

# Strengthening Tribal Sovereignty: Enforcing Protection Orders Under VAWA



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# Disclaimer

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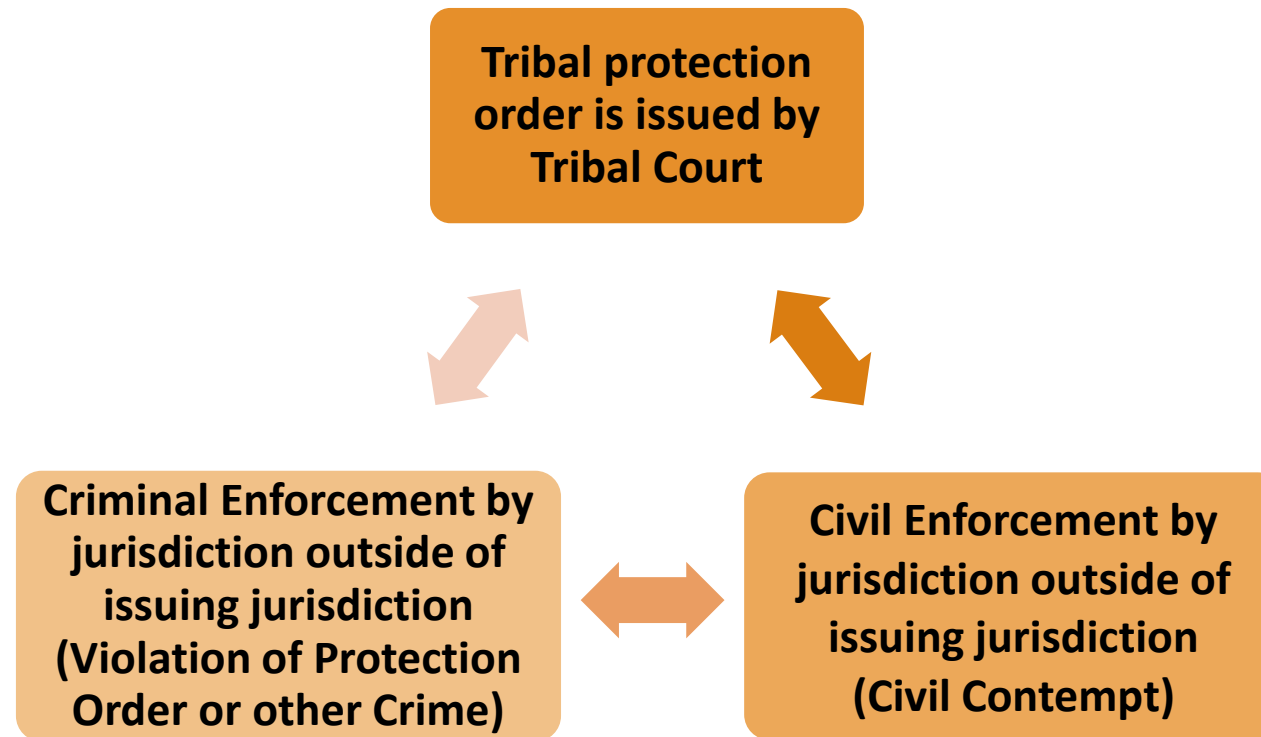
# Learning Objectives

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- Understand the importance of enforcement of tribal protection orders.
- Understand the concept of Violence Against Women Act (VAWA) Full Faith and Credit for protection orders.
- Understand the VAWA federal definition of a protection order.
- List the necessary protection order language to trigger VAWA full faith and credit mandate.
- Understand VAWA 2022 crimes that pertain to protection orders.

# What is Cross-Jurisdictional Enforcement of Tribal Protection Orders?

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# Why is Cross-Jurisdictional Enforcement of a Tribal Protection Order Important?

- Crucial means of providing safety to the victim as the victim travels across jurisdictional boundaries.
- Provides reassurance to the victim that traveling across jurisdictional boundaries will not affect the terms of the tribal protection order.
- Sends message to the perpetrator that violations of a Tribal protection order outside of Indian country will have consequences.
- Instrumental in recognizing Tribal sovereignty by recognizing and enforcing tribal protection orders.

# VAWA: Full Faith & Credit

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# What Does Full Faith and Credit For Tribal Protection Orders Mean?

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- Legally, it means that when a protection order issued by any state, Indian tribe, or territory is violated in another jurisdiction, that jurisdiction must enforce the order as if it were its own.
- Practically, it means that a victim can travel from one jurisdiction to another without having to secure a new protection order in each jurisdiction.
- It means that the protection order will be enforced as it is written by the enforcing jurisdiction.

# 18 U.S.C. 2265 (a): Full Faith and Credit for Protection Orders

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“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 as if it were the order of the enforcing State or tribe.***”

# 18 U.S.C. 2265 (b): Full Faith and Credit for Protection Orders

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“(b) PROTECTION ORDER.—A protection order issued by a state, tribal, or territorial court is consistent with this subsection if—*(1) such court has jurisdiction over the parties and matter under the law of such state, Indian tribe, or territory; and*

*(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.” (Emphasis added)*

# Full Faith And Credit Activating Language

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- In order to be provided full faith and credit, the specific VAWA requirements in [18 U.S.C. 2265\(b\)](#) *need to be met in the Protection Order*:
  - The court has **jurisdiction over the parties and matter** under the law of such state, Indian tribe, or territory; and
  - **Reasonable notice and opportunity to be heard** is given to the person against whom the order is sought sufficient to protect that person's right to due process.
  - **In the case of ex parte orders**, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.
  - **In the case of cross or counter petitions for a protection order**, a written pleading for a protection order has been filed by both parties and the court must make specific findings that each party is entitled to a protection order.

# Federal Definition of a Protection Order

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# What Orders are Included in the 18 U.S.C. 2266 (5) Definition of a Protection Order?

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- Issued by any court- state or Tribe. (may be civil or criminal)
- Order must fit within the federal definition of a protection order despite what the order is called
- The definition includes any order that prevents:
  - violent or threatening acts;
  - harassment;
  - sexual violence;
  - contact or communication with another person;
  - so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection
- May include other provisions (e.g., child custody and visitation) that are also entitled to Full Faith and Credit.

# 18 U.S.C. 2266(5)(A): Protection Order

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*“(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including 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 so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and...*

# 18 U.S.C. 2266(5)(B): Protection Order

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(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to state,, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.”

# Tips: Improving Enforcement Outcomes

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Tip: *Review  
Federal Full  
Faith and  
Credit  
Activation  
Language*

- Jurisdiction over the subject matter.
- Jurisdiction over the person.
- Notice and opportunity to be heard.

(Recall *Ex Parte* and/or Cross or Counter Petitions may require additional statements by the court)

# Tribal Civil Jurisdiction Over the Subject Matter 18 U.S.C. 2265 (e)

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*“For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.”*

(Emphasis added)

# 18 U.S.C. 2265 (e) May be a partial overruling of *Montana* but not clear

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Let's take a look at the *Montana* test.

# Tribal Jurisdiction Over the Subject Matter

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The *Montana* test requires the Tribal court to find that:

- 1) the parties entered into a consensual relationship with the Tribe or its members through commercial dealing, contracts, leases or “other arrangements” **or**
- 2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

If neither of the two factors listed in the *Montana* test are present, the Tribal courts may not exercise civil jurisdiction over non-members on non-Indian lands in Indian country.

*Tip: Drafting Provisions Relevant to Tribal Civil Jurisdiction Over the Subject Matter*

- What Tribal constitutional provision states that this court may hear this types of case?
- What tribal code provision(s) indicates that this court may hear this case?
- If either party is non-member, consider explaining the jurisdictional basis (18 U.S.C. 2265(e)) and/or address the *Montana* test.

# Jurisdiction over the Person or Parties

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- Personal Jurisdiction: the legal power of the court to render judgment over a specific person.
- Demonstrates a person's minimum contacts or connections with the Tribe to indicate that it is not unfair to require the defendant to litigate in Tribal court.

*Tip: Drafting Provisions Relevant to Tribal Civil Jurisdiction Over the Person*

- List any requirements in the statute regarding who may file a protection order (typically the filing of a petition satisfies the Tribal court's jurisdiction over the petitioner).
- List Tribal statute setting forth parties the tribes may exercise civil jurisdiction over.
- Identify any contacts the petitioner and defendant have to the tribe (Examples: Tribal members, work for Tribe, child is a member, etc).

# Reasonable Notice and Opportunity to be Heard

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- This is also known as a form of due process.
- This concept demonstrates that the defendant has been given notice of the allegations alleged; and provided with notice of hearing on the matter and a meaningful opportunity to be heard on the matter.

*Tip: Drafting Provisions Relevant to Due Process Reasonable Notice and Opportunity to be Heard*

- Identify whether the defendant has been served with a copy of the petition in compliance with the Tribal statute.
- Identify whether the court date has been scheduled according to any timelines set out in the tribal statute.
- If the defendant appeared, was the defendant provided an opportunity to tell the defendant's side of the story or ask questions of the petitioner?

# VAWA 2013 & 2022: A Historic Victory

“Tribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear.”

President Obama, March 7, 2013



# The Congressional Findings that support VAWA 2022

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## SEC. 801. FINDINGS AND PURPOSES.

(FINDINGS.—Congress finds that—

(1) American Indians and Alaska Natives are—

(A) 2.5 times as likely to experience violent crimes; and

(B) at least 2 times more likely to experience rape or sexual assault crimes;

(2) more than 4 in 5 American Indian and Alaska Native women have experienced violence in their lifetime;

(3) the vast majority of American Indian and Alaska Native victims of violence—96 percent of women victims and 89 percent of male victims—have experienced sexual violence by a non-Indian perpetrator at least once in their lifetime.

*H.R. 2471-848, Title VIII, Safety for Indian Women, Section 801. (2022)*

# Why was VAWA 2013 necessary?

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The existing jurisdictional framework left victims without adequate protection.

Tribal courts had no criminal jurisdiction over non-Indians in Indian country

→ *Oliphant v. Suquamish* (1978)

US Attorneys declined to prosecute many violent crimes that occurred in Indian country.

# What Did VAWA 2013 Do?

VAWA 2013 affirmed Tribal inherent authority to exercise criminal jurisdiction over non-Indians who commit:

domestic  
violence;

dating violence;  
or

violate protection  
orders



Required Tribes to provide certain due process protections to non-Indians in Tribal courts and required that the non-Indian defendant have certain contacts with the Tribe.

# Lessons Learned from VAWA 2013

**It quickly became apparent that VAWA 2013 did not go far enough.**

Tribal courts still had no criminal jurisdiction to:

- protect children who might be abused or victimized alongside their parent;
- prosecute offenders who assaulted Tribal law enforcement or other justice officials;
- Provide justice to victims of sexual violence, stalking, or sex trafficking.

# VAWA 2022 (H.R. 2471)

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- Amended 25 USC 1304 (Indian Civil Rights Act). These amendments had an effective date of Oct. 1, 2022.
- Replaced the term “special domestic violence criminal jurisdiction (SDVCJ)” with “special tribal criminal jurisdiction (STCJ)” throughout the law.
- Introduced the term “covered crimes” to describe the conduct that can be prosecuted under tribal law in tribal courts.
- Deleted the non-Indian defendant ‘sufficient ties’ requirement in VAWA 2013.
- Changed WHAT can be charged in Tribal court, and, in some instances, WHO can be charged in Tribal court.

# Changes to WHAT can be charged in Tribal Court

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Specifically, the VAWA 2022 amendments to 25 USC 1304:

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

Collectively these are referred to as “covered crimes.”

# Changes to WHO can be charged in Tribal Court

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## The VAWA 2022 amendments to 25 USC 1304:

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

# VAWA Special Tribal Criminal Jurisdiction Due Process Requirements

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- Tribal court ensures “all applicable rights” under the Indian Civil Rights Act – 25 U.S.C. 1302 (a).
- If any term of imprisonment may be imposed, all rights described in Tribal Law & Order Act (TLOA) for enhanced sentencing – 25 U.S.C. 1302(c).
- Additional rights required by VAWA 2013 and VAWA 2022.

# What 25 USC 1304 Does NOT Cover

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

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

# VAWA 2022: Domestic Violence

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(a) (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 an Indian tribe that has jurisdiction over the Indian country where the violation occurs.

# VAWA 2022: Dating Violence

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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.

# VAWA 2022: Violation of a Protection Order

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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, United States Code.

# VAWA 2022: Sexual Violence

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[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.

# Resources

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Tribal Law and Policy Institute

- <http://TribalProtectionOrder.org/>

National Center on Protection Orders and Full Faith and Credit

- [www.FullFaithandCredit.org](http://www.FullFaithandCredit.org)

Protection Order Checklists (member and non-member)

- <https://www.Home.Tlpi.org/violence-against-native-women-publication>

# Checklist to Activate Federal Mandate to Provide Full Faith and Credit to Protection Order

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- The Tribal court has **jurisdiction over the matter** under the law of the \_\_\_\_\_ Tribe.
- The Tribal court has jurisdiction over the parties in this matter.
- The Tribal court finds that the defendant has been provided a meaningful opportunity to be heard on this matter according to Tribal law.
- *If an ex parte order*: notice and opportunity to be heard must be provided within the time Tribal law or event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.
- *If cross or counter petitions*: a written pleading has been filed by both parties seeking a protection order and the court makes the following findings of fact in support of granting a protection order to both parties....

# THANK YOU!!!

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Questions?

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