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Insights: Alerts

The Need to Preserve and Expand Tribal VAWA Jurisdiction and Federal Resources

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March 7, 2017 marks two years since Indian tribes could elect to exercise criminal jurisdiction over certain non-Indians for domestic or dating violence offenses. Although some claimed that non-Indian violence against Native women was not truly a problem and, therefore, tribal criminal jurisdiction over non-Indians was not necessary, implementation of this jurisdiction has definitively shown: that is a problem and that tribes can—and should—have authority to prosecute these offenders

Given the new administration's penchant for rolling back progressive civil rights and social justice victories achieved under the Obama administration, the fight to reauthorize the Violence Against Women Act (VAWA)—and hopefully improve upon and expand its protections—looms large. VAWA will expire next year and as Congress seems likely to pass a Continuing Budget Resolution for FY2017 and begin planning FY2018 appropriations, it is none too early for advocates to lobby to retain and expand key federal resources for VAWA's implementation. This will undoubtedly be yet another challenge in the long journey to achieve justice for Native victims of violence, as several Republican members of Congress, including the newly appointed Attorney General Jeff Sessions, voted against the last reauthorization of VAWA.

Although all reauthorizations of the law have enjoyed bipartisan support, in 2013 a number of Republicans ultimately voted against VAWA because of their objection to provisions that they considered controversial, including domestic-violence (DV) protections for LGBT individuals and undocumented immigrants. Among the disputed provisions, was a narrow restoration of tribal criminal jurisdiction over certain non-Indians accused of domestic or dating violence offenses committed against Native intimate partners on tribal lands.

Known as Special Domestic Violence Criminal Jurisdiction (SDVCJ), this provision partially remedies the jurisdictional enforcement gap that persists for non-Indian DV offenders in Indian country. In 1978, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court ruled that Indian tribes had been divested of their inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Although the federal government technically has criminal jurisdiction over non-Indians who commit violent offenses against Native victims, U.S. Attorneys' Offices decline to prosecute more than half of the Indian country violent crimes referred to their offices, 67% of which are sexual-abuse related cases. In effect, before VAWA's passage, if a non-Indian committed domestic violence against a Native victim, he would more than likely go unpunished.

VAWA 2013 ultimately recognized and reaffirmed Indian tribes' inherent, sovereign authority to exercise criminal

jurisdiction over non-Indians in Indian country, however narrowly. Under the law, Indian tribes that afford the accused specific, due-process protections can prosecute certain non-Indians who commit a DV or dating violence crime against a Native intimate partner, or violate a protective order, within the tribe's jurisdiction. The non-Indian defendant must have ties to the Indian tribe, including living or working within Indian country or having a current or former spouse, intimate partner, or dating partner who is Native and resides there. Exercising this jurisdiction is entirely voluntary and elective and SDVCJ does not change existing federal or state law.

Additionally, this legislation included a voluntary Tribal VAWA Pilot Project that authorized tribes to implement the law with the Department of Justice's (DOJ) approval before the law's effective date of March 7, 2015. Five tribes participated in the Pilot Project and since then eight more tribes have implemented SDVCJ. In total, 13 tribes have implemented to combine for at least:

- 84 arrests;
- 19 guilty pleas;
- 5 referrals for federal prosecution;
- 1 jury acquittal;
- 16 dismissals; and
- 4 pending cases.

To date, no SDVCJ defendant has filed a federal appeal challenging his or her tribal-court charge or conviction.

Although a major victory in tribal governments' ability to protect Native women from violence, the law's extremely narrow scope has led to enforcement problems in practice. Because the law only extends to crimes against a limited group of intimate partners, tribal authorities cannot prosecute these same non-Indian offenders for co-occurring crimes, including drug and alcohol offenses, property damage, and most importantly, violent crimes against children. Significantly, data collected during the VAWA Pilot Project showed that children were present as witnesses, victims, or both in the majority of SDVCJ cases. For example, during the Pilot Project phase, the Pascua Yaqui Tribe had a total of 18 SDVCJ cases involving 18 children. The Pilot Project also demonstrated that SDVCJ offenders were repeat offenders whom the tribe had been unable to charge previously. During the approximately one-year pilot project, SDVCJ offenders at Pascua Yaqui combined for more than 80 previous contacts with tribal law enforcement alone.

Additionally, dicta in the 2014 case *United States v. Castleman* has led to a prevailing uncertainty over the scope of the law's jurisdiction, which has directly impacted tribal prosecutors' charging decisions. In *Castleman*, the Supreme Court considered the scope of a "misdemeanor crime of domestic violence" as it relates to federal firearm prohibitions. The Court referenced SDVCJ in a footnote and implied that its expansive reading of what constituted domestic violence in this case did not apply under SDVCJ, which was defined more narrowly as "violence committed." Consequently, tribal prosecutors have acted conservatively and declined to prosecute certain offenses that would normally qualify as domestic violence under tribal law, but in this instance do not

include an actual, offensive touching of the victim.

Accordingly, SDVCJ's narrowly defined jurisdiction ultimately hinders tribes' ability to protect DV victims before the offenders' conduct escalates to physical violence. Further, as the law is currently written, tribes do not have authority to prosecute basic ancillary offenses a non-Indian may commit in the course of the criminal-justice process, such as resisting arrest, assaulting an officer, or obstruction of justice. Notably, tribes cannot prosecute a non-Indian for DV offenses committed against a non-Indian victim. Thus, the narrow construction of SDVCJ enables continuing injustice for all Indian country community members, Indian and non-Indian alike.

Ongoing support and involvement of the federal government is critical for the continued success of tribal VAWA implementation and enforcement. Federal partners played a key role in in the initial implementation of SDVCJ as tribal jurisdictions and technical-assistance providers coordinated with the Bureau of Indian Affairs, DOJ, and local U.S. Attorney's Offices. Further, despite the lack of direct appropriations for tribal VAWA implementation, the Office of Violence Against Women (OVW) has used its discretionary funding to support key resources and technical assistance, including the Inter-Tribal Working Group (ITWG).

The ITWG has provided a peer-to-peer forum for tribes in various stages of VAWA implementation to share information, advice, and best practices. The ITWG is supported by multiple technical-assistance providers, including:

- National Center for Juvenile and Family Court Judges;
- National Congress of American Indians;
- National Indigenous Women's Resource Center ; and
- the Tribal Law and Policy Institute.

To date, at least 45 tribes have participated in the ITWG, which demonstrates not only the widespread interest in such resources, but also an effective use of federal funds to reach multiple tribal stakeholders at once. Given that the most robust SDVCJ enforcement has been at the three original VAWA pilot tribes that experienced a more fulsome collaboration with DOJ, it seems evident that continued support and engagement of the federal government will bolster widespread, effective implementation of the law. Further, there are ongoing issues that demand federal attention, including continuing to house SDVCJ offenders in BIA facilities and tribes' ongoing inability to directly access the database of federal criminal information known as the National Crime Information Center, which has been a major and dangerous hindrance to tribal law enforcement.

With a Republican-controlled Congress, it remains unclear which aspects of VAWA Republicans will seek to change or potentially take out. Significantly, although VAWA authorized $5 million in annual appropriations through FY2018, Congress has never directly appropriated federal funds to implement SVDCJ. Given the uncertainty over FY2017–2018 appropriations, tribal advocates should look to renew their support of direct VAWA appropriations quickly and lobby to retain key resources, including the OVW, which is purportedly on the administration's shortlist of impending cuts. Although a full " *Oliphant* fix" restoring full tribal criminal jurisdiction

over non-Indians would be ideal, advocates should strive for commonsense expansion of tribal criminal jurisdiction over non-Indians for the following offenses:

- Violent crimes against children;
- Rape and sexual assault;
- Other ancillary offenses committed in the criminal justice process; and
- Extending protection to vulnerable adults.

It is important to recognize that under the current law, Indian tribes do not have criminal jurisdiction over non-Indians who commit "stranger" rape, or the far more common acquaintance rape, against a Native victim. Given this administration's emphasis on energy-infrastructure development, there is a heightened need and obligation to ensure protections for Native women against violence from non-Indian men. As evidenced by the Bakken oil boom, the surge of non-Indian male oil workers into Indian country has led to increased human trafficking of Native women and girls. Native women are victims of violent crime more than any other demographic and one in three Native women will be raped in her lifetime. A DOJ Report indicated that non-Indians account for up to 88% of the violence perpetuated against Native women. Given the reality that 56% of married Indian woman have non-Indian husbands, tribes must have authority to prosecute non-Indians for violent offenses to ensure the safety of their communities.

Just as advocates formally initiated a groundswell of support to pass the reauthorization of VAWA with restored tribal criminal jurisdiction over non-Indians, so too must advocates bolster educational and lobbying efforts to ensure retention and expansion of SDVCJ jurisdiction and resources for implementation. In the Republican-controlled Congress, it may be a more effective strategy to emphasize that SDVCJ is a local-control law enforcement initiative that has ultimately proven to be a better means of ensuring justice for Native victims than federal enforcement.

During his recent Senate confirmation hearing, newly appointed Attorney General Jeff Sessions was questioned about his opposition to the tribal provisions in VAWA. When asked whether he would defend this law, he responded, "I will defend the statute if it's reasonably defensible." The time is now to reinvigorate this conversation in the general public and educate Congress and the new administration that tribal criminal jurisdiction over non-Indians for violent offenses is not only reasonably defensible, but imperative for the safety of all community members.

To learn more information on tribal VAWA implementation and ways to strengthen the law, please watch VAWA: A Call to Action and Tribal VAWA: Much Remains Undone .