VAWA Tribal Provisions and Race Discrimination Arguments

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Amid the current election excitement and heightened national focus on the politics of women's issues, Congressional efforts to reauthorize the Violence Against Women Act (VAWA) have garnered considerable attention. Among the new VAWA provisions which passed through the Senate and are the subject of some controversy is one that would acknowledge the inherent authority of Indian tribes to exercise "special domestic violence criminal jurisdiction" over all persons (including non-Indians) with certain ties to the tribe. Tribal criminal jurisdiction over non-Indians, even those who enter onto tribal lands, has not been recognized by the United States since the Supreme Court case of *Oliphant v. Suquamish Indian Tribe* in 1978. The Senate provision is widely viewed by Indian tribal advocates and others not only as just, but also as necessary in order to combat the appalling rates of domestic violence attacks against Indian women—attacks that the federal government and states, where applicable, often fail to prosecute. Interestingly, the prospect of enhanced tribal jurisdiction over non-members has raised the issue of racial discrimination in varied and even competing ways. Two recent statements by members of Congress, both of whom have been important allies in tribal law enforcement efforts including the enactment of the Tribal Law and Order Act, illustrate this point. Following passage of the Senate bill, Senator Jon Kyl of Arizona released a statement claiming that "by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race," the tribal jurisdiction provision "would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process." Then, during the House Judiciary Committee's markup of a bill that did not contain the tribal jurisdiction provisions, Representative Darrell Issa of California stated that the lack of such a provision raised questions of race discrimination, since whether an individual will be brought to tribal, state, or federal court for a domestic violence offense under current law depends on whether the defendant is Indian or non-Indian.

While seemingly in opposition to each other, neither one of these statements accurately reflects the current legal and political reality of Indian tribes. Instead, they illustrate how easy it can be for us to slip into a widely employed discourse of race that is not always helpful or relevant in the realm of Indian law and policy. Unfortunately, this mistake can obscure the role that racial discrimination is actually playing in the VAWA reauthorization debate.

To begin with, statements about tribes and racial discrimination often assume that tribes are primarily racial groups and that membership and non-membership is therefore based on race. This assumption, however, is not in line with either tribal self-definition or United States federal law, which has long held (as the Supreme Court did in *United States v. Antelope* in 1977) that

"Federal regulation of Indian tribes … is not to be viewed as legislation of a racial group consisting of Indians." Rather, Indian tribes are separate political sovereigns with government-to-government relationships with the United States (as stated in Supreme Court cases from *Worcester v. Georgia* in 1832 to *Morton v. Mancari* in 1974 and beyond). These and countless other court decisions and federal statutes acknowledging the political status of Indian tribes stand for the basic principles that tribes are separate sovereign entities and that political participation in or exclusion from the governance of a particular tribe is in fact based on citizenship or membership in that tribe—not on a person's racial characteristics.
Different tribes have different criteria for citizenship based on their own cultures and histories. It is true that many tribes have tribal ancestry and even blood quantum requirements (a notion introduced by the United States government), while others are based on clan membership or other traditional methods of social organization (which may overlap with ancestry but which bear no resemblance to the concept of race as constructed in western societies as a tool of dominance and oppression). Still others include provisions for naturalization of citizens with no ancestral link to the tribe. Whatever the membership criteria for a particular tribe, federal caselaw explicitly acknowledges the right of tribes to determine their own membership as they see fit as a basic aspect of their political sovereignty (as in *Santa Clara Pueblo v. Martinez* in 1978). Criminal jurisdiction over persons who willingly enter onto tribal lands, then, is fundamentally an issue of tribal sovereignty.

Understanding that tribes are sovereign entities in which political participation is based on citizenship rather than race dispenses with constitutional equal protection concerns and reveals that there is nothing unusual about the notion that tribes may exercise jurisdiction over non-members. Indeed, other sovereigns within our own federal system exercise a range of authority (including criminal jurisdiction) over individuals who are excluded from political participation in their governance by reason of non-citizenship. When a resident of one State crosses the border to visit another, that individual is subject to the criminal jurisdiction of the State he or she is visiting even though he or she cannot vote or serve on a jury there. Noncitizens visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the political process. There is no reason why the rules should be different for non-citizens who visit or reside in tribal territories.

For much the same reason, even pro-tribal arguments based on racial discrimination, while well-intentioned, have a potential to confuse the issue. For example, the non-Indian alleged attacker of an Indian domestic violence victim must currently be prosecuted in federal court not because of his or her race, but because he or she is a non-member of the tribe, and for the time being the United States has decided not to recognize tribal jurisdiction over such individuals. To explain this as the result of racial discrimination against the alleged attacker is not accurate, and even somewhat dangerous. Again, that is because the rights that Indian tribes seek to protect for themselves are rooted in their separate political sovereignty and control over land and natural resources, while the remedy for racial discrimination is popularly assumed to be full incorporation into the social and political life of the state on an equal footing.

But does that mean that racial discrimination plays no part in this story? To the contrary, it is clear that racial discrimination has profoundly shaped the way that Indian political rights are, or are not, protected in our legal system. Though Indian tribes are political sovereigns, Indians have clearly become racialized in American society. And both historically and presently, racism

against Indians has served as an important justification for the confiscation of Indian lands and the non-recognition of tribal sovereign rights, as scholars like Robert A. Williams have clearly shown. In this case, the racial discrimination is embodied in the U.S. laws and policies that purported to restrict inherent tribal authority to exercise jurisdiction over all persons who enter their territories in the first instance. These laws and policies are rooted in antiquated racial stereotypes of Indians as incapable of creating or sustaining complex and "civilized" societies equal in status to European societies. The present-day distrust of tribal courts as just and competent forums even in the face of evidence that they are fair to non-members (an empirical study by Professor Bethany Berger found that the Navajo Nation courts are as likely to rule in favor of non-members as members, for example) is a direct outgrowth of these stereotypes. As the UN Special Rapporteur for Indigenous Peoples James Anaya recently said in an interview on National Public Radio, such distrust "is discriminatory against tribal courts and the people that run these courts."

It is sometimes easy (especially for public figures who do not specialize in Indian law or policy) to slip into the language of race and discrimination in ways that ultimately do not acknowledge the dignity of Indian tribes as sovereigns. But it serves us all well to remember that the very nature of racial discrimination against indigenous peoples has historically been focused on belittling their political capabilities in order to claim their lands and resources. It is important that members of Congress and the American public understand this distinction, and that those who apparently trust state and federal courts to exercise criminal jurisdiction over non-citizens do not raise the specter of racial discrimination to justify their apparent distrust of tribal courts to do the very same. Those members of Congress who support the tribal jurisdiction provisions as part of the VAWA reauthorization are to be commended, for it is through the affirmation of tribal sovereign power that the United States most effectively confronts the legacy of racial discrimination against Indians that is so deeply embedded in our laws and policies.

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