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# Misplaced Jurisdiction

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## Misplaced Jurisdiction

Justice in Indian Country needs an overhaul

### Tanya Lee, interview with Kevin Washburn

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*Kevin Washburn, a member of the Chickasaw Nation, is an associate professor of law at the University of Minnesota. In 1994, he worked for the Justice Department litigating cases involving Indian tribes, and in 1997, he moved to the U.S. attorney's office in New Mexico, where he prosecuted serious crimes in Indian Country. Since joining the faculty at UMN in 2002, he has written and lectured on why the current justice system on Indian lands is not working and why it is having detrimental effects on tribes and the wider community. Washburn is currently on leave from UMN to serve as the Oneida Indian Nation visiting professor of law at Harvard Law School.*

**HIGH COUNTY NEWS:** Why should the federal government not be responsible for prosecuting felonies in Indian Country?

**KEVIN WASHBURN:** They shouldn't be responsible in the way they are now because they're not very good at it. The FBI and U.S. attorneys are good at prosecuting white-collar crime and big cases. They're not so good at prosecuting street crimes such as assault, domestic violence and sex offenses.

But it's deeper than that. In the U.S., crime is thought to be a local concern. Usually, the feds are only brought in on things that affect the national interest. We don't bring them in for routine local offenses.

(Federal prosecution of local crime) is inconsistent with our general notions of American justice. For example, we have a jury because the community is supposed to be involved in the prosecution of crime. When a jury of your peers tells you that you're guilty, that hits home in a much more serious way than if strangers do it. And we just don't have that in Indian Country cases because the courthouses are often 100, 200, 300 miles from where the offense occurred. Imagine the victim who has to testify in court in Phoenix but lives on the northern part of the Navajo Reservation. She may be facing a six-hour drive in a rust trap of a car in extreme weather.

We see this pattern over and over in the West. In Colorado, the Southern Ute Tribe's cases are tried in Denver ... several hundred miles away.

**HCN:** What other factors make federal jurisdiction over Indian Country felonies a problem?

**WASHBURN:** Another cultural problem is that federal agents haven't always been beloved on Indian reservations, and tribes have long memories. That's one of the beauties of oral history is that the memories stay very fresh. The FBI agents and federal prosecutors are in some respects the direct descendents of the cavalry officers who committed atrocities on Indian reservations in the last century and the century before that.

So when a federal agent shows up and says, "I work for the federal government and I'm here to help you," people are very skeptical. One outcome of that distrust is that sometimes witnesses don't want to cooperate with federal agents. The worst situation is in child sexual offense cases, which a lot of these cases are. When an 8-year-old girl reports an offense, it's a federal felony that draws a federal investigation. Federal agents come on the reservation to get involved in local affairs. That can be controversial. One ramification is that sometimes the community turns against the girl for bringing the feds onto the reservation. That happens only because of the dynamics of the system we've created.

**HCN:** How did the federal government come to have this responsibility in Indian Country?

**WASHBURN:** Until about 1885, Indian nations dealt with criminal offenses on the reservation. But in the 1880s, the federal government was trying to ensure Indians stayed on reservations. The U.S. had some ways of exercising power on reservations: A lot of the treaties called for commodities or other goods and services to be paid to the tribe. One way that Indian Affairs controlled reservations was by deciding who would help distribute those goods. That was a carrot approach. But the government didn't have a stick. There was nothing that they could really do to tribal citizens who refused to cooperate with the government.

In the 1880s, a case called *ex parte Crow Dog* went to the Supreme Court. The court said the feds didn't have jurisdiction over crimes committed on Indian reservations. Congress then acted to create federal criminal jurisdiction on reservations. The Major Crimes Act gave the feds jurisdiction over eight so-called major crimes. There are now over 30 crimes covered by the act, and we just added another two years ago.

**HCN:** What was the effect?

**WASHBURN:** Over the last century, we have continuously displaced tribal justice systems. By taking authority over the eight major crimes, the federal government caused many tribal systems to atrophy. And they atrophied more and more, so that now the feds are doing a significant amount of it, but not doing that great of a job. While Congress could give the U.S. attorney's office this power, it couldn't make the office really love the work or want to do it.

**HCN:** What was *Oliphant v. Suquamish Indian Tribe* and what effect did it have?

**WASHBURN:** In 1978, the Supreme Court said tribes don't have jurisdiction over non-Indians on Indian reservations.

**HCN:** They had jurisdiction (over non-Indians on the reservations) before then?

**WASHBURN:** Yes. During that century they still had jurisdiction. Congress acted to give the feds jurisdiction, but it didn't take away tribal jurisdiction. Tribes never negotiated that away in treaties. The Suquamish Reservation was having their festival, and two non-Indians were arrested, one for drunk driving and one for assaulting a police officer. The Supreme Court said summarily that the tribes don't have jurisdiction over non-Indians, and that was news to the tribes because they had routinely exercised jurisdiction. Suddenly, jurisdiction is no longer territorial and geographical, but it's a question of race or tribal membership of the perpetrator and/or the victim. That limited tribes' authority dramatically.

**HCN:** Would it be correct to say that's one of the reasons there's so much drug trafficking on Indian reservations?

**WASHBURN:** In a sense. Some people perceive that reservations are lawless places. They are kind of lawless because people are unclear about jurisdiction. State law enforcement officials often think, "Aw, that's the feds' problem. That's on an Indian reservation." Or, "That's the tribe's problem." (Thanks to a 1950s law, some states have jurisdiction over all crimes on Indian reservations.)

**HCN:** Could you explain the effects on tribal sovereignty and tribal self-determination? What are the effects on surrounding communities, and would changing the system benefit the wider community?

**WASHBURN:** Let me start with the last part first. One of the things suggested in pending legislation is cross-deputization of everyone involved in law enforcement in Indian Country. If state officers get cross-deputized by tribal authorities, and tribal officers get cross-deputized by county or state authorities, then suddenly it doesn't matter which cop pulls up to the scene of a crime. Either can handle it.

Federal police officers and state police officers tend to be OK with this. It's only when you get into the political realms that there are disputes. Cooperation is one of the things (Sen. Byron) Dorgan, (D-N.D., chairman of the Senate Indian Affairs Committee) suggested in his concept paper for an Indian Country crime bill. (Sen. Dorgan's concept paper will form the basis of legislation on law enforcement in Indian Country expected to be introduced next year.)

Another thing he suggested is that we do a better job of collecting data. Can we figure out where the crimes occurred so we'll have a better sense of whether the reservation communities are really worse than nearby communities? The data isn't good enough to be able to determine that because no one keeps track of exactly (where a crime occurred).

So now the self-determination question. Most everything that Congress has done in the past 30 years has been designed to further tribal self-government. The Bureau of Indian Affairs no longer runs the schools on Indian reservations. Many tribes now run their own hospital instead of the Indian Health Service. So we've had dramatic improvements in schools and in health care and many other areas in which tribal self-determination has been pursued.

Ironically, we have not pursued self-determination in criminal justice. I would argue that criminal justice is the most important place for self-determination because a criminal code and the processes we use for enforcing that code are key places where communities define themselves.

When you decide this is what is illegal in your community, you're saying, "This is who we are as a community." That's key to self-determination. In our criminal codes, we order our moral values and say, "If you violate these moral values, that violation is so serious that we're going to put you in jail." There's no stronger way to protect your moral code. That is one of the things we've denied Indian tribes. Congress or the courts are telling tribes what their values are and how they must define themselves. My argument is we've got self-determination in the environmental laws and health care and education, but self-determination as to crime is far more key - far more important than any of those things - if self-determination is the process of defining a community and letting a community say who it is.

When I say self-determination, I don't mean we necessarily need to restore tribal criminal jurisdiction over non-Indians. Self-determination is a community defining for its internal community how people deal with one another. Tribes don't necessarily need jurisdiction over non-Indians.

Most crimes are matters for the local community. From a good-government standpoint, it's just not sensible to have a foreign community, the federal government, trying reservation crimes. We've taken some of the most valuable tools to address serious problems on Indian reservations away from tribal leaders.

*The author is a freelance journalist who has written extensively for 15 years about issues of concern to Native American communities.*

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