Constitutionality of Tribal Government Provisions in VAWA Reauthorization

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Representative Lamar Smith
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Representative John Conyers, Jr.
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Dear Chairmen and Ranking Members:

The signers of this letter are all law professors, and we have reviewed Title IX of S. 1925, the Violence Against Women Reauthorization Act of 2012. We write in support of this legislation generally and of Section 904, which deals with tribal criminal jurisdiction over perpetrators of domestic violence, specifically. Our understanding is that some opponents of these provisions have raised questions regarding their constitutionality. We write to express our full confidence in the constitutionality of the legislation, and in its necessity to protect the safety of Native women.

Violence against Native women has reached epidemic proportions, and federal laws force tribes to rely exclusively on far away federal—and in some cases, state—government officials to investigate and prosecute misdemeanor crimes of domestic violence committed by non-Indians against Native women. As a result, many cases go uninvestigated and criminals walk free to continue their violence with no repercussions. Section 904 of S. 1925 provides a constitutionally sound mechanism for addressing this problem.

Constitutional Concerns

Congress has the power to recognize the inherent sovereignty of Indian tribal governments to prosecute non-Indian perpetrators of domestic violence on reservations. While it is true that the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribal governments did not have criminal jurisdiction over non-Indians, that decision was rooted in common law, not the Constitution, as the later Supreme Court decision in *United States v. Lara*, 541 U.S. 193 (2004), clearly indicates.

Since the Court's decision in *Oliphant* was not based on an interpretation of the Constitution, Congress maintains the authority to overrule the decision through legislation. The Court in *Oliphant* said as much when it stated that tribal governments do not have the authority to prosecute non-Indian criminals "except in a manner acceptable to Congress." 435 U.S. at 204. More proof of Congress's authority to expand tribal government jurisdiction lies in the more recent 2004 Supreme Court decision in *United States v. Lara*, where the Supreme Court upheld a Congressional recognition of the inherent authority of tribal governments to prosecute nonmember Indians.

In *Lara*, the Court analyzed the constitutionality of the so-called "*Duro* fix" legislation. Congress passed the *Duro* fix in 1991 after the Supreme Court decided *Duro v. Reina*, 495 U.S. 676 (1990), which held that a tribal court does not have criminal jurisdiction over a nonmember Indian, under the same reasoning as *Oliphant*. In response to this decision, Congress passed an amendment to the Indian Civil Rights Act recognizing the power of tribes to exercise criminal jurisdiction within their reservations over all Indians, including nonmembers. The "*Duro* fix" was upheld by the Supreme Court in *Lara*. The first part of the Court's analysis determined that

in passing the *Duro* fix, Congress had recognized the inherent powers of tribal governments, not delegated federal powers. 541 U.S. at 193. The Court then held that Congress did indeed have the authority to expand tribal criminal jurisdiction. *Id.* at 200.

In *Lara,* the Court plainly held, based on several considerations, that "Congress *does possess the constitutional power* to lift the restrictions on the tribes' criminal jurisdiction." *Id*. The Court relied on Congress's plenary power and a discussion of the pre-constitutional (historical) relationship with tribes, focusing on foreign policy and military relations. The Court in *Lara* held that "the Constitution's 'plenary' grants of power" authorize Congress "to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Id.* at 202. The Court noted that Congress has consistently possessed the authority to determine the status and powers of tribal governments and that this authority was rooted in the Constitution. So the decision in *Lara* shows clearly that the expansion of tribal jurisdiction by Congress, as proposed in Section 904 of S. 1925, *is* constitutional.

The *Lara* majority also recognized that the *Duro* fix was limited legislation allowing for an impact only on tribes' ability to control crimes on their own lands, and would not undermine or alter the power of the states. The same is true of Section 904, which does nothing to diminish state or federal powers to prosecute.

Due Process Concerns

It is important to note that Section 904 of S. 1925 does not constitute a full restoration of all tribal criminal jurisdiction—only that which qualifies as "special domestic violence criminal jurisdiction." So there must be an established intimate-partner relationship to trigger the

jurisdiction. Moreover, no defendant in tribal court will be denied Constitutional rights that would be afforded in state or federal courts. Section 904 provides ample safeguards to ensure that non-Indian defendants in domestic violence cases receive all rights guaranteed by the United States Constitution.

A. Narrow Restoration

The scope of the restored jurisdiction is quite narrow. First, the legislation only applies to crimes of domestic violence and dating violence when the victim is an Indian and the crime occurs in Indian country. Thus, it applies to a narrow category of persons who have established a marriage or intimate relationship of significant duration with a tribal member. Second, for a non-Indian to be subject to tribal court jurisdiction, the prosecuting tribe must be able to prove that a defendant:

(1) Resides in the Indian country of the participating tribe;

(2) Is employed in the Indian country of the participating tribe; or

(3) Is a spouse or intimate partner of a member of the participating tribe.

In other words, a defendant who has no ties to the tribal community would not be subject to criminal prosecution in tribal court. Federal courts have jurisdiction to review such tribal jurisdiction determinations after exhaustion of tribal remedies. Section 904 is specifically tailored to address the victimization of Indian women by persons who have either married a citizen of the tribe or are dating a citizen of the tribe. This section is designed to ensure that

persons who live or work with tribal members are not "above the law" when it comes to violent crime against their domestic partners.[1]

B. Civil Rights

The Indian Civil Rights Act (ICRA) already requires tribal governments to provide all rights accorded to defendants in state and federal court, including core rights such as the Fourth Amendment right to be secure from unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination. 25 U.S.C. 1301-1303. There is no question that federal courts have authority to review tribal court decisions which result in incarceration, and they have the authority to review whether a defendant has been accorded the rights required by ICRA. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Section 904 of the Violence Against Women Reauthorization Act re-emphasizes and reinforces the protections afforded under ICRA. It requires that tribal courts provide "all other rights" that Congress finds necessary in order to affirm the inherent power of a participating tribe. Tribal governments are already providing the due-process provisions in cases involving non-Indians in civil cases. Empirical studies have demonstrated that tribal courts have been even-handed and fair in dispensing justice when non-Indian defendants appear in court in civil matters.[2] Section 904 provides ample protection for any non-Indian subject to the special

[1] This jurisdictional framework is similar to that established in the civil arena, namely *Montana v. United States*, where the Supreme Court found that tribal governments have civil authority when there is a private consensual relationship with the tribe and a nexus between that relationship and the subject of the litigation. In addition, tribal governments have civil jurisdiction over non-Indians in cases where the actions of the non-Indian threatens tribal political integrity, economic security, or health, welfare, or safety of the tribe. 450 U.S. 544, 565-66 (1981).

[2] *See, e.g.*, Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047 (2005).

domestic violence prosecution. The special domestic violence jurisdiction is conditioned on a requirement that tribes maintain certain minimal guarantees of fairness.

The Violence Against Women Reauthorization Act affirms the right of habeas corpus to challenge detention by an Indian tribe, and goes even further by requiring a federal court to grant a stay preventing further detention by the tribe if there is a substantial likelihood that the habeas petition will be granted. The legislation does not raise the maximum sentence that can be imposed by a tribal court, which is one year (unless the tribal government has qualified to issue sentences of up to three years per offense under the Tribal Law and Order Act).

Thus, the legislation provides ample safeguards. Nothing in the legislation suggests that a defendant in tribal court will be subject to proceedings which are not consistent with the United States Constitution. Indeed, the legislation creates an even playing field for all perpetrators of domestic violence in Indian country. No person who commits an act of violence against an intimate partner will be above the law.

C. Political Participation

While some have criticized tribal jurisdiction over nonmembers based on the inability of nonmembers to participate in tribal political processes through the ballot box, we note that such political participation has never been considered a necessary precondition to the exercise of criminal jurisdiction under the concept of due process of law. A few examples illustrate that point. First, Indians were subjected to federal jurisdiction under the Federal Major Crimes Act of 1885, now codified as amended at 18 U.S.C. 1153, almost 40 years before most of them were made citizens or given the vote by the Citizenship Act of 1924. Second, 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. Third, likewise, due process of law does not preclude criminal prosecution of corporations despite the fact that corporate or other business organizations, which are considered separate legal persons from their shareholders or other owners, also cannot vote on the laws to which such business organizations are subjected. In short, there simply is no widely applicable due-process doctrine that makes political participation a *necessary* precondition for the exercise of criminal jurisdiction.

Conclusion

In conclusion, the signers of this letter urge Congress to enact the VAWA Reauthorization and fully include the tribal jurisdictional provisions necessary for protecting the safety of Native women. Public safety in Indian country is a primary responsibility of Congress, the solution is narrowly tailored to address significant concerns relating to domestic violence in Indian country, and the legislation is unquestionably constitutional and within the power of Congress.

Sincerely,

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