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## WRITTEN TESTIMONY NCAI VAW TASK FORCE CO-CHAIRS

Shannon Holsey, Carmen O'Leary, and Tami Truett Jerue

DECEMBER 23, 2024

### 19th Annual Government-to-Government Violence Against Women Tribal Consultation

The National Congress of American Indians (NCAI) submits written testimony, including what we addressed with our oral testimony last month. We look forward to working with the federal government to continue to fully implement the Violence Against Women Act (VAWA) mandated annual Tribal consultation. Thank you for rescheduling this year's consultation to avoid conflicting with the NCAI Annual Convention.

The following issues, concerns, and recommendations were identified by Tribal Nations and advocates during past consultations since 2006, through NCAI resolutions since 2000, through regional Tribal organization resolutions, and at numerous meetings. Tribal leaders and advocates have tirelessly raised concerns about barriers preventing the protection of American Indian and Alaska Native (AI/AN) women with the administration, Congress, and federal departments and agencies. Many of these issues are not new and illustrate the complicated legal and policy barriers embedded in the layers of federal Indian law.

To achieve the purposes of Tribal Titles 8 and 9 of the Violence Against Women Act (VAWA) 2022 and 2005, respectively, we recommend that the executive and legislative branches of the federal government consult and coordinate with Tribal Nations regarding the implementation of the proposed recommendations.

**First**, limited jurisdiction over non-Indian offenders on Tribal lands continues to be a key reason for the perpetuation of disproportionate violence against American Indian and Alaska Native women. The 2022 reauthorization of VAWA expanded the list of covered crimes over which Tribal Nations can exercise jurisdiction over non-Native perpetrators. While a pivotal step forward, VAWA 2022 did not address protections for elders nor serious crimes that co-occur with domestic and sexual violence, such as financial crimes and homicide. Perpetrators will continue to slip through the cracks until Congress fully restores every Tribal Nation's complete jurisdiction over all crimes committed by non-Indians on Indian land.

#### NCAI's recommendations include:

- We urge Congress to legislatively pass a full Oliphant fix and for the Department of Justice (DOJ) and Department of Interior (DOI) to support Tribal Nations' jurisdiction over non-Indians for any offense on Tribal lands as outlined in NCAI Resolution SPO-16-037.



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- DOJ and DOI should coordinate and collaborate to implement the provisions of VAWA 2022 and support Tribal Nations in implementing their restored jurisdiction over non-Indian perpetrators, including offering joint training for Tribal and federal law enforcement on implementing VAWA.
- The Bureau of Prisons (BOP) should overhaul its Tribal prisoner program to make it easier for Tribal Nations to submit inmate placement requests, including having adequate BOP staff for the program.

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**Second**, the Alaska Pilot Project created under VAWA 2022 represents more than just a program. **It is the restoration of our inherent sovereign authority to keep our communities safe and hold wrongdoers accountable.** For too long, Alaska Tribal Nations have been forced to stand by helplessly as crimes occur in our villages with inadequate or delayed response from other jurisdictions. This has created a devastating cycle of violence that has particularly impacted our women and children.

The DOJ must provide full and adequate funding for this pilot project to succeed. Without proper resources for law enforcement training, detention facilities, tribal court systems, and victim services, the federal government risks setting up our Tribal justice systems to fail. Underfunding this initiative would not only deny us the tools needed to protect our people, it would also continue the federal government's long history of making promises to Tribal Nations without following through with meaningful support. We cannot accept symbolic gestures or partial measures. The safety of our communities and the exercise of our sovereign rights require real, sustained investment. Our people deserve nothing less than a fully functional criminal justice system that can respond swiftly and effectively to protect victims and ensure justice. The success or failure of this pilot project will set a precedent for all Tribal Nations in Alaska seeking to exercise their inherent rights of self-governance and community protection.

As tribal leaders, we urge the DOJ to begin public education and outreach immediately regarding the Alaska Pilot Project and criminal jurisdiction over non-Native offenders rather than waiting until after Tribal Nations are approved. Restoring our sovereign authority to protect our communities through criminal jurisdiction is a historic shift requiring broad public understanding and awareness. By initiating comprehensive public education now—through media campaigns, educational materials, and community outreach—we can proactively address misconceptions, reduce potential resistance, and ensure Native and non-Native residents understand these important changes to Tribal authority. Early education helps demonstrate that Tribal jurisdiction enhances public safety for everyone while respecting due process rights. Waiting until after Tribal Nations are approved to begin public education creates unnecessary barriers and delays. Many of our communities are remote, and information takes time to disseminate effectively across Alaska. Building public awareness and understanding now will help ensure smoother implementation when Tribal Nations begin exercising this restored jurisdiction, ultimately leading to safer communities for all Alaskans.

**NCAI's recommendations include:**

- We urge Office of Violence against Women (OVW) to support dedicated funding for infrastructure capital expenses for Tribal Nations in Alaska.



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- Of the 229 Tribal Nations in Alaska, less than 3% have public safety holding facilities that will support long-term residents. Alaska Tribal Nations need dedicated infrastructure facility funding to implement special Tribal criminal jurisdiction fully.
- The current single-agency funding stream doesn't consider the many robust needs of Tribal Nations in Alaska to implement VAWA and the Alaska Pilot Project fully. We recommend a multi-agency, multi-year, mini-consolidation grant program approach through different agencies to fund Alaska Tribal Nations' implementation of VAWA and the Alaska Pilot Project.

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**Third,** the application of *Castro-Huerta* in the courts threatens to erode Tribal jurisdiction and sovereignty.

The Supreme Court's decision in *Castro-Huerta* circumvents Congress's exclusive authority over Indian affairs and threatens to upset the balance of powers established in the U.S. Constitution. This threat is manifesting. In a 2023 Oklahoma Supreme Court decision, *In the Matter of S.J.W.*, the Court applied the Supreme Court's decision in *Castro-Huerta* to conclude that Tribal Nations no longer have exclusive jurisdiction over adoption cases concerning their citizens within the borders of their reservations under the Indian Child Welfare Act. The Oklahoma Supreme Court reached this decision even though the Supreme Court's decision in *Castro-Huerta* concerned criminal law, not child welfare cases, and Congress was clear in the Indian Child Welfare Act (ICWA) that Tribal Nations exercise this jurisdiction to the exclusion of states. The fact that courts are applying *Castro-Huerta* to override the plain language of statutes passed by Congress could pose grave consequences for the future of VAWA and require immediate Congressional correction.

**NCAI's recommendation includes:**

- DOJ must communicate to Congress that it supports the proposed legislation encapsulated in NCAI Resolution SAC-22-043.<sup>1</sup> Without Congressional action, the Court will be emboldened to continue to rewrite and override federal statutes that Congress has passed to affirm Tribal sovereignty and protect Native women and children. Nothing less than the lives of our women and children are at stake.

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**Fourth,** Tribal Nations cannot meaningfully exercise restored jurisdiction and make Indian Country safer if the federal government does not live up to its trust responsibility to provide public safety funding and resources to implement the restored jurisdiction. Tribal Nations spend significant time and resources to prepare their justice systems and victim service programs to meet the needs of their communities; however, many Tribal Nations are limited by a lack of flexible, consistent, and sustainable funding for their justice systems, leaving many without the ability to implement the VAWA restored criminal jurisdiction. The federal government must live up to its trust responsibility by providing consistent and sustainable upfront funding for Tribal public safety and justice systems. Restoring Tribal criminal

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<sup>1</sup> SAC-22-043 Calling on Congress to Enact the Legislative Proposal to Improve Public Safety in Indian Country  
<https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=3164>



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jurisdiction must include the necessary resources and funding to exercise that jurisdiction and help to make Tribal communities safer.

**NCAI's recommendations include:**

- Federal agencies must include annual, consistent, and sustainable noncompetitive funding for Tribal Nations for all public safety and victim services needs in their annual budget requests.
- DOJ should request the total amount of funding authorized for Tribal programs in VAWA, especially for the Special Tribal Criminal Jurisdiction grant program and reimbursement.
- BOP should cover transportation costs for Tribal Nations to transport inmates to designated facilities and coordinate with Tribal Nations to provide federal transportation to the facility.
- DOJ and DOI should increase funding for Tribal Nations' implementation of Special Tribal Criminal Jurisdiction for DOJ, the Department of Health and Human Services (DHHS), and the Bureau of Indian Affairs (BIA).

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**Fifth**, in 2022, Monty Wilkinson, Director of the Executive Office for United States Attorneys, issued a memorandum to all U.S. Attorneys, Criminal Chiefs, Tribal Liaisons, and Victim Witness Coordinators. In the memo, Director Wilkinson stated that the ruling in *Castro-Huerta* “does not alter federal jurisdiction to prosecute crimes in Indian country pursuant to 18 U.S.C. sections 1152 and 1153. Nor does the decision diminish the federal government’s trust responsibility to Tribal Nations.” The Director went on to advise U.S. Attorneys to “not alter referral practices without formal consultation with Tribal Nations in their districts, bearing in mind the important principles of Tribal sovereignty, government-to-government relationship, and the importance of partnership and open communication.” He stated that, “the Department considers it a priority to address the disproportionately high rates of violence experienced by American Indians and Alaska Natives by promoting public safety in Indian country. The *Castro-Huerta* decision does not alter this mission, and communication, collaboration, and coordination among federal, Tribal, and state partners will help meet that goal.”

**NCAI's recommendations include:**

- DOJ must ensure that U.S. Attorneys follow the direction of Director Wilkinson and that the Federal Bureau of Investigation (FBI) director issues a similar statement and direction to stop the FBI retreat from Indian country.
- DOI should issue a similar memorandum and provide training to relevant DOI and BIA staff located in Indian country.
- The DOJ should provide training and education for U.S. Attorneys, FBI personnel, Criminal Chiefs, Victim Witness Coordinators, and any other relevant DOJ staff on Director Wilkinson's directives.

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**Sixth**, 65% of federally recognized Tribal Nations are in Public Law 280 states. We have low state prosecution rates in P.L 280 states involving violence against Native women. Yet, Tribal Nations located in P.L. 280 states receive little to no support from the BIA for Tribal law enforcement and courts.



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Consequently, the Tribal Nations in P.L. 280 states have two problems: fewer resources to develop their Tribal justice systems, and states with concurrent jurisdiction fail to fulfill their responsibilities under the law.

Since the 1990s, the DOJ has financially supported and provided technical assistance to Tribal Nations to develop and enhance their Tribal police departments and court systems. However, due to Tribal Nations' collective outcry, the DOI has only requested and received funding in the past few years. The federal funding disparities at the BIA for Tribal Nations in P.L. 280 states and similarly situated jurisdictions must be addressed more robustly and immediately by the federal government.

It is imperative not only to restore Tribal Nations' jurisdiction over non-Indian perpetrators fully but also to provide funding for their justice systems so that they can make their communities safer for everyone who lives there. The cost of inaction is measured not in dollars but in lives lost, crimes unpunished, and communities living in fear. Every day without adequate funding is another day our people are denied the fundamental protections every American citizen deserves.

**NCAI's recommendation includes:**

- BIA should continue requesting additional federal funding to provide public safety and justice resources to Tribal Nations in P.L. 280 states.
- DOJ and BIA must take immediate action to address these funding disparities. BIA must secure comprehensive federal funding for public safety and justice in P.L. 280 states—this is fundamental to fulfilling the trust responsibility to protect Tribal communities.
- BIA must establish direct, sustainable funding streams for Tribal courts and law enforcement, with integrated accountability measures to ensure these resources have the maximum impact on Native people.
- The current funding disparity between Tribal Nations based on P.L. 280 status must end immediately—a Tribal Nation's location should never determine its right to safety and justice.
- Finally, OVW must provide Alaska Tribal programs adequate time for implementation and end discriminatory practices like Alaska-specific probation periods that undermine Tribal sovereignty. These changes are crucial to protecting our communities and honoring the federal government's obligations to all Tribal Nations.

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**Seventh**, during past consultations, Tribal leaders raised concerns about the lack of shelter and supportive services for Tribal Nations. The Family Violence Prevention and Services Act, or FVPSA, is the only dedicated federal funding source for domestic violence shelters across the country. However, FVPSA authorization expired in 2015.

**NCAI's recommendations include:**

- DHHS should support a Family Violence Prevention and Services Act (FVPSA) reauthorization that:
  - Adjusts the funding distribution to increase the amount that Tribal Nations receive from 10% to 12.5%;





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- Dedicates formula funding for Tribal coalitions to provide culturally appropriate technical assistance to Tribal Nations;
- Provides permanent funding for the National Indian Domestic Violence Hotline;
- Provides permanent funding for the Alaska Tribal Resource Center on Domestic Violence to reduce disparities facing Native victims; and
- Provides permanent funding for the Native Hawaiian Resource Center on Domestic Violence to reduce disparities facing Native Hawaiian victims.

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**Eighth**, the federal response to the injustice of Missing and Murdered Indigenous Women and Relatives (MMIWR) crisis is a breach of the federal trust responsibility and a human rights violation. An adequately resourced local Tribal response to prevent murders and women from going missing is essential. In 2018, the DOJ Indian Country Investigations and Prosecutions Report to Congress noted that “[i]t is the Department’s position that prioritization of initiatives in Indian country, including the effort to build capacity in Tribal courts, will lead to enhanced public safety for Native Americans.”<sup>2</sup>

The federal government’s failure to adequately fund Tribal victim services and Tribal law enforcement and the lack of response from federal law enforcement is a continuation of genocide committed against Indigenous peoples of this country.

**NCAI’s recommendations include:**

- The Not Invisible Act Commission submitted its report, “*Not One More: the Not Invisible Act Commission*,” to the DOI and DOJ over a year ago on November 1, 2023. We appreciate the responses earlier this year from DOI, DOJ, and most recently from DHHS. **We ask DOJ and DOI to please follow up with the Department of Homeland Security (DHS) for their response and look forward to at least annual updates from each federal agency.**
- DHS agencies and staff work within Indian Country and interact with Tribal citizens, yet DHS does not have protocols to respond to MMIWR cases. DHS should require each agency within the department to develop and implement MMIWR protocols in consultation with Tribal Nations. This would further the mission established by President Biden in Executive Order 14053: *Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People*. For example, Customs and Border Patrol should better coordinate with Tribal Nations on MMIWR cases that occur near U.S. Borders, the Transportation Security Agency should train staff on how to identify human trafficking victims, the Cyber Security Infrastructure Security Agency should train Tribal staff and citizens on how to protect against traffickers, the DHS Blue Campaign should offer free culturally-specific information campaigns for Tribal Nations, and the Federal Emergency Management Agency should coordinate with Tribal Nations to help find MMIWR victims during or after disasters.
- DHS should establish permanent MMIWR staff positions within the Department.

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<sup>2</sup> U.S. Department of Justice Indian Country Investigations and Prosecutions Report, <https://www.justice.gov/d9/pages/attachments/2020/01/02/2018icireportfinal002.pdf>, 2018, pg. 3.



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- DHS must fully staff its Office of Tribal Affairs in the Office of Intergovernmental Affairs with at least six staff members to coordinate Tribal issues within DHS.
- The 2005 reauthorization of VAWA's National Institute of Justice research program should be fully implemented and provide Tribal Nations information regarding missing and murdered Native women, including unique barriers facing Tribal Nations and Native women in P.L. 280 states.
- DOJ and DOI should review, revise, and create law enforcement and justice protocols appropriate to the disappearance of Native women and girls, including inter-jurisdictional issues as provided by Savanna's Act and the Not Invisible Act.<sup>3</sup>
- All federal departments should coordinate efforts in consultation with Tribal Nations to increase the response of state governments, where appropriate, to cases of the disappearance or murder of Native people.
- DOJ should investigate state and local agencies, like Montana state and local justice officials, with a pattern or practice of inadequately responding to cases of missing and murdered Indigenous women and relatives.<sup>4</sup>
- DOJ and DOI should support the Bridging Agency Data Gaps and Ensuring Safety for Native Communities (BADGES) Act and the Parity for Tribal Law Enforcement Act or similar legislation.

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**Ninth**, while preventing the occurrence of MMIWR should be the primary goal, steps must be taken to ensure that both families and victims are supported in a culturally appropriate way when crimes occur. In many reported incidents, the pain of losing a loved one was exacerbated by improper or culturally insensitive treatment of the case or remains.

**NCAI's recommendations include:**

- DOJ, DOI, DHS, and DHHS should implement recommendations from the National Congress of American Indians regarding the Tribal set-aside from the Crime Victims Fund to ensure the resources reach victims, survivors, and their families.<sup>5</sup>
- Crimes that result in MMIWR often occur in the intersection of domestic violence, dating violence, sexual assault, stalking, and sex trafficking. It is essential that the Office on Violence Against Women, the Office for Victims of Crime (OVC), the Office of Family Violence and Prevention Services, DHS, and the Indian Health Service increase Tribally-based victim advocacy services to prevent MMIWR and to support the families and community members of missing, murdered, or trafficked Native people.
- Develop protocols, in consultation with Tribal Nations, which recognize the inherent right of Native peoples to exercise their traditional practices to prevent and intervene in response to

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<sup>3</sup> P.L. 116-165 and P.L. 116-166.

<sup>4</sup> Rose Quilt et al., *The Failed Response of State Justice Agencies to Investigate and Prosecute MMIWG Cases: A Pattern and Practice in Violation of the U.S. Civil Rights Act*, Restoration Magazine, 2022, 34-38.

<sup>5</sup> National Congress of American Indians, *Resolution ABQ-19-034 Calling for Improvements in the Administration of Tribal Crime Victims Funding*, 2019, <http://www.ncai.org/ABQ-19-034.pdf> (last visited November 30, 2020).



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MMIWR. These protocols must address the current violations of Tribal religious and cultural practices in the handling of human remains.

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**Tenth**, the escalation of sexual and domestic violence, including sex trafficking, due to the presence of extractive industries and military construction projects on or nearby Tribal lands must be addressed by DOJ, DOI, DHHS, DHS, and the Department of Defense (DOD) or DOD's Army Corps of Engineers. These industries, including companies and subcontractors, must be held accountable for the resulting violence from itinerant workforces employed within Tribal communities. Native women and their children should not be exposed to violence by those employed by these industries.

**NCAI's recommendations include:**

- DOJ, DOI, DOD Army Corps of Engineers, DHHS, and DHS should consult with Tribal Nations to create standards of protection of Tribal communities for extractive industries' compliance before, during, and post-construction to protect Native women and children. The protections must be included throughout the federal permitting processes.
  - DOJ should assist Tribal Nations in safeguarding the lives of Native women from extractive industries that employ a militarized police force. Further protections must be used to ensure that no militarized tactics, usage of excessive force, or violations of civil rights are committed against Tribal citizens.
  - DHHS should enhance support for services and training for shelter and related advocacy and medical services by consulting with Tribal Nations to develop materials addressing the needs of domestic and sexual violence victims who are victimized by itinerant workers who cannot be held accountable by local Tribal authorities.
  - DOJ, DOI, and DHS should consult with Tribal Nations to establish screening guidelines to prevent convicted rapists, domestic violence offenders, stalkers, child predators, sex traffickers, and murderers from employment with extractive industries on or near Tribal lands and from accessing often unprotected populations of Native women and children.
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**Eleventh**, Native peoples experience some of the highest crime victimization rates in the country.<sup>6</sup>

**NCAI's recommendations include:**

- Support a permanent Tribal set-aside fix to the Victims of Crime Act Tribal funding stream that reflects actual Tribal needs and continues to support the flexible use of funding.
- OVC should continue conducting government-to-government Tribal consultations to improve the distribution, management, and administration of the Tribal Victim Services Set-Aside Program and determine how regulations should be tailored to address unique Tribal needs.

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<sup>6</sup> National Institute of Justice, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings From the National Intimate Partner and Sexual Violence Survey*, May 2016, <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> (last visited November 30, 2020).





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- OVC should appoint a Standing Working Group of Tribal Experts to improve the Tribal Victim Services Set-Aside Program and provide input on programmatic decisions on an ongoing basis. Ongoing consultation and consistent input from Tribal Nations are imperative to ensure the program's continued success.

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**Twelfth**, Section 212 of the Tribal Law and Order Act of 2010 requires U.S. Attorneys to coordinate with Tribal officials. Tribal officials need to be notified promptly when a U.S. Attorney declines to prosecute sexual assault and domestic violence cases and why the U.S. Attorney has declined. When the perpetrator is an Indian defendant, a Tribal prosecutor may proceed with the Tribal prosecution of the crime. In cases with non-Indian defendants, it is still essential that the U.S. Attorneys notify Tribal officials. Tribal Nations can then notify the victim about the case's status, allowing the victim to take the necessary steps for their protection.

**NCAI's recommendation includes:**

- The U.S. Attorney General should respond to the March 14, 2024, letter sent by U.S. Senators Luján, Cortez Masto, Smith, Gillibrand, Rosen, Klobuchar, Hirono, and Heinrich on the high rates of Tribal prosecutorial declinations.<sup>7</sup>

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**Thirteenth**, the NCAI VAW Task Force discussed the Department of Justice's US Attorney's Office statement during oral arguments this past June in the case *L.B. v. United States* at our recent meeting:

Assistant U.S. Attorney: L.B. stated that they had been neighbors, they'd gone to grade school together, their family members had been friends, and on the night of the assault, L.B. asked Bullcoming quote, "You've always had a crush on me since long, since a long time ago."

Judge: How does that affect the scope of employment?

Assistant U.S. Attorney: Because what that shows is, is that his interest in sexually assaulting her was purely personal. He had this personal relationship, a crush on L.B., and he was not sexually assaulting her to serve some interest of the BIA.<sup>8</sup>

"We are shocked and appalled that (the) Department of Justice, under Attorney General Merrick Garland's leadership, continues to fight L.B. in her pursuit of justice," states Mary Kathryn Nagle, attorney for the National Indigenous Women's Resource Center (NIWRC). "The Biden Administration has made very clear they care about ending violence against Native women. But at the oral argument

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<sup>7</sup> Luján, Ben Ray. (March 14, 2024). [Prosecutorial declinations in Indian Country]. Retrieved from [https://www.lujan.senate.gov/wp-content/uploads/2024/03/LujanDOJLetter.pdf?utm\\_medium=email&hsenc=p2ANqtz-9UPYsR5hK2HnzOadfKRwanTu3v6eEW4aMt\\_m2BeiWK9T7cUxBS4JB8wXTt\\_Hv4Oy5Rrgv\\_9gUY\\_CfW48IHOGd2Vjdsgw&hsmi=302077366&utm\\_content=302077366&utm\\_source=hs\\_email](https://www.lujan.senate.gov/wp-content/uploads/2024/03/LujanDOJLetter.pdf?utm_medium=email&hsenc=p2ANqtz-9UPYsR5hK2HnzOadfKRwanTu3v6eEW4aMt_m2BeiWK9T7cUxBS4JB8wXTt_Hv4Oy5Rrgv_9gUY_CfW48IHOGd2Vjdsgw&hsmi=302077366&utm_content=302077366&utm_source=hs_email).

<sup>8</sup> Recording transcript retrieved from <https://www.facebook.com/reel/847768197215745>



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before the Ninth Circuit, Assistant United States Attorney Randy Tanner argued that the DOI and BIA cannot be held liable for the sexual assault committed by its on-duty law officer because the officer had a ‘crush on the victim.’ This line of argument is appalling and reflects a deep-seated problem within Attorney General Garland’s DOJ. Being physically attracted to someone is not a license to rape, and the reversal of the case before the Ninth Circuit now gives the Biden Administration the opportunity to do the right thing finally and simply agree to compensate L.B. for the horrific trauma she has suffered.”

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**Last, the U.S. Attorney General must continue to submit the statutorily mandated annual tribal consultation reports and Indian Country investigations and prosecutions reports to Congress.**

Tribal Nations’ concerns and recommendations regarding violence against AI/AN women are extensive, as documented in past VAWA Annual Tribal Consultation Reports. The legislative and executive branches must coordinate and collaborate to enact changes that will address the disproportionate rates of violence against AI/AN women. The VAWA Annual Tribal Consultation Reports and Indian Country Investigations and Prosecutions Reports to Congress are important mechanisms for ensuring that the legislative and executive branches coordinate and collaborate to this end.

**NCAI’s recommendation includes:**

- The U.S. Attorney General and DOJ must consistently and timely submit the VAWA Annual Tribal Consultation Report to Congress on the DOJ website.