Tribal Injustice: The Past, Present, and Future of the Violence Against Women Act

"The rights of every man are diminished when the rights of one man are threatened."[1]

By Marcella Sgroi

The political climate seems to be ever-changing, especially as our nation unwinds from a divisive campaign season. While we as a state and as individuals are anticipating dramatic changes in the political and judicial landscape, all the while tribal nations have long faced judicial barriers throughout history. The focus of this article is on the administration of tribal justice, specifically as it relates to the Violence Against Women Reauthorization Act 2013, first by way of a brief explanation of criminal jurisdiction on tribal lands; second, by way of the initial enactment of the Violence Against Women Act; third by a discussion of the reauthorization of such act; and fourth, by an analysis of the effectiveness of the approved pilot programs thus far and of a recent Supreme Court ruling.

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I. Criminal Jurisdiction on Tribal Lands

The pathway to prosecution of crimes occurring on tribal lands has long required a complex analysis, or as many before me have opined, a jurisdictional maze.[2] As with most rules, there are always exceptions, and often exceptions to those exceptions, and as you may well be anticipating, criminal jurisdiction on tribal lands unquestionably follows suit.[3]

Tribal nations, as sovereign nations, have the authority to create tribal court systems.[4] In theory, the creation of tribal courts authorizes Indian nations to seek justice for crimes committed within "Indian country," meaning the lands controlled by the tribe within the metes and bounds of the reservation, as defined in federal law.[5] The Supreme Court decision in *Oliphant v. Suquamish Indian Tribe* considerably limited the scope of tribal court jurisdiction, holding that tribal courts lack inherent jurisdiction over non-Indians who commit crimes in Indian country. [6] Further, the court noted that "…these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[7] Tribal court jurisdiction was limited further by the court decision in *Duro v. Reina*, which, at a very basic level, provided that tribal courts could not prosecute Indians who were non-members of the tribe.[8] Legislatively, Congress eliminated this limitation by defining "powers of self-government" and "Indian," thereby granting tribal courts criminal jurisdiction over all Indians.[9]

The decision in *Oliphant* and subsequent congressional actions provide the scope of authority of tribal courts; however, to take a step backward, determining whether a criminal action belongs in tribal court requires a separate analysis. Such analysis generally begins with determining which sovereign has proper criminal jurisdiction, the federal government, the state, or the Indian nation, while taking the following factors into consideration: the type of crime, the race of the perpetrator, and the race of the victim.[10]

Congress has granted federal courts criminal jurisdiction in Indian country as provided in the General Crimes Act and the Major Crimes Act. The General Crimes Act notes that "…the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."[11] There are express exemptions to this provision: (1) crimes committed by an Indian against another Indian or their property, (2) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or (3) when exclusive jurisdiction over the offense has been or can be secured to the Indian tribe.[12] Moreover, as per the Major Crimes Act, certain crimes listed in this act fall under the purview of federal jurisdiction without regard to the race of the victim or perpetrator.[13]

When is it proper for a state to intervene? States may exercise criminal jurisdiction for crimes committed in Indian country when the crime is entirely between non-Indians, or where Congress has expressly granted authorization.[14] At present, Public Law 280 transfers criminal jurisdiction from the federal government to the state government for certain specifically identified states, namely: California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska.[15] Of note, states are permitted to acquire jurisdiction pursuant Public Law at section 280 should they so choose. As noted above, the *Oliphant* decision played a role in shaping the authority of tribal courts. In a more recent decision, the Court in *United States v. Lara* held that Congress has the Constitutional authority to lift the restrictions on tribes' criminal jurisdiction over nonmember Indians.[16] The Court's decision in *Lara* gave Congress the constitutional power to pass, for the first time, legislation that breaks down the barrier that now prohibits a tribe from exercising criminal jurisdiction over non-Indians.[17]

II. The Violence Against Women Act

The Violence Against Women Act (VAWA) was originally enacted in 1994 and was part of the Crime Control and Law Enforcement Act of 1994.[18] VAWA provided various grant programs for state, local, and tribal govern-

ments.[19] The original text of VAWA contained a sunset provision, which caused certain substantive provisions to expire in five years, thereby requiring that these provisions be reauthorized. The provisions of VAWA have been reauthorized, each time with amendments and new protections, in 2000, 2005, and most recently in 2013.[20] The time period between 2005 and 2013 reauthorizations is longer than the five-year period noted above, because 2012 was the first time the provisions of VAWA had expired and without a reauthorization vote. Congress voted on and passed the reauthorization act of 2013 on February 12 by a 78-22 vote in the Senate and February 28 by a 286-138 vote in the House.[21]

The most notable example in the original VAWA, with respect to tribal communities, was the S.T.O.P. (Services, Training, Officers, Prosecution) Violence Against Women Grant. The stated purpose of the S.T.O.P. grants

> …is to assist States, State and local courts (including juvenile courts), Indian tribal governments, tribal courts, and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.[22]

The provisions in VAWA mandated a report of the first year accomplishments of the S.T.O.P. grants program through December 31, 1995, which was completed by The Urban Institute, and the report concludes that after the first year of implementation, relatively few state or territorial S.T.O.P. program plans addressed the needs of Indian tribes and that few states mentioned tribal communities as part of their intent to expand victim services because of language, cultural, or access issues.[23] Further, the states that did mention tribal communities as part of their implementation plans specifically noted the following initiatives: establishing a special unit on one reservation, establishing shelters and rape crisis services on reservations within the state, and assisting tribal governments.[24]

III. The Reauthorization Act of 2013

Senator Murkowski once stated:

> This ought not to be a Republican issue or a Democratic issue. It ought not be a woman's issue. It is an issue that should bother all of us when we cannot stand together and help those who have been victims of domestic violence.[25]

On March 7, 2013 President Obama signed the VAWA Reauthorization Act of 2013. The Reauthorization of VAWA in 2013 established the special domestic violence criminal jurisdiction that expanded a tribe's authority to prosecute crimes committed by non-Indians against Indians on tribal lands.

The sponsor of the Reauthorization of 2013 noted that among its purposes were the following: "transforming the criminal justice and community-based response to abuse by bolstering and streamlining the programs, grants, and coalitions created by VAWA and expanding the reach of VAWA to meet the remaining unmet needs of victims." [26] The Reauthorization of 2013 did not pass with unanimous support; many representatives voiced concerns with the proposed protections as they related to tribal authority. Some members feared the lack of constitutional protection for non-Indian defendants, while proponents focused on the high rates of violence against women on tribal lands and the right of Indian victims to live without fear of violence or rape.[27] Largely at issue was section 904, tribal jurisdiction over crimes of domestic violence.

The Reauthorization of 2013 at proposed section 904 amended the Indian Civil Rights Act of 1968.[28] The revised language reads, "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[29] This authority does not extend to crimes where the parties involved are both non-Indian.[30] An added limitation provides that a tribe exercising special domestic violence criminal jurisdiction may only do so when the defendant: (1) resides in the Indian country of the participating tribe, (2) is employed in the Indian country of the participating tribe, (3) is a spouse, intimate partner, or dating partner of either a member of the tribe or an Indian who resides in the Indian country of the participating tribe.[31] Further, the criminal conduct falling under special domestic violence criminal jurisdiction includes domestic violence and dating violence, and violations of protective orders.[32]

Though the act still contains limitations on the criminal acts under the authority of the tribes, the Reauthorization of the VAWA in 2013 was a monumental legislative act. VAWA was reauthorized in March of 2013, with an effective date of March of 2015, although early enforcement authorization was granted to a limited number of tribes through a pilot program.

A. Federal Recognition: What Does It Mean to Be a Federally Recognized Tribe?

Federal recognition of an Indian tribe is an official acknowledgment from the United States that a tribe is a sovereign entity, and that recognition creates a relationship between the tribe and the federal government. Federal recognition is especially important with regard to a tribe's eligibility for programs and services created by Congress, such as the protections explained above. Accordingly, tribes without federal recognition have diminished access, or no access at all, to federal funds and benefits. The federal recognition process is set forth in 25 C.F.R. 83 *et seq.*, but federal recognition can also be achieved through an act of Congress, a Presidential executive order, or federal court decision. Presently, according to the Bureau of In-

dian Affairs, there are 567 federally recognized American Indian and Alaska Native tribes and villages.[33]

IV. Under the Pilot Program

The Reauthorization Act of 2013 was not effective until March of 2015; however, the Justice Department selected tribes to participate in a pilot project, allowing them to exercise criminal jurisdiction over domestic and dating violence when a non-Indian man is involved. The tribes were the Sioux Tribes of the Fort Peck Indian Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Tulalip Tribes of Washington, the Pascua Yaqui of Arizona, and the Tulalip of Washington State.

The pilot program was available to these select tribes only if the tribe's criminal justice system fully protected the right of the defendant as per federal standards. If this threshold requirement was met, the tribe could apply to the new pilot program for an eligibility determination by the Justice Department, and if approved, for an effective date.

A. Special Domestic Violence Criminal Jurisdiction: The Pascua Yaqui Tribe

The Pascua Yaqui Tribe is a federally recognized tribe located in Arizona, with a reservation that extends over 2,200 acres. The tribe has about 19,000 members, with about 5,000 members living on the reservation.[34] In an article by the *Washington Post*, the Pascua Yaqui tribal police chief described how tribal police had dealt with non-Indian offenders involved in domestic incidents with Indian victims in the past, "We would literally drive them to the end of the reservation and tell them to beat it… and hope they didn't come back that night. They almost always did."[35]

As noted above, the Pascua Yaqui Tribe was one of the tribes selected for early implementation of the protections under the Reauthorization Act of 2013, which began in February of 2014.[36] Alfred Urbina, the acting Attorney General of the Pascua Yaqui Tribe, testified at a Senate hearing in May of 2016. During this testimony, Attorney General Urbina spoke about the tribe's experience with the Special Domestic Violence Criminal Jurisdiction (SDVCJ). Specifically, Attorney General Urbina noted that the Pascua Yaqui Tribe obtained the first conviction of a non-Indian perpetrator of a crime of domestic violence in July of 2014. Since implementation of the pilot program's protections, the tribe has prosecuted 22 cases involving non-Indians, and the tribe has obtained eight criminal convictions.[37] Further, Attorney General Urbina noted that most of the perpetrators had extensive criminal backgrounds in the State of Arizona, and that on average these offenders were contacted by tribal police at least six times prior to the expanded jurisdiction provided by the Reauthorization Act of 2013.[38] At the time of the testimony, three of the offenders already prosecuted had since reoffended with the same victim.[39] Attorney General Urbina noted that, at the time of his testimony, seven cases had been dismissed due to issues related to the Supreme Court decision in *United States v. Castleman*.

In addition to the five tribes that were approved to participate in the pilot program, eight tribes have implemented SDVCJ, and to date, there have been no federal appeals challenging a charge or conviction under SDVCJ.[40]

B. *United States v. Castleman*

As it relates to Special Domestic Violence Criminal Jurisdiction and tribal justice, the decision in *Castleman*, in March of 2014, is cause for concern whenever a tribe is evaluating misdemeanor arrests under the new SDVCJ authority.[41] James Castleman pled guilty to intentionally or knowingly causing bodily harm to the mother of his child in 2001, a misdemeanor charge.[42] As per federal law, conviction of a misdemeanor crime of domestic violence prohibits an individual from possessing a firearm.[43] Mr. Castleman was federally indicted when it was discovered that he and his wife were purchasing firearms and reselling them.[44] Mr. Castleman challenged his indictment on the grounds that his previous conviction for intentionally or knowingly causing bodily harm to the mother of his child did not quality as a misdemeanor crime of domestic violence; he contended that it did not involve "the use or attempted use of physical force."[45] The Supreme Court held that Mr. Castleman's conviction did qualify as a misdemeanor crime of domestic violence under federal law, as under federal law "physical force" is satisfied by the degree of force supporting a common law battery conviction, and "that at common law, the element of force in the crime of battery was satisfied by even the slightest offensive touching."[46] Further, the Court reasoned that "Congress presumably intends to incorporate the common-law meaning of terms that it uses, and nothing suggests Congress intended otherwise here."[47] In a report compiled by Attorney General Urbina, the Pascua Tribe believes that the *Castleman* decision could be problematic for tribes because when a tribe is charging a crime of domestic violence under VAWA that does not involve physical contact, it may not qualify as a misdemeanor crime of domestic violence under federal law. Of note, under VAWA, the term "domestic violence" is defined as violence committed by a current or former spouse or intimate partner of the victim.

V. The Barriers to Justice

> [R]emoving legal barriers alone will be ineffective unless the discretion that allows informal norms to guide decision-making is constrained or meaningful incentives to change norms are created.[48]

Undoubtedly, the protections under VAWA have had a significant impact on improving justice on tribal lands, yet there is still room for improvement. Federal funding plays an integral part in the future success of VAWA, and despite the need for an adequate level of federal funding, the protections granted to tribes under the Reauthorization Act of 2013 are still fairly limited with regard to the

relationship between the perpetrator and the victim in crimes of domestic violence. At this point, it is unclear whether the current presidential administration will continue to provide the level of funding needed to sustain the grant programs under VAWA and whether the provisions pertaining to SDVCJ will be expanded.

Perhaps acts of domestic violence can be viewed as cyclical, often escalating with each occurrence. In an effort to end the cycle of abuse, from a law enforcement perspective, the ability to charge an offender with a crime like stalking may end the cycle of abuse before it becomes a crime involving force. Following this line of thinking, guidance and clarification may be needed to better assist tribes to evaluate and address crimes associated with domestic violence that do not have an element of force, thereby allowing tribes to use the authority granted to them under VAWA to the fullest. Moreover, Congress could seek to amend and expand the definition of domestic violence under the relevant provisions of VAWA. Particularly, it could include language expanding domestic violence to not only include acts involving force, but other acts of abuse generally associated with forceful crimes of domestic violence, such as, stalking. An inclusion of this nature could be met with opposition; those opposed may argue that this provides broad authority that could lead to miscategorizing crimes as acts of domestic violence, when they may have not been.

Looking forward, the past successes of VAWA indicate that great strides can be made with determination and great advocacy, and however unpredictable the future of VAWA may be, the ultimate power to effectuate change remains with us, as individuals and as a community.

Endnotes

1. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963).
2. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976).
3. *See id.*
4. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004).
5. 18 U.S.C. § 1151 (2012).
6. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
7. *Id.*
8. *Duro v. Reina*, 495 U.S. 676 (1990).
9. 25 U.S.C. § 1301 (2012).
10. *See* Robert T. Anderson, Bethany Berger, Philip P. Frickey & Sarah Krakoff, American Indian Law: Cases and Commentary 274-76 (2d ed. 2010).
11. 18 U.S.C § 1151 (2012).
12. *Id.*
13. 18 U.S.C. § 1153 (2012).
14. *See* Cohen's Handbook of Federal Indian Law § 6.04, at 1-6 (Nell Jessup Newton ed., 2012).
15. Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012), 25 U.S.C. §§ 1321-1326 (2012), 28 U.S.C. § 1360 (2012)).
16. *United States v. Lara*, 541 U.S. 193 (2004).
17. *Id.*
18. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
19. Women's Issues: Economic, Societal, and Personal (Dorothy V. Stickle ed., 2008).
20. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.
21. *Id.*
22. 42 U.S.C. § 3796gg (2012).
23. Martha Burt et al., Urban Inst., The Violence Against Women Act of 1994: Evaluation of the STOP Block Grants to Combat Violence Against Women (1996), http://www.ncdsv.org/images/UI_EvaluationOfTheSTOPGrants1996Report_3-1-1996.pdf.
24. *Id.*
25. 159 Cong. Rec. S996 (daily ed. Feb. 28, 2013) (statement of Sen. Murkowski).
26. 159 Cong. Rec. S45 (daily ed. Jan. 22, 2013) (statement of Sen. Reid).
27. *See* Sari Horwitz, Wash. Post, Justice in Indian Country (2015).
28. 25 U.S.C. § 1304 (2012).
29. *Id.* § 1304(b)(1).
30. *Id.* § 1304(b)(4)(A)(i).
31. *Id.* § 1304(b)(4)(B).
32. *Id.* § 1304(c).
33. *See Frequently Asked Questions About Public Law 83-280*, U.S. Att'y's Office, Dist. of Minn., https://www.justice.gov/usao-mn/Public-Law%2083-280 (last updated May 1, 2015).
34. Nat'l Cong. of Am. Indians, Special Domestic Violence Criminal Jurisdiction Pilot Project REPORT (2015), http://www.ncai.org/attachments/NewsArticle_utTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf.
35. Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian Under a New Law*, Wash. Post (Apr. 18, 2014), https://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html?utm_term=.554fb80998c8.
36. Nat'l Cong. of Am. Indians, *supra* note 34.
37. Alfred L. Urbina, Att'y Gen., Pascua Yaqui Tribe of Ariz., Testimony Before the United States Senate Committee on Indian Affairs (May 18, 2016), http://www.pascuayaqui-nsn.gov/images/announcements/pyt_ag_may_2016.pdf.
38. *Id.*
39. *Id.*
40. Rebecca M. Howlett, *The Need to Preserve and Expand Tribal VAWA Jurisdiction*, Law360 (Mar. 7, 2017), https://www.law360.com/articles/898989/the-need-to-preserve-and-expand-tribal-vawa-jurisdiction.
41. Pascua Yaqui Tribe, Pascua Yaqui Tribe VAWA Implementation (2015), http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_2015.pdf.
42. *United States v. Castleman*, 134 S. Ct. 1405 (2014).
43. 18 U.S.C. § 922(g)(9) (2012).
44. *Castleman*, 134 S. Ct. 1405.
45. *Id.*; 18 U.S.C. § 921(a)(33)(A)(ii).
46. *Castleman*, 134 S. Ct. at 1410.
47. *Id.* at 1407; Alfred Urbina & Melissa Tatum, Considerations in Implementing VAWA's Special Domestic Violence Criminal Jurisdiction and TLOA's Enhanced Sentencing Authority (2014), http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf.
48. Burt, *supra* note 23.