

NOTE

THE NEED FOR SPECIAL TRIBAL CRIMINAL JURISDICTION OVER DRUG CRIMES

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INTRODUCTION

“YOU HAVE NO JURISDICTION OVER ME. THE COUNTY MIGHT, THE FEDS MIGHT, BUT YOU DON’T,”¹ proclaimed a non-Indian drug dealer during a May 2024 exclusion hearing convened by the Tribal Council of north-central Montana’s Fort Belknap Indian Community.² Fort Belknap Chief of Police Joshua Roberge testified that Tribal law enforcement had uncovered that the non-Indian offender possessed a large amount of methamphetamine, had beaten a Tribe member, and maintained a history of committing drug crimes, yet expressed little fear of any consequences the Tribe might impose on him.³ This offender’s attitude exemplifies the invincibility many non-Indians feel in Indian country following the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*, while limited law enforcement resources leave already-remote Tribal communities feeling vulnerable amid the drug crisis ravaging their reservations.⁴ For example, Tribes reported almost 1,600 fatal and 900 non-fatal overdoses in fiscal year 2023 alone.⁵

This crisis showcases both the continued erosion of trust between Tribes and the United States government, and the disastrous aftermath of the Supreme Court’s decision in *Oliphant*, which significantly limited Tribes’ ability to prosecute non-Indian individuals accused of committing criminal offenses on Indian reservations.⁶ The *Oliphant* decision capped nearly two centuries of Congressional and federal judicial activity responsible for shrinking Tribal criminal jurisdiction.⁷ Various changes to statutory and common law since the 19th century have granted the federal government exclusive jurisdiction in certain cases and excepted offenders from prosecution depending on their own or their victims’ Indian status.⁸ These changes have created a sort of “jurisdictional maze” in Indian country which confuses law enforcement and shields perpetrators from accountability. Poor intergovernmental coordination owing to a lack of cross-deputization

¹ *Biden’s Border Crisis: Examining Efforts to Combat Int’l Crim. Cartels & Stop Illegal Drug Trafficking Targeting Indian Country: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Nat. Res.*, 118th Cong. 23 (2024) [hereinafter *Int’l Crim Cartels Hearing*] (statement by Joshua Roberge, Fort Belknap Indian Community Chief of Police).

² *Id.*

³ *Id.*

⁴ *Id.* at 23-24.

⁵ *Opportunities and Challenges for Improving Public Safety in Tribal Communities: Hearing Before the Subcomm. on Indian and Insular Affs. of the H. Comm. on Nat. Res.*, 118th Cong. 11 (2023) [hereinafter *Public Safety Hearing*] (statement by Bryan Newland, Assistant Sec’y of Indian Affs.).

⁶ See *id.* at 8 (“[T]he United States has charged itself with obligations of the highest responsibility of trust—including the obligation to protect the existence of Indian Tribes and their citizens.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁷ See *Oliphant*, 435 U.S. at 197-206 (detailing the statutory history of Tribal criminal jurisdiction from the 19th century onward).

⁸ *Id.*

agreements, as well as the difficulties Tribes experience in retaining an adequate number of Tribal law enforcement officers, amplifies the issue.⁹

These shortcomings illuminate the need for Congress to enact legislation granting tribes “special tribal drug criminal jurisdiction” so they have the authority to prosecute non-Indian offenders and tackle the drug crisis head-on. Congress offered somewhat of a remedy to *Oliphant* with the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), which gave Tribes the authority to exercise “special domestic violence criminal jurisdiction,” and the VAWA Reauthorization Act of 2022, which expanded Tribal jurisdiction to encompass more offenses under “special Tribal criminal jurisdiction.”¹⁰ This Note will address the issues created in Indian country by various jurisdictional issues with a particular focus on the ongoing drug crisis. It will also explore tribal law enforcement retention issues and problems with intergovernmental agreements. The following section will first analyze the statutes and judicial decisions that led to today’s jurisdictional void and its implications. It will then examine the economic side of drug trade and why traffickers target Indian country specifically. This Note will discuss Congress’s past actions, namely the Violence Against Women Reauthorization Act of 2013 and the improvements made in its 2022 counterpart, to address similar jurisdictional issues. Lastly, this Note will explore why creating “special Tribal drug criminal jurisdiction” would solve this pervasive issue. It will include an evaluation of the Protection for Reservation Occupants against Trafficking and Evasive Communications Today (PROTECT) Act and its supporting legislation which had been proposed by the 118th Congress.

Limitations to Tribal criminal jurisdiction, especially over drug crimes, have ultimately contributed to “limited law enforcement; delayed prosecutions; too few prosecutions, and other prosecution inefficiencies” that have allowed non-Indian perpetrators to exploit a failing system and endanger vulnerable Tribal communities.¹¹

I. BACKGROUND ON THE CURRENT DRUG CRISIS IN INDIAN COUNTRY

The nature of drug trafficking has changed significantly with the rise of hard drugs like fentanyl.¹² Methamphetamine and fentanyl are

⁹ Lisa Cavazuti et al., *Mexican drug cartels are targeting America's 'last best place'*, NBC NEWS (Feb. 10, 2024), <https://www.nbcnews.com/news/mexican-drug-cartels-are-targeting-americas-last-great-place-rcna130822>.

¹⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. W, § 804, 136 Stat. 840.

¹¹ INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER ix (2013) [hereinafter TLOA REPORT].

¹² *Fentanyl in Native Communities: Examining the Fed. Response to the Growing Crisis: Hearing Before the S. Comm. on Indian Affs.*, 118th Cong. 18 (2023) [hereinafter Fentanyl Crisis]

particularly potent threats to the safety of Tribal communities.¹³ Native Americans aged 35-44 exhibit the highest rate of opioid overdose deaths at nearly seventy-seven deaths per 100,000 people; Native Americans aged 25-34 experience the second-highest rate of overdose deaths at seventy-three per 100,000 people.¹⁴ Tribal leaders have expressed concern about the high rate of overdoses and noted that drugs are robbing them of an entire generation.¹⁵

Mexican drug cartels often target Native reservations because they have developed an understanding of how to work and manipulate Tribal communities.¹⁶ Cartels know Tribal law enforcement typically only monitor Tribal members due to jurisdictional restrictions, and they recognize that drug task forces have difficulty operating in remote areas.¹⁷ Drug traffickers will also go to great lengths to capitalize on these weaknesses, as exemplified by a Mexican former police officer who walked across the U.S.-Mexico border, obtained methamphetamine from a drug mule, and drove sixteen hours to traffic the drugs to Montana.¹⁸ State and federal law enforcement arrested the suspect before he reached his destination, thereby neutralizing a drug trafficking ring which had transported more than 2,000 pounds of methamphetamine and 700,000 fentanyl-laced pills from Mexico to Montana over a three-year period.¹⁹

II. HOW THE JURISDICTIONAL MAZE PERPETUATES THE DRUG CRISIS

A. *The Prosecution Problem*

Traffickers target reservations because Tribal police face a great prosecution problem. The jurisdictional maze *Oliphant* created has left Indian country without realistic remedies for most crimes committed by non-Indian offenders.²⁰ The federal government's exclusive jurisdiction over many crimes defers most power to United States Attorneys' Offices

Hearing] (statement by U.S. Att'y Vanessa Waldref, E. Dist. of Wash.).

¹³ *Public Safety Hearing*, *supra* note 5, at 11 (statement by Bryan Newland, Assistant Sec'y of Indian Affs.).

¹⁴ Albuquerque Area Sw. Tribal Epidemiology Ctr., *The Opioid Crisis: Impact on Native American Communities*, at 2 (2023), https://www.aastec.net/wp-content/uploads/2023/04/Opioids_Impact_Fact_Sheet_8.5x11_2023.pdf.

¹⁵ *Biden's Border Crisis: Examining the Impacts of Int'l Cartels Targeting Indian Country: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Nat. Res.*, 118th Cong. 7 (2024) [hereinafter *Impacts Hearing*] (statement of Bryce Kirk, Councilman, Assiniboine and Sioux Tribes of the Fort Peck Reservation).

¹⁶ *Fentanyl Crisis Hearing*, *supra* note 12, at 29 (statement by Glen Melville, Deputy Director, Bureau of Indian Affs., Off. of Just. Servs.).

¹⁷ *Id.*

¹⁸ Cavazuti et al., *supra* note 9.

¹⁹ *Id.*

²⁰ *Id.*

(USAOs) in prosecuting offenses by non-Indians.²¹ In line with the trust agreement the United States has with tribes, the USAOs have the “responsibility to make sure that the tribal community is protected from crimes by persons whom neither the tribe nor the state has jurisdiction.”²² However, evidence shows that the USAOs do not prosecute many cases, leaving parts of Indian Country reeling as large hotspots for crime by non-Indians.²³

Non-tribal authorities often deprioritize tribal matters. Between 1997 and 2006, while triaging resources, prosecutors dismissed almost two-thirds of reservation cases submitted by FBI and Bureau of Indian Affairs (BIA) investigators—a rejection rate more than twice as high as the overall rate for all federally prosecuted crimes.²⁴ In the 2022 Indian Country Investigations and Prosecutions report, the Attorney General related that, in calendar year (CY) 2022, USAOs declined twenty-four percent of Indian country matters, citing “insufficient evidence” as the most common reason at sixty-three percent.²⁵ The declination rate rose by six percent from CY 2021, as did “insufficient evidence” as a common reason by seven percent.²⁶ Further, a 2010 U.S. Government Accountability Office (GAO) report showed that fifty percent of matters referred to USAOs by tribes were declined over fiscal years 2005 to 2009, with “weak or insufficient admissible evidence” being cited as the reason forty-two percent of time.²⁷

USAOs have broad discretion when assigning declination reasons for Indian country matters, and DOJ officials have reported that prosecutors can even choose alternative reasons such as “no federal offense evident” in the face of jurisdictional or venue issues.²⁸ This alternative reason was used in eighteen percent of instances when a matter was declined in fiscal

²¹ U.S. Dep’t of Just., Criminal Justice Manual § 685, *Exclusive Federal Jurisdiction Over Offenses by Non-Indians Against Indians*, <https://www.justice.gov/archives/jm/criminal-resource-manual-685-exclusive-federal-jurisdiction-over-offenses-non-indians-against> [hereinafter *Exclusive Federal Jurisdiction*] (last visited Dec. 18, 2024) (“[e]xcept for those exempted by McBratney, the Federal government has jurisdiction over non-Indian offenders”); 18 U.S.C. § 1152.

²² *Exclusive Federal Jurisdiction*.

²³ *Public Safety Hearing*, *supra* note 5, at 18 (statement by Chairman Lloyd Goggles, Arapaho Bus. Council, North Arapaho Tribe).

²⁴ Michael Riley, *Promises, justice broken*, DENVER POST (May 7, 2016), <https://www.denverpost.com/2007/11/10/promises-justice-broken/>.

²⁵ U.S. DEP’T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 2022, at 3-5 (2024) (pursuant to Section 212 of the Tribal Law and Order Act of 2010, the Attorney General must “submit an annual report to Congress detailing investigative efforts by the [FBI] and dispositions of matters received by [USAOs] with Indian country responsibility”).

²⁶ U.S. DEP’T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 2021, at 4 (2023).

²⁷ U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010).

²⁸ *Id.* at 10.

years 2005 through 2009.²⁹ While the numbers are improving over time, the lack of non-Indian prosecution due to jurisdictional confusion “results in a higher number of violations” by non-Indians from “simple speeding to far more sinister crimes.”³⁰

To consider taking drug cases from Indian country, federal prosecutors require “airtight cases” with “large amounts of evidence.”³¹ However, for areas like the Chehalis Reservation, crimes that fit such criteria comprise only a small portion of fentanyl cases, rendering federal law enforcement nearly useless for many tribes.³² Tribal law enforcement is often left on its own to combat rampant drug trafficking in Indian country.³³ The Tulalip Tribe prioritizes tracking down dealers, as shown by the tribe recently upgrading drug dealing from a misdemeanor to a felony, but the change only applies if the alleged dealer is enrolled in a tribe.³⁴ Tribal police have to refer suspected non-Indian dealers to state or federal prosecutors who may not give them the priority a tribe would, leaving many of the most dangerous dealers unattended.³⁵

Presuming federal prosecutors would focus resources on higher volume cases, gangs and cartels have purposefully targeted reservations for years. The 2011 GAO report on Indian Country Criminal Justice relates that a South Dakota tribe experienced issues with MS-13 and Mexican Mafia gangs who target reservations for this very reason.³⁶ A tribal justice official from New Mexico articulated that small-scale drug operations in Indian country can have as “equally devastating effect[s] on tribes” as large-scale operations in large cities.³⁷ Even in the 1990s, non-Indian methamphetamine producers would set up labs in Indian country, exploiting the jurisdictional void and using reservations as safe havens, highlighting the persisting presence of drugs on reservations.³⁸

Even though the Tulalip Tribal Police Department has had some success on tackling the fentanyl crisis on their reservation with a self-funded

²⁹ *Id.* at 3.

³⁰ *Public Safety Hearing*, *supra* note 5, at 18 (statement by Lloyd Goggles, Arapaho Bus. Council Chairman, Northern Arapaho Tribe).

³¹ *Id.* at 16 (statement of Dustin Klatush, Confederated Tribes of Chehalis Reservation Chairman).

³² *Id.*

³³ *Id.* at 14.

³⁴ Martin Kaste, *Indian courts can't prosecute non-Indian drug suspects. Tribes say it's a problem*, OPB (Feb. 20, 2024), <https://www.opb.org/article/2024/02/20/indian-courts-fentanyl-drug-trafficking/>.

³⁵ *Id.*

³⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIM. JUST.: DEP'TS OF THE INTERIOR AND JUST. SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 15 (2011).

³⁷ *Id.*

³⁸ NATIONAL TRIBAL OPIOID SUMMIT, FEDERAL POLICY RECOMMENDATIONS 15 (2023), <https://www.npaihb.org/wp-content/uploads/2023/12/NTOS-Report.pdf>.

Tribal Drug Task Force of five full-time detectives focused on narcotics investigations, it still falls short.³⁹ The task force has obtained dozens of related search warrants and seized large amounts of drugs, while boasting a self-funded K-9 detection team. However, since the Tulalip lack prosecution power, and the federal and country governments do not prosecute the crimes in their stead, the tribe's ability to battle the drug crisis and save its citizens is stunted.⁴⁰ Compounding a lack of enforcement, the jurisdictional void creates confusion over which authority (tribal, federal, state or local) has the power to investigate or prosecute the alleged crime.⁴¹ Due to “[c]heckerboarded jurisdiction on reservation[s],” tribal officers sometimes do not know who to contact.⁴² The current framework requires law enforcement to consider the type of crime, tribal affiliation of the perpetrator and victim, land status of the crime scene, and other variables which “impose significant transactional costs” on officers addressing public safety concerns on reservations.⁴³ The confusion often leads to losing valuable time during the pertinent investigation period.⁴⁴ Lengthy discussions over which government should prosecute a crime may occur when concurrent jurisdiction exists.⁴⁵ Ultimately, when only the federal government can prosecute a case but declines to do so, justice may be denied.⁴⁶

Further, federal agencies do not prioritize Tribes when it comes to resources. This is showcased by the fact that there are only twenty Drug Enforcement Administration (DEA) agents covering the fourth-largest state by land area, Montana.⁴⁷ Further, the DEA sends any drug testing to their crime lab in California, which can take eight or more months to complete.⁴⁸ This creates speedy-trial issues, another facet of the crisis of which cartels can take advantage when targeting Indian country.⁴⁹ Cartels know that Indian country has these barriers, and over time choose to exploit them again and again. The cartels are aware that the jurisdictional void puts their activities low on the extensive list of crimes for USAOs to prosecute, leaving tribes helpless with no recourse.⁵⁰

³⁹ *Public Safety Hearing*, *supra* note 5, at 31 (statement of Chris Sutter, Tulalip Police Dep't Chief of Police).

⁴⁰ *Id.*

⁴¹ *Public Safety Hearing*, *supra* note 5, at 2 (statement of Rep. Harriet Hageman).

⁴² *Id.* at 18 (statement of Lloyd Goggles, Arapaho Bus. Council Chairman, Northern Arapaho Tribe).

⁴³ *Id.* at 6 (statement of Bryan Newland, Assistant Sec'y of Indian Affs.).

⁴⁴ *Id.* at 2 (statement of Rep. Harriet Hageman).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Int'l Crim Cartels Hearing*, *supra* note 1, at 24 (statement of Joshua Roberge, Fort Belknap Indian Community Chief of Police).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Public Safety Hearing*, *supra* note 5, at 16 (statement of Dustin Klatush, Confederated Tribes of Chehalis Reservation Chairman).

B. Law Enforcement Retention Issues

Additionally, there are significant issues regarding the hiring and retention of tribal law enforcement also exacerbate ineffective drug crime prosecution in Indian country.⁵¹ The Bureau of Indian Affairs (BIA) “has seen a [thirty] percent vacancy rate across all law enforcement positions.”⁵² In 2013, Indian country had fewer than half the number of law enforcement officers as other American communities, at only about 1.3 officers per 1,000 people.⁵³ Potential applicants and current officers are discouraged by the remoteness of tribal communities, an “overall lack of resources,” and the lack of pay parity with other law enforcement agencies, especially when tribal law enforcement officers are “often respond[ing] to high-risk calls *alone* and face greater rates of death in the line of duty.”⁵⁴

The Chehalis Reservation, located between Seattle, Washington and Portland, Oregon, has experience in recruiting and training law enforcement officers only to have them leave for “more competitive pay and benefits in neighboring jurisdictions.”⁵⁵ Similarly, the Tulalip Tribes Police Chief Chris Sutter reported that they are struggling to fill fifty-nine tribal officer positions in order to maintain an active force.⁵⁶ The Tulalip Tribes lost about half of their officer workforce to local law enforcement agency recruitment after investing almost a year of training in the new hires, showing that even after heavily investing funds and time, there is still little that tribes can do on their own.⁵⁷ Between the lack of officers and the lack of jurisdiction, protecting the Reservation is proving to be extremely difficult, especially considering that about two-thirds of the Reservation’s population is made up of non-Indians.⁵⁸

Even while relying on federal officers, small contingents usually fall short because they are tasked with covering enormous swaths of land. The Northern Arapaho and Eastern Shoshone Tribes do not have their own independent tribal police force, but rather rely on the BIA officers to help with patrolling.⁵⁹ But the BIA officers have great limitations and the tribal police force often only see them when a BIA officer’s “presence

⁵¹ *Id.* at 29 (statement of Chris Sutter, Tulalip Police Dep’t Chief of Police).

⁵² *Id.* at 4 (statement of Rep. Leger Fernandez).

⁵³ Sarah Childress, *Will the Violence Against Women Act Close a Tribal Justice “Loophole”?*, PBS (Feb. 4, 2013), <https://www.pbs.org/wgbh/frontline/article/will-the-violence-against-women-act-close-a-tribal-justice-loophole/>.

⁵⁴ *Public Safety Hearing*, *supra* note 5, at 4, 11 (statements of Rep. Leger Fernandez and Brian Newland, Assistant Sec’y for Indian Affs.) (emphasis added).

⁵⁵ *Id.* at 13 (statement of Dustin Klatush, Confederated Tribes of Chehalis Reservation Chairman).

⁵⁶ *Id.* at 27 (statement of Chris Sutter, Tulalip Police Dep’t Chief of Police).

⁵⁷ *Id.*

⁵⁸ Kaste, *supra* note 34.

⁵⁹ *Public Safety Hearing*, *supra* note 5, at 18 (statement of Lloyd Goggles, Arapaho Bus. Council Chairman, North Arapaho Tribe).

is required or requested.”⁶⁰ Meanwhile, the BIA employed only 352 officers and investigators to serve over 200 tribal communities in 2023.⁶¹ The Northern Arapaho and Eastern Shoshone Tribes currently have three fishing and game wardens patrolling over 2.2 million acres of tribal land, when in reality a minimum of twelve officers are needed.⁶²

There are clear advantages to the community when tribal law enforcement agencies achieve parity in recruitment and retention. From 2009 to 2011, OJS and BIA funded increased staffing levels on four reservations and saw violent crimes decrease by an average of 35 percent.⁶³ While crime rates initially increased, in response to the more active and visible law enforcement presence local citizens gained the confidence to report more crimes and crime rates subsequently decreased.⁶⁴

There are many issues with going after the drug trade on reservations, especially in places like Montana where the “under-funded and short-staffed” tribal law enforcement struggles to protect the wide-open areas.⁶⁵ The BIA boasts on its website and materials about the great working relationship between tribal law enforcement and federal authorities but fails to acknowledge the gaps in policing and the resulting devastation in Indian country.⁶⁶ In situations where the FBI has jurisdiction over a criminal case but does not immediately make an arrest, the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community report that the county sheriff will not make an arrest either, because the sheriff argues that the FBI has jurisdiction.⁶⁷ This allows the criminal to continue preying on the community.⁶⁸

C. Intergovernmental Agreements While Useful Are Not Enough

Intergovernmental agreements like cross-deputization agreements allow “one entity’s law enforcement officers to issue citations, make custodial arrests, and [] act as enforcement officers in the territory of another entity.”⁶⁹ Tribal law enforcement officers are sometimes granted

⁶⁰ *Id.* at 20 (statement of Lloyd Goggles, Arapaho Bus. Council Chairman, North Arapaho Tribe).

⁶¹ *Id.* at 6 (statement of Bryan Newland, Assistant Sec’y of Indian Affs.).

⁶² *Id.* at 18 (statement of Lloyd Goggles, Arapaho Bus. Council Chairman, North Arapaho Tribe).

⁶³ TLOA REPORT, *supra* note 11, at 64.

⁶⁴ *Id.* at 64–65.

⁶⁵ Cavazuti et al., *supra* note 21.

⁶⁶ U.S. Dep’t of the Interior, *Bureau of Indian Affairs Office of Justice Services*, <https://www.doi.gov/oles/bureau-indian-affairs-office-justice-services>; U.S. Dep’t of the Interior Indian Affairs, *Office of Justice Services*, <https://www.bia.gov/bia/ojs>.

⁶⁷ *Int’l Crim. Cartels Hearing*, *supra* note 1, at 24 (statement by Joshua Roberge, Fort Belknap Indian Cnty. Chief of Police).

⁶⁸ *Id.*

⁶⁹ Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N. DAKOTA L. REV. 65, 67 (2017).

this authority under the premise that it ensures continuous law enforcement coverage to pursue perpetrators.⁷⁰ However, as seen from the issues across Indian country, the law enforcement officers most present in Indian country rarely have any true authority, and the ones that do rarely respond adequately.⁷¹ These cooperative agreements are meant to simplify matters for law enforcement by supporting an officer's ability to take action regardless of location or the identities of the parties involved.⁷²

Additionally, tribes can often struggle to find law enforcement authorities to partner with them. At the local level, there is often also reluctance on the part of the police department to expose state and local enforcement to third-party liability without adequate insurance coverage, even though such coverage often eases the burden on non-Indian police.⁷³

The most common type of agreement is a Special Law Enforcement Commission (SLEC) agreement: a cooperative agreement authorized by federal regulation which grants state, local, and Tribal enforcement officers the authority to enforce certain crimes committed within Indian country.⁷⁴ Tribal officers who meet SLEC requirements are issued cards which authorize them to make federal arrests.⁷⁵ The cards have to be renewed every three years, and there is a lack of access to training with only one regular center in New Mexico.⁷⁶ Additional requirements include being a certified peace officer, passing federal background checks, and having one's sponsoring agency enter into an intergovernmental agreement with OJS-BIA.⁷⁷ The Tribal Law and Order Act Report found that there are "unconscionable administrative delays and impediments in the processing and approval of SLECs."⁷⁸ The BIA approval process often takes upwards of one year, with issuances and renewals being subject to BIA discretion.⁷⁹ These requirements create high barriers for officers to be able gain federal authority.⁸⁰ Such requirements are especially crucial to consider because per the TLOA Report, tribal police officers are usually the first responders in Indian country.⁸¹ Agreements like these are important because even if tribes are granted expanded criminal jurisdiction with clear arrest and prosecutorial authority, Tribes will still need to cooperate with other

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 71.

⁷² TLOA REPORT, *supra* note 11, at 13.

⁷³ *Id.* at 101.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 101.

⁷⁹ *Id.* at 103.

⁸⁰ *Id.*

⁸¹ *Id.*

governmental authorities to share resources and training and develop mutually supportive justice programs to sustain public safety.⁸²

III. HOW DID WE GET HERE

Next, it is important to understand how this issue came to be, both legally and economically. The lengthy legal history that has led to this confusing jurisdictional framework within Indian country spans over two centuries and persists today. It is imperative to understand the dynamics within reservations that attract non-Indian drug traffickers to target them.

A. *A History of Encroaching on Tribal Criminal Jurisdiction*

In 1817, Congress took a step towards shrinking tribal criminal jurisdiction when it passed the General Crimes Act which stated that federal laws which apply in areas under exclusive United States jurisdiction also applied to crimes committed in Indian country and included certain specific crimes.⁸³ The first exception excludes crimes where both the perpetrator and victim are Indians. The fourth exception is a judicially created rule stating “absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in Indian country by a non-Indian against another non-Indian.”⁸⁴ This exception emerged from three Supreme Court cases over sixty-five years, where the Court held that crimes between non-Indians in Indian country fall under state jurisdiction.⁸⁵ The Court based this on the inherent jurisdiction of states over Indian lands due to their admission to the Union without an express disclaimer of jurisdiction.⁸⁶ These express exclusions of intra-Indian and intra-non-Indian crimes from the General Crimes Act suggests the law was intended to limit federal jurisdiction to inter-racial crimes, showcasing the thought by state and federal governments that tribal authorities would not prosecute non-Indian offenders fairly.⁸⁷

In 1885, the federal government passed the Major Crimes Act following the events of *Ex parte Crow Dog* (1883).⁸⁸ After killing another

⁸² *Id.* at 100.

⁸³ See e.g., 18 U.S.C. § 1152; arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; theft, 18 U.S.C. § 661; receiving stolen property, 18 U.S.C. § 662; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112, and sexual offenses, 18 U.S.C. § 2241 *et. seq.*

⁸⁴ U.S. Dep’t of Just., Criminal Resource Manual § 678, *The General Crimes Act—18 U.S.C. § 1152*, <https://www.justice.gov/archives/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152>.

⁸⁵ CAROLE E. GOLDBERG ET AL., AM. INDIAN L.: NATIVE NATIONS AND THE FED. SYS. 524-25 (7th ed. 2015).

⁸⁶ *Id.* at 525.

⁸⁷ *Id.*

⁸⁸ U.S. Dep’t of Just., Criminal Resource Manual § 679, *The Major Crimes Act of 1885*, 18 U.S.C. § 1153, <https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153>.

Indian in Indian country, Crow Dog, an Indian himself, was convicted of murder and ordered to pay restitution to the deceased's family by the tribal government.⁸⁹ The Dakota Territory also convicted Crow Dog of murder, after which the defendant appealed for a writ of habeas corpus arguing the federal government lacked jurisdiction.⁹⁰ The Supreme Court ruled in favor of Crow Dog, holding that the General Crimes Act did not extend to intra-Indian homicide.⁹¹ Stunned by the decision due to the crime's violent nature, Congress then passed the Major Crimes Act of 1885, granting jurisdiction to federal courts over Indians who committed any of the several offenses listed in Indian country regardless of the victim's racial status. This Act further limited Indian tribes' criminal jurisdiction from the first General Crimes Act exception, further shrinking tribal authority.⁹²

In 1891, the Supreme Court recognized that Congress's various actions to regulate criminal jurisdiction showed an intent to reserve jurisdiction over non-Indians for the federal courts.⁹³ The Court noted specifically in *In re Mayfield* that Congress's goal was to grant citizens of Indian country limited self-governance while also ensuring the safety of nearby white populations and the desire to encourage tribal assimilation into mainstream Western civilization.⁹⁴ This goal shows a conscious effort to protect historically white populations from tribal governments, reflecting the federal government's lack of trust in the tribal authorities to treat non-Indians fairly.

The aftermath of World War II brought the Termination Era, when sovereignty and the separate jurisdictional status of Indian country were challenged.⁹⁵ In 1953, congressional policy called for ending federal supervision over tribes and aiming to make Indians subject to the same laws as other U.S. citizens and promote assimilation into state legal systems.⁹⁶ Congress passed Public Law 280 in 1953, the most sweeping congressional act authorizing state criminal jurisdiction.⁹⁷ P.L. 280 required six states to assume broad civil and criminal jurisdiction over most of the reservations within their boundaries, making the General Crimes and Major Crimes Acts inapplicable there.⁹⁸ Other states had the

⁸⁹ *Ex parte Crow Dog*, 109 U.S. 557 (1883).

⁹⁰ *Id.*

⁹¹ *Id.* at 559.

⁹² §§ 1152-53; CAROLE E. GOLDBERG ET AL., *supra* note 85, at 527.

⁹³ *Oliphant*, 435 U.S. at 204.

⁹⁴ *In re Mayfield*, 141 U.S. 107, 115-16 (1891).

⁹⁵ CAROLE E. GOLDBERG ET AL., *supra* note 85, at 34.

⁹⁶ *Id.* at 34, 519.

⁹⁷ 18 U.S.C. §1162; CAROLE E. GOLDBERG ET AL., *supra* note 85, at 527.

⁹⁸ § 1162 (California, Minnesota (except Red Lake Nation), Nebraska, Oregon (except Warm Springs Reservation), Wisconsin, and Alaska). In 1968, an amendment passed requiring tribal consent before estates can take over jurisdiction. 25 U.S.C. § 1321; CAROLE E. GOLDBERG ET AL., *supra* note 85, at 527.

option to similarly assume jurisdiction, which some took advantage of in part at least. The law permitted the rest of the states to assume criminal jurisdiction over reservations within their boundaries if they so choose.⁹⁹ The statute was essentially a “halfway measure” short of termination for Tribes not yet ready or objecting to termination of federal supervision.¹⁰⁰

Public Law 280 originally did not require tribal consent for state assumption of jurisdiction, and many states assumed jurisdiction against tribal wishes.¹⁰¹ The Indian Civil Rights Act of 1968 (ICRA) amended P.L. 280 to *prospectively* require tribal consent for all state jurisdiction expansions, and allowed for states to retrocede jurisdiction, but they were not required to take any action to return any authority to tribes.¹⁰² The Tribal Law and Order Act of 2010 (TLOA) further amended P.L. 280 by enabling tribes to request federal criminal jurisdiction under the General Crimes and Major Crimes Acts concurrent with state jurisdiction with Attorney General’s consent.¹⁰³ Overall, P.L. 280 worsened the jurisdictional maze in Indian country by further disrupting the tribal-federal jurisdictional relationship. The shifting policy further created an inconsistent system, perpetuating the jurisdictional maze and its resulting confusion that affects law enforcement even today when attempting to investigate crimes.

Next came ICRA, which limited tribal governments by requiring them to protect the Bill of Rights and the Fourteenth Amendment guarantees, and allowing federal courts to exercise habeas corpus over tribal convictions.¹⁰⁴ ICRA initially limited tribes to sentences of six months in jail and \$500 fines before increasing to one year and \$5,000 respectively under the Anti-Drug Abuse Act.¹⁰⁵ The TLOA further amended the ICRA to allow tribes to enhance certain tribes’ felony¹⁰⁶ sentencing authority so long as the tribe

⁹⁹ 18 U.S.C. § 1162; CAROLE E. GOLDBERG ET AL., *supra* note 85, at 35.

¹⁰⁰ *Id.* at 34.

¹⁰¹ *Id.* at 527.

¹⁰² Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 403, 82 Stat. 73, 79 (1968) (current version at 25 U.S.C. § 1323).

¹⁰³ 18 U.S.C. § 1162; 25 U.S.C. § 1321(a).

¹⁰⁴ CAROLE E. GOLDBERG ET AL., *supra* note 85, at 36, 387.

¹⁰⁵ Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. § 1302); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207, 3207-146 (1986).

¹⁰⁶ To qualify as a felony, the tribal offense must either be a repeat offense, or the crime must be considered a felony at the state or federal level. Tribes must afford defendants five due process protections if they are to charge them with a felony. The five protections provided in the ICRA and as amended by the TLOA include: 1) right to effective assistance of counsel at least equivalent to that guaranteed by the Constitution; 2. right of indigent defendants to an attorney at the tribal government’s expense; 3) right to a judge licensed to practice law and with sufficient legal training; 4) prior to being charged, the right to access the tribe in question’s criminal laws, rules of evidence and rules of criminal procedure; and 5) right to a record for the criminal proceeding. Tribal Law and Order Act of 2010, H.R. 725-23, 111th Cong. §234(c) (2010); 25 U.S.C. § 1302(c).

provides heightened procedural rights.¹⁰⁷ Tribes could “impose sentences of up to three years’ imprisonment and/or a \$15,000 fine per offense” for a combined maximum sentence of nine years.¹⁰⁸ Under TLOA, tribes can impose longer sentences only if they provide indigent defendants with counsel at the tribe’s expense, make criminal laws publicly available, maintain records of proceedings, and appoint judges with sufficient legal training and a valid law license.¹⁰⁹

The TLOA aimed to improve federal accountability to Indian populations; grant tribes more control over their justice systems; enhance cooperation between federal, state, and tribal governments in law enforcement; and encourage cross-deputization.¹¹⁰ It encouraged hiring more law enforcement officers, and expanding training for BIA and Tribal police.¹¹¹ The Act mandated the federal government collect and analyze crime data on tribal communities in an annual report for increased transparency in federal case declinations, and provided tribal police access to federal criminal databases such as the National Crime Information Center.¹¹²

While the TLOA has attempted to solve some issues of the jurisdictional void, the issue is still deep and pervasive, with the biggest blow to tribal criminal jurisdiction coming twenty-five years after P.L. 280 with the *Oliphant* decision.¹¹³

1. The Final Nail in the Coffin: *Oliphant v. Suquamish Indian Tribe* (1978)

The Supreme Court’s decision to strip Indian tribes of any criminal jurisdiction over non-Indians began on the Port Madison Reservation in Washington with the Suquamish Indian Tribe, which was governed by a tribal government and the Law and Order Code adopted in 1973.¹¹⁴ The Code covered a wide breadth of crimes and appeared to extend the Tribe’s criminal jurisdiction to include both Indians and non-Indian offenders.¹¹⁵ In August 1973, both of the Petitioners in *Oliphant* were separately arrested and charged by tribal authorities; one for assaulting a tribal officer and

¹⁰⁷ The *Tribal Law and Order Act of 2010*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/section/vawa/about-vawa-and-stcj/tribal-law-and-order-act> (last visited Sept. 6, 2025).

¹⁰⁸ TLOA REPORT, *supra* note 11, at 1; 25 U.S.C. § 1302(b).

¹⁰⁹ §1302(c).

¹¹⁰ TLOA REPORT, *supra* note 11, at i.

¹¹¹ *Tribal Law and Order Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/tribal/tribal-law-and-order-act> (Apr. 29, 2025).

¹¹² Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FED. BUREAU OF INVESTIGATION L. ENF’T BULL.: LEGAL DIG., <https://leb.fbi.gov/articles/legal-digest/legal-digest-indian-country-and-the-tribal-law-and-order-act-of-2010> (May 1, 2012).

¹¹³ *Oliphant*, 435 U.S. at 191.

¹¹⁴ *Id.* at 192-93.

¹¹⁵ *Id.* at 193.

resisting arrest, and the other for reckless endangerment and damaging tribal property following a high-speed chase.¹¹⁶ Each petitioner was arraigned before a tribal court, released, and their cases stayed pending a decision after both applied for a writ of habeas corpus to the U.S. District Court for the Western District of Washington.¹¹⁷

The petitioners argued the Suquamish Indian Provisional court, where they had been charged, did not have criminal jurisdiction over non-Indians.¹¹⁸ Conversely, the Tribe argued its inherent powers of government over the Reservation included criminal jurisdiction, and the tribe, like many others, believed this jurisdiction extended to non-Indians.¹¹⁹

The Court held that although Congress had never explicitly prohibited Indian tribes from imposing criminal jurisdiction on non-Indians, Tribes do not have inherent jurisdiction to try non-Indians.¹²⁰ Rather, tribes must depend on the federal government to protect them from such intruders, with the Court's decision rooted in the notion Tribes must recognize their dependence on the United States government.¹²¹ The Court reasoned that by acknowledging their dependence on the United States in the Treaty of Point Elliott, the Suquamish Tribe likely recognized that the United States would arrest and try non-Indian intruders on the Reservation.¹²² The Court emphasized that, despite the tribe's organized bodies and legislative functions, its citizens were under the subordination of the U.S. government.¹²³ While the Court stated that tribes lack criminal jurisdiction, it acknowledged the "prevalence of non-Indian crime on [] reservations,"¹²⁴ a problem persisting even today, over forty-five years later.¹²⁵

While evaluating the lengthy legal history of criminal jurisdiction in Indian Country, it is clear the jurisdiction issue is far from simple and depends on various factors that law enforcement officers have to consider at the moment, stunting their abilities. Many non-Indian drug traffickers are aware of the jurisdictional confusion and use this to their advantage.

B. Drug Trade—Why Cartels Target Indian Country

It is imperative to understand that, in addition to the legal incentives causing drug traffickers to target Indian country, there are also great economic incentives. The opioid crisis has seeped into Indian country,

¹¹⁶ *Id.* at 194.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 195-96.

¹²⁰ *Id.* at 204-05.

¹²¹ *Id.* ("[Tribes] 'acknowledge their dependence on the government of the United States.''" (quoting Treaty of Point Elliott, 12 Stat. 927, at Art. IX (1859))).

¹²² *Id.* at 207.

¹²³ *Id.* at 210-11.

¹²⁴ *Id.* at 212.

¹²⁵ See generally Lisa Cavazuti et al., *supra* note 9.

partly since traffickers can produce fentanyl in limitless amounts due to its synthetic nature.¹²⁶ In two takedowns alone, the Eastern District of Washington's USO seized nearly 300,000 fentanyl-laced pills intended for the Colville Indian Reservation and Yakima Nation.¹²⁷ The Department of Interior Opioid Reduction Task Force seized over 1,000 pounds of narcotics with a street value of about six million dollars over fourteen operations in 2019.¹²⁸

Reservations are targeted because they are remote areas that are less accessible to law enforcement, and places like Montana are targeted because in remote areas pills can be sold at twenty times the price than in urban centers closer to the border, creating a deep financial incentive to target such areas.¹²⁹ These fentanyl pills cost less than one dollar in Mexico and southern states, and are produced for even less, but can sometimes sell for as high as \$100 on Montana's Fort Belknap Reservation.¹³⁰ An extremely high return encourages Mexican cartels and drug traffickers, especially since reservations are places they know how to work and manipulate.¹³¹ Drug traffickers will even travel extremely long distances for the economic benefit and low likelihood of prosecution.¹³² Drug traffickers often drive across the nation from the Southern Border to reach these remote reservations because the opportunity is too good for them to give up.¹³³

Cartels are also able to form relationships with Indigenous women to establish themselves within Indian country communities and use homes on reservations as safe houses and drug distribution hubs.¹³⁴ A Mexican drug trafficker developed relationships with several Indian women on reservations in Nebraska, South Dakota, and Wyoming who then aided in recruiting customers to buy methamphetamine.¹³⁵ Drug cartels are able to find a stable population of customers since these communities are so vulnerable, further cementing reservations as targets.¹³⁶

¹²⁶ *Fentanyl Crisis Hearing*, *supra* note 12, at 18 (statement by US. Att'y Vanessa Waldref, E. Dist. Of Wash.).

¹²⁷ *Id.*

¹²⁸ U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFS., FY 2019 YEAR END REPORT, at 9 (2019), https://www.bia.gov/sites/default/files/dup/assets/bia/ojs/ojs/pdf/DDE_2019_Annual_Report_draft_08-18-2020.pdf.

¹²⁹ Lisa Cavazuti et al., *supra* note 18.

¹³⁰ *Impacts Hearing*, *supra* note 13, at 28 (statement of Jeffrey Stiffarm, President of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Cnty.).

¹³¹ *Impacts Hearing*, *supra* note 13, at 29 (statement of Glen Melville).

¹³² See Lisa Cavazuti et al., *supra* note 9.

¹³³ Cavazuti et al., *supra* note 18.

¹³⁴ *Impacts Hearing*, *supra* note 15, at 28 (statement by Jeffrey Stiffarm, President of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community).

¹³⁵ GAO-11-252, *supra* note 37, at 15.

¹³⁶ See GAO-11-252, *supra* note 37, at 15.

Traffickers also look to lure natives into dealing by giving away initial supplies, thus turning them into addicts who are then indebted to the cartels.¹³⁷ Cartels know how to choose victims who are going through emotionally turbulent times, and trapping them in these cycles of addiction makes them pawns to drug trade.¹³⁸ With such tactics, cartels are able to successfully exploit Indians to create highly lucrative drug trafficking networks and create deep cycles of addictions guaranteeing themselves both customers and protection due to the jurisdictional void.¹³⁹

IV. HOW CONGRESS SOLVED CRIMINAL JURISDICTION ISSUES BEFORE: EXAMINING VAWA

This is not the first time Indian country has dealt with the disastrous effects of the *Oliphant* decision. Statistics from 2010 showed twenty-five percent of Native women had been raped in their lifetime, higher than the national average of about twenty percent.¹⁴⁰ A 2010 finding by the Department of Justice National Institute of Justice found fifty-five percent of American Indian and Alaska Native women experienced physical violence by an intimate partner with ninety percent of victims reporting being attacked by a non-Indian perpetrator.¹⁴¹ Also about half of Indian women are married to non-Indian men, so those inter-racial domestic violence cases had to be handled by federal authorities due to *Oliphant*, which often did not take such cases similar to drug crimes.¹⁴² The federal government declined fifty-two percent of violence crimes, forty-six percent of assault cases, and sixty-seven percent of sexual abuse and related offenses reported from fiscal years 2005-2009.¹⁴³ Similarly, with both domestic violence and drug crimes, even if there was enough evidence for law enforcement to arrest a perpetrator, jurisdiction was shared among multiple authorities which complicated matters.¹⁴⁴

In response to this crisis, Congress recognized Tribes' inherent authority to prosecute non-Indians by granting them "special domestic violence criminal jurisdiction" (SDVCJ) over domestic violence offenses in the 2013 Violence Against Women Reauthorization Act (VAWA).¹⁴⁵

¹³⁷ Cavazuti et al., *supra* note 9.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Childress, *supra* note 53.

¹⁴¹ ANDRE B. ROSAY, NAT'L INSTITUTE OF JUST. MAY 2016 VIOLENCE AGAINST AM. INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

¹⁴² Childress, *supra* note 53.

¹⁴³ GAO-11-167R, *supra* note 28, at 3.

¹⁴⁴ Childress, *supra* note 53.

¹⁴⁵ Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113-4, § 905, 127 Stat. 118, 124 (2013); Grant Christensen, *Using Consent to Expand Tribal Court Criminal Jurisdiction*, 111 CAL. L. REV. 1831, 1848 (2023).

Initially, jurisdiction over non-Indians was limited to where the defendant had a connection to Indian country; the tribal court followed the enhanced procedures laid out in TLOA, and tribal court juries did not systematically exclude any groups in the community, including non-Indians.¹⁴⁶ As long as tribes met these requirements they could “affirmatively opt in to assert jurisdiction” and tribes who took the opportunity “have succeeded in prosecuting hundreds of non-Indians for violence occurring on reservations.”¹⁴⁷

SDVCJ was initially limited to three tribes in a Pilot Project which saw remarkable success.¹⁴⁸ During the project period, tribes and USAOs worked together to identify twenty-seven SDVCJ cases involving twenty-three individual offenders that tribal courts were best suited to address.¹⁴⁹ Of the twenty-seven cases, eleven were dismissed citing jurisdictional or investigative reasons, five were referred for federal prosecution, ten ended in guilty pleas, and one offender was acquitted following a tribal court jury trial.¹⁵⁰ In March 2018, the eighteen tribes exercising SDVCJ reported 143 arrests of 128 non-Indian abusers resulting in seventy-four convictions, five acquittals and twenty-four cases pending at the time.¹⁵¹ Of the non-Indian offenders, eighty-five had contact with tribal police records 378 times and seventy-three had criminal records indicating that absent jurisdiction they would have continued their harmful behavior on the reservations.¹⁵²

Between 2015 and 2021, Fort Peck specifically prosecuted forty-five cases under SDVCJ resulting in two jury trials and acquittals, nine guilty pleas, and other defendants who deferred prosecution or opted into diversionary programs.¹⁵³ As of December 2021, the Fort Peck Tribes have had “no federal referrals” nor any “federal declinations to prosecute non-Indians for domestic violence crimes” committed in Indian country.¹⁵⁴

¹⁴⁶ Christensen, *supra* note 145, at 1848.

¹⁴⁷ *Id.*

¹⁴⁸ Tracy Toulou, *Director Tracy Toulou of the Office of Tribal Justice Testifies Before the Senate Committee on Indian Affairs Oversight Hearing on Draft Legislation to Protect Native Children and Promote Public Safety in Indian Country* (May 18, 2016), <https://www.justice.gov/opa/speech/director-tracy-toulou-office-tribal-justice-testifies-senate-committee-indian-affairs-0>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ NAT'L CONG. OF AM. INDIANS, VAWA 2013's SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1, 5 (2018) [hereinafter *NCAI Report*]. After the end of the pilot period, tribes were not required to inform the DOJ if they chose to begin exercising SDVCJ, so there is a possibility that at this time in March 2018 more tribes had implemented SDVCJ. *Id.* at 1 n.2.

¹⁵² *Id.* at 14-15.

¹⁵³ Restoring Justice: Addressing Violence in Native Communities Through VAWA Title IX Special Jurisdiction: Hearing Before the Comm. on Indian Aff., 117th Cong. 28 (2021) [hereinafter VAWA Hearing]. Further, between March 2015 and December 2021, the Fort Peck Tribes prosecuted forty-five VAWA cases under the special jurisdiction with a total of thirty-seven defendants including repeat offenders and defendants facing multiple charges. *Id.* at 30.

¹⁵⁴ *Id.*

However, while it is clear from the data that restoring criminal jurisdiction over domestic violence cases has been a success in making tribal communities safer, the 2013 Act did still leave many holes in jurisdiction. Of the forty-five SDVCJ cases prosecuted by the Fort Peck Tribes over forty-five percent had cases involving children, and over forty percent included drugs and/or alcohol involved with the primary offenses, neither of which could be prosecuted given the jurisdictional limits at the time.¹⁵⁵ Of the 143 arrests by the eighteen Tribes in March 2018, fifty-eight percent involved children and could not be prosecuted as well.¹⁵⁶ SDVCJ was very narrow, only applying to protective order violations, dating violence, and domestic violence, while excluding other violent crimes including sexual assault by a stranger or acquaintance, stalking, sex trafficking, and child violence.¹⁵⁷ In the face of these persisting gaps, Congress opted to expand tribal criminal jurisdiction and strike “special domestic violence criminal jurisdiction” and replace it with “special Tribal criminal jurisdiction” in VAWA 2022.¹⁵⁸ The expanded jurisdiction now includes crimes such as the “Assault of Tribal Justice Personnel,” child abuse, commercial sex acts, obstruction of justice, sex trafficking, and sexual violence among others.¹⁵⁹ Part of the change includes allowing Tribes to prosecute even non-Indians who do not have a connection to the Tribe or reservation, expanding their jurisdiction from only domestic violence crimes to broader sexual assault crimes as well.¹⁶⁰

A. *The Road to “Special Domestic Violence Criminal Jurisdiction”*

Even with the success of 2013 and 2022 VAWA, it is crucial to note that the road to expanded jurisdiction was not smooth. The original 2013 provision for SDVCJ was first introduced in the 112th Congress, yet the bill did not pass until the 113th following much debate.¹⁶¹ Debates consisted of many deeply personal domestic violence stories of Indian women and constantly connecting the plight of Indian country back to concern for American women at large.¹⁶²

Additionally, the provision faced significant pushback in the House of Representatives during the 113th Congress.¹⁶³ The House version of the

¹⁵⁵ VAWA Hearing, *supra* note 153, at 28-29, 36.

¹⁵⁶ NCAI Report, *supra* note 151, at 8.

¹⁵⁷ *Id.* at 22, 24.

¹⁵⁸ Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, § 804, 136 Stat. 840, 898-99 (2022).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Lauren Smith, *Cantor Pledges Domestic Violence Law is an Early House Priority*, ROLL CALL (Feb. 6, 2013), <https://rollcall.com/2013/02/06/cantor-pledges-domestic-violence-law-is-an-early-house-priority/> [https://perma.cc/JZK7-WD3N].

¹⁶² See 112 CONG. REC. S2746 (2012).

¹⁶³ 113 CONG. REC. H676 (2013).

provision required Tribes to seek DOJ certification prior to exercising jurisdiction over non-Indian offenders while the Senate bill did not require Tribes to get permission to exercise their own sovereignty.¹⁶⁴ Representative Tom Cole (R-OK), who is one of the few Indians in Congress and opposed the House bill, stated that then House Majority Leader Eric Cantor (R-FL) and other Republicans who initially opposed the provision did not represent many Indians and needed to better understand tribal justice.¹⁶⁵ Cole also stated that he worked hard to educate his colleagues on the “massive [jurisdictional] loophole” for Indian women seeking justice.¹⁶⁶ Leader Cantor would not articulate a specific issue with either the Senate bill or the provision’s constitutionality. Although tribal authorities assured Congress that defendants would receive due process in tribal courts, the bill’s future remained uncertain until the end.¹⁶⁷ The delay was in part due to Republican concern that the House accepted the Senate bill without moving a Republican version, given the Republican party controlled the lower chamber at the time.¹⁶⁸ Ultimately, the Senate bill, which included the an expanded version of the provision over the GOP House version, passed handily in both chambers in February 2013.¹⁶⁹ The history exhibits that, like most legislation, there was no smooth road for expanded jurisdiction. Tribes also must deal with a persisting bias that they will discriminate against non-Indians, which ironically comes from a discriminatory viewpoint lawmakers hold against tribal courts.

V. ACTION CONGRESS SHOULD TAKE NEXT

A. *Pass the PROTECT Act and Grant Tribes “Special Drug Criminal Jurisdiction”*

The Indian Law and Order Commission Report from 2013 ordered by Tribal Law and Order Act strongly recommended that Tribes should be allowed to opt out of immediately from federal jurisdiction or state jurisdiction, or both, and “Congress [should] immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands. . . [given that tribal governments] afford all [criminals] with civil rights protections equivalent to the those [in

¹⁶⁴ 159 CONG. REC. H678 (daily ed. Feb. 27, 2013) (statement of Rep. Tom Cole).

¹⁶⁵ Childress, *supra* note 53.

¹⁶⁶ *Id.*

¹⁶⁷ Rob Capriccioso, *The GOP House Leader Sank VAWA in 2012, the Fight Starts Anew in 2013*, ICT (Jan. 16, 2013), <https://ictnews.org/archive/the-gop-house-leader-sank-vawa-in-2012-the-fight-starts-anew-in-2013> [https://perma.cc/T89N-VQYV]; Childress, *supra* note 53.

¹⁶⁸ Russell Berman, *House GOP leaders set to hand Senate Dems victory on VAWA*, The Hill (Feb. 27, 2013), <https://thehill.com/homenews/house/143373-house-gop-leaders-set-to-hand-senate-dems-victory-on-vawa/> [https://perma.cc/4PKF-SP82].

¹⁶⁹ S. 47, 113th Congress (2013) (enacted).

the Constitution.]”¹⁷⁰ Further, the report found that more lives “will be saved once Tribes have greater freedom to . . . maintain their own criminal justice systems.”¹⁷¹ Considering the report, the devastating effects of the *Oliphant* decision on the drug crisis, and the success of “special jurisdiction” under VAWA 2013 and 2022, Congress must swiftly pass the Protection for Reservation Occupants against Trafficking and Evasive Communications Today (PROTECT) Act that grants Tribes “special drug criminal jurisdiction.”

The PROTECT Act bill (H.R. 9310) was introduced in the House of Representatives in August 2024, while a similar bill (S. 5453) was introduced in the Senate in December 2024.¹⁷² The proposed bipartisan legislation aspires to provide Tribal courts and law enforcement with much needed resources to combat the opioid epidemic, and it includes a legislative *Oliphant*-fix which will restore the inherent sovereignty of Tribes by recognizing Tribal jurisdiction over offenses involving drugs and firearms.¹⁷³ Such jurisdiction authorizes tribal authorities to investigate, arrest, and prosecute non-Indian drug traffickers who are the main culprits in perpetuating the drug crisis in Indian country.¹⁷⁴ If passed, this jurisdiction allows Tribes to not only take their future in their own hands, but to also stop relying on the federal agencies failing to protect them.¹⁷⁵ It is high time that such sovereignty is restored to Tribes to protect their own communities.

As demonstrated by the jurisdiction granted in VAWA 2013 and 2022, Tribes have repeatedly dispelled any concerns that tribal courts would discriminate against non-Indian offenders.¹⁷⁶ The protections from TLOA further ensure due process protections for non-Indian offenders if they are charged with a felony by a Tribe.¹⁷⁷ It is time that tribal courts are respected and that as independent nations they are given the opportunity to govern Indian country as they see fit, especially in regard to drug crimes. The PROTECT Act will knock down the evidentiary barriers required by USAOs to prosecute such crimes and will significantly narrow the jurisdictional void that non-Indian offenders take advantage of.

It is also the next natural step to take considering how intertwined drug crimes are with so many other offenses such as domestic violence

¹⁷⁰ TLOA REPORT, *supra* note 11, at 23.

¹⁷¹ *Id.* at iii.

¹⁷² H.R. 9310, 118th Cong. (2024); S. 5453, 118th Cong. (2024).

¹⁷³ Rick Larsen, *Larsen Calls for Increased Funding to Combat Opioid Epidemic* (Dec. 21, 2022), <https://larsen.house.gov/news/documentsingle.aspx?DocumentID=2916#:~:text=Re,p,to%20combat%20the%20opioid%20epidemic> [https://perma.cc/XK3S-FN47].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ U.S. DEP’T OF JUST., TRIBAL LAW AND ORDER ACT REPORT ON ENHANCED TRIBAL-COURT SENTENCING AUTHORITY (2010).

¹⁷⁷ *Id.*

and sexual assault. Without the jurisdiction allowed by the PROTECT Act, the tribal justice system is restricted from operating at its full potential to deter more criminal activity and to reduce recidivism.¹⁷⁸ The Act also calls for the enhanced ability of tribal authorities to investigate crimes by allowing law enforcement to use the prompt review of tribal court judges of a search warrant request of social media platforms, which the platforms will also honor.¹⁷⁹ It provides Tribal courts with parity to issue such search warrants for certain electronic communications deeming them competent courts under the Stored Communications Act, granting them the tools to effectively investigate *and* prosecute because, without effective investigation tools, prosecution power is moot.¹⁸⁰ These provisions, along with jurisdiction, will enable and encourage tribal authorities to investigate, arrest, and prosecute drug offenders of *all* backgrounds especially non-Indian offenders wreaking havoc on their communities.¹⁸¹

1. The Southern Border Problem: A Potential Barrier to the PROTECT Act

A potential barrier to the PROTECT Act provision that would restore criminal jurisdiction over drug offenses is the U.S. government's intense focus on the Southern Border as a political talking point. Since Mexican cartels contribute a large part to the issue of non-Indian drug offenders, many lawmakers in Congress use the drug crisis happening in Indian country to detract from jurisdictional fixes and towards the Southern Border.¹⁸² The GOP-led House Oversight and Investigations Subcommittee blames the Biden administration's failed border policies for "allow[ing] violent cartels to infiltrate and ravage rural tribal communities in remote locations far beyond America's southern border."¹⁸³ During the 2024 GOP presidential primaries, candidates focused on reinforcing border security as a solution to the drug crisis including building walls or deploying armed forces, all of which detract

¹⁷⁸ S. 151, 108th Cong. (2003) (enacted).

¹⁷⁹ *Id.*

¹⁸⁰ See Protection for Reservation Occupants Against Trafficking and Evasive Commc'sn Today Act of 2025, H.R. 3773, 119th Cong. § 2 (2025).

¹⁸¹ See generally Ivy K. Chase, *TRIBAL AUTHORITY TO ISSUE SEARCH WARRANTS TO NON-TRIBAL ENTITIES OR ON NON-INDIAN LAND WITHIN RESERVATION BOUNDARIES*, 49 AM. INDIAN L. REV. 15, 54 (2025).

¹⁸² See Press Release, House Comm. on Nat. Res.'s, *Biden's Border Crisis Enables Criminal Cartels to Flourish in Tribal Communities*, (Jun. 4, 2024) <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=416104#:~:text=In%20a%20recent%20Subcommittee%20on,To%20earn%20more%2C%20click%20here>.

¹⁸³ Press Release, House Comm. on Nat. Res.'s, *Biden's Border Crisis Brings Cartel Crime to Tribal Lands*, (Apr. 10, 2024), <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=415840>.

from the issue at hand.¹⁸⁴ Even if politicians are aware of the critical issue, many use tribal experiences to serve their own agendas instead of focusing on concrete solutions.¹⁸⁵

CONCLUSION

In sum, legislation granting special criminal jurisdiction to tribes over drug offenses as an *Oliphant*-fix would be a solid first step towards attacking the pervasive drug crisis in Indian country, something that is heavily perpetuated by non-Indians perpetrators who exploit jurisdictional loopholes. History shows that leaving native criminal jurisdiction to state and federal governments is ineffective as tribes are often low priorities. With the drug crisis raging in Indian country, tribes cannot afford to wait.

As examined above, non-Indian drug offenders are well aware of the jurisdictional complexities created by overlapping laws and decisions on criminal jurisdiction such as the Major Crimes Act, P.L. 280, and the *Oliphant* decision. The current framework poses delays at every level, worsening the crisis and allowing offenders to remain unchecked.¹⁸⁶ Investigations can be delayed by many things, including jurisdictional problems or even declinations to prosecute by U.S. Attorneys.¹⁸⁷ This, along with the great economic success that comes from drug trafficking in Indian country, create a perfect storm of factors for such offenders to target indigenous communities.

Enforcing a VAWA-type special tribal criminal jurisdiction, the PROTECT Act would allow Congress to enact improvements from the 2013 and 2022 reauthorizations over drug crimes. Tribes who accepted jurisdiction have had success in prosecuting offenders while still conducting fair trials. Furthermore, allowing tribal law enforcement to prosecute repeated lawbreakers in tribal courts eased pressure off of federal law agencies that do not see this as a priority. This new jurisdictional reach would complement the current jurisdiction over domestic violence, child violence, and sexual assault crimes that often involve drug abuse and go untouched on reservations because of the lack of authority they have. If Congress can trust tribal law enforcement and judges to oversee the extremely serious crimes outlined in VAWA 2022, there is no reason they should not be entrusted with the same jurisdiction for drug offenses.

¹⁸⁴ See Sudiksha Kochi, *Fighting against fentanyl: Native American communities tell GOP candidates their promises aren't enough*, USA TODAY (Dec. 13, 2023) <https://www.usatoday.com/story/news/politics/2023/12/13/native-americans-urge-fentanyl-crisis-action/71580710007/>.

¹⁸⁵ CoCo Dobard, *Keeping Indigenous Representation in a Threatening Presidency*, BRUIN POL. REV. (Apr. 3, 2025) <https://bruinpoliticalreview.org/articles?post-slug=keeping-indigenous-representation-in-a-threatening-presidency->.

¹⁸⁶ *Maze of Injustice*, AMNESTY INT. 33 (Apr. 24, 2007) <https://www.amnesty.org/en/documents/amr51/035/2007/en/>.

¹⁸⁷ *See id.*

As the Muscogee (Creek) Nation Ambassador Jonodev Chaudhuri explained that VAWA's jurisdiction enables tribal law enforcement, the Attorney General, and the general population to better protect its children and "[n]o sovereign has a more significant interest in protecting Muscogee children than our Muscogee Nation."¹⁸⁸ Glen Melville, OJS deputy director, advocated for special jurisdiction, saying that tribes will take care of such jurisdiction because they can finally do something for themselves and see the final product which is both empowering and emotional, especially after tribes had that power stripped from them via Public Law 280 and *Oliphant*.¹⁸⁹

A reform like this could function as a gateway into recognizing tribal criminal jurisdiction over most crimes by non-Indians in Indian country and reverse the damage done to tribal sovereignty by *Oliphant*. As Meredith Drent, Tulalip Tribal Court (Osage Nation) says, "When I go to Colorado, I may not know their laws, but I know that I'm going to have to follow them, and they can prosecute me if I don't. And it's the same thing here: when you enter someone else's jurisdiction, you fall under their laws."¹⁹⁰

¹⁸⁸ *Testimony of Jonodev Chaudhuri Ambassador of the Muscogee (Creek) Nation Before the United States House Committee on Nat'l Resources Subcommittee on Indian and Insular Affairs Hearing on Opportunities and Challenges for Improving Pub. Safety in Tribal Cnty.'s*, 118th Cong. 1 (Nov. 14, 2023) (Statement of Jonodev Chaudhuri).

¹⁸⁹ *Fentanyl Crisis Hearing*, *supra* note 12, at 37 (response by Glen Melville).

¹⁹⁰ Kaste, *supra* note 34.