THE FAILURE OF THE VIOLENCE AGAINST WOMEN ACT'S FULL FAITH AND CREDIT PROVISION IN INDIAN COUNTRY: AN ARGUMENT FOR AMENDMENT

SANDRA J. SCHMIEDER*

INTRODUCTION

In August of 1994, Congress passed the Violence Against Women Act (VAWA),[1] which includes a provision requiring states and Indian tribes to give "full faith and credit" to protection orders issued by the courts of other states and tribes.[2] The provision, 18 U.S.C. § 2265 ("Section 2265"), purports to ensure that victims of domestic violence do not lose the protection of their restraining orders when they travel out of the issuing jurisdiction. This Comment addresses the effectiveness of the VAWA's full faith and credit statute. Although the statute purportedly applies to Indian tribes, it is not operational in Indian country because many tribes have not implemented statutes giving full faith and credit to foreign protection orders. To achieve the goal of the full faith and credit provision of the VAWA and protect women in Indian country, Congress must therefore amend the statute to make it enforceable against Indian tribes.

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* Law clerk for the Honorable Wade Brorby, United States Court of Appeals for the Tenth Circuit; J.D., University of Colorado School of Law, 2002; B.A., Nebraska Wesleyan University, 1999. Many thanks to the editorial staff of the University of Colorado Law Review for their insightful comments.

1. The VAWA addresses gender-based violence through crime prevention, and comprises five titles. Title I, Safe Streets for Women, increases the criminal penalties for offenders who repeatedly commit crimes against women. Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 254 (1995). Title II, Safe Homes for Women, targets criminal laws related to domestic violence by criminalizing interstate violations of protection orders and requiring interstate enforcement of such orders. 18 U.S.C. §§ 2262–2265 (2000). Title III, Civil Rights for Women, includes the well-known civil remedy provision allowing women to sue their attackers, which was struck down by the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). Title IV, Safe Campuses for Women, establishes funding to address the problems women face on college campuses. Klein, *supra* at 254. Finally, Title V, Equal Justice for Women, funds training for police, prosecutors, and judges regarding gender bias in the legal system. *Id.*

2. 18 U.S.C. § 2265.

Before Section 2265 became law, only seven states statutorily accorded full faith and credit to protection orders issued by other states or tribes.[3] To receive protection under a foreign restraining order in the other forty-three states, domestic violence victims had to petition the local state or tribal court for a new protection order.[4] Due process required service of the perpetrator with the protection order petition, which revealed the victim's new location. The system forced victims to choose between losing the protection of a restraining order or announcing their whereabouts to their abusers. Neither of these two options provided safety to women fleeing abusive partners.

On its face, the VAWA's full faith and credit clause appears to correct this problem. The statute requires states and tribes to enforce a protection order issued by a sister state or tribe "as if it were the order of the enforcing State or tribe."[5] The victim need not petition a court in her new jurisdiction for an additional protection order. Moreover, the statute neither requires a victim to register her order with the court or local police when she enters a different state or Indian reservation,[6] nor requires notice to the abuser.[7] In an attempt to ensure that victims traveling in Indian country receive the full benefit of their protection orders, Congress extended the civil jurisdiction of tribal courts to allow them to fully enforce protection orders issued in other jurisdictions.[8]

Although Congress clearly intended to extend substantive protections to victims of domestic violence across the nation, it did not make the full faith and credit provision of the VAWA self-executing. Accordingly, states, territories, and Indian tribes must take it upon themselves to enact legislation that complies with the VAWA. As of March 2001, forty-seven states

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3. *See* Klein, *supra* note 1, at 254 n.8 (citing KY. REV. STAT. ANN. § 426.955 (Michie 1992); NEV. REV. STAT. ANN. 33.090 (Michie 2002); N.H. REV. STAT. ANN. § 173B: 11-6 (2002); N.M. STAT. ANN. § 40-13-6 (Michie Supp. 1999); OR. REV. STAT. § 24.115 (2001); R.I. GEN. LAWS § 15-15-8 (2000); W. VA. CODE ANN. § 48-2A-3(e) (Michie Supp. 2001)).

4. Klein, *supra* note 1, at 255.

5. 18 U.S.C. § 2265(a).

6. 18 U.S.C. § 2265(d)(2).

7. 18 U.S.C. § 2265(d)(1).

8. 18 U.S.C. § 2265(e).

maintained full faith and credit statutes of some sort.[9] Because no uniform full faith and credit code for states exists, each state that has passed this legislation has constructed its own method of enforcing foreign protection orders.[10] Unfortunately, only twenty-four states have acknowledged the full text of Section 2265 by enacting statutes that explicitly enforce protection orders issued by tribal courts.[11]

Much of the VAWA's ineffectiveness in Indian country results from non-compliance by tribal governments. Although the full faith and credit provision of the VAWA requires implementation by individual tribes, many tribes simply do not pass resolutions giving full faith and credit to foreign protection orders. In part, this omission arises from intentional oversight; many tribes ignore the statute because they view it as an infringement on tribal sovereignty.[12] The refusal to recognize foreign restraining orders leaves a gaping hole in the effectiveness of Section 2265 and undermines its purpose of protecting domestic violence victims from re-victimization.[13]

This gap in enforcement of the VAWA's full faith and credit provision endangers Indian women, who are statistically more likely to experience domestic violence than any other demographic.[14] Native American women are more than twice as likely as black women to be the victims of rape or sexual assault, and three times more likely than the average American woman.[15] These statistics likely contributed to

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9. *Progress Report on Full Faith and Credit Enabling Legislation*, *at* http://www.vaw.umn.edu/FinalDocuments/FFCProgfin.htm (last visited Nov. 16, 2002).

10. *Id.*

11. *Id.*

12. *See Crime Prevention and Criminal Justice Reform Act: Hearing on H.R. 3315 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judicary*, 103d Cong. (1994) (written testimony of Helen Elaine Avalos, Assistant Attorney General, Navajo Department of Justice, on behalf of Peterson Zah, President of the Navajo Nation).

13. The geographic holes in restraining order enforcement are particularly problematic because Section 2265 appears to guarantee continuous protection within the borders of the United States, when this is not actually occurring. A victim could unwittingly rely on the statute and suffer unfortunate consequences when the order is not enforced on an Indian reservation.

14. Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 354 (2000).

15. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 3 (1999).

Congress's inclusion of tribal lands in the full faith and credit provision of the VAWA, but the statute's shortcomings demand further attention from federal legislators.

Because many tribes fail to honor foreign protection orders, attorneys and domestic violence victims' advocates favor the use of legal mechanisms to compel Indian tribes to pass resolutions that comply with the VAWA's full faith and credit mandate. They view the problem of domestic violence as a national epidemic that requires a cohesive, nation-wide response. Conversely, tribes and proponents of tribal sovereignty maintain that the VAWA's requirement is not, and should not become, enforceable against Indian tribes because it infringes on tribal self-governance. Disputes about the extent of tribal sovereignty have existed since the early years of the United States.[16] In *Worcester v. Georgia*, the Supreme Court held that "Indian nations [are] distinct political communities, having territorial boundaries *within which their authority is exclusive* . . . ."[17] The source of this sovereignty, according to the Court, is not Congress's delegation of authority, but tribes' status as "independent political communities . . . from time immemorial."[18] Because of the long-standing principle that Indian tribes have the exclusive right to self-govern, there is some doubt as to the legality and appropriateness of federal statutes requiring tribal entities to recognize and enforce orders of foreign courts.

This Comment considers whether plaintiffs can compel tribes to implement full faith and credit statutes, thus giving effect to the VAWA, in light of tribal sovereignty. Part I establishes that Congress has the authority to enact legislation abrogating tribal sovereignty, and that the VAWA's full faith and credit statute applies to tribes. Part II then explores legal mechanisms that an individual injured by a tribe's failure to enforce a foreign protection order could use to overcome tribal sovereign immunity and compel a tribe to comply with Section 2265 in its current form. Part II concludes that the prognosis for enforcement of Section 2265 through federal litigation seems dismal. Part III explores the possibility of conditioning

16. *See, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

17. 31 U.S. (6 Pet.) 515, 557 (1832) (emphasis added). The Court was addressing whether the State of Georgia could impose its laws on the Cherokee Indian Reservation, which was within the boundaries of the state.

18. *Id.* at 558.

federal law-enforcement funding on tribal enactment of full faith and credit statutes that comply with the VAWA, but concludes that such conditioning would conflict with the long-held federal policy favoring tribal self-governance. Part IV suggests that to accomplish the goal of the VAWA's full faith and credit provision, Congress must expand the statute so that it contains an enforcement mechanism. Congress should tread carefully, however, to ensure that the legislation reflects dual objectives: the effectuation of the full faith and credit provision and deference to tribal sovereignty and self-determination. These competing goals are best reconciled by allowing interested parties to sue tribal officials for prospective injunctive relief in the federal courts.

I. SECTION 2265 IS A VALID EXERCISE OF CONGRESSIONAL POWER

Congress enacted the VAWA following four years of evidence gathering and testimony about violence against women.[19] The Senate found that states frequently were unresponsive to violent crimes against women,[20] and that some did not even have statutes criminalizing spousal rape.[21] As a result, Congress passed a series of statutes (referred to collectively as the VAWA) that supplemented existing state laws and resources addressing domestic violence. The VAWA's purpose is to combat domestic violence from multiple angles by: providing federal funding for training to combat gender biases in state and federal courts;[22] funding the construction of domestic violence shelters;[23] criminalizing interstate domestic violence;[24] excluding a victim's sexual history under the Federal Rules of Evidence;[25] requiring courts to give full faith and credit to foreign protection orders;[26] and creating a civil

19. Melissa Irr, United States v. Morrison*: An Analysis of the Diminished Effect of Congressional Findings in Commerce Clause Jurisprudence and a Criticism of the Abandonment of the Rational Basis Test*, 62 U. PITT. L. REV. 815, 824 (2001).

20. S. REP. NO. 102-197, at 34 (1991).

21. *Id.* at 45 n.50.

22. 42 U.S.C. §§ 13991–14002 (2000).

23. 42 U.S.C. § 10402(a)(1).

24. 18 U.S.C. § 2262 (2000).

25. FED. R. EVID. 412.

26. 18 U.S.C. § 2265.

remedy to allow victims of gender-motivated violence to sue their attackers.[27]

In May 2000, the Supreme Court struck down the civil remedy provision of the VAWA as exceeding Congress's Commerce Clause power in *United States v. Morrison*.[28] In light of the invalidation of that provision,[29] some legal scholars question whether the remaining VAWA provisions will survive judicial review.[30] This section addresses two issues: Congress's power to enact Section 2265 in general, and its power to extend this statute to Indian tribes. The following analysis demonstrates that Congress acted within its authority in enacting Section 2265 and in extending it to Indian tribes.

A. The Enactment of Section 2265 Falls Within Congress's Full Faith and Credit Powers

Because the Supreme Court struck down the civil remedy provision[31] of the VAWA in *United States v. Morrison*,[32] some legislators speculate that the entire VAWA also lies beyond the scope of Congress's power.[33] This theory fails, however, with regard to many of the VAWA provisions,[34] including the full faith and credit provision. The provision struck down in *Morrison* was enacted pursuant to Congress's Commerce Clause power and the enforcement power provided in Section 5 of the Fourteenth Amendment.[35] Like many of the VAWA

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27. 42 U.S.C. § 13981.

28. 529 U.S. 598 (2000).

29. *See infra* text accompanying note 32.

30. Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 990 (2001).

31. 42 U.S.C. § 13981.

32. 529 U.S. 598.

33. Hagan, *supra* note 30, at 990.

34. *See* 42 U.S.C. §§ 13991–14002 (authorizing funding to counter gender biases in state and federal courts through training); 42 U.S.C. § 10402(a)(1) (authorizing funding for communities to build domestic violence shelters); 42 U.S.C. § 13962 (authorizing funding for state databases to track reporting of rape and domestic violence); 42 U.S.C. § 14013 (authorizing funding for reports on battered women's syndrome); 18 U.S.C. § 2262 (prohibiting interstate violation of an order of protection). To date, courts have upheld all of the criminal provisions of the VAWA as constitutional. *See* United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997); United States v. Wright, 128 F.3d 1274 (8th Cir. 1997); United States v. Gluzman, 953 F. Supp. 84 (S.D.N.Y. 1997).

35. 529 U.S. at 607.

statutes, however, the VAWA's full faith and credit provision arose from a separate authority—Congress's Article IV power.

Article IV, Section 1 of the United States Constitution mandates that

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.[36]

The Supreme Court determined in 1901 that the Framers intended the Full Faith and Credit Clause to promote certainty and uniformity in the law among the states.[37]

To date, no court has struck down legislation enacted under the Full Faith and Credit Clause as beyond Congress's authority, and as discussed in Part II.A below, Congress modeled the VAWA statute after other full faith and credit statutes.[38] Thus, the substantial similarity between the full faith and credit provision of the VAWA and longstanding valid legislation suggests that Section 2265 falls within the scope of Congress's powers.

B. Congress Has Plenary Power to Regulate Indian Tribes

Article I, Section 8, Clause 3 of the Constitution, known as the "Indian Commerce Clause," provides that "Congress shall have power . . . to regulate commerce . . . with the Indian tribes." The Supreme Court held in *Worcester v. Georgia*[39] that this clause, in conjunction with the Treaty Clause,[40] provides

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36. U.S. CONST. art. IV, § 1.

37. Atherton v. Atherton, 181 U.S. 155, 160 (1901). In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), the Court held that the purpose of the Full Faith and Credit Clause

> was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Id. at 276–77.

38. *See infra* text accompanying note 104; *see also* People v. Hadley, 658 N.Y.S.2d 814, 816 (N.Y. Crim. Ct. 1997).

39. 31 U.S. (6 Pet.) 515 (1832).

40. U.S. CONST. art. II., § 2, cl. 2.

Congress with "all that is required" for complete control over Indian affairs.[41] This complete control, however, lies in tension with the long-held doctrine that Indian tribes maintain their inherent sovereignty as self-governing nations that pre-existed European settlement of North America.[42] The federal policy favoring tribal self-governance has existed since *Worcester* and was statutorily recognized in the Indian Reorganization Act of 1934.[43] Since the passage of the Indian Reorganization Act, the Supreme Court has been mindful of the importance of Indian self-governance and self-determination.[44] However, even while recognizing the policy favoring tribal self-governance, the Supreme Court has also made clear that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[45]

Because Congress has the authority to enact legislation under the Full Faith and Credit Clause of the Constitution, as well as plenary authority to limit, modify, or eliminate tribal self-governance under the Indian Commerce Clause and the Treaty Clause, the VAWA's full faith and credit provision and its application to Indian tribes is valid law. As Part II demonstrates, however, the VAWA's requirement that tribes honor foreign protection orders may not be enforceable by private individuals.

II. ENFORCING THE VAWA'S FULL FAITH AND CREDIT PROVISION

Although the VAWA's full faith and credit provision is valid and applies to Indian tribes, the challenge lies in enforcing it: what happens when a tribe does not comply with Section 2265? Victims who suffer an injury because a foreign protection order was not enforced could sue the offending tribe and tribal officials in a tort action. As a threshold matter,

41. *Worcester*, 31 U.S. (6 Pet.) at 559.

42. STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 86 (3rd ed. 2002).

43. 25 U.S.C. § 476 (2000).

44. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (upholding the right of a tribe to tax oil and gas extracted by non-Indians from tribal lands); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler , 435 U.S. 313 (1978) (upholding the right of tribes to create and enforce criminal laws that apply to tribal members).

45. *Santa Clara Pueblo*, 436 U.S. at 56.

however, a plaintiff suing an Indian tribe or tribal officials must overcome the defense of tribal sovereign immunity.

An Indian tribe may face suit by private individuals only if Congress has authorized such suits or if the tribe has waived its sovereign immunity:[46] "[A congressional] waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[47] Federal courts therefore require explicit statutory language before they find a congressional waiver of tribal sovereign immunity.[48]

Absent an explicit statutory waiver, tribal sovereign immunity may be overcome in at least three ways: (1) by a private plaintiff suing individual tribal officers who have acted outside of their authority rather than suing the tribe itself,[49] (2) by a private plaintiff proving that the federal government or a tribe has in fact waived tribal immunity in a particular instance,[50] and (3) by the federal government bringing suit against a tribe and trumping tribal sovereign immunity by virtue of its status as the superior sovereign.[51] The following sections address these three methods of overcoming the defense of sovereign immunity for the purpose of forcing a tribe to

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46. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998); Fla. Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1131 (11th Cir. 1999) (holding that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act").

47. *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). Not surprisingly, courts render inconsistent interpretations of the phrase "unequivocally expressed." For example, in *Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1174 (10th Cir. 1999), the Tenth Circuit Court of Appeals loosened its definition by holding that a whistle-blower provision in the Safe Drinking Water Act (SDWA) constitutes an explicit abrogation of tribal immunity. *Id.* at 1178–82. In *Osage*, a former tribal employee brought suit against the tribe before an administrative law judge pursuant to the SDWA. *Id.* at 1178. The court reasoned that "where Congress grants an agency [here, the Department of Labor] jurisdiction over all 'persons,' defines 'persons' to include 'municipality,' and in turn defines 'municipality' to include 'Indian Tribe[s],'" in a statute establishing a national scheme, "it has unequivocally waived tribal immunity." *Id.* at 1182.

48. *See Santa Clara Pueblo*, 436 U.S. at 59–60 (holding that the Indian Civil Rights Act does not waive sovereign immunity, and that out of respect for tribal sovereignty, "we tread lightly in the absence of clear indications of legislative intent"); *see also Fla. Paraplegic Ass'n.*, 166 F.3d at 1135; American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1377–81 (8th Cir. 1985).

49. *See infra* notes 52–57 and accompanying text.

50. *See infra* notes 105–111 and accompanying text.

51. *See infra* notes 141–145 and accompanying text.

answer for its noncompliance with Section 2265 in federal court.

A. *Suits Against Tribal Officials for Prospective Injunctive Relief*

A plaintiff may circumvent the defense of sovereign immunity by naming individual law enforcement officers or judges as defendants in their individual capacities under the doctrine of *Ex parte Young*.[52] *Ex parte Young* established that sovereign immunity does not prohibit suits for prospective injunctive relief against individual officials acting outside the scope of their authority.[53] Thus, tribal sovereign immunity only bars suits against tribal officials acting in their representative capacity and within the scope of their authority.[54]

The doctrine of *Ex parte Young* is limited in that it only applies when the remedy sought is prospective injunctive relief. The Supreme Court has been clear and consistent in prohibiting any retroactive or compensatory relief under this doctrine.[55] Justice O'Connor explained in her concurrence in *Idaho v. Coeur d'Alene Tribe* that an *Ex parte Young* suit is available only when a plaintiff alleges an ongoing violation of federal law and the relief sought is prospective rather than retrospective.[56] In the context of the VAWA, then, a plaintiff challenging tribal non-compliance and using *Ex parte Young* to overcome tribal sovereign immunity could only seek prospective injunctive relief against a tribal official and could not pursue money damages.

Successful application of the *Ex parte Young* doctrine requires that plaintiffs not only demonstrate that defendant officials acted outside their authority, but also that a statute both creates a federal right and provides a private cause of

52. 209 U.S. 123, 155–56 (1908).

53. *Id.* The doctrine of *Ex parte Young* allows suits for prospective injunctive relief to proceed against individual government officials in their official capacity. *Id.* It is a mechanism used to compel action by such individuals while avoiding the defense of sovereign immunity. *See id.* at 133.

54. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479–80 (9th Cir. 1985).

55. Elephant Butte Irrigation Dist. v. Dep't of the Interior, 160 F.3d 602, 608 (10th Cir. 1998).

56. 521 U.S. 261, 294 (1997).

action.[57] The following three sections consider the likelihood of a plaintiff successfully satisfying these three requirements to proceed under *Ex parte Young*.

1. The Scope of Tribal Authority in the Non-enforcement of Foreign Protection Orders

The first question a plaintiff seeking enforcement of the VAWA's full faith and credit provision would encounter in pursuing an *Ex parte Young* claim is whether the tribal official acted outside of the scope of his or her tribal authority. A plaintiff successfully proved this point and invoked the doctrine of *Ex parte Young* to overcome tribal sovereign immunity in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux*.[58] In that case, the tribal council had passed an ordinance requiring transporters of nuclear material who crossed tribal land to apply for a license, pay a fee, and consent to the possibility of a $1,000,000 fine.[59] A local power company petitioned a federal district court for a declaration that the Hazardous Materials Transportation Act preempts the tribal ordinance.[60] The tribal councilmen named in the suit attempted to invoke tribal sovereign immunity as a defense.[61] The court rejected the councilmen's claim of sovereign immunity and held that because federal law preempted the tribal ordinance, the councilmen were acting outside of the tribe's authority when they passed the ordinance, and therefore they were not protected by sovereign immunity.[62] Under this reasoning, tribal officials associated with an activity that fails to give full faith and credit to a foreign protection order as required by federal law could similarly face suit under the doctrine of *Ex parte Young*.

57. Cort v. Ash, 422 U.S. 66, 82–84 (1975).
58. 991 F.2d 458 (8th Cir. 1993).
59. *Id.* at 459.
60. *Id.* at 460.
61. *Id.*
62. *Id.* at 464.

2. A Federal Right under the VAWA's Full Faith and Credit Provision

The next question a plaintiff seeking enforcement of the VAWA's full faith and credit provision would encounter in pursuing an *Ex parte Young* claim is whether the statute creates a federal right. The Supreme Court developed a test for determining whether a statute creates an enforceable right in *Blessing v. Freestone*.[63] In *Blessing*, the plaintiffs brought suit against state officials for violating a federal statute requiring states to satisfy minimum standards in their child support enforcement programs. The Court held that when considering whether a federal right exists, a court must first ask whether the plaintiff is one of the intended beneficiaries of the statute.[64] Next, the court must determine whether the plaintiff's asserted interests are specific enough to be enforced by the judiciary.[65] Finally, the court must determine whether the statute unambiguously imposes a binding obligation on the state or tribe.[66]

In conducting the first part of the inquiry—whether the plaintiffs were among the intended beneficiaries of a federal statute—the *Blessing* Court looked to Congress's intent in passing the statute. The Court concluded that the standards in the statute served merely as a yardstick to measure the performance of a state's program to determine how much federal funding it should receive, and that Congress did not intend for individual parents and children to benefit from them.[67] Tribes facing suit under the VAWA may likewise argue that Congress did not intend the full faith and credit provision to benefit individuals. Unlike the statute in *Blessing*, however, the substantive content of Section 2265 specifically addresses the problem of domestic violence victims losing the protection of restraining orders when they cross state lines. Thus, a court would likely hold that Congress did intend for the statute to benefit individual victims of domestic violence. Accordingly, a suit under Section 2265 would satisfy the first part of the *Blessing* test.

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63. 520 U.S. 329 (1997).
64. *Id.* at 340–41.
65. *Id.*
66. *Id.*; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 n.10 (1978).
67. *Blessing*, 520 U.S. at 343.

The second prong of the test requires a court to consider whether the rights asserted by the plaintiff are specific enough to be enforced by the judiciary.[68] The *Blessing* Court held that the asserted right must not be vague or amorphous, and must fall within the judiciary's competence to enforce.[69] As Section 2265 specifically defines what types of protection orders are to be afforded full faith and credit[70] and how the orders are to be enforced,[71] a plaintiff's interests under the statute appear neither vague nor amorphous. A federal court would not find it difficult to ascertain whether a tribe has violated a plaintiff's rights under the statute.

The third part of the inquiry requires a court to consider whether the statute unambiguously imposes a binding obligation on the state or tribe.[72] The *Blessing* Court held that the provision giving rise to the asserted right must take the form of a mandate rather than a recommendation.[73] Because the VAWA statute reads, "[a]ny protection order . . . *shall* be accorded full faith and credit,"[74] a court would almost certainly consider the statute a mandate rather than a mere recommendation. Because the full faith and credit provision in the VAWA appears to satisfy the three prongs of the *Blessing* test, a court should find that a federal right exists under Section 2265.

3. A Cause of Action under the VAWA's Full Faith and Credit Provision

In addition to proving that a federal right exists, a plaintiff in an *Ex parte Young* suit would also have to demonstrate that the full faith and credit statute creates a private cause of action.[75] The most obvious place to look for a cause of action is in the text of the statute. Section 2265, however, does not contain an explicit enforcement clause, and there is no case law specifically interpreting this provision. A plaintiff could

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68. *Id.* at 340–341.
69. *Id.*
70. 18 U.S.C. § 2265(a) (2000) ("Any" order of protection).
71. *Id.* ("[A]s if it were the order of the enforcing State or tribe.").
72. *Blessing*, 520 U.S. at 340–41.
73. *Id.* at 341.
74. 18 U.S.C. § 2265(a) (emphasis added).
75. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60–62 (1978); Cort v. Ash, 422 U.S. 66, 82–84 (1975).

nonetheless attempt to overcome this barrier by arguing that a federal court should imply a private cause of action.

Since the Supreme Court announced the need for a specific statutory cause of action in *Cort v. Ash*[76] in 1975, courts have hesitated to imply federal causes of action to statutes that do not expressly provide for them. The Supreme Court displayed this reluctance in *Alexander v. Sandoval*[77] when it overturned previous decisions that found a cause of action in Title VI of the Civil Rights Act of 1964. In *Alexander*, the Court went beyond its usual tendency to find no cause of action for legislation enacted *after Cort v. Ash* and refused to imply a cause of action for a statute enacted *prior* to 1975.[78] The VAWA contains no enforcement provision other than the civil remedy provision struck down in *Morrison*.[79] Because the VAWA was enacted after *Cort*, courts are likely to conclude that Congress was on notice that it needed to specify a cause of action and will not imply one.

In light of *Cort*, federal courts have articulated the distinction between Congress making tribes subject to a statute and allowing suit under it. The Eleventh Circuit Court of Appeals tackled this issue in *Florida Paraplegic Ass'n v. Miccosukee Tribe* when it was asked whether a tribe could be sued for noncompliance with the Americans with Disabilities Act (ADA).[80] The *Florida Paraplegic* court held that although the ADA applies to the Miccosukee Tribe in its gaming and restaurant facility, being subject to a statute does not necessarily make a tribe subject to suit for violating it.[81] Because the ADA does not provide for a cause of action against Indian tribes, the court held that the tribe could not be sued by private individuals for violating the statute.[82] The court observed that "the Supreme Court [has] recognized that Congress could enact a statute with substantive limitations on Indian tribes without providing any means for most individuals protected by the law to enforce their rights in federal court."[83] Tribes facing suit under the full faith and credit provision of

76. 422 U.S. at 82–84.
77. 532 U.S. 275, 286–289 (2001).
78. *Id.* at 293.
79. 529 U.S. 598 (2000).
80. 166 F.3d 1126 (11th Cir. 1999).
81. *Id.* at 1130.
82. *Id.* at 1135.
83. *Id.* at 1134.

the VAWA could argue that, as in *Florida Paraplegic*, Congress did not intend the tribe to be amenable to suit.

The federal courts have addressed the question of whether *other* full faith and credit statutes create a cause of action, particularly the Parental Kidnapping Prevention Act[84] and the Indian Child Welfare Act.[85] In *Thompson v. Thompson*,[86] the Supreme Court considered whether the full faith and credit provision of the Parental Kidnapping Prevention Act[87] (PKPA) contained an implicit cause of action. Congress passed the PKPA to prevent parents from "kidnapping" their children to other states in order to seek more favorable custody orders.[88] The Supreme Court held that a parent whose state custody order was modified by another state did not have a federal cause of action under the PKPA.[89] The Court reasoned that

> [b]ecause Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations, the Act is most naturally construed to furnish a rule of decision for courts to use in adjudicating custody disputes and not to create an entirely new cause of action.[90]

According to the *Thompson* Court, the decision does not render the PKPA meaningless because state courts "faithfully administer the Full Faith and Credit Clause every day."[91] In essence, the Court held that the PKPA only provides a rule of decision for state court judges, and is not a substantive law.[92] As a result, no legal mechanism is available to ensure that the PKPA is appropriately applied.

Like the PKPA, the Indian Child Welfare Act[93] (ICWA) is a full faith and credit statute. Congress passed the ICWA to harmonize adoption standards for Indian children.[94] Among

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84. 28 U.S.C. § 1738A (2000).
85. 25 U.S.C. §§ 1901–63 (2000).
86. 484 U.S. 174 (1988).
87. 28 U.S.C. § 1738A.
88. *See Parental Kidnapping, 1979: Hearing Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong. 163 (1979) (statement of Sen. Wallop).
89. Thompson v. Thompson, 484 U.S. 174, 187 (1988).
90. *Id.* at 183.
91. *Id.* at 187.
92. *Id.* at 183.
93. 25 U.S.C. §§ 1901–63 (2000).
94. *See* Kickapoo Tribe v. Rader, 822 F.2d 1493, 1500 (10th Cir. 1987).

other things, the ICWA requires all state and tribal courts to afford full faith and credit to child custody decisions issued by tribal courts.[95] The Ninth Circuit Court of Appeals held in *Native Village of Venetie I.R.A. Council v. Alaska*[96] that the ICWA creates a private cause of action that may be adjudicated in federal court. In *Venetie*, two tribal courts awarded adoptions to tribal members, and state welfare officials refused to recognize the decrees.[97] The adoptive parents and their respective villages brought suit against certain state officials under the doctrine of *Ex parte Young*[98] to force them to recognize the adoptions as required by the full faith and credit provision of the ICWA.[99] In considering whether the ICWA created a private cause of action, the court of appeals noted that federal statutes regulating Indian tribes are to be construed liberally in favor of the tribes,[100] and held no reason that Congress would not have intended to provide access to federal courts under the ICWA.[101] The court therefore held that a federal cause of action exists under the ICWA.[102]

In an attempt to distinguish the seemingly inconsistent results of *Venetie* and *Thompson*, the *Venetie* court held that unlike the PKPA, the ICWA involves more than mere jurisdictional determinations as it provides substantive factors that a court must consider when determining Indian child custody. Consequently, the court concluded that a federal cause of action exists when a state (or tribe, presumably) expressly refuses to abide by substantive mandates, but does not exist when a state fails to follow a procedural rule of decision.[103] Thus, a private cause of action exists when a statute provides substantive factors, but not when the statute provides mere procedural rules. The full faith and credit provision of the VAWA was actually modeled after the PKPA.[104] Courts therefore will likely interpret Section 2265 as a rule of

95. 25 U.S.C. § 1911(d); *see* PEVAR, *supra* note 42, at 297.
96. 944 F.2d 548, 554 (9th Cir. 1991).
97. *Id.* at 551.
98. 209 U.S. 123, 155–56 (1908).
99. *Venetie*, 944 F.2d at 551.
100. *Id.* at 553 (citing Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).
101. *Id.*
102. *Id.*
103. *Id.* at 554 n.4.
104. *See* People v. Hadley, 658 N.Y.S.2d 814 (N.Y. Crim. Ct. 1997).

decision—like the PKPA in *Thompson* rather than as the ICWA was interpreted in *Venetie*.

Although tribal officials who fail to enforce foreign protection orders would not be acting within the scope of their authority, and Section 2265 appears to create a federal right, a plaintiff would likely be unable to sue a tribe under this statute. Because (1) the statute does not contain a specific enforcement provision, (2) modern courts tend not to imply them, and (3) the statute was modeled after the PKPA (which does not create a federal cause of action), a court would likely find that no federal cause of action exists. Hence, it appears unlikely that a plaintiff could obtain relief under the doctrine of *Ex parte Young*.

B. Waivers of Sovereign Immunity: Liability Through Contracts under the Indian Self-Determination Act (638 Contracts)

Another way to defeat the sovereign immunity defense is to show that immunity was waived, either by the tribe or by Congress. A tribe may decide to waive sovereign immunity for a variety of reasons, particularly if it wishes to enter into a contract with a party that demands such a waiver.[105] Congress may also decide to waive tribal sovereign immunity in particular instances, and has plenary authority to do so.[106]

As a part of its policy of non-interference with tribal self-governance, Congress enacted the Indian Self-Determination Act of 1975, which allows the Bureau of Indian Affairs (BIA) to enter into contracts with tribes under which the tribe

105. *See* United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981); Big Spring v. U.S. Bureau of Indian Affairs, 767 F.2d 614 (9th Cir. 1975). However, tribes covered by the Indian Reorganization Act of 1934 may have to attain congressional approval of a waiver. *See* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

106. For example, Congress has allowed the Navajo and Hopi tribes to sue each other in federal court to resolve a property dispute, has authorized suits against tribal governments concerning hazardous waste disposal, and has waived tribal immunity for certain violations of the Safe Drinking Water Act. PEVAR, *supra* note 42, at 354; *see also supra* Part I.B for discussion of Congress's authority over Indian tribes.

administers programs that were previously controlled by the BIA.[107] The Act was passed because

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities . . . .[108]

Many tribes have assumed their own law enforcement duties through contracts authorized by this statute[109] ("638 contracts"). To facilitate the tribes' ability to assume responsibilities such as law enforcement, Congress amended the Indian Self-Determination Act to ensure that tribal officials acting under 638 contracts receive liability coverage under federally supplied insurance or the Federal Tort Claims Act (FTCA).[110]

If a tribe has a 638 contract with the federal government and fails to give full faith and credit to a foreign protection order and the failure results in an injury, the victim could attempt to overcome tribal immunity by arguing that immunity was waived through the 638 contract. The following three sections address whether and how a plaintiff could successfully argue that tribes acting under 638 law enforcement contracts waive the protection of sovereign immunity. The first section

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107. 25 U.S.C. § 450f (2000). These contracts are commonly referred to as "638 contracts," named for the public law number of the Act, Pub. L. No. 93-638, 88 Stat. 2203 (1974).

108. 25 U.S.C. § 450(a)(1).

109. For example, the Ogalala Sioux have entered into a self-determination contract with the federal government to assume responsibility of its police services. *See* United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993).

110. 25 U.S.C. § 450f(c)(1):

> Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

examines whether a tribe waives sovereign immunity simply by entering into a 638 contract and concludes that it does not. The second section considers whether tribes that enter into 638 contracts expose their law enforcement officers to liability through "*Bivens* suits,"[111] and concludes that liability under *Bivens* is unlikely. The third section addresses whether tribal sovereign immunity has been waived for the limited purpose of the FTCA, and determines that it probably has not. The analysis concludes that each waiver argument would likely fail to overcome tribal sovereign immunity, thus 638 contracts would not assist a plaintiff in enforcing Section 2265 against tribes.

1. 638 Contracts as Waivers of Tribal Sovereign Immunity

A plaintiff injured by a tribal police officer's failure to give full faith and credit to a foreign protection order may first try to argue that acceptance of federal funds to carry out law enforcement duties waives tribal sovereign immunity. Several courts, however, have held that tribes do not face liability simply by entering into 638 contracts. For example, the Eighth and Eleventh Circuit Courts of Appeals have held that a tribe's acceptance of federal funds, even if conditioned upon compliance with federal law, does not waive tribal sovereign immunity.[112] Thus, this avenue is unlikely to be successful for a plaintiff seeking to enforce Section 2265 against a tribe.

2. *Bivens* Liability

A plaintiff could also argue that a tribal officer acting under a 638 contract who failed to enforce a foreign protection order is a federal officer, and therefore can be sued under the doctrine of *Bivens v. Six Unknown Named Agents of Federal*

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111. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

112. Dillon v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583–84 (8th Cir. 1998); Sanderlin v. Seminole Tribe, 243 F.3d 1282, 1288–89 (11th Cir. 2001) ("[T]he taking of federal funds, even when accompanied by an agreement not to discriminate in violation of federal laws, does not necessarily effect a waiver of tribal sovereign immunity for suits brought under those laws.") (discussing the Eighth Circuit's holding in *Dillon*, 144 F.3d at 583–84).

Bureau of Narcotics.[113] The Supreme Court in *Bivens* held that plaintiffs whose constitutional or statutory rights have been violated by a federal official can sue that official in his or her individual capacity for money damages.[114] The Supreme Court stated in *Correctional Services Corp. v. Malesko* that "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."[115] The Court later explained in *Carlson v. Green* that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."[116]

Under the *Bivens* doctrine, a plaintiff would argue that the tribal police officer who failed to enforce the plaintiff's rights under Section 2265[117] is a federal officer, and therefore can be sued individually for money damages.[118] The plaintiff would argue that the federal government delegated its power to exercise federal criminal jurisdiction over the tribe when it entered into the 638 contract with the tribe, thus making the tribal police instrumentalities of the federal government.

Several defenses are available to a tribal officer named in a *Bivens* suit. First, he or she could use the reasoning of the Tenth Circuit Court of Appeals in *Dry v. United States*.[119] In *Dry*, the plaintiff sued several public officials including tribal police officers for constitutional violations stemming from an alleged false arrest,[120] arguing that because the officers were agents of the federal government, they were subject to suit under *Bivens*.[121] The court held that the officers had not acted as agents of the federal government because "the tribal defendants acted as agents of the Tribe pursuant to their inherent sovereign power to exercise criminal jurisdiction over intratribal offenses."[122] A court may conclude that, like the defendants in *Dry*, a tribal police officer defending a *Bivens* suit

113. 403 U.S. 388.
114. *Id.* at 397.
115. 534 U.S. 61, 69 (2001).
116. 446 U.S. 14, 21 (1980). See *infra* text accompanying note 127 for a discussion of the FTCA.
117. See *supra* Part II.A.1 for a discussion as to whether Section 2265 creates a federal right.
118. The suit would name the individual officer rather than the tribe.
119. 235 F.3d 1249 (2000).
120. *Id.* at 1251–52.
121. *Id.*
122. *Id.* at 1255.

for failure to enforce a foreign protection order is not a federal agent and is protected from suit by sovereign immunity.

A second defense available to an officer named in a *Bivens* suit would be the argument that *Bivens* only applies to suits for constitutional violations, but not those for statutory violations. The Supreme Court has not yet resolved the question of whether *Bivens* only allows suit for violation of constitutional rights. Although the Ninth Circuit Court of Appeals has held that *Bivens* suits require a violation of the plaintiff's constitutional rights,[123] several federal circuits still allow suits for violations of either constitutional or statutory rights under the *Bivens* theory.[124]

Even if *Bivens* allows recovery for statutory rights violations, a *Bivens* action against a tribal official will probably not succeed because the Supreme Court has been quite reluctant to extend *Bivens* to new circumstances. The Court indicated this reluctance in *Malesko*,[125] in which it pointed out that it had extended *Bivens* only twice since its inception, most recently in *Carlson*:

> In *Carlson*, . . . [w]e reasoned that the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals . . . . Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.[126]

Thus, to permit a suit against a tribal police officer working under a 638 contract, a court would have to break with Supreme Court precedent that has declined to extend *Bivens*. For these reasons, a tribal police officer will likely be able to

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123. In *Bothke v. Fluor Engineers & Constructors, Inc.*, 834 F.2d 804 (9th Cir. 1987) the Ninth Circuit Court of Appeals found that the primary inquiry in any *Bivens* suit should focus on whether an official violated any of the plaintiff's constitutional rights, rather than statutory rights.

124. *See, e.g.*, Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 698–99 (6th Cir. 1996):

> While defendants who are not government employees may, as we have held, be properly sued under the *Bivens* doctrine, they may not enjoy qualified immunity from suit in the same manner as federal officials, who may invoke this doctrine if they did not violate any clearly established constitutional *or statutory rights* of the plaintiffs of which a reasonable person would have known.

(emphasis added).

125. 534 U.S. 561 (2001).

126. *Id.* at 68 (internal citation omitted).

defeat a suit brought under *Bivens* by arguing that (1) the Supreme Court has clearly indicated that *Bivens* should not be extended, (2) tribal officials are not federal agents for purposes of *Bivens* suits, and (3) *Bivens* allows recovery only for constitutional violations.

3. Suit Through the Federal Government Under the Federal Tort Claims Act

A plaintiff might also be able to recover money damages from a tribe or tribal police officer through the FTCA.[127] The following discussion provides basic background information about the FTCA, and considers how it might be used against a tribe that does not comply with the full faith and credit provision of the VAWA. This analysis demonstrates that a tribe or tribal officials would likely succeed in defending against an FTCA suit.

a. FTCA in a Nutshell

The FTCA provides a limited waiver of federal sovereign immunity and governs claims against the United States for any damage caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ."[128] The FTCA guarantees that the United States, through the Department of Justice, will both defend individual federal employees in such suits and pay any damages if the defendants are found liable.

Although tribal police are not considered federal employees for general purposes,[129] 25 U.S.C. § 2501 states that

> an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of Interior . . . while carrying out any [638] contract . . . [and will be] afforded the full protection and coverage of the Federal Tort Claims Act . . . .[130]

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127. 28 U.S.C. § 1346 (2000).

128. 28 U.S.C. § 1346(b)(1).

129. *See* Dry v. United States, 235 F.3d 1249, 1258 (2000); United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993).

130. 25 U.S.C. § 450f notes *quoted in* Ford v. Moore, 552 N.W.2d 850, 853 (S.D. 1996).

Under the statute, claimants injured by the acts of employees working under Self-Determination Act contracts may recover damages from the federal government.[131]

The FTCA requires the federal government to carry insurance for such claims.[132] Congress has, however, allowed the federal government to self-insure, so long as it is capable of paying the claims. To recover any money it pays claimants, the federal government may implead third party defendants. The Supreme Court has explicitly upheld this practice in cases such as *Finley v. United States*,[133] where it stated: "Rule 14(a) of the Federal Rules of Civil Procedure expressly authorizes the defendant to implead joint tortfeasors, and this Rule is applicable to FTCA cases."[134]

b. FTCA Applied to Section 2265

A suit under the FTCA is only available against tribes that have entered into self-determination contracts with the federal government and cannot be brought against tribes that either use BIA law enforcement or fund tribal law enforcement with tribal resources independent of the federal government. A plaintiff injured by tribal non-compliance with the VAWA's full faith and credit provision may recover from the federal government under the FTCA, however, if he or she can prove three elements: (1) that the tribal police were operating under a Self-Determination Act contract; (2) that the tribal police

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131. *Ford*, 552 N.W.2d at 853. For a further inquiry into the FTCA as applicable to tribes via 638 contracts, see Jessie Huff Durham, *Responsible Sovereignty: How Tribes Can Use Protections Provided in P.L. 93-628 and P.L.101-152 to Their Advantage Without Taking Advantage*, 35 TULSA L.J. 55 (1999).

132. 25 U.S.C. § 450f(c)(1).

133. 490 U.S. 545 (1989).

134. *Id.* at 560–61 (Stephens, J., dissenting); *see also* Andrulonis v. United States, 26 F.3d 1224, 1233 (2d Cir. 1994) ("When the United States is sued under the FTCA, Federal Rule 14(a) permits it to implead a third-party defendant who 'is or may be liable' to it for all or part of the plaintiff's judgment.") (citations omitted). The Court in *United States v. Yellow Cab Co.*, 340 U.S. 543, 551–52 (1951), stated:

> Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant. It is fair that this should work both ways.

(emphasis in original) (citation omitted).

officer was acting within the scope of his or her employment; and (3) that any injuries sustained by the plaintiff were the result of a negligent act or omission of the officer. If the government thought the plaintiff could prove these points, it could exercise its prerogative to implead a third party defendant in order to defray the cost of recovery. The Attorney General theoretically could implead the Department of Interior, the BIA,[135] the tribe, the tribal police department, or the individual officers. As discussed below in Part II.C , an action by the federal government would not be defeated by the defense of tribal sovereign immunity because the United States can invoke its status as a superior sovereign to abrogate a tribe's immunity.

Although the federal government theoretically could implead a tribe or tribal police officers in an FTCA suit for money damages, the tribal defendants would likely argue that *United States v. Gilman*[136] established that the federal government cannot implead individuals whom it insures. In *Gilman*, the United States filed a third-party suit for indemnification against a federal employee who committed the negligent act that led to an FTCA suit.[137] The Supreme Court concluded that the government could not seek indemnity from its employees for liability under the FTCA even though state law would allow such a recovery.[138] The Court supported its ruling by pointing out that Congress did not address the question of employee indemnification in the FTCA, and that substantial legislative history suggested that Congress did not intend to allow the government to sue its employees for indemnification.[139]

In defense of an FTCA indemnity action by the federal government, tribal police officers working under a 638 contract could similarly argue that the government cannot implead

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135. For a discussion on suits between departments of the federal government, see Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?* 32 WM. & MARY L. REV. 893 (1991).

136. 347 U.S. 507 (1954).

137. *Id.* at 508.

138. *Id.* at 511–13.

139. *Id.* A federal district court followed this decision in *Brown v. Shredex, Inc.*, 69 F. Supp. 2d 764 (D.S.C. 1999). In *Brown*, the plaintiff cited *Gilman* and similarly argued that the United States could not seek indemnity from one of its employees. *Id.* at 770. The court found that there was no precedent overruling *Gilman* or undermining its reasoning, thus did not allow the United States to maintain its action against the employee. *Id.*

individuals whom it insures. However, this argument would directly contradict the reasoning employed in defending a *Bivens* action. The officer would have to take the uncomfortable position that he or she is a federal employee for purposes of the FTCA, but not for purposes of a *Bivens* action. Although such a position seems paradoxical, a court would likely accept this argument because the Indian Law Enforcement Reform Act specifically states that an officer acting under a self-determination contract who is not otherwise a federal employee may *only* be considered a Department of the Interior employee for a limited number of enumerated purposes, including protection under the FTCA.[140] Thus, tribal officers likely would argue successfully that they are statutorily federal employees for limited purposes, including the FTCA, but not for general purposes such as a *Bivens* suit. Where 638 contracts exist, tribes and tribal police officers should be able to construct a sound defense based on their status as insureds under the FTCA. An impleader action through the FTCA therefore poses little threat to tribes that do not comply with the full faith and credit provision of the VAWA.

The case law indicates that a self-determination contract does not constitute a waiver of sovereign immunity, that a *Bivens* suit would be unlikely to succeed against tribal police officers, and that the FTCA does not permit the federal government to seek indemnification from the parties it insures. Thus, a private plaintiff seeking to compel a tribe to honor foreign protection orders would have difficulty convincing a court that Congress or a tribe waived sovereign immunity and would have to seek another method to overcome this defense.

C. The United States as a Superior Sovereign

An alternative approach to the problem of enforcement of Section 2265 is to involve the United States in the effort to compel tribes to comply with the statutes. As a matter of law, Indian tribes cannot assert sovereign immunity in defense of suits brought by the United States[141] due to the tribes' status

140. *See* 25 U.S.C. § 2804(f)(1) (2000).

141. United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987) ("Tribal immunity from suit without their consent is among those fundamental attributes of sovereignty that may be divested as an implicit result of their dependent status.").

as "domestic dependent nations."[142] The United States has asserted its superior sovereignty over tribes on several occasions.[143] For example, in *United States v. Red Lake Band of Chippewa Indians*, the United States filed suit in federal court to recover tribal court records that had been removed from a tribal court and stored in the tribal archives.[144] On appeal, the Eighth Circuit Court of Appeals held that tribal sovereign immunity did not bar the suit. Specifically, the court held that "it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."[145]

As in *Red Lake Band of Chippewa*, a tribe that defiantly refuses to give full faith and credit to foreign orders of protection could face suit by the United States for injunctive relief in federal court. If the tribe continued to disregard the VAWA's full faith and credit mandate, it would remain under the jurisdiction of the federal courts and could face a contempt citation for continued non-compliance.

In order for the United States to pursue a suit against a tribe, something must serve as a catalyst to bring the matter to the federal government's immediate attention. If a victim of domestic violence suffered a severe injury or died because a tribe refused to comply with the full faith and credit mandate, perhaps the federal government would consider bringing suit against the tribe on her behalf. Short of this scenario, however, the United States likely would not pursue litigation against a

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142. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832):

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

See also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 235 (1982).

143. *See, e.g.*, Fla. Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126 (11th Cir. 1999); Quileute Indian Tribe v. Babbitt, 18 F.3d 1456 (9th Cir. 1994); United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986) ("Like each of the fifty states, the Yakima Nation is not immune from suits brought by the United States.") (quoting the district court); United States v. Yakima Tribal Court, 794 F.2d 1402 (9th Cir. 1986); United States v. White Mountain Apache, 784 F.2d 917 (9th Cir. 1986).

144. 827 F.2d at 381.

145. *Id.* at 382.

tribe for its failure to comply with a single federal domestic violence law.

III. THE POWER OF THE PURSE: RESCISSION OF 638 CONTRACTS TO FORCE COMPLIANCE WITH THE VAWA'S FULL FAITH AND CREDIT PROVISION

As discussed in Part II.B.3, litigation under the FTCA against a tribe or tribal official for non-compliance with the VAWA's full faith and credit provision is unlikely to succeed. However, the federal government could attempt to force tribal compliance by tightening its purse strings and rescinding the tribe's 638 law enforcement contract. Under 25 U.S.C. § 450(m), the BIA may resume control of a program if the Secretary of the Interior determines that the tribe's performance of the contract involves "the violation of the rights or endangerment of the health, safety, or welfare of any persons."[146] If, for example, the Secretary were to determine that tribal law enforcement's refusal to enforce foreign protection orders threatened the safety of the individuals whom the orders seek to protect, she could rescind the 638 contract pursuant to 25 U.S.C. § 450(m).

The loss of a 638 law enforcement contract would create a severe financial burden for a tribe, as it would result in the loss of grant money and tribal police officers' jobs. In addition, the tribe would lose its prerogative to carry out its own law enforcement duties. The threat of losing a 638 contract could perhaps generate enough pressure to compel a tribe to pass a resolution complying with Section 2265. However, rescission of a 638 contract would hinder a tribe's governmental and economic development and would conflict with the Indian Self-Determination Act's stated goal of promoting tribal self-governance.[147] Moreover, the threat of rescission could only wield influence over tribes that have 638 contracts for law enforcement. Perhaps for these reasons, the Department of Interior has not used the threat of rescission to compel a tribe to comply with the full faith and credit provision of the VAWA.

This analysis has demonstrated that none of the enforcement actions discussed above provides a feasible

146. 25 U.S.C. § 450m (2000).
147. *See* 25 U.S.C. § 450.

method to compel a tribe to honor foreign protection orders. The full faith and credit statute's lack of enforcement mechanisms, combined with a shortage in tribal initiative to enact legislation consistent with the VAWA's full faith and credit requirement, deprives women in Indian country of the protection they need, and to which they are statutorily entitled. As it stands, Section 2265 fails to effectuate its goal of uniform protection for victims of domestic violence throughout the country.

IV. SOLUTION: A CONGRESSIONAL COMPROMISE BETWEEN CARRYING OUT THE PURPOSE OF THE VAWA AND RESPECTING TRIBAL SOVEREIGNTY AND SELF-DETERMINATION

Tribal sovereign immunity facilitates the independence of Indian tribes by allowing them to operate as sovereign political entities. Although federal law may unjustly or needlessly infringe on tribal sovereignty in some instances, the objectives of the VAWA's full faith and credit provision render its imposition both justified and necessary. Congress found the need to ensure nationwide enforcement of protection orders great enough in 1994 to enact Section 2265. It must now recognize that the protections of the VAWA's full faith and credit provision will not be effective in Indian country until a statutory enforcement mechanism compels the tribes to comply.

To fully realize the objectives of the VAWA's full faith and credit provision in Indian country, Congress should amend Section 2265 to expressly create both a federal right and a private cause of action that allows individuals to sue tribal officials for prospective injunctive relief if a tribe fails to enact full faith and credit legislation. Adding a clear federal right and cause of action to the statute would subject individual tribal officials to *Ex parte Young* suits for prospective injunctive relief,[148] yet would not constitute an explicit congressional waiver of tribal sovereign immunity. Thus, such an amendment would both advance the goals of the statute and maintain some deference to tribal sovereignty.

148. *See supra* Part II.A.

Permitting suits for prospective injunctive relief would encroach less on tribal sovereign immunity than other enforcement alternatives, such as an unequivocal waiver of sovereign immunity. Allowing *Ex parte Young* suits would minimize the degradation of tribal sovereign immunity by protecting tribes from the threat of money damages, and would encourage tribal self-governance.[149] Tribes would still have the freedom to draft their own statutes and could choose to supplement the federal requirements with tribal protections. At the same time, an amendment creating a federal right and a federal cause of action for prospective injunctive relief would apply enough pressure to force tribes to comply with the statute because it would bring them under the contempt authority of the federal courts. In practice, the amendment would compel a tribe to engage in an act of self-governance and draft a tribal law that complies with Section 2265.

Although an enforceable full faith and credit statute would divest tribal courts of a certain amount of their discretion to disregard foreign orders of protection, the tribal courts would maintain the authority to review due process questions and the issuing courts' jurisdiction over parties.[150] In addition, the full faith and credit statute bolsters a tribal court's authority by requiring state courts and other tribal courts to afford full faith and credit to its protection orders. Native American victims of domestic violence would thus continue to receive the protection of their restraining orders when they travel within Indian country.

CONCLUSION

As it currently stands, Section 2265 fails to protect victims of domestic violence from their abusers in Indian country because it is unenforceable against tribes. Until Congress decides to address the full faith and credit provision's limitations, the safety of domestic violence victims in Indian country is left to the discretion of the individual tribes. To achieve the purpose of the VAWA's full faith and credit provision yet maintain some deference to tribal sovereignty,

149. Concededly, allowing individuals to force a tribe into federal court is an affront to tribal sovereign immunity regardless of whether the relief sought is equitable or monetary.

150. 18 U.S.C. §§ 2265(b)(1), (2) (2000).

Congress must amend Section 2265 to allow individuals to sue tribal officials in federal court for prospective injunctive relief.