



## At Sidebar

by Hon. Elizabeth Ann Kronk

# An Affront to Our Shared Humanity: The 112th Congress' Failure to Enact Senate Bill 1925

### One in three American Indian women is raped or is

a victim of attempted rape.<sup>1</sup> American Indian women experience domestic violence at twice the rate of other women in the United States,<sup>2</sup> and in some places in the United States, American Indian women face domestic violence at 12 times the rate of other American women.<sup>3</sup> President Barack Obama has referred to the extreme level of domestic violence facing American Indian women as “an affront to our shared humanity.”<sup>4</sup> In reaction to this startling and horrific reality, the U.S. Senate of the 112th Congress passed Senate Bill 1925, which would have extended the protections of the Violence Against Women Act (VAWA) to aid American Indian women in Indian country.<sup>5</sup> On Jan. 1, 2013, however, the U.S. House of Representatives let Senate Bill 1925 lapse without bringing the bill for a vote in the House.<sup>6</sup> As a result, it was thought that American Indian women would continue to endure a harsh reality where many face domestic violence on a daily basis. Two questions may arise from an examination of the atrocity of domestic violence against women and the House's failure to vote on Senate Bill 1925. First, why is it that American Indian women face higher rates of domestic violence than their non-Native counterparts? And, second, why did Senate Bill 1925 of the 112th Congress and the protections it offered American Indian women prove controversial and ultimately fail?

### Criminal Jurisdiction in Indian Country<sup>7</sup>

In order to answer the first question of why it may be that American Indian women face higher rates of domestic violence, it is helpful to explore the criminal jurisdictional scheme applicable in Indian country. Indian tribes are sovereign nations that predate the formation of the United States, and as a result, the law applicable to tribes and Indian country generally is different than that of the United States. Beginning with the U.S. Constitution, the federal government has recognized the sovereign nature of Indian tribes.<sup>8</sup> As early as 1831, the U.S. Supreme Court acknowledged the separate, sovereign nature of Indian tribes.<sup>9</sup> This recognition of tribal sovereignty continues to the present day, as every modern administration since President Richard M. Nixon's has acknowledged the

sovereignty possessed by tribes; the Supreme Court continues to recognize the existence of tribal sovereignty; and, since 1975, the U.S. Congress has also advocated and encouraged a policy of tribal self-determination. Because of its plenary authority in Indian country, Congress has the ability to enact legislation impacting Indian country.<sup>10</sup> Specifically, Congress has enacted legislation affecting the criminal jurisdiction scheme, including the Indian Country Crimes Act and the Major Crimes Act. In 1834, Congress enacted the Indian Country Crimes Act (also referred to as the General Crimes Act), 18 U.S.C. § 1152, which provides that “the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country.” The Indian Country Crimes Act goes on to state that

[t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.<sup>11</sup>

Accordingly, despite the federal government's intervention into tribal affairs through the Indian Country Crimes Act, the Act preserves crucial aspects of tribal sovereignty. In 1885, Congress passed the Major Crimes Act, 18 U.S.C. § 1153. The Major Crimes Act grants the federal government concurrent jurisdiction with tribes when certain enumerated crimes are committed by an Indian within Indian country. The enumerated crimes include: murder; manslaughter; kidnapping; maiming; any felony under the sexual abuse statutes; incest; assault with intent to commit murder, with a dangerous weapon, resulting in serious bodily injury, or against a child under 16; felony child abuse or neglect; arson; burglary; robbery; and felony theft. Accordingly, through enactment of the Indian Country Crimes Act and Major Crimes Act,

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*Hon. Elizabeth Ann Kronk is an appellate judge for and an enrolled citizen of the Sault Ste. Marie Tribe of Chippewa Indians in Michigan. She is also an associate professor and director of the Tribal Law and Government Center at the University of Kansas School of Law. She currently serves as a member of The Federal Lawyer's editorial board and as a member of the national FBA Board of Directors. She formerly served as chair of the FBA's Indian Law Section.*

Congress allows for federal criminal jurisdiction in Indian country concurrent with tribal jurisdiction under certain circumstances. In addition to these and other congressional actions impacting criminal jurisdiction in Indian country, the Supreme Court also intruded upon the criminal jurisdiction scheme by placing a significant limitation on tribal criminal jurisdiction through its decision in *Oliphant v. Suquamish Indian Tribe*.<sup>12</sup> In *Oliphant*, the Court held that tribes may not assert jurisdiction over non-Indians committing crimes in Indian country.<sup>13</sup> Notably, however, the Court's decision in *Oliphant* marked a departure from several treaties which recognized tribal jurisdiction over non-Indians in certain circumstances.<sup>14</sup> For example, the Treaty of New Echota between the United States and Cherokee Nation recognizes the Cherokee Nation's jurisdiction over *all* individuals who "connected" themselves to the Cherokee Nation.<sup>15</sup>

As seen from this very brief introduction, criminal jurisdiction in Indian country is a labyrinth. Multiple sovereigns, such as the federal government and tribal government, may have jurisdiction over a single crime.<sup>16</sup> Moreover, the U.S. Supreme Court divested tribes of their criminal jurisdiction over non-Indians. This is particularly important in the context of violence against women. Amnesty International reported that 86 percent of American Indian women are raped by non-Native men.<sup>17</sup> Although not conclusive, this startling statistic suggests that a significant portion of those who are committing domestic violence offenses against American Indian women are non-Native. Accordingly, these non-Native offenders are not currently subject to tribal court jurisdiction because of the Supreme Court's opinion in *Oliphant*. Furthermore, domestic violence crimes often require immediate collection of evidence necessary for prosecution and valuable time may be lost as law enforcement officials try to ascertain which sovereign has jurisdiction. By the time jurisdiction is determined, it may be too late to gather the evidence necessary to convict domestic violence offenders in Indian country. For these reasons, in part, many believe that the criminal jurisdictional scheme in Indian country contributes to the high rate of domestic violence against American Indian women.

### Senate Bill 1925: The Controversy

Given the foregoing, why is it that Senate Bill 1925 of the 112th Congress proved so controversial that the House allowed it to expire at the end of 2012? Entitling it "An Act to Reauthorize the Violence Against Women Act of 1994," the Senate passed the bill on Apr. 26, 2012. Although the House passed a version of the bill, Senate Bill 1925 was broader than the House version, as Senate Bill 1925 would have extended the protections of the VAWA to three groups of women previously not protected by the Act: American Indian women; lesbian, gay, bi-sexual, and transgendered individuals; and undocumented immigrants.<sup>18</sup> Some have suggested that Senate Bill 1925 was objectionable to members of the House because provisions of the bill specifically related to Indian country.<sup>19</sup> Title IX of Senate Bill 1925 was entitled "Safety for Indian Women" and addressed domestic violence offenders committing crimes in Indian country. Section 904 addressed "Tribal Jurisdiction Over Crimes of Domestic Violence," specifically, § 904(b)(1) provided in relevant part that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." Accordingly, those tribes meeting the



requirements of the bill would have jurisdiction over "all persons" committing domestic violence crimes within the participating tribe's jurisdiction, which includes non-Natives committing domestic violence crimes.<sup>20</sup> In this way, Senate Bill 1925 constituted a limited *Oliphant* fix. Regardless of why the House allowed Senate Bill 1925 to lapse without allowing a vote on it, the position of the Federal Bar Association (FBA) on tribal jurisdiction in these instances seems clear. "The [FBA] supports the restoration of criminal jurisdiction to Indian tribal courts, in accordance with federal, state and tribal law, over non-Indian offenders in cases of domestic and family violence."<sup>21</sup> Hopefully, with the continued support of the FBA, domestic violence advocates will be able to find a solution to the atrocity of domestic violence in Indian country soon. The FBA is not alone in its position, as several members of the House have indicated their desire to pursue reauthorization of the VAWA during the tenure of the 113th Congress.<sup>22</sup> To otherwise allow American Indian women to suffer such high rates of domestic violence is "an affront to our shared humanity." ©

### Author's Post-Script Note

Remarkably, after this article was written and submitted for publication, the 113th Congress passed the reauthorization of VAWA, inclusive of the expanded provisions to protect American Indian women, on Feb. 28, 2013. For more information, see the Feb. 28, 2013, press release on the VAWA reauthorization at [www.ncai.org](http://www.ncai.org).

## Endnotes

<sup>1</sup>Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES, May 22, 2012, available at [www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all&r=0](http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all&r=0) (citing statistics from the U.S. Department of Justice).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>JENNIFER BENDERY, VIOLENCE AGAINST WOMEN ACT: ERIC CANTOR, JOE BIDEN IN TALKS AMID STALLED TRIBAL PROVISION (Dec. 6, 2012), available at [www.huffingtonpost.com/2012/12/06/violence-against-women-act-eric-cantor-native-americans\\_n\\_2251924.html](http://www.huffingtonpost.com/2012/12/06/violence-against-women-act-eric-cantor-native-americans_n_2251924.html).

<sup>5</sup>The term “Indian country” is a legal term of art, as defined at 18 U.S.C. § 1151. Generally, “Indian country” includes Indian reservations, allotments, and dependent Indian communities.

<sup>6</sup>JAMIL SMITH, CONGRESS LETS VIOLENCE AGAINST WOMEN ACT WITHER AWAY (Jan. 2, 2013), available at [tv.msnbc.com/2013/01/02/congress-lets-violence-against-women-act-wither-away](http://tv.msnbc.com/2013/01/02/congress-lets-violence-against-women-act-wither-away).

<sup>7</sup>Notably, Public Law Number 280 applies in some states. In 1953, Congress enacted Public Law Number 280, which had the effect of extending both civil and criminal state jurisdiction to events occurring within Indian country. 67 Stat. 588 (1953), as amended, 18 U.S.C.A. §§ 1161-1162, 25 U.S.C.A. §§ 1321-1322, 28 U.S.C.A. § 1360 (1953). Originally, Public Law Number 280 conferred criminal and civil jurisdiction in Indian country to California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Alaska was later added in 1958. Public Law Number 280 also allowed states to assume jurisdiction, if they opted to do so. Under this provision, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington all assumed some aspect of jurisdiction in Indian country. Ultimately, the Supreme Court determined that Public Law Number 280 did not confer general regulatory authority on the states. *Bryan v. Itasca County*, 426 U.S. 373 (1976). Despite this ruling, however, Public Law Number 280 dramatically changes the jurisdiction of tribal courts where it applies. For an in-depth discussion of the application of Public Law Number 280, please see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians* (Univ. of California, American Indian Culture & Research Center, 1975), reprinted from 22 UCLA L. REV. 535-94 (1975). The following discussion explains the criminal jurisdictional framework generally applicable in jurisdictions where Public Law Number 280 does not apply.

<sup>8</sup>U.S. CONST. art. I, § 8; art. II, § 2.

<sup>9</sup>See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (explaining that while tribal governments are dependent on the federal government they still remain separate entities outside of the complete control of the federal government and tribes are therefore “domestic dependent nations”). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”).

<sup>10</sup>See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886).

<sup>11</sup>Indian Country Crimes Act, 18 U.S.C. § 1152.

<sup>12</sup>435 U.S. 191 (1978).

<sup>13</sup>For a discussion of the need for a potential *Oliphant* “fix,” see articles by Troy Eid and Elizabeth Ann Kronk in the March/April

2007 issue of *The Federal Lawyer*.

<sup>14</sup>For an extended discussion of these treaties see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214-15 (2002).

<sup>15</sup>Treaty of New Echota, Dec. 29, 1835, art. V, 7 Stat. 478.

<sup>16</sup>Notably, because the federal government and tribal governments are separate sovereigns, prosecution by one sovereign of a crime arising in Indian country does not preclude the other sovereign from prosecuting under the Double Jeopardy provision of the Constitution. *United States v. Wheeler*, 435 U.S. 313 (1978). Relatedly, however, tribes retain criminal jurisdiction over Indians, regardless of whether or not the Indian in question is a citizen of the prosecuting tribe. *United States v. Lara*, 541 U.S. 193 (2004).

<sup>17</sup>AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at [www.amnestyusa.org/pdfs/MazeOfInjustice.pdf](http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf).

<sup>18</sup>LAURA BASSETT & JENNIFER BENDERY, HOUSE GOP LETS VIOLENCE AGAINST WOMEN ACT PASSED BY SENATE DIE WITHOUT A VOTE (Jan. 2, 2013), available at [www.huffingtonpost.com/2013/01/02/violence-against-women-act\\_n\\_2398553.html](http://www.huffingtonpost.com/2013/01/02/violence-against-women-act_n_2398553.html).

<sup>19</sup>*Id.*; MATTHEW L.M. FLETCHER, UPDATE ON VAWA REAUTHORIZATION & TRIBAL JURISDICTION—CRUNCH TIME (Mar. 12, 2012), available at [turtletalk.wordpress.com/2012/03/12/update-on-vawa-reauthorization-tribal-jurisdiction](http://turtletalk.wordpress.com/2012/03/12/update-on-vawa-reauthorization-tribal-jurisdiction). It has been suggested that some may object to tribal jurisdiction over non-Native offenders because of concerns related to the adequacy of tribal courts. The adequacy of tribal courts is beyond the scope of this article. For a discussion, however, of the adequacy of tribal courts, see *Elizabeth Ann Kronk, Tightening the Perceived “Loophole”: Reexamining ICRA’s Limitation on Tribal Court Punishment Authority in THE INDIAN CIVIL RIGHTS ACT AT FORTY* (Kristen A. Carpenter et al. eds, UCLA American Indian Studies Center, 2012).

<sup>20</sup>The bill did provide some limitations on tribal jurisdiction over non-Native domestic violence offenders. For example, concurrent jurisdiction with the federal or state government remained where appropriate. Also, the participating tribe would not have jurisdiction where neither the perpetrator nor victim is Indian. Furthermore, the perpetrator must have ties to the prosecuting tribe.

<sup>21</sup>FBA, *Federal Bar Association 2012 2013 Issues Agenda*, [www.fedbar.org/Advocacy/Issues-Agendas.aspx](http://www.fedbar.org/Advocacy/Issues-Agendas.aspx) (last visited Jan. 3, 2013).

<sup>22</sup>*Backers Hope to Revive Violence Against Women Act* (Jan. 4, 2013), [www.cnn.com/2013/01/03/politics/congress-domestic-violence/index.html](http://www.cnn.com/2013/01/03/politics/congress-domestic-violence/index.html).