CRIMINAL AND CIVIL JURISDICTION IN INDIAN COUNTRY †

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The subject of jurisdiction over Indian country is extremely complex and frequently not well understood. To be able to understand jurisdiction over the Indian country, it is necessary to review the history of the legal relations between the United States and the various Indian tribes now within its boundaries. This discussion will treat the subject of jurisdiction over Indian country very broadly and as simply as possible so that the basic understanding of the subject can more easily be understood.

To begin with, the term "jurisdiction" is best defined as the power or authority over a particular person, thing or subject matter. This discussion will deal with the jurisdiction of the United States Government, State governments and the Indian tribes themselves over the Indian country. The term "Indian country" as used herein will be defined later.

Long before the coming of the white man to North America, the Indian tribes were independent and sovereign nations. Through no choice of their own, and in fact over their long and violent objections, the United States, as we know it now, assumed the right to make and enforce its laws over the Indian tribes. We call this "conquest." By this process, the Indian tribes lost all their authority (external sovereignty) to have relations with other nations, but they did not lose any of their other internal (sovereign) governmental powers, except those which the United States took away from them.

It is important to note that the jurisdiction of the Indian tribes derives primarily from the tribes' own sovereignty and not by delegation from the United States. Therefore, the laws of the United States are not the sources of tribal authority but rather are in the nature of limitations on tribal authority. The jurisdiction of the various States

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* See Contributors' Section, p. 65, for biographical data.

over Indians within Indian country derives solely and exclusively from grants of authority given them by the Federal Government, as enacted by the Congress.

We may conclude, then, that the tribes' jurisdiction exists by virtue of their own sovereignty, respectively as to each tribe, and is limited only to the extent that the Federal Government has limited it by treaty, conquest or Federal legislation. The Federal Government's general authority over Indians and Indian affairs exists by virtue of the so-called "Commerce Clause of the Federal Constitution,"[1] which gives the Federal Government authority to regulate commerce with the Indian tribes. Such authority as the States have over Indians and Indian affairs within Indian country is found only in specific grants from the United States, as defined by law.

TERRITORIAL LIMITS AND JURISDICTION OVER INDIANS

A. Federal Territorial Jurisdiction.

By virtue of the Constitutional provision above-mentioned, the Federal Government has the power to act on the persons of Indian tribes *anywhere* in the United States.

B. Tribal Territorial Jurisdiction.

Since the Indian tribes lost their power over international relations to the Government of the United States, the territorial limits of their jurisdiction depends on treaties, Executive Orders and Federal laws.

C. State Territorial Jurisdiction.

Since the jurisdiction of a State depends on specific grants from the Federal Government, its territorial jurisdiction over Indians and Indian affairs within Indian country depends on Federal law.

FEDERAL CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY

18 U.S.C., Section 1151, defines the term "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 dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian title to which has not been extinguished, including rights-of-way running through the same. (Emphasis added.)

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[1] U.S. CONST. art. I, § 8, cl. 3.

The above section is important because by virtue of Article 1, Section 8, Clause 3 of the Federal Constitution, the Federal Government has the power to legislate and deal with the whole intercourse between the Indian tribes and the other people of the United States. By Section 1151, Congress has chosen to define the area within which it chooses to exercise criminal jurisdiction over members of Indian tribes. Congress could have enacted a statute choosing to exercise such criminal jurisdiction over Indians anywhere in the United States, but chose to exercise its power and authority only over the areas mentioned in Section 1151, *supra.*

18 U.S.C., Section 1152 provides as follows:

> 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.
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> 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.

From the foregoing statute it would appear that Congress intended that the Federal Courts would thereby have exclusive jurisdiction over all crimes committed in the Indian country except those committed by one Indian against another and those over which exclusive jurisdiction is guaranteed by treaty to a particular Indian tribe. However, two United States Supreme Court decisions, *United States v. McBratney*[2] and *Draper v. United States,*[3] supply a further exception to Section 1152 to the effect that a crime committed in Indian country by a non-Indian against the person of another non-Indian comes within the jurisdiction of the State.

Consequently, the Federal courts have jurisdiction over crimes committed in Indian country in the following cases:

(1) Crimes committed by an Indian against the person or property of a non-Indian. Such offenses come specifically within the language of 18 U.S.C., Sec. 1152. In these cases, the State courts do not have any jurisdiction.

(2) Crimes committed by a non-Indian against the person or property of an Indian. These cases also fall within the purview of 18 U.S.C., Sec. 1152. In these cases, the tribal courts do not have con-

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[2] 104 U.S. 621 (1881).
[3] 164 U.S. 240 (1896).

current jurisdiction, although there would seem to be concurrent jurisdiction by the States in such cases.

(3) Crimes committed either by an Indian or a non-Indian which have no victim. If the Indian is the offender, the State court would have no jurisdiction and the offender would be subject to Federal and tribal jurisdiction except where Congress has given jurisdiction to the State.

(4) The so-called "Ten Major Crimes" committed by an Indian against the person or property of another Indian. 18 U.S.C., Sec. 1153 provides as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses: namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

By a later Act of August 1, 1956,[4] embezzlement, stealing or conversion of tribal funds or property by an Indian was added as the eleventh major crime.

STATE CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY

The Supreme Court decision in *Worcester v. Georgia*[5] established that the States have only such jurisdiction over Indians in the Indian country as Congress has conferred upon them; that in the absence of Congressional legislation, the State has no jurisdiction over Indians in Indian country. To the present time, Congress has conferred jurisdiction on the States over the person of Indians within the Indian country only to a very limited extent. The Act of February 15, 1929[6] authorized the Secretary of the Interior to permit agencies and employees of the States to enter Indian country to enforce sanitation and quarantine regulations. The Act of August 9, 1946[7] permits State agents to enter Indian country for the purpose of enforcing State compulsory school attendance laws against Indians provided the Indian Tribal Council has given its prior consent.[8]

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[4] 18 U.S.C. § 1163 (1948).
[5] 6 Pet. 515 (1832).
[6] 45 Stat. 1185 (1929).
[7] 60 Stat. 962 (1946).
[8] In this connection, it is to be noted that the Navajo Tribal Council, by resolution adopted August 11, 1952, consented to the application of the foregoing law wherever a public school district lies or extends within the Navajo Reservation.

The Assimilative Crimes Act[9] assimilates the criminal laws of the States to offenses committed on lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof. This Act gives the States legislative jurisdiction to define crimes within Indian country but leaves to the Federal Government and Federal courts the power to apprehend and punish the offense of crimes as defined by State legislation. It would seem that the Assimilative Crimes Act would give the States the ability to superimpose on tribal law, except the narrow field of crimes committed by an Indian against an Indian; for instance, by attaching a criminal penalty, the State would be able to make any law it wished applicable to the Indian country. However, the enabling act of each of the States stands as a bar to a sweeping application of the Assimilative Crimes Act.[10] The Enabling Act of the State of Arizona[11] reads as follows:

> That the people inhabiting said state do agree and declare that they forever disclaim all right and title to . . . all lands lying within state boundaries owned or held by any Indian or Indian tribe the right or title to which shall have been acquired through or from the United States or any prior sovereignty and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Thus, the Assimilative Crimes Act assimilates only such State criminal laws as are not contrary to Federal policy. State laws in conflict with the Enabling Act are not assimilated.

Tribal Criminal Jurisdiction

We have noted previously the general proposition that the jurisdiction of Indian tribes over criminal offenses committed by Indians within the Indian country is absolute, except to the extent that it has been limited by Federal law. Certain practical limitations have been placed upon the exercise of the tribes' jurisdiction in the matter of criminal law. Indian tribal legislation, usually by council resolution, is subject to the approval of the Secretary of the Interior. Tribal Constitutions are subject to approval by the Secretary of the Interior. For those tribes who have not accepted the Indian Reorganization Act, the Secretary of the Interior has established regulations setting out a

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[9] 18 U.S.C. § 13 (1948).
[10] *Ibid.*
[11] 36 Stat. 56g (1910).

Code of Indian Offenses.[12] The most important limitation on the criminal jurisdiction of Indian tribes is that such jurisdiction extends only to cases in which an Indian is the defendant.

CIVIL JURISDICTION IN INDIAN COUNTRY

The territorial jurisdiction over civil matters and actions within the Indian country coincides in general with the territorial jurisdiction over criminal offenses, as outlined above, with such modifications and exceptions as are provided by Federal law and regulation.

Unless otherwise provided or excepted by the Constitution of the United States or Federal laws and regulations, the Indian Tribal Courts have jurisdiction over civil actions arising between Indians within the Indian country or an Indian reservation.

Where tribal Indians become involved in personal actions or transactions outside the Indian reservation, such civil actions are subject to the jurisdiction of the State courts, where the parties are brought within the jurisdiction of such courts by lawful process. However, a judgment obtained in the State court against an Indian may not be satisfied by execution or levy on the property of the Indian located within an Indian reservation.[13]

As pointed out under a preceding paragraph on State territorial jurisdiction, the laws of a State may not be extended to or over an Indian and his property within an Indian reservation, except in those limited situations as authorized by Federal law.

On the other hand, an Indian, being a citizen of the United States and a citizen of the State within which he resides, may appear in a State court and maintain a civil action against an Indian or a non-Indian on any subject matter which is within the jurisdiction of the State court and where valid process has been served upon the non-Indian defendant.

SUMMARY

While there has been and will continue to be considerable conflict and differences of opinion regarding the lines of demarcation between Federal, State and tribal jurisdiction over Indians in Indian country, we must recognize that these matters have been resolved by decisions in the Federal courts. The recent cases of *Williams v. Lee;*[14] *In the Matter of Denetclaw,*[15] *State v. Begay,*[16] and *Native American*

[12] 25 C.F.R. § 11 (1958).
[13] Williams v. Lee, 358 U.S. 217 (1959).
[14] *Ibid.*
[15] 83 Ariz. 299, 320 P.2d 697 (1958).
[16] 63 N.M. 409, 320 P.2d 1017 (1958).

Church of No. America v. Navajo Tribal Council,[17] have left many persons with the impression that Indian country is a no-man's land in which neither white man nor Indian knows his rights. However, these cases have all followed the fundamental principle set forth in 1832 by the U. S. Supreme Court in the case of *Worcester v. Georgia*,[18] that is; that the paramount authority or jurisdiction over Indians in Indian country rests with the United States Federal Government; that whatever rights the states have over Indians in Indian country are found only in specific grants of authority from the United States Government; and that the right of self-government and authority over internal affairs of the tribe rests with the tribe, except in those cases where the Federal Government has placed limitations. For examples of these principles, we cite the following illustrations:

(1) In the *Native American Church* case, the plaintiff sought to invalidate a Navajo Tribal Council ordinance prohibiting the use, sale, possession, etc., of peyote on the reservation absolutely on the grounds that it violated the plaintiff's right to freedom of worship as guaranteed by the First Amendment to the Constitution of the United States. The U. S. Court of Appeals of the Tenth Circuit, in upholding the tribal court's decision, held that the Constitution of the United States, with respect to freedom of religion, did not apply to the Navajo Tribe of Indians. The court properly construed the First and Fourteenth Amendments to the Constitution as being limitations and restrictions on the activity of the Federal and State governments, but having no application to the Navajo Tribe. This case illustrates the principle that the right of self-government and jurisdiction over internal affairs of the tribe is fixed solely in the tribal government unless limited by Federal law.

(2) The "Buck Act"[19] authorizes the various States to levy and collect sales and income taxes in areas under the exclusive jurisdiction of the United States. However, a specific exception is contained in the Act excluding the levy or collection of any tax on or from any Indian not otherwise taxed. This illustrates the principle that the States can exercise only such jurisdiction over Indians in Indian country as the Federal Government specifically authorizes by law.

By Public Law 280 of the 82nd Congress,[20] the United States has given consent to all states having an express disclaimer of jurisdiction over Indian country to acquire civil and criminal jurisdiction over

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[17] 272 F.2d 131 (1959).
[18] 6 Pet. 515 (1832).
[19] 4 U.S.C. § 105 (1947).
[20] 67 Stat. 588 (1953).

Indian country by amending or repealing their disclaimer law and by taking affirmative legislative action to obligate and bind themselves to assume jurisdiction over the Indian country. Thus far, the States of New Mexico and Arizona, which cover much of the Indian country in the Southwest, have shown no desire or attempt to assume any jurisdiction over the Indian country.