

## **Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know**

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In the war against domestic violence, the protection order has proven to be a very effective tool. The protection order has also proven helpful in a number of other situations, such as for stalking victims. A protection order's value, however, is only as broad as its enforceability. Enforceability can be a problem for people who work, travel, and live in different jurisdictions. A protection order is, after all, a court order (and often a temporary one at that) and enforcement of a court order outside the issuing court's jurisdiction can sometimes be tricky at best and impossible at worst.

In an effort to address these enforceability problems, Congress included a full faith and credit provision in the omnibus Violence Against Women Act, ("VAWA").<sup>2</sup> That provision declares:

[a]ny protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.<sup>3</sup>

With this law, Congress essentially required all states and all tribes to recognize and enforce protection orders issued by any other state or any other tribe. This statute is a tremendous boon for persons who obtain protection orders. In one fell swoop, Congress provided nationwide coverage for those with protection orders, eliminating many hassles and hurdles.

The full faith and credit provisions are both a boon and a burden for tribal governments. On the positive side, the statute reflects Congress' recognition that tribal governments are legitimate governments with court systems that issue protection orders. On the negative side, Congress has complicated the tasks for tribal governments and tribal courts by leaving the extent of tribal court authority over non-members ambiguous. The one thing that is very clear for all courts asked to enforce a protection order is that they must enforce any protection order as if it was an order of the enforcing court. This essay will explore the import of the VAWA's full faith and credit provisions and how tribal governments can take full advantage of those provisions to maximize the protection afforded to those shielded by protection orders.<sup>4</sup>

**I. WHAT VAWA'S FULL FAITH AND CREDIT PROVISIONS DO**

The Violence Against Women Act of 1994 is a broad statute designed to take a multi-pronged approach to combating all forms of violence against women. The statute has three major components. The first component, the full faith and credit provision, is the subject of this essay. The other two are a series of grants targeted at combating domestic violence and a civil rights remedy for gender-motivated violence. The latter provision gained a great deal of prominence when the U.S. Supreme Court declared it to be unconstitutional.<sup>5</sup> The full faith and credit provisions, however, suffer from no such defect.<sup>6</sup>

With the full faith and credit provisions, Congress wanted to eliminate obstacles that reduced the effectiveness of protection orders.<sup>7</sup> A protection order is a court order, usually one with an expiration date. There are both constitutional and statutory requirements for states to give full faith and credit to other states' judicial actions,<sup>8</sup> but they are generally considered to apply only to final orders.<sup>9</sup> Before the VAWA, the temporary nature of protection orders meant that it was often difficult for a person to get one enforced outside the issuing jurisdiction. Some people covered by protection orders will never run up against these obstacles, as they work, live, vacation, and visit family without ever leaving the one jurisdiction. Other people may work in one jurisdiction, live in another, and visit family in yet another. Or a person may decide that the safest thing to do is flee the attacker and relocate to another jurisdiction.

To be fully assured of protection, the person may need to obtain a new protection order in each jurisdiction. At a minimum, this is a time-consuming process that requires multiple trips to multiple courthouses. It may also become expensive, as it may require the payment of multiple fees (and perhaps lost income from missed work). At its worst, the necessity of obtaining a new protection order may send up a red flag, telling a dangerous violator where to find his victim. Obtaining a protection order is a legal procedure, and the law demands that a person be provided with due process, which at its most basic means notice and an opportunity to be heard. The "notice" part may present huge problems for someone who has fled for safety reasons. After all, the court filing will tell the respondent where to find the petitioner.

As if these obstacles were not enough, a petitioner willing and able to hurdle them may still not be able to get a protection order in each jurisdiction. Before each court can issue a protection order, it must possess both subject matter jurisdiction over the case and personal jurisdiction over the respondent. A court may not possess such jurisdiction if the respondent lives elsewhere and has never set foot in the court's territory. In addition, each government can establish different criteria for obtaining a protection order.<sup>10</sup> A person who is able to get a protection order in one jurisdiction may not qualify for a protection order in another jurisdiction because, for example, the

relationship was not serious enough (i.e., it was a casual dating relationship or perhaps did not even rise to that level) or because the relationship was homosexual.

With the VAWA's full faith and credit provisions, Congress wiped away these hurdles and essentially created a mechanism for providing nationwide coverage once a protection order is issued.<sup>11</sup> When the original VAWA proved to leave a few bumps in the road, Congress revisited the area with the VAWA 2000.<sup>12</sup> Between the two statutes, Congress eliminated the need for multiple protection orders and simplified the process for getting a protection order enforced, as one order is valid everywhere and law enforcement is placed under a duty to enforce all protection orders regardless of who issued them. The statutes also eliminate the "red flag" notice issues that can potentially escalate the danger for persons covered by protection orders.<sup>13</sup> All of these benefits, however, depend on the issuing court having jurisdiction to issue the protection order and the enforcing jurisdiction having personal jurisdiction over the alleged violator. As discussed in the next section, satisfying these two prerequisites can be complicated in the context of tribal courts.

## **II. THE AMBIGUITIES WITH RESPECT TO TRIBAL GOVERNMENTS**

In its early forms, the VAWA's full faith and credit provisions were applicable only to states; they did not mention tribes.<sup>14</sup> As the bill moved through the legislative process, Congress became aware of the fact that tribal courts also issue protection orders and that tribal courts play an important role in combating domestic violence. Accordingly, Congress inserted "and tribes" into the statute, to include both tribes and states under the full faith and credit requirements. Although this impinged on tribal sovereignty by imposing on tribes a duty to enforce state orders, it also supported tribal sovereignty by imposing on states a corresponding duty to enforce tribal orders.

This recognition of the role of tribal courts is an important step forward, but in taking this step Congress forgot about the differences between tribal and state jurisdiction. The Supreme Court has developed a body of law to define the boundaries of each government's jurisdiction. Indeed, as a result of this body of law, "jurisdiction" is not a monolithic entity. The two basic types of jurisdiction are legislative jurisdiction and adjudicative jurisdiction.<sup>15</sup> The first refers to the ability of the government to pass laws regulating a particular person's conduct; the latter refers to the authority of the government's courts to adjudicate particular disputes. Adjudicative jurisdiction itself breaks into two parts: subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction refers to the court's ability to hear the particular case, and personal jurisdiction refers to the court's authority to issue a decision that is binding on the parties.

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Unfortunately, the Supreme Court has developed jurisdictional rules for states and tribes along completely different paths.<sup>16</sup> The law regarding state jurisdiction is known as "conflicts of law," while the law regarding tribal jurisdiction is known as "federal Indian law." The Supreme Court has kept these two separate and has not allowed one to influence the other. The touchstone for state jurisdiction is "due process." The Court essentially looks to whether it is "fair" for the state to regulate a particular person's conduct or haul a particular person into the state's courts.<sup>17</sup> If a person is physically present within the state's territory, that is always sufficient to allow the state to exercise both legislative and adjudicative jurisdiction. Since most protection order violations require proximity,<sup>18</sup> it is likely that a violator is physically present within the state's territory, giving the state jurisdiction to punish the violation.

The same is not true of tribal governments. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribes do not have criminal jurisdiction over non-Indians who commit crimes within the tribe's territory.<sup>19</sup> Since *Oliphant*, the Court has continued to chip away at the territorial sovereignty of tribes.<sup>20</sup> The tribe may still detain the offender and turn him over to state or federal authorities for prosecution, and the tribe may also exclude the offender from its territory, but the tribe cannot prosecute non-Indians for crimes.<sup>21</sup> In *Duro v. Reina*,<sup>22</sup> the Supreme Court extended its ruling to exclude tribes from exercising criminal jurisdiction over non-member Indians, but Congress overturned *Duro* through legislation commonly known as the Duro fix amendment.<sup>23</sup> In that legislation, Congress declared that it recognized and affirmed inherent tribal authority to exercise criminal jurisdiction over all Indians, member and non-member alike.

As a result of a series of opinions, most notably *Montana v. United States*,<sup>24</sup> *Strate v. A-1 Contractors*,<sup>25</sup> and *Nevada v. Hicks*,<sup>26</sup> the Supreme Court has also limited tribes' civil jurisdiction over non-members. Although a clear "yes, tribes have it" and "no, tribes lack it" rule exists for criminal jurisdiction, civil jurisdiction is not so straightforward. We do know, after *Strate* and *Hicks*, that a tribe's adjudicatory jurisdiction is no broader than its regulatory jurisdiction.<sup>27</sup> Thus, the Court seems to have melded the two tests, although the exact contours of the new test are not entirely clear.<sup>28</sup> What is clear is that whether a tribe possesses civil jurisdiction over a non-member depends on an analysis of the status of the land where the protection order violation occurred; the nature of the relationship between the alleged violator, the tribe, and the victim; and whether the violation has a direct effect on core tribal functions.<sup>29</sup>

This test has its genesis in *Montana*, which addressed the regulatory jurisdiction of tribes.<sup>30</sup> According to the Supreme Court's opinion, tribes are less likely to possess civil jurisdiction when the violation occurs on fee land within the reservation, as opposed to land held in trust for the tribe.<sup>31</sup> When the violation occurs on fee land, the tribe must demonstrate either the existence of a consensual relationship between the non-member and the tribe (or its members) or that the non-member's

conduct has a direct effect on the tribal government's ability to function.<sup>32</sup> As discussed in the next section, the vague contours of this test introduce increased uncertainty into a tribal court's ability to punish a non-member for violating a protection order within the tribe's territory. After all, a tribal court must possess jurisdiction over the alleged offender before it can impose a punishment.

### **III. FASHIONING PENALTIES FOR VIOLATION OF PROTECTION ORDERS**

Despite the ambiguities in tribal court jurisdiction, the VAWA is crystal clear about one thing. When faced with a protection order, regardless of who issued it, a tribal court must enforce it as if it had been issued by that tribal court.<sup>33</sup> This requirement means that a tribal court can only use one schedule of penalties; it cannot have penalties for violating a tribal court protection order and penalties for violating some other court's protection order.<sup>34</sup>

The best way to handle the "one penalty structure" requirement is to look to tribal law. Each tribal legislature should enact a domestic violence code with a set of penalties clearly spelled out. This approach helps ensure consistency and clarity in treatment of protection order violations.<sup>35</sup> When creating these penalties (or reviewing already established penalties), a tribe should keep in mind that the same penalties will be imposed on both members and non-members.

No comprehensive list spells out the approaches used by tribes to penalize violations of protection orders.<sup>36</sup> Lists that survey state responses, however, do exist.<sup>37</sup> Most states penalize violation of protection orders either as criminal contempt or as a misdemeanor. A few states also make violating a protection order a felony. The common theme running through all of these approaches is that they are handled as criminal, not civil, matters.

Tribes may also want to treat violations of protection orders as crimes. The first step in making this decision is to consider whether criminal penalties would be consistent with tribal tradition and culture. Just because states do it does not mean tribes should follow suit. What works in the state context may not work in the tribal context. Each tribe must make this decision for itself.

A tribe that does decide to enact criminal penalties must decide whether to treat the violation as criminal contempt, a misdemeanor, and/or a felony, as well as what particular punishment to attach to the crime (such as a fine, jail time, or both). A tribe that does decide to enact criminal penalties must keep two things in mind. First, the Indian Civil Rights Act<sup>38</sup> limits the penalties that can be imposed to one year imprisonment and/or a \$5000 fine.<sup>39</sup> The ICRA does not, however, limit other forms of punishment, such as community service, restitution, and probation.

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Second, tribes cannot impose criminal penalties against persons who are not Indian. This limitation stems from the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*,<sup>40</sup> in which the Court used judicial fiat to declare that tribal governments possess no criminal jurisdiction over non-Indians.<sup>41</sup> The Supreme Court's decision did leave open the possibility that Congress could change this "default" rule, but it is clear after the VAWA 2000 amendments that Congress has not done so. In its clarification regarding tribal jurisdiction, the VAWA 2000 addresses only tribal civil jurisdiction; it does not mention tribal criminal jurisdiction.<sup>42</sup> Since Congress addressed one and not the other, it is only logical to conclude that Congress did not intend to alter the existing rules for tribal criminal jurisdiction.

Thus, even if a tribe chooses to enact criminal penalties for violation of a protection order, it should also create civil penalties. Otherwise, a tribe will have no penalties to impose on non-Indians who violate protection orders within the tribe's territorial jurisdiction. Within the realm of civil penalties, tribes are essentially charting new ground, as states generally do not approach violations of protection orders as civil matters. The Anglo-American legal system, however, does have a tradition of using civil penalties as incentives to guide behavior. For example, many states treat parking violations and traffic citations as civil matters. Many regulatory statutes also have civil penalties attached, such as for pollution, failure to maintain certain records (such as gun sales and serial numbers for auto parts), and failure to pay taxes. Thus, these "civil infractions" are familiar aspects of law to most courts. While tribes are not required to use penalties recognized by state and federal courts, it is human nature to accept as legitimate an approach that is familiar.

The civil infraction approach is also generally more consistent with most tribes' traditional approaches to regulating behavior. Although many tribes today do use imprisonment to punish misbehavior, incarceration was practically unheard of in the past. Tribes tended to use restitution, ostracism, and banishment as methods of social control. Today, penalties for civil infractions might take the form of fines, restitution, and/or community service.

Monetary payments or community service, however, are not always effective, particularly against the most serious types of protection order violators. Civil infractions, however, are not the only form of civil penalty available to tribes. Two other major types of civil penalties are civil contempt and exclusion from Indian country.

Civil contempt is a routine form of punishment for violating a court order, and a protection order is a court order. The problems with the use of civil contempt by tribes come with the two typical forms of punishment attached to a finding of civil contempt: fines and imprisonment. There is certainly no problem with tribes imposing fines on a person found in violation of a protection order. The problem, as noted above, is that a fine will not deter all violators, particularly those who present the most

danger to their victims. Theoretically, there should also be no problem with a tribal court imposing jail time as a penalty for civil contempt. Congress did, after all, explicitly declare that "tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings."<sup>43</sup> Since incarceration is a standard penalty for civil contempt, tribes should be able to impose it on those who violate protection orders.

The problem is that the Supreme Court, in both *Oliphant*<sup>44</sup> and *Duro*,<sup>45</sup> has shown great reluctance to let tribes put non-members in jail. Although both those cases dealt with criminal matters, the Court's opinions contained sweeping language about the fact that tribal courts are not bound by the Bill of Rights.<sup>46</sup> It did not seem to matter that tribal courts are bound by provisions of the Indian Civil Rights Act, which duplicated most of the critical provisions of the U.S. Constitution for purposes of criminal cases.<sup>47</sup> One major difference between the ICRA and the Constitution, at least as far as the Supreme Court is concerned, is that the ICRA contains no guarantee of counsel for indigent defendants.<sup>48</sup>

The Supreme Court has not, however, looked beyond that basic provision to analyze why the ICRA does not require appointment of counsel. Congress' failure to include that provision was deliberate, not inadvertent. After considerable discussion, Congress recognized that two critical differences exist between tribal courts and state and federal courts.<sup>49</sup> First, tribal governments have much more limited revenues and a requirement that they furnish attorneys to all indigent defendants would place a tremendous strain on tribal treasuries.<sup>50</sup> Second, an attorney is simply not as critical in tribal proceedings as in state and federal proceedings.<sup>51</sup> State and federal proceedings are generally much more procedurally complex than tribal court proceedings. In addition, state and federal courts are much less forgiving of procedural errors than are most tribal courts. Thus, an attorney is really a necessity in state and federal courts in a way that is not true of tribal courts. This is not to suggest that tribal courts are simplistic; rather, tribal courts have developed different ways to focus on substance. Those ways are more flexible and accepting of pro se defendants.

A third factor is also important to this essay,<sup>52</sup> and that is the fact that the U.S. Constitution does not mandate the provision of counsel for all civil matters. Rather, state and federal courts must provide counsel in civil cases only when due process requires it.<sup>53</sup> The complex balancing test usually results in a finding of no requirement to appoint counsel.<sup>54</sup> Since civil contempt is, by definition, a civil matter, state and federal courts would generally be under no obligation to provide counsel. Thus, the differences in individual rights protections should not be a stumbling block to the ability of tribal courts to impose jail time on non-Indians who violate protection orders within the tribe's territory. This is particularly true in light of Congress' explicit statement that tribal courts have the authority to impose civil contempt penalties in these circumstances.

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Logic has not, however, always controlled Supreme Court decisions in Indian law. Thus, tribes might also want to consider one other major type of civil penalty -- exclusion from tribal territory. A flexible approach to creating the schedule of penalties is the best way to maximize the options for tribal courts without running afoul of VAWA's declaration that enforcing courts must treat foreign protection orders the same as they would their own protection orders.<sup>55</sup> The Supreme Court has never limited tribal ability to remove people from tribal territory, even when the tribe lacks the ability to haul those people into tribal court. Some lower courts<sup>56</sup> have been skeptical and sometimes critical of these "banishment" proceedings, as they are often called. Of course, this is really just a question of semantics. Every civilized government on the planet carries out these "banishment" proceedings; they are just more commonly called "deportation." Changing the label should not change the tribes' abilities, especially in light of Congress' explicit recognition in the VAWA 2000 that tribal courts can use exclusion as a method to punish those who violate protection orders.<sup>57</sup>

While creating both criminal and civil options may maximize tribal courts' ability to deal with protection order violators, the existence of those penalties is not the end of the matter. Indeed, before a tribal court can punish a person for violating a protection order, the tribal court must first establish jurisdiction over the violator. When the violator is a member of the tribe, there is no question regarding the tribal court's ability to impose punishment. Questions do, however, arise when the violator is not a member of the tribe.

As discussed above, the rules regarding a tribe's jurisdiction will differ depending on whether the tribe is seeking to impose criminal or civil penalties. As to criminal penalties, the rules are now quite clear. After *Oliphant*, *Duro*, and the post-*Duro* legislation, tribes possess criminal jurisdiction over all Indians and lack criminal jurisdiction over all non-Indians. The rules are not quite as clear with respect to civil jurisdiction.

Over the last twenty-five years, the Supreme Court has switched from talking about "Indians" and "non-Indians" to talking about "members" and "non-members." The non-member category includes both non-Indians and persons who are Indian, but who are members of a different tribe. The Supreme Court has taken this approach in both civil and criminal cases. With the *Duro* fix amendment, however, Congress rejected the member/non-member distinction for purposes of criminal jurisdiction and changed the law back to the Indian/non-Indian approach. Congress has not similarly tackled the civil jurisdiction area, so for now, the Supreme Court's member/non-member approach still prevails. Congress and the Supreme Court have thus created a different regime for civil jurisdiction than for criminal jurisdiction.

Within the realm of civil jurisdiction, several additional ambiguities exist. As discussed above in Part II, a state would have full civil jurisdiction over all persons

physically present within its territory. The same is not true of tribes. Under the default rules created by the Supreme Court, tribes possess civil jurisdiction over members present within their territory, but whether a tribe possesses civil jurisdiction over a non-member depends on a complex weighing process, looking at the status of the land where the activity occurred, whether the non-member has engaged in a consensual relationship with the tribe or its members, and whether the non-member's activities have a direct effect on core tribal governmental functions.

Matters are even more complicated within the context of the VAWA's full faith and credit provisions. The Supreme Court has consistently stated that Congress has the authority to alter the default rules regarding tribal jurisdiction.<sup>58</sup> The language of the VAWA 1994 was ambiguous about whether Congress intended to expand tribal jurisdiction to cover all persons who violated a protection order within the tribe's territory.<sup>59</sup> After the VAWA 2000, it is clear Congress had no intent to change the default rules regarding tribal criminal jurisdiction, but it is still not clear whether Congress intended to expand tribal civil jurisdiction.

In the VAWA 2000, Congress declared "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."<sup>60</sup> This statement is somewhat circular, as it states that tribes have full civil jurisdiction over matters within their authority. But to what "authority" is Congress referring? The authority the tribe possesses under the Supreme Court's default rules? The territorial authority of the tribe? Neither the text of the statute nor the legislative history supply a clear answer. Given the intent and purpose of Congress in enacting the VAWA's full faith and credit provisions, the broader interpretation makes the most sense. Congress was attempting to provide a comprehensive blanket of protection for those covered by any protection orders. In other words, one protection order is good anywhere in the country. Leaving the default rules of tribal jurisdiction in place undercuts this purpose, as it creates jurisdictions where a person can violate a protection order with impunity, where no jurisdiction has the authority to punish a person for violating a protection order. That would clearly be contrary to Congress' primary intent.<sup>61</sup>

Nevertheless, a tribe attempting to implement the VAWA's full faith and credit requirements must plan ahead and consider all possibilities. If the courts do take the more sensible, broader interpretation of the statute and decide that tribal courts have civil jurisdiction over all persons who violate protection orders on tribal lands, then the tribe's job is easy. By ensuring that a tribe has civil penalties on the books, the tribe will be able to impose a punishment on anyone, member or non-member, who violates a protection order. If the tribe also has criminal penalties on the books, it may be able to impose a criminal penalty on an Indian who violates a protection order.

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If the courts take the narrower interpretation of the full faith and credit provisions, then the tribe's job is more difficult. The tribe must be prepared to establish its jurisdiction over non-members who violate protection orders within the tribe's territory. The best way to achieve that is to lay a factual foundation, both generally regarding the impact of domestic violence and violation of protection orders on the tribe, and specifically about the relationship of the particular violator to the tribe. If the person protected by the order and the person who violated the order have no connection with tribe or its territory other than mere happenstance, then the tribe's burden is difficult. But if the protection order covers a tribal member or if either party works for the tribe or lives on tribal lands, a tribe should have an easier time establishing its jurisdiction.

The key will be to research and gather the facts, and then present them to the court. The tribe can further ease its burden by making detailed legislative findings. When Congress passed the VAWA's full faith and credit provisions, it told the states and the tribes to enforce each other's protection orders, but left the details of how to achieve that goal up to each individual state and each individual tribe. Many states are choosing to enact legislation and regulations spelling out their procedures.<sup>62</sup> Several model codes exist for tribes to use if they choose to follow the same basic approach.<sup>63</sup>

A number of benefits exist to using the legislative approach. First and foremost, it serves as a governmental declaration that the tribe takes violations of protection orders seriously and that the tribe will fulfill the obligations imposed on it by Congress. Second, legislation clearly establishes the procedures for tribal authorities to follow in punishing violations of protection orders. Finally, tribes can also use the "purpose" provisions of the legislation to begin laying the framework for establishing civil jurisdiction over all persons, member and non-member alike, who violate protection orders within the tribe's territory. This purpose language should be targeted at institutionalizing the facts necessary to establish civil jurisdiction over non-members.<sup>64</sup> Only when the tribe possesses jurisdiction to punish violators will Congress' objectives be achieved and those covered by protection orders be safe.

## IV. CONCLUSION

The VAWA's full faith and credit provisions present tribal governments with a tremendous opportunity. With the passage of this statute, Congress demonstrated that it considers tribal courts to be legitimate courts that play an important role in the war against domestic violence. At the same time, Congress raised awareness about tribal courts, which accordingly focused attention on those courts. Tribal courts now have an important opportunity, albeit a rather unfair one. No one questions state court legitimacy and authority. Tribal courts are under a microscope to prove theirs. But hopefully when tribal courts show state and federal courts that they are up to the

challenge, it will help reduce questions about tribal courts' authority to deal fairly with non-members. Only then will tribal court regain the jurisdiction so wrongfully limited by the Supreme Court.

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**Notes**

1. Associate Professor and Co-Director, Native American Law Center, University of Tulsa College of Law. This essay grows out of a speech delivered at the Tribal Law and Governance Conference, hosted by the Tribal Law and Government Center at the University of Kansas School of Law. Thanks go to Professor Stacy Leeds for organizing the conference and inviting me to speak.
2. The Violence Against Women Act of 1994, Pub. L. No. 133-322, 108 Stat. 1902 (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.). The VAWA was amended in 2000 by Pub. L. No. 106-386, 114 Stat. 1464.
3. 18 U.S.C. § 2265(a) (2000). "Subsection (b)" basically requires that the issuing court have jurisdiction over the parties and provide them with due process. *See* 18 U.S.C. § 2265(b) (2000).
4. After laying the basic background, this essay will concentrate on structuring penalties to impose on those who violate protection orders. For a more comprehensive look at the challenges the VAWA's full faith and credit provisions present for tribes, *see* Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L. J. 123 (2001-2002).
5. *United States v. Morrison*, 529 U.S. 598 (2000).
6. The problem with the civil rights remedy was that Congress exceeded its commerce clause power. In contrast, the VAWA's full faith and credit provisions spring from the Constitution's full faith and credit clause, U.S. CONST. art. IV, § 1, not from the commerce clause. Even if the full faith and credit provisions are analyzed under the commerce clause, they should easily pass constitutional muster, as their goal is to protect persons as they travel throughout the United States. *See* Tatum, *supra* note 4, at 132-34.
7. *See* 145 CONG. REC. S345-02 (daily ed. Jan. 19, 1999) (statement of Sen. Biden) (stating that requiring jurisdictions to give full faith and credit facilitates enforcement of valid protection orders).
8. U.S. CONST. art IV, § 1; 28 U.S.C. § 1738 (2000).
9. *See* EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 24.8 (2d ed. 1992); DAVID D. SIEGEL, *CONFLICTS IN A NUTSHELL* §103 (2d ed. 1994).
10. *See* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L. Q. 253, 254-55 (1995); FEDERICA L. LEHRMAN, *DOMESTIC VIOLENCE PRACTICE AND PROCEDURE* 4:10 and app. 4A (1997); PETER FINN & SARAH COLSON, NATIONAL INSTITUTE OF JUSTICE, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT* 7-18 (March 1990).
11. The federal statute does put some limitations on which protection orders qualify for full faith and credit. The first such potential limitation is the definition of "protection order" found in 18 U.S.C. § 2266(5) (2000). The definition, however, is extremely broad and covers just about any form of protection order a court could issue, as well as any type of proceeding that could give rise to a

- protection order. The more substantive limitations are found at 18 U.S.C. § 2265(b) (2000), but even these are quite minimal. A "valid" protection order under the VAWA is one which the issuing court had jurisdiction to issue, one for which the respondent was provided due process, and one which is not a mutual order. "Mutual orders" are ones that require both parties to stay away from each other. These orders are automatically issued by some courts, usually without any findings of blame or wrongdoing. Some mutual orders do qualify for full faith and credit, but a separate set of requirements must be negotiated. 18 U.S.C. § 2265(c). For a discussion of mutual orders, see Jennifer Paige Hanft, *What's Really the Problem With Mutual Protection Orders?*, 22 WYO. LAW. 22 (Oct. 1999). See also, Klein, *supra* note 9, at 266-68; Elizabeth Topliffe, *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders are Not*, 67 IND. L.J. 1039 (Fall 1992).
12. Pub. L. No. 106-386, 114 Stat. 1464 (2000). Some of the main issues addressed in the amendments include tribal jurisdiction and the ability of a court to require registration of foreign protection orders.
  13. The VAWA 2000 allows government to create an optional (but not mandatory) procedure for registering foreign protection orders. A government cannot, however, notify respondent that a foreign protection order was registered unless the petitioner specifically requests such notice. 18 U.S.C. § 2265(d)(1) (2000).
  14. See S. 15 137th Cong. § 2265(a) (1991) (requiring full faith and credit for protective orders issued by state courts but not tribal courts in an early Senate version of the Violence Against Women Act).
  15. See Tatum, *supra* note 4, at 136.
  16. For a more in depth exploration of these different paths, see *id.* at 136-65.
  17. Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985).
  18. Not all violations require proximity; it depends on the terms of the protection order. It is certainly conceivable that a protection order would direct the respondent not to telephone or email petitioner, both of which can be accomplished from a distance. Regardless of the state where the violation is deemed to occur (in the place where the call/email originates or in the place where it is received), one of the two states, and perhaps both, would possess jurisdiction to punish the violation.
  19. 435 U.S. 191, 208 (1978).
  20. See, e.g., Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 28-30 (1993).
  21. *Id.* at 35.
  22. 495 U.S. 676, 693 (1990).
  23. Defense Appropriation Act of 1991, Pub. L. No. 101-511, § 8077, 104 Stat. 1956, 1892 (1990) (codified as amended at 25 U.S.C. § 1301 (2003)).
  24. 450 U.S. 544 (1981).
  25. 520 U.S. 438 (1997).
  26. 533 U.S. 353 (2001).
  27. In keeping with the different approaches to state and tribal jurisdiction, the Court also uses different labels. In the tribal context, "legislative jurisdiction" becomes "regulatory jurisdiction" and "adjudicative jurisdiction" becomes "adjudicatory jurisdiction."
  28. See Tatum, *supra* note 4 (discussing the ambiguities and the possible resolutions).
  29. *Id.* at 158-66.

30. *Montana*, 450 U.S. 544.
31. *Id.* at 556.
32. *Id.* at 566.
33. A "protection order . . . shall be . . . enforced as if it were the order of the enforcing State or tribe." 18 U.S.C. § 2265(a) (2000).
34. It also imposes consistency requirements on law enforcement. *See, e.g., The Proposed Model Code for Use by Michigan Indian Tribes: Enforcement of Foreign Protection Orders*, included as an appendix to Tatum, *supra* note 4, at 198-227.
35. It also helps with accessibility issues. One common (although often exaggerated) complaint about tribal law is its inaccessibility to non-members. By codifying its law and making the code available, a tribe sidesteps these complaints.
36. For an overview of selected tribes' domestic violence laws, *see* Gloria Valencia-Weber & Christine P. Zuni, *Women's Rights as International Human Rights: Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995). *See also*, James W. Zion & Elsie B. Zion, *Hozho' Sokee' Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993).
37. *See, e.g.,* LEHRMAN, *supra* note 9.
38. 25 U.S.C. §§ 1301 et seq. (2003). The Supreme Court held that tribal governments are not bound by the individual rights protections in the U.S. Constitution. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). In response to (rather unfounded) concerns that tribes were violating individual rights, Congress passed the Indian Civil Rights Act of 1968, which codifies many of those constitutional protections and imposes them on tribal governments.
39. 25 U.S.C. § 1302(7) (2003).
40. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).
41. *Id.* at 206-08. The Supreme Court did purport to rest its decision on history and federal policy, but the Court's analysis has been roundly and uniformly criticized. *See, e.g.,* Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1595-99 (1996).
42. The VAWA 2000 provides that "tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." 18 U.S.C § 2265(e) (2000).
43. 18 U.S.C. § 2265(e).
44. 435 U.S. 191 (1978).
45. 495 U.S. 676 (1990).
46. *Oliphant*, 435 U.S. at 210; *Duro*, 495 U.S. at 693-94.
47. 25 U.S.C. § 1301 et seq. (2000).
48. 25 U.S.C. § 1302(6) states only that no tribe shall prevent a criminal defendant from having, at his own expense, the assistance of counsel for his defense.
49. *See* Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S. J. Res. 40, *To Protect the*

*Constitutional Rights of American Indians Before the Subcommittee on Constitutional Rights of the Senate Committee*, 89th Cong., 1st Sess. (1965).

50. *Id.* at 21.
51. *Id.*
52. There is also a fourth issue, although it is not relevant in the context of this particular argument. State and federal courts are required to appoint counsel for indigent criminal defendants in all felony matters, but not in all misdemeanors. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 514-18 (2d ed. 1997). The generally accepted division between felony and misdemeanors is the potential jail time. Felonies carry penalties of more than a year imprisonment, while misdemeanors are less than a year. The ICRA's limitation on tribal punishment to one-year incarceration and/or a \$5000 fine would put most tribal criminal offenses on par with misdemeanors. The U.S. Constitution requires appointment of counsel in misdemeanor cases only when the defendant receives a sentence involving at least one day in jail. Since this essay is currently exploring the ability of tribes to impose a jail sentence for civil contempt, jail time is involved. In many tribal criminal cases, however, the tribal court does not sentence the defendant to jail time. In those cases, then, the defendant would not have been entitled to an attorney in state or federal court either.
53. To determine whether appointment of counsel is required in a civil case, the court must engage in a three part balancing test, looking at the private interests at stake, the governmental interest involved in the case, and the risk the procedures will lead to an erroneous decision. *See, e.g.*, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981).
54. *See* Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2003).
55. 18 U.S.C. § 2265(a) (2000).
56. *See, e.g.*, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996).
57. 18 U.S.C. § 2265(e).
58. *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 759 (1998); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993).
59. *See* Tatum, *supra* note 4, at 168-172.
60. 18 U.S.C. § 2265(e).
61. This argument is elaborated on in Tatum, *supra* note 4, at 193-97.
62. For an overview of these statutes, *see* *Progress Report on Full Faith and Credit Enabling Legislation*, at <http://www.vaw.umn.edu/documents/ffc/ffcprogfin/ffcprogfin.html> (last visited Nov. 11, 2003).
63. *See, e.g.*, Tatum, *supra* note 4, at 198-227.
64. For a more detailed look at structuring "purpose" language, *see id.* at 206-08.