

JUSTICE FOR NATIVE SURVIVORS OF SEXUAL VIOLENCE
ACT

DECEMBER 15, 2020.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GRIJALVA, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3977]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3977) to amend the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes involving sexual violence, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 3977 is to amend the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes involving sexual violence.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3977 amends the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes of sexual violence. Even though American Indian and Alaska Native (AI/AN) women experience murder rates at 10 times the national average, many offenders continue to go unpunished. The 2013 reauthorization of the Violence Against Women Act (VAWA) notably expanded tribal court jurisdiction to cover crimes of domestic violence. However, tribal nations still lack the authority to prosecute crimes of sexual

violence, threatened domestic violence, violence against children, or violence committed against law enforcement personnel enforcing special domestic violence criminal jurisdiction. Currently, the only prosecutorial avenue available to tribal nations for these related crimes exists in the federal court system. Through this bill, a tribal court's power to prosecute offenses of sexual assault, sex trafficking, and stalking will be restored, regardless of the perpetrator's non-tribal status.

COMMITTEE ACTION

H.R. 3977 was introduced on July 25, 2019, by Representative Deb Haaland (D-NM). The bill was referred solely to the Committee on Natural Resources, and within the Committee to the Subcommittee for Indigenous Peoples of the United States. On December 5, 2019, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Representative Louie Gohmert (R-TX) offered an amendment designated Gohmert #1. The amendment was not agreed to by a roll call vote of 11 yeas and 18 nays, as follows:

Date: December 5, 2019

COMMITTEE ON NATURAL RESOURCES
116th Congress - Roll Call

Bill / Motion: H.R. 3977

Amendment: Rep. Gohmert #1 amendment

Disposition: Not agreed to by a roll call vote of 11 yeas and 18 nays.

	DEM. MEMBERS (25)	YEAS	NAYS	PRESENT
1	Mr. Brown, MD		X	
2	Mr. Cartwright, PA			
3	Mr. Case, HI		X	
4	Mr. Clay, MO		X	
5	Mr. Costa, CA		X	
6	Mr. Cox, CA		X	
7	Mr. Cunningham, SC		X	
8	Ms. DeGette, CO		X	
9	Mrs. Dingell, MI		X	
10	Mr. Gallego, AZ		X	
11	Mr. Grijalva, AZ (<i>Chair</i>)		X	
12	Ms. Haaland, NM		X	
13	Mr. Horsford, NV			
14	Mr. Huffman, CA		X	
15	Mr. Levin, CA		X	
16	Mr. Lowenthal, CA			
17	Mr. McEachin, VA			
18	Ms. Napolitano, CA		X	
19	Mr. Neguse, CO		X	
20	Mr. Sablan, CNMI		X	
21	Mr. San Nicolas, GU			
22	Mr. Soto, FL		X	
23	Mr. Tonko, NY			
24	Mr. Van Drew, NJ		X	
25	Ms. Velázquez, NY			
	REP. MEMBERS (19)	Y	N	P
1	Mr. Bishop, UT (<i>Ranking</i>)			
2	Ms. Cheney, WY	X		
3	Mr. Cook, CA	X		
4	Mr. Curtis, UT			
5	Mr. Fulcher, ID	X		
6	Mr. Gohmert, TX	X		
7	Ms. González-Colón, PR	X		
8	Mr. Gosar, AZ			
9	Mr. Graves, LA	X		
10	Mr. Hern, OK			
11	Mr. Hice, GA			
12	Mr. Johnson, LA			
13	Mr. Lamborn, CO	X		
14	Mr. McClintock, CA	X		
15	Mrs. Radewagen, AS	X		
16	Mr. Webster, FL	X		
17	Mr. Westerman, AR			
18	Mr. Wittman, VA	X		
19	Mr. Young, AK			
	TOTALS	11	18	
	Total: 44 / Quorum: 15 / Report: 23	YEAS	NAYS	PRESENT

Ranking Member Rob Bishop (R-UT) offered an amendment designated Bishop #3. The amendment was not agreed to by voice vote. No additional amendments were offered, and the bill was adopted and ordered favorably reported to the House of Representatives by a roll call vote of 22 yeas, 7 nays, and 1 present, as follows:

Date: December 5, 2019

COMMITTEE ON NATURAL RESOURCES
116th Congress - Roll Call

Bill / Motion: H.R. 3977

Amendment:

Disposition: Final Passage: H.R. 3977 was ordered favorably reported to the House of Representatives by a roll call vote of 22 yeas, 7 nays, and 1 present.

	DEM. MEMBERS (25)	YEAS	NAYS	PRESENT
1	Mr. Brown, MD	X		
2	Mr. Cartwright, PA			
3	Mr. Case, HI	X		
4	Mr. Clay, MO	X		
5	Mr. Costa, CA	X		
6	Mr. Cox, CA	X		
7	Mr. Cunningham, SC	X		
8	Ms. DeGette, CO	X		
9	Mrs. Dingell, MI	X		
10	Mr. Gallego, AZ	X		
11	Mr. Grijalva, AZ (Chair)	X		
12	Ms. Haaland, NM	X		
13	Mr. Horsford, NV			
14	Mr. Huffman, CA	X		
15	Mr. Levin, CA	X		
16	Mr. Lowenthal, CA			
17	Mr. McEachin, VA			
18	Ms. Napolitano, CA	X		
19	Mr. Neguse, CO	X		
20	Mr. Sablan, CNMI	X		
21	Mr. San Nicolas, GU			
22	Mr. Soto, FL	X		
23	Mr. Tonko, NY			
24	Mr. Van Drew, NJ	X		
25	Ms. Velázquez, NY			
	REP. MEMBERS (19)	Y	N	P
1	Mr. Bishop, UT (Ranking)			
2	Ms. Cheney, WY		X	
3	Mr. Cook, CA	X		
4	Mr. Curtis, UT			
5	Mr. Fulcher, ID		X	
6	Mr. Gohmert, TX		X	
7	Ms. González-Colón, PR			X
8	Mr. Gosar, AZ			
9	Mr. Graves, LA	X		
10	Mr. Hern, OK			
11	Mr. Hice, GA			
12	Mr. Johnson, LA			
13	Mr. Lamborn, CO		X	
14	Mr. McClintock, CA		X	
15	Mrs. Radewagen, AS	X		
16	Mr. Webster, FL		X	
17	Mr. Westerman, AR	X		
18	Mr. Wittman, VA		X	
19	Mr. Young, AK			
	TOTALS	22	7	1
	Total: 44 / Quorum: 15 / Report: 23	YEAS	NAYS	PRESENT

HEARINGS

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress—the following hearing was used to develop or consider H.R. 3977: oversight hearing by the Subcommittee for Indigenous Peoples of the United States titled “Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women (MMIW): Exploring Solutions to End the Cycle of Violence” held on March 14, 2019.¹

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources’ oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. *Cost of Legislation and the Congressional Budget Act.* With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 5, 2020.

Hon. RAÚL M. GRIJALVA,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3977, the Justice for Native Survivors of Sexual Violence Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

¹*Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women (MMIW): Exploring Solutions to End the Cycle of Violence: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res., 116th Cong. (2019), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg35582/pdf/CHRG-116hhrg35582.pdf>.*

H.R. 3977, Justice for Native Survivors of Sexual Violence Act			
As ordered reported by the House Committee on Natural Resources on December 5, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	*	*	not estimated
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

Under current law, federal law enforcement officials prosecute a range of crimes on tribal land that involve domestic violence, sexual violence, sex trafficking, and related crimes. In a subset of those cases related to domestic and dating violence, tribal governments are concurrently authorized under federal law to prosecute defendants, provided that the alleged victim or defendant is a member of the tribe or that the defendant resides in or works in Indian country.

H.R. 3977 would expand the scope of crimes that tribal governments may prosecute on tribal land to include sexual violence, sex trafficking, stalking, and other related conduct that constitutes a crime under a tribe's own laws. The bill also would authorize tribal governments to exercise jurisdiction over a non-Indian defendant regardless of whether the defendant resides on the tribes' land; is employed on the tribes' land; or is a spouse, dating partner, or intimate partner of an Indian who resides on the tribes' land.

CBO expects that, under the legislation, some tribal governments would expand law enforcement efforts within their jurisdictions to combat additional types of crime and would prosecute more criminal cases.

Tribal law enforcement agencies receive funding from several sources, including federal grants administered by the Bureau of Indian Affairs (BIA) and the Department of Justice (DOJ). Although H.R. 3977 would not authorize additional funding to support activities authorized in the bill, CBO expects tribal law enforcement agencies would rely on these grants to cover any additional costs they incur. Those grants are provided annually and are subject to the availability of appropriated funds.

Using information provided by BIA and DOJ, CBO expects that federal agencies would incur some additional administrative costs related to providing technical assistance to tribes that undertake expanded law enforcement efforts. However, CBO estimates that those costs would not be significant over the 2020–2025 period.

The CBO staff contact for this estimate is Jon Sperl. The estimate was reviewed by H.Samuel Papenfuss, Deputy Director of Budget Analysis.

2. *General Performance Goals and Objectives.* As required by clause 3(c)(4) of rule XIII, the general performance goals and objectives of this bill are to amend the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes involving sexual violence.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

UNFUNDED MANDATES REFORM ACT STATEMENT

This bill contains no unfunded mandates.

EXISTING PROGRAMS

This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

PREEMPTION OF STATE, LOCAL, OR TRIBAL LAW

Any preemptive effect of this bill over state, local, or tribal law is intended to be consistent with the bill's purposes and text and the Supremacy Clause of Article VI of the U.S. Constitution.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

CIVIL RIGHTS ACT OF 1968

(Public Law 90-284)

AN ACT To prescribe penalties for certain acts of violence or intimidation, and for other purposes.

* * * * *

TITLE II—RIGHTS OF INDIANS

* * * * *

SEC. 204. TRIBAL JURISDICTION OVER CRIMES OF [DOMESTIC VIOLENCE] DOMESTIC, DATING, OR SEXUAL VIOLENCE, SEX TRAFFICKING, OR STALKING.

(a) DEFINITIONS.—In this section:

(1) **DATING VIOLENCE.**—The term “dating violence” [means violence] *includes any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

(2) **DOMESTIC VIOLENCE.**—The term “domestic violence” [means violence] *includes any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by a current or former spouse or intimate partner 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 or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of [an Indian tribe that has jurisdiction over the Indian country where the violence occurs] that Indian tribe.*

(3) **INDIAN COUNTRY.**—The term “Indian country” has the meaning given the term in section 1151 of title 18, United States Code.

(4) **PARTICIPATING TRIBE.**—The term “participating tribe” means an Indian tribe that elects to exercise special [domestic violence] *tribal* criminal jurisdiction over the Indian country of that Indian tribe.

(5) **PROTECTION ORDER.**—The term “protection order”—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) **RELATED CONDUCT.**—*The term “related conduct” means conduct alleged to have been committed by a defendant that—*

(A) *is a violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the underlying offense occurred; and*

(B) *occurs in connection with the exercise of special tribal criminal jurisdiction by that Indian tribe.*

(7) **SEX TRAFFICKING.**—

(A) **IN GENERAL.**—*The term “sex trafficking” means conduct—*

(i) *consisting of—*

(I) *recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting by any means a person; or*

(II) *benefiting, financially or by receiving anything of value, from participation in a venture that*

has engaged in an act described in subclause (I); and

(ii) carried out with the knowledge, or, except where the act constituting the violation of clause (i) is advertising, in reckless disregard of the fact, that—

(I) means of force, threats of force, fraud, coercion, or any combination of such means will be used to cause the person to engage in a commercial sex act; or

(II) the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.

(B) DEFINITIONS.—*In this paragraph, the terms “coercion” and “commercial sex act” have the meanings given the terms in section 1591(e) of title 18, United States Code.*

(8) SEXUAL VIOLENCE.—*The term “sexual violence” means any nonconsensual sexual act or contact proscribed by Federal, tribal, or State law, including in any case in which the victim lacks the capacity to consent to the act.*

[(6)] (9) SPECIAL [DOMESTIC VIOLENCE] TRIBAL CRIMINAL JURISDICTION.—*The term “special [domestic violence] tribal criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.*

[(7)] (10) SPOUSE OR INTIMATE PARTNER.—*The term “spouse or intimate partner” has the meaning given the term in section 2266 of title 18, United States Code.*

(11) STALKING.—*The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person—*

(A) to fear for his or her safety or the safety of others; or

(B) to suffer substantial emotional distress.

(b) NATURE OF THE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—*Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special [domestic violence] tribal criminal jurisdiction over all persons.*

(2) CONCURRENT JURISDICTION.—*The exercise of special [domestic violence] tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.*

(3) APPLICABILITY.—*Nothing in this section—*

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

[(4) EXCEPTIONS.—

[(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—

[(i) IN GENERAL.—A participating]

(4) EXCEPTION FOR NON-INDIAN VICTIM AND DEFENDANT.—

(A) *IN GENERAL.*—A *participating* tribe may not exercise special **domestic violence** *tribal* criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

DEFINITION OF VICTIM.—In this subparagraph

(B) *DEFINITION OF VICTIM.*—*In this paragraph* and with respect to a criminal proceeding in which a participating tribe exercises special **domestic violence** *tribal* criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

DEFENDANT LACKS TIES TO THE INDIAN TRIBE.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.]

(c) *CRIMINAL CONDUCT.*—A participating tribe may exercise special **domestic violence** *tribal* criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) *DOMESTIC VIOLENCE AND DATING, DATING, AND SEXUAL VIOLENCE.*—An act of domestic violence **or dating violence**, *dating violence, or sexual violence* that occurs in the Indian country of the participating tribe.

(2) *VIOLATIONS OF PROTECTION ORDERS.*—An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18, United States Code.

(3) *STALKING.*—*An act of stalking that occurs in the Indian country of the participating tribe.*

(4) *SEX TRAFFICKING.*—*An act of sex trafficking that occurs in the Indian country of the participating tribe.*

(5) *RELATED CONDUCT.*—*An act of related conduct that occurs in the Indian country of the participating tribe.*

(d) *RIGHTS OF DEFENDANTS.*—In a criminal proceeding in which a participating tribe exercises special **domestic violence** *tribal* criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 202(c);

(3) the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special **【domestic violence】** *tribal* criminal jurisdiction over the defendant.

(e) PETITIONS TO STAY DETENTION.—

(1) IN GENERAL.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 may petition that court to stay further detention of that person by the participating tribe.

(2) GRANT OF STAY.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203.

(f) GRANTS TO TRIBAL GOVERNMENTS.—The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising **【special domestic violence】** *special tribal* criminal jurisdiction, including—

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe **【prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;】** *prosecutes*—

(A) *a crime of domestic violence;*

- (B) a crime of dating violence;
- (C) a crime of sexual violence;
- (D) a criminal violation of a protection order;
- (E) a crime of stalking;
- (F) a crime of sex trafficking; or
- (G) a crime of related conduct;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises [special domestic violence] *special tribal* criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, *sexual violence, stalking, sex trafficking*, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

(g) SUPPLEMENT, NOT SUPPLANT.—Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated \$5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

* * * * *

ADDITIONAL VIEWS

H.R. 3977 is not ripe for consideration by the full House. The bill raises serious Constitutional concerns, and if this legislation is struck down by the Supreme Court, then predators who will have been convicted and incarcerated under the authorities conferred in this bill may be set free. That is not justice and certainly cannot be what the sponsor intends.

The Justice Department appears to share these concerns. In a Senate Indian Affairs Committee hearing on S. 288, the Senate companion to this bill, the Department expressed a desire to take a “measured approach” and to “work with the Committee to ensure that the legislation will weather judicial challenges.”¹ This is quite an understatement of the Constitutional issues at stake.

There are alternative approaches to address violent crime in Indian Country, ones that fully respect tribes as the primary administrators of justice on their lands. However, Members of the Committee were deprived of an opportunity to evaluate them because no hearing was held on this bill. Indeed, the need for a hearing was underscored in the markup of H.R. 3977, where several Democrat Members were completely unaware of the existence of a long-settled legal doctrine—that the Constitution does not apply to Indian Country—at the heart of the controversy.

H.R. 3977, which amends the Indian Civil Rights Act of 1968 (ICRA),² builds on provisions in the 2013 Violence Against Women Act (VAWA) reauthorization act that gave tribes power to punish non-Indians.³ Under this authority, tribes may opt to exercise special criminal jurisdiction over all persons, including non-Indian offenders, who violate certain tribal laws. Previously, tribes could exercise criminal jurisdiction over Indians only.

Critically, the nature of the special criminal jurisdiction in H.R. 3977 is declared to be “inherent,” not federally delegated. In other words, an offender will be arrested, charged, tried, and incarcerated under tribal law, not federal law and there is no direct right of appeal to a federal court.⁴ The only rights a defendant in tribal court possesses are those enacted in law by Congress, as the Bill of Rights and the 14th Amendment are not applicable to tribes.⁵ And currently, the only statutory rights one possesses in tribal court are those listed in ICRA. While these rights are similar to (but not the same as) the Bill of Rights, ICRA has been held by

¹ Statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice, Before the Senate Committee on Indian Affairs Hearing on S. 288 and other bills, June 19, 2019.

² Sec. 204 of Public Law 90–284 (25 U.S.C. 1304).

³ Sec. 904 of Public Law 113–4 (127 Stat. 120).

⁴ “Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women,” U.S. Department of Justice submission of legislative proposal to the President of the U.S. Senate, July 21, 2011. [H.R. 3977 amends the legislation, enacted in law, which the referenced document explains]

⁵ See *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

the Supreme Court to be unenforceable in federal court.⁶ In simpler terms, a person who enters Indian Country may lose his civil rights.

The Supreme Court has held that tribes do not possess inherent power over non-Indians.⁷ The Court has further expressed doubt about the power of Congress to grant tribes inherent powers over non-Indians:

Retained criminal jurisdiction [of tribes] over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent . . . With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country . . . *This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.* [emphasis added].⁸

Thus, H.R. 3977 violates two core principles of American government: that a person is endowed with natural rights that are protected by the Constitution and that government must be at the consent of the governed.

Most House Republicans voted to oppose the unconstitutional “inherent tribal powers” scheme in 2013 when the VAWA reauthorization bill was considered.⁹ Nothing has changed between then and now. The Constitution is still the Constitution, and it must not be eliminated anywhere in the United States, including in Indian Country. Any proposals to modify the civil rights of a defendant in any criminal court subject to United States jurisdiction should be carefully weighed—not rammed through Committee on short notice, with no opportunity for the kind of thoughtful analysis from expert witnesses that a hearing affords.

Tribes should have the tools to prosecute those who prey on vulnerable Indians in Indian Country. Congress can easily delegate the power to them, and to provide the necessary funding for vigorous enforcement of laws to protect Indian women, children, and tribal officers. A hearing, had it been held, would have allowed Members to view comparisons of how “inherent” versus “delegated” powers may work in practice, and which is more effective in protecting Indian women in Indian Country. No person needs to have his or her Bill of Rights and Fourteenth Amendment rights denied as the price for resolving violence in Indian Country. We can—and must—apply the Constitution to tribal courts to make this system workable. And it will work.

In the Committee meeting to consider H.R. 3977, two amendments to cure the defects in the bill were offered by Congressman Gohmert and Ranking Republican Bishop. Both amendments were borrowed from provisions in Title VIII of S. 2920 (Ernst), the Sen-

⁶*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁷*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁸*Duro v. Reina*, 495 U.S. 676, 694 (1990).

⁹See votes on McMorris-Rodgers Amendment to and Final Passage of S. 47, VAWA reauthorization act, 113th Congress, February 28, 2013.

ate VAWA reauthorization bill, and both were voted down by the Democrats.

The amendment offered by Congressman Gohmert was simple: it would apply the Bill of Rights and 14th Amendment to tribal courts, and to make these protections enforceable in federal court. It seems awkward to be required to justify such an amendment. U.S. citizens have civil rights, and these rights should not be denied. Period. But it's even more awkward to explain why Democrats oppose the Bill of Rights and 14th Amendment. If the Gohmert amendment had been adopted, any Constitutional challenge to the special tribal criminal jurisdiction under H.R. 3977 would be moot.

The other amendment offered by Ranking Member Bishop would have required the Secretary of the Interior, in consultation with the Attorney General, to submit to appropriate Congressional committees comprehensive reports on tribal implementation of the bill as well as recommendations to Congress to improve tribal special criminal jurisdiction. Considering Congress is subsidizing the costs of tribes to exercise their special jurisdiction, it is perfectly reasonable for the United States to audit how tribes conduct their justice systems. Unfortunately, Democrats oppose meaningful Committee oversight of how tribes—using taxpayer funds—arrest, try, and punish offenders in Indian Country, and the amendment was not adopted.

While the Constitutional issues described above generally discuss the effects of the bill on non-Indians, odds are that a Constitutional challenge to this bill will be filed by an Indian to strike down the special tribal criminal jurisdiction it provides. The reason is a peculiar aspect of the law which received no discussion in the House debates on VAWA in 2013 or the Committee markup of H.R. 3977.

VAWA and H.R. 3977 do not force a tribe to exercise jurisdiction over all persons. Tribes have the option to exercise it. A “participating tribe” that opts to exercise special criminal jurisdiction over all persons including non-Indians must provide defendants specific rights in addition to those currently established in ICRA. A tribe that does not choose to exercise this special criminal jurisdiction will be able to prosecute only Indians, without any requirement to afford the additional rights provided by H.R. 3977 to defendants.

A challenge to special tribal criminal jurisdiction (over all persons) may come from an Indian defendant who is being prosecuted by a tribe that has decided not to be a “participating tribe.” This will likely be the majority of tribes. The argument the defendant may raise is that Congress has created two separate tiers of rights that will apply to a particular case depending on whether the tribe has decided to prosecute (1) just Indians, or (2) Indians and non-Indians alike. In other words, under H.R. 3977, if a tribe chooses to prosecute non-Indians, it is mandated to afford “all persons” the higher tier of rights. On the other hand, if the tribe chooses to prosecute only Indians, and leaves the non-Indians alone, then it's okay to afford Indian defendants a lower tier of rights.

The single factor that dictates which tier of rights applies is whether the tribe has decided to prosecute non-Indians. That is a race-based factor. Clearly, Congress is requiring extra protections only if the liberty of non-Indians is potentially at stake. Curiously,

the lower tier of rights Indians receive is a product of the Obama Administration, which proposed this scheme in the first place in the 2013 VAWA reauthorization.

For these many reasons, we urge our colleagues to address the Constitutional issues in this bill before tainted prosecutions are brought under it.

ROB BISHOP (UT).
LOUIE GOHMERT.
PAUL A. GOSAR.
RUSS FULCHER.

