



# Department of Justice

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**STATEMENT OF  
TRACY TOULOU  
DIRECTOR  
OFFICE OF TRIBAL JUSTICE**

**BEFORE THE  
COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE**

**FOR A HEARING ENTITLED**

**“S. 2785, the TRIBAL YOUTH AND COMMUNITY PROTECTION ACT of  
2016, S. 2916, a BILL TO PROVIDE THAT THE PUEBLO OF SANTA  
CLARA MAY LEASE FOR 99 YEARS CERTAIN RESTRICTED LAND,  
and S. 2920, the TRIBAL LAW AND ORDER REAUTHORIZATION ACT  
OF 2016”**

**PRESENTED  
MAY 18, 2016**

**Testimony of**

**Tracy Toulou  
Director, Office of Tribal Justice  
U.S. Department of Justice**

**Before the  
Committee on Indian Affairs  
United States Senate**

**For a Hearing Entitled  
“S. 2785, the Tribal Youth and Community Protection Act of 2016, S. 2916, a bill  
to provide that the Pueblo of Santa Clara may lease for 99 years certain  
restricted land, and S. 2920, the Tribal Law and Order Reauthorization Act of  
2016”**

**Wednesday, May 18, 2016**

On behalf of the United States Department of Justice, I want to thank Chairman Barrasso, Vice Chairman Tester, and the members of this Committee for focusing attention on the critically important issues of protecting Native American children and promoting public safety in Indian country. My name is Tracy Toulou, and I am the Director of the Department of Justice’s Office of Tribal Justice. I also want to thank you for holding this hearing on pending legislation including S. 2785, the Tribal Youth and Community Protection Act of 2016. Protecting Indian families from violence in their homes, regardless of whether it is committed by Indians or non-Indians, has been a central concern of our Department for many years. Our conversations and consultations with tribes after the passage of the Tribal Law and Order Act of 2010, or TLOA, and the Violence Against Women Reauthorization Act of 2013, or VAWA 2013, have only underscored the urgent public-safety issues facing tribal communities. The Department remains dedicated to working with tribes to identify and implement tribally driven solutions to these problems. My testimony today will address S. 2785 and the specific issues that gave rise to it, as the Department of Justice is still in the process of formulating views on the other bills that are the subject of today’s hearing.

S. 2785 primarily would amend Section 1304 of Title 25 of the United States Code, which is part of the Indian Civil Rights Act of 1968, as amended. Congress enacted Section 1304 as the tribal-criminal-jurisdiction provision of VAWA 2013. We commend the entire Committee, and Senators Tester and Franken in particular, for their willingness to listen to Indian tribal leaders and to take action to improve and strengthen VAWA 2013 and Section 1304.

### Domestic Violence and the Jurisdictional Gap in Indian Country

Before describing in detail the Department's views on Section 1304, some background may be helpful. Criminal jurisdiction in Indian country generally is shared among the federal, state, and tribal governments, according to an extraordinarily complex matrix that depends on the nature of the crime, whether the crime has victims or is victimless, whether the defendant is Indian or non-Indian, whether the victim is Indian or non-Indian, and sometimes other factors as well. In 1978, in *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court held that, absent express Congressional authorization, tribes lack jurisdiction over crimes committed by non-Indians. Prior to VAWA 2013, even violent crimes committed by a non-Indian husband against his Indian wife, in the presence of their Indian children, in their home on the Indian reservation, could not be prosecuted by the tribe. Instead, these crimes fell within the exclusive criminal jurisdiction of the United States or, in some circumstances, of the state.

In the decades following *Oliphant*, too many cases of domestic violence and dating violence committed by non-Indians against their Indian spouses and dating partners went unprosecuted and unpunished. This was particularly true for misdemeanor crimes of domestic violence, which, absent a response from law enforcement, often escalated to domestic-violence felonies within weeks or months.

As a result of this jurisdictional gap, as well as other factors, Native American women have suffered some of the highest rates of violence at the hands of intimate partners in the United States. A recent National Institute of Justice analysis of 2010 survey data collected by the Centers for Disease Control and Prevention found that more than half (55.5 percent) of American Indian and Alaska Native women have experienced physical violence by an intimate partner in their lifetimes. Among these victims, 90 percent have experienced such violence by a non-Indian intimate partner. Over their lifetimes, American Indian

and Alaska Native women are about five times as likely as white women to have experienced physical violence at the hands of an intimate partner who is of a different race.

### The Department's 2011 Legislative Proposal

In 2011, the Justice Department took the unusual step of drafting and proposing to Congress legislation responding to this crisis. The Department's proposed legislation was designed to decrease domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior. Part of the legislation amended the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding.

Another part of the legislation focused on tribal, rather than federal, prosecution. Specifically, it proposed to amend the Indian Civil Rights Act by recognizing tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate certain protection orders, in Indian country.

While the Department focused tightly on the problems of domestic violence and dating violence in crafting this proposed legislation, the broad principles undergirding the proposal were clear: The division of labor between federal and tribal prosecutors should depend more on the nature and seriousness of the crimes and less on the Indian or non-Indian identity of the victim or of the defendant. U.S. Attorneys' Offices and the FBI will have the greatest positive impact on public safety in Indian country when they can concentrate on the most dangerous crimes. And local tribal prosecutors can be most effective when they focus on offenses that, if left unaddressed, can escalate to more dangerous crimes.

## VAWA 2013 and Special Domestic Violence Criminal Jurisdiction

Following the Department's 2011 legislative proposal, this Committee held hearings and received extensive testimony on these issues. Its members ultimately played key roles in enacting, as part of VAWA 2013, the law that is now codified at 25 U.S.C. 1304. Section 1304 recognizes and affirms tribes' inherent power to exercise "special domestic violence criminal jurisdiction," or SDVCJ, over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. For the first time in decades, tribes therefore could prosecute non-Indian perpetrators of domestic violence and dating violence.

In broadening the set of persons who could potentially be prosecuted by tribes, Congress also carefully delineated the scope of tribal authority recognized by VAWA 2013. First, Congress included two important exceptions to tribes' exercise of SDVCJ. Tribes may exercise SDVCJ only if the defendant resides in the tribe's Indian country, is employed in the tribe's Indian country, or is a spouse, intimate partner, or dating partner of a member of the tribe or of an Indian who resides in the tribe's Indian country. Tribes also may not exercise SDVCJ over an offense with a non-Indian victim. These provisions ensure that the defendant has adequate ties to the tribe and its reservation and that this jurisdiction does not include cases involving only non-Indians, which typically fall within a state's exclusive criminal jurisdiction.

Second, Congress effectively ensured that the protections for a defendant's federal rights and civil liberties would be as robust in tribal court as they would be if the defendant were prosecuted in any state court. Specifically, in any case in which a term of imprisonment of any length may be imposed, the defendant is afforded all applicable rights under the Indian Civil Rights Act of 1968, all rights applicable to defendants charged with felony offenses under TLOA, and also the right to trial by an impartial jury chosen from a jury pool that reflects a fair cross-section of the community, including both Indians and non-Indians.

Third, to give tribes time to prepare to meet the requirements of the statute, Section 1304 generally did not take effect until March 7, 2015, two years after VAWA 2013 was signed into law by President Obama. In the interim, VAWA 2013 established a voluntary Pilot Project authorizing tribes to commence exercising SDVCJ on an accelerated basis, but only if the tribe could establish to the Attorney General's satisfaction that it would fully protect defendants' rights.

Once the two-year Pilot Project concluded, other tribes were authorized to exercise SDVCJ without seeking the Attorney General's approval.

### The Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

After enactment, the Department moved quickly to implement the Pilot Project, which we recognized would lay the groundwork for the success of SDVCJ in general. After consulting with tribal officials and requesting public comment, on November 29, 2013, the Department published a final notice establishing procedures for tribes to request accelerated designation, establishing procedures for the Attorney General to act on such requests, and soliciting such requests from tribes. Two months later, on February 6, 2014, the Department of Justice announced that the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Confederated Tribes of the Umatilla Indian Reservation in Oregon were selected for the Pilot Project. On March 6, 2015, the Department announced the designation of two additional pilot tribes, the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana.

The three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period from February 2014 through March 2015. In this first year of implementation, the three pilot tribes had a total of 27 SDVCJ cases involving 23 separate offenders. Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution, and 1 offender was acquitted after a jury trial in tribal court.

Although these tribes moved swiftly to implement SDVCJ, they also acted with deliberation. They worked closely with their local United States Attorneys' Offices to identify which cases were best prosecuted by the tribes and which were more suitable for federal prosecution, with the common goal of holding offenders accountable and keeping tribal communities safe. And not one of their SDVCJ non-Indian defendants petitioned for habeas corpus review in federal court, which is a testament to the tribes' ability to safeguard the rights of all defendants in their tribal courts.

Statistics from the individual Pilot Project tribes reveal that many SDVCJ defendants have long histories with the police, underscoring how VAWA 2013 has empowered tribes to respond to long-time abusers who previously had evaded justice. The Pascua Yaqui Tribe reported that their non-Indian defendants had at least 80 documented tribal-police contacts, arrests, or reports attributed to them over the past four years. Similarly, the Tulalip Tribes reported that their non-Indian defendants had at least 88 documented tribal-police contacts, arrests, or reports in the past.

### Ongoing Implementation of VAWA 2013 by Tribes and the Department

During the course of consultation about how to structure the Pilot Project, tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes. With these views in mind, in June 2013, the Department established the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction, or ITWG.

Approximately 45 tribes have voluntarily joined the ITWG, sharing their experiences implementing or preparing to implement SDVCJ, attending six in-person meetings, and participating in numerous webinars on subjects such as jury pools and juror selection, defendants' rights, victims' rights, and prosecution skills. The Department is supporting the ITWG with training and technical assistance, including an award by its Office on Violence Against Women to the National Congress of American Indians to support the ITWG's ongoing work.

Since the end of the pilot period, we understand that five more tribes have implemented SDVCJ, including two in the last two months. In the ten communities that have now implemented SDVCJ, tribal governments are working to end impunity for non-Indian abusers and to bring safety and justice to Native American victims. Together, as of February 2016, the implementing tribes reported having made a total of 51 SDVCJ arrests (involving 41 separate offenders), resulting in 18 guilty pleas, 5 referrals for federal prosecution, 1 acquittal by jury, and 12 dismissals, with 13 cases pending.

Just as the implementing tribes have been working to hold non-Indian abusers accountable, the Department has stepped up prosecutions of felony-level domestic-violence offenders in Indian country. Since the passage of VAWA 2013, our United States Attorneys have been making good use of their new ability to seek more robust federal sentences for certain acts of domestic violence in Indian

country, including the ten-year offense for assaulting an intimate partner by strangling or suffocating. Over the past three years, federal prosecutors have indicted more than 100 defendants on strangulation or suffocation charges.

Based on reports from tribal members of the ITWG, the Department anticipates that many more tribes will choose to implement SDVCJ in the coming year. We know, however, that tribes cannot be expected to shoulder this responsibility without the support of the federal government. To this end, United States Attorneys' Offices will continue to collaborate with tribes that exercise this jurisdiction, and the Department will continue to support peer-to-peer technical assistance to tribes. In addition, by the end of this fiscal year, the Office on Violence Against Women anticipates announcing awards under its new Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction program.

#### Gaps in Coverage of Special Domestic Violence Criminal Jurisdiction

Although tribal efforts to implement Section 1304 have been impressive, actual tribal experience prosecuting cases under Section 1304 has revealed three significant gaps in the federal law. Our reading of S. 2785 is that it is intended principally to address these gaps. While we applaud that effort, we believe it is important that any legislation effectively and precisely target the areas of greatest need. We would be happy to work with the Committee's members and staff to refine some of the bill's language to achieve that goal.

First, there has been some unfortunate confusion in the field about the scope of conduct covered by Section 1304's definitions of "domestic violence" and "dating violence." This confusion was exacerbated by dicta in footnotes in the majority and concurring opinions in a 2014 U.S. Supreme Court case, *United States v. Castleman*. As a result, there is a need to clarify whether a tribe can prosecute a non-Indian whose acts against an Indian spouse or partner arguably would fall short of constituting "violence" in a nondomestic context, but nonetheless use a sufficient degree of force to support a common-law battery conviction. Moreover, because tribes have been cautious not to exceed their authority under Section 1304, implementing tribes' prosecutors have hesitated to prosecute a non-Indian who attempts or threatens to cause his Indian spouse or partner bodily injury, without causing physical injury. In a real-world example of this, a non-Indian boyfriend, in a highly intoxicated state, attempted to punch his



Indian girlfriend but missed and fell to the ground. Concerned that a case with no actual physical contact would not meet the definition of “domestic violence” in Section 1304, the tribe declined to prosecute. The defendant later returned to assault his victim again — and was arrested again by the tribe.

Given this uncertainty, the Department recommends legislation clarifying that Section 1304 covers the use, attempted use, or threatened use of physical force against the person or property of the victim, including any offensive touching of the victim (consistent with the common-law crime of battery). It appears that the language S. 2785 proposes to add to Section 1304(a) was intended to achieve this result, but it may inadvertently sweep in a far broader range of criminal conduct, including acts that do not even involve physical force (or an attempt or threat to use force). The Department would be glad to provide technical drafting assistance to ensure that this provision is properly tailored.

The second gap in the law involves Indian children. All too often, a husband or boyfriend who assaults or batters his Indian wife or girlfriend also assaults or abuses her children during the same incident. Yet Section 1304 allows the tribe to prosecute only the former crime (committed against the wife or girlfriend) and not the latter crime (committed against the children). In these circumstances, the only effective way to hold the perpetrator accountable for all his misconduct, including his crimes against the children, is to prosecute him federally, rather than tribally. In one example from a Pilot Project tribe, a non-Indian boyfriend, after a prolonged methamphetamine binge, forced both his Indian girlfriend and her child to sit in a chair while he threw knives at them. Given the tribe’s inability to prosecute the defendant for crimes committed against the child, as well as the severity of the conduct, the tribe referred the case for federal prosecution.

The Department believes that Congress should close this gap in the law as well. And the Department would welcome the opportunity to work with the Committee to make sure that this fix is narrowly tailored to the circumstances we have just described — where the crime against a spouse, intimate partner, or dating partner goes hand-in-hand with a crime against the victim’s children.

The third gap in the law, exposed by practical experience, is that it does not clearly recognize that tribes exercising SDVCJ have the authority to protect the tribal law-enforcement officers, prosecutors, judges, and courtroom officials who administer justice. For example, there is uncertainty about a tribe’s authority to charge an SDVCJ offender for resisting arrest by a tribal police officer. In one case, an SDVCJ defendant attempted to escape mandatory court appearances and

physically struck a tribe's bailiff in tribal court. Obviously, this sort of misconduct is a direct affront to the tribe's power and practical ability to successfully prosecute domestic- and dating-violence crimes under Section 1304.

The Department therefore believes that Section 1304 should be amended to protect tribal criminal-justice officers and employees from crimes that directly frustrate the successful arrest, detention, and prosecution of SDVCJ defendants and the adjudication of their criminal cases. This appears to be the intended focus of S. 2785's proposal for new Sections 1304(a)(12) and 1304(c)(3). The Department would be glad to provide the Committee with technical drafting assistance to sharpen the focus of these provisions, as well.

At this time, the Department would recommend against expanding the universe of potential tribal-court criminal defendants, although we fully recognize the terrible impact of drugs on Native American communities. For now, we believe Congress's focus instead should be to empower tribal criminal-justice systems to deal strongly and appropriately with all persons who are already subject to tribal criminal jurisdiction under Section 1304.

As federally recognized Indian tribes, usually with financial support from Congress and the federal government, continue to build their capacity to effectively enforce their own criminal laws, Congress may well choose to expand the universe of potential criminal defendants in tribal courts, and also to expand the sentencing authority of those courts. Soon, it may make sense to vindicate the broad principles underlying VAWA 2013 and Section 1304 by expanding tribal criminal jurisdiction to cover additional non-Indian perpetrators, perhaps starting with those offenders who abuse Indian children (regardless of whether they also are abusing a spouse or intimate partner) and then considering other offenders, such as perpetrators of sexual assault, stalking, and sex trafficking, and criminals who bring illegal drugs into tribal communities.

But today, less than 15 months after the effective date of VAWA 2013, the Department believes the most important and timely legislative reforms should focus instead on clarifying and expanding tribal prosecutors' tools for bringing to justice the defendants who are already within the tribe's jurisdiction.

We thank the Committee for its willingness to undertake this important project. And we look forward to working with you and your staff as you shape properly targeted language to accomplish our common objectives. I will be happy to answer any questions you may have.