Senator Kyl and the Violence Against Women Act

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Last month, the United States Senate moved to close a jurisdictional loophole that for decades has allowed non-Indian perpetrators of domestic violence in Indian country to evade prosecution. Senate Bill 1925, the carefully crafted reauthorization of the Violence Against Women Act or VAWA, would allow Indian tribes to prosecute non-Indians for dating violence and domestic violence against Indians within the tribe's territorial jurisdiction, while also protecting the rights of criminal defendants who might be unfamiliar with tribal justice systems.

The VAWA reauthorization is a necessary step to address the extraordinary rate of domestic violence in Indian country. Nonetheless, just days after S. 1925 passed the Senate, Sen. Jon Kyl (R-Ariz.) issued a statement alleging that these provisions are unconstitutional, because "subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race [. . .] would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process."

Restoring tribes' inherent jurisdiction to prosecute non-Indians for crimes against Indians within tribal territory is a bold step, and for that reason the VAWA reauthorization is a pathmaking piece of legislation. However, Sen. Kyl's concerns are unfounded. In crafting S. 1925, the Senate took special care to protect the constitutional rights of all involved.

First, it is important to acknowledge both the scope of the problem, and the targeted way that the Senate has addressed that problem. In passing the Tribal Law and Order Act of 2010, Congress noted that "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions," citing statistics showing that 34 percent of American Indian and Alaska Native women will be raped in their lifetimes, and 39 percent of American Indian and Alaska Native women will be subject to domestic violence. As Sen. Tom Udall (D-N.M.) pointed out earlier this year, the only thing more shocking than the frequency of these crimes against Native women is the fact that the vast majority of these crimes "go unprosecuted and unpunished" because tribes currently do not have jurisdiction to prosecute non-Indians.

The Senate's response is appropriately targeted to this epidemic of domestic violence. The special criminal jurisdiction restored to tribes under S. 1925 is limited to dating violence and domestic violence. In other words, the only non-Indians who may be subjected to tribal criminal jurisdiction under S. 1925 are those who have voluntarily entered into social relations with Indians, and they would only be subject to that criminal jurisdiction if they commit violent acts within a tribe's territorial jurisdiction.

Sen. Kyl first objects that non-Indians are unable to participate in tribal political processes. However, the ability to participate in political processes is not a prerequisite for the exercise of criminal jurisdiction. A man who lives in Arizona, but who assaults his girlfriend or wife in New Mexico, is subject to the laws of New Mexico regardless of his inability to influence those laws through the political process. Additionally, as noted in a joint letter from 50 law professors to the ranking members of the House and Senate Judiciary Committees, "due process certainly does not prevent either the federal government or the states from prosecuting either documented or undocumented aliens for crimes committed within the United States, despite the fact that neither can vote on the laws to which they are subjected."

Sen. Kyl's concerns about due process are equally unfounded. Although the Supreme Court in 1977 stripped tribes of their authority to exercise criminal jurisdiction over non-Indians, tribal courts have long exercised jurisdiction over non-Indians in civil cases. University of Connecticut law professor Bethany Berger has studied those cases, and found that non-Indian parties are treated fairly by tribal court systems. Additionally, the Indian Civil Rights Act affords defendants in tribal court systems almost all of the same protections provided by the Bill of Rights, including the right to seek habeas corpus in federal court. Finally, the VAWA reauthorization provides additional procedural rights, including the right to seek a stay of detention.

Most vexing is Sen. Kyl's concern about equal protection, which puts the rights of abusers before the rights of the abused. Currently, tribes are prohibited from prosecuting non-Indian domestic and sexual abusers. Federal officials have the authority to prosecute these crimes, yet according to a U.S. Government Accountability Office report, the U.S. Department of Justice declines to prosecute 67 percent of sexual abuse and related crimes that occur within tribal jurisdiction. Where is the equal protection for Native women?

With the reauthorization of VAWA, legislators have an opportunity to address an obvious flaw in existing law. For the sake of victims of domestic violence, Congress must choose to do more than what has been done in the past, and take action to protect victims of domestic and sexual violence. The constitutional concerns raised by Senator Kyl and others are unfounded, and Native victims of domestic violence crimes do not have the luxury of waiting for Congress to work out their differences until the next act of violence is committed without consequence.

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