



PRACTICING INDIAN  
LAW IN FEDERAL,  
STATE, AND TRIBAL  
CRIMINAL COURTS:  
AN UPDATE ABOUT  
RECENT EXPANSION  
OF CRIMINAL  
JURISDICTION OVER  
NON-INDIANS

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**a**s a result of changes in federal law, criminal defense attorneys are more likely to find themselves or their clients appearing in American Indian tribal courts. This article summarizes the very knotty jurisdictional maze that surrounds criminal law and American Indians or Indian tribes. It explains recent changes in the handling of domestic violence cases in tribal courts following 2013 congressional action and the enhanced enforcement now occurring by tribal police and prosecutors. Finally, I offer general advice to lawyers not familiar with practicing law in tribal courts.

## VAWA CONFERS DOMESTIC VIOLENCE JURISDICTION OVER NON-INDIANS

In 2013, President Obama signed into law the reauthorization of the Violence Against Women Act (VAWA), a federal statute that addresses domestic violence and other crimes against women. (Pub. L. No. 113-4, 127 Stat. 54 (2013).) When originally enacted in 1994, VAWA created new federal offenses and sanctions, provided training for federal, state, and local law enforcement and courts to address these crimes, and funded a variety of community services to protect and support victims. Most significantly, the amended version of VAWA recognizes that tribal courts have jurisdiction over criminal cases brought by tribes against nonmembers, including non-Indians, that arise under VAWA.

Significantly, this is the first time since the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe* that Congress recognized tribal courts' criminal jurisdiction over non-Indians. (435 U.S. 191 (1978).) This change in the law represents a major change for native communities and especially native women. Native American and Alaska Native women experience sexual violence at a rate two and a half times higher than other women in the United States. (See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY—RESEARCH PRIORITIES (2005).)

The special domestic violence criminal jurisdiction conferred under the VAWA reauthorization not only provides an additional tool to address violence in Indian country, but also strengthens tribal courts and tribal sovereignty. Congress's recognition of tribal criminal jurisdiction comes with limitations and places obligations on tribes. Tribes wishing to take advantage of VAWA's jurisdictional provisions may need to amend tribal law, and hire new judges and public defenders. Further, there remain significant limitations on who can be prosecuted in tribal courts.

VAWA pilot programs and prosecutions of non-Indians in domestic violence cases have commenced in select tribal

courts in the following states: Arizona, Montana, North Dakota, Oregon, South Dakota, and Washington, and it is extremely likely that many more will follow.

Here is a summary of the new law's requirements and limitations:

## LIMITATIONS OF THE ENHANCED JURISDICTION UNDER VAWA

**Types of offenses.** Under the amended statute, tribes can prosecute any type of violence committed by a person who is or has been in a "dating or domestic relationship" with the victim. Tribes can also prosecute violations of protection orders that occur in Indian country (see definition below) as long as those protection orders were issued to prevent (1) violent or threatening acts, or (2) contact, communication, or physical proximity with or to the victim.

**Types of defendants.** Tribes can only prosecute VAWA cases against a non-Indian defendant if he or she has one of the following connections to the tribe's reservation or lands: (1) resides in Indian country, (2) is employed in Indian country, or (3) is the spouse, intimate partner, or dating partner of an Indian living in Indian country or a tribal member. The last category includes former spouses, individuals who share a child in common, and individuals in social relationships of a romantic or intimate nature. With one very limited exception, this new jurisdiction does *not* apply to tribes in Alaska, who under the Alaska Native Claims Settlement Act (ANCSA) are governed by 12 regional corporations. (See 43 U.S.C. §§ 1601 *et seq.*) These new jurisdictional rules also have very limited impact with nonrecognized tribes.

**Types of victims.** Tribes can only use the jurisdictional provisions of VAWA to prosecute crimes against Indian victims. This new law does not recognize tribal authority to prosecute non-Indians for violent acts against non-Indian victims.

**Procedural safeguards.** Tribes will need to guarantee that their criminal codes and rules of criminal procedure provide defendants with certain procedural safeguards. These include the right to a trial by an impartial jury of members of the community, from which non-Indians may not be excluded. Whenever a tribe intends to impose imprisonment, it must provide counsel/public defenders for indigent defendants. It must guarantee that proceedings are presided over by a law-trained judge. It must make publicly available the tribal criminal statutes and rules of procedure, and the criminal proceedings must be recorded. Defendants ordered detained under VAWA must be informed by the tribal court of their right to file federal habeas corpus petitions. Tribes must comply with all provisions of the Indian Civil Rights Act (ICRA) and guarantee "all other rights whose protection is necessary under the Constitution of the United States" in order to exercise this criminal jurisdiction. (See 25 U.S.C. §§ 1302, 1304.) It has not yet been established precisely what "other rights" this refers to. The guarantee of these fundamental rights is something which may very well end up becoming the topic of future defense challenges and litigation.

**Pilot programs.** As a result of the new federal legislation, in February 2013 the Justice Department announced a pilot program with three initial tribes, giving them jurisdiction over non-Indians in domestic violence cases on their reservations.

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Those tribes were the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Umatilla Tribes of Oregon. As of February 20, 2014, the tribal courts in those three jurisdictions began to exert their newly enhanced jurisdiction. In 2015, two additional tribes were approved to begin exercising special domestic violence jurisdiction as part of the pilot program: the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana and the Sisseton Wahpeton Oyate of the Lake Traverse Reservation of North and South Dakota.

**Since 2015.** After 2015, another 10 tribes were approved to exercise the special domestic violence jurisdiction: Little Traverse Bay Band of Odawa Indians of Michigan, Seminole Nation of Oklahoma, Eastern Band of Cherokee Indians of North Carolina, Muscogee Creek Nation of Oklahoma, Chitimacha Tribe of Louisiana, Alabama-Coushatta Tribe of Texas, Kickapoo Tribe of Oklahoma, Nottawaseppi Huron Band of Potawatomi of Michigan, Standing Rock Sioux Tribe of North Dakota, and Sault Ste. Marie Tribe of Chippewa Indians of Michigan. The 10 tribal courts are at varying stages of exercising the approved jurisdiction, but it is likely they will all begin prosecuting cases shortly, if they have not already done so. It is extremely likely that many more tribes will soon be approved by Congress to adopt the enhanced VAWA domestic violence jurisdiction.

#### **JURISDICTION IN CRIMINAL COURT: TRIBAL, FEDERAL, AND STATE**

Indian law in the United States is a complex maze depending on what the subject is, the pinpoint precise location of where an offense is committed, and the particular indigenous people affected. The state attorney general of Washington once said, "One reason that the State of Washington and its Indian citizens have frequently been in court is because no one truly understands exactly what position an Indian tribe occupies within the federal system." (Richard A. Monette, *New Federalism for Indian Tribes: The Relationship between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Tol. L. Rev. 617, 628 (1994).) And Comanche activist LaDonna Harris said, "We are part of the federal system, not part of the states. Our political relationship is not well-known and little is understood, which causes a great deal of problems." (*Id.*) Indian law has been referred to by one scholar as being characterized by "doctrinal incoherence," where principles aggregate into "competing clusters of inconsistent norms." (Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).)

Lawyers appearing in tribal courts working in either prosecution or defense quickly learn that the place to start analyzing any case is to determine where jurisdiction lies. A case may be brought in one forum or more than one, in cases where concurrent jurisdiction exists. Attacking a jurisdiction problem can be complex, and requires attention.

Indian tribes, as sovereigns, historically have inherent jurisdictional power over everything occurring within their territory. Tribal courts are courts of general jurisdiction that continue to have broad criminal jurisdiction. Any analysis of

tribal criminal jurisdiction should begin with this sovereign authority and determine whether there has been any way in which this broad overarching sovereign authority has been reduced.

**Federal or state concurrent jurisdiction.** Congress granted limited jurisdictional authority to the federal courts under the General Crimes Act (18 U.S.C. § 1152) and the Major Crimes Act (*Id.* § 1153), and to state courts under Public Law 280 (*Id.* § 1162). It is important to remember that tribal courts may maintain concurrent, joint criminal jurisdiction.

**Defining terms.** To understand federal criminal jurisdiction as it relates to Indian tribes, defining, for legal purposes, the territory of the tribe and status as an Indian is essential.

The term "Indian country" was first defined by the Indian Country Crimes Act (ICCA) and now applies to most federal Indian law. The term includes (1) all land within the limits of any Indian reservation under the jurisdiction of the United States government, (2) dependent Indian communities, and (3) all Indian allotments, where the Indian titles have not been extinguished. (*Id.* § 1151.)

Determining who is an Indian for purposes of finding federal criminal jurisdiction is not always a simple determination. Unlike defining the term "Indian country," where the ICCA is now universally accepted, there is no single statute that defines "Indian" for federal Indian law purposes. The most widely accepted test evolved after the 1846 United States Supreme Court case of *United States v. Rogers*. (45 U.S. 567, 572–73 (1846).) This test considers Indian descent as well as recognition by a federally recognized tribe. No single percentage of Indian ancestry has been established to satisfy the descent prong of the test. Congress has often deferred to tribal determinations of establishing their own membership, which sometimes impose actual blood quantum parameters. Tribal membership often requires formal enrollment. Where this is the case, the tribe's own list of enrolled members is the easiest source of determining Indian status. Tribal constitutions or tribal codes often describe tribal membership requirements.

In cases where there is not a tribal enrollment list, other factors may be considered, including whether the person holds himself or herself out to be an Indian, lives on an Indian reservation, attends Indian schools, or receives tribal or federal benefits for being an Indian. (*See United States v. A.W.L.*, 117 F.3d 1423 (8th Cir. 1997).)

**Criminal jurisdiction over non-Indians.** With very limited exceptions that are outlined here, tribal courts no longer have criminal jurisdiction over non-Indians, unless Congress delegates such power to them. (*See Oliphant*, 435 U.S. 191.)

**Criminal jurisdiction over nonmember Indians.** The Supreme Court ruled in 1990 in *Duro v. Reina* that tribal courts did not have criminal jurisdiction over nonmember Indians. (495 U.S. 676 (1990).) Congress, however, overturned the decision and restored tribal court criminal jurisdiction over nonmember Indians by adding the following language to the definition of "powers of self-government" in the ICRA: "self-government . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." (25 U.S.C. § 1301.)

**Sentencing limitations.** The ICRA provides that tribal

courts cannot "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both." (*Id.* § 1302(a)(7)(B).) However, in 2010 Congress enacted amendments to ICRA (referred to as the Tribal Law and Order Act of 2010) whereby tribes are permitted to sentence defendants up to a term of three years for any one offense and fines of up to \$15,000, if the tribes guarantee defendants certain constitutional rights. These constitutional rights include the rights of indigent defendants to tribal paid counsel, their cases to be presided over by judges "licensed to practice law," and other guarantees. (*Id.* § 1302(a)(7)(C).)

**Charging defendants in both federal and tribal court is not a violation of double jeopardy.** The US Supreme Court held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. (*United States v. Wheeler*, 435 U.S. 313 (1978).) Consequently, when two prosecutions are by separate sovereigns (e.g., the Navajo Nation and the United States), the subsequent federal prosecution does not violate the defendant's right against double jeopardy.

**Federal criminal jurisdiction.** As federal courts are courts of limited jurisdiction, there must be specific constitutional or statutory authority for the government to initiate a prosecution in federal court. Congress granted criminal jurisdiction in Indian country to the federal courts in certain circumstances, including the following:

**General Crimes Act.** This federal statute, 18 U.S.C. § 1152, enacted in 1817, provides that the federal courts have jurisdiction over interracial crimes committed in Indian country as follows:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

**Major Crimes Act.** The Major Crimes Act, 18 U.S.C. § 1153, enacted following the US Supreme Court's 1883 decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), provides for federal criminal jurisdiction over seven major crimes when committed by Indians in Indian country. Over time, the original seven offenses have been increased and now include 16 offenses: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under the age of 16, felony child abuse, arson, burglary, robbery, felony embezzlement, and theft. The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama*. (118 U.S. 375 (1886).)

**State criminal jurisdiction.** The states generally do not have jurisdiction over crimes occurring in Indian country,

with three exceptions set forth below:

**Public Law 280.** In 1953, Congress authorized states to exercise jurisdiction over offenses by or against Indians. (Pub. L. No. 83-280, § 2, 67 Stat. 588, 588-89 (1953) (codified as 18 U.S.C. § 1162).) Public Law 280 provided for broad state concurrent criminal jurisdiction on those states and reservations impacted by the law. Some states have mandatory Public Law 280 status and others opted to assume it.

**Other federal acts conferring state jurisdiction.** Some tribes have been affected by federal legislation in which states have received a federal mandate to exercise jurisdiction outside of Public Law 280, e.g., through statewide enactments, restoration acts, or land claims settlement acts.

**Non-Indian vs. non-Indian crimes.** The US Supreme Court ruled in *United States v. McBratney*, 104 U.S. 621 (1882), and *Draper v. United States*, 164 U.S. 240 (1896), that state courts have jurisdiction to punish wholly non-Indian crimes in Indian country.

**Criminal actions may need to be treated as civil actions in certain circumstances.** Some cases that might be treated as criminal actions in federal or state court may need to be treated as civil cases in tribal courts. This may be due to many factors, including legal jurisdictional limitations such as the lack of tribal jurisdiction over non-Indians, practical jurisdictional limitations (e.g., Public Law 280), and resource limitations. Consequently, it is more difficult to determine individual victim's rights in Indian country than would be necessary in federal and state courts. There are many resources available to help crime victims navigate through the jurisdictional complexities, including private organizations such as the National Center for Victims of Crime.

## PRACTICING LAW IN TRIBAL COURTS

Attorneys wishing to appear in tribal courts must be admitted to practice in those courts, which have their own rules for admission. Some tribal courts require a bar exam, like those of the Tulalip Tribes of Washington or the Pascua Yaqui Tribe of Arizona, two tribes presently exercising special domestic violence jurisdiction. Other tribal courts require lawyers to be admitted to practice before a state court bar.

Some tribal courts have two levels of representation: one for lawyers who have graduated from an accredited law school, and another level for "lay advocates." It is highly advised to consult with lawyers or lay advocates who are knowledgeable in the laws and procedures of the particular tribal court before venturing to take a case there. It is also highly advisable to learn as much as possible about the tribe, its people, customs, and traditions before appearing in court. An excellent resource about the use of customary law in American Indian tribal courts is the 2009 book *Navajo Courts and Navajo Common Law* by former Navajo Nation Supreme Court justice Raymond Austin.

Attorneys appearing in tribal courts should not expect the applicable rules of evidence or civil procedure of state or federal courts to apply in tribal court; they have their own rules, procedures, and practices. The first place to look are the tribal constitutions, followed by tribal codes of procedure and offenses. Tribal courts obviously also have their own trial

court and appellate court decisions, sometimes published on the courts' own website. A few tribal courts publish statutes and court decisions on Westlaw, and one other electronic database for tribal court decisions is VersusLaw.

Some tribes have their own bar association, like the Navajo Nation Bar Association; regional Indian law bar associations and state and federal bar association chapters also exist. There is one other extremely explosive landmine defense attorneys should be mindful of when taking on an Indian law case or venturing into tribal court. Under Rule 8.5 of the American Bar Association Model Rules of Professional Conduct (followed in most states and very influential in tribal courts), a lawyer may be exposed to attorney discipline wherever he or she is admitted to practice. Although the Rules' choice of law language favors discipline in the jurisdiction where the egregious conduct occurred, an ethical lapse in tribal court can, conceivably, result in discipline by a state lawyer regulating body. So, for example, a lawyer who theoretically transgresses in a tribal court in California may find his or her

state bar admission suspended or even terminated.

## CONCLUSION

Venturing into tribal court is not something a defense lawyer should take lightly; just as with any litigation, there are neither shortcuts nor substitutes for preparation. And, as my colleague trial advocacy law professor Thomas Mauet says, "preparation is 90% perspiration and 10% inspiration." (THOMAS A. MAUET, MAUET'S TRIAL NOTEBOOK (2d ed. 1998).)

Domestic violence against women in Indian country, until abated, will continue to be a crisis. Accordingly, Indian nations will be aggressive in working to protect their people and move toward a solution. The latest battleground is the tribal court, and attorneys, as always, will be on the frontlines. ■

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