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Full Faith and Credit, Comity, or Federal Mandate - A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders

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FULL FAITH AND CREDIT, COMITY, OR FEDERAL MANDATE? A PATH THAT LEADS TO RECOGNITION AND ENFORCEMENT OF TRIBAL COURT ORDERS, TRIBAL PROTECTION ORDERS, AND TRIBAL CHILD CUSTODY ORDERS

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> I have heard talk and talk, but nothing is done. Good words do not last long unless they amount to something. I am tired of talk that comes to nothing.... When the white man treats an Indian as they treat each other, then we will have no more wars.
>
> Chief Joseph, Nez Perce Tribe (1879)[1]

A recent article surveyed tribal court judges in the lower forty-eight states with respect to state recognition and enforcement of all types of tribal court orders.[2] Eighty percent of the tribal courts that responded indicated that their enforcement difficulties arose in a state forum.[3] But the most striking results of the study arose where states failed to recognize tribal court judgments—even when required to do so by federal law.[4] Over forty percent of the difficulties with state court recognition of tribal court orders stemmed from subject matters covered by the federal full faith and credit mandates of the Violence Against Women Act[5] and the Full Faith and Credit for Child Support Orders Act.[6]

There has been much debate over all aspects of enforcing tribal judgments by another sovereign (a state or the federal government).[7] This article will discuss three possible avenues focused on obtaining enforcement of tribal court judgments:[8] the Full Faith and Credit Clause of the U.S. Constitution,[9] the doctrine of comity, and

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1. Carl H. Johnson, *A Comity of Errors: Why* John v. Baker *Is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1 (2001) (citing THE WISDOM OF THE GREAT CHIEFS: THE CLASSIC SPEECHES OF RED JACKET, CHIEF JOSEPH AND CHIEF SEATTLE 58–59, 61 (Kent Nerburn ed., 1994)).

2. Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000).

3. *Id.* at 349, n.246.

4. *Id.* at 349.

5. 18 U.S.C. § 2265 (2000).

6. 28 U.S.C. § 1738(B) (2000). Although this Act is mentioned, for purposes of this article it will not be discussed.

7. Other tribes, although considered another sovereign when analyzing possible recognition of judgments, will only be addressed in part III of this article, which focuses on the Violence Against Women Act and the Indian Child Welfare Act.

8. There is an alternative avenue for obtaining full faith and credit of tribal court orders in state courts: states may adopt and codify general full faith and credit provisions that apply to tribal court orders, independent of the federal mandates.

9. U.S. CONST. art. IV, § 1.

the enactment of federal statutes[10] that mandate full faith and credit for certain judgments such as the Violence Against Women Act (VAWA)[11] and the Indian Child Welfare Act (ICWA).[12] The Supreme Court of the United States has not given practitioners or lower courts a clear and concise answer to some of the most basic questions that arise out of enforcing tribal judgments.

INTRODUCTION

This article is divided into three major sections. The first section of the article begins by examining whether Congress intended for the Full Faith and Credit Act[13] to be applied to tribal judgments.[14] Specifically, this section analyzes whether the term "territory" in the Full Faith and Credit Act is applicable to Indian tribes and how changes in federal Indian policy play a role in such interpretation.[15] The second section of the article examines whether the doctrine of comity is a better method for recognition of tribal judgments.[16] The third section of this article examines congressional mandates of full faith and credit through protection orders obtained by way of VAWA and full faith and credit of tribal custody orders through the enactment of ICWA.[17]

I. THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION

The Full Faith and Credit Clause under Article IV of the U.S. Constitution, section I states, "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[18] The Supreme Court of the United States has interpreted the Full Faith and Credit Clause of the Constitution to give the same conclusive effect to the judgment of all the states so as "to promote certainty and uniformity in the rule among them."[19] As of the date of this writing, the Supreme Court has not struck down any congressional legislation that incorporates the Full Faith and Credit Clause of Article I as being beyond the scope of congressional authority.

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10. In the absence of controlling federal statutes regarding full faith and credit of tribal court judgments, states have the discretion to enact legislation that addresses the issue of recognition of tribal court orders.

11. 18 U.S.C. § 2265(a) (2000).

12. 25 U.S.C. § 1911(d) (2000). A federal mandate of full faith and credit is also addressed in the Child Support Orders Act, 28 U.S.C. § 1738(B) (2000). However, that Act will not be addressed in this article.

13. 28 U.S.C. § 1738 (2000).

14. *See infra* Part I.

15. *See infra* Part I.A.

16. *See infra* Part II.

17. *See infra* Part III.

18. U.S. CONST. art. IV, § 1.

19. Sandra J. Schmeider, *The Failure of the Violence Against Women Act's Full Faith and Credit Provisions in Indian Country: An Argument for Amendment*, 74 U. COLO. L. REV. 765, 771 (2003). The article cites *Atherton v. Atherton*, 181 U.S. 155, 160 (1901), in which the Court cited *Huntington v. Attrill*, 146 U.S. 657, 684 (1892). Also note that the 1901 Court did not include Indian tribes in the application of the Full Faith and Credit Clause of the U.S. Constitution. *Atherton*, 181 U.S. at 160.

Congress, since the "form[ation] [of] a more perfect Union,"[20] has had the plenary power to regulate Indian tribes.[21] Article I, Section 8, Clause 3 of the Constitution states, "The Congress shall have power to...regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[22] This unfettered control, held by the federal government to the detriment of all Indian tribes, allows for the Congress of the United States to extend the doctrine of full faith and credit into the realm of tribal jurisdiction at its own discretion.[23] As will be discussed later in this article, Congress has only extended the Full Faith and Credit Clause of the Constitution to tribal judgments in very limited circumstances.

Exercising their power annunciated in Article I of the Constitution, Congress enacted the Full Faith and Credit Act (FFCA).[24] The Act, as amended, reads as follows:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[25]

At first blush, the FFCA extends its constitutional benefits to "States" and "Territories or Possessions."[26] While the definition of "State" within the context of the FFCA has not generated much discourse within the legal community, the same cannot be said for the term "Territory."

A. "Territory" within the Full Faith and Credit Act

In examining whether the Full Faith and Credit Act's definition of "Territories" includes Indian tribes, it is important to look at the literal language of the statute, caselaw, and the effects of current Indian policy.

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20. U.S. CONST. pmbl.

21. Congress has maintained, and the Supreme Court of the United States has upheld, that the federal government, as a consequence of Chief Justice Marshall's identifying the Indian tribes as domestic dependent nations, has unyielding and unfettered power over the Indian nations and their efforts to exercise tribal sovereignty in every context. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

22. It should be noted that Chief Justice Marshall, when writing for the majority in *Worcester v. Georgia*, used this part of the U.S. Constitution, in addition to the Treaty Clause of Article II, Section 2, Clause 2, to justify his assertion that Congress has unfettered power to regulate Indian nations. *See Worcester*, 31 U.S. (6 Pet.) 515.

23. Throughout Indian law jurisprudence, and more recently in such pivotal cases as *Duro v. Reina*, Congress has continually exercised, and the Supreme Court of the United States dutifully recognized, Congress's ability to allow for Indian tribes, at the discretion of Congress, to exercise their sovereignty in a limited or expanded context. 495 U.S. 679 (1990).

24. 28 U.S.C § 1738 (2000).

25. *Id.*

26. *Id.*

The first question that must be addressed is whether the term "Territories," in general American jurisprudence, has ever included Indian tribes. It is important to look at the literal language of the statute to see if the dispositive answer lies within the writing itself. Examining the enumerated sovereigns that fall under the provisions of the Act, the terms "tribe" or "Indian Country" or "Indian land" are absent from the Act. It could be argued that, if Congress wanted to include Indian tribes in the FFCA, Congress would have added the term "Indian tribes" in the enumerated list. This argument is strengthened by the fact that Congress, in post-FFCA statutory creation, has explicitly stated when Indian tribes fall under the exercise of a particular act.[27]

Looking beyond the literal language of the statute, the congressional records of the Act are silent as to whether Indian tribes should benefit from the FFCA. It is a reasonable assumption that if the term "territories" was intended to encompass Indian tribes, then some member of the congressional body would have memorialized such an important classification in the congressional record.[28] This inclusion within the congressional record is noticeably absent.

B. Caselaw

Many prominent legal scholars, such as Felix Cohen, have pointed to one particular Supreme Court case that addressed the "Territory" issue, and they have concluded that tribes may fall within the definition of the term "Territory."[29] In 1856, the Supreme Court, in *Mackey v. Coxe*,[30] held that the term "Territory," as defined in the applicable federal probate statute, encompassed Indian tribes.[31] In constructing this holding, the *Mackey* Court contemplated the issue of whether an Indian tribe is a U.S. Territory.[32] Based on the United States and Cherokee Nation Treaty of 1835, which stipulated that the Cherokee Nation would adhere to the U.S. Constitution, the Supreme Court concluded that Indian nations were appropriately designated U.S. Territories.[33] The Court in *Mackey* did not, nor has it in any subsequent cases, determined whether Indian tribes are "Territories" under the Full Faith and Credit Clause of the Constitution.[34]

On the heels of *Mackey*, there were a few federal appellate decisions that addressed whether tribal judgments are afforded the right of full faith and credit. In 1893, the Eighth Circuit Court of Appeals held in *Mehlin v. Ice*[35] and *Exendine v. Pore*[36] that judgments derived from tribal courts are on the same footing as decisions

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27. *See* 18 U.S.C. § 2265 (2000).

28. David S. Clark, *State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization*, 23 OKLA. CITY U. L. REV. 353, 362 (1998) (citing Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997)).

29. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 275 (1942, reprinted 1971).

30. 59 U.S. (18 How.) 100 (1856).

31. *Id.* at 104.

32. *Id.* at 103.

33. *Id.* at 102–03. Again, this definition of territories was acknowledged by the Court to include Indian nations only in the context of the relevant federal probate statute that was at issue in the case.

34. Mackey v. Coxe, 18 U.S. (18 How.) 100 (1856).

35. 56 F. 12 (8th Cir. 1893).

36. 56 F. 777 (8th Cir. 1893).

and judgments derived from U.S. Territories.[37] However, in closely examining the opinions of the appellate court, it is quite clear that none have ever conclusively determined that tribes are indeed "Territories," and, thus, the precise question of whether the constitutional mandate of affording full faith and credit to Indian tribal judgments has still not been answered.

It can be argued, however, that *Mackey*, combined with the Eighth Circuit cases, shows that the federal courts have not been hesitant to place tribal courts on the same level as "Territories" of the United States, and, thus, full faith and credit should follow tribal judgments. These courts' recognition of the proper status of Indian tribes was never predicated on whether the parties involved in the tribal court judgment were Indian or non-Indian. The recognition by the federal and state judiciary was predicated solely on the *status* of the Indian tribe during the late nineteenth century.[38] The basis for this policy, while beneficial for tribes at the time,[39] is malleable and has dramatically changed with the passing of time. In fact, shortly after these pivotal cases were decided, a dramatic shift in federal Indian policy was initiated.[40] This shift in policy was sparked by the controversial decision in *Ex Parte Crow Dog*.[41]

As a consequence of *Ex Parte Crow Dog*, the Congress of the United States, pressured by the westward expansion into Indian land, enacted the Major Crimes Act.[42] This highly invasive action by Congress marked the first major incursion into the power of the Indian tribes to control their internal affairs based on their national sovereignty. The federal government assumed jurisdiction over the crimes; however, the exclusiveness of federal jurisdiction over the enumerated crimes remains

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37. *Mehlin*, 56 F. at 16; *see also Exendine*, 59 F. at 7780. It should be noted that other decisions from the Eighth Circuit Court of Appeals, such as *Standley v. Roberts*, 59 F. 836 (8th Cir. 1893), and *Cornells v. Shannon*, 63 F. 305 (8th Cir. 1894), also reinforced the idea that states should give full faith and credit to tribal orders in the same fashion as states giving full faith and credit to U.S. territories' judgments. Again, these post-*Mackey* cases do not equate tribes to territories. *See* Leeds, *supra* note 2, at 318–29.

38. See the "Marshall Trilogy" for an understanding of nineteenth century federal attitudes toward Indian sovereignty: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In general, the federal government's attitude toward the Indian nations during the nineteenth century is one of conquer and isolation. In the Marshall Trilogy, Chief Justice Marshall characterizes the Indian nations as people who were conquered by the newly arrived Europeans and the Indian nations were wholly dependent on the newly-minted federal government for guidance and protection.

39. The federal Indian policy was "beneficial" for the Indian nations at the time, but only in the context that the Supreme Court appeared, through its holding in *Mackey*, to follow the benefits of identifying Indian lands as "territories" to Indian nations. This recognition of Indian nations as "territories" under the federal probate statute in *Mackey* does recognize, in a limited fashion, Indian sovereignty that pre-dates the U.S. Constitution.

40. *Ex Parte* Crow Dog, 105 U.S. 559 (1883); *see also* B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Courts Relations*, 24 WM. MITCHELL L. REV. 457 (1998).

41. *Ex Parte Crow Dog* involved one Indian killing another Indian on Indian land. The Supreme Court of the United States reinforced the legally-based political autonomy of Indian tribes and found that the state had no jurisdiction in the case. *See* Leeds, *supra* note 2, at 322–23 (citing SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 110–18 (1994)).

42. Major Crimes Act, 18 U.S.C. § 1153 (2000). The legislative history of the Act clearly supports the proposition that the Act was a direct response to the decision in *Ex Parte Crow Dog*. Congress was outraged at the sentence handed down by the tribal court. One sponsor of the Act stated, "the law of the tribe...is just no law at all." *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 276 (1991) (quoting 16 CONG. REC. 934 (1885)).

unclear.[43] What is clear by the passage of the Major Crimes Act is that Congress would no longer abstain from being involved in the internal affairs of Indian tribes. This departure demonstrated that the U.S. government's view of Indian tribes, compared to the *Mackey* years, had changed dramatically.

C. *Current Indian Policy*

The last consideration directly relates to the status of Indian sovereignty in *today's* judicial and legislative climate. Relatively recent Supreme Court cases such as *United States v. Wheeler*,[44] *Oliphant v. Suquamish Indian Tribe*,[45] and *Duro v. Reina*[46] have reiterated that the sovereignty enjoyed by the modern Indian tribes is limited and restricted.[47] In *Duro*, the Court reinforced its earlier holding in *Wheeler*, holding that the sovereignty tribes currently enjoy is only that needed to control the tribes' internal relations and no more.[48] Despite these rulings, the long arm of the federal government has continued to disturb some of the internal relations of Indian tribes.[49] The federal government's view of Indian sovereignty during the *Mackey* years has dramatically diminished, and its current state is but a ghostly reflection of its pre-constitutional existence. Consequently, any deference that Congress or the Supreme Court afforded the Indian nations during the nineteenth century has all but disappeared.

With respect to state courts providing full faith and credit to tribal court judgments, it must be noted that some states, such as New Mexico and Washington, have afforded full faith and credit to tribal orders in certain cases.[50] However, the Supreme Court has not reviewed these cases, and an overwhelming majority of other states have been reluctant to follow the lead of their two sister states. Thus, reviewing the plain meaning of the statute (including the silence of the congressional record), caselaw, and today's shift in Indian policy, it would amount to judicial activism for the judiciary to interpret "Territory" to include Indian tribes within the meaning of the FFCA.

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43. The jurisdictional query in the Major Crimes Act arises out of the terminology Congress used in establishing which sovereign had jurisdiction over the enumerated crimes. Congress used the term "exclusive" when describing the federal government's jurisdiction to the said crimes. However, it is unclear whether the term "exclusive" abrogates Indian tribal courts, exercising their inherent sovereignty, to maintain jurisdiction over the said crimes, or whether such tribal jurisdiction is concurrent with the federal government's jurisdiction.

44. 435 U.S. 313 (1978).

45. 435 U.S. 191 (1978).

46. 495 U.S. 676 (1990).

47. *Wheeler*, 435 U.S. at 319; *Oliphant*, 435 U.S. at 200; *Duro*, 495 U.S. at 686.

48. *Duro*, 495 U.S. 676 (citing United States v. Wheeler, 435 U.S. 313 (1978)). The *Duro* Court emphasized the distinction between member and nonmember Indians in the realm of "internal relations." The Court recognized the ability of Indian tribes "to prescribe and enforce rules of conduct for its own members." *Id.* at 686.

49. *Id.*

50. Daina B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 740 (1996). The article cites *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (N.M. 1975), in which the New Mexico Supreme Court held that the Navajo Nation's laws are afforded full faith and credit, as provided by 28 U.S.C. § 1738, because the Navajo Nation satisfied the "territory" requirement of the Act. *Jim*, 87 N.M. at 363, 533 P.2d at 752. The Washington Supreme Court, in *In re Buehl*, 555 P.2d 1334 (Wash. 1976), came to the same conclusion as *Jim*. Both state courts found that Indian tribes satisfy the definition of "territories" for the purposes of the Full Faith and Credit Act.

In support of preserving Indian sovereignty and preventing further erosion of the ability of Indian tribes to self-govern, the doctrine of full faith and credit as expressed in the FFCA would challenge the essence of tribal government. In its current form, the FFCA demands that all sovereigns that fall under the Act shall not only have their judgments recognized, but they must recognize other sovereigns' judgments.[51] As Indian tribes struggle to reverse the lethal effects of assimilation, demanding that tribal courts recognize state judgments is counterproductive to the survival of Indian culture and norms. While it would be beneficial for tribes to have their orders given full faith and credit by the states, the price of reciprocity is too taxing and costly for Indian tribes. To impose the judgments of states, which have historically been unsupportive of Indian tribes,[52] would not support Indian self-government and would infect the Indian judiciary with state influence. This influence would soften the resistance of the Indian tribes to assimilation.

II. COMITY

A more sovereign-friendly path by which tribal orders can receive due respect from states involves the doctrine of comity. The federal government first recognized the doctrine of comity in the U.S. Supreme Court's decision in *Hilton v. Guyo*.[53] The *Hilton* Court laid the foundation for the acceptance of comity within the federal common law by stating:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.[54]

Over the years, many states have recognized tribal court judgments based not on a full faith and credit doctrine but on the principles of comity. Unlike the FFCA, which does not apply to judgments of foreign nations,[55] comity requires that the parties involved be foreign nations. Many states have determined that there is enough of a parallel between Indian tribes and foreign nations to satisfy this requirement of comity. Such states include Arizona, Minnesota, Montana, Oregon, North Dakota, South Dakota, and Wisconsin.[56] Consequently, these states have used

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51. 28 U.S.C. § 1738 (2000).

52. The federal government's reason for establishing a trust relation with the Indian tribes was based upon the notion that the states were often the tribe's deadliest enemies.

53. 159 U.S. 113, 202–03 (1895).

54. *Id.* This part of the case has been widely quoted in many articles addressing the use of comity with tribal court decisions. However, the authors of this article felt the necessity to include the quote in full.

55. *See* 28 U.S.C. § 1738 (1994).

56. Johnson, *supra* note 1.

the doctrine of comity to ensure that tribal court judgments are recognized outside of Indian country.[57]

A. *Foreign Nations—Comity*

While the Supreme Court has not recognized Indian tribes as "foreign nations" in relation to the U.S. Constitution,[58] the Court has failed to apply such reasoning to the term "foreign nations" within the context of comity.[59] A foreign nation is characterized by the *Hilton* Court as

> [a] sovereign [not] bound, unless by special compact, to execute within his [Foreign Nation] dominions a judgment rendered by the tribunals of another State; and if execution be sought...the tribunal...is, on principle, at liberty to examine into the merits of such judgments, and to give effect to it or not, as may be found just and equitable.[60]

Indian tribes are not "bound by special compact" to recognize other jurisdiction's judgments. Further, Indian tribes have the authority to execute, within their dominions, judgments rendered by tribunals of other jurisdictions. Therefore, there is a strong argument that Indian nations fall under the definition of "foreign nations" within the context of comity based upon *international* law.

B. *Standards of Comity*

The *Hilton* Court has identified certain standards that must be met before comity is applicable. The first standard requires that the parties in the case have been afforded an impartial tribunal and that the procedures used to litigate the matter were also impartial.[61] Second, the foreign court must have had territorial and subject matter jurisdiction over the original case.[62] Third, the judgment of the foreign nation must not be repugnant to a public policy associated with the recognizing nation.[63] Finally, the *Hilton* Court requires the nations to have reciprocity of judgment recognition in order for comity to be effective.[64] For example, a receiving nation can reject the judgment of a foreign nation, on a case-by-case basis, if a specific judgment violates the public policy of the receiving jurisdiction. Therefore, the purpose of comity, which is to preserve and respect foreign nations' sovereignty, is upheld. Comity, in its bare essence, upholds and demands that a nation's sovereignty be recognized and cherished.[65] A failure to give recognition to tribal judgments by foreign sovereigns, like states, weakens an Indian tribe's ability to control its internal relations.

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57. The use of comity by these states facilitates a path in which tribal court judgments transcend Indian land and recognition and enforcement of such judgments is expanded.

58. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

59. *Hilton*, 159 U.S. at 227; *see also* United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 496 U.S. 676 (1990).

60. *Hilton*, 159 U.S. at 166 (quoting WHEATON'S INTERNATIONAL LAW § 147 (8th ed.)).

61. *Id.* at 205.

62. *Id.*

63. *Id.*

64. *Id.* at 228.

65. *See Hilton*, 159 U.S. at 227.

In conclusion, tribes are most likely "foreign nations" under the doctrine of comity. Recognition of tribal judgments will vary from jurisdiction to jurisdiction based upon the differing attitudes toward comity and tribal court orders in general.

The next major section of this article addresses the third avenue regarding full faith and credit of tribal judgments: federal mandate. Congress has utilized its plenary power over Indians to promulgate a few federal statutes in critical areas that mandate states to give full faith and credit to tribal orders in certain types of cases, namely, tribal protection orders and tribal custody orders.

III. THE FEDERAL MANDATES OF FULL FAITH AND CREDIT OF TRIBAL PROTECTION ORDERS

A. Purpose of the Violence Against Women Act

The purpose of VAWA focuses on reducing all aspects of domestic violence and promoting victim safety.[66] One of the most common methods for victims of domestic violence to obtain court ordered protection is known as the protection order.[67] Prior to VAWA, protection orders were only enforceable within the jurisdiction that issued the order, leaving victims unprotected as they moved from jurisdiction to jurisdiction.[68] In 1994, Congress addressed this issue by inserting a federal mandate in VAWA's statutory language requiring states and tribes to give full faith and credit to each jurisdiction's protection orders if certain requirements are met.[69] VAWA requires certain substantive language to be included in the protection order to invoke the full faith and credit provisions of the Act.[70] A brief discussion of the Act and an analysis of the requirements to invoke the mandate follow.

1. Full Faith and Credit under VAWA

a. Protection Order Filing

The Act defines a protection order as "any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact

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66. 18 U.S.C. § 2265 (2000).

67. 18 U.S.C. § 2266(5) states:

> The term "protection" order includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente elite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

Id.; *see also* Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995).

68. *See* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 254, 257 (1995); *see also* Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001-2002).

69. 18 U.S.C. § 2265 (2000); *see also* S. Rep. No. 103-138, at 41.

70. 18 U.S.C. § 2265 (2000).

or communication with or physical proximity to, another person, issued in response to a complaint, petition, or motion filed by, or on behalf of, a person seeking protection"; this should be explicitly in the language of the protection order.[71] Therefore, the first requirement is a court filing by, or on behalf of, the person seeking protection. The additional requirements involve an analysis of subsection (b) of the Act: the protection order must be issued by a state or tribal court that has subject matter jurisdiction and in personam jurisdiction, and there must be reasonable notice and opportunity to be heard.[72] If the order is ex parte, the notice and opportunity to be heard must be granted within the time required by state or tribal law, or at least within a reasonable time after the ex parte order is issued.[73] Each of these requirements is addressed in order.

b. Subject Matter Jurisdiction

Subject matter jurisdiction is the power of a court to hear a certain type of case.[74] Subject matter jurisdiction cannot be consented to or waived by the parties.[75] A thorough review of the issuing court's constitution will assist in determining what types of cases a particular court has the power to hear.[76] However, determining tribal court jurisdiction over nonmembers in Indian Country is a vast, complex maze. This article will set forth some basic guidelines for obtaining criminal and civil subject matter jurisdiction in Indian Country since domestic violence protection orders may involve both criminal and civil issues.[77]

Criminal subject matter jurisdiction in Indian Country revolves around whether the batterer is an Indian or a non-Indian.[78] In cases involving non-Indians in Indian Country, the Supreme Court has ruled that tribes do not have criminal subject matter jurisdiction over non-Indians.[79]

Tribes have criminal subject matter jurisdiction over all member Indians for crimes arising within Indian Country, unless the tribe is located in a Public Law 280 state.[80] For purposes of this jurisdictional discussion, it is assumed that there is no Public Law 280 jurisdiction. In some instances,[81] the U.S. Attorney may exercise

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71. 18 U.S.C. § 2266(5) (2000).

72. 18 U.S.C. § 2265(b)(1)–(2) (2000).

73. 18 U.S.C. § 2266(b)(2) (2000).

74. *See* BLACK'S LAW DICTIONARY 856 (7th ed. 1999) (defining "judicial jurisdiction" as "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it"); *see also* 21 CJS § 10 (2003) (citing Sierra Life Ins. Co. v. Granata, 586 P.2d 1068 (Idaho 1978)).

75. Sosna v. Iowa, 419 U.S. 393, 398 (1975).

76. *Sierra Life Ins. Co.*, 586 P.2d at 1073 (quoting Boughton v. Price, 215 P.2d 286, 289 (Idaho 1950) ("Such jurisdiction the court acquires by the act of its creation and possesses inherently by its constitution....")).

77. For an in-depth explanation of civil jurisdiction in Indian Country, see Tatum, *supra* note 68, at 149–65.

78. *See Oliphant*, 435 U.S. 191. There is no federal definition of who is an Indian for purposes of criminal or civil jurisdiction. It is widely accepted that a member of a federally recognized tribe is an Indian for jurisdictional purposes. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 10 (4th ed. 2004).

79. *Oliphant*, 435 U.S. 191 (It is inconsistent with a tribe's dependent status to exercise criminal jurisdiction over non-Indians.).

80. Public Law 280 authorizes some states to exercise jurisdiction over criminal and certain civil matters in Indian Country. 18 U.S.C. § 1162 (2000); 25 U.S.C. §§ 1321–1326 (2000); 28 U.S.C. § 1360 (2000). Whether a tribe has jurisdiction over a matter should be reflected in the tribal code enacted by the tribe.

81. Major Crimes Act, 18 U.S.C. §§ 1152–1153 (2000); *see also* Assimilative Crimes Act, 18 U.S.C. § 13 (2000); CANBY, *supra* note 78, at 169 ("Tribes may exercise concurrent jurisdiction with the federal government over major crimes.").

concurrent subject matter jurisdiction with the tribe regarding criminal matters.[82] With respect to tribes exercising criminal jurisdiction over nonmember Indians, Congress has passed legislation commonly known as the "*Duro*-Fix."[83] The statute basically sets forth that tribes have always possessed criminal jurisdiction over all Indians, whether they are members or nonmembers of the tribe that is exercising jurisdiction over a matter.[84]

Civil subject matter jurisdiction in Indian Country is even more complex. Civil jurisdiction will require a finding of whether the parties are member or nonmember Indians,[85] keeping in mind that the Supreme Court has categorized all non-Indians and nonmember Indians into one class labeled "nonmembers" for civil jurisdictional purposes.[86] Another critical component of the analysis will include a distinction between trust and fee land.[87]

Civil subject matter jurisdiction involving Indians who are members of the tribe exercising civil jurisdiction over matters arising in the tribe's Indian Country is with the tribal court, unless limited by the tribal constitution or tribal codes.[88] *Montana v. United States*[89] sets forth a presumption that tribes do not have regulatory jurisdiction over nonmembers on fee land located in Indian Country, unless one

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82. Major Crimes Act, 18 U.S.C. §§ 1152–1153 (2000); *see also* Assimilative Crimes Act, 18 U.S.C. § 13 (2000). However, see also 18 U.S.C. § 1162(a), the mandatory provisions of Public Law 280, which state that the General Crimes Act and Major Crimes Act are inapplicable to Indian Country.

83. 25 U.S.C. § 1301 (1994).

84. United States v. Lara, 124 S. Ct. 1628 (2004). In *Lara* the Appellant was tried and convicted in tribal court and then tried for the same offense in federal court. The Appellant raised double jeopardy as a bar to the subsequent federal action. The issue in *Lara* was whether the "*Duro* Fix" federal statute is constitutional, and, if so, whether tribes exercise criminal jurisdiction over nonmember Indians as a result of inherent sovereignty or as a delegation of federal power via the "*Duro* Fix" statute. The Supreme Court held that Congress has the power to lift or relax restrictions previously imposed on tribal inherent authority. Hence, the exercise of tribal prosecutorial power over Lara originated from inherent tribal authority and not the federal government so no double jeopardy violation occurred. In essence, Lara had been tried by two separate sovereigns.

85. Montana v. United States, 450 U.S. 544, 565–66 (1981). The Court held that the tribe's domestic dependent sovereignty extended only to self-government of internal relations. The Court held that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe, unless one of two exceptions can be met: (1) if the nonmember entered into a consensual relationship with the tribe or its members or (2) if the conduct on the reservation threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe. *Id.*; *see also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980) (stating that for most practical purposes, nonmember Indians stand on the same footing as non-Indian residents on the reservation); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (referring to nonmembers, as opposed to tribal members, in the case despite the fact that the litigants were non-Indians).

86. Some reasons cited for treating nonmember Indians the same as non-Indians include (1) nonmembers may not know where tribal jurisdiction begins and ends; (2) the special nature of Indian tribunals as they differ from American courts; (3) tribal courts apply tribal law; (4) the U.S. Constitution does not apply to tribal courts; and (5) the nonmember, nor the non-Indian, consented to tribal jurisdiction, and neither can vote in tribal elections or participate in tribal governments. *See* Nevada v. Hicks, 533 U.S. 353 (2001) (Souter, J., concurring).

87. *See* CANBY, *supra* note 78, at 381–91. Some land is held in trust and, in some cases, the uses for the land are restricted by the federal government on behalf of tribal members; these lands are referred to as "Indian lands" or "aboriginal lands." Conversely, some land is held in fee simple, either by Indians or non-Indians, and is referred to as "fee land."

88. *Montana*, 450 U.S. at 565. For purposes of this jurisdictional section, assume the tribe is located in a non-Public Law 280 state. If the tribe is located in a Public Law 280 state, the state and tribe may have concurrent jurisdiction over civil matters or jurisdiction may vest exclusively with the state. Public Law 280 does not grant regulatory jurisdiction to the state.

89. *Id.* at 544.

prong of a two-prong test can be met.[90] In the first prong, the tribe must establish that the nonmember has entered into a consensual relationship with the tribe or its members.[91] Alternatively, in the second prong, the tribe must demonstrate that the nonmember's conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.[92]

Historically, the Supreme Court distinguished between regulatory and adjudicatory jurisdiction in civil matters involving nonmembers on fee land in Indian Country.[93] However, in *Strate v. A-1 Contractors*, the Supreme Court held that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction[94] and applied the *Montana* test to an adjudicatory jurisdiction case.[95] Thus, the *Montana* test appears to control in any tribal case involving the actions of a nonmember on fee land.[96]

For these reasons, the language of the protection order will need to address, in detail, the statutory authority or common law basis for exercising subject matter jurisdiction over civil or criminal cases. Furthermore, the *Montana* requirements, and how those requirements are satisfied, should be set forth in the language of the order, specifying if either of the parties is a nonmember Indian or a non-Indian, and should include the status of the land on which the cause of action arose.

c. In Personam Jurisdiction

Unlike subject matter jurisdiction, personal jurisdiction can be consented to and may be waived by the parties.[97] The next full faith and credit requirement of VAWA is that the issuing court must have jurisdiction over the person or in personam jurisdiction.[98] There typically is no issue of personal jurisdiction over a plaintiff as

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90. *Id.* at 565–66.

91. *Id.* at 565; *see Strate*, 520 U.S. at 456–57 (holding that an accident that occurred between nonmembers on a state highway did not meet the consensual relationship prong because the relationship between the parties was personal in nature, not commercial, as required by *Montana*).

92. *Montana*, 450 U.S. at 566. The Court in *Strate* held that the second prong of *Montana* should be read narrowly. In doing so, the Court held that the prong was not met in *Strate* since the accident, which occurred on a state highway within the reservation and was between two nonmembers, did not directly affect the political integrity, economic security, or health and welfare of the tribe. *See Strate*, 520 U.S. at 459; *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657–59 (2001); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that the second prong of the *Montana* test must be read narrowly).

93. *Strate*, 520 U.S. at 447–52. Prior to *Strate*, the Court distinguished civil jurisdiction in Indian Country as "regulatory" or "adjudicatory." Regulatory jurisdiction governed the tribe's power to regulate the conduct of persons in Indian Country, *Montana*, 450 U.S. at 565, while adjudicatory jurisdiction denotes the power of the tribe to adjudicate the case. *See* Williams v. Lee, 358 U.S. 217, 220 (1959).

94. *Strate*, 520 U.S. at 453.

95. *Id.* at 456–60. *Strate* involved a car accident between nonmembers that occurred on the reservation, but on a state highway that ran through the reservation. Although the nonmember Plaintiff was a widow of a tribal member, had children who were tribal members, and resided on the reservation, *id.* at 442–43, the Court held there was no adjudicatory jurisdiction in the case because, under the *Montana* analysis, there was a presumption against finding tribal court jurisdiction unless one of the two *Montana* exceptions applied. *Id.* at 456–60. The Court went on to state that a finding of the second *Montana* exception ("directly affects the political integrity, economic security, health and welfare of the tribe"), based upon the tribe's interest in safe driving, would severely shrink the *Montana* rule. *Id.* at 457–58.

96. However, see *Nevada v. Hicks*, 533 U.S. 353 (2001), for the Supreme Court's latest declaration regarding the weight to be given to the status of the land when applying the *Montana* test.

97. Hoffman v. Blaski, 363 U.S. 335, 343 (1960).

98. 18 U.S.C. § 2265(b)(1) (2000).

that person has consented to jurisdiction by filing the suit. There are three bases for personal jurisdiction over the defendant: (1) personal service on a defendant while the defendant is physically present in the jurisdiction, irrespective of domicile;[99] (2) establishing that the defendant has minimum contacts with the jurisdiction such that an exercise of personal jurisdiction over the defendant would not offend traditional notions of fair play and substantial justice;[100] or (3) establishing that a defendant comes into a jurisdiction and commits a tortious act while in the jurisdiction.[101]

The protection order language should set forth, with specificity, how the tribal court established personal jurisdiction over the defendant, citing to the tribal code and the tribal constitution, in addition to the *Montana* factors set forth above.

d. Due Process

Due process[102] protects against fundamental unfairness by requiring, among other things, that parties receive the procedural protections of notice and an opportunity to be heard.[103] VAWA requires that the constitutional mandate of due process be satisfied.[104] Therefore, the protection order language should set forth what type of notice and opportunity to be heard was afforded the defendant, and that the requirement of due process was satisfied. Service by publication is highly questionable in this type of proceeding and requesting a continuance of the ex parte order is perhaps the best way to continue the case until personal service can be obtained.

e. Dual Protection Orders

VAWA places limitations on the validity of mutual protection orders in two ways. First, each party must file a request for a protection order with the court. Second, the court must make specific findings of fact regarding why each party is entitled to a protection order.[105] In addition, all of the other substantive requirements of VAWA, set forth above, must be included in the language of the protection order.

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99. Pennoyer v. Neff, 95 U.S. 714 (1877).

100. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

101. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). However, see analysis of tribal civil and criminal jurisdiction set forth in this section at Part III.A.1.b.

102. The Fourteenth Amendment of the U.S. Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV. Procedural due process protects against fundamental unfairness by requiring parties to receive notice and have an opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

103. *Armstrong*, 380 U.S. at 550.

104. 18 U.S.C. § 2265(b)(2) (2000).

105. 18 U.S.C. § 2265(c); *see also* Jennifer Paige Hanft, *What's Really the Problem with Mutual Protection Orders?*, 22 WYO. LAW. 22 (1999).

2. What Is Not Included in VAWA

VAWA does not cover federally issued orders.[106] Thus, orders issued by CFR courts (Courts of Indian Offenses)[107] are not included in the Act's protections and full faith and credit mandate.[108] CFR courts were created by the Bureau of Indian Affairs as a method of maintaining law and order in Indian Country.[109] In addition, the Act, by its provisions, does not extend the full faith and credit requirements to child support orders or tribal custody orders.[110]

3. Drafting Tribal Court Protection Orders That Require Full Faith and Credit

In addition to the mandatory language set forth above, the order should also set forth detailed findings regarding the danger to the victim and the need for the order of protection. The duration of the order should be included. If the order pertains to custody of children, the order should state, with specificity, the statutory source entitling the custody order to full faith and credit, such as the Parental Kidnapping Prevention Act (PKPA),[111] the Uniform Child Custody Jurisdiction Act (UCCJA),[112] the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA),[113] or the Indian Child Welfare Act (ICWA).[114] These requirements are addressed more fully in the section addressing full faith and credit of tribal custody orders.

The order should set forth contact information, such as the clerk's name and telephone or fax number, where the enforcing jurisdiction can ask for additional information if needed. The order should cite to VAWA and state that the order's provisions meet all of the full faith and credit requirements. The order should also provide that all parties have been informed of the scope and terms of the order. Further, the order may provide a notice that sets forth what acts amount to a violation of the order. All parties should be provided with a copy of the order and that fact should also be noted in the order itself.

Some jurisdictions provide a protection order coversheet that sets forth that the requirements of VAWA have been met. Tribes should create their own coversheets since law enforcement officers may tend to enforce orders of protection that look familiar to them. In addition, VAWA's federal gun law provisions require the order

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106. *See* 18 U.S.C. § 2265(a) (2000) ("[A]ny protection order issued that is consistent with subsection (b) of this section by a court of one State or Indian tribe...."); 18 U.S.C. § 2266(8) (2000) ("[T]he term 'State' includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.").

107. In 1883, CFR (Code of Federal Regulations) courts were created by Congress to be utilized as federal educational and disciplinary tools to civilize the Indians. Neither the courts, nor the codes found in 25 CFR, were tailored to reflect Indian cultures. *See* CANBY, *supra* note 78, at 20.

108. *See* 18 U.S.C. §§ 2265–2266 (2000). A CFR court is neither a state court nor a tribal court. The CFR courts were created by Congress and are governed by 25 C.F.R. As such, CFR Courts are more akin to a federal/tribal hybrid.

109. *See generally* VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113–15 (1983).

110. *See* CANBY, *supra* note 78, at 20.

111. 28 U.S.C. § 1738A (2000). The language of the PKPA does not address tribes, but at least one court has held that tribes are states for purposes of the PKPA. *See* E. Band of Cherokee Indians v. Larch, 872 F.2d 66, 68 (4th Cir. 1989).

112. UNIF. CHILD CUSTODY JURISDICTIONAL ACT, 9 U.L.A. 261 (1999).

113. *Id.* at 649.

114. 25 U.S.C. § 1911 (2000).

to contain language finding that the defendant is a credible threat to the physical safety of the intimate partner or the child, and the terms of the order must explicitly prohibit the use, attempted use, or threatened use, of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.[115]

In conclusion, all protection orders issued by a tribe must contain specific language to invoke the full faith and credit mandates of VAWA, which requires tribal and state jurisdictions to work together to promote victim safety and hold batterers accountable. Victim safety requires further congressional action to close the jurisdictional loopholes in Indian Country created by the Supreme Court, preferably by returning territorial jurisdiction to Indian nations.

4. Enforcement of Protection Orders by States and Tribes

VAWA's full faith and credit provisions include the power to recognize and enforce protection orders. VAWA requires the enforcing jurisdiction to enforce a protection order issued by another state or tribe as if it were the order of the enforcing jurisdiction.[116] The enforcing jurisdiction cannot refuse to enforce the order, even if the terms of the order could not have been obtained in the enforcing jurisdiction.[117] This mandate presents some interesting and complex jurisdictional queries as the Act did not take into consideration the differences between state and tribal jurisdictional issues.

VAWA sets forth that "tribal courts 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."[118] Thus, the question becomes whether the Act intended to alter or expand tribal civil jurisdiction. A likely interpretation is that it did not expand tribal civil jurisdiction since it used the phrase "in matters arising within the authority of the tribe." Thus, the jurisdictional parameters for tribal court civil jurisdiction, set forth above, most likely still apply.

Batterers who are not Indian themselves committed seventy percent of the violence experienced by Indian victims of domestic violence.[119] Tribes should consider establishing clear-cut civil penalties for violations of a protection order within its jurisdictional boundaries, such as fines, posting of peace bonds, exclusion from tribal lands, and even imprisonment for civil contempt,[120] all in an effort to force compliance with protection orders. Tribes should also consider promulgating

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115. 18 U.S.C. § 922(g)(8).

116. *Id.*

117. *Id.*

118. 18 U.S.C. § 2265(e) (2000).

119. U.S. Dept. of Justice, Bureau of Justice Statistics, *American Indians and Crime*, Feb. 1999, *available at* http://www.ojp.usdoj.gov/bjs/abstract/aic.htm.

120. *See* 18 U.S.C. § 2265(e) (2000). However, note that at least one author has indicated that the full faith and credit provisions of VAWA are not self-authenticating, and thus require tribes to enact legislation to invoke the mandates of VAWA. Schmieder, *supra* note 19. However, the more likely analysis is that VAWA's full faith and credit provisions are a clear federal mandate that does not require states or tribes to enact legislation to invoke the mandate. *See* Sarah Deer & Melissa L. Tatum, *Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements: A Response to Sandra Schmieder*, 39 TULSA L. REV. 403 (2003).

statutes that require a court filing by, or on behalf of, the person seeking protection, as well as procedures and timelines for obtaining orders of protection.[121] In addition, tribal governments, when enacting civil legislation that will include jurisdiction over nonmember Indians and non-Indians, should set forth in the resolutions or meeting minutes details explaining how the issue involves a nonmember's consensual relationship with the tribe or its members, or how that nonmember's conduct directly affects the tribe's political integrity, economic security, or the health and welfare of the tribe.[122] Tribes should also consider establishing procedures for recognizing orders of protection from other jurisdictions.[123]

Tribes may establish criminal penalties for violations of protection orders. However, tribal courts do not have criminal jurisdiction over non-Indians.[124] In many instances, this causes a jurisdictional void in the criminal realm when it comes to non-Indian violations of protection orders that occur in Indian Country.[125] In addition, the state will not have criminal jurisdiction over a non-Indian that violates a protection order in Indian Country, unless the state has jurisdiction under Public Law 280.[126] The U.S. Attorney may have jurisdiction over the non-Indian violator,[127] but in reality will not exercise jurisdiction unless the injuries to the victim were egregious.[128] The failure of Congress to address the jurisdictional difference between tribes and states undercuts the purpose of the Act by ignoring the fact that tribes cannot prosecute non-Indians for protection order violations that occur in Indian Country. This gap in jurisdiction is extremely dangerous for victims. Congress must address this discrepancy by further legislation granting tribes the ability to prosecute and enforce violations of all protection orders occurring in Indian Country, irrespective of the identity of the violator.

Since VAWA's full faith and credit statutes do not cover child custody orders, the next section of the article will address the purpose and substantive requirements of the ICWA and other key statutes that provide an avenue for full faith and credit of tribal custody orders.

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121. Samples of tribal domestic violence codes, including model tribal domestic violence codes, can be found at Tribal Court Clearing House, Domestic Violence Resources, *at* http://www.tribal-intitute.org/lists/domestic.htm (last visited Apr. 28, 2004).

122. Montana v. United States, 450 U.S. 544, 565–66 (1981).

123. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

124. *Id.*

125. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that it was inconsistent with the tribes' domestic dependent status to exercise criminal jurisdiction over non-Indians. Therefore, the tribes have no criminal jurisdiction over non-Indian violators of Protection Orders.

126. *See* 18 U.S.C. § 1162 (2000); 25 U.S.C. §§ 1321–1326 (2000); 28 U.S.C. § 1360 (2000).

127. Major Crimes Act, 18 U.S.C. §§ 1152–1153 (2000); *see also* Assimilative Crimes Act, 18 U.S.C. § 13 (2000). However, see 18 U.S.C. § 1162(a), the mandatory provisions of Public Law 280, which state that the General Crimes Act and Major Crimes Act are inapplicable to Indian Country. Note that the United States will not have jurisdiction over crimes committed in Indian Country by a non-Indian against a non-Indian. *See generally* United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896).

128. U.S. Attorneys experience high caseloads and are not equipped to handle all of the criminal cases in Indian Country allowed by federal law. Therefore, only the cases that demonstrate the most egregious violations have a realistic probability of being prosecuted.

IV. THE FEDERAL MANDATES OF FULL FAITH AND CREDIT OF TRIBAL CUSTODY ORDERS

A. Purpose of the Indian Child Welfare Act

The Indian Child Welfare Act was codified as a result of Indian children having been taken from their families and tribes and placed in foster-care homes that were primarily non-Indian.[129] Ninety percent of the Indian children that were adopted were placed in non-Indian homes.[130] Congress, with the enactment of ICWA, wanted to change the former policy and promote and preserve the unique nature of Indian traditions and culture.[131] Congress states that the policy and purpose behind ICWA is to "promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards...which will reflect the unique values of Indian culture."[132]

B. ICWA's Full Faith and Credit Provisions

ICWA has a provision in which states must recognize tribal orders that arise out of custody proceedings involving an Indian child. Specifically, the Act states:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[133]

In examining the literal language of the full faith and credit provision of ICWA, the United States, all states, and all territories or possessions of the United States, must recognize *all* Indian child custody orders derived from tribal courts.[134] This section of ICWA provides for recognition of tribal court orders by other Indian tribes, states, and the federal government, with some limitations.

The first limitation is that the court orders that are afforded full faith and credit must be derived from Indian tribes.[135] States and federally-derived orders are not afforded full faith and credit under ICWA.[136] Second, only tribal orders involving custody proceedings regarding Indian children satisfy this section of ICWA.[137] Custody proceedings, as defined in ICWA, involve a vast array of cases: foster care

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129. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–37 (1989) (citing Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1978)).

130. *Holyfield*, 490 U.S. 30 (citing Indian Child Welfare Program, *Hearings Before the Subcommittee on Indian Affairs of the Senate Committee of Interior & Insular Affairs*, 93rd Cong. 75–83 (1974) (statement of William Byler)).

131. *See* 25 U.S.C. § 1902 (congressional declaration of policy).

132. *Id.*

133. 25 U.S.C. § 1911(d) (full faith and credit to public acts, records, and judicial proceedings of Indian tribes).

134. *Id.*

135. *Id.*

136. However, states are afforded full faith and credit from the Full Faith and Credit Act derived from the Full Faith and Credit Clause of the U.S. Constitution.

137. 25 U.S.C. § 1911(d) (full faith and credit to public acts, records, and judicial proceedings of Indian tribes).

placements, termination of parental rights, pre-adoptive placements, and adoptive placements.[138] Most noticeably absent from the definition is custody determined through a divorce decree.[139] The third limitation involves the term "Indian Child." This type of person is defined as any unmarried person, under the age of eighteen, who is a member of a tribe or is eligible for membership of a tribe and is the biological child of a member of a tribe.[140]

Therefore, ICWA allows for full faith and credit to follow tribal orders that involve custody proceedings of a child who is a member of a tribe or who is eligible for membership and is the biological child of a tribal member.[141] This recognition of tribal orders transcends the boundaries of ICWA as it does not limit its full faith and credit mandate to include only orders that arise out of, or are made consistent with, ICWA.[142] For example, if a tribal court issues a custody order that is not consistent with ICWA's provisions, or is made independent of ICWA, the tribal order (as defined by ICWA) will enjoy full faith and credit, as long as it involves an Indian child (as defined by ICWA), and the order involves a custody proceeding (as defined by ICWA).

Some states have liberally applied ICWA's full faith and credit clause. In Mississippi, the state supreme court recognized, in a custody dispute, that full faith and credit can be given to *any* tribal order that can be attributed to a custody proceeding.[143] The state supreme court in Alaska, however, has a much narrower view of ICWA's full faith and credit mandate. The court there concluded that ICWA does not apply to tribal court custody disputes between Indian parents and, therefore, full faith and credit also does not apply.[144] This interpretation by Alaska and its supporting states limits the applicability of full faith and credit under ICWA to just ICWA-based cases. However, as already presented, the literal language of section 1911(d) of ICWA does not limit full faith and credit to just ICWA-derived cases.

Finally, the fourth limitation involved with ICWA's full faith and credit mandate of tribal orders is that the state's recognition of tribal orders must be of the same degree as the state's recognition of other "entity's" (state's) orders.[145] One interpretation is that ICWA mandates that states recognize, in the same fashion and extent, tribal custody orders involving Indian children as they would any sister state's orders under the Full Faith and Credit Act. However, a second interpretation requires states to recognize tribal custody orders to the same "extent" as states

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138. 25 U.S.C. § 1903(1).

139. *Id.*

140. 25 U.S.C. § 1903(4).

141. *See* 25 U.S.C. § 1902. ICWA's full faith and credit clause does not mandate that the child must be eligible for membership in the tribe in which the biological parents are members. 25 U.S.C. § 1911(d).

142. Of great import is the fact that the provisions of ICWA are not binding on tribes unless the issuing tribe has copied these ICWA revisions into its tribal code. B.J. JONES, INDIAN CHILD WELFARE ACT HANDBOOK (1995). In other words, tribes do not have to follow ICWA's provisions unless the tribe has adopted ICWA into the tribal code. However, ICWA provisions will bind state court adjudications in relevant cases and will also require enforcement and recognition of tribal court orders that meet ICWA requirements.

143. *In re* B.B., 511 So. 2d 918 (Miss. 1982), *rev'd*, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

144. John v. Baker, 982 P.2d 738 (Alaska 1999).

145. *See* 25 U.S.C. § 1903.

recognize another state's custody orders, namely through the Parental Kidnapping Prevention Act (PKPA).

C. *PKPA's Purpose*

PKPA was enacted by Congress as a result of several problems arising out of the state court systems in the area of custody disputes.[146] It was observed that parties involved in custody cases were seizing the children involved and fleeing to different jurisdictions in order to obtain favorable custody orders. In some cases, children were transported across state lines, even after a custody determination had already been made in the original state. As a result, custody orders were not uniformly recognized, conflicting orders were often obtained, and excessive litigation clogged the court system.[147] Congress intended PKPA to bring uniformity to the recognition of custody orders throughout the country.

D. *PKPA's Full Faith and Credit Provisions*

Like ICWA and VAWA, PKPA also has a version of full faith and credit. In general, PKPA provides the framework as to which custody orders shall be given full faith and credit in sister states. PKPA provides the following: "The appropriate authorities of every State shall enforce according to its terms...any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."[148] The term "state" is defined in PKPA as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States."[149] While PKPA's definition of "state" does not include Indian tribes specifically, many state courts have interpreted PKPA to be applicable to Indians. For example, in a divorce case, the Washington Appeals Court concluded that PKPA applies to custody and visitation orders entered by tribal courts.[150] Some federal circuit courts have also determined that PKPA's full faith and credit provision applies to tribes because tribal court orders, under certain circumstances, are entitled to full faith and credit, and tribes are similar to states for the purpose of sovereignty and jurisdiction.[151]

While not actually written in the text of PKPA, some tribal courts have applied the full faith and credit provision of PKPA to tribal court cases that arise out of the PKPA. A Mashantucket Pequot tribal court addressed the issue of whether PKPA is applicable to tribal court decisions.[152] The court concluded that PKPA does apply to tribal decisions, even if not explicitly stated in the Act.[153] However, in the particular case before the tribal court, there was no previous order, so the court ruled that PKPA's substantive requirements were not satisfied and the Act did not

146. 28 U.S.C. § 1738A.
147. *Id.*
148. 28 U.S.C. § 1738A(a).
149. 28 U.S.C. § 1738A(b)(8).
150. *In re* Marriage of Susan C. & Sam E., 60 P.3d 644, 648–50 (Wash. Ct. App. 2002).
151. *See, e.g.*, E. Band of Cherokee Indians v. Larch, 872 F.2d 66, 68 (4th Cir. 1989).
152. Father v. Mother, No. 3 Mash. 204, ¶ 34 (1999).
153. *Id.*

apply.[154] It must be noted that PKPA's full faith and credit is limited to only those custody orders that satisfy PKPA's requirements.[155]

E. PKPA's Substantive Requirements

In order for PKPA's full faith and credit section to be applicable to tribal orders, states must not only interpret the term "state" to include Indian tribes, but PKPA's substantive requirements must also be followed. First, the tribal court issuing the original order must have jurisdiction based on tribal law.[156] In addition, the tribe must satisfy the jurisdictional requirements of section 1738(A)(c)(2)[157] and the Act's due process requirements.[158]

There are also two other ways to obtain full faith and credit for tribal custody orders: the Uniform Child Custody Jurisdiction Act (UCCJA)[159] and the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).[160]

F. UCCJA and UCCJEA

The UCCJA was drafted in 1968 and was enacted by all fifty states over the subsequent decade.[161] The purpose of UCCJA was to bring uniformity by eliminating multiple, inconsistent custody orders.[162] The Act's purpose also included

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154. *Id.*
155. 25 U.S.C. § 1738A(a).
156. 25 U.S.C. § 1738A(c)(1).
157. 25 U.S.C. § 1738A(c)(2)(A). Jurisdictional basis for custody determinations is as follows:
(A) such State
(i) is the home State of the child on the date of the commencement of the proceeding, or
(ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
(B) (i) it appears that no other State would have jurisdiction under paragraph (A), and
(ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have significant connection with such State other then mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
(C) the child is physically present in such State and
(i) the child has been abandoned, or
(ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;
(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and
(ii) it is the best interest of the child that such court assume jurisdiction; or
(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.
Id.
158. 25 U.S.C. § 1738(A)(e).
159. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999).
160. UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT, 9 U.L.A. 649 (1999).
161. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 262–65, prefatory note.
162. *Id.* § 1, 9 U.L.A. 271.

a desire to deter and prevent parental abduction of children across state lines.[163] In addition, the Act was codified in order to reduce re-litigation of custody decisions and promote and expand the exchange of information between courts of different states.[164]

The Uniform Child Custody Jurisdiction Enforcement Act was promulgated thirty years after the UCCJA and accomplishes two major purposes. First, the Act provides clearer standards by which a state can exercise original jurisdiction and provides a standard for continuing jurisdiction.[165] Second, the Act provides a uniform procedure for interstate enforcement of custody orders.

G. UCCJA—Recognition of Out-of-State Custody Decrees

The UCCJA does provide for one state to recognize another state's custody order, as long as certain requirements are met.[166] The first requirement is that the custody order be from a "state" court. The term "state" in the UCCJA means any state, U.S. territory or possession, the Commonwealth of Puerto Rico, and the District of Columbia.[167] The term "Indian tribes" is not included in the definition and some state courts have determined that since the term is absent, tribes do not fall under the application of the UCCJA.[168] However, other state courts have interpreted "state" to include Indian tribes. In *Martinez v. Superior Court*,[169] the Arizona Court of Appeals stated that an Indian tribe qualifies as a territory of the United States and, therefore, an Indian tribe is a "state" for UCCJA purposes.[170] The Washington Appeals Court embraced the *Martinez* decision and concluded that the term "state" within the UCCJA does include Indian tribes.[171]

The second UCCJA requirement for recognition of out-of-state custody orders is that the state that rendered the original decision have substantially complied with the UCCJA.[172] If the original state did not adopt the UCCJA, then the original state must have jurisdictional requirements substantially similar to those of the UCCJA.[173] If either of these requirements is not met, then the original state must have had jurisdiction, under the facts of the case, as if the UCCJA had been the law in the state.[174]

Despite this section of the UCCJA, which affords full faith and credit to state orders, the recognition is not mandatory. State courts have the discretion to adopt all, part, or none of the UCCJA.[175] Therefore, states have full discretion in determining whether they want to give tribes full faith and credit under the UCCJA. In 1980, Congress recognized this flaw in the UCCJA and rectified its mistake

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163. *See id.* § 1, 9 U.L.A. 271.
164. *Id.*
165. *Id.* 9 U.L.A. 650.
166. *Id.* § 13, 9 U.L.A. 559.
167. *Id.* § 2(10), 9 U.L.A. 286–87.
168. *In re* Custody of Stagstock, 477 N.W.2d 310, 314 (Wisc. Ct. App. 1991).
169. 731 P.2d 1244 (Ariz. Ct. App. 1987).
170. *Id.* at 1247.
171. *In re* Marriage of Susan C. & Sam E., 60 P.3d 644, 648–51 (Wash. Ct. App. 2002).
172. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 580 (1999).
173. *Id.*
174. *Id.*
175. *Id.*

through the enactment of PKPA which, as already discussed, requires states to accord full faith and credit to custody decrees of sister states.[176]

H. UCCJA's Procedural Requirements

Before a state can recognize a tribal court order for custody (this is after the state court has determined that Indian tribes satisfy the UCCJA definition of "state"), notice to all parties must be given.[177] In addition to notice, all parties must be afforded reasonable opportunity to be heard.[178] If one of the parties is outside of the state, notice to such person must be "given in a manner reasonably calculated to give actual notice."[179]

In determining original jurisdiction, the Act provides four different jurisdictional bases: home state, significant connections, emergency, and last resort. These jurisdictional bases are not prioritized within the UCCJA. In addition, complying with the UCCJA does not always equate to compliance with PKPA. Based upon this fact, and the gaps and ambiguities in the UCCJA, the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) was drafted to provide a more uniform jurisdictional approach to custody disputes and ensure compliance with the PKPA.

I. UCCJEA's Purpose

It is important that practitioners not only understand the requirements of both the UCCJA and the UCCJEA, but they should also have a working knowledge of how they are similar and different from one another. This knowledge is especially beneficial when a practitioner is involved in a case that has passed through the state's jurisdiction and has been exposed to both the UCCJA and the UCCJEA.

The UCCJEA has addressed some problems that arose out of, or were never addressed in, the UCCJA. First, the UCCJEA prioritizes home state jurisdiction where the UCCJA provided no such clarification.[180] Second, unlike the UCCJA, the UCCJEA allows for domestic violence to form the basis of emergency jurisdiction.[181] Third, the UCCJEA is clear that the decree-granting state retains exclusive jurisdiction to modify a decree under certain circumstances; the UCCJA was less clear.[182] Fourth, the UCCJEA specifies exactly which custody proceedings are governed by the Act,[183] since states using the UCCJA were confused as to which proceedings were covered.[184] Fifth, the UCCJEA eliminates the UCCJA's "best interest of the child" language, which had left the door open for re-litigation of

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176. Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N. D. L. REV. 301, 303 (1999) (citing Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 274 (1996)).

177. UNIF. CHILD CUSTODY JURISDICTION ACT § 4, 9 U.L.A. 458 (1999).

178. *Id.*

179. UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT § 5(a), 9 U.L.A. 466 (1999).

180. *Id.* § 201, 9 U.L.A. 671.

181. *Id.* § 204, 9 U.L.A. 676.

182. *Id.* § 203, 9 U.L.A. 676.

183. *Id.* § 102, 9 U.L.A. 658.

184. *Id.* 9 U.L.A. 651–52.

custody cases, and, thus, the jurisdictional and substantive standards of the UCCJEA are clearly defined.[185] Finally, the overall structure and substance of the UCCJEA is more closely in compliance with the Parental Kidnapping Prevention Act (PKPA)[186] than is the UCCJA.

J. Recognition of Tribal Orders under the UCCJEA

The UCCJEA has a section allowing for states to recognize and enforce custody orders derived from tribal courts. States, under the UCCJEA, shall recognize and enforce other states' child-custody determinations if such determinations were made "under factual circumstances meeting the jurisdictional standards of this Act and the determination has not been modified under this Act."[187] The term "states," as used in the UCCJEA, does not explicitly include Indian tribes. However, section 104 declares that states are to treat Indian tribes the same as other states when applying the UCCJEA.[188] Consequently, when tribal courts make a child-custody determination that is substantially consistent with the UCCJEA, states must recognize and enforce such determination.

As a consequence of the UCCJEA prioritizing home state jurisdiction as superior to the other jurisdictional standards, the loophole created by the UCCJA is resolved. Further, the UCCJEA brings custody orders into compliance with the PKPA and the Uniform Interstate Family Support Act.

In conclusion, by understanding how ICWA, PKPA, UCCJA, and UCCJEA work together, and at times in opposition to one another, a practitioner can ensure that tribal child-custody orders will receive the due respect and enforcement by the states. This, in turn, will create uniformity among child-custody orders and allow for Indian children to have the best chance for a stable and fulfilling life while preserving the sanctity and strength of the Indian nation's sovereignty.

CONCLUSION

Recognition of tribal judgments is a fundamental aspect in the exercise and expansion of tribal sovereignty. The Full Faith and Credit Act may prove to be futile for practitioners seeking recognition of tribal judgments in state courts. The plain language of the statute, including the absence of clear congressional intent, coupled with common law and the current status of federal Indian policy, prevents Indian tribes from being considered "territories" under the Full Faith and Credit Act. However, the exercise of comity, within the framework of state recognition of tribal judgments, yields a more productive and stable result. Indian tribes, under the protections afforded by international law, can fall within comity's definition of foreign nations, and, thus, the benefits afforded by the doctrine of comity can be realized for tribal judgments.

The federal statutory full faith and credit schemes involving protection orders and child-custody orders through VAWA and ICWA provide strength to tribal orders by

185. *Id.* 9 U.L.A. 652.
186. PARENTAL KIDNAPPING PREVENTION ACT, 28 U.S.C. § 1738A.
187. UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT § 13, 9 U.L.A. 673 (1999).
188. *Id.* § 104(b), 9 U.L.A. 661.

requiring recognition and enforcement of those orders. In exercising full faith and credit under VAWA, it is important that the Act's jurisdictional requirements be explicit in the tribal order. To receive the full faith and credit mandated by ICWA requires a practitioner to ensure that the case in which the tribal custody order is created satisfies one of the enumerated types of custody orders outlined in ICWA, and that the child involved falls within ICWA's definition of "Indian Child." In conjunction with the federal mandates of VAWA and ICWA, the PKPA, the UCCJA, and the UCCJEA may also provide support for tribal custody orders across jurisdictional bounds.

Practitioners will be better equipped to address the issue of full faith and credit of tribal court orders by taking advantage of the avenues outlined in this article. Recognition and enforcement of tribal court orders will support tribal sovereignty and the sanctity of all Indian nations.