



Department of Justice

STATEMENT OF

**ALLISON L. RANDALL
PRINCIPAL DEPUTY DIRECTOR
OFFICE ON VIOLENCE AGAINST WOMEN
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

SENATE COMMITTEE ON INDIAN AFFAIRS

AT A HEARING ENTITLED

**“RESTORING JUSTICE: ADDRESSING VIOLENCE IN NATIVE
COMMUNITIES THROUGH VAWA TITLE IX SPECIAL JURISDICTION”**

PRESENTED

December 8, 2021

**Testimony of Allison L. Randall
Principal Deputy Director, Office on Violence Against Women
U.S. Department of Justice**

**Before the Senate Committee on Indian Affairs
December 8, 2021**

Introduction

Thank you, Chairman Schatz, Vice Chairman Murkowski, and members of the Committee for the opportunity to speak to you today. I am pleased to be here to discuss implementation of Special Domestic Violence Criminal Jurisdiction from 2013-2021, including successes achieved and lessons learned.

In the spring of 1994, I ran away from home and drove halfway across the country to a small town just outside Cherokee, North Carolina, where the Native American women who worked and were fellow residents at a domestic violence shelter saved my life. They embraced me, taught me, and encouraged me to give back to other survivors, sparking my lifelong dedication to reducing domestic and sexual violence. It is thanks to those Cherokee women that I sit before you today.

The U.S. Department of Justice's Office on Violence Against Women (OVW) assumes the day-to-day work of implementing VAWA, including supporting the exercise of Special Domestic Violence Criminal Jurisdiction by federally recognized tribes. The office leads the federal government's efforts to reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking. VAWA and subsequent legislation authorize four programs that are specifically designed for tribal communities: the Tribal Governments Program, the Tribal Sexual Assault Services Program, the Tribal Domestic Violence and Sexual Assault Coalitions Program, and the Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction Program (Tribal Jurisdiction Program). In fiscal year (FY) 2021, OVW awarded over \$43 million under these tribal-specific grant programs. OVW also manages a Violence Against Women Tribal Special Assistant U.S. Attorney (SAUSA) special initiative, which funds tribal prosecutors who can bring cases in both tribal and federal court. The President's FY 2022 budget request includes an increase of over \$46 million for OVW's tribal-specific grant programs, including \$3 million for OVW's Violence Against Women Tribal SAUSA initiative.

OVW is proud to have a Deputy Director for Tribal Affairs, established by the 2005 reauthorization of the Violence Against Women Act to oversee administration of OVW's tribal funding, coordinate development of federal policy on violence against American Indian and Alaska Native women, and provide advice and technical assistance to Department officials. This position is currently held by Sherriann C. Moore, Rosebud Sicangu' Lakota, who, since 2017, also has led OVW's work hosting the Department's annual VAWA-mandated consultation with tribal leaders.

Domestic Violence and the Enforcement Gap in Indian Country

Criminal jurisdiction in Indian country generally is shared among the federal, state, and tribal governments, according to a matrix that takes into account the nature of the crime, whether the crime has victims or is victimless, whether the defendant is Indian or non-Indian, whether the victim is Indian or non-Indian, and sometimes other factors as well. In 1978, in *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court held that, absent express Congressional authorization, tribes lack jurisdiction over crimes committed by non-Indians.¹ The practical effect of this decision was that, prior to the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), even violent crimes committed by a non-Indian husband against his Indian wife, in the presence of their Indian children, in their home on the Indian reservation, could not be prosecuted by the tribe. Instead, these crimes fell under the criminal jurisdiction of the United States or, in some circumstances, of the state.

As a result of this jurisdictional framework, as well as other factors, Native American women have suffered some of the highest rates of violence at the hands of intimate partners in the United States. A National Institute of Justice analysis of 2010 survey data collected by the Centers for Disease Control and Prevention found that more than half (55.5 percent) of American Indian and Alaska Native women have experienced physical violence by an intimate partner in their lifetimes. As this study notes, among these victims, 90 percent have experienced such violence by a non-Indian intimate partner at least once in their lifetimes. Over their lifetimes, American Indian and Alaska Native women are about five times as likely as non-Hispanic White-only female victims to have experienced physical violence at the hands of an intimate partner who is of a different race.² The same analysis likewise found high rates of sexual violence against Native American women, concluding that more than 1 in 2 American Indian and Alaska Native women (56.1 percent) have experienced sexual violence in their lifetimes. American Indian and Alaska Native women are three times as likely as non-Hispanic White women to have experienced sexual violence by a perpetrator who is of a different race.³

VAWA 2013 and Special Domestic Violence Criminal Jurisdiction

In VAWA 2013 (codified at 25 U.S.C. 1304), Congress recognized and affirmed tribes' inherent power to exercise "special domestic violence criminal jurisdiction," or SDVCJ, over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. For the first time in decades, tribes therefore could prosecute non-Indian perpetrators of domestic violence and dating violence.

In broadening the set of persons who could potentially be prosecuted by tribes for these specific crimes, Congress required that participating tribes provide protections for a criminal defendant's rights and civil liberties that would be as robust in tribal court as they would be if the defendant

¹ 435 U.S. 191 (1978).

² Andre B. Rosay, U.S. Dept. of Justice, Nat'l Inst. of Justice, Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey (May 2016) 21, 26, <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

³ *Id.* at 13, 18.

were prosecuted in any state court. Specifically, in any case in which a term of imprisonment of any length may be imposed, the defendant is afforded all applicable rights under the Indian Civil Rights Act of 1968, all rights applicable to defendants charged with felony offenses under the Tribal Law and Order Act of 2010 (TLOA), and also the right to trial by an impartial jury chosen from a jury pool that reflects a fair cross-section of the community, including both Indians and non-Indians. The TLOA rights include providing each indigent defendant, at no cost to the defendant, the right to the assistance of a defense attorney licensed to practice law.

In addition, to give tribes time to prepare to meet the requirements of the statute, Section 1304 generally did not take effect until March 7, 2015, two years after VAWA 2013 was signed into law. In the interim, VAWA 2013 established a voluntary Pilot Project authorizing tribes to commence exercising SDVCJ on an accelerated basis, but only if the tribe could establish to the Attorney General's satisfaction that it had adequate safeguards in place to protect defendants' rights. Once the two-year Pilot Project concluded, other tribes were authorized to exercise SDVCJ without seeking the Attorney General's approval.

The Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

After enactment, the Department moved quickly to implement the Pilot Project and thereby lay the groundwork for other tribes that would choose to implement SDVCJ. On February 6, 2014, the Department of Justice announced that the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Confederated Tribes of the Umatilla Indian Reservation in Oregon were selected for the Pilot Project. On March 6, 2015, the Department announced the designation of two additional pilot tribes, the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana.

The three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period from February 2014 through March 2015. Tribes worked closely with their local United States Attorneys' Offices to identify which cases were best prosecuted by the tribes and which were more suitable for federal prosecution, with the common goal of holding offenders accountable and keeping tribal communities safe. In this first year of implementation, the three pilot tribes had a total of 27 SDVCJ cases involving 23 separate offenders. Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution, and 1 offender was acquitted after a jury trial in tribal court.⁴

Intertribal Technical-Assistance Working Group on SDVCJ

In June 2013, the Department established the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) so that tribes can exchange views, information, and advice about how they can best exercise SDVCJ, combat domestic violence,

⁴ Press Release, U.S. Dept. of Justice, Director Tracy Toulou of the Office of Tribal Justice Testifies Before the Senate Committee on Indian Affairs Oversight Hearing on Draft Legislation to Protect Native Children and Promote Public Safety in Indian Country, (May 18, 2016), <https://www.justice.gov/opa/speech/director-tracy-toulouoffice-tribal-justice-testifies-senate-committee-indian-affairs-0>.

recognize victim’s rights and safety needs, and fully protect defendants’ rights. Since then, over 50 tribes have voluntarily joined the ITWG where tribes share their experiences implementing or preparing to implement SDVCJ, attend in-person meetings, and participate in numerous webinars on subjects such as jury pools and juror selection, defendants’ rights, victims’ rights, and prosecution skills. Through the ITWG, the Pilot Project tribes and other earlier implementing tribes have not only discussed challenges and successes with other tribes but also shared best practices, including their revised tribal codes, court rules, court forms, jury instructions, and other tools they have developed to implement SDVCJ. The Department continues to support the ITWG with training and technical assistance, including grant awards by OVW to the National Congress of American Indians (NCAI) to support the ITWG’s ongoing work.

Ongoing Tribal Implementation of VAWA 2013

To date, 28 tribes have reported to NCAI that they have implemented SDVCJ.⁵ Based on updates provided at an October 2021 meeting of the ITWG (which does not include data from all tribes that exercise SDVCJ), tribes reported the following aggregate statistics regarding their implementation of SDVCJ:

- 396 arrests (cases, not charges)
- 227 defendants
- 133 convictions (both guilty pleas and convictions following a bench or jury trial)
- 1 habeas petition (dismissed for lack of jurisdiction)

In March 2018, NCAI published *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report*,⁶ which summarizes how tribes implemented SDVCJ in the five years following VAWA 2013’s enactment and analyzes its impact on tribal communities. The five-year report documented the implementing tribes’ commitment to upholding the rights of non-Indian defendants. According to the NCAI statistics, of the 143 arrests for SDVCJ-related crimes, 52 percent resulted in convictions, while 18 percent of the cases resulted in acquittals or dismissals. Of the cases that were filed, 21 percent were dismissed or resulted in acquittals. As noted by NCAI, the rate of dismissals indicates that tribes do not proceed with prosecutions where they lack jurisdiction or sufficient evidence. Moreover, as of March 2018, of the six SDVCJ trials that had occurred—five jury trials and one bench trial—five ended in acquittal. The NCAI report quoted a former Attorney General of the Pascua Yaqui Tribe describing the tribe’s first SDVCJ jury trial:

Although we would have preferred a guilty verdict, this first full jury trial . . . proved our system works. A non-Indian was arrested and held by Pascua Yaqui law enforcement, he was represented by two attorneys, and a majority Yaqui jury, after hearing evidence presented by a tribal prosecutor, in front of an Indian

⁵ Since the end of the pilot period, tribes are not required to notify the Department if they begin exercising SDVCJ, but NCAI, which receives funding from the Department to provide technical assistance to tribes implementing or planning to implement SDVCJ, tracks developments.

⁶ The report is available at https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

judge, determined that the Tribe did not have jurisdiction in a fairly serious [domestic violence assault] case.⁷

The very fact that SDVCJ trials have resulted in acquittals suggests that, contrary to the fears of some opponents of SDVCJ, non-Indian offenders receive fair trials in tribal court. Similarly, the fact that only one SDVCJ defendant has filed a *habeas* petition challenging his tribal conviction is a testament to the tribes' ability to safeguard the rights of defendants. VAWA 2013 was designed to ensure that non-Indian offenders subject to tribal criminal jurisdiction could challenge the legality of their treatment in federal court. The statute requires that defendants are affirmatively notified of their right to petition for *habeas* review in federal court, and of their right to request that tribal detention be stayed during that review. Nonetheless, after six years of implementation by dozens of tribes involving hundreds of defendants, only one defendant has filed a *habeas* case.

Critically, statistics from implementing tribes indicate that many SDVCJ defendants have long histories with the police, underscoring how VAWA 2013 has empowered tribes to finally be able to hold accountable long-time abusers. NCAI's report found that, with 18 implementing tribes reporting, **85 SDVCJ defendants accounted for 378 prior contacts with tribal police before SDVCJ implementation** – when the tribes were unable to hold non-Indian abusers accountable. For example, the Tulalip Tribes reported that their 17 SDVCJ defendants had a total of 171 contacts with tribal police in the years prior to SDVCJ implementation and their ultimate arrests. Similarly, the report found that 73 defendants arrested and convicted under SDVCJ had prior convictions or outstanding warrants, including documented histories of violent behavior.

Identified Gaps in SDVCJ

The NCAI's report also identified several areas where VAWA 2013 could be strengthened to improve public safety. The report noted that the omission of jurisdiction over other common forms of violence against women (e.g., stalking, sexual assault, or sex trafficking) was a continual source of frustration for implementing tribes, which were often unable to prosecute crimes that co-occur with domestic violence. Similarly, the report highlighted that the narrow scope of criminal conduct that can be charged under SDVCJ has created safety concerns for tribal law enforcement, as the tribes lacked the ability to prosecute a defendant who assaults responding law enforcement officers or courtroom personnel.

Tribal leaders have repeatedly echoed these same concerns to the Department at our annual Violence Against Women Government-to-Government Tribal Consultation. Most of the tribes that testified about SDVCJ between the years 2016 and 2020 advocated to expand SDVCJ to include non-Indian perpetrators of sexual assault, sex trafficking, crimes against children and law enforcement officers, and property crimes, among other crimes.

One common theme from tribal leaders has been that domestic violence incidents often involve attendant crimes that should be prosecuted concurrently—including child abuse. For example, in

⁷ In that case, while there was no question that the assault had occurred, the jury was not convinced that the relationship between the victim and the non-Indian defendant met the requirements for qualifying as “domestic violence” or “dating violence,” as is necessary to trigger tribal jurisdiction under VAWA 2013.

2016, a Board of Trustees Member of the Confederated Tribes of Umatilla Indian Reservation testified that “[c]hildren were present in all [SDVCJ] cases prosecuted at Umatilla with the exception of restraining order violation cases. All suspects had prior domestic violence incidents on their records. In the charges filed under the limited jurisdiction of VAWA 2013, there was probable cause for other attendant crimes. Domestic violence can also be directed at third parties, such as children, family members, boyfriends/girlfriends, or other persons that the primary victims have relationships with”—yet tribes cannot prosecute these crimes. Similarly, the Tribal Chairman of the Pascua Yaqui Tribe explained that “[m]any tribal communities contain multi-generational households with extended family members commonly sharing residences and childrearing duties. A restrictive definition does not allow for the prosecution of acts of domestic violence occurring against other, more distantly related children in the home. This gap in jurisdiction results in children from the extended family of the parties in the romantic relationship being exposed to the harms of domestic violence without the perpetrator being held accountable.”

Of equal importance, many tribes have advocated for an expansion of SDVCJ to include non-Indian defendants who commit sexual assaults where there is no intimate partner relationship, including those who are strangers and do not maintain “substantial ties” to the tribe. In one instance, the Vice Chairman of the Nez Perce Tribe described how “A woman was taken off our reservation by two non-Native perpetrators and raped repeatedly over several days. Even if we had SDVCJ at that time, the tribe would not have been able to prosecute the offenders since they had no relationship to the victim because SDVCJ only applies to intimate partners.” And the 2018 testimony of a Tribal Council Member of the Sault Ste. Marie Tribe of Chippewa Indians highlighted that gaps in tribal authority to prosecute sexual assaults committed by non-Indians have allowed some crimes to go unanswered: “In the last year, our tribe has had two instances of non-Native juveniles sexually assaulting their Native step-siblings. The tribe has no jurisdiction, so we requested the U.S. attorney to prosecute.” The Department acknowledges the difficulty in prosecuting juveniles in federal court, especially if the defendants are very young, and it follows that tribes would want jurisdiction to address these crimes within their communities.

Finally, tribes have noted that VAWA left a gap by failing to recognize tribal criminal jurisdiction over crimes committed by SDVCJ defendants during and after their arrests by tribal authorities. For example, the Lieutenant Governor of the Gila River Indian River Community testified: “Our Department of Corrections is concerned about whether our tribal courts have the ability to bring additional criminal charges against a VAWA inmate who is already imprisoned. For example, if a VAWA inmate assaults staff or another inmate, will tribal courts have jurisdiction over that incident?”

The Department and tribes also have identified another shortcoming with VAWA 2013’s recognition of tribal criminal jurisdiction: it did not expressly apply to tribes in Maine. Any new legislation should clarify that tribes in Maine may exercise this same jurisdiction so that a provision in the Maine Indian Claims Settlement Act does not continue to restrict tribes in that state from implementing SDVCJ.

Empowering Alaska Native Villages to Exercise SDVCJ

Tribes in Alaska face additional challenges in ensuring a strong criminal justice response to violence against women crimes due to vast distances, remote locations, and the limited amount of Indian country in Alaska, a requirement for the exercise of SDVCJ under VAWA 2013. At the Department's 2021 Violence Against Women Government-to-Government Tribal Consultation, Vivian Korthuis, Chief Executive Officer for the Association of Village Council Presidents and a member of the Emmonak Tribe, testified from Bethel, AK about some of these challenges:

We are located on the Yukon-Kuskokwim Delta in western Alaska and this is what I like to call extreme rural America. Our region is about the size of the State of Washington, and there are no roads connecting our 48 villages to each other or the rest of the state. The only way into our region is to either fly or [travel by] barge in the summertime. Transportation within our region is by small plane or boat in the summertime and snow machine on snow machine trails or the ice road in the wintertime...

The rates of domestic violence in the south in our Tribal communities are 10 times higher than the rest of the United States. This is unacceptable... Last week at our executive board meeting, one of our board members, who is the council president of her Tribe, told me that she called the police to report a crime. Her village has no local law enforcement. Calls for help can be answered [by] one of the few state trooper posts in our region, hundreds of miles away. This time, her call for help was answered in Fairbanks, 453 miles away from her village. They took down her complaint and she never heard from them again.

According to the 2013 report of the Indian Law and Order Commission (ILOC), Alaska Native women are overrepresented in the domestic violence victim population by 250 percent.⁸ In the state of Alaska, Alaska Native females comprise 7.5 percent of the population⁹ but the ILOC found that Alaska Native women are 47 percent of reported rape victims in the state. The ILOC also stated that "the rate of sexual violence victimization among Alaska Native women was at least seven times the non-Native rate."¹⁰

When Congress recognized SDVCJ in VAWA 2013, it limited participating tribes to those that exercise jurisdiction over Indian country, which is defined as land within the limits of an Indian reservation, dependent Indian communities, and Indian allotments.¹¹ Although there are 229 federally recognized tribes in Alaska, when Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971, it revoked the reservation status of lands set aside for all

⁸ The Indian Law and Order Commission. *A Road Map for Making Native America Safer: Report to the President & Congress of the United States*. (November 2013) Available at: https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

⁹ July 1, 2019 estimate from the American Community Survey conducted by the U.S. Census Bureau, Population Estimates Program. Available at: <https://www.census.gov/quickfacts/fact/table/AK/RHI325219#RHI325219>.

¹⁰ *Supra* note 8.

¹¹ 18 U.S.C. § 1151.

tribes in Alaska except the Annette Island Reservation of the Metlakatla Indian Community.¹² Then in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Supreme Court held that lands reacquired by the Native Village of Venetie through the ANCSA process did not fit within the definition of “dependent Indian community” under the Indian country statute. See 18 U.S.C. 1151(b). As a result, while there are still lands that would qualify as Indian country in Alaska, those lands are limited by ANCSA and the *Venetie* decision. As a consequence, tribes in Alaska have not been able to realize the benefits of SDVCJ in holding offenders accountable and keeping victims safe. This is despite the fact that American Indian and Alaskan Native (AIAN) women in Alaska endure staggering rates of violence, often in the most remote and sparsely populated regions of the country. By some estimates, almost 58% of AIAN women in Alaska experience interpersonal violence, sexual violence, or both during their lifetime.¹³ The extreme climate and geography of Alaska coupled with a scarcity of resources means that AIAN victims in Alaska are in unimaginable danger. Creating a pilot project to extend SDVCJ to select Alaskan tribes could empower tribes in Alaska to confront the tremendous violence against women in their communities.

Support for Special Domestic Violence Criminal Jurisdiction for Tribes under VAWA

As emphasized in the President’s recent *Executive Order on Improving Public Safety and Criminal Justice of Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People*, the Department is committed to helping tribes implement SDVCJ and stands ready to support tribes if Congress recognizes tribal criminal jurisdiction over non-Indian offenders who commit other crimes against Indian victims in tribal communities. Such legislation will allow participating tribes to hold accountable non-Indian perpetrators of sexual violence, sex trafficking, domestic violence against child victims, stalking, elder abuse, and assault against law enforcement officers when they commit such crimes on tribal territory.

To support tribes’ implementation of this jurisdiction, the President’s FY 2022 Budget would increase the funding level for OVW’s Tribal Jurisdiction Program from \$4 million to \$5.5 million. This increased funding will help tribes defray the costs of implementation, including those associated with law enforcement, prosecution, court and probation systems, corrections and rehabilitation, victim services, indigent defense, and empaneling juries.

Conclusion

SDVCJ has been a success, but many survivors have been left behind by its limitations. I urge Congress to build upon tribes’ effective implementation of SDVCJ under VAWA and recognize tribal criminal jurisdiction over additional crimes in order to expand access to justice for Native victims and improve public safety in Native communities. I appreciate the time and attention of

¹² For example, land was taken into trust for some tribes in Alaska pursuant to the Indian Reorganization Act and those lands remain in trust status and are therefore Indian country and there are allotments in Alaska that may qualify as Indian country as well.

¹³ Johnson, I. (2021). *2020 Statewide Alaska Victimization Survey Final Report*. Justice Center, University of Alaska, Anchorage. Available at: <https://scholarworks.alaska.edu/bitstream/handle/11122/12259/2021-10%20AVS%202020%20Final%20Report.pdf?sequence=1&isAllowed=y>.

this Committee and look forward to answering your questions and working with you on this crucial issue.