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JURISDICTION OVER NON-INDIANS: AN OPINION OF THE "OPINION"

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On August 10, 1970, Mitchell Melich, Solicitor of the Department of Interior, issued an "opinion" with regard to the question of tribal jurisdiction over non-Indians.[1] The three-page opinion concludes: "Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments."[2] This "opinion," and the Bureau of Indian Affairs policy which spawned it,[3] has been a major impediment to the full exercise of tribal sovereignty. Although the opinion is based almost exclusively on *dicta* found in an early circuit court decision,[4] it has seldom, until quite recently, been challenged.[5]

But times have changed—even if the Department of Interior hasn't. Modern reservation Indians are demanding a larger role in the government of their reservations. A number of Indian tribes[6] have recently amended their constitutions and law and order codes so as to authorize the exercise of criminal jurisdiction over all offenses[7] occurring on the reservation, regardless of the offender's or the victim's race.[8] Other tribes are contemplating similar changes.[9] Thus, the exercise of tribal jurisdiction over non-Indians is not a dead issue, as the Solicitor would have us believe. It is in fact one of the most important issues in Indian law today. The purpose of this short article is to emphasize that the Solicitor's Opinion is just that—an opinion, and that while the opinions of administrative agencies often are given great weight by the courts, this particular opinion is entitled to little, if any, weight.

The Opinion reaches the conclusion that Indian tribes do not possess criminal jurisdiction over non-Indians unless a specific treaty provision can be found which gives such jurisdiction to a particular tribe. This conclusion is reached on the basis of only two pieces of authority: one federal circuit court case, *Ex parte Kenyon*,[10] and the narrow, conflicting interpretation of a federal statute, 18 U.S.C. § 1152. This paucity of authority takes on added significance when it

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is realized that the Opinion was written in 1970, almost one hundred years after the decision in *Kenyon*.

Ex parte Kenyon

In that case, the petitioner (Kenyon) was born of white parents and lived in Connecticut and Missouri prior to moving to the Cherokee Nation. After moving to Indian country, Kenyon married Mollie Cobb, a Cherokee Indian. They lived together until she died six years later. After her death, Kenyon took her property and their children and moved to Kansas. Among the property he took with him to Kansas was a mare which had belonged to Mollie, but which Kenyon had "broke" and used as his own during their marriage. He pledged the animal for a time to secure a debt, but later redeemed it and continued to use it as his own. He apparently returned to the Cherokee Nation[11] and was charged and convicted by the Circuit Court for the Coowees—Coowee District, Cherokee Nation, of the crime of larceny for taking and converting the mare to his own use.[12] He then petitioned the federal court for a writ of habeas corpus on the ground that the Indian court was without jurisdiction to convict him for the crime charged.

The federal court examined the jurisdiction of the tribal court from three different points of view: (1) jurisdiction over the person, (2) jurisdiction over the place, and (3) jurisdiction over the acts committed. In reaching its decision, the court held that a federal court has the authority to issue a writ of habeas corpus to run in the Cherokee Nation and Indian Territory; that the acts for which Kenyon was convicted by the Cherokee court were committed outside of the territorial jurisdiction of the Cherokee Nation; and that the Cherokee courts had jurisdiction only over Indian defendants.

It must be emphasized that the first two holdings adequately support the writ of habeas corpus.[13] The court concluded that the larceny (if one was committed) occurred when Kenyon parted with possession of the horse, and then redeemed it and converted it to his own use.[14] This act occurred in Kansas and the tribal court did not have subject matter jurisdiction over the crime as it occurred beyond the territorial jurisdiction of the Cherokee court. As the court itself pointed out: "This alone would be conclusive of this case."

It is clear, then, that the alternative holding that the Cherokee court lacked jurisdiction because Kenyon was a non-Indian[15] is merely *dicta* as the United States Supreme Court acknowledged in *Elk v. Wilkins*.[16] In that case, the third ground for the *Kenyon* decision (lack of jurisdiction over non-Indian defendants), was rejected by

the Court, which held that the second ground (lack of subject matter jurisdiction) was itself sufficient to settle the case and to show that Kenyon was entitled to be released from custody.

The Statutory Basis

For statutory authority for his opinion, the Solicitor relies on 18 U.S.C. 1152:

> 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.
>
> 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.[17]

The Opinion reaches the conclusion that the intent of Congress as to the meaning of this statute is perfectly clear: the federal courts have exclusive jurisdiction over all crimes committed in Indian country *except* those committed by one Indian against another (some of which are also within the exclusive jurisdiction of federal courts under the so-called Major Crimes Act,[18]), and those over which exclusive jurisdiction is secured by treaty to a particular Indian tribe. However, the United States Supreme Court has repudiated the exclusivity of the statute. In *United States v. McBratney*,[19] and *Draper v. United States*,[20] the Court read a major exception into the language of Section 1152, by holding that a crime committed in Indian country by one non-Indian against the person of another non-Indian was within the jurisdiction of state courts even where the state enabling act and constitution contained an express disclaimer of jurisdiction over Indian land. These decisions clearly point out the fallaciousness and inconsistency of the Opinion, for the Solicitor suggests that to decide the issue of Indian jurisdiction over non-Indian offenders, one need only look to 18 U.S.C. 1152, which places such jurisdiction "exclusively" in the federal government. However, the Solicitor also recognizes that federal jurisdiction under 1152 is not "exclusive" at all. One can only wonder how the Solicitor can, in good conscience, conclude that federal jurisdiction can be both exclusive and non-exclusive at the same time under the same statute.

A consistent reading of 18 U.S.C. 1152 would require one of two results. Either *McBratney* and *Draper* are ignored and federal jurisdiction over crimes committed within Indian country is exclusive—exclusive of both state and tribal jurisdiction—or 18 U.S.C. 1152 is interpreted as giving federal courts concurrent jurisdiction over such crimes—concurrent with both state and tribal courts. The latter interpretation is consistent with the only relevant Supreme Court decisions.

We are faced, then, with an Opinion citing only two pieces of authority: a nineteenth-century federal district court case, from which *dicta* alone is relied upon, and a statute, the express terms of which are no longer applied. One can hardly conceive of a legal argument propounded or a legal position adhered to on the basis of *less* compelling authority.

Tribal Sovereignty

In addition to the basic deficiencies in the Opinion, the entire history of judicial treatment of Indian tribes militates against the position taken by the Solicitor. The right of self-government has been a consistent theme in Supreme Court decisions, even in those denying tribes the status of a foreign nation. In *Cherokee Nation v. Georgia*, [21] Chief Justice Marshall, while denying the Cherokee Nation the status of a *foreign* state, emphasized that

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful.

In fact, the Supreme Court has been steadfast in preserving Indian self-government from encroachment by the states.

The whole course of judicial decision on the nature of Indian tribal powers is marked by these principles:

(1) An Indian tribe, in the first instance, possesses all the powers of a sovereign nation.[22]

(2) Conquest renders the tribe subject to the legislative powers of the United States and, in substance, terminates the external powers of sovereignty in the tribe, *e.g.*, its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe.[23]

(3) These powers are subject to qualification by treaties and by legislation of Congress, but legislation does not apply to Indians

unless so expressed as to clearly manifest as intention to include them.[24]

(4) Doubtful expressions in the acts of Congress relating to Indians are to be resolved in favor of the Indians.[25]

If one accepts the principle that Indians retain their internal sovereignty, one simply cannot accept the conclusion reached in the Opinion. Internal sovereignty cannot be said to exist if the "sovereign" does not have the right and power to control the internal security of its lands and its people. A tribe can be sovereign if, and only if, it has the right to establish rules for the conduct of people within its boundaries, and to punish those who violate the rules, regardless of who they are.

The fourth principle also negates the conclusion reached by the Solicitor. There can be little doubt that Section 1152, as construed by the Supreme Court, constitutes a "doubtful expression in an act of Congress." As such, it must be resolved in such a way as to expand rather than to contract the extent of the tribe's power—a position directly contrary to that advanced in the Opinion.

One of the earliest Supreme Court decisions involving jurisdiction over Indians was the case of *Ex parte Crow Dog*.[26] The Supreme Court held that the murder of one Sioux by another on the reservation was within the exclusive jurisdiction of the *Sioux tribe*, and that Crow Dog could not be punished by the United States. The United States attempted to assert jurisdiction on the basis of a treaty which provided that "Congress shall, by appropriate legislation, secure to [the Sioux] an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." Discussing this clause the Court said,

It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. (*Crow Dog, supra* at 568.)

This decision caused so much consternation that Congress en-

acted the Seven Major Crimes Act,[27] but this does not blunt the impact of the Court's language. The tribe should be allowed to promote and protect its internal peace and security. This can only be done by permitting the tribe to regulate all conduct on its reservation.[28]

The Indian Reorganization Act[29]

The Solicitor observed in the Opinion that many tribes, in organizing under the IRA, limited the criminal jurisdiction of their courts to tribal members.[30] However, the Solicitor did not discuss the full impact of the Wheeler-Howard Act on the question presented to him. However, a prior Solicitor opined that section 16 of the Wheeler-Howard Act gave Indian tribes the following powers:

(1) The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers, to prescribe the procedure for the tribal council and subordinate committees or councils, to provide for the salaries or expenses of tribal officers and other expenses of public business, and, in general, to prescribe the forms through which the will of the tribe is to be executed.

* * *

(6) To remove or to exclude from the limits of the reservation non-members of the tribe, excepting authorized government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which non-members of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with Federal laws governing trade with the Indian tribes.

* * *

(8) To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal Courts.[31]

That Opinion, rendered at a time when the Department of Interior was truly concerned with the preservation of Indian tribes and Indian people, clearly supports the exercise of jurisdiction over non-Indians by tribes "organized" under the Wheeler-Howard Act.

The first element of sovereignty, and perhaps the last to survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define the powers and duties of its

officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of the acts done in the name of the tribe. This power, unless coupled with jurisdiction over non-Indians, is a hollow one indeed. What benefit is there in the ability to define one's own form of government, when that government, once formed, is severely limited in its power? How effective is the ability to structure the government when that government only has the power to prescribe rules and regulations for some, but not all of the people on the reservation? What kind of government is it that cannot protect its people at all times and in all situations?

The power of an Indian tribe to exclude non-members of the tribe from entering into the reservation was first clearly formulated in an opinion of the Attorney General rendered in 1821.[32] Two grounds for this power of exclusion are generally asserted: First, the Indian tribe may exercise over all tribal property[33] the rights of a landowner; second, the tribe may, in the exercise of local self-government, regulate the relations between its members and other persons, so far as may be consistent with congressional legislation. Again, the existence of this power seems contradictory to the lack of jurisdiction over non-Indian criminal offenders. Could Congress have intended to exclude non-Indians from the reservation but deny it the power to regulate their conduct if admitted? Perhaps the tribe should deny admittance to all non-Indians, thereby avoiding the question altogether.

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by Congress. The Opinion incorrectly concludes that Section 1152 is such a limitation.

The result is that if an Indian commits an offense on the reservation, he is subject to the tribe's jurisdiction. However, if a non-Indian commits the same offense on the reservation, he is not subject to the jurisdiction of the tribe. Similarly, if an Indian and a non-Indian are accomplices or participants in the same crime, one can be arrested and prosecuted by the tribe while the other is now only subject to state or federal prosecution. The inefficiency, inconsistency, and potential unfairness of such a tri-faceted system of justice is all too apparent. It is inconceivable that Congress intended such a result.

To the contrary, Congress, through the Wheeler-Howard Act, clearly gave Indian tribes the power to form strong independent governments with full authority to regulate their internal affairs, including the authority to regulate the conduct of non-Indians on the reservation.[34]

Conclusion

Perhaps the most basic principle of all Indian law is the principle that those powers which are lawfully vested in the tribe are not delegated powers conferred by Congress, but rather inherent powers which have never been extinguished. It is a general rule, judicially recognized, that it is only by positive enactments, even in the case of conquered or subdued nations, that their laws are changed by the conqueror.[35] The inherent powers of Indian tribes are far more extensive than have been recognized and exercised in the past.[36] The time has come to recognize the full power and authority of tribal governments to regulate all conduct within the boundaries of the reservation.

NOTES

1. The opinion, M-36810, 77 I.D. 113, was requested by the National Council on Indian Opportunity, and the request was transmitted to the Secretary of Interior by the Vice President of the United States.

2. 77 *Id.* at 115.

3. It is no secret that the BIA has continually discouraged Indian tribes from exercising their inherent sovereignty by giving restrictive interpretations to treaties and acts of Congress. *See* 7 Op. Atty. Gen. 174 (1855) and Federal Indian Law, Interior Department (1958) at 447-48. It therefore comes as no surprise that the United States recently urged that the opening of the Cheyenne River Reservation to homesteading in 1908 changed the boundaries of the reservation; *see*, U.S. v. Erickson, 478 F.2d 684 (8th Cir. 1973) and that state courts rather than tribal courts have jurisdiction to grant divorces to reservation Indians, *see* State *ex rel* Iron Bear v. District Court, 512 P.2d 1292 (Mont. 1973).

4. *Ex parte* Kenyon, 14 Fed. Cas. 353 (C.C.W.D. Ark. 1878).

5. This decision was followed by the same court five years later. *Ex parte* Morgan, 20 Fed. 298, 308 (D.C.W.D. Ark. 1883). There have been no decisions directly in point since then. This hiatus is due in part to the fact that tribal courts were abolished by the Curtis Act in 1898 and were not reinstated until after the Indian Reorganization Act of 1934 was implemented by many Indian tribes.

6. *E.g.*, the Salt River Pima Maricopa Indian Community, Gila River Indian Community in Arizona, and the Yakima Indian Tribe in Washington.

7. Most tribes seem to reluctantly concede the exclusivity of federal jurisdiction over the so-called major crimes under 18 U.S.C. 1153.

8. The United States Supreme Court continues to recognize the broad jurisdiction of tribal courts over civil matters involving non-Indians. Kennerly v. District Court, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 251 (1958).

9. *E.g.*, an early draft of the proposed new Blackfeet Tribal Constitution provides for the exercise of criminal jurisdiction over all persons within the boundaries of the reservation. The Northern Cheyenne Tribal Council is considering a somewhat different approach; it has adopted an ordinance which provides for the permanent expulsion of any non-Indian committing a crime on their reservation.

10. A trial court decision—apparently never appealed; not to be confused with a decision of what used to be referred to as United States Circuit Court of Appeals.

11. The court's decision does not indicate whether Kenyon's return was voluntary or whether he was brought back by tribal authorities.

12. He was sentenced to be confined in the penitentiary of the Cherokee Nation at Tahlequah for the period of five years.

13. The first holding is now moot; the 1968 Civil Rights Act specifically makes federal habeas corpus available to test the validity of a tribal court judgment and sentence. 25 U.S.C. § 1303. The second holding—that tribal courts do not have jurisdiction over crimes committed off the reservation—is not disputed.

14. Kenyon committed no crime when he took the horse with him to Kansas. The court found he had lawful *possession* of the mare during the life of his wife, the true owner of the horse, and after her death, at least until letters of administration were taken out on her estate, which was not done before he left for Kansas.

15. Kenyon had apparently become an adopted Indian himself by having married a Cherokee. The court apparently found that he lost his status as an Indian by leaving his domicile in Indian country and establishing a new domicile in Kansas. But it was not the fact that Kenyon was Indian by adoption rather than birth that convinced the federal court that the Indian court had no jurisdiction over him. It was Judge Parker's opinion that "[w]hen the members of a tribe of Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and of the state where they may reside, and, equally with the citizens of the United States and of the several states, subject to the jurisdiction of the courts thereof." Thus, the dicta in *Ex parte Kenyon* is *not* that Indian courts lack jurisdiction over non-Indians, but rather that Indian courts lack jurisdiction over members (natural or adopted) who have established a domicile off the reservation. Although such a view of Indian "citizenship" was adopted by some courts, *see* State v. Monroe, 274 P. 840 (Mont. 1929); it has been thoroughly discredited. State v. Phelps, 19 P.2d 319 (Mont. 1933).

16. 112 U.S. 94, 108 (1884).

17. This statute is based on Revised Statutes of 1873, §§ 2144, 2145, and 2146. Section 2146 was cited and relied upon by the court in *Kenyon*.

18. 18 U.S.C. 1153.

19. 104 U.S. 621 (1882).

20. 164 U.S. 240 (1896).

21. Chreokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), 8 L.Ed. 25 (1832).

22. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); it should be remembered that Reverend Worcester was *white*.

23. United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

24. Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884).

25. Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956).

26. *Ex parte* Crow Dog, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883).

27. 62 STAT. 758, now amended and codified as 18 U.S.C. § 1153.

28. Many Indian leaders feel that federal enforcement of the "major crimes" on

their reservations has generally been inept. This was one of the major conclusions reached at the Conference on the Indian Justice Systems held in Aspen, Colo., this past June.

29. Also known as the Wheeler-Howard Act. 48 Stat. 987 (1934).

30. This is rather typical BIA "bootstrapping." Field Solicitors advise tribal leaders that tribal governments lack jurisdiction over non-Indians; the Indian leaders therefore pass laws limited to members, and the Solicitor points to such laws as evidence that the tribes lack jurisdiction over non-members.

A similar type of bootstrapping recently surfaced with regard to federal services for off-reservation Indians. It has been the BIA's position that it has little if any responsibility for off-reservation Indians. When it seeks appropriations under the Snyder Act, it limits its request for funds to those necessary for assisting reservation Indians. When sued by an off-reservation Indian, the BIA responds, "We cannot provide services to off-reservation Indians because Congress only gives us funds for Reservation Indians." The self-serving nature of this "logic" was rejected in Ruiz v. Morton, 462 F.2d 818 (9th Cir. 1972). *cert. granted* 411 U.S. 947 (1973).

31. "Opinion of the Solicitor for the Department of the Interior on Powers of Indian Tribes," 55 I.D. 14 (1934).

32. 1. Op. Atty. Gen. 465, 466.

33. A federal court has recently recognized the authority of tribal game wardens to arrest non-Indians hunting on the reservation without a tribal permit and to seize their weapons *even* in a state (California) which has civil and criminal jurisdiction over Indians on their own reservations under Public Law 280. The court reasoned that the Indians' exclusive right to hunt and fish on their land gave them the right to prohibit others from hunting and fishing without tribal authority, which in turn gave tribal officials the authority to arrest non-Indians hunting without permission. Quechan Tribe v. Rowe, 350 F. Supp. 106 (S.D. Cal. 1972).

34. Non-Indians need not fear arbitrary or discriminating treatment from tribal courts as they will come within the protection of the Indian Bill of Rights, 25 U.S.C. 1302.

35. Wall v. Williams, 8 Ala. 48, 51 (1844).

36. The full extent of the tribe's civil jurisdiction is only beginning to be recognized. *See, e.g.*, State of Arizona *ex rel* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969); Security State Bank v. Pierre, 511 P.2d 325 (Mont. 1973).