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Domestic Abuse on Indian Reservations: How Congress Failed to Protect Women Against Violence

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Abstract

Last year, Congress reauthorized the Violence Against Women Act (VAWA). A provision in the statute grants Indian tribal courts concurrent jurisdiction over certain criminal charges of domestic abuse filed against non-Indians. While Congress is right to be concerned about spousal abuse and other forms of domestic violence on Indian reservations, this provision, Section 904, violates Articles II and III of the U.S. Constitution. Consequently, this new law will not address the domestic violence problem on Indian reservations because it is likely to be struck down as unconstitutional.

Congress passed the Violence Against Women Act (VAWA)[2] in 1994 in part to authorize various federally funded anti-violence programs.[3] Last year, Congress passed a VAWA reauthorization bill. A provision in the statute, Section 904, grants Indian tribal courts concurrent jurisdiction over certain criminal charges of domestic abuse filed against non-Indians.[4] While Congress was justifiably concerned about spousal abuse and other forms of domestic violence on Indian reservations,[5] that provision is likely unconstitutional because it grants tribal courts authority that can be exercised only by parties appointed in compliance with the Appointments Clause of Article II[6] and that satisfies the requirements of the Judicial Power and Good Behavior Clauses of Article III.[7] The selection of tribal court judges violates Articles II and III because tribes appoint judges for terms that the tribes themselves select.[8] Congress could have avoided the problems that this statute raises, but it

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Key Points

- A provision in the recently reauthorized Violence Against Women Act grants Indian tribal courts concurrent jurisdiction over certain criminal charges of domestic abuse filed against non-Indians.
- While Congress is right to be concerned about spousal abuse and other forms of domestic violence on Indian reservations, this provision, Section 904, violates Articles II and III of the U.S. Constitution.
- Congress could have (1) granted Article III courts jurisdiction over domestic violence offenses committed on reservations; (2) granted state courts jurisdiction over such crimes; or (3) required that tribal judges be appointed in compliance with Articles II and III.
- Instead, Congress chose a path that violates those provisions.
- This new law will not address the domestic violence problem on Indian reservations because it is likely to be struck down as unconstitutional.

failed to do so. In all likelihood, those problems now will be litigated in the courts, where that provision should be struck down.[9]

Article II Problems

Under the Appointments Clause, the President can appoint all "Officers of the United States"—i.e., any person who exercises the power of the federal government[10]—with the advice and consent of the Senate. Congress also can delegate the appointment of "Inferior Officers" to "the President alone, the Courts of Law, or the Heads of Departments."[11] That clause serves several functions: (1) It identifies who is responsible for making an appointment; (2) it protects that party against outside interference; (3) it makes sure that only individuals who have been properly vetted can exercise federal power; and (4) it ensures (by implication) that federal officials can be removed for misconduct or incompetence.[12]

Vesting criminal jurisdiction in tribal courts cannot be squared with the Appointments Clause. A judgment ordering a person to be imprisoned[13] is a classic example of the type of government power that only a person properly appointed under Article II can exercise.[14] A tribal court lacks inherent criminal jurisdiction over non-Indian offenders and may exercise that power only if Congress supplies it.[15] In so doing, however, Congress makes the tribal court judge an "officer of the United States" for Article II purposes, which requires that the judge be properly appointed before he or she can exercise that authority. Yet no such appointment mechanism currently exists with respect to tribal court judges. Neither the President nor any other federal officer is involved in the appointment or removal of a tribal court judge, which the tribes do themselves.[16]

Congress also cannot grant tribes or their leaders appointment authority, because neither one is designated in Article II as a permissible recipient of that power.[17] While the Supreme Court has ruled on a few occasions that Congress may *limit* the President's removal power,[18] the Court has never held that the President, a court, and a department head all can be *ousted* from the appointment and removal process entirely. Yet, under the VAWA reauthorization act, no federal official would be legally or politically accountable for intentional misconduct, negligent defaults, or even simple mistakes by tribal court judges—the exact scenario that the Framers designed Article II to prevent.[19]

Article III Problems

Section 904 of VAWA suffers from another flaw. Article III requires that federal judges enjoy life tenure and salary protection in order to ensure that they can exercise judgment without fear of retaliation for displeasing Congress or the President.[20] Only courts enjoying those protections can exercise the "judicial Power," and there can be no more classic exercise of that power than the entry of a judgment ordering an offender imprisoned following his conviction for a crime.[21] Tribal court judges lack these Article III guarantees, and the new statute does not provide them.[22] On its face, therefore, the VAWA reauthorization act is problematic.

There are exceptions to that rule, but none of them would apply here. For example, military courts-martial are not subject to Article III requirements,[23] but tribal courts are not courts-martial.[24] Congress can establish non–Article III courts for the District of Columbia,[25] but the District is a unique federal enclave, geographically and structurally, that does not encompass tribal court jurisdiction.[26] Congress can allow administrative agencies to adjudicate disputes without staffing them with Article III judges.[27] Tribal courts are not administrative agencies, however, and even if they were, administrative agencies do not and could not adjudicate criminal cases.

Lastly, when legislating for a "[t]erritory" of the United States,[28] Congress may create criminal courts that lack Article III guarantees.[29] A "reservation," however, is not a "territory." The federal government created reservations for tribes to live separately, subject only to federal and tribal governance. Under "the accepted meaning of the term," a "reservation" is a "distinct tract" of land that is set aside or "reserved" by the United States for the "occupancy" and use of a tribe under a treaty, statute, or executive order.[30] Congress cannot retroactively transform a "reservation" into a "territory"[31] because Congress's decision to accept a territory into "this Union" as a new state is final and unalterable. Once that designation has been made, Congress no longer can treat the state as a territory.[32]

Moreover, under the Equal Footing Doctrine, each new state receives the same rights that existing states enjoy,[33] one of which is territorial integrity against dismemberment by Congress.[34] Congress therefore cannot escape Article III requirements by treating "reservations" as "territories" after the fact.[35]

Conclusion

Congress is right to be concerned about spousal abuse and other forms of domestic violence on Indian reservations; this issue, however, should have been addressed in a manner that satisfied Articles II and III. For instance, Congress could have:

- Granted Article III courts jurisdiction over domestic violence offenses committed on reservations,
- Granted state courts jurisdiction over such crimes, or
- Required that tribal judges be appointed in compliance with Articles II and III.

Instead, Congress chose a path that violates those provisions. The result, sadly, is that the tribal courts provision in the new law will not help to address the domestic violence problem on Indian reservations because it is likely to be struck down as unconstitutional.

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Endnotes

1. This Legal Memorandum is an abridged version of the article Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 B.Y.U. J. of Pub. L. 1 (2012).
2. VAWA 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 at scattered sections of 8, 12, 15, 16, 18, 20, 21, 26, 28, 31, and 42 U.S.C.).
3. *See*, *e.g.*, Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 Harv. Women's L.J. 123, 123 n.2 (1999) (listing several such programs).
4. *See* S. Rep. No. 112-153, 112th Cong., 2d Sess. 7–11 (2012) (discussing the same provision in a bill introduced in the 112th Congress). Indian tribes do not possess inherent criminal jurisdiction over non-Indians. Prosecutions can be brought against non-Indians only in federal or state court. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The relationship between tribal court jurisdiction and federal or state court 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, 2006), *available at* http://www.tribal-institute.org/lists/concurrent_tribal.htm.
5. *See*, *e.g.*, S. Rep. No. 112-153, 112th Cong. 7–8 (2012) (footnotes omitted) ("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.").
6. 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.
7. The Judicial Power and Good Behavior Clauses, Article III, § 1, provide 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. article III, § 1.
8. *See* Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 Stan. L. Rev. 1397, 1403 (1985).
9. Heritage criticized the Senate bill that ultimately became the 2013 VAWA reauthorization act. *See*, *e.g.*, Paul J. Larkin, Jr., *Send in the Lawyers: The House Passes the Senate's VAWA*, Heritage Found., The Foundry (Mar. 1, 2013), *available at* http://blog.heritage.org/2013/03/01/send-in-the-lawyers-the-house-passes-the-senates-violence-against-women-act/; David Muhlhausen, *Violence Against Women Act: Substitute Amendment Fails to Address the Underlying Problems*, Heritage Found., The Foundry (Feb. 26, 2013), *available at* http://blog.heritage.org/2013/02/26/violence-against-women-act-substitute-amendment-fails-to-address-the-underlying-problems/; Paul J. Larkin, Jr., "*Violence Against Women" Act: House Bill Better but Still Flawed*, Heritage Found., The Foundry (Feb. 26, 2013), *available at* http://blog.heritage.org/2013/02/26/vawa-house-bill-better-but-still-flawed/; Paul J. Larkin, Jr., "*Violence Against Women Act" Violates the Constitution*, Heritage Found., The Foundry (Feb. 26, 2013), *available at* http://blog.heritage.org/2013/02/14/vawa-violates-the-constitution/.
10. *See*, *e.g.*, 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]").
11. On the meaning of the terms "Superior Officers" and "Inferior Officers," as well as the differences between them, *see*, *e.g.*, Edmond v. United States, 520 U.S. 651, 661–66 (1997).
12. *See*, *e.g.*, Free Enterprise Fund v. Public Company Accounting Oversight Bd., 131 S. Ct. 3138, 3146–47, 3157 (2010); Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989); *id*. at 483–84 & n.4 (Kennedy, J., concurring); Myers v. United States, 272 U.S. 52 (1926); The Federalist No. 76, at 455–56 (C. Rossiter ed. 1961) (A. Hamilton).
13. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq*. (2012), authorizes several places of confinement: (1) an approved tribal correctional center; (2) the nearest appropriate federal correctional facility; (3) a state or local government-approved correctional center; or (4) a tribal alternative rehabilitation center. 25 U.S.C. § 1302(d)(1)(A)–(D).
14. *See* Weiss v. United States, 510 U.S. 163, 169–70 (1994) ("The parties do not dispute that military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States."); Freytag v. Commissioner, 501 U.S. 868 (1991) (concluding that special trial judges of Tax Court are officers); *Buckley*, 424 U.S. at 126.
15. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
16. 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 8, at 1403.

17. *See, e.g.*, Edmond v. United States, 520 U.S. 651 , 658 (1997) ("Under the Appointments Clause, Congress could not give the Judge Advocate 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.").
18. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Weiner v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States, 295 U.S. 602 (1935); *see also* United States v. Perkins, 116 U.S. 483 (1988) (upholding a restriction on the removal authority of an inferior officer).
19. *See* United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) ("But even if the statute were less clear, I would not interpret it as a delegation of federal power. The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power.... Congress cannot transfer federal executive power to individuals who are beyond 'meaningful Presidential control.' ... And this means that, at a minimum, the President must have some measure of 'the power to appoint and remove' those exercising that power." (citations omitted)). Congress cannot rely on the Indian Commerce Clause or the Necessary and Proper Clause to justify noncompliance with the requirements of the Appointments Clause. The Supreme Court has ruled that Congress must comply with the dictates of the Appointments Clause regardless of the power that Congress invokes to justify its legislation. *See* Freytag v. Comm'r, 501 U.S. 868, 883 (1991); Metro. Wash. Airport Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 271 (1991); Larkin & Luppino-Esposito, *supra* note 1, at 22–24.
20. *See, e.g.*, Stern v. Marshal, 131 S. Ct. 2594, 2608–09 (2011); CFTC v. Schor, 478 U.S. 833, 848–50 (1986); William R. Castro, *If Men Were Angels*, 35 Harv. J. L. & Pub. Pol'y 663, 666 (2012).
21. For this reason, for example, under the Federal Magistrates Act, 28 U.S.C. § 631 *et seq*. (2012), a United States magistrate judge cannot become involved in the disposition of a criminal case if the defendant objects. That is so even though magistrate judges are appointed by the relevant U.S. district court to a specific term and are subject to de novo review by a district court judge in a particular case. *See* Gonzalez v. United States, 553 U.S. 242 (2008); Peretz v. United States, 501 U.S. 923 (1991); Gomez v. United States, 490 U.S. 858 (1989); United States v. Raddatz, 447 U.S. 667 (1980).
22. *See* Wright, *supra* note 8, at 1403; *supra* note 15. The new law does not grant tribal court judges any tenure, let alone life tenure, or protect their salary against diminution.
23. *See, e.g.*, Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).
24. Court-martial trial judges are drawn from the officer corps. *See* Weiss v. United States, 510 U.S. 163 (1994) (describing the military justice system).
25. *See* Palmore v. United States, 411 U.S. 389 (1973).
26. The Enclave Clause provides as follows: "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,
27. Congress may allow administrative agencies to adjudicate disputes regarding "public rights"—i.e., rights that exist only because Congress has created them by statute. *See, e.g.*, Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 585–89 (1985); Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 454–55 (1977); Crowell v. Benson, 285 U.S. 22, 50, 53 (1932); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).
28. The New States Clause of the Constitution provides as follows: "New States may be admitted by the Congress into this Union; but no new States 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." U.S. Const. art. IV, § 3, cl. 1. The Property Clause of the Constitution 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." U.S. Const. art. IV, § 3, cl. 1.
29. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); *In re* Ross, 140 U.S. 453 (1891); American Ins. Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511 (1828). The Supreme Court's territorial decisions make no effort to square their results with the text of Article III. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 888–94, 907–08 (1990).
30. Minnesota v. Hitchcock, 175 U.S. 373, 389 (1902); *see also id*. at 389–90; United States v. Dion, 476 U.S. 734, 737 (1986); Spalding v. Chandler, 160 U.S. 394, 402–03 (1896).
31. *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.").
32. *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 no longer can regulate it as a territory).
33. *See, e.g.*, PPL Montana LLC v. Montana, 132 U.S. 1215, 1227–28 (2012); Shively v. Bowlby, 152 U.S. 1, 57 (1894). The term "equal footing" comes from the Northwest Ordinance of 1787, which provided that each new state admitted to the union from that territory would enter on an "equal footing" with existing states. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 222 (1845).

34. Article IV of the Constitution forbids Congress from carving a new state out of the land of an existing state without the latter's consent. *See* U.S. Const. art. IV, § 3, cl. 1. It would follow that Congress cannot do the same for the purpose of creating a new "territory."

35. *Cf.*, *e.g.*, NFIB 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).