

Tribal Sovereignty and Criminal Jurisdiction

BY: LISA FRANCEWARE

NOVEMBER 18, 2020

Topics Not Covered

In-depth review of Federal and Tribal Relations

Civil Jurisdiction

P.L. 280 Jurisdiction

Outline

Federal and Tribal Government Relationship

Criminal Indian Law and Jurisdiction

Applicable Federal Law

Jurisdiction Analysis

Goals

Gain an understanding of the Federal and Tribal Government-to-Government Relationship.

Gain a general understanding of Criminal Jurisdiction in Indian Country.

U.S. Constitution

- ▶ Article I, Section 8, Clause 3
- ▶ The Congress shall have Power...
- ▶ To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Constitution

Article II, Section 2, Clause 2 – Gives the President the power, by and with the advice and consent of the Senate, to make treaties.

This Congressional power (plenary power) to deal with Indian Tribes is drawn both explicitly and implicitly from the Constitution. Morton v. Mancari, 417 U.S. 535 (1974).

Tribal Governments

The Constitution distinguishes Tribes from states of the Union and foreign nations.

They do not possess the full attributes of sovereignty. Rather they are a distinct, independent political communities. A separate people with the power to regulate their internal and social relations. Kagama and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Through that plenary power, Congress can limit, modify or eliminate powers of self-government that Indian Tribes otherwise possess.

Cherokee v. Georgia, 30 U.S. 1, 17 (1831) – The term of “domestic dependent nations” is first used.

Federal and Tribal Relationship


The Court, such as in Morton and Cherokee recognized a “unique obligation” toward the Indians, likening it as that of a ward to his guardian. Tribes considered dependent nations and wards of the United States.

For instance – legislation that may apply special treatment to Indians must be rationally tied to the fulfillment of Congress’ unique obligation toward the Indians. Morton.

“Unique Obligation”

Example:

United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011) – Equal Protection Challenge to 18 U.S.C. §117 (Domestic Assault by an Habitual Offender)



Shavanaux Court dismissed the Defendant's claim that the statute singles out Indians for prosecution on the basis of prior tribal convictions, resulting in disparate treatment. Court found that there was no Equal Protection violation.

First – “Indian” is not a racial classification; it is a political one. Tribes have their own political institutions. Federal regulation of Tribes is governance over once sovereign political communities, and not over a racial group, consisting of Indians. *Citing Morton and United States v. Antelope, 430 U.S. 641 (1977).*

Second – the Court reviewed the legislation for a rational basis - “As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.” *citing Morton*.



Court found that the legislation was rationally tied the fulfillment of Congress' obligation:

“Protecting Indians from domestic violence is unquestionably a legitimate government interest. Congress has found that Indian women are subject to physical and sexual abuse at higher rates than other groups in the United States. See 42 U.S.C. § 3796gg–10 (statutory note). The government also cites to evidence that domestic abusers are prone to recidivate. A criminal statute which targets recidivist abusers for enhanced punishment is rationally tied to Congress' legitimate interest and indeed obligation to protect Indians.”

Context of Jurisdiction

Shavanaux, 647 F.3d 993, n.9 (10th Cir. 2011). (Footnote 9)

“Congress’ ‘unique obligation’ flows from the relationship between Indians and the United States, which “resembles that of a ward to his guardian.” *Cherokee Nation*, 30 U.S. at 17. On the basis of Congress’s obligations to the Indians, the Supreme Court has upheld federal jurisdiction over crimes by reservation Indians. *United States v. Kagama*, 118 U.S. 375, 383–84, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).”

Inherent Tribal Sovereignty

Though dependent nations, Tribes have inherent sovereign authority to self-govern internal matters that affect Tribal life. They have the authority to enact laws and enforce those laws within their boundaries.

That includes criminal law, outlining offenses for which members and nonmembers may be prosecuted in a Tribal Court.

Tribal Courts: Traditional Court; Tribal Court; CFR Court

Criminal Jurisdiction over Members and Non-members

What is the source of authority to prosecute and punish members and nonmembers for a crime that is committed on that Tribe's reservation?

→ Inherent tribal sovereignty; not delegated federal authority. United States v. Lara, 541 U.S. 193 (2004).

Indian Civil Rights Act of 1968 – “*recognizes and affirms*” in each tribe their inherent tribal power.

Criminal Jurisdiction over Non-Indians

Tribes lack criminal jurisdiction over non-Indian defendants. Oliphant v. Suquamish, 435 U.S. 191 (1978).

Tribal Courts do not have the inherent authority to prosecute non-Indians, and they may not assume such criminal jurisdiction, unless specifically authorized by Congress.

Tribes do have the power to exclude non-Indians from what would be considered Indian Country, unless federal law grants the non-Indian a right to be there.

Indian Civil Rights Act

Applies most of the Bill of Rights (due process rights), but not all of them, to tribal governments. 25 U.S.C. § 1302(a)

Main differences (re: criminal law):

- Right to counsel, but at your own expense

- No right to a grand jury indictment

Establishes sentencing limitations (25 U.S.C. § 1302(a))

- 1 year

- \$5,000.00 fine

- Or both

Indian Civil Rights Act

25 U.S.C. § 1302(b) - Tribal Law and Order Act Sentencing (TLOA)
sentencing guidelines if over 1 year:

Not to exceed 3 years or a fine greater than \$15,000, or both

Need other protections for the defendant

Habeas Jurisdiction in federal court as a remedy (25 U.S.C. § 1303)

Indian Country

Federal Jurisdiction – Applicable Law

- ▶ Major Crimes Act (18 U.S.C. §1153)
 - ▶ CJ over Indian offenders for murder; manslaughter; kidnapping; maiming; Chap. 109 offenses (sex crimes); incest; felony assaults under §113; felony child abuse or neglect; assault against individual under the age of 16; arson; burglary; robbery; and a felony under §661.
- ▶ General Crimes Act (18 U.S.C §1152)
 - ▶ These apply regardless if Indian or Non-Indian, e.g: Firearms offenses; Narcotics offenses; Human trafficking; Assault on a federal officer.
- ▶ Assimilative Crimes Act (18 U.S.C §13) - applying state law as gap filler when no applicable federal offense, and no state jurisdiction.

Criminal Jurisdiction

- ▶ Four questions to ask when determining jurisdiction:
 1. 1. Where did the crime occur?
 1. Indian Country?
 2. 2. Who is the suspect?
 1. Indian or Non-Indian
 3. 3. Who is the victim?
 1. Indian or Non-Indian
 4. 4. What did they do?
 - Tribal, state, and/or federal offense?

General Criminal Jurisdiction

- ▶ If we are not in Indian Country:
 - ▶ No tribal jurisdiction
 - ▶ No federal jurisdiction, unless it is a crime of General Applicability

Hypothetical #1

Scenario -

Jane and John Doe share a daughter together. John arrives at Jane's house to pick up their daughter, Jill. John becomes upset over Jane's new life, and they get into a heated argument. John picks up a nearby can opener and strikes Jane, causing serious bodily injury.

John and Jane are both members of the Mescalero-Apache Tribe. Jane lives within the exterior boundaries of the Navajo Nation. John lives in Cortez, Colorado.

Criminal Jurisdiction

- ▶ Four questions to ask when determining jurisdiction:
 1. Where did the crime occur?
 1. Indian Country?

“Indian Country” Defined

18 U.S.C. 1151

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, including patented land and 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.

Hypothetical #1

► Four questions to ask when determining jurisdiction:

1. 1. Where did the crime occur?

1. Indian Country

2. 2. Who is the suspect?

1. Indian or Non-Indian

3. 3. Who is the victim?

1. Indian or Non-Indian

4. 4. What did they do?

Tribal, state, and/or federal offense?

“Indian” Defined

- ▶ Morton v. Mancari
 - ▶ Some degree of Indian blood from a federally recognized Tribe; and
 - ▶ Individual is recognized by the federal government or tribe as an Indian
- ▶ Ex Parte Pero, 99 F. 2d 28 (7th Cir)
 - ▶ Preponderance of Indian blood
 - ▶ Habits of the person
 - ▶ Substantial amount of Indian blood plus a racial status in fact as an Indian

See also - US v. AWL, 117 F.3d 1423 (8th Cir. 1997) and U.S. v. Zepeda, 792 F.3d 1103 (2015)

Note: Some statutes define who an Indian is for that particular statute (e.g. Indian Reorganization Act), so may depend on why you are asking.

Hypothetical #1

► Four questions to ask when determining jurisdiction:

1. 1. Where did the crime occur?

1. Indian Country

2. 2. Who is the suspect?

1. Indian

3. 3. Who is the victim?

1. Indian

4. 4. What did they do?

Tribal offenses; Major Crimes Act

General Criminal Jurisdiction Scheme

Indian Country

	Indian Victim	Non-Indian Victim
Indian Suspect	Tribal Federal	Tribal Federal (if MCA; other if Tribe has not prosecuted first under 18 USC §1152)
Non-Indian Suspect	Federal	State (<u>United States v. McBratney</u> , 104 U.S. 621 (1881)) (Unless General Crimes Act applies)

Double Jeopardy?

- ▶ Federal and Tribal Jurisdiction = Concurrent Jurisdiction
- ▶ Major Crimes Act – did not take away jurisdiction from the Tribes. It is concurrent jurisdiction with the federal government

Inherent Sovereignty & Double Jeopardy

United States v. Lara, 541 U.S. 193 (2004)

The Tribe is exercising this authority when prosecuting a tribal offense. It is not acting as the federal government.

Because double jeopardy bars successive prosecution from the *same sovereign*, double jeopardy does not apply when a defendant is prosecuted in Tribal Court and in Federal Court for the federal offense. Two separate sovereigns.

Hypothetical #2

- ▶ Scenario –
 - ▶ Salena was driving under the influence of alcohol on HWY 550 within the exterior boundaries of the Pueblo of Santa Ana. She swerves off the road, crashing into the fence of a homeowner, who is NN. Salena is a member of the Hoopa Valley Tribe.
-
- Indian Country
 - Suspect is Indian
 - Victim is Non-Indian
 - Offense – Tribal - DUI, CDP, or RD

General Criminal Jurisdiction Scheme

Indian Country

	Indian Victim	Non-Indian Victim
Indian Suspect	Tribal Federal	Tribal Federal (if MCA; other if Tribe has not prosecuted first, 18 USC §1152)
Non-Indian Suspect	Federal	State (<u>United States v. McBratney</u> , 104 U.S. 621 (1881)) (Unless General Crimes Act applies)

Hypothetical #2

- ▶ Scenario –
- ▶ What if Salena is NN, and there was no victim?
 - State jurisdiction
- ▶ What if Salena (NN), had veered into the on-coming lane, and crashed into a passing vehicle, killing the driver, who is Indian.
- ▶ → Federal jurisdiction

General Criminal Jurisdiction Scheme

Indian Country

	Indian Victim	Non-Indian Victim
Indian Suspect	Tribal Federal	Tribal Federal (if MCA; other if Tribe has not prosecuted first, 18 USC §1152)
Non-Indian Suspect	Federal	State (<u>United States v. McBratney</u> , 104 U.S. 621 (1881)) (Unless General Crimes Act applies)

Hypothetical #3

- ▶ Scenario –
- ▶ Tammy, a member of Taos Pueblo, attends a party at a friend's house. The friend lives in Indian Country. While at the party, Tammy is sexually assaulted by George, who is from the Southern Ute Indian Reservation.

→ Federal and tribal jurisdiction

What if Tammy was NN?

→ Federal jurisdiction and tribal jurisdiction

Hypothetical #3

- ▶ Scenario –
- ▶ Tammy, a member of Taos Pueblo, attends a party at a friend's house. The friend lives in Indian Country. While at the party, Tammy is sexually assaulted by George, who is from the Southern Ute Indian Reservation.

What if George was NN?

→ Federal jurisdiction

General Criminal Jurisdiction Scheme

Indian Country

	Indian Victim	Non-Indian Victim
Indian Suspect	Tribal Federal	Tribal Federal (if MCA; other if Tribe has not prosecuted first, 18 USC §1152)
Non-Indian Suspect	Federal	State (<u>United States v. McBratney</u> , 104 U.S. 621 (1881)) (Unless General Crimes Act applies)

TLOA & SDVCJ

Tribal Law and Order Act of 2010 - 25 U.S.C. §1302 (b) and (c)

- ▶ Amends ICRA to allow for greater penalties and imprisonment terms provided a tribe provides additional protections to defendants

Violence Against Women Act 2013 Reauthorization (ICRA 25 U.S.C. §1304)

- ▶ Special Domestic Violence Criminal Jurisdiction (SDVCJ)
- ▶ Amends ICRA by providing for tribal jurisdiction over crimes of domestic violence, dating violence, and criminal violations of protection orders committed by all persons and provided the defendant has sufficient contacts with the tribe and the tribe provides additional protections to defendants.

Public Law 98-290

The Southern Ute Indian Tribe has jurisdiction over all territory within the exterior boundaries of the reservation as established in the Brunot Agreement (April 29, 1874), and as added thereto by Presidential Proclamation and Executive Order.

State of Colorado shall exercise criminal and civil jurisdiction within the boundaries of the Town of Ignacio; and any other municipality which may be incorporated under the laws of Colorado within the Southern Ute Indian Reservation, as if such State had assumed jurisdiction under P.L. 280 (67 Stat. 588), as amended.

Public Law 98-290

Within the town limits of Ignacio:

State and Tribe have concurrent jurisdiction. There is a general understanding that the State handles felonies and the Tribe handles misdemeanors.

No federal jurisdiction over Indian Suspects and Non-Indian Suspects.
See United States v. Burch, 169 F.3d 666 (10th Cir. 2018).

Within the Reservation over Non-Indian Suspect

On fee land: State jurisdiction; P.L. 98-290

On trust land: Federal jurisdiction; P.L. 98-290



Thank you and stay safe!

LISA FRANCEWARE

LFRANCEWARE@SOUTHERNUTE-NSN.GOV

(970) 563-2145