

‘NO MORE STOLEN SISTERS’: JURISDICTIONAL BARRIERS TO JUSTICE FOR MISSING AND MURDERED INDIGENOUS WOMEN

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Since colonization, the strength and resilience of the American Indigenous people have been tested relentlessly. One contemporary existential threat to Indigenous communities is the dangerous rising trend of missing and murdered Indigenous women (MMIW). According to the Centers for Disease Control and Prevention, murder is the third leading cause of death among American Indigenous women.¹ Furthermore, the murder rate of these Indigenous women is ten times the average national murder rate.² The disproportionate rate at which Indigenous women are subject to homicidal violence can be devastating for communities that are already battling for sovereignty and survival against continued marginalization from non-Indigenous American cultural hegemony and the federal government. Compounding the narrative of these damaging external forces, the Bureau of Justice reported that when Indigenous women are victims of violent crime, 88 percent of the perpetrators are non-Indigenous.³ This sobering statistic necessarily implicates the non-Indigenous American public and further compels non-Indigenous American government involvement to rectify the harms caused to Indigenous communities.

Even as they paint the picture of a stark reality, the statistics only represent a partial truth about MMIW. While the data relays astronomically high rates of violence against Indigenous women, evidence also suggests that the quality of this data is impacted by poor record keeping, uncooperative law enforcement, and underreporting from Indigenous communities.⁴ In 2016, a mere 116 MMIW cases of the total 5,712 reported were included in the United States Department of Justice database, NamUs.⁵ The federal government’s exceptionally deficient record keeping shrouds the issue of MMIW in invisibility and makes it more difficult for effective intervention to occur. Likewise, local governments present another unique barrier to adequate data collection. Many police departments will ignore Freedom of Information Act (FOIA) requests from researchers and activists attempting to gather data on MMIW in various localities.⁶ Some police departments do acknowledge the FOIA requests, but fail to provide relevant information or respond to follow-ups.⁷ Others provide records but do not specify the name or status of any of the victims, resulting in diminished data quality and increased anxiety in communities longing for any insight or updates

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¹ *Leading Causes of Deaths - Females - Non-Hispanic American Indian or Alaska Native - United States, 2016*, CENT. FOR DISEASE CONTROL & PREVENTION (Sept. 27, 2019), <https://www.cdc.gov/women/lcod/2016/nonhispanic-native/index.htm>.

² Vaidya Gullapalli, *The Crisis of Murdered and Missing Indigenous Women and Why Tribes Need the Power to Address It*, THE APPEAL (Dec. 2, 2019), <https://theappeal.org/the-crisis-of-murdered-and-missing-indigenous-women-and-why-tribes-need-the-power-to-address-it/>.

³ Lorelei Laird, *Indian tribes are retaking jurisdiction over domestic violence on their own land*, ABA J. (Apr. 1, 2015, 6:02 AM), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own.

⁴ Annita Lucchesi, *Missing and Murdered Indigenous Women & Girls*, URBAN INDIAN HEALTH INST. 12–17 (Nov 14, 2018), <http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

⁵ *Id.* at 2.

⁶ *Id.* at 13.

⁷ *Id.* at 13–14.

on their loved ones' cases.⁸ Finally, and perhaps most tellingly, poor data quality exists because of underreporting; Indigenous communities expect inaction from authorities due to years of obfuscation and broken promises, particularly when the perpetrator is known to be non-Indigenous and jurisdictional barriers to successful prosecution exist.⁹

Jurisdictional issues between the federal government and Indigenous Tribes are foundationally defined by the Tribes' status as "domestic dependent nations" and rights of Tribal sovereignty.¹⁰ Further complications arise when legal matters involve a combination of Indigenous and non-Indigenous people, subject to different levels of Tribal authority. The Supreme Court helped solidify these jurisdictional barriers to justice in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).¹¹ The Court held that federally recognized Tribes lack jurisdiction to prosecute non-Indigenous people for crimes committed on Tribal land.¹² This means that while Tribal authorities cannot respond effectively to calls for help on their own territory, federal authorities have default jurisdiction to prosecute non-Indigenous people for those crimes committed on Tribal land.¹³ Unfortunately but perhaps unsurprisingly, the federal government has proven itself incapable of fulfilling its duty to Indigenous women. Federal prosecutors often decline to prosecute the Indigenous women's cases of intimate partner violence unless the perpetrator inflicted serious injury.¹⁴ Most state and county authorities lack the jurisdiction necessary for effective intervention in the wake of federal inaction.¹⁵ Congress has given statutory jurisdiction over crimes on Tribal lands to local authorities in sixteen states, but the statute does not apply to all federally recognized Tribes in most affected states, further cementing disparity and inefficacy.¹⁶ The *Oliphant* Court, however, granted an opportunity for reprieve from this broken ineffective system. The opinion notes that while Tribes currently lack jurisdiction, Congress has constitutional authority to override the holding and restore full Tribal jurisdiction.¹⁷ Congress attempted to meet this goal through the 2013 reauthorization of the Violence Against Women Act (VAWA).

VAWA was signed into law by former President Bill Clinton in 1994 to bolster prosecution efforts of violent crimes against women.¹⁸ Congress must reauthorize VAWA every five years for the granting provisions to remain in effect.¹⁹ Reauthorizations in the past have improved eligibility and funding for the various programs that exist under the law.²⁰ Notably, VAWA expired in 2018

⁸ *Id.* at 14–15.

⁹ *Id.* at 4–6.

¹⁰ Jeffrey S. Ashley, *American Indians and Federalism*, CENT. FOR THE STUDY OF FEDERALISM (Dec. 2017), http://encyclopedia.federalism.org/index.php/American_Indians_and_Federalism.

¹¹ See, e.g., *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

¹² *Id.* at 212.

¹³ Laird, *supra* note 3.

¹⁴ *Id.* Federal prosecutors cite concerns of burdening witnesses who might have to travel long distances from tribal lands to federal courts and overwhelming already full dockets.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Oliphant*, 435 U.S. 191 at 206, 212.

¹⁸ *Violence Against Women Act*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE (2017), <https://nnedv.org/content/violence-against-women-act/>.

¹⁹ *Reauthorization of VAWA in 2019*, PROTECTING ABUSED WOMEN (May 28, 2019), <https://www.vawalaw.com/2019-vawa-reauthorization/>.

²⁰ *Id.*

and is due for reauthorization by the 116th Congress in 2020.²¹ The last reauthorization in 2013 included Section 904, which utilizes the loophole of congressional authority identified by the *Oliphant* Court. Section 904 grants federally recognized tribes and the associated Tribal courts optional “special domestic violence jurisdiction” over non-Indigenous alleged perpetrators of intimate partner violence or violation of a protective order.²² In order to qualify for this grant of jurisdiction, Tribal courts must submit undergo a rigorous application process which includes submitting detailed questionnaires and excerpts of Tribal law and policy to the United States Department of Justice (DOJ) in order to prove that the Tribes can adequately protect defendants’ rights.²³ Shortly after the reauthorization, three Tribes in Washington participated in a DOJ pilot program and began practicing their strengthened jurisdiction in intimate partner violence cases against non-Indigenous perpetrators in 2014.²⁴ Since then, numerous other Tribes have been granted Section 904 special domestic violence jurisdiction and have experienced some level of success in prosecuting non-Indigenous perpetrators. As of June 2019, the prosecution records from these courts show 143 arrests and 74 convictions, including 73 guilty pleas and 5 jury trials.²⁵

Despite these promising numbers, Section 904 special domestic violence jurisdiction does not amount to full jurisdiction; gaps in the system and barriers to justice continue to exist despite the federal government’s efforts. The most prominent barrier to effective prosecution is that Section 904 special domestic violence jurisdiction only applies to the narrowly defined circumstances of “domestic violence”.²⁶ Excluded from this category are related crimes like sexual assault, child abuse, substance abuse, property destruction, threats, stalking, and assault between persons who are not considered to be in an intimate relationship.²⁷ In one case, the Pascua Yaqui Tribe of Southern Arizona encountered difficulty prosecuting a case involving a same-sex couple and the ambiguity of their relationship status that was not public.²⁸ These jurisdictional gaps continue to serve as significant barriers for survivors of violence seeking justice in the Tribal courts under Section 904. While the majority of responses from Indigenous communities have been positive in spite of

²¹ *Violence Against Women Act Reauthorization Threatened*, ABA (May 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/; Although the House of Representatives has passed a bill reauthorizing VAWA, doubts exist as to whether the Senate will be able to overcome partisan differences and reauthorize the legislation. Part of the issue is that the House bill includes progressive measures on gun violence in intimate partner relationships and closes “the boyfriend loophole.” The NRA’s strong influence in the Senate has kept the bill for reauthorization in committee and it is unlikely to see a floor vote in the near future. See Jay Willis, *Why Can’t the Senate Pass the Violence Against Women Act?*, GQ (Dec. 13, 2019), <https://www.gq.com/story/senate-violence-against-women-act>.

²² See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (2013).

²³ *3 Tribes Chosen to Implement VAWA’s 2013’s Special Domestic Violence Jurisdiction*, (Feb. 6, 2014), <https://nativenewsonline.net/currents/3-tribes-chosen-implement-vawa-2013s-special-domestic-violence-jurisdiction/>.

²⁴ See James D. Diamond, *Practicing Indian Law in Federal, State, and Tribal Criminal Courts and an Update on Recent Expansion of Criminal Jurisdiction Over Non-Indians*, 32 CRIM. JUST. 4 (2018).

²⁵ *SDVCJ Today: 5 Year Prosecution Statistics*, NAT’L CONG. OF AM. INDIANS (June 2019), <http://www.ncai.org/tribal-vawa/the-first-5-years/5-year-prosecution-statistics>.

²⁶ Laird, *supra* note 3.

²⁷ *Id.*

²⁸ *Violence Against Women Act Special Domestic Violence Criminal Jurisdiction*, TRIBAL ACCESS TO JUST. INNOVATION (last visited Feb. 14, 2020), <http://www.tribaljustice.org/places/cross-jurisdictional-collaboration/violence-against-women-act-special-domestic-violence-criminal-jurisdiction/>.

the shortcomings of the law,²⁹ some Tribes have voiced concerns about the “attempted jurisdictional assimilation” requisite for a multi-government system to function.³⁰ These concerns stem from the idea that compliance with the requirements of the DOJ program result in loss of Tribal justice traditions, such as restorative justice practices and peacemaking circles.³¹

Many of these concerns with the current strength of Tribal jurisdiction are addressed in the House of Representative’s VAWA Reauthorization Act of 2019. The bill not only reauthorizes the provisions from Section 904 of the 2013 Reauthorization, but it also expands jurisdiction to include prosecution of non-Indigenous perpetrators for obstruction of justice-type crimes, sexual assault, sex trafficking, and stalking.³² The bill also partially addresses the definitional issue by expanding “domestic violence” to include children who witness these violent crimes.³³ Furthermore, the bill expands the definition of Tribal lands to include communities that are “75% Native”, which has the ability to address violence against the many Indigenous people who live outside of reservations.³⁴ The bill passed the House in April 2019, but faces an uphill battle in the Senate. Currently, there are two Senate bills for reauthorization of VAWA. The first, S. 2843, was proposed by Senator Diane Feinstein (D-CA) and closely reflects the House Reauthorization Act.³⁵ The second bill, S. 2920, was introduced by Senator Joni Ernst (R-IA); while it includes the expanded list of covered crimes, it would also impose undue burdens and restrictions on Tribal courts, undermining the positive impacts of the special domestic violence jurisdiction.³⁶ Neither bill has advanced beyond committee, nor does the Senate, which remains bitterly divided along partisan lines, seem likely to make progress on the legislation any time soon.³⁷

Given the uncertainty of VAWA’s reauthorization and the limitations of Section 904 special domestic violence jurisdiction, advocates in the federal government have undertaken various legislative and policy initiatives to overcome the existing barriers. Senators Lisa Murkowski (R-AK) and Catherine Cortez Masto (D-NV) have introduced bipartisan legislation known as Savanna’s Act. The bill addresses the issue of MMIW by improving Tribal access to federal criminal information databases, requiring data collection on MMIW, and creating mandates for United States Attorneys to develop protocols surrounding MMIW.³⁸ Another legislative initiative is the Not Invisible Act which aims to improve coordination across law enforcement, Tribal and federal governments, and service providers by establishing an advisory committee of the relevant stakeholders to make recommendations to the United States Department of the Interior and the DOJ on addressing MMIW.³⁹ Additionally, The Bridging Agency Data Gaps and Ensuring Safety Act addresses

²⁹ *SDVCJ Today: SDVCJ Implementation Promotes Positive Changes*, NAT’L CONG. OF AM. INDIANS (June 2019), http://www.ncai.org/tribal-vawa/the-first-five-years/findings/sdvcj-implementation-promotes-positive-changes_

³⁰ Laird, *supra* note 3.

³¹ *Id.*

³² Elizabeth Carr, *116th Congress Legislative Update: Legislation to Watch VAWA, FVPSA, and MMIW*, 17 RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN 1, 27 (2020).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Jordain Carney, *Senate talks on stalled Violence Against Women Act Reauthorization unravel*, THE HILL (Nov. 8, 2019 1:55 PM), <https://thehill.com/homenews/senate/469635-senate-talks-on-stalled-violence-against-women-act-reauthorization-unravel>.

³⁸ S. 227, 116th Cong. (2019).

³⁹ S. 982, 116th Cong. (2019).

the issue of resource allocation by improving law enforcement recruitment, addressing the inefficiency of the federal criminal databases, increasing Tribal access to those databases, and providing Tribes with the resources they need to improve public safety coordination across the various levels of government.⁴⁰ Each of these efforts represents a bipartisan attempt to combat the epidemic of MMIW and hope for Indigenous communities experiencing the challenges of limited jurisdiction, underreporting, and poor record keeping.

Yet the most dedicated advocates exist within Indigenous communities themselves, where tireless activists demonstrate the strength and resilience of their people through pursuit of sovereignty rights. In March 2017, the National Indigenous Women's Resource Center (NIWRC) launched the StrongHearts Native Helpline, a culturally-rooted support line for survivors of intimate partner violence.⁴¹ StrongHearts advocates provide callers with critical emotional support, crisis intervention services, safety planning, and referrals to local tribal resources, proving the fortitude of their community network.⁴² Indigenous communities regularly organize Tribal press conferences, community searches, and justice marches across the continent to make sure that MMIW are not forgotten.⁴³ The community movement to raise awareness of the issue has grown through conferences, public art displays, songs, films, and donning the color red.⁴⁴ One Yup'ik artist from Alaska, Amber Webb, created a 12-foot display with over 200 portraits of MMIW. Webb described her intention "to make a qaspeq [lightweight parka worn by Alaska Native people] large enough to represent the space that the grief occupies within Native communities. It shouldn't be up to Native women to prove their innocence before crimes against them are investigated. It was also about healing myself and sparking healing for all Native women."⁴⁵ Webb's sentiments of sorrow and hope are epitomized by the continental mass movement across the United States and Canada. Indigenous communities are mobilizing at Women's Marches,⁴⁶ on motorcycle rides,⁴⁷ and across social media⁴⁸ to remember and raise awareness for their lost loved ones with signs and chants of "No More Stolen Sisters". In the face of legislative and cultural adversity, Indigenous women and their communities have emerged as powerful and resilient figures who can no longer be ignored.

⁴⁰ S. 1853, 116th Cong. (2019).

⁴¹ Mallory Adamski, *StrongHearts Awarded More Than \$2.7M to Expand Domestic Violence and Sexual Assault Services*, 17 RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN 1, 7 (2020).

⁴² *Id.*

⁴³ Jacqueline Agtuca, *#MMIW: National Day of Awareness for Missing and Murdered Indigenous Women May 5th Actions Calling for Justice!*, 17 RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN 1, 44 (2020).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Jenni Monet, *At Women's Marches, a spotlight on missing and murdered Indigenous women*, PBS (Jan. 21, 2018 7:42 PM), <https://www.pbs.org/newshour/nation/at-womens-marches-a-spotlight-on-missing-and-murdered-indigenous-women>.

⁴⁷ Carey Dunne, *'No more stolen sisters': 12,000-mile ride to highlight missing indigenous women*, GUARDIAN (Jun. 7, 2019 1:00 PM), <https://www.theguardian.com/us-news/2019/jun/07/indigenous-women-missing-murdered-activists-ride-north-america>.

⁴⁸ See, e.g., *Murdered & Missing Indigenous Women*, NATIVE WOMENS WILDERNESS (last visited Feb 14, 2020), <https://www.nativewomenswilderness.org/mmiw>.