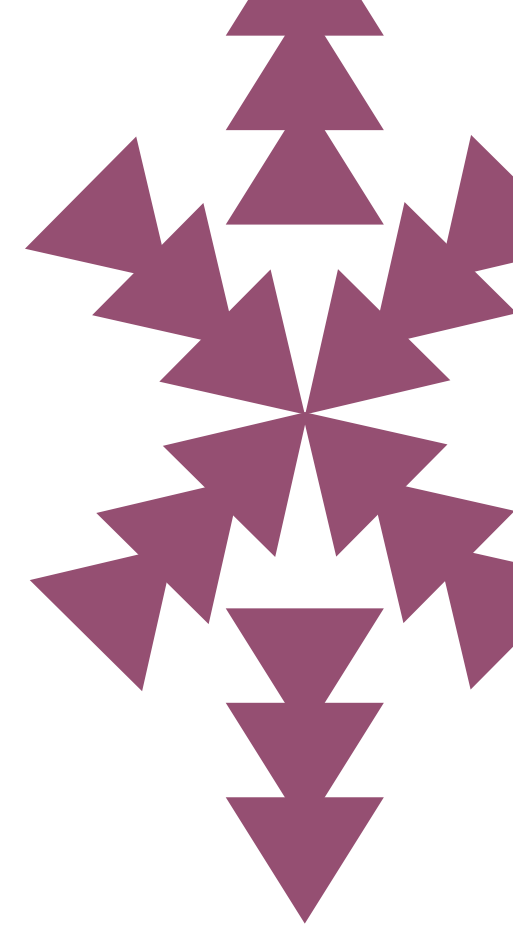


# VAWA 2022: Special Tribal Criminal Jurisdiction



This project was supported by Grant No. 2016-TA-AX-K005, awarded by the U.S. Department of Justice, Office on Violence Against Women. The opinions, findings, conclusions, and recommendations expressed in this program are those of the presenters and do not necessarily reflect the views of the Department of Justice.

# Overview

1. VAWA 2013 & 2022 Tribal Jurisdiction Provisions
2. Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction
3. Resources

# **VAWA 2013 and 2022 Special Tribal Criminal Jurisdiction**

**(STCJ)**

# Historical Overview

# The Problem

- *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)
  - No tribal jurisdiction over non-Indian defendants.
- Infrequent prosecutions by federal and state authorities with jurisdiction.
- High rates of violent crime committed by non-Indians with no accountability.

# Empowering Tribal Nations

VAWA 2013 affirmed tribal **inherent authority** to exercise criminal jurisdiction over non-Indians who commit 1) domestic violence, 2) dating violence, or 3) violations of qualifying protection orders in Indian country.



VAWA 2022 built on this framework and added additional categories of criminal conduct that can be prosecuted against non-Indians in tribal court.

- Both VAWA 2013 and 2022 are amendments to the Indian Civil Rights Act that can be found at 25 USC 1304.

# Important Note about Effective Dates

- **VAWA 2013** went into effect nationwide on March 15, 2014. Since that time, any tribe who complies with the statutory requirements can prosecute non-Indians. NO approval from the U.S. DOJ or BIA is necessary.
- **VAWA 2022** was signed into law March 15, 2022, but has an effective date of **Oct. 1, 2022**. No approval from U.S. DOJ or BIA is required.

Crimes that occur **BEFORE** Oct. 1, 2022: should be prosecuted in compliance with VAWA 2013 and the applicable tribal code.

Crimes that occur **AFTER** Oct. 1, 2022: can be prosecuted in compliance with VAWA 2022, so long as the applicable tribal code allows it.

# **Violence Against Women Reauthorization Act of 2013**

**(VAWA 2013)**



# VAWA 2013 - Tribal Jurisdiction over non-Indians:

Amended the Indian Civil Rights Act (25 USC 1304) to recognize a tribe's inherent criminal jurisdiction over **non-Indians** for the crimes of:

- Domestic Violence.
  - Dating Violence.
  - Criminal Violations of a Qualifying Protection Order.
- 
- ✓ The **crime** must occur **within** the tribe's **Indian country**;
  - ✓ The **victim** must be an Indian; and
  - ✓ The defendant must have **sufficient ties** to the community.
- Requires tribes to provide certain **due process** protections for non-Indian defendants.
- Indigent defense counsel
  - Non-Indians in jury pools, etc.

# VAWA 2022 - Tribal Jurisdiction over non-Indians:

After Oct. 1, 2022, adds recognition of a tribe's inherent criminal jurisdiction over **non-Indians** for:

- Child violence
  - Sexual violence
  - Stalking
  - Sex trafficking
  - Assaults of tribal justice personnel
  - Obstruction of justice
- 
- ✓ The **crime** must still occur **within** the tribe's **Indian country**;
  - ✓ The **victim** must be an Indian for most but not all crimes; and
  - ✓ The defendant's **ties** to the community are no longer a condition of tribal jurisdiction.

Adds a requirement that tribes must provide notice in writing of federal habeas rights.<sup>10</sup>

# VAWA 2022 (H.R. 2471)

- Amends 25 USC 1304. **These amendments have an effective date of Oct. 1, 2022.**
- Replaces the term “special domestic violence criminal jurisdiction (SDVCJ)” with “special tribal criminal jurisdiction (STCJ)” throughout the law.
- Introduces the term “covered crimes” to describe the conduct that can be prosecuted under tribal law in tribal courts.
- Changes **WHAT** can be charged in tribal court, and, in some instances, **WHO** can be charged in tribal court.

# Changes to WHAT can be charged in Tribal Court

**Specifically the amendments to 25 USC 1304 will:**

- add categories of conduct that can be prosecuted in tribal court:
  - *domestic violence (2013)*
  - *dating violence (2013)*
  - *protection order violations (2013)*
  - **sexual violence (2022)**
  - **stalking (2022)**
  - **sex trafficking (2022)**
  - **child violence (2022)**
  - **obstruction of justice (2022)**
  - **assaults against justice personnel (2022)**

Collectively these are referred to as “covered crimes.”

## Changes to WHAT can be charged in Tribal Court (cont.)

### The amendments to 25 USC 1304 will also:

- amend the definitions of “domestic violence” and “dating violence” to give additional deference to how these terms may be defined in tribal law.
- These changes remove the “violence committed” language that had left tribes unable to prosecute domestic violence crimes that were not sufficiently “violent.”

## Changes to WHAT can be charged in Tribal Court (cont.)

(7) *Domestic Violence*.—The term 'domestic violence' means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is violence committed by—

- (A) a current or former spouse or intimate partner of the victim; by
- (B) a person with whom the victim shares a child in common; by
- (C) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or by
- (D) 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 violation occurs.

## Changes to WHO can be charged in Tribal Court

### Specifically the amendments to 25 USC 1304 will:

- clarify that for cases involving obstruction of justice or assaults against tribal justice personnel by a non-Indian, the tribe has jurisdiction even if the victim is also non-Indian;
- remove the existing requirement under VAWA 2013 that limits tribal jurisdiction to those non-Indians who live or work in the Indian country of the tribe or are in a qualifying relationship with a member of the tribe or non-member Indian resident (often referred to as the “sufficient ties” provision);
- clarify that tribes in Maine are able to implement the law if they choose to

# Changes to DUE PROCESS protections that must be provided in Tribal Court

## Specifically the amendments to 25 USC 1304 will:

- add a requirement that notice to defendants of their habeas corpus rights must be made in writing;
- codify the requirement that a defendant must exhaust their tribal court remedies before seeking habeas relief in federal court unless certain exceptions are met. This section borrows language from 18 USC 2254 that currently applies to habeas petitions arising out of state court proceedings.



# What 25 USC 1304 Does NOT Cover

- cases where the Victim and Defendant are **both non-Indian** except in cases of “assault of tribal justice personnel” and “obstruction of justice”.
- crime that **took place outside the Indian country** of the participating tribe.

**25 USC 1304 is voluntary for the tribe. It also does NOT alter existing state or federal jurisdiction.**

# VAWA Special Tribal Criminal Jurisdiction Due Process Requirements

- Tribal court ensures “all applicable rights” under the Indian Civil Rights Act – 25 U.S.C. 1302 (a).
- If any term of imprisonment, all rights described in Tribal Law & Order Act (TLOA) for enhanced sentencing – 25 U.S.C. 1302(c).
- Additional rights required just by VAWA.

# ICRA Due Process Requirements (All defendants)

- No unreasonable searches and seizures
- No double jeopardy
- No self-incrimination
- Right of confrontation
- No excessive bail or fines or cruel and unusual punishments
- Due process and equal protection
- Right to a jury trial
- Right to a speedy and public trial

# TLOA Due Process Requirements

## (All VAWA defendants facing incarceration)

- Effective assistance of counsel equal to what would be available in federal or state court /is equal to that guaranteed by the U.S. Constitution;
- Free appointed licensed attorneys for indigent defendants;
- Law-trained tribal judges who are licensed to practice law in any jurisdiction in the United States;
- Publicly available tribal criminal laws and rules of evidence and criminal procedure; and
- Maintain a record of criminal proceeding, including audio or video recording of trial proceedings







# VAWA Due Process Requirements (All VAWA defendants)

- Tribal court must provide the right to a trial by an impartial jury.
  - Drawn from sources that reflect a fair cross-section of the community, and
  - Does not systematically exclude any distinctive group, including non-Indians.
- Tribal court must ensure defendants are timely notified in writing of the right to *habeas corpus* and right to petition for stay of detention.



# Due Process Protections Required by TLOA and/or VAWA

TLOA and VAWA Due Process Requirements		TLOA	VAWA
1.	Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	✓	✓
2.	Tribal government provides, at their expense, to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	✓	✓
3.	Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	✓	✓
4.	Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	✓	✓
5.	Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants are licensed to practice law by any jurisdiction in the United States.*	✓	✓

\*Note: These due process protections are required under VAWA *if* a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
6.	The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*		
7.	Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*		
8.	Any defendant sentenced to greater than 1-year imprisonment to be served in a tribal facility, that facility must pass the BIA jail standards for long-term incarceration.		
9.	Tribal court provides the defendant the right to a trial by an impartial jury that is drawn from sources that: <ul style="list-style-type: none"> <li>• Reflects a fair cross section of the community.</li> <li>• Do not systematically exclude any distinctive group in the community, including non-Indians</li> </ul>		

\*Note: These due process protections are required under VAWA *if* a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
10.	Tribal court ensures that anyone detained under the special domestic violence criminal jurisdiction is “timely notified” in writing of his/her rights and privileges (right to petition for habeas corpus and a stay of detention).		
11.	Tribal court ensures that “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 criminal jurisdiction over the defendant” are provided.		



# Exercising STCJ

# What Tribal Governments Need to Do to Exercise STCJ under VAWA

1. Prepare for the recent changes in scope to **go into effect on Oct. 1**. Until Oct. 1, the law remains unchanged from what was enacted in VAWA 2013.
2. Ensure that nothing in current constitution/code prohibits exercise of STCJ.
3. Consider the following questions:
  - ❖ What changes would be required in your criminal code?
  - ❖ Are you giving notice in writing of habeas corpus rights of defendants?

If your tribe is NOT currently exercising jurisdiction over non-Indians under VAWA 2013:

- ❖ Does your tribe have a public defender program?
- ❖ Do your existing judges have the requisite training?
- ❖ What kind of facilities exist for incarceration?
- ❖ How would we make the jury system changes needed?
- ❖ How can you fund the changes?

# **Inter-Tribal Working Group on Special Tribal Criminal Jurisdiction**

**(ITWG)**

# Inter-Tribal Working Group

- Formed in 2013
- Approximately 70 tribes participate
- Bi-annual meetings
- Peer-to-peer exchange of views, information, and advice about how tribes may best exercise STCJ and promote safety within their communities.



# Technical Assistance Team

- Sally Waters, Special Projects Attorney, National Congress of American Indians (NCAI)
- Hon. Steve Aycock, Consultant, NCAI
- Jerry Gardner, Executive Director, Tribal Law & Policy Institute (TLPI)
- Kelly Stoner, Victim Advocacy Legal Specialist, TLPI
- Chia Halpern Beetso, Tribal Courts Specialist, TLPI
- Virginia Davis, Consultant, TLPI
- Dawn Stover, Executive Director, Alliance of Tribal Coalitions to End Violence (ACTEV)

# Resources

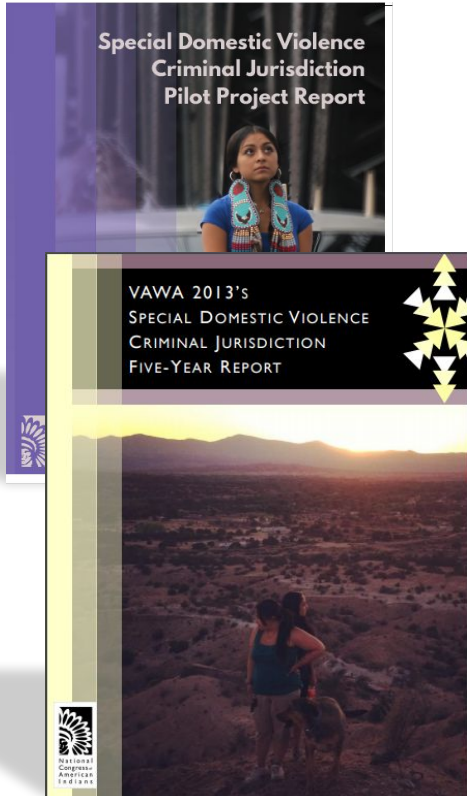
# Free One-on-One Technical Assistance

- **Review draft tribal codes**, policies, or procedures to implement the law.
- Help address specific **questions about VAWA's jury requirements** and the logistics of creating a jury pool system that complies with VAWA.
- Help address issues that may come up with the **investigation or prosecution of individual cases**.

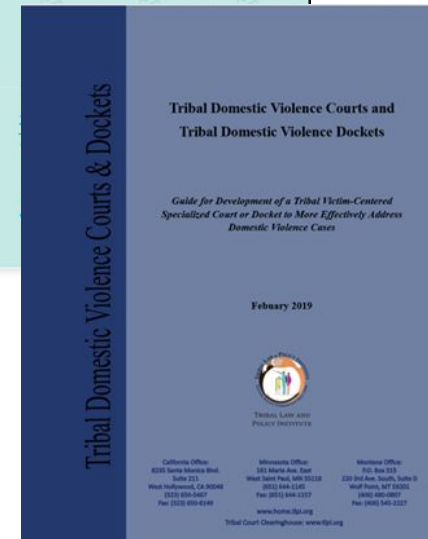
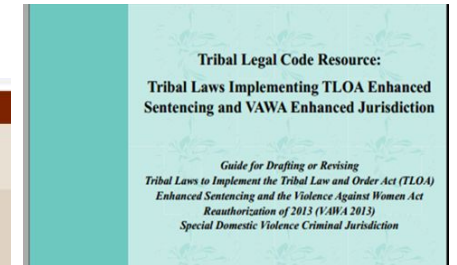
To access any of these free technical assistance resources, please email [swaters@ncai.org](mailto:swaters@ncai.org).



# VAWA Special Tribal Criminal Jurisdiction Resources



The screenshot shows the NCAI website's navigation bar with links for HOME, OVERVIEW, SDVCJ TODAY, GET STARTED, RESOURCES, and EVENTS. The main heading reads 'VAWA 2013 Special Domestic Violence Criminal Jurisdiction Tribal Criminal Jurisdiction over Non-Indians'. Below this is a large banner for 'A Look at VAWA SDVCJ in the First Five Years' with a 'Read Full Report Here' button. A smaller banner below it says 'VAWA 2013's SDVCJ Five Year Report' with another 'Read Full Report Here' button. The text below the banners states: 'In the five years following the passage of VAWA 2013, 18 tribes began exercising Special Domestic Violence Criminal Jurisdiction. Learn about ...' and includes a link to 'Read Full Report Here'.



NCAI Tribal VAWA Resources: <http://www.ncai.org/tribal-vaawa>  
 TLPI Publications: [www.Home.TLPI.org](http://www.Home.TLPI.org)