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Danna R. Jackson

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# ESSAYS

## COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM AT TRIBAL, STATE, AND LOCAL LEVELS: A CASE FOR COOPERATIVE CHARGING DECISIONS IN INDIAN COUNTRY

Danna R. Jackson, Esq.\*

### I. A TALE OF TWO DEFENDANTS

#### A. *Case Study #1—Non-Indian vs. Indian—Misdemeanor Assault*

A non-Indian (Defendant) returned to the home he shared with his domestic partner (Victim), who is an Indian. Defendant kicked in the door and threw a lighter at Victim. The lighter hit her in the face. She tried to leave with their two children. Defendant locked the front door, precluding escape. Victim and the children then tried to leave out the back door, after which Defendant struck Victim on the head and the face, took the youngest child, and departed. Victim suffered bruising to her face and a possible broken nose, but she did not seek medical care. The first officer to arrive at the scene took pictures of Victim and took her statement.

The crime occurred within the boundaries of a federal jurisdiction reservation. Defendant was apprehended by the tribal police and was later taken into custody by the County. Defendant had a prior federal felony con-

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\* Danna R. Jackson is an Assistant United States Attorney for the District of Montana. She is part of the District's Indian Country Crime Unit. Jackson prosecutes violent crime that arises in Indian Country. Although all Indian Country Crime Unit attorneys have liaison duties, Jackson is designated as the District's tribal liaison. In that capacity, she facilitates the government-to-government relationship between the U.S. Attorney's Office and the tribal governments and responds to training requests from tribal courts, tribal advocate programs, and tribal law enforcement. She also works with national and state agencies and organizations that work in and around Indian Country in Montana.

viction (nonviolent) but was not subject to federal supervision at the time of this new offense. In the federal system, Defendant could receive a sentence of no more than six months for misdemeanor assault.<sup>1</sup>

### B. Case Study #2—Indian v. Indian—Felony Assault

An Indian (Defendant), driving south on a highway, turned west into a tribal casino parking lot and was struck by another vehicle traveling north. The driver of the second vehicle had the right-of-way. The one passenger in Defendant's vehicle suffered minor injuries. The second vehicle carried three passengers, including a young man (Victim) who suffered a left hip fracture. Victim is expected to have permanent injuries as a result of the collision; the other two passengers suffered minor injuries.

Immediately following the collision, Defendant went into the tribal casino and asked someone to call the police. He told law enforcement that he did not know who was driving the vehicle he was in. Defendant was then transported to the hospital and treated for minor injuries. A toxicology report indicated Defendant had a blood alcohol content (BAC) of 0.265 and screened positive for both opiates and tetrahydrocannabinol (THC). Defendant later changed his story and admitted guilt. Because of the seriousness of the injuries suffered by the Victim, this matter could be considered a felony assault.

This accident happened within the boundaries of a federal jurisdiction reservation. The Defendant had no federal criminal history, but had extensive tribal criminal history, including alcohol related offenses. In the federal system, the anticipated sentence for such a crime is 27–33 months based on (1) the aggravated assault (base offense level 14); (2) permanent injury to the victim (increase 7 levels); and the defendant's number of prior offenses (in this instance the Defendant had no felony offenses so his criminal history did not affect the sentence).<sup>2</sup>

## II. DISPENSING JUSTICE IN INDIAN COUNTRY

In the case studies above, both the tribal and the federal government could charge these cases in their respective courts.<sup>3</sup> But which authority *should* charge these cases? And if the answer is both, how do we go about making sure the charging decisions are fair and just?

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1. *U.S. Sentencing Guidelines Manual* § 2A2.3 (2014).

2. *Id.*

3. 25 U.S.C. §§ 1302, 1304 (2012).

## 2015 COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM 129

Indian Country has been plagued by systemic violence.<sup>4</sup> Statistics show that American Indians are victims of violent crime at least twice as often as other racial groups.<sup>5</sup> It is paramount that justice systems work together in a coordinated fashion to address the violence. We must do better. Until recently, tribal courts were only able to sentence a criminal up to one year and levy a \$5,000 fine.<sup>6</sup> Additionally, a tribal court did not have criminal jurisdiction over a non-Indian perpetrator.<sup>7</sup> The Tribal Law and Order Act of 2010<sup>8</sup> and Violence Against Women Reauthorization Act of 2013<sup>9</sup> permit tribes to opt into the restoration and expansion of tribal court jurisdiction, which over the years had been stripped away by Congress and the courts.<sup>10</sup>

The Tribal Law and Order Act authorizes tribes to bring felonious criminal matters that arise on their reservation in tribal court. The Violence Against Women Reauthorization Act of 2013 authorizes tribal courts to assert jurisdiction over non-Indian perpetrators of domestic violence. This means that for the first time in decades, tribes can handle certain felonies and crimes of domestic violence in their own systems and on their own turf. But this does not mean that the federal government can abandon its prosecution obligations. Most tribal systems do not have the resources to dispense justice as holistically and comprehensively as they may want—many times the United States is the only entity with the resources to address the crime. Therein lies the dilemma.

This article provides a summary description of the major federal acts and case law that provide the framework for criminal jurisdiction in Indian Country.<sup>11</sup> Next, the article summarizes the sections of the Tribal Law and Order Act and the Violence Against Women Act that pertain to jurisdiction. The article concludes with a description of some of the programs in effect in Montana today, which detail the “best practice” models of communica-

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4. Felix Cohen, *Cohen's Handbook of Federal Indian Law*, 730 (5th ed.) (citing Callie Rennison, *Violent Victimization and Race 1993-1998*, 1, 10 (Bureau of Justice Statistics 2001)); see also Lawrence A. Greenfeld & Steve K. Smith, *American Indians and Crime* (Bureau of Justice Statistics 1999) (general look at crime statistics); Stewart Wakeling et al., *Policing on American Indian Reservations* 13–21 (National Institute of Justice 2001) (detailed look at gathering crime statistics specific to Indian country).

5. *Id.*

6. 25 U.S.C. § 1302.

7. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194–195 (1978).

8. 25 U.S.C. §§ 2801–2815.

9. Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified in scattered sections of the U.S. Code).

10. Pub. L. No. 111-211, § 202(b), 124 Stat. 2258, 2263 (2010).

11. For outstanding explanations of Indian Country jurisdiction see Timothy Droske, *Correcting Native American Sentencing Disparity Post Booker*, 91 Marq. L. Rev. 723, 761–762 (2008); see also Stephen L. Pevar, *The Rights of Indians and Tribes* 127–148 (4th ed., Oxford U. Press 2012).

tion and coordination between the tribal and federal systems to address the violence in Indian Country.

### III. BRIEF EXPLANATION OF CRIMINAL JURISDICTION

A person might assume that a tribe has exclusive jurisdiction over all criminal matters that arise within its boundaries. After all, in *Johnson v. M'Intosh*,<sup>12</sup> the United States Supreme Court held that tribes have full jurisdiction over on-reservation activities, to the exclusion of state law.<sup>13</sup> Less than ten years later, the Court twice agreed that tribes' sovereign powers are retained unless relinquished through treaty or expressly limited by the plenary power of the United States Congress.<sup>14</sup>

Since the Supreme Court established the jurisdictional framework, Congress has passed laws that permit both the state and the federal government to exercise criminal jurisdiction within reservation borders.<sup>15</sup> The four most significant laws affecting criminal jurisdiction are Public Law 83-280 (PL 280),<sup>16</sup> the Indian Country Crimes Act (also known as the "General Crimes Act" or the "Federal Enclaves Crime Act"),<sup>17</sup> the Indian Major Crimes Act of 1885 (Major Crimes Act),<sup>18</sup> and the Indian Civil Rights Act.<sup>19</sup>

#### A. *In Montana, Public Law 280 Only Applies to the Confederated Salish and Kootenai Tribes*

Congress enacted PL 280 in 1953. This statute authorized states to assume criminal and certain types of civil jurisdiction on reservations.<sup>20</sup> Originally, Congress mandated that certain states assume this type of jurisdiction.<sup>21</sup> The original 1953 text of PL 280 allowed states to unilaterally assume jurisdiction.<sup>22</sup> Congress responded to tribal opposition with an amendment to PL 280 in 1968 that included a tribal consent requirement to

12. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

13. *Id.* at 603–605.

14. *Cherokee Nation v. Ga.*, 30 U.S. 1, 14 (1831); *Worcester v. Ga.*, 31 U.S. 515, 534 (1832).

15. Pevar, *supra* n. 11, at 128–129.

16. 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).

17. 18 U.S.C. § 1152.

18. 18 U.S.C. § 1153; Pevar, *supra* n. 11, at 128 (Pevar identifies Public Law 83-280, the Indian Country Crimes Act, and the Major Crimes Act as the "three most important laws" affecting criminal jurisdiction in Indian country.).

19. 25 U.S.C. §§ 1301–1304.

20. *See e.g.* 18 U.S.C. §§ 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1322.

21. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://perma.cc/6QTD-BAS4> (<http://www.aidainc.net/Publications/pl280.htm>) (2013).

22. 67 Stat. at 588.

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 131

the change to state jurisdiction and an opportunity for the tribes to decide to withdraw the state's assumption of jurisdiction under the original version of the law.<sup>23</sup> "The only Montana tribes to agree to the new version of the law were the Confederated Salish and Kootenai Tribes."<sup>24</sup>

### B. Major Crimes Act

Prior to the enactment of the Major Crimes Act, Crow Dog was convicted for the murder of Sin-ta-ge-le-Scka, or in English, Spotted Tail.<sup>25</sup> Crow Dog and Spotted Tail were Indians from the same band and nation, and the homicide occurred in Indian Country.<sup>26</sup> Crow Dog filed a writ of habeas corpus claiming that the United States district court had no jurisdiction to try him.<sup>27</sup> The jurisdictional analysis hinged on whether the Fort Laramie Treaty left exclusive jurisdiction of Indian-on-Indian crime within Indian Country to the tribe.<sup>28</sup> The Court said that it did.<sup>29</sup> The conviction and sentence were deemed void and Crow Dog's imprisonment was therefore considered illegal.<sup>30</sup>

Shortly thereafter, Congress enacted the Major Crimes Act.<sup>31</sup> The Major Crimes Act grants the federal government criminal jurisdiction over an enumerated list of crimes committed by an Indian against an Indian in Indian Country.<sup>32</sup> In sum, the Major Crimes Act handed the federal government substantial power to contend with violent crime in Indian Country.

### C. Indian Country Crimes Act

The Major Crimes Act only applies to crimes committed by Indians. Congress passed the Indian Country Crimes Act "to provide for prosecution

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23. Mont. Off. of Pub. Instr., *Flathead Reservation Timeline: Confederated Salish and Kootenai Tribes* 7, <http://perma.cc/W6PZ-MDG3> (<http://www.opi.mt.gov/Pdf/IndianEd/IEFA/FlatheadTimeline.pdf>) (2010).

24. *Id.*; Mont. Code Ann. § 2-1-301 (2013).

25. *Ex parte Kan-gi-shun-ca*, (otherwise known as Crow Dog), 109 U.S. 556 (1883).

26. *Id.* at 556-557.

27. *Id.*

28. *Id.* at 567-568.

29. *Id.* at 572.

30. *Id.*

31. U.S. Dep't of Just., *Criminal Resource Manual* § 679 (available at <http://perma.cc/65QY-TU2> ([http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00679.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00679.htm))).

32. 18 U.S.C. § 1153(a) ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.").

of crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians.”<sup>33</sup> The Indian Country Crimes Act provides for “federal jurisdiction over interracial crimes only.”<sup>34</sup> In other words, if a non-Indian commits a crime against an Indian, or vice-versa, the crime would be charged under this section of the federal code, instead of the Major Crimes Act.

#### D. Indian Civil Rights Act

The Indian Civil Rights Act was passed “to ensure that the American Indian is afforded the broad Constitutional rights secured to other Americans . . . [in order to] protect individual Indians from arbitrary and unjust actions of tribal governments.”<sup>35</sup> The rights conferred by the Indian Civil Rights Act include many of the same rights contained in the United States Bill of Rights, except the establishment clause.<sup>36</sup> Also, the Indian Civil Rights Act permits a person the right to hire a lawyer in a criminal case, but does not mirror the language in the Bill of Rights that provides “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense” or counsel paid at the expense of the government.<sup>37</sup>

Important to our discussion here, the Indian Civil Rights Act limited the sentence a tribal court could impose on a defendant.<sup>38</sup> Tribal courts could only sentence a defendant up to one year for each offense.<sup>39</sup> Further, tribal courts could only sentence the defendant for three offenses.<sup>40</sup> In other words, in total, a tribal court could only potentially sentence a defendant up to three years.<sup>41</sup> Although a tribe may have limitations on its ability to sentence, Congress has not abrogated tribes’ right to assert jurisdiction over major crimes.<sup>42</sup> So, for example, should a tribe provide the authority in its tribal code, a tribe can charge a major crime—like sexual assault without consent or murder. But again, if the defendant is convicted of the tribal charge, he or she can only be sentenced up to one year.

33. 18 U.S.C. § 1152; Willam C. Canby, Jr., *American Indian Law in a Nutshell* 173 (5th ed., West 2009).

34. *U.S. v. Bruce*, 394 F.3d 1215, 1219 (9th Cir. 2005) (quoting *U.S. v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001)).

35. S. Rep. No. 841, 90th Sess. 6 (1967). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

36. 25 U.S.C. § 1302.

37. U.S. Const. amend VI.

38. 25 U.S.C. § 1302.

39. *Id.*

40. *Id.*

41. *Id.*

42. See *Duro v. Reina*, 495 U.S. 676 (1990) (*superseded*, in part, by 25 U.S.C. § 1301(2) as stated in *U.S. v. Lara*, 541 U.S. 193 (2004)).

## 2015 COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM 133

*E. A Romp through Cases Affecting Tribal Authority**1. Tribes and the Federal Government Share Jurisdiction over Crimes that Arise on Federal Jurisdiction Reservations*

The question then arises, if both the United States and the tribal government have criminal authority to charge the same Indian person for the same crime: is that not a blatant violation of double jeopardy?<sup>43</sup>

Wheeler, a member of the Navajo Tribe, pleaded guilty in Tribal Court to a charge of contributing to the delinquency of a minor and was sentenced.<sup>44</sup> Subsequently, he was indicted by a federal grand jury for statutory rape arising out of the same incident.<sup>45</sup> He moved to dismiss the indictment on the ground that since the tribal offense of contributing to the delinquency of a minor was a lesser-included offense of statutory rape, the Tribal Court proceeding barred the subsequent federal prosecution.<sup>46</sup>

The Supreme Court found that the Navajo Nation's exercise of power to punish tribal offenders was a part of its inherent tribal sovereignty.<sup>47</sup> It further held that the double jeopardy clause did not bar tribal members' subsequent federal prosecution for statutory rape arising out of the same incident because the prosecutions were brought by separate sovereigns and were not for the same offense.<sup>48</sup> The Court also found that "when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity."<sup>49</sup>

In 1989, the Ninth Circuit decided the *Ant* case.<sup>50</sup> After confessing to a crime even though he had not been advised of his *Miranda* rights, defendant Ant entered a guilty plea in tribal court to a charge of "assault and battery" in a matter that involved the death of an Indian woman.<sup>51</sup> Separately, but involving the same matter, the United States charged Ant with involuntary manslaughter.<sup>52</sup> The Ninth Circuit found that even though the uncounseled tribal court guilty plea did not violate tribal law or the Indian Civil Rights Act, because the plea would have been in violation of the Sixth Amendment had it been made in federal court, and because suppression of Ant's tribal

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43. U.S. Const. amend V.

44. *U.S. v. Wheeler*, 435 U.S. 313 (1978), superseded by statute on other grounds.

45. *Id.* at 313.

46. *Id.*

47. *Id.* at 328.

48. *Id.* at 313; *U.S. v. Lara*, 541 U.S. 193 (2004).

49. *Wheeler*, 435 U.S. at 331.

50. *U.S. v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

51. *Id.* at 1390.

52. *Id.*



court guilty plea would not violate principles of comity, and would not disparage tribal proceedings, the order of the district court denying suppression of the pleas reversed the conviction.<sup>53</sup> In sum, both sovereigns can proceed against the same person in a related criminal matter but the federal court may not admit the tribal evidence if it violates federal law.

Today in Montana, tribal and federal charges against the same person for a related offense happen on a regular basis without challenge. From my perspective, this is because the tribal sentence is considered to be significantly “mild” enough not to trigger double jeopardy concerns under *Wheeler*.

## 2. Tribal Jurisdiction over Non-Indians and Non-member Indians

In the late 1970s, a Washington tribal court convicted defendant Oliphant of “assaulting a tribal officer and resisting arrest,” during a tribal celebration.<sup>54</sup> Oliphant was a non-Indian residing on the Port Madison Indian Reservation in Kitsap County, Washington. He filed a writ of habeas corpus to the United States Supreme Court, claiming the Tribe had no authority to punish him because he was not Indian.<sup>55</sup> The Court relied on *Crow Dog*,<sup>56</sup> and decided that the Tribe lacked the authority to criminally punish non-Indians on tribal lands.<sup>57</sup> The Court stated, “an examination of our earlier precedents satisfies us that . . . Indians do not have criminal jurisdiction over non-Indians, absent affirmative delegation of such power by Congress.”<sup>58</sup>

On a related note, in *Duro* the Supreme Court grappled with whether a tribal court had jurisdiction over non-member Indians and found that it did not.<sup>59</sup> In reaction, the holding in *Duro* was overturned by “emergency” legislation that amended the Indian Civil Rights Act to clarify that tribal courts have criminal jurisdiction over non-member Indians.<sup>60</sup>

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53. *Id.* at 1396.

54. *Oliphant*, 435 U.S. at 194.

55. *Id.*

56. *Ex Parte Crow Dog*, 109 U.S. at 563, 567.

57. *Oliphant*, 435 U.S. at 208.

58. *Id.*

59. *Duro*, 495 U.S. at 679.

60. 25 U.S.C. § 1301(2), (3); *See also, Mousseaux v. U.S. Comm’r of Indian Affairs*, 806 F. Supp. 1433, 1439–1442 (1992).

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 135IV. A SHIFT IN POLICY – CONGRESS RESTORES SOME  
TRIBAL COURT JURISDICTIONA. *Tribal Law and Order Act*

Tribes and tribal people have been generally dissatisfied with the way justice has been dispensed.<sup>61</sup> To combat this issue, in 2009 U.S. Attorney General Eric Holder prioritized the Justice Department’s “engagement, coordination, and action on public safety in Indian Country.”<sup>62</sup> He held a Tribal Nations Listening Tour in 2009.<sup>63</sup> As a result of this effort, the Department of Justice dedicated funds and resources in hopes of addressing violence in Indian Country.<sup>64</sup> After these efforts were undertaken by the Justice Department, Congress enacted the Tribal Law and Order Act.<sup>65</sup>

The Tribal Law and Order Act focuses on “federal accountability and coordination”; “state accountability and coordination”; “empowering tribal law enforcement agencies and tribal governments”; encouraging “Indian Country Crime Data Collection and Information Sharing”; and “Domestic Violence and Sexual Assault Prosecution and Prevention.”<sup>66</sup>

Significantly, the Tribal Law and Order Act permits tribes to expand their sentencing authority, potentially stacking three years for a maximum sentence of three years.<sup>67</sup> Now, tribal courts may stack three charges, which permits tribes to sentence an offender for up to nine years.<sup>68</sup> If the tribal court does exercise its authority to impose a term of imprisonment greater than one year, the Tribal Law and Order Act requires the tribe to:

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
- (3) require that the judge presiding over the criminal proceeding—
  - (A) has sufficient legal training to preside over criminal proceedings; and
  - (B) is licensed to practice law by any jurisdiction in the United States;
- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence,

61. See Pevar, *supra* n. 11, at 131–134 (explaining the high violence rates in Indian Country).

62. U.S. Dep’t of Just., *Tribal Justice and Safety, Tribal Law and Order Act*, <http://perma.cc/3VKE-BPFH> (<http://www.justice.gov/tribal/tloa.html>) (accessed Sept. 20, 2014).

63. *Id.*

64. *Attorney General Announces Significant Reforms*, Indian Country Today 10 (Jan. 27, 2010).

65. U.S. Dep’t of Just., *supra* n. 62.

66. Pub. L. No. 111-211, 124 Stat. at 2261–2262 (2010).

67. 25 U.S.C. § 1302(b).

68. *Id.* at § 1302(a)(7)(D).

- and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.<sup>69</sup>

The Tribal Law and Order Act also contemplates appropriate incarceration alternatives for tribal people sentenced under the Act.<sup>70</sup> The Act permits a tribal court to require the defendant:

- (1) to serve the sentence—
- (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
- (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;
- (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
- (D) in an alternative rehabilitation center of an Indian tribe; or
- (2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.<sup>71</sup>

#### B. *The Violence Against Women Act Expands Tribal Court Jurisdiction over Non-Indian Perpetrators of Domestic Violence*

Three years after the Tribal Law and Order Act was enacted, the Violence Against Women Reauthorization Act was enacted.<sup>72</sup> The Violence Against Women Act added two new assault charges relevant to a spouse, intimate partner, or dating partner: (1) “assault resulting in substantial bodily injury”; and (2) “assault . . . by strangling, suffocating, or attempting to strangle or suffocate.”<sup>73</sup>

Relevant to the jurisdictional discussion in this article, the Violence Against Women Act included an amendment that provides a limited *Oliphant* fix. This amendment “authorizes tribes to assert criminal jurisdiction over non-Indian perpetrators of misdemeanor crimes of domestic violence.”<sup>74</sup> It confers tribal criminal jurisdiction over non-Indians only in

69. *Id.* at § 1302(c).

70. *Id.*

71. *Id.*

72. The Violence Against Women Reauthorization Act became Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified in scattered sections of the U.S. Code) in 2013. The Tribal Law and Order Act became Pub. L. No. 111-211, § 202(b), 124 Stat. 2258, 2263 (2010) in 2010.

73. 18 U.S.C. § 113(a)(7)–(8).

74. 25 U.S.C. § 1304(a)(6).

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 137

crimes related to domestic and dating violence, or criminal violations of related protection orders.<sup>75</sup> In regard to crimes involving Indians or Indian country, the Violence Against Women Act does not apply to “crimes committed outside of Indian country; crimes between two non-Indians; crimes between two strangers, including sexual assaults; crimes committed by a person who lacks sufficient ties to the tribe, such as living or working on its reservation; and child abuse or elder abuse that does not involve the violation of a protection order.”<sup>76</sup>

The jurisdictional piece of the Violence Against Women Act took effect on March 7, 2015.<sup>77</sup> To be eligible to exercise special domestic violence criminal jurisdiction, a tribe must provide services similar to those required for Tribal Law and Order Act enhanced sentencing. For example, a tribe must provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; provide a law-trained judge; provide access to the tribe’s laws; and maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.<sup>78</sup>

One of the most interesting requirements is the condition that the tribe must include a “fair cross section of the community” in jury pools and “not systematically exclude any distinctive group in the community, including non-Indians.”<sup>79</sup> Until now, tribal court juries were filled with tribal members. It is unclear whether non-Indians would be interested in sitting on a tribal court jury. And what if a non-Indian refuses to serve? The tribal court lacks authority to issue a criminal subpoena over non-Indians who may be nonresponsive to a tribal court jury summons. How then does a tribe guarantee that a non-Indian defendant has a jury of his peers if non-Indians refuse to participate in the process? This question remains unanswered.

Neither the Tribal Law and Order Act nor the Violence Against Women Act stripped the federal government of its ability to assert jurisdiction over criminal matters. In other words, should a tribe opt to expand jurisdiction under the Tribal Law and Order Act and/or the Violence Against Women Act, *both* tribal and federal authorities have the ability to prosecute the

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75. U.S. Dep’t of Just., *Tribal Justice and Safety, Violence against Women Act (VAWA) Reauthorization 2013*, <http://perma.cc/KYF8-NFAU> (<http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0>) (accessed Nov. 30, 2014).

76. *Id.*

77. *Id.*; U.S. Dep’t of Just., *Tribal Justice and Safety, Violence against Women Act (VAWA) Reauthorization 2013, VAWA 2013 Pilot Project*, <http://perma.cc/VXY9-RQRK> (<http://www.justice.gov/tribal/vawa-2013-pilot-project>) (accessed Nov. 30, 2014) (On February 6, 2014, the Department of Justice granted pilot project applications for the Confederated Tribes of the Umatilla Indian Reservation of Oregon, the Pascua Yaqui Tribe of Arizona, and the Tulalip Tribes of Washington.).

78. 25 U.S.C. § 1304(d).

79. *Id.* at § 1304(d)(3)(A)–(B).

same defendant for the same conduct. In fact, the Violence Against Women Act states that “nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.”<sup>80</sup>

In my travels to different Montana reservations, members of the tribal governments and courts have expressed to me an interest in restoring their jurisdiction under the Tribal Law and Order Act and Violence Against Women Act. The tribes on the Fort Peck Indian Reservation have made significant efforts to meet the requirements of the respective laws. For example, Fort Peck’s tribal government participated in an Inter-Tribal Working Group that specifically focused on implementing the Violence Against Women Act pilot project.<sup>81</sup> Additionally, Fort Peck has made revisions to its code, made all of its laws accessible to the public, and has made efforts to assure that an attorney public defender is available.<sup>82</sup>

The Department of Justice and the U.S. Attorney’s Office for the District of Montana encourage tribes to opt into restoring their jurisdiction.<sup>83</sup> When testifying in front of the United States Sentencing Commission in February 2014, Deputy Assistant Attorney General Sam Hirsch and U.S. Attorney Michael W. Cotter lauded the opportunities provided by the Violence Against Women Act:

[The Act] represents a historic step forward for tribal sovereignty and jurisdiction. It recognizes the tribes’ inherent power to exercise ‘special domestic violence criminal jurisdiction’ over those who commit acts of domestic violence or dating violence or violate certain protection orders in Indian Country, regardless of their Indian or non-Indian status.<sup>84</sup>

80. *Id.* at § 1302(f).

81. Nat’l Cong. of Am. Indians, *Alphabetical List of Tribes Who Have Submitted Preliminary Expressions of Interest to Implement SDVCJ (Section 904 Tribal Jurisdiction) and Participate in ITWG*, <http://perma.cc/FF9L-4BZU> (<http://www.ncai.org/tribal-vawa/pilot-project-itwg/about-itwg>) (updated Oct. 30, 2013).

82. Fort Peck Tribal Court, Assiniboine and Sioux Tribe, <http://perma.cc/QX79-KNPY> (<http://www.fptc.org>) (accessed Jan. 13, 2015).

83. Sam Hirsch, Dep. Assoc. Atty. Gen., & Michael W. Cotter, U.S. Atty. for the Dist. of Mont., Statement before the U.S. Senten. Comm’n, *Hearing on the Implementation of the Violence against Women Reauthorization Act of 2013*, at 6 (Feb. 13, 2014) (available at <http://perma.cc/R8YY-6SE6>) ([http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140213/Testimony\\_Cotter\\_Hirsch.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140213/Testimony_Cotter_Hirsch.pdf)); U.S. Dep’t of Just., *U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014*, at 8 (Mar. 6, 2014) (available at <http://perma.cc/P5XC-FCEM>) ([http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony\\_DOJ.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony_DOJ.pdf)) [hereinafter *DOJ Views*].

84. Hirsch & Cotter, *supra* n. 83, at 6; *DOJ Views*, *supra* n. 83, at 8.

## V. SO . . .TRIBAL OR FEDERAL?

If a tribe in Montana elects to proceed with Tribal Law and Order Act and Violence Against Women Act expansion of jurisdiction, both federal and tribal authorities would then have concurrent jurisdiction over the scenarios presented at the beginning of this article.

Returning to the two case studies, imagine the questions that arise when charging decisions are made:

1. If incarceration is part of the sentence, where will the defendant be incarcerated?
2. Is there an advantage to having the defendant closer to his home community?
3. Does the Tribe have adult probation services?
4. Should substance abuse treatment be part of a sentence? If so, which sovereign might provide the best treatment for the defendant?
5. What type of sentence is the court likely to hand down?
6. In the event the tribal court exercises its sentencing flexibility, do robust tribal programs exist that can provide a more effective “punishment” than incarceration?
7. How old is the defendant? Has he or she previously disregarded tribal court sentences?
8. What is the defendant’s criminal history?
9. Does the tribe have the resources to deal with the concern at hand?
10. Which code provides the more appropriate criminal charge?
11. As tribal courts generally only have a one-year statute of limitation, can the tribal prosecutor bring an action within the appropriate time frame?
12. Does this defendant pose an immediate danger? If so, which sovereign can act faster to get the defendant off the streets?

Making appropriate charging decisions requires an honest assessment of resources, frank discussions between tribal and federal officials, and an institutionalized plan that describes an appropriate communication scheme.

## VI. MONTANA – A DISTRICT WITH A PLAN

The United States Attorney’s Office, District of Montana, has an Indian Crime Unit dedicated to the prosecution of violent crime in Indian

Country.<sup>85</sup> The Unit is guided by the District of Montana Indian Country Law Enforcement Initiative Operational Plan. The Operational Plan lays out an explicit plan for communication and collaboration in Indian Country.<sup>86</sup>

### A. Operational Plan

Part of the Operational Plan is as follows:

**Investigations and Prosecutions:** It is crucial that the [U.S. Attorney's Office] inform tribal law enforcement about charging decisions, including cases not resolved in federal court. It is equally important that cases are staffed by the Tribe and the [U.S. Attorney's Office] on a regular basis so that the most appropriate charging decision, both crime and jurisdiction, is made as quickly as possible.

**USAO/Tribal Prosecution Phone Conference:** On a bi-monthly basis, the [Assistant U.S. Attorney](s) assigned to a particular reservation, the tribal prosecutor(s), and representatives from federal and tribal law enforcement will staff cases that have arisen on that reservation by talking about potential charges and whether the case is most appropriately prosecuted in tribal court, federal court, or both courts. A permanent record of cases staffed will be maintained by the [U.S. Attorney's Office]. Efforts will be made to assure that [the Legal Information On-Line System] accurately reflects those cases that are referred to the tribal system and track the disposition of cases referred to tribal court.

**Written Resolution of Cases:** The resolution of cases that are referred for consideration of federal prosecution, and later resolved by referral to the tribal court, or because of an inability to prosecute must be in writing before the Tribe's statute of limitations period expires, if possible. The resolution letter will be provided by the [Assistant U.S. Attorney] to the referring agency. The resolution letter will also be provided to the tribal prosecutor to inform him or her of the decision. The investigating agency or victim of a crime can obtain a review of that decision. Our "second look policy" is invoked when the investigating agency or the victim of a crime that has been resolved other than by federal prosecution asks the AUSA to review the matter for a second opinion. Additionally, the [Assistant U.S. Attorney] with primary responsibility as tribal liaison for cases arising on a particular reservation is always available to answer questions and provide legal advice. The [U.S. Attorney's Office] does not resolve cases referred to our office orally.

**Sharing Information With Tribal Prosecutor:** If a case is not appropriate for federal prosecution and is referred to tribal court, the lead investigative

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85. United States Attorney's Office, District of Montana Criminal Division, <http://perma.cc/8JFZ-NT7D> (<http://www.justice.gov/usao/mt/criminal.html>) (accessed Jan. 13, 2015).

86. For a description of other districts' plans, see Brendan V. Johnson, U.S. Atty. For the Dist. of S.D., Statement before the U.S. Senate Comm. on Indian Affairs, *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country* (Sept. 22, 2011) (available at <http://perma.cc/7D5P-A5P9> (<http://www.indian.senate.gov/sites/default/files/upload/files/Brendan-Johnson-testimony.pdf>)).

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 141

agency will, within 10 days from the date of the notice that federal prosecution is not appropriate, provide the tribal prosecutor with all appropriate reports, evidence, and information available to insure successful prosecution. The [U.S. Attorney's Office] will provide all pertinent case file information.

**Sharing Information Among Investigative Agencies:** Investigators rely on databases to conduct investigations. Agencies must share information by computer through databases and other on-line services. It is important that all investigative agencies working in Indian Country have access to software and computers that allow them to share information with each other.

**Federal Agent Cooperation with Tribal Court:** Federal agents working in Indian Country have a responsibility to the Tribal Court to cooperate by honoring subpoenas and providing evidence and testimony for proceedings in tribal court.<sup>87</sup>

Due to the frequent overlap between tribal and federal governments in Indian Country, the two governments need a clear guideline outlining each government's role in different situations. This guideline should be institutionalized in a publication that can provide tribes and the federal government the necessary framework to ensure maximum cooperation and prevent cases from falling through the cracks. Additionally, when tribal and federal systems are making joint charging decisions, the systems can avoid overcharging an individual and drawing a *Wheeler* challenge.

Because of the frequent contact between the federal government and tribes, another benefit is that stakeholders are able to speak bluntly regarding training needs. As a result, the U.S. Attorney's Office, along with its training partners, the Bureau of Indian Affairs (BIA), the State of Montana Attorney General's Office, and others, have responded to numerous training requests.<sup>88</sup>

*B. Participation in Multidisciplinary Teams and Sexual Assault Response Teams*

In addition to increased communication, federal prosecutors, including me, collaborate with individual tribes in other formal ways. For example, every month federal prosecutors participate in multidisciplinary team meetings (MDTs). These multidisciplinary teams focus on the criminal investigation and prosecution of the physical and sexual abuse and neglect of children. The teams are composed of multiple entities including tribal and fed-

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87. District of Montana Indian Country Law Enforcement Initiative Operational Plan, 2014 (On file with author).

88. For example, see Press Release from U.S. Dep't of the Int., Off. of the Asst. Sec.—Indian Affairs, *BIA Office of Justice Services to Hold Third Tribal Court Trial Advocacy Training Session in Helena, Mont.* 1 (May 15, 2014) (available at <http://perma.cc/U3SY-GQ4U> (<http://www.bia.gov/cs/groups/public/documents/text/idc1-026710.pdf>)).



eral prosecutors; tribal, BIA, and FBI law enforcement; tribal social services; medical personnel (such as pediatricians); mental health professionals; and victims' advocates. The diversity in skill, experience, and perspective allows the team to make effective staffing decisions. Additionally, the participants establish case timelines and action plans. While multidisciplinary team meetings overlap with similar staffing that occurs via child protection teams, the multidisciplinary team's focus on prosecution permits the child protection teams to focus on intervention and child protection plans rather than criminal investigations.

The information sharing among the members of the multidisciplinary team is one of the major benefits of this system. For example, when a potential defendant's name is raised in a team meeting, additional victims of this same potential defendant may be identified. This can be significant to a federal prosecution for a variety of reasons. For example, in federal court, similar crimes of sexual assault and child molestation can be admitted as relevant evidence.<sup>89</sup> Many times, especially in historical sexual abuse cases, a federal prosecutor will have no physical evidence to admit into the record. In a case I personally tried, additional victim testimony was helpful in securing a conviction.<sup>90</sup>

In June 2012, Tony West, Acting Associate Attorney General at the time, and U.S. Attorney Michael W. Cotter announced the establishment of "sexual assault response teams . . . in the six Montana reservations under federal jurisdiction."<sup>91</sup> I have served as a team member of two reservation teams. The sexual assault response teams staff similar cases to those staffed by multidisciplinary teams with some notable differences; namely, sexual assault response teams are purposed toward staffing known cases of sexual assaults of adults. Due to the compositional similarity of sexual assault response teams and multidisciplinary teams, many members play roles in both groups, but some do not. For example, the medical provider team member is usually a Sexual Assault Nurse Examiner and not a pediatrician.

In Montana, some county attorney offices (Glacier and Big Horn County) have participated in collaborative prosecution meetings, multidisciplinary teams, and sexual assault response teams. A perpetrator of violent crime who is known in reservation communities may have also committed crimes off of the reservation. The ability for federal, county, and tribal law enforcement to have confidential discussions enables law enforcement offi-

89. Fed. R. Evid. 413, 414; *U.S. v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (concluding there is "nothing fundamentally unfair about the allowance of propensity evidence under Rule 414").

90. See e.g. *U.S. v. Bullcalf*, 563 Fed. Appx. 535, 536 (9th Cir. 2014).

91. Press Release from U.S. Dep't of Just., *Acting Associate Attorney General Tony West and U.S. Attorney Michael W. Cotter Announce Pilot Initiative to Address Sexual Assault on Montana Reservations* (June 6, 2012) (available at <http://perma.cc/3M2E-PUY7> (<http://www.justice.gov/opa/pr/acting-associate-attorney-general-tony-west-and-us-attorney-michael-w-cotter-announce-pilot>)).

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 143

cially to have a broader understanding of the criminal conduct. Further, when law enforcement fully understands the timing of potential indictments or proceedings in other courts, officials can plan better and more effectively utilize law enforcement resources.

*C. Special Assistant United States Attorneys Program*

As stated by Deputy Assistant Attorney General Sam Hirsch and U.S. Attorney Michael W. Cotter in their testimonies in front of the United States Sentencing Commission in February 2014:

Tribal [Special Assistant U.S. Attorneys] are tribal prosecutors who are ‘cross-deputized’ and able to prosecute crimes in both tribal court and federal court as appropriate. These Tribal [Special Assistant U.S. Attorneys] are able to strengthen tribal governments’ role in fighting Indian Country crime and improve U.S. Attorney coordination with tribal law enforcement personnel.

In 2012, the Office on Violence Against Women . . . augmented the existing Tribal [Special Assistant U.S. Attorneys] program through awards to four tribes in Nebraska, New Mexico, Montana, North Dakota, and South Dakota. The goal of the Tribal [Special Assistant U.S. Attorneys] program is for every prosecutable crime of intimate partner violence to be pursued in federal court, tribal court, or both.<sup>92</sup>

In Montana, the Fort Belknap Indian Community was the recipient of the Special Assistant U.S. Attorneys award.<sup>93</sup> The goal of the program is twofold: (1) to train tribal prosecutors in federal law, procedure, and investigative techniques; and (2) to increase the likelihood that every viable violence against women criminal offense is prosecuted in tribal court, federal court, or both.<sup>94</sup> Tribal prosecutors serve as co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities.<sup>95</sup> The Fort Belknap Tribal Special Assistant U.S. Attorney is veteran county and tribal prosecutor Yvonne Laird. Laird and I have served as co-counsel on each other’s cases and both participate on the Fort Belknap MDT and sexual assault response teams. Laird participates fully in federal court matters, including trial work, hearings, and resolution of criminal matters arising on the Fort Belknap reservation.

92. Hirsch & Cotter, *supra* n. 83, at 4; *DOJ Views*, *supra* n. 83, at 6–7.

93. Press Release from U.S. Dep’t of Just., *Office on Violence against Women Announces Agreements to Cross-Designate Tribal Prosecutors in Nebraska, New Mexico, Montana, North Dakota and South Dakota* (June 5, 2012) (available at <http://perma.cc/4J7W-LPNB> (<http://www.justice.gov/opa/pr/office-violence-against-women-announces-agreements-cross-designate-tribal-prosecutors>)) (Although the Crow Tribe does not currently have a SAUSA, it had one appointed in the past. The Fort Peck Tribe is expected to get a SAUSA to help contend with the increase of violence related to the Bakken oilfield.).

94. *Id.*

95. *Id.*

The Department hopes that “[t]he work of Tribal [Special Assistant U.S. Attorneys] can also help to accelerate implementation of the Tribal Law and Order Act of 2010 by addressing the broader need for skilled, committed prosecutors, be they [Assistant U.S. Attorneys] or Tribal [Special Assistant U.S. Attorneys], working on the ground in Indian Country.”<sup>96</sup> Consistent with that goal, Attorney General Holder announced a “new fellowship within the Attorney General’s Honors Program—the Attorney General’s Indian Country Fellowship.”<sup>97</sup> The fellowship is intended to “create opportunities for highly qualified law school graduates to spend three years working on Indian Country cases, primarily in U.S. Attorneys’ Offices, developing a pool of attorneys with deep experience in Federal Indian law, tribal law, and Indian Country issues.”<sup>98</sup>

## VII. CONCLUSION

The two examples at the beginning of this article illustrate the types of cases staffed by federal and tribal officials. In my experience, the most significant factor that drives a joint charging decision is a resolution between the sovereigns regarding which system has the best resources to contend with the criminal matter. Until tribes can fully fund their own tribal criminal justice systems, jurisdictional restoration under the Tribal Law and Order Act and the Violence Against Women Act will not be realized.

To illustrate the point, I am aware that the Fort Belknap Indian Community operated without an adult probation office for a term. Assuming the Community fulfilled the requirements for restored jurisdiction under the Violence Against Women Act, the Community might agree to assert jurisdiction in Case Study #1, and should the defendant be convicted, the tribal court would put the burden on the defendant to find his or her own anger management and/or substance abuse treatment programs and pay for them himself or herself. The Tribe would likely find this to be the only solution because the non-Indian defendant would not be eligible for tribal services.

In Case Study #2, the Community would probably refer the case to federal prosecutors simply because the Tribe cannot provide effective supervision.

To illustrate this point further, because of the condition of the tribal detention facility a tribal judge may not feel comfortable sentencing a person to a term over one year. Without faith in the detention facilities, and

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96. Hirsch & Cotter, *supra* n. 83, at 4; DOJ Views, *supra* n. 83, at 7.

97. Hirsch & Cotter, *supra* n. 83, at 4; DOJ Views, *supra* n. 83, at 7. (For more information about the fellowship, see U.S. Dep’t of Just., *Legal Careers, The Gaye L. Tenoso Indian Country Fellowship*, <http://perma.cc/2T6G-PSPS> (<http://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship>) (accessed Nov. 30, 2014)).

98. Hirsch & Cotter, *supra* n. 83, at 4–5; DOJ Views, *supra* n. 83, at 7.

2015 *COOPERATIVE (AND UNCOOPERATIVE) FEDERALISM* 145

notwithstanding the Bureau of Prisons pilot project opportunity, this Tribe would likely press for the federal prosecutors to charge both of the cases.

Fort Peck and the Chippewa Cree Tribes have brand new detention facilities located on their respective reservations.<sup>99</sup> It is no coincidence that these two reservations expressed to me the most interest in restoring jurisdiction under the Violence Against Women Act amendments to the Tribal Law and Order Act.

Nationwide, 26% of cases referred to the federal system are for crimes of sexual abuse.<sup>100</sup> Until Tribes have the ability to provide sex offender treatment as an aspect of a tribal sentence, these cases will likely continue to be federal matters.

Further, because of the federal government's greater access to forensic and expert resources, it is likely that tribes will refer homicide cases to federal authorities. This is also true because most tribal officials see the need for a homicide sentence to exceed three years.

The virtues of restoring criminal jurisdiction to the tribes can be extolled far and wide, but will not become a reality until tribal systems are fully funded. Until then, the federal presence in crimes arising in Indian Country will continue to be significant. Even though the federal system, at least in Montana, will continue to be the major player in prosecuting major crimes, Montana's model of collaboration and communication between federal and tribal partners is important for purposes of fostering tribal "buy-in." Likewise, should Montana tribes assert tribal court jurisdiction under the Tribal Law and Order Act or the Violence Against Women Act, Montana's model will facilitate the staffing of cases in a manner that would prevent a defendant from being charged in two systems for the same crime. The federal government continues to have significant power in Indian Country. Therefore, it should make a significant effort to institutionalize a collaboration and communication system that includes the participation of those most affected by crime on the reservations—those who actually live on the reservation.

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99. Bureau of Justice Assistance, U.S. Dep't of Justice, Correctional Systems and Correctional Alternatives on Tribal Lands, *Fort Peck Assiniboine & Sioux Tribes—Construction of Fort Peck New Adult Detention Facilities*, <http://perma.cc/9JLL-PLUB> ([https://www.bja.gov/programs/tribal\\_corrections/20.html](https://www.bja.gov/programs/tribal_corrections/20.html)) (accessed Jan. 13, 2015); Bureau of Justice Assistance, U.S. Dep't of Justice, Correctional Systems and Correctional Alternatives on Tribal Lands, *Chippewa Cree Tribe—Construction of Chippewa Cree Multi-Purpose Jail Facility*, <http://perma.cc/F5CZ-DFXH> ([https://www.bja.gov/programs/tribal\\_corrections/30.html](https://www.bja.gov/programs/tribal_corrections/30.html)) (accessed Jan. 13, 2015).

100. See Hon. Byron Dorgan, Hon. John Barrasso, Hon. John Thune, U.S. Gov't Accountability Office, *U.S. Dep't of Just., Declinations of Indian Country Criminal Matters*, 9 (Dec. 13, 2010) <http://perma.cc/FYW4-4YTF> (<http://www.gao.gov/assets/100/97229.pdf>) (accessed Jan. 13, 2015).

