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Affirmed or Delegated?
Finding Inherent Tribal Civil Power to Issue and
Enforce Protection Orders Against All Persons
in Light of *Spurr v. Pope*

Kelly Gaines Stoner¹ and Lauren van Schilfgaarde²

ABSTRACT

Federal courts have wreaked havoc on tribal jurisdiction by injecting incertitude over their most basic authority, including the authority to issue and enforce civil protection orders. This jurisdictional incertitude causes not just legal disruption, but also further compromises the safety of Native people who are disproportionately victimized, especially by gender-based forms of violence. While Congress has been slow to remedy the onslaught of judicial limitations on tribal jurisdiction, Congress has at least remedied tribal authority to issue and enforce protection orders in 18 U.S.C. § 2265(e). However, even in this remedy, jurisdictional incertitude remains.

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Through its plenary power, Congress has the authority to remedy tribal jurisdiction by either affirming inherent tribal power, or by delegating new federal powers to tribes. The precise nature of the Congressional action – affirming or delegating -- determines the source of power a tribe exercises., The source of a tribe’s power affects in turn the ways in which a tribe may exercise that power—in this case, the power to issue or enforce a protection order. Native victims bear the consequences of this decision.

This Article examines how implicit divestiture led to the need for Congressional reassurance that tribes possess the authority to issue and enforce protection orders over all persons. This Article then examines the potential consequences of whether that reassurance is an affirmation of inherent tribal powers, or instead a delegation of federal powers. Finally, this Article analyzes, the plain language and legislative intent behind 18 U.S.C. § 2265(e)—as well as overarching federal and international policies—to determine whether this reassurance of tribal civil power is an affirmation or a delegation.

INTRODUCTION

There is a troubling cloud of judicial doubt threatening tribes’ ability to issue and enforce protection orders. Such incertitude regarding inherent tribal civil jurisdiction over non-Indians poses a dangerous barrier to the effective administration of justice in Indian country. This is concerning, as Indian country has a public safety crisis.³ A Bureau of Justice Statistics report estimates the rate of American Indian/Alaska Native (“AI/AN”)⁴ violent crime to be well

³ INDIAN LAW & ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 3 (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf (“An exceedingly complicated web of jurisdictional rules, asserted by Federal and State governmental departments and agencies whose policy priorities usually pre-date the modern era of Tribal sovereignty and self-determination, contributes to what has become an institutionalized public safety crisis.”).

⁴ A note on terminology: this article uses “Indigenous,” “American Indian and Alaska Native,” “Indian,” and “Native” to refer to the original inhabitants of what is now the United States of America. We use these terms interchangeably, seeking to be inclusive and respectful of the Peoples and tribes that represent them. Indigenous peoples comprise hundreds of tribes, including the 574 presently federally recognized tribes, and the hundreds more that are unrecognized. Indigeneity is both a political and a racial status, with overlapping and distinct legal meanings, including in regards to tribal authority to respond to violence. This article specifically concerns the authority of federally recognized tribes. However, we would like to acknowledge all Indigenous peoples. We also would like to honor the space on which this article

above that of any other U.S. racial or ethnic group and more than twice the national average.⁵ Native women are particularly at risk. AI/AN women are victimized at rates higher than any other race.⁶ They are much more likely to be battered, raped, and stalked.⁷ Four out of five AI/AN women have experienced violence in their lifetime.⁸

Tribal protection orders⁹ are critical tools to keep tribal residents safe from violence, especially gender-based forms of violence. Tribal nations have always been and continue to be committed to securing public safety in Indian country.¹⁰ Yet, the demographics and needs of tribes are dynamic: tribal communities

was drafted, including both the traditional lands of the Gabrielino Tongva and Fernandeano Tataviam in California, and the Cheyenne and Arapaho Tribes in Oklahoma.

⁵ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME, A BJS STATISTICAL PROFILE, 1992-2002, at iii (Dec. 2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf>. Unfortunately, the BJS has yet to release an updated report.

⁶ *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence, United States- 2005*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 57(05) MORBIDITY AND MORTALITY WEEKLY REPORT, Feb. 6, 2008, at 113-117.

⁷ NAT'L CONG. OF AM. INDIANS, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN RESEARCH POLICY UPDATE 1 (Feb. 2018), https://www.ncai.org/policy-issues/tribal-governance/public-safety-and-justice/violence-against-women/VAWA_Data_Brief_FINAL_2_1_2018.pdf.

⁸ *Id.*

⁹ See 18 U.S.C. § 2265(5) (“The term “protection order” includes— (A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.”).

¹⁰ See 18 U.S.C. § 1151 (“Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”).

may be comprised of Indian members of the tribe,¹¹ Indians who are members of other tribes, and non-Indians who may be residing, visiting, or working within a tribe's Indian country.¹² A comprehensive public safety strategy requires the exercise of jurisdiction over all persons.

The importance of a tribe's jurisdiction to issue and enforce protection orders—specifically over non-Indians—cannot be overstated: fifty-six percent of AI/AN women have experienced sexual violence, of which 90 percent were by interracial perpetrators; 55.5 percent of AI/AN women have experienced physical violence by an intimate partner,¹³ of which 90 percent were by interracial perpetrators; and 48.8 percent of AI/AN women have been stalked, of which 89 percent were by interracial perpetrators.¹⁴ In at least 86 percent of reported cases of rape or sexual assault against AI/AN women, survivors report that the batterers are non-Indian men.¹⁵ These studies underscore the long-standing reality of interracial violence for Native persons. The jurisdictional complexities in Indian country, including the limitations on tribal authority to respond, exacerbate this interracial violence.¹⁶

Congress has acknowledged the critical importance of tribal protection orders—including the need for tribes to exert civil jurisdiction to issue and enforce protection orders over all persons—

¹¹ For purposes of this article, the authority of a tribe's civil powers will be examined solely for federally recognized tribes. The 1994 Federally Recognized Indian Tribe List Act provides “the list of federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United State to Indians because of their status as Indians.” Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, Title I, § 103, 108 Stat. 4791 (Nov. 2, 1994) (codified as 25 U.S.C. § 5130). There are currently 574 federally recognized tribes. The Indian Civil Rights Act, 18 U.S.C. § 1301 *et. seq.* defines an Indian as any person who would be subject to the jurisdiction of the United States as an Indian under 19 U.S.C. § 1153. But, tribal sovereignty and tribal existence are not dependent on federal recognition. Rather, tribal sovereignty is rooted inherently within the tribe.

¹² *See, e.g.,* McGirt v. Oklahoma, 140 S. Ct. 2452, 2479 (2020) (“But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today.”).

¹³ André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. OF JUST. J. 38-45 (2016).

¹⁴ *Id.*

¹⁵ AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL ASSAULT IN THE USA 4 (2007), <https://www.amnesty.org/download/Documents/AMR510592007ENGLISH.PDF>.

¹⁶ NATIONAL CONGRESS OF AMERICAN INDIANS, VAWA'S 2013 SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 3 (2013), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

by verifying that tribal authority in 18 U.S.C. § 2265(e). But the source and extent of tribal authority in that statute remain unclear. Section 2265(e) does not explicitly identify whether the source of tribal authority is inherent and merely affirmed by Congress, or if it is a delegation of federal authority to the tribes. Previous verifications of tribal authority have gone both ways.

In *Spurr v. Pope*, the Sixth Circuit upheld § 2265(e)'s verification of tribal authority to issue civil protection orders, but suggested in a footnote that § 2265(e) was a delegation of federal authority.¹⁷ The ramifications of whether tribal authority is affirmed versus delegated are vast: they implicate whether federal-tribal double jeopardy, federal notions of constitutional due process and equal protection, and accompanying federal case law become applicable to tribes in civil protection order cases.¹⁸

To analyze whether § 2265(e) is an affirmation of inherent tribal authority or a delegation of federal authority to a tribe, this article reviews the plain language of the statute, legislative intent, and overarching federal and international policy against the backdrop of the Indian law canons of construction.¹⁹ In addition to this legal analysis, this article explores the legal and historical position of tribes as sovereigns and the possible ramifications of affirmed tribal authority versus delegated federal authority. Ultimately, the textual, policy, and historical context behind the verification of tribal authority within § 2265(e) consistently upholds a finding that it is affirmed inherent tribal power. This bodes well for tribal sovereignty, as well as the victims seeking tribal protection.

I. Implicit Divestiture and the Need for a *Martinez-Fix*

A. The Growing Trend of Implicitly Divesting Inherent Tribal Powers

Since time immemorial, tribes have exercised civil and criminal jurisdiction over all persons. Like all governments, tribes

¹⁷ 936 F.3d 478, 486 n.2 (6th Cir. 2019) (“This express delegation of authority to the tribes obviates the need to meet one of the two *Montana* exceptions.”).

¹⁸ While Congress has plenary power over Indian affairs, that plenary power does not impact the source of tribal laws, which are inherent and separate from the United States. Because tribal sovereignty existed prior to the formation of the Constitution, tribes are not bound by its provisions and the attendant federal case law interpreting those provisions. *See Talton v. Mayes*, 163 U.S. 376 (1896) (holding the Fifth Amendment did not apply to the Cherokee Nation’s Tribal Court).

¹⁹ *See infra* Section VI.A.

have a duty to protect all those within their lands. Increasingly, this includes nonmembers present in Indian country.²⁰ Beginning in the latter half of the twentieth century and continuing into the twenty-first, U.S. courts have created *implicit* cracks in tribal powers over non-Indians. The “implicit divestiture” doctrine was first introduced in 1978 by the U.S. Supreme Court in *Oliphant v. Suquamish Indians*.²¹ *Oliphant* held that all tribes lack criminal jurisdiction over non-Indians because such an exercise of authority—though not explicitly acknowledged by Congress or treaty—was suddenly “‘inconsistent with [the tribes’] status.’”²² The doctrine was extended to the exercise of tribal civil jurisdiction in *Montana v. United States*,²³ impacting the tribes’ ability to issue protection orders against nonmembers, as well as an array of tribal governmental powers. In *Montana*, the Supreme Court held that tribes lacked regulatory authority over nonmembers on non-Indian owned fee land within the reservation subject to two exceptions: (1) the tribes may exercise jurisdiction over “nonmembers who enter consensual relationships with the tribe or its members,” or (2) when the nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁴ The Supreme Court in *Strate v. A-1 Contractors* then extended *Montana* to a tribe’s civil adjudicatory authority.²⁵

²⁰ See generally Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STANFORD L. REV. 38 (2020). Note: the term “nonmember” has been used to refer to both nonmember Indians and non-Indians. Supreme Court case law has often conflated these terms, exacerbating the complexity of tribal jurisdiction.

²¹ 435 U.S. 191, 203 (1978) (basing the Court’s finding of an erosion of tribal criminal jurisdiction over non-Indians in the federal “unspoken assumption” that tribes lacked such jurisdiction historically); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][b] (Nell Jessup Newton, et. al., eds., 2012), at 228 [hereinafter “COHEN’S HANDBOOK”] (footnote omitted) (“In positing the existence of a historical assumption, shared by all three branches of the federal government, that Indian tribes lack authority to try and to punish non-Indians, the [*Oliphant*] Court relied on selected treaty language, opinions of attorneys general issued in 1834 and 1856, defeated congressional bills and accompanying legislative reports, dictum from an 1878 opinion by a district court judge, and a withdrawn 1970 opinion of the Solicitor of the Department of the Interior.”).

²² *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

²³ 450 U.S. 544 (1981).

²⁴ *Id.* at 565-66. Note, the Court uses “non-Indian” and “nonmember” interchangeably. While there are significant jurisdictional ramifications to extending restrictions on tribal civil authority over nonmember Indians, *Montana* analysis indisputably extends to non-Indians.

²⁵ 520 U.S. 438, 459 (1997). *Strate* held that a tribe could not exercise civil jurisdiction over a tort suit between nonmembers arising from an accident on a state

Subsequent U.S. Supreme Court decisions have narrowed these *Montana* exceptions considerably.²⁶ Determining whether tribal authority satisfies one of these two exceptions, and therefore exists over nonmembers on fee land in Indian country, is now known as conducting a “*Montana* analysis.”²⁷ A *Montana* analysis would be necessary to establish tribal civil subject matter jurisdiction any time a protection order action involves a nonmember petitioner or respondent.

The implicit divestiture doctrine was recently examined in *Dollar General*, in which the U.S. Supreme Court tied 4 to 4 to effectively affirm the Fifth Circuit’s decision to uphold tribal adjudicatory jurisdiction over a tort claim for an alleged sexual assault of a minor tribal member.²⁸ The U.S. Supreme Court similarly upheld the inherent authority of tribes pertaining to tribal police office authority to temporarily detain and search non-Indian persons traveling on public rights-of-way running through a reservation.²⁹ In *U.S. v. Cooley*, the Court unanimously found inherent tribal police power under the second *Montana* exception.³⁰ The Court noted that the second *Montana* exception recognizes inherent tribal power to protect the health or welfare of the tribe, including from ongoing threats.³¹

However, these narrow tribal victories are part of a long-standing debate over whether the United States ought to “trust tribes”

highway within a reservation, opining that neither *Montana* exception was satisfied.
Id.

²⁶ See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001) (citation omitted) (first alteration in original) (narrowing the second *Montana* exception to mean “unless the drain of the nonmember’s conduct upon tribal services and tribal resources is so severe that it actually ‘imperil[s]’ the political integrity of the Indian tribe, there can be no assertion of [tribal] civil authority beyond tribal lands”); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 340 (2008) (holding that a tribe lacks adjudicatory authority over a civil claim brought by a tribal member against a nonmember owned bank involving fee land on a reservation). *But see Nevada v. Hicks*, 533 U.S. 353, 371 (2001) (noting that the claim concerned “a very narrow category of outsiders,” *i.e.*, state law enforcement officers, the Court denied tribal civil jurisdiction in a tort claim brought by a tribal member asserting damages committed on trust land by state law enforcement officers searching the tribal member’s own land for evidence of an alleged off-reservation crime).

²⁷ See, *e.g.*, *Hicks*, 533 U.S. at 370 (referring to “the *Montana* analysis”).

²⁸ *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), *aff’d by an equally divided court*, 746 F.3d 167 (5th Cir. 2014).

²⁹ *U.S. v. Cooley*, No. 19-1414, 593 U.S. ____ (2021).

³⁰ *Id.* at slip op. at 4.

³¹ *Id.*

to exercise governance powers.³² While the doctrine of implicit divestiture maintains that tribal sovereignty has deteriorated through a combination of colonization and time, challenges to tribal jurisdiction over nonmembers frequently rest on the “foreignness” of tribes. Many courts believe that tribal jurisdiction is “sovereignty outside the basic structure of the Constitution”³³ and that tribal laws are unknowable and obscure.³⁴ Justice Breyer noted in *Cooley* that tribal police authority to search and detain non-Indians is palatable in part because *Cooley* was only being transferred to a state or federal jurisdiction and would not be subject to tribal laws.³⁵ Yet, at least concerning the issuance and enforcement of protection orders, Congress has been repeatedly clear that it both trusts and needs tribes to provide this protection.³⁶

Not only is the judicial reasoning of implicit divestiture troubling, the scrutiny of perceived flaws of tribal law is largely irrelevant to whether a tribe possesses jurisdiction. The exercise of congressional plenary power over Indian affairs, including the power to determine the extent of a tribe’s remaining inherent sovereignty, is a political question and judicial scrutiny should be limited.³⁷ Instead of restraint however, courts have been ravenous in slashing tribal regulatory efforts based on the perceived inferiority and foreignness of tribes.³⁸ Indeed, scholars note that in light of *Montana* and its progeny,

³² Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs* 2018 UTAH L. REV. 307, 309 n.9 (2018).

³³ *Plains Commerce Bank*, 554 U.S. at 337.

³⁴ *Dolgencorp, Inc.*, 746 F.3d at 181 (Smith, J., dissenting) (“The elements of Doe’s claims under Indian tribal law are unknown to Dolgencorp and may very well be undiscoverable by it.”).

³⁵ *Cooley*, 593 U.S., slip op. at 6-7.

³⁶ Hearing on S. 1763, S. 872, & S. 1192 Before the S. Comm. on Indian Affairs, 112th Cong. 13–14 (Nov. 10, 2011) (statement of Thomas J. Perrelli, Associate Attorney General, U.S. Dep’t of Justice) (“Without the ability to issue and enforce protection orders and to get full faith and credit for those protection orders, there is a real risk to Native women to be threatened again.”).

³⁷ Steele, *supra* note 32, at 309 n.12 (2018) (noting that “the legislature, rather than the judiciary, is the branch best suited by institutional competencies to address questions of inherent tribal sovereignty in federal law within the tripartite federal system”). Note: the “political question” doctrine was nefariously relied upon by nineteenth and early twentieth century federal courts to excuse despicably harmful federal policies against Indigenous Peoples. See WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 177 (2012) (describing the reliance of the U.S. Supreme Court on the political-question doctrine to avoid providing remedies for violations of the Medicine Lodge Treaty of 1867 by the Jerome Commission in *Lone Wolf v. Hitchcock*).

³⁸ Fletcher, *supra* note 20, at 45 (“There is a clear trend surfacing in the small universe of Supreme Court cases involving tribal civil jurisdiction over

unless a nonmember has consented to tribal civil jurisdiction, nonmembers have ample latitude to misbehave.³⁹ At least since 1978, congressional expressions regarding tribal powers have essentially been in response to these judicially-created jurisdictional messes.

B. Congress has Previously Restored Implicitly Divested Tribal Powers: The *Duro-Fix*

In 1990, as an extension of *Oliphant*'s implicit divestiture logic, the U.S. Supreme Court held that in addition to lacking criminal jurisdiction to prosecute non-Indians, tribes also lack inherent criminal jurisdiction to prosecute nonmember Indians.⁴⁰ In a string of alarming judicial blows against tribal sovereignty, *Duro v. Reina* was especially devastating: as in *Oliphant*, the *Duro* Court reasoned that components of tribal sovereignty were "implicitly lost by virtue of their dependent status."⁴¹ This *perception* that sovereignty was diminished, as opposed to an explicit Congressional or treaty provision, was despite tribes' exercising such authority for nearly two hundred years under American rule, and long before the concepts of "member" and "Indian" were relevant. It was despite federal legislation broadly defining criminal jurisdiction in Indian country based on defendants' racial status as Indians, rather than more narrowly as tribal members.⁴² And it was despite the legal vacuum created by the *Duro* holding in which no sovereign would have the authority to prosecute a class of

nonmembers—the conduct of the nonmembers determined to challenge tribal jurisdiction is worsening.”).

³⁹ *Id.* at 42.

⁴⁰ *Duro v. Reina*, 495 U.S. 676, 695 (1990).

⁴¹ *Id.* at 686.

⁴² WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 80 (6th ed. 2015); *see e.g.*, 18 U.S.C. §§ 1152, 1153.

nonmember Indian offenders for certain crimes committed in Indian country.⁴³

Congress quickly responded with a “*Duro*-fix,”⁴⁴ clarifying that tribal self-government powers include the authority “to exercise criminal jurisdiction over all Indians.”⁴⁵ Congress was careful not to call this verification of tribal power a delegation of federal powers. Instead, the *Duro*-fix amended 25 U.S.C. § 1301(2) to define tribal powers as “inherent powers of Indian tribes,” that were “recognized and affirmed,” by Congress.

Was this language enough to settle the affirmation versus delegation debate? *United States v. Lara*⁴⁶ answered that question. The Court confirmed the *Duro*-fix was an affirmation of a tribe’s inherent sovereign power, not a delegation of federal powers. The Court additionally confirmed that affirmations of inherent tribal powers were Congressional feasible. While *Duro* restricted tribal powers, those tribal powers merely lay dormant; they did not evaporate. So, through its plenary power and pursuant to its trust responsibility, Congress “awakened” those tribal powers by affirming their existence and recognizing their present applicability (comparable to Congress’ power to re-recognize formerly terminated tribes).⁴⁷

⁴³ In non-P.L. 280 jurisdictions, tribes have exclusive jurisdiction over Indian defendants that commit “non-major” crimes (crimes that are not enumerated in the Major Crimes Act, 18 U.S.C. § 1153, over which the federal government has concurrent jurisdiction to prosecute) against Indian victims, and over Indian defendants who commit victimless crimes. Because federal jurisdiction under the Major Crimes Act and the General Crimes Act, 18 U.S.C. § 1152, are defined by the Indian status of the defendant and the victim, rather than their membership status, the *Duro v. Reina* holding meant no sovereign has the power to prosecute nonmember Indian defendants who commit a non-major crime against an Indian victim or commit a victimless crime.

⁴⁴ The term “fix” is used here to indicate the congressional enactment of federal statute(s) overruling or partially overruling of prior precedent.

⁴⁵ Pub. L. No. 102-153 (1991) (codified as 25 U.S.C. § 1301(2)).

⁴⁶ 541 U.S. 193, 210 (2004).

⁴⁷ See, e.g., *United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003) (noting the power of Congress to restore the “terminated” Menominee Tribe was an exercise of reinstated inherent power, not delegated federal power).

C. Implicitly Divesting the Tribal Authority to Issue Civil Protection Orders: *Martinez*

Even when characterized as “domestic dependent nations,”⁴⁸ tribes have been held to retain “attributes of sovereignty over both their members and their territory.”⁴⁹ At a minimum, these attributes have always included the power to issue civil protection orders against all persons within Indian country. Just as *Oliphant* and *Duro* gutted tribal criminal powers, *Montana* and its progeny gutted many tribal civil powers. However, a tribe’s authority to protect the physical safety and well-being of persons through a civil protection order likely survives by falling squarely within the second *Montana* exception, much like *Cooley*. This was so well understood that in 2000, Congress presumed the survival of this inherent jurisdiction and passed the Violence Against Women Act (VAWA), which clarified tribal civil authority to enforce such tribal protection orders through the full faith and credit clause.⁵⁰

However, in *Martinez v. Martinez*, a federal district court in the State of Washington disagreed. The district court held that VAWA did not explicitly confer sufficient tribal civil jurisdiction to issue a protection order and that VAWA simply provided jurisdiction “in matters arising within the authority of the tribe.”⁵¹ A tribe would only be able to issue a protection order after a case-by-case *Montana* analysis.⁵² The court then held that in this instance, the Suquamish Indian Tribe failed the *Montana* analysis and therefore lacked the inherent authority to issue a civil protection order against a nonmember for an incident that arose on fee land within reservation

⁴⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

⁴⁹ *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

⁵⁰ See Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (adding the following language as 18 U.S.C. § 2265(e): “For purposes of this section, 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”); see also 18 U.S.C. § 2265(a) (“Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory . . . shall be accorded full faith and credit by the court of another State, Indian tribe, or territory . . . and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [territory] as if it were the order of the enforcing State, Indian tribe, or territory.”).

⁵¹ See *Martinez v. Martinez*, No. C08-5503 FDB, 2008 WL 5262793, at *5 and *8 (W.D. Wash. Dec. 16, 2008) (quoting 18 U.S.C. § 2265(e) (2005)).

⁵² See *id.* *12-14.

boundaries.⁵³ The court relied on the fact that the petitioner, while Indian, was not a member of the Tribe, and while she may have suffered, her suffering did not imperil the subsistence of the tribal community.⁵⁴ Effectively, pursuant to the legal reasoning of *Montana*, the ability of the Tribe to protect her had been implicitly divested at some time in the past.

Like *Duro*, *Martinez* signaled a disturbing trend toward the implicit divestment of tribal sovereignty: tribes purportedly lack civil powers to protect nonmember victims from nonmember conduct through civil protection orders. This trend persisted despite tribes' authority to criminally prosecute nonmember Indians for violating civil protection orders, and despite Congress's clear preference for tribes to possess and use this power to protect member Indians, nonmember Indians, and non-Indian victims as evidenced in VAWA. *Martinez* created a legal vacuum that exacerbated the public safety crisis in Indian country. So, in 2013, Congress updated § 2265(e) with a "*Martinez-fix*."

D. *Martinez-Fix*: 18 U.S.C. § 2265(e)

VAWA was originally enacted in 1994 and was reauthorized in 2000, 2005, and 2013, displaying a groundswell of political will needed to address multiple forms of gender-based violence. While not always uncontroversial,⁵⁵ VAWA has presented a uniquely ripe opportunity for tribal advocates to address the urgent human rights crisis of implicit divestiture through a politically effective mechanism. There is much remaining work to do in remedying the ills of implicit divestiture, but gender-based violence is a good place to start.

In 2013, as part of the reauthorization of VAWA, Congress updated 18 U.S.C. § 2265(e) to verify tribes' civil jurisdictional authority to issue and enforce protection orders against all persons.⁵⁶ Modifying VAWA 2000's initial recognition of tribal authority over

⁵³ *Id.* at *15-16.

⁵⁴ *Id.* at *6 (citing *Plains Commerce Bank*, 554 U.S. 316).

⁵⁵ See e.g. *Tribal Provisions of Violence Against Women Act Survive Fight*, INDIANZ.COM (Feb. 28, 2013), <https://www.indianz.com/News/2013/02/28/tribal-provisions-of-violence-1.asp> ("VAWA has enjoyed bipartisan support since it was first enacted in 1994. But the bill became a hot issue during the 112th Congress when Democrats included provisions to protect American Indian and Alaska Native women, as well as immigrants and gay and lesbian victims.").

⁵⁶ Pub. L. No. 113-4, 127 Stat. 54, Sec. 905 (2013).

the civil enforcement of protection orders,⁵⁷ VAWA 2013 added the words “issue” and “involving any persons” to provide a *Martinez-fix*.⁵⁸

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to *issue* and enforce protection orders *involving any person*, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.⁵⁹

This amended version of § 2265(e) obviates the need for a *Montana* analysis, verifying that tribes have the power to both issue and enforce civil protection orders over all persons in matters arising anywhere in the Indian country of the tribe or otherwise within the authority of the tribe. Section 2265(e) is therefore a *Martinez* fix and a partial *Montana*-fix.

II. The Latest Cloud in a Storm of Doubts: Implicit Divestiture and *Spurr v. Pope*

In one of the first cases to consider this 2013 provision, the Sixth Circuit examined the application of 18 U.S.C. § 2265(e) in *Spurr v. Pope*.⁶⁰ The court addressed whether the Nottawaseppi Huron Band of the Potawatomi (“NHBP”),⁶¹ a federally recognized tribe, had

⁵⁷ Pub. L. No. 106-386, Sec. 1101(e) (Oct. 28, 2000) (“For purposes of this section, 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.”).

⁵⁸ Pub. L. No. 113-4, 127 Stat. 54, Sec. 905 (2013).

⁵⁹ 18 U.S.C. § 2265(e) (emphases added). Section 2265(a)-(d) addresses full faith and credit of protection orders issued by states, Indian tribes, or territories, provides a definition of protection order, addresses cross or counter petitions for a protection order, and notifications or registrations of protection orders.

⁶⁰ 936 F.3d 478 (6th Cir. 2019).

⁶¹ The Nottawaseppi Huron Band of Potawatomi is a federally recognized tribal government located at the Pine Creek Indian Reservation near Athens, Michigan. It is one of the seven federally recognized Potawatomi tribes within the United States. It consists of more than 1,500 enrolled tribal members. After being forced to cede its lands and remove to lands in Oklahoma, its tribal members escaped and returned to

jurisdiction to issue a personal protection order against a non-Indian for a matter arising in Indian country. The Sixth Circuit held that § 2265(e) does in fact provide tribal courts such civil authority.⁶² In *Spurr* the petitioner, Nathaniel Spurr (“N. Spurr”), a tribal member, resided in Nottawaseppi Indian country and sought an ex parte protection order from the Nottawaseppi Tribal Court alleging that Joy Spurr (“J. Spurr”), a non-Indian residing outside of Indian country, engaged in a campaign of harassment against him.⁶³ The Nottawaseppi tribal judge issued a protection order against J. Spurr.⁶⁴ J. Spurr appealed to the Nottawaseppi Supreme Court, which affirmed the tribal trial court,⁶⁵ and held that tribal law authorized the tribal court to issue civil protection orders against a non-Indian who resided outside of the boundaries of the Nottawaseppi Indian country. The NHBP Supreme Court further held that § 2265(e) was a reaffirmation of inherent tribal authority and a partial overruling of *Montana*.⁶⁶

J. Spurr then sought relief in federal court in the Western District of Michigan. The district court agreed that § 2265(e) established tribal civil jurisdiction, but did not make a finding as to the origin of the powers authorized in § 2265(e).⁶⁷ The court simply noted that the plain text of the statute “clearly establishes the Tribal Court’s ‘full civil jurisdiction’ under federal law” to issue civil protection orders in matters involving nonmembers.⁶⁸

their native lands in Michigan where they continue to reside. *See History, NOTTAWASEPPI HURON BAND OF POTAWATOMI*, <https://nhbpi.org/history/>.

⁶² *Spurr v. Pope*, 936 F.3d at 489.

⁶³ *Id.* at 481.

⁶⁴ *Id.*

⁶⁵ *Spurr v. Spurr*, Supreme Court Case No. 17-287-APP, Nottawaseppi Huron Band of the Potawatomi Tribal Court (2018). Anticipating a federal challenge to tribal court authority, the NHBP Supreme Court decision provided significant factual and legal analysis, including the extreme nature of J. Spurr’s harassment which ultimately targeted the court itself.

⁶⁶ *Id.* at 13.

⁶⁷ *Spurr v. Pope*, No. 1:17-CV-1083, 2018 WL 10075919 (W.D. Mich. Sept. 27, 2018), *aff’d*, 936 F.3d 478 (6th Cir. 2019).

⁶⁸ *Id.* at 6. The district court determined that it had federal question jurisdiction but failed to address the issue of sovereign immunity. Sovereign immunity is a jurisdictional doctrine which must be addressed before the merits. The NHBP explicitly waived sovereign immunity as to tribal judge Pope, but asserted sovereign immunity as to the NHBP Supreme Court and the NHBP Tribe. Tribes have sovereign immunity that protects the tribe and arms of the tribe acting on behalf of the tribe. Congress must unequivocally and expressly waive tribal sovereign immunity. Courts will not lightly assume that Congress intended to undermine tribal self-government. A waiver must be shouted and not whispered. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998).

J. Spurr then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held that the Tribe must point to one of two means to exercise tribal civil authority over nonmembers: inherent sovereign tribal powers, or an act of Congress.⁶⁹ The court held that § 2265(e) unambiguously granted tribal courts the power exercised by the Nottawaseppi Tribal Court in that case. But, in a footnote, the Sixth Circuit opined that the federal statute was an “express delegation of authority to the tribes obviat[ing] the need to meet one of the two *Montana* exceptions.”⁷⁰

While not directly addressing the origin of the powers vested in § 2265(e), the Sixth Circuit’s curious footnote suddenly implicated the affirmation versus delegation debate. Did the Sixth Circuit, with the term “express delegation” intend to hold that § 2265(e) is a delegation of federal powers? It is not clear. More likely, the footnote’s relevance is to the practical application of § 2265(e). Namely, that a tribe need not also prove its issuance-of-a-protection-order authority under a federal common law *Montana* analysis, because § 2265(e) already confirms that power. This concern is a logical extension of other tribal civil regulatory debates, like whether the authority to regulate water quality under the Clean Water Act⁷¹ also requires a simultaneous *Montana* analysis.⁷² Nevertheless, the term “delegation” is charged, with significant consequences for how a tribe exercises a power. The court’s use of the term, however innocuous, necessitates an examination of the origin of the powers verified in § 2265(e).

III. What is at Stake? The Consequences of Exercising Inherent Powers Versus Delegated Federal Powers

Determining whether § 2265(e) is a delegation of federal powers or an affirmation of inherent tribal powers has meaningful collateral consequences on the tribal issuance and enforcement of protection orders. These consequences impact both the tribe’s self-determination and victims’ access to safety. For any protection order—whether it is issued by a state, territory, or tribe, and whether that entity is exercising delegated federal authority or inherent authority—Section 2265(a)-(b) requires that the issuing court have personal

⁶⁹ Spurr v. Pope, 936 F.3d at 485.

⁷⁰ *Id.* at 486 n.2.

⁷¹ 42 U.S.C. § 7601.

⁷² See Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183, 90 (May 16, 2016) (clarifying that courts no longer need to perform a separate *Montana* analysis as to whether tribes can be treated as states under the Clean Water Act).

jurisdiction over the parties and matter, and that the respondent receive reasonable notice and an opportunity to be heard.⁷³ However, the sources of law used to determine whether personal jurisdiction was met and whether the respondent's due process rights were protected changes depending on the issuing jurisdiction and whether the origin of their power is delegated or inherent. The sources of law also affect the tribe's choice of civil remedies for enforcing the protection order.

The ability to make one's own laws includes the inverse: to be exempt from other sovereigns' laws. In part, tribes' domestic dependent status means that while tribes exist within the United States, they are also separate. In this way, Indian country has been characterized as an "intraterritoriality"⁷⁴ or an "anomalous zone."⁷⁵ The typical constraints of the U.S. Constitution on governmental action—like the requirement to provide due process and equal protection—do not apply to tribes,⁷⁶ tribal laws do.

Determining whether a tribal power is an expression of inherent authority or of delegated authority therefore affects whether a tribe continues to operate in its anomalous zone. An affirmation of inherent authority would keep tribes in their extraconstitutional sovereign status, enjoyed because tribes are domestic dependent nations over which Congress has plenary power⁷⁷ to verify jurisdiction, but without the typical "Bill of Rights" strings that would otherwise attach to non-Indian legislation.⁷⁸ The binding source of law is tribal law. But if § 2265(e) is a *delegation* of federal authority, the tribe is no longer exercising extraconstitutional inherent sovereign powers, but rather is serving as a quasi-federal agent, and must therefore provide the federal due process protections that other federal bodies must provide. Federal law suddenly becomes a binding source of law on the tribe.

⁷³ 18 U.S.C. § 2265(a)-(b).

⁷⁴ KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 5-8, 16, 46-47 (2009).

⁷⁵ Gerald L. Neuman, *Anomalous Zones*, 48 STAN L. REV. 1197, 1201 (1996).

⁷⁶ *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment . . .").

⁷⁷ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

⁷⁸ *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("Congress has plenary authority to alter [the] jurisdictional guideposts."); *see also Lara*, 541 U.S. at 196 (holding that "Congress has the constitutional power to relax restrictions that the political branches have . . . placed on the exercise of a tribe's inherent legal authority").

Congressional acknowledgement of tribal extraconstitutionality is not new. Congress enacted the Indian Civil Rights Act (ICRA)⁷⁹ in 1968 in response to tribes' extraconstitutional status. ICRA statutorily extends civil rights protections to individuals under tribal jurisdiction.⁸⁰ ICRA contains civil rights terminology similar to those found in the U.S. Constitution, like free exercise of religion, equal protection, and due process.⁸¹ ICRA was frequently framed as constitutional rights for Indians,⁸² and thereby imposes a distinct Western flavor of adversarial, individual-focused law into tribal law. ICRA's focus on individual rights can clash with tribal values of community rights and infringe on tribal sovereignty.⁸³

However, ICRA has notable differences from the U.S. Constitution.⁸⁴ ICRA only selectively incorporated (and in some instances, modified) the protections of the Bills of Rights.⁸⁵ Importantly, the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez* held that ICRA provides no federal cause of action other than habeas corpus, and upheld tribal sovereign immunity.⁸⁶ As a result, ICRA has been interpreted and enforced almost exclusively by tribal courts. Tribes determine what ICRA rights mean in a tribal context and within a tribal cultural analysis. By finding no federal cause of action and tribal sovereign immunity in *Santa Clara*, the Court enshrined

⁷⁹ Pub. L. 90-284, 82 Stat. 73, Title II (1968) (subsequently amended in 1986, 1991, 2010, and 2013, codified as 25 U.S.C. §§ 1301-1304).

⁸⁰ See Carrie Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WILLIAM & MARY BILL OF RIGHTS J. 137, 141 (2015) ("Some members of Congress expressed shock that Indian Nations were outside the reach of the Constitution.").

⁸¹ See 25 U.S.C. § 1302(a)(1), (8).

⁸² Lawrence R. Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT 40, 2 (Kristen A. Carpenter et al. eds., 2012) (noting that many courts and commentators incorrectly referred to the statutory rights of ICRA as 'constitutional rights', which colored their thinking about those rights in a tribe-by-tribe legal and cultural setting).

⁸³ Garrow, *supra* note 80, at 141.

⁸⁴ See, e.g., 25 U.S.C. § 1302(a)(1), (7), (10). ICRA, unlike the U.S. Constitution, does not prohibit against the establishment of a religion. ICRA also only requires a six-person jury for a criminal trial. Most notably, ICRA imposes a steep sentencing and fine limitation.

⁸⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978); see also Melissa Tatum, *Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know*, 13 KAN. J. L. & POLICY 123, 131 (2003) (noting Congress's failure to perfectly mirror the Constitution in ICRA was deliberate, not inadvertent).

⁸⁶ 436 U.S. at 58.

tribal courts as the appropriate forum for adjudicating disputes, including interpreting whether “rights” have been upheld according to tribal case law. So, while ICRA infringes on tribal sovereignty by statutorily imposing Western values on tribes, *Santa Clara* recognizes tribal sovereignty and tribes’ “extraconstitutional” authority to develop tribal-specific bodies of case law interpreting the scope and value of those ICRA provisions.

For example, in *Navajo Nation v. Rodriguez*, the Navajo Nation Supreme Court interpreted the ICRA right to not incriminate oneself⁸⁷ to include a comparable *Miranda*-type warning from law enforcement.⁸⁸ Rather than drawing upon a Western history of government infringement on individual rights, the court relied on the Navajo principle of *hazhó’ógo*: meaning loosely that patience and respect are required when dealing with another human being.⁸⁹

However, if instead of exercising inherent powers (albeit under the limiting frame of ICRA), tribes were exercising delegated federal powers, then the *Santa Clara* tribal case law framework would not apply. Instead, a tribe would be acting as a federal agent. Alleged due process violations when issuing a protection order could likely be filed directly in federal court, circumventing tribal justice systems. Instead of interpreting the issuance of protection orders and potential attendant civil rights violations under tribal law, a delegation of federal power would attach binding federal case law. While monumental in U.S. law, the watershed cases of *Gideon*⁹⁰ and *Miranda*⁹¹ reflect Western values and struggles to protect individual rights from intrusive and untrustworthy governments. These values and histories are not necessarily reflective of tribal values and histories, and their forced incorporation into tribal law—often without community buy-in—leaves little room for tribes to integrate those holdings into other tribal laws, or to experiment with how they might interact with customs, traditions, codes, and tribal constitutions.

A finding that § 2265(e) delegates federal authority also can impact a tribe’s civil enforcement of protection orders. The distinction

⁸⁷ 25 U.S.C. § 1302(a)(4).

⁸⁸ *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 2004 WL 5658107 (Navajo Dec. 16, 2004).

⁸⁹ *Id.* at *5.

⁹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (holding the Sixth Amendment’s guarantee of a right to assistance of counsel applies to criminal defendants in state court by way of the Fourteenth Amendment).

⁹¹ *Miranda v. Arizona*, 384 U.S. 346 (1966) (holding the Fifth Amendment requires law enforcement officials to advise suspects of their right to remain silent and to obtain an attorney during interrogations while in police custody).

between civil and criminal enforcement can be murky, especially when it comes to the detainment of noncompliant respondents. At least under the wording of § 2265(e), tribal authority to criminally enforce the violation of protection orders is untouched. Tribes retain their inherent authority to criminally prosecute Indians,⁹² and their authority to prosecute non-Indians is re-recognized in section 904 of VAWA's special domestic violence criminal jurisdiction provisions.⁹³ Tribes also have access to civil remedies, including civil fines, restitution, community service, and civil contempt, among others. Civil remedies for protection orders tend to be generally more consistent with most tribes' traditional approaches to justice.⁹⁴ However, because § 2265(e) verifies tribal civil jurisdiction to issue and *enforce* protection orders involving any person, a finding that § 2265(e) delegates federal enforcement injects federal case law for civil enforcement remedies. These additional due process protections can pose a logistical roadblock to victims located in tribal jurisdictions unable to satisfy those additional requirements and contradicts Congress's explicit desire for tribal courts to have the civil authority to enforce protection orders.⁹⁵

IV. Finding the Origins of Power

A. Inherent Sources of Power

There is only a limited set of circumstances and accompanying case law examining Congressional bestowments of powers to other sovereigns. Does Congress possess the requisite authority to empower a tribe with jurisdictional powers? Is this Congressional action necessarily an affirmation or a delegation, or can Congress choose? This analysis has largely taken place within the context of the dual sovereignty doctrine regarding double jeopardy.⁹⁶

In *Puerto Rico v. Sánchez Valle*,⁹⁷ the U.S. Supreme Court held that the origin of the Territory of Puerto Rico's prosecutorial powers was not separate and inherent, but rather was a delegation of federal

⁹² See, e.g., *Lara*, 541 U.S. at 210.

⁹³ Pub. L. No. 113-4, 127 Stat. 121, Sec. 904 (2013).

⁹⁴ Tatum, *supra* note 85, at 130.

⁹⁵ *Id.*

⁹⁶ *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”).

⁹⁷ 136 S. Ct. 1863 (2016).

power.⁹⁸ Consequently, double jeopardy applied to a federal criminal prosecution and a subsequent Puerto Rican prosecution for the same gun sale violation. Because Puerto Rico was fully colonized by the Spanish and ceded to the United States as part of the 1898 Treaty of Paris, all of Puerto Rico's preexisting inherent sovereignty was lost. Its authority to organize and self-govern, including to prosecute criminal offenses, thereby derived from a federal delegation under United States law, namely the 1950 Act.

Interestingly, the Court found that the 1950 Act,⁹⁹ recognizing and encouraging Puerto Rico's self-governance, evidenced congressional intent to recognize inherent territorial powers. However, the totality of Puerto Rico's inherent powers of self-governance had been decimated by colonization. There were therefore no surviving dormant inherent powers to awaken. Instead, to fulfill Congress's intent to encourage Puerto Rico's self-government, Congress could only re-empower Puerto Rico through the delegation of federal powers, regardless of its intent. To underscore the limitations of Congress to revive Puerto Rico's territorial powers, the Court compared Puerto Rico with Indian tribes. Unlike Puerto Rico, tribal inherent sovereignty was never fully extinguished. Because tribes retain some inherent powers, Congress has the power to revive other inherent tribal powers if dormant.¹⁰⁰ The Court pointed to the tribal exercise of prosecutorial powers, including those simultaneous with a federal prosecution for the same incident, as examples of inherent sovereign powers that do not trigger double jeopardy.¹⁰¹

The Court all but conceded that the logic of the dual sovereignty doctrine is strange. Justice Kagan noted that while the temptation is to examine the extent to which a sovereign such as Puerto Rico self-governs, including the nature of its criminal justice system, "for whatever reason, the test we have devised . . . overtly disregards common indicia of sovereignty."¹⁰² Rather, the dual sovereignty

⁹⁸ *Id.* at 1875.

⁹⁹ Act of July 3, 1950, Pub. L. No. 600, § 1, 64 Stat. 319.

¹⁰⁰ *Sánchez Valle*, 136 S. Ct. at 1872, citing *United States v. Wheeler*, 435 U.S. at 323.

¹⁰¹ *Wheeler*, 435 U.S. at 313; *see also Lara*, 541 U.S. at 197 and 210 (holding no double jeopardy for the prosecution of a member of the Turtle Mountain Band of Chippewa Indians in Spirit Lake Tribal Court followed by a subsequent federal prosecution); *United States v. Antelope*, 548 F.3d 1115, 1157 (8th Cir. 2008) (holding no double jeopardy for the prosecution of a Cheyenne River Sioux tribal member in Standing Rock Sioux Tribal Court followed by a subsequent federal prosecution).

¹⁰² *Sánchez Valle*, 136 S. Ct. at 1870.

doctrine hinges on a single criterion: the “ultimate source” of the power. Under federal Indian law, tribes are considered the ultimate source of their powers.¹⁰³

Sánchez Valle confirms that, at least compared to Puerto Rico, tribes have retained a sufficient amount of their inherent sovereignty to qualify as distinct under the dual sovereignty doctrine. Regardless of the diversity of tribes, the extent to which a tribe has experienced colonization, or the extent to which a tribe now exercises their sovereign powers, all tribes are homogeneously held to retain this sufficient sovereignty. *Sánchez Valle* also confirms that because Puerto Rico did not retain any surviving inherent sovereignty, Congress lost the ability to awaken those powers. Conversely, because at least some tribal inherent sovereignty survives, implicitly divested inherent tribal powers are not forever lost, they are merely dormant. The U.S. Supreme Court confirmed this in *United States v. Lara*, finding that the *Duro*-fix, a statutory recognition of tribal criminal jurisdiction over nonmember Indians, was a congressionally permissible affirmation of inherent tribal powers.¹⁰⁴ For tribes, Congress has the power to awaken those dormant inherent tribal powers, not just delegate federal ones.

B. Can Congress Delegate Powers to Tribes?

While Congress may have the power to affirm inherent tribal powers, could Congress nevertheless choose to delegate federal powers to tribes? In *Sánchez Valle*, Congress had clear authority to delegate federal powers to Puerto Rico pursuant to the U.S. Constitution’s Territory Clause.¹⁰⁵ But, delegations of federal powers are otherwise generally constrained to executive agencies within the federal government. Specifically, the nondelegation doctrine prohibits Congress from delegating its legislative authority to private entities.¹⁰⁶

¹⁰³ *Id.* (citing *Wheeler*, 435 U.S. at 320).

¹⁰⁴ *Lara*, 541 U.S. at 204.

¹⁰⁵ *Sánchez Valle*, 136 S. Ct. at 1868, citing Organic Act 1900, ch. 191, 31 Stat. 77 and U.S. Const., Art. IV, § 3, cl. 2.

¹⁰⁶ *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *see also* U.S. CONST. art. 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

In addition, the power delegated must have a nexus to a delegate's traditional scope of authority.¹⁰⁷

In the 1975 case *United States v. Mazurie*,¹⁰⁸ a unanimous Supreme Court found that Congress can delegate federal powers to tribes primarily because tribes, unlike private organizations, possess a distinct inherent sovereignty. The Court found that Congress could delegate federal authority to the Eastern Shoshone and Northern Arapaho Tribes to regulate alcohol sales on their reservation, including with respect to non-Indians.¹⁰⁹ Notably, the Court reasoned that limitations on congressional delegation authority are less stringent when the delegation recipient "possesses independent authority over the subject matter."¹¹⁰ Because tribes can regulate the internal and social relations of tribal life, and because alcohol "is just such a matter," Congress's delegation showed a sufficient delegation nexus.¹¹¹ The Rehnquist Court in *Mazurie* noted it need not determine whether the Tribes have sufficient inherent authority to impose the alcohol regulation. Instead, the Court simply determined there was enough inherent tribal authority to justify the congressional delegation, and that low bar finding is all that is required.¹¹²

Most recently, *Mazurie* has been upheld in a 2021 Fifth Circuit en banc appeal finding a proper delegation of federal power to tribes in the Indian Child Welfare Act ("ICWA").¹¹³ ICWA's § 1915(c) allows tribes to re-order foster care and pre-adoptive placement preferences for an Indian child in a state court proceeding.¹¹⁴ The Court noted that such authority is unquestionably within a tribe's inherent power for tribal child welfare proceedings, supporting a sufficient nexus.¹¹⁵ The court noted that even though tribes are separate sovereigns from the federal government, Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine.¹¹⁶

¹⁰⁷ *United States v. Mazurie*, 419 U.S. at 556-57.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 556.

¹¹⁰ *Id.* at 556-57 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

¹¹¹ *Id.* at 557.

¹¹² This is a seemingly *Montana*-light test. See *infra* Section II.A., regarding the *Montana* test.

¹¹³ *Brackeen, et. al. v. Haaland, et. al.*, No. 18-11479 (5th Cir., Apr. 6, 2021) (en banc).

¹¹⁴ 25 U.S.C. § 1915(c).

¹¹⁵ *Brackeen*, slip op. at 129 (citing *Montana*, 450 U.S. at 564).

¹¹⁶ *Id.*, slip op. at 128, 136-37 citing *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958).

Mazurie's holding has been extended to include delegations of environmental regulatory authority. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,¹¹⁷ Justice White in his plurality opinion cited the Clean Water Act's "treatment as states" provisions as an example of an express delegation of federal authority to a tribe.¹¹⁸ That finding of a delegation of federal power was explicitly upheld in 1998 by the Ninth Circuit Court of Appeals in *Montana v. Environmental Protection Agency*.¹¹⁹ Curiously however, and despite *Brendale*, the Environmental Protection Agency (EPA) still required tribes to separately demonstrate, on a case-by-case basis, that they possessed the inherent jurisdiction to regulate under the Clean Water Act pursuant to *Montana's* tribal civil jurisdiction analysis. This effectively nullified the *Mazurie* test and negated the federal delegation in the Clean Water Act. This was also in contradiction to the EPA's determination that the Clean Air Act (containing similar "treatment as state" provisions), was a valid express federal delegation of authority to tribes.¹²⁰ However, in 2016, after an extensive comment period, the EPA revised its approach and concluded definitively that Congress expressly delegated authority to tribes to administer the Clean Water Act regulatory programs, including over non-Indian activities on fee lands.¹²¹

In addition to tribes, Congress has delegated federal powers to other sovereigns, including states. This includes delegating federal authority to exercise criminal and civil adjudicatory jurisdiction in Indian country through Public Law 280.¹²² Delegations to states, like to tribes, have been found to be constitutionally sound.¹²³

If Congress had intended to delegate federal powers to tribes to issue and enforce protection orders in § 2265(e), such a delegation would likely survive a *Mazurie* analysis. Tribes, even under a narrow

¹¹⁷ 492 U.S. 408 (1989).

¹¹⁸ *Id.* at 428 (opinion of White, J.).

¹¹⁹ *Montana v. EPA*, 137 F.3d 1135, 1138 (9th Cir. 1998).

¹²⁰ See 40 CFR part 49; Clean Air Act Tribal Authority Rule, 63 Fed. Reg. 7254, 7255 (Feb. 12, 1998), *aff'd*, *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Circuit 2000).

¹²¹ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183, 30190 (May 16, 2016).

¹²² Pub. L. No. 83-280 (codified as 18 U.S.C. § 1162 & 28 U.S.C. § 1360). See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (describing Public Law 280, which "expressly granted six States . . . jurisdiction over specified areas of Indian Country"),

¹²³ See e.g. *Parker v. Richard*, 250 U.S. 235, 239 (1919) (holding that Congress could select a state court as "agency" to decide the validity of conveyance of property rights in land to citizens of five Indian Tribes).

view of tribal sovereignty, retain the powers to protect the health and welfare of the tribe.¹²⁴ A delegation of federal powers to issue and enforce protection orders therefore likely satisfies the low bar nondelegation nexus requirement.

Congress has the authority to both affirm previously dormant inherent tribal powers, as well as delegate new federal powers to tribes. To determine whether the authority verified in § 2265(e) is an affirmation or a delegation, the question is what did Congress intend? The language of the statute, the context of the statute, the legislative history, and prior congressional affirmations of tribal powers after comparable implicit divestiture restraints all point to § 2265(e) being an affirmation of inherent tribal powers.

V. Finding the Origins of Power in 18 U.S.C. § 2265(e) to be an Affirmation of Inherent Sovereignty

A. Canons of Construction, the Indian Canons of Construction, and the Trust Responsibility

The canons of statutory interpretation provide several tools for determining whether 18 U.S.C. § 2265(e) is an affirmation of inherent tribal powers like the *Duro*-fix, or whether it is a federal delegation as in *Mazurie*. Generally, statutory interpretation starts with the language of the statute itself.¹²⁵ However, when a statute is ambiguous, courts may also review the context of the legislative bill and the legislative history of a statute to glean clues about congressional intent.¹²⁶ Courts may also use the canon of constitutional avoidance where one interpretation of a statute would raise serious doubt about the overall statute's constitutionality. The court may look for a fairly plausible

¹²⁴ *Montana*, 450 U.S. at 566 (noting a tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health or welfare of the tribe).

¹²⁵ *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also* *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (stating that when statutory language is "plain and unambiguous," it should be applied "according to its terms.").

¹²⁶ *See, e.g.,* *Mitchell v. Cohen*, 333 U.S. 411, 418 (1948); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979).

reading that would avoid the constitutional issue.¹²⁷ A matter not covered by a statute should be treated as intentionally omitted.¹²⁸

However, when examining Indian law, such as a federal verification of tribal powers, the standard principles of statutory interpretation do not have their usual force.¹²⁹ The Indian law canons of construction call for statutes to be liberally construed in favor of the Indians, and require that all ambiguities be resolved in their favor.¹³⁰ Tribal sovereignty should be preserved unless congressional intent is clear and unambiguous to the contrary.¹³¹ The Indian law canons of construction are rooted in the unique trust relationship between the federal government and tribes.¹³² In exercising authority over Indian affairs, the federal government is bound to act as a fiduciary toward its trustees, the tribes. This includes legislative action like recognizing tribal civil authority.

The trust responsibility is a contextual veneer, calling for the framing of statutory interpretation within the federal-tribal legal history. There is no single origin of the trust responsibility. Initial federal-tribal legal relations were sparse, limited to a settler-colonial negotiation centered on keeping peace and federal exclusivity over land sales. In numerous negotiated treaties, the United States used language to acknowledge U.S. sovereignty, but did so as it related to tribal dependence on the United States and the federal government's role in "managing all their affairs."¹³³ This positioning has been used

¹²⁷ *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

¹²⁸ CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 54 (Apr. 5, 2018) ("*Casus Omissus*: A matter not covered by a statute should be treated as intentionally omitted.")

¹²⁹ *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985).

¹³⁰ COHEN'S HANDBOOK § 2.02[1], *supra* note 21, at 113; *see, e.g.*, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfoot Tribe*, 471 U.S. at 767-68) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'").

¹³¹ *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

¹³² *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

¹³³ *See, e.g.*, Treaty with the Wyandotte, art. 7, Jan. 21 1785, Stat., 16 ("The said Indian nations, do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever."); Treaty with the Choctaw, art. 2, Jan. 3, 1786, 7 Stat. 21 ("[T]o be under the protection of the United States of America, and no other sovereign whosoever."); Treaty with the

to emphasize that while the federal government enjoys extensive power over Indian affairs, with that power come federal obligations.

The United States Supreme Court further solidified this protector-like language: Chief Justice John Marshall in *Cherokee Nation v. Georgia* declared tribes to be “domestic dependent nations,” and likened the federal-tribal relationship to that of a “ward to his guardian.”¹³⁴ The analogy was likely intended to focus more on the subservient need of tribes rather than on the positive obligations of the federal government towards tribes.¹³⁵ But this ward-guardian relationship has evolved into a modern federal trust responsibility doctrine that includes exacting fiduciary standards.¹³⁶ Most modern federal legislation, administrative action, and executive policy statements reference and reaffirm the federal trust responsibility to tribes.¹³⁷

The trust responsibility doctrine as applied to congressional action is not dispositive. The doctrine has not served as the basis of a judicial order forcing or invalidating congressional action.¹³⁸ It does, however, serve as a lens, motivating federal action and serving as oversight of federal actions over Indian affairs.¹³⁹ In interpreting a statute, the plain language should be the primary guidepost. Ambiguities should be framed within the legislative intent of that statute, as found within the context of the legislative bill and the

Kaskaskia, art. 2, Aug. 13, 1803, 7 Stat. 78 (“The United States will take the Kaskaskia tribe under their immediate care and patronage . . .”); Treaty with the Sauk and Foxes, art. 2, Nov. 3, 1804, 7 Stat. 84 (“The United States receive the united Sac and Fox tribes into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States and of no other power whatsoever.”).

¹³⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *see generally* COHEN’S HANDBOOK § 5.04(3)(a), *supra* note 21, at 412-15.

¹³⁵ *Cherokee Nation*, 30 U.S. at 2 (“Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.”).

¹³⁶ *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942) (noting that payment of money to agents known to be dishonest violated private trust law standards).

¹³⁷ COHEN’S HANDBOOK § 5.04(3)(a), *supra* note 21, at 412; *see, e.g.*, President Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (“The United States has a unique legal and political relationship with Indian tribal governments . . .”).

¹³⁸ COHEN’S HANDBOOK § 5.04(3)(a), *supra* note 21, at 415.

¹³⁹ *See, e.g.*, U.S. DEP’T OF THE INTERIOR, SECRETARIAL ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (August 20, 2014).

AFFIRMED OR DELEGATED?

legislative history. But the trust responsibility must also frame that legislative action. Statutory expansions of tribal powers should be examined as in relation to the federal-tribal trust relationship. Similarly, § 2265(e), as a tribal jurisdiction-fix must be viewed as a manifestation of that federal-tribal relationship. *Martinez* created an untenable legal vacuum that disempowered tribes, exposed victims, and invited lawlessness in Indian country. The federal trust responsibility to tribes should be used to frame Congress's enactment of § 2265(e). With these tools in mind, we examine the language of § 2265(e) and the context within which it was enacted.

B. The Plain Language of 18 U.S.C. § 2265

Section 905 of the Violence Against Women Reauthorization Act of 2013 ("VAWA") amends 18 U.S.C. § 2265(e) to provide:

(e)Tribal Court Jurisdiction.—

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

Section 905 of VAWA amended an older version of 18 U.S.C. § 2265(e) (2000)¹⁴⁰ which had provided:

(e)Tribal Court Jurisdiction.—

For purposes of this section, 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.

The plain language of § 2265(e) is silent as to the origins of the verified issuance and enforcement of protection order powers. This is

¹⁴⁰ The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1494 (Oct. 28, 2000).

notable since the *Duro*-fix was explicit in stating the origins of its verified power as “inherent” that Congress was recognizing and affirming.¹⁴¹ In contrast, Section 905 of VAWA 2013 only states that an Indian tribe “shall have” civil protection order powers. Congressional affirmations of another sovereign’s authority are rare, and Congress tends to be explicit when it makes such a maneuver.

On the other hand, the Indian canons of construction call for considering the impact on tribal self-determination. While affirmations of inherent power are rare, delegations of federal powers to a tribe are also quite extraordinary. A delegation would circumvent the opportunity to mirror the *Duro*-fix, as well as the opportunity to uplift tribal self-determination. A federal delegation, though a “fix” to judicial restrictions, would impose new infringements on tribal sovereignty through the injection of double jeopardy and federal definitions of constitutional protections.¹⁴² When Congress infringes on tribal self-determination, Congress should be explicit.¹⁴³ Moreover, delegations of federal powers to tribes tend to embed those delegated powers into an existing federal regulatory scheme, with accompanying federal scrutiny.¹⁴⁴ In contrast, the powers verified in § 2265(e) anticipate the civil issuance and enforcement of protection orders to remain within tribal courts. Rather than provide for the federal scrutiny of the tribal exercise of these powers, other jurisdictions are expected to provide full faith and credit.¹⁴⁵ “Shall have” does not seem to evidence an accompanying federal regulatory framework of other delegations, nor an intention to deviate from affirmation policy.

Further, within the plain language of the statute, finding a delegation would render at least a portion of § 2265(e) useless. The statute indicates that tribes shall have full civil authority to issue and

¹⁴¹ 25 U.S.C. § 1301(2).

¹⁴² See *infra* Section IV.

¹⁴³ See, e.g., *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452, 2469 (2020) (holding that once a federal reservation is established, only Congress can diminish or disestablish it through a “clear expression of congressional intent.”).

¹⁴⁴ See e.g., 18 U.S.C. § 1161, as examined by *Mazurie*, 419 U.S. at 547 (delegating federal powers to tribes to regulate liquor in Indian country, but only to the extent those tribal regulations conform with the laws of the State, are certified by the Secretary of the Interior, and are published in the Federal Register); 25 U.S.C. § 1915 (delegating federal powers to tribes to establish a different order of placement preference, but for cases that are otherwise adjudicated in state court proceedings, regulated by the remaining provisions of the Indian Child Welfare Act); and 33 U.S.C. § 1377(e) (delegating federal powers to tribes to manage and protect water resources, but within the regulatory framework of the Clean Water Act statute and accompanying regulations).

¹⁴⁵ 18 U.S.C. § 2265(a).

enforce civil protection orders in “matters arising anywhere in Indian country” [according to 18 U.S.C. § 1151)] “or otherwise within the authority of the tribe.”¹⁴⁶ What impact does delegating a federal power that is “otherwise within the authority of the tribe”? The tribe, by the words of the statute, must already possess that other authority. At best, assuming the statute is a delegation of federal powers, “otherwise within the authority of the tribe” might clarify that the federal delegation is not intended to limit or restrict any inherent tribal powers. Though, such savings clauses are usually more apparent.

Rather than a federal delegation, the plain language of § 2265(e) demonstrates a congressional affirmation of inherent tribal powers on at least four fronts. VAWA 2013 actually modified quite a few different portions of § 2265(e). First, directly in response to *Martinez*, VAWA 2013 added the terms “issue” and “involving any person,” clarifying that tribes have the power to both enforce and issue civil protection orders, and that this power extends to members, nonmembers, and non-Indians alike. This clarification encompasses both inherent powers that have not been disputed, such as the issuance of protection orders over member Indians, and powers that have been disputed, such as over Indians, as litigated in *Spurr v. Pope*. A federal delegation likely would not need to delegate powers that tribes already possess.

Second, VAWA 2013 clarified that these civil protection order powers extend to all Indian country, as defined by 18 U.S.C. § 1151.¹⁴⁷ The older VAWA 2000 version of this statute only referenced tribal lands in the context of a tribe’s power to exclude violators. “Tribal lands” could possibly be interpreted as referencing all of § 1151’s Indian country. Or, “tribal lands” could be read more narrowly to include only Indian trust lands. By modifying § 2265(e) to specifically reference § 1151, Congress ensured that a tribe’s civil protection order powers extend to all of Indian country, including non-Indian fee lands.¹⁴⁸ Yet, like “involving any person,” tribes already possess inherent powers on most of Indian country tribal lands, particularly “trust lands.” Lumping together obvious inherent tribal powers with purported delegated ones is a sloppy delegation, making it impossibly difficult to distinguish when tribes are exercising their inherent powers

¹⁴⁶ 18 U.S.C. § 2265(e).

¹⁴⁷ 18 U.S.C. § 1151; *see supra*, note 10.

¹⁴⁸ Because the *Montana* test injects doubt as to whether a tribe retains inherent civil power over a non-Indian, particularly over non-Indian fee lands, the clarification of referencing all of “Indian country” further negates the need to conduct *Montana* analysis.

and when they are exercising their delegated federal ones. Or, more likely, the lumping taking place in “involving any person” and “Indian country” are simply affirmations that inherent tribal powers now indisputably extend over all these persons and territories.

Third, VAWA 2013 completely reworked the phrase “otherwise within the authority of the tribe.” The VAWA 2000 text stated that “a tribal court shall have full civil jurisdiction to enforce protection orders ... in matters arising within the authority of the tribe.” “Within the authority of the tribe” is a reference to the surviving inherent sovereignty a tribe retains after a *Montana* analysis. Therefore, the VAWA 2000 version of the statute had the effect of requiring a *Montana* analysis for each tribal issuance or enforcement of a protection order. The *Martinez* court found that the Suquamish Indian Tribe failed to satisfy the *Montana* test.¹⁴⁹ VAWA 2013, however, dispenses with the *Montana* analysis entirely by stating a tribe “shall have full civil jurisdiction ... in matters arising in the Indian country of the Indian tribe.” No *Montana* analysis is necessary.

The VAWA 2013 statute continues, stating that a tribe “shall have full civil jurisdiction to issue and enforce protection orders ... in matters arising [in Indian country] or otherwise within the authority of the Indian tribe.”¹⁵⁰ By craftily adding “or otherwise,” the phrase “within the authority of the Indian tribe” transforms from requiring a *Montana* analysis to expanding tribal civil jurisdiction to both all matters arising in Indian country and matters that are otherwise within tribal jurisdiction. Consider, for example, a person domiciled in Indian country who is in a violent relationship with someone who lives in a town bordering the tribal reservation. Numerous violent incidents take place within the perpetrator’s apartment in town, but when the victim returns to the tribal community, her fear of harm comes with her. The matter may have arisen outside of Indian country, but when she returns to Indian country, the Tribe has both the authority and obligation to protect her.¹⁵¹ When exercising civil authority to issue and enforce protection orders pursuant to the phrase “or otherwise within the authority of the Tribe,” the “shall have” verification applies, and so no *Montana* analysis is necessary. This has effectively provided a partial *Montana*-fix. A delegation interpretation, however, muddles this

¹⁴⁹ See *Martinez v. Martinez*, 2008 WL 5262793, at *5-6.

¹⁵⁰ 18 U.S.C. §2265(e).

¹⁵¹ To engage the VAWA full faith and credit mandate to ensure enforceability outside of Indian country, the issuing tribe must have subject matter jurisdiction, jurisdiction over the defendant, and provide due process. See 18 U.S.C. § 2265(a)-(b).

phrase meaningless by purporting to delegate authority that a tribe must necessarily already possess.

Fourth, the reference to a tribe's power to exclude strongly indicates an affirmation of inherent tribal powers. The power to exclude has long been held to persist among the surviving bundle of inherent tribal rights.¹⁵² It is considered an integral tribal power pursuant to both a tribe's status as a sovereign and a landowner.¹⁵³ It has been applied to any person within tribal lands, including members, nonmembers, and non-Indians.¹⁵⁴ Like the federal trust responsibility, the power to exclude and its uniquely elevated status derives from numerous treaty provisions specifically providing for the exclusion right.¹⁵⁵ In *Merrion v. Jicarilla Apache Tribe*, decided one year after *Montana*, the U.S. Supreme Court found the tribal jurisdiction to tax nonmembers on tribally-owned land derived from the tribe's power as landowner to exclude nonmembers, and from its "general authority, as sovereign, to control economic activity within its jurisdiction."¹⁵⁶ While *Montana* made tribal land ownership only a persuasive factor for regulating nonmembers, the power to exclude has proven to be distinct and lasting.¹⁵⁷ In *Cooley*, the Court reiterated these distinct prongs of tribal sovereignty, noting that in addition to their inherent sovereign powers based on the right to protect the health and welfare of the tribe, tribes have a distinct right to exclude.¹⁵⁸

In finding that the *Duro*-fix was a congressional affirmation of inherent tribal powers, *United States v. Lara* noted the *Duro*-fix was not just a congressionally permissible action, but that it was similarly rooted in core tribal powers. "It concerns a tribe's authority to control

¹⁵² U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 467 (Oct. 25, 1934) ("Over tribal lands, the tribe has the rights of landowner as well as the rights of a local government, dominions as well as sovereignty.").

¹⁵³ Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 107-108 (2007).

¹⁵⁴ *Id.* at 108.

¹⁵⁵ *See id.* at 108-110.

¹⁵⁶ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 130 (1982).

¹⁵⁷ *See, e.g. Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (holding the regulatory power derived from the inherent power to exclude is independent from the inherent powers recognized in *Montana*, 450 U.S. 544.); *see also South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993) (noting that "[r]egulatory authority goes hand in hand with the power to exclude."); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 423-424 (1989) (noting because the Yakima Nation lost the power to exclude, they similarly lost the derived zoning authority over that closed area of the reservation).

¹⁵⁸ *Cooley*, 593 U.S., slip op at 6.

events that occur upon the tribe's own land.”¹⁵⁹ *Lara* noted that the *Duro*-fix was permissible in part because it revives powers that are in close relation to other inherent tribal powers. Like criminal jurisdiction over nonmembers, the issuance and enforcement of protection orders over nonmembers derives from the core of tribal sovereignty. Protection orders can range in form, including requiring a person to stay a certain distance from another person or place. Only in their most extreme versions do protection orders limit a person’s movement from an entire jurisdiction, which draws upon the tribe’s inherent power to exclude. The power to issue civil protection orders involving all persons is necessarily included within the power to exclude. In explicitly referencing this power in § 2265(e), Congress connected the power to issue protection orders to the core of inherent tribal powers, affirming both inherent powers.

Cumulatively, the array of plain language in VAWA 2013’s modifications to § 2265(e) show an overarching push for tribal inherent authority. Congress confirmed that tribal civil powers regarding protection orders extend to the power to issue, to all persons, to all of Indian country, and to all other matters over which tribes have authority, are rooted in comparable inherent powers like the power to exclude. It is a comprehensive approach to protection orders, mirroring the same type of authority that exists in other jurisdictions. The plain language of VAWA 2013’s § 2265(e) is an extension of VAWA 2000—both of which promote the inherent sovereignty of tribes to respond to the needs of their communities.

Unlike the *Duro*-fix,¹⁶⁰ Section 905 of VAWA 2013 lacks explicit language that the verification is intended to be an affirmation, but silence is not fatal here. In fact, Congress communicated that intent through numerous VAWA language clarifications, resolving not just *Martinez*, but providing a partial *Montana*-fix, too. Moreover, the framing of those language clarifications, coupled with the reference to a tribe’s inherent right to exclude, is rooted in inherent jurisdiction. The plain language of § 2265(e) suggests a congressional intent to affirm inherent tribal jurisdiction.

C. Internal Statutory Consistency: 18 U.S.C. § 2265

¹⁵⁹ *Lara*, 541 U.S. at 204.

¹⁶⁰ Pub. L. No. 101-511, 104 Stat. 1892, Sec. 8077 (Nov. 5, 1990) (while buried in Department of Defense appropriations, the *Duro*-fix provides that tribal powers of self-government “means the *inherent power* of Indian tribes, hereby *recognized and affirmed*, to exercise criminal jurisdiction over all Indians.”) (emphasis added).

Section 2265(e) is a subpart of § 2265, regarding the full faith and credit that is to be given protection orders. Section 2265(a) requires states, tribes, and territories to provide full faith and credit to each other's protection orders, but only when the protection order meets the requirements of § 2265(b). Section 2265(b) requires the issuing court to have jurisdiction over the parties and the matter under the relevant laws. The issuing court must also provide the respondent due process rights to reasonable notice and opportunity to be heard.

The requirement of subject matter jurisdiction puts § 2265(e) at the crux of whether a tribal civil protection order will be entitled to full faith and credit because tribal jurisdiction over both the parties and the subject matter are required. By using the words "tribes shall have full civil jurisdiction to issue and enforce protection orders involving any person,"¹⁶¹ Congress cemented a tribe's civil authority to issue and enforce tribal protection orders for all other jurisdictions, relevant to the other parts of § 2265. Just as Congress does not delegate federal authority to states or territories regarding their capacity to issue civil protection orders, § 2265(e) does not delegate federal authority so much as it clarifies that tribes shall be treated on a par with states and territories for purposes of full faith and credit.

D. Internal Legislative Consistency: Title IX of VAWA 2013

Assuming the plain language of § 2265 is ambiguous as to the origins of the verified tribal powers, statutory interpretation leads us next to the legislative context in which these provisions were enacted. VAWA was originally enacted in 1994 and was designed to address domestic and sexual violence. It emphasized a coordinated community response to violence against women: it provided for restitution, civil redress, established the Office on Violence Against Women, provided

¹⁶¹ 18 U.S.C. §2265(e).

grant dollars, and extended protections to vulnerable populations.¹⁶² It was reauthorized in 2000,¹⁶³ 2005,¹⁶⁴ and 2013.¹⁶⁵

Section 905 is one component of Title IX within VAWA 2013. Title IX is entirely devoted to safety for Indian women¹⁶⁶ with a stated policy to “develop and promote legislation and policies that enhance best practices for responding to violent crimes against Indian women.”¹⁶⁷ It included strategies to enhance tribal capacities as well as federal responses. Section 901 authorizes grants to Indian tribal governments.¹⁶⁸ Section 903 reauthorized the requirement for the federal government to engage in consultation with tribes and actively coordinate between the Departments of Justice, Health and Human Services, and the Interior.¹⁶⁹ Section 906 specifically regards federal powers, and includes amendments to the federal assault statutes, providing expanded federal authority to prosecute crimes like strangling.¹⁷⁰ Notably, tribal authority to issue civil protection orders is not located in this federal powers section.

Instead, while section 905 regarding the power to issue civil protection orders is in its own stand-alone section, it immediately follows section 904, which similarly provides an implicit divestiture “fix.” Section 904 recognizes the Special Domestic Violence Criminal Jurisdiction (SDVCJ) of tribes, providing a partial *Oliphant*-fix for participating tribes¹⁷¹ to criminally prosecute non-Indians for dating violence, domestic violence, and violations of protection orders.¹⁷² In describing the nature of this criminal jurisdiction, Congress mirrored the language of the *Duro*-fix:

¹⁶² See generally Violence Against Women Act, Title IV, §§ 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong., Pub. L. No. 103-322 (1994).

¹⁶³ Victims of Trafficking and Violence Protection Act of 2000, VAWA 2000, H.R. 3244, Division B, 106th Cong.

¹⁶⁴ Violence Against Women Reauthorization Act of 2005, H.R. 3402, 109th Cong.

¹⁶⁵ Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong.

¹⁶⁶ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, Title IX.

¹⁶⁷ *Id.*, § 901(10).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, § 903.

¹⁷⁰ *Id.*, § 906.

¹⁷¹ Because tribes can opt into special domestic violence criminal jurisdiction, the statute refers to tribes that opt-in as “participating tribes.”

¹⁷² Pub. L. No. 113-4, 127 Stat. 54, Title IX, § 904 (2013) (codified as 25 U.S.C. § 1304).

“[T]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”¹⁷³

As a partial *Oliphant*-fix, and exactly like the *Duro*-fix, SDVCJ is an explicit congressional relaxation of a prior Supreme Court decision, implicitly divesting tribal criminal jurisdiction. The reasoning of *Lara*, upholding the *Duro*-fix as a constitutionally valid affirmation of inherent tribal powers, likely extends to SDVCJ.

Of course, Congress’s use of the inherent-recognized-affirmed language for SDVCJ in section 904, and the absence of that language in the immediately following section 905 regarding the civil power to issue and enforce protection orders, could suggest congressional intent to approach these powers differently. But finding section 905 to be a delegation would mean Congress delegated a federal power for a tribe to civilly issue and enforce a protection order, but affirmed the tribe’s inherent power to prosecute the violation of that protection order. This would have curious policy and practical implications. There are no other indications in Title IX to support this curious inherent-delegated combination, why Congress would affirm the arguably more intrusive inherent criminal power, but delegate a civil one, or how this combination would practically be implemented. Instead, section 905 of VAWA is not an intentional deviation from section 904’s affirmation of inherent powers, it is simply a separate civil section. Meanwhile, section 904’s SDVCJ is the only explicit statutory expression of the origin of tribal powers in VAWA 2013, and it affirms those powers as inherent.

E. Legislative History of § 2265(e)

The Senate Indian Affairs Committee report accompanying Senate Bill 1763 (an early version of what would become § 2265(e)) noted that § 2265 is explicitly designed to reverse the *Martinez* case.¹⁷⁴ The report noted the provision is intended to “clarif[y] that every Tribe has full civil jurisdiction to issue and enforce certain protection orders against Indians and non-Indians.”¹⁷⁵ Similarly, the Senate Judiciary Committee report noted the legislation was designed to correct the

¹⁷³ *Id.*, § 904 (codified as 25 U.S.C. § 1304(b)(1)).

¹⁷⁴ S. REP. NO. 112-265, at 11, 21 (2012).

¹⁷⁵ *Id.*

Martinez error.¹⁷⁶ Further, the Senate report stated that Congress's intent was "to recognize that tribal courts have [this] civil jurisdiction".¹⁷⁷ The legislative history, while minimal, uses words like "recognize" and "affirm," with no indication of a congressional intent to delegate federal powers to tribes or inject federal case law into tribal courts. The term "recognition" strongly supports an authority rooted in inherent tribal powers.

A bill authored by Senators Hutchison and Grassley introduced an alternative to what ultimately became VAWA 2013's Title IX.¹⁷⁸ It provided for a federal cause of action allowing Indian tribes to petition a federal court for a protection order to exclude any person from the tribe's Indian country for certain limited circumstances.¹⁷⁹ Violations of the protection order would be subject to federal penalties. This version of the bill failed. Senators Hutchinson and Grassley's amendment provides some insight into the delegation-affirmation question. Their proposed federal cause of action would have required the tribe itself, not the victim, to request a protection order from the federal government to exclude a perpetrator from tribal lands. This structure would likely have caused incredible hardship for victims seeking timely protection. It would have forced tribes to first adjudicate the issuance of protection orders within their own systems, and then go to federal court to essentially "register" each protection order. This would have essentially undone the intent of § 2265's full faith and credit provisions. Such an amendment, as ill-conceived as it might be, suggests that even Senators Hutchison and Grassley conceived of § 2265(e) as enhancing inherent tribal powers: if § 2265(e) was a federal delegation, Senators Hutchison and Grassley would likely have proposed further limitations on that delegation, or proposed a federal cause of action to challenge tribal civil protection violations in federal court. Instead, their failed proposal reads like an attempt to circumvent inherent tribal powers.

The legislative history positions § 2265(e) as intended to "fix" *Martinez*, much like how the *Duro*-fix and the partial *Oliphant*-fix in section 904 of VAWA 2013 each remedied restrictions on inherent tribal powers. The Senate described its intent to help tribes better protect victims, noting tribal courts are "often in the best position to best meet the needs of the residents of the community."¹⁸⁰ This pro-

¹⁷⁶ S. REP. NO. 112-153, at 11 (2012) (footnotes omitted).

¹⁷⁷ *Id.* (emphasis added).

¹⁷⁸ S. 2338, 112th Cong. § 907(3), 2d Sess. (2012).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

tribal self-determination stance, reiterated throughout the Senate report, pushes toward an interpretation that § 2265(e) is an affirmation of inherent sovereignty.

F. Federal Policy to Protect Native Women and Promote Tribal Self-Determination

Congress has consistently recognized and affirmed the federal trust responsibilities to tribes in matters involving violence against Native women.¹⁸¹ In VAWA's congressional findings, Congress found: (1) One out of every 3 Indian (including Alaska Native) women are raped in their lifetimes; (2) Indian women experience seven sexual assaults per 1,000, compared with four per 1,000 among Black Americans, three per 1,000 among Caucasians, two per 1,000 among Hispanic women, and one per 1,000 among Asian women; (3) Indian women experience the violent crime of battering at a rate of 23.2 per 1,000, compared with eight per 1,000 among Caucasian women; (4) Between 1979 and 1992, homicide was the third leading cause of death of Indian females aged fifteen, and 75 percent were killed by family members or acquaintances; (5) Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and (6) The unique legal relationship of the United States to Indian tribes creates a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.¹⁸²

Since 1978, when *Oliphant* restricted tribal authority to criminally prosecute non-Indian offenders, tribal communities have experienced a compounding violence epidemic, including drastic gender-based violence. Many of Congress's VAWA 2013 findings have been reinforced by subsequent studies showing that the crisis continues today.¹⁸³ Pursuant to the Tribal Law and Order Act,¹⁸⁴ and after surveying Indian country, the very first recommendation of the

¹⁸¹ Violence Against Women Reauthorization Act of 2005, H.R. 3402, 109th Cong., 119 Stat. 3078, § 901.

¹⁸² *Id.*

¹⁸³ See, e.g. ROSAY, *supra* note 13, at 43 (finding more than four in five American Indian and Alaska Native women, or 84.3 percent, have experienced violence in their lifetime); CENTERS FOR DISEASE CONTROL AND PREVENTION, *Leading Causes of Death—Females—Non-Hispanic American Indian or Alaska Native—United States, 2016*, <https://www.cdc.gov/women/lcod/2016/nonhispanic-native/index.htm> (finding that homicide is the third leading cause of death among American Indian and Alaska Native women between 10 and 24 years of age and the fifth leading cause of death for American Indian and Alaska Native women between 25 and 34 years of age).

¹⁸⁴ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

Indian Law and Order Commission's ("ILOC") 2013 report was not to delegate federal powers to tribes, but rather that tribes should have full territorial inherent jurisdiction.¹⁸⁵ The partial *Oliphant*-fix/ILOC response regarding special domestic violence criminal jurisdiction is emblematic of the self-determination era.¹⁸⁶

It is fitting that the dire needs of victims of gender-based violence in Indian country are producing the first congressional responses to the implicit divestiture crisis. Section 2265(e) is not a random federal delegation outlier, but part of a comprehensive congressional response, empowering tribes by relaxing federal restraints on their inherent sovereignty. Congress could have been more skillful in describing the origins of tribal civil power to issue and enforce protection orders, but nevertheless, Congress's intent is clear enough: tribes have the inherent power to protect victims.

G. International Push Toward Tribal Self-Determination

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples following decades of advocacy by Indigenous peoples. The Declaration is a standard-setting document supported by 150 nation states (including the United States), and is committed to the individual and collective rights of Indigenous peoples, which have for so long been disregarded in legal systems around the world. The Declaration recognizes that Indigenous peoples have rights to self-determination, equality, property, culture, health, and economic well-being, among many others. It calls on nation states

¹⁸⁵ INDIAN LAW & ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 25 (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

¹⁸⁶ Federal policy towards Indian tribes has fluctuated greatly throughout the centuries. To process what otherwise appears to be unintelligible shifts in policy, spanning genocide to self-governance, federal Indian policy is frequently categorized into "eras," including the Colonial Period, the Confederation Period, the Trade and Intercourse Act Era, the Removal Period, the Reservation Era, the Allotment and Forced Assimilation Period, the Indian Reorganization Act Period, the Termination Era, and the Self-Determination Era. Beginning in 1962 and known for federal support for the revitalization of tribal self-governance, though hardly fully realized, we are presently in the "Self-Determination Era." See JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 82-101 (3rd ed. 2016).

to undertake legal reforms to remedy past violations and ensure current protections for Indigenous peoples' rights.¹⁸⁷

Most fundamental among the Declaration's provisions are its recognition of Indigenous peoples' rights of self-determination.¹⁸⁸ It claims "Indigenous peoples . . . have the right to autonomy or self-government in matters relating to their internal and local affairs"¹⁸⁹ and "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."¹⁹⁰ Particularly in light of federal case law diminishing tribal self-determination through implicit divestiture, the Declaration offers a powerful affirmation of the inherent rights of Indigenous peoples to their laws and their basic right to survive as distinct peoples, which necessarily includes the right to respond to the threatened safety of residents.

The Declaration also identifies the specific impact that gender-based violence has wreaked on Indigenous peoples. Article 22 notes that nation states should "take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."¹⁹¹ The crisis of missing and murdered Indigenous women, girls, and Two-Spirit persons, is the result of the violent intersection of nation state indifference and tribal paralysis.¹⁹² Responding to the crisis necessarily requires reenabling tribes to respond.

Section 2265(e) is a limited implementation of the principles of the Declaration. It enables tribes to offer victims an accessible forum for relief. It enables tribes to respond, including by participating in the coordinated inter-jurisdictional response among other tribes, states, and the federal government. And, critically, it recognizes that tribes have always possessed this power and must exercise it for both the public safety and for tribal nation-building.

¹⁸⁷ G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¹⁸⁸ *Id.*, art. 3.

¹⁸⁹ *Id.*, art. 4.

¹⁹⁰ *Id.*, art. 5.

¹⁹¹ *Id.*, art. 22.

¹⁹² See, e.g., URBAN INDIAN HEALTH INSTITUTE, MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS: A SNAPSHOT OF DATA FROM 71 URBAN CITIES IN THE UNITED STATES 3 (2018), <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

VI. Conclusion

Despite inadvertent references to delegations of federal power in *Spurr v. Pope*, Section 2265(e) is a congressional affirmation of inherent tribal powers. It is a *Martinez*-fix and a partial *Montana*-fix. This affirmation is demonstrated by the plain language of § 2265(e); by the interaction of § 2265(e) with the rest of § 2265; by its position within Title IX of VAWA 2013 and its close relationship to special domestic violence criminal jurisdiction; in the legislative history of § 2265(e), including the failed attempts to undermine § 2265(e); and in the larger national and international policies promoting tribal self-determination and meaningful responses to gender-based violence.

Tribes are distinct sovereign governments, with both the right and the obligation to protect their communities. Tribal sovereignty should not be tampered with or diminished by the whim of courts eager to implicitly divest inherent tribal jurisdiction. Rather, pursuant to the federal government's trust obligations toward tribes, and in the face of a human rights crisis resulting in unprecedented gender-based violence, the least Congress can do is to remedy bungled implicit divestiture case law. Enacting such remedy is what Congress has done through § 2265(e). Section 2265(e), like special domestic violence criminal jurisdiction, is an affirmation of inherent tribal sovereignty. Its provisions are already enabling tribes to provide protective services as a component of a holistic bundle of support to continue the healing process after centuries of violence. Civil protection orders are only a small step towards remedying the full damage wrought by implicit divestiture; however, by ensuring that protection orders are held to be expressions of inherent tribal power—rather than delegated federal power—will promote current tribal efforts and ready those efforts for future solutions to implicit divestiture.