



# VAWA Reauthorization: Substantive Criminal Law Proposals

March 20, 2019

The authorization of appropriations for the Violence Against Women Act (VAWA) [expired](#) at the end of FY 2018. The House Judiciary Committee has voted out an amendment in the nature of a substitute of the reauthorization of the [bill](#) (H.R. 1585). The absence of an authorization is [no legal impediment](#) to an appropriation, but the absence of an authorization can present parliamentary obstacles during floor consideration of an appropriation. VAWA and its periodic reauthorization amendments consist of grant programs and substantive criminal law provisions. VAWA's grant programs are covered in detail [elsewhere](#). This legal sidebar discusses some of the substantive criminal law issues raised during current reauthorization efforts.

## *Protective order online confidentiality*

Existing [law](#) bans states, tribes, and territories from publishing online the identity or location of the individuals protected by restraining orders issued under their jurisdiction. Section 106 of the [bill](#) would make it clear that the prohibition extends to the orders other than their own.

## *Child stalking penalty*

It is a federal [crime](#) to stalk another person using mail, computer, or interstate or foreign travel. Section 304 of the [bill](#) would increase the maximum sentence for the offense by an additional 5 years in prison if the victim is a child with exceptions for Romeo-and-Juliet situations (15-18 year-old victims and offenders no more than 3 years older) and for juvenile offenders.

## *Firearms*

Among those who may not lawfully [possess](#) a firearm and to whom a firearm may not be lawfully sold are individuals who are subject to a restraining order for the protection of an intimate partner. Section 801 of the [bill](#) would amend the definition of intimate partner to include dating or former dating partners or anyone similarly situated. Section 802 of the [bill](#) would adjust the possessory prohibition to those who are the subject of an *ex parte* restraining order, *i.e.*, an order issued initially unbeknownst to the person it restrains.

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Section 802 of the bill also would add those convicted of a “misdemeanor crime of stalking” to the list of individuals to whom a firearm may not be lawfully sold and by whom a firearm may not be lawfully possessed. Section 801 would define the misdemeanor crime of stalking as an offense under federal, state, municipal, or tribal law that proscribes stalking. The definition would exclude those who were not represented by counsel (unless they waived representation). It would also exclude those whose convictions have been expunged or set aside, for which the individual has been pardoned or had his civil rights restored (unless the right to possess a firearm was withheld). It would cover convictions for stalking intimate partners and anyone else for whom a restraining order is issued.

Section 1201 of the bill would require a National Instant Criminal Background Check System (NICS) notification of federal, state, and local law enforcement agencies of a firearm transferred automatically to a convicted felon or other disqualified individual for want of a timely response from NICS to the request of a federal firearms dealer.

Section 1202 of the bill would require the Attorney General to notify state and local law enforcement authorities when NICS reports the prospective transfer of a firearm to an individual disqualified because of a domestic violence restraining order, a misdemeanor conviction for domestic violence, or a misdemeanor conviction for stalking.

Section 1203 of the bill would authorize the Attorney General to cross-designate state, local, tribal, and territorial prosecutors and law enforcement officials in order to enhance investigation and prosecution of unlawful firearm possession by individuals disqualified because of a domestic violence restraining order, a misdemeanor conviction for domestic violence, or a misdemeanor conviction for stalking.

### *Tribal criminal jurisdiction*

Section 204 of the Indian Civil Rights Act affords tribes criminal jurisdiction over domestic violence cases in Indian country. Section 204 supplements federal, and in some instances state, criminal jurisdiction. Section 903 of the bill would recast the tribal jurisdictional provision of Section 204 as follows:

- Tribal criminal jurisdiction would consist of domestic violence (with an enlarged definition), as well as, obstruction of justice, assaulting a law enforcement officer, sex trafficking, sexual violence, and stalking.
- “Domestic violence” under current law means violence, committed by a spouse, former spouse, or the equivalent of one of the two, proscribed by tribal domestic or family violence law; Section 903 would carry forward the existing definition and insert violence committed against a child or elderly person residing with the defendant.
- “Obstruction of justice” would mean conduct interfering with the administration or due process of tribal criminal law. Unlike other instances, obstruction of justice would come within tribal criminal jurisdiction even if neither the offender nor the victim is an Indian.
- The added “assault” offense would consist of the harmful or offensive touching, threatened touching, or attempted touching of a tribal law enforcement or correctional officer.
- The “sex trafficking offense” would be patterned after the federal commercial sex trafficking offense.
- “Sexual violence” would include all manner of nonconsensual sexual misconduct ranging from rape to fondling, apparently either violent or nonviolent.
- Tribal criminal jurisdiction over domestic violence requires the defendant to live or work in Indian country or have a domestic relationship with an Indian; tribal criminal jurisdiction over obstruction of justice, assaulting a tribal law enforcement or correctional

- officer, sex trafficking, or sexual violation would not require such a tie to Indian country or the tribe.
- “Indian country” would include certain “Alaska Native” areas on a pilot-project basis for purposes of tribal criminal jurisdiction.

During House Judiciary Committee markup of H.R. 1585, Representative Sensenbrenner offered an [amendment](#) that would have eliminated Section 903 from the bill and Section 204 from the Indian Civil Rights Act. The Committee voted down the amendment that would have put an end to tribal special domestic violence criminal jurisdiction.

### *Custodial rape*

Section 1302 of the [bill](#) would make it a federal crime for a federal law enforcement officer, acting under color of law, to engage in a consensual or nonconsensual sexual act with another individual, including an individual in custody. Offenders would face imprisonment for not more than 15 years.

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