

**Written Testimony of Professor Elizabeth A. Reese, Yunpoví
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**Before the United States Senate Committee on Indian Affairs
For the Oversight Hearing on
“Restoring Justice: Addressing Violence in Native Communities through VAWA
Title IX Special Jurisdiction”**

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Kunda wo ha, (thank you), to the Chairman and Members of the Committee for inviting me to testify today. Navi towa hahweh Yunpoví. Navi Americana hahweh Elizabeth Reese. Nah Nambé Owingeh we ang oh mu. My name is Elizabeth Reese, Yunpoví, and I am from the Pueblo of Nambé. I hold degrees in political science and political theory from Yale and the University of Cambridge and a law degree from Harvard. I am an Assistant Professor of Law at Stanford Law School, where I teach and write about American Indian tribal law, federal Indian law, federal constitutional law, and civil rights law.

I was asked to testify here today not only because of my academic expertise but because of my professional experience. Before becoming an academic, I worked as an attorney at the National Congress of American Indians (NCAI), where I was the primary attorney responsible for coordinating NCAI’s work providing technical assistance to the tribal governments across the country that were working to implement the Violence Against Women Reauthorization Act of 2013’s (VAWA 2013) expanded criminal jurisdiction over domestic violence cases involving non-Indians.

I am here today to tell you what I know about the successes of what has come to be known as VAWA 2013’s Special Domestic Violence Criminal Jurisdiction (SDVCJ), the need to do more, and to offer my expert opinion on the legal questions that cloud and complicate this picture.

I. VAWA 2013 SDVCJ’S SUCCESSES

In my role at NCAI, I worked closely with the first tribes who were implementing expanded criminal jurisdiction under VAWA 2013. While I worked particularly closely with the handful of tribes who were receiving the DOJ grant funding that had been appropriated along with VAWA 2013 for implementation, it was also my job to support the rest of the tribes throughout the country who were taking on the task of these prosecutions entirely at their own expense. I talked on a regular basis with tribal prosecutors, judges, and defense counsel from across the country from tribes that were at every stage of the implementation process. I helped advise tribes as they rewrote their legal codes to comply with this statute. I explained the intricacies of this law, its requirements, and its limitations more times than I can count. I tracked data from the implementing tribes and listened firsthand to the harrowing stories about what it was like to be on the front lines of these prosecutions. And then, on the five-year anniversary of VAWA 2013, I wrote it all up into a comprehensive report documenting the one-year pilot project, and the first three years after the statute took nation-wide effect.¹ In that report, I worked with colleagues and collaborating organizations to agree on a set of detailed substantive findings that broadly supported the effectiveness of the law at achieving its key goal—allowing tribes to

¹ NAT’L CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT (2018) [hereinafter VAWA 2013 REPORT].

prosecute domestic violence offenders. When I wrote that report in March of 2018, NCAI was only aware of 18 tribes exercising expanded criminal jurisdiction, and there had been 143 arrests of 128 defendants which led to 74 convictions. As of September 2021, that number has increased to 28 tribes who have made at least 396 arrests of 227 defendants, leading to 133 convictions.²

Not only were the tribes able to do all of this work to bring justice to their communities, but they were able to do so while carefully safeguarding the rights of non-Indian defendants. As I heard about time and again, many tribes provide far beyond the floor of what is required of them. In many instances, non-Indian defendants in tribal courts experience a justice system that has far more time for them, and that treats them and their families with more individualized services and, frankly, care, than they are used to receiving in the state or federal system. For example, tribes in the initial few years sent 51% of the non-Indian defendants to batterer intervention or another rehabilitation program.³

A particular case from the Alabama Coushatta Tribe of Texas sticks out to me. When I spoke with the tribal prosecutor, she described the non-Indian defendant in that case—not as an outsider—but as a community member, and the mother of five tribal children. She spoke about how hard she tried to keep the woman’s case in tribal court. In tribal court, she would be able to work out a plea deal that addressed her underlying drug problem and provided her with mental health counseling. This plan kept her clean and out of jail, building toward reuniting her with her children. If the same defendant was prosecuted in state court, not only would that kind of care be resource or time prohibitive, but she would have likely received a longer sentence due to her criminal history with drug possession.⁴

Moreover, the law had the perhaps unintended effect of creating an impetus for positive reforms, creative legal innovations with benefits beyond the borders of Indian Country,⁵ collaboration, and communication across tribal governments as well as other sovereigns.⁶ However, the report also carefully documented the many ways in which VAWA 2013 did not go far enough and the frustrations that tribal governments had with the current limitations in the law.

II. THE NEED TO DO MORE TO PROTECT NATIVE WOMEN

Since VAWA 2013 was passed, the National Institute of Justice issued a 2016 report showing that the problem was even worse than we thought. The rates of domestic and sexual violence against American Indian and Alaska Native women are staggering. More than 4 in 5 American Indian and Alaska Native women—84.3%—have experienced intimate partner violence, sexual violence, or stalking in their lifetimes. And the vast majority of them experience violence at the hands of a non-Native perpetrator, including 96% of victims of sexual violence and 89% of stalking victims. American Indian and Alaska Native women are 5 times more likely

² Email from Esther Labrado, Legal Manager and Policy Lead – Legal & Governance, National Congress of American Indians, to author (Dec. 6, 2021, 11:33 AM) (on file with author).

³ VAWA 2013 REPORT at 20.

⁴ *Id.* at 21.

⁵ *Id.* at 61-70 (describing tribal courts’ different implementation and code choices as “laboratories of justice”); see Elizabeth Reese, *The Other American Law*, 73 STAN. L. REV. 55, 588-594 (2021) (explaining how the decision to interpret VAWA 2013’s requirement that tribal jury pools represent a fair cross section of their communities, including non-Indians, as allowing for tribal flexibility to use lists of non-Indian community members such as spouses, employees, and lessees rather than simply non-Indian residents as an innovative idea with applications to other geographic areas throughout the United States that struggle with diversifying their jury pools).

⁶ VAWA 2013 REPORT at 32-37 (discussing tribal law reforms—particularly in the realm of victims’ rights and safety—as well as the increased collaboration between tribes and stronger relationships built with state and federal partners).

to experience violence by an interracial partner as non-Hispanic white women, and 1.7 times more likely than white women to have experienced violence in the past year.⁷ VAWA 2013 and the financial supports provided therein was only the beginning of what is needed to address this problem.

A. Increase Funding to Support Tribal Governments

The number one reason that more tribal governments are not prosecuting under VAWA 2013 is **because they cannot afford it**. Criminal justice systems are very expensive. And tribal governments throughout this country are struggling financially without anything close to adequate support from the federal government.⁸ I would be happy to return to this committee another time to provide testimony on the historical roots, demographic realities, and legal complexities⁹ that all compound to create the untenable status quo of how tribal governments are funded—it is indeed an unsustainable reality that ought to trouble us all. However, for now, all I will say is that for many tribal communities, it is not that they lack the will or ability, it is that the cost of reworking or ramping up the scale of their criminal justice systems is daunting. In order to prosecute under VAWA 2013, many tribes must rework their codes, hire additional prosecutors, defense attorneys, and judges, contract for incarceration and inmate healthcare, and make countless other changes to comply with law.¹⁰ Take a look at the cost to a state or the federal government for each arrest, prosecution, police officer, judge, jail, healthcare costs for detainees, transportation, and everything in between all the way down to keeping the lights on. It is just as expensive for tribes to grow their justice systems and take on this work as any other government. We ought to be thinking about budgetary support on those terms.

Therefore, not only is it my recommendation that this committee consider proposing legislation that reaffirms the grant funding to support tribes who are seeking to implement SDVCJ, but I suggest increasing it. And what they need is not another competitive grant program for discrete and limited projects, but additional, steady streams of funding that more tribes can use to do things like hire additional staff, expand infrastructure, and generally keep the lights on.

B. Expand the Scope of Tribal Jurisdiction Over Non-Indians Under VAWA

1. It Is Senseless and Dangerous to Keep Tribes from Prosecuting the Many Similar Crimes Against Native Women

I also suggest expanding the number of offenses available under the statute. Having the power to prosecute such a limited set of offenses and limited kind of offenders forces a senseless and frustrating powerlessness upon tribal governments. While prosecuting domestic and dating violence cases, tribes consistently come across other kinds of similar, but not covered crimes, or

⁷ NAT'L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (May 2016).

⁸ See U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING SHORTFALL AND UNMET NEEDS IN INDIAN COUNTRY (July 2003).

⁹ Tribes are unable to effectively collect funds the primary way that most governments are able to, through taxes, thanks to a series of legal decisions and policy choices. They are unable to collect property taxes since reservation lands are held in trust by the federal government. Tribes are able to use sales and excise taxes to a limited degree, though their efforts to impose such taxes over non-Indians are often challenged through litigation, *Atkinson v. Shirley*, 532 U.S. 645 (2001), or de-facto limited by the imposition of concurrent state taxation, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018). The urgent need for tribal economic development responds to this need for alternative funds. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771–74 (2004).

¹⁰ VAWA 2013 REPORT at 29-30.

crimes that happen alongside their VAWA SDVCJ cases.¹¹ Tribes have the knowledge, will, and capacity to do something about these crimes, and lack only the permission. This powerlessness can have tragic and preventable consequences.

As it was told to me by the victim advocates and court officials at Sault Ste. Marie Tribe, a non-Indian man who was dating a tribal member made unwanted sexual advances on her 16-year-old daughter. He sent inappropriate text messages and stood outside their house. On one occasion he groped the daughter and told her not to tell anyone. When mother and daughter came forward asking for help, the tribe tried to charge the defendant with domestic abuse—attempting to characterize the sexual assault against the daughter as part of a pattern of abusing her mother. But, the tribal court, mindful of limits of the law, dismissed the charges for lack of jurisdiction since the girl was not in a domestic or dating relationship with the defendant. Four months later, he was arrested by county police for kidnapping and repeatedly raping another 14-year-old tribal member at an off-reservation hotel.¹² This rape was preventable. The tribe knew that this individual was a danger to the community—particularly to young girls—and had victims willing to come forward. The only thing stopping them from protecting their community was they lacked the precise permission of the United States Congress. Federal law has not yet said that it is ok for the local police, prosecutors, and judges to do anything about these crimes being done to their own people—that happen right in front of them. So they have to sit back and do nothing.

2. It Is Ineffective, Inefficient, and Problematic to Prevent Tribes from Charging and Negotiating Plea Bargains That Include Adjacent Criminal Conduct

At the very least, Congress ought to expand tribal criminal jurisdiction to include similar crimes that go to the heart of the violence against women that this law is intended to address, such as sexual assault, stalking, and sex trafficking, and the kinds of crimes that are the most common adjacent offenses. These offenses often occur along with the domestic violence or dating violence crimes that tribes already have jurisdiction over. Across the initial few years of VAWA 2013 cases documented in my report, for example, 58% of incidents involved children,¹³ and 51% of incidents involved drugs or alcohol.¹⁴ But currently, tribes cannot charge defendants with many of these co-occurring offenses, including violence against children, drug possession, or assault on law enforcement.¹⁵

An expansion to adjacent crimes would create a more equitable system for prosecutors and defense counsel to navigate. The vast majority of criminal cases in the United States are resolved, not at trial, but by plea bargaining. One of the most common tools that prosecutors and defense counsel have when negotiating a plea is that there are often multiple charges of criminal conduct brought. Taking one or another more serious or minor offense off the table allows the two sides to arrive at a result they can both live with. Without the full power to charge an offender with all of the crimes they are suspected of committing, both sides are stuck with just the one charge: domestic violence, a charge which is notoriously difficult to prove in court and which relies on the cooperation of often highly traumatized and reticent witnesses. Crimes such as a DUI when fleeing the scene of a domestic assault or an assault on the arresting police officer are often easier, simpler, and less difficult options for prosecutors to work with, particularly because

¹¹ *Id.* at 22 (discussing a workplace sexual assault case that Pascua Yaqui was unable to charge although the assailant had sufficient ties to the community because it was not within the context of a prior romantic relationship).

¹² *Id.* at 24-25.

¹³ *Id.* at 24.

¹⁴ *Id.* at 26.

¹⁵ *Id.* at 23.

they are less traumatizing for domestic violence victims.¹⁶ Violent crime rarely unfolds in a neat fashion such that only one crime fits the set of events and everyone is on the same page about the alleged offender's guilt and the appropriate punishment. Granting tribes the power to prosecute only one kind of crime simply doesn't reflect the reality of how crime happens or the tools people in the criminal justice system use to do their jobs. As one attorney from a prosecuting tribe described it to me, forcing attorneys to work within such a limited legal framework is akin to requiring them to do their jobs "with one hand tied behind their back."¹⁷

In truth, Congress should simply restore full concurrent jurisdiction over non-Indian defendants for tribal governments, keeping in mind that the 1-to-3-year sentencing limitations put in place by the Tribal Law and Order Act already do a tremendous amount of work to limit what tribes can do when it comes to the most serious offenses.¹⁸ That would be clearer and eminently more workable. And it would be safer and far more effective because it would be informed by the realities of how criminal cases are investigated and prosecuted. Think of the officers who show up on the scene to answer a 9-1-1 call, when the facts of what happened aren't yet clear. Having the authority to conduct an open-ended investigation helps those officers to do their jobs. But that's not what happens in Indian Country. Instead, the officer's authority or what court needs to issue a warrant can turn on things like Indian status or even a couple's relationship status. As Justice Kavanaugh—quoting a group of U.S. Attorneys describing this system last summer—said at a Supreme Court oral argument recently, the jurisdictional system in Indian Country is an "indefensible morass of complex, conflicting, and illogical commands layered in over decades via congressional policies and court decisions and without the consent of tribal nations."¹⁹

III. THE LEGAL FOUNDATION FOR TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS & THE PROCESSES AND RIGHTS THAT PROTECT NON-INDIAN DEFENDANTS

Despite this "morass," and the truly unacceptable levels of violence against Native women, change has been slow. When the prospect of expanding tribal criminal jurisdiction as a potential solution for this untenable status quo has been raised in the past, I know that there has been concern for the rights of non-Indians being tried in tribal courts, or the underlying constitutional validity of congressional action. I have encountered reticence about tribal courts prosecuting non-Indians, because of concern that they would not have the protections of the federal Constitution in tribal courts. To that, I have two responses. The first is to clarify the law on this matter since these concerns are rooted in several fundamental misunderstandings of the law. The second is a simple reminder that tribal governments are American governments too, and as such they are no less worthy of our trust, respect, and dignity.

A. No Further Protections or Oversight is Necessary: VAWA 2013 Already Ensures That Non-Indian Defendants in Tribal Courts are Protected by Constitutionally Equivalent Rights

To begin with, the Indian Civil Rights Act (ICRA), particularly as amended by the Tribal Law and Order Act (TLOA) and VAWA 2013, extends all of the relevant constitutional protections in a criminal court proceeding to non-Indian defendants.²⁰ The Supreme Court

¹⁶ *Id.* at 26-27 (describing instances of such adjacent crimes going unprosecuted and the difficulties it creates for tribal prosecutors).

¹⁷ *Id.* at 22.

¹⁸ 25 U.S.C. § 1302(a)(7), (b).

¹⁹ Transcript of Oral Argument at 56, *Cooley v. United States*, 593 U.S. ____ (2021) (Kavanaugh, J.) (No. 19-1414) (quoting Brief for Former United States Attorneys as Amici Curiae Supporting Petitioner at 8-9).

²⁰ 25 U.S.C. §§ 1302-1304.

recently described the provisions contained in ICRA as “require[ing] tribes to ensure ‘due process of law,’ . . . accord[ing] defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment.”²¹ These protections include the basic right to due process of law;²² freedom from illegal or warrantless search or seizure;²³ a prohibition on double jeopardy;²⁴ a right against self-incrimination;²⁵ the right to a speedy trial and to confront witnesses;²⁶ the right to a jury trial;²⁷ the right to indigent defense;²⁸ the right to effective assistance of counsel;²⁹ the prohibition on bills of attainders;³⁰ and the right not to be subjected to cruel or unusual punishment, excessive fines, or excessive bail.³¹

Congress has created these protections and provided the remedy of habeas corpus.³² Tribes are also legally required to notify all their detainees of their right to file a habeas petition to contest their detention as a violation of their rights.³³ Just like the equivalent guarantees in the Constitution, these protections exist on the books, ready to spring into action when they are transgressed and then invoked by an aggrieved citizen. Nothing else beyond the legal promise of the right and the provision of a remedy is needed to ensure that tribes are adequately providing the rights that they are required to under the law. Indeed, no more than we do to make sure that the county courts in Illinois are complying with the federal constitutional rights they are required to afford their defendants. Both systems already work the same way. The writ of habeas corpus is available in both instances,³⁴ and so defendants are able to contest any violation of their equivalent constitutional rights protections that result in unlawful detention, just as they would a contest a similar violation of their constitutional rights in state court.³⁵ We can trust that tribal court systems take just as seriously their duty to interpret and provide adequate rights protections to defendants,³⁶ when they are raised immediately or in the course of a direct appeal. And we can certainly trust that people don’t want to stay in prison, particularly when their rights have been violated. If there were rampant rights violations in tribal courts, we can rest assured that we would know about it.

²¹ *U.S. v. Bryant*, 579 U.S. 140, 156-57 (2016). The Court went on to conclude that: “Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions.” *Id.* at 157.

²² 25 U.S.C. § 1302(a)(8).

²³ 25 U.S.C. § 1302(a)(2).

²⁴ 25 U.S.C. § 1302(a)(3).

²⁵ 25 U.S.C. § 1302(a)(4).

²⁶ 25 U.S.C. § 1302(a)(6).

²⁷ 25 U.S.C. §§ 1302(a)(10), 1304(d)(3).

²⁸ 25 U.S.C. § 1302(c)(2).

²⁹ 25 U.S.C. § 1302(c)(1).

³⁰ 25 U.S.C. § 1302(a)(9).

³¹ 25 U.S.C. § 1302(a)(2).

³² 25 U.S.C. § 1303

³³ 25 U.S.C. § 1304(e)

³⁴ 25 U.S.C. § 1303 (extending the writ of habeas corpus to any person to test the legality of detention ordered by an Indian tribe); U.S. Const. art. I, § 9, cl. 2; 28 U.S.C. § 2254(a).

³⁵ 28 U.S.C. § 2254(a).

³⁶ Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 522 (2000) (“Additional evidence demonstrates that tribal courts take their task of construing ICRA seriously. This evidence is the attentiveness tribal courts give to federal court precedents when construing ICRA’s sister terms in the Bill of Rights, as well as the tendency of tribal courts to depart from federal interpretations only after articulating good reasons to do so. Indeed, analysis of the case law reveals that tribal courts have assimilated many Anglo constitutional values even though they have given the provisions varying applications.”).

B. Tribal Governments Deserve to Be Trusted to Do Their Part Alongside Other American Governments to Protect Native Women

My second response to those who may be worried about the fairness or adequacy of the justice systems that tribes are running, is to share what I came to realize while working so closely with tribal governments throughout this country. It is at once so obvious and yet unfortunately still so profound that it has become a large part of my academic career to extend this insight to every corner of American law: Indian Tribes are simply governments, just like any other in this country. They are composed—not of “outsiders”—but entirely of your fellow American citizens. Like any other government, they are trying their best to do what is best for the people they are responsible for. They are trying to make laws and programs that help people thrive and protect them from harm. They are not perfect. They are simply a group of American citizens doing their best to shape laws and build systems that they and their families will have to live by and be brought to justice under when they cause harm. And it is high time we trusted them to do that.

When equivalent rights protections are already readily available under existing federal law, requiring any additional federal agency oversight of tribal governance, or earlier federal court intervention beyond what we require of states is a waste of federal and tribal resources. When a state is accused of violating a criminal defendant’s Constitutional rights, defendants are required to raise the issue first in state court to give them the first opportunity to address and rectify it.³⁷ To subject tribal governments to any more supervision or scrutiny than we do the other governments in this country is nothing more than a paternalistic impulse rooted in colonially tinged distrust of tribal governments as somehow more suspect or less capable of dispensing equal justice.³⁸ The “jurisdictional maze” of Indian Country and lack of adequate protections for public safety already makes Indian people feel like “second-class citizens.”³⁹ We should be weary of any programmatic change which would likewise communicate that their governments are second-class governments.

C. Congress Has the Power to Restore Tribal Criminal Jurisdiction Over Non-Indians

Finally, there is the question of Congress’ power to authorize broader exercise of tribal criminal jurisdiction. It is settled law that tribal sovereignty, including the power to prosecute all persons who commit crimes within their territories, is inherent.⁴⁰ It is built into the government of the tribe, with permanent and deep roots in their very existence as a government in their own right, as pre-colonial self-governing peoples. However, it is also settled law, that Congress—as a matter of both constitutional power and colonial necessity—has plenary power over the scope of that sovereignty.⁴¹ Just as with state sovereignty, Congress cannot create or destroy tribal sovereignty, but federal power can limit its exercise.⁴² But Congress can, just as easily—and

³⁷ 28 U.S.C. § 2254(b) (describing the state court exhaustion requirement in habeas corpus petitions for violations of constitutional rights).

³⁸ Moreover, evidence suggests such concerns are completely unwarranted. In a study of tribal court civil cases involving non-Indian defendants, Professor Bethany Berger found that tribal courts were nonetheless even-handed and fair. Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); see also Rosen, *supra* note 36.

³⁹ INDIAN L. & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES v, viii-ix (Nov. 2013) (describing the “jurisdictional maze” in Indian Country that makes Indian people “second-class citizens” when it comes to protection from crime, particularly because the local police & law enforcement most closely connected to Indian Country are helpless to prosecute a great deal of the crimes that they encounter).

⁴⁰ *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

⁴¹ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 380 (1886).

⁴² Although there are, of course, many ways—including provisions of the Constitution itself—which limit the exercise of state sovereignty, federal law also recognizes that Congress’ power to limit the scope

without complicating the source of that underlying authority—remove the barrier placed on that power. Congress did just that in VAWA 2013, and in the “Duro Fix,”⁴³ which restored tribal power to prosecute non-member Indians. When the Supreme Court examined Congress’ decision to allow tribes to exercise more of their original inherent authority to prosecute crimes committed on their territory, it described that action as simply Congress “removing restrictions imposed on the tribes’ inherent sovereignty,”⁴⁴ and it upheld Congress’ power to do so under the Constitution.⁴⁵

Then, as here, Congress has not only the power to do something but the responsibility.

Forty-three years ago, when the Supreme Court decided *Oliphant v. Suquamish*—the case that removed tribal criminal jurisdiction over non-Indians—the opinion’s final paragraph acknowledged three important things. First, that the concerns about tribal courts that motivated parts of their decision might not even be well founded, particularly after the passage of ICRA. Second, that their decision might have drastic consequences for the “prevalence of crime” on reservations. And finally, that it would be up to Congress to fix the mess they made, if that indeed happened.⁴⁶

And here we are, still largely sitting in this mess 43 years later, after decades of Native women paying the highest price for the Supreme Court’s decision and Congress’ inaction. It is time to get out of the way and let tribal governments do as much as they can in the fight to protect Native women. Our reasons for keeping them out of it are rooted in fear, distrust, and assumptions about their capacity to soundly administer the law that all ought to be long since in our past.

of state courts’ jurisdiction. In *Tafflin v. Levitt*, the Supreme Court held that though state courts otherwise have “inherent authority, and are presumptively competent, to adjudicate claims,” they can “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests” be “divested of jurisdiction to hear [certain claims.]” 493 U.S. 455, 458, 460 (1990) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

⁴³ 25 U.S.C. § 1301(2).

⁴⁴ *United States v. Lara*, 541 U.S. 193, 207 (2004).

⁴⁵ *Lara*, 541 U.S. at 210.

⁴⁶ “We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.” *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211–12 (1978).