Tribal Criminal Jurisdiction over Non-Indians in S. 47 and H.R. 11, the Violence Against Women Reauthorization Act of 2013

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Summary

Domestic and dating violence in Indian country are reportedly at epidemic proportions. However, there is a practical jurisdictional issue when the violence involves a non-Indian perpetrator and an Indian victim. Indian tribes only have criminal jurisdiction over crimes involving Indian perpetrators and victims within their jurisdictions. Most states only have jurisdiction over crimes involving a non-Indian perpetrator and a non-Indian victim within Indian country located in the state. Although the federal government has jurisdiction over crime committed by non-Indians against Indians in Indian country, offenses such as domestic and dating violence tend to be prosecuted with less frequency than other crimes. This creates a practical jurisdictional problem.

S. 47 and H.R. 11, the Violence Against Women Reauthorization Act, would recognize and affirm participating tribes' inherent sovereign authority to exercise special domestic violence jurisdiction over domestic violence involving non-Indian perpetrators and Indian victims occurring within the tribe's jurisdiction. It is not clear whether Congress has the authority to restore the tribes' inherent sovereignty over nonmembers, or whether such authority would have to be a delegation of federal authority. The tribal jurisdiction provisions of S. 47 and H.R. 11 are nearly identical to the tribal jurisdiction provisions of S. 1925, which passed the Senate in the 112th Congress.

In a series of cases, the Supreme Court outlined the contours of tribal criminal jurisdiction. In *United States v. Wheeler*, the Court held that tribes have inherent sovereign authority to try their own members. In *Oliphant v. Suquamish Indian Tribe*, the Court held the tribes had lost inherent sovereignty to try non-Indians. The Court in *Duro v. Reina* determined that the tribes had also lost the inherent authority to try nonmember Indians. In response to *Duro*, Congress passed an amendment to the Indian Civil Rights Act that recognized the inherent tribal power (not federal delegated power) to try nonmember Indians. S. 47 and H.R. 11 would apparently supersede the *Oliphant* ruling and "recognize and affirm the inherent power" of the tribes to try non-Indians for domestic violence offenses.

The Supreme Court stated in *United States v. Lara* that Congress has authority to relax the restrictions on a tribe's inherent sovereignty to allow it to exercise inherent authority to try nonmember Indians. However, given changes on the Court, and, as Justice Thomas stated, the "schizophrenic" nature of Indian policy and the confused state of Indian law, it is not clear that today's Supreme Court would hold that Congress has authority to expand the tribes' inherent sovereignty. It may be that Congress can only delegate federal power to the tribes to try non-Indians.

The dichotomy between delegated and inherent power of tribes has important constitutional implications. If Congress is deemed to delegate its own power to the tribes to prosecute crimes, all the protections accorded criminal defendants in the Bill of Rights will apply. If, on the other hand, Congress is permitted to recognize the tribes' inherent sovereignty, criminal defendants would have to rely on statutory protections under the Indian Civil Rights Act or tribal law. Although the protections found in these statutory and constitutional sources are similar, there are several important distinctions between them.

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Introduction

American Indians in general are victims of violent crimes at a rate much higher than the general population.[1] This trend carries over to domestic violence: American Indian women are victims of domestic and dating violence at more than twice the rate of non-Indian women.[2] It is reported that most of this violence involves an offender of a different race.[3] This fact creates a jurisdictional problem because tribal courts do not have criminal jurisdiction over crimes committed within the tribe's jurisdiction by non-Indians.[4] States generally do not have jurisdiction over such crimes either.[5] Although such crimes are subject to federal jurisdiction, frequently overburdened federal prosecutors are not able to prosecute them.[6] Thus, it appears that American Indian women are left with a higher risk of domestic violence and less protection than non-Indian women.

In the 112th Congress, the Senate passed S. 1925, which included proposed amendments to the Violence Against Women Act (VAWA) aimed at remedying this practical jurisdictional void. S. 47 and H.R. 11, the Violence Against Women Reauthorization Act[7] (VAWA Reauthorization) are nearly identical to S. 1925 and have been introduced in the 113th Congress. Section IX of these bills would, among other things, expand the inherent jurisdiction of tribal courts to include non-Indian-on-Indian crimes of domestic and dating violence committed within the tribes' jurisdictions.

Opponents of the proposed amendments in S. 1925 were concerned that, under current law, tribal courts are not required to provide the identical constitutional protections to criminal defendants as state and federal courts.[8] The VAWA Reauthorization would provide that courts exercising special domestic violence criminal jurisdiction shall provide to defendants "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."[9] As discussed below, it is not clear what protections the tribes must provide to exercise this power.

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[1] STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, A BJS STATISTICAL PROFILE, 1992-2002, at iv (2004) (hereinafter BJS Statistical Profile), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf; Fact Sheet: Violence Against Women in Indian Country, National Congress of American Indians 1, (hereinafter Fact Sheet), available at http://www.ncai.org/ncai/advocacy/hr/docs/dv-fact_sheet.pdf, citing U.S. Department of Justice, Office of Justice Programs, Census of State and Local Law Enforcement Agencies, 2000–Tribal Law Enforcement, 2000 (January 2003, NCH 197936).

[2] BJS Statistical Profile, *supra* note 1, at v; Fact Sheet, *supra* note 1, at 1 (citing Violent Victimization and Race, 1993-98 NCJ176354), available at http://www.ojp.usdoj.gov/bjs/abstract/aic.htm. These statistics are for Indian women in general and are not specific to areas subject to tribal jurisdiction. In fact, accurate data on violence against women in Indian country are difficult to find because data about such violence are not systematically collected by Indian tribes and there is a problem of victims underreporting such crimes. Fact Sheet at 1.

[3] BJS Statistical Profile, *supra* note 1, at 9; Fact Sheet, *supra* note 1, at 2.

[4] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[5] United States v. John, 437 U.S. 634 (1978) (Major Crimes Act preempts state jurisdiction); Williams v. United States, 327 U.S. 711, 714 (1946) (federal jurisdiction over interracial crimes is exclusive of state jurisdiction).

[6] S.Rept. 112-153, at 9 (2012).

[7] S. 47, H.R. 11, 113th Cong. (1st Sess. 2013).

[8] S.Rept. 112-153, at 48. *See* Required Rights for Non-Indian Defendants, *infra* p. 4.

[9] S. 47, H.R. 11, §904 (§204(d)(4)).

Criminal Jurisdiction in Indian Country

Criminal jurisdiction in Indian country is complex. Indian country is defined by 18 U.S.C. Section 1151 as Indian reservations, dependent Indian communities, and allotments. Depending on the crime and the identities of the victim and the perpetrator, there can be exclusive tribal jurisdiction, exclusive federal jurisdiction, concurrent tribal and federal jurisdiction, or exclusive state jurisdiction. The following chart sets forth which governments have jurisdiction over crimes in Indian country.[10]

Table 1. Chart of Criminal Jurisdiction in Indian Country by Parties and Subject Matter

Crime by Parties	Jurisdiction	Statutory Authority
Crimes by Indians Against Indians		
a) "Major" crimes	Federal or Tribal (concurrent)	18 U.S.C. §1153
b) Other crimes	Tribal (exclusive)	
Crimes by Indians Against Non-Indians		
a) "Major" crimes	Federal or Tribal (concurrent)	18 U.S.C. §1153
b) Other crimes	Federal or Tribal (concurrent)	18 U.S.C. §1152
Crimes by Indians without Victims	Tribal (exclusive)	
Crimes by Non-Indians Against Indians	Federal (exclusive)	18 U.S.C. §1152
Crimes by Non-Indians Against Non-Indians	State (exclusive)	
Crimes by Non-Indians without Victims	State (exclusive)	

Source: Derived from U.S. ATTORNEY'S MANUAL, CRIMINAL RESOURCE MANUAL 689, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

Note: This chart does not apply to Indian country over which the state has taken jurisdiction pursuant to P.L. 280, 18 U.S.C. §1162.

In cases of dating and domestic violence where the offender is non-Indian and the victim is Indian, which appear to constitute the greatest percentage of domestic and dating violence involving Indians,[11] tribal and most state courts do not have jurisdiction. Federal jurisdiction is exclusive, unless a state has criminal jurisdiction under P.L. 280. As a practical matter, there is a jurisdictional void for domestic and dating violence between non-Indians and Indians because federal prosecutors frequently cannot make such crimes a priority for prosecution on account of the demands of their workload and the difficulty of investigating such crimes, which usually

[10] P.L. 280 gave the following states criminal jurisdiction over all crimes in Indian country: California; Minnesota; Nebraska; Oregon; Wisconsin; and Alaska. 18 U.S.C. §1162. Florida, Idaho, Montana, Nevada and Washington assumed varied jurisdiction over Indian country in their states under Sections 6 and 7 of P.L. 280. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 970 n.10 (1975).

[11] Fact Sheet, *supra* note 1, at 1.

occur far away from federal investigators.[12] Therefore, it is argued that domestic violence between non-Indian perpetrators and Indian victims frequently goes unprosecuted and unpunished, and the victims of such violence go unprotected.

Special Domestic Violence Criminal Jurisdiction Under VAWA Reauthorization

To address the jurisdictional issue concerning domestic and dating violence involving non-Indians and Indians, the VAWA Reauthorization would give tribal courts jurisdiction over domestic and dating violence between non-Indians and Indians that occur within the tribes' jurisdiction, provided there are sufficient ties to the Indian tribes. Special domestic violence criminal jurisdiction would be limited to "act[s] of domestic or dating violence that occur[] in the Indian country of the participating tribe" and violations of protection orders.[13] The VAWA Reauthorization does not purport to delegate federal authority to the tribes. Rather, it would declare that the tribes' "powers of self-government ... include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[14]

Limitations on the Tribes' Special Domestic Violence Criminal Jurisdiction

The Senate Report on S. 1925 explains that this special domestic violence criminal jurisdiction would apply "in a very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe."[15] In an effort to ensure that this is the case, the VAWA Reauthorization, like S. 1925, provides that Indian tribes may not exercise special domestic violence jurisdiction if both the victim and the defendant are non-Indians or the defendant lacks sufficient ties to the Indian tribe.[16] A tribe may exercise special domestic violence jurisdiction only if the defendant lives in the Indian country of the tribe; is employed in the Indian country of the tribe; or is a spouse or intimate partner of a member of the tribe or an Indian residing within the tribe's territory.[17] Therefore, the tribes' special domestic violence criminal jurisdiction would be limited to domestic and dating violence occurring within a tribe's jurisdiction by a non-Indian against an Indian when the non-Indian lives or works in the tribe's Indian country or the non-Indian is married to, or in an intimate relationship with, a tribal member or other Indian residing within the tribe's jurisdiction.

[12] Fact Sheet, *supra* note 1 at 3; S. Rpt., *supra* note 6, at 9 (explaining that the distance of U.S. Attorneys from the location of domestic violence in Indian country, coupled with a workload, that includes "addressing large-scale drug trafficking, organized crime, and terrorism cases" results in non-Indian on Indian domestic and dating violent cases going unprosecuted).

[13] S. 47, H.R. 11, §906 (§204(c)).

[14] S. 47, H.R. 11, §904 (§204(b)).

[15] S.Rept. 112-153 at 10.

[16] S. 47, H.R. 11, §904 (§204(b)(4)).

[17] S. 47, H.R. 11, §904 (§204(b)(4)(B)).

Required Rights for Non-Indian Defendants

Additionally, the VAWA Reauthorization would purport to give tribes criminal jurisdiction over domestic violence committed by non-Indians if the tribes provide to the 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 special domestic violence criminal jurisdiction over the defendant."[18] The meaning of this phrase is not clear, but there are two plausible interpretations.

The Senate Committee on the Judiciary proposed in the VAWA Reauthorization Report that this provision would require tribes to "to protect effectively the same Constitutional rights as guaranteed in State court criminal proceedings."[19] Stepping back for a moment, as originally conceived, the federal Bill of Rights did not apply against the states.[20] It was not until passage of the Fourteenth Amendment, and subsequent incorporation by the Supreme Court, that protections in the Bill of Rights were applied against the states. To determine which rights should be "incorporated," the Court asks whether the right is "implicit in the concept of ordered liberty"[21] or required to ensure the "fundamental fairness essential to the very concept of justice."[22] Under incorporation, all criminal procedure safeguards contained in the Bill of Rights have been applied against the states except for the grand jury clause of the Fifth Amendment.[23] It is plausible that the above phrase from the VAWA Reauthorization was intended to encompass this same set of rights. If so, Indian tribes would be required to guarantee all the rights contained in the Bill of Rights except for a grand jury. This would mean the addition of several protections not currently accorded all defendants in tribal court prosecutions.

Alternatively, this "recognize and affirm" provision may merely require tribes to provide those protections that are currently available under the Indian Civil Rights Act and the Tribal Law and Order Act. The Senate Report states that these statutes "protect individual liberties and constrain the power of tribal governments in much the same ways that the Constitution limits the powers of Federal and State governments." This could mean that all the rights in these two statutes are deemed sufficient to permit Congress to "recognize and affirm the inherent power" of the tribes to exercise criminal jurisdiction over non-Indians. As discussed below, this could hinder several protections accorded under the U.S. Constitution as applied against the states.

Inherent Tribal Sovereignty Versus Delegated Federal Authority

As mentioned above, the VAWA Reauthorization would extend the tribes' inherent sovereignty to include criminal jurisdiction over non-Indians committing domestic or dating violence against Indians. "The powers of Indian tribes are, in general, inherent powers of a limited sovereignty

[18] S. 47, H.R. 11, §904.

[19] S.Rept. 112-153, at 10 (2012).

[20] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[21] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[22] Lisenba v. California, 314 U.S. 219, 235 (1941).

[23] McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.13 (2010).

which has never been extinguished. Before the coming of the Europeans, the tribes were self-governing sovereign political communities."[24] The Supreme Court has recognized that "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory."[25] Although tribes once enjoyed full sovereignty, since their incorporation into the United States, aspects of their full sovereignty have been restricted or lost, including the authority to punish non-Indians.[26]

The Supreme Court has stated, however, that Congress has authority to relax restrictions on the tribes' inherent sovereignty. For example, in *Duro v. Reina*, the Supreme Court held that Indian tribes had lost the inherent authority to try nonmember Indians.[27] The Court wrote that prosecution of a nonmember Indian was "inconsistent with the Tribe's dependent status and could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution."[28] Congress passed an amendment to the Indian Civil Rights Act to provide tribes with jurisdiction to try nonmember Indians. However, rather than delegating federal authority to the tribes, as the Supreme Court suggested, Congress "recognize[d] and affirm[ed] in each tribe the inherent tribal power (not delegated federal power) to prosecute nonmember Indians."[29] In *United States v. Lara*, the Court considered whether a nonmember Indian defendant who was tried and convicted in tribal court could be tried for the same conduct in federal court or whether the double jeopardy clause prohibited the federal prosecution.[30] Based on the language of the statute and its legislative history, which indicated congressional intent to affirm and acknowledge the tribes' inherent authority, the Court concluded the tribal court exercised its own non-federal authority in trying the defendant.[31] Because the tribe and the federal government were exercising different authorities in prosecuting the defendant, the double jeopardy clause did not apply.[32] The majority also wrote broadly that the Constitution authorized Congress to relax the restrictions on the tribes' inherent authority to allow tribes to try nonmember Indians.[33]

The VAWA Reauthorization would purport to exercise this congressional authority and expand the inherent sovereign authority of tribes to include the authority to try defendants involved in non-Indian on Indian domestic and dating violence. It is unclear whether the Supreme Court would find that Congress has this authority.

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court implicitly recognized that prior to "submitting to the overriding sovereignty of the United States" Indian tribes possessed the power to try non-Indians.[34] The power to try non-Indians, therefore, is an aspect of inherent sovereignty which the tribes lost, like the power to try nonmember Indians. In *Lara*, the majority opinion

[24] United States v. Wheeler, 435 U.S. 313, 322 (1978) (internal quotation marks and citations omitted).

[25] Duro v. Reina, 495 U.S. 676, 685 (1990).

[26] *Oliphant*, 435 U.S. 191, 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

[27] *Duro*, 495 U.S. at 679.

[28] *Id.* at 686.

[29] United States v. Lara, 541 U.S. 193, 199 (2004) (internal quotation marks omitted).

[30] *Id.* at 196.

[31] *Id.* at 199.

[32] *Id.* at 210.

[33] *Id.*

[34] *Oliphant*, 435 U.S. at 210.

concluded that the Constitution authorized Congress to relax the restrictions on tribes' inherent authority to try nonmember Indians.[35] It could be argued that because nonmember Indians and non-Indians are both outsiders to the tribe, there appears to be no reason to distinguish Congress's authority to relax restrictions on the tribes' inherent sovereignty to try nonmember Indians from its authority to relax restrictions on the tribes' authority to try non-Indians. In other words, if the tribe can exercise inherent authority over nonmember Indians, it appears it would be able to exercise inherent authority over non-Indians. However, it is not clear whether the Court would adopt that reasoning.

In his concurrence in *Lara*, Justice Kennedy took issue with the majority's statement that the Constitution authorized Congress to relax the restrictions on the tribes' inherent authority and subject nonmembers to inherent tribal criminal authority.[36] He questioned whether Congress has authority to subject citizens to a sovereign outside the structure of the Constitution.[37] The Constitution is premised on consent of the governed, he wrote.[38] The Constitution established a system of two sovereigns—the nation and the state—to which the citizen owes duties and against which the citizen has rights.[39] Justice Kennedy wrote that by amending the Indian Civil Rights Act to extend inherent tribal criminal jurisdiction over nonmember Indians, "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."[40] Justice Kennedy, therefore, seems to believe that Congress may not have authority to subject nonmember citizens to the criminal jurisdiction of tribes, extra-constitutional sovereigns, to which they have not consented.

Further, the Supreme Court considered the issue of tribal court civil jurisdiction over nonmembers in a case that, although it did not concern criminal jurisdiction, may be informative with regard to jurisdiction generally in tribal courts. In *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[41] decided four years after *Lara*, the majority held that the tribal court did not have civil jurisdiction over a non-Indian bank that had allegedly discriminated against a tribal member in connection with the sale of a parcel of non-Indian land on the reservation. The majority opinion, which cites Justice Kennedy's concurrence, notes that an exercise of tribal court jurisdiction must be based on the consent of the nonmember:

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." *United States v. Lara*, ... (Kennedy, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional courts in a number of significant respects." And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws

[35] *Lara*, 541 U.S. at 200.

[36] *Id.*

[37] *Id.* at 212.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).

> and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.[42]

Although the Supreme Court stated in *Lara* that Congress has authority to relax restrictions on the tribes' inherent authority so that they may try nonmember Indians, it is not clear whether today's Court would reach the same result. Of the five Justices signing on to that statement, only Justice Breyer and Ginsburg are on the Court today.[43] Justice Kennedy expressed doubt about whether Congress had that authority.[44] Justice Thomas questioned whether tribes had inherent sovereignty at all and stated that he believed tribes did not have inherent authority to try their own members, but that under existing precedent, he believed Congress had the authority to change the contours of the tribes' inherent sovereignty.[45] Justice Scalia, in signing on to Justice Souter's dissent, apparently believed Congress did not have authority to expand the inherent sovereignty of Indian tribes to try nonmember Indians.[46]

Indian law is full of contradictions and confusion, making it difficult to predict how the Court will decide. As Justice Thomas wrote in his concurrence in *Lara*, "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."[47] Therefore, it is not clear whether the Court considering a tribal court conviction under the VAWA Reauthorization would find that Congress has the authority to expand the inherent sovereignty of tribes to try non-Indian defendants.

If Congress does not have authority to subject citizens to inherent tribal criminal authority, it is possible that the courts would uphold tribal authority to try defendants involved in non-Indian on Indian domestic and dating violence as a delegation of federal authority. This is what Justice Souter would have done in *Lara*.[48] He, with Justice Scalia, dissented because they believed that prior precedent referring to the need for Congress to delegate authority to the tribes to try nonmember Indians was binding[49] and that, by virtue of their dependent status, tribes simply cannot exercise inherent authority to try nonmembers.[50] To fulfill Congress's intention to fill the jurisdictional void created by *Duro*, they would have found that Congress delegated federal authority to the tribes to try nonmember Indians.

Implications of Delegated versus Inherent Tribal Sovereignty

The dichotomy between delegated and inherent power of tribes has important constitutional implications. If Congress is deemed to have delegated to the tribes Congress's own power to prosecute crimes, the whole panoply of protections accorded criminal defendants in the Bill of

[42] *Id.* at 337 (other citations omitted).

[43] Justices Breyer and Ginsburg were among the majority.

[44] *Lara*, 541 U.S. at 212. (Kennedy, J., concurring).

[45] *Id.*. at 215 (Thomas, J., concurring).

[46] *Plains Commerce Bank*, 541 U.S. at 231.

[47] *Lara*, 514 at 219 (Thomas, J., concurring).

[48] *Id.* at 231.

[49] *Id.* at 227.

[50] *Id.* at 231.

Rights will apply.[51] If, on the other hand, Congress is permitted to recognize the tribes' inherent sovereignty, so that the tribes are exercising their own powers, the Constitution will not apply.[52] Instead, criminal defendants must rely on statutory protections under the Indian Civil Rights Act or those protected under tribal law. Although the protections found in federal statutory and constitutional sources are similar, there are several important distinctions between them. Most importantly, if inherent sovereignty is recognized and only federal statutory protections are triggered, defendants (1) may be subjected to double jeopardy for the same act; (2) may not be able to exercise fully their right to counsel; (3) may have no right to prosecution by a grand jury indictment; (4) may not have access to a representative jury of their peers; and (5) may have limited federal appellate review of their cases.

Additionally, although the Indian Civil Rights Act (ICRA) covers many of the same protections found in the U.S. Constitution, the same protections are not always given the same meaning. For instance, the terms "due process" and "equal protection" are construed with regard to the "historical, governmental and cultural values of an Indian tribe."[53] As such, these rights may function much differently than they do in federal courts.

Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"[54] In general, the Double Jeopardy clause protects an individual from being subjected twice to the perils of trial for the same offense.[55] The purpose of the Double Jeopardy Clause was best framed by Justice Black in *Green v. United States*:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[56]

There are three broad classes of cases to which the clause applies: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense.[57] To determine if two prosecutions are for the "same offense" (and thus barred by the clause), a court will ask whether the elements of the two crimes are the same.[58] However, even in instances in which two acts constitute the

[51] Duro v. Reina, 495 U.S. 676, 686 (1990) ("Had the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution.").

[52] Talton v. Mayes, 163 U.S. 376 (1896) (holding that Fifth Amendment did not apply to the Cherokee nation); Nevada v. Hicks, 533 U.S. 353, 383 (2001) ("[I]t has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.").

[53] Tom v. Sutton, 533 F.2d 1101, 1105 n.5 (9th Cir. 1976).

[54] U.S. CONST. amend. V.

[55] Green v. United States, 355 U.S. 184, 187 (1957).

[56] *Id.*

[57] United States v. Difrancesco, 449 U.S. 117, 129 (1980).

[58] Brown v. Ohio, 432 U.S. 161, 166 (1977) (applying the *Blockburger* test, which is used to test whether two offenses (continued...)

"same offense" under this elements test, separate prosecutions are not prohibited when different sovereigns exert criminal jurisdiction.

Under this dual sovereignty doctrine, the Supreme Court has ruled that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[59] As such, a defendant may be subjected to two prosecutions for the same offense by two different sovereign governments. This doctrine was extended to the tribal context in *United States v. Wheeler*.[60] There, the Court had to determine if the Double Jeopardy Clause barred the prosecution of an Indian in federal court when he had previously been convicted in tribal court for a lesser included offense arising out of the same incident.[61] This question hinged on whether the tribe's authority to prosecute its own members was inherent or delegated. If it were exercising inherent authority, the tribe would be deemed a sovereign, the dual sovereignty rule would apply, and the Double Jeopardy Clause would not bar a second prosecution for the same offense.[62] However, if the tribe were exercising delegated authority from the federal government, its power would not be sovereign, but merely derivative of Congress's power. Under this approach, the dual sovereignty rule would not apply, and a second prosecution would be barred.[63]

The Court ultimately recognized that Indian tribes may have been divested of some powers of sovereignty, but have retained certain aspects of sovereignty, including criminal jurisdiction over their own members.[64] Because of this dependent status, the Court explained, the tribes' sovereignty "exists only at the sufferance of Congress."[65] Because Congress had been silent as to tribal jurisdiction over their own members, the Court concluded that they retained this power. Additionally, the Court relied on the fact that there was no express grant of criminal jurisdiction to the tribes to try their own members, further supporting the theory that the tribes were exercising pre-existing sovereign powers rather than powers delegated from Congress. By deeming this inherent power, the tribe's prosecution of the defendant did not violate the Double Jeopardy Clause.

There are various double jeopardy implications for accepting either the inherent sovereignty or delegation theories. If tribal jurisdiction is extended to non-Indians under inherent sovereignty, any non-Indian may be subject to multiple prosecutions in tribal and federal courts, as the dual

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(...continued)

are sufficiently distinguishable to allow for cumulative punishment) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[59] United States v. Lanza, 260 U.S. 377, 382 (1922).

[60] United States v. Wheeler, 435 U.S. 313 (1978).

[61] *Wheeler*, 435 U.S. at 314.

[62] *Id.* at 316-17.

[63] *Id.* at 321-22.

[64] *Id.* at 326.

> Moreover, the sovereign power of a tribe to prosecute its members for a tribal offense clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe.... And as we recently held, they cannot try non-members in tribal courts.

Id. (internal citations omitted).

[65] *Id.* at 323.

sovereignty doctrine will preclude application of the Double Jeopardy Clause. Conversely, as observed in *Wheeler*, under the delegation theory, a prosecution by a tribe for a minor offense may bar prosecution by the federal government for a more serious federal crime.[66] If a tribal prosecution were to conclude before a federal case, under the delegation theory, this would preclude an imposition of sentence in the federal prosecution, usually for a more serious punishment under federal law. Further complicating the issue, under the Indian Civil Rights Act, tribes may only sentence a defendant for a maximum prison term of three years for any one offense or nine years total.[67] If that prosecution concludes first, that will be the maximum penalty to which the defendant may be sentenced (as long as both prosecutions would be for the "same offense").

Right to Counsel

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."[68] The primary purpose of the right to counsel is to ensure the defendant is accorded a fair trial.[69] The Sixth Amendment right to counsel is not limitless, but attaches when criminal proceedings have been initiated against the defendant "by way of formal charge, preliminary hearing, indictment, information, or arraignment."[70] The right to counsel under the Sixth Amendment, however, does not cover police interrogations.[71] To protect this fundamental right, the Supreme Court has required that both federal and state governments provide counsel when the defendant cannot afford one. The Court observed that this "noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[72] However, counsel need not be provided at no cost in every case. The court must determine if the case will result in actual imprisonment. If so, the defendant is entitled to counsel.[73] If the criminal offense permits imprisonment, but the judge determines that such an imposition will not occur in that case, the defendant is not provided free counsel.[74]

In tribal prosecutions, the Indian Civil Rights Act requires that Indian tribes may not "deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel

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[66] *Wheeler*, 435 U.S. at 318.

[67] 25 U.S.C. §1302(b).

[68] U.S. Const. amend VI.

[69] *See* Gideon v. Wainright, 372 U.S. 335 (1963).

[70] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[71] Moran v. Burbine, 475 U.S. 412, 432 (1986). The right to counsel during interrogations derives from the Fifth Amendment right against self-incrimination. U.S. CONST. amend V.

[72] U.S. CONST. amend VI; *Gideon*, 372 U.S. at 344.

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.

Id.

[73] Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).

[74] Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

for his defense."[75] Because the United States Constitution does not apply to Indian tribes, the tribal courts are not required under the Sixth Amendment to provide indigent defendants counsel in *all* cases where the defendant faces actual imprisonment.[76] The Tribal Law and Order Act of 2010, however, requires Indian tribes to provide free counsel to defendants for crimes with a sentence of more than one year.[77] Additionally, the VAWA Reauthorization would require tribes to provide counsel to defendants if any term of imprisonment may be imposed.[78] There is, however, some question whether tribes have the resources to provide all defendants counsel when required to do so.[79]

If tribes are unable to provide counsel in some instances, evidence obtained in these cases might be inadmissible in a later federal prosecution. In *United States v. Ant*, for example, the defendant pleaded guilty to manslaughter in tribal court and was sentenced to six months' imprisonment.[80] A federal indictment was then brought against him for the same crime. The prosecution sought to admit into evidence his guilty plea from the tribal prosecution. The U.S. Court of Appeals for the Ninth Circuit ruled that the plea was inadmissible, as it was obtained in violation of the defendant's Sixth Amendment right to counsel.[81] In particular, Ant was not afforded the opportunity to have appointed counsel; did not make a knowing and intelligent waiver of that right; and was not made aware that his guilty plea could be used in a later prosecution. Although the Court left untouched the tribal prosecution, it would not permit evidence obtained in violation of the Constitution into evidence.[82]

In addition to the Sixth Amendment right to counsel, a distinct and separate right to counsel has been implied from the Fifth Amendment right against self-incrimination.[83] Likewise, the Indian Civil Rights Act contains a nearly identical provision prohibiting the tribes from compelling any person "to be a witness against himself."[84] In construing the Fifth Amendment right against self-incrimination, the Supreme Court held in *Miranda v. Arizona* that before questioning a suspect in custody, police are required to warn him that he has the right to have an attorney present and will have one appointed for him if he cannot afford one.[85] As the Court noted in *Miranda*:

> If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the

[75] Tribal Law and Order Act of 2010, P.L. 111-211, §234, 124 Stat. 2261, 2280 (codified at 25 U.S.C. 1302 (a)(6)).

[76] *See* Duro v. Reina, 495 U.S. 676, 694 (1990) ("The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer.").

[77] 25 U.S.C. §1302 (c)(2).

[78] S. 47, H.R. 11, §904.

[79] Gary Fields, *Native Americans on Trial Often Go Without Counsel*, WALL STREET JOURNAL A1 (February 1, 2007).

[80] United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989).

[81] *Id.* at 1396.

[82] *Id.*

[83] U.S. CONST. amend V. ("No person ... shall be compelled in any criminal case to be a witness against himself.... ").

[84] 25 U.S.C. §1302. ("No Indian tribe in exercising powers of self-government shall ... compel any person in any criminal case to be a witness against himself[.]")

[85] Miranda v. Arizona, 384 U.S. 436, 472 (1966). It appears that the tribal courts have generally required *Miranda*-like warnings to be given to suspects before being questioned about a crime, and also require exclusion of any unwarned statements. *See* Lower Elwha Klallam Indian Tribe v. Bolstrom, 19 Ind. L. Rep. 6026, 6027 (L. Elwha Ct. App. 1991); *see also* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 499 (1998).

> individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals.[86]

Once the accused invokes his right to counsel under *Miranda*, interrogation should stop until an attorney is present.[87] As the Court observed in *Miranda*, the police are not required to keep a station house lawyer on hand at all times to advise suspects.[88] However, if the tribes are unable to provide suspects with counsel, *Miranda* requires that the police not question the suspects unless they waive their right to counsel.[89] Accordingly, if a suspect invokes his right to counsel, but the tribe does not provide one, any uncounseled statements would be inadmissible in a tribal[90] or federal prosecution.[91]

As one observer has noted, over the years, Congress and the executive branch have made efforts to increase tribal prosecutions.[92] With this increase may come a greater need for public defenders who can practice in tribal courts. If Congress expands tribal jurisdiction over non-Indians, it may want to consider additionally expanding resources for tribes in order to provide such counsel.

Grand Jury Indictment

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury."[93] A grand jury is an investigatory body of citizens who are brought together to decide whether there is enough evidence to bring formal charges against an individual.[94] Historically, grand juries were seen as a buffer between the accuser and the accused, preventing the arbitrary exercise of government power.[95] As apparent from the constitutional text, not all criminal cases must be initiated by a grand jury, but only those for "infamous crimes." Rule 7 of the Federal Rules of Criminal Procedure requires that any crime that is punishable by death or imprisonment for more than one year (felony) must be prosecuted by a grand jury indictment.[96]

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[86] *Miranda*, 384 U.S. at 472.

[87] Edwards v. Arizona, 451 U.S. 477, 485 (1981).

[88] *Miranda*, 384 U.S. at 474.

[89] Duckworth v. Eagan, 492 U.S. 195, 204 (1989).

[90] *See Bolmstrom*, 19 Ind. L. Rep. at 6027 (explaining that exclusion of evidence is the proper remedy for failure of tribal officers to advise suspects of their *Miranda* rights).

[91] *See* United States v. Medearis, 775 F. Supp. 2d 1110, 1127 (D.S.D. 2011) (suppressing unwarned statements produced from interrogation by tribal officers).

[92] Robert T. Anderson, *Criminal Jurisdiction, Tribal Courts, and Public Defenders*, 13 KAN. J.L. & PUB. POL'Y 139, 145 (2003).

[93] U.S. CONST. amend V. For a comprehensive treatment of federal grand juries, see CRS Report 95-1135, *The Federal Grand Jury*, by (name redacted).

[94] United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

[95] *See* Wood v. Georgia, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

[96] Fed. R. Crim. P. 7. This rule was an attempt to distill and capture Supreme Court cases construing the Fifth Amendment grand jury right. *See Ex parte* Wilson, 114 U.S. 417 (1885) (holding that potential term of fifteen years of hard labor was an "infamous crime"); Mackin v. United States, 117 U.S. 348 (holding that potential term of (continued...)

Unlike in federal court, in tribal prosecutions there is neither a constitutional nor federal statutory right to a grand jury indictment. In the seminal case *Talton v. Hayes*, the Supreme Court held that the right to prosecution by grand jury indictment contained in the Fifth Amendment did not apply against the tribes.[97] The Court reasoned that because the Cherokee nation was constituted before the founding of America, protections in the United States Constitution could not logically apply to the tribes.[98] Likewise, the Indian Civil Rights Act does not contain a statutory requirement for a grand jury indictment for felonies. With neither constitutional nor statutory protections, the accused in tribal court must submit to the criminal practices of that particular tribe. However, in the context of jurisdiction over non-Indians, if Congress is deemed to have delegated its power to the tribes, the grand jury requirement along with the other safeguards of the Constitution will apply in tribal prosecutions.

Jury of One's Peers

The right to a jury trial has a long historical pedigree in Anglo-American tradition, dating back to the Magna Carta and before.[99] This right was imported from England by the American colonists, and found its place in the Sixth Amendment, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[100] Like the right to a grand jury, the right to a jury trial relied on a body of one's peers to protect them against unrestrained and arbitrary government power.[101]

Not long after passage of the Fourteenth Amendment, the accused began attacking the racial composition of juries as a violation of the Equal Protection Clause. In *Strauder v. West Virginia*, the Supreme Court held that West Virginia's statute that required that a jury consist of only white men was a violation of the black defendant's right to equal protection of the law.[102] Since then, there have been innumerable equal protection challenges concerning the racial make-up of juries.[103] Along these lines, in 1942, the Court observed that "the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community.'"[104] This has come to be known as the "fair cross-section" requirement.[105]

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imprisonment of two years was an "infamous crime").

[97] Talton v. Hayes, 163 U.S. 376, 384 (1896). Although the Supreme Court has since applied many of the protections for criminal defendants contained in the Bill of Rights against the states through Fourteenth Amendment incorporation, the grand jury requirement has not been incorporated and thus does not apply in state prosecutions. Hurtado v. California, 110 U.S. 516, 538 (1884).

[98] *Talton*, 163 U.S. at 383-84.

[99] Thompson v. Utah, 170 U.S. 343, 349 (1898) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1779).

[100] U.S. CONST. amend VI.

[101] *Id.* ("Those who emigrated to this country from England brought with them this great privilege as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.") (citation and internal quotation marks omitted).

[102] Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

[103] *See, e.g.*, Neal v. Delaware, 103 U.S. 370 (1880) (holding that discriminatory administration of jury selection laws violated the equal protection clause); Swain v. Alabama, 380 U.S. 202, 221 (holding that preemptory challenge of black jurors was not *per se* invalid under the equal protection clause).

[104] Glasser v. United States, 315 U.S. 60, 85 (1942) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

[105] Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

(continued...)

Generally, the prosecution and defense may remove an individual from the jury using a peremptory challenge without having to explain the reason for doing so.[106] But the Court in *Batson v. Kentucky* held that peremptory challenges based solely on account of race are prohibited by the equal protection clause.[107]

Under the Indian Civil Rights Act, "[n]o Indian tribe in exercising powers of self-government shall ... deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."[108] This requirement meets the constitutional minimum of a six-member jury,[109] but it does not require an impartial one. This could pose equal protection problems. For example, as one observer notes, some tribal courts are not required to allow nonmembers to sit on juries.[110] To provide vastly different forms of constitutional protections to similarly situated people simply based on race is the problem the equal protection clause was designed to prevent.[111] The Court's hesitation to submit non-Indians to an Indian jury was evident in *Oliphant*. In commenting on the inverse situation—Indians being tried by a non-Indian jury—the Court noted that Indians were being tried "not by their peers, nor by the customs of their people, nor the law of their land, but by … a different race, according to the law of a social state of which they have an imperfect conception."[112]

Although these possible equal protection problems have been raised, the Supreme Court has yet to squarely address this issue in the tribal context. S. 47 and H.R. 11 include specific protections to address this issue. The bill requires the tribe to provide defendants "the right to a trial by an impartial jury that is drawn from sources that—(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-

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> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Id.

[106] *Swain*, 380 U.S. at 220.

[107] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[108] 25 U.S.C. §1302(10).

[109] Williams v. Florida, 399 U.S. 78, 102-03 (1970).

[110] Sam Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 U.C.L.A. L. REV. 553, 578-79 (2009); *see* Navajo Nation v. McDonald, 19 Ind. L. Rpt. 6053, 6054 (Nav. Sup. Ct. 1991) (rejecting defendant's challenge that use of tribal voter lists to create jury pool denied him a jury of a fair cross-section of the community).

[111] *Batson*, 476 U.S. at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.'") (internal citation omitted).

[112] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).

Indians."[113] If tribal criminal jurisdiction is extended to cover non-Indians under the VAWA Reauthorization, some tribes may have to reconstitute their jury systems to provide more representative juries for non-Indian defendants.

Limited Review by Federal Courts

There are significant differences in appellate review of criminal prosecutions between tribal and federal courts. Although in 1894 the Supreme Court held in *McKane v. Durston* that the due process clause does not create a constitutional right to appeal in a criminal case,[114] there are numerous statutory avenues for appellate review in federal prosecutions. For example, under 18 U.S.C. Section 3742, a defendant may appeal a decision of a federal trial court if the sentence was imposed in violation of the law or an incorrect application of the sentencing guidelines.[115]

Criminal decisions in tribal courts, on the other hand, are not subject to direct federal appellate review. In *Santa Clara Pueblo v. Martinez*, the Supreme Court was asked to determine what forms of review may be granted from a tribal court ruling.[116] The Court observed that, after balancing the competing interests of "preventing injustices perpetrated by tribal governments" with "avoiding undue or precipitous interference in the affairs of the Indian people," Congress chose habeas review as the sole form of relief.[117] Generally speaking, the writ of habeas corpus requires any government authority who is holding (habeas) a person (corpus) in custody to produce that person to the court in order to determine the legality of his detention.[118] In addition to the traditional custody requirement, ICRA requires that defendants may only seek federal habeas review when they have exhausted all tribal remedies.[119]

There are several potential defects with applying the habeas approach to cases over non-Indians. First, a writ of habeas corpus, as pointed out by Justice White's dissent in *Santa Clara Pueblo*, can only be invoked when the defendant is in custody.[120] This will preclude any appeal to federal court that entails a fine or where the prison term has already been served. Second, protections under ICRA will primarily be construed and enforced in tribal forums.[121] Important civil rights such as equal protection and due process will be construed by tribal courts, which may not be

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[113] S. 47, H.R. 11, §904.

[114] McKane v. Durston, 153 U.S. 684, 687 (1894).

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

Id.

[115] 18 U.S.C. §3742.

[116] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978).

[117] *Id.* at 66-67.

[118] For an overview of habeas corpus, see CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*, by (name redacted).

[119] 25 U.S.C. §1303. This same exhaustion requirement must be met in order for a defendant prosecuted in state court to seek federal habeas relief. 28 U.S.C. §2254(b).

[120] *Santa Clara Pueblo*, 436 U.S. at 74 (White, J., dissenting).

[121] *Id.* at 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

bound by the U.S. Constitution. With habeas as the only avenue of review, federal oversight accorded criminal defendants might be limited. In light of this, Congress may want to reconsider using habeas as the sole form of review if tribal criminal jurisdiction is extended over non-Indians under the VAWA Reauthorization. Authorizing the same federal appellate review as is received in federal courts could close this gap.

Conclusion

Supporters of the VAWA Reauthorization assert there is a significant problem of domestic and dating violence against American Indian women. Currently, although tribes may prosecute Indian perpetrators, they may not prosecute non-Indian perpetrators. In addition, most states do not have jurisdiction to prosecute non-Indians who commit domestic and dating violence against Indians. Usually, the federal government has exclusive jurisdiction to try such non-Indian perpetrators. However, because federal prosecutors usually are located a long distance from reservations and have heavy workloads, investigation and prosecution of non-Indian on Indian domestic and dating violence are said to be inadequate. The VAWA Reauthorization would provide tribal courts with criminal jurisdiction to prosecute non-Indians charged with domestic or dating violence against an Indian that occurs within their jurisdictions.

With the VAWA Reauthorization's tribal jurisdiction provisions, there are two fundamental legal questions that must be asked: (1) If Congress grants Indian tribes criminal jurisdiction over non-Indians, would this be a recognition of inherent sovereignty or a delegation of federal prosecutorial power?; and (2) Depending on which form of authority is employed, what procedural safeguards will be accorded criminal defendants?

Through a series of cases and federal statutes, Indian tribes exercise their inherent sovereignty over member Indians and nonmember Indians. It is not clear from the Supreme Court case law whether this theory would be extended to prosecutions of non-Indians. If it is extended under an inherent sovereignty theory, it appears that tribes will not be bound by the Constitution but only by protections in the Indian Civil Rights Act, Tribal Law and Order Act, and the individual tribal laws. If, on the other hand, the tribes are exercising delegated federal authority, it appears the full catalog of protections in the Bill of Rights would apply against the tribes.

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