
RECENT LEGISLATION

INDIAN LAW — TRIBAL COURTS — CONGRESS RECOGNIZES AND AFFIRMS TRIBAL COURTS' SPECIAL DOMESTIC VIOLENCE JURISDICTION OVER NON-INDIAN DEFENDANTS. — The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26 (to be codified in scattered sections of the U.S. Code).

Violence shapes the lives of American Indian¹ women. By some estimates, sixty percent of all Indian women are assaulted, one third are raped, and forty percent experience domestic violence in their lifetimes.² Yet when these crimes occur on tribal land, a jurisdictional loophole allows some perpetrators to escape punishment entirely. Tribal governments' authority to pursue criminal charges depends on the racial status of the potential defendant: non-Indians enjoy absolute immunity from criminal prosecution in tribal courts.³ On February 28, 2013, Congress passed the Violence Against Women Reauthorization Act of 2013⁴ (VAWA 2013). The law includes a novel expansion of tribal court jurisdiction aimed at addressing this legal loophole, which “leaves victims tremendously vulnerable and contributes to the epidemic of violence against Native women.”⁵ Section 904 of VAWA 2013 allows tribal prosecution of non-Indians accused of domestic and dating violence crimes.⁶ As the first and only statute to reverse, even if only partially, the Supreme Court's rejection of tribal courts' criminal

¹ This comment uses the terms “Indian” and “American Indian” to refer to indigenous peoples of the lower forty-eight states. These are the terms most commonly used in federal law. *See, e.g.*, DAVID E. WILKINS & HEIDI KIWETINEPINESIHK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM, at xvii (3d ed. 2011).

² *See* NAT'L CONG. OF AM. INDIANS, SPEAK OUT & ACT NOW! ADVOCATING FOR THE REAUTHORIZATION OF THE VIOLENCE AGAINST WOMEN ACT: A TOOLKIT FOR TRIBAL NATIONS 3 (2013) [hereinafter NCAI TOOLKIT], available at http://files.ncai.org/broadcasts/2013/February/VAWA%20toolkit_013113%20%282%29.pdf; *see also* Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES, Feb. 11, 2013, at A11 (reporting similar statistics).

³ *See* JANE M. SMITH & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42488, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND THE SAVE NATIVE WOMEN ACT 1, 2 & tbl.1 (2012). The responsibility for pursuing criminal charges against non-Indian offenders falls instead to state and federal authorities, who are often far away, overworked, and distracted by competing priorities. *See* NCAI TOOLKIT, *supra* note 2, at 3. The harrowing story of one Southern Ute victim of spousal violence, whose abusive, non-Indian husband once “called the county sheriff himself to prove to her that he could not be stopped” by law enforcement, illustrates the chilling consequences of this “jurisdictional black hole.” Weisman, *supra* note 2; *see also* Kavitha Chekuru, *Sexual Violence Scars Native American Women*, AL JAZEERA (Mar. 6, 2013, 9:16 AM), <http://www.aljazeera.com/indepth/features/2013/03/201334111633172507.html>.

⁴ Pub. L. No. 113-4, 127 Stat. 54 (to be codified in scattered sections of the U.S. Code).

⁵ S. REP. NO. 112-153, at 9 (2012).

⁶ *See* VAWA 2013 § 904, 127 Stat. at 120–23 (to be codified at 25 U.S.C. § 1304).

jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*,⁷ section 904 is more than a mere jurisdictional grant. By redefining the contours of tribal authority over non-Indians, it represents a reclamation by Congress of the lead role — occupied by the Court for more than three decades — in balancing tribal sovereignty and constitutional values.

VAWA 2013 is the third and most recent reauthorization of the groundbreaking Violence Against Women Act of 1994.⁸ Welcomed by many as long overdue and critically necessary, VAWA was easily reauthorized in 2000 and 2005.⁹ Yet after the latest incarnation expired in 2011, the statute for the first time in its history experienced significant legislative pushback, with controversy igniting along partisan lines.¹⁰ Competing bills offered by the Democratic majority in the Senate and the Republican majority in the House of Representatives exposed stark differences in the priorities of the two parties.¹¹ Though the Senate bill passed in early 2012 with a 68–31 vote,¹² it never saw a vote in the House; the House bill similarly stalled.¹³ When the 112th Congress adjourned for the last time on January 3, 2013, “[n]either bill was enacted into law.”¹⁴

With the inauguration of the 113th Congress came a revived push for reauthorizing VAWA. In the Senate, a bipartisan coalition reintroduced a renewal bill substantially similar to the failed 2012 effort. Over the continued opposition of a group of Republican senators who particularly opposed section 904,¹⁵ the reauthorization passed the Sen-

⁷ 435 U.S. 191 (1978).

⁸ Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code). The original VAWA authorized a host of programs to combat domestic violence as well as sex crimes and reformed the criminal justice system’s responses to these offenses. See LISA N. SACCO, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (2013).

⁹ See SACCO, *supra* note 8, at 9 & n.47 (noting that both reauthorizations enjoyed unanimous support in the Senate and only single-digit opposition in the House of Representatives).

¹⁰ See Jonathan Weisman, *Women Figure Anew in Senate’s Latest Battle*, N.Y. TIMES, Mar. 15, 2012, at A1.

¹¹ Each of the two bills, S. 1925, 112th Cong. (2012), and H.R. 4970, 112th Cong. (2012), was accompanied by a report containing strident dissents by minority party legislators in each house. See H.R. REP. NO. 112-480, pt. 1, at 227–58 (2012); S. REP. NO. 112-153, at 36–56 (2012).

¹² See Jonathan Weisman, *Senate Votes to Reauthorize Domestic Violence Act*, N.Y. TIMES, Apr. 27, 2012, at A13.

¹³ See SACCO, *supra* note 8, at 10–11; see also Jennifer Steinhauer, *As Recess Nears, Hopes Dim for Ending Impasse*, N.Y. TIMES, June 9, 2012, at A11.

¹⁴ SACCO, *supra* note 8, at 11; see also Laura Bassett & Jennifer Bendery, *House GOP Lets Violence Against Women Act Passed by Senate Die Without a Vote*, HUFFINGTON POST (Jan. 3, 2013, 11:08 AM), http://www.huffingtonpost.com/2013/01/02/violence-against-women-act-_2398553.html.

¹⁵ See 159 CONG. REC. S578 (daily ed. Feb. 11, 2013) (statement of Sen. John Cornyn) (arguing that section 904 “denies constitutional rights to certain American citizens”).

ate on February 12, 2013, by a vote of 78–22.¹⁶ The House passed the Senate bill on February 28, 2013, by a vote of 286–138.¹⁷ President Obama signed VAWA 2013 into law on March 7, 2013.¹⁸

Among VAWA 2013's many important programs,¹⁹ section 904's expansion of tribal court jurisdiction is perhaps the most controversial. Structured as an amendment to the Indian Civil Rights Act of 1968²⁰ (ICRA), it arises from a Department of Justice (DOJ) proposal addressing violence against Indian women.²¹ Section 904 "recognize[s] and affirm[s]" tribal courts' "inherent power . . . to exercise special domestic violence criminal jurisdiction"²²: these courts now have jurisdiction over non-Indian defendants for "act[s] of domestic violence or dating violence" and acts violative of protective orders "that occur[] in the Indian country of the . . . tribe."²³ This authority is tightly constrained by identity — no jurisdiction exists "over an alleged offense if neither the defendant nor the alleged victim is an Indian"²⁴ — and by relationship — the defendant must have "ties" to the tribe, whether residential, professional, or personal.²⁵ Furthermore, tribes that choose to

¹⁶ See 159 CONG. REC. S616 (daily ed. Feb. 12, 2013).

¹⁷ See 159 CONG. REC. H800–01 (daily ed. Feb. 28, 2013). The House also rejected a Republican-backed amendment that would have modified section 904 to allow non-Indian defendants to remove their prosecutions from tribal to federal court. See 159 CONG. REC. H799–800 (daily ed. Feb. 28, 2013); Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Mar. 1, 2013, at A13.

¹⁸ See Remarks on Signing the Violence Against Women Reauthorization Act of 2013, 2013 DAILY COMP. PRES. DOC. 1 (Mar. 7, 2013).

¹⁹ For a description and analysis of VAWA 2013's other provisions, see SACCO, *supra* note 8.

²⁰ 25 U.S.C. §§ 1301–1303 (2012).

²¹ S. REP. NO. 112-153, at 8 (2012); see also *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 5–29 (2011) [hereinafter *Native Women Hearing*] (introducing the DOJ proposal that would become section 904). The DOJ proposal also contained what would become section 905, which affirms tribal courts' "full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms." VAWA 2013 § 905, 127 Stat. at 124 (to be codified at 18 U.S.C. § 2265(e)); see also *Native Women Hearing, supra*, at 8 (proposing "full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian").

²² VAWA 2013, sec. 904, § 204(b)(1), 127 Stat. at 121 (to be codified at 25 U.S.C. § 1304(b)(1)).

²³ *Id.* sec. 904, § 204(c), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(c)). Inexplicably, section 910 excludes Alaskan tribes other than the Metlakatla Indian Community from coverage under sections 904 and 905. See *id.* § 910, 127 Stat. at 126; see also Natalie Landreth, *Alaska Native Women Lose in Violence Against Women Act Renewal*, ALASKA DISPATCH (Mar. 12, 2013), <http://www.alaskadispatch.com/article/20130312/alaska-native-women-lose-violence-against-women-act-renewal>.

²⁴ VAWA 2013, sec. 904, § 204(b)(4)(A)(i), 127 Stat. at 121 (to be codified at 25 U.S.C. § 1304(b)(4)(A)(i)).

²⁵ *Id.* sec. 904, § 204(b)(4)(B), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(b)(4)(B)). The defendant must "reside[] in the Indian country of the participating tribe," be employed in that country, or have a "spouse, intimate partner, or dating partner" who is either a member of the tribe or an Indian residing in that country. *Id.*

exercise section 904 authority must provide defendants with a panoply of possibly overlapping protections: “(1) all applicable rights under this Act”; (2) an impartial jury “reflect[ing] a fair cross section of the community” that does not “systematically exclude” non-Indians; (3) “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm [tribal courts’] inherent power . . . to exercise” this jurisdiction; and (4) for offenses punishable by imprisonment, all rights under existing 25 U.S.C. § 1302(c).²⁶ Finally, section 908 of the Act delays general section 904 effectiveness by two years (to March 7, 2015); until then, tribes with interest and “adequate safeguards” for defendant rights, as determined by the Attorney General, may be admitted to a pilot program.²⁷

Conflicting values lie at the heart of federal law on tribal authority.²⁸ Perhaps befitting a nation defined from its birth by an uneasy relationship with Indian tribes,²⁹ the federal government’s Indian policy has veered wildly over the years between exceptionalism and assimilation, between respect for tribal sovereignty and desire to impart the values of American democracy. With regard to tribal criminal jurisdiction, this conflict came to a head in the Supreme Court’s trilogy of *Oliphant v. Suquamish Indian Tribe*, *Duro v. Reina*,³⁰ and *United States v. Lara*.³¹ These cases are part of the Court’s long struggle to reconcile “federal Indian law with basic Anglo-American legal values,”³² which has led it to produce a muddle of seemingly inconsistent case law while privileging its own views about tribal sovereignty.³³ Through section 904, Congress challenges the Court’s approach. By structuring the statute to strongly establish a respect for tribal sov-

²⁶ *Id.* sec. 904, § 204(d), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(d)). A convicted defendant also possesses the right to petition a federal court for a stay of detention in conjunction with his petition for habeas corpus, *see id.* sec. 904, § 204(e)(1), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(e)(1)), which the court must grant if it finds the habeas petition meritorious and the defendant unlikely to flee or present a danger to the community, *see id.* sec. 904, § 204(e)(2), 127 Stat. at 123 (to be codified at 25 U.S.C. § 1304(e)(2)). There is no right of direct appeal to federal court from tribal court decisions; a defendant’s only path to federal court review is through habeas. *See* Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 *BYU J. PUB. L.* 1, 10 n.39 (2012).

²⁷ VAWA 2013 § 908, 127 Stat. at 125–26. Furthermore, the Attorney General may distribute up to five million dollars per year in “grants to the governments of Indian tribes” to aid in implementing section 904. *Id.* sec. 904, § 204(f), 127 Stat. at 123 (to be codified at 25 U.S.C. § 1304(f)); *see id.* sec. 904, § 204(h), 127 Stat. at 123 (to be codified at 25 U.S.C. § 1304(h)).

²⁸ 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, 7 (1999).

²⁹ *See generally* Gregory Ablavsky, *The Savage Constitution*, 63 *DUKE L.J.* 999 (2014) (providing a novel account of the Founding that emphasizes the role of the Indian tribes).

³⁰ 495 U.S. 676 (1990).

³¹ 541 U.S. 193 (2004).

³² Frickey, *supra* note 28, at 73.

³³ *See id.* at 80.

ereignty while simultaneously quasi-constitutionalizing tribal courts, Congress has staked its position on the appropriate balance of values when it comes to tribal court criminal jurisdiction. Thus viewed, section 904 is an apparently deferential yet ultimately bold reclamation by Congress of its principal role in setting federal Indian policy.

The relationship between the federal and tribal governments has always been uneasy. As political entities that predate the formation of the United States, tribes occupy a unique space outside the strict confines of the U.S. Constitution;³⁴ this extraconstitutional status rests precariously atop an American legal and political system founded upon principles of liberal democracy.³⁵ The Marshall Court settled on characterizing tribes as “domestic dependent nations,”³⁶ a status conferring both strength and weakness: Indian tribes “are sovereign in their domain” as quasi-independent political entities yet also “subject to unusually broad federal authority” as dependents of the federal government.³⁷ And this broad federal authority has generally been considered the province of Congress: “Under foundational federal Indian law, Congress bore the responsibility of modifying the [law] in light of social evolution, unanticipated developments, or whatever else.”³⁸

Yet the peculiar legal framework that currently governs criminal justice in Indian country³⁹ is not solely Congress’s doing. In Indian country, criminal jurisdiction is a function of the alleged offense and a function of the alleged offender, but only the first consideration comes from Congress.⁴⁰ The second factor — which, by restricting tribal court jurisdiction to Indians, effectively immunizes non-Indians from tribal authority,⁴¹ and consequently receives much of the blame for the

³⁴ See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (recognizing that tribal courts were not bound by the Constitution); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 440, 441 (2005).

³⁵ See generally Frickey, *supra* note 34; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (recounting the evolution of congressional power to regulate Indian affairs).

³⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³⁷ Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013).

³⁸ Frickey, *supra* note 34, at 458.

³⁹ For a general treatment of the history of Indian criminal justice and the creation of the tribal courts, see Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 804–12 (2011/12); Larkin & Luppino-Esposito, *supra* note 26, at 11–17; and Price, *supra* note 37, at 669–79.

⁴⁰ Congress has defined a convoluted statutory scheme for prosecuting various levels of crimes that has resulted in overlapping tribal, state, and federal court authority. See SMITH & THOMPSON, *supra* note 3, at 2 & tbl.1.

⁴¹ In cases involving non-Indian defendants, either the federal or state courts enjoy exclusive jurisdiction depending on the nature of the offense. See *id.* Tribal courts retain criminal jurisdiction over Indians, subject to the constraints of the ICRA — but not the Constitution. In cases

high incidence of gender-based crime in Indian country — arises instead from Supreme Court jurisprudence. In *Oliphant v. Suquamish Indian Tribe*, the Court held that tribes, having “submitt[ed] to the overriding sovereignty of the United States,” had also relinquished their inherent power to try non-Indians.⁴² Twelve years later, in *Duro v. Reina*, the Court extended *Oliphant*’s reasoning beyond non-Indians to prohibit tribal criminal jurisdiction over Indians who are not members of the prosecuting tribe.⁴³ After Congress quickly acted to override *Duro*’s controversial holding,⁴⁴ the Court in *United States v. Lara* held that this “*Duro* fix,” which “recognized and affirmed” “the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians,”⁴⁵ constituted a legitimate exercise of Congress’s power to remove restrictions on inherent tribal authority.⁴⁶

The Court’s neat division of tribal authority along racial lines⁴⁷ masks a maelstrom of divergent and conflicting opinions about the values served by federal Indian law. In *Oliphant*, the majority divested tribes of criminal jurisdiction over non-Indians though Congress had never expressly limited tribes’ criminal jurisdiction in this fashion.⁴⁸ Justice Marshall, in dissent, would have recognized the value of Indian tribes’ “retained sovereignty” “[i]n the absence of affirmative withdrawal by treaty or statute,”⁴⁹ but the majority had other values in mind. The Court expressed deep skepticism of tribal courts’ legitimacy,⁵⁰ a discomfort seemingly arising out of tribes’ freedom from the

involving Indian defendants, tribal courts enjoy exclusive jurisdiction over some crimes and concurrent jurisdiction with federal or state courts over others. *See id.*; Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 562–63 (2009) (discussing Public Law 280, which in six states transferred concurrent federal jurisdiction to the states).

⁴² 435 U.S. 191, 210 (1978).

⁴³ *See* 495 U.S. 676, 684 (1990).

⁴⁴ *See* Price, *supra* note 37, at 677.

⁴⁵ Frickey, *supra* note 34, at 463 (quoting 25 U.S.C. § 1301(2) (2012)) (internal quotation marks omitted).

⁴⁶ 541 U.S. 193, 207 (2004).

⁴⁷ Although an individual’s membership in a federally recognized Indian tribe is a matter of political status, tribal authority to exercise criminal jurisdiction over an individual turns on more overtly racial considerations. *See* Ennis, *supra* note 41, at 565–67 (describing “a series of ad hoc tests that essentially based Indianness on race,” *id.* at 565, for the purpose of determining criminal jurisdiction).

⁴⁸ Price, *supra* note 37, at 676; *see also* Frickey, *supra* note 34, at 457 (calling *Oliphant* “flatly wrong” under then-existing law and noting that “no treaty or federal statute” purported to so limit tribal courts).

⁴⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting).

⁵⁰ *Compare id.* at 210 (majority opinion) (discussing the federal government’s “great solicitude” for its citizens’ “personal liberty”), *with id.* at 197 (suggesting that tribes historically operated without laws and ruled without restraint).

strictures of the Bill of Rights.⁵¹ To the Court, confronted with “a matter of individual rights against governmental authority,”⁵² it simply could not be possible that tribes retained so much extraconstitutional power; only an affirmative authorization by Congress could justify such deviation from established and familiar legal norms.

This concern for individual rights, even at the expense of tribal sovereignty, fully flowered in *Duro*, where the Court “placed even greater emphasis than in *Oliphant* on due process implications of tribal jurisdiction.”⁵³ Indeed, the majority’s reasoning — that tribal courts’ failure to secure “the consent of the governed” necessarily voided any exercise of tribal authority over nonmember Indians — privileged such consent as “a fundamental basis for power within our constitutional system.”⁵⁴ This theory, challenged by Justice Brennan as “inconsistent with the underlying premise of Indian law, namely, that Congress has plenary control over Indian affairs,”⁵⁵ reveals that at least one faction of the Court believed in overarching judicial power to resolve a foundational inconsistency between tribal courts and “American values.”⁵⁶

Lara briefly reversed the *Oliphant-Duro* trend of stripping tribal courts of criminal jurisdiction, but it did so by focusing on congressional intent, leaving unresolved the fundamental tension between tribal sovereignty and constitutional values. Indeed, the Court entirely avoided — by relying on the case’s unique procedural posture — the due process issues so central to the majority opinion in *Duro*.⁵⁷ Thus, though *Lara* prioritized congressional intent over Court-dictated values, it did so without engaging the core issues of *Oliphant* and *Duro*.⁵⁸

The Court’s struggle to situate tribal sovereignty within American legal norms, as seen in the *Oliphant-Duro-Lara* trilogy, is not unique.

⁵¹ See *id.* at 210; Frickey, *supra* note 34, at 457 (asserting that concerns over civil liberties drove the *Oliphant* majority’s decision).

⁵² Frickey, *supra* note 28, at 38.

⁵³ Price, *supra* note 37, at 677; see also *Duro v. Reina*, 495 U.S. 676, 692–94 (1990).

⁵⁴ *Duro*, 495 U.S. at 694.

⁵⁵ *Id.* at 707–08 (Brennan, J., dissenting).

⁵⁶ Frickey, *supra* note 34, at 463.

⁵⁷ See *United States v. Lara*, 541 U.S. 193, 207–09 (2004) (declining to rule on the merits of the constitutional arguments because those issues were irrelevant to the double jeopardy analysis).

⁵⁸ See Price, *supra* note 37, at 707 n.257. Notably, of the five Justices in the *Lara* majority, only Justices Ginsburg and Breyer remain on the Court. By virtue of its divergent concurring and dissenting opinions and the Justices who signed them, *Lara* represents a significant “fracture[]” in the Court’s approach to tribal sovereignty. Frickey, *supra* note 34, at 464. Justice Kennedy invoked the liberal principle of government by consent to question the tribe’s exercise of criminal jurisdiction over a presumptively nonconsenting nonmember. See *Lara*, 541 U.S. at 212–13 (Kennedy, J., concurring in the judgment). Justice Thomas strained to reconcile the very notion of retained sovereignty with the reality of broad congressional power to intrude on tribal affairs. See *id.* at 225–26 (Thomas, J., concurring in the judgment). And Justice Souter, joined by Justice Scalia, argued that inherent tribal power, once lost, can never be regained. See *id.* at 227 (Souter, J., dissenting).

Through section 904, Congress seeks to balance these same values. First and perhaps most noticeably, the language used in this “*Oliphant* fix” to confer special domestic violence criminal jurisdiction is almost identical to the text of the “*Duro* fix.”⁵⁹ Adopting this familiar construction of recognition and affirmation of inherent tribal power not only signals clear intent to override *Oliphant* as § 1301(2) overrode *Duro* — and likely demonstrates Congress’s hope that the new fix will similarly survive scrutiny — but also reflects Congress’s modern Indian policy of respect for tribal sovereignty and encouragement of tribal autonomy.

Yet Congress also included in section 904 a multitude of conditions limiting tribes’ ability to exercise their new jurisdiction. Perhaps in response to the Court’s plaintive distress — most apparent in *Duro* — over what it considered to be tribal courts’ unbounded power,⁶⁰ Congress’s considerable solicitude for defendants’ rights effectively privileges section 904 defendants above all other defendants in tribal courts. For example, tribes must provide *all* section 904 defendants with jury trials; under the ICRA, only defendants subject to imprisonment, if convicted, are granted that right.⁶¹ Similarly, extending the enhanced protections of the Tribal Law and Order Act of 2010⁶² (TLOA) to *all* section 904 defendants⁶³ confers on those defendants a privileged panoply of nontrivial rights — most notably, the right to counsel at tribe expense.⁶⁴ Though of statutory origin, the rights afforded by section 904 begin to closely resemble the constitutional rights defendants would receive in state or federal court.⁶⁵ Indeed, section 904 even includes a catch-all provision providing for “all other rights whose protection is necessary under the *Constitution of the United States* in order for Congress to recognize and affirm the inherent pow-

⁵⁹ Compare VAWA 2013, sec. 904, § 204(b)(1), 127 Stat. at 121 (to be codified at 25 U.S.C. § 1304(b)(1)) (“[T]he 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.”), with 25 U.S.C. § 1301(2) (2012) (“[P]owers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, . . . including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”).

⁶⁰ See, e.g., *Duro*, 495 U.S. at 693–94.

⁶¹ Compare VAWA 2013, sec. 904, § 204(d)(3), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(d)(3)), with 25 U.S.C. § 1302(c).

⁶² Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified at scattered sections of 25 U.S.C.).

⁶³ See VAWA 2013, sec. 904, § 204(d)(2), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(d)(2)). The TLOA would normally protect only those defendants facing criminal charges that could result in greater than one year of imprisonment. 25 U.S.C. § 1302(c) (applying the TLOA only “[i]n a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant”).

⁶⁴ See 25 U.S.C. § 1302(c)(2).

⁶⁵ See S. REP. NO. 112-153, at 10 (2012) (“[T]ribes would be required to protect effectively the same Constitutional rights as guaranteed in State court criminal proceedings.”).

er of the participating tribe.”⁶⁶ This imposition of constitutional norms is as close an approximation of constitutionalizing tribal courts — infusing them with “American values” — as has ever occurred in federal Indian law.

Moreover, section 904’s limited application to only non-Indian defendants with significant “ties” to the tribe⁶⁷ responds directly to the concern that tribal court criminal jurisdiction over nonmembers offends the liberal ideal of government legitimized by the consent of the governed. Although many scholars have pointed out that political participation is not generally required for the exercise of criminal jurisdiction — they cite, for example, municipal and state authority over visitors who, like non-Indians on reservations, are barred from participating in local political processes⁶⁸ — reassurances about section 904’s narrow scope permeate the legislative history.⁶⁹ Section 904 is carefully constructed to apply only to defendants who have “voluntarily and knowingly established significant ties to the tribe”⁷⁰ — in other words, defendants who have impliedly consented to tribal court jurisdiction. This limitation on section 904, like the safeguarding of defendants’ rights, constitutes a significant overlay of “American values” on Congress’s conception of the tribes.

Congress’s creation of a statute that neither wholeheartedly embraces tribal sovereignty nor fully imposes constitutional values could be dismissed as too tentative — as a partial *Oliphant* fix, it is timid indeed⁷¹ — or as too incoherent. But these two criticisms of section 904 are also what lends it power. The statute’s scope and limitations respond precisely to the Court’s scattered concerns in *Oliphant*, *Duro*, and *Lara*; section 904 may be piecemeal, but it is also structured to survive constitutional challenge. By forcing tribal courts to adopt what is essentially a quasi-constitutional approach toward non-Indian criminal defendants, section 904 preempts the Court’s previously ex-

⁶⁶ VAWA 2013, sec. 904, § 204(d)(4), 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(d)(4)) (emphasis added).

⁶⁷ Only those defendants with personal ties to the tribe and who are accused of crimes occurring in Indian country may be prosecuted by tribal courts. *See id.* sec. 904, § 204(b)–(c), 127 Stat. at 121–22 (to be codified at 25 U.S.C. § 1304(b)–(c)); *see also supra* note 25.

⁶⁸ *See, e.g.,* Frickey, *supra* note 34, at 477–79; Ennis, *supra* note 41, at 580 (arguing that consent to tribal court jurisdiction ought not be based on the right of political participation, as “one’s choice to . . . visit a particular state . . . attaches consent to be subject to its laws”).

⁶⁹ *See* S. REP. NO. 112-153, at 9–10 (describing the jurisdictional grant as “very limited,” *id.* at 9, and “narrowly crafted,” *id.* at 10); *see also* M. Brent Leonhard, *Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ’s Proposed Fix*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 117, 119 (2012) (noting that the DOJ proposal that would become section 904 was “closely circumscribed”).

⁷⁰ S. REP. NO. 112-153, at 10.

⁷¹ For a broader, alternative proposal, *see* Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902 (2009).

pressed concerns about tribal courts' perceived disregard for civil liberties.⁷² And by strictly limiting section 904's applicability to a narrow class of non-Indian defendants who enjoy significant existing relationships with tribes, Congress has addressed the Court's discomfort with the perceived democratic illegitimacy of tribal governments.

Indeed, by giving way to the Court in these secondary areas, Congress has saved its challenge for the most important issue. The Justices' meandering discourses in *Oliphant*, *Duro*, and *Lava* masked an "arrogat[ion]" of power to legislate the terms of the federal-tribal relationship.⁷³ By finding tribal divestiture of sovereignty in congressional silence, the Court "essentially displac[ed] Congress as the federal agent with front-line responsibility for federal Indian policy."⁷⁴ The power to balance the competing values associated with tribal authority was assumed by the Court, and for years Congress acquiesced in this arrangement. With the *Duro* fix, Congress took back some of this power. Through section 904, Congress reclaims even more power — for the first time, the power to recalibrate the balance upset in *Oliphant* and to reassert its primary role in negotiating the federal-tribal relationship. The statute's bold affirmation and recognition of inherent tribal power represent Congress's assessment of tribal sovereignty as a value worth preserving, despite the Court's professed skepticism.

From a practical standpoint, section 904 does not release a substantial amount of power back to the tribes; it is a cautious experiment, not a revolution.⁷⁵ Indeed, section 904 is primarily a statement about values — the value of tribal sovereignty, the value of liberal ideals, the proper balance between them, and above all, Congress's role in fixing that balance. By aligning section 904 so closely with the Court's previously expressed concerns, Congress leaves the Court with no choice but to accept its calibration of these important values, and consequently, its privileged role in setting federal Indian policy.

⁷² The question of whether tribal courts, if not constrained by the defendants' rights guarantees of section 904, would in fact live down to the Court's fears is beyond the scope of this comment. For an argument that such skepticism of tribal courts is unfounded, see Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After Duro v. Reina*, 41 CONN. L. REV. 265 (2008). See also Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (arguing that concerns about civil liberties in tribal courts are misguided, as this preoccupation with liberalism is fundamentally inconsistent with respect for tribal sovereignty).

⁷³ Frickey, *supra* note 28, at 73; see also Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 436–37 (2007–08).

⁷⁴ Frickey, *supra* note 34, at 436. Most scholars of federal Indian law condemn the Court's arrogation of power. See, e.g., Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 117 (2012) ("[T]he Supreme Court should defer more to Congress's silence on the question of tribal authority over nonmembers.").

⁷⁵ See sources cited *supra* note 69.