



An Overview of Practicing American Indian Criminal Law in Federal, State, and Tribal Courts, and an Update About Recent Expansion of Criminal Jurisdiction Over Non-Indians

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As a result of changes in federal law, domestic violence offenders and their 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 now-occurring enhanced enforcement by tribal police and prosecutors. Finally, I offer general advice to attorneys not familiar with practicing law in tribal courts.

In 2013 President Barack 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Against Women Act (VAWA), a federal statute that addresses domestic violence and other crimes against women.¹ When originally enacted in 1994, VAWA created new federal offenses and sanctions; provided training for federal, state, and local law enforcement and courts to address these crimes;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 non-members, 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*² that Congress recognized tribal courts' criminal jurisdiction over non-Indians. 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.³

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' 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 six states—Arizona, Montana, North Dakota, Oregon, South Dakota, and Washington—and it is extremely likely that many more will follow. A summary of the new law's requirements and limitations is below.

Limitations of the Enhanced Jurisdiction Under VAWA

Types of Offenses. Under the amended statute, tribes can prose-

cute domestic 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 (defined 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.⁴

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 a tribal member or an Indian living in Indian country. The last category includes former spouses, individuals who share a child in common, and individuals in social relationships of a romantic or intimate nature. Note that, with one very limited exception, this new jurisdiction does *not* apply to tribes in Alaska who, under the Alaska Native Claims Settlement Act, are governed by 12 regional corporations. These new jurisdictional rules also have very limited impact on non-recognized tribes.

Types of Victims. Tribes can only use the jurisdictional provisions of VAWA to prosecute crimes against Indian victims. The amended 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, and the tribes cannot exclude non-Indians. Whenever a tribe intends to impose imprisonment, it must provide counsel 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 required under the U.S. Constitution” in order to exercise this criminal jurisdiction. It has not yet been established precisely what “other rights” this refers to. The guarantee of these fundamental rights is something that may very well end up becoming the topic of future legal challenges.

Pilot Programs. In February 2013, as a result of the new federal legislation, the Department of Justice announced a pilot program with three tribes—the Pascua Yaqui tribe of Arizona,⁵ the Tulalip tribes of Washington, and the Umatilla tribes of Oregon—giving them jurisdiction over non-Indians in domestic violence cases on their reservations.⁶ As of Feb. 20, 2014, the tribal courts in those three jurisdictions began to exert their newly enhanced jurisdiction.^{7,8} 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 11 tribes were approved to exercise the special domestic violence jurisdiction: Little Traverse Bay Bands of Odawa Indians of Michigan, Seminole Nation of Oklahoma, Eastern Band Cherokee 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 the Potawatomi of Michigan, Standing Rock Sioux Tribe of

North Dakota, and Sault Ste. Marie Tribe of Chippewa Indians of Michigan. The 11 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 by the time this article is published. 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 the subject matter, the precise location of where an offense is committed, and the particular indigenous people affected. The state attorney general of Washington once said, “One reason 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.”⁹

And LaDonna Harris, the Comanche activist, 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.”¹⁰ Indian law has been referred to by one scholar as being characterized by “doctrinal incoherence,” where principles aggregate into “competing clusters of inconsistent norms.”¹¹

Lawyers appearing in tribal courts, working on 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 in 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 Act¹² and the Major Crimes Act¹³ and to state courts under Public Law 280.¹⁴ It is important, again, 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 the status as an Indian is essential.

Indian Country. The term “Indian country” was first defined by The Indian Country Crimes Act (ICCA)¹⁵; however, it now applies to much federal Indian law.¹⁶ 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.¹⁷

Determining Who is an Indian for Jurisdiction Purposes. Determining who is an Indian for purposes of finding federal criminal jurisdiction is not always a simple analysis. 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.¹⁸ The most widely accepted test evolved after the 1846 Supreme Court case of *United States v. Rogers*.¹⁹ 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 often defers to tribal determinations of establishing their own membership. Tribal constitutions or tribal codes often describe tribal membership requirements, 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.

In cases where there is not a tribal enrollment list, other factors may be considered. These factors include: whether the person holds themselves out to be an Indian, lives on an Indian reservation, attends Indian schools, or receives tribal or federal benefits for being an Indian.²⁰

Criminal Jurisdiction Over Non-Indians. With the very limited exceptions outlined here, tribal courts no longer have criminal jurisdiction over non-Indians, unless Congress delegates such power to them.²¹

Criminal Jurisdiction Over Non-Member Indians. The Supreme Court ruled in 1990 that tribal courts did not have criminal jurisdiction over non-member Indians.²² Congress, however, overturned this decision and restored tribal court criminal jurisdiction over non-member Indians by adding the following language to the definition of “powers of self-government” in ICRA.²³ Self-government “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”²⁴

Sentencing Limitations. ICRA provides that tribal courts cannot “impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of \$5,000 or both.”²⁵ 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.²⁶ 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.²⁷

Charging Defendants in Both Federal and Tribal Court Is Not a Violation of Double Jeopardy. The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power.²⁸ Consequently, when two prosecutions are pursued by two 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

Federal courts are courts of limited jurisdiction, which means that they cannot hear all cases and there must be specific constitutional or statutory authority in order to bring a case in federal court. Congress has granted criminal jurisdiction in Indian country to the federal courts in certain circumstances, including the following:

General Crimes Act. The General Crimes Act,²⁹ enacted in 1817, provides that the federal courts have jurisdiction over inter-racial 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 in the District of Columbia, 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.³⁰

Major Crimes Act. The Major Crimes Act,³¹ enacted following the U.S. Supreme Court’s 1883 *Ex Parte Crow Dog* decision,³² 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. These offenses are: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, felony child abuse or neglect, 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, arson, burglary, robbery, felony embezzlement, and theft. The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama*.³³

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. Public Law 280 (PL 280)³⁴ provided for broad state concurrent criminal jurisdiction on those states and reservations impacted by PL 280. Some states have mandatory PL 280 status and others opted to assume it.

Other Federal Acts Conferring State Jurisdiction. Some tribes have been affected by federal legislation in states that have received a federal mandate to exercise jurisdiction outside of PL 280 (e.g., through statewide enactments, restoration acts, or land claims settlement acts).

Non-Indian Versus Non-Indian Crimes. The Supreme Court ruled in *United States v. McBratney*³⁵ and *Draper v. United States*³⁶ 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 a criminal action 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., PL 280), and resource limitations. As a consequence, 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.³⁷

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Practicing Law in Tribal Courts

Attorneys wishing to appear in tribal courts must be admitted to practice in those courts, and each has its own rules for admission. Some tribal courts require a bar exam, like those of the Tulalip Tribes of Washington³⁸ and the Pascua Yaqui Tribe of Arizona,³⁹ 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 and 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 insightful book written by former Navajo Nation Supreme Court Justice Raymond Austin, *Navajo Courts and Navajo Common Law*.⁴⁰

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 since many tribal courts have their own rules, procedures, and practices. The first place to look for tribal court rules, procedures, and practices is in 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 Westlaw⁴¹ and/or VersusLaw.⁴²

Some tribes have their own bar association, such as the Navajo Nation Bar Association; regional Indian law bar associations and state and federal bar association chapters and sections devoted to Indian law also exist.⁴³ There is one other extremely explosive landmine of which defense attorneys should be mindful 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 Responsibility (followed in most states and very influential in tribal courts), a lawyer may be exposed to attorney discipline wherever they are admitted to practice.⁴⁴ 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, say, may find their state bar admission suspended or even terminated.

Conclusion

Venturing into tribal court, then, 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 percent perspiration and 10 percent inspiration.”⁴⁵

All signs point to domestic violence against women in Indian country to 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 front lines. ☉



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Endnotes

- ¹Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (2013) (VAWA).
- ²*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
- ³U.S. DEP’T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY: RESEARCH PRIORITIES (Dec. 2005), <https://www.ncjrs.gov/pdffiles1/nij/209839.pdf>.
- ⁴VWRA, *supra*, note 1.
- ⁵The author is an attorney admitted to practice law before the Pascua Yaqui Tribal Court.
- ⁶Press Release, Dep’t of Justice, Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013 (Feb. 6, 2014), <http://www.justice.gov/opa/pr/2014/February/14-ag-126.html>.
- ⁷*See, e.g.*, Press Release, Pascua Yaqui Tribe, Pascua Yaqui Tribe Asserts Authority to Prosecute All Persons, including Non-Indians for Domestic Violence (Feb. 6, 2014), http://www.pascuayaqui-nsn.gov/images/announcements/press_release_vawa_140205_final.pdf.
- ⁸*Id.*
- ⁹Richard A. Monette, *A 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).
- ¹⁰*Id.*
- ¹¹Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).
- ¹²18 U.S.C. § 1152.
- ¹³18 U.S.C. § 1153.
- ¹⁴18 U.S.C. § 1162.
- ¹⁵18 U.S.C. § 1151.
- ¹⁶COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 732 (N.J. Newton et al. eds., 2005 ed.).
- ¹⁷*Id.*
- ¹⁸*Id.* at 177.
- ¹⁹*United States v. Rogers*, 45 U.S. 567, 572-573 (1846).
- ²⁰*See United States v. A.W.L.*, 117 F.3d 1423 (8th Cir. 1997).
- ²¹*Oliphant*, 435 U.S. 191.
- ²²*See Duro v. Reina*, 495 U.S. 676 (1990).
- ²³25 U.S.C. § 1301.
- ²⁴Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991).
- ²⁵25 U.S.C. § 1302(c).
- ²⁶*Id.*
- ²⁷*United States v. Wheeler*, 435 U.S. 313 (1978).