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Just When You Thought It Was Safe to Go Back on the Rez: Is It Safe

Jared B. Cawley

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JUST WHEN YOU THOUGHT IT WAS SAFE TO GO BACK ON
THE REZ: IS IT SAFE?

JARED B. CAWLEY¹

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I. INTRODUCTION

Among the most difficult problems we currently face are unacceptably high rates of violent crime in Indian country. A Bureau of Justice Statistics study found recently that American Indians are victims of violent crime at rates more than twice the national average — far exceeding any other ethnic group in the country This is simply unacceptable. Just like all Americans, Native Americans deserve to live in safe communities.

United States Attorney General John Ashcroft²

Prior to the colonial establishments in North America, American Indians enjoyed a sense of sovereignty, which is largely taken for granted by the citizens of the United States today. Following the birth of the United States as a sovereign entity, legislation and judicial decisions have essentially stripped Indian tribes of any meaningful control over violent/felonious crimes committed in Indian country. With a violent crime rate twice that of the United States' national average, an overly burdened federal prosecutor's office, and an even larger possible crime rate increase due to gaming in Indian country, now is the time to return "actual" criminal felony jurisdiction to tribal courts.³

Imagine, if you will, terrorists from abroad walking and living among us, and committing horrific crimes of violence, all without the fear of being punished, because the United Nations would not recognize our authority to punish those who were harming our citizens. Were the citizens of any city or state of this nation to experience the same rate of crime and be forbidden to effectively punish those who were committing the crimes, this author has no doubt that the citizens would revolt. Allowing tribes the authority to effectively punish non-Indians would go a long way in providing a safer environment in Indian country.

This article will trace the history of tribal criminal jurisdiction following the arrival of the colonists, through the foundation of the United States government, and will lead into where it stands today. On this journey, this article will discuss significant statutes and case law dealing with the role tribal courts have played in handling criminal jurisdiction in Indian country and will also discuss some important studies conducted by the Department of Justice Bureau of Justice Statistics and others on the current state of violent crime in Indian country, as well as the tribes' ability to handle it. Finally, this article will look to the future of tribal criminal jurisdiction by looking at the changing view of the United States federal government.

²United States Attorney General John Ashcroft, Remarks at the Native American Heritage Event (Nov. 28, 2001), at <http://www.usdoj.gov/otj/agremarksnativeamericanheritage.htm> (last visited Oct. 4, 2003) [hereinafter United States Attorney General John Ashcroft].

³Technically, tribes do have jurisdiction over felony crimes; however, the Indian Civil Rights Act of 1968 capped the punishments of crimes that tribal courts can dole out in Indian country at a maximum of one year in jail, or less, and/or a maximum \$5000 fine. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq.

II. BACKGROUND

Tribal legal systems, prior to the arrival of the colonists in America, varied from tribe to tribe.⁴ That each tribe enjoyed a sense of sovereignty prior to the colonists' arrival is not to be debated. As the colonists, and eventually the United States federal government, claimed more and more territory, the sovereignty once enjoyed by the tribes began to diminish. Chief Justice Marshall, in *Johnson v. McIntosh*⁵ recognized the sovereignty of the tribes, but recognized it as something less than complete sovereignty and later relegated the tribes to the status of dependant nations.⁶ This, and other rulings, placed tribal jurisdiction over any matter on the chopping block, awaiting its determinative fate.

A. *General Crimes Act and Ex Parte Crow Dog*

One of the first areas of tribal sovereignty to get the axe was in the area of criminal jurisdiction. In order to curtail problems with non-Indians and Indian populations, the federal government, following the Revolutionary War, extended its jurisdiction to non-Indians committing crimes against Indians, but allowed the tribes to retain full jurisdiction over Indian against Indian crimes committed in Indian country.⁷ This jurisdiction employed by the federal government was codified in 18 U.S.C. § 1152, and is known as the General Crimes, or Indian Country Crimes, Act. Notably, the statute provides for the allowance of "exclusive jurisdiction" to the tribes over Indians and non-Indians where a treaty had already given them that option.⁸ The act reads:

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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.

⁴FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1 § 6.B (1982).

⁵21 U.S. 543, 574 (1823).

⁶See also *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁷18 U.S.C. § 1151 defines "Indian country" as follows:

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

⁸18 U.S.C. § 1152 (2003).

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, *or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.*⁹

The federal government quickly changed its mind regarding exclusive tribal jurisdiction over Indian against Indian crimes as a reaction to the United States Supreme Court decision in *Ex Parte Crow Dog*.¹⁰ Crow Dog was a member of the Brule Sioux Band, who was convicted in federal court for murdering Spotted Tail, another Brule Sioux Band member.¹¹ Crow Dog petitioned the United States Supreme Court under a writ of *habeus corpus* to be released from federal prison and to have the murder conviction against him dropped.¹² The defendant argued that the federal government could not punish him because the murder occurred against another Indian while in Indian country and therefore fell under the exclusive jurisdiction of the Tribe according to the General Crimes Act.¹³

Relying on statutes and treaties with the Sioux Indians, the federal government argued that it had jurisdiction over “any person who commits murder” within the territory of the United States, in spite of another revised statute which excluded jurisdiction over Indian against Indian crimes committed in Indian country.¹⁴ The treaty relied upon by the federal government stated in part that the Indians were to “deliver up the wrong-doer”¹⁵ who commits “a wrong or depredation upon [a] person or property of any one . . .”¹⁶

The Supreme Court agreed but held that the treaty must be read in its entirety in order to gain its full meaning.¹⁷ Where the preceding paragraph is also read, the Court held that the only meaning that could be determined was that whites and tribes were to hand over those wrong-doers who had committed crimes against the other party, not amongst themselves.¹⁸ The charges and conviction against Crow Dog were dismissed.¹⁹

⁹*Id.* (emphasis added).

¹⁰109 U.S. 556 (1883).

¹¹*Id.* at 557.

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 563.

¹⁶*Id.*

¹⁷*Id.* at 567-68.

¹⁸*Id.*

¹⁹*Id.* at 572.

Essentially, the General Crimes Act allowed the tribes exclusive jurisdiction over Indian vs. Indian crimes of any nature, and gave concurrent jurisdiction to the tribes over Indian vs. non-Indian crimes. But the holding of *Crow Dog*²⁰ sent fear throughout the United States Congress that Indians would literally, and actually, be getting away with murder if things were to remain as they were.²¹ The result? The Major Crimes Act.

B. The Major Crimes Act

18 U.S.C. § 1153, more commonly referred to as the Major Crimes Act, created federal jurisdiction over a few specified crimes committed by an Indian against another Indian or non-Indian. The Major Crimes Act reads:

- (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 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 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.²²

Originally, the Major Crimes Act included only seven “major” crimes, but the list has been expanded to fourteen.²³ Crimes not listed in the Major Crimes Act remain under the exclusive jurisdiction of the tribe, except in the case where jurisdiction has been granted to the States under the infamous Public Law 280.²⁴ Essentially, the purpose behind the Major Crimes Act was to give the federal courts jurisdiction over Indian criminals.

²⁰*Id.*

²¹Some scholars suggest that much of the fear created was merely a manufactured hue and cry.

²²18 U.S.C. § 1153 (2003) (emphasis added). Originally, the Major Crimes Act also covered the misdemeanor (usually) crime of theft, but eliminated the confusion in a 1984 amendment, which replaced the crime of “theft” with “felony theft.” WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 161 (1998).

²³WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 153 (1998).

²⁴67 Stat. 588 (1953).

It is possible, however, that a tribe could exercise criminal jurisdiction over the “Major” crimes,²⁵ but the Indian Civil Rights Act of 1968 essentially strips the tribal judicial decision of any effectiveness.²⁶ In addition, tribal authorities have been highly critical of the quality of prosecution by the U.S. Attorney’s office under the Major Crimes Act and have often attempted to assert jurisdiction on their own.²⁷ Such an example can be found in *Oliphant v. Suquamish Indian Tribe*.²⁸

C. *Oliphant v. Suquamish*

In 1973, fed up with the lack of law enforcement against non-Indians on its reservation, the Suquamish Tribe of the Port Madison Reservation in the State of Washington passed new tribal law and order codes and posted signs at the entrance to the reservation warning all visitors that entrance would subject them to the jurisdiction and laws of the Tribe, whether Indian or non-Indian.²⁹ A few years later, tribal authorities arrested—for separate incidents—two non-Indians, Mark Oliphant and Daniel Belgarde, who were living on the reservation.³⁰ Oliphant was arrested for assaulting a Tribal officer and Belgarde was arrested for evading Tribal authorities on a high-speed chase, which ended when Belgarde crashed into a Tribal police vehicle.³¹ In compliance with the Tribal codes, both were arraigned before the tribal court.³² The defendants then sought relief in United States District Court under a writ of *habeas corpus*, claiming that the Tribe had no criminal jurisdiction over them.³³

The United States District Court for the Western District of Washington denied the defendants their relief and held that the defendants were subject to the criminal jurisdiction of the Tribe.³⁴ On appeal, the United States Court of Appeals for the Ninth Circuit upheld the district court’s findings.³⁵

Absent an affirmative grant of power from the United States Congress, the United States Supreme Court held that tribes did not have criminal jurisdiction over

²⁵*See* *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (holding that where a tribe is in compliance with the rights defined under ICRA, the Tribe has the authority to try tribal members for crimes which also fall under the Major Crimes Act).

²⁶*See supra* note 3.

²⁷CANBY, *supra* note 23, at 158.

²⁸435 U.S. 191 (1978).

²⁹*Id.* at 194.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.* at 195.

³⁵*Id.*

non-Indians; the Court reversed both the Ninth Circuit and district court's findings.³⁶ The Court based its holding on the age old claim that the powers were inconsistent with Indian status as dependant sovereigns.³⁷ In dicta, the court reasoned that even though tribes, and more specifically, tribal courts, are more advanced than they once were, (not to mention the Constitutional liberty protections afforded in the Indian Civil Rights Act of 1968) it must be obvious to everyone that tribes were incapable of exercising criminal jurisdiction over non-Indians.³⁸ Why were the tribes incapable? Because when the tribes "submitted" themselves to the sovereignty of the United States, they "gave up their power to try non-Indian citizens of the US except in a manner acceptable to Congress."³⁹ Whether a person agrees or disagrees with the reasoning of the Court, the potential "fix" for the tribes would now seem to be in the hands of Congress.

Barely two weeks after the holding in *Oliphant*,⁴⁰ the U.S. Supreme Court created future controversy by upholding a tribe's criminal jurisdiction over the tribe's own members. While dealing ultimately with the double jeopardy issue, *United States v. Wheeler*⁴¹ has had determinative implications on the issue of whether or not tribes have criminal jurisdiction over non-member Indians.

D. United States v. Wheeler

The defendant was a member of the Navajo Tribe who had been convicted in Tribal Court and punished under the laws of the Tribe for contributing to the delinquency of a minor and for disorderly conduct.⁴² He was then subsequently convicted and sentenced under federal law for the crime of statutory rape.⁴³

The defendant argued that double jeopardy barred his subsequent sentence in federal court.⁴⁴ The "Dual Sovereignty Doctrine" establishes that no double jeopardy attaches where there are two governmental sources that derive their jurisdiction from two separate sources. For example, state sovereignty is inherent, and federal sovereignty stems from the U.S. Constitution, therefore, there is no double jeopardy issue when prosecuted by the federal government and the State.

The question in this case was whether the federal plenary power over tribes really makes tribes creatures of the federal government.⁴⁵ The Supreme Court held that the

³⁶*Id.* at 208.

³⁷*Id.* at 210.

³⁸*Id.*

³⁹*Id.*

⁴⁰435 U.S. 191 (1978).

⁴¹435 U.S. 313 (1978).

⁴²*Id.* at 315.

⁴³*Id.* at 315-16.

⁴⁴*Id.* at 330.

⁴⁵*Id.* at 322.

Tribe's sovereignty was not created by Congress, but existed independently (as far as criminal jurisdiction is concerned) as a separate sovereign. Therefore, the federal government was not placing the defendant in double jeopardy.⁴⁶

What most people focus on in the *Wheeler* decision, however, is the Court's insistence and constant referral to a tribe's right of jurisdiction over its "members."⁴⁷ Some argue that the Court, in its constant referral to jurisdiction over tribal "members," was implying that tribes may not have jurisdiction over Indian, non-tribal members. Several years later the Court decided to follow through with its implied threat in *Wheeler*;⁴⁸ the Court removed criminal jurisdiction from the tribes over Indian non-Tribal members in *Duro v. Reina*.⁴⁹

E. *Duro v. Reina* and the "Duro Fix"

The Pima Maricopa Indian Tribe attempted to assert Tribal criminal jurisdiction over Albert Duro for a murder which took place on the Pima Maricopa Indian Reservation after the United States Attorney dropped the charges against him in federal court.⁵⁰ Though Indian, Duro was not a member of the Pima Maricopa Tribe.⁵¹ Duro had been living on the Pima Maricopa Reservation with his girlfriend and also worked for the tribally owned PiCopa Construction Company.⁵² The victim, a 14 year old boy, was also not a member of the Pima Maricopa Tribe.⁵³ Additionally, because the Indian Civil Rights Act of 1968 only allowed the tribe to fix punishments at less than one year, the Tribal criminal code involved only misdemeanor-type crimes; therefore, Duro was merely charged with illegally firing a weapon on the reservation.⁵⁴

After reaffirming its previous holding in *Wheeler* (that a tribe has exclusive criminal jurisdiction over its own members),⁵⁵ the Supreme Court turned to the issue

⁴⁶*Id.*

⁴⁷"The sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Id.* at 326. "That the Navajo Tribe's power to punish offenses against tribal law committed by *its members* is an aspect of its retained sovereignty is further supported by the absence of any federal grant of such power." *Id.* at 326-27. "The power to punish offenses against tribal law committed by *tribe members*, which was part of the Navajos' primeval sovereignty, has never been taken away from them . . ." *Id.* at 328. (emphasis added).

⁴⁸435 U.S. 313 (1978).

⁴⁹495 U.S. 676 (1990).

⁵⁰*Id.* at 679-80.

⁵¹*Id.* at 679.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 681.

⁵⁵*Wheeler*, 435 U.S. 313.

of “whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.”⁵⁶

In overruling the district court, the Court of Appeals for the Ninth Circuit found that because Congress made no attempt to limit tribal criminal jurisdiction to members of the tribe, and because the majority of statutes dealing with tribal criminal jurisdiction mentioned only the authority of the tribe over Indians, a tribe did indeed have jurisdiction over all Indians, tribal members or not.⁵⁷

Referring back to its holdings in *Wheeler*⁵⁸ and *Oliphant*,⁵⁹ and once again citing to the dependent sovereign status of the tribes, the Supreme Court found that what actual sovereign authority remained in the tribes was only that which was necessary to deal with internal relations. Subsequently, the Court held that tribes have no criminal jurisdiction over non-member Indians.⁶⁰ (Although this author would argue that murder on your reservation would seem to be important “internal relations.”)⁶¹ The court reasoned that because criminal penalties are so “serious an intrusion on personal liberty,”⁶² criminal jurisdiction over non-Tribal persons, whether Indian or non-Indian, was one of those powers “necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.”⁶³ The Court further explained that non-members often have no say in tribal government or elections, and it would be unfair to hold non-members to a standard to which they have no say.⁶⁴ However, the Court did not explain why foreign nationals, who commit crimes in the United States, and who have no say in U.S. government or elections, are still subject to the criminal jurisdiction of the federal or state governments.

In *Duro*,⁶⁵ the Tribe and the federal government argued that a jurisdictional void would be created where tribes would have no power to punish non-member Indians for any minor violation and where states were unwilling to do so.⁶⁶ Unfortunately, this argument fell on the deaf ears of the Court.

⁵⁶*Duro*, 495 U.S. at 684.

⁵⁷*Id.* at 683.

⁵⁸*Wheeler*, 435 U.S. at 313.

⁵⁹*Oliphant*, 435 U.S. 191.

⁶⁰*Duro*, 495 U.S. at 686.

⁶¹It is difficult for this author to understand how Congress can allow the states to prosecute citizens of other states for crimes committed in their respective states, but not allow the tribes the same protection.

⁶²*Duro*, 495 U.S. at 693.

⁶³*Id.*

⁶⁴*Id.* at 688.

⁶⁵*Duro*, 495 U.S. 676.

⁶⁶*Id.* at 696.

To its credit, Congress, in 1990, attempted to fix the ruling in *Duro*⁶⁷ by adding language to 25 U.S.C. § 1301(2), which defined “powers of self-government” of the tribes to include “exercis[ing] criminal jurisdiction over all Indians.”⁶⁸ This amendment has come to be known as the “Duro Fix.”

This language, depending on which circuit you agree with, the Eighth or the Ninth, either affirmatively recognized the *inherent sovereignty* of the tribes, or *delegated the authority* to the tribes, over non-member Indians. What difference does it make? If the authority is inherent, there are no double jeopardy issues. If the authority is delegated, then double jeopardy exists and tribes would effectively be barred from prosecuting non-members for crimes committed within the reservation.

III. THREE ADDITIONAL BACKGROUND STATUTES

In looking at the broad picture of Tribal Criminal Jurisdiction, it is also necessary to look at three additional background statutes. Public Law 280 deals with statutorily granted jurisdiction to some states.⁶⁹ The Indian Civil Rights Act of 1968 deals with codified individual liberties which were given to Native Americans.⁷⁰ The Indian Gaming Regulatory Act deals with the regulation and oversight of gaming within Indian country.⁷¹

A. Public Law 280

When looking at whether or not more effective criminal/felony jurisdiction should be given to the tribes, it is important to look at the often confusing Public Law 280.⁷² Public Law 280, or PL-280, transfers criminal jurisdiction to the state governments of certain “Mandatory States” and other “Optional States,” sometimes concurrently with the tribes, but usually exclusive of the federal government.⁷³ The “Mandatory States” are: Alaska, California; Minnesota (except the Red Lake reservation); Nebraska; Oregon (except the Warm Springs reservation); and Wisconsin.⁷⁴ These “Mandatory States” have been given criminal jurisdiction over misdemeanors and felonies committed in Indian country within the borders of the

⁶⁷*Duro*, 495 U.S. 676.

⁶⁸25 U.S.C. § 1301(2) (2003).

⁶⁹Pub. L. No. 83-280, 67 Stat. 588.

⁷⁰The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, 1302, 1303, 1311, 1312, 1321, 1322, 1323, 1324, 1325, 1326, 1331, 1341 (2004).

⁷¹The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2717(a), 2718, 2719, 2720, 2721 (2004).

⁷²Pub. L. No. 83-280, 67 Stat. 588.

⁷³COHEN, *supra* note 4, at 5.

⁷⁴Indian Country Criminal Jurisdiction, PL-280 and Other Jurisdictional Transfers, available at <http://tribaljurisdiction.tripod.com/indiancountrycriminaljurisdiction/id4.html>. (last visited Oct. 4, 2003).

state.⁷⁵ The so-called “Optional States” were given the option of having criminal jurisdiction over Indian country over certain types of offenses established under state law, while the tribe retains jurisdiction over misdemeanors and the federal government still retains jurisdiction under the Major and General Crimes Acts.⁷⁶ The U.S. Department of Justice has made an excellent chart to help further explain how criminal jurisdiction works in PL-280 states:⁷⁷

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷U.S. Dept. of Justice, Criminal Resource Manual, 689 Jurisdictional Summary, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm (last visited Oct. 4, 2003).

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal and tribal jurisdiction. “Option” state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with the federal courts.
Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

Which category a defendant falls into and whether or not the Tribal court is in a state which has been given PL-280 jurisdiction, can often be confusing issues. Under the issue of granting more effective criminal jurisdiction back to the tribes, however, PL-280 states would still retain jurisdiction over criminal matters which fall within their state’s boundaries.

B. Indian Civil Rights Act of 1968

Additionally, while the tribes may exercise concurrent jurisdiction over the major crimes committed by Indians in Indian country, their ability to adequately punish those acts was severely curtailed by the Indian Civil Rights Act of 1968,⁷⁸ which

⁷⁸The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301.

only allows for tribes to apply a maximum punishment of one year in jail and a \$5,000 maximum fine.⁷⁹

Conceived by Congress following a ruling by the United States Supreme Court in *Talton v. Mayes*,⁸⁰ which held that the rights guaranteed by the United States Constitution did not apply to the tribes,⁸¹ the Indian Civil Rights Act of 1968 codified a limited amount of Constitutional liberties which it felt should also apply to the tribes.⁸² Similar to the Bill of Rights, the Indian Civil Rights Act defined certain liberties which applied to all Native Americans. It is also applicable against tribal governments. These same liberties, would apply to defendants who are subject to the criminal jurisdiction of the tribes. Therefore, whatever fears a non-Indian might have about being denied Constitutional protections in Tribal court could be answered under the Indian Civil Rights Act of 1968.

C. Indian Gaming Regulatory Act

One last statutory area which touches on crime in Indian country is the Indian Gaming Regulatory Act.⁸³ While not a statute that grants criminal jurisdiction over gaming in Indian country to the tribes, the Indian Gaming Regulatory Act was created by Congress to provide regulation of the fast growing gaming, which was taking place in certain areas of Indian country, and to help prevent and/or “shield” the tribes “from organized crime and other corrupting influences.”⁸⁴

Before any tribe may conduct certain types of gaming, certain provisions of the Act must be complied with, and (in some cases) the tribe must receive the approval of the National Indian Gaming Commission (NIGC)—the administrative agency established by Congress to watch over Indian gaming. It is interesting to note that although the purpose of the Act was to promote tribal welfare and to protect tribes from the influence of organized crime, the statute has no enforcement provisions. The Chairman of the NIGC must rely on the overburdened U.S. Attorney’s office to combat any violations of its provisions. There is simply no expressed provision which would further protect the tribe from any organized crime, especially where that organized crime comes from non-Indians.

⁷⁹Note, however, that the Act does not impose limits on probation periods or community service.

⁸⁰163 U.S. 376 (1896).

⁸¹*Id.* at 384.

⁸²COHEN, *supra* note 4, at § 12.E.; *see also* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (including freedom of speech, freedom of the press, freedom from self incrimination, etc.).

⁸³The Indian Gaming Regulatory Act, 25 U.S.C. § 2701.

⁸⁴*Id.* at § 2702(2).

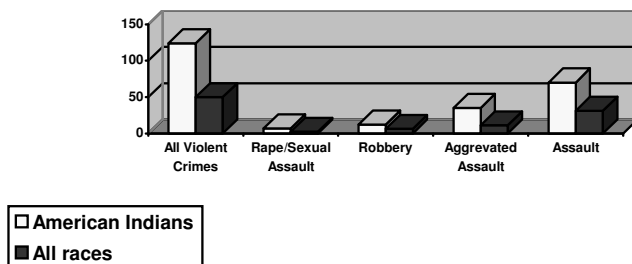
IV. CRIME IN INDIAN COUNTRY AND THOSE WHO ARE UNABLE TO DEAL WITH IT

With an overall background of the state of criminal jurisdiction within Indian country, it is now possible to look at how this jurisdictional void has had such a hugely negative impact on Native Americans. Although courts and Congress have not expressly created this void, implicitly it exists and is doing terrible damage. Let the U.S. Attorney's do their job, you say? This article is not attempting to imply that they are not doing their job, but as the statistics (compiled by the Department of Justice) point out, the U.S. Attorney's office has priorities which do not seem to fall in the direction of crime in Indian country.

A. American Indians and Crime

In February 1999, the United States Department of Justice, Bureau of Justice Statistics released a study entitled *American Indians and Crime*. The study paints a very disturbing picture of criminal activity among Native Americans. The study found that American Indians are twice as likely as any other ethnic group in the United States to experience violent crimes.⁸⁵ American Indians during the study years of 1992-96 experienced a violent crime rate of 124 per 1,000 persons aged 12 or older, as compared to 49 per 1,000 for whites, and 61 per 1,000 for blacks.⁸⁶

Average annual number of violent victimizations per 1,000 persons age 12 or older, 1992-96:⁸⁷



American Indians, as of 1998, accounted for 1% of the total United States population, or approximately 2.3 million people.⁸⁸ Whites accounted for 82.6%, or

⁸⁵U.S. Dept. of Justice, Bureau of Justice Statistics, *American Indians and Crime 2*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic/pdf> (last visited Sept. 12, 2004).

⁸⁶*Id.* at 3.

⁸⁷*Id.* at 1.

⁸⁸*Id.*

222 million.⁸⁹ Blacks accounted for 12.7%, or 34.3 million,⁹⁰ and Asians accounted for 3.8%, or 10.3 million.⁹¹

Other than for murder,⁹² Indians experienced higher than average rates of victimization for the categories of rape/sexual assault, robbery, aggravated assault, and simple assault.⁹³ When asked about who had committed the acts of violence against the victim, American Indians reported that nearly 46% of the offenses were committed by strangers.⁹⁴ Additionally, nearly 70% of the victims of violent crimes among American Indians described the offender as non-Indian.⁹⁵

Percent of violent victimizations, by race of victim and race of offender, 1992-96. ⁹⁶				
Race of Victim	Race of Offender			
	Total	Other	White	Black
All Races	100%	11%	60%	29%
American Indians	100	29	60	10
White	100	11	69	20
Black	100	7	12	81
Asian	100	32	39	29

Clearly, the percentages of those who are non-Indian offenders of Indian victims is staggering. While the tribe may be able to punish those who commit these offenses where they are Indian, nearly 70% cannot be punished by the tribe at all, and it is worrisome to guess the number of those 70% who go unpunished due to the federal government's inability or lack of desire to do so.

Certainly, the United States Attorney General's office would prosecute those more serious crimes, such as murder. However, the offenses committed in Indian

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²American Indians experienced 150 murders, per 100,000 people, which is close the per capita rate for the entire nation.

⁹³U.S. Dept. of Justice, *supra* note 85, at 1.

⁹⁴*Id.* at 6.

⁹⁵*Id.* at 7 ("The majority (60%) of American Indian victims of violent crime described the offender as white, and nearly 30% of the offenders were likely to have been other American Indians. An estimated 10% of offenders were described as black.").

⁹⁶*Id.* at 7.

country may not fall high enough on their priority list at the time they are reported, and may, in fact, go unpunished.

Comparison of Violent and Drug Offenses*		
Total U.S. Offenses:	117,450	
Violent Offenses:	5,641	4.8% (of Total)
Prosecuted:	3,732	60% (of violent)
Declined:	1,909	30% (of violent)
Drug Offenses:	37,009	32% (of Total)
Prosecuted:	26,917	78% (of Drug)
Declined:	6,126	16% (of Drug)
* Data and Percentages taken from the U.S. Dept. of Justice, Bureau of Justice Statistics, <i>Compendium of Federal Justice Statistics, 2000</i> .		

For example (see chart above), for the statistical year of October 1999 to September 2000, the Attorney General's office investigated 117,450 total federal offenses nationwide.⁹⁷ Of those, 5,641 (or 4.8%) were considered "violent offenses," which are categorized as murder, assault, robbery, sexual abuse, kidnapping, and threats against the President.⁹⁸ Of the 5,641 "violent offenses," 60% were prosecuted, and 30% of the cases were declined.⁹⁹ Only 4,250 of the total number of "violent offenders" were arrested.¹⁰⁰ Of the 3,732 offenders actually prosecuted, only 2,676 were convicted.¹⁰¹ Compare this with the number of federal drug offenses investigated, and we see that of the 117,450 total offenses investigated, 37,009 (or 32%) were drug related.¹⁰² Of those 37,009, roughly 80% were prosecuted, and only roughly 20% were declined.¹⁰³ Obviously the Attorney General's office has certain priorities set up when looking at which offenses to prosecute. Unfortunately for American Indians, their offenses fall more under the "violent offenses" category for which very little priority is given.¹⁰⁴

⁹⁷U.S. Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2000*, at <http://www.ojp.udoj.gov/bjs/abstract/cfjs00.htm> (last visited Nov. 8, 2003) [hereinafter *Compendium*].

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.* at 9.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.* at 29.

¹⁰⁴For example, during the same time period as the U.S. Department of Justice *Compendium*, 9,578 cases of "violent offenses" were reported just in Indian country alone, but only 5,641 "violent offenses" were looked into by the Attorney General's office nationwide.

B. Crime Due to Gaming

These “violent crime” rates could be expected to grow even larger with the influx of money and persons to Indian country due to gambling. While many gambling towns, such as Atlantic City, do not appear to experience a rise in crime rates when tourists are kept out of the equation, many researchers agree that with a large influx of people, crime rates are going to rise.¹⁰⁵ Whether this is attributed to the gambling or to the larger number of people going to Indian country does not need to be debated in this paper.

Whatever the cause, crime rates are likely to increase. In a question and answer interview with one-year incumbent police chief Gary Jeandron, of the Palm Springs, California Police Department, the *Desert Sun* newspaper asked Chief Jeandron whether Indian gaming in California had increased the rate of crime in the area.¹⁰⁶ His answer: “A successful business that brings in a large amount of population and influences the demographics, you are going to have increased crime [I]f you have an increased amount of people coming in, you are going to have more crime.”¹⁰⁷ With the tribes being able to punish only the worst of these offenders with one year in jail or a \$5,000 fine, and in the cases of non-Indians, not at all, these offenders can run rampant in Indian country with little to no fear of punishment.

Again, this article is not attempting to argue the evils of gambling itself, but is merely trying to show that sources indicate that where there is a large increase in population, whether as new move-ins or tourists, the crime rate is likely to increase as well. Also, the probability is high that a large portion of those coming to Indian country to gamble will be non-Indian. While the non-Indian victims will see restitution of their injuries due to the fact that the federal government and states have criminal jurisdiction over them, it is not as likely that the Indian victims will see the same result.

But even if tribes had the jurisdiction necessary to combat crime due to gaming or otherwise, do tribes have the law enforcement and judicial resources to effectively deal with it? There would be no need to make criminal jurisdiction over non-Indians in Indian country exclusive to the tribes. But what law enforcement and judicial resources currently exist?

C. Policing on American Indian Reservations

In another report by the United States Department of Justice, Bureau of Justice Statistics, entitled *Tribal Law Enforcement, 2000*, the Justice Department determined

See U.S. Department of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement, 2000*, 3, at <http://www.ojp.usdoj.gov/bjs/abstract/tle00.htm> (last visited Oct. 4, 2003).

¹⁰⁵Gambling and Crime, Crime Rates, at http://www.casinochecker.com/casino_knowledge/crime/rates.htm (last visited June 7, 2004).

¹⁰⁶Cindy Uken, *Desert Sun Quizzes Palm Springs Police Chief*, THE DESERT SUN (June 1, 2003), at <http://www.thedesertsun.com/news/stories2003/opinion/20030531174753.shtml> (last visited June 7, 2004).

¹⁰⁷*Id.*

that out of 562 federally recognized tribal entities, only 171 tribes had law enforcement agencies with at least one or more officers.¹⁰⁸ An additional 37 tribes receive law enforcement through the Bureau of Indian Affairs.¹⁰⁹

As the reservation policy was implemented, policing on the reservation consisted entirely of policing by United States soldiers,¹¹⁰ who obviously did not have the interests of the tribal members in mind. In the 1860's, American Indians were allowed to join the ranks of the tribal police forces, although they were often looked down upon by other tribal members as agents of the federal government.¹¹¹ This type of control, a few tribal members working with, but mostly being supervised by, the federal government lasted for close to the next eighty to ninety years until the 1950's, 60's, and 70's.¹¹² However, some tribes, due to neglect from the federal government, and due to an issue of sovereignty, had their own tribal police forces as well.

During the 1960's and 70's the Bureau of Indian Affairs (BIA) created and managed the "first modernized reservation police forces,"¹¹³ as well as established the BIA Law Enforcement Academy.¹¹⁴ It was also during this time that the era of "self determination" began to evolve among the tribes, and more and more tribes began establishing, and in some cases re-establishing, stronger tribal governments and courts.¹¹⁵

In the National Institute of Justice report entitled *Policing on American Indian Reservations*, the authors create a rough estimate of the makeup of a typical Indian country police department. On the average, the typical police department is either managed directly by the BIA, or indirectly through contract where the BIA merely provides the funding but is administered and employed by the tribe.¹¹⁶ The average police department polices 500,000 acres of land (roughly the size of Delaware) with a total of 16 police officers (only a slight majority are Indian), all of whom would obviously not be on duty at the same time.¹¹⁷ Those 16 or fewer police officers would be responsible for 10,000 tribal members (which of course does not include any non-tribal members living there), while serving in dilapidated police buildings

¹⁰⁸U.S. Dept. of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement, 2000*, at <http://www.ojp.usdoj.gov/bjs/abstract/tle00.htm> (last visited Nov. 1, 2003).

¹⁰⁹*Id.*

¹¹⁰STEWART WAKELING ET AL., NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT: POLICING ON AMERICAN INDIAN RESERVATIONS 41 (2001).

¹¹¹*Id.*

¹¹²*Id.* at 42.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.* at 7, 9.

¹¹⁷*Id.* at 9.

and driving very worn out police vehicles, all of which would operate on a budget of \$1 million or less.¹¹⁸

Today, only a small percentage of tribes have law enforcement agencies or their own tribal judiciary, and a few are still controlled by the BIA.¹¹⁹ But, as was mentioned above, criminal jurisdiction need not be exclusive to the tribe. Criminal jurisdiction could be held concurrently with the federal government or even the state, which could prosecute those cases where adequate tribal courts, jails or law enforcement is not found. But where a tribe does have sufficient resources and desire, the tribe should be allowed to conduct full criminal jurisdiction and punishment. A current example can be found in the State of Oklahoma with the Cherokee Nation. The Cherokee Nation and Oklahoma have teamed their law enforcement resources so that some law enforcement officers from the state and those of the tribe are cross-deputized to deal with any matters which may occur when the other is not around or lacks the resources to adequately deal with it.

The same process is often done with prison systems. Another example from the State of Oklahoma is the Creek Juvenile Detention Center which shares juvenile bedding with the state. But, there are tribes which have the resources to adequately adjudicate and incarcerate criminals. The next section briefly explains the status of courts and prisons in Indian country.

D. Tribal Courts and Prisons in Indian Country

Historically, many tribes had ways of dealing with problems created within the tribe, whether it was disputes between or among families. If the problem was serious enough, the offender was often banished from the tribe. Tribes began to have a more formal/Americanized look to their judicial systems in the early 1900's. Due to the fear and lack of understanding of how offenders were punished among the tribes, Congress created the Courts of Indian Offenses (more specifically in response to the holding in *Crow Dog*¹²⁰).¹²¹ The Courts of Indian Offenses took over the traditional role of the tribes in settling disputes among its members and had no jurisdiction over non-Indians.¹²²

¹¹⁸*Id.*

¹¹⁹In 1995, the BIA created a survey which showed that of a total of 178 total tribal law enforcement agencies, 88 had agencies created through a contract with the BIA, 64 were administered completely by the BIA, 22 were completely administered by the tribe, but funded through a block grant from the BIA, and 4 tribes administered and funded their own law enforcement agencies. *Id.* at 7.

¹²⁰109 U.S. 556 (1883); *see supra* Part I.A.

¹²¹B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER 2 (Mar. 2000), at <http://w3.ouhsc.edu/ccan/Tribal%20Courts.pdf> (last visited Nov. 1, 2003).

¹²²*Id.* at 4.

With the nodding approval of Congress, many tribes instituted, or re-instituted, more formalized judicial systems beginning in the early 1930's.¹²³ Early on, those tribes which operated their own judicial systems had judges and attorneys who were often untrained in the law, but more recently this is becoming less frequent.¹²⁴ Many judges and attorneys now have law degrees.¹²⁵ But some of the untrained judges and attorneys still remain.

Today, courts in Indian country are a mix of tribal courts and courts administered by the BIA.¹²⁶ As stated above, not every tribe has the resources or perhaps even the desire to have its own judicial systems, and unfortunately, this author was unable to locate any statistical information regarding the exact number of tribal judicial systems now operating. The Department of Justice, however, is currently conducting a survey to determine this information entitled, *2002 Census of Tribal Justice Agencies in American Indian and Alaska Native Tribal Jurisdictions*, but has not yet published this information on its website.

Thankfully, the Department of Justice has conducted a survey of jails in Indian country, appropriately entitled, *Jails in Indian Country, 2001*.¹²⁷ As of 2001, the Department of Justice has determined that a total of 68 correctional facilities exist,¹²⁸ in one form or another, within Indian country, where a total of 2,030 persons were awaiting trial or serving sentences.¹²⁹ Of those in custody, 1,600 were adults, and 312 were juveniles.¹³⁰ The total capacity of the 68 correctional facilities in Indian country was 2,101 and were at 91% of capacity as of 2001, but were at 125% of capacity during the peak summer months.¹³¹ Of the 2,030 persons being held in correctional facilities in Indian country, misdemeanor charges accounted for 1,738 of the inmates, while felony charges accounted for 113.¹³² The disparity is not illogical when one remembers that tribal courts can only impose a maximum sentence of one year and/or a \$5,000 fine. It would not make much sense for a tribe to charge too many persons with felonies that could only be punished for such a short amount of

¹²³*Id.* at 5.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Jails in Indian Country, 2001* (May 2002) at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#jic> (last visited Oct. 4, 2003).

¹²⁸The 10 largest facilities held more than 60% of the total number of inmates in Indian country correctional facilities, with 7 of the 10 facilities being located in the State of Arizona. *See id.* at 3.

¹²⁹*Id.* at 1.

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.* at 2.

time, probation time notwithstanding. But whether tribes have the resources or not, it is refreshing to note the seemingly 180 degree change in how Congress is currently viewing its criminal jurisdictional role in Indian country.

V. CHANGING FEDERAL/STATE VIEW/ROLE IN INDIAN COUNTRY

Ironically, and somewhat surprising, is the changing federal congressional view/role in Indian country. Long the bane of the tribes' desire for increasing tribal sovereignty, Congress is now pushing for a larger role for the tribes in combating crime in Indian country. And once a defender of what little was acknowledged of tribal sovereignty, the courts are now waging a war to remove effective jurisdiction over Indian non-Tribal criminals. This section looks briefly at a few federal initiatives which have been aimed at decreasing tribal dependence on federal assistance as well as a strong push by Senator Daniel Inouye (D-Hawaii) to raise tribal sovereignty to that enjoyed by the states. Additionally, this section will briefly discuss the U.S. Supreme Court case of *United States v. Lara*¹³³ from the Eighth Circuit, with the Eighth Circuit originally holding that tribal jurisdiction over non-member Indians was a delegated power from Congress¹³⁴ and therefore implicitly removes Tribal jurisdiction over non-member Indians.

Also recognizing the increasing violent crime rate among American Indians, the United States Department of Justice created the Indian Country Justice Initiative (ICJI) in order to "streamline the Justice Department's support for Indian Country."¹³⁵ The initiative instituted several pilot programs with the hope of instructing and strengthening the tribal members to handle problems by employing traditional and modern mechanisms.¹³⁶ Additionally, the Department of Justice is working in conjunction with the Department of Interior on the CIRCLE Project.

A. The CIRCLE Project

The CIRCLE project, or Comprehensive Indian Resources for Community and Law Enforcement project, is a three year project that was created by the Department of Justice to help curb the rising violent crime rate in Indian country by teaming up with the local Indian communities.¹³⁷ Rather than create a new program which would require federal funding, the CIRCLE project utilizes the existing resources of the Department of Justice and the tribes.¹³⁸ The central focus of the project is in developing creative and effective solutions from the tribes themselves, which make

¹³³324 F.3d 635 (8th Cir. 2003).

¹³⁴*Id.* at 640.

¹³⁵Kim Baca, *The Changing Federal Role in Indian Country*, NATIONAL INSTITUTE OF JUSTICE JOURNAL 9 (Apr. 2001), at <http://www.ncjrs.org/pdffiles1/jr000247c.pdf> (last visited Oct. 4, 2003).

¹³⁶*Id.*

¹³⁷United States Attorney General John Ashcroft, *supra* note 2.

¹³⁸*Id.*

recommendations to the federal government on ways to handle certain problems on the reservation.¹³⁹

One of the first tribes to receive assistance from the project was the Northern Cheyenne tribe located near Billings, Montana.¹⁴⁰ The tribe applied for the project due to the rising increase in juvenile crime because of methamphetamine, as well as an overall increase in violent activity on the reservation.¹⁴¹ Initial reports from the tribe showed that juvenile criminal activity declined by more than half following the implementation of the project.¹⁴² The Oglala Sioux tribe of South Dakota, also a participant in the project, noted a decrease in gang activity and domestic violence.¹⁴³ These tribes were not financially well off, but were willing to do whatever necessary to bring order back to the tribes. Additionally, on a side note, the CIRCLE project tribes went above and beyond the project following the tragic events of September 11, 2001 when they jumped in their vehicles and drove across country to aid in the search and rescue efforts as well as in the recovery of the citizens and city of New York.¹⁴⁴

One of the highlights of the CIRCLE project is that so much was done to improve the situations of these two tribes without any additional funding from the federal government. Some might argue that if tribes regain their full sovereign status or merely achieve the sovereignty enjoyed by the states, that the federal government should remove all financial assistance from the tribes. And while some tribes are financially better off than many states (due to gaming), many tribes would effectively disappear if financial assistance were removed. However, states enjoy an elevated sovereign status above and beyond that of the tribes and still receive federal financial assistance; therefore, an argument for improving the sovereign status in line with that of the States would seem to be fair. This is exactly what Senator Inouye is attempting to do with his proposed amendments to the Homeland Security Act of 2002; He is arguing that tribes should be as sovereign as any state.¹⁴⁵

B. Tribal Government Amendments to the Homeland Security Act of 2002

Senator Inouye has introduced an amendment to the Homeland Security Act of 2002¹⁴⁶ which would recognize tribal sovereign powers over non-Indians. In the Tribal Government Amendments to the Homeland Security Act of 2002, Senator

¹³⁹Baca, *supra* note 135, at 10.

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²United States Attorney General John Ashcroft, *supra* note 2.

¹⁴³Baca, *supra* note 135, at 10.

¹⁴⁴United States Attorney General John Ashcroft, *supra* note 2.

¹⁴⁵*Inouye Ties Sovereignty to Homeland Security*, INDIANZ.COM (Feb. 25, 2003), at <http://www.indianz.com/News/show.asp?ID=2003/02/25/inouye> (last visited Oct. 4, 2003).

¹⁴⁶Pub. L. No. 107-296, 116 Stat. 2135 (2002).

Inouye, along with Senator Daniel Akaka (HI), Senator Ben Nighthorse Campbell (CO), and Senator Maria Cantwell (WA) co-sponsored this bill with the goal “to overturn recent Supreme Court rulings by recognizing that tribes have primary law enforcement duties on their lands.”¹⁴⁷ In addressing the National Congress of American Indians in Washington, D.C., Senator Inouye said,

Homeland security presents an opportunity . . . to secure a status under federal law that will not only recognize your powers and responsibilities as sovereign governments but will strengthen your position and your status in the family of governments that make up the United States Least of all, you should be as sovereign as any state in the union.¹⁴⁸

The “Findings and Purposes” section of the proposed amendment suggests that Congress find that each Indian tribal government possesses the inherent sovereign authority:

- (A) (i) to establish its own form of government;
- (ii) to adopt a constitution or other organic governing documents; and
- (iii) to establish a tribal judicial system; and
- (B) to provide for the health and safety of those who reside on tribal lands, including the provision of law enforcement services on lands under the jurisdiction of the tribal government¹⁴⁹

The purpose of this Act is to ensure the inclusion of the Indian tribes in discussions involving homeland security as well as to make sure the tribes participate “fully in the protection of the homeland of the United States.”¹⁵⁰ If approved, Congress will have come a long way from its earlier days of stripping the tribes of nearly everything they were and owned to a period where it is now making a more sincere effort to support the tribes in their increased sovereignty during a period of self-determination. This amendment is still pending.

If Senator Inouye and others get their wish, tribes would not only regain criminal jurisdiction over non-Indians who commit crimes within Indian country, but the wording of the amendment also seems to imply that tribes would have jurisdiction over foreign nationals as well. If that is not its intention, then including it as part of the Homeland Security Act would not make any sense. In order for the tribes to aid the United States in the defense of the “homeland,” it would be necessary for them to have full criminal jurisdiction over all persons committing crimes within Indian country. The United States Supreme Court seemed poised to strike another blow to tribal criminal jurisdiction by implicitly removing tribal criminal jurisdiction over non-member Indians.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. § 2 (2003).

¹⁵⁰Senate Bill 578.

C. *United States v. Lara and United States v. Enas*

The courts, once friendly towards Indian sovereignty, even if on a lowered status, however, appear to be the ones who are now taking large swipes at what little is left of Indian criminal jurisdiction. Recently, in *United States v. Lara*,¹⁵¹ the Court of Appeals for the Eighth Circuit suggested that the ultimate arbiter of what sovereign powers the tribes have should be held in the United States Supreme Court and not Congress—where those powers are not dealing with areas which would fall under the Indian Commerce Clause of the Constitution.¹⁵²

The Ninth Circuit, however, in *United States v. Enas*¹⁵³ held that decisions made by Congress, such as the “*Duro Fix*” legislation, were a legitimate exercise of Congressional authority. The Supreme Court took up the argument on an appeal of the Eighth Circuit’s decision in *Lara*.¹⁵⁴

Both cases dealt with the double jeopardy issue and whether or not a tribe or the federal government could prosecute the defendants when either of the other had already done so. The argument stems back to the one posed by the holdings in *Wheeler*¹⁵⁵ and *Duro*,¹⁵⁶ namely, do tribes have jurisdiction over non-member Indians, and if so whether or not the tribes were acting under inherent power or delegated powers because of the “*Duro Fix*”?

1. *United States v. Enas*

Enas, a member of the San Carlos Apache Tribe, while on the White Mountain Apache Reservation was arrested and charged with “assault with a deadly weapon, and assault with intent to cause serious bodily injury”¹⁵⁷ to Joseph Kessay.¹⁵⁸ Enas pled guilty to the charges but later fled while on work release.¹⁵⁹ While on the lam, a federal grand jury filed charges against Enas in Federal District Court, which dismissed the grand jury indictment on the basis that the Tribe was not a separate sovereign from the United States, and was therefore in violation of the double jeopardy clause.¹⁶⁰ Following a reversal ordered by a three-judge panel from the Ninth Circuit Court of Appeals, the entire court took up the issue de novo.¹⁶¹

¹⁵¹324 F.3d 635 (8th Cir. 2003).

¹⁵²*Id.* at 639.

¹⁵³255 F.3d 662 (9th Cir. 2001).

¹⁵⁴324 F.3d 635 (8th Cir. 2003).

¹⁵⁵435 U.S. 313 (1978).

¹⁵⁶495 U.S. 676 (1990).

¹⁵⁷*Enas*, 255 F.3d 662, at 665.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*Id.*

The tribes, stated the court, retain all sovereignty “which is not inconsistent with their status as ‘conquered’ and ‘dependant’ nations.”¹⁶² In other words the sovereignty they retain is only that which is “needed to control [the tribes’] own internal relations, and to preserve their own unique customs and social order.”¹⁶³ Congress, the court found, has the authority to grant or take away any and/or all of this authority.¹⁶⁴

The debate centered on whether this authority was inherent to the tribe. “Who prevails,” asks the court, “when the dispute between court and Congress is neither constitutional nor statutory, but a matter of common law based on history? After all . . . *Duro* (as well as the cases upon which *Duro* relies) rests on its interpretation of the historical attributes of tribal power.”¹⁶⁵ Nowhere in *Duro*¹⁶⁶ is there any mention of constitutional implications, explained the court.¹⁶⁷ It would be “extraordinary,” explained the court, for *Duro*¹⁶⁸ to be based on constitutional principles without actually mentioning the Constitution.¹⁶⁹ Additionally, the court pointed to language in the legislative history of the “Duro Fix” which specifically states that the statute was an affirmation of inherent tribal powers, and not a delegation of them.¹⁷⁰

The court found that the holding in *Duro*¹⁷¹ was in fact based on common law, and “within the realm of federal common law—and the federal common law of tribes—Congress is supreme.”¹⁷² And, as often seems the case, the Eighth Circuit completely disagreed with the Ninth Circuit’s holding, with a holding of its own in *Lara*,¹⁷³ which found that tribal jurisdiction over non-member Indians was a delegated power not inherent.¹⁷⁴ Interestingly, the United States Supreme Court denied a hearing on appeal for the *Enas*¹⁷⁵ case.

¹⁶²*Id.* at 667 (quoting *Oliphant*, 435 U.S. at 196).

¹⁶³*Id.* (quoting *Duro*, 495 U.S. at 685-86).

¹⁶⁴*Id.*

¹⁶⁵*Id.* at 674.

¹⁶⁶495 U.S. 676 (1990).

¹⁶⁷*Enas*, 255 F.3d at 673.

¹⁶⁸495 U.S. 676 (1990).

¹⁶⁹*Enas*, 255 F.3d at 673-74.

¹⁷⁰*Id.* at 670.

¹⁷¹495 U.S. 676 (1990).

¹⁷²*Enas*, 255 F.3d at 675.

¹⁷³324 F.3d 635 (8th Cir. 2003).

¹⁷⁴*Lara*, 324 F.3d at 639.

¹⁷⁵255 F.3d 662 (9th Cir. 2001).

2. United States v. Lara

Lara, like Enas, was a non-member Indian on another tribe's reservation;¹⁷⁶ specifically, the Spirit Lake Nation Reservation.¹⁷⁷ Initially, Lara was arrested by tribal police officers from the BIA and informed that he had been banned from the reservation by tribal order, whereupon Lara punched one of the officers.¹⁷⁸ Lara was charged in tribal court of "violence to a policeman, resisting lawful arrest, public intoxication, disobedience to a lawful order of the tribal court and trespassing."¹⁷⁹ Lara was sentenced to a total of 155 days after he pled guilty to the first three charges.¹⁸⁰ The federal government then instituted proceedings against Lara for assault on a federal officer (the officer was part of the BIA), and Lara requested a motion to dismiss, arguing, like Enas, that this was a violation of double jeopardy.¹⁸¹ The magistrate judge denied Lara's motion, and Lara appealed to the Eighth Circuit.¹⁸²

Like the Ninth Circuit, the Eighth Circuit found that the threshold issue turned on whether or not a tribe's sovereignty in criminal jurisdiction over non-member Indians was inherent, or delegated by Congress.¹⁸³ Unlike the Ninth Circuit, however, the Eighth Circuit held that rather than the issue being a federal common law issue, "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court."¹⁸⁴

Whatever jurisdiction tribes had, Congress took away from them, and what little was returned, was done so under delegation through treaties or statutes.¹⁸⁵ These treaties and statutes, held the court, were done so under the authority given to Congress by the Constitution, and were therefore, constitutionally delegated powers rather than federal common law powers.¹⁸⁶ Exercising criminal jurisdiction over non-member Indians, the court explained, was an "external relation" which the

¹⁷⁶*Lara*, 324 F.3d at 636.

¹⁷⁷*Id.*

¹⁷⁸*Id.*

¹⁷⁹*Id.*

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²*Id.* at 637.

¹⁸³*Id.* at 639.

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Id.* at 640.

Supreme Court had held in *Duro*,¹⁸⁷ to have no longer existed in the tribes, and could only be “fixed” through a delegation of Constitutional powers.¹⁸⁸

Just like after the holding in *Duro*,¹⁸⁹ however, the federal government came to the rescue (an unimaginable sense of irony, the U.S. Congressional “Cavalry” coming to the *aid* of the tribes). The United States Solicitor General, backed by the Bush administration in its “urging the Supreme Court to affirm the inherent powers of tribal governments,”¹⁹⁰ took a very pro-tribal argument in arguing for Congress’ ability and authority to restore tribal sovereignty in criminal matters.

The Solicitor General’s Office, in its petition for writ of certiorari argued four main reasons for granting the review of the *Lara* case: a) that the “*Duro Fix*” legislation is a common law fix and not a constitutional fix, and therefore falls squarely under the proper authority of Congress to legislate and correct; b) that the Eighth and Ninth Circuit Court of Appeals conflict with one another requiring a uniform decision; c) that the Eighth Circuit greatly erred in attempting to “rewrite” the intent of Congress in the “*Duro Fix*” legislation; d) that agreeing with the Eighth Circuit would completely undermine what little authority tribal judiciaries have left over criminal matters in Indian country.¹⁹¹

The Solicitor’s Petition also pointed to studies conducted by the Senate and House which took place prior to the adoption of the “*Duro Fix*” amendment.¹⁹² The reports pointed out that if the *Duro* decision were to be left “as is,” that a jurisdictional void would be created in Indian country due to the fact that the federal and state governments have little resources or little incentive to go after misdemeanor crimes taking place in Indian country.¹⁹³ Even in PL-280 states, where the state does have jurisdiction over Indians in Indian country, the committees found that they were unwilling to pursue misdemeanor defendants.¹⁹⁴ Additionally, since lesser-included offenses have also been deemed to fall under the auspices of the double jeopardy clause, even the prosecution of the misdemeanor offenses in Tribal courts would bar prosecution of the “greater-encompassing offenses.”¹⁹⁵ Therefore, the Solicitor General’s Office argued, non-member Indians would have a great incentive to be tried and punished in tribal courts and thereby avoid any more serious

¹⁸⁷495 U.S. 676 (1990).

¹⁸⁸*Lara*, 324 F.3d 635, at 640.

¹⁸⁹495 U.S. 676 (1990).

¹⁹⁰*Supreme Court Case Impacts Homeland Security Proposal*, INDIANZ.COM (Jul. 29, 2003), at <http://www.indianz.com/News/archives/000471.asp> (last visited Oct. 04, 2003).

¹⁹¹Petition for Writ of Certiorari United States Solicitor General at 9, *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003) (No. 03-107).

¹⁹²*Id.* at 20-21.

¹⁹³*Id.* at 21.

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 22.

federal prosecution and sentence.¹⁹⁶ However correct the Solicitor's arguments may have been, the argument that a jurisdictional void would be created has fallen on deaf Supreme Court ears before, and was merely brushed aside.¹⁹⁷

As is often the case where two Federal Circuit Courts disagree on an issue, the U.S. Supreme Court recently weighed in on the delegation vs. inherent powers dilemma.¹⁹⁸ Referring to the Constitution's broad grant of power over Indian affairs to Congress, the Court held that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians . . ." ¹⁹⁹ Congress used this power, held the Court, merely to relax restrictions to the tribes' inherent sovereignty to "control events that occur upon the tribe's own land."²⁰⁰

This recent ruling by the Court could be interpreted very broadly to mean that should Congress so desire, it could "relax" more restrictions on Indian sovereignty by passing new legislation which could give tribes jurisdiction over anyone and everyone. Certainly, should it so desire, it could grant jurisdiction to tribes over foreign nationals as is being proposed in the Tribal Government Amendments to the Homeland Security Act discussed above.

VI. CONCLUSION

Will the courts continue to erode at what little is left of tribal sovereignty over criminal jurisdiction in Indian country, or will they begin to follow the trend now found among their colleagues in Congress, to assist in the self-determination of the tribes? It is clear that something must be done.

If the courts and Congress determine that the jurisdiction lies with the federal government rather than the tribes, then they both need do something about the spiraling rise in violent crime rates in Indian country. The best solution would be to work with the tribes, either by giving back full/concurrent jurisdictional control over criminal matters which take place in Indian country, or to find alternate solutions to prevent this great injustice. With the revenue from gaming and other enterprises, which is now finding its way to some of the tribes, it would behoove the federal government to continue to work closely with these and other tribes to make sure some of it is earmarked for the improvement of law enforcement and judicial entities. Yet, what incentive do tribes have to make these improvements when they continue to lack effective criminal jurisdiction over those who are committing the majority of the crimes?

¹⁹⁶*Id.* at 23.

¹⁹⁷*See Oliphant*, 435 U.S. at 212 (1978); *Duro*, 495 U.S. at 696 (1990).

¹⁹⁸*United States v. Lara*, 158 L. Ed. 2d. 420, 428 (2004).

¹⁹⁹*Id.*

²⁰⁰*Id.* at 431.