CRIMINAL JURISDICTION IN INDIAN COUNTRY: TLOA, VAWA, *Cooley* and *Castro-Huerta*

January 11, 2024
Seattle, Washington

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Talton v. Mayes, 163 U.S. 376 (1896)

"It cannot be doubted, as said in *Worcester*, that . . . 'The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.' . . . [Because] the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment."

Indian Civil Rights Act of 1968

(25 U.S.C. § § 1301 *et seq.*)

In 1968, in reaction to allegations of arbitrary abuse of tribal authority, Congress imposed on Indian tribes nearly all the restrictions that the Bill of Rights imposes on the federal and state governments, such as:

- Freedom of speech, press, and assembly;
- Protection against unlawful search and seizure;
- Protection against double jeopardy and self-incrim.;
- Right to a speedy trial, and to call witnesses;
- Right to retain counsel;
- Right to due process and equal protection;
- Right to a jury trial of at least six jurors.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

The Tribe argued that its authority to prosecute non-Indians "flows automatically from the Tribe's retained inherent powers of government." The Tribe pointed out that no federal law prohibited the exercise of this power.

The Court held: "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status."

"[Indian tribes do not] retain the power to try non-Indians according to their own customs and procedure."

Tribal Law and Order Act of 2010 (TLOA)

Under the ICRA, the maximum punishment that tribes can impose for one offense is 1 year of imprisonment or a fine of $5,000, or both.

Under TLOA, the maximum punishment tribes can impose for any one offense is 3 years of imprisonment or a fine of $15,000, or both, with a maximum of 9 years for three or more offenses.

TLOA (cont.)

However, to impose an "enhanced" sentence, the defendant must:

1. have been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
2. is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

TLOA (cont.)

In addition, the tribe must do five things:

1. "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;"
2. if the defendant is indigent, provide free assistance of an attorney licensed "by any jurisdiction in the United States" that ensures the competence of its licensed attorneys;

TLOA (cont.)

3. "require that the judge presiding over the criminal proceeding-

   (A) has sufficient legal training to preside over criminal proceedings; and

   (B) is licensed to practice law by any jurisdiction in the United States;"
4. prior to charging the defendant, make publicly available the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
5. "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding."

TLOA (cont.)

Sentencing:

Defendants sentenced under TLOA may be required to serve their sentence in (1) a tribal jail approved by the BIA for long-term incarceration, (2) a federal facility, (3) a state or local correctional center, or (4) an alternative rehabilitation center.

As of 2020, at least fifty-five tribes have exercised authority under TLOA.

Violence Against Women Act of 2013: Background

Disturbing statistics show that:

- Native women are two-and-a-half times more likely to be victims of sexual assault than non-Native women;
- 39% of Native women will be subjected to domestic violence during their lifetimes;
- One-third of Native women will be raped during their lifetimes, and most of the time, the assailant is a non-Native; and
- U.S. Attorneys declined to prosecute 52% of the violent crimes reported in Indian country, and 67% of the cases declined involved claims of sexual abuse.

Background (cont.)

Thus, the federal government wasn't prosecuting most crimes of sexual violence committed against Indian women. Moreover, Indian tribes were prevented from prosecuting those lawbreakers due to *Oliphant*. Non-Indians were aware that they could sexually assault Native women and likely never face prosecution.

VAWA "Tribal Provision"
(25 U.S.C. § 1304)

In 2013, as part of the reauthorization of VAWA, Congress affirmed the "inherent power" of Indian tribes to exercise criminal jurisdiction over all persons—including non-Indians—who commit domestic violence or dating violence or who violate protection orders in Indian country against an Indian. VAWA allowed tribes to exercise "special domestic violence criminal jurisdiction" (SDVCJ).

VAWA (cont.)

In 2022, Congress amended VAWA to restore to tribes "special Tribal criminal jurisdiction" (STCJ) over an expanded list of crimes. (Moreover, under VAWA 2022, the tribes in Maine became eligible to participate in VAWA, and a "pilot program" was created under which the Attorney General may designate five Alaska tribal villages per year to exercise STCJ.)

VAWA (cont.)

The crimes now covered by VAWA are:

- Assault of tribal justice personnel;
- Child violence;
- Dating violence;
- Domestic violence;
- Sexual violence;
- Obstruction of justice;
- Sex trafficking;
- Stalking; and
- Criminal violations of protection orders.

VAWA (cont.)

Limitations:

- The victim must be an Indian;
- The crime must take place in that tribe's Indian country;
- However, the 2022 amendment *removed* the requirement in VAWA 2013 that the non-Indian defendant must have "sufficient ties to the Indian tribe" by (a) residing within the tribe's Indian country, (b) being employed within the tribe's Indian country, or (c) being a spouse, intimate partner, or dating partner of a tribal member. Now, a sexual assault by a stranger (to the victim and to the tribe) is covered.

VAWA: The Defendant's Rights

To exercise VAWA jurisdiction and impose a sentence *of any length*, the tribe must provide the defendant with all of the rights and protections set forth in ICRA and TLOA, *and* provide:

1. A right to a trial by an impartial jury drawn from a pool of prospective jurors reflecting a cross-section of the community, including non-members of the tribe.
2. The tribal court must timely notify defendants of their rights, including the right to petition for writ of *habeas corpus* and to petition for a stay of detention.
3. Plus, the court must provide defendants with "all other rights" under federal law for the crime alleged to have occurred.

United States v. Cooley, 141 S. Ct. 870 (2021)

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Issue: "The question presented is whether an Indian tribe's police officer has the authority to detain temporarily and to search a non-Indian on a public right-of-way [a state highway] that runs through an Indian reservation?"

United States v. Cooley, 141 S. Ct. 870 (2021)

The Supreme Court rules 9-0 in favor of the tribe.

The Court cites *Montana v. United States* (1981), which held that Indian tribes generally do *not* have jurisdiction over non-Indians *unless* the non-Indian (1) has entered into a contract or other agreement with the tribe, or (2) the conduct of the non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

United States v. Cooley, 141 S. Ct. 870 (2021)

The Court holds that the second exception "fits the present case, almost like a glove." Indian tribes have the right "to protect themselves against ongoing threats." The Crow Tribe has the "inherent sovereign authority to engage in policing of the kind before us."

The Court notes that this is not "*Oliphant*" because the officer was not subjecting the driver to *tribal* law. The tribe was merely protecting itself from harm, which it has the inherent right to do.

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)

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The Court's first sentence: "At the far end of the Trail of Tears was a promise."

The Court's last paragraph: "If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."

Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022)

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Oklahoma v. Castro-Huerta (2022)

The General Crimes Act of 1817 authorizes the federal government to prosecute all federal crimes committed by a non-Indian against an Indian in Indian country. (Thus, the feds can prosecute C-H.) The question here is whether Oklahoma can *also* prosecute C-H, that is, whether the state has *concurrent* jurisdiction.

The Court ruled 5-4 that Oklahoma has concurrent jurisdiction and, therefore, C-H was validly convicted.

Oklahoma v. Castro-Huerta (2022)

The majority and the dissent analyzed the case differently. The majority asked whether Congress had passed any law *prohibiting* Oklahoma from prosecuting the crime. The Court found nothing preventing Oklahoma from prosecuting C-H.

The dissent, on the other hand, asked whether Congress had passed any law *authorizing* Oklahoma to prosecute the crime. Finding no such authority, the dissent argued that Oklahoma lacked the authority to prosecute C-H.

Oklahoma v. Castro-Huerta (2022)

For tribes, what's most scarry about the Court's decision isn't its conclusion, but its analysis. As Justice Gorsuch wrote in his dissent, the majority's opinion is "unattached to any colorable legal authority….Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom." After all, the Court's first decision regarding state jurisdiction in Indian country, *Worcester v. Georgia* (1832), held that a state has *no* jurisdiction without *express* congressional consent. The decision in C-H is inconsistent with long-settled law.