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No Surrender: Fighting for Native American Justice

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No Surrender: Fighting for Native American Justice

By Troy A. Eid*

EDITOR'S NOTE: This essay is excerpted from the Keynote Remarks of the Honorable Troy A. Eid before the FIU Law Review's 2014 Symposium, "From War and Removal to Resurgence: The Legal and Political History of Florida Tribal Governments," held at the Florida International University College of Law on February 28, 2014.

Thanks very much to the *Law Review* and Professor Alex Pearl for inviting me to join you today. Thanks also to Dean R. Alexander Acosta. I've been asked to share some stories from earlier days, but like many old friends, your Dean and I enjoy a Fifth Amendment privilege. So I can only say: don't ever play poker with this man. There is no finer public servant than Alex Acosta. It's clear from this visit that Alex draws great inspiration from you—and I think you're lucky to have him as well. I can't say enough about the *Law Review* staff, especially Ben Crego and Adam Lewinson and the other fine people who attended the welcome dinner last night.

Let me begin with a point of personal privilege: how many of you are First Generation Americans? It's wonderful to see so many of you. From a man whose father immigrated to the United States from Egypt with just \$100 in 1957, let me recognize you and reflect on what your success means to our great country.

On the occasion of this inaugural conference on the Native American Tribes of Florida, it's fitting that those of us who are First Generation Americans begin by honoring this land and the people who have lived here since time immemorial. Throughout this day together, we will be learning about the Seminole and Miccosukee Tribes and other Native Nations—not just as they were, but as they've endured and flourished—and rightly so.

At the same time, ours is a country of constant immigration, from the distant corners of the world, which only adds to the richness of our shared

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national identity. To the many First Generation Americans here today, I appreciate how very hard you worked to enter these walls, and how profound that journey can be for your families. As my Dad, the late Edward Eid, used to say: “every day we live in the United States is a great day.” When he passed away in 2006, my father left instructions to make sure there was an American flag on his gravestone. He loved our country with an immigrant’s love.

The theme for these remarks is, “No Surrender,” a phrase that comes from the Seminole Tribe’s governmental website.¹ In the interest of full disclosure, our law firm, Greenberg Traurig LLP, has represented the Seminole Tribe for many years in its commercial dealings and also in gaming compact matters with the State of Florida.

As you look toward graduation and entering law practice, you might keep American Indian law in mind. It’s a place where generalists can thrive. You never know what to expect and the legal and policy issues are endlessly fascinating. But if you do choose this path, the going can sometimes be tough. Plan on experiencing some really difficult days where your views—and even your presence—may be challenged. Good intentions simply aren’t enough. That’s because of the deep and painful legacy that comes with working in Indian country, including for those of us who are visitors. It demands that we go outside our individual comfort zones and open our minds and our hearts to how Native America came to be at this place today.

It is our responsibility to be honest not just about what befell Native Americans in the past, but about how those injustices have carried forward to this day. The ideal that lies at the heart of the United States—that all men and women are created equal²—will never be fulfilled until we come to terms with the institutional and structural inequities that still confront Native people.

MOMENTOUS TIMES

I was asked to talk about criminal justice issues affecting the 566 Federally recognized Native American and Alaska Native Nations in our great country. It is an honor to do so because we’re living in such momentous times. Two landmark pieces of legislation are changing the landscape. First, in 2010, Congress enacted the Tribal Law and Order Act (“TLOA”).³ TLOA was intended to make certain Federal officials serving

¹ *History: Where we came from*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/NoSurrender.aspx> (last visited Mar. 25, 2014).

² See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Declaration of Sentiments and Resolutions, Women’s Rights Convention held at Seneca Falls (July 19, 1848).

³ 25 U.S.C. § 2801 *et seq.* (2010).

Indian country—including United States Attorneys and law enforcement agencies such as the Federal Bureau of Investigation—more directly accountable to Native communities. TLOA also strengthens Tribal court systems by giving Tribal judges and juries more flexibility in sentencing criminal offenders. The second legislative milestone was the enactment of Section 904 of the Violence Against Women Act Reauthorization Amendments of 2013 (“VAWA Amendments”), which recognize Tribal courts’ criminal jurisdiction over non-Indian defendants in certain domestic violence cases.⁴ The unexpected passage of the VAWA Amendments overruled a portion of the United States Supreme Court’s infamous 1978 decision in *Oliphant*⁵ that Tribes by definition lack any criminal jurisdiction over non-Indians.

Some background puts these two new laws in perspective. By the end of the Nineteenth Century, the Federal Government had stripped Tribal governments of virtually all their authority to deal with violent crimes. Washington, D.C. instead embraced a Colonial model that imposed Federal laws, officials, and institutions on reservation lands—contravening Tribes’ ability to take action, and accept responsibility, for keeping order at the local level. Replacing tribally based authority with Federal command-and-control policies has inflicted unimaginable hardship on Native American and Alaska Native people and Nations, a legacy that persists to this day.⁶

The passage of TLOA and the VAWA Amendments are moving our country forward: Toward enhanced Federal respect for Tribes’ inherent sovereign authority to, in the words of the Supreme Court, “make their own laws and be ruled by them.”⁷ TLOA makes Federal officials more accountable—for instance, by requiring United States Attorneys to report to tribes whenever they decline cases for prosecution.⁸ It also enables Tribes

⁴ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118-26.

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁶ See INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING INDIAN COUNTRY SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 5-13 (Nov. 2013), available at http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf. [hereinafter ROADMAP].

⁷ *Williams v. Lee*, 358 U.S. 217, 219 (1959).

⁸ For instance, TLOA mandates reporting requirements when United States Attorney’s Offices decline to prosecute cases in Indian country. Prior to TLOA, the U.S. Department of Justice did not engage in any such systematic case-declination reporting across U.S. Attorney’s Offices serving Indian country. According to one analysis of U.S. Department of Justice records, Federal prosecutors filed a total of 606 criminal cases arising in Indian country in all of 2006. “With more than 560 Federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe.” N. Bruce Duthu, Op-Ed., *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 10, 2008, at A17; see also Testimony of Troy A. Eid, Chairman, Indian Law and Order Commission, Before the U.S. Senate Committee on Indian Affairs, *The Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Criminal Justice Throughout Indian Country?* 1, 4 (Sept. 22, 2011), available at

to reassert some criminal justice powers that have been severely restricted or eviscerated by Congress since 1885. This includes allowing Tribal courts to impose felony sentences—with periods of incarceration of longer than one year, the previous limit that had been imposed by Congress—on Native American offenders who commit violent crimes on Tribal lands.⁹

Starting early next year, the VAWA Amendments will permit Tribes to enact domestic violence laws covering non-Indians as well as Native Americans, and to enforce civil restraining orders designed to keep perpetrators away from victims.¹⁰ The VAWA Amendments also contain early authority for Tribes to begin reasserting this jurisdiction sooner, which several are currently pursuing with assistance from the U.S. Department of Justice.¹¹

TOO MUCH CRIME

This restoration of Tribal authority to prevent and combat violent crime is long overdue. Native Americans and Alaska Natives suffer from disproportionately high crime rates on Tribal homelands—2.5 times the national average or higher—where jurisdictional confusion reigns, resources are lacking, and local authority has been degraded or displaced.¹²

Available data also reveal that non-Native perpetrators disproportionately commit domestic violence and sexual assaults against Native victims.¹³ Of course, the underreporting of domestic violence crimes

<http://indian.senate.gov/hearings/upload/Troy-Eid-testimony.pdf> [hereinafter Eid Testimony].

⁹ See Eid Testimony, *supra* note 8.

¹⁰ Matthew L. Fletcher, *Indian Law—Tribal Courts—Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction over Non-Indian Defendants*, 127 HARV. L. REV. 1509, 1511-12 (2014).

¹¹ Section 908 of the VAWA Amendments establishes a “pilot project” by which the U.S. DOJ can recognize and affirm individual Tribes’ special domestic violence jurisdiction over non-Indians prior to Section 904’s general effective date of March 7, 2015. The Department on February 6, 2014, approved pilot project applications voluntarily submitted from three Tribes—the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe in Arizona, and the Tulalip Tribes in Washington State. See *VAWA 2013 Pilot Project*, U.S. DEP’T. OF JUST. (Feb. 6, 2014) www.justice.gov/tribal/vawa-pilot-2013.html (last visited Mar. 31, 2014).

¹² Professor Sarah Deer has written extensively about disproportionate rates of Native criminal victimization. She concludes that since 1999, when the U.S. Department of Justice’s Bureau of Justice Statistics (“BJS”) published its first national survey showing disproportionately high rates of Native criminal victimization, “those statistics have been affirmed, verified, and replicated by a number of different sources including State and Tribal entities.” Sarah Deer, “Criminal Justice in Indian Country,” at the Berkeley Law Thelton E. Henderson Center for Social Justice Symposium, “Heeding Frickey’s Call: Doing Justice in Indian Country” (Berkeley, CA, Sept. 27-28, 2012), Conference Transcript, 37 AM. INDIAN L. REV. 347, 377 (cataloguing recent statistical studies).

¹³ See, e.g., Steven W. Perry, *A BJS Statistical Profile 1992-2002: American Indians and Crime*, at 8-9 (Dec. 2004), available at www.bjs.gov/content/pub/pdf/aic02.pdf (last visited Mar. 31, 2014). Perry determined that in sixty-six percent of the violent crimes in which the race of the offender was reported, American Indian victims reported that the offender was non-Native; that nearly four in five

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in Indian country must be considered when interpreting these statistics. This point was made recently by Tony West, the Associate Attorney General of the United States, the third-highest position in the Department of Justice:

Department of Justice statistics show that one in three Native women can expect to be a victim of rape in her lifetime, and American Indians are twice as likely to experience rape or sexual assault compared to all races. Think about those numbers for a moment. Compounding these tragic figures is the fact that sexual assault is one of the most underreported crimes, with recent statistics indicating that seventy percent of sexual assaults are not reported. And one of the major contributing factors to underreporting is a lack of faith in criminal justice systems.¹⁴

Against this backdrop, TLOA and the VAWA Amendments represent an inflection point in the journey toward restoring local justice systems that are more accountable and accessible to all U.S. citizens than an outmoded Federal bureaucracy designed to make Tribal citizens dependent on Washington even for local public safety concerns.

‘IT TAKES SEVEN YEARS’

While TLOA and the VAWA Amendments seem like common sense today, there was a time—not long ago—when the passage of both seemed unlikely or even far-fetched. Go back to 2007, when future Dean Acosta and I were serving as the United States Attorneys for the Southern District of Florida and the District of Colorado, respectively, in President George W. Bush’s Administration.

That year, I worked with then-U.S. Senator Byron Dorgan of North Dakota, the Chair of the Senate Committee on Indian Affairs (“SCIA”), and his staff to explore a one-State limited *Oliphant* repeal where the Southern Ute Indian Tribe in Colorado would be permitted by Congress to assert criminal jurisdiction over non-Indian perpetrators in certain domestic violence cases. This very modest concept was dead on arrival because, given the politics, any Congressional recognition of Tribes’ inherent

American Indian victims of rape/sexual assault described the offender as white; and that roughly three in five American Indian victims of robbery (fifty-seven percent), aggravated assault (fifty-eight percent), and simple assault (fifty-five percent) described the offender as white. *Id.* Perry’s path-breaking research on this disparity should be properly understood as the first rather than last word on this important subject. His analysis was based primarily on nationwide victimization surveys and did not distinguish between Indian reservations and other rural and urban settings.

¹⁴ See Tony West, Acting Associate Attorney General, Address at the Press Conference Regarding Sexual Assault Response Team Initiative (June 6, 2012) (transcript from the U.S. Department of Justice *available at* www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-120606.html).

criminal jurisdiction over non-Indian perpetrators was perceived as lacking sufficient votes to make it out of the SCIA, let alone be approved on the floor of either the Senate or U.S. House of Representatives. Bear in mind that Chairman Dorgan was an extraordinarily effective legislator and committee chair; it's just that the political issues were too controversial to gain any momentum.

This was discouraging at the time. That same year, 2007, I had started teaching at the University of Colorado School of Law thanks to Professor Charles Wilkinson, one of the intellectual leaders of our profession and an author of extraordinary clarity and power.¹⁵ He and the late Dean David Getches¹⁶ helped forge American Indian Law into an academic discipline. I mentioned to Charles over dinner that our Colorado-only *Oliphant* repeal concept had been shelved.

"You do know, Troy," Charles said, "that it takes seven years to accomplish anything in this field."

This puzzled me. He explained: "Pretty much everything worth doing in Indian law has taken seven years. What seems impossible in Year One becomes possible in Year Seven if you work at it every day and don't quit."

"Why does it take seven years?"

"It just does."

Fast-forward to last year. The VAWA Amendments, recognizing Tribes' criminal jurisdiction over non-Indians in certain domestic violence cases, suddenly passed in the Senate. Many of us worked the House—and to our pleasant surprise—it passed there, too, and President Obama signed it into law.

Charles and I had dinner again. "You were right," I said.

"Not quite," he replied. "It only took six years."

¹⁵ During his remarkable career, Professor Wilkinson has published on a vast range of legal and policy matters facing the American West and Native America. He has directly participated—as a practicing attorney as well as a teacher and scholar—in key matters involving Tribal sovereignty and self-determination. *See, e.g.*, CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (W.W. Norton & Co., 2005).

¹⁶ *See, e.g.*, DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW (Thompson West, 5th ed. 2004).

Earlier this year, three Indian nations—the Tulalip Tribes in Washington State, the Umatilla Tribes in Oregon, and the Pascua Yaqui Tribe near Tucson, Arizona—were cleared by the U.S. Department of Justice to commence their pilot programs under the VAWA Amendments, closely resembling the Colorado pilot project a handful of us floated in 2007. Charles Wilkinson was right: times can and do change if we work at it.

FACING OUR FEARS

So how should we spend the next seven years?

We might start by taking aim at the unfinished business of a Civil Rights Movement that still bypasses far too much of Native America. For starters, why is it such a controversial proposition that some Native Nations wish to assert criminal jurisdiction over all people within their boundaries, regardless of land status?

It's time to call out our underlying fears and expose them to the light. When the Federal Government prevents Tribes from making and enforcing their own criminal laws over non-Indians and keeping the peace within their own borders, what it's really saying is that Native people can't be trusted to govern themselves or be fair to non-Natives. As Americans, which idea is radical: On the one hand, to put our faith in our fellow citizens, regardless of their race or ethnicity, or—on the other—to categorically assume that Native Americans and Alaska Natives will routinely fail to perform their civic duty as U.S. citizens whenever non-Natives are involved?

I respectfully suggest that the latter proposition—that Native people can't be fair to non-Natives and therefore should be denied any ability to hold them accountable for their actions—is a radical legacy that lingers from the late Nineteenth Century.¹⁷ It is un-American, at least judging by the inviolate principle that all people “are created equal, and are endowed by their Creator with certain unalienable rights; and among these are life, liberty and the pursuit of happiness.”¹⁸

¹⁷ For a thoughtful analysis of the colonial roots of the Federal criminal justice system in Indian country, and their stubborn endurance to this day, see Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709 (2005). Ironically, both the language and legislative history of the Major Crimes Act of 1885, now codified at 18 U.S.C. § 1153, demonstrate that Congress viewed Federal criminal jurisdiction over Indian country merely as a temporary expedient while Tribal governments passed away, Indian lands were opened to non-Native settlement, and American Indians were assimilated. Congress certainly never anticipated that it would be establishing a permanent Federal criminal justice scheme for Native Americans living on Tribal lands that have now endured for nearly 130 years. See Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1076-85 (2010).

¹⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

I make this observation after spending much of the last three years in the field with the Indian Law and Order Commission. We traveled from the outer reaches of Alaska to the East Coast, nine citizens from different walks of life, volunteers all. We came to the consensus conclusion that the Federal criminal justice system that is supposed to protect Indian people is broken. It isn't so much that it needs to be fixed; it needs to be jettisoned.

The Federal system is not—and emphatically will never be—a system that meets or truly respects the needs of local governments. Throughout the rest of the United States, roughly ninety-nine percent of the justice is locally based. If somebody commits a sexual assault in South Florida, for instance, local police or sheriff's deputies are responsible for responding. The matter goes before a local judge and there are local prosecutors and public defenders or criminal defense lawyers, all comparatively accessible. Should Federal civil rights issues arise, Federal justice is still available, of course, but the vast majority of the system is accountable and accessible at the community level. If you don't like how the district attorney is handling the case, for instance, you can go talk with her about it. If she doesn't listen, she may have to answer for it at the polls.

Contrast this quintessentially American model of local government with the Federal criminal justice system that serves Indian country, or with Federally mandated State systems imposed on Tribes without their consent through Public Law 93-280.¹⁹ Consider what it means when Native people are forced to endure a criminal justice system to which they never consented and which fails systematically to accommodate most community priorities and needs.²⁰

My home state of Colorado is home to two Federally recognized Tribes, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. The combined population of these Native Nations is about 5,000. Hundreds of Ute citizens have been convicted of Federal crimes over the decades at the closest U.S. courthouse, located as far as 450 miles away in Denver.²¹ According to available records, Utes have rarely if ever served on either Federal trial or grand juries since Colorado became a U.S. Territory in

¹⁹ Pub. L. No. 83-280, 67 Stat. 588 (1953). For background on the origins of PL-280 and the law and policies of what became known as the Termination Era, see Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 151-54 (1977).

²⁰ Washburn, who is now the Assistant Secretary for Indian Affairs, memorably described these phenomena as the "cavalry effect": Federal officials may see themselves as riding to the rescue of Tribal communities, whereas Tribal citizens must endure Federal officials and institutions that are not directly accountable to them, and in which they have little or no say. Washburn, *supra* note 17, at 30.

²¹ For a discussion of the U.S. Attorney's Office for the District of Colorado and its relationship to the two Federally recognized Indian Nations, the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe, see Troy A. Eid, *Making Indian Country Safer: Colorado's 'Admirable' Experiment*, 38 COLO. LAW. 21 (Oct. 2009); see also ROADMAP, *supra* note 6, at 113.

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1861.²²

Admittedly, the situation has improved somewhat thanks to individual U.S. District Court Judges who are willing to travel from Denver at least occasionally to hold court in Southwestern Colorado, and through the use of U.S. Magistrate Judges to handle some procedural matters.²³ Yet the essence of what amounts to a Colonial justice system remains stubbornly unchanged. For the Federal Government to dispense justice from afar in this manner, without the consent of or much actual participation from the local population, bears closer resemblance to the former British Empire than the American system of localism—that government should be closer and more transparent and accountable to the people, and more directly representative of their priorities and interests.

MAKING NATIVE AMERICA SAFER

As the Commission's report, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER*,²⁴ explains, the Federal criminal justice system in Colorado and other States is largely inaccessible and unaccountable to the Native Nations it is supposed to serve. We suggest more than forty substantive reforms to make Native America safer and more just for all U.S. citizens.²⁵

The heart of our approach is what I will call the Grand Bargain. That is to say, the Commission believes that all the Indian Nations in our country should be able to opt-out of the Federal system, except for laws of general application—that is, Federal laws that apply to all U.S. citizens no matter where they live or work, such as immigration crimes, racketeering, anti-terrorism and drug laws, and so forth.²⁶ If a given Tribe wants to develop and run its own criminal justice system, it should be able to do that so long as defendants' Federal civil rights are respected. Local justice matters should fall within the Tribes' direct control if that's what Tribal governments choose. Inclusive within this approach, Native Nations should also be free to negotiate voluntary agreements with the Federal Government or State governments as needed to protect their communities.

The other half of the Grand Bargain in the Commission's report is to make sure that Native Nations respect the Federal civil rights of all criminal defendants.²⁷ This means every defendant is of course entitled to his or her

²² ROADMAP, *supra* note 6, at 79. Nor is this disparity unique to Colorado. See Washburn, *supra* note 17 at 60 (analyzing the “de facto absence” of Native Americans on Federal juries).

²³ ROADMAP, *supra* note 6, at 79-81.

²⁴ ROADMAP, *supra* note 6.

²⁵ *See id.*

²⁶ *Id.*

²⁷ *See id.* at 1-27.

day in court. Specifically, the ROADMAP proposes that all defendants, Native and non-Native alike, be subject to the Tribe's criminal laws and be charged and prosecuted there with the same right to legal counsel and other Constitutional protections applicable to State courts.²⁸ Because justice delayed is justice denied, the procedural timelines mandated by the Federal Speedy Trial Act should be required in all Tribal court criminal proceedings.²⁹ If a Federal civil rights issue arises, the defendant would first be required to appeal through the Tribal court system, and then could pursue a direct appeal into Federal court on any Constitutional claims, again subject to strict timelines to prevent delay.

The Commission's recommendation is that all appeals from Tribes' appellate courts go to a newly created U.S. Court of Indian Appeals.³⁰ This would be a Federal circuit court on a par with the U.S. Court of Appeals for the Eleventh Circuit and other intermediate Federal courts established pursuant to Article III of the Constitution. The Commission envisions this as a specialized court, sitting in three-judge panels, that hears Federal Constitutional claims arising from Tribal court proceedings. We think a centralized U.S. Court of Indian Appeals would be more efficient than having such appeals go to the Federal courts in the respective circuits, and would produce a more consistent body of precedent for Tribal courts to follow. Such a court could be headquartered in Indian country and "ride circuit," visiting different geographical regions. From there, a discretionary appeal would lie with the U.S. Supreme Court.

The guiding premise behind the Grand Bargain is this: Protect everyone's Federal civil rights while strengthening public safety through enhanced local control, transparency, and accountability. The resounding lesson from the field is that where Tribal governments have more freedom to make their own laws and be governed by them, they overwhelmingly rise to the challenge, just as other local governments do. Abuses of power can and do occur, but that tends to be the exception to the rule—just as it is in many States. Our civil rights are only as strong as the weakest court. Yet the vast weight of practical experience, in Indian country and elsewhere, suggests that the most effective crime-prevention and crime-fighting strategies are locally based.

TRUSTING TRIBAL COURTS

With that in mind, let's get back to confronting our worst fears: can Tribal courts and juries really be fair?

²⁸ *Id.* at 1-33.

²⁹ *Id.* at 23-24.

³⁰ *Id.*

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That question needs to be right on the table because that's what non-Indians talk about when they're not in public. You can find an example of this if you search the words "Indian" and "Grassley" on YouTube. You will see more than 23,000 hits for a video clip of U.S. Senator Charles Grassley of Iowa, purportedly of a town hall meeting in Iowa shortly before the VAWA Amendments were voted on in the Senate.³¹ In fairness, Senator Grassley, who by all accounts is a fair and decent man and an accomplished public servant, states that non-Native perpetrators are disproportionately victimizing Native women in domestic violence cases. He decries this problem and rightly says it needs to be addressed. But then, again according to this unauthorized video (whose source is anonymous), Senator Grassley apparently tells the crowd he's concerned because the VAWA Amendments would enable Tribal courts to assert criminal jurisdiction over non-Indians:

The jury is supposed to be a reflection of society as a whole, and on an Indian reservation it's made up of Indians, right? So a non-Indian doesn't get a fair trial.

Again in fairness, Senator Grassley expresses his concerns about combatting domestic violence. He says there's a problem. He thinks it's serious. Yet that last comment, concerning non-Indians' inability to get a fair trial because an Indian reservation is "made up of Indians," contains a latent assumption: That Native people can't be fair to non-Natives, at least when a fellow Native citizen is an alleged victim of a crime. The question is, why? Especially if we non-Indian defendants can vindicate their constitutional rights through Federal courts, why should Native judges and juries be any less fair than, say, all-White judges and juries who routinely adjudicate criminal charges against Native Americans and Alaska Natives? This is not just a question for Senator Grassley and his colleagues, but for every one of us.

Nor is there anything new in that YouTube video. If you go back in history, you'll find that this is an enduring problem. Again and again, it's been assumed by the white majority that Native people and other minorities can't be trusted when it comes to other people.

Let's go back to the British Empire. In British Imperial India, for instance, a great controversy arose in the late Nineteenth Century over a piece of Colonial legislation that became known as the Ilbert Bill.³² It was

³¹ See *Sen. Grassley Doesn't Think Native Americans Can Hold Fair Trials*, YOUTUBE (Feb. 20, 2013), <http://www.youtube.com/watch?v=BRpjxtLrTcE>

³² For an introduction to the Ilbert Bill and its context—and controversy—within the British Empire, see KWASI KWARTENG, *GHOSTS OF EMPIRE: BRITAIN'S LEGACIES IN THE MODERN WORLD* 156 (2011).

named for the legal advisor to the Council of India, Sir Courtenay Ilbert, and was proposed as a modest reform in 1883 to enable local Indian judges and magistrates to hear cases involving non-Indian defendants in sexual assault and other criminal cases. The British had previously taken away criminal jurisdiction from Indian courts to hear criminal cases involving British citizens. Ilbert and his boss—the Viceroy for Imperial India, Lord Ripon—hoped to strengthen local justice by enabling Indian judges and magistrates to adjudicate crimes regardless of the race, ethnicity, or nationality of the offender.

The Ilbert Bill sparked enormous controversy back home in Great Britain, where opponents contended that Indian judges and juries categorically would discriminate against white defendants. It was even contended by some critics that the Ilbert Bill would trigger an increase in the rape of Englishwomen by the Indian judges themselves. The legislation was quickly watered down, yet the impact of the controversy lingered. The demise of the Ilbert Bill was a catalyst in the birth of the Indian National Congress, and the resulting drive for Indian independence, less than two years later.³³

Bear in mind that at the very same time in our own country, Congress in 1885 enacted the Major Crimes Act.³⁴ This law, which Federalized local felonies involving Native Americans on Indian reservations, remains the law of the land to this day. Decades earlier, Congress had required that all non-Native defendants be subject to exclusive Federal jurisdiction. It is no coincidence that as the controversy over the Ilbert Bill was playing out in British India, the United States government was cementing its control over local justice in Indian country here at home. In both cases, Native people were forced to surrender the authority—and the resulting responsibility—to preserve law and order in their own communities.

This same trend continues even within our own lifetimes. In 1978, the U.S. Supreme Court ruled in *Oliphant v. Suquamish Tribe* that Indian tribes lack all criminal jurisdiction over non-Indians, even for crimes arising on Tribal trust lands.³⁵ *Oliphant* reinforces the same premise that Native people and institutions somehow can't operate fairly in dealing with non-Natives. Rather than focus on the actual extent to which Native Nations respect Federal Constitutional rights, which would be the appropriate inquiry, *Oliphant* categorically prevents all Tribes from asserting any criminal jurisdiction over non-Native defendants. Not until 2013 did the enactment of the VAWA Amendments create a single exception to the rule

³³ *Ilbert Bill*, ENCYLOPAEDIA BRITANNICA, www.britannica.com/EBchecked/topic/282695/Ilbert-Bill (last visited Mar. 31, 2014).

³⁴ Eid & Doyle, *supra* note 17.

³⁵ 435 U.S. 191 (1978).

that Native people cannot be trusted to govern themselves and respect the legal rights of their fellow U.S. citizens.

LESSONS OF THE CIVIL RIGHTS MOVEMENT

Now contrast the latent assumptions in *Oliphant*, or the Ilbert Bill—or for that matter, Senator Grassley’s apparent musings in the YouTube video—with America’s experience in the post-Civil Rights Movement era. Here in the South, segregationists predicted dire consequences if African-Americans ever took the bench or began sitting regularly on juries where white defendants faced criminal charges.

What has been the actual experience in this regard? Before juries were racially integrated, all-white juries tended to convict black defendants at disproportionately higher rates than whites. Yet as courtrooms and juries have become more inclusive of people of color over the past four or five decades, researchers have documented that these racial disparities in conviction rates have fallen dramatically. In other words, when people are treated fairly and inclusively, and permitted to serve on juries without *de facto* or *de jure* discrimination, racial and ethnic disparities in conviction rates tend to disappear.³⁶ This same research also shows that neither group—blacks or whites—discriminate invidiously against the other so long as those same jury pools are open and accessible to all.³⁷

As a former Federal prosecutor, I respectfully submit that such scholarly findings dovetail not only with anecdotal evidence in the courtroom, but with our own experience and common sense as Americans.

Think about it: when African-Americans, Hispanics, and other people of color were treated more fairly by Federal, State and local justice systems, and finally were able to participate in those systems in a meaningful way, did they engage in some kind of retaliation or payback for the years they endured discrimination? The question itself is shocking, unthinkable, and revolting. We know that American citizens from all backgrounds and walks of life are fundamentally a fair and decent people. There are exceptions, of course, but in my experience they are few and far between.

³⁶ See, e.g., Shamina Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012), available at qje.oxfordjournals.org/content/early/2012/04/15/qje.qjs014.full. Analyzing criminal jury trials in the State of Florida from 2000 through 2010, the authors concluded that all-white juries tend to convict black defendants at a rate that is disproportionately higher (by an average of sixteen percent) than their convictions of white defendants for the same or similar crimes. However, this same racial gap is entirely eliminated when at least one black person is included in the jury pool.

³⁷ In their study, Anwar, Bayer, and Hjalmarsson find that all-white and all-black juries each tend to convict members of their own racial group at lower rates than when defendants of the opposite race are charged with crimes. *Id.* at 32. Once members of both races are included in the jury pool, however, these disparities dissipate, regardless whether they are actually seated as jurors. *Id.*

Yet when it comes to Native Americans and Alaska Natives, the “cavalry effect” that Dean Kevin Washburn described a decade ago—the majority’s unwillingness to trust the actions and intentions of the minority, and to ride to its rescue by taking away its authority—seems to cloud our judgment. It does so because the Federal criminal justice system has effectively marginalized Native Americans and Alaska Natives from serving on juries even for purely local criminal justice matters.³⁸

Notwithstanding these challenges, the Indian Law and Order Commission’s Roadmap is bullish on the potential for swift and effective reform:

The Commission finds that the public safety crisis in Native America is emphatically not an intractable problem. More lives and property can and will be saved once Tribes have greater freedom to build and maintain their own justice systems. The Commission sees breathtaking possibilities for safer, stronger Native communities achieved through home-grown, tribally based systems that respect the civil rights of all U.S. citizens, and reject outmoded Federal command-and-control policies in favor of increased local control, accountability, and transparency.³⁹

I share this optimism. This is a defining moment for our generation. We should welcome this challenge and—seeing your enthusiasm, and learning what each of you has achieved—is there any real doubt that we can and will rise to the occasion?

I have come to believe that, the Federal criminal justice system in Indian country, along with the Federal commandeering of State justice systems to dispense Tribal justice in PL-280 States, is really a house of cards. It is often noted that it took the British 300 years to build their empire in India, but just seventy days to lose it when India declared its independence in 1947. The very same thing may be happening here. Experts constantly assure us that Congress is in gridlock and won’t do anything involving Indians—yet the Tribal Law and Order Act and the VAWA Amendments passed nonetheless.

In our travels with my distinguished colleagues on the Indian Law and Order Commission, Native and non-Native people alike—from the East Coast to Alaska—demanded immediate reform of the Federal criminal justice system in Indian country once they learned more about it and juxtaposed its flawed assumptions about race and ethnicity against our country’s core principles and highest ideals. The sun is rising, not setting, on the American Dream of equal justice for all.

³⁸ Washburn, *supra* note 17, at 30-61.

³⁹ ROADMAP, *supra* note 6, at iii.

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Never surrender. With your help, our country never will. Thank you very much and God bless you.