

## Stalking and VAWA 2013

This memo discusses whether stalking can be charged against a non-Indian under the Reauthorization of the Violence Against Women Act of 2013 (VAWA 2013) provisions that recognize inherent tribal criminal jurisdiction over domestic and dating violence. Critical to this analysis is looking at how jurisdictions generally define the crime of “stalking.” Additionally, we need to look at how “domestic violence” and “dating violence” are defined in VAWA 2013. This in turn requires an analysis of the phrase “violence committed”, which is used in both definitions to describe the type of covered conduct. Since there are no reported cases on the intersection of criminal stalking statutes and enhanced criminal jurisdiction under VAWA 2013, any conclusion is tentative.

Ultimately, there is a wide range of conduct that might be considered “stalking” and certain conduct more clearly falls within the scope of VAWA 2013’s non-Indian jurisdictional provision than others. This memo concludes that there is a range of stalking criminal conduct that easily falls within VAWA 2013’s scope, conduct that likely falls within its scope, and a range of conduct commonly included within criminal stalking statutes that likely do not fall within VAWA 2013’s scope. Consequently, a tribe’s ability to charge a non-Indian with stalking under VAWA 2013 will depend on whether the specific conduct being alleged or specific element of a criminal stalking statute falls within the range of conduct covered by VAWA 2013’s definitions of domestic and dating violence.

### Stalking

Let’s first address how different jurisdictions tend to define stalking as a crime. According to *Stalking in America: Findings from the National Violence Against women Survey* (NIJ CDC Research Brief, April 1998), anti-stalking laws have been adopted in all 50 states. Not surprisingly, legal definitions of stalking vary widely between states and likewise are likely to vary widely between tribes.

In the 1998 survey, NIJ recognized the difference in how jurisdictions defined stalking and crafted a definition that closely resembled NIJ’s model anti-stalking code for states. The NIJ defined stalking as:

A course of conduct directed at a specific person that involves repeated visual or physical proximity, non-consensual communication, or verbal, written or implied threats, or a combination thereof that would cause a reasonable person fear.

The NIJ definition does not require the stalker to make a credible threat of violence against a victim. However, it does require the stalker’s repeated behavior to be such that it would cause fear in a reasonable person.

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For purposes of this memo, we will define stalking as two or more acts directed at a specific person that involves visual or physical proximity, non-consensual communication, or explicit or implied threats, and would cause fear in a reasonable person. This definition is broad enough to cover most cases of stalking as defined in various state criminal statutes, but narrow enough to distinguish it as a unique crime.

Some anti-stalking laws include specific conduct, such as appearing at a person's home or place of work or vandalizing their property. Others describe a broader purpose or effect, such as causing a person to fear for the safety of others rather than themselves or fear of damage to property. The general definition adopted in this memo does not define the type of fear caused by the course of conduct, but may arguably include situations where a perpetrator's actions involve threats against family or loved ones or involve threats to a person's property or financial wellbeing. Regardless, most jurisdictions define stalking in a way that involves repeated acts directed at a specific person designed to cause them fear – either for their personal safety or fear for the safety of others or fear of destruction of property – or is designed to inflict serious emotional harm. Given this, the general definition should suffice in broadly analyzing whether stalking crimes can be charged under VAWA 2013's non-Indian jurisdictional provisions.

### Domestic and Dating Violence

With a general understanding of what constitutes criminal stalking, we now turn to VAWA 2013's definitions of domestic and dating violence as well as the phrase "violence committed" used in those definitions. These terms are defined at 25 U.S.C. § 1304 as follows:

*Dating Violence.* The term 'dating violence' means violence 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. 25 U.S.C. § 1304(a)(1).

*Domestic Violence.* The term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by 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 violence occurs. 25 U.S.C. § 1304(a)(2).

VAWA 2013's definitions of domestic and dating violence focus on the nature of the relationship between the perpetrator and the victim rather than the nature of the act involved. This is to ensure there is a strong and narrow nexus to between the perpetrator and a prosecuting tribe. It serves to bolster the uniquely tribal sovereign interest in ensuring the safety of its citizens and other community member Indians residing within the tribe's borders from the criminal acts of non-Indians. The strong and narrow nexus provides a compelling argument, both legally and

politically, that the conduct of stalking is included within a tribe's criminal jurisdiction over non-Indians.

However, VAWA 2013 does not further define what constitutes "violence committed." Nor has this phrase been defined by federal courts. While Congress has defined "violence" in other criminal statutes, Congress sought to avoid making the enhanced jurisdictional provisions of VAWA 2013 too narrow. For example, the phrase "crime of violence," defined at 18 U.S.C. 16, is very narrow in nature and requires the "use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony that involves a substantial risk that physical force against the person or property of another may be used." VAWA 2013 was not intended to limit tribal jurisdiction only to crimes involving physical force as domestic violence crimes are much broader than the singular use of physical force. Nor was VAWA 2013 intended to limit application of tribal criminal jurisdiction to felonies that involve a substantial risk that physical force will be used, particularly when the vast majority of tribes lack felony sentencing authority.

The Supreme Court has also held that "whereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force'... that is not true of 'domestic violence', which is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *U.S. v. Castleman*, 134 S. Ct. 1405, 1407 (2014). Perpetrators of domestic and dating violence are routinely prosecuted under generally applicable assault laws that include crimes that otherwise might not constitute 'violence' in the generic sense. *Id.* at 1411-12. Ultimately, the United States Supreme Court has held that a "misdemeanor crime of domestic violence" includes crimes that involve only offensive touching and is not limited to cases involving the use of physical force. *Id.* at 1410.

It is especially important to define 'violence' broadly within the context of domestic violence under VAWA 2013. According to the Congressional record, VAWA 2013 was passed to assist Indian tribes "in developing and promoting legislation and policies that enhance best practices for responding to violent crimes against Indian women including the crimes of domestic violence, dating violence, sexual assault, sex trafficking, and stalking." *Stand Against Violence and Empower Native Women Act Senate Report*, Sen. Rep. No. 112-265 at 2 (2012) (emphasis added).

In passing enhanced tribal jurisdictional provisions over non-Indian domestic and dating violence Congress particularly noted the epidemic rates of violence against native women including that 1 in 3 would be raped in their lifetime, 3 in 5 will be physically assaulted, and that they are more than twice as likely to be stalked as other women. Sen. Rep. No. 112-265 at 4-5 (2012). The record goes on to note that "restoration of inherent Tribal authority to investigate, prosecute, convict, and sentence perpetrators of violence against women would allow tribes to protect victims of violence and address these pervasive crimes against Native American women." *Id.* at 6. VAWA 2013's tribal jurisdiction provisions were intended to help reduce the epidemic rates of violence against Native women by non-Indians, and particularly rates of rape, physical assault, and stalking.

In light of the purpose of the definitions of domestic and dating violence (to ensure a nexus to the tribe), and Congressional intent, the definitions of “domestic violence” and “dating violence” ought to be interpreted broadly to include conduct that public safety and victim advocacy professionals typically deem domestic or dating violence. Like the court in *Castleman*, VAWA 2013 special domestic violence criminal jurisdiction should not be interpreted as limited only to the use or attempted use of physical force. Such a cramped interpretation would fail to address domestic violence crimes as they first arise in a violent intimate partner relationship, which often progress from verbally abusive treatment to authentic threats of violence and offensive touching like pushing and shoving or slapping. Left unaddressed, this criminal conduct progresses over time to profoundly serious felony assaults, including rape and homicide. It is unreasonable to interpret VAWA 2013 as Congress’ attempt to address the epidemic of non-Indian domestic violence against native women, while at the same time intending to limit the exercise of criminal jurisdiction such that tribes cannot adequately address non-Indian perpetrated violence at its earliest stages.

#### Federal Court Decisions and Stalking as Violence

Federal courts have grappled with whether certain state stalking convictions constitute a “violent felony” under the Armed Career Criminal Act (ACCA). *See e.g., U.S. v. Johnson*, 707 F.3d 655 (6<sup>th</sup> Cir. 2013). They have also looked at whether a state stalking conviction qualifies as a “crime of violence” under federal sentencing guidelines. *See e.g., U.S. v. Mohr*, 554 F.3d 604 (5<sup>th</sup> Cir. 2009). While VAWA 2013’s definitions of domestic and dating violence are broader than a “violent felony” under the ACCA or a “crime of violence” under the federal sentencing guidelines, analyzing the application of stalking laws to these statutes is helpful in analyzing whether stalking is likely to be considered by a reviewing federal court as falling within the scope of VAWA 2013’s tribal jurisdiction provisions.

Mr. Johnson was convicted of being a felon in possession of a firearm. At sentencing he argued that his prior Kentucky state conviction for First-Degree Stalking is not a “violent felony” under the ACCA that would subject him to a mandatory minimum sentence of 180 months in federal prison. *Johnson* at 657. In analyzing whether Kentucky’s crime of First-Degree Stalking amounted to a “violent felony” the court surveyed other circuit court decisions on similar issues. They all came to a similar conclusion. For purposes of a “violent felony” under the ACCA, a state stalking conviction must involve the use or threatened use of physical force. Consequently, if a state statute defines stalking as a course of conduct directed at producing only emotional distress, or other non-physical harm, then it does not necessarily constitute a “violent felony”. *Id.* at 659-662.

*U.S. v. Mohr* involved the question of whether a state stalking conviction in South Carolina constituted a “crime of violence” under the residual clause of the federal sentencing guidelines. *U.S. v. Mohr*, 554 F.3d 604 (2009). To fall under the residual clause a crime must be similar to the

enumerated offenses in 18 U.S.C. 924(e)(2)(B); namely, burglary, arson, extortion, or the use of explosives. *Id.* at 609. In addition, it must present a serious risk of physical injury to another. *Id.* at 606. Mr. Mohr was convicted in South Carolina of stalking, which has among its elements a pattern of conduct intended to cause a person, and would cause a reasonable person in the same position, to fear: death, assault, bodily injury, criminal sexual contact, kidnapping, or damage to property. *Id.* at 609.

Because property damage is among the elements, Mr. Mohr argued his South Carolina stalking conviction was not a “crime of violence” under the residual clause of the sentencing guidelines as it is not similar to the enumerated crimes. The court ultimately rejected that argument as the majority of covered conduct in the state stalking law is analogous to those enumerated in the sentencing guidelines and because Mr. Mohr’s crime actually involved threats of serious bodily injury. *Id.* at 609-610. Implicit in the court’s analysis, however, is that a purely property related stalking crime would not constitute a “crime of violence”.

## Conclusions

In consideration of the federal circuit courts’ holdings on the interplay of state stalking laws and either a “violent felony” under the ACCA or a “crime of violence” under federal sentencing guidelines, it is safe to conclude that an easy case for stalking being charged pursuant to VAWA 2013’s special domestic violence criminal jurisdiction is a non-Indian crime in which the course of conduct involves the explicit or implied use or threatened use of physical force. While the ACCA and sentencing guidelines have specific statutory definitions that either require the use of physical force to be considered a “violent felony” (ACCA) or require that an offense involve the serious risk of physical injury and be similar to certain enumerated serious felony offenses like burglary and arson to be considered a “crime of violence” (sentencing guideline’s residual clause), there is little doubt but that these types of offenses, and any other offense involving the use of physical force, would amount to “violence committed” and therefore constitute domestic or dating violence under VAWA 2013.

This leaves open the issue of whether VAWA 2013 covers stalking crimes that do not involve the use or threatened use of physical force or harm. This includes conduct that involves offensive touching or unwanted sexual contact and cases involving infliction of serious emotional distress. The federal circuit decisions also leave open the question of stalking crimes focused only on property damage. None of these types of stalking conduct would constitute a “violent felony” under the ACCA or a “crime of violence” under the federal sentencing guidelines. However, they may well constitute domestic or dating violence under VAWA 2013. *Castleman* itself held that offensive touching falls within the federal definition of a “misdemeanor crime of domestic violence”. *Castleman* at 1410. As such, it should be safe to conclude that Congress, when enacting VAWA 2013 to combat the epidemic of domestic violence in Indian country and eliminate reservations as safe havens for non-Indians domestic abuse against their Indian partners, at least

intended to include crimes otherwise considered misdemeanor crimes of domestic violence under federal law within VAWA 2013's definitions of domestic and dating violence. As such, we can relatively safely consider stalking crimes that involve a course of conduct focused on the implied or explicit threat or use of offensive touching or unwanted sexual contact as falling within VAWA 2013's enhanced jurisdictional scope even when it does not rise to the level of the use of physical force.

A harder case involves the use or attempted use, or threats of, non-physical harm designed to inflict emotional distress. Such actions may not fall with VAWA 2013's scope if a case cannot be made that the action or threatened action involved does not rise to the level of an assault or battery under the common law (e.g., offensive touching, reasonable apprehension of imminent harm, etc.). However, if a record can be established that such conduct is widely considered both a crime and an act of domestic violence or dating violence by public safety experts and professional victim advocates, a case might be made that they do fall within VAWA 2013's scope for reasons similar to those raised by the majority of the United States Supreme Court in *Castleman* when analyzing the scope of a "misdemeanor crime of domestic violence".

The hardest cases are stalking crimes involving only property damage. Given the federal circuit court decisions surrounding what constitutes a "crime of violence" or "violent felony" as well as the Supreme Court's analysis of what constitutes a "misdemeanor crime of domestic violence", which focused on common law definitions of assault and battery, it is unlikely a federal court would find that a course of conduct designed to cause fear of damage to property alone amounts to "violence committed". Of course, crimes involving destruction of property can be perpetrated in such a manner as to cause the victim to reasonably fear for their own, or someone else's, personal safety. Those circumstances may fall within VAWA 2013's scope, but any such charges should focus on the fear of personal harm rather than fear of harm to property.

It should also be remembered that prosecuting crimes of stalking, like domestic violence crimes generally, is difficult. It may be the safest course of conduct where stalking is involved and the stalker is known, to use evidence of a repeated course of harassing conduct as a basis to obtain a protection order against the perpetrator and then file criminal charges based on a violation of that protection order if the conduct continues.