Concurrent Tribal Authority Under Public Law 83-280 in Alaska
Office of Tribal Justice
United States Department of Justice
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Like Indian Tribes in the contiguous United States or "Lower 48," federally recognized Alaska Native Tribes are sovereigns that enjoy inherent authority to exercise concurrent criminal jurisdiction over Indians within their Villages. On November 9, 2000, the Office of Tribal Justice (OTJ) of the United States Department of Justice issued a legal memorandum entitled "Concurrent Tribal Authority Under Public Law 83-280" ("OTJ Memorandum") (Attachment 1). The OTJ Memorandum concluded that, notwithstanding the enactment of Public Law 83-280 ("P.L. 280"), "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." OTJ Memorandum 1. This Memorandum updates the OTJ Memorandum issued in 2000, specifically addressing inherent Tribal jurisdiction in Alaska.

Although P.L. 280 conferred on certain states, including Alaska, jurisdiction over Indian Country, and allowed other states to assume such jurisdiction in the future, the statute did not deprive Tribal governments of their inherent criminal authority. Instead, as the OTJ Memorandum reiterated, longstanding federal and state case law affirms that Indian Tribes retain concurrent criminal jurisdiction over Indians in P.L. 280 states. As for Alaska Native Tribes, Congress confirmed as much in the Violence Against Women Act Reauthorization of 2022. That statute provides that, subject to the Indian Civil Rights Act of 1968 ("ICRA"), "Congress recognizes and affirms the inherent authority of any Indian tribe occupying a Village in the State to exercise criminal and civil jurisdiction over all Indians present in the Village." 25 U.S.C. § 1305(a). This language is fully consistent with the prior OTJ Memorandum's analysis and represents a definitive statement that Alaska Native Tribes have the inherent power to prosecute Indians present in their Villages.

DISCUSSION:

A. Inherent Jurisdiction Generally.

In November 2000, OTJ issued a memorandum addressing the extent of inherent authority of Tribes over their lands under P.L. 280. As the OTJ Memorandum observes, Congress enacted P.L. 280 in 1953 after a perceived "lack of law enforcement and judicial services in many areas of Indian country." OTJ Memorandum 2. The statute generally conferred criminal and some civil jurisdiction over Indian Country on certain enumerated states. *See* 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). In 1958, Congress added Alaska to the list of P.L. 280 states. *See* Pub. L. No. 85-615 (1958).

The OTJ Memorandum examined prevailing case law, including decisions handed down by the U.S. Supreme Court, to conclude that following the enactment of P.L. 280, "tribes retain their inherent authority to exercise criminal jurisdiction over Indians." OTJ Memorandum 3

(citing *Bryan v. Itaska County*, 426 U.S. 373, 388 (1976)).[1] It also relied on a 1990 statute amending a provision of ICRA that "recognized and affirmed" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2); *see* OTJ Memorandum 2. The OTJ Memorandum specifically highlighted Alaska in determining that inherent Tribal civil jurisdiction remained unchanged in the aftermath of P.L. 280. *See id* at 4 (citing *Native Village of Venetie v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (concluding that P.L. 280 did not divest Tribes of concurrent authority to adjudicate child custody proceedings)).

Further, the Supreme Court has held that Tribes, "as an exercise of their inherent tribal authority," may "prosecute nonmember Indians." *United States v. Lara*, 541 U.S. 193, 210 (2004). In *Lara*, the Supreme Court found that Congress properly exercised its authority in amending a provision of ICRA to recognize the "inherent power" of Indian Tribes to exercise criminal jurisdiction over "all Indians." *See id.* The Court in *Lara* specifically highlighted that "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Id.* at 202. It is thus well-settled that Congress has the power to recognize and affirm Tribes' inherent criminal jurisdiction. *See id.*

B. Inherent Jurisdiction in Alaska.

Congress has addressed this question directly in the context of Alaska. As mentioned above, the reauthorization of the Violence Against Women Act[2] in 2022 expressly recognized and affirmed "the inherent authority of any Indian tribe occupying a Village in [Alaska] to exercise criminal and civil jurisdiction over all Indians present in the Village" subject to ICRA. *See* Pub. Law No. 117-103 (codified at 25 U.S.C. § 1305(a)). It likewise provided that Alaska Native Tribes have full civil jurisdiction over the issuance and enforcement of protective orders involving any person within the Village or otherwise under the authority of the Tribe. *See* 25 U.S.C. § 1305(b).

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[1] In reaching this conclusion, OTJ highlighted that numerous court findings acknowledged that P.L. 280's extension of state criminal jurisdiction into Indian Country does not obviate the need for Tribal law enforcement, and that "eliminating tribal law enforcement authority would have defeated Congress's purpose of enhancing law enforcement services in Indian country." OTJ Memorandum 3-4 (citing *State v. Schmuck*, 121 Wash. 2d 373, 396 (1993)). It further noted that the U.S. Department of Justice and the U.S. Department of the Interior, which have been tasked by Congress to oversee law enforcement in Indian Country, have historically maintained that Tribes retain concurrent criminal jurisdiction in P.L. 280 states. *See id.* at 5.

[2] Originally enacted on September 13, 1994, the Violence Against Women Act has been reauthorized by Congress four times. Significantly, the Violence Against Women Reauthorization Act of 2013 allowed participating Tribes to exercise their inherent special jurisdiction over defendants, including non-Indians, who commit certain acts of domestic violence or dating violence or violate relevant protection orders in Indian Country. *See* 25 U.S.C. § 1304(b). This special jurisdiction is concurrent with any federal or state jurisdiction, and there exists a general exception for crimes where both the victim and alleged defendant are both non-Indians. *Id.* Nine years later, VAWA 2022, which was enacted as part of the Consolidated Appropriations Act of 2022, expanded the special criminal jurisdiction of participating Tribes over non-Indian perpetrators of the crimes of assault of tribal justice personnel, child violence, sexual assault, stalking, obstruction of justice, and sex trafficking. *See* Pub. Law No. 117-103.

The 2022 VAWA reauthorization also established a pilot program that permits up to 30 Alaska Tribes to exercise "Special Tribal Criminal Jurisdiction." *See id.* § 1305(d). Pursuant to the new law, participating Alaska Native Tribes' powers of self-government include the inherent power to exercise this special jurisdiction over non-Indian individuals within a Village. *See id.* § 1305(c)(1). An Alaska Native Tribe's special jurisdiction over a Village is concurrent with any federal or state jurisdiction. *See id.* § 1305(c)(2). However, there is an exception for crimes where both the alleged defendant and the alleged victim are non-Indians, in which case an Alaska Native Tribe would generally not be authorized to exercise jurisdiction.[3] *See id.* § 1305(c)(3).

Accordingly, Congress has confirmed that Tribes in Alaska retain inherent sovereign authority to prosecute Indians for crimes committed within the Tribes' Villages, and that Alaska Native Tribes may exercise additional criminal authority as authorized by statute. This confirmation is consistent with the analysis in the 2000 OTJ Memorandum, which specifically highlighted Alaska in concluding that inherent Tribal civil jurisdiction remained unchanged following the enactment of P.L. 280. *See id.* at 4 (citing *Native Village of Venetie v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (concluding that P.L. 280 did not divest Tribes of concurrent authority to adjudicate child custody proceedings)).

This position is also consistent with established principles of Tribal sovereignty. Tribes in Alaska, as well as the Lower 48, are "distinct, independent political communities, retaining their original natural rights" including the "power of regulating their internal and social relations."[4] *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). In particular, a Tribe's enactment and enforcement of its criminal laws is "an aspect of its retained sovereignty." *Denezpi v. United States*, 142 S. Ct. 1838, 1845 (2022) (quoting *United States v. Wheeler*, 435 U.S. 313, 328 (1978)). Similarly, as the executive branch has recently emphasized, the "United States recognizes the right to Tribal governments to self-govern and supports Tribal sovereignty and self-determination." Presidential Memorandum on Uniform Standard for Tribal Consultation (Nov. 30, 2022).

Alaska Native Tribes' jurisdiction is not affected by the fact that most Tribes lack "Indian Country" as defined in 18 U.S.C. § 1151. In the 2022 VAWA reauthorization, Congress permitted "*any* Indian tribe occupying a Village" in Alaska to exercise inherent criminal

[3] Under the 2022 VAWA reauthorization, Alaska Native Tribes participating in the pilot program still retain special criminal jurisdiction over cases involving obstruction of justice or the assault of Tribal justice personnel, regardless of the Indian status of a defendant and victim. *See* 25 U.S.C. § 1305(c)(3)(A).

[4] The U.S. Department of the Interior in 1993 announced its determination that Alaskan Native Tribes "have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes." 58 Fed. Reg. 54364, 54365-66 (Oct. 21, 1993).

jurisdiction over "*all* Indians present in th[at] Village," regardless of Indian Country status. 25 U.S.C. § 1305(a) (emphasis added). And in doing so, Congress acted well within its powers. Indeed, the Supreme Court recently emphasized its "long line of cases" characterizing Congress's power to legislate as to Indian Tribes as "plenary and exclusive." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627 (2023) (citing cases). Given that Congress has exercised this power to identify where Alaska Native Tribes may exercise their inherent criminal jurisdiction, it is of no moment that *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), held that lands subject to the Alaska Native Claims Settlement Act of 1971 conveyed in fee to an Alaska Native Village from two Alaska Native corporations were not "Indian Country" under 18 U.S.C. § 1151. In any event, the Supreme Court has also affirmed the fundamental tenet that Tribes possess inherent sovereign authority that extends to both their citizens and to their territories. *See United States v. Mazurie*, 419 U.S. 544, 557 (1974) (citing *Worcester v. Georgia*, 6 Pet. 515, 557 (1832)).

Lastly, the inherent authority of an Alaska Native Tribe to exercise criminal and civil jurisdiction over Indians remains the same for both misdemeanors and felonies. The language in VAWA 2022 affirming this inherent authority, as well as the case law addressed by the OTJ Memorandum, does not distinguish between the severity of crimes subject to Tribal jurisdiction. In other words, Tribal jurisdiction in Alaska over Indian defendants within a Village is consistent with Tribal jurisdiction elsewhere in the country, regardless of whether the crime is a misdemeanor or a felony. While ICRA generally limits Tribal courts throughout the country from imposing criminal sentences of imprisonment more than one year for any one crime, Tribes are free to exercise felony criminal jurisdiction.[5] *See* 25 U.S.C. § 1302(a)(7)(B). There is no exception for Tribes in Alaska.

CONCLUSION:

In light of the 2022 VAWA reauthorization, and as consistent with settled legal precedent, Alaska Native Tribes retain inherent criminal jurisdiction over Indians in their Villages. As discussed in the 2000 OTJ Memorandum, the state jurisdiction established under P.L. 280 is concurrent with this Tribal jurisdiction; P.L. 280 does not deprive Indian Tribes—whether in Alaska or the Lower 48—of their inherent jurisdiction.

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[5] The Tribal Law and Order Act allowed Tribal courts to impose sentences longer than one year and no more than three years when a defendant has previously been convicted of the same crime or when conviction of the crime would result in imprisonment for over one year in federal or state court. *See* 25 U.S.C. § 1302(b). In those circumstances, ICRA requires Tribes to adopt certain procedures and conditions for the criminal proceedings. *See* 25 U.S.C. § 1302(c).