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# CRIMINAL JURISDICTION ALLOCATION IN INDIAN COUNTRY

By

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ABSTRACT

CRIMINAL JURISDICTION ALLOCATION
IN INDIAN COUNTRY

By

Ronald Barri Flowers

This thesis examines the criminal jurisdiction division of Indian country between the Federal, State, and tribal courts. The theme of this research is to determine how the jurisdiction is divided and what the problems associated with it are. Major cases are documented throughout this paper that either set precedence or had a direct impact on the subject matter.

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Last, but not least, I would like to express my gratitude to the Lord for giving me the strength to carry on and for being with me through the good years and the tough years.

Thank You!

Ronald Barri Flowers

# CRIMINAL JURISDICTION ALLOCATION

# IN INDIAN COUNTRY

- Ronald Barri Flowers -
Department of Criminal Justice

To Committee Members:

Professor's Ferency, Turner, and Hoffman

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# PART I

# Introduction

Indians born here, in the United States, have long had problems with the National Government. These problems focus on such things as Indian sovereignty, Indian self-determination, jurisdictional disputes, etc. Because of circumstances of varying legal and historical importance, tribal Indians have been subject throughout the history of the United States to many treaty provisions and special laws enacted by Congress for their governance. This has led to many court cases to decide exactly where the Indian stood with regard to such things as independence, laws, etc. Since the beginning of our National Government, authority to enact Federal legislation pertaining to Indians has been vested in the Federal Government, first by the United States Constitution.

In Indian country, the division of criminal jurisdiction between federal, state, and tribal governments has been very complex throughout American history. With Federal legislation being unclear and overlapping jurisdictional authority to the federal, state and tribal governments, it has been difficult to determine who has jurisdiction over what tribe, race, or crime. In addition, tribal law present before federal legislation, has further added to the problem of jurisdiction. It is this area of the United States Government-Indian relations, that we will try to understand better. Before one can understand jurisdictional disputes within Indian country, the terms Indian and Indian country must first be defined. This will be discussed in the first chapter. Chapter 2 will examine the historical foundation for the United States Government and the relation to Indian affairs. Chapters 3 and 4 will examine the early legislation and treaties dealing with the Indians. Chapter 5 will study the federal recognition of sovereignty. Chapters 6 and 7 will examine the allocation of criminal jurisdiction in Indian country. In Chapter 8,

civil jurisdiction in Indian country will be discussed. Chapter 9 will concentrate on Indian sovereignty and Chapter 10 will explain some of the problems in the jurisdictional scheme and offer some solutions. My personal opinion on all of the areas covered will be represented by Chapter 11.

# CHAPTER 1

Before one can begin to understand the Indian and criminal jurisdictional problems in Indian country, three questions must be answered: (1) Who is an Indian?, (2) What is Indian country?, and (3) What is an Indian title?

## (1) Definition of Indian

For the purpose of criminal jurisdiction, in order for one to be an Indian, that person must have some ethnic connection and some degree of Indian blood. The definition of "an Indian" varies as statutes, case law, and administrative enactments have formulated different definitions of Indian status. Often, the definition of an Indian would appear in the individual constitution of legal codes of a tribe. In general, however, certain considerations are relevant in order to be considered as an Indian. These include: an individual's residence, the particular law involved, a persons degree of Indian blood, tribal enrollment, and an individual's opinion as to his own status. In Title 25 of the United States Code and the Code of Federal Regulations, definitions of Indians vary, depending on the topic. For example, one section dealing with the court of Indian offenses states specifically that for enforcement of regulations in that section, "an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction."[1]

Without having specific criteria, other than statutory words, the courts in earlier decisions took the position that the term "Indian" is descriptive of an individual who not only has Indian blood, but who is also regarded as an Indian by the community of Indians in which he lives. With this in mind, in United States v. Rogers[2], the court held that a white man that was adopted into an Indian tribe, did not, therefore, become an Indian within the meaning of the statute. Other courts have largely followed the example of this case in determining who could be considered an Indian.

For purposes of legislation on Federal criminal jurisdiction, a person of mixed blood living on a reservation and enrolled in a tribe, is an Indian[3]. "It has been held[4] that an individual of less than one-half Indian blood enrolled in a tribe and recognized as an Indian by the tribe is an Indian within the act of March 4, 1909[5], extending Federal jurisdiction to rape committed by one Indian against another within the limits of an Indian reservation."[6] In a similar case, it has been held in Sloan v. United States[7], that mixed bloods are recognized by the tribe as members, therefore, they may properly receive allotments of land as Indians." In Sulley v. United States[8], where one-eighth bloods were involved, the court stated that the persons were "of sufficient Indian blood to substantially handicap them in the struggle for existence", and held that "they were Indians and were entitled to be enrolled as such."[9]

State and Federal courts have often debated with the question of who is an Indian. In State v. Phelps[10], an Indian was defined as "a person with some degree of Indian blood who has not severed his tribal relationship and who claims to be an Indian."[11] Indians who have severed ties with their tribes are sometimes treated as non-Indians for the purpose of criminal jurisdiction; People v. Carmen[12]. Generally speaking, aside from statutory definitions, the Federal government, in dealing with Indian affairs, commonly considers a person who is of Indian blood and a member of a tribe, an Indian regardless of the degree of Indian blood in him. "Thus, the Indian Law and Order Regulations approved by the Secretary of the Interior on November 27, 1935 contain the provision: For the purpose of the enforcement of the Regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction."[13]

In determining whether or not a person is an Indian, it basically

depends on who is interpreting this and for what purpose. To determine whether or not a person who has committed a crime on a reservation is an Indian produces many problems. For one, it depends on who has jurisdiction over the crime committed. Also, the offender has to cooperate in determining this. Many offenders are well aware of the limitations of the law and could, therefore, act accordingly depending on what crime they commit. An example of this would be an offender committing a crime and then, if apprehended, may deny or claim being an Indian depending on what could happen to him. The many definitions of being "an Indian" are troublesome for tribal governments as the technicalities in determining who is an Indian tend to hinder the tribe's ability to effectively govern its territory.

(2) What Is Indian Country?

The Indian country, at any given time, must be viewed with regard to the existing body of Federal and tribal law. Until 1817, Indian country was land within which the criminal laws of the United States had not been made applicable. This meant that any crimes within this country whether white against white, or by Indians, were not recognized in Federal or state courts because Congress had not issued jurisdiction in those courts for that purpose.

In general, the term "Indian country" has been used in many senses. It is most usefully defined as country in which Federal laws relating to Indians and tribal customs are laws that generally are applicable. The phrase, "generally applicable" is used because Federal law, relating to Indians and tribal law and custom, have a validity regardless of locality. The greater part, however, of the body of Federal Indian law and tribal law applies only to certain areas which have a peculiar relation to the Indians and are referred to generally as "Indian country."[14]

The power to define Indian country is exclusively in the hands of the Federal government. This power is derived from three sources. "First, the Constitution gives the President[15] and Congress[16] power over Indian affairs. The Supreme Court has construed these Constitutional grants as giving broad authority to the Federal government[17]. Secondly, the courts have described the Federal government's relationship to the tribe as that of a guardian to a ward[18]. Third, Federal authority is inherent in the Federal government's ownership of Indian occupied lands."[19] Treaties were the initial way in which Indian country was determined by Congress. The first Congressional procedure for determining Indian country was with the Indian Intercourse Act of 1834, which will be discussed in Chapter 3.

As the Indian titles were extinguished, those lands east of the Mississippi would discontinue being Indian country. The change in designation of Indian land west of the Mississippi would require new legislation to fix the new boundaries. This would have to be consistent with the policy of relocating the Indians in the west. Allotted lands were to be included in the Federal determination of Indian country, too. These changes in legislative policy led to the United States Supreme Court expanding the definition of Indian country between 1834 and 1948.

The General Allotment Act of 1887, known as the Dawes Act, provided for the division of tribal lands by allotment to individual Indians. The United States held the titles to such allotments in trust for twenty-five years to prevent alienation. This law was motivated by Indian rights organizations which were convinced that allotment and assimilation were the only answers to the Indian problem. The Dawes Act addressed itself to not only the issue of collective landholding, but also to equally important issues such as tribal organization and the legal status of individual Indians. The Dawes Act was enacted to

allow the Indian to have stronger retention of alloted lands and tribal affiliation and at the same time be culturized into American Society. A case that had a significant role in the Dawes Act was the Elk v. Wilkins[20] decision. In this case, the plaintiff, an Indian, who had separated from his tribe and resided among the white people of Omaha, Nebraska, was denied the right to register to vote by Wilkins, the local registrar, on the grounds that he was not a United States citizen. This decision was upheld by the Supreme Court. "The decision in Elk acutely embarrassed the proponents of severalty legislation. Their argument that tribalism had to be destroyed in order to allow the individual Indian to assume his rightful place in white society seemed, in the light of the Supreme Court's decision, either false, hypocritical, or both. If the Indian were to lose his tribal affiliation and to move into white society, he would be left in limbo."[21]

Allotted lands were recognized as a part of Indian country in 1914 in United States v. Peliam[22], where the court "decided that allotments held in trust by the United States for Indian allottees were still of distinctively Indian character and would remain Indian country for the period of the trust."[23] This decision was further reinforced in 1921 in United States v. Ramsey[24]. In this case, the court held that restricted allotments are part of Indian country until these restrictions are removed.

In addition to allotted lands, the definition of Indian country was further expanded with Supreme Court decisions. Two important cases along this course were Donnelly v. United States[25] and United States v. Sandoval[26]. "In Donnelly v. United States, the court held that any change in the definition of Indian country was acceptable, provided that Congress or the Executive could demonstrate some change of circumstances necessitating the revision. In the same year, 1913, the court in United States v. Sandoval

extended the definition of Indian country to reach the non-reservation lands of the Santa Clara Pueblo in New Mexico. In so doing, the court relied upon the plenary power of Congress over Indians and reasoned that Congress had the power to decide what was Indian country."[27]

In 1938, in United States v. McGowan[28], the court held that any lands purchased by the Federal government and set apart exclusively for Indian use fall within the definition of Indian country. This standard meant that those lands that were designated by the government for Indian use would be called Indian country.

In 1948, Congress enacted a comprehensive Federal definition of Indian country. This was part of an act to revise the entire United States Criminal Code. The aim of this definition was to attempt to clarify the confusion that existed in the application of criminal laws to Indian country. This definition is current and it adopted the guidelines expressed in such cases as Sandoval, Gunnelly, Pelican, Ramsey, and McGowan. When enacting Title 18 of the United States Code, entitled "Crimes and Criminal Procedure" into law, Congress established the following definition of "Indian country". "Except as otherwise provided in Sections 1154 and 1156 of this title, the term 'Indian country' 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 right-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 hereof, 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 right-of-way running through the same."[29]

There are many ways of defining Indian country. Some of the court decisions mentioned illustrate these ways. However, the difficulty in

applying these definitions in day-to-day situations has caused many problems in Indian law today. Problems often arise in such areas as fragmental land ownership. This is an area where allotted Indian land overlaps with non-Indian land. This could cause such problems as land ownership disputes that could result in crime, violence, etc. In these areas, criminal jurisdiction changes as often as land title changes. This is because the criminal jurisdiction depends on whether the land is Indian owned or non-Indian owned as well as whether or not the individual is Indian or non-Indian. This makes it especially tough on law enforcement officers in dealing with these fragmented land ownerships that involve Indian land, as they often find it necessary to search tract books to determine whether criminal jurisdiction is within the state, Federal, or tribal government.

(3) Indian Title

In looking at the term Indian title, it implies Indian ownership or the right to land just because they had original possession of it. Whether this right is legitimate or not is a totally different research, morally and otherwise. In terms of the United States, "Indian title" has been used to distinguish aboriginal usage without definite recognition of this right by the United States from a recognized right of occupancy. As the United States assumed a sovereign position, they maintained the right and authority to honor Indian title or to extinguish it. The United States Government used this sovereign position to give them the right to extinguish Indian title and to control individual non-Indian dealings with the Indians. "Johnson v. McIntosh[30], decided in 1823, gave rationalization to the appropriation of Indian land by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss.

Exclusive title to the lands passed to the white discoverers, subject to the Indian title with power in the white sovereign above to extinguish that right by purchase or conquest."[31] In these terms, Indian title is merely a title given to land occupied by Indians by the sovereign (United States) that can be taken away at any time.

This type of Indian title has been referred to as being "sacred as the fee simple of the whites" as in the case of Mitchel v. United States[32]. It has never been held to constitute a title in fee simple in the absence of some type of official recognition by the United States Government. There is no Congressional recognition of an Indian's right to permanent occupancy of any particular land. There has to be definite intention by Congressional action to accord legal rights, not simply permissive occupation. In the Hynes v. Grimes Packing Company[33] decision, the Supreme Court held that the Indian right of occupancy was not a compensable right in the absence of specific Federal recognition.

In the Tee-Hit-Ton Indians v. United States[34] case, claims of these Indians were rejected by the Court of Claims on the same grounds of non-recognition. In this case, Mr. Justice Reed stated, "We think it must be concluded that the recovery in the Tillamook Case[35] was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with neighboring tribes, rather than upon holding that there had been a compensable taking under the Fifth Amendment. This leaves unimpaired the rule derived from Johnson v. McIntosh that the taking by the United States, of unrecognized Indian title, is not compensable under the Fifth Amendment.

This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by

the Fifth Amendment or any other principle of law."[36]

The terms "national domain", "Indian reservation", and "public lands" should be defined. It is generally recognized that "the national domain is the total area, land and water embraced in the boundaries of the United States including its possessions." An Indian reservation is simply a part of the public domain set aside by proper authority for use and occupation by a group of Indians. The United States holds the title, and the right of use and occupancy is in the Indians.[37] The term "public lands", found in various land laws, is said to be used generally "to describe such lands as are subject to sale or other disposition under general law and not to lands that have been reserved by treaty, act of Congress, or executive proclamation."[38]

## Conclusion

In order to be able to establish exactly what an Indian is and how to differentiate them from other races, general definitions of Indians, Indian country, and Indian title have been examined in this chapter. From the historical context which this material was presented in, one should be able to see the shaping of United States - Indian relations. Chapter 2 will look at the actual historical basis that shaped United States - Indian relations.

FOOTNOTES
Chapter 1

1 25 C.F.R., Sec. 11.2 CA(c),1974

5 35 Stat. 1088, 1151

6 Federal Indian Law, U.S. Department of the Interior, United States Government Printing Office, Washington, 1958, p. 8

8 Ibid, p. 10

11 Immigration, Alienage and Nationality, "The Allocation of Criminal Jurisdiction and Indian Country - Federal, State and Tribal Relationships", University of California, Davis Law Review, Vol. 8, 1975, p. 433

13 Federal Indian Law, p. 12

14 Federal Indian Law, p. 14

15 United States Constitution, Art. II, Sec. 2, cl. 2

16 United States Constitution, Art. I, Sec. 8, cl. 3

19 Immigration, Alienage and Nationality, p. 436

21 Rosen, Lawrence. American Indians and the Law, Transaction Book, New Jersey, 1976, p. 20

23 Immigration, Alienage and Nationality, p. 435

27 Ibid, p. 434

29 United States Code, Crime and Criminal Procedures, Act of June 25, 1948, 62 Stat. 684

31 Federal Indian Law, p. 19

36 Ibid, p. 21, 348 United States 272, 284-285 (1955)

37 58 I.D. 331, 343

FOOTNOTES (Continued)

38 Federal Indian Law, p. 20

CASES
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[2]United States v. Rogers, 45 U.S. 567 (1846)

[3]Famous Smith v. United States, 151 U.S. 50 (1894)

[4]United States v. Gardner, 189 Fed. 690 (1911)

[7]Sloan v. United States, 118 Fed. 283 (1902)

[8]Sully v. United States, 195 Fed. 113 (1912)

[10]States v. Phelps, 93 Mont. 227, 19 p. 2d,319 (1933)

[12]People v. Carmen, 43 C. 2d, 342 (1954)

[17]United States v. Holliday, 70 U.S. 407, 417-418 (1866)

[18]Cherokee Nation v. Georgia, 30 U.S. (1831)

[19]Johnson Graham's Lessee v. McIntosh, 21 U.S. (1823)

[20]Elk v. Wilkens, 112 U.S. 94 (1884)

[22]United States v. Pelican, 232 U.S. 442 (1914)

[24]United States v. Ramsey, 271 U.S. 467 (1921)

[25]Donnelly v. United States, 228 U.S. 243, 256-257 (1913)

[26]United States v. Sandoval, 231 U.S. 2f (1913)

[28]United States v. McGowan, 302 U.S. 535 (1938)

[30]Johnson v. McIntosh, 8 Wheat. 543 (1823)

[32]Mitchel v. United States, 9 Pet. 711, 746 (1835)

CASES (Continued)

[33]Hynes v. Grimes Packing Company, 337 U.S. 86 (1949)

[34]Tee Hit-Ton Indians v. United States, 120 F. Supp. 202 (1954)

[35]United States v. Tillamooks, 341 U.S. 48 (1951)

[38]Newhall v. Sanger, 92 U.S. 761, 763 (1875)

# CHAPTER 2

In defining the United States Government's earliest relationship to the Indians, the historical foundation of this relation should be examined. The Constitution, as the supreme law of the United States, provided the legislative and executive branches of the federal government with a broad authorization for the exercise of power over Indian affairs. "Acting under the Articles of Confederation and under the Constitution, the new government of the United States of America had cautiously defined its relationship to the Indian nations by treaties and by legislative enactments. The government still feared the Indian nations, on its borders, and it sought to establish relations which would minimize conflict with them. The treaties and laws of this period acknowledged in principle that Indian law was supreme in the Indian territories."[1] Unfortunately, though the federal government could not prevent contact between its American citizens and the Indian nations. This contact, in part, had a significant affect in altering Indian legal systems.

The Articles of Confederation, in 1777, provided that "Congress shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits not be infringed or violated."[2] With this charter as its guide, the new nation made its first treaty with the Delaware Indian nation in 1778. Article IV, of the Delaware Treaty established a way in which each nation would handle criminal violations within its own borders by citizens from others, and provide for the extradition of criminal fugitives. During this time, other treaties stipulated that United States citizens, within Indian nation boundaries, were subject to the tribe's national law.

The Confederation Congress also controlled United States citizens dealing with Indians. The Northwest Ordinance of July 13, 1787 provided:

"The utmost good faith shall always be observed toward the Indians, their land and property shall never be taken from them without their consent; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."[3] At this time and throughout the history of Indian affairs, the intentions by the government of justice toward the Indians were steadily stated.

With this purpose in mind, Congress followed the pattern set by the Articles of Confederation. In examining the Constitution, there has been virtually no mention of Indians. However, of the few words in the Constitution mentioning Indians, probably the largest single provision of the Constitution which is really the basis of most of the Indian - United States relations is Article I, Section 8, clause 3, which provides that: "The Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[4] It is the part of this clause with regard to Indians that will be looked at.

Congress, from the very beginning, has exercised its commerce power over the Indians in a premptive way. As one can note, "foreign nations, states, and Indian tribes" are separately delineated. With the Constitution giving the Legislature broad powers over Indian affairs through Article I, Section 8, clause 2, John Marshall recognized this fact in one of the first important Indian cases, Worcestor v. Georgia[5]. In this case Marshall stated that, "The Constitution confers on Congress the powers of war and peace; of making treaties, and of regulating commerce. . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. Of the three Constitutional elements of this general power to regulate Indians, two - the treaty making[6] and commerce powers - have had continuing importance to Indian law in their own right."[7]

Historically, the power of Congress to regulate Commerce with Indian tribes has the entire nation for its field of action; not just Indian country. The extent of this power has been demonstrated in the Indian liquor laws, which represented one of the early examples of Federal control. Present law leaves the issue of liquor up to the states and the Indian tribes.

"The Commerce clause is the only grant of power in the Federal Constitution which mentions Indians. The Congressional power over commerce with the Indian tribes plus the treaty making power is much broader than the power over commerce between states. So long as "Indian tribes" exist as such, or until the Constitution is amended, Congress ostensibly will retain the plenary power granted or implied in Article I, Section 8, clause 3, of the Constitution, to regulate tribal activities and thereby the activities of individual members. So far, citizenship for the Indian has presented no insurmountable obstacle to continued regulation."[8]

In addition to Article I, Section 8, clause 3, there are a few other lesser provisions in the Constitution which refer to Indians or tribes. Article I, Section 2, clause 3 and the Fourteenth Amendment, which amended it, exclude Indians not taxed for the purpose of determining a state's representation in the House of Representatives. Article I, Section 2, clause 3, in addition, excluded Indians not taxed from a state's apportionment of direct taxes. Article II, Section 2, clause 2, gives the President, with the consent of the Senate, the power to make treaties. This will be further discussed in Chapter 4. The other provision is the Tenth Amendment[9], which divides the powers into three groups: United States, the States, and the people. In reality though, the Tenth Amendment does not actually provide for Indian tribes. There is no other provision in the Constitution that can be read as a source of

tribal power. Therefore, this closes the tribe's Constitutional rights to entity status.

This conclusion is basically supported by the little mentioning that there is in the Federalist Papers regarding Indian tribes or Indians. The Federalist Papers was written by Alexander Hamilton, James Madison, and John Jay. It is a major document contemporaneous with the Constitution in that it actually defends it. It explains the complexities of the Constitutional government. Alexander Hamilton looked at the Indians as savages and the natural enemies of the United States. He saw a justification for a standing army under the Constitution[10]. Hamilton also viewed the Indian nations as a threat to the Union[11]. John Jay, though also basically against Indians, was a bit more thoughtful in his attitude. He stated that "not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual states, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants."[12] James Madison, in commenting on the commerce power with the Indian tribes, observed Article I, Section 8 (3) cured imperfection in the Articles of Confederation, which had limited federal power to Indians not within a state[13].

In this great document dealing with the Constitution of the United States, these are the only references made regarding Indians. This makes it a valid conclusion that neither the Constitution nor its draftsmen provided for the continuing existence of Indian tribes. Forty years after the Federalist Papers, in 1828, James Kent predicted the doom of all Indians: "Indians have generally, and with some very limited exceptions, been unable to share in the enjoyment, or to exist

in the presence of civilization and judging from their past history, the Indians of the Continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own."[14] Although this did not happen, it probably generalized the feelings of the people and possibly the government at that time.

A case that exercises the commerce clause of the Constitution is United States v. Forty-Three Gallons of Whiskey[15]. In this case, the Supreme Court declared: "Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of a state within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution, and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes - a power as broad and as free from restrictions as that to regulate commerce with foreign nations."[16]

Congress, in exercising its power to regulate commerce with Indian tribes has been the major architect of American law and policy. The commerce clause was designed not only to prevent state legislation against the Indians, but to also protect the Indians from white people and vice versa. Prentice and Egan describe the historic purpose of the commerce clause in The Commerce Clause of the Federal Constitution, 1898: "The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating state legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks."[17] Congress has been inconsistent in regulating commerce with the Indians. It reflects

the values and interests of the American society, henceforth, the Congressional treatment of Indians has fluctuated from total separation, to total assimilation, and this has included the complete termination of tribal status.

## The Federal Sources of Power

The entire power of the United States Government over Indians and Indian tribes, discussed briefly in Chapter 1, emanates from three sources. The first source was discussed in this chapter; the Constitution grants to Congress[18] and to the President's[19] powers over Indian affairs which has been interpreted as giving broad authority to the Federal Government[20].

The second source of federal power is the court applied theory of guardian - ward relationship to the Federal Government's relationship to the tribe[21]. "The courts, in maintaining that the liquor prohibition applied to Indians not residing on a reservation, recognized a second source of Congressional power - that implicit in the guardianship of the United States over the Indian[22] - which operated in conjunction with the Constitutional authority of the commerce clause[23]. The "guardian - ward theory of Federal - Indian relations arose out of a direction in Chief Justice Marshall's opinion in Cherokee Nation v. Georgia[24], and the Federal judiciary has often relied on it as a justification for the exercise of Federal power as against both the states[25] and the tribe[26]."[27] This theory is based on the weakness and dependency of the tribes on the Federal Government. It also emphasizes the Government's obligation to aid the Indian in adjusting to an alien culture that has altered the Indian's traditional life style. The guardianship theory has provided alienating his land[28], for excluding a tribal Indian from a state adultery law[29], for establishing a body of criminal law that can be applied to Indian country[30], for maintaining exclusive jurisdiction over

crimes between Indians in Indian country[31], and for establishing additional reasoning for the liquor prohibition[32]. This will be discussed in more detail in Part II.

Federal ownership is the third source of the plenary power of the United States. This has been discussed some in Chapter 1 under Indian country and Indian title. "The doctrine of federal ownership originated in Johnson & Graham's Lessee v. McIntosh[33] where Marshall, in holding invalid a land patent granted by the Cherokee Nation, maintained that title was in the United States and was derived from the right of discovery exercised by the colonial forerunners of the new nation. According to Marshall, the Indian tribes held only an exclusive right of occupancy."[34] In a way similar to a landlord drawing up rules for its tenants, the Federal Government, as owner of the land in which Indians live on, has declared what laws shall and shall not apply to its tenants on the reservation. "The basis of this unique landlord and tenant theory was restated in United States v. Kagama[35], when the Supreme Court in holding that the government's exclusive jurisdiction over the commission of major crimes by Indians on the reservation was not an unconstitutional interference with state authority, maintained that the power of the United States over Indian country and other "federal enclaves" emanated from ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government and can exist nowhere else."[36]

The sources of federal power, guardianship and ownership tend to operate together. "Where a controversy taking place in Indian country does not involve Indians or Indian interests, as in a crime involving non-Indians on the reservation, the federal judiciary has tended to assume that exclusive federal jurisdiction over the crime does not exist even though the crime is committed on federally owned land[37]. Apparently,

the federal landlord will deal exclusively with the persons and property its Indian tenants, but it does not feel it necessary to deal with controversies that, although arising on federal property, concern only non-Indians."[38]

## Conclusion

This chapter has studied the Constitutional foundation of the United States Government - Indian relations. Article I, Section 8, clause 3 was the only real Constitutional basis, although there were a few other Constitutional references on Indian tribes. The lack of Constitutional provisions for Indians in the Constitution verified that its framers had not really thought of or recognized Indians in relation to the shaping of the Country and establishment of the government. The power of the United States Government over Indians and Indian affairs is derived from three sources: the Constitution, federal guardianship, and federal ownership. It is here that the shaping of United States - Indian relationships get to be more understanding. The Federal Government owns the land in which Indians occupy and also act as protectors of those Indians. Indian country and Indian title are the controlling interest in the Indians, with regard to jurisdiction, therefore major problems that may arise with Indians, etc. are clearly in the hands of the Federal Government. Chapter 3 will examine some of the early legislation with respect to the commerce clause of the Constitution and its effect on United States - Indian relations.

The United States Government used Article I, Section 8, clause 3 as the force or justification behind their decision and interactions relating to Indian affairs. The government took advantage of this clause as its early legislation was specifically designed to limit state, county, and individual intrusion on Indian interests. The commerce clause itself did not specifically outline the United States power over Indians or define

its relationship to Indians. However, since there was virtually no mention of Indians in the Constitution, the commerce clause had to be expanded to fit the government's need.

FOOTNOTES
Chapter 2

1 American Criminal Law Review. "In Our Image . . ., After Our Likeness: The Drive for the Assimilation of Indian Court Systems", by Kirk Kickingbird, Spring, 76, Vol. 13, No. 1, p. 683

2 Articles of Confederation, Art. IX, Sec. 4

3 Kickingbird, p. 684

4 Martone, Frederick J. "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?", Notre Dame Lawyer, Ap. 76, Vol. 51, No. 4, p. 603

6 United States Constitution, Art. II, Sec. 2, cl. 2

7 Prince, Monroe E., Law and the American Indian. The Bobbs-Merrill Company, Inc., New York, 1973, p. 17

8 Federal Indian Law, United States Department of the Interior, United States Government Printing Office, Washington: 1958, p. 27

9 Martone, p. 603; United States Constitution, Tenth Amendment

10 The Federalist Papers, by Alexander Hamilton, James Madison, and John Jay, 1788, New American Library, 1961, No. 24, p. 161

11 The Federalist, No. 25, p. 163

12 The Federalist, No. 4, p. 44

13 The Federalist, No. 42, p. 268-269

14 Martone, p. 604

16 Federal Indian Law, p. 27

17 Ibid, p. 28

FOOTNOTES (Continued)

18 United States Constitution, Art. I, Sec. 8, cl. 3

19 United States Constitution, Art. II, Sec. 2, cl. 2

27 Prince, p. 19

34 Ibid, p. 21

36 118 United States at 380, Prince, p. 20

38 Prince, p. 22

CASES
Chapter 2

[5]Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

[15]United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876)

[20]United States v. Holliday, 70 U.S. 407, 417-418 (1866)

[21]Cherokee Nation v. Georgia, 30 U.S. 1, 9 (5 Pet.), 1, 12 (1831)
United States v. Nice, 241 U.S. 591, 597-98 (1916)

[22]United States v. Holliday, 70 U.S. 407, 417, 418 (1866)

[23]United States v. Holliday, 70 U.S. 407, 417-418 (1866)

[24]30 U.S. 1, 9 (5 Pet.) 1, 12 (1831): "(The Indians) are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."

[25]United States v. Kagama, 118 U.S. 375, 383 (1886)

[26]United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888)

[28]Tiger v. Western Investment Co., 211 U.S. 286 (1911)

[29]State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893)

[30]United States v. Kagama, 118 U.S. 375, 383 (1886)

[31]United States v. Pelican, 232 U.S. 442, 447 (1914)

[32]Hallowell v. United States, 221 U.S. 317, 324 (1911)

[33]United States v. Kagama, 118 U.S. 375, 383 (1886)

[37]Langford v. Monteith, 102 U.S. 145 (1880); Draper v. United States, 164 U.S. 240 (1896)

# CHAPTER 3

In Chapter 2, it was determined that federal policy was geared toward protection of the Indians and control of state and individual dealings with the Indians. This was established with the commerce clause in the United States Constitution. Since the extent of tribal self-government, the entity status of the tribe, and tribal immunity from state interference are not guaranteed anywhere in the United States Constitution. These matters have historically been under the legislative power of Congress under the commerce clause, Article I, Section 8(3). Accordingly, law and policy have been dictated by the times.

In examining the early legislation toward the Indians, the time period between 1790-1834 was known as the formative era. In less than a year after the Constitution was ratified, Congress enacted its first measure in governing relations between Indian tribes and citizens of the United States. It was the first of a series of non-intercourse acts to be adopted during the next 44 years. This first act was the Act of July 22, 1790[1]. This measure, which attempted to protect Indians, vested federal courts with jurisdiction over crimes committed by citizens against the property or person of peaceful or friendly Indians. The 1790 law was renewed by the Act of March 1, 1793[2]. President Washington remarked on this by stating, "A rigorous execution of justice on the violators of peace... is most likely to conciliate their (Indian's) attachment (to the United States)."[3] These acts were designed to keep Americans away from Indians. For example, the issuance of federal licenses was required to trade with tribes. These acts also prohibited the alienation of Indian land to Americans or to any of the states, without a federal treaty authorizing it. The third non-intercourse act was more elaborate than the first two. It set boundaries between Indian country and the rest of the United States territory. This act also established the death penalty for the

non-Indian's murder of an Indian on tribal land. After expiring on its own, this act was replaced by a fourth act[4], which expired on March 3, 1802. This act was not replaced until March 3, 1813[5]. Between 1802 and 1813, there was no federal legislation existing that regulated affairs with Indians.

The objective of these non-intercourse acts was to guarantee westward settlement and, at the same time, minimize conflicts between Indians and non-Indians.

"After 44 years of experience with sporadic non-intercourse acts, the first major piece of federal Indian legislation emerged, the Intercourse Act of 1834[6]. The frontier was advancing at an even faster rate, and the time had come to establish a more permanent mechanism by which non-Indian conflicts with Indians could be minimized. It provided licensing for trade with Indians[7], prohibited non-Indians from bartering with Indians for hunting and cooking items[8], prohibited non-Indians from hunting in Indian country[9], prohibited non-Indians from grazing their animals in Indian country[10], prohibited settlement on Indian land[11], prohibited the conveyance of Indian land except by federal treaty[12], prohibited speeches in or messages to Indian country designed to disturb the peace[13], and extended federal criminal jurisdiction to all crimes committed in Indian country, except as 'to crimes committed by one Indian against the person or properties of another Indian.'"[14]

## Conclusion

This chapter has examined the major historical pieces of legislation toward Indian affairs enacted by Congress under its power to regulate commerce. The major emphasis in this era, between 1790 and 1834, was to control non-Indian and state interaction with the Indians. This was accomplished through a series of non-intercourse regulations defining what non-Indians could and could not do concerning Indians and

under what conditions they could do things. The purpose of this early legislation was to promote western expansion and to curb the Indian hostilities. Chapter 4 will examine some of the early treaty approaches to jurisdiction of Indian country.

The power to make treaties was concurrent with the Commerce Clause. Article II, Section 2, gave the President and Congress the power to make treaties. This power extended from the commerce power to regulate trade with the Indians. The treaty making efforts of the United States never operated as smoothly as perhaps the Federal government had intended for it to. There were many treaties that were rushed and illegal, and there were disagreements between non-Indians over land rights, some treaties were overlapped, terms of the treaties were not honored, and time limits expired, all making many treaties obsolete, etc. In short, the treaty making process was never smoothly handled and some of the problems associated with treaties, such as territorial disputes and land rights, can still be felt today. The treaty years lasted from the early 1700's to 1868.

FOOTNOTES
Chapter 3

1 Act of July 22, 1790, Ch. 33, Sec. 5, 1 Stat. 137, 138

2 Act of March 1, 1793, Ch. 19, Sec. 4, 1 Stat. 329

3 Kickingbird, Kirk. "In Our Image...After Our Likeness: The Drive For The Assimilation of Indian Court Systems", American Criminal Law Review, Sp. 76, Vol. 13, No. 4, p. 684

4 Act of March 3, 1799, Ch. 46, 1 Stat. 743

5 Act of March 3, 1813, Ch. 61, 2 Stat. 829. This Act allowed the President to retaliate against the British for those injuries done to Americans by Indians aligned with the British in the War of 1812.

6 Act of June 30, 1834, Ch. 161, 4 Stat. 729 (codified in different sections of 25 U.S.C.)

7 Id. Sec. 2

8 Id. Sec. 7

9 Id. Sec. 8

10 Id. Sec. 9

11 Id. Sec. 11

12 Id. Sec. 12

13 Id. Sec. 13

14 Martone, Frederick J. "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?", Notre Dame Lawyer, Vol. 51, No. 4, Ap. 76, Id. Sec. 13, p. 609

# CHAPTER 4

Chapter 4 will examine, in brief, the historical process of treaties between the United States and Indians and its effect on United States - Indian policy. The original thirteen colonies entered into many treaties with Indian tribes[1]. As noted in Chapter 1, the initial United States - Indian relations and deals were made strictly by treaty. The colonial reservations were the precursors of the later federal reservations. By 1700, most of the Massachusetts Indians were placed on colonial reservations[2]. At the time, though, the colonists expected the assimilation of Indians into Massachusetts society, and so the reservation system was not meant to be permanent[3]. By the time that the United States started the federal reservation policy for the Indian tribes in 1786, the Massachusetts reservation system had already served its purpose and had virtually ended.

When the colonies dealt with Indian tribes before they separated from Great Britain, they also dealt with Indian tribes through treaties during the Revolutionary War. The first federal treaty with a tribe was in 1778, with the Delaware Indians[4]. This was designed to keep these Indians from aligning with the British during the war. The new United States guaranteed, to the Delaware Indians, any territory that they were entitled to by former treaties[5].

The only Constitutional provision dealing with Indian treaties was Article II, Section 2(2), which gives the President and the Senate the power to make treaties. This article required only Senate ratification, therefore the House of Representatives was never involved with Indian treaties. The Senate started off where the Continental Congress left off. Between the years 1778 and 1868, the last year in which the United States dealt with Indian tribes by treaty, the United States Senate ratified 370 Indian treaties[6].

The use of treaties in dealing with the Indians in the formative

era of American expansion was a natural phenomenon. It was preferred that westward expansion be accomplished by voluntary relinquishment of the territory, if possible, and if not, then by war. It was decided early that treaties entered into with Indian tribes required Senate ratification and had the same dignity and status as agreements with sovereign nations[7].

As the United States' power expanded, the use of treaties with Indians raised serious questions. These treaties suggested sovereignty in the tribe. What was thought to be necessary in the Seventeenth and Eighteenth Centuries became somewhat of an embarrassment by the Nineteenth Century. As early as 1817, Andrew Jackson had written to President Monroe, "I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then is it not absurd for the sovereign to negotiate by treaty with the subject?"[7] While the implication of tribal sovereignty arising from treaties may appear accurate, an examination of a typical treaty suggests the contrary. "In the treaty between the United States and the Cherokees in 1835[8], the Cherokees ceded all their land east of the Mississippi River to the United States for $5 million[9]. The United States ceded lands west of the Mississippi River to the Cherokee tribe and agreed that the lands so ceded would never be included within the territorial limits of a state or territory without its consent[10]. The United States also promised that the tribe could make its own laws and be governed by them, 'provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they (Cherokee laws) shall not be considered as extending to such citizens and army of

the United States as may travel or reside in the Indian country by permission of the United States.'"[11] In other words, the tribe here was subjected to the sovereignty of the United States. For instance, the tribe was granted self-government power, but subject to the Constitution and Congress. Its governmental power did not include non-Indians entering Indian country. The very terms of the treaty deny the tribe the sovereignty that they are supposed to have by virtue of that treaty.

What ever inference was raised regarding tribal sovereignty by use of the treaty, power of the United States was soon to be no longer needed. By the Act of March 3, 1871[12], the United States Congress proclaimed that: "(H)ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty ..."[13]

After this point, no treaty was made with an Indian tribe. There can be no clearer way to see the extinguishing of tribal sovereignty than this. Existing treaties with Indian tribes have a status no greater than that of a statute and therefore can be repealed by an act of Congress.

## Conclusion

In this chapter, it can be seen that treaties were the initial method of United States - Indian transactions. The United States, at this time, accepted the treaties as official and recognizance of Indian country as sovereign. This was soon to change as the United States outgrew its need for treaties with the Indians as a result of expansion, power, and sovereignty itself.

However, when the treaties were in force they were used for just about every sort of transaction with the Indians. Jurisdiction was one

of those areas in which treaties were used. Many of the treaties dealt with the difficult political problems created by criminal offenses of whites against Indians or Indians against whites.

Some of the earlier treaties adopted rules in treaties regarding both sides as equal. Indians committing offenses against Federal or State laws outside the Indian country were subjected to punishment by Federal or State courts. On the other side, whites committing offenses within Indian country against Indian laws were subjected to punishment by the Indian tribe.

Some treaties adopted an adjusted rule, similar to that found in treaties between the United States and various oriental countries[14], whereby the United States was granted jurisdiction over its citizens in Indian country, for appropriate punishment for any offense they might commit, and the Indian tribe delivered such offenders to agents of the United States Government[15]. There were a number of treaties which gave the federal government authority to punish those Indians who committed offenses against non-Indians even if they occurred within Indian country[16]. After the treaty making period ended, the federal government made the move of asserting jurisdiction over offenses committed by Indians against Indians with Indian country. Most treaties contained no express provisions on civil jurisdiction and so, in the absence of federal legislation, it was tribal law that governed the members of the tribe within the Indian country, to the exclusion of state law.

Chapter 5 will examine the friction that developed during territorial disputes between the United States and Indians in the treaty years. Then the legal status of Indian tribes in the United States and the important cases that set precedence in that respect will be studied.

The treaty years were turbulent years as Indian resistance was at its peak. Whether the treaties were legal or illegal, Indians did not

want to give up their homelands and move westward to unknown territory. The result of this was many battles between the Indians and non-Indians. The Indians were eventually cast aside.

The Indian Removal Act of 1830 was Congress' legal aim at justifying the brutality and forceful eviction of thousands upon thousands of Indians. It forced the Indian to move westward against his own will. The land was bought from the Indians via treaties for sums far less than what the land was really worth. The United States Government could not control its own people as non-Indians in many cases simply took what they wanted or killed and maimed Indians just for their pleasure.

The concept of sovereignty and the legality of relocation was tested in court in the 1830's with the Cherokee Nation challenging Georgia. The Cherokee Nation was affirmed to be sovereign in and of itself but it was still said to be a ward of the United States and subject to its jurisdiction.

FOOTNOTES
Chapter 4

1 See Indian Treaties 1736-1762 (Historical Socity of PA ed. 1938)

2 Kawashima, "Legal Origins of the Indian Reservation in Colonial Massachusetts",13 AM. J. Legal History 42 (1969)

3 Id. at 56

4 Treaty with the Delaware, Sept. 17, 1778, 7 Stat. 13

5 Id., Art. 6, at 14

6 House Comm. of Interior and Insular Affairs, 88th Cong., 2d Sess., Lists of Indian Treaties 1-6 (Comm. Print No. 33, 1964)

7 Higgins, "International Law Consideration of the American Indian Nations by the United States",3 Ariz. L. Rev. 74, 82, (1961), quoting from Basset, Correspondence of Andrew Jackson 279-281 (1955)

8 Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478 (1835)

9 Id., Art. 1 at 479

10 Id., Art. 5 at 481

11 Martone, Frederick J., "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License", Notre Dame Lawyer, Vol. 51, No. 4, April 76, p. 606

12 Y1 25 U.S.C., Sec. 71 (1970)

13 Martone, p. 607

14 E.G., Art. 21 of Treaty of July 3, 1844, with China, 8 Stat. 529, 596

15 E.G., Art. 6 of Treaty of August 24, 1818, Quapow Tribe, 7 Stat. 176, 177

FOOTNOTES (Continued)

[16] E.G., Art. 9 of Treaty of January 21, 1785, Wyandottes and Others, 7 Stat. 16, 17; Art. 6 of Treaty of November 28, 1785, Cherokee, 7 Stat. 18

# CHAPTER 5

On a superficial level, the early laws of the new struggling nation were sincere and were intended to maintain peaceful relations with those still powerful Indian nations. The treaty making process was meant to focus on this perspective of United States - Indian dealings. In reality, though, everything pointed to the fact that the Republic had every intention of obtaining as much land as quickly as possible from the Indians whether honestly or not. The stage for expansion had long been set: the treaties for land cessions, such as the Penn "walking treaty", the practice of genocide wherever and whenever the Indians were unwilling to part with their land, etc.

Indian resistance continued throughout not only to the new government, but also to individual pressures from non-Indians. Sometimes the struggles blossomed into Holy Wars. During the Pontiac rebellion, prior to the Revolutionary War, Lord Jeffrey Amherst, Commander of the British forces, introduced germ warfare when he ordered distribution of blankets infested with small pox to the Indian camps. This rebellion ended with another Indian defeat. This is just an example of some of the cruelties used to remove Indians from their land.

The United States started early to intimidate Indian tribes into signing treaties which yielded huge areas of land. When intimidation failed, there was always an epidemic or the spreading of alcohol that whether deliberate or otherwise were equally devastating to tribal power and sometimes wiped out entire tribes. Around the beginning of the Nineteenth Century, American "Indian policy" started to evolve.

"President Thomas Jefferson first proposed the removal of Indians from the eastern states to a region west of the Mississippi where they might continue to live, undisturbed by civilization. The program had a few drawbacks. First, the frontier was moving west faster than would prove safe for the removed Indians. Second, the Indians to

be sent west would lose land, resources, and improvements which the government had no right to deprive them of, by legislation. 'Removal' began to be debated in 1802 and later became a popular policy."[1]

In 1812, the Shawnee Tribe, similar to other midwestern tribes, were continually harassed and conned into ceding their land. The government appointed several Indians as chief of their tribes to represent the tribe in land cession treaties. In this same manner, the Sac and Fox tribes lost 50 million acres of land. The Delaware tribe lost three million acres, for which they were only offered $7,000. Many other tribes lost millions of acres in the same way. Sometimes the government did not even wait for treaties, but extinguished by legislation Indian title (see Chapter 1) to occupied lands. The Shawnee tribe, under Tecumseh, rebelled against an illegal treaty. They helped to organize other tribes for similar rebellion. They also urged the British to help them. The Indian war was lost, even though the British had captured the Nation's capitol, and Tecumseh was killed. The Creek Indian wars were similar to the Shawnee wars. It was during this conflict that Andrew Jackson introduced the scored earth method of warfare. In the treaty at Fort Jackson, at the end of the war, Jackson stripped the Creek nation of all remaining eastern land, therefore, preparing them for removal.

When Andrew Jackson was elected President, the Indian removal policy was on its way to becoming law. In Jackson's first annual message on December 8, 1829, he set forth his program to move the Indians west of the Mississippi River. Speaking to the members of the Senate and House of Representatives, Jackson delivered his message:

> "The condition and ulterior destiny of the Indian tribes within the limits of some of our States have become objects of much interest and importance. It has long been the policy of Government to introduce among them the arts of civilization, in the hope of gradually reclaiming them from a wandering life.

This policy has, however, been coupled with another wholly incompatible with its success. Professing a desire to civilize and settle them, we have at the same time lost no opportunity to purchase their lands and thrust them farther into the wilderness. By this means they have not only been kept in a wandering state, but been led to look upon us as unjust and indifferent to their fate. Thus, though lavish in its expenditures upon the subject, Government has constantly defeated its own policy, and the Indians in general, receding farther and farther to the West, have retained their savage habits. A portion, however, of the Southern tribes, having mingled much with the whites and made some progress in the arts of civilized life, have lately attempted to erect an independent government within the limits of Georgia and Alabama. These States claiming to be the only sovereigns within their territories, extended their laws over the Indians, which induced the latter to call upon the United States for protection.

Under these circumstances the question presented was whether the General Government had a right to sustain those people in their pretensions. The Constitution declares that 'no new State shall be formed or erected within the jurisdiction of any other State' without the consent of its legislature. If the General Government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent, much less could it allow a foreign and independent government to establish itself there. Georgia became a member of the Confederacy which eventuated in our Federal Union as a sovereign State, always asserting her claim to certain limits ... Alabama was admitted into the Union on the same footing with the original States, with boundaries which were prescribed by Congress. There is no constitutional, conventional, or legal provision which allows them less power over the Indians within their borders than is possessed by Maine or New York...

Actuated by this view of the subject, I informed the Indians inhabiting parts of Georgia and Alabama that their attempt to establish an independent government would not be countenanced by the Executive of the United States, and advised them to emigrate beyond the Mississippi or submit to the laws of those States...

A State cannot be dismembered by Congress or restricted in the exercise of her constitutional power. But the people of those States and of every State, actuated by feelings of justice and a regard for our national honor, submit to you the interesting question whether something cannot be done, consistently with the rights of the States to preserve this much-injured race.

As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any State or Territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier

and between the several tribes. There the benevolent may endeavor to teach them the arts of civilization and, by promoting union and harmony among them, to raise up an interesting commonwealth, destined to perpetuate the race and to attest the humanity and justice of this Government.

This emigration should be voluntary, for it would be as cruel and as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land. But they should be distinctly informed that if they remain within the limits of the States they must be subject to their laws. In return for their obedience as individuals they will without doubt be protected in the enjoyment of those possessions which they have improved by their industry...

The charter of the Bank of the United States expires in 1836, and its stockholders will most probably apply for a renewal of their privileges. In order to avoid the evils resulting from precipitancy in a measure involving such important principles and such deep pecuniary interests, I feel that I cannot, in justice to the parties interested, too soon present it to the deliberate consideration of the Legislature and the people. Both the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow citizens, and it must be admitted by all that it has failed in the great end of establishing a uniform and sound currency.

Under these circumstances, if such an institution is deemed essential to the fiscal operations of the Government, I submit to the wisdom of the Legislature whether a national one, founded upon the credit of the Government and its revenues, might not be devised which would avoid all constitutional difficulties and at the same time secure all the advantages to the Government and country that were expected to result from the present bank..."[2]

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The message proved to be important as it recognized some of the problems between the States and the Indians and the plan to move the Indians westward. It also set forth conditional recognition of sovereignty for those tribes that cooperated.

Congress supported Jackson's program and the Indian Removal Act[3] became law in 1830. It provided for the exchanging of lands west of the Mississippi to which the United States claimed title, for those lands which the tribes held east of the Mississippi. The Indian Removal Act had its creation in the unstable political situation that was created by land-hungry settlers. In finding that it could not control its own citizens, the young, unstable United States Government began to fear that an Indian war would result from white encroachment on Indian territory[4]. The United States' first

idea was to buy Indian land, however, when it became obvious that the Indians would not sell, Congress thought of the idea of Indians exchanging their home land for title to land in another part of the United States[5].

In the initial stages of the Indian removal, it was quite hectic. Cherokees, Choctaws, Chicassaws, Creeks, and Seminoles were rounded up and herded like animals over the "Trail of Tears" to Oklahoma. More than 100 people died every day due to starvation, exhaustion, and brutality at the hands of the United States army as well as the American citizens. Even before Indians were out of eyesight of their property, it was being auctioned off to whites. Of the 50,000 Indians from the many tribes that were forced to leave their homes, approximately half of them died. Yet in President Van Buren's report to Congress on the progress of Indian removal in December of 1838, he announced: "It affords me sincere pleasure to apprise the Congress of the entire removal of the Cherokee Nation of Indians to their new homes west of the Mississippi. The measures authorized by Congress at its last session have had the happiest effects. By an agreement concluded with them by the commanding general in that country, their removal has been principally under the conduct of their own chiefs, and they have immigrated without any apparent reluctance."[6]

When they arrived in Oklahoma, those leaders of the Cherokee and Creek nations who signed the illegal treaties agreeing to removal were executed. These executions were under the authority of the "Blood Laws" of the nations, which forbid any treaties exchanging or selling their lands. After several years of intra-tribal problems over the illegal treaties, the United States Government stepped in for the purpose of mediating and to at least reimburse the tribes for the harsh suffering that they had been through. However, the tribes had to pay for their own removal out of the small allowances held for them in the United States Treasury as payment for those lands stolen from them.

The only successful resistance of the removal was by the Seminole tribe. The Seminole war, waged by the United States Army, not only cost $50 million, but also resulted in the death of 1,500 men. Thousands of the Seminoles were finally removed. Truce flags were ignored and many leaders were murdered.

"Eventually, approximately 80 tribes were forced to resettle in Oklahoma territory. Boundaries established for one tribe were moved to squeeze in additional tribes. 'Civilization' caught up to the removal lands almost before the tribes were resettled, but not before they had lost over 300 million acres of land to the speculators of the new democracy. All the tribal governments were outlawed to prepare for Oklahoma statehood. Thus, the farce was completed."[7]

The policy of Indian removal was pretty heatedly debated in the national press, and also in the federal and state legislative bodies. As in the issue of slavery a few years earlier, the debates threatened to tear the Union apart. The state of Georgia led the proponents for removal. The Cherokee nation was quick to suffer the consequences of Georgia's position. "When gold was discovered on Cherokee lands in northern Georgia, the greedy reprobates who had immigrated to Georgia from the European prisons would recognize no law greater than their own. The state of Georgia outlawed the Cherokee nation's right to self-government and enforced their rulings by using vigilante groups. They killed and raped, and burned Indian farms and property, arresting and driving out sympathetic whites."[8] The Cherokee tribes, however, were unwilling to leave their traditional homes. The friction between the tribes and the whites over the control of territories increased. The conflict was soon brought before the Supreme Court in two famous cases, which not only addressed the legal status of Indian tribes in the United States, but also addressed the allocation of legal jurisdiction among the Indian, state, and federal courts.

The first case was Cherokee Nation v. Georgia[9]. In this case, the state of Georgia laid claim to those lands within the Cherokee national boundaries and went on to pass laws purporting to affect those lands. The Georgia law challenged not only those laws passed by the Cherokee National Council, but also the very existence of the Cherokee Nation. The Cherokee Nation brought suit in the United States Supreme Court invoking its original jurisdiction under the Commerce Clause in Article III of the United States Constitution because the controversy involved a dispute between a state and a foreign nation, the Cherokee Nation. Chief Justice Marshall avoided the issue of state or federal supremacy by declaring the Cherokee not to be a foreign nation:

> "Though the Indians are acknowledged to have an unquestionable and heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether the tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases...Meanwhile, they are in a state of pupilage. The relation to the United States resembles that of a ward to his guardian... At the time the Constitution was formed, the ideas of appealing to an American court of justice for an assertion of right of redress of wrong, had perhaps never entered the mind of an Indian or his tribe."[10]

The significance of the Cherokee Nation v. Georgia decision lies in Chief Justice Marshall's choice of words. Phrases such as "domestic dependent nation" and "a ward to his guardian" pretty much spearhead the United States Government's role of its relation to the Indian tribes. The concept of the United States as the guardian to its wards; the Indian tribe is the basis for the federal government's role in Indian affairs even to the present day.

Another important case, again of tribal sovereignty, went to the Supreme Court a year later. In this issue, a missionary, Samuel Worcester,

was arrested and persecuted by the state of Georgia for entering Cherokee land in violation of Georgia law, but in conformity with Cherokee law. "In Worcester v. Georgia[11], the court declared that the Indian nations '... had always been considered as distinct, independent political communities, retaining their original natural rights...'[12] Writing for the majority, Chief Justice Marshall did not refer to the Indians' dependent status which he had announced in the earlier Cherokee case. On the contrary, he affirmed the sovereignty of the Cherokee Nation when he said, 'The settled doctrine of the law of the nation is, that a weaker power does not surrender its independence - its right to self-government - by association with a stranger, and taking its protection.'[13] In this decision the court rejected the idea that state laws can have any effect on Indians within tribal boundaries: 'The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but the the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.'[14] The tribes had little trouble in maintaining internal order until whiteman influence began to break up tribal values and customs. Some Indian commissioners reported that the per capita annuity payments were lessing the power of the tribal governments to maintain law and order."[15]

"'Commissioners of Indian Affairs recognized the strength of Indian institutions: though it appeared to be the casual white observer that anarchy reigned in Indian encampments, those societies had evolved their own patterns of law and order. While they lacked law in the sense of formal written codes, of course, there were defined customary codes of behavior enforced by public opinion and religious sanction.'[16] The Commissioners, however, did not use traditional Indian institutions to solve Indian problems. On the contrary, they sought solutions for the

white culture. An example of this was in 1833 and 1838 when the Commissioner of Indian Affairs recommended that a general written code be established for use by the tribes. Instead of using the law to control its own citizens, the United States increased military personnel near Indian reservations to keep unscrupulous whites away from the Indians."[17]

When the Indians turned to the federal government for justice, more often than not, they ran into prejudicial attitudes. It was extraordinary for the murderer of an Indian to be convicted in New England. It was equally not unusual for horse thieves in Montana to be captured by federal troops with Indian stock in their possession and then be freed by a federal grand jury. The courts manifested their prejudice not only in unequal protection of Indians, but also through judicial decisions which sharply curtailed the jurisdiction of Indian courts. An example of this was in 1878, when Judge Parker decided a case involving the theft of a horse committed by a non-Indian within Cherokee territory. Parker held in Ex Parte Kenyon[18] that the tribal court did not hold jurisdiction over the non-Indian defendant. "Focusing both on the unrelated sale of the horse in Kansas and on the defendant's race, Parker said: If there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but at the time it was committed, by one over whose person such court did not have jurisdiction, because to give this court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian."[19]

There were some efforts promoting Indian self-government that were partially successful. In 1878, a bill to establish an Indian police force was introduced to Congress. This measure provided for the organization or reservations of police forces of trustworthy Indians, under the supervision of Indian agents. The program was greatly underfunded,

but it succeeded because it met the needs of the Indian society[20]. Many other tribes already had similar police forces for the administration of law and order.

Another example of effective Indian self-government occurred on the Yakima Reservation. Here, the reservation was divided into five judicial districts by the Indian agent there. From these districts, elections were held for judges among tribal members. The agent found that after a few years of experience, these Indian judges could try cases successfully. Some other attempts, however, to expand the powers of local Indian courts failed. "In 1878 the Society of Friends unsuccessfully presented Congress with a bill to establish a judicial system affecting all Indians except the Five Civilized Tribes. The Quaker proposal would have given jurisdiction over all criminal and civil cases arising on the reservation to courts on the reservation, presided over by the local federal Indian agent[21]. Further, the defendant would have a right to trial by a jury composed partly of Indians."[22]

The conflict over the extent of Indian court jurisdiction reached the Supreme Court in 1883. When Spotted Tail, a famous Sioux Indian, was killed by Crow Dog, equally famous; the matter was settled according to the Sioux code of justice. However, the whites were not satisfied with Indian justice here, and Crow Dog was prosecuted and convicted of murder in the United States Territorial Court for Dakota. This decision was appealed to the Supreme Court. The Supreme Court held in Ex Parte Crow Dog[23] that the murder of one Indian by another Indian on the reservation was outside of the criminal jurisdiction of a federal court. "The Supreme Court relied principally on the cultural differences between Indian and white society. After noting that action of the territorial court was unprecedented and legally insupportable, the court continued: Indians are members of a community separated by race, tradition, instincts

of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should accept them from its exactions, and makes no allowance for their inability to understand it..."[24] In the Ex Parte Crow Dog case, it was another decision that supported Indian sovereignty.

Congress was quick to react after the Ex Parte Crow Dog decision[25]. After they overruled the Supreme Court, Congress further infringed upon tribal court jurisdictions by passing a series of statutes. Federal courts generally upheld such legislation, while at the same time upholding the sovereignty of the Indian nations in other cases. Indians themselves drew further away from federal policies as more measures designed to civilize the Indians were passed without consulting those people who were affected by them.

Congress responded to the public pressure following Crow Dog, by passing the Act of March 3, 1885[26], which made seven major crimes by Indians on a reservation, including the murder of one Indian by another, subject to federal jurisdiction. In this act, the federal courts were given jurisdiction over cases that had been declared earlier by the Supreme Court to be within the exclusive jurisdiction of the Indian courts. The Major Crimes Act placed the following seven crimes under federal jurisdiction: manslaughter, murder, rape, arson, burglary, assualt with intent to kill, and larceny.

"Congress, under the Major Crimes Act scheme, preserves the idea that the tribe is the proper authority to regulate conduct (by defining crimes and then trying offenders) where fairly minor matters are involved. The tribal council and the tribal courts are almost reduced to municipal authority over petty offenses. The exercise of tribal sovereignty may take place without discomfort. The risk of defining and enforcing major crimes is too great to leave to chance enactment."[27]

The constitutionalists of the Major Crimes Act were challenged in United States v. Kagama[28]. "In Kagama, the Supreme Court held that the law was constitutional and made some revealing remarks which demonstrated both the frontier prejudices of that era and the patronizing attitude of the white man's government toward the Indians: 'Because of the local ill feeling; the people of the States where the Indians are found are often their deadliest enemies. From their very weakness and helpfulness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.'"[29]

The court, in noting that state jurisdiction had been excluded with regard to Indian inhabitants, went on to say: "The power of the General Government over these remnants of a race once powerful, now weak and diminishing in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."[30] This is the basis of "plenary power"[31] which gives the United States jurisdiction of any territory within the United

States, that is not within the limits of a state, and any offense committed within this territory whether by a white man or an Indian.

The Major Crimes Act, though representing Indian sovereignty to a degree also represented a significant step toward assimilation of the Indian society. "United States v. Whaley [32] illustrated the change in the jurisdictional scheme brought about by the Major Crimes Act. The Indian defendants in Whaley were charged with the killing of Juan Baptiste, also an Indian, on the Tule River Indian Reservation. The deceased was an Indian doctor, who in the course of his treatment of tribal members had been so unsuccessful as to induce the belief on the part of the tribe that he had been systemmatically poisoning his patients. Finally, one Indian, Hunter Jim, a favorite with the tribe, became seriously ill under the doctor's treatment. The members of the tribe held a council and informed the doctor that if Hunter Jim died, the doctor would also die. Jim did die; and a council was held and the four defendants were appointed to carry out the council's resolution. The next morning the doctor was shot. If this homocide had been committed prior to the passage of the Major Crimes Act, the federal court would have lacked jurisdiction. The tribal council, since it directed the acts of the defendants, would have granted an acquittal."[33] The Major Crimes Act was the first time that federal policy imposed American values on solely Indian matters on Indian land. This Act did not take into consideration the differences in the American and Indian system of justice. The American standards were implemented through the federal courts as the federal government restricted states from exerting their authority over crimes in Indian country [34].

## Conclusion

This chapter has examined the Constitution, the legislation of

Congress, Indian sovereignty, and the problem of Indian jurisdiction. The legal status of Indian tribes in the United States was focused on in this chapter. Andrew Jackson, in his State of the Union Address, outlined a plan to move the Indians westward to keep American expansion going. This move was also to allow Indians to live peacefully, and maintain their customs without outside influences or pressures. This plan of Jackson's was approved by Congress in the Indian Removal Act of 1830. This presented problems as the Indians resisted. This led to much bloodshed on both sides.

About the same time that the Indians were trying to maintain their sovereignty that was in part due to past treaties they had made with the United States. This led to two important cases, Cherokee Nation v. Georgia and Cherokee Nation v. Worcester, which upheld Indian sovereignty. This was eventually overturned by Congress, who further limited tribal jurisdiction over their own matters when the Major Crimes Act of 1885 was passed. This put seven major crimes committed in Indian land under federal jurisdiction. This was challenged, unsuccessfully, in the case of United States v. Kagama, 1885.

Chapter 6 will focus on and examine the allocation of criminal jurisdiction in Indian country between the federal, state, and tribal governments.

Criminal jurisdictional allocation in Indian country was actually formalized in the 1800's. Before that time, the Indians had their own criminal codes and states often took jurisdiction over a crime if the crime was committed within its boundaries. However, there certainly were no clear cut approaches to jurisdiction.

The problems of the early 1800's, relating to sovereignty and legal rights of the Indians (i.e., Worcester v. Georgia), brought about a greater awareness of Indian problems associated with self-government and

law and order. Though in the 1870's the Indian Affairs Commission recognized the strength of Indian codes of behavior, they did not appear strong enough to prevent problems related to criminal conduct on Indian land, including that of non-Indians. Therefore, solutions were sought from the white society. In the court case, Ex Parte Kenyon in 1878, it was ruled that Indian courts did not have the authority to try non-Indians.

Self-government by Indian courts fell through also because Indian judges were only allowed to exercise jurisdiction over offenses that the United States Government allowed. This caused a loss of confidence in Indian government by Indians and non-Indians and also meant that the Indian nation was not really self-governed. In the case Ex Parte Crow Dog, in 1883, the Supreme Court ruled that the federal government did not have jurisdiction over one Indian murdering another Indian on Indian land. However, Congress quickly overruled them.

The jurisdiction of Indian courts was steadily eroding at this time. Further infringements of their authority came with the Major Crimes Act of 1885. This gave the federal courts jurisdiction over all major crimes committed on Indian land. This act is actually what set the tempo for the current division of criminal jurisdiction between the federal, state, and tribal governments. State jurisdiction and tribal jurisdiction were determined by federal authority and the powers of commerce. Public Law 280, of 1953, was the principal bill that actually shifted the federal government's power to some of the states. The Indian Reorganization Act of 1934 was the basis for the tribal government's power today.

FOOTNOTES
Chapter 5

1 Meyer, William. Native Americans: The New Indian Resistance, International Publishers, New York, 1971, p. 21

2 Shaw, Ronald E. Andrew Jackson, "First Annual Message, December 8, 1829", Oceana Publications, Inc., New York, 1969, p. 26-28

3 Act of May 28, 1830, Ch. 148, 4 Stat. 411

4 Kickingbird, Kirk. "In Our Image...,After Our Likeness: The Drive For the Assimilation of Indian Court Systems", American Criminal Law Review, Vol. 13, No. 4, Sp. 76, p. 685

5 Ibid, p. 687

6 Meyer, p. 22

7 Ibid, p. 24

8 Meyer, p. 24

14 Kickingbird, p. 687

15 Report of the Commissioner of Indian Affairs: Annual Report 1853, 249-250

16 Hagan, W. Indian Police and Judges 11 (1966)

17 See Treaty with the Apache Tribe of July 1, 1852, Art. 8, 10 Stat. 979; Treaty with the Commanche, Kiowa, and Apache Tribes of July 27, 1853, Art. 3, 10 Stat. 1013 (1855)

20 Fritz, H. The Movement for Indian Assimilation, 20 (1963) at 140

21 Id. at 216-217

22 Id.

FOOTNOTES (Continued)

26

Act of March 3, 1885, Ch. 341, Sec. 9,23, Stat. 385, as amended, 18 U.S.C., Sec. 1153 (Supp. 1976)

27

Prince, Monroe E. Law and the American Indian, The Bobbs-Merrill Co., Inc., New York, 1973, p. 11

29

Kickingbird, p. 691

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United States Department of the Interior, Federal Indian Law, United States Government Printing Office, Washington, 1958, p. 33

31

The plenary power over tribal relations and tribal property of the Indians has been often exercised by Congress. Sec. U.S. 218 (1897); and Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)

33

Immigration, Alienage and Nationality. "Criminal Jurisdiction in Indian Country", University of California, Davis, Vol. 8, 1975, p. 443-44

9
30 U.S. (5 Pet.) 1 (1831)

10
30 U.S. (5 Pet.) (1831) at 17

11
31 U.S. (6 Pet.) 515 (1832)

12
Id. at 559

13
Id. at 560-61

14
Id. at 561

18
14 F. Cas. 353 (No. 7, 720) (C.C.W.D. Ark. 1878)

19
Id. at 355

23
109 U.S. 556 (1883)

24
Id. at 571

25
109 U.S. 556 (1883)

28
118 U.S. 375 (1886)

29
Id. at 384

30
118 U.S. 375 (1886)

32
37 F. 134 (C.C.S.J. Ca. 1888)

34
Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)

# PART II

## Introduction

This thesis is a historical perspective of the criminal jurisdiction problems between the federal, state, and Indian courts concerning Indian land. Part I focused on the foundation of Indian - United States Government relations. This covered such important areas as the definition of an Indian, the Constitutional basis of United States - Indian relations, early Indian legislation, and problems with Indian sovereignty and assimilation. The first part of this research was important as it gives the reader a basic understanding of the foundation of United States - Indian relations. This foundation set the stage for the various legal transactions, decisions, etc., that occurred concerning Indians. Most of the major occurrances that have happened in the United States - United States Government - Indian relations have been illustrated by cases. Many of these cases were precedent setting.

Part II will cover the criminal jurisdiction of Indian country. This will focus on the federal, state, and tribal jurisdiction over crime and criminal conduct in Indian country. This section will also look at all the important court decisions and legislation that has had an effect on criminal jurisdiction of Indian country. Civil jurisdiction will be briefly examined, too.

# CHAPTER 6

The earlier chapters have studied how the jurisdictional setup between the federal, state, and tribal courts was set up. This was via legislation by Congress, the concept of United States sovereignty and its position as guardian over its ward, the Indians; the Constitutional power of commerce over Indians, aggressive westward expansion of the United States, United States recognition of partial Indian sovereignty, and Supreme Court decisions.

Historically, the United States government has been interested not only in expansion and control of its territory, but also protection of the Indian and his culture. This has been through assimilation of the Indians in part, and preservance of Indian sovereignty over their own affairs. With there being a thin line between assimilation and sovereignty, one area of major concern has been criminal jurisdiction in Indian country. It has been examined, in earlier chapters, how problems have arisen in trying to determine who has and should have criminal jurisdiction in Indian country. This is due to the concept of Indian sovereignty and long established criminal codes or rules of conduct in some tribes v. the United States' position of jurisdiction over criminal conduct within its boundaries, yet outside of state boundaries, and the United States Government's position of guardian and protector over the Indians and Indian country. In the treaty years, there were some statutes toward criminal jurisdictional allocation in Indian country; also there has been some earlier legislation by Congress with regard to criminal jurisdiction in Indian country.

Overall, the United States government has controlled the jurisdictional allocation by Congress and Art. 1, Sec. 8, clause 3, of the United States Constitution and the Commerce Clause. The government's position has been to have jurisdiction over major criminal conduct in Indian country (the Major Crimes Act[1]) and allow Indian control over minor offenses. At the

same time, the state has also wanted some jurisdiction over Indian affairs within its boundaries. This has been ruled against in some cases by the Supreme Court (Worcester v. Georgia[2]).

Despite the federal government's position toward jurisdiction in Indian country, there has been some problem and confusion with regard to the allocation of criminal jurisdiction in Indian country. This chapter will examine how criminal jurisdiction is determined and allocated in Indian country.

In determining who has criminal jurisdiction in Indian country, it is allocated to the federal government, the states, and to the Indian courts. This allocation is based on (1) the offense involved, (2) the races of the victim and the criminal offender, and (3) the location of where the offense occurred. The question of who has Indian country jurisdiction between state and federal courts is rather simple. What would need to be determined is the offense involved. If it is a state offense, the state court has jurisdiction. If it is a federal offense, then jurisdiction belongs in the federal court. In these instances, it is irrelevant whether the offender is Indian or non-Indian. The real complication in jurisdictional issues occurs when tribal court jurisdiction of offenses on Indian reservations is considered.

## Federal Jurisdiction

The federal government department that handles the affairs between the United States and the Indians is the Bureau of Indian Affairs. The Bureau of Indian Affairs administers and coordinates the federal programs for the reservations. The Bureau moved from the Department of War to the Department of Interior in 1849. All transactions between the United States wards, the Indian and non-Indians are regulated through the Interior Department and the Bureau of Indian Affairs. These include territorial disputes, land transactions, public health services, schools, etc.

In examining federal jurisdiction, a federal court has jurisdiction over all federal offenses. There are three exceptions to this. "The exceptions codified at 18 U.S.C. 1152[3], provide that federal jurisdiction does not extend (1) to the offenses committed by one Indian against the person and property of another Indian, (2) to any Indian committing any offense in Indian country who has been punished under tribal law, and (3) to any case whereby stipulations of a treaty the exclusive jurisdiction over such offenses rest in the tribal court."[4] In connection with the exercise of federal criminal jurisdiction, Section 1152, of the Criminal Code, extends the general laws of the United States to Indian country, other than for those exceptions specified amongst the general laws in Section 1152 in the Assimilative Crime Statute[5]. In a recent Supreme Court decision, William v. United States[6], the Assimilative Crime Statute has been held to be applicable to Indian country. "The effect of that statute is to incorporate the criminal laws of the several states into the laws of the United States so the violations will be prosecuted as federal offenses."[7] Despite these exceptions, 18 U.S.C. 1152, a separate statute, "the Major Crimes Act provides that a federal court has exclusive jurisdiction over thirteen named offenses even if the offenses are committed by an Indian in Indian country. These offenses are murder, manslaughter, rape, carnal knowledge as defined in the statute, assault with intent to rape, incest, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. An important exception to the Major Crimes Act is that a federal court does not have exclusive jurisdiction over the thirteen enumerated crimes if a state has validly assumed jurisdiction over crimes on an Indian reservation."[8]

"Federal courts, other than the Supreme Court, are courts of limited jurisdiction[9]. Article III of the Constitution vests the judicial power of the United States 'in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish'. The lower federal courts constitute the 'inferior courts' thus authorized and they exercise only that criminal or civil jurisdiction which Congress has vested in them specifically by statutory law. Even that jurisdiction which has been vested in them can be withdrawn or limited at a later time by Congress."[10]

In its exercise of plenary power, Congress has largely excluded, until recent years, state jurisdiction. Because federal courts are of limited jurisdiction, in many instances a gap has appeared in jurisdiction[11]. This gap has been filled by tribal jurisdiction. This situation will prevail until other legislation is initiated by Congress that will place Indians in the same status as other United States citizens; that is, under the jurisdiction of the states in which they reside[12].

"Jurisdictional problems may be statutorily adjusted, of course, by a state, and the United States where a state relinquishes jurisdiction over an Indian reservation within its borders, and the United States extends its jurisdiction generally to cover certain crimes within the limits of all Indian reservations, the intent of the state and the United States must be viewed in the light of the history, setting, and purpose of those jurisdictional acts."[13]

Congress gave its consent to all the states to assume criminal and civil jurisdiction over Indian country within their boundaries[14]. Jurisdiction was also granted to specific states, sometimes excluding certain Indian reservations[15]. This jurisdiction grant does not give a state power to affect the federal trust status of personal property of Indians[16].

"Since there is no federal common law of crimes, and because lower federal courts are courts of limited jurisdiction, a basis for the exercise of jurisdiction must be found in almost every instance in some applicable Federal Statute. Under certain circumstances, a de facto jurisdiction theretofore assumed and exercised by a state may be accorded great weight where Congress has not prescribed exclusive federal jurisdiction[17]. From the real standpoint of areas of application, the federal criminal statutes relating to Indian affairs generally are of two types: (a) those that apply regardless of the place of the offense[18], and (b) offenses punishable by the United States only when committed within 'Indian country'[19]. Most of the federal statutes are of the latter type and are generally subject to further classification on the basis of subject matter or identity of person."[20]

## State Jurisdiction

In examining state jurisdiction over Indians and Indian country, it has been pretty limited in itself because of the Constitutional powers of the federal government. This can be seen in such cases as Worcester v. Georgia[21] and United States v. Kagama[22].

"When justice is effectively administered under state laws or by state law enforcement agencies, no Court of Indian Offenses presently will be established on an Indian reservation[23]. Jurisdictional conflicts may be statutorily adjusted, of course, by a state and the United States when they arise. When a state relinquishes acquired jurisdiction on a reservation within that state, and the United States has, by law, extended its jurisdiction generally to certain crimes committed within the limits of 'any Indian reservation', the intent to assume jurisdiction must be viewed in the light of the history, setting and purpose of the general legislation."[24]

Federal statutes which grant or recognize state power over Indian affairs fall under two categories: (1) those that apply only to particular areas or tribes, and (2) those that apply throughout the United States. State laws and power have been extended by Congress to Indian reservations for (1) probate matters involving allotments and (2) laws enacted by Congress for covering health and educational conditions, and sanitation and quarantine regulations. A third area of state laws extended to Indian country is by the Assimilative Crime Act which makes a large number of offenses punishable in federal courts in accordance with state laws[25].

State courts have criminal jurisdiction over all state offenses committed outside Indian land, regardless of the race of the offender. In addition, if the state has assumed jurisdiction pursuant to Public Law 280[26], a state court has jurisdiction over all state offenses even if they are committed on Indian land. Public Law 280 was enacted by Congress in 1953. This was declared by the House Concurrent Resolution 108:

> "To be the policy of the federal government to, as rapidly as possible, make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same priviledges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship. The Act, as amended, gives Alaska, California, Minnesota (with one exception), Nebraska, Oregon (with one exception), and Wisconsin civil and criminal jurisdiction over Indian country. Section 7, of the Act, gives the consent of the federal government to any other state which would assume civil or criminal jurisdiction either by legislation or amendment of the state constitution, if required."[27]

Public Law 280 dealt with three groups of states in different ways, depending on the legal needs of the states. "Public Law 280 ceded criminal and civil jurisdiction directly to one group of states[28]. It empowered a second group of states to take jurisdiction over reservations by enactment

of appropriate state legislation[29]. A third group of states could amend their state constitutions to assume such jurisdiction[30]. Despite its constitutionality[31], Indian leaders severely criticized the Act for its destructive impact on tribal sovereignty[32]. Even in matters solely involving Indians within Indian territory, state law superseded the tribe's authority."[33]

Public Law 280 was pretty vague, at best, and was tough to determine exactly what Congress meant by civil and criminal jurisdiction. It was assumed that the termination of federal jurisdiction meant now that the states held complete jurisdiction over Indians in Indian country. States under Section 7 of the Act were given the power to assume jurisdiction, felt that too many problems which had been handled before by the federal government would be transferred to the state. Therefore, many states refused to assume jurisdiction without adequate federal assistance to finance new and necessary programs, and also the requirement of tribal consent to state jurisdiction. As a result of pressure from tribes and Indian organizations, Public Law 280 was amended in the 1968 Civil Rights Act to add a tribal consent requirement to any new assumption or extension of state jurisdiction over Indians or Indian tribes. This Act also authorized states to be able to retrocede jurisdiction to the federal government, only at the government's option. (Public Law 280 is one of the most severe pieces of federal government legislation in terms of impeding on tribal sovereignty).

Much litigation has arisen from state attempts to extend jurisdiction over Indian country since Public Law 280 was enacted. Some of the general challenges regarding Public Law 280 include the fact that Public Law 280 has been challenged as unconstitutional on due process and equal protection grounds, because it does not apply uniformity to all Indians in the United States, and because it classifies persons on a tribal basis.

Public Law 280 has also been challenged as an unconstitutional delegation of federal power to the states. However, these and other challenges have repeatedly been rejected by both federal and state courts. As far as the effect of Public Law 280 on tribal jurisdiction, it is a basic tenant of Indian law that Indian tribes maintain their internal sovereignty and jurisdiction except as it is expressly overridden by Congress.

## Tribal Jurisdiction

A tribal court has jurisdiction over all of the offenses committed on the reservation which violate tribal law[34]. "Tribes may set up tribal courts according to their own practices and customs unless the federal government has withdrawn such authority from the tribes[35]. Most tribal codes limit jurisdiction to cases involving Indian offenders. If the state in which the reservation is located has assumed jurisdiction, the tribal court may have concurrent jurisdiction to the extent that tribal as well as state law has been violated[36].

The current form of tribal government stems from the 1934 Indian Reorganization Act[37]. Even though this Act was not the first major piece of Indian legislation to emerge from the New Deal[38]; it had the most significant impact on tribal authority and self-government. The Act was drafted by Felix S. Cohen, a Department of the Interior employee, who went on to publish the book, "Federal Indian Law". The Act was permissive in nature, and could be rejected by any tribe[39]. The major features of the Act were, "the termination of allotment[40], and the provision of federal legislative authority for tribal self-government[41]. Trusts created under the General Allotment Act were extended indefinitely[42], all unallotted lands were restored to tribal ownership[43], and the Secretary of the Interior was authorized to acquire land for tribes[44] and create new reservations[45]. The goal of the Act was to allow tribes to elect

existance as separate people as an alternative to the mandatory assimilation of the General Allotment Act. The Act permitted those tribes who elected existence to adopt a constitution and bylaws for their self-government[46], with certain enumerated powers in addition to any which might have existed under prior law."[47] These powers included negotiation with the federal, state, and local governments, employment of legal counsel, and prevention of the sale or lease of tribal lands, or other tribal assets without tribal consent. In looking at the Indian Reorganization Act; more important than just the end of allotment was the Act's provisions for tribal self-government. However, with this clearly being a legislative grant of power, it really only gave Indians limited powers of sovereignty subject to that legislation.

In viewing the tribal court jurisdiction with regard to the Indian Reorganization Act, they actually only have jurisdiction over those offenses which could be characterized as misdeameanors under state or federal law. The Indian Civil Rights Act of 1968[48], puts a limit on the punishment which a tribal court may impose to a maximum imprisonment of six months or a fine of $500.00, or both.

Tribal court authority has been continually challenged in court. Federal courts, in some cases, have attempted to protect Indian sovereignty, only to be overruled by Congress. "In Iron Crow v. Oglaula Tribe[49], the authority of tribal courts to impose criminal convictions for offenses against the tribal code was challenged on the grounds that there was no Constitutional or statutory authority for the jurisdiction of the Indian courts. The Eighth Circuit upheld the tribal court judgement, noting that the Constitution clearly recognizes the soveriegnty of the Indian nations. Furthermore, the court said, 'sovereignty is absolute excepting only as to such rights as are taken away by the

paramount government, the United States.'[50] The court went on to conclude that Congress had demonstrated a clear intention not to take away the jurisdictional rights challenged."[51]

The Tenth Circuit Court in Native American Church v. Navajo Tribal Council[52], upheld the force of Indian substantive laws. The court found that the First Admendment, right to freedom of religion, applied only to the federal government, and the states only by the Fourteenth Amendment and did not apply to Indian tribes. This was eventually overturned by Congress when it passed the 1968 Indian Civil Rights Act, which made most of the Bill of Rights, also finding on tribal courts and governments.

In terms of tribal court authority on non-Indians, the Supreme Court has found that tribal courts do not have that authority. This was exemplified in Oliphant v. Suquamish Tribe[53] where the court held that tribal courts have no inherent authority to try and punish non-Indians.

In examining the tribal codes of law and order, it is not possible to mention them in the same respect as the United States Constitution or criminal codes, because there are many tribes and each one has its own regulations and customs. Many of them still have their criminal codes for serious crimes, such as murder, even though they are no longer applicable[54]. Basically, the only law and order codes that are applicable in tribal courts are those for misdeameanor violations. This is in addition to the codes of civil conduct in which the tribal courts do assume jurisdiction.

An example of a tribal code would be that of the Navajo tribe. In all civil cases, the Court of the Navajo Tribe applies any United States laws that are applicable. For matters that are not covered by traditional codes or United States laws shall be decided by the Court of the Navajo Tribe according to the laws of the state in which they occur. "(1) The

Navajo Tribal Code, designated Volumes I and II is, at the present time, the only law that is and will be followed by the Courts of the Navajo Tribe in all cases litigated falling within their jurisdiction. (2) Though the Courts of the Navajo Tribe were granted specific authority by Resolution C-09-58 to adopt rules, pleading, practice, or procedures by the Navajo courts that add to, that differ from, or that are in conflict with the Navajo Tribal Code. The Code is still the Supreme Law of Navajoland."[55]

This is an example of a tribal code that though is an official code, is in reality a code of conduct under United States law. This is exemplified by using United States laws that are applicable here in civil tribal court cases. The tribal court has been more and more limited in actual authority to impose jurisdiction on any conduct within reservation boundaries. Even such things as civil matters and minor crimes are under tribal authority strictly because the United States chose for it to be that way.

## Conclusion

This chapter has examined the allocation of criminal jurisdiction in Indian country between the federal, state, and Indian courts. While the federal government was found to have limited power, they still appear to dictate the jurisdictional allocation here strictly by the Constitutional powers granted them. The Major Crimes Act gives the federal government jurisdiction over all major crimes committed on Indian land. The states have jurisdiction over state offenses. Public Law 280 gave specified states complete jurisdiction over Indian country within their territory and also gave other states the option of doing the same. Indian court jurisdiction is sometimes concurrent with state jurisdiction. In most cases, however, their jurisdiction has been limited to minor offenses.

Chapter 7 will outline the actual allocation of criminal jurisdiction of Indian country between the federal, state, and Indian courts.

FOOTNOTES
Chapter 6

1 Act of March 3, 1885, Ch. 341, Sec. 9, 23, Stat. 385, as amended 18 U.S.C., Sec. 1153 (Supp. 1976)

3 18 U.S.C., Sec. 1152 (1970)

4 Immigration, Alienage and Nationality. "Criminal Jurisdiction in Indian Country", University of California, Davis Law Review, Vol. 8, 1975, p. 436

5 18 U.S.C., 13

7 Federal Indian Law, p. 308

8 Criminal Jurisdiction in Indian Country, p. 436, 18 U.S.C., 1153, 1970

9 Harris, The Judicial Power of the United States (1940), p. 1

10 Fourteenth Amendment, Federal Indian Law, United States Department of Interior, United States Government Printing Office, Washington: 1958, p. 307

12 Fourteenth Amendment

13 Federal Indian Law, p. 306

14 See Section 7 of the Act of August 15, 1953, 67 Stat. 588, 28 U.S.C. 1360

15 U.S.C. 1360, 54 Stat 249, 18 U.S.C. 1162

16 Op. Sol. M. 36362, August 13, 1954

18 Ex., 18 U.S.C. 1158 and 1163

19 Ex., 18 U.S.C. 1151, 1152, and 1153

20 Federal Indian Law, p. 311

FOOTNOTES (Continued)

23 25 C.F.R., 161.1 (c)

24 Federal Indian Law, p. 502

26 18 U.S.C., Sec. 1162 (1970); 28 U.S.C., Sec. 1360 (1970)

27 State Government, "The States and Indian Jurisdiction", by Leo Houston. Published by the Council of State Governments, Winter, 1977, p.20

28 U.S.C., Sec. 1360 (1970)

29 Act of August 15, 1953, Ch. 505, Sec. 6, 67 Stat. 589

30 Act of August 15, 1953, Ch. 505, Sec. 7, 67 Stat. 589

31 Public Law 280, 18 U.S.C., Sec. 1162 (1970); 28 U.S.C., Sec. 1360 (1970)

32 Wendell Chino; President of the National Congress of American Indians, "President Johnson Presents Message to Congress", Indian Records 28 (March, 1968)

33 Criminal Jurisdiction in Indian Country, p. 437

34 Felix Cohen. Federal Indian Law, 1 at 46

35 Dowling, Criminal Jurisdiction Over Indians and Post-Conviction Remedies, 22 Mont. L. Review. 165, 171 (1961)

36 Justice and the American Indian, "Examination of the Basis of Tribal Law and Order Authority",Vol. IV, 9 (1974)

37 Act of June 18, 1934, Ch. 576, 48 Stat. 984

38 The Indian Reorganization Act was preceded by the Johnson - O'Malley Act, 25 U.S.C., Sec. 452-54 (1970)

39 Act of June 18, 1934, Ch. 576, Sec. 18, 48 Stat. 984

40 Id., Section 1

FOOTNOTES (Continued)

41 Id., Section 16, Section 12

42 Id., Section 2

43 Id., Section 3

44 Id., Section 5

45 Id., Section 7

46 Id., Section 16, Section 17

47 Frederick J. Martone. "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?", Notre Dame Lawyer, April 1976, Vol. 51, No. 4, p. 613

51 Kirk Kickingbird, "In Our Image..., After Our Likeness: The Drive For the Assimilation of Indian Court Systems", American Criminal Law Review, Sp. 76, Vol. 13, No. 4, p. 695

55 Monroe E. Price, Law and the American Indian, Bobbs-Merrill Company, Incorporated, New York, 1973, p. 134

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2
31 U.S. (6 Pet.) 515 (1832)

6
327 U.S. 711 (1946)

7
U.S. v. Sosseur, 181 F.2d 873, 874-875 (1950)

11
Phillips v. Payne, 92 U.S. 130; and Ex Parte Ray, 54, F. Supp. 218 (1943)

17
Ex Parte Ray, 54 F. Supp. 218 (1943)

21
6 Pet. 515 (1832)

22
118 U.S. 375 (1886)

25
Williams v. United States, 711 (1946)

47
25 C.F.R., Section 11.2CA-11.21 (1974)

48
25 U.S.C. Section 1302 (7) (1970)

49
231 F.2d 89 (8th Cir. 1956)

50
Id. at 94

51
Id. at 96

52
272 F.2d 131 (10th Cir. 1959)

53
535 U.S. 191 (1978)

54
Major Crimes Act, 1885, Ch. 341, Sec. 9, 23, Stat. 385, as amended 18 U.S.C., Section 1153 (Supp. 1976)

# CHAPTER 7

This chapter will focus on the specific criminal conduct in Indian country and who has jurisdiction.

## Crimes in Indian Country

"As previously indicated, Congress defined 'Indian country' in 1948[1]. Before then, since the great bulk of the legislation penalized various acts committed on Indian reservations or within the Indian country, a question might arise in any given case whether an offense charged was in fact within the scope of the applicable legislation. The following general conclusions serve as guidelines to the historical development of the definition of 'Indian country': (1) Tribal land is considered 'Indian country' for purposes of Federal criminal jurisdiction[2]. (2) An allotment held under patent in fees and subject to restraint against alienation is likewise considered 'Indian country' for purposes of Federal criminal jurisdiction[3]. (3) An allotment held under trust patent, with title in the government, is likewise considered 'Indian country' during the trust period[4]. (4) Rights-of-way across an Indian reservation are considered 'Indian country' for some purposes of Federal criminal jurisdiction[5]. (5) It is questionable whether land held by an Indian under a fee patent without restriction is 'Indian country' for purposes of Federal criminal jurisdiction; the weight of authority is that the land is not 'Indian country' within the meaning of Federal penal statutes[6], unless it is within the exterior boundaries of a reservation."[7]

There was a problem in determining jurisdiction, whether state or federal. Indians who were allotted were supposed to be under state jurisdiction as allotment terminated the tribal status and therefore, federal jurisdiction. However, state law enforcement officers had trouble distinguishing patent in fee Indians from ward Indians. "In Williams v. United States[8], it was held that the issuance by the United States of a fee simple patent to land or which an unemancipated Indian ward murdered

another such Indian, did not remove that land from the reservation on the jurisdiction of the federal government. However, Circuit Judge Healy noted that, 'so far as presently concerns the Klamath and certain other reservations, it appears that Congress has since conferred upon state courts jurisdiction over crimes committed thereone.'"[9] In certain offenses, the nature of the offense along with the character of locus in quo determine federal jurisdiction without regard to the question of whether the offender or the victim is an Indian[10]. In other offenses, among other things, jurisdiction depends upon the persons involved.

Crimes in Indian Country by Indian Against Indian

Those offenses committed by an Indian against another Indian in Indian country are normally within tribal court jurisdiction[11]. "In determining whether an offense by an Indian against an Indian falls within the jurisdiction of tribal courts, we look to federal laws and treaties largely for the limitations on tribal authority. The most important of such limitations stems from the Act of March 3, 1885[12]. This act brought under federal jurisdiction certain offenses committed by Indians against Indians, notably murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years robbery, incest, and assault with a dangerous weapon were added to this list."[13] Some other federal statutes, relating to non-Indian or Indians are applicable to offenses by Indians against Indians committed on an Indian reservation.

The federal courts have exclusive jurisdiction over murder or manslaughter on Indian reservations and the tribal courts may not act to punish a member of the tribe who has killed another member.[14]

The policy of the federal government in regard to tribal jurisdiction over offenses between Indians is embodied in a series of statutes starting with the Act of March 3, 1817[15].

Crimes in Indian Country by Non-Indians Against Indians

In general, offenses committed by non-Indians against Indians are punishable in federal courts where the offense is specified in the federal code of territorial offenses.

Federal jurisdiction over non-Indian offenders against Indians was initially put on a statutory basis by the first Trade and Intercourse Act, the Act of July 22, 1790[16] (Chapter 3). Subsequent statutes reenacted this provision with the general rule of the Act being confirmed by the Act of March 3, 1817[17]. "The Trade and Intercourse Act of June 30, 1834[18], reenacted the rule developed in the earlier statutes. This rule was subsequently incorporated in the revised statutes as section 2145, now 18 U.S.C. 1152 and 1153. The exceptions contained in section 1152 relating to offenses by Indians against Indians and to offenders punished by tribal law have no application to offenses committed by non-Indians against Indians. The third exception in section 1152, dealing with the case of a treaty where the exclusive jurisdiction over such offenses is secured to the Indian tribes might have current application, but no such treaty provisions appear to be now in force."[19] Except for the general statutes, Congress every now and then has enacted various laws to punish particular offenses committed by non-Indians against Indians within the Indian country[20].

Crimes in Indian Country by Indian Against Non-Indian

"An Indian committing offenses in the Indian country against a non-Indian is subject to the Act of March 3, 1885, section 9[21], which with an amendment, became section 328 of the United States Criminal Code of 1910 and now is section 1153 of Title 18 of the United States Code[22], providing for the prosecution in the federal courts of Indians committing within Indian reservations any of ten specifically mentioned offenses whether against Indians or against non-Indians."[23] Apart from those ten

crimes, an Indian committing offenses in Indian country against a non-Indian is subject to the Federal Code of Territorial Offenses[24]. There are two exceptions to this: "(a) Where he 'has been punished by the local law of the tribe', and (b) 'whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.'"[25] The Act of March 3, 1817[26], was the first federal enactment dealing generally with crimes by Indians against non-Indians in Indian country. "This provision was subsequently incorporated in section 25 of the Trade and Intercourse Act of 1834[27], and became part of section 3 of the Act of March 27, 1854[28], from which section 2145 of the Revised Statutes and 18 U.S.C. 1152 and 1153 were derived."[29]

Crimes in Areas Within Exclusive Federal Jurisdiction

"Section 1152, title 18[30], extends to Indian reservations, with exceptions already noted, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia. While the federal criminal law may seem meager and inadequate when compared to some state codes, it is supplemental by the Assimilative Crimes Statute[31], which makes acts, not made penal by any other laws of Congress, committed upon land within the exclusive jurisdiction of the United States subject to federal prosecution wherever made criminal by state law. Thus, state criminal provisions can be enforced in the absence of applicable federal law. If the act committed on an Indian reservation is a crime under federal law, it must be prosecuted, of course, under that law - not under state law."[32]

Crimes in Which Locus is Irrelevant

There are certain federal offenses with regard to Indian affairs, such as making prohibited contracts with Indian tribes[33], purchasing I.D.

cattle without permission[34], and stealing or embezzling from Indian tribal organizations[35], that are under federal jurisdiction regardless of the place of the offense.

Crimes in Indian Country by Non-Indian Against Non-Indian

In general, offenses committed by a non-Indian against a non-Indian in Indian country are punishable by the state[36] for criminal jurisdiction, in situations where Indians are not involved, an Indian reservation is normally considered to be a part of the state within which it is located[37].

Conclusion

This chapter has examined the actual jurisdiction allocation of the federal, state, and tribal courts concerning Indian land. The result is that it is a complex and inconsistent setup with regard to jurisdiction of Indian country. This jurisdiction is divided amongst the federal, state, and tribal courts on the basis of three variables: races of the offender and victim, the nature of the offense, and the title or status of the land in which the offense occured.

Chapter 8 will examine, in brief, the allocation of civil jurisdiction and some of the related factors connected with it.

As a general practice, the United States Government does not concern itself with civil disputes concerning Indians against Indians within Indian territory. However, there is a civil jurisdiction allocation that contains two suits against or by the Government concerning Indians. In terms of time, the civil jurisdiction allocation got started in the early 1800's and is concurrent with criminal jurisdictional allocation.

FOOTNOTES
Chapter 7

1 18 U.S.C. 1151

5 18 U.S.C. 1151 et Seq.

7 Federal Indian Law. United States Department of Interior, United States Government Printing Office, Washington: 1958, p. 310

9 215 F 2d. 1, p. 3, citing 67, Stat. 588 (1954), Federal Indian Law, p. 318

11 18 U.S.C. 1152

12 23 Stat. 362, 385, now 18 U.S.C. 1151 and 1153

13 Act of March 4, 1909, Sec. 328, 35 Stat. 1088, 1151; Act of June 28, 1932, 47 Stat. 336, 337, Federal Indian Law, p. 320

15 3 Stat. 383, now covered by 18 U.S.C. 1152

16 Secs. 5 and 6, 1 Stat. 137, 138

17 Stat. 383

19 Federal Indian Law, p. 324

20 See 18 U.S.C. Ch. 53,Secs. 437-439

21 23 Stat. 362, 385, 18 U.S.C. 1153

23 Federal Indian Law, p. 321

24 18 U.S.C. 1151, 1152

25 Federal Indian Laws, p. 322

26 3 Stat. 383

FOOTNOTES (Continued)

27 Act of June 30, 1834, 4 Stat. 729, 733

28 10 Stat. 269, 270

29 Federal Indian Law, p. 324

30 June 30, 1834, Sec. 25, 4 Stat. 733, as amended by the Act of March 27, 1854, Sec. 3, 10, Stat. 269, 270, R.S. Sec. 2145

31 R.S. Sec. 5391; Act of July 7, 1898, Sec. 2, 30 Stat. 717, Act of March 4, 1909, Sec. 289, 35 Stat. 1089, 1145, now 18 U.S.C. 13

32 Federal Indian Law, p. 325

33 Act of March 3, 1871, Sec. 3, 16, Stat. 544, 570; R.S. Sec. 2105, 18 U.S.C. 438

34 Act of March 3, 1865, Sec. 8, 13, Stat. 541, 563

35 Act of August 1, 1956, 70 Stat. 792, 18 U.S.C. 1163

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2
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3
United States v. Ramsey, 271 U.S. 467 (1926); Toosigah v. United States, 137 F.2d, 713 (1943)

4
United States v. Sutton, 215 U.S. 291 (1909); Hallowell v. United States, 221 U.S. 317 (1911); United States v. Pelican, 232 U.S. 442 (1914); Ex Parte Pero, 99 F.2d 28 (1938); Ex Parte Van Moore, 221 Fed. 95A (1915); and Toorsgah v. United States, supra.

6
CF. Eugene Sol Lovie v. United States, 274 Fed. 47 (1921); 60 I.D. 368, 369; Williams v. United States, 215 F.2d 1 (1954); State v. Monroe 556, 274 Pac. 840 (1929), U.S.C. 1151; Irvine v. District Court, 239 P. 2d, 272, (1951)

8
215 F.2d 1 (1954)

10
United States v. Sutton, 215 U.S. 291, 295 (1909). Accod: Perrin v. United States, 232 U.S. 478 (1914)

14
United States v. Whaley, 37 Fed. 145 (1888)

22
Gon-Shay-Ee, Petitioner, 130 U.S. 343 (1889)

23
Appapas v. United States, 233 U.S. 587 (1914)

36
United States v. McBratney, 104 U.S. 621 (1881). New York ex ref. Ray v. Martin, 326 U.S. 496 (1946)

37
Draper v. United States, 164 U.S. 240 (1896)

# CHAPTER 8

## Civil Jurisdiction

Jurisdiction as applied to the courts is the power of a court to hear matters of a justifiable nature arising within the limits to which the judicial power of those courts extends.

## Federal Courts

The judicial power of the United States is in the Supreme Court as well as lower courts. The power comes from the United States Constitution, Article I, Clause 8, Section 3. "In considering the jurisdiction of the federal courts, it may be observed that under the Constitution[1] and laws[2] of the United States the federal courts exercise jurisdiction in two different classes of cases - cases where the jurisdiction depends upon the character of the parties, and cases where the jurisdiction depends upon the subject matter of the suit."[3] For jurisdiction dependent upon the parties, this includes the United States as the plaintiff, the United States as the defendant, the United States as intervener; Indian tribe as party litigant, and the individual Indian as party litigant.

### A. Jurisdiction Dependent on Parties

1. The United States as plaintiff - "It may be stated as a general proposition that under Section 1331 et. seq. of Title 28 of the United States Code, the District Courts of the United States have jurisdiction of all suits of a civil nature, at common law or in equity, in which the United States is the plaintiff."[4]

2. The United States as defendant - The general rule here is that the United States cannot be sued in any court, whether federal or state, without its consent[5]. This consent has been granted with regard to a tort claim which accrued on or after January 1, 1945[6], and this is also available to the individual Indian[7].

3. United States as intervener - The question arises as to whether the United States can become a party to a pending suit by intervention, in view of the established doctrine that the United States cannot be sued without its consent. "It appears that where an intervention places the government in the position of plaintiff, as in New York v. New Jersey[8], and Oklahoma v. Texas[9], the government may properly become an intervener. It is clear, however, that if by such intervention the government would become virtually a defendant in the suit, its appearance as an intervener would come in dire conflict with the ruling that the United States cannot be sued. The consent of the United States cannot be given by any officer of the United States unless authority to do so has been conferred upon by him by some act of Congress."[10]

4. Indian tribe as party litigant - Though the Indian tribes in the United States territory have some degree of sovereignty, they have been declared by the Supreme Court not to be states of the Union, or "foreign nations" within the meaning of Article III, Section 2, of the United States Constitution. This gives original jurisdiction to the Supreme Court in any controversy in which a state or one of its citizens is a party thereof, and a foreign state and its citizens thereof are parties[11]. As a result, an Indian tribe, as such, cannot be sued, or sue, or intervene in any case in which the original jurisdiction of the Supreme Court is invoked[12].

5. Individual Indian as party litigant - "As a general rule, an Indian, irrespective of his citizenship or tribal relations, may sue in any state court of competent jurisdiction to redress any wrong committed against his person or property outside the limits of the reservation[13]. But the mere fact that the plaintiff is an Indian does not vest jurisdiction in the federal courts[14]. This being true, the only grounds upon which a federal court could take jurisdiction of a suit by an Indian would be either because of diversity of citizenship between the plaintiff and defendant or

because the cause of action arose under the Constitution, treaties, or laws of the United States."[15]

B. Jurisdiction Dependent Upon Character of Subject Matter

"As to the character of the subject matter as an element of federal jurisdiction, it is to be observed that the cases are considerably in conflict in determining whether an action arises under the Constitution, treaties, or laws of the United States. It is quite clear, however, that the federal question must appear by specific allegations in the bill of complaint, and not from facts developed either in the answer or in the course of the trial[16]. A number of general statutes contain jurisdictional provisions conferring jurisdiction over defined subjects of Indian concern upon the Federal courts[17]. Other statutes contain provisions conferring jurisdiction over various matters upon territorial courts or courts of the United States in the territories."[18] In addition to these, there are several special statutes containing jurisdictional provisions, relating to specific subjects[19].

Other courts concerning civil jurisdiction with regard to Indians are the Court of Claims, the Indian Claims Commission, the Federal Administrative Tribunals, the State Courts, and the Tribal Courts.

Court of Claims

While the United States cannot be sued without its consent, it can be sued with its consent. This consent may be conditional: "Conditioned on the requirement that all sums expended gratuitously by the United States for the benefit of the tribe or band shall be offset against the amount found due[20]. The burden is on the United States, however, to show that the expenditures were gratuities[21], and on the court to specify which gratuities are offset against the judgement[22]. So far as the Court of Claims is concerned, its jurisdiction rests upon these general proportions,

and therefore the extent of that jurisdiction is to be measured by the provisions of the jurisdictional act of Congress by which it is conferred in particular instances where such jurisdiction is invoked."[23] In other words, the Court of Claims does not have any general jurisdiction over claims against the United States[24].

## Indian Claims Commission

"In creating a temporary three-member Indian Claims Commission, Congress provided in connection with Indian claims arising prior to August 13, 1946[25], a forum for suits against the United States by any 'identifiable group'[26] of Indian claimants residing in the United States or Alaska covering (1) claims in law or equity, (2) tort claims, (3) claims based on fraud, duress, unconscionable consideration[27], mutual or unilateral mistake[28], (4) claims based upon fair and honorable dealings[29] not recognized by existing rules of law and equity[30], and (5) claims based on the taking of lands without payment of the agreed compensation."[31] The Indian Claims Commission was authorized to establish an investigation division. This division would search for all evidence affecting each claim[32].

## Federal Administrative Tribunals

The judicial power of the federal government is vested in the Supreme Court by the United States Constitution. Despite this fact, there are some matters which relate to the execution of Congressional power by other provisions of the Constitution which are susceptible of judicial determination. For these types of matters, Congress may use its own option as to whether or not to bring the matters within the cognizance of Federal courts[33]. Congress may refer these matters to special tribunals if it will be helpful or essential in carrying into execution powers delegated to it by the Constitution. When a matter is exclusively before a tribunal due to an act of Congress, the federal courts have no jurisdiction to reexamine it

for errors[34]. The judgement of a special tribunal given the power to pass upon judicial questions cannot be attacked for mistake or fraud unless it is proved it is such as to prevent a full hearing[35].

## State Courts

"In matters not affecting either the federal government or the tribal relations, an Indian has the same status to sue and be sued in state courts as any citizen[36]. In matters affecting either the federal government or the tribal relations, Congress has the power, of course, to vest jurisdiction in state courts, if it so desires. Limited civil jurisdiction already has been granted to some states[37], and section 7 of the Act of August 15, 1953[38], constituted a standing offer of federal consent to states to assume jurisdiction."[39] The state courts have no jurisdiction in those civil matters affecting tribal relations or restricted property of the Indians unless provided otherwise by Congress, as long as the United States retains governmental control over them. Other areas in which the State could assume jurisdiction under certain conditions,such as federally approved, are questions of jurisdiction concerning determining heirs and partitions of allotted land controversies.

## Tribal Courts

The Federal Constitution gave Congress the power to regulate commerce with Indian tribes[40]. This also served as recognition that sovereignty existed in the Indian tribes since Congress has not withdrawn it, a quasi-sovereignty still remains in the tribal courts. The authority of those courts find their statutory support in Title 25, U.S. Code, Section 2, as well as other Congressional appropriations made for Indian courts[41]. An Indian tribe has the power to confer upon the jurisdiction of its own court for controversies involving Indians and decision rendered by tribal courts in cases properly within their jurisdiction are recognized[42].

There is always the question as to how far the power to confer upon tribal court jurisdiction has been exercised. This matter has been left primarily to the tribes themselves. "One of the few federal statutes which appears to recognize tribal jurisdiction over civil cases is Section 229 of Title 25 of the United States Code[43]. This statute provides that where injuries to property are committed by an Indian, application for redress shall be made by the appropriate federal authorities 'to the nation or tribe to which such Indian shall belong, for satisfaction'. It has been noted by the Solicitor for the Interior Department[44] that this provision assumes that the Indian tribe has the means of compelling return of stolen property or other forms of satisfaction where its members have violated the rights of non-Indians."[45]

Aside from this general statute, there was a special provision made by federal law with respect to the tribal courts in the Indian Territory. "The jurisdiction of these courts, both in civil and in criminal matters, over Indians belonging to the same tribe, was specifically recognized by the Act of May 2, 1890[46], which provided for a temporary government for the Territory of Oklahoma and enlarged the jurisdiction of the United States court in the Indian Territory. Under sections 30 and 31 of this act, the exclusive jurisdiction preserved to the judicial tribunals of the Indian nations in all civil and criminal cases was limited to those cases in which 'members of said Nations' were the sole parties, which creates an ambiguity as to the meaning of the words 'only parties' or 'sole parties'".[47]

## Conclusion

This chapter examined the civil jurisdiction allocation of Indian country. For the federal courts, the jurisdiction is dependent upon the parties, and upon the character of the subject matter. For federal

jurisdiction, dependent upon parties, the jurisdiction depends upon the United States as plaintiff, defendant, intervener, and Indian tribes as party litigant, or an individual Indian as party litigant. Other areas of civil jurisdiction vary depending upon whether it is written the Court of Claims, the Indian Claims Commission, the Federal Administrative Tribunals, the State Courts, and the Tribal Courts. This chapter has examined the civil jurisdiction allocation of Indian country and the important cases on legislation that pertain to it.

Chapter 9 will focus on American Indian sovereignty in both the eyes of the Indians and the federal government.

American Indian sovereignty and the problems surrounding it has gone on since the English settlers first arrived on North American soil. Indian sovereignty claim is really the basis for the gap between Indians and the United States. Though by right, or perhaps because they were here first, Indians may have a claim to being sovereign. However, to begin with, they are not recognized internationally as sovereign. When the non-Indians took control of this territory, mostly through force, they actually became the sovereign of this land.

Indians have fought for their own sovereignty within the United States limits throughout American history. This effort has been through continual resistance dating back to the treaty years of the 1700's and 1800's. The sovereignty of Indians as an independent unit has been partially recognized and at the same time denied through such measures as the Indian Removal Act of 1830 and the Indian Reorganization Act of 1934. Sovereignty has been fought for and tested in many court cases. The two most famous cases are Worcester v. Georgia, 1832, and Cherokee Nation v. Georgia, 1831. These cases affirmed the sovereignty of the Indian nations as a whole, but within the sovereign authority of the United States within this territory.

In retrospect, the United States is the actual sovereign within United States territory, as they accept their relationship to the Indians as that of a guardian to its ward. However, the Indians have some degree of sovereignty within their own culture and outside that of the United States culture and are recognized as such. There will be a continual struggle and resistance by the Indians until they realize such rights as hunting and fishing, etc. uninterrupted.

FOOTNOTES
Chapter 8

1 Art. III, Sec. 2, The Constitution of the United States

2 28 U.S.C.A. 1331 et. seq.

3 Federal Indian Law. United States Department of the Interior, United States Government Printing Office, Washington: 1958, p. 327

4 Ibid, p. 336

6 28 U.S.C. 1346 (b), 2401 (b) and 2671 et seq.

10 Federal Indian Law, p. 340

15 Ibid, p. 343

17 Act of June 30, 1834, 4 Stat. 729, 733, 734; Act of March 30, 1802, 2 Stat. 139, 145

18 Idaho Territory: Act of July 3, 1882, 22 Stat. 148; Federal Indian Law, p. 342

19 Act of June 9, 1892, 27 Stat. 768

20 Sec. 25 U.S.C. 475

23 Federal Indian Law, p. 344

31 Ibid, p. 356

32 25 U.S.C. 70

37 28 U.S.C. 1360, 25 U.S.C. 233

38 67 Stat. 589, 28 U.S.C. 1360 note

39 Federal Indian Law, p. 363

FOOTNOTES (Continued)

40 Constitution, Art. I, Sec. 8, cl. 3

43 R.S. Sec. 2156, derived from Act of June 30, 1834, sec. 17, 4 Stat. 729, 731

44 55 I.D. 14, 63 (1934)

45 Federal Indian Law, p. 368

46 26 Stat. 81

47 Federal Indian Law, p. 371

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4
United States v. Board of County Commissioners of Grady County, Oklahoma, 54 F.2d 593 (1931)

5
Kansas v. Colorado, 206 U.S. 46, 83 (1907); Kawanakoa v. Polyblank, Trustee, s.c. 205 U.S. 349

7
Hatahley et al. v. United States, 351 U.S. 173, 181 (1956)

8
256 U.S. 296 (1921)

9
258 U.S. 574 (1922)

10
Stanley v. Schualby, 162 U.S. 255 (1896)

11
Cherokee Nation v. Georgia, 5 Pet. 1 (1831)

12
Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926)

13
Wiley v. Keorkirk, 6 Kan. 94, 110 (1870), Brown v. Anderson, 610 Okla. 136, 160 Pac. 724

14
United States v. Seneca Nation of New York Indians, 274 Feb. 946, 950 (1921)

15
Deere v. St. Lawrence River Power Company, 32 F.2d 550 (1929)

16
Shulthis v. McDougel, 225 U.S. 561 (1922)

21
Seminole Nation v. United States, 102 Ct. Cl. 565 (1944)

22
Seminole Nation v. United States, 316 U.S., 286, 308 (1942)

23
DeGroot v. United States, 5 Wall. 419 (1866); Ex Parte Russell, 13 Wall. 664 (1871); McElrath v. United States, 102 U.S. 426 (1880)

24
Thurston v. United States, 232 U.S. 469, 476 (1914); Citing Johnson v. United States, 160 U.S. 546, 549 (1896)

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25
Choctaw Nation v. United States, 118 F. Suppl. 365 (1954)

26
Thompson v. United States, 122 Ct. Cl. 348 (1952); 60 I.D. 152

27
Otoe and Missouri Tribe of Indians v. United States, 131 F. Supp. 265 (1955)

28
Osage Nation v. United States, 97 F. Supp. 381 (1951)

29
Otoe and Missouria Tribe of Indians v. United States, op. cit. supra

30
25 U.S.C. 70a, 70b, Otoe and Missouria Tribe of Indians v. United States, op. cit. supra

33
Murray's Lessee v. Hoboken Land and Improvement Company, 18 How. 272 (1855)

34
Hallowell v. Commons, 239 U.S. 506, 508 (1916)

35
United States v. Wunderlih et. al., 342 U.S. 98 (1951)

36
Felix v. Patrick, 145 U.S. 317, 332 (1892)

41
Iron Crow et. al. v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 92 ff. (1956)

42
Standley v. Roberts, 59 F. 836 (1894); Raymend v. Raymond, 83 F. 721 (1897)

47
Alberty v. United States, 162 U.S. 499 (1896)

# PART III

## Introduction

Part II has studied the allocation of criminal jurisdiction in Indian Country. It examined the individual roles that the federal, state, and tribal courts played in criminal jurisdiction in Indian country. It also examined important legislation and cases that were instrumental in determining jurisdictional allocation. Civil jurisdiction was looked at, too. This jurisdiction varies and is dependent upon the parties involved, the subject matter, and the court.

Part III will examine Indian sovereignty and various related areas such as civil rights, Indian resistance, self-determination, etc. Part III will also look at the problems in the jurisdictional setup, what some of the criticisms of this setup are, and what solutions can be offered. A personal opinion of the entire subject matter will be the focus of the last chapter in this section, as I will examine my view of the jurisdictional setup and what I see as alternatives to the present system.

# CHAPTER 9

American Indian sovereignty has been examined throughout the first eight chapters in terms of defining it, assessing it legitimately viewing its relation to the United States and the United States government, viewing its recognition in terms of the United States Constitution, Supreme Court and lower court cases, etc.

This chapter will focus on actual American Indian sovereignty in terms of tribal self-government, rights, and United States recognition. First of all, the chapter will examine the concept of Indian sovereignty in terms of international law and recognition.

## International Law

Initially, European citizens traveled to North America, discovered it, established settlements on it, made claims to it for their sovereign nations, and engaged in war with the native inhabitants. In 400 years, the conquest of North America was complete. Without a doubt, the American colonists represented the sovereignty of their mother country, Great Britain. Equally true is the fact that the various Indian tribes were sovereign states[1]. Certainly before the Europeans arrived, the tribes exercised total self-government over the lands that they occupied without outside influence. What effect, in this case, did the European "discovery" and conquest have on the status of Indian tribes within the doctrine of international law?

"A state can acquire sovereignty over territory in various ways, two of which are conquest and cession[2]. A state acquires sovereignty over the territory of another state by conquest under two sets of circumstances: (a) where the territory annexed has been conqured or subjugated by annexing state, (b) where the territory annexed is in a position of virtual subordination to the annexing state at the time the latter's intention of annexation is declared...Conquest of a territory as under (a) is not sufficient to constitute acquisition of title; there must be, in addition,

a formally declared intention to annex[3].

On the other hand, a state acquires sovereignty over the territory of another state by cession, when the ceding state transfers its territory to the acquiring state: Cession rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a state. The cession of a territory may be voluntary, or it may be made under compulsion as a result of a war conducted successfully by the state to which the territory is to be ceded. As a matter of fact, a cession of territory following defeat in war is more usual than annexation."[4]

When you apply these general international rules to the historical reality of Britain, and later American claims to the United States, it becomes clear that the effect of cession and conquest leaves the Indian tribes with no internationally recognizable claim to sovereignty over any part of the territory now a part of the United States. The truth is that the Indian tribes were conquered,subjugated, and more or less put into a position of virtual subordination. The United States had declared an intent to annex the lands it claimed. Those lands not taken in combat were involuntarily or voluntarily ceded to the United States by treaty and agreement.

"At least one international tribunal is in accord. In the case of Cayuga Indian claims (Great Britain v. United States)[5], Great Britain attempted to sue the United States on behalf of the Cayuga Indian Nation. The tribunal held that the claim could not be maintained on behalf of the Cayuga Nation, but only 'on behalf of the Cayuga Indians in Canada', because the Cayuga Nation, 'an Indian tribe (many of whose members were in the state of New York, not in Canada)...is not a legal unit of international law.'"[6]

It has been determined that Indian tribes are not recognized as sovereign internationally. We have also realized through the earlier chapters that the United States is actually the real sovereign power of this territory and only respects Indian sovereignty to a very small degree. Nonetheless, let us examine Indian sovereignty here in the United States more closely.

## Civil Rights

In terms of civil rights under tribal government, Indian tribes do have some degree of sovereignty. However, it is sovereignty that is given to them by the federal government.

Santa Clara Pueblo v. Martinez[7], decided in 1978, was the first Supreme Court review of the Indian Civil Rights Act of 1968[8]. "The Indian Civil Rights Act reflected a majoritarian view[9] that all Indian tribal governments must be required to respect the rights and liberties of persons coming under their authority[10]. While Indian tribes are not bound by the United States Constitution[11], they are bound by acts of Congress, which have been held to have plenary authority over them[12]. Consequently, the Indian Civil Rights Act, which makes the Constitutional guarantees of liberty and property binding on Indian tribes, has the effect of creating new rights against tribal governments. Strictly speaking, it is inaccurate to call them Constitutional rights, since they derive from statute. The statute repeats the language of the Constitution, however, and covers most of the rights and liberties found there[13], with some notable exceptions. These exceptions were intended to avoid infringing upon the rights of tribes to preserve their identity and cultural autonomy."[14]

In viewing the tribal court system, sharp contrasts are apparent. The existence of most tribal courts comes from the tribe's legislative bodies[15]. Tribal constitutions generally assign the central role in

tribal government to the tribal council rather than providing for co-equal branches. Tribal courts are, overall, the creation of ordinances enacted by the tribal council[16]. As a result, there exists a different relationship between the judiciary and legislature in Indian and American governments. The roles of tribal courts in tribal government have been pretty limited, historically. In addition, not many of the tribal judges have had any formal training in law. This has a great impact on the respect of tribal members and other agencies of tribal government for the tribal courts[17].

How one can better understand how the American systems and influence can also impinge on Indian sovereignty. Though the Indian government and court system may not be on the same level as the United States system in terms of sophistication, and education, it is apparent that the Indians themselves feel the United States's presence in determining their own acceptance of Indian government.

## Bureau of Indian Affairs

In observing Indian resistance today, one area in which the Indians have had problems is with the Bureau of Indian Affairs. While their role, historically, is supposed to be one of protecting the Indians, it is actually the source of the greatest exploitation of the Indians. The Indians have little to say regarding their own services or property. All transactions between Indians and non-Indians are regulated through the Bureau of Indian Affairs. The problems of the Indians go on and on. Infant mortality is twice that of the rest of America; there is a 50% high school dropout rate, life expectancy on an Indian reservation is only 43 years, etc. These are hardly statistics which one could be satisfied with. Since the Bureau of Indian Affairs runs all of the Indian affairs, it seems apparent that something is not going right.

## Land and Water Rights

In the original treaties with the various Indian nations, the United States Government guaranteed these nations the utilization and possession of both water and land. Under the terms of the treaties, the federal government was legally obligated to protect Indian possessions from violations by state and local authorities, and private citizens. Nevertheless, the government has not provided this protection. Not only that, but the federal government itself has violated the treaty rights. Presently, there are many tribes waging legal battles for control over their rightful lands and waters. The following case is a sample of such a legal battle.

"The Seminole - in Florida, as in California, the United States Claims Commission has recognized Indian title to 80% of the state. The Seminole tribe, though it made treaties with the United States, resisted the 'removal' policy and was not defeated in its wars. Thus, it never legally signed away its land rights. The Court of Claims estimated the lands to be worth $50 million, but Congress decided to pay only $12 million. All claims are based on land prices at the time they were stolen. The Seminoles have refused the payment, demanding their land. Their tribal leaders have compared the $12 million with the figure of $350 million given by the United States to anti-Castro Cubans."[18]

## Hunting and Fishing Rights

Hunting and fishing rights were also guaranteed in the original treaties with the Indian nations. Nonetheless, Indians have been constantly prevented from exercising these rights. Hunting and fishing is not merely a form of recreation for Indians; it is their livelihood, as most of the reservations are extremely impoverished.

Indians have waged many legal battles in response to the curtailment of their rights. There have been many demonstrations, some of them resulting in violence.

The poor quality of both fish and other meat products sold on the reservations make it almost a necessity for Indians to be able to hunt and fish. The following cases are isolated examples of legal struggles for hunting and fishing rights for Indians.

"In a dispute over licensing, the Solicitor General ruled for the Bureau of Indian Affairs, in 1936, 'though hunting rights of the Minnesota Chippewa were not written into the treaties, they are still to be upheld by virtue of the larger rights possessed by them on land occupied and used'. The customary rights of a tribe remain inviolable unless specifically rescinded in treaties. Thus, the Red Lake tribe of Chippewas was not required to purchase the licenses and migratory bird stamps in order to hunt ducks, geese, etc."[19]

In another case, the federal government ruled in 1969 that the Indians throughout an eight state region of the Southwest and the Rockies could not gather pinyon nuts unless they pay a tax. This harvest has been of economic importance to Indians for centuries, providing not only a major food source but a commercial base as well.

## Self-Determination

The Indians resistance has picked up in recent years. Self-determination and sovereignty is very important to them now. This is important to them because they are culturally different, religiously different, etc. Also, the great infringements on Indian sovereignty make them more determined than ever. The problems that the Indians have encountered with assimilation have been the complete failure of education programs for their people, cultural genocide, continual rejection of Indian projects geared toward self-determination, violation of their

rights, etc. Until there is clear recognition of Indian sovereignty, rights and self-determination, there will always be Indian resistance.

## The Sovereign Immunity of the Tribe

A key to being truly a sovereign entity is a nation's power to make itself exempt from a suit. Indian tribes do not have this power in and of itself. Congress may authorize suits against tribes. In United States v. United States Fidelity Company[20], the Supreme Court said: "These Indians are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefits, as their tribal properties did."[21] Indian tribes do have conditional immunity from suits.

## Conclusion

This chapter has taken a broad observation at some of the key areas associated with American Indian sovereignty. While the Indians are not recognized as sovereign internationally, they do possess some degree of sovereignty here in the United States. This has been recognized in some court cases, some legislation, etc.

Overall, the Indians clearly are not really recognized as a sovereign entity within the United States. There have been great infringements on Indian sovereignty throughout American history, whether it was violence, federal and state infringements on Indian sovereignty, violation of Indian's hunting and fishing rights, etc. With this, there has been continual Indian resistance to assimilation and violation of their rights.

"Largely through his own effort, the tribal Indian is no longer the forgotten American[22]. His efforts have raised the question whether his sui generis role in the federal system can or should survive. It has been said that 'to the extent the tribal Indian asserts an inherent right or tribal self-government, he has not truly manifested his consent to be

governed wholly under the internal government set forth in the Constitution'[23]. Many tribal Indians would heartily agree with this appraisal[24]. The Constitution was not designed with tribes in mind. Congress has been caught between changing tides of opinion running from full separation to total assimilation, but neither is immediately achievable. The reality is that the tribe cannot be separate, if only because historical forces and the Indian's already achieved partial integration are irreversable[25]. The effort must be to find some imaginative accomodation of tribal interests in cultural identity consistent with the federal system and the near certain assimilation of the tribe in the future."[26]

This chapter is not meant to be confusing with the theme of the paper. It is simply meant to give the reader a basic understanding of American Indian sovereignty in terms of United States recognition and Indian self-determination.

Chapter 10 will review the problems in jurisdictional allocation and some of the solutions that can be offered.

FOOTNOTES
Chapter 9

1 e.g. Restatement of Foreign Relations Law of the United States, Sec. 4 (1965)

2 W. Friedman, O. Lissitzen & R. Pugh, Cases and Materials of International Law 180 (7th ed. 1972)

3 J. Starke, An Introduction to International Law 180 (7th ed. 1972)

4 Id., at 181; Frederick Martone, "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License", Notre Dame Lawyer, Vol. 51, No. 4, Ap. 76, p. 603

6 Ibid, p. 604

8 25 U.S.C. Sections 1301-1341 (1976)

9 Bishin, "Judicial Review in Democratic Theory", 50 S. California Law Law Review, 1099, 1102 (1977)

10 Burnett, "An Historical Analysis of the 1968 Indian Civil Rights Act",9 Horv. J. Legis. 557, 579 (1972)

13 25 U.S.C. Sec. 1302 (1976); Alvin J. Ziontz, "After Martinez: Civil Rights Under Tribal Government", UCD Law Review, Vol. 12, No. 1, March 1979, p. 2

15 See Report of the NAICJA Long Range Planning Project, 37-40 (1978)

17 See American Indian Lawyer Training Program, Indian Self-Determination and the Role of Tribal Courts, 68 (1977)

18 William Meyer, Native Americans: The New Indian Resistance, International Publishers, New York, 1971, p. 65

19 Ibid, p. 68

22 The Indian: The Forgotten American, 81 Harv. L. Review, 1818 (1968)

FOOTNOTES (Continued)

23 Sovereignty, Citizenship and the Indian, 15 Ariz. Law Review, 973, 1001-1002 (1973)

24 Henderson & Barsh, Oyate Kin Hoye Keyuga U Pe, Har. Law School Bulletin, April 1974 at 10, June 1974 at 10, Fall 1974 at 17

25 See note, Supra note 294, at 1840

26 Martone, p. 634

CASES
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5
20 A.M.J. International L. 574 (1926)

6
Id. at 577

7
436 U.S. 49 (1978)

11
Talton v. Mayes, 163 U.S. 376 (1896); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959)

12
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Lone Wolf v. Hitchcock, 187 U.S. 294 (1902); Talton v. Mayes, 163 U.S. 376 (1896); U.S. v. Kagama, 118 U.S. 375 (1886)

16
Halona v. MacDonald reported in five Indian; L. Rep. Section m at 119 (1978)

20
309 U.S. 506 (1940)

21
Id. at 512

# CHAPTER 10

Two things have been determined throughout this paper in terms of criminal jurisdiction on Indian land. One is that criminal jurisdiction is determined by a complex and inconsistent body of law which more often than not makes it incomprehensible to the people who live under it. The other is that the existing jurisdictional scheme has been responsible for erosion of tribal sovereignty, and has continued to impede the Indian effort toward self-determination.

The magnitude of this subject prevents identification of all the existing problems; and equally prevents the proposal of all possible solutions.

(1) One disadvantage of the three-fold jurisdictional system of federal, state, and tribal governments - courts over criminal jurisdiction of Indian country is the confusion and sometimes duplication of law enforcement efforts. The majority of problems in this area are those of definition. Application of the rules governing jurisdiction may prove to be difficult in cases where the race of the victim or the offender is not known, difficult in those cases when the status of the place of the crime as Indian land is unclear[1], and difficult in multi-racial offenses.

There are basic jurisdictional problems in determining what is Indian country and who is an Indian. To be able to deal more effectively with these problems, Congress should eliminate some of the many definitions of an Indian to allow tribal courts a greater degree of territorial jurisdiction[2]. With respect to the fact that the tribe bears the burden of territorial violations, it should be empowered to prosecute such offenses without the difficulties of determining the race of the offender. The effect of this would be to clarify the bounds of federal and state jurisdiction as well.

"One solution to the problems which the definition of 'Indian country' poses is that in checkerboard areas, i.e., areas in which Indian land is

interspersed with non-Indian land, the definition should reflect the predominant character of the land[3]. For example, land primarily occupied by Indians should be classified as Indian country for purposes of allocating criminal jurisdiction. Similarly, land occupied primarily by non-Indians should be excluded from the definition of Indian country. This proposal would increase the scope of tribal authority in non-reservation land inhabited by Indians with the desirable effect of encouraging Indian self-government and tribal institutions."[4]

(2) A second major criticism of the existing jurisdictional setup deals with the impact of Public Law 280. There has been sharp criticism of the effect of Public Law 280 on Indian self-government by Indian leaders[5]. Some of these leaders have referred to thoselands under state jurisdiction as lawless no man's land. The states not only have failed to assume the responsibilities of Public Law 280, but they have also impeded Indian's efforts toward tribal sovereignty[6].

The result of the three-fold approach of Public Law 280 has been a lack of national uniformity in state - tribal relations. "California has jurisdiction with respect to all reservations for both criminal and civil matters. On the other hand, Mississippi exercises no jurisdiction under Public Law 280, and thus all reservations in Mississippi are under federal jurisdiction[7]. More confusion is added by a provision which permits retrocession of any measure of jurisdiction to the federal government after once assumed by a state pursuant to Public Law 280[8]. Although this measure was to provide the means of returning jurisdiction to the Indians via the federal government, an insufficient amount of effort has been spent on plans to prepare the various tribes to use the retrocession provision to their advantage."[9]

(3) A major question that has not been answered is the extent to which Indian tribal courts may exercise criminal jurisdiction over non-

Indians who commit offenses in violation of tribal law on Indian reservations. In Ex Parte Kenyon[10] in 1878, a circuit court held that the Cherokee Nation did not have jurisdiction over a non-Indian United States citizen residing in Kansas. The court ruled that the offender must be an Indian before the tribal court has jurisdiction[11].

"The Kenyon decision is regarded as having heavily damaged[12] Indian sovereignty. Kenyon is still relied upon as authority for denying tribal courts criminal jurisdiction over non-Indian offenders[13]. Several Indian tribes have recently challenged this holding and have, on their own initiative, assumed jurisdiction over non-Indians within their reservation[14]. The tribes have sought to justify this assumption of jurisdiction by enacting ordinances which stipulate that any person who enters the reservation by virtue of his entry impliedly consents to the jurisdiction of tribal courts."[15]

In a recent study on the American Indian and justice, the National American Indian Court Judges Association conducted several interviews with reservation Indians between July 1, 1972 and December 1, 1973[16]. The results of these interviews were that many Indian leaders and law enforcement officials believe that Indian courts and policy must have jurisdiction over non-Indians. There is also a considerable amount of resentment on the part of the Indians concerning the double standard which results when non-Indians are not made subject to tribal laws. The situation is even more pronounced when an Indian is punished under tribal law for a misdemeanor and the Indian's non-Indian accomplice is set free. The resultant effect of this is to engender in tribal members a mistrust of the law, and this is demonstrated by frustration, hostility and a feeling that the law is grossly unfair[17].

"The implied consent ordinances are a desirable means to remedy some of the jurisdictional confusion. The Solicitor General of the Department

of the Interior has challenged the legality of such ordinances[18]. Thus, the viability of this Indian-initiated remedy is hindered by the 1878 Kenyon ruling and the recent 1970 opinion of the Solicitor General. Opposition to implied consent ordinances is not justified. A state can legislate for its general welfare by the means of implied consent jurisdiction over non-residents[19]. Indian tribes, recognized as sovereign dependent nations[20], should be allowed to promote tribal welfare by obtaining implied consent jurisdiction over non-Indians on reservations."[21]

(4) The funding for the administration of criminal justice in Indian country is very limited. The federal, state, and tribal governments experience problems in this area.

Things such as investigation difficulties, distances, and limited personnel for reservation caseloads hinder the federal government. Many Indians complain that those Indians who commit the most serious offenses either go unpunished altogether or only receive the misdemeanor sentences of the tribal courts[22]. State governments more often than not fail to provide adequate enforcement services for reservations, mainly because those taxes that are normally available for law enforcement purposes cannot be collected in Indian country[23]. The tribe's own judicial systems are ineffective because they lack the monetary and personnel resources necessary to properly operate them. Indian tribes vary in areas such as traditions and customs, the amount of land in the reservation, and their economic assets. Programs toward adding to tribal resources to result in more effective tribal courts are lacking at both the federal and state level.

"Federal policy in its reliance on state jurisdiction (where the state has assumed jurisdiction under Public Law 280) and federal jurisdiction ignores the tribal court's potential to function most effectively as the authority most directly involved with the affairs of the Indian reservation. A change in policy is suggested. Remedial action

would require increased federal funding for tribal judicial systems and training programs for tribal personnel. These efforts would conceivably offer two benefits. First, by dealing directly with the needs of the tribal community, the administration of justice would be more effective. Second, this would encourage the tribes in their effort to promote internal sovereignty."[24]

## Conclusion

This chapter has examined the complexity of the criminal jurisdiction allocation. It has looked at some of the criticisms of the present three-fold setup as well as some suggestions and possible solutions for improvement of jurisdictional allocation of Indian country.

The complex system of criminal jurisdiction is a problem unique to those Native Americans residing in Indian country. Indians, as citizens of the tribal, state, and federal governments, must deal with multiple and often conflicting assertions of authority. To alleviate the problems connected with the present division of criminal justice, several things would be required: (1) recognition of Indian self-determination and tribal integrity, (2) legislative and judicial attention, and (3) a balance of concession somewhere between the United States Government's role of power, control, and authority over the Indians and the Indian's continual attempt at self-government.

FOOTNOTES
Chapter 10

2 National American Indian Court Judges Association, Justice and the American Indian, "Examination of the Basis of Tribal Law and Order Authority",Vol. IV, 9 (1974)

3 Id. at 26

4 Immigration, Alienage and Nationality, "Criminal Jurisdiction in Indian Country", UDC Law Review, Vol. 8, 1975, p. 448

5 Wendell Chino, President of the NCAI, President Johnson Presents Indian Message to Congress, 1 Indian Record 28 (March ,1968)

6 Id.

7 N.A.I.C.J.A., Justice and the American Indian, "The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations",Vol. 1, 88 (1974)

8 This provision was added by the 1968 Civil Rights Act and is codified at 25 U.S.C., Sec. 1323 (a) 1970

9 See Goldberg, Supra note 105, at 558; "Criminal Jurisdiction in Indian Country", p. 448

12 Basis of Tribal Law and Order, Supra note 5 at 32

13 Id. at 39

14 Id. note 5 at 50

15 E.g., The Salt River Ordinance No. S.R.O. 11-72; Criminal Jurisdiction in Indian Country, p. 450

16 Basis of Tribal Law and Order, Supra note 5 at 8

17 Id. at 52

18 Basis of Tribal Law and Order, Supra note 5 at 39

FOOTNOTES (Continued)

19 E.g., states have passed laws by which non-residents impliedly consent to the jurisdiction of the state with regard to service of process and intoxication tests for drivers

21 Criminal Jurisdiction in Indian Country, p. 451

22 D. Klein, Criminal Jurisdiction in Indian Country: The Policeman's Dilemma 1 (1973)

23 Comment, South Dakota Indian Jurisdiction, 11 S.D. Law Review 101, 115 (1966)

24 Criminal Jurisdiction in Indian Country, p. 458

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1
People v. Carmen 36 C.2d 768, 228 p. 2d 281 (1951)

10
14 F. Cas. 353 (no. 7720) (C.C.W.D. Ark. 1878)

11
14 F. Cas. at 355

20
31 U.S. (6 Pet.) 515, 561 (1832)

# CHAPTER 11

The topic of historical perspective of the criminal jurisdictional setup, and the resultant problems of Indian country has been very interesting. This chapter will be devoted to my personal opinion of this subject matter.

## The Constitution

In reviewing the historical shaping of the United States - Indian relations, let's take a look at the Constitutional section which is the real basis of United States - Indian interacting. Article I, Section 8, Clause 3 is the section of the Constitution which gives Congress the power to regulate commerce with the Indian tribes. The United States Government used this commerce clause as the means for all dealings with Indians, simply for lack of any other passages in the Constitution that mention Indians in any real sense. With the United States being a democratic nation, they probably wanted to make any and all moves within the limits of the Constitution. They, therefore, used that commerce clause as their justification for the poor way in which Indians were treated in the past and the way that they continue to be treated. It is interesting to note that the Constitution, being the powerful document that it is, failed to mention hardly anything about the Indians who had already occupied this territory. In the book, "The Federalist Papers", the few words mentioned in the book were negative toward the Indians. It is hard to imagine that great men held in such esteem such as Hamilton, Madison, and Jay, could be willing to look at a fellow human being as a savage. With those shapers of the Constitution having the opinion that they had of the Indians and with American policy toward Indians based upon an interpretation of the little said about them in the Constitution, it is little wonder that the Indians have been humiliated, abused, and robbed of their homeland.

## Defining the Indian

The varying definitions of the Indian, Indian country, and Indian title

are broad, unclear and sometimes overlapping. It is certainly important, in terms of criminal and civil jurisdiction, that there is a basis upon which an Indian can be determined. This is necessary for many reasons including the determinate of what court has jurisdiction, whether a crime is a misdemeanor or a felony, the amount of governmental financial assistance one is entitled to, etc. However, in many cases the federal, state, and even the tribal courts and governments have a different definition of what an Indian is and what constitutes Indian country. This tends to be pretty confusing not only for the different governments but also for Indians and non-Indians. In addition, many of the definitions used are devised and suited to the advantage of the particular government that established the definition. I feel that a universally accepted definition of an Indian and Indian country should be made applicable to all governments and their laws relating to Indian affairs. This would not only eliminate a lot of the confusion resultant from the current diverse definitions, but would also make the definitions of Indians, Indian country, and Indian title clear and singular so that they can apply to all Indians.

## Early Legislation and Treaties

The early legislation and treaties between the Indians and the United States Government stem from a common base; expansion. The various trade and intercourse acts were specifically designed by the federal government to limit state and individual dealings with Indians. At the same time, the federal government's intentions were to establish control of Indians and what they could and could not do. It seems that this was the government's early effort; to establish sovereignty over the Indians. With the federal government controlling the interest in Indians, it has allowed them to almost totally control all matters of importance concerning the Indians of the United States.

The treaties between the United States and the Indians were totally self-centered by the federal government. The government's efforts were strictly for expansion and did not really concern itself with the resultant plight of the Indians. Not only the federal government, but the state government as well accomplished much of their treaties with the Indians through trickery, deceit, forgery, broken promises, etc. Such unjust practices had a great effect on the United States Government - Indian relations. It gave the United States more land and expansion as the Indians either gave up their property through illegal treaties, force unfair treaties, or bribery. This led to many deaths of Indians due to disease, starvation, battle as they were forced to do different things that were to their disadvantage. Much of the problem with the treaty making has surfaced today with the Indians having problems with fishing and water rights, rightfully owned territory, taxes, sovereignty, etc.

Regardless of whether or not the Indian treaties were legal or not, they definitely were not fair and totally to the advantage of the United States. It was these treaties that really constituted the foundation of United States - Indian relations. With these treaties being unfair from the beginning, it constitutes an asterisk next to the United States' remarkable progression in two hundred years.

## The Legal Status of Indians

The government's Indian Removal Act and its partial recognition of Indian sovereignty was again strictly an American government effort at expansion and sovereignty. With Andrew Jackson's State of the Union message outlining the Removal Act, it was clear that the Act was strictly a means to allow the government to expand legally. In a sense, the Act also was for the protection of the Indians. As the settlers were going to expand by force, if necessary, the Indian Removal Act allowed the Indians to move westward on their own. If they did so, they were allowed

partial self-government as long as it did not infringe with the United States laws or interests. The Removal Act did not really give the Indians a choice. They either moved westward voluntarily or stayed at the risk of losing their life. This led to some fights and efforts by the Indians to keep their land. In the end, the Indians were virtually stripped of everything. This is reflected today by the poor living conditions on Indian reservations.

## Criminal Jurisdiction in Indian Country

The allocation of criminal jurisdiction in Indian country is rather unclear, overlapping and strictly to the advantage of the United States Government. The government has jurisdiction over the major crimes committed on Indian land. The state government has jurisdiction over some crimes within state boundaries and some of them have jurisdiction over major crimes through Public Law 280. The Indian government (courts) have very little criminal jurisdiction, even though Indian country is under its territory and certainly within its jurisdiction.

The writer's assessment of the criminal jurisdictional setup is that it is unfair, biased, to the federal government's advantage, unclear, inefficient, etc. It is quite unfair and inefficient for several reasons: (1) the federal or state governments often will not send officials to investigate offenses on Indian territory due to lack of concern, higher priority events, the time it takes to travel there, and monetary expenses that may be involved. The Indian courts, in these instances, cannot really do anything about these crimes because they do not have jurisdiction. (2) The Indian courts have no jurisdiction at all over non-Indians. Therefore, given the lack of the United States Government concern over prompt attention to criminal matters on Indian land, it would not be very difficult for a non-Indian to use that to his advantage. (3) Indians

who live on Indian land can also take advantage of the lack of real authority of major crimes on Indian land. (4) Given the minimum control that they have over major criminal conduct, the tribal officers tend to have a dim effort on criminal conduct on Indian land. This is also reflected in minor criminal conduct. (5) Though most Indian tribes have their own criminal codes for all criminal conduct on Indian land, they are really obsolete.

The tribal courts need to have more authority and power in criminal conduct and control of this conduct on Indian territory. They will never have complete control over all criminal conduct on Indian land. It is important that the tribal courts have more input in major criminal problems that occur on Indian land for better efficiency and effectiveness. In the present system, the tribal court authority is barely more than that of a figurehead. They have virtually no power unless the federal government gives it to them. The federal government does not bother to concern itself with very minor criminal conduct and civil disputes. This is an insult to the Indians, as the government is telling them that they will control everything that is important with regard to their lives, but they can maintain their sovereignty on issues such as marriage. The present setup of criminal jurisdictional allocation also holds true for civil jurisdiction. The same solutions for civil jurisdiction are necessary.

## Indian Sovereignty

Indian sovereignty is basically unrealistic in terms of its definition. The Indians have no international recognition of sovereignty. The United States clearly has sovereignty of every area of major importance in United States territory concerning Indians. Any mention of Indian sovereignty is strictly a figurehead position or a degree of sovereignty granted to them by the United States Government. Once the

United States acquired control of the territory through treaties, land ceding, trickery, the Indian Removal Act, etc., they have solidified their claim to sovereignty.

Even though the Indians claim such rights as hunting, fishing, and water, etc., via early treaties, they are fighting a losing battle. Some of the rights of Indians are still protected, but it is because the United States wants to do it. It may be due to honor or might be out of slight compassion. Nonetheless, it has become quite apparent that the government can decide and thereon treat the Indians in any way that they desire. This can be seen throughout the history of the United States - Indian relations.

## Analysis

The overall analysis of United States - Indian relations and criminal jurisdiction in Indian territory is that the system is totally unfair and geared toward the United States Government and its people. From the very beginning of the United States - Indian relations (treaties, and Article I, Section 8 of the Constitution), it has been clearly evident that the Indians were not thought of in the Constitution and the treaties were to the advantage of the United States Government. This has pretty much set the example for all United States - Indian relations since that time. The criminal jurisdictional allocation is clearly one-sided (geared toward the United States) and the tribal government has virtually no authority. The United States is the real sovereign power in this territory. The Indian has been constantly abused and taken advantage of.

## Solutions

(1) The Indians should be allowed to maintain total sovereignty and maintenance of their culture (those that want to) as a test to see if they can accomplish it in an orderly fashion.

(2) All criminal jurisdiction in Indian territory should be under the jurisdiction of the tribal courts with an American school-trained set of officials or, perhaps, an American committee that could help administer and set up the court system.

(3) The Indians should be assimilated more into American society in terms of education, American methods, etc. and be allowed to use their increased knowledge to administer their own culture better.

(4) More of the original treaties between the Federal Government and Indians should be honored to allow the Indians some of the rights which they are entitled to,without harassment, such as fishing and water rights, etc.

(5) There should be a continual effort on the part of the American government to achieve better relations and communication with the Indians.

## Reflection

Reflecting on the Indian plight, there is no question in my mind that they have suffered greatly. The United States Government has taken advantage of and used the Indians to their own means. Though the Indian problems have been vast, they constitute another form of hardship; that a race has had to suffer in the United States. Slavery and the resultant racism and prejudice accompanying it is another form of hardship evident in the United States.

## Conclusion

This thesis has examined the criminal jurisdictional setup of Indian country and the problems associated with it. To do this, it has reviewed the definitions of Indians and Indian country, the Constitutional basis for United States - Indian interaction, important legislation regarding the shaping of the United States - Indian relations and jurisdiction, and

the concept of Indian sovereignty. This has been accomplished with the use of research materials and by using cases that were either precedent setting or clear examples of the subject matter.

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## APPENDIX

### Jurisdictional Allocation and the Effect of Public Law 280

The following list, which is a partial listing of the many possibilities involved, is offered for illustrative purposes only to indicate how the variables in a specific case can be used to determine the selection of the proper court for jurisdictional purposes:

| Defendant | Victim | Type of Offense | Locus of Crime | Court |
|---|---|---|---|---|
| Indian | Indian | Misdemeanor, tribal | Reservation | Tribal |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Indian | Non-Indian | Misdemeanor, tribal | Reservation | Tribal |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Non-Indian | Indian | Misdemeanor, tribal | Reservation | Tribal** |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Reservation | Federal |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Non-Indian | Non-Indian | Misdemeanor, tribal | Reservation | Tribal** |
| " | " | Misdemeanor, federal | Reservation | Federal |
| " | " | Felony, state | Reservation | State*** |
| " | " | Felony, federal | Reservation | Federal |

*Assuming state has *not* assumed valid jurisdiction over the reservation. In the event the United States declines to prosecute, the cases are sometimes referred back to tribal court. There is divergence of opinion on the legality of this procedure. In most cases, when the United States Attorney declines to prosecute no further action is taken. If tribal court action may properly be taken, the charge must be reduced consistent with the tribal law and order code and the Indian Civil Rights Act of 1968.

**Assuming tribal law and order permits jurisdiction over non-Indian offenders.

***Assuming state *has* assumed valid jurisdiction over reservation.

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Note 1

secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757.

## Historical and Revision Notes

**Reviser's Note.** Based on sections 215, 217, 218 of Title 25, U.S.C., 1940 ed., Indians (R.S. 2144, 2145, 2146; Feb. 18, 1875, c. 80, § 1, 18 Stat. 318).

Section consolidates said sections 217 and 218 of Title 25, U.S.C., 1940 ed., Indians, and omits section 215 of said title as covered by the consolidation.

See reviser's note under section 1152 of this title as to effect of consolidation of sections 548 and 549 of Title 18, U.S.C., 1940 ed.

Minor changes were made in translations and phraseology. 80th Congress House Report No. 304.

## Cross References

State jurisdiction over offenses committed by or against Indians in the Indian country, see section 1162 of this title.

## Notes of Decisions



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C.J.S. Indians § 75.

### 1. Power of Congress

Congress may define and punish crimes committed by white men on the person or property of an Indian, and vice versa, within as well as without the limits of a state. U. S. v. Kagama, Cal.1886, 6 S.Ct. 1109, 118 U.S. 375, 30 L.Ed. 228. See, also, In re Wilson, Ariz.1891, 11 S.Ct. 870, 140 U.S. 575, 35 L.Ed. 513; U. S. v. Martin, D.C.Or.1883, 14 F. 817.

Where the country occupied by Indians is not within any state, Congress may by law punish any offense committed there, whether the offender be a white man or an Indian. U. S. v. Rogers, Ark.1846, 45 U.S. 567, 4 How. 567, 11 L.Ed. 1105.

Congress has exclusive power to deal with Indians and Indian affairs on reservations set apart for them. Hilderbrand v. Taylor, C.A.Kan.1964, 327 F.2d 205.

While Congress retains paramount authority to legislate for and enforce its laws on all the Indian tribes it has recognized authority of Indian governments over their reservations and if this power is to be taken away it must be done by Congress. Oliver v. Udall, 1962, 306 F.2d 819, 113 U.S.App.D.C. 212, certiorari denied 83 S.Ct. 720, 372 U.S. 905, 9 L.Ed.2d 717.

Both Indian tribes and individuals within the tribes, to an increasing extent, have been regarded as wards of the federal government and the power of Congress has been implied to extend as to Indians, to crimes committed by and against them and also to their dealings with non-Indians. People ex rel. Ray v. Martin, 1944, 47 N.Y.S.2d 883, 181 Misc. 925, affirmed 52 N.Y.S.2d 496, 268 App.Div. 218, affirmed 60 N.E.2d 541, 294 N.Y. 61, affirmed 66 S.Ct. 307, 326 U.S. 496, 90 L.Ed. 261.

### 2. Construction with other laws

No implied repeal of former section 217 of Title 25 could have been inferred from former section 548 of this title. Donnelly v. U. S., Cal.1913, 33 S.Ct. 449, 228 U.S. 243, 57 L.Ed. 820, Ann.Cas.1913E, 710, rehearing denied 33 S.Ct. 1024, 228 U.S. 708, 57 L.Ed. 1035, Ann.Cas.1915E, 710.





Unless offense committed by Indian in place within Indian country is committed by an Indian against person or property of another Indian, or Indian committing offense in Indian country had been punished by local law of tribe, or unless, by treaty, exclusive jurisdiction over offense is secured to Indian Tribe, an Indian is, under this section, amenable to general laws of United States as to punishment of offenses committed in any place within exclusive jurisdiction of the United States, including or as enlarged by the Assimilative Crimes Act, section 13 of this title. U. S. v. Sosseur, C.A.Wis.1950, 181 F.2d 873.

Former sections 217 and 218 of Title 25 were not affected by any subsequent legislation, except by former section 548 of this title. Ex parte Hart, D.C.Or.1907, 157 F. 130.

The provisions of the Organic Act of Oklahoma were not inconsistent with the provisions of former section 217 of Title 25 and did not repeal the same. Brown v. U. S., Okl.1906, 146 F. 975, 77 C.C.A. 173. See, also, Goodson v. U. S., 1898, 54 P. 423, 7 Okl. 117.

Former section 457 of this title was one of the general laws of the United States in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of former sections 217 and 218 of Title 25, crimes committed in the Indian country by one Indian against another were excluded. U. S. v. Ward, C.C.Cal.1880, 42 F. 329.

Former section 215 of Title 25, extending to Indian country general laws of the United States defining and prescribing punishments for forgery and for depredations upon the mails, was repealed by implication by enactment of this section extending to Indian country, except as otherwise expressly provided by law, general laws of the United States as to punishment of offenses committed in any place within the exclusive jurisdiction of the United States. State ex rel. Bokas v. District Court of Fifteenth Judicial Dist., In and For Roosevelt County, 1951, 270 P.2d 396, 128 Mont. 37.

### 3. Purpose

The purpose of this section to bring Indians under federal jurisdiction was to permit prosecution of Indians the same as other people, but not to discriminate against the Indians. U. S. v. Red Wolf, D.C.Mont.1959, 172 F.Supp. 168.

### 4. Definitions

An illegitimate child of a Choctaw Indian by a colored woman, who was a slave in the Cherokee Nation, is not an Indian, but a negro. Alberty v. U. S., Ark.1896, 16 S.Ct. 864, 162 U.S. 499, 40 L.Ed. 1051.

The words "sole and exclusive" do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. Ex parte Wilson, Ariz. 1891, 11 S.Ct. 870, 140 U.S. 575, 35 L.Ed. 513. See, also, Ex parte Nowabbi, 1956, 61 P.2d 1139, 60 Okl.Cr. 111.

A white person, adopted into an Indian tribe, is not an Indian. U. S. v. Rogers, Ark.1846, 45 U.S. 567, 4 How. 567, 11 L.Ed. 1105. See, also, Westmoreland v. U. S., Tex.1895, 15 S.Ct. 213, 155 U.S. 545, 39 L.Ed. 255.

### 5. Federal jurisdiction generally

The laws and courts of the State of Arizona have jurisdiction over offenses committed on an Indian Reservation in Arizona between persons who are not Indians, but the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there by one who is not an Indian, against one who is an Indian. Williams v. U. S., Ariz.1946, 66 S.Ct. 778, 327 U.S. 711, 90 L.Ed. 962.

Independently of any question of title, the federal courts have jurisdiction of crimes committed by Indians on a reservation, for, regarding them as the wards of the nation, the United States has full power to pass such laws as may be necessary to their full protection, and to punish all offenses committed against them or by them within the reservation. U. S. v. Thomas, Wis.1894, 14 S.Ct. 425, 151 U.S. 577, 38 L.Ed. 276. See, also, State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219.

Indian courts functioning in Fort Belknap Indian community are in part, at least, arms of federal Government, and federal Government maintains partial control over them. Colliflower v. Garland, C.A.Mont.1965, 342 F.2d 369.

Prosecution of full blooded Indian for alleged murder of full-blooded Indian on lands which were originally within Indian Reservation, but which had been ceded by Indians to the United States subject to allotment of land in severalty to individual members, was not cognizable in federal court under this section. Toosigah v. U. S., C.A.Okl.1950, 186 F.2d 93.

Note 5

Where tribes occupying reservation ceded lands embraced within it to United States, relinquishing and surrendering all their claim, title and interest subject to allotments in severalty, and every allottee was given benefit of and made subject to laws, both criminal and civil, of state or territory, with gift of citizenship and equal protection of laws, Congress thereby intended to dissolve tribal government, disestablish the organized reservation, and assimilate the Indians as citizens of state or territory. Id.

The United States exercises exclusive jurisdiction over Indians who live on reservations and are members of tribe with which United States has a treaty agreement. Application of Konaha, C.C.A.Wis.1942, 131 F.2d 737.

The United States had not relinquished jurisdiction over a crime committed within an Indian reservation by an Indian, even though the crime was committed on a plot of land belonging to a church. U. S. v. Hilderbrand, D.C.Kan.1960, 190 F.Supp. 283, affirmed 287 F.2d 886, certiorari denied 81 S.Ct. 1655, 366 U.S. 952, 6 L.Ed.2d 391, rehearing denied 82 S.Ct. 65, 368 U.S. 872, 7 L.Ed.2d 73.

The federal government generally has jurisdiction over Indians for any assault committed by them on Indian Reservation. U. S. v. La Plant, D.C.Mont.1957, 156 F.Supp. 660.

Under the Constitution the states have lost exclusive sovereignty over the Indians, and federal sovereignty has extended to cover the Indian and the reservation. Ex parte Ray, D.C.N.Y.1943, 54 F.Supp. 218.

The federal government has paramount authority to deal with Indians for offenses committed within a reservation, although state courts will take jurisdiction of Indians for offenses outside reservation. Nephew v. State, 1942, 36 N.Y.S.2d 541, 178 Misc. 824.

Locus of murder of Indian allegedly committed by non-Indian on county road between tracts of land within former boundaries of Indian reservation which, having been opened for settlement and sale, had been under non-Indian ownership with unrestricted nontrust status for many years was not within Indian country subject to exclusive jurisdiction of United States. State v. Barnes, S.D. 1965, 137 N.W.2d 683.

Federal court has exclusive jurisdiction of prosecution of regularly enrolled tribal Indian for burglary committed within the Indian country. Application of De Marria, 1958, 91 N.W.2d 480, 77 S.D. 294.

Deliberate choice of phrase "within any Indian reservation under the jurisdiction of the United States Government" by Congress in determining the term "Indian country" for purposes of jurisdiction of United States courts for crimes committed in Indian country indicated a congressional disposition to restrict federal jurisdiction to organized reservations. Ellis v. State, Okl.Cr.1963, 386 P.2d 326, certiorari denied 84 S.Ct. 801, 376 U.S. 965, 11 L.Ed.2d 768.

Homicide committed by Indian within territory that had formerly been an Indian reservation but which had been ceded by the Indians to the United States in exchange for citizenship was not committed in "Indian country" and federal courts did not therefore exercise exclusive jurisdiction. Id.

Until Indian tribes elect to place themselves under the operation of statute which permits tribes to petition Governor for proclamation placing their people and lands under state jurisdiction, or the Legislature unconditionally assumes jurisdiction, as it is authorized to do, jurisdiction over crimes committed by Indians in Indian country remains in federal courts. Arquette v. Schneckloth, 1960, 351 P.2d 921, 56 Wash.2d 173.

Federal jurisdiction over offenses, either felonies or misdemeanors, committed by an Indian in Indian Country, is exclusive and not concurrent with state jurisdiction. Application of Denetclaw, 1958, 320 P.2d 697, 83 Ariz. 269.

There can be no divided jurisdiction in regard to Indian wards of the federal government. State ex rel. Bokas v. District Court of Fifteenth Judicial Dist., In and For Roosevelt County, 1954, 279 P.2d 396, 128 Mont. 37.

Federal court has exclusive jurisdiction of crime triable by federal court committed on tribal lands within reservation, whether such lands have been allotted or not. State v. Phelps, 1933, 19 P.2d 319, 9 Mont. 277.

If tribal Indian residing on reservation commits crime on Indian land, "jurisdiction" of federal court is exclusive even though Indian is citizen. Id.

An Indian allottee, who had not obtained patent in fee, was a ward of the government although a citizen, and under former section 349 of this title was subject to exclusive jurisdiction of the United States. State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219. See, also, In re Nowge-zhuck, 1904, 76 P. 877, 69 Kan. 410.





Note 6

The district courts of the territory of Oklahoma, when exercising the powers and jurisdiction of the United States court, have exclusive jurisdiction of all crimes punishable by the laws of the United States when committed by persons other than Indians on an Indian reservation occupied by Indian tribes, and to which the Indian title has not been extinguished, and also to certain crimes committed by an Indian on such reservation. Herd v. U. S., 1904, 75 P. 291, 13 Okl. 512, affirmed 146 F. 975, 77 C.C.A. 173. See, also, Welty v. U. S., 1904, 76 P. 121, 14 Okl. 7; Goodson v. U. S., 1898, 54 P. 423, 7 Okl. 117.

It is not required that the United States shall exercise sole and exclusive jurisdiction over an Indian reservation and its inhabitants, in order that the United States courts may have jurisdiction to try offenses made punishable by the laws of the United States when committed upon such reservations. Goodson v. U. S., 1898, 54 P. 423, 7 Okl. 117.

**6. State court jurisdiction—Generally**

In absence of a limiting treaty obligation or congressional enactment, each state has a right to exercise jurisdiction over Indian reservations within its boundaries. People of State of N. Y. ex rel. Ray v. Martin, N.Y.1946, 66 S.Ct. 307, 326 U.S. 496, 90 L.Ed. 261.

The rule was that the organization of a territory into a state and its admission into the Union on an equal footing with the original states qualified the former federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the states the control of offenses committed on a reservation or in Indian country by persons not Indians against other persons not Indians, in the absence of some law or treaty to the contrary. U. S. v. McBratney, Colo.1881, 104 U.S. 621, 14 Otto. 621, 26 L.Ed. 869. See, also, U. S. v. Ramsey, Okl.1926, 46 S.Ct. 559, 271 U.S. 467, 70 L.Ed. 1039; Draper v. U. S., Mont.1896, 17 S.Ct. 107, 164 U.S. 240, 41 L.Ed. 419; State v. Columbia George, 1901, 65 P. 904, 39 Or. 127; Ex parte Sloan, D.C.Nev.1877, Fed.Cas.No.12,944; U. S. v. Ward, C.C. Kan.1863, Fed.Cas.No.16,639.

When Territory of Oklahoma was admitted into the union on an equal footing with original states, it thereby acquired full and complete jurisdiction over all persons and things within its boundaries, including Indians, except to extent that federal government expressly retained or asserted paramount jurisdiction over such Indians as guardian and ward. [illegible] U. S. v. [illegible], C.A.Okl.1950, 182 F.2d 93.

Wisconsin state courts, in absence of legislation by Congress conferring jurisdiction upon them, have no jurisdiction of crimes committed by tribal Indians on Indian reservation. Application of Konaha, C.C.A.Wis.1942, 131 F.2d 737.

Provisional, territorial and state courts of Oregon have always had jurisdiction over crime of murder committed within boundaries of governmental unit, such jurisdiction being limited only by congressional action in Indian affairs, and when Congress withdrew from that field, the impediment to state jurisdiction was removed. Anderson v. Gladden, D.C.Or. 1960, 188 F.Supp. 666, affirmed 293 F.2d 463, certiorari denied 82 S.Ct. 390, 368 U.S. 949, 7 L.Ed.2d 344.

The federal administrative view and the de facto jurisdiction assumed by the New York courts over crimes committed in the city of Salamanca, N. Y., which is within the Allegany Indian Reservation, should be accorded great weight in determining whether the state had sole jurisdiction over crimes committed therein. Ex parte Ray, D.C.N.Y.1943, 54 F.Supp. 218.

Indians of a tribe maintaining a tribal organization on a reservation within a state are subject to the local or state laws for offenses off the reservation. U. S. v. Sa-coo-da-cot, C.C.Wis.1870, Fed. Cas.No.16,212. See, also, In re Wolf, D.C. Ark.1886, 27 F. 606; State v. Williams, 1895, 43 P. 15, 13 Wash. 335; Hunt v. State, 1866, 4 Kan. 60; State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219.

Crimes committed by Indians against Indians or non-Indians and crimes committed by non-Indians against Indians on non-trust land in opened portion of Indian reservations are within jurisdiction of state courts. State v. Barnes, S.D.1965, 137 N.W.2d 683.

State court acted within its powers in passing sentence on one convicted of forgery where crime was committed by enrolled tribal member of Pine Ridge Indian Reservation on land which although original part of Pine Ridge Indian Reservation was also within boundaries of land open to settlement by subsequent act of Congress with exception of lands which had already been allotted to Indians, and the Indian title to such had been extinguished. State ex rel. Hollow Horn Bear v. Jameson, 1959, 95 N.W.2d 181, 77 S.D. 527.

Note 6

South Dakota has jurisdiction to prosecute Indians for crimes when committed outside of Indian country because of the admission of State to union upon an equal footing with the original states. Id.

A state's jurisdiction does not extend over individual members of an Indian tribe in "Indian country", but jurisdiction of state courts does extend over Indian country except as limited by Indian treaties or federal laws, to prosecute white persons or nontribal Indians for crimes committed upon Indian reservations. State ex rel. Du Fault v. Utecht, 1945, 19 N.W.2d 706, 220 Minn. 437, 161 A.L.R. 1316.

The courts of Nebraska have jurisdiction and authority to try and punish persons other than Indians for crimes committed on Indian reservations within the state. Marion v. State, 1884, 20 N.W. 289, 16 Neb. 349. See, also, Marion v. State, 1886, 29 N.W. 911, 20 Neb. 233, 57 Am.Rep. 825.

The criminal laws of Wisconsin apply to the Indians on their reservations within the state, and the circuit court for Brown county has jurisdiction of all violations of such laws committed, whether by Indians or others, in the Oneida reservation, which is included within the boundaries of that county as fixed by law. State v. Doxtater, 1879, 2 N.W. 439, 47 Wis. 278. See, also, State v. Harris, 1879, 2 N.W. 543, 47 Wis. 298.

Where authority under which state was permitted to construct a highway through and over a Navajo Indian reservation failed to extinguish title of Navajo Indian tribe to such lands in view of fact state has no jurisdiction over Indian lands until title of the Indian has been extinguished, state did not have criminal jurisdiction over an Indian driving an automobile on portion of highway in question. State v. Begay, 1958, 320 P.2d 1017, 63 N.M. 469, certiorari denied 78 S.Ct. 1359, 357 U.S. 918, 2 L.Ed.2d 1363.

Justice court of State of Arizona did not have jurisdiction to try Indian charged with two traffic misdemeanors, viz., driving under influence of intoxicating liquor and with reckless driving at a point on United States highway within exterior boundaries of Indian reservation. Application of Denetclaw, 1958, 320 P.2d 697, 83 Ariz. 209.

Fact that United States granted State of Arizona an easement for right of way across Indian reservation did not confer jurisdiction on Arizona courts over Indian traffic offenders. Id.

Where Flathead Indians were found guilty by judge of Flathead Indian Reservation tribal court of violating Indian ordinance by killing antelope on reservation during closed season, and they paid their fine, justice court and district court were without jurisdiction to try the Indians thereafter for having in their possession the same antelope, which was killed during closed season for hunting antelope under state law. State v. McClure, 1954, 268 P.2d 629, 127 Mont. 534.

Criminal laws of state except so far as restricted by authority of Congress to regulate commerce with Indian tribes extend to all crimes committed on lands within part of state that was formerly Indian territory, in absence of contrary provision in Enabling Act or treaty with Five Civilized Nations or Tribes. Ex parte Wallace, 1945, 162 P.2d 205, 81 Okl. Cr. 176.

State courts have jurisdiction of crimes committed against whites, outside of an Indian reservation, by Indians maintaining tribal relations on a reservation within the state, in charge of the federal government. State v. Spotted Hawk, 1899, 55 P. 1026, 22 Mont. 33. See, also, State v. Little Whirlwind, 1899, 56 P. 820, 22 Mont. 425.

Cherokee Indians residing within the state of North Carolina are subject to the general criminal laws of the state. State v. Ta-cha-na-tah, 1870, 64 N.C. 614.

The state courts have criminal jurisdiction over the Brothertown Indians, who are not a distinct nation or tribe as to a crime not committed on any reservation. In re Peters, N.Y.1801, 2 Johns. Cas. 344.

**7. —— Indians who severed tribal relations**

Emancipated Indian may not defend against power of state to punish him by claiming as sanctuary house of Indian on reservation. State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219.

An Indian who retains his tribal relations may be prosecuted in the courts of a state for a crime committed at a place without the limits of a reservation. But an Indian who has severed his tribal relations may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation. State v. Williams, 1895, 43 P. 15, 13 Wash. 335. See, also, State v. Nimrod, 1912, 138 N.W. 377, 30 S.D. 239; State v. Smokalem, 1903, 79 P. 603, 37 Wash. 91; State v. Howard, 1903, 74 P. 382, 33 Wash. 250.





**8. Indian court jurisdiction**

Under the treaty with the Cherokee Nation, 14 Stat. 799, art. 10 providing that a court may be established by the United States in that territory, and that the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all cases arising within their country in which members of the nation shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, and Act March 1, 1889, 25 Stat. 783, providing for the establishment of a court in the Indian Territory with criminal jurisdiction limited to cases not punishable by death or hard labor, jurisdiction of the crime of adultery committed by a citizen of nation with a white woman within the territory where they both resided, was vested in the Indian courts. Ex parte Mayfield, Ark.1891, 11 S.Ct. 939, 141 U.S. 107, 35 L.Ed. 635.

Indian tribal courts have considerable jurisdiction and such jurisdiction is, to considerable extent, exclusive, and that is the normal rule as to criminal offenses and as to suits against Indians arising out of matters occurring on the reservation. Colliflower v. Garland, C.A.Mont. 1965, 342 F.2d 369.

Indian tribe has power, in absence of some treaty provision or act of Congress to the contrary, to enact its own laws for government of its people and to establish courts to enforce them. Id.

To give an Indian court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian. Ex parte Kenyon, C.C.Ark.1878, 5 Dill. 385, 14 Fed.Cas. No.7,720. See, also, Ex parte Morgan, D. C.Ark.1883, 20 F. 298.

**9. State or territorial legislation, effect**

Reservations in Act Iowa Feb. 14, 1896, Acts 26th Gen. Assem. c. 110, did not subject Indians to the criminal laws of the state, except for offenses committed against white persons, or reserve to the state any jurisdiction or control over the domestic affairs or relations of the Indians, which would practically nullify the purpose of the act as declared in its first section, and which jurisdiction the state in fact never possessed. Peters v. Malin, C.C.Iowa 1901, 111 F. 244.

The extension of jurisdiction of the United States over the Indian country by former section 217 of Title 25 could not have been taken away or repealed by any territorial legislature. U. S. v. Beebe, 1882, 11 N.W. 505, 2 Dak. 292.

**10. Treaty stipulations**

Crimes committed by one Indian upon the person of another within the limits of the Tulalip reservation, in the state of Washington, were not excepted from the exclusive jurisdiction of the federal courts, under former section 548 of Title 18, because both parties held patents from the United States, issued under the authority of the treaty with the Omahas, of March 16, 1854, and the treaty of Point Elliot of January 22, 1855. U. S. v. Celestine, Wash.1909, 30 S.Ct. 93, 215 U.S. 278, 54 L.Ed. 195.

A treaty which conferred upon the United States courts jurisdiction over crimes committed by one Indian upon the person of another had the effect of abrogating former section 218 of Title 25 as to the treaty-making tribe and thus the treaty of Feb. 24, 1869, with the Sioux Nation providing that if bad men among the Indians should commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the nation agreed to deliver up the offender to the United States to be tried and punished according to its laws, gave jurisdiction to the federal courts of a prosecution for the killing of one Indian by another on the Sioux reservation. U. S. v. Crow Dog, 1882, 14 N.W. 437, 3 Dak. 106, habeas corpus and certiorari granted 3 S.Ct. 396, 109 U.S. 556, 27 L.Ed. 1030.

**11. Bigamy**

An Indian could have been prosecuted in the state courts for bigamy committed within an Indian reservation notwithstanding former section 549 of this title. State v. Nimrod, 1912, 138 N.W. 377, 30 S.D. 239.

**12. Gambling**

An Indian who was convicted under St.Wis.1949, §§ 348.07, 348.08 of operating slot machines on Indian reservation located within territorial boundaries of state, pursuant to Assimilative Crimes Act, section 13 of this title and this section that, except as otherwise provided by law, general laws of United States as to punishment of offenses extend to Indian country, was punishable pursuant to punishment prescribed by state statute for such offense, and not under punishment provided by tribal law. U. S. v. Sosseur, C.A.Wis.1950, 181 F.2d 873.

Where the Lac du Flambeau Band of Chippewa Indians of the Lac du

Note 3

Section 1151 of this title and this section, defining Indian country and dealing with certain offenses committed within such country are not intended to circumvent or override treaty of New Echota of 1835 with Cherokee Nation. In re McCoy, D.C.N.C.1964, 233 F.Supp. 469.

**4. Repeal of other Indian legislation**

No implied repeal of former section 217 of Title 25, concerning punishments in the Indian country, could have been inferred from former section 548 of this title. Donnelly v. U. S., Cal.1913, 33 S.Ct. 449, 228 U.S. 243, 57 L.Ed. 820, Ann.Cas. 1913E, 710, rehearing denied 33 S.Ct. 1021, 228 U.S. 708, 57 L.Ed. 1035. See, also, Bailey v. U. S., C.C.A.Ariz.1931, 47 F.2d 702.

Former section 548 of this title which provided that all Indians committing any one of certain enumerated crimes against the person or property of another Indian or other person within the boundaries of any state and within the limits of any Indian reservation shall be subject to the same laws and penalties "as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States," by implication repealed former section 212 of Title 25, in so far as that section made a distinction between white persons and Indians in respect to the crime of arson committed in the Indian country, and under the later section the crime and the punishment were the same whether committed by a white person or an Indian, or against a white person or an Indian. U. S. v. Cardish, D.C.Wis.1906, 145 F. 242.

Former section 331 et seq. of Title 25 did not repeal or modify former section 548 of this title. State v. Columbia George, 1901, 65 P. 604, 39 Or. 127.

**5. Generally**

Practical interpretation of the Department of Justice, as to what constituted Indian country, within exclusive jurisdiction under this section, was entitled to weight in interpretation of ambiguous statutes. DeMarrias v. State of S. D., C.A.S.D.1963, 319 F.2d 845.

South Dakota could cede to United States jurisdiction over certain crimes committed within limits of Indian reservations in state even with respect to patented lands within reservations. Kills Plenty v. U. S., C.C.A.S.D.1943, 133 F.2d 292, certiorari denied 63 S.Ct. 1172, 319 U.S. 750, 87 L.Ed. 1711.

Under former section 548 of this title, jurisdiction to try reservation Indian who had received a trust patent but who had not received a patent in fee simple, although trust period had expired, was exclusively in the proper federal court, notwithstanding that the Secretary of Interior, presuming to act under the authority of sections 328 and 329 of Title 25, had granted the Indian a certificate of competency. Ex parte Pero, C.C.A.Wis. 1938, 99 F.2d 28, certiorari denied 59 S.Ct. 581, 306 U.S. 643, 83 L.Ed. 1043.

**6. Enumerated crimes, limitation to**

Action by Congress of deleting carnal knowledge from list of offenses enumerated in this section indicated that Congress did not think carnal knowledge should be made an offense under this section. U. S. v. Jacobs, D.C.Wis.1953, 113 F.Supp. 203, appeal dismissed 74 S.Ct. 228, 346 U.S. 802, 98 L.Ed. 394.

Federal courts have exclusive jurisdiction over crimes which are enumerated in this section and are committed by Indians in Indian country. Wood v. Jamieson, S.D.1964, 130 N.W.2d 35.

Former section 548 of this title did not have the effect of extending to state the power to subject Indians within a reservation to state criminal laws defining misdemeanors or felonies not enumerated in said former section. State v. Jackson, 1944, 16 N.W.2d 732, 218 Minn. 429.

**7. Indians, persons constituting**

An illegitimate child of a Choctaw Indian by a colored woman, who was a slave in the Cherokee Nation, must be regarded, not as an Indian, but as a negro, for the purposes of the jurisdiction of the United States courts. Alberty v. U. S., Ark.1896, 16 S.Ct. 864, 162 U.S. 499, 40 L.Ed. 1051.

The son of an Indian mother and a half-blood father, both of whom were recognized as Indians and maintained tribal relations, and who himself lived on a reservation and maintained tribal relations and was recognized as an Indian, was an "Indian" within meaning of former section 548 of this title, notwithstanding that he had not been enrolled with any Indian tribe on any reservation. Ex parte Pero, C.C.A.Wis.1938, 99 F.2d 28, certiorari denied 59 S.Ct. 581, 306 U.S. 643, 83 L.Ed. 1043.

Where defendant was a mixed blood Indian, who for many years had been enrolled as a member of the Stockbridge and Munsee Tribe in Wisconsin, had been recognized as such by the tribe and by the government, and as such was enrolled and became an allottee of land, and for many years lived within the limits of





Note 9

the reservation and under the care of an Indian agent and policed by Indian police, he was an Indian, within former section 548 of this title, though his father was a white man and his mother a part blood Indian who had never been enrolled. U. S. v. Gardner, D.C.Wis.1911, 189 F. 690.

Half breeds, who never receive recognition from their white parents, but are left to be nurtured during childhood by Indian relatives, and live as savages, and are subjects of governmental care, have the status of Indians. U. S. v. Hadley, C.C.Wash.1900, 99 F. 437.

The son of a negro father by an Indian mother was not an Indian, within former section 548 of this title, as the child follows the condition of the father. U. S., v. Ware, C.C.Cal.1890, 42 F. 530.

Person who was Indian by blood, enrolled as a member of the Mono Tribe by the Bureau of Indian Affairs, and who has received no allotment, is an Indian subject to this section. Petition of Carmen, D.C.Cal.1958, 165 F.Supp. 942, affirmed 270 F.2d 809, certiorari denied 80 S.Ct. 575, 361 U.S. 934, 4 L.Ed.2d 355, rehearing denied 80 S.Ct. 585, 361 U.S. 973, 4 L.Ed.2d 553.

Fact that Indian, allegedly committing murder on an Indian allotment, had been emancipated to a great extent, did not preclude him from coming under definition of an Indian within meaning of this section providing that an Indian who commits certain enumerated crimes in Indian Country shall be subject to those same laws and penalties and tried in the same courts as persons committing such crimes within exclusive jurisdiction of the United States. Id.

Presumptively person apparently of mixed blood residing on reservation and claiming to be an Indian is an Indian. State v. Phelps, 1933, 19 P.2d 319, 93 Mont. 277.

Indian to whom land allotment has been made and while allotment is held by government in trust, although not under immediate supervision of Indian agent, and though he may be United States and state citizen, remains an Indian within federal acts regarding crime. Id.

**8. Alaskan Indians, application to**

Former section 548 of this title, making all Indians amenable to the criminal laws of the United States for the offenses therein designated, and Act March 3, 1871, 16 Stat. 566, prohibiting future recognition of tribal independence among the Indians, the Alaska Indians are amenable to the penal laws of the United States, they being dependent subjects though not citizens within the full meaning of the term. In re Sah Quah, D.C. Alaska 1886, 31 F. 327.

Since Metlakatla is not an Indian reservation in the traditional sense, none of the Indians of Southeastern Alaska including residents of Metlakatla are within the definition of "Indian country" as set out in section 1151 of this title making crimes committed therein outside the jurisdiction of the Territory, and hence federal District Court would accept jurisdiction of prosecution for driving while under the influence of intoxicating liquor committed therein. U. S. v. Booth, 1959, 161 F.Supp. 269, 17 Alaska 561.

Tyonek area in Alaska which had been set aside by executive order for use of Indians was within term "Indian country" as defined by this section making crimes committed therein outside jurisdiction of territory. Petition of McCord, 1957, 151 F.Supp. 132, 17 Alaska 162.

Alaskan natives do not have different status than Indians of the United States under this section dealing with their liability for criminal prosecution. Id.

**9. Reservations included**

Act of 1906 providing for sale of mineral lands and for settlement and entry under homestead laws of other surplus land remaining on diminished Colville Indian Reservation did not dissolve such reservation, but the reservation remains in existence and therefore State of Washington did not have jurisdiction over offense of burglary committed on such reservation by an enrolled, unemancipated member of the Colville Indian Tribe. Seymour v. Superintendent of Washington State Penitentiary, Wash.1962, 82 S.Ct. 424, 368 U.S. 351, 7 L.Ed.2d 346, on remand 369 P.2d 309.

"Indian country" as used in this section, includes the Klamath Reservation in Oregon. Anderson v. Gladden, C.A.Or. 1961, 293 F.2d 463, certiorari denied 82 S.Ct. 390, 368 U.S. 949, 7 L.Ed.2d 344.

Unallotted Lake Traverse Reservation lands opened for settlement under homestead and townsite laws pursuant to acts of 1889 and 1891 and Presidential Proclamation of 1892 were thereafter subject to laws of South Dakota, ceased to be part of any "Indian reservation" or to be within "Indian country," within this section giving federal government jurisdiction over specified offenses committed

by Indians within Indian country and section 1151 of this title defining Indian country as land within limits of Indian reservation, and Indian charged with third degree burglary committed on non-Indian patented land within original boundaries of Lake Traverse Reservation was not subject to federal jurisdiction. De Marrias v. State of S. D., D.C.S.D.1962, 206 F.Supp. 519, affirmed 319 F.2d 845.

Former section 548 of this title, conferring jurisdiction on the federal courts of enumerated crimes committed within the limits of any Indian reservation, applied as well to reservations, title to which has been derived from the state or from other sources than the federal government as to reservations which are the direct gift of the United States. People v. Daly, 1914, 105 N.E. 1048, 212 N.Y. 183.

Where enrolled and allotted Indian allegedly committed offense of burglary, one of offenses specified in this section relating to criminal offenses of Indians committed upon reservations, of grocery store, located upon ground lying within organized and supervised Indian reservation but to which United States had ceded all right, title and interest, state court lacked jurisdiction of offense and exclusive jurisdiction was in federal court. State ex rel. Irvine v. District Court of Fourth Judicial Dist. in and for Lake County, 1952, 239 P.2d 272, 125 Mont. 398.

**10. Federal jurisdiction, generally**

Under former section 217 of Title 25 and former section 548 of this title, providing for the punishment of the crimes enumerated when committed by Indians within the territories and for the punishment of the same crimes when committed by an Indian on an Indian reservation within a state, the rule was that the federal courts had jurisdiction of certain enumerated crimes by or against Indians committed on a reservation. Donnelly v. U. S., Cal.1913, 33 S.Ct. 449, 228 U.S. 243, 57 L.Ed. 820, Ann.Cas.1913E, 710, rehearing denied 33 S.Ct. 1024, 228 U.S. 708, 57 L.Ed. 1035.

Tract of land conveyed to church but within exterior boundaries of Indian reservation was "Indian country" notwithstanding issuance of any patent, and crime committed on such tract was subject to jurisdiction of federal court. Hilderbrand v. Taylor, C.A.Kan.1964, 327 F.2d 205.

United States exercises concurrent jurisdiction with state of North Carolina over criminal offenses committed by Indians on the Cherokee Indian Reservation in Swain County, but never exercises exclusive jurisdiction. In re McCoy, D.C.N.C.1964, 233 F.Supp. 409.

This section providing that Indian committing certain enumerated crimes in Indian Country shall be subject to the same laws and penalties and tried in the same courts as persons committing such crimes within exclusive jurisdiction of the United States, gives federal court exclusive jurisdiction over offenses enumerated in this section. Petition of Carmen, D.C.Cal.1958, 165 F.Supp. 942, affirmed 270 F.2d 869, certiorari denied 80 S.Ct. 375, 361 U.S. 934, 4 L.Ed.2d 355, rehearing denied 80 S.Ct. 585, 361 U.S. 973, 4 L.Ed.2d 553.

Federal courts had exclusive jurisdiction of crimes mentioned in former section 548 of this title, when committed by Indians residing on reservations. People ex rel. Schuyler v. Livingstone, 1924, 205 N.Y.S. 888, 123 Misc. 605. See, also, People v. Daley, 1914, 105 N.E. 1048, 212 N.Y. 183, Ann.Cas.1915D, 367; State v. Campbell, 1893, 55 N.W. 553, 53 Minn. 354, 21 L.R.A. 169.

Deliberate choice of phrase "within any Indian reservation under the jurisdiction of the United States Government" by Congress in determining the term "Indian country" for purposes of jurisdiction of United States courts for crimes committed in Indian country indicated a congressional disposition to restrict federal jurisdiction to organized reservations. Ellis v. State, Okl.Cr.1963, 386 P.2d 326, certiorari denied 84 S.Ct. 801, 376 U.S. 945, 11 L.Ed.2d 768.

Homicide committed by Indian within territory that had formerly been an Indian reservation but which had been ceded by the Indians to the United States in exchange for citizenship was not committed in "Indian country" and federal courts did not therefore exercise exclusive jurisdiction. Id.

When an enrolled Indian commits an act in Indian country that is a breach of a specific federal criminal statute, even though it is also a state crime, federal jurisdiction, or that of the tribe, is exclusive, in the absence of express congressional legislation to the contrary. White v. Schneckloth, 1960, 351 P.2d 919, 56 Wash.2d 173.

Federal courts have exclusive jurisdiction over offenses enumerated in the Ten Major Crimes Act when they are committed by an Indian in Indian country. Seymour v. Schneckloth, 1959, 346 P.2d





669, 55 Wash.2d 169, on remand 369 P.2d 309, reversed on other grounds 82 S.Ct. 424, 368 U.S. 351, 7 L.Ed.2d 346.

Under this chapter, an Indian ward, while residing on and being on and within exterior boundaries of his Indian reservation, is under exclusive jurisdiction of federal government in regard to all crimes recognized and made applicable to Indian country by Congress. State ex rel. Bokas v. District Court of Fifteenth Judicial Dist., In and For Roosevelt County, 1954, 270 P.2d 396, 128 Mont. 37.

Enrolled and allotted member of Indian tribe, residing on Indian reservation, who had never received a patent in fee of his allotment of land on reservation, was a ward of federal government under exclusive jurisdiction of federal government for all acts and crimes defined and made punishable by federal law, when committed within exterior boundaries of Indian reservation. Id.

Where enrolled and allotted member of Indian tribe, residing on reservation, who had never received patent in fee of his allotment of land on reservation, allegedly committed offense of forging and attempting to pass a check at store, located upon ground lying within organized and supervised Indian reservation but to which United States had ceded all right, title and interest, state court lacked jurisdiction of offense and exclusive jurisdiction was in federal court. Id.

**11. State and territorial jurisdiction—Generally**

Courts of the State of Washington had no jurisdiction to try an enrolled, unemancipated member of the Colville Indian Tribe for burglary, where land upon which burglary allegedly occurred was located within limits of the Colville Indian Reservation. Seymour v. Superintendent of Washington State Penitentiary, Wash.1962, 82 S.Ct. 424, 368 U.S. 351, 7 L.Ed.2d 346, on remand 369 P.2d 309.

The part of former section 548 of this title, relating to jurisdiction of crimes committed by Indians within any territory was enacted to transfer to the territorial courts, established by the general government, jurisdiction to try such crimes when sitting as, and exercising the functions of, a territorial court, and not while sitting for the trial of cases arising under the Constitution and laws of the United States. Ex parte Gonshay-ee, Ariz.1889, 9 S.Ct. 542, 130 U.S. 343, 32 L.Ed. 973. See, also, Ex parte Captain Jack, 1889, 9 S.Ct. 546, 130 U.S. 353, 32 L.Ed. 976.

Wisconsin state courts, in absence of legislation by Congress conferring jurisdiction upon them, have no jurisdiction of crimes committed by tribal Indians on Indian reservation. Application of Konaba, C.C.A.Wis.1942, 131 F.2d 737.

That accused was discharging his duties as Indian policeman when he committed the offense charged did not render him immune from prosecution in the state courts. Ex parte Tilden, D.C.Idaho 1914, 218 F. 920.

North Carolina court had jurisdiction over defendant, an enrolled, unemancipated member of Eastern Band of Cherokee Indians, with respect to crime of arson and felonious breaking and entry allegedly committed on Cherokee Indian Reservation and involving building owned by Cherokee Indian. In re McCoy, D.C.N.C.1964, 233 F.Supp. 409.

State of Oregon had jurisdiction of crime of murder committed by enrolled member of tribe of Indians residing on Indian reservation, although crime was committed within boundaries of such reservation. Anderson v. Gladden, D.C. Or.1960, 188 F.Supp. 666, affirmed 293 F. 2d 363, certiorari denied 82 S.Ct. 390, 368 U.S. 949, 7 L.Ed.2d 344.

Provisional, territorial and state courts of Oregon have always had jurisdiction over crime of murder committed within boundaries of governmental unit, such jurisdiction being limited only by congressional action in Indian affairs, and when Congress withdrew from that field, the impediment to state jurisdiction was removed. Id.

Where it appeared from record that Indian convicted in State court of assault with intent to commit murder allegedly committed crime in Indian Country, State court lacked jurisdiction to try Indian for that offense. Petition of Carmen, D.C.Cal.1958, 165 F.Supp. 942, affirmed 270 F.2d 869, certiorari denied 80 S.Ct. 375, 361 U.S. 934, 4 L.Ed.2d 355, rehearing denied 80 S.Ct. 585, 361 U.S. 973, 4 L.Ed.2d 553.

State courts had jurisdiction to administer state criminal law against a sojourning Indian, not a member of the tribe residing on Onondaga reservation, for a crime not within enumeration of major crimes in former section 548 of this title. People ex rel. Schuyler v. Livingstone, 1924, 205 N.Y.S. 888, 123 Misc. 605.

State had no jurisdiction to prosecute Indian ward of government charged with

Note 11

offense of burglary against property of Indian or another person committed within exterior limits of Red Lake Indian Reservation, regardless of nature of ownership or particular plot where offense occurred. State v. Lussier, 1964, 130 N.W.2d 484, 269 Minn. 176.

State courts have no authority to prosecute and punish one Indian for a crime committed against another on the reservation to which they each belong, so long as they maintain their tribal relations. In re Cross, 1886, 30 N.W. 428, 20 Neb. 417. See, also, State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219; State v. Columbia George, 1901, 65 P. 604, 39 Or. 127.

Under this section declaring that any Indian who commits any of 10 specified major crimes within Indian country shall be subject to same laws and penalties as all other persons committing any of the specified offenses, within exclusive jurisdiction of the United States, and shall be tried in the same court and in same manner as are all other persons committing any of the specified crimes within exclusive jurisdiction of the United States, assumption of jurisdiction in such cases by state district court conflicts with action of Congress in dealing with specified crimes committed by Indian within limits of Indian reservation. State ex rel. Irvine v. District Court of Fourth Judicial Dist. in and for Lake County, 1952, 239 P.2d 272, 125 Mont. 398.

In larceny prosecution, where evidence indicated that offense, if any, was committed, if at all, within the limits of an Indian reservation, the defendant, who was an Indian, was subject to applicable federal laws, and was under exclusive jurisdiction of the United States courts, and the state district court was without jurisdiction and its purported judgment was a nullity. State v. Pepion, 1951, 230 P.2d 961, 125 Mont. 13.

### 12. —— Offenses not committed within Indian country

A burglary committed by an Indian and a duly enrolled member of a tribe based on a reservation was not committed within "Indian country" within this section relating to exclusive jurisdiction even though crime was committed upon land which was included in original Indian reservation created by treaty, where the Indians had thereafter ceded such land to the public domain, and therefore state had jurisdiction. DeMarrias v. State of S. D., C.A.S.D.1963, 319 F.2d 845.

Where lands where full blooded Indian allegedly murdered full blooded Indian had originally been part of an Indian reservation, but Indians had ceded the lands to the United States subject to allotment in severalty to individual members of tribes, the lands lost their character as lands within an "Indian Reservation" within meaning of this section defining Indian country, and therefore federal District Court had no jurisdiction of murder prosecution. Tooisgah v. U. S., C.A.Okl.1950, 186 F.2d 53.

State courts have jurisdiction to punish an Indian for an offense committed off the reservation. People ex rel. Schuyler v. Livingstone, 1924, 205 N.Y.S. 888, 123 Misc. 605. See, also, State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219; State v. Little Whirlwind, 1899, 56 P. 820, 22 Mont. 425.

Rape committed by enrolled member of Indian tribe on land which had originally been included in parcel reserved by 1858 treaty to tribe but had been ceded and conveyed by tribe back to United States by treaty ratified and confirmed by 1894 Congressional Act did not occur in "Indian country" within statutory definition for purpose of applying this section, and state court had jurisdiction of prosecution for the offense. Wood v. Jameson, S.D.1964, 130 N.W.2d 95.

State court had jurisdiction of charge against enrolled Indian of burglary committed on non-Indian patented land within original exterior boundaries of reservation, but within the "opened" part of original reservation, rather than the "closed" portion. State v. De Marrias, 1961, 107 N.W.2d 255, 79 S.D. 1, certiorari denied 82 S.Ct. 72, 368 U.S. 844, 7 L.Ed. 2d 42.

State court had jurisdiction of prosecution of regularly enrolled tribal Indian for burglary committed on non-Indian patented land which, though located within original exterior boundaries of Indian reservation, had been ceded and conveyed to the United States by agreement with Indians and opened for settlement. Application of De Marria, 1958, 91 N.W.2d 180, 77 S.D. 294.

Unallotted lands within limits of Lake Traverse Reservation, which were ceded and conveyed to the United States by agreement with Indians, restored to the public domain and thereafter opened for settlement, came under the jurisdiction of state of South Dakota, but criminal jurisdiction over reserved or closed portion of reservation remained in tribal or federal courts. Id.





Note 14

The United States courts have not exclusive jurisdiction over an offense committed by one Indian against another Indian on an Indian allotment upon the public domain outside the boundaries of any reservation and within the limits of the state. Ex parte Moore, 1911, 133 N.W. 817, 28 S.D. 339.

State has jurisdiction over offenses committed by Indians without the bounds of "Indian country". Buckman v. State, 1961, 366 P.2d 346, 139 Mont. 630.

Crimes committed by Indians in territory which was once part of reservation but which had been sold to United States were within jurisdiction of state courts, not federal courts. Blackburn v. State, Wyo.1960, 357 P.2d 171, rehearing denied 357 P.2d 1111.

An Indian was subject to jurisdiction of state court for possession of peyote, if he was not under federal restriction, or if offense was committed on land to which United States has relinquished title. State v. Big Sheep, 1926, 243 P. 1067, 75 Mont. 219.

A state has jurisdiction of prosecution of Indian ward of government for misdemeanor committed on land to which United States had relinquished title. Id.

State courts have jurisdiction of crimes committed against whites, outside of an Indian reservation, by Indians maintaining tribal relations on a reservation within the state, in charge of the federal government. State v. Spotted Hawk, 1899, 55 P. 1026, 22 Mont. 33. See, also, State v. Little Whirlwind, 1899, 56 P. 820, 22 Mont. 425.

### 13. —— Offenses committed by non-Indians

Supreme Court of New York State had jurisdiction to punish a murder of one non-Indian committed by another non-Indian upon the Allegheny Reservation of the Seneca Indians, located within State of New York. People of State of N. Y. ex rel. Ray v. Martin, N.Y.1946, 66 S.Ct. 307, 326 U.S. 496, 90 L.Ed. 261.

The federal courts had no jurisdiction under former section 548 of this title of the prosecution of one white person for killing another white person. U. S. v. La Plant, D.C.S.D.1917, 200 F. 92.

Notwithstanding former section 548 of this title jurisdiction existed in state courts in which reservation was contained to punish persons other than Indians for offenses committed on a reservation, but not against person or property of an Indian. People ex rel. Schuyler v. Livingstone, 1924, 205 N.Y.S. 888, 123 Misc. 605.

Where former section 549 of this title, relating to Indian reservations in South Dakota, conferred jurisdiction on federal courts of offenses committed "by any person", but this section limited application to "any Indian", congressional intent was to restore jurisdiction as to offenses committed by non-Indians against non-Indians on Indian reservations to the courts of the state of South Dakota, as stated in revisor's note. State ex rel. Olson v. Shoemaker, 1949, 39 N.W. 2d 524, 73 S.D. 520.

Where South Dakota gave United States exclusive jurisdiction to punish all persons on any Indian reservation who should violate penal laws, and former section 549 of this title dealt with offenses committed by "any person", but this section limited application to "any Indian", and revisor's note stated that effect of revision was to deprive federal court of jurisdiction of offenses on Indian reservations by non-Indians against non-Indians and to restore such jurisdiction to courts of South Dakota, South Dakota had jurisdiction of murder prosecution of a non-Indian by a non-Indian within an Indian reservation. Id.

State court has jurisdiction as to manslaughter within Indian reservation, involving only white persons. State v. Monroe, 1929, 274 P. 840, 83 Mont. 356.

Jurisdiction of state courts over offenses committed by others than Indians on Indian reservations is not affected by the provision in the enabling act, providing that such lands shall remain under the absolute jurisdiction of Congress. Ex parte Crosby, 1915, 149 P. 989, 38 Nev. 389.

### 14. —— Offenses by Indians not sustaining tribal relations

An Indian who has taken land in severalty under the Dawes Act, sections 336, 348, and 349 of Title 25, and who has voluntarily taken up within the limits of the state his residence separate and apart from any tribe of Indians, and who has adopted the habits of civilized life, is amenable to the general criminal laws of the state, except where the Acts of Congress make the laws of the United States applicable. State v. Nimrod, 1912, 138 N.W. 377, 30 S.D. 239.

The Puyallup Indian reservation having been abandoned, the lands allotted to the Indians in severalty, and the tribe having abandoned its tribal organization, laws, habits, and customs, and the only parcel of reservation land retained

1880, 101 U.S. 235, 10 Otto. 235, 25 L.Ed. 615.

3. Court of claims jurisdiction

Statutes, extending the jurisdiction of the court of claims and permitting the government to be sued for causes of action therein referred to, will generally be strictly construed, and former sections 227 and 228 of Title 25 did not confer jurisdiction upon the court of claims over claims for the destruction, etc., of the property of individual Indians by white citizens and soldiers. Blackfeather v. U. S., Ct.Cl.1903, 23 S.Ct. 772, 190 U.S. 368, 47 L.Ed. 1099.

## § 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.

**Library references:** Indians ⇐31; C.J.S. Indians § 76.

### Historical Note

**Legislative History:** For legislative history and purpose of Act Aug. 15, 1953, see 1953 U.S.Code Cong. and Adm.News, p. 2399.

## § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within the Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water





rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958. Pub.L. 85-615, § 1, 72 Stat. 545.

### Historical Note

**1958 Amendment.** Subsec. (a). Pub.L. 85-615 gave Alaska jurisdiction over offenses committed by or against Indians in all Indian country within the Territory of Alaska.

**1954 Amendment.** Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

**Admission of Alaska as State.** Admission of Alaska into the Union was accomplished Jan. 3, 1959 upon issuance of Proc.No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub.L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

**Legislative History:** For legislative history and purpose of Act Aug. 15, 1953, see 1953 U.S.Code Cong. and Adm. News, p. 2399. See, also, Act Aug. 24, 1954, 1954 U.S.Code Cong. and Adm.News, p. 3171; Pub.L. 85-615, 1958 U.S.Code Cong. and Adm.News, p. 3347.

### Cross References

Amendment of State Constitutions to remove legal impediments and effective date thereof, see note set out under section 1360 of Title 28, Judiciary and Judicial Procedure.

Consent of U. S. to other States to assume jurisdiction, see note set out under section 1360 of Title 28, Judiciary and Judicial Procedure.

### Notes of Decisions



**Library references**

Indians ⇐38(2).
C.J.S. Indians §§ 16, 79.

**1. Constitutionality**

This section providing that certain states or territories shall have jurisdiction over offenses committed by or against Indians in areas of certain Indian country in such states or territories is valid. Anderson v. Gladden, D.C.Or.1960, 188 F. Supp. 666, affirmed 293 F.2d 463, certiorari denied 82 S.Ct. 390, 368 U.S. 949, 7 L.Ed.2d 344.

This section conferring jurisdiction over offenses committed by or against Indians in areas of certain Indian country to the states was not unconstitutional as an improper delegation of federal powers to the states. Anderson v. Britton, 1957, 318 P.2d 291, 212 Or. 1, certiorari denied 78 S.Ct. 999, 356 U.S. 962, 2 L.Ed.2d 1068.

# APPENDIX B

## Table 1.—Indian Population, Land, Education,

| States | Population | | | | | | Land (Acres) | |
|---|---|---|---|---|---|---|---|---|
| | Total Population (All races) 1970 Advanced Census Report | Indian Population | | | | | | |
| | | Total 1970 Census | Percent Indian | Federal Indian Areas March 1970 BIA | Percent State Responsibility | Federal Trust June 30, 1970 | | |
| | | | | | | Tribal | Allotted | State Reservation |
| U. S. Total or Number of States | 203,184,772 | 827,091 | .41 | 477,458 | 42.27 | 39,642,412.09 | 10,697,621.58 | 237,582.70 |
| Alabama | 3,444,165 | 2,514 | .07 | | 100. | | | |
| Alaska | 302,173 | 51,528 | 17.05 | 56,795 [2] | 0 [3] | 87,635.70 | 18,003.77 | |
| Arizona | 1,772,482 | 95,812 | 5.41 | 115,002 [2] | 0 [3] | 19,363,995.79 | 259,284.58 | |
| Arkansas | 1,923,295 | 2,041 | .11 | | 100. | | | |
| California | 19,953,134 | 91,018 | .46 | 6,984 | 92.33 | 460,927.73 | 75,405.65 | |
| Colorado | 2,207,259 | 8,836 | .40 | 1,764 | 80.04 | 750,110.64 | 4,969.50 | |
| Connecticut | 3,032,217 | 2,222 | .07 | | 100. | | | 804.00 |
| Delaware | 548,104 | 656 | .12 | | 100. | | | |
| Florida | 6,789,443 | 6,715 | .10 | 1,286 | 80.86 | 79,014.06 | | 104,800.00 [4] |
| Georgia | 4,589,575 | 2,455 | .05 | | 100. | | | |
| Hawaii | 769,913 | 1,126 | .15 | | 100. | | | |
| Idaho | 713,008 | 6,687 | .94 | 5,121 | 23.42 | 413,161.20 | 373,796.09 | |
| Illinois | 11,113,976 | 11,413 | .10 | | 100. | | | |
| Indiana | 5,193,669 | 3,887 | .07 | | 100. | | | |
| Iowa | 2,825,041 | 2,992 | .11 | 514 | 82.83 | 4,115.00 | | |
| Kansas | 2,249,071 | 8,672 | .39 | 2,594 | 70.09 | 1,966.49 | 24,484.57 | |
| Kentucky | 3,219,311 | 1,599 | .05 | | 100. | | | |
| Louisiana | 3,643,180 | 5,366 | .15 | 268 | 95.01 | 262.23 | | |
| Maine | 993,663 | 2,195 | .22 | | 100. | | | 22,600.00 |
| Maryland | 3,922,399 | 4,258 | .11 | | 100. | | | |
| Massachusetts | 5,689,170 | 2,376 | .08 | | 100. | | | 239.40 |
| Michigan | 8,875,083 | 16,854 | .19 | 1,026 | 93.92 | 7,875.51 | 8,242.19 | 120.00 |
| Minnesota | 3,805,069 | 23,128 | .61 | 11,023 | 52.34 | 682,731.51 | 51,977.20 | |
| Mississippi | 2,216,912 | 4,113 | .19 | 3,127 | 23.98 | 17,381.37 | 1.00 | |
| Missouri | 4,677,399 | 5,405 | .12 | | 100. | | 314.53 | |
| Montana | 694,409 | 27,130 | 3.91 | 22,592 | 16.73 | 1,791,862.62 | 3,355,988.99 | |
| Nebraska | 1,483,791 | 5,624 | .43 | 2,499 | 62.27 | 17,178.21 | 44,341.52 | |
| Nevada | 488,738 | 7,933 | 1.62 | 4,697 | 40.79 | 1,061,182.18 | 79,125.86 | |
| New Hampshire | 737,681 | 361 | .05 | | 100. | | | |
| New Jersey | 7,168,164 | 4,706 | .07 | | 100. | | | |
| New Mexico | 1,016,000 | 72,788 | 7.16 | 76,835 [2] | 0 [3] | 6,141,752.27 | 681,154.02 | |
| New York | 18,190,740 | 28,330 | .16 | | 100. | | | 103,719.00 |
| North Carolina | 5,082,059 | 43,487 | .86 | 4,766 | 89.04 | 56,433.57 | | |
| North Dakota | 617,761 | 14,369 | 2.33 | 13,948 | 2.93 | 151,697.41 | 692,227.02 | |
| Ohio | 10,652,017 | 6,654 | .06 | | 100. | | | |
| Oklahoma | 2,559,253 | 97,731 | 3.82 | 81,229 | 16.89 | 58,872.60 | 1,337,124.69 | |
| Oregon | 2,091,385 | 13,510 | .65 | 2,835 | 79.02 | 517,698.34 | 167,974.85 | |
| Pennsylvania | 11,793,909 | 5,533 | .05 | | 100. | | | |
| Rhode Island | 949,723 | 1,390 | .15 | | 100. | | | |
| South Carolina | 2,590,516 | 2,241 | .09 | | 100. | | | 600.00 |
| South Dakota | 656,257 | 32,365 | 4.86 | 29,707 | 8.21 | 2,041,086.41 | 2,693,543.29 | |
| Tennessee | 3,926,164 | 2,376 | .06 | | 100. | | | |
| Texas | 11,196,740 | 18,571 | .16 | | 100. | | .16 | 3,243.30 |
| Utah | 1,059,273 | 11,273 | 1.06 | 5,999 | 46.78 | 2,215,909.90 | 55,088.19 | |
| Vermont | 444,732 | 229 | .05 | | 100. | | | |
| Virginia | 4,648,494 | 4,904 | .11 | | 100. | | | 1,457.00 |
| Washington | 3,409,169 | 33,386 | .98 | 15,845 | 52.54 | 1,875,933.77 | 583,452.31 | |
| West Virginia | 1,744,237 | 808 | .05 | | 100. | | | |
| Wisconsin | 4,417,933 | 18,924 | .43 | 6,862 | 63.74 | 69,198.80 | 81,958.96 | |
| Wyoming | 332,416 | 4,980 | 1.50 | 4,140 | 16.87 | 1,777,428.84 | 108,117.94 | |
| Washington, D.C. | 756,510 | 956 | .13 | | 100. | | | |

[1] Number of States.
[2] Alaska, Arizona, and New Mexico show more Indians in Federal service area than the 1970 Census totals for the State. BIA has not had a chance to review all pertinent data and review its service population figures.
[3] Some Indians are undoubtedly in urban areas and not receiving service from BIA. Complete Census detail not yet available to determine the number.
[4] Florida has also committed another 143,620 acres for Indian use bordering on the state reservation. The State has also dedicated three small parcels of land along the Tamiami Trail.
[5] Some Chitimachas in Federal school, included in Mississippi total.
[6] Maine has State reservation schools for elementary pupils on the reservations. These totals are the only students that Maine funds specially because they are Indians. All other Indians in the State are in the public schools on the same financial basis as any other children. The Maine figure for "public schools" and "other schools" are not included in totals.
[7] Figures only for Eastern Cherokee; do not cover Lumbees, the most numerous Indian group, none of whom are eligible for Federal schools.
[8] Figures only for federally recognized groups. Other Indians are State or private responsibility.



## Law and Order and Other Services, 1970

| Special State Organization | Indian Education (5–18 year olds in school) | | | | | Law & Order (Jurisdiction) | | BIA | IHS |
|---|---|---|---|---|---|---|---|---|---|
| Indian Commission or Equivalent | Director or Coordinator | Director's Staff | Federal Schools | Public Schools | Other | Tribal | State | Federal | Agencies and Field Offices | Hospitals and Facilities |
| 17 [1] | 16 [1] | 14 [1] | 47,922 | 127,596 | 10,942 | 14 [1] | 45 [1] | 16 [1] | 28 [1] | 19 [1] |
| | | | All | All | | | X | | 9 | 16 |
| | | | 13,212 | 411 | | | X | X | 15 | 18 |
| X | X | 4 | 7,245 | 19,747 | 3,957 | X | | | | |
| | | | 17,824 | All | | | X | | 12 | 4 |
| | | | All | All | | | X | X | 3 | 1 |
| | Pt. Time | | 65 | 622 | 18 | X | X | | | |
| | | | All | All | | | X | | 2 | |
| | | | 124 | 258 | 0 | | X | | | |
| X | | | All | All | | | X | X | 2 | 3 |
| | | | 73 | 1,569 | 58 | X | X | | 2 | |
| X | | | All | All | | | X | | | |
| | | | All | 152 | 5 | | X | | 1 | 1 |
| | | | 61 | 1,196 | 0 | | X | | 2 | |
| X | X | | 44 | All [5] | | | X | | | |
| | | | All | All [5] | | | X | | | |
| | Comm. | 10 | | 121 [6] | 213 [6] | | X | | | |
| | | | All | All | | | X | | | |
| | | | All | All | | | X | X | 3 | 3 |
| X | X | 3 | 23 | 2,995 | 207 | X | X | X | 1 | 1 |
| X | X | 3 | 1,237 | 263 | 14 | | X | | | |
| | | | All | All | | | X | X | 10 | 8 |
| | | | All | 8,274 | 939 | X | X | | 17 | |
| X | X | 2 | 769 | 737 | 92 | | X | X | 1 | 2 |
| X | X | 1½ | 44 | 1,675 | 20 | X | X | | | |
| X | X | 2 | 125 | All | | | X | | | |
| | | | All | All | | | X | X | 13 | 12 |
| X | X | 2 | 8,733 | 20,377 | 1,855 | X | X | | 1 | 1 |
| X | X | 4 | All | 533 [7] | 32 | X | X | X | 1 | 3 |
| | | | 1,155 | 3,409 | 1,119 | X | X | | 51 | |
| X | X | 2 | 3,459 | All | | | X | X | 24 | 15 |
| | | | All | 35,278 | 89 | X | X | | 4 | 2 |
| X | X | 3 | 1,102 | 1,200 | 47 | X | X | X | | |
| | | | 55 | All | | X | X | | | |
| | | | All | All | | | X | X | 8 | 10 |
| X | X | 2 | 4,347 | 5,167 | 1,553 | X | X | | | |
| | | | All | All | | | X | X | 1 | |
| X | X | 25 | All | All | | | X | | 2 | 1 |
| X | X | 4 | 1,023 | 1,407 | 101 | X | X | X | | |
| | | | All | All | | | X | | | |
| | | | 334 | 6,537 | 242 | X | X | X | 6 | 4 |
| | | | All | All | | | X | X | | |
| | | | 1,047 [8] | 1,041 | 183 | X | | | 1 | 1 |
| X | | | 80 | 1,041 | | | X | | 1 | |
| | | | | | | | | Total | 133 | 103 |

Federal trust land as of June 30, 1970, from Annual Report of Indian Land, BIA.
State reservation land figures from the States concerned.
Special State organization from answers to GIC questionnaire by the States.
Indian Education statistics from "Statistics Concerning Indian Education" Fiscal Year 1970, BIA. (Figures do not total as Winnebago omitted from source and included here). Figures do not cover all Indians in public schools even in States listed, but are only figures reported by BIA.
Law and Order jurisdiction from information compiled by Branch of Judicial Prevention and Enforcement Services, BIA, by telephone conversation with areas, June 1970.
BIA agencies, BIA Directory, October 1970 (includes area-wide offices, Indian agencies, independent Irrigation districts, independent boarding schools, field employment assistance offices, industrial development offices.) Does not include over 200 schools under supervision of agencies. Does include Sherman, Phoenix, Haskell, Carter Seminary, Seneca Indian School, Chemawa, Chilocco, Riverside, Eufaula, Jones Academy, in the above count.
For example, there are 69 BIA schools in Alaska and only Mt. Edgecumbe and Wrangell schools are included
Indian Health Service Hospitals and facilities, from information submitted by IHS.

## APPENDIX

### Jurisdictional Allocation and the Effect of Public Law 280

The following list, which is a partial listing of the many possibilities involved, is offered for illustrative purposes only to indicate how the variables in a specific case can be used to determine the selection of the proper court for jurisdictional purposes:

| Defendant | Victim | Type of Offense | Locus of Crime | Court |
|---|---|---|---|---|
| Indian | Indian | Misdemeanor, tribal | Reservation | Tribal |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Indian | Non-Indian | Misdemeanor, tribal | Reservation | Tribal |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Non-Indian | Indian | Misdemeanor, tribal | Reservation | Tribal** |
| " | " | Misdemeanor, state | Off Reservation | State |
| " | " | Misdemeanor, federal | Reservation | Federal |
| " | " | Misdemeanor, federal | Off Reservation | Federal |
| " | " | "Major Crime" (18 U.S.C. § 1153) | Reservation | Federal* |
| " | " | Felony, state | Off Reservation | State |
| " | " | Felony, federal | Off Reservation | Federal |
| Non-Indian | Non-Indian | Misdemeanor, tribal | Reservation | Tribal** |
| " | " | Misdemeanor, federal | Reservation | Federal |
| " | " | Felony, state | Reservation | State*** |
| " | " | Felony, federal | Reservation | Federal |

*Assuming state has *not* assumed valid jurisdiction over the reservation. In the event the United States declines to prosecute, the cases are sometimes referred back to tribal court. There is divergence of opinion on the legality of this procedure. In most cases, when the United States Attorney declines to prosecute no further action is taken. If tribal court action may properly be taken, the charge must be reduced consistent with the tribal law and order code and the Indian Civil Rights Act of 1968.

**Assuming tribal law and order permits jurisdiction over non-Indian offenders.

***Assuming state *has* assumed valid jurisdiction over reservation.

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