SCHOOL OF LAW
UNIVERSITY of WASHINGTON

Native American Law Center

# Indian Law and Order Commission

**Visit to Tulalip Tribes**
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**Testimony of**

**ROBERT T. ANDERSON**
**PROFESSOR OF LAW AND DIRECTOR, NATIVE AMERICAN LAW CENTER**
**UNIVERSITY OF WASHINGTON SCHOOL OF LAW**

**ONEIDA INDIAN NATION VISITING PROFESSOR OF LAW**
**HARVARD LAW SCHOOL (2010-2015)**

My name is Robert Anderson, Professor of Law and Director of the Native American Law Center at the University of Washington. I also have a long-term appointment as the Oneida Indian Nation Visiting Professor of Law at Harvard Law School where I teach annually. I am a member of the Bois Forte Band of the Minnesota Chippewa Tribe. I am a co-author and member of the Board of Editors of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) and the co-author of Anderson, Berger, Frickey and Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY (Second Ed. 2010). I teach and write in the areas of Indian Law, Public Land Law and Water Law. In 2008, I was co-lead of the Obama Transition team for the Department of the Interior. I spent twelve years as a Staff Attorney for the Boulder–based Native American Rights Fund where I litigated major cases involving Native American sovereignty and natural resources. From 1995-2001, I served as an appointee in the Clinton Administration under Interior Secretary Bruce Babbitt, providing legal and policy advice on a wide variety of Indian law and natural resource issues. I have extensive experience in matters involving Alaska Native rights to sovereignty, the Alaska Native Claims Settlement Act, and the implementation of the subsistence title of the Alaska National Interest Lands Conservation Act. I am also a member of a "Joint Executive-Legislative Task Force on Retrocession" established by the Governor of Washington, Speaker of the State House of Representatives, and Senate Majority leader. Much of our work to date has focused on criminal jurisdiction questions.

My testimony covers two areas. First is the general application of the modern self-determination policy to tribal criminal jurisdiction in which I endorse the views expressed by Professor (now Dean) Kevin Washburn in an important 2006 article. This includes a recommendation for the incremental restoration of tribal criminal jurisdiction over non-Indians. The second part of my testimony describes the effort underway in the Washington State Legislature to provide a tribally initiated method for the retrocession of some or all state criminal and civil jurisdiction assumed by states under Public Law 280 (P.L. 280). While this state effort is commendable and should be encouraged by this Commission as a creative local approach, it could also serve as a model for federal legislation to provide all tribes subject to P.L. 280 with similar options.

This Commission's appointees have a tremendous amount of knowledge and expertise. It is my hope that the in the course of your hearings and the development of the Report mandated by § 235(f) of the Tribal Law and Order Act of 2010 (TLOA), you will be bold in your recommendations to improve law enforcement within Indian country.

You will hear later from my colleague Professor Ron Whitener regarding tribal public defense systems and our innovative program at the University of Washington School of Law. We stand ready to provide further information to the Commission.

**I. Tribal Self-Determination Mandates Federal Deference to Tribal Control**

With respect to the first issue I will discuss, I must credit my esteemed colleague Dean Kevin Washburn of the University of New Mexico School of Law. In an insightful 2006 law review article, the former federal prosecutor described the federal criminal jurisdictional patchwork as a relic of repudiated federal policies that remain intact in the criminal area -- an anomaly in the self-determination era.

> The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their will. Thus, even if prosecutors performed their work in accordance with sensible criminal justice policy, and even if juries were selected in accordance with the Sixth Amendment, these actors would nevertheless be enforcing laws not made by Indian tribes. This is the essence of colonialism. And despite efforts to undo the harmful effects of American colonialism in Indian country, it has never been addressed.

Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. Rev. 779, 782 (2006). Dean Washburn concluded his analysis by suggesting that

> A middle ground between outright repeal [of the Major Crimes Act] and reforming the existing system might involve a limited number of pilot programs, or an "opt out" approach in which tribes with appropriate capacities could leave the federal system and undertake their own felony criminal justice systems. The mere existence of choice represents improved self-determination. By merely having the policy discussion at the tribal level, some of the goals of self-determination are served, even though the tribes are not the primary actors as they are when they compact for the federal functions to

undertake these responsibilities themselves.

Given the seriousness of the crime problem in Indian country and the persistence of the dissatisfaction with the quality of the federal system, more creative thinking ought to be brought to bear on these problems.

*Id*. at 853.

In addition, the problems caused by the Supreme Court ruling in *Oliphant v. Suquamish Tribe* that denied tribal criminal jurisdiction over non-Indians have been recounted many times. *See, e.g.,* General Accounting Office, Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts at 14-16 (February 2011). In a July 21, 2011 letter recommending amendments to the Violence Against Women Act (VAWA), Assistant Attorney General Ronald Reich also recounted the problems engendered by the *Oliphant* ruling and proposed a partial legislative solution.

> The Department of Justice is therefore asking Congress to consider proposals to address the epidemic of domestic violence against Native women. Draft legislative language and an explanatory document are attached to this letter. The legislation we propose would:
>
> • Recognize certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders, in Indian country.
>
> • Clarify that tribal courts have full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.
>
> • Amend the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding.

Senator Akaka followed up with an August 15, 2011 letter to tribal leaders asking for comments on the proposal as the general VAWA reauthorization moves through Congress.

In addition to the restoration of tribal jurisdiction under the approach outlined above, I suggest consideration of an approach similar to than followed in the Indian liquor laws. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, ch. 13 (Newton, et al., 2005). In the liquor laws, Congress delegated federal authority to tribes to entirely prohibit, and otherwise regulate the possession, sale and consumption of liquor within Indian country. 18 U.S.C. §§ 1154, 1156, 1161, 3055, 3113, 3488, 3669, 3670. This delegation of federal authority was upheld in *United States v. Mazurie*, 419 U.S. 544 (1975). While such an approach would not be as preferable as a restoration of inherent authority, it might be easier to accomplish as a practical matter.

## II. Retrocession of Public Law 280 Jurisdiction as a Tribal Option

Washington state accepted most criminal and civil jurisdiction under Public Law 280 in 1963 without the consent of Indian tribes. In the 2010-2011 Washington state legislative session, two bills (HB 1773 and HB 1448) were advanced to provide for the retrocession of state jurisdiction over civil and criminal matters to the United States upon request of an Indian tribe. Of course, under federal law, the retrocession would only become effective if accepted by the Secretary of the Interior. While the bills did not become law, there was tremendous interest in the proposals from tribes, the U.S. Attorney's office, and state law enforcement entities. The premise of the proposals is that Indian tribes should have the choice as to whether to be subject to state jurisdiction, and that it was unfair for Congress to allow state jurisdiction without tribal consent. I bring this issue to your attention because it is my hope that the Commission will include a recommendation for federal legislation that would provide for tribally initiated retrocessions of state jurisdiction.

Set out below are discussion points that provide some general background on the issue as it pertains to Washington. Some of the issues are discussed further in the sections that follow.

- As a general matter, states lack civil and criminal jurisdiction over Indians and tribes within Indian country unless Congress authorizes a state to exercise jurisdiction. Conversely, states generally have jurisdiction over Indians outside Indian country, unless a treaty or other federal law preempts state law.

- Indian country is defined in federal law and includes reservations, dependent Indian communities and allotments. 18 U.S.C. § 1151. It is important to note that the Indian country definition includes fee land owned by non-Indians within reservations, and state rights of way running through Indian reservations

- P.L. 280 authorized states to unilaterally assert jurisdiction over Indian country. Washington accepted some criminal and civil jurisdiction through laws passed 1957 and 1963. *See* RCW 37.12.100 - .130. The 1957 statute provided for state jurisdiction only upon tribal request, while in 1963 state jurisdiction was imposed unilaterally. It is an extremely complex arrangement, but it was upheld by the U.S. Supreme Court in *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979).

- In 1968 Congress repealed the part of P.L. 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the remainder by providing that "[t]he United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588). . . ." 25 U.S.C. § 1323.

- The Secretary of the Interior is authorized to accept a retrocession from a state only after consulting with the Attorney General. Exec. Order No. 11435, 33 Fed. Reg. 17339 (1968). He or she is not required to accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with

respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department would carry great weight since the local U.S. Attorney and FBI would have increased obligations after any retrocession.

- The bills pending in the state legislature would require the Governor to retrocede, or give back, upon tribal request part, or all, of the jurisdiction that the state acquired pursuant to P.L. 280. This could include off-reservation trust, or restricted lands, or be limited to reservation lands, depending on the wishes of the affected tribe. The bills would have allowed a tribe to seek retrocession of only on-reservation matters, or particular subject matter in the civil or criminal contexts.

- Tribes would continue to have criminal jurisdiction over their own members and members of other federally recognized tribes. They would not have criminal jurisdiction over non-Indians.

- The proposed legislation would not alter the balance of tribal and state civil regulatory authority in Indian country. That area would remain complex and confusing, but unaffected by the proposed legislation.

- The state would continue to have exclusive jurisdiction over crimes by non-Indians v. non-Indians. The United States is only authorized to accept the retrocession of jurisdiction provided to states under P.L. 280. State jurisdiction over non-Indian v. non-Indian crime was not granted by P.L. 280.

## A. P.L. 280's Limited Grant of Civil Jurisdiction

States did not gain any authority to regulate civil activities in Indian country through P.L. 280. *Bryan v. Itasca County*, 426 U.S. 373 (1976) (no authority under P.L. 280 to tax personal property of tribal member). The Supreme Court stated that it "was not the Congress's intention to extend to the States the 'full panoply of civil regulatory powers,' but essentially to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians." *Id*.

## B. Washington's Limited Acceptance of Jurisdiction

In 1957, Washington offered to accept full jurisdiction over any reservation in the state upon request from the tribe. 1957 Wash. Laws ch. 240. Of the ten tribes that requested such jurisdiction, only four remain subject to full jurisdiction since the state partially retroceded criminal jurisdiction on the other six reservations. The latter six are now subject to the same P.L. 280 scheme as other recognized tribes in 1963.[1]

In 1963 Washington asserted civil and criminal jurisdiction: (1) over all off-reservation Indian country; (2) over all reservations, but this assertion does not extend to Indians when on trust or restricted lands within reservations; and (3) over Indians on trust or restricted lands within reservations in the following eight subject matter areas.

[1] There are several reservations established after 1968 that are not subject to P.L. 280 at all, although the state now disputes that assertion.

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

**The example of highways.** Washington State asserted criminal jurisdiction over operation of motor vehicles on all roads under paragraph (8) above. However, Washington cannot regulate speeding by tribal members because it is not a criminal offense, but only a civil infraction sanctioned by a fine. *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991). The tribe would have authority to regulate speeding by members on reservation roads.

Because Washington asserted civil jurisdiction over operation of motor vehicles on public roads, state courts may entertain personal injury lawsuits among Indians arising within reservations on tribal roads, *McRea v. Denison*, 885 P.2d 856 (Wash. App. 1994). Such jurisdiction would disappear if jurisdiction were retroceded, but under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) the state would presumably have authority to adjudicate cases involving only non-members on state highways.

Washington's current statute dealing with retrocession (RCW 37.12) provides that tribes that agreed to full state criminal and civil jurisdiction under the 1957 state law may request retrocession of some (but not all) state criminal jurisdiction. This is a partial retrocession scheme that still limits tribes and their Indian country to the jurisdiction imposed by state law in 1963 and described above.

**C. The Proposed Legislation**

While a bill has not been drafted for introduction in the next legislative session, House Bill 1773 in the last legislative session dealt with criminal jurisdiction and provided as follows.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. A new section is added to chapter 37.12 RCW to read as follows:

(1) The state must retrocede to the United States the criminal jurisdiction previously acquired by the state over Indians and Indian territory, reservations, country, and lands in accordance with the requirements of this section.

(2) To initiate the criminal jurisdiction retrocession process, a majority of any tribe, tribal council, or other governing body that is duly recognized by the United States bureau of Indian affairs must submit a retrocession resolution to the governor. The resolution must

express the desire of the tribe, community, band, or group for the retrocession by the state of all or any measures or provisions of the criminal jurisdiction acquired by the state under RCW 37.12.010 and 37.12.030 over the Indians and Indian territory, reservations, country, and lands of such Indian tribe, community, band, or group.

(3) Upon receiving a resolution under this section, the governor must issue within sixty days a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over the Indians and Indian territory, reservations, country, and lands subject to the retrocession resolution.

(4) The proclamation for retrocession does not become effective until it is accepted by a duly designated officer of the United States government and in accordance with the procedures established by the United States for the acceptance of such retrocession of jurisdiction.

HB 1448 was the companion bill that applied to civil jurisdiction, but was otherwise identical to the foregoing text.

**D. Tribal Jurisdiction.**

Tribes have full civil jurisdiction over their own members regarding activities arising within Indian country, and it is concurrent with state and federal jurisdiction.

Tribal civil jurisdiction over non-members exists when non-members are engaged in activities on tribal lands that involve the tribe or its members. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (tribe may tax non-member purchases of cigarettes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal may tax oil and gas production by non-Indian company on tribal land).

There is a presumption that tribes may not regulate the activities on non-Indians on fee land within reservations. *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In *Montana*, the Court set out two exceptions to this general presumption against tribal jurisdiction:

> **i)** a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
>
> **ii)** a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The exceptions to the presumption have been very narrowly construed. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

Retrocession of jurisdiction would not affect the scope of tribal civil jurisdiction over non-Indians. In general, state courts would lose their concurrent civil adjudicative jurisdiction over matters involving tribal members within Indian country. This would include most matters where a non-member and a tribal member were the parties.

## Conclusion

I hope you will give serious attention to the restoration of tribal jurisdiction eliminated in the *Oliphant* case, and that you also recommend federal legislation to permit tribally initiated retrocession of state jurisdiction provided under P.L. 280 and other similar legislation.

I greatly appreciate this opportunity to testify and commend your visits to Indian country. I look forward to following the progress of the Commission and hope that you consider setting out a draft summary of your Report for comment by Indian country and those interested in these critical issues. Please let me know if I can provide further information, or otherwise assist you in the important venture.