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Beyond the Reservation: Multijurisdictional Issues Affecting Tribal Communities

In This Issue

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Introduction

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While American Indians and Alaska Natives are citizens of the United States, they also maintain distinct citizenships, cultural values, traditions, beliefs, and identities. Understand, also, that these values, traditions, and beliefs provide for a different mode of thought and communication that may be unfamiliar to non-Indians.

Indian Tribes have a unique legal relationship with the federal government. The recognition of Tribes as sovereign nations in the U.S. Constitution and in historic treaties that the federal government signed with many Indian Tribes are the basis of this relationship. Therefore, the relationship between the federal government and Indian Tribes is a political one based on this historic and evolving relationship between sovereign governments—not on the race or ethnicity of Native Americans.

Either a treaty, statute, executive or administrative order, or dealing with the Tribe as a political entity establishes the federal recognition of an Indian Tribe. The Department of the Interior has published regulations creating an administrative process, known as the federal acknowledgment process, through which Tribes may become federally recognized. This can be found in 25 C.F.R. Part 83.[1] The Office of Federal Acknowledgment, within the Office of the Assistant Secretary for Indian Affairs, implements this administrative process and recommends whether to recognize a Tribe. The Assistant Secretary for Indian Affairs makes the final acknowledgment decision. To secure such recognition through the federal acknowledgment process, a petitioning group of American Indians must satisfy seven criteria, including showing that the group has comprised a distinct community and has maintained political influence or authority over its members from 1900 to present.

Federal recognition is usually a prerequisite for a Tribe's participation in federally administered Indian programs and services and for the United States to hold land in trust for the Tribe.

Legally, Indian Tribes that are federally recognized are distinct from those that are not. Federal recognition signifies that the federal government acknowledges the political sovereignty and Indian identity of a Tribe. From that recognition flows the obligation to conduct dealings

[1] 25 C.F.R. §§ 83.1–83.62.

with that Tribe's leadership on a government-to-government basis.

There are 574 federally recognized Indian Tribes in the United States. This includes over 220 Alaska Native villages, which are recognized Tribes in the same manner as those Tribes in the Lower 48.[2] There are Tribes currently seeking recognition through the administrative process or by federal statute, so these numbers may increase over time. Regardless of how it was recognized, each Tribe has its own unique history and culture.

One of the most significant issues for Indian Tribes is the safeguarding of Tribal sovereignty or self-governing authority. Tribal sovereignty is recognized as being inherent, meaning that the traditional authority of Tribal leaders to govern their people and lands existed long before their relationship with the federal government. Indian treaties were based on the sovereign power of Indian Tribes to enter into agreements on a government-to-government basis with the United States. Because it is inherent, Tribal sovereignty is something Indian Tribes have retained, not something granted to them by the federal government.

Tribal sovereignty was reaffirmed in the landmark cases of *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, where the Supreme Court of the United States (Supreme Court), in opinions penned by Chief Justice John Marshall, held that Tribes retained a nationhood status and inherent powers of self-governance.[3] These cases, referred to as the Marshall Trilogy, are still valid law and form a large part of the foundation of present-day Indian law.[4]

As part of the sovereign status of Indian Tribes, their Tribal governments generally have the authority to do the following:

1. define their Tribal membership criteria;
2. enact civil, criminal, and regulatory legislation;
3. enforce Tribal law using law enforcement;
4. assert jurisdiction over their people and lands via Tribal courts; and
5. tax Indians and non-Indians engaged in economic activity on Tribal lands.

These rights are in effect unless waived by a Tribe, or modified by treaty, statute, or Supreme Court decision.

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[2] The "Lower 48" refers to the 48 contiguous United States, meaning those states that share a land border with each other, excluding Alaska and Hawaii.

[3] Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

[4] *Marshall Trilogy,* Univ. of Alaska Fairbanks, https://www.uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php (last visited Aug. 11, 2025).

The federal government has a government-to-government relationship with federally recognized Tribes. What does this mean? The government-to-government relationship between the federal government and Indian Tribes is rooted in the historic signing of treaties. The U.S. Constitution established the exclusive power of the Congress to regulate commerce with Indian Tribes in Article 1, § 8, Clause 3, known as the "Indian Commerce Clause," although congressional authority to engage with Indian Tribes is not limited to commercial matters.[5]

The federal government's exclusive relationship with Tribes was further solidified by the passage of multiple laws, called Trade and Intercourse Acts, which prohibited states from encroaching upon or purchasing land from Tribes without congressional approval.[6] Later, the Supreme Court decision in *Worcester v. Georgia* also served to establish the principle that the states are specifically excluded from the relationship between two sovereign nations.[7] The federal obligation to conduct what is known as "government-to-government" consultation with federally recognized Indian Tribes springs from this exclusive relationship. The Canons of Construction in federal Indian law also established that treaties must be interpreted as Indian Tribes would have understood them (that is, to the benefit of Tribes).[8] Subsequent court cases furthered this concept to apply to federal statutes and regulations with provisions specific to Tribes so that, should there be any ambiguity, the statute or regulation must be interpreted in favor of Tribes.[9]

Since the 1970s, U.S. presidents have consistently reaffirmed the primacy of the government-to-government relationship between the federal government and federally recognized Indian Tribes.

The public safety challenges in Indian country vary widely from district to district—and from Tribe to Tribe—depending on jurisdictional issues, geography, Tribal cultures, and a myriad of other factors. The Department of Justice (Department) recognizes that in many cases the Tribal government is best positioned to effectively investigate and prosecute crime occurring in its own community. That is why the Department has supported congressional efforts to increase Tribal courts' legal authority to address crime in their own jurisdictions, such as the expansion

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[5] U.S. Const. art. I, § 8, cl. 3.

[6] *Trade and Intercourse Acts*, EBSCO, https://www.ebsco.com/research-starters/history/trade-and-intercourse-acts (last visited Aug. 11, 2025).

[7] 31 U.S. 515 (1832).

[8] *See* Meredith Harris, *Analyzing the Implications of the Supreme Court's Application of the Canons of Construction in Recent Federal Indian Law Cases*, 10 Am. Indian L. J. 1, 2 (2022).

[9] *Id.*

of Tribal sentencing authority in the Tribal Law and Order Act of 2010 and the ability to prosecute non-Indians provided in the Violence Against Women Reauthorization Acts of 2013 and 2022.[10]

This legal backdrop sets the stage for this issue of the *Department of Justice's Journal of Federal Law and Practice* (*DOJ Journal*). Each of the articles in this issue of the *DOJ Journal* showcase Tribes navigating significant legal issues in a multijurisdictional arena. While many think of issues in Tribal communities as confined to the reservation boundaries, the reality is that many Tribes have developed economies and criminal and civil justice systems that interface daily with state and federal governments. This issue of the *DOJ Journal* deals with multijurisdictional issues, including the enforcement of Tribal arrest warrants off-reservation; Missing or Murdered Indigenous Persons; the ability to use Tribal court convictions in federal habitual domestic assault cases; the exploitation of Indigenous children across the Mexican border; and Tribal courts in Alaska being able to prosecute non-Indians for certain crimes. These articles highlight some (but not all) of the many important multidisciplinary and multijurisdictional legal issues in 2025 that extend beyond the reservation.

[10] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2261 (codified as amended at 25 U.S.C. § 1302); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (codified as amended at 25 U.S.C. § 1304); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. 8, 136 Stat. 49, 840 (codified as amended in scattered sections of 25 U.S.C.).

Achieving Public Safety Within Transboundary Tribes: Challenges and Paths Forward

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I. Introduction

For prosecutors and law enforcement assigned to Indian country, jurisdiction can be a challenging maze of factors, complicated by boundaries that may have been set by haphazard processes. Borders on transnational boundaries further complicate the complexity of this challenge. This article examines the challenges of achieving public safety when efforts are hampered by a history of mistrust and muddled by the boundaries of bordering nations and the numerous law-enforcement agencies that serve them. It also offers examples of success among sovereign nations in pursuit of joint public safety.

II. The Kootenai Tribe of Idaho

The ʔaq̓anqmi Ktunaxa, or Kootenai Tribe of Idaho (Kootenai Tribe or Tribe), is one of the six modern governments of the Ktunaxa Nation.[1] The Kootenai Tribe's history is offered here to place the issues affecting the Tribe and the entire Ktunaxa Nation in context, with a specific emphasis on those directly related to the international boundary between

[1] The other five governments are the First Nations of Yaqan nukʔiy, Yaq̓it ʔaƛknuqǂ i̓it, ʔaq̓am, ʔakisq̓nuk, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Canada and the United States. The intent is to show how communication, collaboration, and strong partnerships between Indigenous and non-Indigenous governments result in real solutions. It can also lead to true reconciliation between governments and communities, overcoming historical mistrust between entities.

A. The Creation story of the Kootenai Tribe of Idaho

Kootenai Elders and oral historians say much of their early history, including Creation and the beginning of time, is uniquely Kootenai and so sacred that it cannot be shared with outsiders. They have consented to provide the following information.

* * *

There is a Creator who made the world. The Creator-Spirit was in everything, and there were no people. Then He decided to make human beings. He made different people for different places. He made the Kootenai people for this place.

He told us Kootenais our rules, our Commandments. Here is part of what He said:

"I am your Kwiłqa Nupika, your supreme being.[2] I have no beginning and no end. I have made my Creation in my image—a circle—and your Kootenai people are within that circle along with everything else in my Creation. Remember that everything in my Creation is sacred and is there for a purpose. Treat it well.

"Take only what you need, and waste nothing.

"Do not commit murder.

"Respect and help one another.

"Cherish your children and your old ones—they are your future and your past.

"Your word must always be good. Never lie, never break a promise.

"At all times, pull together—act with one heart, one mind."

Finally, Kwiłqa Nupika told us His most important commandment. He said:

"I have created you Kootenai people to look after this beautiful land, to honor and guard and celebrate my Creation here, in this place. If you do that, this land will meet all your needs. Everything necessary for you and your children to live and be happy forever is here, as long as you keep this Covenant with me. Will you do that?"

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[2] The spelling in *Century of Survival* is Quilxka Nupika but has been modified here to reflect the new Ktunaxa alphabet. *See* Kootenai Tribe of Idaho, Century of Survival: A Brief History of the Kootenai Tribe (2d ed. 2010).

And those first Kootenai people promised to keep the Covenant with the Creator. So, He put us here.

And that is how time began.[3]

* * *

B. History of the Kootenai Tribe of Idaho[4]

The Ktunaxa Nation was composed of several bands that inhabited all Ktunaxa Territory—what is now northwest Montana, north Idaho, northeast Washington, southeast British Columbia (B.C.), and southwest Alberta. The bands were separately governed but interacted often and intermarried on a regular basis. Each band was responsible for honoring the Covenant with the Creator in its area of primary responsibility within the overall Ktunaxa Territory.

The Kootenai Tribe of Idaho was responsible for the area above Kootenai Falls, reaching to the Yaak Valley in the state of Montana in the east, Lake Pend Oreille and Priest Lake in the state of Idaho to the south and west, and to the Kootenay Lake delta in B.C. in the north. The Tribe was composed of several villages and family groups and closely related to Yaqan nuk̓iy.

When the International Boundary Commission arrived in the Ktunaxa Territory, the surveyors became lost and ran out of food. The Ktunaxa assisted them in traveling around the territory, showing them safe trails and providing food. Unfortunately, the international boundary between the United States and Canada was established that drew a line through the middle of Ktunaxa Territory.[5]

In 1855, the Kootenai, Salish, and Flathead people were called to a Treaty session in Hellgate, Montana, for the purpose of ceding territory to the U.S. government.[6] The Salish and Upper Kootenai Tribes entered the Treaty, which resulted in cession of most Ktunaxa Territory and creation of the Flathead Reservation for the newly created Confederated Salish and Kootenai Tribes.[7] The Kootenai Tribe of Idaho did not participate

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[3] *See id.*

[4] This history is based on *Century of Survival*, historical documents in the Tribe's possession, and discussions one of the authors has had with Ktunaxa elders, Tribal leaders, and Tribal citizens during more than 25 years he has represented the Tribe. *See id.*

[5] The site of present-day Porthill/Rykerts Land Ports of Entry was a historic village and meeting site of the Ktunaxa. When they established the international boundary, the United States and Canada reportedly dismantled the village.

[6] Treaty with the Flatheads, Confederated Salish and Kootenai Tribes of the Flathead Reservation-U.S., July 16, 1855, 12 Stat. 975.

[7] *Id.*

in the negotiations nor sign the Treaty. Notwithstanding the Tribe's absence, the Treaty ceded territory, including the Tribe's portion of Ktunaxa Territory.[8]

Upon recognizing the Kootenai Tribe of Idaho was separate and distinct from the Kootenai that signed the Treaty, the United States' Indian agents traveled to Bonners Ferry to discuss the impact of the Treaty.[9] During the meetings, the Indian agents attempted to force the Tribe to relocate to the Flathead Reservation. Some members accepted, while others moved across the international boundary into B.C. and joined those villages.

The remainder of the population did not move and held off the Indian agents for several years with excuses (for example, it was too wet to travel, the hunting was not good enough to have adequate food for the trip, and so on). In 1908, the Indian agents finally agreed the Kootenai Tribe could remain in the area, and they were provided allotments along the Kootenai River and in the uplands.[10]

Although Tribal members continued to hunt, fish, and gather throughout their territory, life became increasingly difficult. Private ownership of property throughout the valley and dwindling harvest opportunities decreased the hunting and fishing in the area. For the most part, the United States refused to provide many services to persuade the Kootenai to move to the Flathead Reservation. In the 1930s, the federal government took part of a Kootenai Allotment and provided a day-school and housing at the area known as the Mission.[11]

The ensuing years became even more difficult for the Tribe as the United States continued to provide little-to-no services. Jobs for Kootenai were scarce, and the population dwindled to around 67 members.[12] The housing could not be upkept, which resulted in an elder freezing to death in his government-provided home.

In response to this hardship, on September 20, 1974, the Kootenai Tribe of Idaho declared war on the United States.[13] The people made

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[8] *Tribal History*, Kootenai Tribe of Idaho, https://www.kootenai.org/pages_AboutUs/tribalHistory.html (last visited June 19, 2025).
[9] *Id.*
[10] Mont. Off. Of Pub. Instruction, Flathead Reservation Timeline 5 (2017).
[11] *Id.* at 6.
[12] *Kootenai War of 1974*, Kootenai Tribe of Idaho, https://www.kootenai.org/pages_AboutUs/kootenaiWar.html#:~:text=On%20September%2020%2C%201974%20in,12.5%20acres%20belonging%20to%20it (last visited June 19, 2025); *Kysuk Kyikyut (Welcome)*, Kootenai Tribe of Idaho, https://www.kootenai.org (last visited June 20, 2025).
[13] *Kootenai War of 1974*, *supra* note 12; *Kysuk Kyikyut (Welcome)*, *supra* note 12.

sure everyone knew it was a peaceful war with no guns or violence, and through conversations with the Boundary County Sheriff and the local communities, it remained that way. "Roadblocks" manned by Kootenai people asked drivers to stop and purchase "war bonds" and to learn about the issues facing the Kootenai Tribe.

The publicity from the War of 1974 got the United States' attention. The government provided new houses, roads, sewer, water, and electricity. A ceasefire was reached, and the Kootenai Tribe began its long road to self-determination.[14]

The Kootenai Tribe prides itself on its self-governance and self-determination. The Tribe has entered into Self-Governance Compacts under the Indian Self-Determination and Education Assistance Act with the Bureau of Indian Affairs and Indian Health Service to implement programs, services, functions, and activities the United States is otherwise obligated to provide the Tribe.[15] The Tribe has a robust government, with many departments implementing the Tribe's programs and services, including a Tribal Court, Police Department, Fish and Wildlife Department, and Health Department.[16]

The Kootenai Tribe now has 168 Tribal citizens, approximately 70% of whom live in their territory.[17] The Kootenai Indian Reservation can be seen in Figure 1. Most importantly, the Kootenai Tribe continues to keep its promise to Kwiɬqa Nupika. The Covenant remains the supreme law that guides every decision of the Tribal government.

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[14] Technically, there is only a ceasefire. Thus, War Bonds are not yet due and payable.
[15] Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 5301, 88 Stat. 2203 (1975).
[16] *Kysuk Kyikyut (Welcome)*, *supra* note 12.
[17] *Id.*

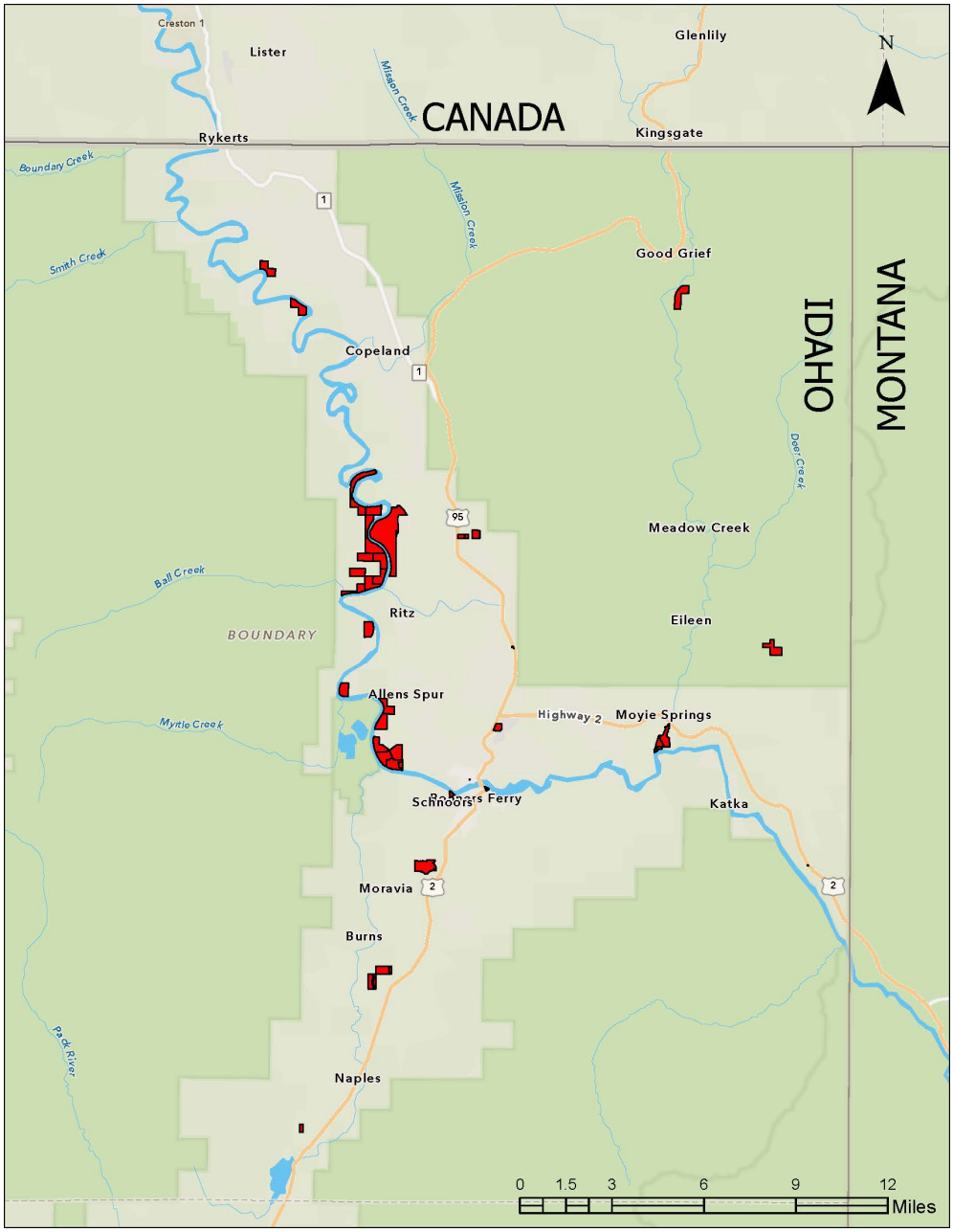

Figure 1: Kootenai Indian Reservation[18]

[18] *First Nation Profiles Interactive Map*, Gov't of Can., https://geo.sac-isc.gc.ca/cippn-fnpim/index-eng.html (last visited June 18, 2025). *See also Ktunaxa ʔamakʔis: Traditional Territory of the Ktunaxa Nation*, Ktunaxa Lands & Res. Agency, https://www.ktunaxa.org/wp-content/uploads/Traditional_Territory_Av2_02.png (last visited June 18, 2025) (the Ktunaxa Nation's map of its Territory).

III. Law-enforcement contacts in border communities

Living near an international border presents unique challenges. For example, the closest grocery store, school, or gas station may be in another country. For Indian people, there are additional factors to consider. For example, the rights to cross the border are different. American Indians born in Canada have the right to enter the United States and are exempt from the U.S. Immigration and Nationality Act.[19] American Indians born in the United States do not yet have a reciprocal right to enter Canada. Some Tribal citizens born in the United States also have Indian Status in Canada that recognizes their rights to enter Canada.[20] As a result, there is a great deal of lawful travel across the international boundary for a variety of purposes, including work, study, prayer, and family gatherings. For instance, Yaq̓it ʔaƛknuqƚi̓it children generally attend school just across the border in Eureka, Montana, as the closest Canadian school is a 45-minute drive north. Kootenai Tribe of Idaho families also make near-daily trips to take their kids to hockey practice at the nearest rink in Creston, B.C.

Travel for the Kootenai Tribal members can result in interactions with a myriad of law enforcement, including Idaho State Police, Montana Highway Patrol, U.S. Border Patrol, U.S. Customs and Border Protection, U.S. Forest Service Law Enforcement and Investigation Division, Boundary County Sheriff (Idaho), Bonner County Sheriff (Idaho), Lincoln County Sheriff (Montana), Royal Canadian Mounted Police, Canada Border Services Agency, and numerous municipal police services. Each of these agencies has their own priorities, and the law differs between Tribal code, state code, and the laws of each country. For example, under Kootenai Tribal Law, Canadian Indians are considered Indians, and the Kootenai Tribal Court exerts jurisdiction over them in the same manner as Indians born in the United States. The United States, however, does not consider Canadian-born Indians to be Indians for federal law, unless they are also members of a federally recognized Tribe. Consequently, the need for points of contact and clear communication is strong.

After identifying a crime for prosecution, the often-convoluted task of determining jurisdiction begins. For example, if a Ktunaxa living in ʔaq̓am (near Cranbrook, B.C.) is victimized while on the Kootenai Indian Reservation in Idaho, who will prosecute the perpetrator? It depends on several key factors: (1) whether the victim is a member of the Koote nai

[19] 8 U.S.C. § 1359 (Immigration and Nationality Act).
[20] Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 19(1) (Can.).

Tribe of Idaho or another federally recognized Indian Tribe; (2) the identity of the perpetrator; and (3) the nature of the crime.

Now couple these jurisdictional issues with the fact that the victim may not wish to speak to United States or state police services. Instead, the victim may want to only speak with the Kootenai Tribal Police, perceiving those officers as protectors since they answer to a Ktunaxa government.

One effort to foster cooperation is the United States Attorney's Office (USAO) and the Kootenai Tribe's collaborative hosting of an Indian country jurisdiction training every two to three years. The Tribe and USAO invite all police, prosecution, and victim services who work in the area, including those in Idaho, Montana, and B.C. Explaining the complex analysis of victim, perpetrator, and crime in determining jurisdiction is useful. Another critical part of the training is providing an opportunity for everyone to meet, exchange contact information, and share challenges they have faced and how they addressed them.

A. Victim services

The international border affects victims of criminal conduct in Indian country. Due to historical reasons, Tribal members may not trust the federal government; therefore, delivering victim services in Indian country can be difficult. Alternatively, Tribal members may be concerned that "everyone will know their business" if they use Tribal support services. There is no one-size-fits-all approach to victim services; each crime is unique, and each person impacted by crime is distinct, with individual needs, support systems, and resources.

To ensure justice is served, the governments involved must communicate and coordinate. The federal government employs victim specialists to connect victims of crimes to proper resources and to uphold victims' rights. Locating and maintaining victims is difficult, however, when many do not wish to have contact with federal employees. Additionally, some victims may live or spend significant time across the border, which can prevent the establishment of consistent lines of communication between victims and victim-services providers.

To combat these deficiencies, it is important to establish a team of victim-services providers across the multiple jurisdictions. The Kootenai Tribe of Idaho has a relatively new victim-services team—made up of members of Tribal Council and Tribal Social Services—to assist Tribal members if they become victims of a crime. Recognizing that some Tribal members may prefer to seek assistance outside the Tribe due to its small size, the team has been collaborating with victim specialists employed by the federal government and a local nonprofit called Boundary County Vic-

tim Services. The group meets quarterly to coordinate support to those impacted by trauma, explore collaborative initiatives, and strengthen community partnerships.

Victim services is an area that is typically under-resourced and understaffed. Establishing a forum of victim-services providers where they can connect and network, however, leads to better services. These efforts need to extend across international borders for victims of transnational crimes. The group of victim-services partners is currently working with victim specialists employed by the Royal Canadian Mounted Police to build relationships and extend the reach of victim support. For example, if a crime occurs in Ktunaxa Territory in Idaho and the victim is an enrolled member who travels to B.C. to spend time with family and heal, services could more swiftly be rendered if victim-services providers on both sides of the boundary connect, share information, and work as a team to assist the victim.

Similarly, establishing cross-border relationships among all members of law-enforcement entities is an important piece of public safety. Steps toward this effort among the Kootenai Tribe, the USAO, District of Idaho, Border Patrol, and Canadian counterparts are discussed in more detail below.[21]

Important work is occurring to overcome these challenges. We highlight human trafficking in the context of the Missing or Murdered Indigenous People movement to illustrate challenges and exemplify how working together addresses those challenges.[22]

B. Missing or Murdered Indigenous People

State, provincial, federal, Tribal, and First Nations governments recognize the epidemic of missing or murdered Indigenous women and children.[23] The extent of the problem, however, is difficult to ascertain for many reasons. First, combining the issues of missing persons with murdered persons conflates two separate problems. Not all missing persons become victims of murder. On the contrary, most missing persons are located or returned. Some individuals have left difficult situations on purpose and do not wish to be found. Similarly, not all murder victims were

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[21] *See* section III.B, *infra.*

[22] *See* section IV, *infra.*

[23] *See, e.g.*, 2020 Idaho Sess. Laws 33; Melanie Fillmore et al., HCRSS Report: Idaho's Missing & Murdered Indigenous Persons (2021); Marion Buller et al., Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019); *Missing or Murdered Indigenous Persons*, U.S. Dep't of Just., https://www.justice.gov/tribal/mmip (last visited June 18, 2025).

also missing persons.

Analyzing the issue of missing Indigenous persons individually, many challenges hinder the accurate collection of data: racial misclassification; mistrust of law enforcement among many Indigenous communities; the absence of Tribal citizenship or affiliation information; and failure to respond—or to adequately respond—to law-enforcement reports of missing persons.[24] When responding to missing persons across boundaries of reservations, states, territories, or nations, inconsistent communication, differing or conflicting priorities, and unclear leadership create issues.

Nonetheless, the rates of homicide and other violence against Indigenous persons are higher than most other racial and ethnic groups. For example, data from the United States consistently ranks homicide as among the top five causes of death of Indigenous girls, women, and men.[25] Additionally, intimate partner violence, including sexual violence, physical violence, and stalking, is reported among 46% of Indigenous women in the United States, and one in three Indigenous women will be a victim of sexual assault in her lifetime.[26] Research indicates perpetrators of assaults on Indigenous women are frequently non-Indigenous men.[27]

According to Crown-Indigenous Relations and Northern Affairs Canada, the Government of Canada agency obligated to renew the nation-to-nation relationship between Canada and First Nations.[28] Data from Canada similarly indicate more than 6 in 10 Indigenous women have suffered sexual or physical assault in their lifetimes.[29] Indigenous women and girls are

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[24] U.S. Dep't of Just., Dep't of the Interior, Federal Law Enforcement Strategy to Prevent and Respond to Violence Against American Indians and Alaska Natives, Including to Address Missing or Murdered Indigenous Persons (2022).

[25] *Web-based Injury Query and Reporting System (WISQARS)*, Ctrs. for Disease Control & Prevention, https://wisqars.cdc.gov/ (last visited June 18, 2025).

[26] *Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month*, U.S. Dep't of Just., Off. on Violence Against Women (Apr. 27, 2017), https://www.justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american; Emiko Petrosky et al., *Homicides of American Indians/Alaska Natives—National Violent Death Reporting System, United States, 2003-2008*, 70 MMWR Surveillance Summaries 1, 8 (2021).

[27] Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003-2014*, 66 MMWR 741 (2017).

[28] *Crown-Indigenous Relations and Northen Affairs Canada*, Gov't of Can. (June 6, 2025), https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html.

[29] Stat. Can., Violent Victimization and Perceptions of Safety Among First Nations, Métis and Inuit Women and Among Women Living in Remote Areas of Canada (2022).

also overrepresented among long-term unresolved missing persons cases.[30]

The international boundary poses additional challenges since information is not always shared across the international boundary. While there are several initiatives to address this crisis, the response can be seen as an inconsistent patchwork of bureaucracy.

Many state governments have created Endangered Missing Persons Alerts. For example, Idaho State Police employs Endangered Missing Persons Alerts, Blue Alerts, and Amber Alerts, grouping missing persons by category, such as medical conditions, mental capacity, attacks on law enforcement, and endangered children.[31] The state of Montana has similar alerts but names one category—Missing and Endangered Person Advisory (MEPA)—for missing persons who do not fit the criteria of an Amber Alert.[32] Additionally, some states use "Silver Alerts" to indicate missing and endangered senior citizens, while some, as well as the Federal Communications Commission, have adopted "Turquoise Alerts" for missing Indigenous people.[33] Canada, Manitoba, and Giganawenimaanaanig are partnering on a pilot project, named "Red Dress Alerts," to do the same.[34] This effort is rooted in cultural competency and focuses on regionally specific perspectives to address violence against Indigenous people, including women, men, and children. It is critical to include input from those directly impacted by these crises. Thus, the approach of Red Dress Alerts is anchored in lived experience. A lack of consistency across the numerous jurisdictions, however, creates challenges when a missing person is trafficked across borders or even when one leaves by choice.

The gap, however, highlights the need to release alerts to all relevant areas when there is a potential of cross-border trafficking. This gap became apparent when the Kootenai Tribe hosted a Department of Justice sponsored Northern Border Focus Group with the Amber Alert Training and Technical Assistance Program in September 2024 to gather information with the aim of developing a course curriculum intended for cross-border abduction investigations.[35] During the discussion, partici-

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[30] Press Release, Gov't of Can., Canada, Manitoba and Giganawenimaanaanig Partner to Develop Red Dress Alert (Oct. 4, 2024).

[31] *Missing Person Alerts*, Idaho State Police, https://isp.idaho.gov/alerts/ (last visited June 18, 2025).

[32] *Missing Persons*, Mont. Dep't of Just., https://dojmt.gov/missing-persons/ (last visited June 18, 2025).

[33] Jonathan Franklin, *FCC Adopts an Alert System for Missing Indigenous People*, NPR (Aug. 15, 2024), https://www.npr.org/2024/08/15/nx-s1-5075158/fcc-alert-system-missing-indigenous-persons.

[34] Press Release, Gov't of Can., *supra* note 28.

[35] *AMBER Alert in Indian Country*, AMBER Alert Training & Tech. Assistance Program, https://amberadvocate.org/aiic/aiic-home/ (last visited June 18,

pants learned that alerts issued from a U.S. jurisdiction do not automatically release north of the border. In fact, U.S. Customs and Border Protection officers stated they had at times ran across the street to Canada Border Services Agency to provide the information to them so they could be aware of a potential cross-border abduction. The development of a formal process will result in better notifications and communication, leading to improved outcomes for communities.

IV. Recommendations and conclusions

The criminal-justice and victim-services fields should look to collaborative efforts led by the Kootenai Tribe that have generated success in restoring fish and wildlife habitats. The Tribe's work with the other governments in Ktunaxa Territory (Ktunaxa Nation, other First Nations and Tribes, federal United States and Canada, the Province of B.C., and the states of Montana and Idaho) has led to the successful restart of a burbot Treaty fishery for the Tribe and sport fishery for the state of Idaho.[36] As close neighbors whose waterways, fish, and wildlife do not acknowledge the international boundary, strong partnerships centered around recovering nature and addressing water quality is critical. The governments in Ktunaxa Territory on both sides of the international boundary recognized this when developing and implementing their recovery programs. As a result, nearly every meeting involves representatives from both sides of the boundary. Restoration work continues for other fish and wildlife, including the Kootenai River white sturgeon, kokanee, grizzly bear, and caribou. It is only through steady communication and cooperation among our governments that we can be successful.

The Kootenai Tribe of Idaho has a small membership. Like most Tribal governments, it must work with Tribal, state, and federal agencies. The placement of the Canada-United States border added additional challenges and requires the Tribe and federal government to work with law enforcement from even more agencies. With the focus on public safety first, followed by which jurisdiction responds second, the relationships across sovereigns are successful. It is only through continued communication and collaboration that this is possible. While historical wrongs and changing international relationships could impact the day-to-day relationships and safety, the Kootenai Tribe of Idaho—through its leadership and Council—and the USAO of Idaho continue their commitment to working collaboratively. It is the way to keep the Covenant, keep the promises of

2025).

[36] Kootenai Tribe of Idaho Nat. Res., https://www.naturalresourceskootenaitribe.com/ (last visited June 18, 2025).

the United States to the Kootenai people, and improve public safety.

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He is the Attorney General of the Kootenai Tribe of Idaho and oversees all legal aspects of Tribal operations. His work concentrates on negotiated problem solving on behalf of the Tribe in a variety of contexts. That work includes ongoing representation of the Kootenai Tribal Fish and Wildlife Department regarding the interrelationships of the Northwest Power Act, Endangered Species Act, National Historic Preservation Act, and other legal authorities in the protection of Kootenai natural resources.

Before joining the Kootenai Tribe staff, he represented Tribal governments as a member of two separate firms. He was the principal negotiator for one Tribal client in a complex problem-solving effort involving Tribal, state, federal, and private parties to clean up decades of pollution in Portland Harbor. He also worked extensively with Tribal social services, including enforcing the Indian Child Welfare Act in state courts and child protection and family reunification in Tribal courts.

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Before joining the USAO, she taught for the social sciences divisions of Gonzaga University and North Idaho College. She has a PhD in Criminology and Criminal Justice from Washington State University (WSU), where she researched the Pathways to Justice involvement of U.S. military veterans and co-authored articles published in the *Handbook on Risk and Need Assessment*, *Justice Quarterly*, *Criminal Justice Policy Review*, and *The Prison Journal*.[37] She holds an M.A. in Criminal Justice, from

[37] Zachary Hamilton et al., *Customizing Criminal Justice Assessments, in* Handbook on Risk and Need Assessment: Theory and Practice (Faye Taxman ed., 2017); Laurie Drapela et al., *Assessing the Behavior and Needs of Veterans with Trau-*

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During her over 30 years as a prosecutor, she has prosecuted almost every type of criminal case, including death-penalty murder, robbery, child exploitation, murder for hire, environmental crime, white-collar crime, tax fraud, firearm offenses, and narcotics violations. She believes it is a tremendous honor to serve the citizens of Idaho and the United States.

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matic Brain Injury in Washington State Prisons: Establishing a Foundation for Policy, Practice, and Education, 36 Just. Q. 1023 (2018); Youngki Woo et al., *Disciplinary Segregation's Effects on Inmate Behavior: Institutional and Community Outcomes*, 31 Crim. Just. Pol'y Rev. 1 (2019); Michael Campagna et al., *Understanding Offender Needs over Forms of Isolation Using a Repeated Measures Design*, 99 Prison J. 1 (2019).

The Violence Against Women Reauthorization Act of 2022 and the Return of Tribal Criminal Authority in Alaska

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All crimes are reprehensible, but the rates at which Alaska Native people are murdered, raped, and suffer from violent crime are all higher than national averages.[1]

We live in shadows. We live in the shadows of women who if they were features of landscape would be the tallest mounts, the widest rivers, the deepest part of our literary oceans, while we cling to narrow shores. While we wade in ankle-deep shoals. While we bluster at barnacles.[2]

I. Introduction

Louise Erdrich's novel, *The Round House*, involves the brutal sexual assault of a Native woman and the repercussions of this trauma on her family, underscoring the limitations of Tribal criminal authority.[3] In one affecting moment from the book, Tribal judge Bazil Counts explains the challenges of his work to his teenage son:

> Everything we do, no matter how trivial, must be crafted keenly. We are trying to build a solid base here for our sovereignty.

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[1] John Skidmore, *Prosecuting Crimes Against Alaska Native People Is at Core of Department of Law Work*, Alaska Beacon (May 2, 2024), https://alaskabeacon.com/2024/05/02/prosecuting-crimes-against-alaska-native-people-is-at-core-of-department-of-law-work/.

[2] Ernestine Hayes, The Tao of Raven: An Alaska Native Memoir 113 (2017).

[3] Louise Erdrich, The Round House (2012).

> We try to press against the boundaries of what we are allowed, walk a step past the edge. Our records will be scrutinized by Congress one day and decisions on whether to enlarge our jurisdiction will be made. Some day. We want the right to prosecute criminals of all races on all lands within our original boundaries. Which is why I try to run a tight courtroom, Joe. What I am doing now is for the future, though it may seem small, or trivial, or boring, to you.[4]

Judge Counts' words illustrate the jurisdictional architecture in Indian country, which is often governed not by principles of Tribal sovereignty, but by a lattice of structural restrictions that Tribal advocates have long sought to overcome.

This holds particularly true in Alaska. For much of the 20th century, Alaska existed on the periphery of federal Indian law, not only in geography, but also in doctrine. Its Tribes are federally recognized, but their jurisdictional standing has been mired in statutory omissions, judicial hesitation, and a legal framework that generally treats the state as an exception rather than a part of Indian country. Nowhere have the consequences been more deeply experienced than by victims of crime—most often Native women and children—who endure violence in communities where Tribal governments lack the jurisdictional authority to protect them. With passage of the Violence Against Women Reauthorization Act of 2022 (VAWA 2022), Congress took a cautious but noteworthy step toward correcting this legacy.[5]

This article is divided into two parts. The first half provides information highlighting some of the complex issues confronting Alaska Natives as well as the state and federal governments' responses to criminal justice issues. The second half of the article focuses on violence against women in Alaska Native Villages and efforts to implement special Tribal criminal jurisdiction. This article, however, only begins to touch on the critical historical, political, legal, and social issues confronting Alaska Natives and the villages where they live.

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[4] *Id.* at 229–30.

[5] *See* Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. 8, 136 Stat. 49, 840–962 (codified as amended in scattered sections of 25 U.S.C.).

II. A brief history of Alaska

The United States purchased Alaska from Russia on March 30, 1867, for 7.2 million dollars, approximately 2 cents per acre.[6] The United States organized the area as a territory on May 11, 1912, and admitted it as the 49th state of the United States on January 3, 1959.[7] Alaska is the largest state in land area at 663,268 square miles, over twice the size of Texas, the next largest state.[8] Counting territorial waters, Alaska is larger than the combined area of the next three largest states: Texas, California, and Montana.[9] It is also larger than the combined area of the 22 smallest states.[10]

Alaska is blessed with a diverse and dynamic mix of Tribes, Tribal organizations, and natural resources. Of the 574 federally recognized Tribes in the United States, 229 are found within Alaska.[11] That means 40% of all federally recognized Tribes are based in Alaska with a population of more than 180,000 Tribal members.[12]

When the United States acquired the territory of Alaska, the treaty provided United States with "dominion over the territory, and it conveyed title to all public lands and vacant lands that were not individual property."[13] The United States did not regard the land that the Tribes used as individual property. The treaty said that Tribes "would be subject to such laws and regulations as the United States might from time to time adopt with respect to Aboriginal [T]ribes."[14] On May 17, 1884, Congress enacted a statute, providing that the Alaska Natives and other persons in the territory "should not be disturbed in the possession of any lands actually in their use or occupation or then claimed by them, but that the terms under which such persons could acquire title to such lands were

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[6] *Check for the Purchase of Alaska (1868)*, Nat'l Archives (Mar. 28, 2024), https://www.archives.gov/milestone-documents/check-for-the-purchase-of-alaska.

[7] *Alaska Statehood*, Nat'l Archives, Dwight D. Eisenhower Presidential Libr., Museum & Boyhood Home, https://www.eisenhowerlibrary.gov/research/online-documents/alaska-statehood (last visited June 23, 2025).

[8] *What's the Largest U.S. State by Area?*, Encyc. Britannica (May 30, 2025), https://www.britannica.com/topic/largest-U-S-state-by-area.

[9] *Id.*

[10] *Id.*

[11] *Alaska Region: Overview*, U.S. Dep't of the Interior, Bureau of Indian Affs., https://www.bia.gov/regional-office/alaska-region#:~:text=More%20than%20180%2C000%20Tribal%20members,Atka%20in%20the%20Aleutian%20Chain (last visited June 23, 2025).

[12] Indian L. & Ord. Comm'n, A Roadmap for Making Native America Safer 35 (2015); *Alaska Region: Overview*, *supra* note 11.

[13] H.R. Rep. No. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2193.

[14] *Id.*

reserved for future legislation by Congress."[15]

III. The Alaska Native Claims Settlement Act

Historically, it was the policy of the United States to grant title to a portion of lands occupied by Tribes, extinguish Aboriginal title to the remainder of those lands by putting them into the public domain, and pay fair value of the titles that were extinguished.[16] But when Alaska became a state in 1959, there were many outstanding Aboriginal claims to lands.[17] Because of these outstanding claims, the federal government had limited ability to transfer land to the state pursuant to the Alaska Statehood Act.[18] In 1971, in an effort to settle all land claims by Alaska Natives, Congress passed the Alaska Native Claims Settlement Act (ANCSA).[19] ANCSA served to extinguish all Aboriginal land claims and revoked all designated reservations but for one: the Annette Island Reserve.[20]

ANCSA required the Secretary of the Interior to divide Alaska into 12 geographical regions.[21] Each region was comprised, to the extent possible, of Alaska Natives sharing a common heritage and similar interest.[22] ANCSA also required the Secretary of the Interior to enroll every living Alaska Native in a region on December 18, 1971—the date ANCSA was enacted.[23] This registration was according to residence.[24] ANCSA directed each region to establish a regional corporation, and the Alaska Natives enrolled in the region became its shareholders. ANCSA also provided that certain Alaska Native Villages were also eligible to form village

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[15] *Id. See* 23 Stat. 24 (1884).

[16] H.R. Rep. No. 92-523, *reprinted in* 1971 U.S.C.C.A.N. 2192, 2193–94.

[17] Meghan Sullivan, *The Modern Treaty: Protecting Alaska Native Land, Values*, Alaska Pub. Media (Aug. 17, 2021), https://alaskapublic.org/ancsa50/2021-08-17/the-modern-treaty-protecting-alaska-native-land-values.

[18] Akiachak Native Cmty. v. U.S. Dep't of Interior, 827 F.3d 100, 103 (D.C. Cir. 2016).

[19] 43 U.S.C. § 1601; *id.* §§ 1601–1629h (Alaska Native Claims Settlement).

[20] *See Akiachak*, 2016 WL 3568092, at *2 (inhabited by an immigrant group of Indians from Canada, thus they did not have any original Aboriginal claims to any land in Alaska).

[21] *The Twelve Regions*, ANCSA Reg'l Ass'n, https://ancsaregional.com/the-twelve-regions/ (last visited June 27, 2025).

[22] 43 U.S.C. § 1601.

[23] *About the Alaska Native Claims Settlement Act*, ANCSA Reg'l Ass'n, https://ancsaregional.com/about-ancsa/ (last visited June 27, 2025).

[24] U.S. Gov't Accountability Off., GAO-13-121-Regional Alaska Native Corporations: Status 40 Years After Establishment, and Future Considerations 3 (2012) [hereinafter GAO-13-121].

corporations under state law.[25]

The corporations established under ANCSA received title to about 44 million acres of land in exchange for the extinguishment of Alaska Native Aboriginal land claims.[26] In addition, each of the regional and village corporations established under ANCSA received a portion of a nearly $1 billion monetary settlement.[27] The 12 regional corporations were required to distribute a percentage of the settlement money to shareholders each year.[28]

The regional corporations are organized as for-profit corporations under Alaska state law. The corporations are separate and distinct entities from the Alaska Native Tribal governments recognized by the federal government as Indian Tribes.[29] Since the passage of ANCSA 50 years ago, the 12 regional corporations have developed into diverse and often large businesses.[30] They are an important part of Alaska's economy. For example, "The past half-century has seen all twelve—and a few village corporations—grow into the largest Alaskan-owned companies."[31] A 2022 issue of the magazine Alaska Business reported that the Arctic Slope Regional Corporation was approaching $4 billion in annual revenues; thereby, establishing itself as the largest Alaskan-owned and operated company.[32] In 2021, the Arctic Slope Regional Corporation was ranked 131st on Forbes' annual list of America's largest private companies, and it distributed $87.5 million in dividends.[33] In 2018, the 12 Alaska Native corporations cumulatively reported more than $10.5 billion in revenues.[34] The regional corporations provide both monetary and nonmonetary benefits to its shareholders.[35] Monetary benefits include the following: cash dividends per share; special dividends to elder shareholders; educational scholarships; funeral-related expenses; shareholders'

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[25] *Id.* at 4.
[26] 43 U.S.C. § 1611.
[27] *See* GAO-13-121, *supra* note 24, at 6.
[28] *Id.*
[29] *Id.* at 10.
[30] *Id.* at 12.
[31] Clark Mishler, *The Big Twelve: Alaska Native Regional Corporations*, Alaska Native Mag. (Sept. 6, 2022) https://www.akbizmag.com/magazine/the-big-twelve-alaska-native-regional-corporations/.
[32] *Id.*
[33] *Id.*
[34] Meghan Sullivan, *Alaska Native Corporations: 'Homegrown engines of economy,'* Indian Country Today (May 13, 2022) https://ictnews.org/news/alaska-native-corporations-homegrown-engines-of-the-economy/.
[35] *See* GAO-13-121, *supra* note 24, at 38.

equity; and charitable donations.[36] Nonmonetary benefits include the following: employment preference for Alaskan Native shareholders; cultural preservation of Alaskan Native tradition through establishing heritage centers; land management for subsistence and recreation; economic development; and advocacy for the Alaskan Native communities.[37]

IV. Is there "Indian country" in Alaska?

Typically, when determining which jurisdiction has the legal authority to investigate and prosecute a crime, one must first determine whether the crime occurred in Indian country. Following the passage of ANCSA, an important question remained unanswered: Do Native lands subject to ANCSA meet the federal definition of Indian country as defined in 18 U.S.C. § 1151?[38] If Native lands were deemed Indian country, they would presumably be able to exercise all the powers of reservation Tribes. In addition, if these Native lands met the federal definition of Indian country, the state of Alaska would be unable to exercise general regulatory jurisdiction on those lands. The Supreme Court of the United States helped decide this issue in *Alaska v. Native Village of Venetie Tribal Government*.[39]

In the *Venetie* case, two Native corporations established for the Neets'aii Gwich'in Indians decided to take advantage of a provision within ANCSA that allowed them to take title to former reservation land if they relinquished any monetary payments from the federal government.[40] After taking title to the former reservation land as tenants in common, the Native corporations transferred title back to the Native Village of Venetie Tribal Government.[41] Over a decade later, the state of Alaska entered into a contract with a private contractor to build a public school in the Native Village of Venetie.[42] The Tribe sought $161,000 in taxes from the state and the contractor for conducting business on Tribal land.[43] The Tribe sought to collect the money in Tribal court. The state sued in federal court to enjoin collection of the tax.

The Supreme Court, in a unanimous decision, began their analysis by looking at the definition of Indian country found in 18 U.S.C. § 1151.[44]

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[36] *Id.* at 38–43.
[37] *Id.* at 45–48.
[38] 18 U.S.C. § 1151.
[39] Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).
[40] *Id.* at 524.
[41] *Id.*
[42] *Id.* at 520, 525.
[43] *Id.* at 525.
[44] *Id.* at 526–27.

Because ANCSA revoked the Venetie Reservation and because no allotments were at issue, the court focused on the definition of dependent Indian community. The court examined two requirements essential for a determination whether a parcel of land is a dependent Indian community: (1) the land must have been set aside by the federal government for the use of the Indians as Indian land; and (2) the land must be under federal superintendence.[45] The court found that the land in question was not set aside by the federal government because the purpose of ANCSA was to revoke all existing reservations in Alaska that were previously set aside for Native Alaskan use.[46] With regards to federal superintendence, the court stated that the provisions of ANCSA were intended to prevent the federal government from having a "lengthy wardship or trusteeship."[47] "After ANCSA, federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed."[48] Thus, the Supreme Court ruled that the Tribe's land did not meet the definition of a dependent Indian community under section 1151.[49]

V. Criminal justice responses to crime in Alaskan villages

In 1953, Congress passed Public Law 280, which extended state civil and criminal jurisdiction to Indian country in five states: California, Nebraska, Minnesota, Oregon and Wisconsin.[50] Congress added Alaska, except for the Metlakatla Indian Tribe, in 1958.[51] Accordingly, most criminal cases occurring in Alaskan villages involving Alaska Natives and non-Indians as either victim or defendant are prosecuted in state court. Tribes in Alaska, however, have concurrent jurisdiction and therefore, their criminal justice systems or Tribal courts may handle certain types of cases.

Family violence and sexual assault are prevalent in Alaska Native Villages. The problem is exacerbated by the isolation of some villages and insufficient law enforcement.[52] Roughly every five years, the University

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[45] *Id.* at 527.
[46] *Id.* at 532.
[47] *Id.* at 533.
[48] *Id.*
[49] *Id.* at 532–34.
[50] 18 U.S.C. § 1162.
[51] John v. Baker, 982 P.2d 738, 745 n.14 (Alaska 1999) (amended under Public Law 85-615).
[52] Alaska Legal Servs. Corp., Tribal Jurisdiction in Alaska: Child Protection, Adoption, Juvenile Justice, Family Violence and Community

of Alaska Anchorage (UAA) Justice Center and the Council on Domestic Violence and Sexual Assault (CDVSA) conduct the Alaska Victimization Survey.[53] It provides comprehensive statewide and regional data to assist stakeholders with planning and policy development and to evaluate the impact of prevention and intervention services. The UAA Justice Center and the CDVSA completed the most recent survey in 2020.[54] They designed the survey to provide estimates that could be compared to previous statewide estimates from 2010 and 2015.[55]

In 2020, a total of 2,100 adult women in Alaska participated in the survey.[56] Participants were randomly selected and contacted by phone—using both land lines and cell phones—from July through November 2020.[57] Participants were asked questions about intimate partner violence—physical violence perpetrated by romantic and sexual partners—as well as alcohol- or drug-involved sexual assault and forcible sexual assault.[58] Out of every 100 adult women residing in Alaska, 48 experienced intimate partner violence, 41 experienced sexual violence, and 58 experienced intimate partner violence, sexual violence, or both over the course of their lifetime.[59]

The primary law-enforcement agency for serious crime in Alaska is the Alaska State Troopers. But due to the vastness of Alaska and months of inclement weather, it is not always possible for Troopers to quickly respond when a crime like domestic violence or sexual assault happens in bush Alaska.[60] It was reported in 2018 that one third of Alaska communities have no law-enforcement presence at all.[61] To provide additional "boots on the ground" first responder support, the state legislature created two programs: (1) the Village Public Safety Officers (VPSOs); and

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Safety 22 (2012).

[53] *Alaska Victimization Survey*, Univ. of Alaska Anchorage, https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/avs/ (last visited June 25, 2025).

[54] *Resources—Alaska Victimization Survey*, Alaska Dep't of Pub. Safety, Council on Domestic Violence & Sexual Assault, https://dps.alaska.gov/cdvsa/resources/alaska-victimization-survey (last visited June 25, 2025).

[55] Ingrid Johnson, Assistant Professor, Univ. of Alaska Anchorage Just. Ctr., 2020 Statewide Alaska Victimization Survey: Final Report 3 (2021).

[56] *Id.* at 3.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 4.

[60] Bush Alaska is any part of the state that is not connected to the North American road network or is not easily accessible by the state ferry system.

[61] Kyle Hopkins, *Lawless: One in three Alaska villages have no local police*, Anchorage Daily News (May 16, 2019) https://www.adn.com/alaska-news/lawless/2019/05/16/lawless-one-in-three-alaska-villages-have-no-local-police/.

(2) the Village Public Officers (VPOs).[62] Historically, the recruitment and retention of VPSOs has been a major challenge across Alaska.

Alaska Statute § 18.65.670 is the governing statute for VPSOs.[63] Per this statute, the Alaska Commissioner for Public Safety provides grants to nonprofit regional corporations and Alaska Native organizations for training and employment of VPSOs.[64] If a nonprofit regional corporation for a village or Alaska Native organization for a village either does not exist or rejects a grant, the Alaska Commissioner for Public Safety may provide the grant to a municipality with a population of less than 10,000 willing to administer the grant for the village.[65] While the Alaska State Troopers are the primary law-enforcement arm within Alaska, the VPSOs are similar to first responders.[66] The VPSO motto is "First Responders—Last Frontier."[67]

A VPSO's responsibilities are broad and are set out in statute:

> A village public safety officer who is certified under AS 18.65.682 has the power of a peace officer of the state or a municipality and is charged with
>
> (1) the protection of life and property in the state, including through
>
> (A) fire prevention and suppression;
> (B) provision of emergency medical services; and
> (C) participation in and coordination of search and rescue efforts for missing or injured persons;
>
> (2) providing pretrial, probation, and parole supervision to persons under supervision by communicating with and monitoring the activities and progress of these persons at the direction of pretrial services, probation, and parole officers;
>
> (3) conducting investigations;
>
> (4) enforcing

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[62] *Alaska Department of Public Safety, Village Public Safety Operations,* The Great State of Alaska, https://dps.alaska.gov/AST/VPSO/Home (last visited June 30, 2025).
[63] Alaska Stat. Ann. § 18.65.670 (West 2022).
[64] *Id.* § 18.65.670(b).
[65] *Id.*
[66] Ryan Fortson, *Advancing Tribal Court Jurisdiction in Alaska*, 32 Alaska L. Rev. 93, 98 (2015).
[67] *Village Public Safety Operations*, State of Alaska Dep't of Pub. Safety, https://dps.alaska.gov/ast/vpso/home (last visited June 24, 2025).

(A) the criminal laws of the state or a municipality;
(B) statutes or ordinances of the state or municipality punishable as a violation if the certified village public safety officer has completed training in that field of violation enforcement;

(5) providing local training programs on public safety; and
(6) the powers usually and customarily exercised by a peace officer.[68]

In the past several years, Alaska has made a significant commitment to the VPSO program and has worked to improve both the program and VPSO responses to Alaska Native Villages. For example, training requirements for the position were statutorily updated in 2022.[69] Also, the Alaska Legislature passed a law creating the position of Regional Public Safety Officer (RPSO).[70] The RPSO provides specialized regional support that includes first-line supervision. This supervisory role was originally to be handled by the Alaska State Troopers. It did not work, however, because of differing non-state employing organizations, distance, and workload.[71]

In 2024, the state legislature established the Village Public Safety Operations Division.[72] The division oversees certification, training, and support for VPSO programs operated by regional grantees.[73] The VPSO program has grown substantially in the last couple of years. In January 2020, there were 42 VPSOs.[74] In January 2025, the number increased to 85.[75]

The state legislature created the VPO program before the VPSO program. VPOs strictly provide immediate police services.[76] In addition to being limited to communities with a population less than 1,000, the community must be off the interconnected Alaska roadway system.[77] VPOs receive much less training than VPSOs.[78] In the end, the state legislature intended that the VPO program would create a "constable" type of individual who could help process law-enforcement issues in rural com-

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[68] Alaska Stat. Ann. § 18.65.686 (West 2022).
[69] *Id.* § 18.65.676.
[70] *Id.* § 18.65.680.
[71] James Hoelscher, Vill. Pub. Safety Operations Div., Village Public Safety Operations: "First Responders—Last Frontier" (2025).
[72] *Id.*
[73] *Id.*
[74] *Id* at 2.
[75] *Id.*
[76] Alaska Inter-Tribal Council v. State, 110 P.3d 947, 951 (Alaska 2005).
[77] *Id.*
[78] Alaska Admin. Code tit. 13, § 89.040 (West 2020).

munities until the Alaska State Troopers could arrive on scene.[79]

Federal law enforcement may investigate some crimes committed in rural Alaska with cases prosecuted by the United States Attorney's Office. These types of offenses are referred to as crimes of general federal applicability, which means they are federal crimes regardless of who commits the crime (Indian or non-Indian) and regardless of where the crime occurs (inside or outside Indian country).[80] Examples of such crimes are Gun Control Act violations, controlled substances, assault on a federal officer, and human trafficking because the situs of the crime is not an element of the offense.[81]

VI. Full faith and credit for Tribal court protection orders

In July 2015, the Alaska Attorney General issued an opinion stating that the federal Violence Against Women Act (VAWA) preempts any state law in Alaska that would require registration of protection orders before enforcement for violation of the order.[82] Accordingly, VAWA requires qualifying protection orders to be afforded full faith and credit by the enforcing jurisdiction—in this case, the state of Alaska.[83] Tribal or foreign protection orders do not need to be pre-registered with the state.[84] The Alaska Attorney General further stated that "officers may arrest an offender for violating a [T]ribal or foreign protection order to the same extent that they can arrest an offender for violating a protective order issued under Alaska law."[85] Therefore, before arresting an offender for violation of a foreign protection order, a state officer must determine if an arrest would be proper if the order had been issued by the state of Alaska.[86] To be enforceable, the opinion states that the protective order must include certain provisions required by state law and also meet the requirements in federal law for full, faith, and credit.[87]

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[79] *See Alaska Inter-Tribal Council*, 110 P.3d at 951.
[80] United States v. Begay, 42 F.3d 486, 497–501 (9th Cir. 1994).
[81] *Id.*
[82] *Violence Against Women Act and Tribal Protection Orders*, File No. AN2013102606, 2015 WL 4699349 (Alaska A.G. July 30, 2015).
[83] *Id.* at 1.
[84] *Id.* at 1–2.
[85] *Id.* at 2.
[86] *Id.* at 5.
[87] *Id.* at 4–5, 7–9.

VII. Additional Alaska legislative and executive efforts

A. Alaska Enrolled Senate Bill No. 91

In July 2016, Alaska passed and signed into law a criminal justice reform act—Enrolled Senate Bill No. 91 (Act).[88] The passage of this Act made five changes to practices in cases of domestic violence or sexual assault. First, there is a requirement now to "create or expand community-based violence prevention programming and services for victims of a crime involving domestic violence or sexual assault."[89] Second, a parole officer cannot recommend early discharge of parolee if that parolee has committed a sexual felony or a crime of domestic violence.[90] Third, a court may not suspend entry of judgment or defer prosecution of a person who "has been convicted of a crime involving domestic violence."[91] Fourth, the probation period for a felony sex offense is reduced from 25 years to 15 years and the probation period for a misdemeanor sex offense or a crime involving domestic violence is reduced from 10 years to 3 years.[92] And fifth, the Act created a new chapter that covers the pretrial services program.[93] Alaska Statute § 33.07.030 covers the duties of pretrial services officers and states that a pretrial services officers shall recommend for release on personal recognizance a defendant charged with a misdemeanor, unless the misdemeanor is a crime involving domestic violence.[94]

B. Executive Actions

Two successive Alaska Governors have taken steps to recognize Alaska Native Tribes and have worked to increase public safety in those communities. In 2015, the Alaska governor established the Governor's Tribal Advisory Council to provide a forum for dialogue on a range of issues

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[88] 2016 Alaska Sess. Laws ch. 36. *See* 18 U.S.C. § 2265.
[89] 2016 Alaska Sess. Laws ch. 36, § 181. *See* Alaska Stat. Ann. § 18.66.010 (West 1981).
[90] *See* Alaska Stat. Ann. § 33.16.210 (West 2019); 2016 Alaska Sess. Laws ch. 36, § 144.
[91] 2016 Alaska Sess. Laws ch. 36, § 77. *See* Alaska Stat. Ann. § 12.55.078 (West 2017).
[92] *See* Alaska Stat. Ann. § 12.55.090(c) (West 2019); 2016 Alaska Sess. Laws ch. 36, § 79.
[93] *See* Alaska Stat. Ann. § 33, ch. 7; 2016 Alaska Sess. Laws ch. 36, § 117.
[94] *See* Alaska Stat. Ann. § 33.07.030 (West 2018); 2016 Alaska Sess. Laws ch. 36, § 117.

facing Tribes in Alaska.[95] Per the Administrative Order,

> [t]he mission of the Council is to identify areas of concern and opportunity shared by the State and the Tribes and to suggest policy, programs and other means and methods for solutions and progress. The goal is to maximize opportunity, resolve issues, and generate timely, efficient, and effective responses to both pressing and long-range matters affecting the State and the Tribes.[96]

On September 23, 2018, then-Governor of Alaska Bill Walker signed Administrative Order No. 300.[97] While the purpose of the Order is the preservation of Alaska Native Languages, it contains important language reinforcing that "the policy of the [s]tate of Alaska to recognize Alaska Tribes' sovereignty by interacting and engaging with Alaska Tribes on a government-to-government basis."[98]

Finally, on July 28, 2022, current Alaska Governor Mike Dunleavy signed HB 123 into law.[99] The legislative findings section states that the history of Tribes in Alaska predates the United States and territorial claims to land by both the United States and Imperial Russia.[100] Moreover, Indigenous people have inhabited land in Alaska for multiple millennia since time immemorial.[101] Per the Act, Alaska "recognizes the special and unique relationship between the United States government and federally recognized [T]ribes in the state."[102] Alaska recognizes all Tribes in the state that are recognized by the United States Secretary of the Interior to exist as an Indian Tribe under 25 U.S.C. §§ 5130–5131.[103] The Alaska Tribes advocated strongly for this law to pass. As stated by Julie Kitka, President of the Alaska Federation of Natives, "The cultural survival of our Indigenous people is dependent on our ability to maintain our values, practice our traditions, and maintain freedom to live our lives well with dignity and respect for each other."[104] President Kitka further stated, "We

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[95] *Administrative Order No. 277*, Off. of Governor Mike Dunleavy (Oct. 14, 2015), https://gov.alaska.gov/admin-orders/administrative-order-no-277/.
[96] *Id.*
[97] *Administrative Order No. 300*, Off. of Governor Mike Dunleavy (Sept. 23, 2018), https://gov.alaska.gov/admin-orders/administrative-order-no-300/.
[98] *Id.*
[99] Alaska Stat. Ann. § 01.15.100 (West 2022).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*; 25 U.S.C. §§ 5130–5131.
[104] *HB 123 "State Recognition of Tribes" Signed into Law*, Alaska Fed'n of Natives, https://nativefederation.org/2022/07/hb-123-state-recognition-of-tribes-signe

have strengthened our [T]ribal governments and have initiated multiple efforts to continue our path to self-determination and self-governance. The formal recognition through this legislation is an historic step for us to have a successful relationship with the state."[105]

Alaska Native Tribes have an interesting and complicated history. This history has impacted criminal justice and public safety for the 229 federally recognized Tribes in the state. Additionally, remoteness, isolation, and inclement weather have impacted the response to crimes in bush Alaska. The Alaska State Troopers, the Alaska State Legislature, and the Alaska governor have placed a greater focus on public safety in rural Alaska over the last several years. In addition to the work done at the local, Tribal, and state level, the federal government has worked to strengthen the capacity of Alaska Native Tribes to respond to certain crimes in their own criminal justice systems. The second half of this article will focus on those efforts.[106]

VIII. The partial restoration of jurisdictional balance in Indian country

For decades, Tribal governments throughout the nation were divested of their authority to prosecute non-Indians who commit crimes in their communities. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court ruled that Tribal courts lack inherent criminal jurisdiction over non-Indian defendants, even when a crime occurs within Tribal territory and targets Tribal victims.[107] This decision resulted in a void in Tribal powers and a dangerous public safety vacuum across Indian country. In the wake of *Oliphant*, non-Indian perpetrators on Tribal lands could act with a degree of impunity, potentially shielded by an already complicated jurisdictional maze that neither states nor the federal government were able to consistently navigate.[108] Concerning these gaps in jurisdiction, the Senate Committee on Indian Affairs in 2012 observed:

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d-into-law/ (last visited June 24, 2025).

[105] *Id.*

[106] *See* sections VIII–X, *infra*.

[107] 435 U.S. 191 (1978). In its concluding remarks, the *Oliphant* Court acknowledged that the increased sophistication of Tribal court systems, the passage of the Indian Civil Rights Act and its enlargement of procedural rights to defendants in Tribal courts, and the prevalence of non-Indian crime on Indian reservations were all "considerations for Congress to weigh in deciding whether Indian [T]ribes should finally be authorized to try non-Indians." *Id.* at 2011–12.

[108] *See generally* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709 (2006).

> Tribes do not currently have the authority to prosecute non-Indian offenders even though they live on Indian land with Native women. Prosecuting these crimes is left largely to [f]ederal law[-]enforcement officials who may be hours away and are often without the tools or resources needed to appropriately respond to domestic violence crimes while also addressing large-scale drug trafficking, organized crime, and terrorism cases. As a result, non-Indian offenders regularly go unpunished, and their violence continues. Domestic violence is often an escalating problem, and currently, minor and mid-level offenses are not addressed, with [f]ederal authorities only able to step in when violence has reached catastrophic levels.[109]

The consequences wrought by *Oliphant* were therefore devastating, especially for Native American women, who experience some of the highest rates of domestic and sexual violence in the United States.[110]

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) marked the first major congressional action to correct this imbalance.[111] Originally enacted on September 13, 1994, VAWA established a comprehensive and lifesaving federal response to domestic violence, sexual assault, and stalking nationwide, and has since been reauthorized four times.[112] While it did little to restore the long overdue Tribal criminal jurisdiction over non-Indians, the reauthorization of VAWA in 2005 (VAWA 2005) made several important, albeit somewhat limited, contributions to support Tribal public safety efforts. For example, it expanded funding for Tribal programs, including those for victim services, and directed the Department of Justice (Department) to consult annually with Tribal governments on the administration of programs addressing violence against Indian women.[113] VAWA 2005 also made it a crime for any person to commit a domestic assault in Indian country if the perpetrator has at least two prior final convictions for domestic violence rendered "in federal, state, or Indian [T]ribal court proceedings."[114]

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[109] S. Rep. No. 112-153, at 9 (2012).

[110] *See* André B. Rosay, U.S. Dep't of Just., Nat'l Inst. Of Just., Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey (2016).

[111] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304).

[112] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[113] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901–909, 119 Stat. 2960 (Title IX).

[114] *See id.* § *909* (codified at 18 U.S.C. § 117). *See also* United States v. Bryant, 579

The 2013 reauthorization signified a historic shift by partly restoring Tribal criminal jurisdiction and affirming the inherent authority of Tribal nations to exercise a newly created category of jurisdiction, now known as special Tribal criminal jurisdiction.[115] Under VAWA 2013, Tribes exercising special Tribal criminal jurisdiction could prosecute non-Indians who commit certain acts of domestic violence, dating violence, or violating protection orders in Indian country.[116] This special jurisdiction runs concurrently with any federal or state jurisdiction over the crimes, and there exists a general exception for crimes in which the victim and alleged defendant are both non-Indians.[117]

In addition, the new law launched a pilot project. For the first two years after the enactment of VAWA 2013, Tribes were allowed to seek designation from the U.S. Attorney General to exercise special jurisdiction on an accelerated basis.[118] The U.S. Attorney General was then permitted discretion to grant such a designation after coordinating with the Secretary of the Interior, consulting with other affected Tribes, and concluding that the criminal justice system of the requesting Tribe had adequate safeguards in place to protect defendants' rights, consistent with the Indian Civil Rights Act of 1968 (ICRA).[119] Ultimately, throughout the first two years of VAWA 2013's incipience, the Department granted five Tribes the ability to exercise special Tribal criminal jurisdiction on their lands.[120]

Following the 2013 reauthorization of VAWA, the Department partnered with Tribal governments and organizations to inaugurate the Inter-Tribal Technical Assistance Working Group (ITWG), a voluntary, Tribally led group composed of Tribal court administrators, law-enforcement personnel, and other representatives from across the United States.[121] The ITWG supports Tribal nations interested in exercising special Tribal criminal jurisdiction by providing a forum for peer-to-peer education, in-

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U.S. 140, 142–45 (2016) (recounting the high incidence of domestic violence against Native American women in finding that the use of Tribal court convictions as predicate offenses under 18 U.S.C. § 117 did not violate the Constitution).

[115] *See* 25 U.S.C. § 1304(b). Because of its limited scope at the time of its enactment, this was called "special domestic violence criminal jurisdiction" in VAWA 2013. Violence Against Women Reauthorization Act of 2013 § 904.

[116] *See* 25 U.S.C. § 1304(b).

[117] *See id.*

[118] *See* Violence Against Women Reauthorization Act of 2013 § 908.

[119] *See id.* § 904.

[120] *See VAWA 2013 Pilot Project*, U.S. Dep't of Just., Tribal Just. & Safety (Apr. 7, 2023), https://www.justice.gov/tribal/vawa-2013-pilot-project.

[121] *Intertribal Technical-Assistance Working Group (ITWG)*, Nat'l Cong. of Am. Indians, https://archive.ncai.org/tribal-vawa/get-started/itwg (last visited June 30, 2025).

formation, and technical assistance.[122] It has since played a central role in sustaining the objectives of VAWA 2013, offering guidance on legal reforms, Tribal court infrastructure, victim services, and intergovernmental coordination. The national ITWG formally convenes twice a year and continues to serve as a critical means for collaboration between Tribes and federal agencies in the exercise of special Tribal criminal jurisdiction and the protection of Native American women and men.[123]

Still, VAWA 2013 came with conditions. To exercise special Tribal criminal jurisdiction, Tribes must meet certain federal standards, including providing public defenders to indigent defendants, maintaining written and publicly available criminal laws and procedures, and recording judicial proceedings.[124] For many Tribes, these requirements necessitate investments in court infrastructure and personnel. Despite these hurdles, by 2022, 31 Tribes had implemented special Tribal criminal jurisdiction and successfully prosecuted non-Indian defendants.[125]

The legislation's transformative potential was also unevenly distributed. In a "Special Rule for the State of Alaska," VAWA 2013 categorically excluded most Alaska Native Tribes from exercising special Tribal criminal jurisdiction.[126] Relying on the distinct legal geography of Alaska, where the absence of a reservation system and the applicability of Public Law 280 had long complicated Tribal authority, Congress determined that Alaska Native Villages lacked the requisite territorial status for purposes of the law. Although this exclusion was repealed a year later, a broader message remained clear: Tribes in Alaska were still left in a legal grey area and were not presumed to possess the same inherent sovereign powers as their counterparts in the Lower 48.[127]

VAWA 2013 was a landmark legislative act and provided an unequivocal statement that Tribal governments should be trusted (and are best suited) to protect their own members, including from non-Indian vio-

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[122] *Id.*

[123] *See Intertribal Technical-Assistance Working Group (ITWG)*, Nat'l Cong. of Am. Indians, https://archive.ncai.org/tribal-vawa/get-started/itwg (last visited June 24, 2025).

[124] *See* 25 U.S.C. § 1304(d)–(f).

[125] *See VAW Resource Center: Implementing Tribes*, Nat'l Cong. of Am. Indians, https://www.ncai.org/section/vawa/about-vawa-and-stcj/about-stcj (last visited June 24, 2025).

[126] *See* Violence Against Women Reauthorization Act of 2013 § 910 (making clear that in the State of Alaska the amendments authorizing the exercise of special Tribal criminal jurisdiction "shall only apply to the Indian country . . . of the Metlakatla Indian Community, Annette Island Reserve").

[127] *See* Repeal of Special Rule for State of Alaska, Pub. L. No. 113-275, 127 Stat. 2988 (2014).

lence. Nevertheless, the restoration of Tribal authority was selective, limited, and incomplete. And as for Alaska Native communities, which are already often left in legal margins, the law's promise of justice remained unfulfilled for nearly another decade.

IX. The Violence Against Women Reauthorization Act of 2022 and reawakening Tribal authority in Alaska

On March 15, 2022, VAWA 2022 was signed into law as part of the Consolidated Appropriations Act of 2022.[128] Until that point, Alaska was functionally excluded from the implementation of special Tribal criminal jurisdiction under the previous iteration of VAWA. And as discussed above, Alaska for many decades has occupied a liminal space in federal Indian law, shaped by the enactment of ANCSA, a knotty jurisdictional backdrop, and persistent federal reluctance to recognize the criminal jurisdiction of Alaska Native Villages.[129] This legislative breakthrough reflected the culmination of many years of legal advocacy, Tribal testimony, and mounting bipartisan concern over the crisis of violence against Alaska Native women.

In VAWA 2022, Congress expressly recognized the immense need for Alaska Tribes to be able to address violence against women in their communities, acknowledging that "the unique legal relationship of the United States to Indian Tribes creates a [f]ederal trust responsibility to assist Tribal governments in safeguarding the lives of Indian women."[130] In particular, it reiterated findings from the 2010 Indian Law and Order Commission that Alaska Native women are overrepresented in the population experiencing domestic violence by 250% and that Alaska Native women make up 19% of the population in Alaska but 47% of reported rape victims in the state.[131] Congress also found that although the Alaska

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[128] *See 2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. Dep't of Just. (Apr. 7, 2023), https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa.

[129] *See* sections III–IV, *supra*.

[130] Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, tit. 8, § 811, 136 Stat. 49, 905.

[131] *See id.* § 811, 136 Stat. at 904. In its findings for VAWA 2022, Congress likewise restated the Indian Law and Order Commission's recommendation that "devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so." *Id.* §§ 904–905 (citing Indian L. & Ord. Comm'n, A Roadmap for Making Native America Safer 35 (2015)).

Department of Public Safety has primary responsibility for law enforcement in rural Alaska, it provides only 1 to 1.4 field officers per 1 million acres.[132] These official pronouncements echoed those from the U.S. Attorney General, who declared a public safety emergency in rural Alaska in 2019, after "witness[ing] firsthand the complex, unique, and dire law[-]enforcement challenges the [s]tate of Alaska and its remote Alaska Native communities are facing."[133]

One of the most notable outcomes of the legislation was the expansion of the newly renamed special Tribal criminal jurisdiction. Under VAWA 2022, participating Tribes nationwide now have the authority to prosecute non-Indians for six additional covered crimes committed on Tribal lands: (1) the assault of Tribal justice personnel; (2) child violence; (3) sexual assault; (4) stalking; (5) obstruction of justice; and (6) sex trafficking.[134] The law thus broadened special Tribal criminal jurisdiction to encompass not only interpersonal violence, but also threats to the administration of Tribal justice itself, clarifying that Tribes may prosecute non-Indians who perpetrate obstruction of justice or assaults against Tribal justice personnel, even where the victim is non-Indian.[135] This amounts to a recognition that inherent sovereign powers necessarily include the ability to defend the integrity of a government's own legal system.

Although the 2022 reauthorization has a national reach, its most defining advancement was the deliberate and unprecedented inclusion of Alaska Native Tribes. Significantly, in VAWA 2022, Congress recognized and affirmed "the inherent authority of any Indian [T]ribe occupying a Village in the State to exercise criminal and civil jurisdiction over all Indians present in the Village" subject to ICRA.[136] It also provided that Alaska Tribal courts have full civil jurisdiction over the issuance and enforcement of protective orders involving any person within a Village or otherwise under the authority of the Tribe.[137] For purposes of determining jurisdiction pursuant to VAWA 2022, the term *Village* denotes the Alaska Native Village Statistical Area, an administrative designation of the Census Bureau that recognizes the functional geography of Tribal

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[132] *See* Violence Against Women Act Reauthorization Act of 2022 § 811, 136 Stat. at 904.

[133] *See* Press Release, U.S. Dep't of Just., Attorney General William P. Barr Announces Emergency Funding to Address Public Safety Crisis in Rural Alaska (June 28, 2019). In doing so, the U.S. Attorney General also announced more than ten million dollars in public safety funding from the Department to support police in Alaska Native Villages. *See id.*

[134] *See* 25 U.S.C. § 1304(a)(5).

[135] *See id.* § 1304(b)(4)(A).

[136] *Id.* § 1305(a).

[137] *See id.* § 1305(b).

communities in Alaska.[138]

Perhaps the centerpiece of VAWA's extension into Alaska was its establishment of the Alaska Pilot Program, a pathway for Alaska Native Tribes to exercise special Tribal criminal jurisdiction over their Villages.[139] The statute permits the U.S. Attorney General to designate up to 5 Alaska Tribes each year—but no more than 30 total Tribes—with the authority to prosecute non-Indian defendants for the same range of offenses recognized elsewhere.[140] It also directed the Department to create a process for Tribes in Alaska to participate in the Pilot Program and instructs the U.S. Attorney General to prioritize Tribes based in villages that are predominantly Indian in population and lack a permanent state law-enforcement presence.[141] To promote Tribal collaboration in rural Alaska where resources are limited, VAWA 2022 allows for two or more Tribes to share resources, such as court personnel or detention facilities, and jointly participate in the Pilot Program as an inter-Tribal partnership.[142]

Like elsewhere in the United States, the exercise of special Tribal criminal jurisdiction in Alaska has its constraints. It remains subject to the procedural safeguards first articulated in VAWA 2013 and then reaffirmed in 2022.[143] Participating Alaska Tribes must in the same way provide a full array of due process protections to non-Indian defendants, including the right to effective assistance of counsel, trial by an impartial law-trained judge, and public access to Tribal codes and records, to name a few.[144] In addition, VAWA 2022 provides that a Tribal court imposing a sentence exceeding one year must ensure that defendants either serve their

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[138] *See id.* § 1305 note (Application of Definitions and Grant Conditions); Violence Against Women Act Reauthorization Act of 2022 § 812, 136 Stat. at 905–06 ("The term 'Village' means the Alaska Native Village Statistical Area covering all or any portion of a Native village (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), as depicted on the applicable Tribal Statistical Area Program Verification map of the Bureau of the Census.").

[139] *See* 25 U.S.C. § 1305(d). As in the Lower 48, special Tribal criminal jurisdiction in Alaska is concurrent with federal and state jurisdiction and is generally inapplicable where both the victim and the defendant are non-Indians, in which case an Alaska Tribe would not be authorized to exercise jurisdiction. *See id.* § 1305(c)(2)(3). Under VAWA 2022, however, Alaska Native Tribes participating in the Pilot Program still retain special criminal jurisdiction over cases involving obstruction of justice or the assault of Tribal justice personnel, regardless of the Indian status of the defendant and victim. *See id.* § 1305(c)(3)(A).

[140] *See id.* § 1305(d)(1), (5).

[141] *See id.* § 1305(d)(3).

[142] *See id.* § 1305(d)(4).

[143] *See id.* §§ 1304(d), 1305(d)(3)(A)(ii).

[144] *See id.* § 1302(c).

sentence in correctional facilities that meet certain federal standards or allow them to "serve another alternative form of punishment, as determined by the Indian court pursuant to Tribal law."[145] For many Alaska Native Tribes, which are often underfunded, remote, and operating more informal justice systems, all these requirements present practical barriers to exercising the jurisdiction that the law nominally restores.

Despite these restrictions, VAWA 2022 includes several other provisions that support the exercise of Tribal criminal authority in Alaska. For one, it created the Alaska Tribal Public Safety Advisory Committee, with the dual mandate to focus on "improving the justice systems, crime prevention, and victim services of Indian [T]ribes and the [s]tate" and "increasing coordination and communication among [f]ederal, Tribal, [s]tate, and local law enforcement agencies."[146] The Committee's composition is diverse: It is required to consist of at least one representative from participating Tribes and Tribes aspiring to participate in the pilot; at least one representative from federal, Tribal, state, and local law enforcement; and at least one representative from Tribal nonprofit organizations providing victim services.[147] Furthermore, VAWA 2022 directs the Department to submit a report to Congress detailing the results of the Alaska Pilot Program, as well as any legislative proposals that would be "necessary to facilitate improved law enforcement in Villages."[148] VAWA 2022 also offers targeted funding and technical assistance, including financial assistance to Tribes preparing to implement special Tribal criminal jurisdiction, such as costs related to law enforcement and court personnel, court facilities, and detention and correctional needs.[149]

A year after the law's enactment, and in response to calls from Tribal leaders across Alaska, the Department's Office of Tribal Justice (OTJ) issued a formal opinion affirming that Alaska Native Tribes retain inherent authority to exercise concurrent criminal jurisdiction over the Indians in their villages.[150] This determination rested in part on Congress' recent recognition of the inherent authority of Alaska Native Tribes, which until

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[145] *Id.* § 1305(e)(2).
[146] *Id.* § 1305(g)(3).
[147] *See id.* § 1305(g)(2).
[148] *Id.* § 1305(h).
[149] *See id.* §1304(h).
[150] *See* Off. of Tribal Just., U.S. Dep't of Just., Concurrent Tribal Authority Under Public Law 83-280 in Alaska (2023). This memorandum relied partly on a 2000 OTJ memorandum concluding that notwithstanding the enactment of Public Law 280, "Indian [T]ribes, as sovereigns that pre-exist the federal Union, retain inherent sovereign powers over their members and territory, including the power to exercise criminal jurisdiction over Indians." Off. of Tribal Just., U.S. Dep't of Just., Concurrent Tribal Authority Under Public Law 83-280 (2000).

now had been complicated by assumptions rooted in Alaska's distinctive geography and history. And by creating a statutory mechanism for Tribes there to assume jurisdiction over all offenders in their communities, VAWA 2022's Alaska provisions reflect an important shift in federal Indian policy in that state.

X. A measured return: the Department's implementation of the Alaska Pilot Program

In a legal terrain long defined by the absence of effective law enforcement in Alaska Native Villages, Tribal prosecutorial authority, and justice for victims, the Department's Alaska Pilot Program signals a quiet but profound re-entry. In June 2022, the Department convened an intradepartmental working group under the joint leadership of the Office of the Deputy Attorney General and the Office of the Associate Attorney General.[151] The working group comprised leaders from several components within the Department, including those who oversee public safety and support criminal justice systems in Tribal communities nationwide: the OTJ; the Office on Violence Against Women; the Office of Justice Programs; the Office of Community Oriented Policing Services; the Executive Office for U.S. Attorneys; the Office on Access to Justice the Federal Bureau of Investigation; the Office of Legal Policy; the Criminal Division; the Environment and Natural Resources Division; the Office of Public Affairs; the Office of Legislative Affairs; and the Office of Legal Counsel.[152]

Later that summer, the Department undertook a series of formal consultations with Tribal leaders in Alaska and other interested entities regarding how to best implement the new law.[153] During these consultations and successive engagements, Tribal governments and advocates clearly

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[151] *See* U.S. Dep't of Just., Violence Against Women Act 2022 Reauthorization, Alaska Pilot Program, Update for Tribal Leaders and Advocates, Annual Violence Against American Indian and Alaska Native Women Tribal Consultation (2023).

[152] *See id.*

[153] *See* U.S. Dep't of Just., Tribal Consultation, Violence Against Women Act Reauthorization 2022 Alaska Pilot Project, Framing Paper (2022). VAWA 2022 explicitly required the Department to consult with the Interior Department and Alaska Tribes in structuring the Pilot Program. 25 U.S.C. § 1305(d)(3)(A). These Tribal consultations, however, were also conducted fulfilling the letter and spirit of the federal trust responsibility, Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments"), and the Department's own Tribal consultation policy. *See* U.S. Dep't of Just., DOJ Policy Statement 0300.01: Tribal Consultation (2022).

voiced that interested Tribes in Alaska require technical assistance and funding to ready their criminal justice systems and exercise special Tribal criminal jurisdiction.[154] Several other recurring themes emerged. For instance, many Tribes cited the need to develop infrastructure from the ground up to meet the standards identified in VAWA 2022, an endeavor that will require time, as well as consistent and sustained funding. Given the unique legal landscape in Alaska, Tribes also expressed that training and technical assistance would be most effective if offered by Alaska experts. Most commenters highlighted that the recognition of Tribal law enforcement by state agencies has been largely unsuccessful, which has encumbered efforts to establish cross-deputization or information sharing agreements with state and local law enforcement.

In October 2023, the Department formally launched the Alaska Pilot Program's implementation procedures, as approved by the U.S. Attorney General.[155] Recognizing the special legal and logistical challenges faced by Alaska Native communities, the Department designed a graduated framework composed of three tracks to augment Tribal participation in the program, each accommodating varying levels of readiness and capacity among Alaska Native Tribes.[156] The tiered approach aims to balance Tribal sovereignty and self-determination with the historical complexities in Alaska resulting from its Public Law 280 underpinnings and the limited Tribal land base in the state. Accordingly, in remarks at the Alaska Federation of Natives 2023 Annual Convention, the Department's Associate Attorney General encouraged all Alaska Tribes to join the program, acknowledging that "many Alaska Tribes are still in the early stages of being ready to exercise [special Tribal criminal] jurisdiction, so we have created a three-track process for interested Tribes to receive technical assistance and federal support along the way."[157]

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[154] On August 9, 2023, at the Office on Violence Against Women's Annual Tribal Consultation in Tulsa, Oklahoma, the Department hosted a special session to discuss its proposed plan for implementing the Alaska Pilot Program. Then on August 23, 2023, Department leadership and staff participated in a roundtable discussion in Anchorage, Alaska on the Alaska Pilot with Alaska Native leaders and Tribal representatives.

[155] *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Announces Violence Against Women Act Alaska Pilot Program (October 20, 2023).

[156] *See id.*

[157] *See* U.S. Dep't of Just., Associate Attorney General Vanita Gupta Delivers Remarks at the Alaska Federation of Natives 2023 Annual Convention, (Oct. 20, 2023). Recognizing that the implementation of special Tribal criminal jurisdiction will require funding, the Department also announced that its Office on Violence Against Women (OVW) made awards to two Alaska Tribes under a special funding initiative targeting Tribes in Alaska. Further, to address Tribal leaders' calls for Alaska-based technical assistance, OVW made an award to the Alaska Native Justice Center, along with five Alaska-based partners, to set up the Alaska-specific ITWG vital to Track One of the

Track One of the Alaska Pilot Program serves as an entry point for Tribes interested in exploring the exercise of special Tribal criminal jurisdiction.[158] Tribes may join the Alaska Inter-Tribal Technical Assistance Working Group (Alaska ITWG), a collaborative body modeled after the national ITWG established in 2013.[159] Membership in the Alaska ITWG provides Tribes with access to targeted technical assistance, peer-to-peer support, and resources to assess and build their criminal justice systems.[160] Notably, participation in this track does not require immediate commitment to pursue formal designation to exercise special Tribal criminal jurisdiction, but allows Tribes to engage in preparatory activities at their own pace, while sharing information and strengthening relationships with one another.

In Track Two of the Pilot Program, Alaska Tribes that have progressed beyond initial exploration but are not yet fully prepared to exercise special Tribal criminal jurisdiction can engage in structured capacity-building activities.[161] These Tribes complete a questionnaire aligning with the statutory defendants' rights requirements for exercising special Tribal criminal jurisdiction under VAWA 2022.[162] On submission, the Department assigns a Federal Project Liaison to collaborate with the Tribe and the Alaska ITWG technical assistance provider.[163] Together, they identify unmet needs and develop a tailored plan to address gaps in their laws, policies and procedures, and criminal justice infrastructure.[164] Preliminary Pilot Program Tribes are not required to ultimately seek designation for special Tribal criminal jurisdiction to avail themselves of the unique peer-to-peer support offered in Track Two. This collaborative approach ensures Alaska Tribes receive the necessary assistance both in furtherance of their public safety goals and to advance toward full participation in the program.

Lastly, Track Three of the Alaska Pilot is reserved for Alaska Tribes equipped to fully exercise special Tribal criminal jurisdiction.[165] Tribes ready for this track submit a formal request for designation to the Department, accompanied by the completed statutory questionnaire, rele-

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pilot and to provide technical assistance for Alaska Tribes preparing to exercise special Tribal criminal jurisdiction.

[158] *See Violence Against Women Act 2022 Reauthorization—Alaska Pilot Program*, U.S. Dep't of Just. (Aug. 9, 2024), https://www.justice.gov/tribal/vawa-2022-alaska-pilot-program.

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.*

vant Tribal legal materials, and certifications from Tribal leadership.[166] Department staff with expertise in federal Indian law and criminal justice systems will then review the submitted questionnaire and make a recommendation to the U.S. Attorney General. Once approved, designated Alaska Tribes attain the authority to prosecute non-Indian offenders for covered crimes within their villages, representing a significant step toward enhanced Tribal sovereignty and public safety.

Early developments suggest both momentum and constraint. Some participating Tribes have begun drafting criminal codes, training Tribal court personnel, and establishing relationships with federal and state agencies. Others are navigating practical hurdles, such as funding defense services, protecting due process while centering Tribal values, and handling sentencing and appeals in remote villages with few detention options. Nonetheless, the three-track framework reflects a nuanced approach to the diverse capacities and needs of Alaska Native Tribes. By providing flexible pathways to participation, the Alaska Pilot Program supports Tribes in strengthening their justice systems and exercising restored jurisdiction in a manner consistent with their readiness and community priorities.

XI. Conclusion

Alaska is home to a vast archipelago of Native villages that are geographically remote, often small in population, and culturally distinct. The jurisdictional structure that governs these communities has been shaped by many years of congressional policy decisions and judicial actions resistant to Tribal sovereignty in Alaska. Across these villages, the absence of Tribal criminal authority has contributed to some of the highest rates of domestic and sexual violence in the nation, with devasting effects on Native women and families. The Indian Law and Order Commission described this reality in stark terms, presenting an unsettling picture of structural neglect. Although VAWA 2022 does not restore full jurisdictional parity for Alaska Native Tribes, it offers a path for Tribal courts to assert the same limited protective authority recognized in the Lower 48 states. VAWA 2022's measures in Alaska tentatively redraw the legal map.

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[166] *See id.*

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The Department of Justice's Role in Addressing the Incidence of Missing or Murdered Indigenous Persons

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"Coming together is a beginning, staying together is progress, and working together is success."[1]

I. Introduction

Addressing violent crime and enhancing public safety in Indian country is a priority for the Department of Justice (Department).[2] The Department uses a multi-faceted approach to address public safety in Indian country: conduct federal investigations and prosecutions; work with federal, Tribal, state, and local law-enforcement partners; provide training and technical assistance; and give financial support to Tribal partners through various grant programs.

For more than 100 years, the Department has investigated and prosecuted crime—violent or otherwise—in Indian country.[3] The U.S. Constitution, treaties, federal statutes, Executive Orders, and court decisions establish and define the unique legal and political relationship between the

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[1] This quotation has been attributed to both Henry Ford (1863–1947) and Edward Everett Hale (1822–1909). *See, e.g.*, John P. Muñoz, *Coming Together, Keeping Together, Working Together*, Peoria Mag., https://www.peoriamagazine.com/archive/ibi_article/2010/coming-together-keeping-together-working-together/ (last visited July 28, 2025); Ulrike Linnig, *Collaboration Is Hard!*, ClimateKIC (May 24, 2019), https://www.climate-kic.org/opinion/collaboration-is-hard/.

[2] *See* Press Release, U.S. Dep't of Just., Justice Department to Surge Resources to Indian Country to Investigate Unresolved Violent Crimes (Apr. 1, 2025).

[3] 18 U.S.C. § 1151 (defining Indian country).

United States and Indian Tribes.[4] Federal criminal jurisdiction in Indian country is established by statute. Two main federal statutes that govern federal criminal jurisdiction in Indian country are the General Crimes Act and the Major Crimes Act.[5] In certain situations, federal statutes have transferred some or all federal criminal jurisdiction in Indian country to state criminal jurisdiction.[6] The federal government has the ability to prosecute federal crimes of general applicability (such as drug, firearms, child exploitation, and financial crimes) in Indian country regardless of other applicable jurisdictional statutes.[7]

The Department has established practices to ensure communication, coordination, and collaboration with Tribal, state, and local partners.[8] The Department directs that each United States Attorney's Office (USAO) with Indian country in its district engage at least annually in consultations with Tribes in the district and prepare an operational plan to address public safety challenges specific to each district and Tribe.[9] The Department also requires each newly confirmed United States Attorney (USA) to consult with all the Tribes in the district within eight months of assuming office.[10] Additionally, the Department, through its USAOs with Indian country responsibilities, is statutorily required to have at least one designated Tribal liaison who serves as the primary point of contact for Tribes in the district.[11] Statutory duties of Tribal liaisons include the following:

- organizing prosecutions of federal crimes that occur in Indian country;
- developing multidisciplinary teams to foster communication among law-enforcement partners;
- working with Tribal leadership, justice officials, community members, and victim advocates to address public safety challenges in Indian country; and

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[4] Exec. Off. for U.S. Att'ys, U.S. Dep't of Just., 2023 Indian Country Investigations and Prosecutions (2024).
[5] *See* 18 U.S.C. § 1152 (General Crimes Act); *id.* § 1153 (Major Crimes Act).
[6] *See*, *e.g.*, *id.* § 1162; *id.* § 3243.
[7] *Id.* §§ 1152–1153.
[8] *See* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just. on Indian Country Law Enforcement Initiative to U.S. Att'ys with Districts Containing Indian Country (Jan. 11, 2010); Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just. on Promoting Public Safety in Indian Country to Fed. L. Enf't Agencies and U.S. Att'ys (July 13, 2022).
[9] Memorandum, Lisa O. Monaco, *supra* note 8.
[10] *Id.*
[11] 25 U.S.C. § 2810.

- providing training and technical assistance to federal, Tribal, state, and local law-enforcement partners to improve investigations and prosecutions in Indian country.[12]

Despite the Department's ability to investigate and prosecute crime in Indian country and its policies to ensure partnership among federal, Tribal, state, and local law-enforcement entities, American Indian and Alaska Native (AI/AN) populations continue to face some of the highest rates of violence in the United States, including a disproportionate number of missing or murdered Native American women, children, and men.[13] Tribal leaders, community organizers, and victim advocates organized to draw attention to the violence that Native American people suffer. The movement is identified as Missing or Murdered Indigenous Persons (MMIP).[14] The MMIP movement addresses the persistently high rates of violence and the disproportionate number of missing or murdered Indigenous persons in reservation and urban AI/AN communities through education, prevention, outreach, investigation, and prosecution.

This article focuses on the Department's role in addressing the incidence of MMIP through investigations, prosecutions, and outreach. By examining the origins of the MMIP movement and governmental steps to address the public safety issues contributing to the MMIP movement, this article will emphasize the need for continued communication, coordination, and collaboration in investigating and prosecuting violent crime (including murder) and addressing the number of missing Native people through outreach.

II. Origins of the Missing or Murdered Indigenous Persons movement

Amidst grassroots organizations in Canada, the MMIP movement emerged from a long history of violence against Indigenous peoples—particularly women and girls—and the inadequate response from law enforcement.[15] The first official Missing or Murdered Indigenous Women's gath-

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[12] *Id.*

[13] *See* André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 Nat'l Inst. Just. J. 38 (2016).

[14] MMIP is used interchangeably with Missing or Murdered Indigenous People (MMIP), Missing or Murdered Indigenous Women (MMIW), and Missing or Murdered Indigenous Relatives (MMIR).

[15] *Missing and Murdered Indigenous Women (MMIW)*, Native Hope: St. Joseph's Indian Sch., nativehope.org/missing-and-murdered-indigenous-women-mmiw (last visited July 28, 2025).

ering was held in Canada in 2015.[16] The MMIP movement gained momentum in the United States as a direct response to published reports highlighting the disproportionately high rates of violence (including murder and sexual assault) that Indigenous populations experience.[17] Today, the MMIP movement continues to be a coalition of grassroots and nongovernmental organizations and Tribal governments throughout Canada and the United States that seek to draw attention to the disproportionate violence experienced by Native people and the significant number of Native people that go missing each year.

A. Data supporting the Missing or Murdered Indigenous Persons movement

No single source for data exists on MMIP statistics. To understand the scope of the MMIP problem, one must examine several federal databases as well as data gathered by researchers and Tribal, state, and local government entities.[18] The complexities of evaluating MMIP statistics is exacerbated by the fact that MMIP encompasses two distinct issues: (1) cases related to missing persons; and (2) cases related to murdered persons.[19] Although the issues may be interrelated or overlapping, many missing persons either return home or are located, and not all murder victims were previously missing.[20]

Despite limitations in gathering MMIP data, a common theme is undeniable in evaluation of the data: AI/AN persons experience disproportionately high rates of violence. A 2016 Urban Indian Health Institute report addressing the number of MMIP cases noted that the murder rate of Native women was 10 times higher than the national average.[21] A 2016 study by the National Institute of Justice found that more than four in

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[16] *Id.*

[17] *See* Rosay, *supra* note 13, at 38–45; Annita Lucchesi (Southern Cheyenne) & Abigail Echo-Hawk (Pawnee), Urb. Indian Health Inst., Missing and Murdered Indigenous Women & Girls: A Snapshot of Data from 71 Urban Cities in the United States (2018).

[18] Nathan James, Cong. Rsch. Serv., Missing and Murdered Indigenous People (MMIP): Overview of Recent Research, Legislation, and Selected Issues for Congress (2023).

[19] U.S. Dep't of Just. & U.S. Dep't of the Interior, Federal Law Enforcement Strategy to Prevent and Respond to Violence Against American Indians and Alaska Natives, Including to Address Missing or Murdered Indigenous Persons 9 (2022) [hereinafter Strategy to Prevent and respond to Violence Against American Indians and Alaska Natives].

[20] *Id.*

[21] Lucchesi & Echo-Hawk, *supra* note 17. This report was compiled from a survey of 71 U.S. cities.

five AI/AN women and men have experienced violence and over half of AI/AN women have endured sexual violence.[22]

According to recent statistics evaluated by the Centers for Disease Control and Prevention, homicide is the 4th leading cause of death among Native men under the age of 44 and the 6th leading cause of death among Native women under the age of 44.[23] Among Indigenous women, approximately 44% report having been raped and 58% have experienced intimate partner violence.[24]

AI/AN individuals go missing at a higher rate than most other racial or ethnic groups.[25] As of June 2023, of the 23,300 missing persons included in the National Missing and Unidentified Persons System (NamUs), 820 (3.5%) were identified as AI/AN.[26] The proportion of missing people who were identified as AI/AN is more than 3 times the AI/AN percentage of the U.S. population identified in the 2020 census (1.1%).[27]

Despite available data, the Department recognizes that data gaps persist in both AI/AN violent crime and missing person data due to the following: failure to report a missing person to law enforcement; inadequate data entry by law enforcement (including failure to submit a report to national databases or racial misclassification); lack of access to databases; and insufficient law-enforcement response.[28] The Department continues to seek improvements in data collection, while still fulfilling its role in addressing MMIP issues through investigation, prosecution, and outreach.

III. Initial federal government response

As grassroots organizations, non-profit victim advocacy groups, and state and local governments were organizing efforts to address the MMIP movement through various state and local task forces and gatherings, the federal government, including the Department, formulated its initial response in 2019.[29]

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[22] *See* Rosay, *supra* note 13, at 38–45.

[23] U.S. Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention & Control, Violence Against Native Peoples Fact Sheet (2025).

[24] *Id.*

[25] *See* Lori McPherson & Sarah Blazucki, *"Statistics are Human Beings with the Tears Wiped Away": Utilizing Data to Develop Strategies to Reduce the Number of Native Americans Who Go Missing*, 47 Seattle U. L. Rev. 119 (2023).

[26] James, *supra* note 18.

[27] *Id.*

[28] *See* McPherson & Blazucki, *supra* note 25, at 15.

[29] *See, e.g.*, Press Release, U.S. Dep't of Just., Trump Administration Launches Presidential Task Force on Missing and Murdered American Indians and Alaska Natives (Jan. 29, 2020); *What Is NamUs?*, Nat'l Missing and Unidentified Perss.

A. Operation Lady Justice

On November 26, 2019, President Trump issued Executive Order 13898, which established a two-year Presidential Task Force on Missing or Murdered American Indians and Alaska Natives (Task Force).[30] The Task Force, also known as Operation Lady Justice (OLJ), aimed to enhance the operation of the criminal justice system and address concerns of AI/AN communities regarding missing or murdered people—particularly missing or murdered women and girls.[31] The Task Force included representatives from multiple agencies and components of the federal government, including the Department, the Department of the Interior (DOI), and the Department of Health and Human Services.[32] Over two years, the Task Force accomplished the following tasks:

- conducted consultations with Tribal governments on the scope and nature of the issues regarding MMIP;
- developed model protocols and procedures to apply to new and unsolved cases of MMIP;
- established a multidisciplinary, multi-jurisdictional team—including representatives from Tribal law enforcement, the Department, and the DOI—to review cold cases involving MMIP; and
- assisted federal, Tribal, state, and local law-enforcement partners in clarifying roles, legal authorities, and jurisdiction in MMIP cases.[33]

By the conclusion of its two years, the Task Force established a framework for the federal government, and more specifically the Department, to address the incidence of MMIP. The Task Force worked to identify investigation and prosecution strategies for unresolved missing or murdered cases where the Department and other federal law-enforcement agencies have jurisdiction. The Task Force identified that sustained success in addressing public safety in Indian country is achieved through communication, coordination, and collaboration among federal, Tribal, state, and

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Sys. (Mar. 21, 2024), https://namus.nij.ojp.gov/what-namus; *Tribal Access Program (TAP)*, U.S. Dep't of Just., https://www.justice.gov/tribal/tribal-access-program-tap (last visited July 28, 2025).

[30] Exec. Order No. 13898, 84 C.F.R. 66059 (2019).

[31] Presidential Task Force on Missing and Murdered American Indians and Alaska Natives (Operational Lady Justice), Dep't of Just. et al., Report to the President: Activities and Accomplishments of the First Year of Operation Lady Justice (2020).

[32] *Id.* at 3.

[33] *Id.* at 7.

local law-enforcement partners to address unresolved violent crimes (including homicide) and provide direct resources to Tribal communities for MMIP-related prevention and education.[34]

B. The Department of Justice's Murdered or Missing Indigenous Persons initiative

In the same week that President Trump issued the Executive Order launching OLJ, the Department established a program to temporarily place 11 MMIP coordinators in select USAOs to assist in outreach surrounding MMIP issues.[35] The MMIP coordinators assisted OLJ in the development of protocols and resources to address missing persons cases.[36] Additionally, MMIP coordinators in select USAOs assisted in review and consultation of unresolved cases.[37]

For more than three years, the temporary MMIP coordinators were instrumental in developing Tribal Community Response Plans (TCRPs) and helping Tribal communities draft and implement their own TCRPs.[38] A TCRP is a voluntary protocol or guidelines document developed by a Tribe that is tailored to that Tribal community's needs, resources, and culture to assist its coordinated response to missing person cases.[39] MMIP coordinators participated in pilot projects to facilitate the development of TCRPs and assist Tribes as they coordinate a response to MMIP.

In 2023, the temporary MMIP coordinators were made a permanent part of the MMIP Regional Outreach Program after proving success in enhancing the Department's role in coordinating with federal, Tribal, state, and local partners regarding MMIP issues.[40]

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[34] *See, e.g.*, Presidential Task Force on Missing and Murdered American Indians and Alaska Natives (Operation Lady Justice), When a Loved One Goes Missing: Resources for Families of Missing American Indian and Alaska Native Adults (2021); U.S. Dep't of Just., Guide to Developing a Tribal Community Response Plan for Missing Person Cases (2022) [hereinafter Tribal Community Response Plan].

[35] Press Release, U.S. Dep't of Just., Attorney General William P. Barr Launches National Strategy to Address Missing and Murdered Indigenous Persons (Nov. 22, 2019).

[36] *See* Tribal Community Response Plan, *supra* note 34.

[37] Strategy to Prevent and Respond to Violence Against American Indians and Alaska Natives, *supra* note 19, at 35.

[38] *Id.*

[39] *Id.*

[40] *See* section V.B, *infra*.

IV. Federal legislation

As governmental and public safety officials discussed how to assist in addressing the issues embodied in the MMIP movement, the U.S. Congress simultaneously authorized two acts to aid federal agencies in developing long-term solutions to assist in addressing the public safety and MMIP challenges in reservation and urban AI/AN communities.[41]

A. Savanna's Act

On October 10, 2020, Savanna's Act—named after Savanna Greywind, a 22-year-old member of the Spirit Lake Tribe who was tragically murdered in an urban area of North Dakota in 2017—was enacted to accomplish the following: clarify the responsibilities of law-enforcement agencies at all levels of government in responding to MMIP; increase cooperation among law-enforcement agencies; provide Tribal governments with additional resources to respond to MMIP cases; and increase data collection and reporting on MMIP.[42]

The law directed the Department to comply with several new requirements to address MMIP:

- provide training to law-enforcement agencies on how to record Tribal enrollment for victims in federal databases;
- consult annually with Tribes to improve access to local, regional, state, and federal crime information databases and criminal justice information systems;
- develop and implement a strategy to educate the public on NamUs;
- conduct specific outreach to Tribes, Tribal organizations, and urban Indian organizations regarding the ability to enter information through NamUs or other non-law-enforcement-sensitive portals;
- develop regionally appropriate guidelines for responses to cases of missing or murdered Native Americans;
- provide training and technical assistance to Tribes and law-enforcement agencies for implementation of the developed guidelines; and
- report statistics annually on missing or murdered Native Americans.[43]

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[41] *See* Savanna's Act, Pub. L. No. 116-165, 134 Stat. 760 (2020) (codified at 25 U.S.C. §§ 5701–5705); Not Invisible Act of 2019, Pub. L. No. 116-166, 134 Stat. 766 (2020) (codified at 25 U.S.C. §§ 2801–2815).
[42] Savanna's Act § 2, 13 Stat. at 760; James, *supra* note 18.
[43] Savanna's Act, § 6, 13 Stat. at 763.

The Department worked to implement Savanna's Act requirements throughout 2021 and 2022. In November 2021, the Department launched a Steering Committee to address the crisis of MMIP.[44] The Steering Committee was tasked with reviewing the Department's relevant guidance, policies, and practices to improve law-enforcement response in Indian country through the implementation of Savanna's Act and compliance with Executive Order 14053, which was aimed at improving public safety and criminal justice for AI/AN and addressing MMIP issues.[45] The Steering Committee's work was guided through consultation with Tribal and law-enforcement partners.

In July 2022, the DOI issued a joint report as required by Executive Order 14053.[46] In the report, the Department highlighted its work in meeting the requirements of Savanna's Act. Since 2020, the Department's National Indian Country Training Initiative (NICTI) invested heavily in providing training to law enforcement and other criminal justice and social service personnel on MMIP issues, including training required by Savanna's Act.[47] The Department devoted significant resources to preparation of regionally appropriate guidelines.[48]

1. Regionally appropriate guidelines

Section 5(a) of Savanna's Act requires USAs to develop regionally appropriate guidelines to respond to cases of missing or murdered Indians.[49] In creating such guidelines, USAOs should consult with Tribes and other relevant partners, including the Federal Bureau of Investigation (FBI); the DOI; Tribal, state, and local law-enforcement agencies; medical examiners and coroners; Tribal, state, and local organizations that provide victim services; and national, regional, and urban Indian organizations

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[44] Memorandum from Lisa O. Monaco, Deputy Att'y Gen. on Steering Committee to Address the Crisis of Missing or Murdered Indigenous Persons to U.S. Dep't of Justice to Dep't Heads of Components (Nov. 15, 2021).

[45] *See* Exec. Order No. 14053, 86 C.F.R. 220 (2021); Memorandum, Lisa O. Monaco, *supra* note 44; *About DOJ Efforts to Address MMIP*, Tribal Just. & Safety, U.S. Dep't of Just., https://www.justice.gov/tribal/mmip/about (last visited July 28, 2025).

[46] *See* Strategy to Prevent and Respond to Violence Against American Indians and Alaska Natives, *supra* note 19.

[47] *Id.*; U.S. Dep't of Just. & U.S. Dep't of Interior, Section 4(c)(2)(C) Response of the Departments of Justice and the Interior to *Not One More: Findings and Recommendations of the Not Invisible Act Commission* Pursuant to Public Law 116-166, at 50 (2024) [hereinafter Section 4(c)(2)(C) Response].

[48] *See* section IV.A.1, *infra*.

[49] Savanna's Act, § 5(a), 13 Stat. at 762.

with relevant experience.[50] After consultation, the resulting guidelines must address the following:

- inter-jurisdictional cooperation among law-enforcement agencies at the Tribal, federal, state, and local levels;
- inter-jurisdictional enforcement of protection orders;
- specific responsibilities of each law-enforcement agency;
- best practices in conducting searches for missing persons on and off Indian land;
- standards on the collection, reporting, and analysis of data and information on missing persons and unidentified human remains;
- information on culturally appropriate identification and handling of human remains identified as Indian;
- guidance stating that all appropriate information related to missing or murdered Indians should be entered into applicable databases in a timely manner;
- guidance on which law-enforcement agency is responsible for inputting information into appropriate databases under section 3 of Savanna's Act if the Tribal law-enforcement agency does not have access to those appropriate databases;[51]
- guidelines on improving law-enforcement agency response rates and follow-up responses to cases of missing or murdered Indians; and
- guidance on ensuring access to culturally appropriate victim services for victims and their families.[52]

In 2022, USAOs prepared their individual district's regionally appropriate guidelines consistent with the requirements of Savanna's Act.[53] These guidelines vary by federal judicial district, as each USAO tailored their guidelines to the specific circumstances of the district, including the following: the presence of Indian country or Tribal land; the relative size of the Indian populations; the type of federal, state, local, and Tribal law-enforcement resources within a district; and the proximity to Indian country in other districts.[54] All USAOs with Indian country responsibilities—including USAOs where the state has jurisdiction over crimes committed in Indian country under Public Law 280 or another statute—have

[50] 25 U.S.C. § 5704(b).
[51] Savanna's Act, § 3(2), 13 Stat. at 760.
[52] 25 U.S.C. § 5704(a).
[53] Memorandum, Lisa O. Monaco, *supra* note 8.
[54] Section 4(c)(2)(C) Response, *supra* note 47.

had their regionally appropriate guidelines in place since the spring of 2022.[55] USAOs are directed to periodically review their Savanna's Act guidelines and update them as needed.[56]

B. The Not Invisible Act

On October 10, 2020, the Not Invisible Act was enacted to increase intergovernmental coordination in identifying and combating violent crime within Indian lands and against AI/AN people.[57] The Not Invisible Act imposed two requirements on the federal government's executive branch. First, the DOI was charged with designating a position within the Office of Justice Services in the Bureau of Indian Affairs (BIA) that would "coordinate prevention efforts, grants, and programs related to the murder of, trafficking of, and missing Indians" across the DOI and the Department.[58] Second, the Department and the DOI were charged with creating a cross-jurisdictional joint federal advisory commission to develop recommendations to increase intergovernmental coordination to identify and combat violent crime within Indians lands and against Indians.[59]

On May 5, 2022, the DOI announced the 41 members of the Not Invisible Act Commission, which included the following: officials from the federal government; family members of missing or murdered individuals; survivors of human trafficking; Tribal leaders; mental and physical healthcare service providers; state and local law enforcement; and national and regional Indian organizations.[60] As required under section 4(c)(2)(C) of the Act, the commission was charged with making recommendations pertaining to the following areas:

- identifying, reporting, and responding to instances of missing persons, murder, and human trafficking on Indian lands and of Indians;
- making necessary legislative and administrative changes to use programs, properties, or other resources funded or operated by the DOI and the Department to combat the crisis of missing or murdered Indians and human trafficking on Indian lands and of Indians;
- tracking and reporting data on instances of missing persons, murder, and human trafficking on Indian lands and of Indians;

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[55] *Id.*
[56] *Id.* at 55.
[57] *See* Not Invisible Act of 2019, Pub. L. No. 116-166, 134 Stat. 766 (2020); Section 4(c)(2)(C) Response, *supra* note 47.
[58] Not Invisible Act of 2019, § 3(a)(1), 134 Stat. at 766.
[59] Section 4(c)(2)(C) Response, *supra* note 47.
[60] *Id.*

- addressing staff shortages and open positions within relevant law-enforcement agencies, including issues related to hiring and retention of law-enforcement officers;
- coordinating Tribal, state, and federal resources to increase prosecution of murder and human trafficking offenses on Indian lands and of Indians; and
- increasing information sharing with Tribal governments on violent crime investigations and prosecutions in Indian lands that declined or were terminated.[61]

The commission worked for more than a year to shape its recommendations based on an extensive analysis of current federal law, policies, and procedures. The commission held eight public hearings throughout Indian country to gather public testimony to inform its recommendations.[62] On November 1, 2023, the commission issued its final report and recommendations.[63] The final report included more than 300 recommendations aimed at addressing the root issues of MMIP by improving intergovernmental coordination and establishing best practices for law enforcement in the areas of data collection, victim services, and law-enforcement training.[64]

As directed by the Act, the Department and DOI provided a joint response to the commission's report in March 2024.[65] The response addressed the work the Department and DOI have done and will undertake to address the findings and recommendations. The Department continues to build on the concepts of communication, coordination, and collaboration to investigate and prosecute violent crime (including murder) and address the number of missing Native people through outreach, including education and coordination with federal, Tribal, state, and local governmental and non-governmental partners.[66]

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[61] Not Invisible Act of 2019, § 4, 134 Stat. at 767–70.
[62] Section 4(c)(2)(C) Response, *supra* note 47, at 94.
[63] *Id.* at 8.
[64] *Id.* at 26–220.
[65] *Id.*
[66] *See* section V, *infra.*

V. Maintaining a coordinated and collaborative approach to addressing the incidence of Missing or Murdered Indigenous Persons

The Not Invisible Act commission report highlighted the work required to address public safety challenges and violent crime in Indian country and involving AI/AN individuals, including those who are missing or have been murdered.[67] As highlighted at the beginning of this article, the Department uses a multi-faceted approach to address public safety in Indian country.[68] As was identified and established by the 2019 OLJ Task Force, this same approach is used in responding to the MMIP movement.[69]

The Department is committed to addressing unsolved or unresolved homicide cases and missing persons cases involving AI/AN people through investigation, prosecution, and outreach. After several years of discussion and preparation, the Department is acting on the discussions by fully implementing its strategies to enhance its efforts to investigate and prosecute violent crime cases in Indian country and address issues raised by the MMIP movement.

A. Law enforcement

At the beginning of Fiscal Year 2025, the FBI's Indian country program had approximately 4,300 open investigations: 900 death investigations; 1,000 child abuse investigations; and more than 500 domestic assault and adult sexual abuse investigations.[70] In addition to the FBI's statistics on open investigations, additional databases and independent analyses conducted by other federal, state, and Tribal law-enforcement agencies reveal an even greater number of open investigations, including murders and missing persons cases.

The FBI—along with other Department law-enforcement components, the DOI's BIA units, and Tribal, state, and local law-enforcement agencies—is addressing both reactive crimes and unresolved violent crimes. Although federal law-enforcement agencies do not have authority to investigate missing persons cases unless the missing person is a child or a crime is suspected, law enforcement has learned that a partnership as-

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[67] Section 4(c)(2)(C) Response, *supra* note 47.
[68] *See* section I, *supra*.
[69] Press Release, U.S. Dep't of Just., *supra* note 29.
[70] *See* Press Release, U.S. Dep't of Just., *supra* note 2.

sists in not only resolving unsolved violent crime cases but also in clearing missing persons cases.[71]

On April 1, 2025, the Department announced that it would surge FBI assets—in partnership with BIA's Missing or Murdered Unit—across the country for a third year to address unresolved violent crimes in Indian country, including crimes relating to MMIP.[72] This annual deployment of resources is known as Operation Not Forgotten.[73]

Operation Not Forgotten solidifies efforts to provide concentrated resources to address unresolved cases. In the first 2 years of investigative support, the FBI worked on over 500 cases, which resulted in the recovery of 10 child victims, 52 arrests, and more than 25 indictments or judicial complaints.[74] Operation Not Forgotten expands on the law-enforcement resources from both the Department and BIA that have been deployed in recent years to address MMIP cases.

B. Missing or Murdered Indigenous Persons Regional Outreach Program

On June 28, 2023, the Department announced the creation of the MMIP Regional Outreach Program (Program), whose mission is to aid in the prevention and response to missing or murdered Indigenous people through the resolution of MMIP cases where federal jurisdiction exists and through continued cooperation with Tribal, federal, and state governmental and non-governmental partners.[75] The Program builds on the work started by the OLJ Task Force and the Department's previous MMIP Coordinator Program and fulfills promises made in the Department's response to the Not Invisible Act commission report. Recognizing that MMIP issues are not confined to one Tribal community, city, or state, the Program allows coordination on a regional and national level to ensure more efficiency.

The Program places five regional MMIP Assistant United States Attorneys (AUSAs) and five regional MMIP coordinators in five designated regions across the United States. These regions can be seen in Figure 1.[76]

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[71] *See, e.g.*, Bryan Lockerby, *Investigating Missing and Murdered Indigenous Persons: A Guide to Law Enforcement Executives*, Police Chief Online, Int'l Ass'n of Chiefs of Police (June 25, 2025), https://www.policechiefmagazine.org/investigation-mmip-executive-guide/.

[72] Press Release, U.S. Dep't of Just., *supra* note 2.

[73] *Id.*

[74] *Id.*

[75] *See* Press Release, U.S. Dep't of Just., Justice Department Launches Missing or Murdered Indigenous Persons Regional Outreach Program (June 28, 2023).

[76] Missing or Murdered Indigenous Persons Regional Outreach Program, *Team Con-*

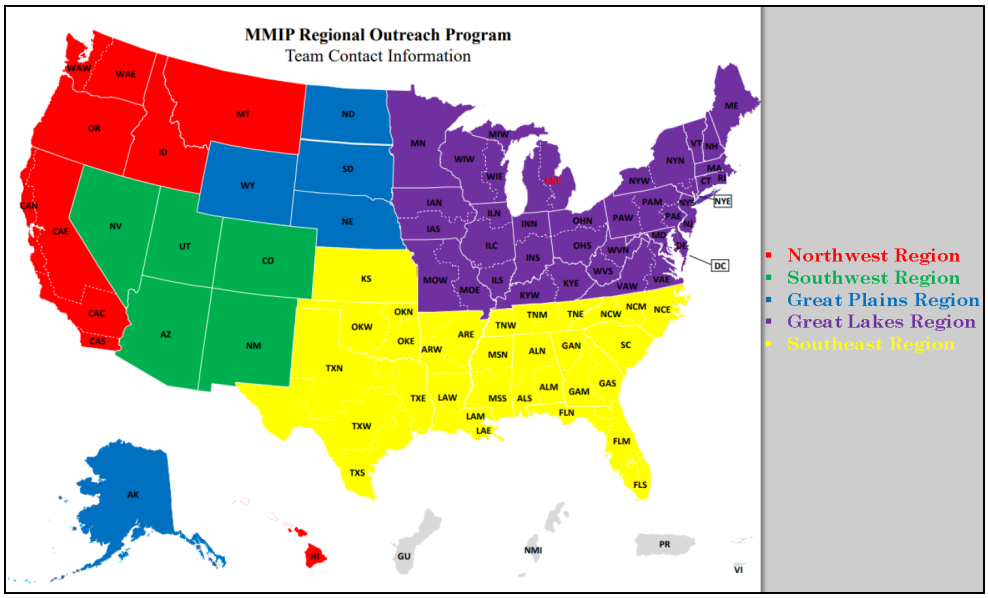

Figure 1: Map of Missing or Murdered Indigenous Persons Regional Outreach Program regions

The Program, including its MMIP coordinators and AUSAs, provides specialized support to USAOs to address and combat the issues of MMIP. The Program's work complements the MMIP-related work of the existing USAO Tribal liaisons, Indian country prosecutors, and NICTI. Specifically, the MMIP AUSAs prosecute and assist in the prosecution of MMIP-related violations of federal law that occur in Indian country throughout their designated regions. The MMIP coordinators and AUSAs promote collaboration among federal, Tribal, local, and state partners on MMIP issues throughout their designated regions.

While assisting USAOs with Indian country responsibilities, the Program builds a cohesive response within and across Program regions through the following: investigation and prosecution of cases; outreach to enhance the Department's efforts with federal, Tribal, state, and local MMIP partners; and, in partnership with NICTI, educational programming to raise awareness and strategies for resolving MMIP cases.

As it relates to case resolution, the Program partners with USAOs and federal and Tribal law-enforcement agencies to address unresolved MMIP-related cases by provided support and prosecution assistance.[77] The Program responds to requests from Tribal and state partners to enhance

tact Information, https://www.justice.gov/usao/media/1398681/dl?inline (2025).

[77] *See* Press Release, U.S. Dep't of Just., U.S. Att'y's Off. D.S.D., Sisseton Man Sentenced for Voluntary Manslaughter in Connection with a 30-Year-Old Crime (June 27, 2024); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Wash., Washington Man Sentenced to Seventeen Years in Prison for Murder on the Colville Reservation

communication with victims, families of victims, and law-enforcement partners on Tribal or state MMIP cases.

To enhance the relationship with federal, Tribal, state, and local governmental and non-governmental partners, the Program can assist USAOs in updating and revising the Savanna's Act regionally appropriate guidelines. The Program's MMIP coordinators work with state and local MMIP task forces and non-governmental organizations to track missing AI/AN cases and provide resources and information across various components. The Program's MMIP coordinators support the development and implementation of TCRPs in Tribal communities in their individual regions. The Program, in conjunction with NICTI, coordinates regional training to address MMIP issues, including Amber Alert, NamUs, and data collection training.

The Program highlights the Department's goal to centralize communication among various federal, Tribal, state, and local MMIP partners. The Program exists to address unresolved missing or murdered cases across regions while individual USAOs continue to actively pursue reactive violent crime cases.

VI. Conclusion

The investigation of MMIP cases requires a holistic approach that combines communication, collaboration, and coordination across multiple law-enforcement agencies and partners. By learning from past cases, implementing data-driven strategies, and engaging with Indigenous communities, the Department can improve outcomes and build trust.

Thousands of unsolved or unresolved cases of Native Americans (including those who are missing or murdered) await justice in federal, Tribal, and state legal systems. The Department is committed to fulfilling its role in investigating and prosecuting those cases in which there is jurisdiction and working with federal, Tribal, state, and local law enforcement and Tribal partners to deliver justice to not only MMIP victims, but all victims of violence in Indian country.

About the Author

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(Apr. 4, 2025); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D.N.M., U.S. Attorney's Office and FBI Announce Five-Count Indictment in Violent Crime Spree on Navajo Nation (Mar. 11, 2025).

tact for USAOs, Department components, and partner agencies on MMIP issues. In 2010, she joined the Department as an AUSA in the District of Minnesota, where she worked exclusively in Indian country. She served as the Tribal Liaison for the USAO in Minnesota for more than 10 years. During her time as Tribal Liaison, she assisted in the coordination and implementation of investigative and prosecution practices after the White Earth Nation and Mille Lacs Band were granted assumption of concurrent jurisdiction under the Tribal Law and Order Act.[78] She also served as a task force member on the state of Minnesota's Missing and Murdered Indigenous Women's Task Force from 2019 to 2020. Before joining the Department, she was a state prosecutor in Minnesota for seven years, primarily prosecuting violent crimes.

[78] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2280 (codified at 25 U.S.C. § 1302).

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The "Categorical Approach" That Often Hinders Application of the Habitual Offender Statute, 18 U.S.C. § 117, to Violations of Tribal Law

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I. Introduction

The horror of domestic abuse has long plagued Native American communities.[1] One effort to combat this scourge appears in a federal statute, adopted in 2005, that imposes significant penalties on the most serious repeat offenders.[2] But that aim is made difficult by the "categorical approach," a strange rule of statutory construction that causes mischief in many arenas and complicates the task of defining the prior offenses that permit application of this habitual offender statute. This article explains the challenges the categorical approach presents to prosecutors and courts.

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[1] "While [domestic violence (DV)] happens across all gender identities, American Indian and Alaska Native girls and women experience the highest rates of DV and abuse in the United States. More than 84% of American Indian and Alaska Native women experience some form of violence in their lifetime. Homicide rates for American Indian and Alaska Native women are more than 10 times the national average in some counties and overall, 2.8 times that of white women." Tassy Parker et al., *Domestic Violence in American Indian and Alaska Native Populations: A New Framework for Policy Change and Addressing the Structural Determinants of Health*, 40 Lancet Reg'l Health—Americas 1 (Nov. 7, 2024) (citation modified).
[2] 18 U.S.C. § 117.

II. The habitual offender statute

The habitual offender statute, 18 U.S.C. § 117, seems straightforward enough.[3] It provides:

> Domestic assault by a habitual offender
>
> (a) **In general.**—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least two separate prior occasions in federal, state, or Indian Tribal court proceedings for offenses that would be, if subject to federal jurisdiction—
>
> > (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or
> >
> > (2) an offense under chapter 110A,
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.
>
> (b) **Domestic assault defined.**—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.[4]

This statute was added in the Violence Against Women Reauthorization Act of 2005, as part of a package of measures aimed to enhance Tribal abilities to address violent crimes against Native American women, aid victims, and develop prevention strategies.[5] The provision significantly increased the period of imprisonment faced by repeat offenders. If a person has two prior Tribal court convictions for domestic violence and commits a third domestic violence offense, the federal government can prosecute

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[3] *Id.*

[4] *Id.* (citation modified).

[5] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 909, 119 Stat. 2960, 3084 (2006).

that individual as a habitual domestic violence offender in federal court and obtain a longer sentence than would otherwise likely apply for the latest assault.[6] The five-year maximum sentence for a habitual offender considerably exceeds the available penalty for many federal and Tribal assault provisions.[7]

Specifically, in prosecutions under federal law, many assaults are punishable by a term of imprisonment of no more than one year. According to 18 U.S.C. § 113(a)(4), an assault within the maritime and territorial jurisdiction of the United States "by striking, beating, or wounding" is punishable by imprisonment for not more than 1 year, while simple assault violating section 113(a)(5) is punishable by imprisonment for not more than 6 months (unless the victim is under 16 years old, in which case the maximum penalty is 1 year of imprisonment).[8] The statute allows for higher penalties for an initial offense based on aggravating circumstances including intent to commit murder or another felony, assault with a dangerous weapon, and assault resulting in serious bodily injury.[9] In addition, section 113(a)(7) states a 5-year maximum for domestic assault resulting in substantial bodily injury "to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years," and section 113(a)(8) increases that maximum to 10 years for "assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate."[10] But note that the habitual offender statute applies to any previous domestic assault, which would include simple assault, without the aggravating factor of serious bodily injury or strangulation.[11] The habitual offender statute thus often allows a much higher sentence for a third domestic assault than would be allowed for a single assault.

The habitual offender statute is even more noteworthy in permitting a significant federal sentence where the prior offenses, as well as the latest assault now being addressed, were violations of Tribal law. Absent this statute, the maximum penalty for any violation of Tribal law is limited, even for a 3rd, 5th, or 10th assault. In most Tribal legal systems, as a matter of federal law the maximum term of imprisonment for a criminal offense is one year.[12]

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[6] *Id.*
[7] *Id.*
[8] 18 U.S.C. § 113(a)(4)–(5).
[9] *Id.* § 113(a)(1)–(3), (6).
[10] *Id.* § 113(a)(7)–(8).
[11] *Id.* § 113(a)(5).
[12] Most criminal convictions in Tribal court are of Indians. In the Violence Against Women Reauthorization Act of 2013, Congress afforded Tribal courts with Spe-

That limit was originally set at six months in the Indian Civil Rights Act of 1968, then increased to one year in 1986.[13] The one-year limit is presently codified at 25 U.S.C. § 1302(a)(7)(B).[14] The Tribal Law and Order Act of 2010 (TLOA) allows for a sentence of imprisonment of up to three years for a Tribal offense, if the crime is "comparable" to an offense that would be punishable by a term of imprisonment of more than one year if prosecuted by the federal government or a state, or if the defendant was previously convicted of a "comparable" offense.[15] But this enhanced sentence is only allowed if the Tribe provides specified due-process protections, including the effective assistance of counsel, provided free to indigent defendants, law-trained judges, and publicly available criminal laws.[16] In part due to a lack of resources, few of the 574 federally recognized Tribes have implemented TLOA enhanced sentencing.

In sum, the maximum sentence for an assault in a Tribal court is usually no more than a year in prison, and often no more than that even in federal prosecutions. The habitual offender statute, 18 U.S.C. § 117, is significant in allowing a much higher penalty to incapacitate those who commit a domestic assault at least three times, including in Native communities.[17]

III. The Categorial Approach

The challenge arises in defining which prior offenses qualify for the application of section 117.[18] The definition of the instant offense prosecuted under section 117 is clear enough. It must be a "domestic assault," defined in section 117(b) as

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cial Tribal Criminal Jurisdiction (STCJ) to prosecute certain crimes committed by non-Indians, including domestic violence. That authority was expanded in the Violence Against Women Reauthorization Act of 2022. But application of STCJ requires that the Tribal court meet specified due-process requirements, and most Tribes have not undertaken to accomplish this. In a 2021 report, the National Congress of American Indians reported that 28 Tribes as of that time implemented STCJ. *VAW Resource Center: Key Statistics*, Nat'l Cong. of Am. Indians (Oct. 2021), https://www.ncai.org/section/vawa/overview/key-statistics. There are currently 574 federally recognized Tribes.

[13] 25 U.S.C. §§ 1301–1304; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 404(b)(1), 100 Stat. 3207, 3216.

[14] 25 U.S.C. § 1302(a)(7)(B).

[15] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2280 (codified at 25 U.S.C. § 1302). *Indian Civil Rights Act*, Tribal Ct. Clearinghouse, Tribal L. and Pol'y Inst., www.tribal-institute.org/lists/icra.htm (last visited July 7, 2025) (timeline of federal legislation governing sentencing for Tribal offenses).

[16] 25 U.S.C. § 1302(c).

[17] 18 U.S.C. § 117.

[18] *Id.*

> an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.[19]

The statute is also clear in stating that a prior offense qualifies as one of the two required prior convictions if it was an offense under Chapter 110A of Title 18 of the U.S. Code.[20] That chapter addresses domestic violence and stalking and encompasses 18 U.S.C. §§ 2261–2266.[21] Such convictions only arise in federal prosecutions, and thus are fewer in number and do not establish the basis of a section 117 offense in most instances. Previous state or Tribal offenses will be the main driver of section 117 prosecutions.

The difficulty arises in addressing the definition of such a qualifying prior offense, that is, "any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault."[22]

Here, we run into the "categorical approach." The Supreme Court of the United States (Supreme Court) developed this doctrine in the context of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a frequently applied statute that increases the statutory penalties for certain firearms crimes where the defendant was previously convicted of a "violent felony" or "serious drug offense" on three or more occasions.[23] The ACCA, in turn, defines each of these terms, for instance, defining a "violent felony" in part as any offense that presents "as an element the use, attempted use, or threatened use of physical force against the person of another."[24]

In *Taylor v. United States*, the Supreme Court held that the definitional terms in ACCA are applied categorically, such that the facts of a defendant's prior crime do not matter.[25] The Supreme Court later stated, "[F]acts . . . are mere real-world things—extraneous to the crime's legal requirements . . . . And ACCA, as we have always understood it, cares not a whit about them."[26] Rather, the pertinent question is whether the

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[19] *Id.* § 117(b).
[20] *Id.* § 117(a)(2); *id.* at ch. 110A.
[21] *Id.* §§ 2261–2266.
[22] *Id.* § 117(a)(1).
[23] *Id.* § 924(e).
[24] *Id.* § 924(e)(2)(B)(i).
[25] 495 U.S. 575 (1990).
[26] Mathis v. United States, 579 U.S. 500, 504 (2016).

statute of conviction involved in a prior case in all circumstances meets the relevant definition. That is, using the example of an ACCA "violent felony," if a particular statute may be violated without the proof of actual, attempted, or threatened force, then no violation of that statute qualifies under the "force clause" quoted above—even if defendants engaged in heinous violence to earn their convictions.[27] The analysis "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the . . . felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force."[28]

The Supreme Court has also allowed for a "modified categorical approach," that applies where a statute is "divisible" by alternative elements.[29] In this regard, a court is permitted to examine undisputed judicial documents, such as charging documents, to identify the divisible portion of the statute that was the basis of the prior offense, and then determine whether that portion categorically qualifies. Once again, the facts supporting the conviction do not matter.

This is a complicated subject. The Supreme Court has held that a statute may be divisible by "elements," not "means," and it is often difficult to distinguish the difference.[30] As described by the Supreme Court, "'[e]lements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'"[31] "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant," and "at a plea hearing, they are what the defendant necessarily admits when he pleads guilty."[32] "Means," on the other hand, are "various factual ways of committing" a single element.[33] A jury need not be unanimous as to the means by which a defendant committed a particular element of a crime.[34] As a hypothetical, *Mathis* posited a statute that requires use of a "deadly weapon" as an element of a crime and further states that the use of a "knife, gun, bat, or similar weapon" would all qualify; those different types of weapons are "means."[35]

Where a statute is divisible by alternative elements, the court remains

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[27] *Id.*
[28] United States v. Taylor, 596 U.S. 845, 850 (2022).
[29] *Id.* at 878.
[30] *Mathis*, 579 U.S. at 506.
[31] *Id.* at 504 (quoting Black's Law Dictionary 634 (10th ed. 2014)).
[32] *Id.*
[33] *Id.* at 506.
[34] *See* Richardson v. United States, 526 U.S. 813, 817 (1999).
[35] *Mathis*, 579 U.S. at 506.

barred from considering the actual facts and is instead limited to review of a specific set of judicial documents (so-called *Shepard* documents) to decide whether the defendant was convicted of the divisible part that meets the federal definition.[36] The court may not examine police reports or complaint applications, or other documents which may be contested.[37] With respect to a trial, the court may consider the charging document and the jury instructions to determine what elements the jury necessarily found.[38] With respect to a guilty plea, the court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[39]

The Supreme Court and lower courts have mandated the application of the categorical approach in applying a myriad of provisions which require definition of the nature of a current offense, or of a past offense that enhances a new criminal sentence. The list most notably includes the ACCA; the bar in 18 U.S.C. § 924(c) against use or possession of a firearm in relation to a "crime of violence"; and the career offender provision in the U.S. Sentencing Guidelines, which enhances sentences based on prior commission of "crimes of violence."[40] This has set off a tidal wave of litigation during the last decade, requiring examination of many criminal statutes. If any other defendant was convicted of the same statute that served as the basis of the defendant's conviction, based on conduct that would not meet the categorical federal definition, then the defendant's own offense, however violent, does not qualify as a predicate.

In *Mathis v. United States,* the Supreme Court used three points to summarize the rationale behind the categorical approach: "Our decisions have given three basic reasons for adhering to an elements-only inquiry."[41] First, the Supreme Court stated that ACCA's text favors the approach in referring to "previous convictions" instead of previous acts.[42] "Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns."[43]

> And third, an elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior con-

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[36] *See* Shepard v. United States, 544 U.S. 13 (2005).
[37] *Id.* at 18–22.
[38] *Id.* at 16, 21, 28.
[39] *Id.* at 16.
[40] *See* 18 U.S.C. § 924(e); *id.* § 924(c); U.S. Sent'g Guidelines § 4B1.1 (U.S. Sent'g Comm'n 2024).
[41] 579 U.S. at 510.
[42] *Id.* at 511.
[43] *Id.*

> victions are prone to error precisely because their proof is unnecessary. . . . At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to"—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. . . . Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.[44]

Notwithstanding this explanation, the doctrine has been subject to withering criticism from lower court judges. As one recently observed, "The categorical approach has as many critics as there are judges."[45]

There are multiple reasons for this avalanche of dissent. First, the doctrine is difficult to apply. The approach "involves an exhaustive review of state law as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic."[46] It often produces a "sentencing adventure[] more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls."[47]

Moreover, it produces inconsistent results. One state may narrowly tailor a statute to address violent conduct, while another state might write a broad statute, leading to different outcomes in different states for identical violent conduct.

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[44] *Id.* at 512 (internal citations omitted).

[45] United States v. Vines, 134 F.4th 730, 744 (3d Cir. 2025) (Roth, J., dissenting). *See also, e.g.*, United States v. Rice, 36 F.4th 578, 579 (4th Cir. 2022) ("[W]e must resolve this issue using the 'categorical approach,' not common sense."); United States v. Escalante, 933 F.3d 395, 406 (5th Cir. 2019) ("In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.").

[46] United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring).

[47] United States v. Perez-Silvan, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring). This witty reference is to the exceedingly elaborate and difficult requirements imposed on the fictional Indiana Jones in *Raiders of the Lost Ark* (1981), where, in an effort to find the "Well of Souls" burial location of the biblical Ark of the Covenant, he must use a special headpiece to reconstruct a particular staff, insert the staff in an ancient Map Room at a specific time of day, then follow the beam of sunlight that shines through the headpiece that reveals the location of the Well of Souls on a map. *See Filmsite Movie Review: Raiders of the Lost Ark (1981)*, FILMSITE, https://www.filmsite.org/raid3.html (last visited Aug. 5, 2025).

> [T]wo defendants who, in their past, independently committed identical criminal acts in two different states and have essentially the same criminal history will find that the applicability of the ACCA to their current cases depends not on their past criminal conduct but on the phrasing of the different state criminal statutes.[48]

And it often produces absurd results.

> Time and again, federal courts have been required to hold that state law felony convictions for conduct that plainly involved the use of force—including convictions for voluntary manslaughter, aggravated assault, assault with a deadly weapon with intent to kill, attempted rape, first-degree sexual abuse, sexual abuse by forcible compulsion, taking indecent liberties with a child, maliciously damaging or destroying property by means of an explosive, first-degree robbery, second-degree robbery, first-degree burglary, and second-degree burglary—do not qualify as "violent felonies" under ACCA.[49]

In a recent dissent, Justice Thomas described this exercise as a "30-year excursion into the absurd," observing, "In case after case, our precedents have compelled courts to hold that heinous crimes are not 'crimes of violence' just because someone, somewhere, *might* commit that crime without using force."[50] He added, "It is hard to fathom why this makes sense or why any rational Congress would countenance such an outcome so divorced from reality," as "[n]o rational legislature would have implicitly imposed this byzantine and resource-depleting legal doctrine that so encumbers federal courts and threatens public safety."[51] But for better or worse, the doctrine lives for now, and we confront it in addressing the habitual offender statute that reaches repeat domestic abusers in Indian country.[52] Again, section 117 defines a qualifying prior conviction as including "any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault."[53]

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[48] United States v. Chapman, 866 F.3d 129, 136–37 (3d Cir. 2017) (Jordan, J., concurring).
[49] United States v. Harris, 87 F.4th 195, 207 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing).
[50] United States v. Taylor, 596 U.S. 845, 861, 867 (2022) (Thomas, J., dissenting).
[51] *Id.* at 863, 872.
[52] I have written much more about the categorical approach and possible ways to eliminate it in statutory provisions. *See* Robert A. Zauzmer, *Fixing the Categorical Approach "Mess,"* 69 Dep't Just. J. Fed. L. & Prac. 3 (2021).
[53] 18 U.S.C. § 117(a)(1).

One court, in *United States v. Morris*, concluded that the categorical approach is inapplicable here.[54] It determined that each part of the definition—whether there was an assault as defined by federal law, and whether it occurred in a domestic context—is a factual question for the jury to determine beyond a reasonable doubt.[55] But other courts have disagreed, and adopted a hybrid approach, in which the nature of the previous crime—either as an assault, sexual abuse, or a serious violent felony—is subject to the categorical approach, leaving a factual question for the jury as to whether the previous offense was committed "against" a spouse, intimate partner, or child in the defendant's care.[56]

In recent years, Department attorneys have advocated the hybrid approach. That is sensible, given that the language of the habitual offender statute, referring to a previous "conviction" for an offense "that would be . . . any assault, sexual abuse, or serious violent felony," is characteristic of the language in statutes deemed by the Supreme Court to require a categorical approach.[57] Further, section 117(a) refers to at least one term ("serious violent felony") that is uniquely defined in the federal three-strikes statute, 18 U.S.C. § 3559(c)(2)(F), in a provision that is indisputably subject to a categorical approach.[58]

At the same time, the "against" provision, inviting a factual determination regarding the facts of the prior case, appears to demand a fact-specific determination.[59] There is precedent for such a hybrid interpretation.[60] Under this view, the court should apply the categorical approach to determine whether the statute applicable to each prior conviction qualifies as an "assault," "sexual abuse," or "serious violent felony," and if so, submit to the jury the question whether that prior crime was targeted at a spouse, intimate partner, or child as described in the statute.[61]

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[54] United States v. Morris, No. 8:18CR260, 2019 WL 1110211 (D. Neb. Mar. 11, 2019).
[55] *Id.*
[56] *See, e.g.*, United States v. Cline, No. CR19-23, 2020 WL 1862595 (W.D. Wash. Apr. 14, 2020); United States v. Gourneau, No. 3:21-CR-83, 2022 WL 1001468 (D.N.D. Apr. 4, 2022).
[57] 18 U.S.C. § 117(a)(1).
[58] 18 U.S.C. § 117(a); *id.* § 3559(c)(2)(F). *See, e.g.*, United States v. Ruska, 926 F.3d 309, 311 (6th Cir. 2019); United States v. Johnson, 915 F.3d 223, 228 (4th Cir. 2019).
[59] *See* 18 U.S.C. § 3559(c)(2)(F)(ii).
[60] *See* United States v. Hayes, 555 U.S. 415 (2009) (a statute defined "misdemeanor crime of domestic violence" as "an offense" that (1) "has, as an element, the use or attempted use of physical force," and (2) was "committed by" a person who has a domestic relationship with the victim; the Supreme Court of the United States concluded that the elements requirement was subject to the categorical approach, while the "committed by" requirement presented a factual circumstance-specific approach).
[61] *See* United States v. Cline, No. CR19-23, 2020 WL 1862595, at *3 (W.D. Wash. Apr. 14, 2020) (if the prior offense categorically qualifies, then the government must

One important task is to define the type of prior crime that qualifies—assault, sexual abuse, or a serious violent felony—so a categorical comparison may be made between the previous statute of conviction and that controlling definition. There are no definitive answers, as few cases have addressed this question.

A sensible approach, recognizing that other provisions of Title 18 define these terms, is to employ those definitions for comparison. Section 113 addresses "assault," and while it is not defined there, it is assumed that the common-law definition applies.[62]

> At common law, "assault" had two meanings, one being criminal assault, which is an attempt to commit a battery, and the other being tortious assault, which is an act that puts another in reasonable apprehension of immediate bodily harm. Both meanings are embraced within the term 'assault' as used in 18 U.S.C. § 113.[63]

"Sexual abuse" is defined in 18 U.S.C. § 2242, as referring to one who knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping);

(2) engages in a sexual act with another person if that other person is—

   (A) incapable of appraising the nature of the conduct; or

   (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or

(3) engages in a sexual act with another person without that other person's consent, to include doing so through coercion; or attempts to do so.[64]

Finally, "serious violent felony" is defined in 18 U.S.C. § 3559(c)(2)(F) in a list of enumerated federal and state offenses, such as aggravated

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then prove at trial (or the defendant must admit) facts sufficient for a jury to determine "beyond a reasonable doubt that the victim of each alleged predicate offense was a 'spouse'" or otherwise satisfies the statute's domestic-relationship element).

[62] 18 U.S.C. § 113.

[63] United States v. Guilbert, 692 F.2d 1340, 1343 (11th Cir. 1982) (internal citations omitted). *Accord* United States v. Lewellyn, 481 F.3d 695, 697 (9th Cir. 2007).

[64] 18 U.S.C. § 2242.

sexual abuse, murder, manslaughter, and kidnapping, as well as through a "force clause" similar to that in ACCA reaching "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another."[65]

This "three-strikes" statute imposes a mandatory life sentence on a person who commits a "serious violent felony" following conviction for two or more "serious violent felonies," or one or more "serious violent felonies" and one or more "serious drug offenses."[66] The definition of "serious violent felony" in section 3559(c)(2)(F)(ii) also includes a "residual clause" referencing an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."[67] This provision also appears in the ACCA definition of "violent felony," and was deemed unconstitutionally vague in *Johnson v. United States*.[68] In the Department's view, it is equally obsolete in section 3559(c).[69]

The few reported cases thus far to apply the categorical approach in prosecutions under the habitual offender statute have involved prior convictions for assault and illustrate the challenge.

In *United States v. Casey*, the court addressed prior convictions for assault violating provisions of the Swinomish Indian Tribal Community Tribal Code.[70] The Swinomish provisions at issue in that case have since been amended.[71] Each provision relied on this definition of assault:

> Any person who: (A) attempts with unlawful force to inflict bodily injury upon another, OR (B) without consent touches, strikes, cuts, shoots, or poisons the person or body of another, OR (C) intentionally, with unlawful force, creates in another a reasonable apprehension and fear of bodily injury even though the infliction of bodily injury was not actually intended, OR (D) by threatening violence causes another to harm himself, commits the crime of assault.[72]

The court found that the provision did not qualify in relation to the

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[65] *Id.* § 3559(c)(2)(F)(ii).
[66] *Id.* § 3559(c).
[67] *Id.* § 3559(c)(2)(F)(ii).
[68] 576 U.S. 591 (2015).
[69] 18 U.S.C. § 3559(c).
[70] No. 2:20-CR-20, 2020 WL 1940446 (W.D. Wash. Apr. 22, 2020). *See, e.g.*, Swinomish Tribal Code § 4-02.020(C) (2003); *id.* § 5-1.030.
[71] Swinomish Tribal Code § 4-02.020(C) (2020).
[72] *Casey*, 2020 WL 1940446, at *4 (quoting Swinomish Tribal Code § 5-01.030 (1994)).

federal definition of "assault."[73] First, the court determined part A of the Tribal definition was overbroad in omitting a mens rea requirement of willful conduct, which is an element of assault under federal law.[74] Second, the court stated part B, regarding mere touching, "clearly criminalizes more conduct than the federal assault statute."[75]

The court continued, "The same goes for the fourth provision [part D] which provides that a person commits assault who 'by threatening violence causes another to harm himself.' . . . Causing another person to harm themselves i[s] not even contemplated by the generic statute."[76]

Finally, the court stated:

> The third provision, however, is a closer call. A person commits assault under [Swinomish Tribal Code] § 4-02.020(A)(3) if the individual 'intentionally, with unlawful force, creates in another a reasonable apprehension and fear of bodily injury even though the infliction of bodily injury was not actually intended.' Although this provision incorporates an 'intent' requirement, it does not include the 'immediacy' requirement present in the federal definition. In theory, Defendant surmises, a person could be convicted under [Swinomish Tribal Code] § 4-02.020(A)(3) if the person creates a 'reasonable apprehension of fear of bodily injury' in another at time in the distant future. Because the Swinomish assault statute criminalizes a broader swath of conduct than the federal generic statute, it is 'categorically overbroad' under the standard categorical approach.[77]

In this decision, the pitfalls of the categorical approach are on full display, where the defendant's actual earlier conduct is ignored, and the defendant escapes liability based on hypothetical scenarios on how the statute may be violated without conduct that would meet the federal definition. The court concluded with a lament that is all too familiar to students of the categorical approach:

> The Court is mindful of the inherent difficulties of enforcing violations of 18 U.S.C. § 117(a) where the prior statutes of conviction must categorically match the generic statute. This is especially troubling given the statute's legislative purpose

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[73] *Id.* at *5.
[74] *Id.* at *4.
[75] *Id.* at *5.
[76] *Id.*
[77] *Id.*

> of reducing the incidence of domestic violence against Native American women. But the relevant statutory language and Supreme Court precedent compel this outcome. Because the two prior convictions alleged by the [g]overnment are not categorical matches to the federal generic assault statute, they do not qualify as predicate offenses under 18 U.S.C. § 117. As a result, the indictment against Defendant does not state a cognizable offense and is subject to dismissal.[78]

In *United States v. Gourneau*, the habitual offender charge met the same fate.[79] There, the question was the status of a violation of a criminal provision of the Turtle Mountain Band of Chippewa Indians in North Dakota, which applied to a defendant who committed 1 of 18 enumerated crimes "against a family or household member with the purpose of, or having the effect of, inflicting physical harm or bodily injury or placing the family or household member in imminent fear or apprehension of physical harm or bodily injury."[80]

The court held that this provision did not categorically qualify as "assault" under the habitual offender statute, first because some of the enumerated crimes, such as "harassment," fall outside the scope of common-law assault.[81] Further, the court explained, the last element was also overbroad because, in contrast with the requirement of a common-law assault charge, the Turtle Mountain Tribal Code did not require the victim's "imminent fear or apprehension of physical harm or bodily injury" be reasonable.[82] Finally, the court stated the defendant's three prior Turtle Mountain convictions did not qualify even if the pertinent statute was divisible, as there were no judicial records specifying the precise basis of any of the defendant's convictions.[83]

The Turtle Mountain Tribal Code provision at issue has since been amended.[84] Statutes now present two groups of offenses, one labeled as "domestic assault," that encompasses apparently violent offenses including homicide, sexual offenses, assault, and kidnapping; and the other la-

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[78] *Id.* at *6.
[79] No. 3:21-CR-83, 2022 WL 1001468 (D.N.D. Apr. 4, 2022).
[80] *Id.* at *5 (quoting Turtle Mountain Tribal Code § 37.0200 (2012) (codified as amended at Turtle Mountain Tribal Code § 37.02.010) (2023))).
[81] *Id.* at *5–6.
[82] *Id.*
[83] *Id.* at *7.
[84] Domestic Violence Crimes, Res. No. TMBC220-03-23 (2023) (Duly Elected and Certified Governing Body of the Turtle Mountain Band of Chippewa Indians), https://www.narf.org/nill/triballaw/us/nsn/tmchippewa/council/resolutions/2023/adopted/220-03-23.pdf.

beled as "domestic abuse," which includes a list of 12 often less violent offenses.[85] Whether a violation of one of these provisions qualifies under section 117 is still uncertain and will require an examination of both the charging document and the specific terms of the Tribal statute that was the predicate for the domestic assault charge.[86]

The outcome in *United States v. Cline* was different.[87] That case concerned previous charges of battery in violation of the Nooksack Indian Tribe's Criminal Code: "Any person who willfully strikes another person or otherwise inflicts bodily harm, or who by offering violence causes another to harm himself shall be guilty of a Class B offense."[88] The *Cline* court held the second part of this statute, applying to one who causes another to harm himself, was overbroad in relation to the federal definition of assault, but the parts of the statute were divisible, and here, judicial documents showed the prior convictions were entered under the portion that categorically qualifies as assault.[89]

IV. Concluding observations

As these cases illustrate, the application of the categorical approach—deciding whether an offender has prior convictions for assault, sexual abuse, or a serious violent felony, warranting application of the habitual offender statute—presents all the familiar problems that the categorical approach delivers. A court must engage in complex scrutiny of a previous statute of conviction and deny application of a prior conviction as a section 117 predicate if there is any scenario in which the statute may be violated in a situation not reached by the federal definition—even if the defendant's actual crime unquestionably involved assault, sexual abuse, or violent crime against a spouse, intimate partner, or child. Further, this approach will produce varying results, even for identical conduct, depending on the drafting of the Tribal provisions at issue and the quality of the Tribes' judicial record-keeping.

This problem poses a significant impediment to consistent application of the habitual offender statute for the purpose for which it was enacted, to punish and incapacitate for longer periods those who repeatedly engage in domestic violence, particularly on Tribal lands.

Congress could ameliorate the problem. It could insert definitions of predicate crimes that more broadly and consistently capture the types of

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[85] Turtle Mountain Tribal Code §§ 37.02.010, 37.02.015.
[86] 18 U.S.C. § 117.
[87] No. CR19-23, 2020 WL 1862595, at *2 (W.D. Wash. Apr. 14, 2020).
[88] Nooksack Criminal Code § 20.02.050 (2021).
[89] *Cline*, 2020 WL 1862595, at *4–5.

domestic assault prosecuted by Tribes. It could also provide an option of allowing federal authorities to prove to a jury that the prior crimes involved domestic violence, in those cases where a categorical comparison is insufficient to definitively establish the nature of the prior offense. Such legislation would eliminate the Sixth Amendment concern that animates the categorical approach, that a court is increasing a sentence based on facts not found by a jury. It would significantly increase the burden on prosecutors, who would be required in a habitual offender prosecution to prove not one offense but at least three, including the earlier crimes. That may be difficult where the earlier crimes are dated, or where witnesses are not readily available or forthcoming. But under the hybrid approach advocated here, the government must already prove at trial that the earlier offenses were targeted at a domestic relation. In appropriate cases, prosecutors would welcome the opportunity to prove additional facts that secure an appropriately lengthy sentence for a repeat offender.

Absent congressional action, inconsistent results are inevitable. To be sure, Tribes may be encouraged to draft domestic assault provisions narrowly to comport with the common-law definition and thus assure violations will qualify as habitual offender predicates. But one hesitates to make such a suggestion; a Tribe may have other interests in protecting its members and decide a broader criminal provision is more suitable based on its customs and needs (for instance, addressing infliction of emotional distress as well as physical injury). At best, it would be helpful if the drafters of Tribal codes are aware of this issue, and the need for criminal provisions to either be narrowly drafted or state clearly divisible provisions. Such an effort would be abetted by the actions of Tribal prosecutors and judicial officers to assure divisible charges are clearly stated and recorded in the records of conviction. Ideally, judicial records will report convictions of statutory provisions, or a divisible portion of a statutory provision, that categorically meet the federal definitions incorporated in section 117, allowing serial domestic offenders to face enhanced punishment under federal law.[90]

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[90] 18 U.S.C. § 117.

Maquiladoras, Indigenous Communities, and the Risk Posed by Traveling Sex Offenders in Two Border Cities

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I. Introduction

Running for over 1,900 miles, the U.S.-Mexico border has long been a location for trade and migration.[1] The current border between the two countries was finalized in 1853, just a few years before the U.S. Civil War.[2] Up until the late 20th Century, the northern border region in Mexico was a kind of "no man's land," isolated from the rest of the country, and largely dependent on economic connections with the United States.[3]

Population growth in the region has been extraordinary in recent decades. For example, from 1970 to 2020, Ciudad Juárez saw its population jump from 400,000 to over 1.5 million, and Tijuana's population similarly rose from 277,000 to over 1.9 million in the same period.[4] Fueling this rapid growth has been the rise of the *maquiladora* program along the U.S.–Mexico border.[5]

In the northern border regions of Mexico, thousands of assembly

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[1] U.S. Census Bureau, Statistical Abstract of the United States 223 (2011).

[2] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mexico, Feb. 2, 1948, 9 Stat. 922 (Treaty of Guadalupe Hidalgo); Treaty with Mexico, U.S.-Mexico, Dec. 30, 1853, 10 Stat. 1031 (Gadsden Purchase).

[3] Gabriel Estrella Valenzuela, *The New Millennium and Mexico's Northern Border Population*, 44 Voices of Mex. 43 (1998).

[4] *Juárez*, Data México, Gov't of México, https://www.economia.gob.mx/datamexico/en/profile/geo/juarez-8037 (last visited July 18, 2025); *Tijuana*, Data México, Gov't of México, https://www.economia.gob.mx/datamexico/en/profile/geo/tijuana (last visited July 18, 2025).

[5] *See* Jesus Angel Enriquez Acosta, *Migration and Urbanization in Northwest Mexico's Border Cities*, 51 J. of the Sw. 445 (2009).

plants, called *maquiladoras*, provide employment opportunities that attract workers from across Mexico and Central America. *Maquiladora* jobs, despite their low wages and questionable working conditions, can provide a level of stability to persons who would otherwise be unemployed in the formal economy. *Maquiladoras* are notorious for their substandard and dangerous working conditions, long hours, and low wages.[6] Those attracted to employment in *maquiladoras* are those who, by virtue of poverty, lack of education, or other factors, are usually out of other options. While the precise demographic composition of the Mexican *maquiladora* labor force is hard to quantify, more disadvantaged persons are more likely to find their way to the *maquiladoras* for work opportunities.

As in the United States, Indigenous persons in Mexico face structural barriers that result in higher poverty rates, unemployment, and illiteracy than their non-Indigenous neighbors. These vulnerabilities—among others—create conditions in which the prospect of employment at a *maquiladora* may be attractive for some Indigenous persons in Mexico, even if the job is hundreds of miles away from home.[7] Because the *maquiladora* wage is low—and the *maquiladoras* themselves attract a variety of persons to the communities in which they are located—a secondary, informal economy tends to spring up around them. *Maquiladora* workers are known to take on side work to supplement their income.[8] Particularly for women seeking to earn a living, border cities, such as Ciudad Juárez and Tijuana, provide two significant economic opportunities: *maquiladoras* and sex work.[9]

Sex trafficking of every kind—including child sex trafficking—occurs in the northern border cities of Mexico. Because of low ages of consent for sexual activity, legalization of sex work, and ineffectiveness of law-enforcement efforts, the risk of detection in pursuing a child for sexual exploitation in these informal economies is low to nonexistent. While most of the clients of sex workers in northern Mexico are Mexican nationals,

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[6] Joshua M. Kagan, *Workers' Rights in the Mexican Maquiladora Sector: Collective Bargaining, Women's Rights, and General Human Rights: Law, Norms, and Practice,* 15 J. Transnat'l L. & Pol'y 153, 158 (2005).

[7] *See* J. Benton Heath, *Fetch the Bolt Cutters: Reflections on Racial Capitalism and the NAFTA/USMCA,* 49 Brook. J. Int'l L. 449, 454 (2024). The negative impact of the North American Free Trade Agreement (NAFTA) and the U.S.-Mexico-Canada Agreement (USMCA) on the livelihoods of Indigenous farmers is well-documented. Robert Alan Hershey, *Paradigm Wars Revisited: New Eyes on Indigenous Peoples' Resistance to Globalization*, 5 Indigenous People's J. L. Culture & Resistance 43, 53 (2019).

[8] Heath, *supra* note 7, at 456.

[9] Melissa W. Wright, *From Protests to Politics: Sex Work, Women's Worth, and Ciudad Juárez Modernity*, 94 Annals Ass'n Am. Geographers 369 (2004).

there is an unknown-but nonzero-number of individuals who travel from the United States to engage in child sexual exploitation.

While Arizona does statutorily require advance notice of international travel from its registered sex offenders (RSOs), California, New Mexico, and Texas each have thousands of RSOs whose international travel across the land borders into Mexico is essentially unchecked and undetectable by Mexican authorities. Despite federal requirements to do so, none of these three states require advance notice of international travel from RSOs, thus squandering robust opportunities to gather intelligence and perhaps interdict in situations where a RSO is at high risk to offend against children in the sex trade in Mexican cities.

This article will focus particularly on two border cities that have a documented history of *maquiladoras* and child sex trafficking, as well as a measurable Indigenous population.

- **Ciudad Juárez** is a city of more than a million people which sits across the border from El Paso, Texas.[10] There are 12 recognized Indigenous communities in the region of Juárez.[11] While solid statistics are difficult to come by, at least 18,000 people living in Ciudad Juárez identify as Indigenous, many from the local Rarámuri ethnic group, along with others who have migrated from other regions of Mexico.[12]
- **Tijuana** is a city of over 2 million people located immediately to the south of San Diego, California across the Mexican border.[13] Over 20,000 people in Tijuana still speak an Indigenous language.[14]

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[10] Caroline Schneider, *Ciudad Juárez: Strengthening U.S.-Mexico Cooperation for a Secure and Prosperous New Frontier,* State Mag. (July 2023), https://statemag.state.gov/2023/07/0723pom/.

[11] Julian Resendiz, *Juárez to Provide Interpreters for Indigenous Communities,* Border Rep. (Aug. 25, 2022), https://www.borderreport.com/hot-topics/border-culture/Juárez-to-provide-interpreters-for-indigenous-communities/.

[12] Corrie Boudreaux, *Indigenous Artisans Struggle to Make a Living and Keep Traditions Alive in Juárez*, El Paso Matters (Nov. 26, 2021), https://elpasomatters.org/2021/11/26/indigenous-artisans-struggle-to-make-a-living-and-keep-traditions-alive-in-Juárez/. *See also* Fatima del Rocio Valdivia & Juan Okowí, *Drug Trafficking in the Tarahumara Region, Northern Mexico: An Analysis of Racism and Dispossession*, 142 World Dev. 105426 (2021).

[13] Gustavo Solis, *Tijuana Is Crumbling Under the Weight of its Population Growth*, S.D. State Univ., KPBS Pub. Media (Aug. 9, 2023), https://www.kpbs.org/news/border-immigration/2023/08/09/tijuana-is-crumbling-under-the-weight-of-its-population-growth.

[14] *Tijuana: Population*, Data México, Gov't of México https://www.economia.gob.mx/datamexico/en/profile/geo/tijuana#population-and-housing (last visited July 21, 2025).

II. *Maquiladoras* and Indigenous Mexican communities

"Until 1965, the region along the U.S./Mexico border was a desert comprised mainly of small towns drawing little tourism."[15] In an effort to boost a lagging economy, the *maquiladora* program was established in 1965.[16] The nationwide growth in employment in the *maquiladoras* exploded from 3,000 in 1966 to over 3 million today, with over 60% working in the northern border states.[17]

A. *Maquiladoras*

Maquiladoras are plants where parts exported from the United States are assembled either to completion or for additional manufacturing operations.[18] As these facilities have evolved along the U.S.–Mexico border, they are best described as follows:

> A *maquiladora* is different from a typical U.S. factory in Mexico in that the workers do not fabricate parts on the premises. The only value added to the product at the *maquiladora* . . . is that of assembly. Once assembled, the *maquiladora* ships the products back to the United States . . . . Under this program, Mexican instead of American labor is used to facilitate the production process of U.S. goods.[19]

The two urban areas with the most operational *maquiladoras* along Mexico's northern border are Ciudad Juárez and Tijuana.[20] Hundreds of thousands of people are employed in the hundreds of *maquiladoras* in these cities.[21] Almost 350,000 people are employed by *maquiladoras* in Baja California (Tijuana) and 108,000 are employed by *maquiladoras* in Sonora (Ciudad Juárez).[22]

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[15] Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?,* 3 Kan. J. Law & Pub. Pol'y 128, 129 (1994).
[16] *Id.*
[17] *Border Economy: IMMEX Manufacturing Employment in Mexico*, Univ. of Ariz., Eller Coll. of Mgmt., https://azmex.eller.arizona.edu/border-economy/immex-program-manufacturing-employment (last visited July 21, 2025).
[18] Durand, *supra* note 15, at 128.
[19] *Id.* (emphasis added).
[20] *Id.* at 129.
[21] Julian Resendiz, *Maquiladoras Exporting More Goods to US with Fewer Workers*, Border Rep. (Aug. 8, 2024), https://www.borderreport.com/news/trade/maquiladoras-exporting-more-goods-to-us-with-fewer-workers/.
[22] *Id.*

B. Indigenous communities

Indigenous persons make up a more significant percentage of the population in Mexico than Indigenous persons in the United States; estimates range 15–19% of Mexico's total population.[23] Compared to other countries across Latin America, Mexico's Indigenous population is also comparatively high.[24] There are 68 ethnolinguistic groups in Mexico which are considered Indigenous, and those communities are largely located in the southern parts of the country.[25] The widespread social and economic vulnerabilities faced by Indigenous communities in Mexico, however, create a situation where many Indigenous persons gravitate to U.S.-Mexico border cities for employment opportunities.[26]

Indigenous communities in Mexico endure several hardships that make it more likely that their younger members will be drawn to the high-risk/high-reward lure of jobs along the border. In Mexico, the illiteracy rate for Indigenous persons is 44% and only 27% of Indigenous children graduate from high school.[27] In recent years, Indigenous persons in Mexico have also faced serious barriers to health care and had worse outcomes due to COVID-19 than the general population.[28] In addition, one estimate shows that "half of the [I]ndigenous population resides in rural localities with fewer than 2,500 inhabitants; 78.7% live in poverty, and 39.4% live in extreme poverty, five times more than the non-[I]ndigenous population."[29] High dropout rates, gender and racial inequality, and inequalities in income distribution are all structural factors which leave persons vulnerable to commercial sexual exploitation.[30] "Unaccompanied

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[23] Carla Y. Davis-Castro, Cong. Rsch. Serv., Indigenous Peoples in Latin America: Statistical Information 4 (2023).

[24] *Id.* The lowest percentage is found in El Salvador (0.2%), while the highest is in Bolivia (41.5%).

[25] *See* Press Release, Gov't of Mex., Presenta CDI el "Atlas de los Pueblos Indígenas de México" [CDI Presents the "Atlas of the Indigenous Peoples of Mexico"] (Aug. 1, 2018).

[26] *See* Heath, *supra* note 7, at 454.

[27] Olivia Bradley, *Five Important Facts About Indigenous Education in Mexico*, Borgen Project (Nov. 27, 2017), https://borgenproject.org/5-important-facts-about-indigenous-education-in-mexico/.

[28] Andrea Salas-Ortiz, *Socioeconomic Inequalities and Ethnic Discrimination in COVID-19 Outcomes: The Case of Mexico*, 11 J. Racial & Ethnic Health Disparities 900 (2024).

[29] Liliana Gómez Flores Ramos & Sergio Meneses Navarro, *The Health of Indigenous Populations in Mexico,* ReVista: Harv. Rev. of Latin Am. (May 9, 2023), https://revista.drclas.harvard.edu/the-health-of-indigenous-populations-in-mexico-disencounters/.

[30] Lesly Zambrano & Isabel Abreu, ECPAT Int'l, Global Study on Sexual Exploitation of Children in Travel and Tourism: Regional Report: Latin

internal and external migration also contributes to the growth of Commercial Sexual Exploitation of Children (CSEC) in Latin America, with large numbers of children and youth moving to urban areas, other cities or other countries due to extreme poverty, family reunification, and violence."[31] In addition, Indigenous workers "earn significantly lower wages than their non-Indigenous peers" and are overrepresented in the informal economy.[32] Of note, Indigenous women experience a higher wage gap than their Indigenous male peers.[33]

Alongside the *maquiladoras* in Ciudad Juárez and Tijuana, the commercial sex trade thrives. The majority of the workers in *maquiladoras* are women, and "employers fire or pressure coworkers to quit if they refuse to take birth control or become pregnant during their employment."[34] Often times, women come to a border city with the intention of working in a *maquiladora* and end up choosing to enter the sex work industry instead.[35] There is also a link among child sexual exploitation, a lack of schools in the area, and mothers working out of the home. "Research conducted in Ciudad Juárez and Tijuana found a link between CSEC and the lack of schools in poor areas. In such places, it is common for children to be left alone, while (mostly single) mothers work two shifts in an environment of violence and drug smuggling."[36]

III. Child sex trafficking in border communities

Mexico is a destination country for U.S.-based offenders seeking to sexually abuse children without consequence. Nevertheless, there is a high level of impunity for all crimes across the country.[37] Impunity and ineffective institutional responses represent a critical challenge for preventing and punishing violence against women in Mexico. About 93% of crimes

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America 25 (2016) [hereinafter ECPAT].

[31] *Id.* at 26 (citation modified).

[32] Ana Canedo, *Labor Market Discrimination Against Indigenous Peoples in Mexico: A Decomposition Analysis of Wage Differentials,* 48 Iberoamericana—Nordic J. Latin Am. & Caribbean Stud. 12, 13 (2019) (the informal economy including labor such as "domestic work, street vending, construction, and agriculture").

[33] *Id.*

[34] Kagan, *supra* note 6, at 164.

[35] Wright, *supra* note 9, at 380.

[36] ECPAT, *supra* note 30, at 26 (citation modified).

[37] U.S. Dep't of State, Bureau of Democracy, Hum. Rts., & Lab., Human Rights Report: Mexico 33 (2023).

either go unreported or uninvestigated.[38] Moreover, many victims do not even file complaints, owing to factors such as fear of retaliation and distrust in authorities.[39]

The federal age of consent for sexual activity in Mexico is 18 and applies to cases involving either domestic activity or international travel.[40] In the most recent statistics available, however, there were no investigations or prosecutions of "any suspects for extraterritorial commercial child exploitation crimes."[41] Travelers seeking sexual services in northern border regions likewise perceive "less ability or willingness to enforce laws that protect children in Mexico."[42]

Despite the federal law, in both Tijuana and Ciudad Juárez, the legal age of consent is 14.[43] Although beyond the scope of this article, it is worthwhile to note that the state directly south of Arizona—Sonora—has a legal age of consent of 12 years of age.[44] Many sex workers in border cities enter the trade when they are still in their teens—some as young as 14.[45]

In addition to the low ages of consent, commercial sex work in Mexico functions in a quasi-legal fashion. There are *zonas rojas* (red light zones) where sex workers operate without fear of prosecution.[46] In Tijuana, sex workers are technically required to obtain permits, while in Ciudad Juárez, there is no such requirement.[47] In Tijuana, the permit requirement is rarely enforced, and when it is, the punishment is only

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[38] Inst. for Econ. & Peace, Mexico Peace Index 2025: Identifying and Measuring the Factors that Drive Peace 40 (2025).
[39] *Id.* (citing Jorge Ramos, *In Mexico, Women Break the Silence Against Femicide*, N.Y. Times (Mar. 6, 2020), https://www.nytimes.com/2020/03/06/opinion/international-world/mexico-femicides-amlo.html).
[40] Código Penal Federal [CPF] [Federal Criminal Code] §§ 201, 203, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 07-06-2024 (Mex.).
[41] *Id.*
[42] ECPAT, *supra* note 30, at 46.
[43] Código Penal del Estado de Chihuahua [Criminal Code of the State of Chihuahua] § 172, Periódico Oficial No. 103, 27-12-2006, últimas reformas 01-02-2025 (Mex.); Código penal para el Estado de Baja California [Criminal Code of the State of Baja California] § 177, Periódico Oficial No. 23, 20-08-1989, últimas reformas 10-04-2024 (Mex.).
[44] Código Penal del Estado de Sonora [Criminal Code of the State of Sonora] § 213, últimas reformas 25-09-2023 (Mex.).
[45] Jesus Bucardo et al., *A Qualitative Exploration of Female Sex Work in Tijuana, Mexico*, 33 Archives of Sexual Behav. 343, 346 (2004); Wright, *supra* note 9, at 380.
[46] Steffanie A. Strathdee et al., *Characteristics of Female Sex Workers with US Clients in Two Mexico-US Border Cities*, 35 Sexually Transmitted Diseases 263 (2008).
[47] *Id.*

a fine.[48] In a dated but reliable study, estimates of the number of sex workers in Tijuana ranged from 4,500 to 9,000, and in Ciudad Juárez, the estimate was about 4,000.[49]

The primary formal industry in each of these cities is *maquiladora* assembly plants, and many of the sex workers' clients are Mexican locals—mainly factory workers.[50] Over two-thirds of female sex workers in Tijuana and Ciudad Juárez, however, reported having at least one client from the United States.[51] Sex workers in Tijuana were more likely to report a client from the United States than those in Ciudad Juárez.[52] "[E]xtraterritorial [CSEC] is increasing, especially in . . . northern border cities. Parents are sometimes complicit in facilitating this exploitation of their children, and children experiencing homelessness are also believed to be at high risk. Many perpetrators are from the United States."[53]

Indigenous children are at particular risk. Some people traveling to Mexico to sexually exploit children prefer minors with Indigenous features.[54] In addition, Indigenous people are one of the groups most likely to be victims of trafficking, where cartels "take advantage of ancestral uses and customs to take young Indigenous women . . . to the northern border [where they are] sexually exploited."[55]

IV. The risk posed by U.S.-based registered sex offenders

There are hundreds of thousands of RSOs in the United States, and over 150,000 of them live in the southern border states of California, Arizona, New Mexico, and Texas.[56] California has approximately 74,000 reg-

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[48] *Id.*
[49] *Id.*
[50] Bucardo, *supra* note 45, at 346.
[51] Strathdee, *supra* note 46.
[52] *Id.*
[53] *2024 Trafficking in Persons Report: Mexico*, U.S. Dep't of State, Off. to Monitor & Combat Trafficking in Perss., https://www.state.gov/reports/2024-trafficking-in-persons-report/mexico/ (last visited July 21, 2025).
[54] ECPAT, *supra* note 30, at 49.
[55] Albinson Linares, *"They Kill You, They Kidnap You, They Rape You": Trafficking Victims Speak of the Dangers They Face*, NBC News (Aug. 22, 2022), https://www.nbcnews.com/news/latino/-kill-kidnap-rape-trafficking-victims-speak-dangers-face-rcna40952.
[56] Lori McPherson, *Leveraging Information to Prevent Offending Abroad: International Megan's Law and Sex Offender Registration Systems Around the World*, 57 Gonzaga L. Rev. 209 (2021). This section of the article draws extensively from this source.

istrants.[57] Arizona has over 10,000 registrants.[58] New Mexico has roughly 2,700 registrants.[59] Texas has over 75,000 registrants.[60] It remains unknown how many of these RSOs travel across the Mexican border to sexually abuse children. Nevertheless, this population of known sex offenders demands special attention in the effort to reduce child sexual exploitation along Mexico's northern border.

Federal law in the United States prohibits traveling in foreign commerce with the intent to engage in a commercial sex act with a minor.[61] A violation carries a range of imprisonment of up to 30 years.[62] Leveraging the sex offender registration system in the United States, nearly 20 years ago, the federal government started taking steps to track the foreign travel of RSOs.[63]

A. Border crossing process

The information provided to the Mexican government about inbound U.S. RSOs varies by the method of travel. For air travelers from the United States, the Angel Watch Center works to detect U.S.-based international travelers convicted of sex offenses against minors and, on confirmation of the prior conviction and registration status, sends advance notice of travel to the destination country (here, Mexico).[64] In recent years, Mexico has been denying entry to nearly all the U.S.-based RSOs for whom it has received advance notification of travel.[65]

The process for inbound travel to Mexico via land crossings, however, is quite different. There are no outbound checks conducted by the United States when a person seeks to cross into Mexico via foot or motor vehicle. On arrival at the Mexican port of entry, travelers are required to present their passport or passport card along with other identifying

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[57] *California's Megan's Law Website: Statistics*, State of Cal. Dep't of Just., https://www.meganslaw.ca.gov/AboutMegansLaw/Statistics (last visited July 21, 2025).
[58] *Arizona Sex Offender Information*, Az. Dep't Pub. Safety, https://www.azdps.gov/content/basic-page/106 (last visited July 21, 2025).
[59] Rob Gabriele, *Sex Offender Registry Statistics: 2024 Data for All 50 States*, SafeHome.org (Sept. 17, 2024), https://www.safehome.org/data/registered-sex-offender-stats/.
[60] *Id.*
[61] 18 U.S.C. § 2423(b).
[62] *Id.*
[63] *See* McPherson, *supra* note 56, at 226.
[64] U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the Angel Watch Program 2 (2020).
[65] *2024 Trafficking in Persons Report: Mexico*, *supra* note 53 (438 registered sex offenders denied entry to Mexico in 2023).

information, but there is no immediate and real-time way for Mexican immigration officials to check a person's criminal history in the United States.[66] Because of this, convicted sex offenders are often able to travel undetected via land crossings to Mexico in the absence of advance notification from the United States.

B. International Megan's Law and state implementation

The Sex Offender Registration Notification Act (SORNA) was passed in 2006 and anticipated the need to create a system for tracking RSOs traveling internationally.[67] To that end, the United States developed multiple mechanisms to provide proactive advance notice of international travel of RSOs to destination countries. The two primary methods are via the analysis of passenger manifest data via the Department of Homeland Security, and the other is through the state's collection of information about a registrant's intended international travel.[68]

Beginning in 2011, it has been a minimum standard of SORNA implementation that each state requires its RSOs to provide 21 days' advance notification of any international travel.[69] Codified in 2016, this requirement is handled by way of a form completed by local law enforcement that is then sent to the United States Marshals Service (USMS).[70] After the

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[66] *Mexico International Travel Information*, Travel.State.Gov, U.S. Dep't of State, Bureau of Consular Affs. (July 14, 2025), https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html.

[67] *SORNA: Sex Offender Registration and Notification Act*, U.S. Dep't of Just., Off. of Just. Programs, Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, https://smart.ojp.gov/sorna (last visited July 22, 2025). *See* 34 U.S.C. §§ 20901–20902.

[68] *See APIS: Advance Passenger Information System,* U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec. (Mar. 5, 2024), https://www.cbp.gov/travel/travel-industry-personnel/advance-passenger-information-system; U.S. Dep't of Homeland Sec., Privacy Impact Statement for the Advance Passenger Information System: APIS (2007).

[69] *SORNA: Information Required for Notice of International Travel*, U.S. Dep't of Just., Off. of Just. Programs, Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, https://smart.ojp.gov/sorna/current-law/implementation-documents/information-required-notice-international-travel (last visited July 22, 2025) [hereinafter *Information Required for Notice of International Travel*].

[70] 34 U.S.C. § 21504; Internation Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016). *See International Megan's Law Complaint Form for Traveling Sex Offenders*, U.S. Dep't of Just., U.S. Marshals Serv., https://www.usmarshals.gov/what-we-do/fugitive-investigations/international-mega

appropriate vetting and confirmation, information about the offender's intended travel is sent to the United States National Central Bureau of the International Criminal Police Organization (INTERPOL-Washington), who then forwards it to their National Central Bureau counterpart in the destination country.[71]

At the present time, approximately 35 states require the submission of, and facilitate the statewide processing of, these SORNA-required advance notifications of international travel.[72] Only one of the southern border states—Arizona—does so.[73]

V. Conclusion

Indigenous communities in Mexico endure structural hardships at a rate higher than their non-Indigenous neighbors. The *maquiladoras* at the northern border, although maybe hundreds of miles away, provide economic opportunity in the formal sector where few alternatives exist. Once at the northern border, *maquiladora* workers find cities, such as Ciudad Juárez and Tijuana, where commercial sex work is prevalent. Once in a border city, economic migrants—including minors—may choose to engage in commercial sex work for any number of reasons and are more likely than not to find U.S. residents among their client bases.

In the United States, around 150,000 RSOs live in the 4 states which border Mexico, and an unknown number travel to Mexico every year.[74] While Arizona adheres to federal standards and provides advance notice of intended travel by its RSOs to Mexico, none of the other southern border states do so. This leaves persons engaged in the commercial sex trade in Mexico—including minors and Indigenous persons—at risk of possible victimization by known sex offenders.

Implementing the advance travel notifications, as federal law requires, would go a long way toward protecting vulnerable commercial sex workers—both adults and children—in the northern border states of Mexico

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ns-law-complaint-form-traveling-sex-offenders (last visited July 22, 2025); U.S. Dep't of Just., Off. of Just. Programs, Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, Statute in Review: International Megan's Law (2019).

[71] *Information Required for Notice of International Travel, supra* note 69.

[72] This information was derived from state sex offender registration forms that are on file with the author. While California does have a provision on its sex offender registration form that advises its registrants of the federal requirement to provide advance notification of international travel, it is unclear whether such information is comprehensively collected by registration officials.

[73] This information was derived from state sex offender registration forms that are on file with the author.

[74] Gabriele, *supra* note 59.

from U.S.-based offenders.

About the Author

Lori McPherson is a Senior Policy Advisor in the Sex Offender Investigations Branch of the USMS who has widely published on topics related to sex offenders and Indian country. She holds a J.D., cum laude, from the University of Richmond School of Law and has been licensed to practice law in the Commonwealth of Virginia since 1996.

The Tribal Warrants Loophole: The Washington Solution

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I. Introduction

Tribal governments regularly exercise criminal jurisdiction to prosecute crimes that arise in Indian country. The exercise of some of that criminal jurisdiction is realized purely through inherent Tribal sovereignty. A century of caselaw attempting to clarify the relationship among federal, state, and Tribal governments has also shaped the exercise of criminal jurisdiction. Regardless of its form, criminal jurisdiction is crucial for Tribal governments to keep their communities safe and afford accountability.

Such a scenario develops when a Tribe has lawful authority to investigate, charge, and punish a given crime. Here is an example: A member of a Tribe perpetrates a crime against another member while within the boundaries of the reservation. Tribal police respond to the scene, investigate, and develop a case. After developing probable cause to make an arrest, the Tribal authority issues an arrest warrant.

The Tribal officers cannot find the suspect. In this scenario, the reservation is small and not many people live there. The suspect does not live there. The suspect was traveling through the reservation when he committed the crime. The suspect has left the reservation. With nothing else to do, the Tribal police enter the warrant into a law-enforcement database using the Tribal Access Program, hoping that the neighboring county's law enforcement (or another agency) will come across the suspect, make an arrest, and send the suspect back to the Tribe for his initial appearance in Tribal court.[1]

After a time, the county police stop the suspect. The suspect was speeding about five minutes from the reservation, still in the county adjacent to the scene of the crime in Indian country. The officers run the

[1] The Tribal Access Program for National Crime Information (TAP) is a system designed to give Tribal law enforcement access to, and to provide information to, national crime information systems, including arrest warrants. *Tribal Access Program (TAP)*, U.S. Dep't of Just., https://www.justice.gov/tribal/tribal-access-program-tap (last visited July 23, 2025).

suspect's information and learn of the Tribal arrest warrant.

But they cannot take the suspect into custody for speeding (a civil infraction). The suspect is released, despite the lawful arrest warrant issued by the Tribe. The suspect drives slowly away from the Tribal jurisdiction, and away from the Tribe's chance to address the suspect's wrongdoing.

II. Total escape from prosecution

In the above example, it is possible that no other criminal jurisdiction exists over the perpetrator.[2] As a result, the perpetrator could fully escape lawful prosecution for the offense. A state does not have authority over an Indian who commits a crime against another Indian.[3]

Federal jurisdiction, however, may exist for a limited subset of offenses for Indian defendants committing crimes against Indians. The General Crimes Act of 1817 authorized federal jurisdiction over crimes involving one Indian and one non-Indian, regardless of whether the victim or defendant is the Indian or non-Indian person.[4] But that statute does not expressly allow for the prosecution of crimes involving an Indian against another Indian person, which was tested in *Ex parte Crow Dog*.[5] The Supreme Court held that the United States could not prosecute a murder of one Indian person by another Indian person. Two years after *Crow Dog*, Congress enacted the Major Crimes Act of 1885 (MCA).[6] The MCA provided jurisdiction over Indian defendants committing an enumerated major crime over any person regardless of the victim's Indian status.[7] In addition to murder, the list includes manslaughter, kidnapping, maiming,

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[2] *See* section I ¶¶ 2–5, *supra*.

[3] Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) (State criminal jurisdiction within Indian country is generally "limited to crimes by non-Indians against non-Indians . . . and victimless crimes by non-Indians." (citation omitted)). This is true absent express delegation by Congress, such as under Public Law 83-280. State Jurisdiction over Offenses Committed by or Against Indians in the Indian Country, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, 588–90 (1953) (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

[4] 18 U.S.C. § 1152. The act provides, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." *Id.*

[5] Ex parte Crow Dog, 109 U.S. 556 (1883). The Court in *Crow Dog* found that Congress had not authorized criminal jurisdiction over a crime committed by one Indian against another in Indian country. *Id.* Indeed, the General Crimes Act exempts coverage over "offenses committed by one Indian against the person or property of another Indian"; offenses committed by an Indian "who has been punished by the local law of the [T]ribe"; and "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian [T]ribes respectively." 18 U.S.C § 1152.

[6] 18 U.S.C. § 1153.

[7] *Id.*

sexual abuse, felony assault, and felony child abuse and neglect.[8]

This leaves a category of crimes that fall between the cracks of federal jurisdiction. Where a crime involves an Indian against another Indian, but is not an MCA crime, the only remaining jurisdiction would be that of the Tribe. That includes both felonies that are not enumerated as a major crime and misdemeanors. Thus, without federal or state jurisdiction, fleeing the reservation and exploiting the warrant recognition loophole under these facts would mean the suspect goes unpunished.

III. Washington's Tribal Warrants Act

This scenario was the legal reality in the state of Washington until the legislature passed the Tribal Warrants Act (TWA).[9] The bill was designed to close the "long-standing jurisdictional gap that allowed individuals who committed crimes on Tribal lands to evade prosecution by fleeing to state lands."[10] Tribes in Washington had long agreed not to shelter or conceal subjects of state prosecution; accordingly, it seemed time to provide a uniform process for reciprocation by the state.[11] Thus, the bill sets forth a process to advance "cross-jurisdictional cooperation so that fugitives from Tribal courts cannot evade justice by remaining off reservation in Washington's counties and cities."[12]

The bill itself provides two distinct ways of handling Tribal warrants. The Tribes are designated as either "certified" or "non-certified."[13] A certified Tribe's arrest warrant is given full faith and credit, "as if it were the arrest warrant of the state."[14] The statute sets forth a process whereby state law enforcement first verifies the warrant with Tribal law enforcement, the subject is detained, and transfer is arranged.[15] In contrast, state law enforcement treats a non-certified Tribe's warrants with more rigor, providing a process that feels more like a typical extradition process between states involving a state court hearing.[16] The subject of the warrant is brought before a superior court judge and provided notice of the Tribe

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[8] *Id.*
[9] Wash. Rev. Code § 10.32 (2025).
[10] *Tribal Warrants Bill Closes Long-Standing Jurisdictional Gap*, Swinomish Indian Tribal Cmty. (May 29, 2025), https://www.swinomish-nsn.gov/public-safety/page/tribal-warrants-bill-closes-long-standing-jurisdictional-gap#:~:text=Beginning%20July%201%2C%20legislation%20will,by%20fleeing%20to%20state%20lands.
[11] Wash. Rev. Code § 10.32.005.
[12] *Id.*
[13] *Id.* § 10.32.010(1)–(2).
[14] *Id.* § 10.32.100.
[15] *Id.* § 10.32.005.
[16] *Id.* §§ 10.32.040, 10.32.090.

issuing the warrant, the basis of the warrant, the right to counsel, and the right to require a judicial hearing before transfer of custody.[17] In testing the legality of the extradition, the hearing is limited to the following: (1) whether the person has been charged with or convicted of a crime by the non-certified Tribe; (2) whether the person before the court is the person named in the request for extradition; and (3) whether the person is a fugitive.[18] A judge must order transfer following the hearing unless the arrested person shows by clear and convincing evidence that the arrested person is not the person identified in the warrant.[19]

IV. Distinctions in legal process

So which Tribes may take advantage of the streamlined process, and which are relegated to the more standard extradition-like procedure? Even though Tribes have historically extradited subjects of state criminal prosecutions to state courts, the TWA redundantly incorporated that as a requirement for state reciprocation.[20] That is true of both categories of Tribes, certified and non-certified. Rather, the distinction stems from differences in apparent levels of criminal process that Tribes may have incorporated into their government structure. Tribes, after all, are independent political communities—and existed before the Constitution—and thus are not subject to the restrictions contained in the Bill of Rights and other amendments.[21]

Congress passed the Indian Civil Rights Act (ICRA) of 1968, also known as the Indian Bill of Rights, to extend certain constitutional rights to individuals subject to Tribal jurisdiction.[22] Many of the requirements in the ICRA look like those in the Bill of Rights in the U.S. Constitution: the right to free speech, religion, press, and to protest; the right against unreasonable search and seizure; the right to a speedy trial; and the right against cruel and unusual punishment.[23] The ICRA did not mirror all the rights enumerated in the Bill of Rights; specifically, the 1968 version excluded the establishment clause, the right to appointed counsel, the grand-jury requirement, and the right to a civil trial.[24] Because of the limited protections federally required of Tribal courts, Congress limited

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[17] *Id.* § 10.32.090.
[18] *Id.* § 10.32.060.
[19] *Id.*
[20] *Id.* § 10.32.010(1)–(2).
[21] Talton v. Mayes, 163 U.S. 376, 384 (1987).
[22] 25 U.S.C. §§ 1301–1304.
[23] *Id.* § 1302.
[24] *Id.*

their sentencing authority to one year and a fine of $5,000.[25]

Beginning in 2010, with additional amendments to the ICRA through the Violence against Women Act of 2013, Tribes were given options to increase sentencing capabilities and recognize jurisdiction over non-Indians by enhancing the legal process for defendants.[26] Tribes are not required to take on either additional process. The distinction in the Washington TWA between certified and non-certified Tribes reflects that some Tribes have this additional process, and others do not.[27]

One purpose of the Tribal Law and Order Act of 2010 (TLOA) is to give a Tribe the ability to increase jail sentences resulting from Tribal prosecutions.[28] Under TLOA, to exercise enhanced sentencing jurisdiction—and to qualify as a certified Tribe for the TWA—a Tribe must do the following: (1) provide effective assistance of counsel equal to or greater than required under the U.S. Constitution; (2) provide free, appointed, and licensed attorneys for indigent defendants; (3) require law-trained Tribal judges who are licensed to practice in any jurisdiction in the United States; (4) make Tribal criminal laws, rules of evidence, and criminal procedure publicly available; and (5) maintain records of criminal proceedings, including audio or other recordings of trials.[29] If a Tribe meets these requirements, they may then sentence up to 3 years imprisonment and a fine of up to $15,000 per offense for a combined maximum sentence of 9 years per criminal proceeding.[30] And the Tribe is recognized under the TWA as a certified Tribe which can take advantage of the streamlined process.[31]

Perhaps the streamlined process for TLOA-compliant Tribes is a recognition that Tribes who have taken on the additional due-process require-

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[25] The Indian Civil Rights Act has been amended several times. The one year and $5,000 sentencing maximum was a part of amendments to section 1302(7) in 1986 as a part of the Anti-Drug Abuse Act (Public Law 99-570). That expanded sentencing authority from just six months and $500 maximum sentences in the first 1968 version.

[26] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304). *See also* Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI L. Enf't Bull. (May 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-indian-country-and-the-tribal-law-and-order-act-of-2010.

[27] Wash. Rev. Code § 10.32.010(1)–(2).

[28] *The Tribal Law and Order Act of 2010*, Nat'l Cong. of Am. Indians, https://www.ncai.org/section/vawa/about-vawa-and-stcj/tribal-law-and-order-act (last visited July 25, 2025).

[29] Luis C. deBaca, Dir., Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, Enhanced Sentencing under TLOA: Ramifications for Implementing SORNA (2016).

[30] 25 U.S.C. § 1302(c)(1)–(5).

[31] Wash. Rev. Code § 10.32.010(2).

ments are more like local state entities, ensuring some level of consistency in the way a criminal defendant would be treated in Tribal court.

To the extent state concerns exist over the perceived lack of due process that Tribes afford to criminal defendants, the secondary extradition-like process for non-certified Tribes does not seem to add any substantive protections. The required state court confirmation of the warrant, determination of fugitive status, and an identity hearing, provides no meaningful due process. Even the secondary process does not seem overly burdensome on the demanding Tribal jurisdiction. Alternatively, the bifurcated process does not appear to meaningfully address the distinctions between certified and non-certified Tribes.

The perceived lack of due process for non-certified Tribes may be just that: perception. After all, there is more than one way to structure government; and there are perhaps structures set forth by various Tribal governments that feel inherently different from a typical state structure but satisfactorily protect individual interests balanced against the jurisdiction's interest in public safety and justice.

The bifurcated process may also be the best that can be done given that Tribes are uniquely situated as neither foreign nations nor states themselves. While they are neither, states must treat them in some ways as both a local government and a separate sovereign. Treated as a local government, unnecessary red tape falls away and efficient, adaptive government-to-government relationships allow for dynamic and effective response to public safety in both state and Tribal lands. And still, Tribes maintain distinct political status, enjoying a government-to-government relationship with the federal government that sets them apart from local governments that fall under state authority. In the absence of a process designed to accommodate the unique position Tribes are in, perhaps the bifurcated process will suffice.

V. Conclusion

Closing the loophole reinforces Tribal sovereignty through the exercise of lawful criminal jurisdiction. That in turn promotes public safety for both Tribal and non-Tribal communities. The Tribal court process can discourage offenders from new criminal acts through appropriate punishment and sanctions, which can have the added effect of deterring others from engaging in criminal conduct. Also, criminal process can give perpetrators access to drug addiction and mental health support where needed, which can reduce recidivism rates and make communities safer. Leaving Tribal fugitives in local state communities with criminal conduct unaddressed can only expose those communities to greater public safety risk.

This jurisdictional gap—where Tribal warrants are not recognized by

the state in which the Tribe is located—could very well exist in other jurisdictions. For other states seeking similar solutions, there are a few things to keep in mind. First, states and Tribes must collaborate. Washington and the Tribes in the state worked together to structure the TWA, which should be commended. Tribal consultation and state-Tribal collaboration is necessary for effective solutions in a complex space.

Second, while this bill addressed a key problem, it does not cover every scenario where someone might escape Tribal jurisdiction by fleeing Indian country. An area of concern is with juvenile delinquents. Delinquency, a category apart from criminal conduct, necessitates a separate process from the one set forth in the TWA. The reality of juveniles running away from Tribal communities, and local state law enforcement finding themselves unable to return those subjects, remains an issue. Here, the concern is not as much ensuring consequences for criminal behavior; rather, it is about returning children to their communities to provide the support and structure they need.

Third, states looking to take on this type of legislative solution should consider the purpose of providing different processes to different Tribes. The TWA recognizes that Tribal governments, and the due process protections they afford criminal defendants, may not always look synonymous with the state's structure. The TWA opts for a bifurcated process wherein Tribes with less due process have a more involved process to follow. This bifurcated process, however, does not appear to account for the perceived lack of due process. Ultimately, the TWA is a great step forward in state and Tribal collaboration.

About the Author

Michael Harder serves as an Assistant United States Attorney (AUSA) in the Western District of Washington as well as a Tribal Liaison in the District. In that role, he prosecutes crime occurring in Tribal communities, ranging from domestic violence and child sexual abuse to drugs and gun crime. In addition to his criminal docket, he works with Tribes on public safety issues and collaboration efforts between federal and Tribal issues. He began his career as a Department of Justice Honors Program Indian Country Fellow. He served as an AUSA in the Northern District of Oklahoma, in the wake of *McGirt v. Oklahoma*, where he was exposed to countless issues in Indian Country.[32] Before that, he interned in the Environment and Natural Resources Indian Resources Section in the Department, as well as the Indian Water Branch of the U.S. Department of Interior.

[32] 591 U.S. 894 (2020).

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Note from the Editor-in-Chief

The United States of America is jurisdictionally unique. Our great land has federal, state, territorial, and Tribal governments. Jurisdiction in Indian country is particularly complex. This issue of the *Department of Justice Journal of Federal Law and Practice* is devoted to some of the thorniest issues facing practitioners. But our gifted authors make these difficult issues understandable through a rich analysis of Tribal history, federal policy, and the applicable law. I know this volume, covering things like Tribal public safety, violence against women, missing or murdered indigenous person, traveling sex offenders, the tangled and often illogical "categorical approach" used in sentencing, and a legal loophole regarding Tribal warrants, will be useful to those who have Indian country in their jurisdiction.

Leslie Hagen, our point of contact and policy reviewer for the issue, is an esteemed colleague here at the Office of Legal Education. She is the go-to authority for anything related to Indian country and Tribal issues. Her work rounding up our authors (all subject-matter experts) and acting as overseer of this issue was exemplary. Thanks, Leslie. And thanks go out to those subject-matter experts who took time away from their busy schedules to share their knowledge.

Shout-outs go to Managing Editor Kari Risher and Associate Editor Abbie Hamner who worked hard getting this issue to press. It's summer, so they didn't have the assistance of any University of South Carolina law clerks. But this dynamic duo still did a fantastic job. And finally, thanks to Jim Scheide who does our computer typesetting. He had extra challenges this issue with typesetting some non-Roman characters in addition to making everything look aesthetically pleasing and easy to read.

We hope you enjoy the issue and the rest of your summer.

Chris Fisanick
Columbia, South Carolina
August 2025