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MEMORANDUM

Legislative History of § 905 of the Violence Against Women Reauthorization Act of 2013
(Updated April 27, 2015)

Summary

This memorandum briefly examines the legislative history of § 905 of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). Section 905 concerns tribal court authority to issue and enforce civil protection orders, providing that:

[A] court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders against any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian lands, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.¹

Two key Senate committees prepared reports that address the specific language eventually adopted as § 905 of VAWA 2013. Both of those reports reflect Congress' intent that § 905 clarified and confirmed the already existing authority of all tribes to issue and enforce protection orders against anyone, Indian or non-Indian, for matters arising in the Indian country of the Indian tribe or otherwise within the authority of the tribe. Because the federal district court in *Martinez v. Martinez*² had interpreted the Violence Against Women Act of 2000 (VAWA 2000) to be ambiguous regarding tribal civil jurisdiction to *enter* certain protection orders, Congress found that it was necessary to confirm that all tribes have had this power since the enactment of

¹ Section 905 of VAWA 2013.

² *Martinez v. Martinez*, 2008 WL 5262793, No. C08-55-3 FDB (W.D. Wash. Dec. 16, 2008) (holding that an Indian tribe lacked authority to enter a protection order for a non-member Indian against a non-Indian residing on non-Indian fee land within the tribe's reservation). *See also* S. Rep. No. 112-265, at 11 and 21 (2012). The report notes that the clarification that tribal courts have full civil jurisdiction to issue and enforce protection orders against Indians and non-Indians would effectively reverse *Martinez v. Martinez*.

VAWA 2000.³ Congress used § 905 of VAWA 2013 to amend 18 U.S.C. § 2265 to clarify three points under current law: (1) tribal courts have full civil authority to issue protection orders, not just to enforce them; (2) tribal court protection orders can apply to any person; and (3) jurisdiction includes matters arising anywhere in Indian country or “otherwise within the authority of the Indian tribe.”⁴

Unfortunately, inclusion of the Special Rule for the State of Alaska as § 910 in VAWA 2013 raised questions for some about the authority of most Alaska tribes to issue and enforce civil protection orders against non-tribal members.⁵ These questions persisted despite provisions in § 910 on retained tribal jurisdiction, a savings clause, and clarifications by Senator Murkowski, the sponsor of § 910, that under both the pending bill and her amendment, Alaska tribes other than Metlakatla would “retain all of the authority they currently have to issue domestic violence protection orders, whether or not that authority is inherent or statutorily created, and none of this authority, to the extent it exists, is diminished by the legislation or by my amendment.”⁶ Regardless, these questions were finally put to rest when § 910 of VAWA 2013 was repealed in its entirety on December 18, 2014.⁷ This repeal removed any lingering cloud regarding the applicability of § 905 to all Alaska tribes.

Discussion

I. Legislative History of § 905 of VAWA 2013

Prior to the enactment of VAWA 2013, two related bills were introduced and studied by the 112th Congress--the Violence Against Women Reauthorization Act of 2011⁸ and the SAVE Native Women Act.⁹ Although neither of these bills became law, each did contain language that was substantially similar to what is now § 905 of VAWA 2013. Each of these bills was also accompanied by a written committee report explaining the proposals and their intended effects. Those committee reports are important sources for determining Congress’ intent and understanding of the civil protection order language.¹⁰

A. Senate Indian Affairs Committee Report No. 112-265 (2012). In the 112th Congress (2011-2012), Senator Akaka introduced S. 1763, the SAVE Native Women Act. Core provisions of S. 1763 were subsequently incorporated into the VAWA reauthorization bill as

³ The Violence Against Women Act of 2000 added the following as 18 U.S.C. § 2265(e): “For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” (emphasis added).

⁴ See S. Rep. Report No. 112-265, at 21 (2012).

⁵ See S. Rep. No. 113-260, at 1 (2014). Section 910 operated to exclude Alaska tribes other than the Metlakatla Indian Community from the amendments made by §§ 904 (restoring special domestic violence criminal jurisdiction) and 905 (clarifying tribal authority to issue and enforce protection orders).

⁶ 159 Cong. Rec. S581 (daily ed. Feb. 11, 2013) (statement of Sen. Murkowski).

⁷ Alaska Safe Families and Villages Act of 2014, Pub. L. No. 113-275.

⁸ S. 1925, the Violence Against Women Reauthorization Act of 2011 (VAWA 2011). This bill subsequently passed the Senate in 2012 under the amended title “Violence Against Reauthorization Act of 2012”.

⁹ S. 1763, the Stand Against Violence and Empower Native Women Act (SAVE Native Women Act).

¹⁰ Other sources of legislative history, not fully reviewed here, include floor statements during legislative debate, hearing testimony, and earlier versions of bills.

Title IX.¹¹ The Senate Indian Affairs Committee Report on the SAVE Native Women Act is significant. It states that the Act “confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every Tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.”¹² The report adds that this jurisdiction extends to “matters arising in the Indian country of the tribe ‘or otherwise in the authority of the tribe’.”¹³ Specifically, the report details the purpose of § 202 of S. 1763, a provision substantively identical to that eventually codified as § 905 of VAWA 2013.¹⁴

The SAVE [Native Women] Act addresses Tribal civil jurisdiction. **Specifically, it confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every Tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.** “Without the ability to issue and enforce protection orders and to get full faith and credit for those protection orders, there is a real risk to Native women to be threatened again.” To help tribes better protect victims, Tribal courts should have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian. Because Native communities are often located in rural areas, physically distant from State courts and police stations, Tribal courts are often in the best position to best meet the needs of the residents of the community. “Orders of protection can be a strong tool to prevent future violence, but they are only as strong as their recognition and enforcement.”¹⁵

The pertinent part of the report’s section-by-section analysis of S. 1763 states:

Sec. 202. Tribal protection orders--This section amends 18 U.S.C. Sec. 2265 to: (1) **clarify provisions in prior amendments to the VAWA, enacted in 2000, that Indian tribes have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian, in matters arising in the Indian country of the tribe “or otherwise in the authority of the tribe.”** (At least one Federal district court has interpreted the language in current law to be ambiguous regarding jurisdiction of an Indian tribe to enter a protection order for a nonmember Indian against a non-Indian residing on non-Indian fee land within the reservation. This amendment would clarify that tribes have full

¹¹ See S. Rep. No. 112-153, at 8 (2012) (stating that “sections 904 and 905 of this bill [S. 1925, subsequently reintroduced and passed in the 113th Congress as S. 47] are taken almost entirely from S. 1763, the Stand Against Violence and Empower Native Women Act (the SAVE Native Women Act)”).

¹² See S. Rep. No. 112-265, at 11 (2012).

¹³ S. Rep. No. 112-265, at 21 (2012).

¹⁴ The text of § 202 of S. 1763 follows with variant language adopted in § 905 of VAWA 2013 noted in brackets: Section 2265 of title 18, United States Code, is amended by striking subsection (e) and inserting the following:
(e) Tribal court jurisdiction
For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, the exclusion of violators [to exclude violators] from Indian land, and [to use] other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

¹⁵ S. Rep. No. 112-265, at 11 (2012) (emphasis added) (footnotes omitted).

civil jurisdiction over these matters.); and (2) **clarify that nothing in this section limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska or any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.**¹⁶

Senator Murkowski offered § 202(2), an Alaska savings clause, as an amendment to S. 1763.¹⁷ This amendment was accepted by the Senate Indian Affairs Committee on December 8, 2011 and would have been added to 18 USC § 2265 as subsection (f).¹⁸ S. 1763 was never passed by the Senate, and the precise text of Senator Murkowski’s amendment was not carried over into either the 2011 or 2013 version of the VAWA reauthorization bills. However, the Special Rule for the State of Alaska eventually codified in § 910 of VAWA 2013 was generally similar. Section 910 contains not only the limitation that §§ 904 and 905 only apply to the Indian country of the Metlakatla Indian Community but also a statement recognizing retained jurisdiction of each tribe in Alaska¹⁹ and a savings clause.²⁰ Significantly, as a sponsor of § 910 in 2013, Senator Murkowski clarified that under both the pending bill and her amendment, Alaska tribes other than Metlakatla will “retain all of the authority they currently have to issue domestic violence protection orders, whether or not that authority is inherent or statutorily created, and none of this authority, to the extent it exists, is diminished by the legislation or by my amendment.”²¹

B. Senate Judiciary Committee Report No. 112-153 (2012). Also during the 112th Congress, the Senate Judiciary Committee issued S. Rep. No. 112-153 on S. 1925, the Violence Against Women Reauthorization Act of 2011. The Judiciary Committee’s report clarifies the intent of Congress to recognize the full civil jurisdiction of tribal courts to issue and enforce protection orders against any person under current law. The report also refers to the flawed federal district court decision *Martinez v. Martinez*,²² which held that a tribe lacked authority to enter a protection order for a non-member Indian against a non-Indian residing on non-Indian fee land within the reservation. The report discusses § 905 stating:

Another important tool in reducing violence on tribal land is the use of protection orders. Section 905 of the legislation is a narrow technical fix to clarify Congress’s intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian. At least one Federal district court has misinterpreted 18 U.S.C. 2265(e) and held that tribes lack civil jurisdiction to issue and enforce protection orders against certain

¹⁶ S. Rep. No. 112-265, at 21 (2012) (emphasis added).

¹⁷ Section 202(2) offered by Murkowski read:

(f) Applicability

Nothing in this section limits, alters, expands or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.

¹⁸ S. Rep. No. 112-265, at 20 (2012).

¹⁹ Section 910(b) provides that “The jurisdiction and authority of each Indian tribe in the State of Alaska . . . (as in effect on the day before the date of enactment of this Act) — (1) shall remain in full force and effect; and (2) are not limited or diminished by this Act or any amendment made by this Act.”

²⁰ Section 910(c) provides that “Nothing in this Act or an amendment made by this Act limits or diminishes the jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.

²¹ 159 Cong. Rec. S581 (daily ed. Feb. 11, 2013) (statement of Sen. Murkowski).

²² 2008 WL 5262793, No. C08-55-3 FDB (W.D. Wash. Dec. 16, 2008).

non-Indians who reside within the reservation. That decision erroneously undercut tribal courts' ability to protect victims and maintain public safety within their communities. Section 905 corrects this error. It does not in any way alter, diminish, or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land.²³

The pertinent part of the report's section-by-section analysis of S. 1925 states:

At least one Federal court has misinterpreted 18 U.S.C. 2265 to hold that tribes lack civil jurisdiction to issue and enforce protection orders against certain non-Indians who reside on reservation lands. This undermines the ability of tribal courts to protect victims and maintain public safety. **This section clarifies the intent of current law, namely that tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian. The language of this section does not in any way alter, diminish, or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land.**²⁴

II. Repeal of § 910 of VAWA 2013

For some, inclusion of the Special Rule for the State of Alaska as § 910 in VAWA 2013 raised questions about the authority of most Alaska tribes to issue and enforce civil protection orders against non-tribal members.²⁵ Section 910 operated to exclude Alaska tribes other than the Metlakatla Indian Community, Annette Island Reserve, from the amendments made by § 904 (restoring special domestic violence criminal jurisdiction) and § 905 (clarifying tribal jurisdiction to issue and enforce protection orders).²⁶

Such questions persisted despite the fact that § 910 also included a statement recognizing that the retained jurisdiction of all Alaska tribes in effect the day before the enactment date of VAWA 2013 would remain in full force and effect,²⁷ as well as a savings clause stating that nothing in the legislation or the amendment would limit or diminish the jurisdiction of Alaska or any subdivision of Alaska, or of any Alaska tribe.²⁸ Additionally, less than a month before VAWA 2013 became law, Senator Murkowski (AK), the sponsor of § 910, clarified on the Senate floor that under both the pending bill and her amendment, Alaska tribes other than Metlakatla would “retain all of the authority they currently have to issue domestic violence protection orders, whether or not that authority is inherent or statutorily created, and none of this authority, to the extent it exists, is diminished by the legislation or by my amendment.”²⁹

²³ S. Rep. No. 112-153, at 11 (2012) (footnotes omitted).

²⁴ S. Rep. No. 112-153, at 32-33 (2012) (emphasis added).

²⁵ A Senate Indian Affairs Committee report on a bill to repeal § 910 stated that § 910 had “clouded to what extent [Alaska tribal] civil authority lies over non-tribal members.” See S. Rep. No. 113-260, at 1 (2014).

²⁶ Section 910(a) of VAWA 2013.

²⁷ Section 910(b) of VAWA 2013.

²⁸ Section 910(c) of VAWA 2013.

²⁹ 159 Cong. Rec. S581 (daily ed. Feb. 11, 2013) (statement of Sen. Murkowski).

Inclusion of § 910 in VAWA 2013 created a public outcry and groundswell opposing it.³⁰ Section 910 of VAWA 2013 was repealed in its entirety on December 18, 2014, resolving any questions it may have raised and removing any lingering cloud regarding the applicability of § 905 to all Alaska tribes.³¹

Conclusion

The legislative history of § 905 reflects that Congress intended to clarify and confirm the already existing authority of all tribes to issue and enforce protective orders against anyone, Indian or non-Indian, for matters arising in the Indian country of the Indian tribe or otherwise within the authority of the tribe. Although the Special Rule for the State of Alaska set forth in § 910 of VAWA 2013 may have confused matters for some, that provision has been repealed. It is now clear that § 905 applies to all tribes, including those in Alaska.

³⁰ See also Indian Law and Order Commission's report to the President and Congress, "*A Roadmap For Making Native America Safer*" (November 2013). There, the Commission recommended the repeal of § 910 to place Alaska Native communities on a par with other Native communities in the country. Referring to such a fix, the Commission stated that: "Allowing Tribal courts to issue protective orders, to enforce them, and provide the local, immediate deterrence effect of these judicial actions may be the single-most effective tool in fighting domestic violence and sexual assault in Native communities in Alaska." The report also points out that the provisions of § 905 can apply even in the absence of Indian country and therefore "clearly should be in the purview of Tribal courts in Alaska." See Roadmap Report at Recommendation 2.4, at page 55.

³¹ Alaska Safe Families and Villages Act of 2014, Pub. L. No. 113-275.