

Serious Flaws in the Violence Against Women Act Reauthorization Bill

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KEY TAKEAWAYS

Congress originally enacted the Violence Against Women Act (VAWA) as a coordinated, comprehensive strategy to combat violence against women.

Using the popularity of VAWA as political cover, certain political interests have pushed for including novel and controversial policy initiatives in VAWA.

These should receive separate legislative consideration to avoid distracting from VAWA's design and purpose and destroying its traditional bipartisan support.

Introduction

The Violence Against Women Act (VAWA) was first introduced in 1990¹ and enacted in 1994,² and Congress reauthorized it in 2000,³ 2005,⁴ and 2013.⁵ House Resolution (H.R.) 1585, the new reauthorization bill that was passed by the House of Representatives on April 4, 2019—and which would amend VAWA in several significant respects—is deeply flawed. It adds controversial provisions that require separate consideration on their own merits, magnifies previous concerns about its constitutionality, continues the trend away from VAWA's original design and purpose, and would virtually destroy what is left of the traditional bipartisan consensus behind VAWA.

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Controversial New Provisions

This is the second reauthorization in which VAWA's popularity has been deliberately used as political cover for novel and controversial policy initiatives that, at the very least, require separate legislative consideration. This strategy was obvious when only one of the seven House committees to which H.R. 1585 was referred held a hearing and issued a report. Just 20 days after its introduction, H.R. 1585 was simply discharged from the other six committees. The House considered the bill under a rule allowing for just one hour of general debate,⁶ and passed the 220-page bill less than a month after its introduction.

If H.R. 1585 had simply extended the existing statute, this might still have been considered minimal, if not cursory, legislative treatment of such a comprehensive bill. But H.R. 1585 is the opposite of a "clean" reauthorization bill, containing some of the most novel and controversial changes in VAWA's history. The analysis that follows examines only a few of them.

Definition of "Domestic Violence." The term "domestic violence" is perhaps the most important in the entire Violence Against Women Act. It appears 239 times in the 2013 reauthorization legislation and 144 more times in H.R. 1585 alone. This bill would not only make the most significant changes in the definition of this key term since before VAWA was enacted but, for the first time, change the very concept of "domestic violence" itself.

The definition of domestic violence has two elements, one identifying actions and the other the perpetrators of those actions. Changing either or both of these elements has a substantial practical effect, since the term "domestic violence" is related to so many government programs and policies and incorporated into so many funding criteria. In addition, the negative reaction evoked by the term can dissuade policymakers from objectively evaluating definitional changes. As a result, this term is an attractive source of political cover for legislative or policy initiatives that, on their own, might be considered controversial and subject to more scrutiny.

When it was first enacted, VAWA defined domestic violence as "misdemeanor crimes of violence" committed by someone in a current or former concrete domestic relationship with the victim, such as a spouse, someone cohabiting "as a spouse," or "similarly situated to a spouse." It also covered persons from whom the victim was protected under domestic or family violence laws.

The 2000 VAWA reauthorization incorporated from another federal statute a nearly identical definition of domestic violence.⁷ It covered "felony or misdemeanor crimes of violence" and added "intimate partner" to the

list of perpetrators. The purpose for the latter change is unclear because each element in the definition of “intimate partner” was already included in the original definition.⁸ The 2005 VAWA reauthorization used the same definition of domestic violence but dropped “intimate partner” from the perpetrators list. The 2013 VAWA reauthorization made no change to the definition of domestic violence.

The consistent definition of domestic violence, therefore, included crimes of violence and a concrete domestic relationship with the victim. The 2019 VAWA reauthorization bill, however, changes these concepts. First, it replaces criminal acts—either misdemeanors or felonies—with the general term “pattern of behavior” without any guidance for determining whether behavior constitutes a “pattern.”

Second, federal law defines the term “crime of violence,” used in VAWA since its first enactment, as the actual, attempted, or threatened use of “physical force.”⁹ The 2019 reauthorization bill, however, abandons this familiar, concrete category and introduces categories of non-violent conduct—some of them completely undefined—that have never before been associated with VAWA. These include verbal, emotional, economic, and technological abuse and a catch-all category of “any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim.” The bill offers no guidance about what most of these new terms mean.

This bill, therefore, would no longer require that domestic violence involve a crime or physical force, but instead could involve undefined actions as vague as enabling coercive behavior. The fact that these categories have never before been related in any way to the definition of domestic violence does not, by itself, mean that they should never be considered. But such a radical change in the very concept of VAWA’s central component should at least result from thorough and deliberate consideration.

Before the first Violence Against Women Act was enacted, with key terms that were more consonant with existing law, it was the subject of *extensive* hearings in both the Senate and the House over two separate Congresses. In contrast, VAWA reauthorization bills including this expansive new definition were introduced in the 115th Congress—but never had a hearing. And, as noted above, H.R. 1585 itself was passed after a single hearing in one committee only a few weeks after it was introduced, with almost no general debate.

Firearm Possession. The Constitution protects the “right to keep and bear Arms.” In a February 1982 report, the Senate Judiciary Subcommittee on the Constitution explained that “the second amendment to our

constitution was intended as an individual right of the American citizen,”¹⁰ a conclusion later echoed by the Supreme Court.¹¹ Congress should be diligent to avoid compromising Americans’ fundamental constitutional rights, whether protected by the Second Amendment or another provision of the Bill of Rights.

Like other rights, however, the right to the keep and bear arms is not absolute, and federal law prohibits possession of firearms by specific categories of persons.¹² Here, too, while neither the original Violence Against Women Act nor any of its reauthorizations changed this statute, H.R. 1585 not only expands one prohibition category but creates an entirely new one.

First, H.R. 1585 expands the range of court orders that trigger the possession prohibition. Currently, the statute prohibits possession of firearms by a person subject to a court order that is issued *after* a hearing for which the person has received “actual notice” and at which he or she has “an opportunity to participate.”¹³ These essential components of due process are especially important when a fundamental constitutional right is at stake.

In addition, this post-hearing order must do two things. It must restrain the person from “conduct that would place an intimate partner [of such person] in reasonable fear of bodily injury to the partner or child.”¹⁴ It must also either include “a finding that such person represents a credible threat to the physical safety of such intimate partner or child”¹⁵ or explicitly prohibit “the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.”¹⁶ Violating this statute can result in up to 10 years in prison.¹⁷

Under H.R. 1585, however, a person would also be prohibited from possessing a firearm following an “ex parte order, relative to which notice and opportunity to be heard are provided...within a reasonable time *after* the order is issued.” This is the first time that the term “ex parte order” has appeared in VAWA or any of its reauthorizations, and H.R. 1585 does not define it. The term generally refers to “court proceedings for the benefit of one party to a controversy, without the other being present.”¹⁸

This is more than a policy change. It creates, for the first time, the possibility of losing one’s constitutional right to possess a firearm and the potential for up to a decade in prison by a court order issued *without the individual’s knowledge or the opportunity to contest it*. This very serious compromise in application of the Second and Fifth Amendments would be accomplished by legislation passed through an orchestrated process with virtually no consideration.

The second restriction on the Second Amendment by H.R. 1585 is a new prohibition on possessing a firearm by any person “who has been

convicted in any court of a misdemeanor crime of stalking.” Like “domestic violence,” the term “stalking” evokes an automatic, negative reaction that can dissuade objective evaluation of what it actually means in a particular context. But being able to exercise a fundamental constitutional right—and the possibility of spending up to 10 years in prison—should not depend on an emotional reaction to a charged word. Nor should this new policy be enacted without actually considering its merits.

Under federal law, “stalking” includes conduct with the intent to “harass” someone that puts that person in “reasonable fear” of serious bodily injury not only to themselves but also to a pet.¹⁹ It also includes conduct that would “would be reasonably expected to cause substantial emotional distress” to the person.²⁰ Under H.R. 1585, however, a conviction of even misdemeanor stalking in “any court” is enough to lose the right to possess a firearm.

According to the National Center for Victims of Crime, the crime of stalking “is defined differently...in all 50 states, the District of Columbia, and on tribal and federal lands.”²¹ Some states, for example, consider it a “general intent” crime, in which the perpetrator must intend “the *actions* in which he engages.”²² Other states consider it a “specific intent” crime, which is “more difficult to prosecute” because the perpetrator “must intend to cause the *result* of his actions.”²³ Under H.R. 1585, therefore, the same behavior could constitute a stalking crime, and possibly result in imprisonment and losing a constitutional right, in one state but not in another.

Constitutional Concerns

The Violence Against Women Act raises both general and specific constitutional concerns. First, general questions about Congress’ constitutional authority to enact VAWA have been raised since it was first enacted. The Supreme Court has held for more than two centuries that the “powers of the [federal] legislature are defined and limited.”²⁴ Quoting James Madison, the Supreme Court reaffirmed in 1995 that the “powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”²⁵

Criminal law in general, and family and domestic relations law in particular, are in that “numerous and indefinite” remainder that belongs to the state. Just as VAWA’s compelling purpose and growing popularity can offer cover for controversial policy initiatives, they also encourage lawmakers to avoid their responsibility to ensure that Congress may enact legislation like this at all. That happened with VAWA’s enactment and, in *United States*

v. Morrison,²⁶ the Supreme Court struck down the provision of VAWA that sought to turn sex crimes under state law into civil rights violations under federal law.

The original, general constitutional concern is compounded with each example of what has been called VAWA's "mission creep."²⁷ When VAWA was reauthorized in 2013, Heritage Foundation scholar David Muhlhausen and co-author Christina Villegas outlined how it was being expanded to areas "only tenuously connected to the VAWA's original purpose—reducing domestic violence against women."²⁸ Successive reauthorizations, for example, have expanded VAWA to include services for young people and the elderly and prohibited discrimination on the basis of sexual orientation or gender identity in VAWA grant programs. Individually and in combination, these expansions raise serious doubts about Congress' authority to enact such legislation.

Second, specific provisions added to VAWA since its enactment raise their own constitutional issues. The 2013 reauthorization, for example, gave Native American tribal courts jurisdiction over "all persons" regarding domestic violence crimes and issuing and enforcing protection orders.²⁹ Tribal governments are separate sovereigns from the United States³⁰ and, as the Supreme Court has held, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."³¹ As a result, a "non-Indian subject to tribal jurisdiction would enjoy few meaningful civil-rights protections."³²

According to the U.S. Department of Justice, the 2013 VAWA reauthorization gave tribal courts jurisdiction over domestic violence, dating violence, and criminal violation of civil protection orders.³³ Heritage Foundation scholar Paul J. Larkin Jr. detailed at the time how this novel provision raised substantial concerns under both Article II and Article III of the Constitution.³⁴ The 2019 reauthorization compounds, rather than corrects, this flaw by further expanding tribal court jurisdiction over "all persons" from "domestic violence criminal jurisdiction" to "criminal jurisdiction."³⁵

The current reauthorization bill also magnifies a different constitutional problem. The federal anti-stalking statute originally made it a crime to intentionally put a person in reasonable fear of death or serious injury. The 2005 VAWA reauthorization extended the statute to cover so-called "cyberstalking," which includes a "course of conduct that causes substantial emotional distress to that person."³⁶ Courts found that this vague provision violated the First Amendment by improperly criminalizing online speech.³⁷ The 2013 reauthorization took the statute even further, encompassing "conduct that...would be reasonably expected to cause substantial

emotional distress to a person”³⁸ who feared “serious bodily injury to...the pet...or horse of that person.”³⁹ The 2019 reauthorization only magnifies these concerns.

Distracting from VAWA’s Design and Purpose

The addition of controversial provisions in the 2013 reauthorization and in H.R. 1585, as well as growing constitutional concerns, have had two serious consequences. First, they have steadily drawn VAWA away from its design and purpose. From its first introduction, from its legislative development to its title and content, VAWA’s sole focus was to combat violence against women. Senator William Cohen (R-ME), who co-sponsored S. 2754 in 1990, described it as “the first comprehensive legislation designed specifically to combat violent crime against women.”⁴⁰

This legislation was understood the same way in the 102nd Congress.⁴¹ The Senate Judiciary Committee report on S. 15, introduced by Senator Joseph Biden (D-DE), emphasized “the need to concentrate the fight against an escalating blight of violence against women.”⁴² The report described how this legislation employed “complementary strategies, attacking the problem on a number of different fronts” to achieve “what we need most—a national consensus that this society will not tolerate this kind of violence.”⁴³ The committee reported the bill by voice vote.

The report urged against allowing other issues or problems to draw “public concern and attention” away from the priority of addressing violence against women.⁴⁴ “Our country,” the report said, “has an unfortunate blind spot when it comes to certain crimes against women.”⁴⁵

VAWA’s reauthorizations, however, have extended its reach to youth, the elderly, men, and persons with disabilities, as well as the LGBT community. Political groups realized that VAWA’s popularity and traditional bipartisan support could provide useful political cover for controversial proposals that might not succeed on their own. The 2013 VAWA reauthorization showed that VAWA was turning into a general statute to “meet the needs of victims” and “address remaining unmet needs.”⁴⁶ The Senate Judiciary Committee report on the bill shows the priority shifting toward making VAWA-related programs and services available to “a diverse population of victims, including battered immigrants, racial, ethnic and religious minorities, and lesbian and gay victims.”⁴⁷ As a result, VAWA has been turned into a statute to “ensure that services are available for...vulnerable group[s] of victims.”⁴⁸

Undermining VAWA's Traditional Bipartisan Support

Finally, in addition to pulling VAWA away from its original design and purpose, controversial provisions and constitutional concerns have destroyed VAWA's solid and steadily growing bipartisan support. This support began with its first introduction in the 101st Congress and grew for more than two decades. Senator Biden introduced S. 2754 on June 19, 1990, and its co-sponsors included Senator Mitch McConnell (R-KY), the current Majority Leader. When Biden introduced S. 15 on January 14, 1991, its co-sponsors grew to 56, including Senator Dan Coats (R-IN), the current Director of National Intelligence. In the 103rd Congress, Biden introduced S. 11 on January 21, 1993, and its co-sponsors grew to 67, including Senators David Durenberger (R-MN) and Kay Bailey Hutchison (R-TX). The House companion bill, H.R. 1133, had 225 co-sponsors and passed by a unanimous vote of 421-0.

The first time Congress reauthorized VAWA, Biden introduced S. 2787 on June 26, 2000, and it attracted 74 co-sponsors including Senators Orrin Hatch (R-UT) and John Ashcroft (R-MO). The House companion bill, H.R. 1248, had 239 co-sponsors and passed by a vote of 415-3. For the next reauthorization, Biden introduced S. 1197 on June 8, 2005. After the House passed the companion bill, H.R. 3402, by a vote of 415-4, the Senate passed it with an amendment by unanimous consent, and the House passed the Senate version by a voice vote.

The growing bipartisan support for VAWA, from its initial enactment through two reauthorizations, reversed course in the 112th Congress. For the first time, Democrats began using the popularity and support for VAWA as political cover for controversial, divisive policy initiatives that should have been considered separately from VAWA.

Senator Charles Grassley (R-IA), who has served on the Judiciary Committee since 1981 and chaired it for four years, made this point on the Senate floor in April 2012. "I have supported reauthorization of the Violence Against Women Act each time," he said, and "each of those occasions has been highly bipartisan. We have passed consensus bills and we have not played politics with reauthorizing the law; that is, until now."⁴⁹

He should know. The Senate Judiciary Committee considered S. 15 at its July 18, 1991, business meeting. Two amendments offered by Senator Grassley were added without opposition and the committee reported the bill by voice vote. Two decades later, when Senator Patrick Leahy (D-VT) introduced S. 1925 on November 30, 2011, VAWA had been made so controversial that Grassley not only voted against it but offered an alternative

reauthorization bill, S. 2338, that did not include those divisive provisions. Other Senators, such as Hatch and McConnell, who had supported previous consensus VAWA reauthorizations, also opposed Leahy's politicized version and supported Grassley's clean reauthorization bill.

Conclusion

After extensive hearings and legislative development, Congress enacted the Violence Against Women Act as a coordinated, comprehensive strategy to combat violence against women. Even though the federal government's authority to address issues traditionally under state jurisdiction had been questionable from the start, Congress has pushed these constitutional boundaries even further with the 2013 VAWA reauthorization and, even more so, with H.R. 1585.

Using the popularity and past bipartisan support for VAWA as political cover, certain political interests have pushed for including novel and controversial policy initiatives in VAWA that not only distract from its design and purpose, but which should receive their own separate legislative consideration. The 2019 House-passed VAWA reauthorization bill is the worst example of these trends, which have—perhaps irreversibly—destroyed the consensus behind this legislation.

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Endnotes

1. Senator Joe Biden (D-DE) introduced S.2754 on June 19, 1990, and Representative Barbara Boxer (D-CA) introduced its companion bill, H.R. 5468, on August 3, 1990.
2. The Violent Crime Control and Law Enforcement Act, Public Law 103-322, Title IV. See Alison Siskin, "Violence Against Women Act: History, Federal Funding, and Reauthorizing Legislation," Congressional Research Service *Report for Congress*, RL30871, updated October 12, 2001, p. 1, <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/VAWA-Tkit-CRSReport10.12.01.pdf> (accessed July 15, 2019).
3. Division B of the Victims of Trafficking and Violence Protection Act, Public Law 106-386.
4. Violence Against Women and Department of Justice Reauthorization Act, Public Law 109-162.
5. Violence Against Women Reauthorization Act, Public Law 113-4.
6. U.S. House of Representative, Committee on Rules, "H.R. 1581: Violence Against Women Reauthorization Act of 2019," <https://rules.house.gov/bill/116/hr-1585> (accessed July 15, 2019).
7. 42 U.S. Code §3796gg-2 was later reclassified as 34 U.S. Code §10447, which, in turn, adopts the definition in 34 U.S. Code §12291.
8. "The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." See 18 U.S. Code §921(a)(32). Since each of these elements is separately included in the definition, it does not appear that adding "intimate partner" changed the definition of domestic violence at all.
9. See 18 U.S. Code §16.
10. "The Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, 2nd Sess., February 1982, Hatch preface, <https://guncite.com/journals/senrpt/senrpt.html> (accessed July 15, 2019).
11. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).
12. 18 U.S. Code §922.
13. 18 U.S. Code §922(8)(A).
14. 18 U.S. Code §922(8)(B).
15. 18 U.S. Code §922(8)(C)(i).
16. 18 U.S. Code §922(8)(C)(ii).
17. 18 U.S. Code §924(a)(2).
18. "Ex Parte," Legal Dictionary, March 2, 2015, <https://legaldictionary.net/ex-parte/> (accessed July 15, 2019) (emphasis added).
19. 18 U.S. Code §2261A(1)(a)(iv).
20. 18 U.S. Code §2261A(1)(b).
21. National Center for Victims of Crime, "Analyzing Stalking Laws," <https://victimsofcrime.org/docs/Stalking%20Laws/Analyzing%20Stalking%20Laws.pdf?sfvrsn=0> (accessed July 15, 2019).
22. *Ibid* (emphasis in original).
23. *Ibid* (emphasis in original).
24. *Marbury v. Madison*, 5 U.S. 137,176 (1803).
25. *United States v. Lopez*, 514 U.S. 549,552 (1995), quoting *The Federalist* No.45.
26. *United States v. Morrison*, 529 U.S. 598 (2000).
27. See David B. Muhlhausen and Christina Villegas, "The Violence Against Women Act: Reauthorization Fundamentally Flawed," Heritage Foundation *Backgrounders* No. 2673, March 28, 2012, p. 2, <https://www.heritage.org/marriage-and-family/report/violence-against-women-act-reauthorization-fundamentally-flawed>.
28. *Ibid*.
29. "Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization," Congressional Research Service *Report for Congress* RL45410, updated April 23, 2019, p. 25, <https://www.everycrsreport.com/reports/R45410.html> (accessed July 15, 2019).
30. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978).
31. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,71 (1978).
32. *Violence Against Women Reauthorization Act of 2011*, S. Rep. 112-153, 112th Cong., 2nd Sess., March 12, 2012, p. 48, <https://www.congress.gov/congressional-report/112th-congress/senate-report/153/1> (accessed July 15, 2019) (views of Senators Kyl, Hatch, Sessions, and Coburn).

33. U.S. Department of Justice, "Violence Against Women Act (VAWA) Reauthorization 2013," <https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0> (accessed July 15, 2019).
34. See Paul J. Larkin Jr. and Joseph Lupino-Esposito, "The Violence Against Women Act, Criminal Jurisdiction, and Indian Tribal Courts," Brigham Young University *Journal of Public Law*, Vol. 26, No. 1 (2012). See also Paul J. Larkin Jr., "'Violence Against Women Act' Violates the Constitution," The Daily Signal, February 14, 2013, <https://www.dailysignal.com/2013/02/14/vawa-violates-the-constitution/> (accessed July 15, 2019).
35. H.R. 1585, Section 903.
36. Public Law No. 109-162.
37. *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Maryland, 2011). See Marcia Hofman, "Senate Bill Would Make Unconstitutional Anti-Stalking Law Even More Unconstitutional," April 24, 2012, <https://www.eff.org/deeplinks/2012/04/senate-bill-would-make-unconstitutional-anti-stalking-law-even-more> (accessed July 15, 2019), and Hanni Fakhoury, "With VAWA, A Major Step Forward in Combating Violence, but Constitutional Concerns Remain," March 14, 2013, <https://www.eff.org/deeplinks/2013/03/vawa-well-intentioned-still-unconstitutional> (accessed July 15, 2019). Other First Amendment advocates, such as Professor Eugene Volokh, also raised these concerns. See Eugene Volokh, "Senate Considering Extending Statute That Led to Unconstitutional Prosecution for Twitter Messages That Criticized Religious Leader," April 24, 2012, <http://volokh.com/2012/04/24/senate-considering-extending-statute-that-led-to-unconstitutional-prosecution-for-twitter-messages-that-criticized-religious-leader/> (accessed July 15, 2019).
38. 18 U.S. Code § 2261A(1)(B).
39. 18 U.S. Code § 2261A(1)(A)(iv).
40. *Congressional Record*, June 26, 1990, p. S8682, <https://web.archive.loc.gov/congressional-record/20160315165816/http://thomas.loc.gov/cgi-bin/query/D?r101:26:/temp/-r101VZGahD::> (accessed July 17, 2019).
41. Both S. 15 and H.R. 1502 stated the bill's purpose to be "combat[ing] violence and crimes against women on the streets and in homes."
42. The Violence Against Women Act of 1991, S. Rep. 102-197, 102nd Cong., 1st Sess., October 29, 1991, accessed on Westlaw, p. 48.
43. *Ibid.*, p. 47.
44. *Ibid.*, p. 49.
45. *Ibid.*
46. *Violence Against Women Reauthorization Act of 2011*, S. Rep. 112-153, 112th Cong., 2nd Sess. (March 12, 2012), p. 5.
47. *Ibid.*
48. *Ibid.*, p. 6.
49. *Congressional Record*, April 26, 2012, p. S2762.