The Violence Against Women Act (VAWA) and the Safety of Indigenous Women, Girls, and Transgender and Two Spirit People

Note to all Readers:

This brief focuses on the Violence Against Women Act (VAWA) as it relates to gender-based violence in Indigenous communities. If you are interested in learning more broadly about VAWA and its impact on all women, please refer to prior work in this area. Also if you are interested in learning about the past iterations of VAWA please refer to the Minnesota Indian Women's Resources Center, they have done amazing work in highlighting this particular aspect. .

Introduction:

Indigenous women, in contrast to women of any other race, are more likely to be sexually assaulted by non-Indigenous people (by someone of a different race than them). MMIWGT2S (Missing and Murdered Indigenous Women, Girls, Transgender and Two-Spirit people) has become a serious issue within Indigenous communities and this biref will zero in on a case in which VAWA failed to protect an Indigenous person, this example allows for further examination in the ways in which VAWA could improve and expand its jurisdiction to serve Indigenous communities. While VAWA's broader impact on violence against women has been analyzed, few reports detail how the act has affected the safety of Indigenous women. It is also worth noting that this issue of violence affects people of all genders, migrants, Black people, and other marginalized groups, however this report will focus specifically on the implications of VAWA that is specific to Indigenous people.

Policy Brief

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Significance of VAWA:

-Around 84% of Indigenous women experience violence during their lifetime. In fact, Indigenous women are ten times more likely to be murdered than the national average, and homicide is the third leading cause of death. -MMIWGT2S (Missing and Murdered Indigenous Women, Girls, Transgender and Two-Spirit people) is an ongoing crisis and this policy brief examines The Violence Against Women's Act (VAWA) and its role in this crisis.

-This brief will assess VAWA's evolution over the last twenty-seven years, further focusing on the act's consideration of and response to (or lack thereof) gender-based violence within Indigenous communities.

History:

VAWA was the first piece of federal legislation that criminalized domestic violence and sexual assault. It was sponsored by then-Senator Joe Biden, and was written with the support of various national, state, and local organizations such as the National Taskforce to End Sexual and Domestic Violence Against Women, the National Organization for Women, and the Family Prevention Fund. The past iterations of VAWA have made some significant steps towards the protection of women; in the 1994 VAWA version it provided financial support to various networks which would assist in working towards the issue of sexual assault and domestic violence. Furthermore, interstate domestic violence or sexual assault crimes could now be prosecuted at the federal level, and protection orders for survivors were to be safeguarded across state lines. Finally, all survivors of gender-based violence, regardless of citizenship status, would be protected under the law. The 2000 Reauthorization of VAWA made a few additions and created legal-assistance initiatives for the survivors of gender-based violence and for the family of these survivors which would also include their children. Furthermore, survivors who crossed state lines have the ability to access custody orders, and no longer have to return to their home states.

The 2005 reauthorization of VAWA was the first instance where there was a closer look at the Indigenous community, and this reauthorization included funding for culturally and linguistically sensitive resources.

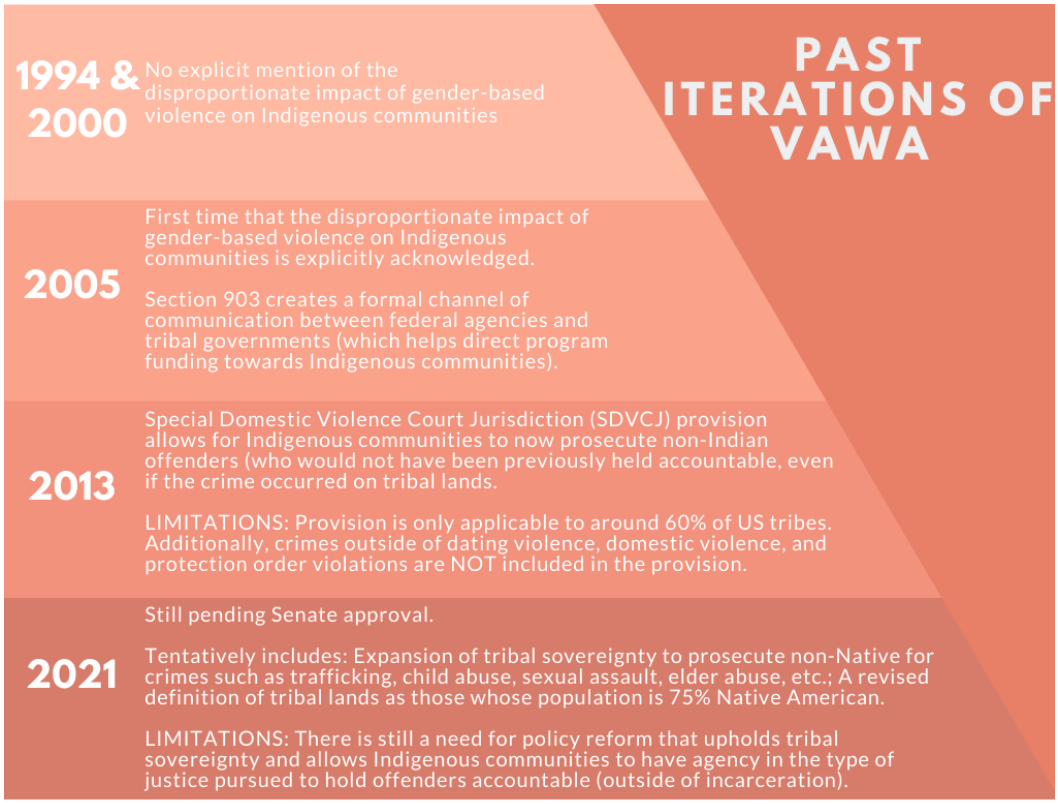
It was able to provide support and increased safety for Indigenous women, but there was still a gap in who the tribal government had authority over. This lack of authority given to the tribal government allows justice for these Indigenous women to either be delayed or buried. The 2013 reauthorization increased federal protection for survivors of violence in Indigenous communities and it introduced the Special Domestic Violence Criminal Jurisdiction (SDVCJ) unit, which allowed for Indigenous communities to prosecute non-Indigenous perpetrators, however this provision lacked in its accessibility to most tribes. Lack of resources and funding are some of the numerous barriers that have erupted from colonial forces and further prohibit justice from being attained.

Finally, the 2021 reauthorization expanded tribal jurisdiction over non-Indigenous offenders and it called for the development of restorative justice practices. These past iterations of VAWA have taken reasonable approaches to address the violence present in many communities, but we can also see how certain areas lacked representation and support for Indigenous people. In the final reiterations of VAWA we are finally able to see the strides that have been made in providing Indigenous communities with the resources and political power to fight against gender-based violence, but more work needs to be done to make sure that tribal communities are able to hold non-Indigenous offenders accountable and Indigenous sovereignty is upheld.

Reauthorizations of VAWA:

1994 VAWA & the 2000:

Before the passage of this VAWA, domestic violence and sexual assault were not considered to be issues capable of being addressed by the U.S. legal system. In the reauthorization of VAWA in 2000, dating violence and stalking were both added as related crimes in the purview of the act. Next, a legal-assistance program for survivors of gender-based violence, as well as a family supervised visitation program (to ensure the safety of children and survivors during family interactions) were implemented. Further steps were also taken to ensure that protection orders across state and Tribal lines were upheld, meaning that survivors who received a protection order in one state or Indigenous reservation would not have to worry about losing that protection if they crossed state or tribal borders. It must be known that there was no explicit focus on the safety of Indigenous women in the 1994 and 2000 versions of VAWA, and they happen to be the people who are disproportionately affected by gender-based violence.



2005 Reauthorization of VAWA:

The 2005 reauthorization of VAWA was the first time the disproportionate impact of gender-based violence on the safety of Indigenous communities was explicitly acknowledged. In addition to introducing services for children and teenagers and funding rape crisis centers for the first time, this version of VAWA included funding for culturally and linguistically sensitive services. Importantly, section 903 of the bill created a formal channel of annual communication between the Attorney General and tribal governments, which allowed for the federal government to be able to fund programs directed at Indigenous women. Unfortunately, this reauthorization of VAWA still "maintained federal criminal jurisdiction over nonmembers" meaning that tribes still did not have authority over non tribal members.

2013 Reauthorization of VAWA:

This section increased federal protection for survivors of violence in Indigenous communities and the Special Domestic Violence Criminal Jurisdiction (SDVCJ) provision was created. The SDVCJ would allow Indigenous communities to prosecute

non-Indigenous abusers (non-Indigenous refers to someone who is not enrolled in a federally recognized tribe by the federal government), who previously could not be held accountable in Indigenous courts, even if the crime had occurred on Indigenous land. However, this provision is only applicable to tribal lands located in the contiguous US states, not in the federally unrecognized tribal lands in Alaska. Tribes are only allowed to utilize the SDVCJ for three particular crimes: dating violence, domestic violence, and protection order violations, which means that non-Indigenous offenders who have committed other crimes such as child abuse or stalking will not be held accountable through the tribal court system. It is also worth noting that only 5% of tribes are freely able to apply the SDVCJ provision, this nonetheless derives from the colonial standards and prohibitions that have been put in place. The National Congress for American Indians have expressed some concern over the low numbers of tribes who have implemented SDVCJ and, unfortunately, it seems that it is too expensive for some tribes to operate. Some foreseeable costs may include hiring law enforcement officers, hiring prosecutors, probations costs, incarceration costs (the average incarceration cost is $86 per day), and the harsh truth is that most tribes lack resources and their justice systems are underfunded.

2018 and 2021 Reauthorization of VAWA (Policy Tracker):

The 2021 Reauthorization of VAWA has passed the US House of Representatives, but has not cleared the Senate. This bill has expanded tribal jurisdiction over non-Indigenous offenders for crimes which were not previously included in the SDVCJ of the 2013 reauthorization. These include trafficking, child abuse, child witness of abuse, stalking, sexual assault, elder abuse, and assault against tribal law enforcement. Furthermore, around $40 million in funding will be devoted to culturally-specific services (ie. community-based assistance that is linguistically and culturally tailored to survivors of different sociocultural backgrounds). In this version of the legislation, tribal lands are defined as reservations which were initially viewed as tribal lands and also those that have populations that are 75% Indigenous-identifying. This meant that communities located off the reservation could be included, such as those in Alaska which were not previously embraced in the SDVCJ provision. Remarkably, the house version of the 2021 reauthorization act calls for the development of restorative justice practices, which would allow survivors to pursue non-carceral approaches to seeking justice for gender-based violence crimes.

Key Challenges:

Reauthorization of VAWA & the SDVCJ Provision

Although the 2018 and 2021 reauthorization of VAWA and SDVCJ have taken the initiative to address some aspects of the MMIW crisis, there are still various flaws and ways in which they can improve. First, it is important that Alaskan Natives continue to be included in these conversations, especially when pertaining to MMIP. Their voices are necessary in these discussions about protection initiatives, specifically those pertaining to the jurisdiction issues within their villages. There are certain instances in which this act failed to protect an Indigenous person, ultimately depicting the ways in which VAWA and SDVCJ have proven to not be accessible to Indigenous people. One example took place on the Sault Ste. Marie Reservation: a non-Indian man was dating a tribal member, the man began acting inappropriately towards this woman's sixteen-year-old daughter, some of this behavior included inappropriately touching, stalking, and sexually harassing her. The tribe arrested and charged the man because they believed that their jurisdiction fell within the SDVCJ (through the woman's relationship with the man); however, the judge ruled against this and determined that the tribe had no jurisdiction as the crime against the daughter did not constitute domestic or dating violence. The woman was in a relationship with the man, but since the crime was against her daughter this was ruled as beyond the scope of tribal jurisdiction and the man was set free. Four months later he was arrested and charged by city police after contacting a fourteen-year-old girl online, kidnapping her, holding her hostage in an off-reservation hotel, and repeatedly raping her over the course of twelve hours. This case here highlights the ever lacking protection for Indigenous people, although VAWA and SDVCJ have made steps in the right direction, there are still various shortcomings. Tribes should be able to access these laws efficiently and the complexities of state and tribal jurisdiction must be unraveled, undoubtedly, justice for Indigenous people can no longer be disregarded.

Second, critical obstacles to the implementation of the SDVCJ provision also remain, such as a lack of direct funding (ie. support for the defendant, paying for the jury trial, and incarceration expenses) and indirect funding (ie. the economic resources needed to alter and administer new legal procedures), with that being said, costs could play a role in why only 18 of the over 50 tribes who are a part of the National Congress of American Indians' (NCAI) Intertribal Technical-Assistance Working Group (ITWG) have failed to implement the SDVCJ provision.

Third, another pressing concern is the issue of what constitutes domestic or dating violence. The case on the Sault Ste. Marie Reservation illuminated this issue, here there was an adequate amount of confusion and uncertainty as to whether or not the tribe had any jurisdiction. This was further complicated by the U.S. Supreme court, during the Pilot Project period of VAWA 2013, particularly when it made its decision in United States v. Castleman.In this case what defines domestic violence was discussed, such as how much force is required for something to be deemed as violence. Most agreed that "domestic violence" implies a "substantial degree of force." Justice Scalia argued that the literal meaning of violence should apply, thus excluding other conduct such as offensive touching. Ultimately, this became a situation that was not based on merits, but a threshold issue of jurisdiction. Tribal authorities have reported that they refrained from prosecutions they might have otherwise pursued because they did not think they could meet the degree of force that Castleman demanded for domestic violence.

A final limitation to this jurisdictional element is its narrow scope. SDVCJ, as we saw in the example with the case on the Sault Ste. Marie Reservation, excludes crimes that occur in concert with domestic and dating violence, for example, tribes do not have the jurisdiction to charge sexual contact, stalking, violence against children, or drug possession if the perpetrator is non-Indian. Also, one occurrence of domestic violence may be split into multiple cases-- the domestic violence charge in tribal court and the other attendant charges in state or federal court. There exists an apparent lack of structure within these acts, some jurisdictions are given to Indigenous tribes, while others are not, resulting in prosecution and justice to be hindered. In order to adequately protect Indigenous people and address the MMIP crisis proper support and jurisdiction is essential. In addition, protection for children of survivors has to be upheld, there remains this urgency to include everyone in the household who experiences this violence. The case on the Sault Ste. Marie Reservation is a prime example of why this section of VAWA and SDVCJ has to be addressed and improved, no Indigenous children should experience the carelessness of current justice systems.

Lack of Full Tribal Sovereignty

Future iterations of VAWA and other relevant policy reforms must uphold tribal sovereignty, without which it is very difficult to prevent and adequately respond to gender-based violence in Indigenous communities. In the current version of VAWA, VAWA Act of 2021, tribal communities face jurisdictional burdens in being able to prosecute non-Indigenous offenders. In the 2013 Reauthorization of VAWA only non-Indigenous offenders who have prior connections to the tribe are allowed to be tried -- this should be reformed to include all non-Indigenous perpetrators. In order to qualify for the SDVCJ provision, tribal governments must amend their tribal constitutions to meet federal standards. Additionally, the process tribal courts face in attempting to meet various other statutory requirements (ie. provide evidence of non-Indigenous offenders' connections to the tribe) to activate SDVCJ is cumbersome. In expecting tribes to alter their legal processes to match those of the United States, VAWA fails to protect and advance tribal sovereignty over response to acts of violence directed towards Indigenous community members, and safeguards colonial structures premised on white supremacy.

Excessive Reliance on Incarceration as an Adequate Form of Justice

Although the 2021 Reauthorization of VAWA contains provisions related to restorative justice practices, the further development of non-carceral forms of responding to gender-based violence remains a key priority. It is especially important that tribal communities, survivors, and relatives of those that experience gender-based violence are able to exercise agency over what justice constitutes for them. In Sara Deer's book The Beginning and End of Rape, she discusses how some tribes dealt with instances of sexual assualt during the precolonial period. During this period tribes were given full jurisdiction over crimes against women, this would include rape, domestic violence, and even child abuse. This would provide them with the opportunity to discipline the perpetrator as they felt suitable, but it would also allow them to aid the survivor as they felt necessary. These Indigenous legal systems upheld victim centered ideations, meaning that tribal governments would support the victim and provide them with any spiritual or cultural entities that would be essential to their recovery process. As for the response to sexual violence in Indigenous communitiies, Ojibiwe scholar Lisa Poupart adds in her knowledge, she writes:

> According to the oral traditions within our tribal communities, it is understood that prior to mass Euro-American invasion and influence, violence was virtually nonexistent in traditional Indian families and communities. The traditional spiritual worldviews that organized daily tribal life prohibited harm by individuals against other beings. To harm another being was akin to committing the same violation against the spirit world.

Justice ideations have been distorted by colonialism, currently, incarceration is viewed as proper forms of discipline; however, Indigenous people have combatted this idea historically. Incarceration is a colonial tactic, not only does it address violence with more violence, it also ignores the wishes of the survivor. The survivor becomes neglected and their desires are often ignored, the focus is put upon the perpetrator, and adequate forms of healing for the survivor become less important within this form of justice.

Conclusion:

Gender-based violence against Indigenous communities is facilitated by centuries of historical trauma and oppression, in which the U.S. government and other colonial institutions have continuously deprived Indigenous communities of economic, political, and social power. The MMIWGT2S crisis remains an urgent and enduring problem. We must continue the work of dismantling these colonial powers, ultimately, putting a stop the silent genocide of our Indigenous people.

Twenty-seven years after the initial passage of the Violence Against Women Act, progress has been made in directing federal support towards the MMIWGT2S crisis. However, Indigenous communities face key jurisdictional and implementation barriers which deprive them of their capacity to adequately respond to gender-based violence. Future policy reforms should center on upholding and advancing tribal sovereignty, provide Indigenous communities with the autonomy to decide what justice entails, and ensure that tribal communities have sufficient funding to carry out services for survivors. If such policy reforms are made, the Violence Against Women Act has the potential to have a long-lasting impact on the safety of Indigenous Women, Girls, and Transgender and Two Spirit People.

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