

Tribal Criminal Jurisdiction over Non-Indians

Violence Against Women Act Reauthorization of 2022

Tribal Law and Policy Institute's Enhanced Tribal Authority Series



Virginia Davis, Chia Halpern Beetso, Jerry Gardner,
Kelly Stoner, and Esther Labrado

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September 2023

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The information provided in this product does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available are for general informational purposes only.

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Overview

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013)¹ included historic provisions reaffirming the inherent authority of Indian Tribes to prosecute non-Indians who commit certain crimes on Tribal lands. The Violence Against Women Reauthorization Act of 2022 (VAWA 2022),² which was signed into law on March 15, 2022, built on the framework in VAWA 2013 to further expand recognition of Tribal authority to prosecute non-Indians. Both VAWA 2013 and VAWA 2022 amended the Indian Civil Rights Act (ICRA), and the Tribal jurisdiction provisions discussed in this resource are codified at 25 U.S.C. §§ 1301-1304.

Through VAWA 2013, Congress responded to the high rates of violence committed against Native women by non-Native men by creating a framework for Tribal prosecutions of non-Indians for the first time since the Supreme Court removed that authority in Oliphant v. Suquamish in 1978.³ Under VAWA 2013, Tribal governments could prosecute only crimes of domestic violence, dating violence, and criminal protection order violations committed on Tribal lands in certain circumstances. VAWA 2022 builds on VAWA 2013's Tribal jurisdiction provision by including additional categories of criminal conduct that can be prosecuted in Tribal Courts against non-Indians. Specifically, Section 804 of VAWA 2022 reaffirms Tribal jurisdiction over non-Indians for certain crimes involving violence against children, sexual violence, stalking, sex trafficking, obstruction of justice, and assaults against Tribal justice personnel. These changes are effective as of October 1, 2022.

Neither VAWA 2013 nor VAWA 2022 alter existing state or federal jurisdiction over crimes committed on Tribal lands, and Tribal governments that choose to exercise criminal jurisdiction over non-Indians must comply with a number of procedural requirements such as providing an attorney to defendants who cannot afford one, including non-Indians in Tribal jury pools, and ensuring that presiding judges are sufficiently law trained. The due process protections that must be afforded to non-Indian defendants in Tribal Courts are codified at 25 U.S.C. § 1304(d).

More than thirty Tribal governments have begun exercising criminal jurisdiction over non-Indians since VAWA 2013 was first enacted. Most of these implementing Tribes have worked closely with a group of more than sixty other Tribes as part of an Intertribal Technical-Assistance Working Group (ITWG) that has been an important forum for Tribal governments to work collaboratively to develop best practices. Many of these Tribes are now working to amend Tribal codes and procedures to reflect the VAWA 2022 changes and expansions.

¹ VAWA 2005 Reauthorization Act (H.R. 3171).

² VAWA 2022 was enacted as part of the Consolidated Appropriations Act (H.R. 2471).

³ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

The positive impacts of VAWA 2013 were documented by the National Congress of American Indians in VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report,⁴ which concluded that “[VAWA 2013] has fundamentally changed the landscape of tribal criminal jurisdiction ... [and] many communities have increased justice and safety for victims who had previously seen little of either.”⁵ The report also found, however, that Tribal implementation of VAWA 2013 has “shown where the jurisdictional framework continues to leave victims—including children and law enforcement—vulnerable.”⁶ VAWA 2022 addresses many of these gaps.

Under VAWA 2022, the framework for exercising Tribal jurisdiction is largely the same as it was under VAWA 2013. Tribal governments are still able to choose whether to implement the law, and those who do will need to provide all the due process requirements of the existing federal law. In addition, Tribal governments are required to provide notice in writing to defendants of their right to petition for a writ of habeas corpus in federal court and other due process rights. A writ of habeas corpus is “employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”⁷

VAWA 2022 also includes a pilot project for Tribes in Alaska—the majority of whom were left out of the VAWA 2013 provision. The law also clarifies that Tribes in Maine are eligible to exercise jurisdiction over non-Indians—a point that has been the subject of confusion and disagreement. In addition to the Tribal jurisdiction provisions, VAWA 2022 also establishes a reimbursement program that Tribal governments will be able to access to cover some costs related to the investigation, prosecution, and incarceration of non-Indians. The law directs the Department of Justice (DOJ) to consult with Tribal governments and within twelve months to develop regulations for this reimbursement program.⁸ In April 2023 the DOJ published an interim final rule⁹ on the Special Tribal Criminal Jurisdiction Reimbursement program.

This publication provides general guidance to assist Tribes in making an informed decision about whether to begin exercising criminal jurisdiction over non-Indians. It also provides

⁴ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

⁵ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 1 (March 2018).

⁶ Ibid.

⁷ *Black’s Law Dictionary*, 8th ed. Edited by Bryan A. Garner. St. Paul, MN: Thomson West, 2004.

⁸ The Office on Violence Against Women (OVW) held a government-to-government consultation with Tribes from July 27–28, 2022 regarding the Tribal Jurisdiction Reimbursement Program. Representatives from OVW also attended the 18th ITWG meeting from August 30–31, 2022 to elicit more feedback from Tribes on the Tribal Jurisdiction Reimbursement Program.

⁹ 88 Fed. Reg. 69, 21459 (April 11, 2023).

information about resources available to Tribes interested in exercising this jurisdiction, as well as the benefits and challenges of doing so.¹⁰

Tribal Criminal Provisions: VAWA 2013 and VAWA 2022

VAWA was first passed in 1994. It provided funding for the investigation and prosecution of violent crimes against women; subsequent legislation established the Office on Violence Against Women (OVW) in the DOJ to administer VAWA. The act authorized appropriations for its funding programs for specified fiscal years and, as a consequence, VAWA has been reauthorized in 2000, 2005, 2013, and 2022. Reauthorization is the process by which Congress can authorize additional years of appropriations while also making changes, additions, and deletions to a congressional act. Through this process, legislation is developed that adjusts the current programs to meet the changing needs in the field. Each time VAWA has been reauthorized, it has included additional provisions aimed at improving safety in Tribal communities.

The 2005 reauthorization of VAWA added a specific Tribal title (Title IX—Safety for Indian Women) for the first time. The 2013 reauthorization similarly included a specific Tribal title (Title IX) that contained provisions that addressed grant funding opportunities; provided support for Tribal domestic violence and sexual assault coalitions; handled Alaska-specific issues; clarified enforcement and recognition of Tribal protection orders; and reaffirmed Tribal criminal jurisdiction over certain non-Indians. The Tribal criminal jurisdiction provision of VAWA 2013 was codified as part of the Indian Civil Rights Act, 25 U.S.C. § 1304,¹¹ and represents a historic shift in how criminal jurisdiction works on Tribal lands.

When VAWA was reauthorized in March 2022,¹² it reauthorized funding for grants to Tribal nations to address violence against women, addressed Tribal access to federal criminal information databases, reauthorized the Bureau of Prisons Program that allowed certain offenders sentenced in Tribal Courts to serve their sentences in federal prison, expanded the

¹⁰ This publication is included in the Tribal Law and Policy Institute’s Enhanced Tribal Authority series. Another publication in this series examines the Tribal Law and Order Act’s (TLOA’s) Enhanced Sentencing Authority. In addition, “Tribal Laws: Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction” provides guidance for Native nations interested in implementing enhanced sentencing under the TLOA and/or criminal jurisdiction under VAWA 2013—the publication was produced before enactment of VAWA 2022 and it does not cover those changes. Moreover, National Congress of American Indian’s VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report goes in-depth and summarizes the results of the first five years (March 2013–March 2018) of Tribal government–expanded criminal jurisdiction over non-Indians under the Tribal provisions of the 2013 reauthorization of VAWA 2013. It also does not include the changes made in VAWA 2022.

¹¹ 25 U.S.C. § 1304

¹² It once again included a Tribal title, this time as Title VIII.

recognition of Tribal criminal jurisdiction over non-Indians,¹³ and created a pilot project to empower Tribes in Alaska to address violence in their communities.

By enacting VAWA 2013 and VAWA 2022, Congress was reacting to the fractured nature of criminal jurisdiction in Indian country that makes it particularly difficult to effectively address violence committed against Native women. A significant portion of that violence is committed by non-Native partners.¹⁴ Since the *Oliphant v. Suquamish* decision in 1978, federal law has limited the criminal authority of Tribal governments over non-Indians for crimes committed on Tribal lands. Where state or federal authorities had responsibility for investigating and prosecuting these crimes, they often went unaddressed unless serious injury or death occurred. Even then, federal reports showed that federal prosecutors declined more than half the cases referred to them.¹⁵

Congress enacted, and subsequently amended, 25 U.S.C. § 1304 in part to address this problem. This statute recognizes the authority of Tribes to prosecute non-Indians who commit certain crimes in Indian country. The statute also sets out a series of requirements that Tribes must satisfy if they want to exercise this recognized authority.

¹³ This included further amendments to 25 U.S.C. § 1304.

¹⁴ According to the National Institute of Justice, U.S. Department of Justice, Office of Justice Programs at least 97% of American Indian/Alaska Native female victims experienced violence at the hand of at least one person not of the same race. André B. Rosay, "Violence Against American Indian and Alaska Native Women and Men," *NIJ Journal* 277 (2016): 38–45, <http://nij.gov/journals/277/Pages/violence-againstamerican-indians-alaska-natives.aspx>.

¹⁵ In fiscal years 2005 through 2009, U.S. Attorney's Office (USAOs) resolved about 9,000 of the approximately 10,000 Indian country matters referred to their offices by filing for prosecution, declining to prosecute, or administratively closing the matter. USAOs declined to prosecute 50% of the 9,000 matters. In addition, (1) about 77% of the matters received were categorized as violent crimes, and 24% as nonviolent crimes and (2) declination rates tended to be higher for violent crimes, which were declined 52% of the time, than for nonviolent crimes, which were declined 40% of the time. U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R: Published December 13, 2010. Publicly released December 13, 2010. <http://www.gao.gov/products/GAO-11-167R>.

As amended by VAWA 2022, 25 U.S.C. § 1304 allows Tribes that meet the statutory requirements to prosecute non-Indians for nine categories of conduct:

| Categories of Conduct That Can Be Charged in Tribal Court against Non-Indians: | |
|---|---|
| Domestic violence | Stalking |
| Dating violence | Sex trafficking |
| Certain protection order violations | Obstruction of justice |
| Sexual violence | Assaults against Tribal justice personnel |
| Child violence | |

These categories of conduct are all defined by federal law but defer to “the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs” for the specific charges (except for sex trafficking, which defers to the federal sex trafficking law).¹⁶ The statute also requires that the victim be Indian, except if the crime involved obstruction of justice or assault of Tribal justice personnel. Tribes exercising criminal jurisdiction over non-Indians must provide the defendant with all the applicable rights under the Indian Civil Rights Act.¹⁷ These rights generally include:¹⁸

- The right not to be deprived of liberty or property without due process of law.
- The right to the equal protection 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 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 right to have the assistance of defense counsel.
- The right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution.
- The right of an indigent defendant to the assistance of a licensed defense attorney at the Tribe’s expense.
- The right to be tried before a judge with sufficient legal training who is licensed to practice law.

¹⁶ 25 U.S.C. 1304 (a).

¹⁷ 25 U.S.C. § 1304(d)(1)-(2).

¹⁸ Some of these rights are only triggered if the defendant is facing the possibility of jail time, but because this is often difficult to determine at the outset of a criminal case, Tribes who are exercising criminal jurisdiction over non-Indians generally provide these rights in all of their STCJ cases.

- The right against excessive bail, excessive fines, and cruel and unusual punishment.
- The right to access the Tribe’s criminal laws, rules of evidence, and rules of criminal procedure.
- The right to an audio or other recording of the trial proceedings and a record of other criminal proceedings.
- The right to petition a federal court for a writ of habeas corpus, to challenge the legality of one’s detention by the Tribe.
- The right to petition a federal court to be released pending resolution of the habeas corpus petition.
- The Tribe must also provide the defendant with 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.¹⁹

Additionally, the Tribe must provide the defendant with notice of their rights in writing.²⁰ Finally, the Tribe must also provide to defendants “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 Tribal criminal jurisdiction over the defendant.”²¹

Intertribal Technical-Assistance Working Group

In 2013, the U.S. DOJ established the Intertribal Technical-Assistance Working Group (ITWG) to assist Tribes with the implementation of VAWA 2013.²² Tribes participating in the ITWG have engaged with DOJ and the Department of the Interior (DOI), which have provided technical advice to the working group as a whole and worked with individual Tribes to address specific issues or concerns as needed.²³

More than sixty Tribes have participated in the ITWG, which continues to meet regularly.²⁴ Through the ITWG the Tribes agreed to work peer to peer to answer questions about exercising jurisdiction over non-Indians and develop best practices regarding the prosecution of non-Indians, combatting domestic violence, recognizing victims’ rights and safety needs, and

¹⁹ 25 U.S.C. § 1304(d)(3).

²⁰ 25 U.S.C. § 1304(g).

²¹ 25 U.S.C. § 1304(d)(4).

²² After consultation with Tribal governments, the DOJ requested preliminary expressions of interest from Tribes who wanted to be a part of the SDVCJ Pilot Project published in the federal register 78 Fed. Reg. 35,961 (June 14, 2013). The DOJ then established a process for interested Tribes to submit formal applications to be a part of the Pilot Project found in 78 Fed. Reg. 71,645 (November 29, 2013). Those Tribes had to demonstrate that they were in compliance with the federal law and afforded adequate due process to non-Indian defendants.

²³ 78 Fed. Reg. 35,961 (June 14, 2013).

²⁴ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 1 (March 2018).

safeguarding defendants’ rights.²⁵ The objective of the ITWG was to develop not a single, one-size-fits-all “best practice” for each of these issues, but rather multiple successful examples that can be tailored to each Tribe’s particular needs, preferences, and traditions.²⁶

In conjunction with the ITWG, the DOJ-funded VAWA Tribal Jurisdiction technical assistance providers (the National Congress of American Indians [NCAI] and the Tribal Law and Policy Institute [TLPI]) have produced a number of resources to aid Tribes seeking to exercise criminal jurisdiction over non-Indians. Many of these resources are maintained on the [TLPI VAWA 2022 webpage](#),²⁷ as well as the forthcoming TLPI website www.TribalVAWA.org, and the NCAI Tribal VAWA Implementation webpage,²⁸ and include information on code development, jury pool, judicial requirements, defendants’ rights, victims’ rights, and DOJ grants. While many of these materials were developed before Congress passed VAWA 2022, much of the information is still relevant—particularly the materials addressing due process and jury requirements.

As of June 2023, the ITWG has met sixteen times in person and four times virtually. It has also participated in a series of teleconferences, webinars, and monthly calls and produced background papers and other resources on a range of topics.

Impacts of Implementation: NCAI’s Five-Year Report

For the March 7, 2018, five-year anniversary of the enactment of VAWA 2013, NCAI surveyed the eighteen Tribes that had begun exercising criminal jurisdiction over non-Indians (then known as special domestic violence criminal jurisdiction [SDVCJ]). NCAI then wrote a report summarizing how VAWA 2013’s landmark provision had been implemented and analyzed its impacts in the five years since it was enacted.²⁹ At the date of the report, eighteen Tribes had implemented SDVCJ. However, as of January 2023, there have been thirteen more Tribes that have begun exercising jurisdiction over non-Indians and significantly more prosecutions have taken place.

In the [Five-Year Report](#),³⁰ NCAI identified the following four key findings that might be relevant to Tribal policy makers who are considering exercising jurisdiction over non-Indians:

²⁵ 78 Fed. Reg. 35,961 (June 14, 2013).

²⁶ *Ibid.*

²⁷ www.tribal-institute.org/lists/VAWA2022.htm

²⁸ www.ncai.org/tribal-vawa.

²⁹ Tribes could implement SDVCJ on an accelerated basis with approval from the Attorney General during a “Pilot Project” period. Three Tribes received approval to implement SDVCJ on an accelerated basis in February 2014—the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes. These Tribes exercised SDVCJ for a little more than a year during the Pilot Project period before the law took general effect on March 7, 2015. Two additional Tribes’ applications were approved on March 6, 2015, during the Pilot Project period—the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. VAWA’s 2013 Special Domestic Violence Criminal Jurisdiction Five-Year Report, 40 (2018).

³⁰ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

1. Tribes’ exercise of criminal jurisdiction over non-Indians helps to combat domestic violence by prosecuting offenders harming their communities. As noted in the NCAI Five-Year Report³¹ many of the non-Indian defendants prosecuted in Tribal Courts had numerous prior contacts with Tribal police, causing a strain on Tribal resources. The Tulalip Tribes, for example, reported that their seventeen SDVCJ defendants had a total of 171 contacts with Tribal police in the years prior to passage of VAWA 2013 and their ultimate arrests. Many defendants had criminal records or outstanding warrants. Now state, federal, and Tribal law enforcement are able, through cooperation and information sharing across jurisdictions, to ensure that defendants with a pattern of dangerous behavior are identified and receive appropriate sentences.³²

2. Tribal Courts uphold the rights of defendants and are committed to their rehabilitation.

The case statistics from the first five years of the implementing Tribes reveal justice systems not unlike the other criminal justice systems in the United States. Of the 143 arrests of non-Indians, 52% resulted in convictions, while 18% resulted in acquittals or dismissals. Many Tribes are committed to ensuring that non-Indian defendants—who are usually partners and parents of Tribal members—get help in addition to punishment. Many Tribal prosecutors expressed the sentiment that these offenders are part of their communities, and therefore the Tribe is committed to ensuring that the defendant also heals. Many Tribes offer batterer-intervention programs. Several Tribes require that every defendant convicted of a domestic violence offense completes a treatment program targeted to their abusive behaviors.³³

3. Implementation revealed serious limitations in the law. VAWA 2013 applied only in cases of protection-order³⁴ violations, domestic violence, and dating violence. NCAI’s Five-Year Report³⁵ found that the narrow focus of the statute prevented Tribes from prosecuting stranger assaults on women; crimes against children (unless the child is a protected party in a protection order); alcohol and drug crimes; and crimes that occur within the criminal justice system, thereby endangering law enforcement and undermining the integrity of the system. Many of these gaps were subsequently addressed in VAWA 2022. NCAI also found that although Congress has

³¹ Ibid.

³² VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 10-16 (March 2018).

³³ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 20-21 (March 2018); See, Lower Elwha Klallam Code, art. III, § 16.03.03(4); Choctaw Nation Criminal Code, pt. 1, ch. 18, § 644.

³⁴ 25 U.S.C. § 1304 (a) 5 - Protection order.—The term “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 Pendente 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 the person seeking protection.

³⁵ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

authorized some funding for Tribes to implement SDVCJ, it can be expensive for some Tribes to implement.³⁶ Congress also responded to this concern in VAWA 2022 by increasing the overall funding authorization to support Tribal jurisdiction from \$2 million per year to \$25 million. The actual appropriation for fiscal year 2023 for both grants and reimbursements combined was only \$11 million. The Bureau of Justice Assistance also provides grant funds that Tribes can use to support the exercise of Special Tribal Criminal Jurisdiction (STCJ).³⁷

4. Implementation promotes positive changes. As Tribes prepare to exercise jurisdiction over non-Indians, many consider more broadly the impact of domestic violence on their communities. They use implementation as an opportunity to go beyond the exercise of criminal jurisdiction under VAWA 2013's requirements and think more holistically about how to improve safety in their communities. Many implementing Tribes have expanded victims' services, or strengthened victims' rights, as a part of their implementation process. The victim supports at each Tribe are discussed at length in the NCAI Five-Year Report.³⁸

³⁶ VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 22-32 (March 2018).

³⁷ The Coordinated Tribal Assistance Solicitation (CTAS) purpose area 3 – "Tribal Justice Systems" administered through the Bureau of Justice Assistance can support Tribes exercising Special Tribal Criminal Jurisdiction.

³⁸ VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 32-36 (March 2018).

Considerations for Exercising Criminal Jurisdiction over Non-Indians

If Tribes are considering exercising criminal jurisdiction over non-Indians, there are some basic questions the community should ask:

- Are non-Indians committing crimes in the Tribe's territory without being punished?
- Is Tribal law enforcement frequently called to domestic violence, sexual violence, or child abuse situations in the Tribe's Indian country? Do the non-Indian offenders frequently return to the home where they are committing domestic violence or child abuse?
- How many non-Indians are likely to be charged if the Tribe begins exercising jurisdiction over them? Would the Tribe need more court staff? More prosecutors?
- Does the Tribe currently provide indigent defense to defendants in Tribal Court?
- Is the Tribe prepared to include non-Indians in its jury pool and hold jury trials as required?
- Does the Tribe currently employ law-trained judges?
- Where will the Tribe house non-Indian inmates? How will their health care costs be covered?
- Is the community comfortable with the changes to the Tribal justice system that the due process provisions in 25 U.S.C. § 1304 might require?

If the Tribe decides to exercise jurisdiction over non-Indians, the following section describes some of the challenges and benefits.

Benefits of Exercising Criminal Jurisdiction over Non-Indians

1. Tribes can hold non-Indian perpetrators of violence accountable. By implementing 25 U.S.C. § 1304 Tribes are able to exercise their sovereign power to investigate, prosecute, convict, and sentence non-Indians who assault Indian spouses, dating partners, children, or Tribal justice personnel, commit sexual violence, stalking, sex trafficking, obstruction of justice, or violate a VAWA-compliant protection order in Indian country.³⁹ Many of the implementing Tribes have developed close working relationships with their federal partners in the U.S. Attorneys' Offices, to make collaborative decisions about prosecution of these cases. This collaboration has strengthened both entities' ability to prosecute crimes more effectively in Indian country.

2. Exercising jurisdiction may deter non-Indian crimes. Tribes may be able to deter criminals from committing crimes on their lands by making clear that these crimes will be taken seriously and punished.⁴⁰ As noted in the NCAI Five-Year Report,⁴¹ a small number of perpetrators accounted for multiple police contacts, arrests, and investigations.

Similarly, many of the non-Indian defendants have prior convictions and warrants. Tribal law enforcement can work with their state and federal counterparts to ensure that all convictions are accounted for and potentially lay the groundwork for federal habitual offender charges.⁴² A Tribe's ability to hold those perpetrators accountable may deter future incidents of domestic violence or other crimes.

3. Implementing VAWA 2013 and VAWA 2022 promotes positive Tribal reforms. Tribes have had to examine their codes closely to ensure that their laws—including their constitutions—comply with the requirements of federal law and make careful decisions about how best to begin exercising jurisdiction over non-Indians given their community's unique history, needs, and priorities. This has led many Tribes to consider more broadly the impact of violence on their communities and take the opportunity to think more holistically about safety in their

³⁹ 18 U.S. Code § 2265 - (a) Full Faith and Credit.—Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [1] as if it were the order of the enforcing State or tribe.

⁴⁰ 25 U.S.C. § 1304.

⁴¹ VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

⁴² The crime of Domestic Assault by an Habitual Offender (18 U.S.C. § 117) was created with the passage of VAWA 2005. This statute punishes any person who commits a domestic assault within the special maritime and territorial jurisdiction (SMTJ) of the United States or Indian country who has at least two prior federal, state, or Tribal Court convictions for offenses that would be, if subject to federal jurisdiction, (1) an assault, sexual abuse, or serious violent felony against a spouse or intimate partner or against a child of or in the care of the person committing the domestic assault, or (2) an offense under Chapter 110A of Title 18 of the U.S. Code.

communities. Many Tribes have expanded victims' services, or strengthened victims' rights, as a part of their implementation process.⁴³

4. Intertribal collaboration creates opportunities and strengthens Tribal justice systems. As described in the section on the ITWG, the ITWG meets regularly and each meeting includes working time as well as speakers and other programming to support the work or discussion. In addition, ITWG Tribes have also participated in a series of teleconferences and webinars and produced white papers and other resources on a range of topics. More than sixty Tribes currently participate in the ITWG. The ITWG has proven to be a productive and useful mechanism for Tribes to share information and best practices among themselves, discuss challenges, and jointly strategize about how to overcome obstacles. For example, after a Tribe held the first SDVCJ jury trial—the technical assistance providers and that Tribe hosted a webinar for the ITWG to ask questions and hear an account of what happened with the trial. This opportunity provided information to the ITWG about much anticipated jury trials. The Tribe explained what they could have done better, potential pitfalls to try and avoid, and what practices were successful. The success of the ITWG has been driven by the engagement of dedicated and knowledgeable attorneys and Tribal representatives from across Indian country. This engagement has been possible because of the travel support provided by DOJ, which allowed many of the Tribes to participate in productive in-person meetings. The engagement and expertise of the technical assistance team has provided important coordination and leadership to the ITWG, while also helping the ITWG to track issues as they arise and to connect with necessary resources.⁴⁴

5. Implementation of VAWA 2013 and VAWA 2022 can promote better relationships with other jurisdictions. Tribes participating in the ITWG have also had opportunities to engage with DOJ and DOI, both of which have made key staff available to provide technical advice to the working group as a whole and work with individual Tribes to address specific issues or concerns as needed. The implementing Tribes have all worked closely with their local U.S. Attorneys Offices to make decisions about which jurisdiction is most appropriate to prosecute a particular case. Many of the implementing Tribes report that their decision to exercise jurisdiction over non-Indians has led to improved communication with the local U.S. Attorney's Office that is leading to greater accountability in all cases. Federal officials have consistently attended and presented at ITWG meetings, offering not only advice and valuable expertise but also presentations that help Tribes take advantage of various federal programs that could support their justice systems or increase their access to other law enforcement data networks and/or resources. For example, in response to Tribes' complaints regarding criminal database access at these meetings, the DOJ launched the Tribal Access Program (TAP) in August 2015 to provide

⁴³ VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

⁴⁴ Ibid.

Tribes access to national crime information systems for both criminal and civil purposes. TAP ensures the exchange of critical data across the Criminal Justice Information Services systems and other national crime information systems.⁴⁵ As of January 2023, there are 123 Tribes participating in TAP.⁴⁶

6. If a Tribe meets the due process requirements in VAWA 2013 and VAWA 2022, it meets almost all the requirements for Tribal Law and Order Act (TLOA) Enhanced Sentencing. Both the exercise of jurisdiction over non-Indians and TLOA enhanced sentencing share requirements that are listed in the Indian Civil Rights Act.⁴⁷ For example, under both statutes the Tribes are required to “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.”⁴⁸ If a Tribe meets the statutory requirements to exercise criminal jurisdiction over non-Indians, then it is close to preparing to implement TLOA enhanced sentencing as well if it chooses to do so.⁴⁹ While TLOA and VAWA special Tribal criminal jurisdiction share requirements under 25 U.S.C. § 1302(c) there are a few differences as set forth in the following chart.

⁴⁵ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

⁴⁶ www.justice.gov/tribal/tribal-access-program-tap

⁴⁷ 25 U.S.C. §§ 1301-1304.

⁴⁸ 25 U.S.C. §§ 1302(c)(1), 1304(d)(2).

⁴⁹ For further information on the TLOA enhanced sentencing, please see the Enhanced Tribal Authority Series: Enhanced Sentencing Authority-Tribal Law and Order Act.

| 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.* | ✓ | ✓ |
| 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 one-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. | | ✓ |
| 10. | Tribal Court ensures that the jury pool reflects a fair cross-section of the community and that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians. | | ✓ |
| 11. | Tribal Court ensures that a defendant is notified in writing of their rights. | | ✓ |
| 12. | 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. | | ✓ |

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

7. Department of Justice provides grants for planning and exercising jurisdiction over non-Indians. A major challenge for some Tribes who are considering exercising their authority to prosecute non-Indians is the cost of meeting the statutory requirements. Beginning in FY 2016, DOJ began making grants to Tribes who were interested in exercising criminal jurisdiction over non-Indians.⁵⁰ To date, the OVW has awarded more than \$17 million to Tribes to plan for and exercise criminal jurisdiction over non-Indians.

VAWA 2022 included new language requiring DOJ to set up a reimbursement program in addition to the grant program. At the time of publication, an interim final rule⁵¹ has been published for the new reimbursement program. The reimbursement program will allow some Tribes to recoup actual costs associated with the investigation and prosecution of crimes committed by non-Indians that fall under Tribal jurisdiction.

Federally recognized Tribes that exercise STCJ are eligible for reimbursement funding under the STCJ Reimbursement Program for costs that are associated with exercising STCJ. For the 2023 fiscal year, the combined appropriation for this program and the STCJ Grant Program is \$11 million. Of that amount, OVW may allocate up to \$4.4 million for the STCJ Reimbursement Program. Examples of expenses for which Tribes may receive reimbursement include:

- Law enforcement expenses;
- Incarceration expenses;
- Offender medical and dental expenses not otherwise covered by insurance;
- Prosecution expenses;
- Defense counsel expenses;
- Court expenses; and
- Community supervision and reentry expenses.

During the first quarter of the 2024 fiscal year, OVW plans to post a Notice of Reimbursement Opportunity on www.justice.gov/ovw with instructions on how to apply for the maximum allowable reimbursement. Later in 2024, OVW plans to provide instructions on how to apply for waivers of the annual maximum.

Challenges to Exercising Criminal Jurisdiction over Non-Indians

1. Implementing can be costly: One of the most significant barriers to exercising jurisdiction over non-Indians is the cost to implement. During and beyond the implementation phase, Tribes need funding, access to resources, and services to support implementation. VAWA 2013 and VAWA 2022 authorized funding to support Tribes with these costs.⁵² While Congress has appropriated some of the authorized funds, it has not appropriated the full authorized amounts

⁵⁰ <https://www.justice.gov/ovw/grant-programs>.

⁵¹ 88 Fed. Reg. 69, 21459 (April 11, 2023).

⁵² 25 U.S.C. § 1304(h).

for each fiscal year. The DOJ OVW provides financial assistance to Tribes through the Tribal Jurisdiction Program, which is a competitive grant program. However, this grant funding has limitations, for example it does not currently allow Tribes to apply for reimbursements and limits the amount of money spent on the medical care of non-Indian defendants to a maximum of 20% of the total project budget.⁵³ VAWA 2022 increases the authorized per fiscal year funding level to \$25 million; as discussed in the preceding text, it also allows Tribes to be reimbursed and create more flexibility based on the needs of Tribes.⁵⁴ The actual appropriation for fiscal year 2023 for both grants and reimbursements combined was only \$11 million. The financial barriers to implementation have been documented by NCAI in its Five-Year Report, as well by implementing Tribes such as the Pascua Yaqui Tribe.⁵⁵

| Possible Costs | |
|---|---|
| Hiring additional personnel: code drafters, law enforcement officers, prosecutors, judges, defense attorneys, probation officers, and advocates | Incarceration costs |
| Probation costs | Jury costs |
| Costs associated with recording proceedings | Batterer support treatment costs |
| Substance-use disorder treatment costs | Costs associated with publishing Tribal codes |
| Medical costs for incarcerated individuals | Victim support costs |
| Training costs for those who work on STCJ cases | |

Source: VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians, 10-16 (March 2018).

2. Specific requirements for defense counsel: VAWA 2013, VAWA 2022, and the TLOA enhanced sentencing require Tribes to “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.”⁵⁶ The

⁵³ OVW Fiscal Year 2022 Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction Solicitation, U.S. Department of Justice, p. 12.

⁵⁴ 25 U.S.C. § 1304(h).

⁵⁵ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018); Alfred Urbina and Melissa Tatum, “Considerations in Implementing VAWA’s Special Domestic Violence Criminal Jurisdiction and TLOA’S Enhanced Sentencing Authority: A Look at the Experience of The Pascua Yaqui Tribe,” 41 (October 2014), http://www.ncai.org/tribal-vaawa/gettingstarted/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf.

⁵⁶ 25 U.S.C. § 1302(c)(1).

Tribe is also required to pay for licensed defense counsel for indigent offenders and the attorney must be “licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”⁵⁷ Many Tribes have gone above the minimum requirements. Some Tribes choose to provide counsel to all indigent defendants, while others provide all domestic violence offenders, or another subset of defendants, with counsel. The Tribes also employ different standards to determine indigency, with some Tribes providing counsel to anyone who asks for it.⁵⁸

Some Tribes rely on contract attorneys to do the majority of their defense counsel work, thereby minimizing the amount the Tribe is required to pay to keep defense counsel on call. For some Tribes, it can be difficult to find attorneys who satisfy the federal requirements and costly to retain them.

3. Specific judicial qualification requirements: Exercise of jurisdiction over non-Indians (and TLOA enhanced sentencing) require Tribes to “require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States.”⁵⁹

The federal statute does not define the “sufficient legal training” requirement. This presents an opportunity for the Tribe to determine the appropriate qualifications for Tribal judges that meet the federal standard. Further, some Tribal judges may not be licensed to practice law (whether in state or Tribal Court). Although not required by the statute, a Tribe may choose to create a Tribal bar association or finance the preparation required for Tribal judges to earn state licensure.

4. Record of the proceedings: Exercise of jurisdiction over non-Indians (and TLOA enhanced sentencing) requires that the Tribe “maintain a record of the proceedings, including an audio recording or other recording of the trial proceeding.”⁶⁰ This is to ensure that issues are preserved for appeal and that applicable legal rules and procedures are followed. The record of the proceedings should be easily accessible to the parties and the court. This requirement places on the implementing Tribe the task of acquiring, assembling, operating, and maintaining a recording system. Tribes need to be prepared to produce the recording if there is a habeas corpus challenge in federal court. There have been federal habeas corpus actions in which the

⁵⁷ 25 U.S.C. § 1302(c)(2).

⁵⁸ VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report, National Congress of American Indians (March 2018).

⁵⁹ 25 U.S.C. § 1302(c)(3).

⁶⁰ 25 U.S.C. § 1302(c)(5).

federal court presumed that the rights were not given when the Tribe could not produce the recording.

5. Jury trial and jury pool requirements: Exercise of jurisdiction over non-Indians also requires that Tribes guarantee the defendant: “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.”⁶¹ If a Tribe does not currently hold jury trials, it will have to establish a system for jury pools and jury trials. If a Tribe currently holds jury trials and does not include non-Indians in the jury pool, the Tribe will have to determine the sources needed from which to draw the non-Indians to include in the jury summons pool. This can be a process specifically tailored for cases with non-Indian defendants.

Some Tribes may not want to include non-Indians on all jury trials. However, for cases with non-Indian defendants a Tribe will need to define its “community” and the ratio of non-Indians that make up that community, which will vary from Tribe to Tribe. The Tribe will have to determine sources for lists of potential jurors and establish a random selection process to select the jury panel from the designated source lists.⁶² A Tribe will have to decide how much to change its judicial system to exercise this special jurisdiction to accommodate what may be only a few cases.

6. Code or constitutional revisions: 25 U.S.C. § 1304 is a statute that requires a number of safeguards for defendants. To ensure compliance with the statute, Tribes may need to make changes to Tribal codes and possibly to the Tribal constitution. Code or constitutional revisions can be complicated and time consuming. They require work not just by attorneys but also by other community members. Tribes with fewer resources have been able to assert criminal jurisdiction over non-Indians by seeing what the other Tribes have done that might work for their Tribal community. Many were able to reduce code drafting costs by relying on the codes of the first few implementing Tribes as a starting point.

7. Lack of Tribal criminal court:⁶³ How Tribes exercise court jurisdiction varies across the country depending on need, resources, infrastructure, and capacity. Some Tribes may possess

⁶¹ 25 U.S.C. § 1304(d)(3).

⁶² “[Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction Guide for Drafting or Revising Tribal Laws to Implement the Tribal Law and Order Act \(TLOA\) Enhanced Sentencing and the Violence Against Women Act Reauthorization of 2013 \(VAWA 2013\) Special Domestic Violence Criminal Jurisdiction](#),” Tribal Law and Policy Institute (updated 2016), pp. 129–32.

⁶³ [Public Law 83-280](#) (commonly referred to as Public Law 280 or PL 280) was a transfer of legal authority (jurisdiction) from the federal government to state governments that significantly changed the division of legal authority among Tribal, federal, and state governments. Congress gave six states (five states initially: California, Minnesota, Nebraska, Oregon, and Wisconsin, and then Alaska upon statehood) extensive criminal and civil jurisdiction over Tribal lands within the affected states (the so-called mandatory states). Public Law 280 also permitted the other states to acquire jurisdiction at their option. Public Law 280 has generally brought about:

- An increased role for state criminal justice systems in “Indian country” (a term which is specifically defined in federal statutes);

the capacity to run specialized courts or courts of only civil jurisdiction. For those Tribes, asserting criminal jurisdiction over non-Indians would require the development of a Tribal criminal court. Some Tribes may only hear a couple cases a month, while others may hear more. However, the court would need to meet all the prerequisites to exercising jurisdiction over non-Indians like providing defense counsel and judges with “sufficient” legal training. This may result in the need for an increase in court personnel, in-house counsel, contracted counsel, and so forth to meet the increased caseload of non-Indians. Similarly, it is a best practice to include resources for victims in Tribal Courts.

Implementing Tribes: Tribes Exercising Jurisdiction over Non-Indians (as of January 2023)

1. Alabama-Coushatta Tribe of Texas
2. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
3. Cherokee Nation*
4. Chickasaw Nation*
5. Chitimacha Tribe of Louisiana
6. Confederated Tribes of the Chehalis Reservation*
7. Confederated Tribes of the Umatilla Indian Reservation
8. Eastern Band of Cherokee Indians
9. Gila River Indian Community of the Gila River Indian Reservation*
10. Grand Traverse Band of Ottawa and Chippewa Indians*
11. Kickapoo Tribe of Oklahoma
12. Little Traverse Bay Bands of Odawa Indians
13. Lower Elwha Tribal Community
14. Nottawaseppi Huron Band of the Potawatomi
15. Pascua Yaqui Tribe of Arizona
16. Penobscot Nation*
17. Port Gamble S’Klallam Tribe*
18. Quapaw Tribe*
19. Quinault Indian Nation
20. Sac and Fox Nation
21. Salt River Pima-Maricopa Indian Community*
22. Santa Clara Pueblo*
23. Sault Ste. Marie Tribe of Chippewa Indians
24. Sisseton-Wahpeton Oyate of the Lake Traverse Reservation

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- A virtual elimination of the special federal criminal justice role (and a consequent diminishment of the special relationship between Indian Nations and the federal government); and
 - Numerous obstacles to individual Nations in their development of Tribal criminal justice systems; and an increased and confusing state role in civil-related matters.

25. Standing Rock Sioux Tribe of North and South Dakota
26. Suquamish Indian Tribe of the Port Madison Reservation*
27. Swinomish Indian Tribal Community*
28. The Choctaw Nation of Oklahoma
29. The Muscogee Creek Nation
30. The Seminole Nation of Oklahoma
31. Tulalip Tribes of Washington

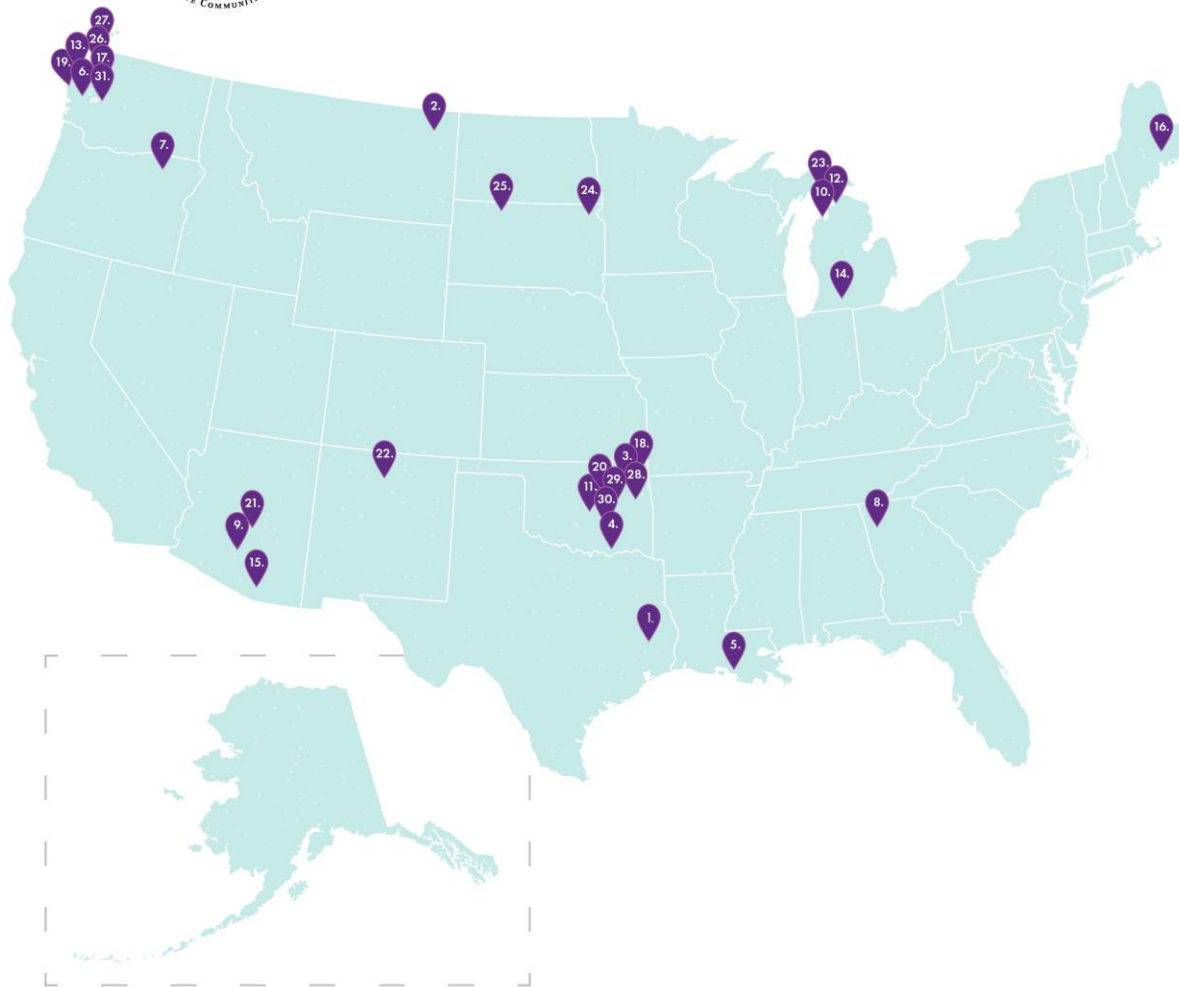
*Tribe not listed in VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report.

Map of Tribes Exercising VAWA 2022 Criminal Jurisdiction over Non-Indians



IMPLEMENTING TRIBES

Tribes Exercising VAWA 2022 Criminal Jurisdiction over Non-Indians
As of January 2023



1. Alabama-Coushatta Tribe of Texas
2. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
3. Cherokee Nation
4. Chickasaw Nation
5. Chitimacha Tribe of Louisiana
6. Confederated Tribes of the Chehalis Reservation
7. Confederated Tribes of the Umatilla Indian Reservation
8. Eastern Band of Cherokee Indians
9. Gila River Indian Community of the Gila River Indian Reservation
10. Grand Traverse Band of Ottawa and Chippewa Indians
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13. Lower Elwha Tribal Community
14. Nottawaseppi Huron Band of the Potawatomi
15. Pascua Yaqui Tribe of Arizona
16. Penobscot Nation
17. Port Gamble S'Klallam Tribe
18. Quapaw Tribe
19. Quinalt Indian Nation
20. Sac and Fox Nation
21. Salt River Pima-Maricopa Indian Community
22. Santa Clara Pueblo
23. Sault Ste. Marie Tribe of Chippewa Indians
24. Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
25. Standing Rock Sioux Tribe of North and South Dakota
26. Suquamish Indian Tribe of the Port Madison Reservation
27. Swinomish Indian Tribal Community
28. The Choctaw Nation of Oklahoma
29. The Muscogee Creek Nation
30. The Seminole Nation of Oklahoma
31. Tulalip Tribes of Washington

Conclusion

The passage of VAWA 2013 and VAWA 2022 are a momentous recognition of the important role Tribal governments must play in bringing safety to Tribal communities. The primary goal of the Tribal jurisdiction provisions is to reduce violence against Tribal members in Indian country and hold all offenders accountable—Indian and non-Indian. VAWA 2013 and VAWA 2022 recognized Tribal inherent criminal jurisdiction and provide an opportunity for Tribes to exercise their sovereign power to investigate, prosecute, convict, and sentence non-Indians who commit many crimes on their lands. The complexity of exercising this jurisdiction and the implications of doing so require serious attention from Tribal leaders, Tribal citizens, and Tribal agency leadership alike.

Resources for Tribes Considering Implementation of Criminal Jurisdiction over Non-Indians

A. Resources Developed by the U.S. Department of Justice Tribal Technical Assistance Providers

1. **“Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction Guide for Drafting or Revising Tribal Laws to Implement the Tribal Law and Order Act (TLOA) Enhanced Sentencing and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013) Special Domestic Violence Criminal Jurisdiction,”** Tribal Law and Policy Institute (updated 2016). This implementing TLOA and VAWA resource provides guidance for Native nations interested in implementing enhanced sentencing under the Tribal Law and Order Act and/or the special domestic violence criminal jurisdiction under the 2013 Violence Against Women Act. Please note that this resource has not yet been updated to reflect VAWA 2022.

2. **“Special Domestic Violence Criminal Jurisdiction Pilot Project Report,”** National Congress of American Indians, with assistance from the Tribal Law and Policy Institute. The reauthorization of the Violence Against Women Act in 2013 created the Pilot Project, which was comprised of five Tribes: the Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe, Tulalip Tribes of Washington, Assiniboine and Sioux Tribes of Fort Peck, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North Dakota. These Tribes exercised Special Domestic Violence Criminal Jurisdiction, which restored their partial power to criminally prosecute non-Indians for domestic and dating violence offenses and criminal violations of protection orders. The Pilot Project Report provides a brief account of the activities during the Pilot Project period from February 2014 to March 2015 and shares recommendations for next steps (2015).

3. **“VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five Year Report,”** National Congress of American Indians. This report summarizes the results of the first five years of Tribal government-expanded criminal jurisdiction over non-Indians under the Tribal provisions of the 2013 reauthorization of the Violence Against Women Act (VAWA 2013) (2018).

B. Congressional Hearings

1. **The Need to Reauthorize the Violence Against Women Act**, March 20, 2018 (this is a webcast).

2. **Reauthorization of the Violence Against Women Act**, March 7, 2019 (this is a webcast).

3. **Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction**, December 8, 2021 (this is a webcast).

C. Proposed Congressional Reauthorizations

1. **Violence Against Women Reauthorization Act of 2019 (H.R. 1585)** (Introduced in the House March 7, 2019, and passed/agreed to in the House. Passed by recorded vote: 263-158 on April 4, 2019).

2. **Violence Against Women Reauthorization Act of 2019 (S. 2843)** (Introduced in the Senate November 13, 2019).

3. **Violence Against Women Reauthorization Act of 2019 (S. 2920)** (Introduced in the Senate November 21, 2019).

4. **Violence Against Women Reauthorization Act of 2021 (H.R. 1620)** (Introduced in the House March 8, 2021. Passed/agreed to in the House: Passed by Yeas/Neas: 244-172 on March 17, 2021)

D. Government Documents/Reports

1. **Federal Register, vol. 78, no. 230, p. 71645, Nov. 29, 2013 - Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence**—This final notice establishes procedures for Indian Tribes to request designation as participating Tribes under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, under the voluntary Pilot Project described in the Violence Against Women Reauthorization Act; establishes procedures for the Attorney General to act on such requests; and solicits such requests from Indian Tribes.

2. **Federal Register, vol. 78, no. 115, p. 35961, June 14, 2013 - Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence**—This notice proposes procedures for an Indian Tribe to request designation as a participating Tribe under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, pursuant to the voluntary Pilot Project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 (“the Pilot Project”), and also proposes procedures for the Attorney General to act on such a request. This notice also invites public comment on the proposed procedures and solicits preliminary expressions of interest from Tribes that may wish to participate in the Pilot Project.

3. **Federal Register, vol. 88, no. 69, p. 21459, April 11, 2023 - Special Tribal Criminal Jurisdiction Reimbursement** —This interim final rule will implement the new Tribal Reimbursement Program within the Department of Justice’s Office on Violence Against Women

(OVW) by providing details on how it will be administered, including eligibility, frequency of reimbursement, costs that can be reimbursed, the annual maximum allowable reimbursement per Tribe, and conditions for waiver of the annual maximum.

4. Tribal Pilot Project Applications Approved by DOJ The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe of Arizona, Sisseton Wahpeton Oyate of the Lake Traverse Reservation, and Tulalip Tribes of Washington submitted application questionnaires to become “participating Tribes” and to approve their accelerated implementation of Special Domestic Violence Criminal Jurisdiction. These applications were granted by the Department of Justice prior to March 7, 2015.

E. Online Resources

1. **www.TribalVAWA.org** is a website developed by TLPI as a resource for VAWA Special Tribal Criminal Jurisdiction. It contains an overview of the Violence against Women Reauthorization Act of 2022: Tribal Criminal Jurisdictions over Non-Indians, covered crimes under VAWA 2022, Frequently Asked Questions, news, webinars and resources, events, funding information, and information for the Inter-Tribal Technical Assistance Working Group.

2. **NCAI VAWA SDVCJ** is a website developed by NCAI as a resource for implementing the Tribal provisions of VAWA. It also was developed to share information and resources relative to VAWA SDVCJ. It contains news, events, webinars, and other helpful information.

3. **TLPI Tribal Provisions of VAWA 2022 Resource Page** is a webpage developed by TLPI to share information and resources relative to VAWA 2022 Special Tribal Criminal Jurisdiction. It contains news, events, webinars, and other helpful information.

4. **www.TribalProtectionOrder.org** is a website intended to serve as an online resource pertaining to drafting and enforcing Tribal protection orders. Note that each Tribe is unique with respect to Tribal constitutions and codes. The reader should consult the specific Tribal constitution and Tribal codes for additional requirements regarding drafting and enforcement of Tribal protection orders.

5. **“Considerations in Implementing VAWA’s Special Domestic Violence Criminal Jurisdiction and TLOA’s Enhanced Sentencing Authority—A Look at the Experience of the Pascua Yaqui Tribe”** compiled by Alfred Urbina, Attorney General, Pascua Yaqui Tribe and Melissa Tatum, Research Professor of Law, The University of Arizona James E. Rogers College of Law. This publication shares the Pascua Yaqui experience of implementing VAWA SDVCJ and examines what factors Tribes should consider in deciding to exercise VAWA SDVCJ (2014).

6. **“Implementing VAWA 2013,”** M. Brent Leonhard, *The Federal Lawyer*, Vol. 62, Issue 9, pp. 52-58, October/November 2015. This article discusses a brief history of criminal jurisdiction in Indian country, violence against Native American women, VAWA Special Domestic Violence Criminal Jurisdiction, and the Confederated Tribes of the Umatilla Indian Reservation experience implementing VAWA SDVCJ.
7. **“Implementing VAWA 2013,”** M. Brent Leonhard, *ABA Human Rights Magazine*, Vol. 40, No. 4, 2014. This article discusses a brief history of criminal jurisdiction in Indian country, violence against Native American women, VAWA Special Domestic Violence Criminal Jurisdiction and the Confederated Tribes of the Umatilla Indian Reservation experience implementing VAWA SDVCJ.
8. **“ITWG Code Development Checklist,”** National Congress of American Indians. This checklist is designed as a tool to assist Tribal governments seeking to develop Tribal codes that implement Special Domestic Violence Criminal Jurisdiction (SDVCJ) over all persons with their jurisdiction. This is not a definitive guide to SDVCJ full implementation requirements but is intended as aid to drafting Tribal codes that comply with federal law (2014).
9. **“Simple checklist for Law Enforcement Officers,”** National Congress of American Indians. This short checklist sets out steps to investigate non-Indian domestic violence against an Indian.
10. **ITWG Webinars** ongoing webinar series on key areas of SDVCJ implementation, including defendants’ rights issues, VAWA 2013’s fair cross-section requirement and jury pool selection, and victims’ rights.
11. **“Crime and Governance in Indian Country,”** Angela Riley, *UCLA Law Review*, Vol. 63, pp. 1564-1637. This article offers the first comprehensive assessment of the Tribal Law and Order Act and the reauthorization of the Violence Against Women Act, respectively, to show how they relate to one another on the ground and the implications for Tribal sovereignty and self-determination (2016).

F. Training and Technical Assistance and Funding Resources

1. **Tribal Law and Policy Institute**, if you are interested in joining the ITWG or have questions about implementing Special Tribal Criminal Jurisdiction please email the Tribal Law and Policy Institute at tribalvawa@tlpi.org.
2. **Office on Violence Against Women (OVW) Tribal Jurisdiction Grant Solicitation**, this program is authorized by the Indian Civil Rights Act of 1968 (codified as amended at 25 U.S.C. § 1304(h)(2)). The OVW Special Tribal Criminal Jurisdiction Grant Program (Tribal Jurisdiction Program) (CFDA # 16.025) supports Tribes in their efforts to exercise special Tribal criminal

jurisdiction (STCJ) over non-Indians who commit “covered crimes” within the Tribe’s jurisdictional boundaries and provides technical assistance for planning and implementing changes in their criminal justice systems necessary to exercise the jurisdiction. “Covered crimes” are limited to assault of Tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order. Grant recipients are committed to exercising the jurisdiction to ensure that victims find safety and justice and that non-Indians who commit covered crimes within their jurisdiction are held accountable.

3. **OVW Tribal Jurisdiction Grant Alaska Specific**, this targeted special initiative solicitation under the Tribal Jurisdiction Program is designed to assist Alaska Native Tribal governments, or consortia of Alaska Native Tribal governments, that plan to seek designation by the Attorney General as participating Tribes able to exercise jurisdiction over non-Indians through the Alaska Pilot Program for STCJ, which was established by the Violence Against Women Act Reauthorization Act of 2022, 25 U.S.C. § 1305(d).

4. **OVW Tribal Jurisdiction Reimbursement Program**, the Office on Violence Against Women (OVW) published a regulation on April 11, 2023, governing the Special Tribal Criminal Jurisdiction (STCJ) Reimbursement Program, a new program authorized under the Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) to reimburse Tribal governments for expenses incurred in exercising STCJ over non-Native individuals who commit certain covered crimes on Tribal lands.

During the first quarter of the 2024 fiscal year, OVW plans to post a Notice of Reimbursement Opportunity on www.justice.gov/ovw with instructions on how to apply for the maximum allowable reimbursement. Later in 2024, OVW plans to provide instructions on how to apply for waivers of the annual maximum.

5. **Office on Violence Against Women (OVW) Funding** is a webpage that provides funding information to organizations and communities working to end gender-based violence. It provides general information about how to apply for OVW grants and cooperative agreements, learn about grant opportunities and how to manage a grant after it's awarded, and access valuable resources for applicants. This includes the Tribal Governments Program, which enhances the ability of Tribes to respond to violent crimes against Indian women, enhance victim safety, and develop education and prevention strategies.

6. **Bureau of Justice Assistance (BJA) Funding** is a webpage that provides information about funding through a variety of different programs. See the webpage to access currently available opportunities, learn about funding webinars, apply to become a peer reviewer, find information about previously available solicitations, and see award details. This includes Coordinated Tribal

Assistance Solicitation (CTAS) Purpose Area 3—Tribal Justice Systems Program, Tribal Healing to Wellness Courts, Tribal Courts, Alaska, Violent Crime, Tribal Corrections, and Tribal Civil and Criminal Legal Assistance Program (TCCLA).

7. **Office for Victims of Crime (OVC) Funding** is webpage that provides information about discretionary grants that are used to fund national-scope demonstration projects and training and technical assistance delivery to enhance the professional expertise of victim service providers. Such grants can be awarded to states, local units of government, Tribal communities, individuals, educational institutions, and private nonprofit organizations. Additionally, OVC is charged by Congress with administering set-aside funds from the Crime Victims Fund for a Tribal Victim Services Set-Aside program that provide support to Tribal communities to enhance services for victims of crime.

Appendix: Indian Civil Rights Act, 25 U.S.C. §§ 1301-1305, as amended by VAWA 2022

The Cornell Law School website has a useful online version of the Indian Civil Rights Act: [25 U.S. Code Subchapter I - GENERALLY | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](https://www.cornell.edu/law-library/resources/indian-civil-rights-act)

Text of Indian Civil Rights Act

The Indian Civil Rights Act of 1968 (ICRA) (see [Federal Laws](#)), 25 U.S.C. §§ 1301-1305 (ICRA), provides as follows:

§ 1301. Definitions

For purposes of this subchapter, the term-

- (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) "Indian court" means any Indian tribal court or court of Indian offense; and
- (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)

(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (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 United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
- (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

- (1) to serve the sentence—
 - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
 - (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;
 - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
 - (D) in an alternative rehabilitation center of an Indian tribe; or

(1) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1302a. Bureau of Prisons tribal prisoner program

(1) In general

Not later than 120 days after March 15, 2022, the Director of the Bureau of Prisons shall establish a program under which the Bureau of Prisons shall accept offenders convicted in tribal court pursuant to section 1302 of this title (as amended by this section), subject to the conditions described in paragraph (2).

(2) Conditions

(A) In general

As a condition of participation in the program described in paragraph (1), the tribal court shall submit to the Attorney General a request for confinement of the offender, for approval by the Attorney General (or a designee) by not later than 30 days after the date of submission.

(B) Limitations

Requests for confinement shall be limited to offenders convicted of a violent crime (comparable to the violent crimes described in section 1153(a) of title 18) for which the sentence includes a term of imprisonment of 1 or more years.

(C) Custody conditions

The imprisonment by the Bureau of Prisons shall be subject to the conditions described in section 5003 of title 18, regarding the custody of State offenders, except that the offender shall be placed in the nearest available and appropriate Federal facility, and imprisoned at the expense of the United States.

(D) Cap

The Bureau of Prisons shall confine not more than 100 tribal offenders at any time.

(3) Rescinding Requests

(A) In general

The applicable tribal government shall retain the authority to rescind the request for confinement of a tribal offender by the Bureau of Prisons under this paragraph at any time during the sentence of the offender.

(B) Return to tribal custody

On rescission of a request under subparagraph (A), a tribal offender shall be returned to tribal custody.

(4) Reassessment

If tribal court demand for participation in this program exceeds 100 tribal offenders, a representative of the Bureau of Prisons shall notify Congress.

§ 1303. Habeas corpus

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.

§ 1304. Tribal jurisdiction over covered crimes

(a) Definitions

In this section:

(1) Assault of Tribal justice personnel

The term “assault of Tribal justice personnel” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, that Indian tribe or serving that Indian tribe during, or because of, the performance or duties of that individual in—

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;

(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime;

(C) detaining, providing supervision for, or providing services for persons charged with a covered crime; or

(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

(2) Child

The term “child” means a person who has not attained the lesser of—

(A) the age of 18; and

(B) except in the case of sexual abuse, the age specified by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(3) Child violence

The term “child violence” means the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(4) Coercion; commercial sex act

The terms “coercion” and “commercial sex act” have the meanings given the terms in section 1591(e) of title 18.

(5) Covered crime

The term “covered crime” means—

(A) assault of Tribal justice personnel;

(B) child violence;

(C) dating violence;

(D) domestic violence;

(E) obstruction of justice;

(F) sexual violence;

(G) sex trafficking;

(H) stalking; and

(I) a violation of a protection order.

(6) Dating violence

The term “dating 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 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.

(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 committed by—

(A) a current or former spouse or intimate partner of the victim;

(B) a person with whom the victim shares a child in common;

(C) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or

(D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(8) Indian country

The term “Indian country” has the meaning given the term in section 1151 of title 18.

(9) Obstruction of justice

The term “obstruction of justice” means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.

(10) Participating tribe

The term “participating tribe” means an Indian tribe that elects to exercise special Tribal criminal jurisdiction over the Indian country of that Indian tribe.

(11) Protection order

The term “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 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.

(12) Sex trafficking

The term “sex trafficking” means conduct within the meaning of section 1591(a) of title 18.

(13) Sexual violence

The term “sexual violence” means any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act.

(14) Special tribal criminal jurisdiction

The term “special Tribal criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(15) Spouse or intimate partner

The term “spouse or intimate partner” has the meaning given the term in section 2266 of title 18.

(16) Stalking

The term “stalking” means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person—

(A) to fear for the person’s safety or the safety of others; or

(B) to suffer substantial emotional distress.

(17) Violation of a protection order

The term “violation of a protection order” means an act that—

(A) occurs in the Indian country of a participating tribe; and

(B) violates a provision of a protection order that—

(i) 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;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe, including any participating tribes in the State of Maine, include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special Tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) 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.

(4) Exception if victim and defendant are both Non-Indians

(A) In general

A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim

In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

(c) Criminal conduct

A participating tribe may exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Indian country of a participating tribe.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction, the participating tribe shall provide to the defendant—

- (1) all applicable rights under this Act;
- (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
- (3) the right to a trial by an impartial jury that is drawn from sources that—
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
- (4) 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 Tribal criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter 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.

(f) Petitions for writs of habeas corpus

(1) In general

After the defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title.

(2) Requirement

An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless –

(A) the applicant has exhausted the remedies available in the Tribal court system;

(B) there is an absence of an available Tribal corrective process; or

(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

(g) Notice; habeas corpus petitions

A participating tribe that has ordered the detention of any person has a duty to timely notify in writing such person of their rights and privileges under this section and under section 1303 of this title.

(h) Reimbursement and grants to Tribal governments

(1) Reimbursement

(A) In General

The Attorney General may reimburse Tribal government authorities (or an authorized designee of a Tribal government) for expenses incurred in exercising special Tribal criminal jurisdiction.

(B) Eligible expenses

Eligible expenses for reimbursement under subparagraph (A) shall include expenses and costs incurred in, relating to, or associated with–

- (i) investigating, making arrests relating to, making apprehensions for, or prosecuting covered crimes (including costs involving the purchasing, collecting, and processing of sexual assault forensic materials);
- (ii) detaining, providing supervision of, or providing services for persons charged with covered crimes (including costs associated with providing health care);
- (iii) providing indigent defense services for 1 or more persons charged with 1 or more covered crimes; and
- (iv) incarcerating, supervising, or providing treatment, rehabilitation, or reentry services for 1 or more persons charged with 1 or more covered crimes.

(C) Procedure

(i) In general

Reimbursement authorized under subparagraph (A) shall be in accordance with rules promulgated by the Attorney General, after consultation with Indian tribes, and within 1 year after March 15, 2022.

(ii) Maximum reimbursement

The rules promulgated by the Attorney General under clause (i)–

- (I) shall set a maximum allowable reimbursement to any Tribal government (or an authorized designee of any Tribal government) in a 1-year period; and
- (II) may allow the Attorney General–
 - (aa) to establish conditions under which a Tribal government (or an authorized designee of a Tribal government) may seek a waiver to the maximum allowable reimbursement requirement established under subclause (I); and
 - (bb) to waive the maximum allowable reimbursement requirements established under subclause (I) for a Tribal government (or an authorized designee of a Tribal government) if the conditions established by the Attorney General under item (aa) are met by that Tribal government (or authorized designee).

(iii) Timeliness of reimbursements

To the maximum extent practicable, the Attorney General shall–

- (I) not later than 90 days after the date on which the Attorney General receives a qualifying reimbursement request from a Tribal government (or an authorized designee of a Tribal government)–
 - (aa). reimburse the Tribal government (or authorized designee); or
 - (bb). notify the Tribal government (or authorized designee) of the reason by which the Attorney General was unable to issue the reimbursement; and
- (II) not later than 30 days after the date on which a Tribal government (or an authorized designee of a Tribal government) reaches the annual maximum allowable reimbursement for the Tribal government (or an authorized designee) established by the Attorney General under clause (ii)(I), notify the Tribal government (or authorized designee) that the Tribal government has reached its annual maximum allowable reimbursement.

(D) Eligibility for participating tribes in Alaska

A Tribal government (or an authorized designee of a Tribal Government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022 shall be eligible for reimbursement, in accordance with this paragraph, of expenses incurred in exercising special Tribal criminal jurisdiction under that subtitle.

(2) Grants

The Attorney General may award grants to Tribal governments (or authorized designees of Tribal governments), including a Tribal government (or an authorized designee of a Tribal government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022—

- (A) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special Tribal criminal jurisdiction, including for—
 - (i) law enforcement (including the capacity of law enforcement, court personnel, or other non-law enforcement entities that have no Federal or State arrest authority agencies but have been designated by an Indian tribe as responsible for maintaining public safety within the territorial jurisdiction of the Indian tribe, to enter information into and obtain information from national crime information databases);
 - (ii) prosecution;
 - (iii) trial and appellate courts (including facilities maintenance, renovation, and rehabilitation);
 - (iv) supervision systems;
 - (v) detention and correctional facilities (including facilities maintenance, renovation, and rehabilitation);
 - (vi) treatment, rehabilitation, and reentry programs and services;
 - (vii) culturally appropriate services and assistance for victims and their families; and
 - (viii) criminal codes and rules of criminal procedure, appellate procedure, and evidence;
- (B) to provide indigent criminal defendants with licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes covered crimes;
- (C) to ensure that, in criminal proceedings in which a participating tribe exercises special Tribal criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and
- (D) to accord victims of covered crimes rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, consistent with Tribal law and custom.

(i) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, or local government amounts made available to carry out activities described in this section.

(j) Authorization of appropriations.

(1) In general

There is authorized to be appropriated \$25,000,000 for each of fiscal years 2023 through 2027—

(A) to carry out subsection (h); and

(B) to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

(2) Limitations

Of the total amount made available under paragraph (1) for each fiscal year, not more than 40 percent shall be used for reimbursements under subsection (h)(1).

§ 1305. Tribal jurisdiction in Alaska

(a) In general

Subject to title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the “Indian Civil Rights Act of 1968”), Congress recognizes and affirms the inherent authority of any Indian tribe occupying a Village in the State to exercise criminal and civil jurisdiction over all Indians present in the Village.

(b) Tribal civil jurisdiction to enforce protection orders

(1) In general

A court of any Indian tribe in the State shall have full civil jurisdiction to issue and enforce protection orders involving any person in matters—

(A) arising within the Village of the Indian tribe; or

(B) otherwise within the authority of the Indian tribe.

(2) Inclusions

The full civil jurisdiction to issue and enforce protection orders under paragraph (1) includes the authority to enforce protection orders through—

(A) civil contempt proceedings;

(B) exclusion of violators from the Village of the Indian tribe; and

(C) other appropriate mechanisms.

(c) Special Tribal criminal jurisdiction

(1). In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed under subsection (a), the powers of self-government of a participating Tribe include the inherent power of the participating Tribe, which is hereby

recognized and affirmed, to exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Village of the participating Tribe.

(2). Concurrent jurisdiction

The exercise of special Tribal criminal jurisdiction by a participating Tribe shall be concurrent with the jurisdiction of the United States, the State, or both.

(3) Exception if victim and defendant are both non-Indians

(A) In general

A participating Tribe may not exercise special Tribal criminal jurisdiction over an alleged offense of a covered crime, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim

In this paragraph and with respect to a criminal proceeding in which a participating Tribe exercises special Tribal criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by the protection order that the defendant allegedly violated.

(d) Pilot program for special Tribal criminal jurisdiction over persons who are not Indians

(1). Establishment

Subject to title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the “Indian Civil Rights Act of 1968”), there is established a pilot program under which the Attorney General, subject to paragraph (5), shall designate not more than 5 Indian tribes per calendar year as participating Tribes to exercise the special Tribal criminal jurisdiction described in paragraph (6) over all persons present in the Village of the Indian tribe.

(2) Procedure

At any time during the 1-year period beginning on March 15, 2022, and annually thereafter, an Indian tribe may request the Attorney General to designate the Indian tribe as a participating Tribe under paragraph (1).

(3) Designation of participating tribes

(A) In general

The Attorney General, in consultation with the Secretary of the Interior and affected Indian tribes, shall establish a process to designate Indian tribes to participate in the pilot program, which process shall–

- (i) require that preference shall be given to Indian tribes occupying Villages–

- (I) the populations of which are predominantly Indian; and
- (II) that lack a permanent State law enforcement physical presence;
- (ii) require that for each Indian tribe requesting to be designated as a participating Tribe, the Attorney General makes a determination that the criminal justice system of the Indian tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204(d) of Public Law 90–285 (25 U.S.C. 1304(d)) (commonly known as the “Indian Civil Rights Act of 1968”); and
- (iii) be subject to such other criteria as the Attorney General considers to be appropriate to achieve the purposes of this subtitle.

(B) Designation

The Attorney General shall designate Indian tribes to participate in the pilot program under paragraph (1) using the process established under subparagraph (A).

(4) Intertribal participation

(A) In general

2 or more participating Tribes (or the Tribal organization (as defined in section 5304 of this title) of the participating Tribe, if the Tribal organization is exercising delegated authority from the participating Tribe)–

- (i) may elect to participate jointly in the pilot program by providing shared resources to carry out the purposes of the pilot program; and
- (ii) on making an election pursuant to clause (i), shall be considered to be a single participating Tribe for purposes of the maximum number of participating Tribes under paragraphs (1) and (5).

(B) Additional participating tribes

(i) In general

Additional participating Tribes may elect to join an established intertribal partnership under subparagraph (A) at any time after the intertribal partnership is established.

(ii) Application

An intertribal partnership that additional participating Tribes elect to join pursuant to clause (i) shall be considered to be a single participating Tribe for

purposes of the maximum number of participating Tribes under paragraphs (1) and (5).

(5) Maximum number of participating tribes

(A) In general

Except as provided in subparagraph (B), the Attorney General may designate not more than 30 Indian tribes to participate in the pilot program.

(B) Exception

The limitation under subparagraph (A) shall not apply if the Attorney General submits to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives, and publishes in the Federal Register, a written notice of the intention to designate additional Indian tribes as participating Tribes, including the rationale for the designation, by not later than the date that is 180 days before the date of designation.

(6) Description of jurisdiction

Congress recognizes and affirms that an Indian tribe selected to participate in the pilot program as a participating Tribe may exercise, subject to paragraph (7), special Tribal criminal jurisdiction with respect to covered crimes.

(7) Rights of defendants

In exercising special Tribal criminal jurisdiction under the pilot program, a participating Tribe shall provide to each defendant all rights described in section 204(d) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the “Indian Civil Rights Act of 1968”).

(e) Sentences

In a criminal proceeding in which an Indian court of a participating Tribe, in exercising special Tribal criminal jurisdiction with respect to a covered crime, imposes a sentence of imprisonment of more than 1 year on a defendant pursuant to section 202(b) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the “Indian Civil Rights Act of 1968”), the Indian court may require the defendant–

(1). to serve a sentence–

(A) in a Tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines set by the Bureau of Indian Affairs;

(B) at the expense of the United States, in the nearest appropriate Federal facility pursuant to the Bureau of Prisons Tribal Prisoner Program established under section 1302a(c)(1) of this title; or

(C) at the expense of the participating Tribe and, subject to section 204(f)(1) of Public Law 90–284 (25 U.S.C. 1304(d)) (commonly known as the “Indian Civil Rights Act of 1968”), reimbursable by the Attorney General, in a detention or correctional center approved by the State or a local government of the State pursuant to a memorandum of agreement between the participating Tribe and the State or local government of the State; or

(2) to serve another alternative form of punishment, as determined by the Indian court pursuant to Tribal law.

(f) Memoranda of agreement

The Attorney General and the Secretary of the Interior may enter into such memoranda of agreement with participating Tribes and the State as are necessary and appropriate—

- (1) to coordinate respective law enforcement activities;
- (2) to share equipment and other resources;
- (3) to establish cross-deputization arrangements;
- (4) to coordinate appropriate training activities; and
- (5) to address any other matters that will facilitate the successful implementation of the pilot program, including intergovernmental agreements regarding—
 - (A) the incarceration of convicted persons; and
 - (C) cooperation in the investigation and prosecution of crimes.

(g) Alaska Tribal Public Safety Advisory Committee

(1) Establishment

Not later than 1 year March 15, 2022, the Attorney General, in consultation with the Secretary of the Interior, affected Indian tribes, and the State, shall establish a committee, to be known as the “Alaska Tribal Public Safety Advisory Committee” (referred to in this subsection as the “Committee”).

(2) Membership

The Committee shall consist of 1 or more representatives from—

- (A) participating Tribes and Indian tribes aspiring to participate in the pilot program;
- (B) Federal, Tribal, State and local law enforcement; and
- (C) Tribal nonprofit organization providing victim services.

(3) Duties

The Committee shall focus on—

- (A) improving the justice systems, crime prevention, and victim services of Indian tribes and the State; and
- (B) increasing coordination and communication among Federal, Tribal, State, and local law enforcement agencies.

(4) Travel expenses

A member of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Committee.

(5) Nonapplicability of FACA

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Committee.

(6) Authorization of appropriations

There are authorized to be appropriated to carry out this subsection such sums as may be necessary for the period of fiscal years 2023 through 2027, to remain available until expended.

(h) Report to Congress

Not later than 5 years after March 15, 2022, the Attorney General, in consultation with the Secretary of the Interior and affected Indian tribes, shall submit to Congress a report describing the results of the pilot program, including an explanation of any modifications to law necessary to facilitate improved law enforcement in Villages.

(i) Applicability

Nothing in this subtitle—

- (1)** limits, alters, expands, or diminishes the civil or criminal jurisdiction of the United States, the State, any subdivision of the State, or any Indian tribe in the State;

- (2)** creates or eliminates any Federal or State criminal jurisdiction over a Village; or
- (3)** affects the authority of the United States of any authority delegated by the United States to the State to investigate and prosecute a criminal violation in a Village.

**For Tribal-State-Federal collaborative promising strategies, visit the
Walking on Common Ground website:**

www.WalkingOnCommonGround.org



***“Resources for Promoting and Facilitating
Tribal-State-Federal Collaborations”***