

Justice in Indian Country

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Introduction

The maintenance of tribal jurisdiction and the effective administration of justice in Indian Country are the heart and soul of tribal sovereignty and the survival tools for the various cultures and traditions of Native Americans. There are many facets to the concept of "Justice in Indian Country." Many on the "law enforcement" side see the justice issue in terms of cause and effect. The diverse nature of criminal activity and the societal forces that produce contributing factors occupy the law enforcement analysis. A related side of the issue is the victim assistance realm that has emerged as a significant area of activity, supporting victim recovery and participation in the prosecution of alleged offenders. A bit further removed is the civil rights component of justice issues, reflecting the need for fair enforcement and application of criminal statutes against Indian citizens and the equal protection and enforcement of such laws for Indian individuals and communities.

The face of crime has shown itself to be illusive. Common economic crimes such as theft, burglary, and larceny are accepted as events that will be committed by a given portion of the population. However, the recognition of more difficult covert activities such as child sexual abuse, elder abuse, gangs and an epidemic of highly addictive substances have challenged the traditional mode of law enforcement to develop special techniques, training, and multi-disciplinary teams.

Crime involves itself in Native American society on many levels. Native Americans are disproportionately over-represented in our nation's prison systems. We know from personal experience the roles of crime victim and criminal. Some issues are more prominent in a Native American context than in other communities. Examples include:

- the inflexibility of federal sentencing guidelines mean Native offenders often serve longer sentences than persons convicted under comparable state statutes;
- the fact that tribal communities have little or no role in passage of federal or state criminal statutes;
- the fact that tribal communities have little or no role in establishing federal or state priorities for allocation of law enforcement resources;
- federal and state juries are rarely composed of people from reservation communities; and,
- federal and state witness-victim coordinators are often located long distances from tribal communities.

Definition of Indian Tribe and Sovereignty

- There is no single federal statute defining an Indian tribe for all purposes, although the Constitution and many federal statutes and regulations make use of the term.
- The Supreme Court has repeatedly ruled that the determination of whether, to what extent, and for what time a group is recognized and dealt with as a dependent tribe requiring the guardianship and protection of the United States to be determined by Congress, and not by the courts. United States v. Sandoval, 231 US 28 (1913).
- Defining Indian tribes as sovereign entities has two significant implications for their relationship with the United States government. First, the tribes are said to be “dependent” upon the federal government for protection. This protection has taken the form of the trust relationship with the federal government having a trustee role in administering the trust property of the beneficiary Indian tribes. The second result of the tribe’s sovereign status is that tribes continue to be ruled by their own laws. Today it is clear that tribal governments exercise legislative, judicial, and regulatory powers and that authority is derived from aboriginal sovereignty, not delegated from the federal government. Indian governments are rapidly expanding their operations to implement their police power through tribal courts, zoning ordinances, taxation bureaus, environmental controls, business and health regulation, and fisheries and water management codes.
- Webster's Dictionary defines sovereignty as, a) supreme power especially over a body politic; b) freedom from external control, autonomy; c) controlling influence; d) one that is sovereign, *especially* an autonomous state.
- The concept of defining an Indian tribe as a sovereign entity with a defined structure and membership was largely for the convenience of invading European governments and the federal government. Originally, the definitional question arose in connection with treaty relations, as it was necessary to determine which groups were political entities for the purpose of negotiating treaties. Treaty making was part of the colonizing process and tribes were identified and treated as sovereigns to the extent necessary to procure their consent to cession of their right to occupy the land.
- More recently, it has been necessary to identify eligible tribal participants in federal programs including environmental protection, infrastructure development, public housing, and local government programs.
- Tribal sovereign rights to make and enforce laws without federal or state constraints, continue so long as those rights are not voluntarily ceded in treaties or other negotiations approved by Congress, or not extinguished by Congress. When cessions are made or rights are extinguished by an Act of Congress, the cession or Congressional act is to be construed narrowly as affecting only matters specifically mentioned.

Definition of Indian Country

- While the public is probably most familiar with the term Indian reservation, for most jurisdictional purposes the governing legal term is “Indian Country.” Originally enacted in 1949, Indian Country is defined comprehensively at 18 U.S.C. §1151 as follows:

§ 1151. Indian Country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

- In 1913 the Supreme Court held that an Indian reservation is Indian Country, and Congress relied on this decision in enacting §1151 in 1949. However, the wording of §1151(a) comes primarily from the Indian Major Crimes Act, whose jurisdiction was not tied to the term “Indian Country” until 1948. The Indian Major Crimes Act was first passed in 1885 to provide for federal punishment of seven felony offenses when committed by an Indian within a federal territory or “within the boundaries of any State of the United States, and within the limits of any Indian reservation.” The term “Indian reservation” originally meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850’s, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of tribal Indians, regardless of origin. This meaning of Indian reservation was intended in the 1885 Indian Major Crimes Act.
- The statutory words “all land” and “notwithstanding the issuance of any patent” were added in the 1948 codification of the definition of Indian Country. These terms include in the definition of Indian Country, Indian allotments within reservations; this continued prior case law both as to Indian Country and the Major Crimes Act. The quoted terms also include federal land located within Indian reservations but reserved for the Bureau of Indian Affairs or other government purposes. The most important effect of these terms is to resolve several problems generated by the prior law regarding unrestricted fee simple lands within reservation boundaries, which had tied Indian Country status to Indian land title.
- Fee lands are fee in simple patents given to Indian allottees after the 1892 allotment, to be held in trust by the U.S. for 25 years. After 1917 if the individual allottee did not get fee in simple for the allotment, their land remained Indian land in trust by the U.S.

- While §1151 appears in the federal criminal code, the Supreme Court has stated that the statute's definition generally applies also to questions of federal civil jurisdiction and to tribal jurisdiction.

Historical Context of Indian Country Justice (Who's In Charge Here Anyway?)

- Tribal culture has experienced over 200 years of change. With the arrival of Europeans, and their willingness to kill for the sake of property in the name of their religion and foreign government, came the demise of traditional communities and traditional law enforcement. Tribes have experienced reformist paternalism at the hands of federal and state governments. With a few exceptions, through the process of war, all Indian men, women, and children were forced to surrender and experienced prisoner of war conditions. United States military personnel replaced the authority of traditional law enforcement, and eventually tribal members were selected and hired by the military.
- Even though most of the federal laws governing Indian affairs were enacted by Congress after adoption of the Declaration of Independence, the treatment of Native Americans and notions of justice have important historic roots. How does one group assume the authority to pass and enforce laws affecting the property and conduct of another group?

Pre-Columbian

- Tribes established justice systems within the parameters of cultural needs and customs. Social norms for punishment, retribution, and responsibility were derived from a wide range of tribal groups, associations, and confederations. Intra and inter-tribal constructs for justice administration evolved through purely tribal means.
- Law enforcement has a traditional role in most, if not all, tribal cultures. In any given tribe one could expect to find a society, clan or organization that functions to identify and punish wrongdoers, and obtain some measure of retribution or compensation for victims. The authority of such law enforcement groups was defined and communicated through oral traditions and storytelling. People learned from an early age who "law enforcement" was, what behavior they were authorized to correct, the punishments that were administered, the expected conduct of the law enforcers, and other attributes of that system through stories. In that traditional communal lifestyle, close living with others meant few secrets were kept, especially acts of violence or abuse. The pace of life was slower and many members easily observed much of the community activity. To a large extent, the welfare of individuals depended on the welfare of the group, so individuals took an interest in the security and safety of others.

Assertion of Foreign Sovereignty – the Catholic Church

- The Catholic Church, and in particular the Pope, constituted the dominant political and legal institution of Western Europe throughout the Middle Ages and early Renaissance. Through early Church doctrine, the Pope was divinely designated as shepherd of Christ's Universal Flock and claimed supreme spiritual jurisdiction over the souls of all humankind. The Crusades to the Holy Lands of the 11th through 13th Centuries represented the first large-scale effort by the Catholic Church and Christian European military leaders to implement the Papacy's theoretical universal authority over non-Christian peoples outside Europe. These Papally sanctioned and directed holy wars were fought under the legal justification that as "heathens and infidels," the non-Christian peoples who occupied and possessed Jerusalem and the eastern Mediterranean could be conquered and displaced by Christian European princes and their armies, acting on orders from the Pope in Rome.
- Though seemingly unrelated to the events following Christopher Columbus' emergence in the New World in 1492, the Crusades generated a large collection of legal opinions and theories on the rights and status of non-Christian peoples. It was the same Crusading-era ideas that were later applied to the "discovery" of new territories by Christian Europeans, first in Africa and then in the New World.
- Columbus apparently presumed that he could lawfully claim "discoveries" of already inhabited territories for the Spanish Crown wherever he encountered indigenous peoples who diverged from Christian European cultural norms of religious belief and civilization. Upon hearing word of Columbus' encounters, the Pope issued a series of pronouncements confirming Columbus' "discoveries" on behalf of Spain.

The U.S. Constitution

- The U.S. Supreme Court has alluded to several federal constitutional powers as supporting legislative and executive authority over Indian affairs. This includes the Treaty Clause, the War Power, and the Property Clause.
- Today federal power over Indian affairs is accepted as tracing primarily to the Indian Commerce Clause, Article I, Section 8, Clause 3. This is the only express grant of federal power over Indians; Congress is authorized "to regulate Commerce . . . with the Indian Tribes."

War Department

- Law enforcement became bureaucratic in the military structure of the War Department. During the first five weeks of the first Congress of the United States four statutes were enacted that established the basic outlines of early Indian legislation. The first of these statutes, the Act of August 7, 1789, established the Department of War. The Act provided that the Department had responsibility for, in addition to its primary military affairs, "such other matters . . . as the President of the United States shall assign to the said department . . . relative to Indian affairs."

Department of the Interior

- Eventually, administrative responsibility passed to the Department of the Interior and the Bureau of Indian Affairs. External forces (Congress) assumed authority to establish the framework of law enforcement, including the definition of criminal acts, punishment for violators, jurisdiction to enforce laws, and funding for the high overhead system. The practical elements of a law enforcement system were dictated by and funded through Congress.

Code of Federal Regulations Courts

- In the 1870's, the federal government placed "Indian police" on the reservations to maintain law and order. In 1878, Congress appropriated money to pay them. By 1881, Indian police could be found at 49 of the 68 agencies.
- Until 1884, Indians arrested by the Indian police were tried and sentenced by federal agents. In that year, codes of offenses were drafted for the reservations and Courts of Indian Offenses were established. Despite widespread resistance to the imposition of these judicial systems, by 1890 such courts existed at most of the agencies. Most of the Pueblos, however, retained their traditional methods of justice. Courts of Indian Offenses operated according to Department of Interior regulations; no legislation was enacted to define their jurisdiction or to govern their procedures. No procedural protections were extended to criminal defendants.
- The tribal constitutions that resulted from the Indian Reorganization Act of 1934 (IRA) did little to remedy the deficiencies of the Courts of Indian Offenses. They did not expressly create tribal courts, nor did they outline their structure; the typical IRA constitution, patterned after a model prepared by the Department of the Interior, merely authorized the tribal council to establish a court system by ordinance and to adopt a law and order code. This subordination of the judicial system to the tribal council began what has become a major hindrance to the development of effective tribal court systems - lack of separation of powers between these branches of government.
- In 1935, the Department of the Interior issued revised regulations to govern the Courts of Indian Offenses and the Indian police. These regulations have not been changed substantially since that time. The courts became known as C.F.R. courts, a reference to the source of the regulations governing them (Code of Federal Regulations). The regulations indicated that they would remain effective on the reservations of tribes newly organized under the IRA until a tribe adopted and implemented its own law and order code.
- Like the tribal constitutions, the law and order codes that resulted were generally patterned after the Department of the Interior model, the 1935 regulations. In practical terms, then, the new "tribal courts" which came into existence were, by and large, simply C.F.R. (Code of Federal Regulation) courts by another name; in terms of structure and procedures; the two systems were practically identical. Lacking independent legal expertise, many of the tribes that did not adopt standard IRA

constitutions also used the 1935 regulations as models for their law and order codes. On those reservations that did not establish tribal courts, C.F.R. courts continued to administer justice.

- The regulations and Solicitor opinions restricted the jurisdiction of courts operating in Indian Country. Specifically, the 1935 regulations and the codes which used them as models provided for the assertion of criminal jurisdiction over members of federally recognized tribes only. In addition, these codes excluded from tribal court jurisdiction, offenses covered by the Major Crimes Act, even though the act does not expressly make federal jurisdiction exclusive. Many of the tribal constitutions limited civil jurisdiction to “Indians” and required the consent of non-Indian defendants to civil suit.

Federal Policies

Pre-Constitution Policy (1533-1789)

- Representatives of British and Spanish colonies negotiated treaties with Indian tribes. Treaties are agreements between two sovereign governments, and are considered to be the supreme law of the land.
- These treaties had the effect of according tribes an equivalent status to that of the colonial governments.

The Formative Years (1789-1871)

- The new U.S. government assumed the role of the British and Spanish governments in making treaties with Indian tribes. U.S.-tribal treaties are indexed in international law publications with treaties made by all other nations of the world.
- Federal policy instead of state policy dominated because the United States Constitution specified in Article 1, Section 8 (Commerce Clause) that, "The Congress shall have the power to... [t]o regulate Commerce with foreign nations and among the several states, and with the Indian tribes."
- The Marshall Trilogy (*Johnson v. McIntosh* - 1823; *Cherokee Nation v. Georgia* - 1831; *Worcester v. Georgia* - 1832) handed down by the Supreme Court further defined the relationship tribes had with the U.S. government, and established the doctrine of federal trust responsibility.

The Era of Allotment and Assimilation (1871-1928)

- The U.S. quit making treaties with tribes during this time. One of the reasons for this was that treaty making was seen as an impediment to the assimilation of Indians into "white" society.
- To encourage assimilation, Congress passed the General Allotment Act of 1887 (also called the Dawes Act). This act changed the communal ownership of tribal

lands to individual ownership. Each Indian male over 18 years old was given an allotment of acres and the rest of the tribal lands, considered to be "excess" were sold to non-Indians.

- The Indian Citizenship Act was passed in 1924. This granted Indians United States citizenship for the first time.

Reorganization Era (1928-1945)

- The Merriam Report of 1928 set the tone for reform. It declared allotment to be a complete disaster.
- The Indian Reorganization Act of 1934 set up Reservation Business Councils to govern tribes, and provided for the adoption of constitutions and the granting of federal charters.

Termination Era (1945-1961)

- Legislation passed that called for a reversal of the tribal self-government movement previously endorsed and called for an end to the trust relationship between federal and tribal governments.
- This resulted in the termination of more than 50 tribal governments. The federal government simply no longer recognized them as Indian Nations.
- Public Law 280, passed in 1953, gave six states mandatory and substantial criminal and civil jurisdiction over Indian Country. The states included were Alaska (except for Metlakatla Reservation), California, Minnesota (except Red Lake Reservation), Nebraska and Oregon (except Warm Springs Reservation). Ten other states also opted to accept some degree of P.L. 280 jurisdiction. They are: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington.

Self-Determination Era (1961-present?)

- The abuses of the termination era led to reforms. This period has been characterized by expanded recognition of the powers of tribal self-government.
- Important legislation includes: Indian Civil Rights Act of 1968, Indian Self-Determination and Education Assistance Act of 1975, Indian Child Welfare Act of 1978, American Indian Religious Freedoms Act of 1978 and Native American Graves Protection and Repatriation Act of 1990.