the defendant travel or cause the victim to travel in interstate commerce. Section 1003, in contrast, would increase the maximum by five years for violating a more broadly-defined, locally-issued protection order,¹⁵ without leaving the

¹¹ *Cassidy*, 814 F. Supp. 2d at 583 (internal citations and quotation marks omitted).

¹² *Id.* at 585.

¹³ *Id.*

¹⁴ *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (internal citations and quotation marks omitted).

¹⁵ "Protection order" is defined under 18 U.S.C. § 2266(5) as "(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether

jurisdiction or causing the victim to leave the jurisdiction. We note that these enhancements would have to be charged in an indictment and proved to a jury beyond a reasonable doubt.¹⁶

While the proposed amendments are 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 1003 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, and his communication causes or attempts to cause her emotional distress should she disobey him, he would be guilty under the proposed amendment. So would an immature college student who lashes out on Facebook when she is dumped by her boyfriend for someone else. The proposed amendments would turn the well-meaning words of the father and the emotional reaction of the student into a federal offense punishable by a lengthy prison sentence. Finally, consider the political blogger who causes an elected representative serious emotional distress when the blogger threatens to organize a protest or challenge the re-election of the representative should he or she not vote a certain way. 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 1003 raise even more troubling constitutional red flags with regard to the First Amendment and unconstitutional vagueness and overbreadth. We believe that there are alternative methods of dissuading such behavior, such as education campaigns and tort liability, that would be more effective in achieving the sponsors' goals without trenching upon constitutional rights.

III. Section 1004(a) Would Broaden the Assault Statute in Ways that Are Unfounded, Unnecessary and Counterproductive.

A. Punishing Reckless Conduct *Not* Intended to Kill or Cause Injury and *Not* Resulting in Injury by Up to Ten Years in Prison is Unwarranted, and Also Unnecessary Where Several Statutes Already Criminalize *Culpable* Conduct Involving Actual or Attempted Strangling or Suffocating.

Title 18 U.S.C. § 113 criminalizes seven kinds of assault committed “within the special maritime and territorial jurisdiction of the United States.” Section 1004(a) would add an *eighth*

obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.”

¹⁶ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

form of assault, described as “[a]ssault upon a spouse or intimate partner or dating partner by strangling, suffocating, or attempting to strangle or suffocate” and punishable by up to ten years.

The ordinary meaning of “strangling” is “to kill by external compression of the throat, esp. by means of a rope or the like passed round the neck,”¹⁷ and of “suffocating” is “to kill . . . by stopping the supply of air through the lungs . . . or other respiratory organs.”¹⁸ But this provision would transform these ordinary definitions to mean a *reckless* act that is *not intended* to kill or injure, and that results in no visible injury and, implicitly, no injury. It would redefine “strangling” to mean “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.*” Likewise, it would redefine “suffocating” to mean “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.*”

It appears that this new crime – which would permit prosecution of conduct not intended to kill or injure and resulting in no injury – is based on an unsubstantiated claim that even though strangling and suffocating carry a “high risk of death,” there “may be no visible external injuries.”¹⁹ Even assuming this unlikely claim is true, it does not justify dispensing with a culpable state of mind requirement. The statute would apply on its face to horseplay between intimate partners, or a bear hug on a date.

There is no need for this offense because several federal statutes criminalize conduct involving attempted or actual strangling or suffocating that *is* culpable and harmful, including: 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. § 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 rope, pillow, or duct tape, with intent to do bodily harm, 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. § 113(a)(7) (assault resulting in substantial bodily injury, punishable by up to 5 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. §§ 1152 and 1153 provide for the federal prosecution of all of these offenses if committed in Indian country by an Indian or a non-Indian.

¹⁷ Oxford English Dictionary.

¹⁸ *Id.*

¹⁹ Letter from Ronald Weich, Assistant Atty. Gen., to Hon. Joseph R. Biden, Jr. 10 (July 21, 2011).

B. Removal of the “Without Just Cause or Excuse” Element from Assault with a Dangerous Weapon Would Permit the Successful Prosecution of a Person Who Was Defending His Home or Property, and of a Battered Woman Defending Herself.

The federal offense of assault with a dangerous weapon has included as an element “without just cause or excuse” since the statute was enacted. This means that the prosecution must prove that the assault was not committed with just cause or excuse, and that the judge must admit evidence from both sides on this issue.

Section 1004(a) would remove this element. As a result, a person who brandished or used a weapon—which need not be firing a gun or cutting with a knife, but can be waving or striking with a wooden stick, a broom, a rock, or a shoe, as well as with a gun or knife—to chase away home or property invaders could be successfully prosecuted for doing so, and may not even be permitted to introduce his own evidence of just cause or excuse. Removal of this element would also permit the successful prosecution of a woman who struck back after being abused for decades, and would permit the judge to exclude evidence offered by the woman to explain her actions. The Department requested this change but offered no justification for it whatsoever.²⁰

C. Transformation of Misdemeanor Simple Assault – an Offense Involving No Physical Contact -- into a Five-Year Felony Punishable as Severely as Assault Resulting in Substantial Bodily Injury is Irrational.

We oppose the increase in grade and punishment for simple assault on a person under 16 years of age, from a one-year misdemeanor to a five-year felony. Simple assault is defined as “assault that [does] *not* involve physical contact,”²¹ which is either a “willful attempt to inflict injury upon the person of another” or a “threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.”²² The proposed amendment would thus transform a parent’s mere threat to smack a child, with no intention of doing so, into a felony punishable by up to five years. (Actual child abuse can be prosecuted in federal court through the Assimilative Crimes Act.) Simple assault is a *lesser* included offense of assault resulting in substantial bodily injury, an offense subject to five years imprisonment if the victim is under 16.²³ This revision would result in the same punishment for an offense that does not even involve physical contact as an offense resulting in substantial bodily injury. It does not appear that the Department of Justice requested this change,²⁴ and we are unaware of any justification for it.

²⁰ See Letter, *supra* note 19.

²¹ *United States v. Rivera-Alonzo*, 584 F.3d 829 (9th Cir. 2009) (emphasis added).

²² *United States v. Rocha*, 598 F.3d 1144 (9th Cir. 2010) (emphasis added).

²³ See 18 U.S.C. § 113(a)(7).

²⁴ See Letter, *supra* note 19.

IV. Section 1004(c) Would Unconstitutionally Require Tribal Court Convictions to be Used to Double the Maximum Punishment for a Federal Domestic Violence or Stalking Offense.

Section 1004(c) 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 provision because, as explained in Part V of this letter, tribal court convictions are likely to have been obtained without counsel and other federal constitutional rights. The Ninth Circuit has held that a guilty plea entered in tribal court by a defendant unrepresented by a lawyer, even though it complied with ICRA, is “constitutionally infirm” and may not be admitted in a federal prosecution.²⁵ Being subjected in tribal court to conviction and imprisonment without representation and other basic rights is injustice enough; using such a conviction to double the maximum punishment for a federal offense would violate the Constitution.

V. Domestic Violence in Indian Country Should Be Addressed By Giving the Significant Measures Enacted in TLOA a Chance to Work Rather Than Through the Unprecedented and Constitutionally Dubious Step of Subjecting Non-Indian Citizens to Prosecution and Punishment in Tribal Court Without the Same Constitutional Rights to Which They Would Be Entitled in Any Other Court in the Nation.

We support H.R. 4970’s exclusion of the deeply troubling expansion of tribal court jurisdiction contained in Section 904 of the Senate version of this legislation and, for the reasons stated below, we urge the House to reject such a provision should it be proposed as an amendment to H.R. 4970 or when these bills are sent to conference.

A. TLOA’s measures to combat domestic violence in Indian Country are just now getting underway.

Not two years ago, Congress passed the Tribal Law and Order Act (TLOA), a comprehensive bill that empowered tribal governments to better combat violent crime in Indian Country. The Act also required the federal government to provide more resources to fighting violent crime in Indian Country and to work closely with tribes in addressing this problem. The unacceptably high rate of domestic violence in Indian Country was one of the driving forces behind passage of TLOA, which provided as one of its stated goals to “combat sexual and domestic violence against American Indian and Alaska Native women.”²⁶ To address these issues, the Act, among other things:

- authorized the Attorney General to appoint “qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country”²⁷

²⁵ *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

²⁶ Pub. L. No. 11-211, tit. II, § 202(b)(4) (July 29, 2010).

²⁷ *Id.* § 213(a).

- 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”²⁸
- required each United States Attorney with Indian-country jurisdiction to appoint a “tribal liaison” to communicate with tribes regarding law enforcement concerns²⁹
- 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 for domestic and sexual violence offenses for purposes of addressing and preventing domestic and sexual violent offenses.”³⁰
- authorized the federal government to exercise concurrent federal jurisdiction in reservations subject to the criminal jurisdiction of states³¹
- authorized the Attorney General to provide technical and other assistance to State, tribal and local governments that enter into cooperative law-enforcement agreements with tribes³²
- 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 country³³

Of course, it takes some reasonable amount of time to implement these measures. According to recent news articles, the Justice Department is working hard to implement TLOA right now.³⁴ The numerous reports required by TLOA to evaluate its effect and implementation, as well as the fairness and effectiveness of tribal criminal justice systems, have yet to be completed. It is plainly too soon to conclude that the substantial changes that are being implemented as a result of TLOA have failed,³⁵ or that tribal courts are willing and able to

²⁸ *Id.* § 213(b)(1).

²⁹ *Id.* § 213(b)(1).

³⁰ *Id.* § 262.

³¹ *Id.* § 221.

³² *Id.* § 222.

³³ *Id.* § 211(b).

³⁴ See, e.g., Felicia Fonseca, *Feds Highlight Efforts to Curb Reservation Crime*, Tribal Law & Order Resource Center, National Criminal Justice Association, May 2, 2012; *DOJ News: Justice and Interior Departments Launch National Criminal Justice Training Initiative in Cherokee Nation*, Department of Justice, Office of Public Affairs, Mar. 12, 2012.

³⁵ In August 2011, the Department of Justice and Department of the Interior submitted to Congress a lengthy report entitled “Tribal Law and Order Act (TOLA) Long Term Plan to Build and Enhance Tribal

respect the rights of criminal defendants prosecuted in their courts,³⁶ and that Congress should therefore pursue the unprecedented path of extending tribal jurisdiction to non-Indian citizens.

B. There is no jurisdictional gap that needs to be filled to permit the federal prosecution of non-Indians for acts of domestic violence committed against Indians in Indian Country, or to permit tribal officers from arresting suspected offenders.

Many proponents of S. 1925 have claimed that there is a jurisdictional gap that precludes the prosecution of non-Indians for acts of domestic violence against Indians in Indian Country. This assertion fails to recognize the arsenal of tools that currently exists within the federal government to combat this problem. The federal government already has jurisdiction over crimes committed by non-Indians in Indian Country under the General Crimes Act, also known as the Federal Enclaves Act, 18 U.S.C. § 1152. This law gives the federal government jurisdiction to prosecute federal crimes, both misdemeanors and felonies, committed in Indian Country by non-Indians against Indians.³⁷ Such federal crimes include, for example, assault (18 U.S.C. § 113), domestic violence (18 U.S.C. § 2261), possession of a gun by any person “who has been convicted in any court of a misdemeanor crime of domestic violence” (18 U.S.C. §922(g)(9)), domestic violence by an habitual offender (18 U.S.C. § 117), stalking (18 U.S.C. § 2261A), murder, (18 U.S.C. § 1111), manslaughter (18 U.S.C. 1112), attempted murder or manslaughter, (18 USC § 1113), aggravated sexual abuse (18 U.S.C. § 2241), sexual abuse (18 U.S.C. § 2242), sexual abuse of a minor or ward (18 U.S.C. § 2243), and abusive sexual contact (19 U.S.C. § 2244). Moreover, the federal government is not limited to these federal criminal statutes. Through the Assimilative Crimes Act, 18 U.S.C. § 13, the federal government’s arsenal is virtually limitless as it can “borrow” state criminal law and prosecute non-Indians, in federal court, for state crimes.

Some also have questioned the ability of tribal officers to intervene in a potentially explosive domestic violence situation and arrest the suspected offender. This concern, which arises with violent crimes anywhere, already has been addressed through the use of “cross-deputized” tribal officers, who have received special training from federal, state or local governments and have the authority to arrest on behalf of the other jurisdiction. Such “cross-deputized” tribal officers have the authority to intervene in domestic violence situations and arrest as necessary, regardless of the defendant’s status.

Finally, it is important to recognize and reaffirm the tribes’ inherent sovereign authority to deal with such offenders in Indian Country through the traditional sanction of banishment.

Justice Systems.” The Report required substantial coordination among various federal agencies, tribes, and the public. Implementation of the plan is just beginning.

³⁶ It has been two years since Congress appropriated funds for the Tribal Civil and Criminal Legal Assistance Program, 25 U.S.C. 3651, et. seq., which is designed to strengthen and improve representation of indigent defendants.

³⁷ See Judge William C. Canby, Jr., *American Indian Law*, (5th ed.), pp. 172-78 (hereinafter “American Indian Law”); CRS Report at 2.

C. S. 1925’s expansion of “inherent” tribal authority to prosecute non-Indians is unprecedented and constitutionally dubious.

In its 1978 decision in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians.³⁸ In 1990 and 1993, the Court twice held that tribes have no inherent power to prosecute Indians who are not members of the tribe and that “such power . . . could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution.”³⁹ Congress responded by “recogniz[ing] and affirm[ing]” the “inherent” power of a tribe to prosecute non-member Indians, rather than by delegating such power subject to the constraints of the Constitution. A five-member majority of the Court, including only two members on the current Court, held in *United States v. Lara*, that Congress could “relax restrictions” on tribes’ “inherent legal authority” to permit them to prosecute non-member Indians.⁴⁰ The Court has never, however, held that tribes have inherent authority to prosecute non-Indians, or that a tribe may prosecute *any* citizen who has not consented to be governed by the tribe without full constitutional protections. Indeed, the Court in *Lara* specifically reserved the issue of whether the law at issue there violated the Constitution’s Due Process Clause by permitting a tribe to prosecute a non-member Indian without full constitutional safeguards.⁴¹

In his concurrence in *Lara*, Justice Kennedy took issue with the majority’s “surprising holding” that Congress could permit tribes to exercise “inherent tribal authority” over any citizen other than its own members, explaining that the Constitution “is based on a theory of original, and continuing, consent of the governed,” whose “consent” rests on the understanding that they will be governed by a Nation and a State to which the citizen owes duties *and* against which the citizen has rights. The tribes’ inherent authority to prosecute their own members is justified by the members’ consent to be governed by the tribe, but this rationale does not extend to citizens who have not consented to be governed by the tribe, but rather have consented to be governed by a Nation and a State that owe them constitutional rights.⁴² In his concurrence, Justice Thomas expressed doubt that Congress has authority to relax restrictions on tribes’ inherent authority to prosecute non-members.⁴³ Justices Souter and Scalia reiterated in dissent that “inherent” tribal power to prosecute non-members does not exist, and that such power could only be “delegated” by Congress.⁴⁴

According to the Congressional Research Service, it is not clear that today’s Supreme Court would agree that Congress may declare that tribes have inherent authority to prosecute

³⁸ 435 U.S. 191, 195, 210 (1978).

³⁹ See *Duro v. Reina*, 495 U.S. 676, 686 (1990); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

⁴⁰ *United States v. Lara*, 541 U.S. 193, 196 (2004).

⁴¹ *Lara*, 541 U.S. at 205, 208-09 (“Other defendants in tribal proceedings remain free to raise that claim should they wish to do so.”).

⁴² *Id.* at 212-13 (Kennedy, J., concurring).

⁴³ *Id.* at 214-26 (Thomas, J., concurring).

⁴⁴ *Id.* at 227-31 (Souter & Scalia, JJ., dissenting).

non-Indian citizens of the United States.⁴⁵ As the CRS explains, Congress may “not have authority to subject citizens to inherent tribal criminal authority,” though “it is possible that the courts would uphold tribal authority to try [non-Indian] defendants as a delegation of federal authority.”⁴⁶ Delegating federal authority would require the tribes to accord defendants full constitutional rights, whereas authority that arises from a tribe’s sovereign authority need not comply with the Constitution.⁴⁷

D. S. 1925 does not guarantee that non-Indians prosecuted in tribal court would be provided full constitutional rights.

Many proponents of S. 1925 assert that the bill guarantees full constitutional rights to non-Indians who would be prosecuted in tribal court under its special domestic violence criminal jurisdiction. This is not accurate because (1) the bill does not delegate federal authority to prosecute non-Indians along with the duty to provide constitutional rights, and does not state that non-Indians would be provided full constitutional rights; (2) the statutory rights set forth in ICRA, TLOA and S. 1925 fall short of full constitutional rights; and (3) the reality is that many tribes still are not complying with ICRA, much less the higher standards of TLOA, and that the writ of habeas corpus, upon which S. 1925 also relies, has been ineffective in enforcing these rights.

1. S. 1925 does not purport to guarantee the same constitutional rights to non-Indians prosecuted in tribal court as those provided defendants in state and federal court.

S. 1925, rather than delegating federal authority along with the duty to accord full constitutional protections, states that it “recognizes and affirms” the “inherent power” of the tribes to prosecute non-Indians, which means that the tribes need not comply with the Constitution. Moreover, S. 1925 does not state that tribal courts exercising special domestic violence jurisdiction must provide full constitutional rights. It states that the tribes shall provide (1) all rights under ICRA; (2) the right to a jury that reflects a fair cross section of “the community” and does not systematically exclude any distinctive group “in the community;” and (3) “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant.”⁴⁸

As the CRS notes, it is not clear what this latter phrase means, resulting in two possible interpretations: (1) that tribes would be required to guarantee all the rights contained in the Bill of Rights except for a grand jury, or (2) that tribes would merely be required to provide the rights

⁴⁵ See *Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act*, April 18, 2012 (hereafter “CRS Report”).

⁴⁶ *Id.* at 6-7.

⁴⁷ *Id.* at 7.

⁴⁸ S. 1925, Sec. 904.

set forth in ICRA and TLOA, “which exclude several protections under the U.S. Constitution.”⁴⁹ It would have been a simple matter to say that tribes are required to provide all rights contained in the Bill of Rights, but S. 1925 does not.

2. The rights described in ICRA, TLOA, and S. 1925 fall short of full constitutional rights.

The rights to due process of law and equal protection of the laws are fundamental to the fairness of any criminal proceeding. While ICRA has long provided that Indian tribes shall not deny these rights, as the Supreme Court has observed, “there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA’s due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-for-jot.”⁵⁰ “[T]he terms ‘due process’ and ‘equal protection’ are construed with regard to the ‘historical, governmental and cultural values of an Indian tribe.’ As such, these rights can function much differently than they do in federal courts.”⁵¹ Indeed, as shown in subsection 3, these provisions are often not honored.

The right to the effective assistance of counsel is fundamental as well. As the Supreme Court observed in *Gideon v. Wainwright* almost fifty years ago, “[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.”⁵² TLOA for the first time requires “effective assistance of counsel at least equal to that guaranteed by the United States Constitution,” and a “licensed” attorney. However, qualified counsel is not in fact available to most defendants in tribal court. In Arizona, for example, twenty of the State’s twenty-two tribes operate tribal courts,⁵³ but only fifteen provide legal representation for indigent criminal defendants.⁵⁴ Only the Navajo Nation expressly guarantees the right to appointed counsel,⁵⁵ but because only a small handful of attorneys are available to represent defendants in the numerous and far-flung Navajo courts, only a small portion of defendants receive representation. Many tribes allow non-lawyer “advocates” to represent criminal defendants, and the requirements for non-lawyer “advocates” practicing in a tribal court vary. To practice in the Navajo courts, a person must pass a bar exam. To practice in the Colorado River Indian Tribes, a person must merely purchase a business license. In the Gila River Indian Community, an

⁴⁹ *CRS Report* at 4, 7.

⁵⁰ *Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (internal citations and punctuation omitted).

⁵¹ *CRS Report* at 7.

⁵² *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (internal quotation marks omitted).

⁵³ Pascua Yaqui Public Defender, *Directory of Tribal Justice Systems Contacts in Arizona* (2007).

⁵⁴ *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.

⁵⁵ *Navajo Court Policy Policy on Appointment of Counsel and Indigency*.

“advocate” need only be a member of the tribe and have some knowledge of tribal codes to represent criminal defendants in tribal court.⁵⁶

The right to trial by an “impartial jury” is fundamental as well. This Sixth Amendment right has a “long historical pedigree” that “relied on a body of one’s peers to protect them against unrestrained and arbitrary government power.”⁵⁷ ICRA and TLOA do not provide a right to an “impartial jury,” but rather a “right, upon request, to a trial by jury of not less than six persons.” S. 1925 attempts to fix the problem with respect to non-Indians by requiring a participating tribe to provide the right to an “impartial jury” drawn from sources that “reflect a fair cross section of the *community*” and that “do not systematically exclude any distinctive group *in the community*, including non-Indians.”⁵⁸ But a tribal community by definition consists only of tribal members and not non-Indians. The ability of a tribal court to assemble a jury of one’s peers to try a non-Indian may not be possible, at least not without extensive changes to the structure of the tribe and the way it defines its community and jury pool.

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

To date, neither ICRA nor TLOA have been effective in guaranteeing fair treatment to Indian defendants in tribal courts. In ICRA, Congress counterbalanced the lack of appointed counsel with a cap on the sentences that tribal courts could impose, and 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; (3) denying an accused notice of the nature and cause of the accusation; (4) denying an accused compulsory process for obtaining witnesses in his favor; and (5) denying an accused a trial by jury of at least six persons “upon request.”⁵⁹

In TLOA, Congress authorized tribes to sentence above the one-year cap, but only on condition that they (1) afford the defendant “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;” (2) provide 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) require the presiding judge to be licensed to practice law and have “sufficient legal training to preside over criminal proceedings;” (4) make their criminal laws and rules publicly available before charging the defendant; and (5) maintain a recording of the trial proceeding.⁶⁰

All of these requirements are purportedly enforceable through a petition for a writ of habeas corpus in federal court.⁶¹

⁵⁶ See *Jackson v. Tracey*, No. CV-11-448-PHX-FJM (ECV) (D. Ariz.), Docket #20-5 at 19 (¶ 10).

⁵⁷ *CRS Report* at 12.

⁵⁸ S. 1925, Sec. 904 (emphasis supplied).

⁵⁹ 25 U.S.C. § 1302(a)(6), (8), (10).

⁶⁰ 25 U.S.C. § 1302(c).

⁶¹ 25 U.S.C. § 1303.

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. 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. Moreover, many tribes have effectively eviscerated ICRA's one-year cap through the practice of "sentence stacking," *i.e.*, charging defendants with several counts based on the same criminal act, trying them without a lawyer, and imposing sentences in excess of the one-year cap.⁶²

Here are several specific examples from recent years:

- 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 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 2008, a tribal defendant was tried without a lawyer or a jury, and sentenced to two and a half years in prison, 250% of the ICRA "maximum."
- 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 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 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.
- 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 at issue in the case over which he was presiding.

⁶² See *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005) (holding this practice to be unlawful); *Miranda v. Anchondo*, --- F.3d ---, 2012 WL 360767 (9th Cir. Feb. 6, 2012) (holding this practice to be lawful).

Proponents of S. 1925 argue that even if tribal courts violate a defendant's rights under ICRA, the right to a federal habeas corpus petition provides an effective "safety net." The above examples, all of which occurred while there was a statutory right to federal habeas, show that federal habeas relief is not an effective remedy in practice. There are many reasons why habeas corpus provides a woefully insufficient remedy, including:

- People living on reservations typically have few resources and limited education, and are thus unlikely to understand what habeas corpus relief means or how to pursue it. This problem is not solved even for represented defendants, as many tribal defenders and all non-lawyer tribal "advocates" cannot practice in federal court because they are not licensed by a state or because the tribe's 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 petition. Indeed, as noted above, one tribal public defender was threatened with termination if he helped a defendant file a petition.
- Defendants must "exhaust" their legal remedies in tribal court before they can proceed with a habeas corpus petition in federal court. 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" that the inmate must "exhaust." Even when the tribe has a functioning appellate court, the process can take months or even years, such that by the time the inmate "exhausts" his tribal remedies, he has served his sentence, mooting the habeas petition.
- Even under the best of circumstances, habeas corpus is an "after-the-fact" remedy. It can address only one case at a time and provide relief to only a single individual. It cannot undo the unlawful incarceration or related havoc wreaked on a defendant and his or her family, it cannot prevent such problems for occurring again in the future, and it cannot correct systemic problems.

In short, regardless of what Congress might put on paper, many tribes have been unable or unwilling to provide adequate protections to the rights of criminal defendants prosecuted in their courts, and the "remedy" of a federal habeas corpus petition has been largely illusory. Congress should seek to ensure that tribal justice systems are equipped to protect the rights of defendants before subjecting a new category of citizens, who have not consented to be governed by the tribes, to deprivation of their constitutional rights in tribal court. H.R. 4970 gets it right here, S. 1925 does not, and the House should reject any attempt to include these provisions in the final legislation.

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Conclusion

In raising these concerns, we do not intend to dispute that the concerns at which H.R. 4970 is directed are serious. We firmly believe, however, that the rights of individual citizens are equally weighty, and deserve equal consideration. We believe that the concerns at which H.R. 4970 is directed can be addressed without unconstitutionally or unnecessarily expanding crimes and punishment in federal court, and without subjecting a new category of citizens to deprivation of constitutional rights in tribal court.

Respectfully,




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