



# Untangling the Web: Understanding Criminal Jurisdiction in Indian Country & the Role of Tribal Sovereignty

# *Join in the conversation!*

## Audio Participation Information:

- Call-in Number: ( 866 ) 379 - 3045
- Conference ID#: 85425436

# GoToWebinar Attendee Interface

## 1. Viewer Window

The screenshot shows the GoToWebinar Viewer application window. The title bar reads "GoToWebinar Viewer". The main content area displays the logo for "CB Presentations™" and the title "Give Online Punch". Below the title, there is a yellow graphic of a pair of pliers. The text "Audio: Use your microphone and speakers (VoIP) or call in using your telephone." is visible, along with contact information: "Dial: (805) 879-4135", "Access Code: 105-748-644", and "Audio PIN: 74". A profile picture of Corena Bahr is shown with her name and title: "Corena Bahr, CEO and Founder, CB Presentations". The Citrix logo is in the bottom left corner of the window.

## 2. Control Panel

The screenshot shows the GoToWebinar Control Panel. The "Audio" section is expanded, showing options: "Full Screen", "Window" (checked), "Auto-Hide the Control Panel" (checked), and "Hide Control Panel". Below these are "Default Control Panel Layout" and "Save this Startup Layout". A note says "If you're already on the call, press #74# now.". The "Questions" section is also expanded, showing a "Questions Log" with the text "Welcome! Please type any questions/comments in the Question and Answer section of your control panel." and an input field "[Enter a question for staff]" with a "Send" button. The bottom of the control panel displays "Give Online Punch", "Webinar ID: 576-794-892", and the "GoToWebinar™" logo.

# Webinar Roadmap:

- 2:00-2:05p.m. – Introductions/Logistics
- 2:05-2:15p.m. – Importance of Tribal/State Cooperation
- 2:15-2:40p.m. – Basics of Criminal Jurisdiction  
in Indian Country
- 2:40-2:50p.m. – Question & Answer Session
- 2:50-2:55p.m. – Intro to Law Enforcement Agreements
- 2:55-3:00p.m. – Conclusion

# U.S. Senator Jon Tester (D-MT)





# Criminal Jurisdiction in Indian Country (the jurisdictional maze)

Dean Kevin Washburn  
University of New Mexico  
School of Law

# Criminal Jurisdiction in Indian Country: Recognizing the Divisions

- Federal
- Tribal
- State Governments
  
- Jurisdiction depends upon the:
  - Location of the crime
  - Type of crime
  - Status of the perpetrator
  - Status of the victim

# The Rules of Jurisdiction

- Created during 200 years of Congressional legislation and Supreme Court decisions
  - Referred to as the "jurisdictional maze."
  - The following is a brief timeline of the development of the jurisdictional rules:



# 1790 - 1834 - Indian Country Crimes Act

- Also known as the "General Crimes Act"
- Extended the federal criminal laws for federal enclaves to Indian country
- Excluded crimes committed by one Indian against another Indian
- Excluded crimes where an Indian had been punished by the law of the tribe
  - The statute extends the "Assimilative Crimes Act" to Indian country, making state law crimes punishable in federal court

# 1881 - *U.S. v. McBratney*

- The Supreme Court held:
  - states have jurisdiction over crimes committed in Indian country by one non-Indian against another non-Indian
  - federal government lacks jurisdiction because there is no federal interest involved
- Ruling later expanded to "victimless crimes" like traffic offenses.

# 1885 - Major Crimes Act -

- *Ex Parte Crow Dog* decision spurs Congress to enact the Major Crimes Act, making Indians subject to federal prosecution for 7 major felonies
- Currently, list includes more than 30 offenses.
  - most recent addition: felony child abuse

# 1934 - Indian Reorganization Act

- Most BIA Courts of Indian Offenses are replaced by tribal courts

# 1953 - Public Law 280

- Delegated criminal (and some civil jurisdiction) over Indian Country to several states (CA, MN, NE, OR, WI and AK)
- Permitted other states to opt in
  - Several states (AZ, FL, ID, IA, MT, NV, ND, UT, and WA) assumed all or part of the jurisdiction offered.
- 1968 Amendments permitted retrocession by states and prevented future assumption of jurisdiction without tribal consent
- Concurrent tribal jurisdiction

# 1968 - Indian Civil Rights Act

- Codifies most of the guarantees found in the Bill of Rights and applies them to tribes.
- Limited tribal court sentencing to a maximum of one year in jail or a \$5,000 fine.

# 1978 –

## *Oliphant v. Suquamish Tribe*

- Supreme Court held tribes do not have inherent criminal jurisdiction over non-Indians unless specifically authorized by Congress.
- *Santa Clara v. Martinez* - Tribal violations of the Indian Civil Rights Act may not be appealed to federal court except by writ of habeas corpus.
- *U.S. v. Wheeler* - An Indian tribe has inherent sovereign authority to punish a tribal member; this authority does not derive from the federal government.

# 1990 - *Duro v. Reina*

- Supreme Court holds that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian.
- 1991 Duro Fix - Congress responds by amending the Indian Civil Rights Act to restore and affirm tribal inherent jurisdiction over all Indians.



# 2004 - *U.S. v. Lara*

- Supreme Court affirmed tribal jurisdiction over nonmember Indians and affirmed the authority of Congress to restore tribal jurisdiction via legislation.
- Held that separate tribal and federal prosecutions do not violate double jeopardy because a tribe is a separate sovereign.
- The decision left open the possibility of further constitutional challenges to jurisdiction over nonmember Indians on grounds of due process or equal protection.

# U.S Attorney's Manual Criminal Resource Manual

- Contains a chart on Indian country criminal jurisdiction derived from statutes and cases.
- \*\*\* The federal government has jurisdiction to prosecute all crimes that are federal no matter where they occur. The following analysis only applies where jurisdiction is premised on location.

<b>Offender</b>	<b>Victim</b>	<b>Jurisdiction</b>
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction

## **Justice Department Criminal Resource Manual**

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

Offender	Victim	Jurisdiction
Indian	Non-Indian	<p>If listed in 18 U.S.C. § 1153, the feds have jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not defined in federal law, state law is assimilated.</p> <p>If not listed in 18 U.S.C. § 1153, the feds have jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined in federal law, state law is assimilated under 18 U.S.C. § 13.</p>

## Justice Department Criminal Resource Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

Offender	Victim	Jurisdiction
Indian	Indian	<p>If the offense is listed in 18 U.S.C. § 1153, the feds have jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined by federal law, state law is assimilated. See section 1153(b).</p> <p>If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.</p>

## Justice Department Criminal Jurisdiction Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

Offender	Victim	Jurisdiction
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

## Justice Department Criminal Jurisdiction Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Where jurisdiction has been conferred by Public Law 280, 18 U.S.C. § 1162, a "mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and federal government have jurisdiction. There is no tribal jurisdiction.

## Justice Department Criminal Jurisdiction Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

Offender	Victim	Jurisdiction
Indian	Non-Indian	Under PL-180 - "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.

## Justice Department Criminal Jurisdiction Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)



Offender	Victim	Jurisdiction
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.

## Justice Department Criminal Jurisdiction Manual

[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)

# Modern Federal Indian Policy

- Characterized by notions of Tribal Self-Determination/Self-Governance
- In most subject matter areas, tribal governance compacts and 638 contracts produce tribal control.
- Theory: Defining policy and administering governmental services are important to sovereignty and self-determination.

# Criminal Justice in Indian Country

- Lags all other areas of federal Indian policy where tribal self-determination is becoming the norm.
- Is often disrespectful of tribal governments?
- Is inconsistent with many basic American constitutional norms of criminal justice?

# Disrespectful of Tribal Governments?

- Legal structure disrespectful: no felony jurisdiction.
- Federal courts disrespectful: federal sentencing guidelines ignore tribal court convictions.
- State courts sometimes hypocritical:
  - often willing to recognize tribal criminal convictions
  - less willing to enforce tribal civil judgments

# Basic Constitutional Norms of Criminal Justice

- Local crime should be handled locally.
- Community involvement is important (this is why we have juries).
- Criminal trials should be “public” (the public and the media should be present).
- Prosecutors/courts must know the communities that they serve.
- Prosecutors should be accountable.

# What is the Future?

- “I believe Washington can't -- and shouldn't -- dictate a policy agenda for Indian Country. Tribal nations do better when they make their own decisions.”
  - President Barack Obama, November 5, 2009
- Should this argument apply to public safety and criminal justice?



*Warren Christopher*

National Archives

# SELECTED WORKS BY DEAN KEVIN WASHBURN ON CRIMINAL JUSTICE IN INDIAN COUNTRY

- ***Sex Offender Registration in Indian Country***
- ***Congressional Testimony***
- ***American Indians, Crime, and the Law***
- ***Federal Criminal Law & Tribal Self-Determination***
- ***Tribal Self-Determination at the Crossroads***
- ***Tribal Courts and Federal Sentencing***
- ***A Different Kind of Symmetry***

***For a full list of Dean Washburn's articles with citations, visit: <http://ssrn.com/author=334714>***





# **Criminal Jurisdiction in Indian Country**

Dean Kevin Washburn

University of New Mexico School of Law

[washburn@law.unm.edu](mailto:washburn@law.unm.edu)

# Question & Answer





Join us for our next webinar:

*State-Tribal Law  
Enforcement  
Agreements*

# Brief Introduction to Law Enforcement Agreements

- Cross-Deputization Agreements
- Mutual Aid Agreements
- Hot Pursuit Agreements
- Issue-Specific Agreements

# Contact Information

Kay Chopard Cohen

Deputy Executive Director, NCJA

(202) 448 1722, [kcohen@ncja.org](mailto:kcohen@ncja.org)

Katy Jackman

Staff Attorney, NCAI

(202) 466-7767, [kjackman@ncai.org](mailto:kjackman@ncai.org)