

CRIMINAL JUSTICE IN INDIAN COUNTRY

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Fall 2008

Class schedule: Wednesdays, August 27–December 3, 2008, 4:30 pm–6:10 pm (except November 26), Wolf Law Building, Room 411, University of Colorado School of Law, Boulder

Seminar paper: All students must complete a substantial piece of writing that meets the seminar requirements (approximately 40 pages). Proposed paper topics must be submitted in the form of a concise (one- to three-page) written outline to Mr. Eid for comment and approval **on or before Wednesday, October 15th. Draft seminar papers are due Wednesday, November 5th.**

During the final three classes of the seminar, each student must make a brief in-class presentation on his/her approved paper topic and findings to date. **THE DEADLINE FOR ALL COMPLETED SEMINAR PAPERS IS WEDNESDAY, DECEMBER 10TH.**

Grading: The seminar paper will count for 75 percent of the student's final grade. The remaining 25 percent will be based on class participation.

Contact information: Mr. Eid is most easily reached by Blackberry at troy.eid@usdoj.gov.

Class schedule and readings: Unless otherwise indicated, all readings should be completed PRIOR to class.

August 27th

Class #1: The State of the Nations

This introductory session explores public safety in Indian Country today; which laws apply to a given situation; and the respective roles of tribal, federal, state, and local institutions in providing criminal justice services.

*William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL (West Publishing Co., 4th Edition, 2003), pp. 124-84, 232-58.

September 3rd

Class #2: Drug-Trafficking in Indian Country

Criminal drug-trafficking organizations are targeting Indian Country with “business plans” seeking to supplant alcohol addiction with dependency on methamphetamine and other illicit drugs. Prescription drug abuse on some reservations also presents a serious challenge to public health and safety. This class will discuss recent case studies dealing with such criminal enterprises—and joint federal-tribal strategies to confront them.

Guest presenters: Jeff Sweetin, Special Agent-in-Charge, and Wendi Roewer, Intelligence Group Supervisor, U.S. Drug Enforcement Administration, Denver Division

*Matt Mead, U.S. Attorney for the District of Wyoming, “Combating Methamphetamine in Indian Country,” statement before the United States Senate, Committee on Indian Affairs (April 5, 2006) (unpublished).

*Christopher B. Chaney, “Overcoming Legal Hurdles in the War Against Meth in Indian Country,” 82 *North Dakota Law Review* 1151 (March 2007).

September 10th

Class #3: The Jurisdictional Maze

Public attitudes toward Native American people and tribes, as reflected by Congress and the federal courts, have varied widely since 1789. Each generation of federal decision-makers has left its own stamp on Indian Country. The cumulative effect of these shifting attitudes is a jurisdictional maze that poses unique public safety challenges. This class discusses the federal government’s historical interest in exercising exclusive criminal jurisdiction over non-Indians who commit Indian Country crimes; the federalization of tribal justice with the Major Crimes Act in 1885; the General Allotment Act of 1887 and subsequent jurisdictional “checkerboard” effect; the *McBratney-Draper* doctrine and increased state involvement; renewed support for tribal self-governance and the Indian Reorganization Act of 1934; Public Law 280 and the Termination Era; the Indian Civil Rights Act and the tribal self-determination movement; and *Oliphant v. Suquamish Indian Tribe*, 433 U.S. 191 (1978), holding that tribes lack criminal jurisdiction over non-Indians.

Guest Presenter: Mike Riley, investigative reporter, *The Denver Post*

*“Impact of Supreme Court Rulings on Law Enforcement in Indian Country,” hearing transcript, United States Senate, Committee on Indian Affairs, 107th Congress, 2d Session (U.S. Government Printing Office, July 11, 2002).

*David C. Iglesias, “Mending Indian Country’s Tattered Quilt of Justice,” *Native Peoples* (June 2008).

*Marc A. LeForestier, California Department of Justice, “Public Law 280: Concurrent Tribal-State Jurisdiction over Indian Country,” PowerPoint presentation (November 13, 2006).

*Mike Riley, “Lawless Lands,” four-part series *The Denver Post* (November 11-14, 2007).

September 17th

Class #4: 'Cross-Commissioning' and Voluntary Law Enforcement Agreements

One current way to navigate the jurisdictional maze in Indian Country is for tribal law enforcement officers to be trained and commissioned as state and federal officers. This expands tribal officers' legal "tool kit" by empowering them to arrest non-Indian criminal suspects for violations of state and federal law. This class examines the legal, political and cultural aspects of such "cross-commissioning" and other voluntary agreements between tribal governments and state and local law enforcement authorities.

Guest Presenter: Bernadine Martin, Senior Trial Attorney, McKinley County District Attorney's Office, Gallup, New Mexico

*"State-Tribal Agreements: A Comprehensive Study," Commission on State-Tribal Relations (May 1981) (unpublished).

*Resolution 93-28, Southern Ute Indian Tribal Council, "Southern Ute Indian Tribe/LaPlata County Sheriff Law Enforcement Agreement for Tribal Gaming," March 2, 1993.

*"Mediation Agreement between the Soboba Band of Luiseño Indians and the Riverside County Sheriff's Department" (U.S. Department of Justice, Community Relations Service, undated) (June 2008 draft).

*"Cross-Commission Agreement between the Navajo Nation and the McKinley County Sheriff's Office" (November/December 2007).

September 24th

Class #5: Tribes, Border Towns, and Public Safety

Leaders in Cortez, Colorado and the nearby Ute Mountain Ute Indian Reservation have recently taken unprecedented steps to strengthen public safety in the Four Corners Region. This includes establishing an inter-governmental law enforcement working group and training Cortez Police Department officers and Montezuma County sheriff's deputies in Indian Country law and jurisdiction. City leaders—with support from the Ute Mountain Tribal Council, Cortez-area community activists, local businesses, Lieutenant Governor Barbara O'Brien and the Colorado Commission of Indian Affairs, the Colorado Division of Civil Rights, and the U.S. Department of Justice—are also working to address concerns about the treatment of Native Americans in this border town.

Guest Presenter: Ernest House, Jr., Executive Secretary, Colorado Commission of Indian Affairs

*Christopher B. Chaney, "BIA Office of Justice Services," PowerPoint presentation to the Ute Mountain Ute Indian Tribal Council (February 5, 2007).

*Sara Burnett, "Strides Against Reservation Violence," *Rocky Mountain News* (January 17, 2008).

*George Lurie, "Ernest House, Jr. Following in His Family's Footsteps," *The Durango Herald* (May 22, 2005).

*Barbara Perry, "The Role of Community Perceptions of Police in Minimizing the Reporting of Hate Crime Against Native Americans," Faculty of Social Science, University of Ontario Institute of Technology (unpublished manuscript, 2006) (used with permission).

October 1st

Class #6: Federal Criminal Justice Mandates on Tribal Governments

In this session, we will discuss PL-280, the Termination Era statute that gave selected states the authority to enforce criminal (and some civil) laws on Indian reservations without the consent of the affected tribes. The session explores how PL-280 states compare with non-PL-280 jurisdictions, probing instances such as full and partial retrocession—where states have later given back some or all of their criminal jurisdiction to the federal government, creating yet another layer of jurisdictional complexity. We will also discuss the 2006 Adam Walsh Child Protection and Safety Act, which mandates the inclusion of tribes in the national sex offender registry system for the first time.

*Carole Goldberg, Duane Champagne, and Heather Valdez Singleton, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, National Institute of Justice, Office of Justice Programs, U.S. Department of Justice (unpublished manuscript, November 1, 2007), pp. vi – 37.

*Gale Courey Toensing, “Appeals Court Affirms Quinault Jurisdiction in Public Law 280 case,” *Indian Country Today* (July 1, 2008).

*Virginia Davis, National Congress of American Indians, “Implementation of the Adam Walsh Act in Indian Country,” PowerPoint presentation to the National Symposium on Sex Offender Management and Accountability (July 30, 2008).

October 8th

Class #7: The Trust Obligation and Tribal Self-Determination

This session addresses the interplay between the trust doctrine and tribal self-determination. How can the federal government’s trust obligation be effectively quantified, funded and delivered so that Indian Country is reasonably safe for people living and visiting there? How are tribes dealing with the historical resource “gap” in criminal justice services as compared to similarly situated off-reservation communities? What barriers must be overcome before real “justice” in Indian Country can be realized?

Guest presenter: Janelle F. Doughty, MSW, Director, Department of Justice and Regulatory Affairs, Southern Ute Indian Tribe

*Robert McCarthy, “The Bureau of Indian Affairs and the Federal Trust Obligation for American Indians,” 19 *BYU Journal of Public Law* 1 (2004-05), pp. 45-57.

*Troy A. Eid, “Criminal Justice in Native America,” *Indian Country Today* (June 7, 2007).

*Kara Briggs, “Law Professors Ask: Is Trust Still Valid?” *Indian Country Today* (April 11, 2008).

October 15th

PROPOSED PAPER TOPICS DUE

Class #8: Courts, Judges, and Juries

This class focuses on criminal justice, the rule of law, and the interplay between tribal and federal courts. Tribal courts have changed substantially in recent decades. Federal criminal law recognizes the importance of prior tribal court convictions and protection orders, and off-reservation courts are increasingly asked to extend Full Faith and Credit to each. Regardless if *Oliphant* is repealed or modified, should the depth and consistency with which tribal courts protect criminal defendants' Due Process and other civil rights always be on a par with that of defendants in state or federal court criminal proceedings? Under what circumstances beyond habeas corpus relief, if any, should tribal court decisions be appealed to the federal courts? The class also addresses judicial access to the federal court system within Indian Country, including Native American participation in federal trials and grand juries.

*United States Indian Service, MANUAL OF INSTRUCTIONS FOR SPECIAL AND DEPUTY SPECIAL OFFICERS AND INDIAN POLICE, Chapter Five, "Indian Courts," pp. 76-77 (1943).

*Paul Giblin, "Tribes Seeks More Federal Funds for Law Enforcement," *East Valley-Scottsdale Tribune* (March 17, 2008).

*Gary Fields, "Defense Reservations: Native Americans on Trial Often Go Without Counsel; Quirk in Federal Law Leaves a Justice Gap in Tribal Court System," *The Wall Street Journal*, February 1, 2007, p. A11; and attached broadcast email response from Raymond C. Etcitty, former Chief Legislative Counsel to the Navajo Nation Council (unpublished) (used with permission).

*Bethany R. Berger, "Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems," 37 *Arizona State Law Journal* 1047 (2005).

*Troy A. Eid, "U.S. District Court Locations, map (2007).

*George Hardeen, "First Federal Criminal Trial Held on Navajo Nation Began Today in Shiprock District Court," press release, Navajo Nation Office of the President and Vice President (Dec. 13, 2005) (unpublished); and "First Federal Court Trial Held on Navajo Nation," posted on [indianz.com](http://www.indianz.com), www.indianz.com (Dec. 14, 2005).

*Shane Benjamin, "Professor Blasts How U.S. Handles Indian Crimes," *The Durango Herald* (Oct. 28, 2007).

*Transcript of Vincent Kirby, Assistant U.S. Attorney, District of Arizona, at the Canby Lecture, Arizona State University Law School, January 24, 2008 (unpublished).

October 22nd

Class #9: Preserving Tribal Public Integrity

Like governmental leaders elsewhere, tribal officials sometimes abuse the offices to which they have been entrusted. This class addresses public corruption and holding tribal governmental leaders accountable. This issue also has a civil dimension. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 339 (1978), the Court held that the Indian Civil Rights Act does not provide a federal remedy, apart from habeas corpus, for Native Americans living on reservations to challenge official tribal governmental decisions or actions that may adversely affect their individual civil rights under the Act. This expansive definition of tribal sovereign immunity is greater than that afforded to states or the federal government, where individuals have the alternative civil remedies of 42 U.S.C. Section 1983 or its federal analogue, *Bivens*, to challenge alleged misconduct by police and other public officials. This class explores whether, for the sake of greater accountability, *Santa Clara Pueblo* should be modified to provide a qualified waiver of sovereign immunity in such civil actions.

Guest Presenter: Robert E. “Bob” Mydans, Assistant U.S. Attorney, Senior Litigation Counsel, and Durango Branch Chief, U.S. Attorney’s Office, District of Colorado.

*Grand jury indictment U.S. District Court for the District of Colorado, *United States of America v. Judith Knight-Frank* (May 2, 2002).

*“Cheyenne-Arapaho Summary” and selected indictments relating to the Cheyenne-Arapaho Business Committee, U.S. Attorney’s Office, Western District of Oklahoma (July 25, 2008).

October 29th

Class #10: Federal Criminal Prosecution

This class reviews the key federal statutes which apply to Indian Country, including the Indian Country Crimes Act and Major Crimes Act. We will also focus on when and how to assimilate state criminal laws to Indian Country offenses, as well as the *McBratney-Draper* doctrine, which extends exclusive state jurisdiction to criminal offenses involving only non-Indians.

Guest Presenter: James Allison, Chief Criminal Division, U.S. Attorney’s Office, District of Colorado.

*Kevin K. Washburn, “American Indians, Crime, and the Law,” 104 *Michigan Law Review* 709, 729-741 (Feb. 2006).

*Gary Fields, “Tilted Scales: On Tribal Land, an Arson Leads to Murder, Prison; American Indians Can Face Unequal Justice,” *The Wall Street Journal* (Aug. 13, 2007), p. A1.

*Marty J. Jackley, U. S. Attorney for the District of South Dakota, “South Dakota Indian Country Report, 2007” (unpublished).

November 5th

DRAFT SEMINAR PAPERS DUE

Class #11: Where From Here?

The course concludes by exploring whether—and if so, how—tribal governments should model their criminal justice systems should Congress repeal or modify *Oliphant*. Should Congress and the Court ultimately permit tribal governments to reassert their inherent criminal jurisdiction over non-Indians, what is the process by which tribes should do so? Should tribal governments be required to provide the full protections of the federal Bill of Rights to criminal defendants—on a level equivalent with that of state justice systems—as a condition precedent of any *Oliphant* repeal? If so, what is the proper scope of federal judicial review, and how should it work in practice? More generally, should the Major Crimes Act and the Indian Country Crimes Acts continue to apply to Indian Country under such scenarios? And what about *McBratney-Draper*? This final session focuses on where we should go together in order to strengthen justice in Indian Country for all Americans.

*Kevin K. Washburn, “Federal Criminal Law and Tribal Self-Determination,” 84 *North Carolina Law Review* 779 (March 2006).

*Troy A. Eid, “Beyond *Oliphant*: Strengthening Criminal Justice in Indian Country”; and Elizabeth Ann Kronk, “Promoting Tribal Self-Determination in a Post-*Oliphant* World: An Alternative Road Map,” *The Federal Lawyer*, March/April 2007, pp. 40-47.

*U.S. Senator Byron L. Dorgan, Concept Paper, “Tribal Justice Improvement Act” (November 7, 2007).

*U.S. Senator Byron L. Dorgan, “Legislation Gives Boost to Law & Order in Indian Country,” press release (July 23, 2008).

*N. Bruce Duthu, “Broken Justice in Indian Country,” *The New York Times* (August 11, 2008).

November 12th

Class #12: STUDENTS PRESENT PAPER TOPICS AND INITIAL FINDINGS

November 19th

Class #13: STUDENTS PRESENT PAPER TOPICS AND INITIAL FINDINGS

December 3rd

Class #14: STUDENTS PRESENT PAPER TOPICS AND INITIAL FINDINGS

December 10th

COMPLETED SEMINAR PAPERS DUE