

# Brigham Young University Journal of Public Law

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Volume 27 | Issue 1

Article 2

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7-1-2012

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### Recommended Citation

Paul J. Larkin Jr. and Joseph Lupino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYUJ. Pub. L. 1 (2012).

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# The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts

*Paul J. Larkin, Jr.*<sup>\*</sup> & *Joseph Luppino-Esposito*<sup>\*\*</sup>

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Daniel Dew, William Perry Pendley, and Scott Detamore gave us valuable comments on an earlier draft. Any remaining errors are ours alone. The views expressed in this article are our own and should not be construed as representing any official position of The Heritage Foundation.

## I. INTRODUCTION

Domestic violence has been an unfortunate fact of life for many women in this nation, one that traditionally has been addressed—or overlooked—by state and local law enforcement agencies.<sup>1</sup> Troubled by the widespread, enduring problem that women have faced,<sup>2</sup> in 1994 Congress decided that the issue finally needed to be addressed at a federal level. Congress passed the eponymously named Violence Against Women Act (VAWA)<sup>3</sup> to deal with that long-standing prob-

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1. See H.R. REP. NO. 103-395, at 25–27 (1993); S. REP. NO. 103-138, at 41 (1993); S. REP. NO. 102-197, at 33–34, 36–39 (1991); S. REP. 101-545, at 27–33 (1990); RONE BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN 2 (1995); Robert Rackham, *Enumerated Limits, Normative Principles, and Congressional Overstepping: Why the Civil Rights Provision of the Violence Against Women Act is Unconstitutional*, 6 WM. & MARY J. WOMEN & L. 447, 451–52 (2000); Sarah B. Lawskey, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 783 (2000). The problem has been a longstanding one:

Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the “rule of thumb,” which barred a husband from “restraining a wife of her liberty by chastisement with a stick thicker than a man’s thumb.” This rule, originally intended to protect women from excessive violence, in fact led to reluctance on the part of government to interfere to protect women even where serious violence occurred.

The legacy of societal acceptance of family violence endures even today. In cases where a comparable assault by a stranger on the street would lead to a lengthy jail term, [sic] a similar assault by a spouse will result neither in arrest nor in prosecution. For example, a 1989 study in Washington, DC, found that in over 85 percent of the family violence cases where a woman was found bleeding from wounds, police did not arrest her abuser. Moreover, family violence accounts for a significant number of murders in this country. One-third of all women who are murdered die at the hands of a husband or boyfriend.

National reporting agencies confirm the serious nature of this violence. According to the U.S. Department of Justice, one-third of domestic attacks, if reported, would be classified as felony rapes, robberies, or aggravated assaults. Of the remaining two-thirds classified as simple assaults, almost one-half involved “bodily injury at least as serious as the injury inflicted in 90 percent of all robberies and aggravated assaults.”

S. REP. NO. 103-138, at 41 (footnotes omitted).

2. Consider the following:

Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life.

S. REP. NO. 103-138, at 38 (footnotes omitted); see also S. REP. NO. 101-545 (1990).

3. The Violence Against Women Act was Title IV of the Violent Crime Control and Law Enforcement Act of 1994, §§ 40001–40703, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 12, 15, 16, 18, 20, 21, 26, 28, 31, and 42 U.S.C.).

lem.<sup>4</sup> Among other things, the VAWA authorized a variety of federally funded programs, each of which must be reauthorized to receive tax dollars every few years.<sup>5</sup> The last reauthorization has expired, so Congress must decide whether to renew the act. Each chamber of Congress has worked to complete that task and has passed a different bill reauthorizing the VAWA.<sup>6</sup>

One of the important differences between the Senate and House bills lies in a new provision found only in the Senate bill. Section 904 of Senate Bill 1925 would grant Indian tribal courts concurrent jurisdiction to adjudicate charges of domestic abuse filed against non-Indians.<sup>7</sup> According to the Senate Judiciary Committee, domestic

4. See *United States v. Morrison*, 529 U.S. 598 (2000). The Supreme Court discussed the act in *Morrison* and held a portion of the statute unconstitutional, on the ground that it exceeded Congress' power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *Morrison* did not affect the funding provisions of the Act, which remain in effect.

5. See, e.g., the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355 (codified as amended in scattered sections of 42 U.S.C.); *id.* at Tit. IV (the Violence Against Women Act); *id.* at § 40121 (grants to combat violence against women); *id.* at § 200106 (grants); *id.* at §§ 40152, 40155–56 (same). For a partial list of such programs, see Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 123 n.2 (1999).

6. See S. 1925, 112th Cong. (2012); H.R. 4970, 112th Cong. (2012).

7. S. 1925, 112th Cong. (2012); see S. REP. NO. 112-153, at 7–11 (2012) (discussing the bill). The House Bill, H.R. 4970, 112th Cong. (2012), does not contain a similar provision. Section 904 of Senate Bill 1925 provides as follows:

Title II of Public Law 90-284 (25 U.S.C. 1301 et seq.) (commonly known as the “Indian Civil Rights Act of 1968”) is amended by adding at the end the following:

SEC. 204. TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

....

(b) NATURE OF THE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to any power of self-government recognized and affirmed by sections 201 and 203, the power of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY. . . .

....

S. 1925, 112th Cong. § 905 (2011).

Section 2 of House Bill 6625, introduced December 3, 2012, adds the following:

(4) EXCEPTIONS.—

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—

(i) IN GENERAL.— A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

abuse is a serious problem today on Indian reservations.<sup>8</sup> Indian tribal courts can adjudicate criminal charges against members of the same tribe<sup>9</sup> or a different one.<sup>10</sup> The problem, however, is that a large number of domestic assaults against women tribal members are attributable to non-Indians,<sup>11</sup> and Indian tribal courts cannot exercise

(ii) **DEFINITION OF VICTIM.**—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

(B) **DEFENDANT LACKS TIES TO THE INDIAN TRIBE.**—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

- (i) resides in the Indian country of the participating tribe;
- (ii) is employed in the Indian country of the participating tribe;
- or
- (iii) is a spouse, intimate partner, or dating partner of—
  - (I) a member of the participating tribe; or
  - (II) an Indian who resides in the Indian country of the participating tribe.

(c) **CRIMINAL CONDUCT.**—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

- (1) **DOMESTIC VIOLENCE AND DATING VIOLENCE.**— An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
- (2) **VIOLATIONS OF PROTECTION ORDERS.**—An act that—
  - (A) occurs in the Indian country of the participating tribe; and
  - (B) violates the relevant portion of a protection order that —
    - (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
    - (ii) was issued against the defendant;
    - (iii) is enforceable by the participating tribe; and
    - (iv) is consistent with section 2265(b) of title 18, United States Code.

H.R. 6625, 112th Cong. § 2 (2012).

8. See, e.g., S. REP. NO. 112-153, at 7 (“Another significant focus of this reauthorization of VAWA is the crisis of violence against women in tribal communities. These women face rates of domestic violence and sexual assault far higher than the national average.”).

9. See, e.g., *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

10. See *United States v. Lara*, 541 U.S. 193, 197–98 (2004).

11. See, e.g., S. REP. NO. 112-153, at 8 (“This legislation . . . recogniz[es] 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 protection orders, in Indian country.”). Consider the following:

jurisdiction over crimes committed by such offenders.<sup>12</sup> Tribal courts, therefore, cannot provide a forum for prosecution of those cases.

The Senate version of the VAWA reauthorization bill seeks to redress that shortcoming.<sup>13</sup> To allow tribal courts to provide an additional system in criminal domestic-violence cases, the Senate bill, for the first time, would grant those courts concurrent criminal jurisdiction in a limited number of domestic-violence cases. By increasing the number of forums in which domestic-violence prosecutions could be brought, the Senate Judiciary Committee sought to protect women against being (re)victimized and to enable tribal courts to express their communities' condemnation of this conduct.<sup>14</sup>

That recommendation, however, proved controversial within the committee, with seven members voting against that section of the VAWA reauthorization bill.<sup>15</sup> The debate between the majority and the dissent in the committee, which split along partisan lines, was over the wisdom of granting tribal courts such jurisdiction.<sup>16</sup> The

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Another significant focus of this reauthorization of VAWA is the crisis of violence against women in tribal communities. These women face rates of domestic violence and sexual assault far higher than the national average. A regional survey conducted by University of Oklahoma researchers 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. A study funded by the National Institute of Justice found that, on some reservations, Native American women are murdered at a rate more than ten times the national average.

*Id.* at 7–8.

12. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

13. The Senate Report stated that:

This legislation bolsters existing efforts to confront the ongoing epidemic of violence on tribal land by expanding Federal law enforcement tools and recognizing 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.

S. REP. NO. 112-153, at 8 (2012).

14. See, e.g., *id.* at 7–8.

15. Compare S. REP. NO. 112-153 (*supra* note 7), at 7–11 (Majority Report), *with id.* at 36–39 (minority views of Senators Grassley, Hatch, Kyl, and Cornyn), *id.* at 48–51 (minority views from Senators Kyl, Hatch, Sessions, and Coburn), and *id.* at 53–56 (minority views from Senators Coburn and Lee).

16. The Senate Report further stated that:

According to Census Bureau data, well over 50 percent of all Native American women are married to non-Indian men, and thousands of others are in intimate relationships with non-Indians. Tribes do not currently have the authority to prosecute non-Indian offenders even though they live on Indian land with Native women. Prosecuting these crimes is left largely to Federal law enforcement officials who may be hours

majority emphasized the need for additional tribunals to handle domestic-violence crimes committed by non-Indians against Indians, while the dissenters voiced two concerns. One is that non-Indians are not, and cannot be, members of the tribe that would exercise jurisdiction over them, so that remitting non-Indians to courts defined by race transgressed equal-protection policies.<sup>17</sup> The other criticism was that the Bill of Rights guarantees do not directly apply to tribal courts, and those tribunals lack the experience in providing the statutory rights guaranteed to criminal defendants.<sup>18</sup> Despite that disagreement, the committee passed Senate Bill 1925 on a strict party line vote, and the full Senate later voted to endorse that bill and sent it to the House of Representatives.<sup>19</sup>

In the meantime, the House was also considering legislation to reauthorize the VAWA. Rather than take up the Senate bill, the House passed its own, separate VAWA reauthorization bill, House Bill 4970.<sup>20</sup> As relevant here, the House bill differs from the Senate bill because House Bill 4970 does not contain any similar provision to enlarge the criminal jurisdiction of tribal courts.<sup>21</sup> Unless one chamber concedes to the other's proposal, the Senate and House must reconcile the competing bills, or else the VAWA programs will not be authorized to receive or spend federal funds. The practical question is, "What will Congress do?" The policy issue is, "Which provision better advances the public welfare?"

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away and are often without the tools or resources needed to appropriately respond to domestic violence crimes while also addressing large-scale drug trafficking, organized crime, and terrorism cases. As a result, non-Indian offenders regularly go unpunished, and their violence continues. Domestic violence is often an escalating problem, and currently, minor and midlevel offenses are not addressed, with Federal authorities only able to step in when violence has reached catastrophic levels. This leaves victims tremendously vulnerable and contributes to the epidemic of violence against Native women.

S. REP. NO. 112-153, *supra* note 7, at 9.

17. *See, e.g., id.* at 36–37 (minority views of Senators Grassley, Hatch, Kyl, and Cornyn).

18. *See, e.g., id.* at 37–38 (minority views of Senators Grassley, Hatch, Kyl, and Cornyn). In 1968, Congress passed the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303, in order to give tribal defendants some of the same protections afforded to defendants tried in federal and state courts. The Supreme Court held in *Talton v. Mayes*, 163 U.S. 376 (1896), that the Bill of Rights applies only to the federal government and does not apply to proceedings in tribal courts.

19. *See* Cong. Rec. S2370–86 (daily ed. Apr. 17, 2012).

20. *See* H.R. REP. NO. 112-480, pt. 1 (2012).

21. *See id.* at 3–47 (reprinting House bill); *id.* at 244–45 (dissenting views criticizing House Judiciary Committee majority for rejecting the tribal jurisdiction provisions of the Senate bill).

An essential consideration to the latter question is whether one bill or the other would violate the Constitution. Indians, tribes, and tribal courts occupy a unique position in our constitutional system in several ways. Tribes existed before the Constitution went into effect. For that reason, the Constitution and Bill of Rights do not apply to Indian tribes.<sup>22</sup> Moreover, Article I of the Constitution gives the federal government plenary authority to regulate commerce with the Indian tribes.<sup>23</sup> Indian tribes, however, no longer occupy the same position that they enjoyed in 1793. During the westward expansion of the United States from states hugging the eastern seaboard, the federal government engaged in military conquest of the remaining lands in the continental United States, a portion of which had been occupied by Indian tribes for centuries. Over time, the Supreme Court expanded Congress' Article I power from the authority to regulate commerce with Indian tribes to the ability to regulate every aspect of their interaction with the non-Indians who settled the United States.<sup>24</sup> That power now includes the authority to define the criminal jurisdiction of the tribal courts over Indians and non-Indians.<sup>25</sup>

In the exercise of that authority, various presidents have negotiated treaties with different tribes, the Senate has approved those treaties, and the President and Congress have created numerous federal laws regulating the tribes. The law governing tribal criminal jurisdiction, however, is not nearly as neat and clean as the comparable law applicable in the federal courts.<sup>26</sup> Instead, tribal jurisdiction is “a

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22. See *Talton v. Mayes*, 163 U.S. 376, 383–84 (1896); see also, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 & n.7 (1978) (collecting cases).

23. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”).

24. See, e.g., *Santa Clara Pueblo*, 436 U.S. at 55–56 (citations omitted) (“Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government. . . . Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”).

25. See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) (Congress can vest tribal courts with jurisdiction over Indian non-tribal members); see generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (discussing the criminal jurisdictional aspects of various treaties). The relationship between tribal jurisdiction and federal or state jurisdiction is a complex one. See OFFICE OF TRIBAL JUSTICE, U.S. DEPT. OF JUSTICE, CONCURRENT TRIBAL AUTHORITY UNDER PUBLIC LAW 83–280 (Nov. 9, 2000), available at [http://www.tribal-institute.org/lists/concurrent\\_tribal.htm](http://www.tribal-institute.org/lists/concurrent_tribal.htm) (last visited Dec. 21, 2012).

26. The general rule is that federal district courts have exclusive jurisdiction over all crimes against the United States. See 18 U.S.C. § 2338 (2012) (“The district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter.”). Of course, Congress always can create exceptions by statute.



complex patchwork of federal, state, and tribal law.”<sup>27</sup> One or more of those governments can exercise exclusive or concurrent criminal jurisdiction in any particular case, depending on the state, tribe, and crime involved.<sup>28</sup> Section 904 of Senate Bill 1925 would modify the existing framework and, in the process, raise serious policy issues regarding the proper allocation of judicial authority, as seen in the different views expressed by members of the Senate Judiciary Committee.<sup>29</sup> Section 904 of Senate Bill 1925 also raises some constitutional concerns that must be addressed. The reason is that Section 904 would empower a tribal court to enter a judgment that authorizes incarceration of a convicted offender. Because it is an act of Congress that would justify confinement, Congress must comply with whatever restrictions the Constitution imposes on the power of federal law. The Constitution does not apply to Indian tribal governments,<sup>30</sup> but it quite clearly applies to Congress. A decision by Congress to empower tribal courts to enter judgment in a criminal case against a non-Indian raises questions under the Appointments Clause of Article II,<sup>31</sup> as well as the Judicial Vesting and Power Clauses of Article III.<sup>32</sup> The reasons are twofold: the tribes select judges for tribal courts, even though the Constitution requires that the President (sometimes with the advice and consent of the Senate), a “Court of Law,” or the “Head of a Department” appoint any official who exer-

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27. See *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990) (“Jurisdiction in ‘Indian country,’ which is defined in 18 U.S.C. § 1151, see *United States v. John*, 437 U.S. 634, 648–649 (1978), is governed by a complex patchwork of federal, state, and tribal law. For enumerated major felonies, such as murder, rape, assault, and robbery, federal jurisdiction over crimes committed by an Indian is provided by 18 U.S.C. § 1153, commonly known as the Indian Major Crimes Act . . .”). Federal law defines “Indian country” as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

28. See B.J. JONES, *ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM* (2000).

29. See *supra* note 18.

30. See *Talton v. Mayes*, 163 U.S. 376, 383–84 (1896); see also, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 & n.7 (1978) (collecting cases).

31. See *infra* notes 84–114.

32. See *infra* notes 115–71.

cises the power of the federal government.<sup>33</sup> In addition, tribal judges lack the life tenure and salary protection enjoyed by Article III judges,<sup>34</sup> protections that historically have been deemed necessary to ensure a judge is not susceptible to outside pressure.<sup>35</sup> On its face, therefore, Section 904 does not satisfy any of those requirements, and the Senate Report on the VAWA reauthorization bill does not address them.<sup>36</sup>

To be sure, no senator who objected to Section 904 raised such a complaint or questioned the premise of the proposed legislation: namely, that Congress could vest federal criminal jurisdiction in tribal courts over non-Indians.<sup>37</sup> The absence of such an objection, however, does not necessarily indicate that the dissenting members of the Senate Judiciary Committee saw no such flaw in Section 904. Their failure to object on this ground could be due to the fact that the committee did not hold a hearing on this aspect of the bill.<sup>38</sup> Regard-

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33. As one commentator has noted:

The education and selection of tribal court judges is as varied as the tribes themselves. Many tribal councils appoint judges to serve for discrete terms. Some tribes choose tribal judges by popular election. Some tribes use a mixed system; the tribal council of the Navajo tribe, for example, which has jurisdiction over close to half of the Indian population subject to tribal courts, appoints its judges for terms of two or three years. If, at the end of that period, the tribal council affirms the appointment, the judge serves for life.

Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1403 (1985) (citations omitted). Compare U.S. CONST. art. II, § 2, cl. 2 (only the President, courts of law, or heads of departments may appoint federal officials), with *infra* notes 80–83.

34. Federal judges hold office during their “good behavior.” U.S. CONST. art. III, §1. Tribal judges do not enjoy life tenure, see Wright, *supra* note 33, at 1403, and the Senate bill does not purport to grant tribal judges any tenure, let alone life tenure. See *infra* note 90.

35. See *Stern v. Marshall*, 131 S. Ct. 2594, 2608–09 (2011).

36. See S. REP. NO. 112-153 (2012).

37. See *id.* at 36–56.

38. Compare *id.* at 9 (Majority Report), with *id.* at 37–38 (minority Views of Senators Grassley, Hatch, Kyl, and Cornyn). The Senate Indian Affairs Committee had held a hearing on such a measure in 2011, but the Senate Judiciary Committee did not. *Id.* at 8–9.

Another explanation could be that Congress had enacted related legislation in 1990 and 1991. In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held that an Indian tribal court could not exercise jurisdiction over a member of a different tribe. In response, Congress included a provision in the Department of Defense Appropriations Act, 1991, that temporarily sought to permit tribal courts to exercise jurisdiction over any Indian. See Pub. L. No. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (1990). The following year, Congress made that temporary provision permanent. See Pub. L. No. 102-137, 105 Stat. 646 (1991). In *United States v. Lara*, 541 U.S. 193 (2004), the Supreme Court rejected the argument that successive prosecutions by a tribe and the United States violated the Double Jeopardy Clause. The Court did not resolve, address, or even note the existence of possible Article II and III issues raised by those acts of Congress.

less of why no one raised a separation of powers objection to the Senate bill, it makes little sense to enact it if Section 904 is unconstitutional on that ground.<sup>39</sup>

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39. Aside from Article II and III issues, the bill also could pose a question under the Fifth Amendment Due Process Clause. See Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority under VAWA*, 13 *ENGAGE* 40 (July 2012). It is true that more than a century ago, the Supreme Court held that the Bill of Rights guarantees do not apply to the Indian tribes—including tribal courts. See *Talton v. Mayes*, 163 U.S. 376, 383–84 (1896). Over the last eighty years, however, the Supreme Court has incorporated, through the Fourteenth Amendment Due Process Clause, virtually every provision in the Bill of Rights applicable to the federal criminal process to the state criminal justice systems. See *McDonald v. Chicago*, 130 S. Ct. 3020, 3031–36 (2010) (collecting cases). The question that the Court asked is “whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice,” *id.* at 3034 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149, n.14 (1968)), and, with few exceptions, the Court has answered that question in the affirmative. (The Fifth Amendment Grand Jury Clause, the Sixth Amendment Jury Trial Clause guarantee of a unanimous verdict, and the Eighth Amendment Bail Clause are the exceptions. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Jury Trial Clause does not require unanimity in state prosecutions); *Hurtado v. California*, 110 U.S. 516 (1884) (Grand Jury Clause does not apply to the states). It would be odd for Congress to be able to disregard procedural guarantees that are “fundamental to our scheme of ordered liberty and system of justice” simply because Congress is exercising its power to regulate our relations with Indian tribes. Congress has sought by statute to require tribal courts to provide the identical rights that the U.S. Constitution guarantees criminal defendants in federal or state court. See 25 U.S.C. §§ 1301–02 (2012). Some differences, however, remain. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978) (the provisions in the Indian Civil Rights Act are “similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.”); S. REP. NO. 112-153, at 10 (2012) (noting that, under current law, “tribes would be required to protect *effectively* the same Constitutional rights as guaranteed in State court criminal proceedings,” because federal 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.” (emphasis added)).

At least one difference may be important. A defendant convicted in a tribal court cannot appeal to a federal circuit court; instead, he must petition a federal district court for a writ of habeas corpus. Compare 28 U.S.C. § 1291 (2011) (federal circuit courts have appellate jurisdiction over “all final decisions of the district courts of the United States”), with 25 U.S.C. § 1303 (2011) (A writ of habeas corpus is available “to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”); *Santa Clara Pueblo*, 436 U.S. at 67 (“habeas corpus [is] the exclusive means for federal-court review of tribal criminal proceedings.”). There is a material difference between relief available on direct appeal and that available in collateral attack on a judgment because some claims may be raised only on direct appeal, not in a habeas corpus proceeding. See, e.g., *United States v. Addonizio*, 442 U.S. 178, 184 (1979) (“It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.”); see also *id.* at 186–90 (defendant cannot raise a claim on collateral attack where the judge miscalculated his probable parole release date when fixing his sentence); *United States v. Timmreck*, 441 U.S. 780 (1979) (same, where FED. R. CRIM. P. 11 was violated when defendant pleaded guilty); *Hill v. United States*, 368 U.S. 424 (1962) (same, where FED. R. CRIM. P. 32(a) was violated when defendant allocuted before sentence was imposed); *Sunal v. Large*, 332 U.S. 174 (1947) (same, where defendants failed to assert a defense that was later accepted by courts). A defendant’s inability to seek direct review from a tribal court judgment is a serious detriment to trial in an Indian court.

The discussion below contains three parts, beginning with Part II. Part II discusses the Indian tribal court system. Part III discusses the issues that the Senate bill poses under Article II of the Constitution. The last part, Part IV, outlines the twists and turns of the Supreme Court’s Article III case law and then analyzes the Senate bill in light of the teaching of those cases.

## II. THE INDIAN TRIBAL COURT SYSTEM

### *A. The Intersection of Federal and Tribal Criminal Law*

The Constitution empowers Congress to regulate commerce with the “Indian Tribes,”<sup>40</sup> and Congress has plenary authority to regulate both the tribes themselves and the nation’s relationship with them.<sup>41</sup> Congress exercised that authority early in this nation’s life.<sup>42</sup>

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*See* Wright, *supra* note 33, at 1415 (“Because of weak or nonexistent appellate procedures in most tribes, most tribal courts remain unaccountable to anyone.”). It may be possible that federal courts would expand the relief available to a defendant convicted in tribal court to offset the absence of the right to trial by an appeal to an Article III court. If not, the rights accorded a defendant forced to stand trial for spousal abuse in tribal court would be less than the rights accorded a defendant charged in federal district court.

40. U.S. CONST. art. I, § 8, cl. 3.

41. *See, e.g.*, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011) (collecting cases stating that Congress has plenary authority over the tribes); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 n.18 (1982) (“The United States retains plenary authority to divest the tribes of any attributes of sovereignty.”); *Santa Clara Pueblo*, 436 U.S. at 56–57. As the Supreme Court explained in *Oliphant v. Suquamish Indian Tribe*:

[T]he tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers “*inconsistent with their status.*” Indian reservations are “a part of the territory of the United States.” Indian tribes “hold and occupy [the reservations] with the assent of the United States, and under their authority.” Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. “[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.”

435 U.S. 191, 208–09 (1978) (alterations in original) (citations omitted). *See also* Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989); United States v. Sandoval, 231 U.S. 28, 34 (1913); Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Stephens v. Cherokee Nation, 174 U.S. 445, 483–88 (1899); *Talton*, 163 U.S. at 379–80 (“[T]he right of the Cherokee nation to exist as an autonomous body” is “subject always to the paramount authority of the United States.”); United States v. Kagama, 118 U.S. 375, 384 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

42. 1 Stat. 137 (1790). As the Supreme Court explained in *Johnson v. McIntosh*, 21 U.S. (8

Congress also sought early on to use the criminal law to regulate the nation's relationship with the tribes.<sup>43</sup> In 1817, Congress enacted the Indian Country Crimes Act,<sup>44</sup> the first federal criminal law governing conduct of non-Indians in "Indian Country."<sup>45</sup> Under that statute, if the conduct would amount to a federal offense in the United States proper, that conduct could be punished as provided by federal law.<sup>46</sup>

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Wheat.) 543 (1823):

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

*Id.* at 587.

43. Professor Philip P. Frickey has described the basic Indian law principles as follows: In the early nineteenth century, the Marshall Court developed most of the foundational principles of federal Indian law in a trio of cases. In *Johnson v. McIntosh*, Chief Justice Marshall's opinion for the Court concluded that, upon "discovery" by Europeans, tribes lost their status as complete sovereigns and, in particular, their ability to engage in external relations with any sovereign other than the European discovering country. Marshall then explained, in *Cherokee Nation v. Georgia*, that although tribes had no sovereignty in an international sense, they retained some governmental authority within the United States. Marshall labeled the tribes "domestic dependent nations" in a relationship with the United States that "resembles that of a ward to his guardian." Finally, in *Worcester v. Georgia*—the most important decision in federal Indian law—Marshall concluded that, because the federal-tribal relationship was exclusive, states had no role in Indian country. Marshall analogized the relationship between tribes and the United States to that between a weaker sovereign and a stronger, supporting sovereign under international law. To be sure, a tribe could cede away power or property by treaty, but Marshall adopted canons of interpretation that require clarity before courts may conclude that a tribe has in fact given up valuable rights. Absent any clear treaty cession or congressional act, a tribe retained territorial sovereignty over its reservation.

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, 9–10 (1999) (footnotes omitted).

44. An Act to Provide for the Punishment of Crimes and Offences Committed within the Indian Boundaries, ch. 92, 3 Stat. 383 (1817) [hereinafter Indian Country Crimes Act] (current codification at 18 U.S.C. § 1152 (2012)).

45. An Act to Regulate Trade and Intercourse with the Indians, and to Preserve Peace on the Frontier [hereinafter Indian Intercourse Act of 1834], ch. 161, Pub. L. No. 23–161, 4 Stat. 729, 730 (current codification at 25 U.S.C. § 177), would later define "Indian country" as:

[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished.

*Id.*

46. Indian Country Crimes Act, *supra* note 44.

*Ex parte Crow Dog*<sup>47</sup> was the watershed case that forever altered the intersection of Indian and federal criminal law. Crow Dog was a Brule Sioux who was convicted of killing Spotted Tail, another Brule Sioux.<sup>48</sup> The case was initially settled under traditional Brule Sioux dispute resolution traditions, resulting in a punishment of restitution.<sup>49</sup> But the case did not end there. The Territorial District Court of Dakota claimed jurisdiction over the case, possibly for political reasons.<sup>50</sup> Crow Dog was found guilty and sentenced to death.<sup>51</sup> A month before his scheduled execution, the Supreme Court intervened and granted Crow Dog's petition for a writ of habeas corpus.<sup>52</sup>

Critical to the Court's analysis in *Ex parte Crow Dog* were Sections 2145 and 2146 of the Revised Statutes.<sup>53</sup> Section 2145, like the Indian Country Crimes Act, extended federal criminal jurisdiction to offenses committed in Indian country.<sup>54</sup> Section 2146, however, created an exception for crimes committed by one Indian against the person or property of another.<sup>55</sup> The Court found that the Brule Sioux land where the murder occurred was Indian country that fell within the jurisdiction of the Dakota district court.<sup>56</sup> Thus, Crow Dog could, presumptively, be prosecuted and convicted under Revised Statute Section 2145. The Court then concluded, however, that Crow Dog's case also met the exception in Section 2146 for crimes involving only Indians.<sup>57</sup> The Court also rejected the argument that the 1868 treaty between the United States and the Sioux, along with

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47. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

48. *Id.* at 557. The Brule Sioux are a sub-tribe of the Lakota Nation. KUL WICASA OYATE [LOWER BRULE SIOUX TRIBE], <http://www.lbst.org/newsite/home.htm> (last visited Dec. 21, 2012). They are sometimes referred to by their larger tribal identification, but are identified as Brule Sioux in this paper.

49. JONES, *supra* note 28, at 3.

50. See Timothy Connors & Vivek Sankaran, *Crow Dog vs. Spotted Tail: Case Closed?*, MICH. BAR J., July 2010, at 36.

51. *Id.*

52. *Id.*

53. 1 REV. STATUTES OF THE UNITED STATES PASSED AT THE SESSION OF THE FORTY-THIRD CONGRESS 1873-74, at 374 (2d ed., U.S. Gvm't Prtg. Off. 1878).

54. *Ex parte Crow Dog*, 109 U.S. 556, 558-61 (1883).

55. *Id.* There also were other exceptions for cases in which the tribe had already imposed punishment pursuant to local tribal law or in which a treaty granted a tribe exclusive jurisdiction over an offense. *Id.* at 558.

56. *Id.* at 561-62. In reaching that conclusion, the Court found instructive the definition of the term "Indian country" in the Indian Intercourse Act of 1834 (*see supra*, note 38), though Congress had previously repealed that statute. *Ex parte Crow Dog*, 109 U.S. at 560-61.

57. *Id.* at 562.

implementing federal legislation,<sup>58</sup> repealed that exemption.<sup>59</sup> The historical presumption in American law, the Court concluded, was to leave to the Indian tribes the authority to resolve crimes committed between Indians, and neither the treaty nor the legislation required a different result.<sup>60</sup>

*B. The Post-Crow Dog Creation of Tribal Courts*

The *Crow Dog* decision sparked congressional legislation that changed the course of the legal relationship between the United States and the Indian tribes with respect to the exercise of criminal jurisdiction.<sup>61</sup> Five statutes are particularly relevant.

In 1817, Congress adopted the first of those statutes, the General Crimes Act,<sup>62</sup> which created federal criminal jurisdiction over crimes between Indians and non-Indians. Crimes involving only Indians remained within the exclusive jurisdiction of tribal governments. The second law, the Indian Major Crimes Act of 1885, brought serious offenses such as murder, rape, arson, robbery, and burglary under federal authority.<sup>63</sup> The Indian Reorganization Act of 1934 (IRA) was the

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58. See Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635.

59. *Ex parte Crow Dog*, 109 U.S. at 562–67.

60. The Court explained that:

The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse Act of 1834, 4 Stat. 733. Prior to that, by the act of 1796, 1 Stat. 479, and the act of 1802, 2 Stat. 139, offences committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform. . . . To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.

*Id.* at 571–72.

61. The Federal Government has exclusive authority over Indian affairs. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 n.2 (1976). A result of that principle is that states cannot prosecute Indians for crimes committed within so-called “Indian country” without Congressional authorization. See *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962).

62. Act of March 3, 1817, ch. 92, § 1–3, 3 Stat. 383 (1917). It is alternatively known as the Indian Country Crimes Act. The descendent statute is 18 U.S.C. § 1152 (2012).

63. Act of March 3, 1885 [hereinafter Indian Major Crimes Act], ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2011)); see *Duro v. Reina*, 495 U.S. 676, 702 (1990); *United States v. Kagama*, 118 U.S. 375 (1886) (upholding the constitutionality of the

third statute. It empowered tribes to create their own tribal courts.<sup>64</sup> In the 1950s, concerned about a lack of law enforcement services in many areas of Indian country, Congress enacted the fourth piece of legislation, commonly known as “Public Law 280.”<sup>65</sup> Public Law 280 required six states to assume criminal (and civil) jurisdiction over all or part of Indian country within those states and provided that the General Crimes Act and the Major Crimes Act shall not apply within those areas of Indian country.<sup>66</sup> Public Law 280 also authorized other states voluntarily to assume criminal (or civil) jurisdiction over Indian country,<sup>67</sup> but the federal government retained concurrent jurisdiction to prosecute offenders under the Major Crimes Act and General Crimes Act in this second category of states.<sup>68</sup> Finally, in 2010 Congress gave tribal courts greater sentencing power under the Tribal Law and Order Act.<sup>69</sup> In the case of tribal felonies, tribal courts can now impose a penalty of up to three years imprisonment and a \$15,000 fine.<sup>70</sup> Previously, tribal courts could not impose a penalty greater than one year’s imprisonment and a \$1,000 fine, which led tribes to pass along serious crimes to the federal system.<sup>71</sup> Important-

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Indian Major Crimes Act); JONES, *supra* note 28, at 3 n.9.

64. Act of June 18, 1934 [hereinafter Indian Reorganization Act], Pub. L. No. 73-383, 48 Stat. 985 (1934) (codified at 25 U.S.C. 461 et seq.); *Id.* at 3-4. These courts primarily were components of tribal governing bodies, rather than separate, co-equal branches of tribal government. JONES, *supra* note 28, at 4. Not all tribes operate their own judicial system. Instead, they maintain courts authorized by the Bureau of Indian Affairs, colloquially known as “CFR courts,” because they must follow the rules and procedures outlined in the Code of Federal Regulations (CFR). *Id.* at 4. For a list of those courts, see 25 C.F.R. 11.100.

65. Act of Aug. 15, 1953 [hereinafter Public Law 280], Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360); see *Bryan*, 426 U.S. at 379-80.

66. See 18 U.S.C. § 1162(a)-(c) (2012).

67. See generally *Wash. v. Yakima Indian Nation*, 439 U.S. 463 (1979).

68. See JONES, *supra* note 28, at 5. The Department of the Interior Bureau of Indian Affairs, [www.bia.gov](http://www.bia.gov), also has established Courts of Indian Offenses to prosecute lesser crimes. Significantly, non-Indians must expressly consent in order to be subject to the jurisdiction of these courts. *Id.* at 3; see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978) (“The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233. See *W. Hagan*, *Indian Police and Judges* (1966). By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. 25 C.F.R. § 11.2(a) (1977).”).

69. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

70. *Id.* at § 234.

71. JONES, *supra* note 28, at 7. Some believe that this change is an indication of an improved perception of Indian tribal courts. See, e.g., Elizabeth Ann Kronk, *American Indian Tribal Courts as Models for Incorporating Customary Law*, 3 J. CT. INNOVATION 231, 241-242 (2010).



ly, none of those statutes authorized a tribal court to exercise criminal jurisdiction over a non-Indian.<sup>72</sup>

*C. The Jurisdiction of Tribal Courts over Non-Indians*

In *Oliphant v. Suquamish Indian Tribe*,<sup>73</sup> the Supreme Court held that Indian tribes do not inherently possess criminal jurisdiction over non-Indians. The Court found that all of the available objective evidence on the issue pointed in that direction,<sup>74</sup> as did the fact that for most of our history tribes had no formal judicial system.<sup>75</sup> After doing so, the Court found no indication that tribes could exercise criminal jurisdiction over non-Indians without an express congressional delegation.<sup>76</sup> For example, in the 19th century the Choctaw Indian Tribe specifically requested authority to prosecute “any white man” who violated tribal rules.<sup>77</sup> Congress granted that request in an 1830 treaty with the tribe, but the terms of that grant imply that the power to prosecute non-Indians was not one assumed to be inherently within the tribe’s jurisdiction.<sup>78</sup> Congressional legislation in the early- to mid-1800s also suggested that Indians did not have this jurisdiction.<sup>79</sup>

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72. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978). Contemporary tribal courts often use traditional tribal dispute resolution methods, including “Peacemaking” and “Sentencing Circles,” which are similar to the methods used by the Brule Sioux Tribe in the *Crow Dog* case. JONES, *supra* note 28, at 3 (citing *Ex parte Crow Dog*, 109 U.S. 556 (1883)). Other tribes still maintain the framework for judicial systems as provided by the Bureau of Indian Affairs, because by the time Indians were given the right to create these systems in 1934, few were familiar with the traditional forms of dispute resolution. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1–2 (1997). There is considerable diversity in the jurisdiction, structure, and procedures that apply in tribal courts. Unless the tribe operates under a court created by the Bureau of Indian Affairs, there is no way to easily determine the jurisdiction, structure, and procedures used by a given tribe’s judicial system.

73. *Oliphant*, 435 U.S. at 212.

74. *Id.* at 196–211 (canvassing treaties between the Federal Government and the Indian tribes, congressional reports, opinions of the Attorney General, treatises on Indian law, etc.).

75. *Id.* at 197 (“Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: ‘With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.’” (quoting H.R. REP. NO. 474, at 91 (1834))).

76. *Id.* at 204.

77. *Id.* at 197 (citing Art. 4, 7 Stat. 333).

78. *Id.* at 197–99.

79. *Id.* at 201–04.

Other presumptions against inherent sovereignty over non-Indians also “carrie[d] considerable weight.”<sup>80</sup> Accordingly, the Court held that tribes could not exercise criminal jurisdiction over non-Indians unless Congress specifically grants tribes that authority.<sup>81</sup> The teaching of *Oliphant* is that tribal courts are not courts of general criminal jurisdiction over non-Indians and are limited to the jurisdiction expressly conferred on them by Congress.<sup>82</sup> Prosecutions can be brought against non-Indians only in federal or state court.<sup>83</sup>

### III. ARTICLE II ISSUES RAISED BY SENATE BILL 1925

#### A. The Appointments Clause

The Appointments Clause of the Constitution<sup>84</sup> creates two mechanisms for appointment of all “Officers of the United States,”<sup>85</sup>

80. *Id.* at 206.

81. *Id.* at 212. The Court later held that tribes also lack inherent authority to prosecute members of a different tribe. *See Duro v. Reina*, 495 U.S. 676, 695–96 (1990). Following *Oliphant*, the Court decided *Montana v. United States*, 450 U.S. 544 (1981), which ruled there were only two conditions in which tribes possess inherent sovereign power in the case of non-member activity that occurred on non-tribal lands within the tribal territory. First, tribes can regulate nonmember activity if there is a consensual relationship between the tribe and the nonmember. Second, tribes can use their civil authority against nonmembers if the conduct of the nonmember is a threat to or will directly affect “the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565–66. Fee lands within the Crow Nation were at issue here, and that could affect the result of domestic-violence disputes as well, not only because of the consideration and potential inconsistency of prosecutions based on individual land ownership, but also for a determination as to what constitutes a threat or effect on the safety of the tribe. *Montana* has, however, proved beneficial for tribes when dealing with the large commercial activities of nonmembers within tribal territory.

82. JONES, *supra* note 28, at 6; *see also, e.g., United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“[T]he sovereign power of a tribe to prosecute its members for tribal offenses 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 nonmembers of the tribe.”).

83. *Id.* at 6–7. Some commentators have criticized the Supreme Court’s decision in *Oliphant*. *See, e.g., Frickey, supra* note 43, at 34–39; Gede, *supra* note 30, at 44 n.2 (collecting authorities). The Supreme Court, however, has not signaled that it would reconsider its decision.

84. The Appointments Clause of the Constitution provides as follows:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

U.S. CONST. art. II, § 2, cl. 2.

85. “In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme

a term that includes any person who exercises the power of the federal government.<sup>86</sup> With the advice and consent of the Senate, the President can appoint what have come to be known as “Superior Officers.” The President also can appoint “Inferior Officers” in the same manner, but Congress can delegate their appointment to the President alone, the courts, or heads of departments.<sup>87</sup>

The appointment process is not a bureaucratic technicality.<sup>88</sup> Instead, like other aspects in our tripartite system of designated and separated powers, the Appointments Clause protects liberty by regulating the personnel who may exercise the federal government’s authority.<sup>89</sup> The clause accomplishes that mission in several ways. It lodges the appointment power in one person or agency, which forces the appointing authority to be responsible for the choice by avoiding diffusion of responsibility.<sup>90</sup> It protects the appointing authority against interference from any other person or branch of the federal

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Magistrate in discharging the duties of his trust.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 131 S. Ct. 3138, 3146 (2010) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)). Moreover, “[a]s Madison stated on the floor of the First Congress, ‘if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.’” *Id.* at 3157 (quoting 1 ANNALS OF CONG. 463 (1789)).

86. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”); see also, e.g., *Edmond v. United States*, 520 U.S. 651, 662 (1997); *Freytag v. Comm’r*, 501 U.S. 868, 880–83 (1991); *Morrison v. Olson*, 487 U.S. 654, 670 (1988); *Weiss v. United States*, 510 U.S. 163, 169–70 (1994).

87. On the meaning of the terms “Superior Officers” and “Inferior Officers,” as well as the differences between them, see *Burnap v. United States*, 252 U.S. 512, 516–17 (1920); *Edmond*, 520 U.S. at 661–66; *Freytag*, 501 U.S. at 882–83; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352–53 (1931); *United States v. Germaine*, 99 U.S. 508, 511–12 (1879).

88. *Edmond*, 520 U.S. at 659 (citing *Buckley*, 424 U.S. at 125).

89. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3157; *Bowsher v. Synar*, 478 U.S. 714, 721–22, 730 (1986); *Edmond*, 520 U.S. at 658; *Freytag*, 501 U.S. at 880 (“The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.”).

90. See *Free Enter. Fund*:

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” That is why the Framers sought to ensure that “those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.”

130 S. Ct. at 3155 (citations omitted).

government. It guarantees that only parties who have been properly appointed and therefore (presumably) properly vetted can exercise federal power.<sup>91</sup> Finally, it ensures that any official exercising federal power can be removed at a minimum for misconduct or incompetence, even if not for other reasons.<sup>92</sup>

The general rule is that one of the bodies identified in Article II—whether the President, the courts of law, or the heads of departments—has the prerogative to appoint or remove federal officers. The Supreme Court’s decision in *Myers v. United States*<sup>93</sup> is the landmark case explaining why. *Myers* reasoned that because Article II expressly confers on the President the responsibility to “take Care that the Laws be faithfully executed,”<sup>94</sup> the article is best read as implicitly authorizing the President to remove whatever personnel he is responsible for supervising.<sup>95</sup> As a result, restrictions on the President’s unfettered ability to appoint or remove federal officers generally are invalid.<sup>96</sup>

The First Congress believed that the Article II Appointments Clause was an important feature of the new constitution. Hard on the ratification of the U.S. Constitution, Congress amended the Northwest Ordinance<sup>97</sup> to ensure that President Washington would appoint officials in that territory, with the advice and consent of the Senate.<sup>98</sup> Congress followed that understanding of the Constitution for the next 150 years. Every statute enacted before 1947 and establishing a territorial government “provided for direct control by the executive branch, usually through a presidentially appointed gover-

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91. See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989); see also *id.* at 483–84 & n.4 (Kennedy, J., concurring) (quoting *THE FEDERALIST* No. 76, at 455–56 (A. Hamilton) (Clinton Rossiter ed., 1961)).

92. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3146–47.

93. *Myers v. United States*, 272 U.S. 52 (1926).

94. U.S. CONST. art. II, § 3.

95. *Myers*, 272 U.S. at 164.

96. See, *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976); *Free Enter. Fund*, 130 S. Ct. at 3146–47, 3157; *Pub. Citizen*, 491 U.S. at 483–84 & n.4 (Kennedy, J., concurring). In theory, the same principle should apply if Congress vests appointment power in one of the other authorities in Article II, so a court of law or the head of a department should have the ability to appoint or remove federal officers as the President does when Senate confirmation is unnecessary.

97. *An Ordinance for the Government of the Territory of the United States North-west of the River Ohio* (July 13, 1787), reprinted in 1 Stat. 50, 51 n.(a) (1789).

98. *Id.*

nor.”<sup>99</sup>

*B. The Proposed Expansion of Indian Tribal Court Jurisdiction and Article II*

Given that design, the vesting of criminal jurisdiction in tribal courts raises serious questions under the Appointments Clause. Because Indian tribes lack inherent criminal jurisdiction over non-Indians,<sup>100</sup> tribal courts cannot issue a judgment in a criminal case against any such person, and tribal courts especially cannot enter a judgment ordering a person’s imprisonment. The Senate bill would grant tribal courts that authority, but in so doing, the Senate bill effectively would make tribal judges “officers of the United States” for Article II purposes.<sup>101</sup> The authority to imprison a person for conviction of a federal offense<sup>102</sup>—one of the most intrusive actions that the government can take against anyone—is an archetypical example of the exercise of government power that can only be exercised by a person properly appointed under Article II.<sup>103</sup>

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99. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 868 (1990). The law governing territories was set forth in a series of cases known as the *Insular Cases*, where a series of Supreme Court decisions deciding whether island territories acquired by the United States after the Spanish-American War were “territories” for purposes of Article IV and what, if any, constitutional provisions applied in those lands. See *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Puerto Rico); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (Philippines); *Goetze v. United States*, 182 U.S. 221 (1901) (Hawaiian Islands). The rule seems to be that “territories” are not “part” of the United States even though they are subject to the “jurisdiction” of the nation. See *Downes*, 182 U.S. at 257–59, 262–63.

Oddly, Congress by statute or the President by executive order has, since 1947, authorized Puerto Rico, Guam, the Virgin Islands, and Samoa to conduct local elections without considering the Article III issues involved. As discussed below, the federal government’s actions in that regard are not precedent here because an Indian reservation is not a “territory.” See *infra* notes 155–63 and accompanying text.

100. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

101. Section 904 does not grant tribal court judges any form of tenure or any salary, let alone provide life tenure or protect what salary they receive from diminution. Accordingly, Section 904 would not make tribal judges Article III judges. Compare U.S. CONST. art. III, § 1.

102. The Senate bill is silent regarding who is authorized to imprison an offender, so presumably the Indian Civil Rights Act of 1968 will govern that subject. That law authorizes several places of confinement: (1) a tribal correctional center approved by the Bureau of Indian Affairs for long-term incarceration; (2) the nearest appropriate Federal facility; (3) a state or local government-approved detention or correctional center; or (4) an alternative rehabilitation center of an Indian tribe. 25 U.S.C. § 1302(d)(1)(A)–(D) (2012). For present purposes, what matters is that it is federal law that justifies confinement of an offender pursuant to a judgment entered by a tribal judge.

103. See *Weiss v. United States*, 510 U.S. 163, 169 (1994) (“The parties do not dispute that

It follows then, that tribal judges must be appointed in the manner identified in Article II. Yet that is where the Senate bill falls short, because neither the President nor any other entity designated in Article II is involved in either appointing or removing tribal judges. The tribes themselves select their judges.<sup>104</sup> Either (and certainly both) of those shortcomings is enough to doom the Senate bill.<sup>105</sup> There have been various arguments advanced in favor of limiting a President's removal power, and on occasion, the Supreme Court has found those arguments persuasive.<sup>106</sup> The Court has never, however, ruled that the President, a court of law, and the head of a department can all be ousted from the appointment and removal process entirely. Were that ever the case, the result would be that no one could be held legally or politically accountable for whatever intentional misconduct, negli-

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military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States."). *See also* Freytag v. Comm'r, 501 U.S. 868 (1991) (concluding that special trial judges of the Tax Court are officers); Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause.]").

104. The selection process varies from tribe to tribe:

The education and selection of tribal court judges is as varied as the tribes themselves. Many tribal councils appoint judges to serve for discrete terms. Some tribes choose tribal judges by popular election. Some tribes use a mixed system; the tribal council of the Navajo tribe, for example, which has jurisdiction over close to half of the Indian population subject to tribal courts, appoints its judges for terms of two or three years. If, at the end of that period, the tribal council affirms the appointment, the judge serves for life.

Wright, *supra* note 33, at 1403.

105. *See, e.g.,* Edmond v. United States, 520 U.S. 651, 658 (1997) ("Under the Appointments Clause, Congress could not give the Judge Advocates General power to 'appoint' even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law.").

106. In *Humphrey's Executor* and *Morrison* the Court upheld, against an Appointments Clause challenge, legislation that restricted the ability of the President to remove an officer except for good cause. *See, e.g.,* Morrison v. Olson, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *see also* *Weiner v. United States*, 357 U.S. 349 (1958) (allowing a claim for wrongful removal of a War Claims Commission by the President); *United States v. Perkins*, 116 U.S. 483 (1886) (upholding a restriction on the removal authority of an inferior officer). The Court has not detailed the justifications that constitute "good cause," but misconduct (e.g., consistently not showing up for work) and incompetence (e.g., consistently doing no work) would be grounds for dismissal under any reasonable construction of that term. For instance, *Humphrey's Executor* upheld a restriction on the President's power to remove members of the Federal Trade Commission, who held seven-year terms and could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620 (quoting 15 U.S.C. § 41); *see also* *Weiner*, 357 U.S. at 356 ("We have not a removal for cause involving the rectitude of a member of an adjudicatory body.").

gent defaults, or simple mistakes are made by a federal official. The Framers did not intend to turn the federal government loose on the public by vesting federal authority in the hands of parties who are neither properly selected at the outset, nor capable of being held legally or politically accountable later on.<sup>107</sup> In fact, the Supreme Court has held unconstitutional the delegation of standardless rule-making authority to private parties who, unlike legislators and executive branch officers, are neither legally nor politically accountable to the electorate or to other government officials.<sup>108</sup> But, that is precisely the scenario the Senate bill would create.

Congress also cannot turn elsewhere for authority to vest tribal courts with criminal jurisdiction over non-Indians. For example, Congress cannot rely on the Necessary and Proper Clause to justify noncompliance with the requirements of the Appointments Clause. As the Supreme Court explained in *Freytag v. Comm'r*: “Despite Congress’ authority to create offices and to provide for the method of appointment to those offices, ‘Congress’ power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it

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107. See *Freytag*, 501 U.S. at 883–84.

The “manipulation of official appointments” had long been one of the American revolutionary generation’s greatest grievances against executive power, see G. Wood, *The Creation of The American Republic 1776–1787*, p. 79 (1969) (Wood), because “the power of appointment to offices” was deemed “the most insidious and powerful weapon of eighteenth century despotism.” *Id.* at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers’ determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison’s complaint that the Appointments Clause did “not go far enough if it be necessary at all”: Madison argued that “Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.” 2 *Records of the Federal Convention of 1787*, pp. 627–628 (M. Farrand rev. 1966). The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. See *Buckley*, 424 U.S. at 129–131. Even with respect to “inferior Officers,” the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.

108. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Schechter Poultry Co. v. United States*, 295 U.S. 495, 537 (1935); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); see also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) (noting and distinguishing the *Eubank* and *Roberge* cases without criticizing them or suggesting that they no longer are good law).

provides comports with the latter, the holders of those offices will not be ‘Officers of the United States.’”<sup>109</sup> Moreover, Congress cannot evade Article II by invoking its authority under the Article IV Property Clause to regulate conduct occurring on Indian property.<sup>110</sup> A similar argument was advanced in *Metropolitan. Washington Airport Authority. v. Citizens for the Abatement of Aircraft Noise*.<sup>111</sup> That case involved the constitutionality of legislation, the Transfer Act,<sup>112</sup> that sought to confer federal government authority over two Washington D.C. area airports on the Metropolitan Washington Airports Authority (MWAA). The transfer, however, was contingent on the creation of a board of directors that had veto authority over MWAA’s actions and that included members of Congress.<sup>113</sup> The Court concluded that the membership and veto provisions of the act granted individual members of Congress federal authority that could be exercised only by a properly appointed federal officer.<sup>114</sup> The Court then turned to the question of whether Congress was subject to the Appointments Clause requirements when exercising its authority under Article IV or could condition the transfer of authority on creation of the board of directors contemplated by the Transfer Act. The Court expressly rejected that argument, ruling that Congress cannot negotiate away Appointments Clause dictates.

The question is whether the maintenance of federal control over the airports by means of the Board of Review, which is allegedly a federal instrumentality, is invalid, not because it invades any state power, but because Congress’ continued control violates the separation-of-powers principle, the aim of which is to protect not the States but “the whole people from improvident laws.”<sup>115</sup>

That rationale would apply here, too.

#### IV. ARTICLE III ISSUES RAISED BY SENATE BILL 1925

The Article II flaws in the Senate bill are sufficient to sink it, but

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109. *Freytag*, 501 U.S. at 883 (quoting *Buckley*, 424 U.S. at 138–39).

110. See *Downes v. Bidwell*, 182 U.S. 244, 249–51 (1901).

111. *Metro. Wash. Airport Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991).

112. 49 U.S.C. app. § 2456 (1988).

113. *Metro. Wash. Airport Auth.*, 501 U.S. at 258–59.

114. *Id.* at 265–70.

115. *Id.* at 271 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).



they are not the only problematic aspect of the bill. By empowering tribal courts to adjudicate federal criminal prosecutions that arise under federal law, the Senate bill raises an additional, distinct set of issues, ones that would be present even if tribal court judges were appointed in full compliance with the Article II appointment process. Numerous officials in the Executive Branch are appointed in that manner, but they cannot enter a judgment that authorizes the incarceration of a person for breaking a rule. Administrative agencies, for example, can adjudicate license applications (e.g., the FCC), can decide whether certain products, such as pesticides, can be distributed in interstate commerce (e.g., the EPA), or can decide whether the commercial conduct of a regulated party violated one of its rules, as well as whether that person should receive a sanction of some type for noncompliance (e.g., the SEC). Congress does not, however, grant administrative agencies the power to adjudicate criminal charges and imprison convicted offenders. Generally speaking, only Article III courts can enter judgments with that effect.<sup>116</sup> The Senate VAWA bill therefore raises Article III issues that must be addressed separately.<sup>117</sup>

#### *A. The Importance of Judicial Independence*

Any discussion of Article III must start with what makes it unique in our constitutional scheme. Article III of the Constitution creates the federal judiciary, but also does far more than merely establish a bench within the federal government. Unlike Articles I and II, which create positions held for only two, four, or six years, Article III affords federal judges life tenure.<sup>118</sup>

Moreover, in order to prevent evasion of that guarantee, Article III also grants federal judges protection against a reduction in their

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116. See *infra* note 146.

117. For a discussion of the analogous Article III issues raised by the assignment of judicial power to an international tribunal, see John C. Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127 (2006).

118. The Judicial Vesting and Good Behavior Clauses of the U.S. Constitution provides as follows:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

salary. Together, those aspects of this provision appear to have a simple, straightforward meaning viz., whatever judicial power the United States may have must be lodged in supreme or inferior courts that will be filled by parties who enjoy tenure and salary protections. The apparent rationale for those protections is to guarantee the independence of federal judges.<sup>119</sup>

That straightforward interpretation makes sense as a matter of history. The Framers had the utmost concern for the independence of the judiciary. As colonists during the reign of King George III, the Framers had experienced firsthand the unholy alliance of judges and the executive. The Framers believed that it was necessary to afford judges protection against removal or impoverishment were they to decide a case against the government or public opinion. Only by affording judges those safeguards, the Framers thought, would courts be able to play their constitutionally assigned role of standing between a potentially autocratic or overweening government and individual citizens.<sup>120</sup> Not surprisingly, Supreme Court precedent confirms the evident meaning of the text and the judgment of history. As the Court recently explained in *Stern v. Marshall*,<sup>121</sup> Article III is essential to the Constitution's checks and balances, and therefore prohibits sharing the judicial power between the judiciary and the other branches.<sup>122</sup>

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119. See William R. Castro, *If Men Were Angels*, 35 HARV. J.L. & PUB. POL'Y 663, 666 (2012) ("The Founders believed that government abuse could be limited by separating the powers of government into three co-equal branches and that the judicial branch would curb misconduct by the legislative and the executive branches. An important part of the judiciary's participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review. Finally, the power of judicial review would be significantly less effective if the other branches could effectively control the judiciary. Hence arose the need for judicial independence.").

120. *Id.*

121. *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

122. See *id.* at 2608–09; *Reid v. Covert*, 354 U.S. 1, 40–41 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15–16 (1955). As the Court explained in *Stern v. Marshall*, 131 S. Ct. 2594 (2011):

As its text and our precedent confirm, Article III is “an inseparable element of the constitutional system of checks and balances” that “both defines the power and protects the independence of the Judicial Branch.” Under “the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government” adopted in the Constitution, “the ‘judicial Power of the United States’ . . . can no more be shared” with another branch than “the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.”

In establishing the system of divided power in the Constitution, the Framers

*B. Article I and Article III Courts*

The simple terms of Article III, however, belie a far more complicated history than its text suggests.<sup>123</sup> The Supreme Court has held in several different contexts that Congress may vest in other courts, known as “Article I courts,” the authority to adjudicate rights and responsibilities of parties to a dispute even if judges who lack life tenure and salary protection enjoyed by Article III judges preside over those courts.<sup>124</sup> The existence of these different exceptions to the general

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considered it essential that “the judiciary remain[] truly distinct from both the legislature and the executive.” As Hamilton put it, quoting Montesquieu, “there is no liberty if the power of judging be not separated from the legislative and executive powers.”

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Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the “[c]lear heads . . . and honest hearts” deemed “essential to good judges.”

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government’s “Judicial Power” on entities outside Article III. That is why we have long recognized that, in general, Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” When a suit is made of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law”—to the Judiciary.

*Stern*, 131 S. Ct. at 2608–09 (citations omitted).

123. See *Freytag v. Comm’r*, 501 U.S. 868, 888–89 (1991) (“The text of the Clause does not limit the ‘Courts of Law’ to those courts established under Article III of the Constitution. The Appointments Clause does not provide that Congress can vest appointment power only in ‘one supreme Court’ and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction.”).

124. See *Palmore v. United States*, 411 U.S. 389, 407–08 (1973) (“It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against

rule set forth in Article II complicates the question of whether Congress can vest Indian tribal courts with criminal jurisdiction over non-Indians. At a minimum, it makes curious the fact that neither the majority nor dissenting Judiciary Committee reports even addressed the issue.

### 1. Territorial courts

The first exception involves the territories of the United States. Several of the original thirteen colonies and states laid claim to unsettled land west of the Appalachian Mountains, and disputes over the sovereign right to those lands was a contentious issue before the Constitution was adopted.<sup>125</sup> Article IV, Section 3 of the Constitution sought to deal with that power by vesting in the federal government the authority to admit new states into the unions and to regulate the “[t]erritory” of the United States.<sup>126</sup> Early on, the question arose whether the Constitution required Congress to vest the courts that Congress established in those territories with the same “judicial power” set forth in Article III that was given to the federal courts in the new nation, as well as to guarantee the judges appointed to sit on the bench in those courts with the same tenure and salary protections enjoyed by federal judges in the states. From the beginning, the Court’s answer was “no.” The leading case is *American Insurance Co. v. 356 Bales of Cotton*.<sup>127</sup> There, Chief Justice John Marshall concluded that Congress could create “legislative courts” in the territories that did

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salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.”)

125. See *Downes v. Bidwell*, 182 U.S. 244, 249–51 (1901) (discussing that history).

126. The New States Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2, provides as follows:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Property Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 1, provides as follows: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

127. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828).

not possess the same jurisdictional, life tenure, and salary-protection features as Article III courts.<sup>128</sup> The Court has followed that decision for more than a century since then, in both civil and criminal cases alike.<sup>129</sup>

## 2. *Military courts-martial*

The second example is the use of a court-martial in the military.<sup>130</sup> Article I empowers Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>131</sup> To maintain discipline within the services, Congress has created the Uniform Code of Military Justice, which serves as the military criminal code.<sup>132</sup> Congress also has created a judicial system for the trial and review of criminal charges against servicemembers.<sup>133</sup> Military officers serve as judges (and juries) at the trial and intermediate appellate

128. *Id.* at 546.

129. *See ex parte* Bakelite Corp., 279 U.S. 438, 453 (1929); *City of Panama*, 101 U.S. 453 (1879); *Clinton v. Englebrecht*, 80 U.S. 434 (1872); *Coe v. United States*, 155 U.S. 76 (1894); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Good v. Martin*, 95 U.S. 90, 98 (1877); *Hornbuckle v. Toombs*, 85 U.S. 648 (1873); *McAllister v. United States*, 141 U.S. 174 (1891); *Palmore v. United States*, 411 U.S. 389, 397–404 (1973); *In re Ross*, 140 U.S. 453 (1891); *Reynolds v. United States*, 98 U.S. 145 (1879); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477 (1899); *see also* *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (stating that courts created by Congress in Puerto Rico are legislative courts); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (favorably discussing *Canter*); *Wallace v. Adams*, 204 U.S. 415, 422 (1907) (courts created by Congress in Indian Country are legislative courts); *cf.* *Benner v. Porter*, 50 U.S. (9 How.) 235 (1850) (supporting the assertion that once a territory is admitted to the union as a state, Congress no longer can regulate it as a territory).

There is the additional complication that not all territories are alike. Some are deemed part of the United States, and the Constitution applies there. Others are not so fortunate. The Constitution itself does not apply, but there is a residual due process guarantee that does. *Compare* *Rasmussen v. United States*, 197 U.S. 516 (1905) (the territory of Alaska was incorporated into the United States), *with* *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (the territory of Puerto Rico was not incorporated into the United States); *Dorr v. United States*, 195 U.S. 138 (1904) (the territory of the Philippines was not incorporated into the United States). Whether those cases, known as the *Insular Cases*, are still good law is unclear. *Compare* *Examining Bd. of Architects, Engrs. & Surveyors v. Flores do Otero*, 426 U.S. 572 (1976) (stating in dicta that the *Insular Cases* no longer are good law), *with* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (dictum that the *Insular Cases* are still good law). For an excellent discussion of the Supreme Court’s territorial cases, see *Lawson*, *supra* note 99.

130. And its fraternal twin, the military tribunal. *See, e.g., In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

131. U.S. CONST. art. I, § 8, cl. 14.

132. *See, e.g., Solorio v. United States*, 483 U.S. 435, 438–39 (1987).

133. For a description of the military criminal justice system, see *Weiss v. United States*, 510 U.S. 163 (1994).

levels,<sup>134</sup> and they lack the tenure and salary protections enjoyed by Article III judges.<sup>135</sup> Nonetheless, the Supreme Court has held, almost without exception,<sup>136</sup> that service members may be tried by a court-martial for any crime committed while they are in the military if they are charged while still in the service.<sup>137</sup> The “military status of the accused” is the only fact necessary to confer jurisdiction on a court-martial.<sup>138</sup>

### 3. District of Columbia courts

A third exception applies to the courts of the District of Columbia. Just as the Constitution gave Congress authority to regulate territories acquired by the fledgling nation by virtue of the Article IV Property Clause,<sup>139</sup> the Constitution also granted Congress similar authority over the District of Columbia pursuant to the Article I En-

134. The highest court in the military justice system is the Court of Appeals for the Armed Forces, which consists of civilians appointed for a fixed term of office. See *Clinton v. Goldsmith*, 526 U.S. 529 (1999); United States Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited Dec. 21, 2012). All other military judges are officers in one of the services. See *Weiss* 510 U.S. at 169 (1994).

135. See *Weiss v. United States*, 510 U.S. 178 (“Although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition. The early English military tribunals, which served as the model for our own military justice system, were historically convened and presided over by a military general. No tenured military judge presided.”).

136. In 1969, in an opinion for the Court authored by Justice Douglas, the Supreme Court imposed a new restriction on court-martial jurisdiction, limiting it to only those charges that were “service-connected,” a term that the Court did not define. See *O’Callahan v. Parker*, 395 U.S. 258 (1969). In *Solorio v. United States*, the Court concluded that the historical analysis in *O’Callahan* was mistaken and that the “service-connection” test was unworkable. 483 U.S. 435, 438–51 (1987). The Court therefore overruled *O’Callahan*. *Id.* at 436.

137. See *Solorio*, 483 U.S. 435; *Gosa v. Hayden*, 413 U.S. 665, 673 (1973) (plurality opinion); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–41, 243 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Reid v. Covert*, 354 U.S. 1, 22–23 (1957) (plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); *Givens v. Zerbst*, 255 U.S. 11, 20–21 (1921); *Kahn v. Anderson*, 255 U.S. 1, 6–9 (1921); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Smith v. Whitney*, 116 U.S. 167, 183–85 (1886); *Coleman v. Tennessee*, 97 U.S. 509, 513–14 (1879); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 *W. WINTHROP MILITARY LAW & PRECEDENTS* 1503 (2d ed. 1896).

138. *Solorio*, 483 U.S. at 439.

139. See U.S. CONST. art. IV, § 3, cl. 2: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”

clave Clause.<sup>140</sup> In each instance, Congress can exercise the authority of a state legislature, rather than the national legislature, and so can create courts that lack the tenure and salary protections enjoyed by Article III courts.<sup>141</sup>

#### 4. *Administrative agencies*

The last example can be seen in administrative agencies. Numerous agencies exist today with the legal authority to promulgate regulations, to initiate legal proceedings, and to adjudicate disputes. The Interstate Commerce Commission was one of the first federal administrative agencies with adjudicative authority, but there are numerous others today. The Supreme Court has not required that Congress use only Article III courts to adjudicate disputes of what the court has termed “public rights,” that is, rights that exist only because Congress has created them by statute.<sup>142</sup> Congress, the Court has held, can empower administrative agencies to handle such adjudications in the first instance.<sup>143</sup>

#### *C. The Proposed Expansion of Indian Tribal Court Jurisdiction and Article III*

Despite those exceptions, the decision to vest tribal courts with authority over non-Indians is problematic under Article III. Congress has not given tribal court judges life tenure, nor has Congress pro-

140. The Enclave Clause states that:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]

U.S. CONST. art. I, § 8, cl. 17.

141. See *City of Panama*, 101 U.S. 453, 460 (1880); *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 447 (1872); *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 655–656 (1874); *McAlister v. United States*, 141 U.S. 174, 180–184 (1891); *Palmore v. United States*, 411 U.S. 389 (1973); *Reynolds v. United States*, 98 U.S. 145, 154 (1879); *Romeu v. Todd*, 206 U.S. 358, 369 (1907); *United States v. McMillan*, 165 U.S. 504, 510 (1897).

142. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585–89 (1985); *Crowell v. Benson*, 285 U.S. 22, 50, 53 (1932); cf. *Util. Workers v. Consol. Edison, Co.*, 309 U.S. 261, 264–65 (1940) (Congress may establish administrative agencies to enforce statutory rights).

143. See, e.g., *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 454–55 (1977); *Crowell v. Benson*, 285 U.S. 22 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *Thomas*, 473 U.S. 568.

tected their salaries from diminution, the two cardinal features of an Article III court judge.<sup>144</sup> The Senate VAWA bill does not change that state of affairs. Accordingly, vesting criminal jurisdiction over non-Indians in tribal courts can be defended only on the ground that one of the above Article III exceptions applies. The problem is that none of these exceptions is applicable here.<sup>145</sup>

Start with the easy ones. First: Tribal courts are not military courts-martial. A court-martial can sentence a defendant to prison, but their jurisdiction is limited to servicemembers.<sup>146</sup> Moreover, tribal courts are not part of the military justice system.<sup>147</sup> Second: Like courts-martial, the District of Columbia courts can sentence an offender to prison, but the District of Columbia is a unique feature of the Constitution, geographically and structurally.<sup>148</sup> That exception cannot reasonably be extended to reach tribal criminal jurisdiction in Arizona. Third: Tribal courts are not administrative agencies. Even if they were, agencies lack criminal jurisdiction and therefore cannot sentence a person to imprisonment, so this exception is inapplicable.<sup>149</sup> Accordingly, the only exception that could apply is the one for

144. See, e.g., Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 299 (1981).

145. The President or the Head of a Department, in compliance with the Article II Appointments Clause, appoints military officers, judges in the District of Columbia courts, and Superior Officers at administrative agencies. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *Edmond v. United States*, 520 U.S. 651, 653–58 (1997) (Coast Guard Court of Military Appeals); *Palmore*, 411 U.S. at 392–93 (District of Columbia court judges); *Weiss v. United States*, 510 U.S. 163, 168 & n.2 (1994) (military officers). The president does not appoint tribal court judges. See *supra* note 33. The problems with the Senate VAWA bill created by Article III also exist under Article II. For convenience, however, we will generally refer only to Article III in this discussion.

146. See 10 U.S.C. §§ 802–03 (2012) (listing parties subject to the Uniform Code of Military Justice).

147. See *id.* § 801(10) (“[t]he term ‘military judge’ means an official of a general or special court-martial detailed in accordance with [10 U.S.C. §] 826 . . . .”); *id.* § 826 (identifying judges who may preside over courts-martial for purpose of the Uniform Code of Military Justice).

148. See *supra* notes 134–35.

149. Administrative agencies lack authority to enter a judgment holding unconstitutional an act of Congress. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Oestereich v. Selective Serv. Sys. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *PUC v. United States*, 355 U.S. 534, 539 (1958). If so it certainly would be odd to allow an Indian tribal court to issue a judgment with that effect. This is particularly true in light of the fact that the United States cannot appeal to the Supreme Court, or to any other federal court, from such a judgment. Circuit courts have jurisdiction over final decisions entered by district courts, not tribal courts. 28 U.S.C. § 1291 (2006). The Supreme Court has jurisdiction to review the judgments of federal circuit courts and state courts of last resort. 28 U.S.C. § 1254(1) (2006). Tribal courts are neither. If tribal courts can exercise even limited criminal jurisdiction over non-Indians, that oddity



territorial courts.

The Supreme Court case law dealing with territories gives new meaning to the term “ipse dixit.” As Professor Gary Lawson has explained, the Supreme Court’s decisions construing Congress’ authority to govern territories make no effort to square the mechanisms that Congress has chosen for territorial governance with the text of Articles II and III.<sup>150</sup> The lesson of the Court’s territorial courts cases appears to be that Congress can act as if it were a state legislature when it seeks to regulate a territory.<sup>151</sup> The Court’s doctrine allows Congress to establish territorial courts lacking the Article III protections that the Framers thought necessary for the judiciary to remain independent.<sup>152</sup> In fact, the Court’s decisions, beginning with Chief Justice Marshall’s 1828 opinion in *American Insurance Co. v. 356 Bales of Cotton*,<sup>153</sup> have granted Congress authority to regulate territories and their local governments as if Article III did not exist, despite the Framers’ efforts to use this provision carefully to circumscribe the power that Congress otherwise may exercise.<sup>154</sup>

The supporters of the Senate VAWA bill likely would point to this body of law to defend the extension of federal criminal jurisdiction to the tribal courts. According to this argument, those decisions enable Congress to do precisely what Section 904 of Senate Bill 1925 seeks to do: empower tribal courts to adjudicate cases and sentence convicted offenders to prison for a narrow category of crimes that tribes have a surpassing interest in punishing.<sup>155</sup> This limited expansion of tribal court jurisdiction, the argument would continue, measurably contributes to a tribe’s ability to engage in the self-governance that any autonomous polity finds essential by enabling tribes to handle matters of critical local concern. Finally, allowing tribal courts to handle crimes involving domestic violence does not encroach on the power of the federal or state courts. On the contrary, the argument

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may occur.

150. See Lawson, *supra* note 99, at 888–94, 907–08.

151. See, e.g., *Palmore v. United States*, 411 U.S. 389 (1973).

152. See Lawson, *supra* note 99, at 878–94. Congress also has authorized territorial inhabitants to elect government officials themselves, which would appear to be a clear violation of the Article II Appointments Clause. *Id.* at 894–905.

153. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828).

154. See Lawson, *supra* note 99, at 871–911.

155. See Rob Hotakainen, *Tribes Want New Powers to Prosecute Non-Indians*, McCLATCHY NEWSPAPERS, Aug. 12, 2012, available at <http://www.mcclatchydc.com/2012/08/12/161534/tribes-want-new-powers-to-prosecute.html>.

would conclude, the Senate VAWA bill avoids adding to their already-heavy caseloads. Federal and state courts, therefore, would welcome having tribal courts serve as alternative forums for these cases.

The strength of that argument lies in its facial reasonableness and practical usefulness. The Senate VAWA bill offers a sensible solution to a serious tribal problem that accommodates all of the competing interests without stepping on anyone's toes. The argument also leans towards affording tribal courts the same type of respect that the Supreme Court has often indicated that state courts deserve as competent, reliable, and honorable adjudicators.<sup>156</sup> To borrow Professor Lawson's colorful words, the formalistic approach envisioned by Article III appears to be "one of constitutionally mandated *colonialism*, which is not likely to go over well at cocktail parties, legal symposia, or congressional committee hearings."<sup>157</sup>

However reasonable that argument may appear, ultimately it is unpersuasive. Under current Supreme Court case law, when Congress acts as a state legislature to regulate a "territory," it has latitude to create governmental structures that would not satisfy the Article III requirements applicable when Congress acts as the national legislature. Nonetheless, there is a limit as to how far the Supreme Court's territorial cases can be stretched. After all, as a matter of logic the same decisions that lift the constraints of Article III when Congress acts as a state legislature would also justify erasing the constraints placed on Congress in Article I. The result would be that Congress could legislate without regard to the Article I Presentment Clause requirement that all bills be forwarded to the President for his signature or veto.<sup>158</sup> Congress could also ignore the Article I prohibition on passing Bills of Attainder and Ex Post Facto laws as well as disregard the guarantees in the Bill of Rights, such as the Eighth Amendment Cruel and Unusual Punishments Clause.<sup>159</sup> Yet, it is inconceivable that the Supreme Court would allow Congress to act as a modern day committee of public safety or to pass a territorial law ret-

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156. See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

157. Lawson, *supra* note 99, at 908 (emphasis in original).

158. See U.S. CONST. art. I, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919 (1983) (a one-house veto is unconstitutional); *Process Gas Consumers Grp. v. Consumers Energy Council*, 463 U.S. 1216 (1983) (same result for a two-house veto).

159. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

roactively criminalizing innocent conduct, branding a specific person as a felon, and punishing him with being boiled in oil. But if that is true, then Articles I, II, and III, as well as the Constitution's amendments, to some extent must limit Congress' power to regulate a territory. The question then becomes, "How much of a limitation is there?"

Reasonable people can disagree on how far Congress can go in regulating a territory.<sup>160</sup> But there should be unanimity on one point; the Supreme Court's territorial court precedents apply only when the polity involved is a "[t]erritory" within the meaning of the Property Clause of Article IV. Otherwise, in the absence of some other exception, the Court's decisions require Congress to legislate only in compliance with Article III.

This should be dispositive here, because a "reservation" is not a "[t]erritory." When the Framers used that term in Article IV, they likely had the Northwest Territories in mind, which the thirteen colonies acquired from Great Britain along with their freedom.<sup>161</sup> That term was later also used to describe the Louisiana Territory, purchased from France in 1803, and other western lands, such as the Or-

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160. For example, it could be said that granting tribal courts criminal jurisdiction over non-Indians is beyond Congress' reach. That argument would go as follows: The authority to punish someone for a crime is the most intrusive of government acts. *Oliphant* exhaustively canvassed the law governing the relationship between the federal government and the tribes, and the Court concluded that federal law never contemplated that tribes may exercise criminal jurisdiction over non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). As explained in the text, if Congress cannot authorize torture as the punishment for domestic violence, Congress cannot force a defendant to be tried before a judge whose tenure and salary rests in the hands of a political community from which the defendant is excluded due to his race. If Congress wants to change that rule of law, the argument concludes, it may do so, but it must comply with Articles II and III in the process.

The problem with that argument, however, is that, as recently as 1973, the Supreme Court has upheld Congress' decision to vest non-Article III courts with criminal jurisdiction in the District of Columbia and the territorial courts. *See, e.g., Palmore v. United States*, 411 U.S. 389 (1973). Whatever the merits of that argument as an original matter—and, as Professor Lawson has noted, it is far more faithful to the text of the Constitution than are the Court's precedents—that argument has an uphill climb given the Court's decisions.

161. *See Mormon Church v. United States*, 136 U.S. 1, 42 (1890) ("[T]he territory northwest of the Ohio River . . . belonged to the United States at the adoption of the Constitution. . . ."). In fact, it is possible that the Framers thought that the term "territory" would refer exclusively to the Northwest Territories, because there was a significant debate over whether President Jefferson had authority to purchase the Louisiana Territory. *See Downes v. Bidwell*, 182 U.S. 244, 252 (1901) ("It is well known that Mr. Jefferson entertained grave doubts as to his power to make the purchase, or, rather, as to his right to annex the territory and make it part of the United States . . .").

egon Territory.<sup>162</sup> Like the land forming the original thirteen states, the federal government acquired that territory by treaty (France, Great Britain, and Spain), conquest (Spain), or both (Spain).<sup>163</sup> In the same way, the United States acquired a property right in the land claimed by the tribes who lived there. Under the “Conquest Theory” of property acquisition, each western nation that discovered and laid claim to a portion of the Western Hemisphere became sovereign over that land, regardless of the presence of an indigenous population.<sup>164</sup> By acquiring land from Great Britain, France, and Spain, the United States acquired the same rights that those nations had enjoyed.<sup>165</sup> In the process, the federal government simply ignored the aboriginal title that the tribes claimed to the land now forming the United States. However it acquired land beyond the thirteen states, the United States possessed the same authority over those territories that any nation would enjoy over land under its control.

“Reservations” came into being in a different way. A reservation is

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162. See *Mormon Church*, 136 U.S. at 142 (“The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories.”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 587 (1823). The United States purchased the Louisiana Territory from France in 1803. The United States acquired the land, called the Mexican Succession, forming all or part of ten western states by virtue of the treaty ending the Mexican War. The United States later bought land from Mexico, an exchange called the Gadsden Purchase, in present-day Arizona and New Mexico to build a transcontinental railroad and to reconcile some outstanding territorial issues from the Mexican War. The United States acquired the Oregon Territory by virtue of settlement and treaties with France, Spain, and Great Britain. See Act of August 14, 1848, ch. 177, § 14, 9 Stat. 329 (1848); the Treaty of Boundary, Cession of Territory, Transfer of Isthmus of Tehuantepec (Gadsden Purchase Treaty), U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031; Treaty of Peace, Friendship, Limits, and Settlement Guadalupe-Hidalgo US-Mex., Feb. 2, 1848, 9 Stat. 926 (1852); *Richardson v. Ainsa*, 218 U.S. 289, 295 (1910); *Shively v. Bowlby*, 152 U.S. 1, 50 (1894); *Botiller v. Dominguez*, 130 U.S. 238 (1889); GAO, TREATY OF GUADALUPE HIDALGO GAO-04-59, at 27–33 (June 2004); SAMUEL ELIOT MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 538–47, 559–65, 567, 604 (1965).

163. See *Downes*, 182 U.S. at 268; *Mormon Church*, 136 U.S. at 42.

164. See *Johnson*, 21 U.S. at 589 (“The title by conquest is acquired and maintained by force. The conqueror prescribes its limits.”).

165. For a discussion of the Conquest Theory, see *Downes*, 182 U.S. at 300–05 (Brown, J., concurring); *Mormon Church*, 136 U.S. at 42; *United States v. Huckabee*, 83 U.S. 414, 434 (1872) (collecting authorities); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828); *Johnson*, 21 U.S. at 572–92; cf. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) (“Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.”).

not acquired by the United States from a foreign nation through force or by purchase. Rather, under “the accepted meaning of the term,” a “reservation” is a “distinct tract” of land held in fee simple by the United States that is set aside or “reserved” for the “occupancy” and use of a tribe by virtue of a treaty with the United States, a statute, or an executive order.<sup>166</sup> Reservations became necessary to avoid conflict as settlers moved west in pursuit of land that the tribes claimed as part of their heritage, but that the federal government claimed by virtue of its status as sovereign.<sup>167</sup> Indeed, acts of Congress admitting territories into the union as states specifically exempted property that belonged to a tribe by treaty.<sup>168</sup> The federal government created reservations for the tribes to live separately from settlers and to be subject only to federal and tribal governance.<sup>169</sup> Tribal reservations therefore are not the same as the “[t]erritories” that the Framers included in Article IV.<sup>170</sup>

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166. *United States v. Dion*, 476 U.S. 734, 737 (1986); *Minnesota v. Hitchcock*, 175 U.S. 373, 389–90 (1902); *United States v. Carpenter*, 111 U.S. 347 (1884); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson*, 21 U.S. (8 Wheat.) 543. As the Supreme Court explained in *Spalding v. Chandler*:

It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

*Spalding v. Chandler*, 160 U.S. 394, 402–03 (1896).

167. Beginning in 1830 with the Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (May 28, 1830), Congress passed several laws to remove the tribes from east to west of the Mississippi and later to allow land to be set aside west of the Mississippi for occupancy by the tribes as Americans moved westward to the Pacific. For later federal legislation, see, for example, General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887); Indian Appropriations Act of 1851, ch. 14, 9 Stat. 574, 586–87 (1851); the Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 (2012)); see also *CORRESPONDENCE ON THE SUBJECT OF THE EMIGRATION OF INDIANS*, S. Doc. No. 512 (1834); *Second Annual Message of President Andrew Jackson to Congress* (Dec. 6, 1830), reprinted in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1908* (James D. Richardson ed., 1908).

168. *E.g.*, *In re Kan. Indians*, 72 U.S. 737, 740–41 (1866) (statute admitting Kansas). The Indian Appropriations Act of 1851 allotted funds to move tribes into reservations to avoid conflict with settlers.

169. See L. Bow Pritchett, Comment, *Problems of State Jurisdiction over Indian Reservations*, 13 *DEPAUL L. REV.* 74, 74–75 (1963).

170. For a discussion of the *sui generis* history of the relationship between the federal gov-

Can Congress retroactively change the status that a tribal reservation enjoys under federal law in order to invest a tribe with the jurisdiction that it might have been able to exercise if the reservation had been a territory from the outset?<sup>171</sup> The answer is no for several reasons.<sup>172</sup> Initially, once a territory becomes a state, Congress loses the authority to regulate the state as if it were still a territory.<sup>173</sup> Under the Equal Footing Doctrine each new state admitted to the union receives the same legal rights that preexisting states enjoy.<sup>174</sup> One of those rights is territorial integrity.<sup>175</sup> Article IV of the Constitution explicitly forbids Congress from carving a new state out of the land of an existing state without the latter's consent.<sup>176</sup> Accordingly, Congress cannot wrest land from an existing state for the purpose of creating a new "territory" for an Indian tribe without the affected state's

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ernment and the tribes, see Frickey, *supra* note 43; Philip P. Frickey, *Marballing Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Charlene Koski, *The Legacy of Solem v. Helm: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 83 WASH. L. REV. 723 (2009).

171. Congress thought about that option once. In 1834, "Congress proposed to create an Indian territory beyond the western-directed destination of the settlers; the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201–02 (1978). The bill never passed. *Id.* at 202 n.13.

172. *Cf. Downes v. Bidwell*, 182 U.S. 244, 260–61 (1901) ("This District [of Columbia] had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward.")

173. *See Benner v. Porter*, 50 U.S. (9 How.) 235, 242–45 (1850) (once a territory is admitted to the union as a state, Congress can no longer regulate it as a territory).

174. *See PPL Mont. LLC v. Montana*, 132 S. Ct. 1215, 1227–28 (2012); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Coyle v. Smith*, 221 U.S. 559 (1911); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). The term "equal footing" comes from the Northwest Ordinance of 1787. It provided that each new state admitted to the union from that territory would enter on an "equal footing" with the states that already were members of the republic. *See Pollard v. Hagan*, 44 U.S. (3 How.) 212, 222 (1845).

175. *See Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) ("'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" (citation omitted)); *United States v. Kagama*, 118 U.S. 375, 379 (1886) ("[T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these."); *accord Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 211 (1978); *cf. Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered.")

176. *See supra* note 126 (quoting the New States and Property Clauses, art. IV, § 3, cl. 1).

approval.<sup>177</sup> The upshot of this process is that Congress cannot regulate tribal court jurisdiction for a reservation within one of the states by invoking its authority to create Article I courts for territories. Put differently, the Constitution prohibits Congress from treating a reservation as if it were a territory if that reservation lies within the borders of any of the fifty states.

Congress may be able to skip over some Article III requirements when legislating for a territory, but it cannot escape those restrictions by virtue of the fiction that “reservations” are “territories.” None of the Supreme Court’s 19th or 20th century decisions makes that fiction a fact. Those decisions give Congress expansive power to regulate a territory, but do not allow Congress to label as a “territory” land that clearly is not. The term “[t]erritory” both defines and limits the reach of Congress’ power, and, like the other terms in that document, the courts, not Congress, have the ultimate authority to define its meaning.<sup>178</sup> Congress, therefore, cannot make a “reservation” into a “territory” by fiat. Stated differently, even if Congress can call an apple an orange for some purposes, Congress can’t change the nature of the fruit. The result is that the Supreme Court’s territorial decisions are inapposite here because a “reservation” is not, and cannot be made into, a “territory.”<sup>179</sup>

It always is possible that the Supreme Court could create a new Article III exception for Indian tribal courts as a way to uphold the

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177. And even if Congress could, the Senate VAWA bill does not purport to have that effect.

178. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598–2600 (2012) (the meaning of the term “tax” for purposes of the Direct Taxes Clause, U.S. CONST. art. I, § 9, cl. 4, is for the courts, not Congress to define); see also *New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816) (a “territory” is not a “state” for purposes of Article III); *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 45 (1805) (the “District of Columbia” is not a “state” for purposes of Article III).

179. Defenders of the Senate bill also might argue that the legislation does not delegate authority to the tribes, but simply recognize their inherent authority to prosecute cases against non-Indians. Language in *United States v. Lara*, 541 U.S. 193 (2004), would support that theory. There are two flaws, however, in that argument. The first flaw is precedent. The Supreme Court held in *Olipbant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes lack inherent authority to prosecute non-Indians. Congress cannot “recognize” authority that has never existed; Congress can only create it. If Congress does, Articles II and III regulate how that power can be exercised. The second flaw is logical. Only an act of Congress can enable tribes to exercise criminal jurisdiction over non-Indians, and it should make no difference whether that legislation is labeled a “delegation of authority” or a “recognition of inherent authority.” In either case only a federal statute would permit a tribal judge to order a convicted defendant imprisoned, and that statute is an exercise of Article I authority that can only be accomplished in accordance with Articles II and III. See *Freytag v. Comm’r*, 501 U.S. 868, 883 (1991).

constitutionality of a statute like the Senate bill. But it would be difficult to obscure the fact that any such exception truly would constitute an example of constitution-making rather than constitutional interpretation. Neither the text of Article III nor the history of relations between the United States and the tribes would support any such exception, as the Supreme Court noted in *Oliphant*. The Framers were well aware of the existence of Indian tribes and the problem of defining the relationship between them and the federal or state governments, so the Court could not justify an exception on the ground that Congress today must address a new problem that the Framers could not have anticipated. If the Court tried to limit the exception to the type of minor crimes anticipated by the Senate bill the Court would find itself forced to undertake an undirected and unguided line-drawing exercise as it tried to identify exactly what offenses may be tried by tribal courts. And there is no need for the Court to squander its prestige on this enterprise. Congress could vest the federal or state courts with jurisdiction over domestic violence on tribal reservations, so there is no argument that only tribal courts can address this problem. Tribes may want the opportunity to address domestic violence in their own courts even when non-Indians are defendants, but their desire to adjudicate those cases is entitled to little weight when stacked against the concerns that Article III protects.

#### V. CONCLUSION

Congress is right to be concerned about spousal abuse and other forms of domestic violence on Indian reservations. But Congress needs to address this problem in a manner that does not leave the solution subject to invalidation under Articles II and III. Congress could vest the federal courts with jurisdiction over such offenses, or Congress could allow the states to prosecute these crimes in state courts. Either approach would avoid the separation-of-powers problems discussed above. The one avenue that seems closed to Congress, however, is precisely the one that the Senate has chosen. However Congress decides to address the domestic-violence problem in Indian reservations, that action must be done in accordance with Articles II and III in a manner that deals with this public policy problem in a constitutional manner. The Senate VAWA bill would not help address the domestic-violence problem on Indian reservations because an unconstitutional remedy is no remedy at all.