Concurrent Tribal Authority Under
Public Law 83-280
Office of Tribal Justice
United States Department of Justice
November 9, 2000

Indian tribes, as sovereigns that pre-exist the federal Union, retain inherent sovereign powers over their members and territory, including the power to exercise criminal jurisdiction over Indians. The Constitution, which allocates powers of government between the state and Federal Governments, vests exclusive authority to address the affairs of Indians in Indian country[1] in the Federal Government. As a result, states lack authority over Indians in Indian country absent congressional authorization. Historically, this meant that the Federal Government and Indian tribes jointly exercised criminal jurisdiction over Indians in Indian country. In 1953, Congress perceived inadequate law enforcement in Indian country and enacted Public Law 83-280 ("P.L. 280") to address the problem. P.L. 280 conferred jurisdiction on certain states over most or all of Indian country within their borders and suspended enforcement of the Major Crimes Act, 18 U.S.C. § 1153, and the General Crimes Act (or Inter-racial Crimes Act), 18 U.S.C. § 1152, in those areas. The statute also authorized other states to assume that jurisdiction. This effort to allow local authorities to address local criminal conditions was not intended to deprive tribal governments of their authority. As a result, the federal government and the vast majority of state and federal courts to consider the issue have agreed that tribes retain concurrent jurisdiction to enforce laws in Indian country. In addition, the Federal Government retains jurisdiction to enforce all federal criminal laws in Indian country except sections 1152 and 1153 of Title 18.

DISCUSSION:

The United States recognizes Indian tribes as "domestic dependent nations," Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), with retained sovereignty over their members and territory, E.O. 13084, Consultation and Coordination with Indian Tribal Governments (May 14, 1998). Tribes do not draw their powers from any source of federal law. Rather, they are the inherent powers of sovereigns that pre-exist the federal Union. United States v. Wheeler, 435 U.S. 313, 323-24 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896). Congress has the power to adjust inherent tribal powers, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978), but courts will ordinarily conclude that tribal powers remain intact absent a "clear indication" of congressional intent to limit them, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); see also Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("the proper inference from

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[1] "Indian country" is defined by 18 U.S.C. sec. 1151 to include all areas within a reservation, trust allotments, and dependent Indian communities. Courts interpret section 1151 to include all lands held in trust for tribes or their members. See United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999).

silence . . . is that the sovereign power . . . remains intact"); Rice v. Rehner, 463 U.S. 713, 720 (1983) ("Repeal by implication of an established tradition of [tribal] immunity or self-governance is disfavored."). Among tribes' inherent powers is the authority "to exercise criminal jurisdiction over all Indians," 25 U.S.C. § 1301(2), and the power to arrest and detain non-Indians and deliver them to state authorities for prosecution under state laws, see Duro v. Reina, 495 U.S. 676, 697 (1990); Strate v. A-1 Contractors, 117 S. Ct. 1404, 1414 n.11 (1997); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); State v. Schmuck, 121 Wash. 2d 373 (1993).

Under the federalist structure, exclusive authority over Indian affairs is vested in the federal government. See Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976). As a result, states lack authority to prosecute Indians for crimes committed within Indian country without congressional authorization. See Seymour v. Superintendent, 368 U.S. 351, 359 (1962). In 1834, Congress first addressed crime in Indian country by enacting the General Crimes Act (also known as the "Inter-racial Crimes Act"), 18 U.S.C. § 1152, which extends federal criminal jurisdiction to crimes between Indians and non-Indians. The General Crimes Act preserved important components of tribal self-government by providing that crimes between Indians remained within the exclusive jurisdiction of tribal governments and by excepting Indian offenders whom the tribal government had tried and punished, ensuring that tribes retained concurrent -- indeed, preemptive -- jurisdiction over crimes by Indians. And, while states generally retain authority over non-Indians in Indian country, including crimes by non-Indians against non-Indians, the prevailing view is that section 1152 preempts state criminal jurisdiction over non-Indians who commit crimes against Indians. See, e.g., State v. Larsen, 455 N.W.2d 600 (S.D. 1990); State v. Flint, 756 P.2d 324 (Ariz. App. 1988). In 1885, meanwhile, Congress enacted the Major Crimes Act, 18 U.S.C. § 1153, which created federal jurisdiction over certain enumerated serious felonies by Indians.[2] Tribes, however, retain their inherent authority to punish Indians for crimes listed in the Major Crimes Act, see Wetsit v. Stafne, 44 F.3d 813 (9th Cir. 1995), although the punishment they may impose is now limited to one-year of imprisonment, 25 U.S.C § 1302(7).[3]

In the early 1950s, Congress perceived a lack of law enforcement and judicial services in many areas of Indian country. See generally Bryan, 426 U.S. at 379-80. That concern became "the central focus" of legislation commonly known as "P.L. 280," id. at 380, which is codified at

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[2] The Major Crimes are: murder, manslaughter, kidnapping, maiming, felony sexual assault, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under sixteen years old, arson, burglary, robbery, and felony theft.

[3] Under the "dual sovereignty" exception to the Double Jeopardy Clause, tribes and the Federal Government can punish the same offender for the same offense. See United States v. Wheeler, supra.

18 U.S.C. § 1162. P.L. 280 required six states to assume criminal and civil jurisdiction over all or part of Indian country within those states and provides that the General Crimes Act and the Major Crimes Act shall not apply within those areas of Indian country. See 18 U.S.C. § 1162(a)-(c). P.L. 280 also authorized other states to voluntarily opt to assume criminal and/or civil jurisdiction over Indian country. See generally Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).[4] The Federal Government retains concurrent jurisdiction to prosecute under the Major Crimes Act and General Crimes Act in the so-called "option states." See United States v. High Elk, 902 F.2d 660 (8th Cir. 1990); but see United States v. Burch, 169 F.3d 666 (10th Cir. 1999).

The Supreme Court undertook its most complete analysis of P.L. 280 in Bryan, which involved the question whether P.L. 280 authorized states to exercise civil regulatory and taxation authority over Indians within the covered areas of Indian country. The Court found that it did not. The Court reasoned that P.L. 280 reflected Congress's concern with the lack of law enforcement and judicial resources for Indian country and meant to allow states to provide those two services only. 426 U.S. at 383-87. Moreover, the Court explained,

> nothing in [P.L. 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and the conversion of the affected tribes into little more than private, voluntary organizations.

Id. at 388 (quotations omitted). See also Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) (same).[5] That two-fold reasoning leads to the conclusion that tribes retain their inherent authority to exercise criminal jurisdiction over Indians. First, extending state criminal jurisdiction to fill a perceived law enforcement void in Indian country does not suggest that tribal

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[4] Congress enacted various provisions in 1968 to limit the further extension of P.L. 280. The 1968 provisions require tribal consent, by majority vote of the adult members, before any further states could assume jurisdiction over any areas of Indian country and authorize states to "retrocede" P.L. 280 jurisdiction back to the Federal Government. See 25 U.S.C. secs. 1323 & 1326.

[5] In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the Supreme Court explained that P.L. 280 did not authorize California to enforce its gaming laws in Indian country. The Court distinguished between civil/regulatory laws and criminal/prohibitory laws, allowing states to enforce only the latter in Indian country. The distinction between civil/regulatory and criminal/prohibitory laws hinges on whether a state completely forbids conduct or simply regulates how it is undertaken. Because of that distinction, states may not enforce regulatory laws against Indians in Indian country, even though state law might impose a criminal sanction for their violation.

law enforcement should be abolished. On the contrary, as one court has noted, eliminating tribal law enforcement authority would have defeated Congress's purpose of enhancing law enforcement services in Indian country. See State v. Schmuck, 121 Wash. 2d at 396. Second, eliminating tribal law enforcement authority would severely undermine tribal governments. The lack of even a "remote[] suggest[ion]" that Congress meant to "undermine . . . tribal governments" falls far short of the "clear indication" that the Court requires in order to find a limitation on tribal powers in a statute.

That conclusion is reflected in the rulings of courts that have addressed this or related issues. Three courts have squarely addressed whether P.L. 280 divests tribes of concurrent criminal jurisdiction, and all have agreed that it does not. In Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990), the Eighth Circuit explained that

> [W]e agree with the district court's conclusion that Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority. As both the Supreme Court and this court have made clear, limitations on an Indian tribe's power to punish its own members must be clearly set forth by Congress. We find no such clear expression of congressional intent in Public Law 280.

898 F.2d at 675 (citations omitted). The Washington Supreme Court in State v. Schmuck, 121 Wash. 2d 373 (1993), and the federal district court for the Central District of California in Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195 (C.D. Cal. 1998),[6] reached identical conclusions in cases squarely addressing whether P.L. 280 divested tribes of criminal authority.

Other courts have reached like conclusions in cases involving P.L. 280's effect on tribal civil jurisdiction. For example, the Ninth Circuit in Native Village of Venetie v. Alaska, 944 F.2d 548 (9th Cir. 1991), concluded that P.L. 280 did not divest tribes of concurrent authority to adjudicate child custody proceedings, see id. at 560-62. More recently, the Fifth Circuit, relying on Walker v. Rushing, held in TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999), that a statute that made P.L. 280 jurisdiction applicable to the Pueblo did not divest the Pueblo's courts of concurrent jurisdiction over civil disputes that arise within its territory, see id. at 685.[7]

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[6] There is an appeal pending in the Cabazon Band case before the Ninth Circuit. That appeal, however, is limited to other issues. More specifically, the district court's determination that the Band has authority to conduct law enforcement activities within its areas of Indian country is not being appealed and is therefore final.

[7] The Alaska Supreme Court in Native Village of Nenana v. State of Alaska Dept. of Health & Social Services, 722 P.2d 219 (Ak. 1986), held that P.L. 280 divested tribes of

The Departments of Justice and Interior, the two federal agencies that deal with law enforcement issues in Indian country, agree that tribes retain concurrent criminal jurisdiction in P.L. 280 states. The Attorney General has testified to that effect before Congress. See S. Hrg. 105-705, 105th Cong., 2d Sess. (June 3, 1998) at 3. The United States has repeatedly taken the position in litigation that P.L. 280 does not divest tribes of concurrent civil litigation, citing among other sources Walker v. Rushing as support for that view. See United States Brief in John v. Baker; Proposed United States Brief as amicus curiae in In re C.R.H. Interior, meanwhile, has stated the view that "it cannot be said that tribal jurisdiction was expressly or by necessary implication withdrawn by" P.L. 280. Sol. Op. M-36907, 85 I.D. 433, 436 (Nov. 14, 1978).

Other sources as well concur with the view of the courts and the federal government that tribes retain concurrent criminal jurisdiction over Indians. The most authoritative text on federal Indian law, Felix Cohen's HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), concludes that

> [N]othing in the wording of either the civil or criminal provisions of Public Law 280 or its legislative history precludes concurrent tribal jurisdiction. The basic intent of the criminal law section was to substitute state for federal jurisdiction under the Indian Country Crimes Act and the Major Crimes Act. Thus, if . . . these two statutes do not preclude concurrent tribal jurisdiction, neither should Public Law 280. The courts have construed Public Law 280 to leave substantial governmental authority with the tribes, holding that the statute should only be interpreted to delegate to the states that jurisdiction which Congress clearly intended to transfer. Like reasoning sustains continuing tribal court authority concurrent with the states.

Id. at 344. Finally, in the legislative history to the Indian Tribal Justice Act, 25 U.S.C. § 3601 et seq., the House Committee on Natural Resources observed that "even in mandatory P.L. 83-280 states, Indian tribes still retain concurrent civil and criminal adjudicatory jurisdiction." H.Rep. No. 103-205, 103d Cong. 1st Sess. (1993) at 9, reprinted at 1993 U.S.C.C.A.N. 2425, 2429.

Aside from tribal authority, it is also clear that the Federal Government retains substantial law enforcement authority in Indian country in P.L. 280 states. Federal criminal laws of general application continue to apply in Indian country areas that are subject to P.L. 280. See United States v. Pemberton, 121 F.3d 1157, 1164 (8th Cir. 1997) (federal mail fraud and conspiracy

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jurisdiction to adjudicate child custody matters. In John v. Baker, 982 P.2d 738 (Ak. 1999), however, that court held that tribes retain concurrent jurisdiction to adjudicate child custody matters in areas where P.L. 280 does not apply, meaning areas that are not Indian country. As noted above in text, moreover, the Ninth Circuit disagrees with the result in Nenana. The United States has asked the Alaska Supreme Court to overrule Nenana in a case now before that court. See Proposed United States Brief as amicus curiae in In re C.R.H., No. S-09677.

offenses apply in P.L. 280 states). That includes the offenses – other than sections 1152 and 1153 – that are designed to protect Indian lands or Indian commerce that are set forth in Chapter 53 of Title 18. See Rice v. Rehner, supra (applying the delegation to regulate Indian country liquor transactions in 18 U.S.C. § 1161 to California); United States v. Guassac, 169 F.3d 1188 (9th Cir. 1999) (offense of theft from a tribal organization defined in 18 U.S.C. § 1163 applies in California); United States v. Pollman, 364 F. Supp. 995 (D. Mont. 1973) (offense of unlawful hunting on Indian lands defined in 18 U.S.C. § 1165 applies in P.L. 280 state). Violations of federal criminal laws are investigated by the Federal law enforcement agencies that generally have responsibility over them. That includes the BIA, which generally has authority to enforce federal laws in Indian country. See 25 U.S.C. § 2806(a). The BIA also has authority to commission tribal police officers as "special law enforcement officers" of the BIA to carry out those responsibilities and to contract out its functions under either the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq., or the Self-Governance Program, 25 U.S.C. § 458aa et seq.

CONCLUSION:

Indian tribes retain concurrent criminal jurisdiction over Indians in P.L. 280 states. That is the shared view of the Federal Government and the vast majority of courts that have directly considered the issue.