

**Amendment 4032 -- This amendment would give tribe members who have been the victims of rape or sexual assault the right to have the assailant tested for HIV/AIDS and other sexually transmitted diseases.**

Native American and Alaska Native women in the United States suffer disproportionately high levels of rape and sexual violence, yet the federal government has created substantial barriers to accessing justice, according to a report release last year.<sup>1</sup>

This amendment would give tribal members who have been raped the right to have the assailant tested for HIV/AIDS and other sexually transmitted diseases within 48 hours of an indictment. This information can protect the health of rape survivors and prevent them from becoming infected with HIV. It would also ensure that the victims receive appropriate counseling and treatment for sexual abuse and HIV and STDs.

The Violence Against Women Act provides other Americans these same rights and protections.

### **Knowledge Of A Rapist's HIV Status Can Protect A Victim From Becoming Infected**

It is vitally important that those who have been raped do not also become victims of HIV/AIDS, and that requires timely medical attention including prompt testing of the defendant.

Treatment with AIDS drugs in the immediate aftermath-- usually within 72 hours-- of HIV exposure can significantly reduce the chance of infection. Because of the toxicity and long-term side effects, these drugs should not be administered for long periods without knowing if HIV exposure has occurred.

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<sup>1</sup> Amnesty International USA. "U.S. Authorities Fail to Protect Native American and Alaska Native Women From Shocking Rates of Rape, Reports Amnesty International," April 24, 2007; <http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070424001>

Victims can not rely solely on testing themselves because it can take weeks, sometimes months, before HIV antibodies can be detected. Testing the assailant, therefore, is the only timely manner in which to determine if someone has been exposed to HIV.

Rapid tests are now available that can diagnose HIV infection within 20 minutes with more than 99 percent accuracy.

The American Medical Association supports this policy because “early knowledge that a defendant is HIV infected would allow the victim to gain access to the ever growing arsenal of new HIV treatment options. In addition, knowing that the defendant was HIV infected would help the victim avoid contact which might put others at risk of infection.”

The National Rape Crisis Center estimates the HIV infection rate among sexual assault victims is higher than the general population because the violent nature of the forced sexual contact increases the chances of transmission.

Ensuring immediate testing of the assailant along with appropriate treatment will reduce this rate and can literally be a matter of life and death for a victim of rape and sexual assault.

### **More Than One In Three Native American Women Raped**

Native American and Alaska Native women in the United States suffer disproportionately high levels of rape and sexual violence, yet the federal government has created substantial barriers to accessing justice, according to an Amnesty International report released last year.<sup>2</sup>

Justice Department figures indicate that American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than other women in the United States. More than one in three Native women will be raped in their lifetimes.

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<sup>2</sup> Amnesty International USA. “U.S. Authorities Fail to Protect Native American and Alaska Native Women From Shocking Rates of Rape, Reports Amnesty International,” April 24, 2007; <http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070424001>

One support worker in Oklahoma reported that only three of her 77 active cases of sexual and domestic violence involving Native American women were reported to the police.

Many women interviewed on the Standing Rock Sioux Reservation could not think of a single Native American woman within their community who had not been subjected to sexual violence, and many survivors reportedly experienced sexual violence several times in their lives by different perpetrators.

A medical professional responsible for post-mortem examinations of victims of rape and murder in Alaska told AI that Alaska Native women comprised almost 80 percent of confirmed cases in the state since 1991.

While this amendment will not prevent sexual assault, it will ensure that those who have already been raped will not be further victimized by becoming infected with HIV.

### **Federal Laws Provide Other Victims Of Sexual Assault The Right To Know A Rapist's HIV Status**

The United States government has created a complex maze of tribal, state and federal jurisdictions that often allows perpetrators to rape with impunity, according to an Amnesty International report released last year.<sup>3</sup>

While this amendment would not address all of these legal issues, it would seek to provide tribal members who have been sexually assaulted the same rights to protect themselves from HIV/AIDS that many other Americans have and that were advocated by Congress in the most recent Violence Against Women Act (VAWA) reauthorization.

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<sup>3</sup> Amnesty International USA. "U.S. Authorities Fail to Protect Native American and Alaska Native Women From Shocking Rates of Rape, Reports Amnesty International," April 24, 2007; <http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070424001>

When Congress reauthorized the Violence Against Women Act in the 109th Congress, an important provision was included that is intended to protect women who have already been victimized once by sexual assault from being assaulted again by either the deadly AIDS virus or the legal system which may deny them potentially life saving information.

Section 102 of VAWA encourages states to implement laws that provide victims of sexual assault and rape the opportunity to know if the person indicted for the assault is infected with HIV. States are encouraged to enact laws that allow victims to request that a defendant, against whom an information or indictment is presented for a crime in which by force or threat of force the perpetrator compels the victim to engage in sexual activity, be tested for HIV disease if the nature of the alleged crime is such that the sexual activity would have placed the victim at risk of becoming infected with HIV. The defendant must undergo the test not later than 48 hours after the date on which the information or indictment is presented, and as soon thereafter as is practicable the results of the test must be made available to the victim. As medically appropriate, the victim may request follow-up testing of the defendant.

The Violence Against Women Act also allows federal VAWA funds to be used to pay for HIV testing of sexual assault perpetrators and notification and counseling programs.

These provisions are desperately needed to address a real, grievous injustice that victims of sexual assault are facing in many states.

The provision in VAWA provides financial incentives to States to enact laws to protect victims of rape, but Native American women may not benefit because their cases are often heard in federal courts. This amendment would correct this loop hole and allow an Indian victim of sexual violence to have the accused rapist tested for HIV and other STDs.

Perpetrators against Native American women are prosecuted under a different legal system. These perpetrators are subject to prosecution by the federal government under the Major Crimes Act and the General Crimes Act. Some cases may be tried in tribal courts.

The Major Crimes Act was passed by in 1885 following the U.S. Supreme Court's 1883 Ex Parte Crow Dog decision. Today, sixteen major crimes, including rape, are under federal jurisdiction if they are committed by Native Americans in Native territory regardless of whether the victim of the crime was Native.

The General Crimes Act is a federal statute, enacted in 1817, that provides the federal courts with jurisdiction over interracial crimes, including rape, committed in Indian country.

Because many of these cases fall under the jurisdiction of federal courts, Congress should apply the same protections that it has encouraged states to adopt as part of the Violence Against Women Act.

### **This Amendment Also Ensures That Victims Of Rape Are Not Further Victimized By The Legal System**

This amendment would correct a terrible injustice and protect those who have been raped and sexually assaulted from being further victimized by HIV. It would do this by requiring those accused of sexual crimes to undergo diagnostic tests for HIV and other STDs.

Studies indicate that treatment with anti-HIV drugs within 72 hours following HIV exposure can significantly reduce the chance of infection. Knowing the status of the assailant also relieves much of the agonizing anxiety of the victim.

Because it can take weeks, sometimes months, before HIV antibodies can be detected and infection determined, testing the assailant is the only timely manner in which to determine if a victim has been exposed to HIV.

Requiring those who commit sexual crimes also prevents rapists from further abusing victims and the legal system by bargaining for lighter sentences if they volunteer to be tested.

Kellie Greene of Florida started the victim's advocacy group Speaking Out Against Rape after she was forced to repeatedly sue the state to get the medical records of the man who sexually assaulted her. "I'm constantly thinking that I may have survived the attack, but he might eventually murder me with HIV, and not knowing is just eating me up right now."

### **Native American Populations Disproportionately Affected With HIV/AIDS And Other STDs**

American Indians and Alaska Natives suffer from HIV/AIDS at higher rates than whites and from a range of other medical conditions at higher rates than the general population. The Centers for Disease Control and Prevention (CDC) estimated that in 2005, a total of 1,581 American Indians and Alaska Natives were living with AIDS in the 50 states and the District of Columbia.

Among ethnic groups, American Indians and Alaska Natives have the third highest rate of HIV/AIDS diagnosis in the United States.

Women accounted for 24 percent of the estimated numbers of American Indians and Alaska Natives living with AIDS in 2005, compared with 12.5 percent for whites.

According to the CDC, since the beginning of the epidemic through 2005, a cumulative total of 3,238 American Indians and Alaska Natives have been diagnosed with AIDS. This estimate may be understated because American Indians and Alaska Natives, particularly those living in rural areas, may be less likely to be tested because of concerns about confidentiality.

According to 2005 CDC surveillance data by race and ethnicity, American Indians and Alaska Natives had the second highest rates of gonorrhea and Chlamydia and the third highest rate of syphilis.

This amendment will help prevent new cases of HIV/AIDS and other STDs among those American Indians who have been raped or sexually assaulted.

## **The Courts Have Upheld The Right to Test Defendants For HIV**

There are countless stories of women and children who have been victims of rape and sexual assault who have been denied access to this potentially life saving information.

In some circumstances, rape defendants have even used HIV status information as a plea bargaining tool to reduce their sentences.

Knowledge about HIV exposure is vital to victims of sexual assault, and the Supreme Court has upheld its constitutionality.

The American Civil Liberties Union claimed that “forced HIV testing, even of those convicted of a crime, infringes on constitutional rights and can only be justified by a compelling governmental interest. No such interest is present in the case of a rapist and his victim because the result of a rapist’s HIV test, even if accurate, will not indicate whether the rape victim has been infected.”

The medical facts are quite obvious why knowledge of HIV exposure is vital to victims of sexual assault and it is astonishing that anyone would argue otherwise.

Claims that providing this information to victims would compromise “privacy” are also quite shocking. Exactly whose rights are being protected by denying a victim of sexual assault the right to know if she has been exposed to the deadly AIDS virus when she was raped? If sufficient evidence exists to arrest and jail a rape suspect, the victim should have the right to request that the suspect be tested for HIV.

Opponents of mandatory testing for those accused of rape and sexual assault have claimed that it is a violation of the Fourth Amendment which protects against unreasonable search and seizure.

The Supreme Court, however, has drawn a different conclusion in regards to law enforcement taking blood samples. Stating that the “Fourth Amendment’s proper function is to constrain, not against all

intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner," the Court found nothing inherently unreasonable about taking blood samples from those accused of a crime. Clearly, knowing whether or not someone was exposed to a deadly virus is justifiable.

Most recently, the New Jersey appeals court upheld the state's law requiring pre-conviction testing when three teen-age boys who gang raped a mentally retarded girl were required to undergo HIV testing. The court ruled that the victim's need to know outweighed the defendants' rights to privacy and confidentiality.

In December 1995, a Florida appeals court upheld the constitutionality of a state law allowing judges to order defendants charged with rape to submit to HIV testing. Duane Fosman was arrested and charged with armed sexual battery. At the request of the accuser, a Broward County trial judge ordered Fosman to be tested for HIV antibodies. Under the Florida law, a crime victim can ask a judge to order HIV testing of a defendant who has been charged with any one of 12 offenses, including sexual battery. The test results are disclosed only to the victim, the defendant and public health authorities. Fosman argued that the testing and taking of his blood amounted to an unreasonable search that violated the Fourth Amendment of the U.S. Constitution. He also said the action violated Article I, Section 23, of the Florida Constitution, which guarantees a person's right to be free from governmental intrusion in his private life. In addition, he asserted that the law is unconstitutional because it doesn't give him an opportunity to rebut the presumption of probable cause. A three-judge panel of the Court of Appeal, Fourth District, said Fosman's situation was analogous to blood and urine testing for drug or alcohol use.

In 1989, the U.S. Supreme Court in *Skinner v. Railway Labor Executive's Association* ruled it was constitutionally permissible to drug test railroad workers who were involved in serious train crashes. In a companion case, *National Treasury Employees Union v. Von Raab*, the high court allowed mandatory drug testing, without probable cause, of customs employees.



Under the same rationale, the Illinois Supreme Court upheld a law which required HIV testing of persons convicted of prostitution, and a California appeals court affirmed a law requiring HIV testing of defendants charged with biting or transferring blood to a police officer.

In each of the cases, the "special needs" of the public outweighed the individual's demand that probable cause be established, the Florida court said. "Even if the petitioner had a reasonable expectation of privacy, society's interest in preventing members of the public from being exposed to HIV would be a sufficient compelling state interest to justify the infringement of that right," the court said. It found the law to be "the least intrusive means" to deal with HIV transmission because blood tests are routine and disclosure of test results are limited.