Criminal Law & Procedure

Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?

*By Tom Gede**

Ever since the U.S. Supreme Court issued its 1978 decision in *Oliphant v. Suquamish Tribe*,[1] holding that Indian tribes do not have inherent criminal jurisdiction over non-Indians, there has been a high level of demand that Congress overturn the decision through legislation. Scholarly literature, policy studies and political analysis have heavily criticized the decision[2] and many have suggested an "*Oliphant*-fix," along the lines of the 1991 "*Duro*-fix," in which Congress amended the 1968 Indian Civil Rights Act ("ICRA")[3] to recognize the inherent authority of tribes to prosecute and punish non-member Indians.[4] An "*Oliphant*-fix" would extend that recognition of authority, in full or in part, over non-Indians. *Oliphant* has long been considered by tribes and tribal advocates as a wound in the side of federal Indian law and policy; it has been described as "the most serious judicial onslaught on tribal territorial sovereignty."[5] Scant literature has been published supporting *Oliphant*, yet there has been little movement in Congress, outside of the Senate Indian Affairs Committee, to further a full or partial repeal. However, the first significant move came with the Senate's April 26, 2012 passage of the reauthorization of the Violence Against Women Act ("VAWA") containing a partial *Oliphant* repeal. The VAWA reauthorization bill, S. 1925, with its incorporated SAVE Native Women Act, S. 1763, included in Title IX a provision, like the *Duro*-fix, recognizing *inherent* authority of tribes to prosecute and punish certain domestic violence crimes committed by non-Indians against Indian women in Indian country.

Along with other controversial provisions of the Senate version of S. 1925, the partial *Oliphant*-fix in S. 1925 was rejected by the House of Representatives, which offered its own version of the VAWA re-authorization in H.R. 4970. Rarely has federal legislation involving tribal jurisdiction garnered the kind of front-page publicity that arose when the House rejected the tribal special domestic violence jurisdiction in the Senate bill.[6] Contentious debate also arose, mostly aired through the news media, with political and policy objections and counter-objections focusing on, among other topics, whether tribal courts could and should properly try non-Indians for crimes committed in Indian country.[7] Aside from the jurisdictional questions raised, however, others questions persist as to whether there is a significant number of non-Indians responsible for domestic violence and sexual assault crimes against Native women and whether the extension of tribal inherent criminal jurisdiction over non-Indians in these cases will actually make any difference to public safety in Indian country.

This paper examines some of the legal and public policy issues relating to the proposed extension of tribal criminal law jurisdiction over non-Indians for domestic violence, and concludes that while some objections are ill-founded, there are still significant reasons to be concerned that such an extension may raise difficult constitutional issues and serious policy objections. As this paper is written before final action on the VAWA re-authorization bill(s), the discussion here must be read as addressing these topics in the abstract.

Before addressing objections and counter-objections to the proposed *Oliphant*-fix in the Senate VAWA bill, it should be noted the proposal to extend tribal criminal jurisdiction was viewed as an essential means to deal with a major public safety issue occurring in Indian country, as reported in the Senate Report accompanying S. 1925: an especially high level of rape, sexual assault, and domestic violence victimizing American Indian and Native Alaskan women in numbers far out of proportion to the levels of these crimes outside of Indian country.[8] The Senate Report cited studies that "showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their lifetimes,"[9] often, or much of the time, by non-Indian men.[10] Additionally, the Report notes, "on some reservations, Native American women are murdered at a rate more than ten times the national average."[11]

The Senate Report acknowledged the "limited concurrent tribal jurisdiction to investigate, prosecute, convict, and sentence non-Indian persons who assault Indian spouses, intimate partners, or dating partners, or who violate protections orders, in Indian country."[12] Generally speaking, with the exception of where Congress extended state criminal law jurisdiction to Indian country under Public Law 280,[13] only federal and tribal law applies to prosecute and punish those accused of crimes involving Indians in Indian country, and under *Oliphant*, tribal jurisdiction does not reach non-Indians. As a result of these limitations, the bill provided a "partial" *Oliphant*-fix, giving tribes "special domestic-violence criminal jurisdiction" to hold non-Indian offenders accountable, but only for crimes of domestic violence, dating violence, and violations of protection orders that are committed in Indian country. It would cover only those non-Indians with significant ties to the prosecuting tribe, those who reside in the Indian country of the prosecuting tribe, are employed in the Indian country of the prosecuting tribe, or are either the spouse or intimate partner of a member of the prosecuting tribe.[14]

The proposed Senate bill provision also provided that if a term of imprisonment of *any* length is imposed under

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the special domestic-violence criminal jurisdiction, the tribe must provide the defendant with the protections provided by the Tribal Law and Order Act of 2010 ("TLOA"),[15] which (as applicable to prosecutions against member and non-member Indians) amended ICRA to allow a tribe to seek a three-year imprisonment on the condition that the tribe provide the defendant with the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,"[16] and, for indigent defendants, qualified counsel at tribal expense.[17] This incorporation of the TLOA provisions into the special domestic-violence criminal jurisdiction allowed the bill to reflect a higher standard of constitutional protection for non-Indians subject to tribal criminal jurisdiction, at least as to the provision of effective assistance of counsel. Additionally, the proposed Senate bill provided that tribes must afford the non-Indian defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant." What this actually means, however, is the subject of debate, as discussed below.

Among the principal objections to the extension of tribal jurisdiction to non-Indians in this legislation was that it would be unprecedented, was insufficiently studied, is ill-advised and premature. Some of these initial objections were raised in two sets of Minority Views to S. 1925.[18] The objections expressed concern that the easing of restrictions against tribal criminal jurisdiction in the domestic violence context will inevitably lead to easing it in all respects and that tribal courts lack the experience or resources to protect constitutional rights of criminal defendants.[19] Reciting the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*,[20] the views acknowledged that "tribes have historically been regarded as unconstrained by those constitutional provisions [of the Bill of Rights] framed specifically as limitations on federal or state authority," and that tribal governments are not bound by the Constitution's First, Fifth, or Fourteenth Amendments,[21] but only by the statutory analogues to the Bill of Rights in ICRA. The views then noted ICRA can only be enforced in tribal court, "[where] the absence of separation of powers and an independent judiciary in most tribal governments makes them an unsuitable vehicle for ensuring the protection of civil rights."[22] The tribal issues portion of the principal Minority Views (which includes Senator Grassley) suggested that greater federal resources be dedicated to the problem,[23] while the separate Minority Views (which do not include Senator Grassley) suggested that states could pick up the jurisdiction for these crimes.[24] The views also discuss impediments to justice as the result of sovereign immunity enjoyed by tribal governments and assert that the tribal court systems lack civil-rights guarantees, which has resulted in failure to provide due process.[25] Read objectively, these views generally assert policy objections, apart from the facial constitutionality of Congress easing the restrictions of *Oliphant*.

Offering a counter to arguments that the tribal jurisdiction provisions would be unconstitutional, a coalition of law professors sent a letter ("Law Professors' Letter") to the leadership of the Senate Judiciary Committee shortly before the passage of the bill.[26] The Law Professors' Letter quoted *Oliphant* for the proposition that Congress has the authority to permit tribes to prosecute non-Indians. The *Oliphant* Court stated the proposition in the negative, namely that tribal governments do *not* have the authority to prosecute non-Indian criminals "*except* in a manner acceptable to Congress."[27] The law professors also relied on the Supreme Court's 2004 decision in *United States v. Lara*[28] that upheld the *Duro*-fix, the congressional recognition of the inherent authority of tribal governments to prosecute nonmember Indians. In passing the *Duro*-fix, the professors noted, Congress did not delegate federal powers to the tribal governments but recited that it was a recognition of pre-existing inherent powers. Importantly, *Lara* stands for the authority of Congress to expand tribal criminal jurisdiction by easing or "relaxing" the restrictions earlier placed on tribal criminal jurisdiction by the political branches, strictly as a matter of common law.[29] While this paper does not permit an extended discussion of *Lara*, it is now reasonably settled that, at least as to non-member Indians, nothing in the Constitution prevents Congress from relaxing the restrictions on tribal criminal jurisdiction. Even Justice Thomas, concurring in the judgment, maintained that the Court's precedents on these matters are "classic federal-common-law decisions."[30] Additionally, the law professors noted that 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," and "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."[31]

As the Law Professors' Letter was prepared before the Senate passage of the bill, it only indirectly countered some of the arguments presented in the Minority Views. The two sets of views might be summed up as follows: where the law professors are confident the tribal governments can provide the requisite constitutional protections, the Senators are not so trusting. As is usually the case in such matters, there is a little bit of truth on all sides. And there is no certainty that the Supreme Court will disapprove of *Oliphant* at some point in the future, any more than there is certainty that *Lara*'s "relaxing"-of-restrictions formula will be extended without hesitation to tribal criminal jurisdiction as to non-Indians. The core of the dispute may not center on the ability of Congress to relax restrictions on tribal inherent jurisdiction, or even on the prudential objections raised by the Senators in April 2012. The real uncertainties relate to the assertion, presented by the law professors, that ICRA requires tribal governments "to provide all rights accorded to defendants in state and federal court," and that federal courts can offer a full review of those rights. *Lara* did not answer these questions, as the defendant there was not challenging his tribal conviction on any of these grounds, but only his subsequent federal prosecution on double-jeopardy grounds. And the *Duro* Court noted: "[ICRA] provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts."[32] While the Senate VAWA re-authorization incorporates the TLOA's provision of effective assistance of counsel, it cannot answer

whether all remaining ICRA rights are "equivalent" to Fourth Amendment and other Fifth Amendment guarantees. Indeed, one commentator has noted: "[T]o mandate the application of the Bill of Rights to tribal-court prosecutions would seriously interfere with tribal culture and the values incorporated in tribal laws. Imposing such a requirement would, therefore, interfere with tribal self-government by transforming these courts from 'tribal' institutions into American ones."[33]

Following the passage of the Senate version of the VAWA re-authorization, the Congressional Research Service ("CRS") weighed in on the special domestic-violence criminal jurisdiction recognized for tribes.[34] The research paper advised Congress that if inherent sovereignty is recognized under the special domestic-violence criminal jurisdiction and only statutory ICRA protections are triggered, then non-Indian criminal defendants may be subjected to double jeopardy for the same act, may not be able to exercise fully their right to counsel, may have no right to prosecution by a grand jury indictment, may not have access to a representative jury of their peers, and may have limited federal appellate review of their cases.[35] Notably, the CRS report focuses on the unclear language in the bill that tribes must afford the non-Indian defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant." The CRS authors suggest two plausible interpretations: on the one hand, it would "effectively" provide the same constitutional rights guaranteed in state court criminal proceedings, or on the other hand, only those statutory rights outlined in ICRA and the TLOA.[36] In the first alternative, the tribe would have to provide those rights that would transform the court from a "tribal" institution into what Professor Alex Skibine calls an "American" one. If one assumes the first interpretation, it also implies a congressional delegation of authority, notwithstanding the language purporting to recognize "inherent" tribal authority over the non-Indians. Similarly, if one assumes the second interpretation, it appears the rights would be part of the recognition of "inherent" authority. The only other possible view is that the enumerated ICRA rights are precisely coterminous with the applicable Bill of Rights protections as interpreted by the federal courts, which defies reason and is offensive, if not fatal, to tribal sovereignty. The CRS report notes that the distinction here has constitutional consequences, as delegated rights will require adherence to the constitutional rulings of the federal courts; inherent authority over the non-Indians, on the other hand, will leave non-Indians subject to tribal authority without the same full set of Bill of Rights protections. With the exception of the TLOA-incorporated rights to counsel, the statutory ICRA protections are left to tribal courts to develop and apply.

Where the CRS report succeeds in laying out the issues, it fails to find anything particularly earth-shaking about the application of inherent tribal criminal law jurisdiction. That a defendant would be subject to double jeopardy if the tribe exercises "inherent" jurisdiction is unremarkable, as that is the holding of *Lara* in any case. When multiple sovereigns seize upon a criminal suspect for prosecution, the issues of which state goes first and what the consequences may be are generally routine questions that are regularly worked out by those sovereigns. Additionally, the Senate VAWA provisions already accord a Sixth Amendment right to counsel, as well as the Fifth Amendment-based right to counsel if the defendant cannot afford one, if the possibility of imprisonment is present. In such a case, there is less distinction between a delegated and inherent application of tribal criminal jurisdiction. More significantly, the CRS report looks to certain other guarantees, including the indictment-by-grand-jury requirement, noting that ICRA does not contain a statutory requirement for a grand jury indictment for felonies. If it is a delegated power, the grand-jury requirement would apply in tribal prosecutions. Similarly, under an inherent jurisdiction theory, there is no requirement that a tribe provide the non-Indian defendant a jury of his peers; the CRS report acknowledges the irony that Indians themselves hauled into federal court often fail to have this right respected. Finally, tribal-court convictions based on the tribe's exercise of an inherent power are not reviewable in federal court. Such judgments are subject only to habeas corpus review[37] after exhaustion in tribal forums, and "protections under ICRA will primarily be construed and enforced in tribal forums. Important civil rights such as equal protection and due process will be construed by tribal courts, which may not be bound by the U.S. Constitution."[38] Referring to this "gap," the CRS report authors suggest that Congress may want to reconsider using habeas as the sole form of review if tribal criminal jurisdiction is extended over non-Indians, as "[a]uthorizing the same federal appellate review as is received in federal courts could close this gap."[39] What this really suggests is a solution based on a delegation of authority to the tribal court over non-Indians; relying solely on the inherent authority of tribes apparently leaves dangling too many constitutional threads. While it is offensive to tribal sovereignty, a delegation theory as to prosecuting and punishing non-Indians may be tighter and more defensible in an uncertain Supreme Court, and, as importantly, it would effectively allow tribal prosecutors and courts to deal locally and immediately with suspected non-Indian rapists, domestic violence offenders, and batterers.

Among the unanswered questions posed by a congressional attempt to "relax" the restrictions on tribal inherent criminal authority over non-Indians is whether it might violate the principle of original, and continuing, consent of the governed. This issue came notably to the forefront in the *Lara* opinion and has generated commentary.[40] Whether the Court would re-affirm *Lara* in the next tough case is an open question. Of the Justices remaining on the Court, several did not join in the majority opinion, including Justice Kennedy, who concurred in the judgment, and Justice Scalia, who dissented. The latter two found, from different perspectives, constitutional implications in the notion of Congress extending tribal criminal jurisdiction to non-member Indians, with Justice Scalia maintaining that the congressional act could only be a delegation of federal authority.[41] Justice Kennedy presented the "consent of the governed" argument that is, to this day, not cleanly resolved by the case law or the scholarly literature:

> To hold that Congress can subject [the defendant], within our domestic borders, to a sovereignty outside

> the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.[42]

In objecting to the "relaxing restrictions" language used by the *Lara* majority, Justice Kennedy complains that "it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject."[43] In reacting to the majority's declaration that due process and equal protection claims are still "reserved" for a criminal defendant, Justice Kennedy states that this statement "ignores the elementary principle that the constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted. . . . The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights."[44] Professor Matthew Fletcher argues that Justice Kennedy postulates a "literal consent," to be contrasted with a "hypothetical consent," where it can be asked "whether a reasonable person subjected to government control would consent to such control,"[45] as in certain regulatory or civil law contexts. In the criminal law context, however, Justice Kennedy addressed a fundamental difference. In the majority opinion in *Duro*, he noted, "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[46] While Congress in the *Duro*-fix readjusted, or un-did, that "surrender" of power, it has to be asked whether a majority of the Court would agree with Justice Kennedy now, as it did in *Duro* (as to a non-member Indian), that the consent of a non-Indian, *in the criminal law context*, is central to whether he or she can be subject "to the authority of an extraconstitutional sovereign to which [he or she] had not previously been subject."[47]

Of course, the special domestic-violence criminal jurisdiction for tribes in the Senate VAWA re-authorization is restricted only to those non-Indians with significant ties to the prosecuting tribe, those who reside in the Indian country of the prosecuting tribe, are employed in the Indian country of the prosecuting tribe, or are either the spouse or intimate partner of a member of the prosecuting tribe. An argument can be made that this restriction reflects the notion that those non-Indians are deeply familiar with and in many respects already "subject to" the authority of the tribal government—at least in the civil and regulatory context. Perhaps this is the "hypothetical" consent. However, it is unclear whether this kind of consent is legally sufficient to subject someone to the "serious . . . intrusion on personal liberty" inherent in the criminal process by what Justice Kennedy called a "third entity" within the territorial boundaries of the United States.

Finally, there remain questions of due process and equal protection, as applied. The *Lara* majority did not, nor did it need to, reach the questions of whether Lara's due process and equal protection rights were violated.[48] In at least one prominent case, an equal protection argument was rejected, in an application of one tribe's criminal jurisdiction over an Indian of another tribe, the very situation contemplated by the *Duro*-fix. However, it was the Indian's status as an Indian that militated the outcome. In *Means v. Navajo Nation*, Russell Means, a well-known American Indian activist and enrolled member of the Oglala-Sioux Indian Tribe, sought to prevent the Navajo Nation from criminally prosecuting him in Navajo tribal court for an incident that occurred on the Navajo Reservation.[49] The Ninth Circuit noted that Means's equal protection argument "has real force":

> Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution. As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.[50]

However, the court resolved the matter against Means by observing that his status as an Indian is "political rather than racial in nature," citing *Morton v. Mancari*.[51] While *Mancari* goes to the status of an Indian (and in *Means*, an Indian subjected to the criminal process of a tribe not his own), it is of no relevance to a non-Indian. This certainly raises questions as to the viability of an equal protection claim that could be raised by a non-Indian subject to tribal prosecution under the envisioned special domestic-violence criminal jurisdiction. The *Means* court also had a due process challenge before it, but ruled as a facial matter that Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.[52] This conclusion appears to assume that the tribal court's application of ICRA's statutory rights covers the same due process rights protected in state and federal courts. Indeed, how tribal criminal trial courts and appellate courts may interpret due process rights inherent in ICRA, in contrast to how they are interpreted by state and federal courts, is not entirely clear, any more than it is as to search-and-seizure law, the right against self-incrimination, speedy-trial rights, compulsory process for obtaining witnesses, the confrontation right, and others rights enumerated in ICRA. As there is no federal appellate right of review as to an allegation of a violation of any one of these rights in tribal court—only a habeas remedy—there is no guarantee that the protections will be consistently applied or be consistent with federal constitutional law as interpreted by the federal courts.

As a policy matter, Congress must consider whether the "relaxing" of restrictions on inherent tribal criminal jurisdiction

over non-Indians is warranted, given that it would subject non-Indian citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject, and where the customary guarantees of federal constitutional protections may be questioned. Unlike the *Duro*-fix, which related to non-member Indians, a full or partial *Oliphant*-fix that relies on reaffirming inherent tribal criminal jurisdiction will bring significant constitutional and prudential questions that will likely have to be tested at the highest levels. An *Oliphant*-fix that grants federal delegated authority to tribal governments and includes federal appellate review likely will be more palatable to non-Indians and to a Supreme Court that looks to constitutional structure guarantees, among others, but does nothing to respect tribal sovereignty. The real question ought to be what instrument most effectively and expeditiously permits the local prosecution and punishment of domestic violence and sexual assault and other crimes committed by non-Indians in Indian country.

Endnotes

1 435 U.S. 191 (1978).

2 *See, e.g.,* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 34-39 (1999); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 609-613 (2010); Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. Rev. 553, 556-557, esp. n.18 (2009); Troy A. Eid, *Beyond* Oliphant*: Strengthening Criminal Justice in Indian Country*, 54 APR Fed. Law. 40, 44 (2007); Matthew L.M. Fletcher, *Tribal Consent*, 8 Stan. J. Civ. Rts. & Civ. Liberties 45, 100 (2012).

3 25 U.S.C. 1301-1303.

4 Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893; Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301).

5 Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 Kan. J.L. & Pub. Pol'y 59, 62 (Fall 2003).

6 Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. Times, May 22, 2012, at A1.

7 *See, e.g.,* David B. Muhlhausen & Christina Villegas, *The Violence Against Women Act: Reauthorization Fundamentally Flawed,* Heritage Foundation Backgrounder, No. 2673 (Mar. 28, 2012); Rob Capriccioso, *More Conservatives Criticize Tribal Courts; White House Rebuts*, Indian Country Today, Apr. 26, 2012.

8 S. Rep. No. 153, 112th Cong., 2d Sess. 7 (2012).

9 *Id.* (citations omitted).

10 *Id.* at 9.

11 *Id.* at 8.

12 *Id.* at 9.

13 Pub. L. 83-280, Aug. 15, 1953, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1326 (notably the six "mandatory" states, including, with exceptions for certain tribes, California, Oregon, Minnesota, Wisconsin, Nebraska, and Alaska; and "optional" states that elected to apply state jurisdiction in Indian country, notably Washington, Florida, Idaho, and others, before the1968 amendments to ICRA required tribal consent).

14 S. Rep. No. 153, 112th Cong., 2d Sess. 7 (2012).

15 Tribal Law and Order Act of 2010, Pub. L. 111–211, 124 Stat. 2258 (July 29, 2010) (amending, *inter alia*, 25 U.S.C. 1302).

16 25 U.S.C. § 1302(c)(1).

17 *Id.* § 1302(c)(2).

18 S. Rep. No. 112-153, at 36-39 (minority views From Senators Grassley, Hatch, Kyl, and Cornyn); *id.* at 48-52 (separate minority views from Senators Kyl, Hatch, Sessions, and Coburn).

19 *Id.* at 38.

20 436 U.S. 49, 71 (1978).

21 S. Rep. No. 112-153, at 44 (minority views).

22 *Id.* at 49.

23 *Id.* at 38.

24 *Id.* at 52.

25 *Id.* at 49-50.

26 Letter from Kevin Washburn, Dean and Professor of Law, University of New Mexico School of Law, et al. to Sen. Patrick Leahy et al., Constitutionality of Tribal Government Provisions in VAWA Reauthorization (Apr. 21, 2012) [hereinafter Law Professors' Letter].

27 *Id.* at 2 (emphasis added) (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 204 (1978)).

28 541 U.S. 193 (2004).

29 Law Professors' Letter, *supra* note 26, at 3.

30 United States v. Lara, 541 U.S. 193, 221 (2004) (Thomas, J., concurring in the judgment).

31 Law Professors' Letter, *supra* note 26, at 5.

32 Duro v. Reina, 495 U.S. 676, 693 (1990).

33 Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L. Rev. 767, 801 (1993).

34 *See* Jane M. Smith & Richard M. Thompson II, Cong. Research Serv., Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act (May 15, 2012).

35 *Id.* at 7, 8-14.

36 *Id.* at 4.

37 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978).

38 Smith & Thompson, *supra* note 34, at 15.

39 *Id.*

40 *See, e.g.*, Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973, 991 (2010); Matthew L.M. Fletcher, *Tribal Consent*, 8 Stan. J. Civ. Rts. & Civ. Liberties 45 (2012).

41 United States v. Lara, 541 U.S. 193, 227 (2004) (Souter, J., dissenting).

42 *Id.* at 212 (Kennedy, J., concurring in the judgment) (citations omitted).

43 *Id.* at 213.

44 *Id.*

45 Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, *supra* note 40, at 991.

46 Duro v. Reina, 495 U.S. 676, 693 (1990).

47 *Lara*, 541 U.S. at 213.

48 *Id.* at 209.

49 Means v. Navajo Nation, 432 F.3d 924 (2005) (resubmitted after U.S. Supreme Court decision in *Lara*).

50 *Id.* at 932 (citations omitted).

51 *Id.* (citing Morton v. Mancari, 417 U.S. 535, 553 (1974)).

52 *Id.* at 935.