



# Violence Against Women Reauthorization Act of 2013

## Title IX: Safety for Indian Women

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# Statement of the Problem

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- Reported rates of domestic violence against Native women in Indian country are among the highest in the United States.
- Federal law enforcement may be hours away from reservation crime scenes and resources are stretched thin.
- Tribal police, prosecutors, and courts have had significant success in combating crimes of domestic violence committed by **Indians** in Indian country. But without Congressional action, tribes lacked the authority to prosecute a **non-Indian**, even if he lives on the reservation and is married to a tribal member. This was because of the decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
- With many non-Indians living on reservations and other Indian lands, interracial dating and marriage are common. Too often, non-Indian men who batter their Indian wives or girlfriends go unpunished. Predictably, the violence escalates.





**VAWA 2013 was signed into law by President Obama on March 7, 2013.**



# VAWA 2013

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- Is not one single brand new law
- In many places, it amends existing Federal law. For intimate-partner violence in Indian Country, most notably the following statutes are amended:
  - The Indian Civil Rights Act (25 U.S.C. § 1301 et seq.)
  - The Full Faith and Credit Statute (18 U.S.C. § 2265)
  - The Federal Assault Statute (18 U.S.C. § 113)



# Amendments to the Indian Civil Rights Act 25 U.S.C. § 1304

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Sections 904 and 908

**With the exception of the Pilot Project,  
the effective date of these  
amendments is March 7, 2015.**



# Tribal Jurisdiction over Crimes of Domestic Violence

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- Nature of the Criminal Jurisdiction
- 25 U.S.C. § 1304(b)(1)

“ . . . [T]he 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 criminal jurisdiction over **all** persons.”



## Does Congress have the power to restore tribes' inherent authority to exercise criminal jurisdiction over non-Indians?

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- Yes. The Federal Constitution empowers Congress to enact this legislation.
- In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court suggested that Congress has the constitutional authority to decide whether Indian tribes should be authorized to try and to punish non-Indians. *See id.* at 206–12; *id.* at 212 (stating that the increasing sophistication of tribal court systems, the Indian Civil Rights Act's protection of defendants' procedural rights, and the prevalence of non-Indian crime in Indian country are all “considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians”).



## Does Congress have the power to restore tribes' inherent authority to exercise criminal jurisdiction over non-Indians?

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- In *United States v. Lara*, 541 U.S. 193 (2004), which involved tribal criminal jurisdiction over an Indian who was not a member of the tribe that prosecuted him (a “nonmember Indian”), the Court held that Congress has the constitutional power to relax restrictions that have been imposed on the tribes' inherent prosecutorial authority. *See id.* at 196, 207; *id.* at 210 (holding that “the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians”); *id.* at 205 (refusing to “second-guess the political branches' own determinations” about “the metes and bounds of tribal autonomy”).





# Concurrent Jurisdiction

## 25 U.S.C. § 1304(b)(2)

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- The exercise of special domestic violence criminal jurisdiction (SDVCJ) by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
- So, does double jeopardy bar successive tribal/federal prosecutions? No.
  - The Indian Civil Rights Act expressly prohibits Indian tribes from “subject[ing] any person,” Indian or non-Indian, “for the same offense to be twice put in jeopardy.” 25 U.S.C. § 1302(a)(3). So a tribe could not try a non-Indian twice for the same **tribal** offense.
  - However, under the “dual sovereignty” doctrine, the Federal Constitution’s Double Jeopardy Clause does not bar successive prosecutions brought by separate sovereigns.



# Applicability – 25 U.S.C. § 1304(b)(3)

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- Nothing in this section:
  - Creates or eliminates any Federal or State criminal jurisdiction over Indian Country; or
  - 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.



# Definitions - 25 U.S.C. § 1304(a)(1)

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- **Dating Violence** – “violence 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.”



# Definitions - 25 U.S.C. § 1304(a)(2)

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- **Domestic Violence** – “violence 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.”
- What types of relationships are not covered?



# Definitions - 25 U.S.C. § 1304(a)

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- **Indian Country** – as defined in 18 U.S.C. § 1151
  - In Alaska, only the Metlakatla Indian Community.
- **Participating Tribe** – an Indian tribe that elects to exercise SDVCJ over the Indian Country of that Indian tribe.
- **SDVCJ** – “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.”
- **Spouse or intimate partner** – as defined in 18 U.S.C. § 2266



# Definition of Spouse or Intimate Partner

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- 18 U.S.C. § 2266(7)(A)(i)
  - for purposes of sections other than 18 U.S.C. § 2261A
    - (I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser, or
    - (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.



# Definition of Spouse or Intimate Partner Cont.

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- 18 U.S.C. § 2266(7)(B)
  - “any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”



# Definitions - 25 U.S.C. § 1304(a)(5)

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- **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[e] 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.”





# Exceptions to SDVCJ?

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- 25 U.S.C. § 1304(b)(4)
- Neither the defendant nor the victim is Indian
- The defendant lacks sufficient ties to the tribe
- Sufficient ties are the following:
  - Resides in the Indian Country of the participating tribe;
  - Is employed in the Indian Country of the participating tribe; or
  - Is a spouse, intimate partner, or dating partner of a member of the participating tribe or of an Indian who resides in the Indian Country of the participating tribe



# When can a tribe exercise SDVCJ?

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- 25 U.S.C. § 1304(c) –
- For criminal conduct that falls into one or more of the following categories:
  - Domestic violence and dating violence that occurs in the Indian Country of the participating tribe; and
  - Violations of protection orders that occur in the Indian Country of the participating tribe



# What constitutes a violation of a protection order for purposes of SDVCJ?

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- 25 U.S.C. § 1304(c)(2)(A)-(B)
- An act that violates the portion of a protection order that –
  - 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;
  - Was issued against the defendant;
  - Is enforceable by the participating tribe; and
  - Is consistent with 18 U.S.C. § 2265(b)



# 18 U.S.C. § 2265(b)

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- A protection order issued by a State, tribal, or territorial court is consistent with this subsection, if
  - The court has jurisdiction over the parties and matter under the law of the State, Indian tribe, or territory; and
  - Reasonable notice and an opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by the law, and within a reasonable time after the order is issued, sufficient to protect the respondent's due-process rights.



# What rights must be afforded to the Defendant?

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- 25 U.S.C. § 1304(d)
- All applicable rights under the Indian Civil Rights Act
- If **ANY** term of imprisonment is imposed, then all rights described in the Tribal Law and Order Act of 2010 (25 U.S.C. § 1302(c))
- The right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community and do not systematically exclude any distinctive group in the community, including non-Indians
- All other rights whose protection is necessary under the U.S. Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise SDVCJ over the defendant



# Defendants' Rights under ICRA pre-TLOA

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- The right to the equal protection of the tribe's laws.
- The right not to be deprived of liberty or property without due process of law.
- The right against unreasonable search and seizures.
- The right not to be twice put in jeopardy for the same tribal offense.
- The right not to be compelled to testify against oneself in a criminal case.
- The right to a speedy and public trial.
- The right to a trial by jury of not less than six persons.
- The right to be informed of the nature and cause of the accusation in a criminal case.
- The right to be confronted with adverse witnesses.
- The right to compulsory process for obtaining witnesses in one's favor.
- The rights against excessive bail, excessive fines, and cruel and unusual punishments.



# Rights of Defendants – 25 U.S.C. § 1302(c)

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- The Indian tribe shall:
  - (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution;
  - (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.



# Rights of Defendants – 25 U.S.C. § 1302(c)

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- (3) require that the judge presiding over the criminal proceeding—
  - (i) has sufficient legal training to preside over criminal proceedings; and
  - (ii) is licensed to practice law in any jurisdiction in the U.S.;
- (4) prior to charging the defendant, make publicly available the tribe’s criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges); and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial





# Post Conviction Right of the Defendant

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Habeas Corpus - 25 U.S.C. § 1303 –

“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”



# Petitions to Stay Detention - 25 U.S.C. § 1304(e)

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- A person who has filed a petition for a writ of habeas corpus may petition the Federal court to stay further detention of that person by the participating tribe.
  - A stay shall be granted if the court
    - Finds a substantial likelihood that the habeas corpus petition will be granted; and
    - After giving each victim 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
- A 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 25 U.S.C. § 1303.



# Section 908 – Pilot Project

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- Any time prior to March 7, 2015, a tribe may ask the Attorney General of the United States to designate the tribe as a participating tribe for purposes of exercising SDVCJ.
- Prior to making a decision, the Attorney General must coordinate with DOI, consult with affected tribes, and conclude that the requesting tribe's criminal-justice system has adequate safeguards in place to protect defendants' rights, consistent with 25 U.S.C. § 1304.
- DOJ is engaging tribal leaders in consultation about the process and criteria for the Pilot Project.



# Federal Register Notice on the Pilot Project

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On June 14, 2013, the *Federal Register* published the official version of the Department of Justice's Notice on the Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence. The official 14-page Notice is available online at

<https://www.federalregister.gov/articles/2013/06/14/2013-14158/pilot-project-for-tribal-jurisdiction-over-crimes-of-domestic-violence>





**Intertribal Technical-Assistance Working Group**

# Sentencing Options for Tribal Courts

## 25 U.S.C. § 1302

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- For SDVCJ cases a tribe may sentence a defendant as follows:
  - imprisonment for a term of up to 1 year or a fine of up to \$5,000, or both
- However, if the defendant has been convicted of the same or a comparable offense by any jurisdiction in the U.S. or is being prosecuted for an offense comparable to an offense that would be punishable as a felony in Federal or State court, the tribal court can impose
  - For conviction of any one offense, a term of imprisonment not to exceed 3 years or a fine of \$15,000, or both
  - A total term of imprisonment not to exceed 9 years



# Sentencing Options 25 U.S.C. § 1302(d)

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- For a Defendant sentenced to a total term of imprisonment of more than one year, a tribal court may require the defendant to serve an alternative form of punishment, as determined by the tribal judge under tribal law, or to serve a sentence in –
  - A. A tribal correctional center approved by BIA for long-term incarceration
  - B. The nearest appropriate Federal facility, at the expense of the U.S. pursuant to the Bureau of Prisons tribal prisoner pilot program
  - C. A State or local government-approved detention or correctional center pursuant to an intergovernmental agreement
  - D. A tribal alternative rehabilitation center



# Federal Register Notice on the Pilot Project

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On November 29, 2013, the *Federal Register* published the final notice establishing procedures for Indian tribes to request designation as Pilot Tribes for purposes of SDVCJ. The official Notice is available online at

[http://www.ncai.org/tribal-vawa/pilot-project-itwg/VAWA\\_Pilot\\_Project\\_Final\\_Notice.pdf](http://www.ncai.org/tribal-vawa/pilot-project-itwg/VAWA_Pilot_Project_Final_Notice.pdf)





# Tribes Awarded Pilot Project Status

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The following Tribes' Pilot Project applications were granted by the Department of Justice on February 6, 2014:

- Confederated Tribes of the Umatilla Indian Reservation (in Oregon)
- Pascua Yaqui Tribe of Arizona
- Tulalip Tribes of Washington

<http://www.justice.gov/tribal/vawa-pilot-2013.html>



Amendment to the  
Full Faith and Credit Statute  
18 U.S.C. § 2265(e)

Section 905 of VAWA 2013

**Effective date is March 7, 2013**



# Tribal Protection Orders

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“For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.”

- Clarifies that tribes have full civil jurisdiction to issue and enforce protection orders involving any person (Indian or non-Indian) in matters arising anywhere in the tribe’s Indian Country or otherwise within the tribe’s authority.
- In Alaska, this applies only to the Metlakatla Indian Community



# Amendments to the Federal Assault Statute 18 U.S.C. § 113

Section 906 of VAWA 2013

**Effective date is March 7, 2013**



# Assault with Intent to Commit Murder

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- 18 U.S.C. § 113(a)(1)
- has been expanded to include Assault with Intent to Commit a Violation of § 2241 (Aggravated Sexual Abuse) or § 2242 (Sexual Abuse)
- The maximum penalty of 20 years of imprisonment remains the same, but the imposition of a fine is now included.



# Assault with Intent to Commit Any Felony

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- 18 U.S.C. § 113(a)(2)
- The statute has been amended to comport with the changes in § 113(a)(1), so the offenses of Assault to Commit Murder, Aggravated Sexual Abuse, and Sexual Abuse are exceptions to the charge of Assault with Intent to Commit Any Felony
- Punishable by a maximum sentence of 10 years imprisonment, a fine, or both



# Assault with a Dangerous Weapon

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- 18 U.S.C. § 113(a)(3)
- Has been amended by striking the phrase “without just cause or excuse”
- Statute now reads “Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.”



# Assault by Striking, Beating or Wounding

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- 18 U.S.C. 113(a)(4)
- The maximum term of imprisonment for a conviction of this crime has been increased from six months to one year.
- This offense is not listed in the Major Crimes Act.





# Assault Resulting in Substantial Bodily Injury

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- 18 U.S.C. § 113(a)(7)
- This offense has been expanded to include as victims spouses, intimate partners, and dating partners of the accused. The statute continues to cover individuals who have not attained the age of 16 years.
- Punishable by a maximum sentence of 5 years imprisonment, a fine, or both.



# Assault by Strangling or Suffocating

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- A new felony assault provision has been added for committing an “[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate”
- 18 U.S.C. § 113(a)(8)
- Punishable by a maximum sentence of 10 years imprisonment, a fine, or both.



# Definition of Strangling

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- The term “strangling” means “intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.”
- 18 U.S.C. § 113(b)(4)



# Definition of Suffocating

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- The term “suffocating” means “intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.”
- 18 U.S.C. § 113(b)(5)



# Definition of Dating Partner

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- 18 U.S.C. § 2266(10)
- “dating partner” refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. Factors to consider include:
  - The length of the relationship;
  - The type of relationship; and
  - The frequency of interaction between the persons involved in the relationship



# Definition of Spouse or Intimate Partner

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- 18 U.S.C. § 2266(7)(A)(i)
  - for purposes of sections other than 18 U.S.C. 2261A
    - (I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser, or
    - (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.



# Definition of Spouse or Intimate Partner Cont.

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- 18 U.S.C. § 2266(7)(B)
  - “any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”



# Amendment to the Major Crimes Act

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- The Major Crimes Act, 18 U.S.C. § 1153(a), has been amended to capture all felony assaults under 18 U.S.C. § 113.
  - Assault with Intent to Commit Murder, Aggravated Sexual Abuse, or Sexual Abuse
  - Assault with Intent to Commit any Felony except Murder, Aggravated Sexual Abuse, or Sexual Abuse
  - Assault with a Dangerous Weapon
  - Assault Resulting in Serious Bodily Injury
  - Assault Resulting in Substantial Bodily Injury
  - Assault by Strangling or Suffocating





# Amendments to the Consultation Statute 42 U.S.C. § 14045d

Section 903

Effective Date is March 7, 2013



# Changes to Annual Tribal Consultation

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- Adds the U.S. Department of the Interior to the annual consultation with the Departments of Justice and of Health and Human Services.
- Requires the Attorney General to submit an annual report to Congress on the annual consultation, recommendations by tribes, and the response to recommendations made during the previous years' consultation.
- Mandates notification to tribal leaders of the consultation date, time, and location at least 120 days before the event.



# Availability of Grant Funds to Implement VAWA 2013



# Is there new funding for the tribes?

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- In VAWA 2013, Congress authorized up to \$25 million total for tribal grants in Fiscal Years 2014 to 2018, but Congress has not yet appropriated any of those funds.
- Tribes may continue to apply for funding through DOJ's Coordinated Tribal Assistance Solicitation (CTAS), which can support VAWA implementation.
- Additional funding sources may be available through other Federal agencies.



# DOJ's Tribal Justice & Safety Website

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<http://www.justice.gov/tribal/index.html>

This Web site provides links to important information concerning available grants and implementation of VAWA 2013.

