

# **Criminal Jurisdiction, Tribal Courts and Public Defenders**

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The impetus for this presentation is the establishment of the Tribal Court Criminal Defense Clinic by the University of Washington School of Law and its Native American Law Center. The Clinic is the public defender for the Tulalip Tribes of Washington. Eight students take the year long clinic and after ten weeks of preparation are appointed as counsel to defendants in tribal court prosecutions under the supervision of the clinic director. The joint effort of the Tribes and the School of Law is a direct product of the Indian self-determination era and reflects the Tribes' decision to increase their law enforcement and tribal court capacity. The hope is to develop a defender system as part of a justice system that is not just focused solely on administering a criminal code and trying cases, but instead is part of the growing effort to deal with the underlying causes of criminal activity. This essay outlines: basic principles of federal Indian law and criminal jurisdiction within Indian country; the history of the right to counsel in criminal matters in general and within tribal courts; and, the defender program operated by the School of Law at the Tulalip Reservation.

## **I. BACKGROUND PRINCIPLES OF FEDERAL INDIAN LAW**

The Supreme Court's rulings in three cases, known as the Marshall Trilogy, set the foundation for the development of federal Indian law.<sup>2</sup> *Worcester v. Georgia* was the capstone of the trilogy and a case in which the State of Georgia had imprisoned Sam Worcester for violating a state law that made it illegal for non-Indians to reside within the Cherokee territory without a state permit. Chief Justice Marshall's majority opinion for the Supreme Court rejected Georgia's claim of authority and explained the status of Indian tribes under international and federal law in the following terms:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. . . . 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

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right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.<sup>3</sup>

This hard and fast rule precluding state jurisdiction within Indian country<sup>4</sup> has been modified over the years through Court decisions and federal statutes. In 1973 the Supreme Court noted that:

The status of the tribes has been described as an anomalous one and of complex character, for despite their partial assimilation into American culture, the tribes have retained a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.<sup>5</sup>

The complexity has come in part because Congress has exercised its broad power over Indian affairs in wildly divergent ways over the course of United States history.<sup>6</sup>

For example, one of the first Acts of Congress was the Indian Trade and Intercourse Act of 1790, which secured tribal lands from state or private party acquisition without the consent of the United States Congress.<sup>7</sup> This protective measure, however, was soon augmented by a contradictory federal effort in the 1820s to “relocate” Indian tribes from the East to the Oklahoma Territory and other parts of the West.<sup>8</sup> The Indian removal statutes were supplemented by treaty negotiations with western tribes to achieve peaceful relations with the tribes and perhaps more importantly, cessions of vast areas for land hungry settlers. In exchange, the United States agreed to recognize permanent homelands and often recognized off-reservation hunting and fishing rights.<sup>9</sup> Most of the “permanent” homelands promised in treaties, however, were dramatically reduced in size when non-Indian settlers clamored for land previously “guaranteed” by treaty.<sup>10</sup> There were frequent allegations by tribes of fraud on the part of the United States in negotiation or implementation of the treaties.<sup>11</sup> Congress ended treaty-making with tribes in 1871 when the House of Representatives refused to appropriate funds to implement existing treaties unless the Senate agreed that it would no longer participate in the treaty process with tribes.<sup>12</sup> Thereafter, Congress more frequently legislated to change the jurisdictional rules when it saw fit,<sup>13</sup> or when it disagreed with Supreme Court decisions.<sup>14</sup> Major congressional acts were adopted without even the veneer of consultation, much less agreement that surrounded many of the treaties.<sup>15</sup> But Congress was not uniformly bent on the destruction of

Indian tribes in the post-treaty era. The devastating effects of the Dawes Act were repudiated when Congress passed the Indian Reorganization Act (IRA) in 1934.<sup>16</sup> The IRA was intended to strengthen tribal governments and to ensure permanent protection for the remaining Indian land base.<sup>17</sup> To that end, it offered tribes the opportunity to reorganize their governmental structure pursuant to federally approved constitutions, and stopped the process of allotment. Not long after passage of the IRA, Congress again reversed course and called for the termination of a number of tribes.<sup>18</sup> The termination policy was accompanied by the adoption of Public Law 280, which authorized (and in some instances required) states to extend their jurisdictional reach into Indian country. In response, Indian tribes organized on a national level to fight for their political existence, which caused the abandonment of the termination policy by the early 1960s.<sup>19</sup> President Nixon's dramatic message to Congress in 1970 announced the policy of self-determination without termination. Congress followed suit by adopting the Indian Self-Determination Act of 1975,<sup>20</sup> which revived the pro-sovereignty spirit of the IRA. The Indian Self-Determination Act reflects congressional repudiation of the termination era and strong support for Indian tribes that continues to prevail among Congress and the Executive Branch today.<sup>21</sup>

## II. THE MODERN ERA

Despite the frequent assaults on tribal sovereignty by the Congress and the Executive Branch from *Worcester v. Georgia*<sup>22</sup> to the present, tribes have maintained their status as distinct political communities with powers of self-government, "not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."<sup>23</sup> The "modern era" in Indian law commenced in 1959, when the Supreme Court relied on the rule of *Worcester v. Georgia* to hold that disputes over debts incurred on an Indian reservation must be heard in tribal court, *i.e.* state court jurisdiction would not be allowed.<sup>24</sup> The Court's ruling was the first of many in which tribes and their members maintained their insulation from state judicial and regulatory jurisdiction.<sup>25</sup>

When tribal lands are involved, the Supreme Court has frequently (and recently) affirmed that Indian tribes exercise governmental powers "not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."<sup>26</sup> Applying this reasoning, the Court upheld the taxing authority of the Jicarilla Apache Tribe and the Navajo Nation over non-Indian corporations doing business on tribal lands.<sup>27</sup> The Court echoed *Worcester v. Georgia* and relied on the seminal opinion regarding the authority of Indian tribes, which noted that tribes possess inherent powers, including "the power of taxation [which] may be exercised over members of the tribe and over nonmembers."<sup>28</sup> In *New Mexico v. Mescalero Apache Tribe*,<sup>29</sup> the

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Court relied on these same principles to uphold tribal regulatory authority to regulate non-Indian hunting and fishing on the Mescalero Apache reservation. The Court struck down conflicting state regulations, noting that “State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.”<sup>30</sup>

### III. CRIMINAL JURISDICTION IN INDIAN COUNTRY

While a detailed discussion of federal jurisdiction over criminal matters within Indian country is beyond the scope of this essay, it is useful to paint the history of criminal jurisdiction within Indian country with a broad brush.<sup>31</sup> That history is consistent with the general rule that state law, and even federal law, is not applicable to tribes and their members within Indian country absent Treaty provision or express congressional action.<sup>32</sup>

The earliest treaties proceeded on the assumption that Indian tribes had the authority to punish both Indian and non-Indian offenders.<sup>33</sup> The Trade and Intercourse Act of 1790 marked the beginning of a limiting trend in both treaties and statutes by providing that citizens (non-Indians) who committed crimes against Indians would be punished as provided by the law of the “state or district to which he or they may belong.”<sup>34</sup> The General Crimes Act (also known as the Indian Country Crimes Act) asserted federal jurisdiction over crimes committed by either Indians or non-Indians in the Indian country.<sup>35</sup> The statute does not apply, however, to “offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe[.]”<sup>36</sup>

In the late nineteenth century, Congress inserted itself for the first time into intra-tribal criminal disputes following the Supreme Court’s ruling in *Ex Parte Crow Dog*.<sup>37</sup> A Lower Brule Sioux Indian, Crow Dog, killed Spotted Elk in a dispute of murky political origin on the Great Sioux Reservation in the Dakota Territory.<sup>38</sup> The families of the two subsequently settled the matter according to tribal law.<sup>39</sup> However, the United States was determined to prosecute Crow Dog under federal law as a test case and as part of the assimilation movement that favored increased non-Indian control over Indians in Indian country.<sup>40</sup> The Supreme Court held the United States had no authority to prosecute an Indian for the murder of another Indian within an Indian reservation. The Court reasoned that although tribes were subject to federal authority, to find federal jurisdiction “requires a clear expression of the intention of congress, and that we have not been able to find.”<sup>41</sup> Congress promptly responded to

*Ex Parte Crow Dog* by adopting the Major Crimes Act, which defined certain Indian versus Indian crimes as federal offenses.<sup>42</sup> The legal landscape respecting criminal jurisdiction remained fairly static until the adoption of Public Law 280 in 1953.<sup>43</sup> That statute provided several states with general criminal jurisdiction over Indian country and offered such jurisdiction to other states.<sup>44</sup>

In *Oliphant v. Suquamish Indian Tribe*<sup>45</sup> the Supreme Court held, for the first time in 150 years, that incorporation of tribes into the United States deprived the tribes of an inherent governmental power.<sup>46</sup> Although loss of criminal jurisdiction over non-Indians was a significant blow, more damaging was the fact that the Court *implied* loss of inherent tribal authority over non-Indians as it was said to be “inconsistent with their status.”<sup>47</sup> This divestment of tribal criminal jurisdiction over non-Indians was followed by the decision in *Duro v. Reina*,<sup>48</sup> which held that Indian tribes similarly lacked authority to prosecute Indians not members of the governing tribe. Congress promptly restored that jurisdiction when it amended the Indian Civil Rights Act in 1990 to define powers of tribal self-government to include jurisdiction to prosecute non-member Indians in tribal court.<sup>49</sup>

#### IV. THE RIGHT TO COUNSEL

The Indian Civil Rights Act provides that Indian tribes may not “deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense.”<sup>50</sup> The provision was included as part of the comprehensive Civil Rights Act of 1968, and was characterized by its chief sponsor “as an effort on the part of those who believe in constitutional rights for all Americans to give ‘the forgotten Americans’ basic rights which all other Americans enjoy.”<sup>51</sup> The underlying assumption of North Carolina Senator Sam Ervin’s effort to provide constitutional rights for individual Indians was that tribal governments were either not capable, or unwilling to provide, what non-Indian politicians perceived as fairness or justice in the treatment of tribal members and non-members.<sup>52</sup>

While the right to counsel provided to defendants in tribal court proceedings is similar to the right of those subject to federal or state prosecutions, it is not identical. A defendant’s right “to have the assistance of counsel for his defense” in federal prosecutions is guaranteed by the Sixth Amendment to the United States Constitution. The Amendment has been interpreted to mean that if an accused “is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.”<sup>53</sup> In other words, the federal government is obligated to provide counsel at the government’s expense for indigent defendants. States are similarly required to provide the accused with counsel when a defendant

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lacks the financial resources to hire his or her own attorney.<sup>54</sup> The rationale for insisting that states, like the federal government, be required to provide appointed counsel was persuasively stated in *Powell v. Alabama*:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>55</sup>

The Court in *Gideon v. Wainwright* viewed the provision of appointed counsel in criminal cases to be so important that it constitutes a fundamental right made applicable to the states through the due process clause of the Fourteenth Amendment.<sup>56</sup> If the right is so uniformly regarded as crucial, why did Congress choose not to mandate the provision of appointed counsel for indigent defendants in tribal court prosecutions when it adopted the Indian Civil Rights Act? The version of the Indian Civil Rights Act that became law was, for the most part, a substitute bill drafted by the Department of the Interior.<sup>57</sup> The Interior Solicitor described the assistance of counsel provision of the proposed bill as follows:

We have specified that the assistance of counsel will be provided at the expense of the Indian defendant. There are several reasons for this. One is that there are no attorneys on the reservations, neither prosecuting attorneys nor defense attorneys, and there would be no bar over which the court has jurisdiction from which it could select attorneys and over which it would have authority to say to an attorney, 'You must represent this litigant.' Accordingly, until a situation obtains where lawyers would be available, we think that it should not be required that the Indian tribes provide defense counsel.<sup>58</sup>

The great expense to the tribes of providing attorneys in all cases was also an important factor, but from the Interior Department's perspective there was perhaps even greater concern that the financial burden would fall on the Bureau of Indian

Affairs – to fund both prosecutors and defenders in order to ensure balance in representation.<sup>59</sup> In any event, there does not appear to be any significant effort to force tribes to provide public defender services by amendment to the Indian Civil Rights Act.<sup>60</sup>

Criminal activity within Indian country may subject an individual to federal or state prosecution, but Tribes retain concurrent jurisdiction to prosecute and impose punishment when the defendant is an Indian.<sup>61</sup> Because tribes are separate sovereigns, dual prosecutions do not implicate the double jeopardy clause.<sup>62</sup> The federal government, or a state government may not assert its authority to prosecute some cases due to lack of resources. A tribe may wish to prosecute offenders in order to assert its independent authority and also ensure that local residents are witness to the tribe's exercise of governmental power. This is true especially when an offense is a serious felony that would normally subject a defendant to significant punishment.<sup>63</sup> Moreover, Congress and the Executive branch have encouraged tribes to greatly increase their law enforcement capacity in recent years and tribes have eagerly taken on the increased responsibility.<sup>64</sup> More police officers means that there are more arrests and more arrests means that there are more defendants who need and want defense counsel.<sup>65</sup> At the same time, Indian tribes generally do not wish to merely mimic state and federal justice systems. This is a recurrent theme in the area of *tribal law*,<sup>66</sup> that is, how to maintain tribal values in the face of non-Indian values that bombard tribal life and institutions in subtle and not so subtle ways.

## **V. CONCLUSION: THE TULALIP MODEL**

The Tulalip Indian Reservation is located 25 miles north of Seattle, Washington and was established pursuant to the Treaty of Point Elliot for the exclusive use and occupancy of the Tribes and bands that ceded lands in the treaty.<sup>67</sup> Article 6 of the Treaty authorized the allotment of the reservation into individual parcels of land, which were subsequently conveyed to non-Indians on a broad scale.<sup>68</sup> As a consequence of the allotment process, approximately 11,000 of the reservation's 22,000 acres are held in trust for the Tribes and individual members, while the other half of the reservation is owned in fee simple by tribal members and nonmembers alike.<sup>69</sup> Approximately 20% of the reservation's ten thousand residents are tribal members.

Pursuant to Public Law 280,<sup>70</sup> the State of Washington in 1958 assumed full criminal jurisdiction over the Reservation.<sup>71</sup> A result of the State's assertion of criminal jurisdiction was the displacement of the United States as the primary law enforcement agency on the reservation.<sup>72</sup> Over time, the Tribes and their members became increasingly dissatisfied with the manner in which the State carried out its law enforcement duties. With the advent of the self-determination era and better economic

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fortunes, the Tribes began developing the government infrastructure to handle criminal matters internally. In 1995, the State of Washington passed legislation authorizing the retrocession of the criminal jurisdiction previously assumed by the State. The Secretary of the Interior accepted the offer of retrocession in 2000.<sup>73</sup> With the State no longer enforcing its criminal laws against Indians in most areas, the Tribes have developed a full-blown criminal justice system to maintain law and order on the reservation.<sup>74</sup> The tribal criminal code extends to criminal offenses ranging from homicide, kidnapping and assault to drug offenses and negligent driving.<sup>75</sup>

In response to a proposal from the Tulalip Tribes, the University of Washington School of Law created a Tribal Court Criminal Defense Clinic to provide representation to low-income defendants charged with crimes on the Tulalip Indian Reservation. The Clinic began taking cases in July of 2002 and by May of 2003 had represented nearly 100 clients on over 160 charges. The Clinic operates on a three quarter basis, with the students spending Fall quarter in class, learning advocacy skills and law specific to the Tulalip Tribes. The eight students in the Clinic are assigned cases from January through the first week of June. The Clinic Director, who is required to be present with the students at all hearings, supervises them closely. The Clinic Director handles all cases not assigned to Clinic students. The tribal government now has a place to refer individuals who might otherwise seek individual assistance by petitioning their government on a case-by-case basis. Most defendants would likely proceed without representation in tribal court proceedings, which would work to their detriment and might also clog the court system with *pro se* defendants ill-prepared to navigate the court system.

The number of cases that went to trial in the first year was less than expected, predominantly due to the flexibility allowed by the prosecution in structuring plea offers that address the alcohol or drug related problems faced by the vast majority of the criminal defendants. This focus on treatment versus punitive jail sentences is much more palatable to the defendants and makes them less willing to take the risks of a trial.<sup>76</sup>

While the Clinic Director and student practitioners fill an important need in the Tribes' justice system, they are careful to avoid the temptation to simply replicate the non-Indian criminal defense model. One way that the clinic is seeking to develop and maintain a "tribal" identity is by working with the prosecutor's office and the tribal government's human services departments to ensure that the focus is not on whether an individual is punished, but on dealing with the root causes of criminal activity. It is well known that the root cause of criminal activity can often be found in addiction to drugs and/or alcohol. Continued discussions and collaboration with the tribal government, prosecutor and community will help develop approaches to deal with the causes of crime and improve the lives of all connected with the reservation. The end is not simply to avoid conviction, but to assist clients in improving their lives and thereby

improve reservation life. The clinic has the added value of introducing law students to criminal law, tribal law, trial advocacy and one aspect of life on an Indian reservation, while providing a valuable service to individuals and the justice system.

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**Notes**

1. Robert T. Anderson is an Assistant Professor of Law at the University of Washington School of Law. He is also the Director of the Native American Law Center. He is a former Associate Solicitor for Indian Affairs; Counselor to the Secretary of the United States Department of the Interior; and Senior Staff Attorney for the Native American Rights Fund.
2. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) were the first two of the three cases. In *Johnson*, the Court held that transfers of fee title by an Indian tribe were valid only if approved by the federal government, while in *Cherokee Nation* the Court held that the Cherokee Nation was not a "foreign Nation" for purposes of the Court's original jurisdiction under Article III of the Constitution.
3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-61 (1832). For criticism of the foundations of Indian law, see Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).
4. "Indian country" is defined at 18 U.S.C. § 1151 (2003) and consists of reservations, allotments and dependent Indian communities. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998) (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).
5. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973) (internal citations omitted).
6. Congress's power over Indian affairs is rooted in the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. For a history of federal Indian policy, see generally, Felix Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* at 47-207 (Michie 1982).
7. 1 Stat. 137 ch. 33 (1790). The Act was temporary, but was continued in various forms and is now codified at 25 U.S.C. § 177 (2003).
8. Ch. 148, 4 Stat. 411-12 (1830), See Francis Prucha, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834* at 224-28 (1962).
9. See, e.g., *Washington State v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
10. See *United States v. Sioux Nation*, 448 U.S. 371, 375-76 (1980).
11. See Francis Prucha, *AMERICAN INDIAN TREATIES 173-74* (1994).
12. Act of March 3, 1871 ch. 120, (codified at 25 U.S.C. § 71).
13. See *General Allotment Act of 1887 (Dawes Act)*, ch. 119 24 Stat. 388 (1887).
14. See *Major Crimes Act*, 18 U.S.C. § 1153 (2003) (discussed at note 42, *infra.*).
15. See Frank Pommersheim, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY*

- TRIBAL LIFE at 15-23 (1995).
16. *See* 25 U.S.C. §§ 461- 479.
  17. “The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. *See* 48 Stat. 984, 25 U.S.C. § 461 *et. seq.* (2003). Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. *See* 25 U.S.C. §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, *see* 25 U.S.C. § 463, and for acquiring, on behalf of the tribes, lands "within or without existing reservations." 25 U.S.C. § 465.” *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 255 (1992).
  18. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) (directing the Secretary of the Interior to recommend tribes for termination).
  19. *See* Stephen Cornell, THE RETURN OF THE NATIVE 123-24 (1988).
  20. 25 U.S.C. § § 450-450n, 455-458e.
  21. In 1994 Congress again affirmed the sovereign status of tribes when it directed the Secretary of the Interior to publish in the Federal Register a list of all Indian tribes recognized by the United States as political entities with a “government to government relationship with the United States.” 25 U.S.C. § 479a-1. In so doing, Congress explicitly recognized the sovereignty of Indian tribes. Pub. L. 103-454, § 103(2). The Secretary of the Interior’s most recent publication of that list notes that: “The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.” 67 C.F.R. 46,328 (July 12, 2002). In other words, any listed tribe is acknowledged to possess inherent powers of self-government.
  22. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).
  23. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978); *see* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW 232 (Michie 1982). Congress has also delegated its authority to Indian tribes in some circumstances. Examples include the Indian liquor laws, 18 U.S.C. 1152 (2003); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (2003); the Clean Water Act, 33 U.S.C. 1251-1377 (2003). *See* *United States v. Mazurie*, 419 U.S. 544 (1975) (liquor); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (air pollution); and *cf.* *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) and *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (administration of Clean Water Act delegated to tribes if tribe demonstrates inherent authority under common law test).
  24. *Williams v. Lee*, 358 U.S. 217 (1959); *see* Charles F. Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW (1987) (describing the “modern era” as commencing with the Court’s decision in *Williams v. Lee*).
  25. *See, e.g.*, *Minnesota v. Mille Lacs Band of Lake Superior Chippewa Indians*, 526 U.S. 172 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); and *Fisher v. District Court*, 424 U.S. 382 (1976).
  26. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978).
  27. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Nation*, 471 U.S. 195, 198 (1985).
  28. *Powers of Indian Tribes*, 55 I.D. 14, 46 (Oct. 25, 1934); *see also* Felix Cohen, HANDBOOK OF

- FEDERAL INDIAN LAW 123 (1941).
29. 462 U.S. 324 (1983).
  30. *Id.* at 334. Tribal authority over non-Indians has been a more complex area and one where the Supreme Court seems to have reversed the presumption of continued tribal autonomy in favor of a rule limiting tribal authority over non-Indians on non-tribal land within reservations. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). For criticism of the trend, *see* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); and *Rulings of the United States Supreme Court affecting Tribal Government Powers and Authorities, Hearing Before Senate Comm. on Indian Affairs*, 107th Cong. 2d Sess. (testimony of Professor David Getches, Professor Robert Anderson, and Honorable William C. Canby, Jr.).
  31. "Indian country" includes reservations, allotments and dependent Indian communities. 18 U.S.C. § 1151 (2003). *See* note 3, *supra*. *See generally*, Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).
  32. *See* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 at 953-62 (1975).
  33. *Id.* at 953-54.
  34. 1 Stat. 137, 138. This had the effect of excluding Indian defendants since Indians were not generally granted citizenship until 1924.
  35. Act of March 3, 1817, 3 Stat. 383. The Act is now codified at 18 U.S.C. § 1152 (2003) ("Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.").
  36. 18 U.S.C. § 1152. In *United States v. McBratney*, 104 U.S. 621 (1882), the Supreme Court held that states, and not the federal government, have jurisdiction over crimes by on non-Indian against another on-Indian. *Cf.* *United States v. Rogers*, 45 U.S. 567 (1846) (tribal member who was a non-Indian also subject to state criminal jurisdiction).
  37. 109 U.S. 556 (1883).
  38. *See* Sidney L. Harring, *CROW DOG'S CASE* at 108-110 (1994).
  39. *Id.*
  40. *Id.* at 118.
  41. *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883).
  42. The Major Crimes Act is codified at 18 U.S.C. § 1153, and provides: "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the

- time of such offense.”
43. Public Law 93-20, 67 Stat. 588 (1953). A detailed discussion of the statute is contained in Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).
  44. Section 2 of Pub. L. 280, 18 U.S.C. § 1162 (2003), provides: "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: [table omitted]." See *State of Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Other similar statutes are discussed in *Negonsett v. Samuels*, 507 U.S. 99 (1993). The State's jurisdiction could be "retroceded," or turned back, to the United States pursuant to 25 U.S.C. § 1323 (2003), which was adopted in 1968 as part of the Indian Civil Rights Act.
  45. 435 U.S. 191 (1978).
  46. The Court's adoption of the European Doctrine of Discovery in the Marshall Trilogy carried with it the notion that upon "discovery" Indian tribes lost: 1) their authority to engage in diplomatic relations with any but the discovering nation, *i.e.*, their external sovereignty; and 2) the ability to convey full fee title to land to any but the discovering nation, or its successor. *Worcester v. Georgia*, 31 U.S. 515, 581-82 (1832).
  47. 435 U.S. at 208. For criticism of the Court's rationale, see Phillip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1, 34-39 (1999); and David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1595-99 (1996).
  48. 495 U.S. 676 (1990).
  49. In 25 U.S.C. § 1302, Congress defined "powers of self-government" to mean: "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; *and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.*" (emphasis added). See H.R. Conf. Rep. No. 102-261, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 379, 379 ("[T]his bill recognizes an inherent tribal right which always existed. It is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away."); Newton, *Permanent Legislation To Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992); and Alex Skibine, *Duro v. Reina and the Legislation That Overturned It: A Powerplay of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993). Whether a tribe exercising criminal authority over non-member Indians is now exercising inherent versus delegated power is the subject of the split between the Eighth and Ninth Circuit Courts of Appeal. Compare *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*) (inherent power confirmed by Congress); *with*, *United States v. Lara*, 324 F.3d 635 (8th Cir. 2002) (*en banc*) cert. granted, 72 U.S.L.W. 3234 (U.S. Sept. 30, 2003) (No. 03-107) (delegated power from Congress).
  50. 25 U.S.C. § 1302 (6) (2003).
  51. S. Rep. No. 90-721, at 33 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1837, 1867. It is worthy to note

- that Senator Ervin's avowed concern of the protection of individual Indian rights is contained as part of his statement of additional views aimed in most part against passage of the Civil Rights Act of 1968. Pub. L. No. 90-284, 82 Stat. 73.
52. See Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).
  53. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1934).
  54. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
  55. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).
  56. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).
  57. Burnett, *supra* note 52, at 602 n. 239.
  58. See Protect the Constitutional Rights of American Indians Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S.968, and S.J. Res. 40, Before the Senate Subcommittee on Constitutional Rights, 89th Cong., 1st Sess. 21 (1965), *quoted in*, *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976).
  59. See Burnett, *supra* note 52, at 559. In recent years, the federal government has spent a great deal of money and effort to support and fund tribal courts and tribal law enforcement efforts, but there is little evidence of any concern on the part of Congress respecting the rights of defendants and any "imbalance" caused by funding tribal prosecutors. See *The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights* at 73 (June 1991) (recommending increased funding for tribal justice systems to allow for public defender services).
  60. See Vincent C. Milani, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279 (Summer 1994).
  61. See *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (Major Crimes Act does not displace tribal jurisdiction); *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990) (State assumption of jurisdiction under P.L. 280 does not divest tribe of criminal jurisdiction). See also *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (P.L. 280 does not divest tribes of concurrent civil jurisdiction).
  62. *Wheeler*, 435 U.S. 313. While the exercise of tribal jurisdiction is no longer in doubt, see *supra* text accompanying note 49 discussing split between circuits on issue of whether the source of tribal jurisdiction over non-member Indians is an inherent power or one delegated by Congress.
  63. The Indian Civil Rights Act provides that tribes may not "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both." 25 U.S.C. § 1302 (7) (2003).
  64. There were 171 tribal law enforcement agencies employing nearly 3500 employees in 2000. U.S. Dept. of Justice, Office of Justice Programs, *Tribal Law Enforcement*, 2000 (Jan. 2003). The Justice Department is seeking to collaborate with and support tribal criminal justice infrastructure. Kim Baca, *The Changing Federal Role in Indian Country*, Nat'l Inst. of Justice J. Apr. 2001.
  65. The number of inmates in tribal custody grew by twenty-nine percent between 1998 and 2001. Contemporary Tribal Governments: Challenges in Law Enforcement Related to Rulings of the United States Supreme Court, Hearings before the Senate. Comm. on Indian Affairs, 107th Cong. 2d Sess. (Testimony of Tracy Toulou at 5); U.S. Dept. of Justice, Office of Justice Programs, *Jails in Indian Country* (May 2002).
  66. Tribal law is distinct from federal Indian law. The latter consists of the web of treaties, federal common law and statutory law that defines the status and relations of Indian tribes, Indians and non-

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- Indians, the states and the federal government.
67. Treaty of Point Elliott, 12 Stat. 927, art. 2 (Jan. 22, 1855). “Tulalip is a place where the government set up a reservation for the Snohomish, Snoqualmie, Skykomish, and other allied tribes and bands signatory to the Treaty of Point Elliott.” The Tulalip Tribes Cultural Resources Department (2003), at [http://www.tttculturalresources.org/historical\\_records/faq.asp](http://www.tttculturalresources.org/historical_records/faq.asp).
  68. Treaty of Point Elliott, 1855, 12 Stat. 2241, art. 6.
  69. *Gobin v. Snohomish County*, 304 F.3d 909, 911 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1488 (2003).
  70. *See supra* text accompanying note 44.
  71. *See* *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).
  72. State assumption of criminal jurisdiction pursuant to Public Law 280 does not divest a tribe of concurrent criminal jurisdiction.
  73. 65 Fed. Reg. 75,948 (Dec. 5, 2000). The retrocession took effect on November 21, 2001. 65 Fed. Reg. 77,905 (Dec. 13, 2000).
  74. The Supreme Court upheld Washington’s piece-meal assumption of jurisdiction in *Yakima Indian Nation*, 439 U.S. 463 (1979). The Tulalip Tribes had requested full state jurisdiction under P. L. 280 in 1958. The State retains jurisdiction over some criminal matters on the reservation. See RCW § 37.12.010 (2003). *See also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976).
  75. Tulalip Tribes, Ordinance 49 – Law and Order (March 2002).
  76. University of Washington Tribal Court Criminal Defense Clinic, Report (April 2003) (on file with author).