



# Types and History of Tribal Courts

## A Brief Summary

Lisa Jaeger,  
Tribal Government Specialist  
Tanana Chiefs Conference  
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[lisa.jaeger@tananachiefs.org](mailto:lisa.jaeger@tananachiefs.org)

### **Introduction:**

Traditional judicial systems were well established among the Indian tribes long before European settlers came to this country. Today, however, only a few tribal justice systems in the United States are able to trace their roots to traditional Indian forums for dispute resolution. Most modern tribal judicial systems are descended from an externally imposed Anglo system, and affected by a maze of federal and state statutes and cases. As part of this era of self-determination, many tribes are working towards including traditional values and dispute resolution mechanisms back into their tribal courts.

### **Types of tribal courts:**

The result of interaction between tribes and the federal government over the years led to the development of several types of tribal court systems: traditional courts, courts of Indian offenses (CFR courts), modern adversarial tribal courts,

and hybrids of modern and traditional courts. Only a handful of traditional and CFR courts remain today, however.

Traditional courts are based on unwritten custom laws and often involve justice delivery by religious or other tribal leaders. The primary goal of traditional courts is typically to mediate a case to everyone's satisfaction. Judges are commonly religious leaders or chiefs who serve without pay. They ascertain guilt and determine an appropriate remedy, which often includes restitution in some form. Although procedures and offenses are defined according to unwritten, customary laws, traditional tribal courts are still bound by the provisions of the Indian Civil Rights Act. The religious courts of the Pueblos are examples of traditional courts in place today.

Courts of Indian Offenses came into being in the 1800s during an era of military battles and political assimilationist policies. They became known as CFR courts when guidelines were established in the Code of Federal Regulations. Although the CFR courts were staffed by Indian people, the judges were originally appointed by the Bureau and served at its pleasure. They marked the first break away from a single body exercising all three governmental powers on an exclusive basis.

The CFR courts reportedly had more to do with cultural assimilation through suppressing religious ceremonials, medicine men, and traditional methods of property distribution and such, than with keeping law and order. At the height of CFR court activity, about two-thirds of the reservations had them. Today there are few CFR courts left. They are bound to the provisions of Title 25 of the Code of Federal Regulations. Title 25 contains regulations to be enforced by the CFR courts, but the tribes may adopt their own ordinances subject to the approval of the Secretary of the Interior.

The modern tribal court systems began with the passage of the Indian Reorganization Act in 1934. That Act encouraged the establishment of constitutional forms of tribal governments with tribally controlled judicial systems. By that time, however, most tribes were not in a position to resurrect the traditional forms of justice that had functioned prior to the Courts of Indian Offenses era because of removal, dissipation, decimation, and suppression. Instead, tribes established judicial systems that were very similar to the model urged upon them by the Bureau. Written laws were adopted and enforced and unwritten customary law played much less of a role. As a result, the modern tribal courts took on practices based on Bureau offered notions of Anglo justice rather than on tribal customs.

Modern tribal courts are typically established by tribal councils, usually under the authority of a tribal constitution. Procedures for them are commonly defined by the councils in the form of ordinances. Judges are elected by the membership or appointed by the council. Tribal judges may not be attorneys, and attorneys are even barred from participating in some tribal court civil proceedings. Tribal court proceedings are generally more informal and relaxed than those in the Anglo system. Indian tribes are not bound by a requirement to separate the branches of tribal government into executive, legislative, and judicial, and it is not uncommon, especially in Alaska, that the tribal councils are also tribal courts.

Although tribal courts have a wide range of independence, decisions of any type of tribal court system that result in the incarceration of someone are subject to review by the federal courts through a writ of habeas corpus. In these cases, the federal courts review cases upon request to determine if there were violations of the equal protection and due process requirements of the Indian Civil Rights Act.

### **History of tribal court jurisdiction:**

The basic premise for tribal court jurisdiction in the United States comes from federal recognition of inherent tribal sovereignty. Tribal sovereignty basically means that tribes have most all governmental powers they once had, except as specifically terminated or limited by the U.S. Congress. Tribal powers to go to war, make treaties with foreign countries, and to print money were terminated by the virtue of their coming under the umbrella of the United States government. Over the last hundred years or so, the policies and laws of the federal government toward tribal jurisdiction have played a significant role in the development of tribal courts. In the earliest years, Congress respected the right of tribes to create their own forums for governing and administering justice. This right was generally recognized through treaties. Tribes had exclusive jurisdiction over all persons and subjects present in Indian country.

As the newly founded nation developed, however, a pattern of extending federal jurisdiction over crimes in Indian country between non-Indians and Indians was established. In 1817, Congress reduced tribal jurisdiction by passing the General Crimes Act, also known as the Indian Country Crimes Act or the Federal Enclaves Act. The General Crimes Act extended federal criminal laws into Indian country except for crimes committed by an Indian against the person or property of another Indian.

In 1832 through *Worcester v. Georgia*, the U.S. Supreme Court ruled that states had no jurisdiction over Indians within Indian country unless Congress granted them that power. The 1800s however, were an era of intense disruption and assimilation for the Indian people. Often crimes in Indian country were handled by Indian agents of the federal government. Traditional forms of tribal justice were continually eroded. In 1871 Congress ended the practice of treaty-making with the Indians and pressures increased to open Indian reservations to settlers and to assimilate tribes into Anglo society.

During the 50 years after *Worcester*, there were relatively few cases in federal Indian law. The *Ex Parte Crow Dog* case was the next federal case of great significance. The case involved a dispute and subsequent murder of an Indian known as 'Spotted Tail' by another Indian known as 'Crow dog.' The murder was handled by the Brule Sioux tribe in a traditional manner which involved restitution by payment of \$600, 8 horses, and a blanket. The Territory of Dakota also arrested Crow Dog, tried him for murder, and sentenced him to death. The case was appealed to the United States Supreme Court which ruled that although federal criminal law applied in Indian country when non-Indians were involved, only an Indian government could punish an Indian for committing a crime against another Indian in Indian country.

In reaction to the U.S. Supreme Court's decision in the *Crow Dog* case, Congress passed the Major Crimes Act in 1885 which extended federal court jurisdiction over felony offenses committed by Indians against other Indians on Indian reservations. Shortly after, in 1887, Congress approved the General Allotment Act in 1887 which did not technically affect tribal jurisdiction, but had devastating effects on it by dividing tribal land among members, causing further disbursement of tribes. In 1896 through *Talton v Mayes*, the U.S. Supreme Court ruled that rights of criminal defendants under the U.S. Constitution do not apply to tribal criminal proceedings.

In the spirit of attempting to improve conditions on the reservations, Congress passed the Indian Reorganization Act in 1934. Many tribes organized under the IRA, adopting written constitutions that were typically based on the 'model constitution' written by the BIA. These constitutions granted tribal councils the power to create tribally operated courts to replace CFR courts, marking the birth of the modern tribal court systems. However, the Bureau drafted a model code for these courts as well. Under this code, Indian judges were appointed by BIA if they were paid federal funds. Under the model constitutions and model codes adopted by tribes after 1934, tribal court jurisdiction was limited to minor

offenses committed by Indians. The model code used by most tribal courts granted rights to jury trials, but authorized tribal courts to bar professional attorneys from court. Few other procedures were outlined in the codes and most limited sentencing power of tribal courts to six months imprisonment for any one offense.

In the early 1950s Congress began adopting a policy of terminating federal obligations to tribes. Although most tribes were not terminated, tribal councils were discouraged from efforts to develop more effective tribal courts. Congress passed Public Law 280 in 1953 which authorized some state courts to assume criminal and some civil jurisdiction over Indians within Indian country regardless of tribal consent. Through the 1950s, tribal codes generally remained the same as those developed by the Department of the Interior in 1934.

At the end of the termination decade of the 1950s, the U.S. Supreme Court issued an opinion favorable to tribes in *Williams v Lee*. The case involved a non-Indian who operated a store within the Navajo Nation suing an Indian customer in the Arizona state courts claiming that the Indian customer had not paid for goods sold to him on credit. The Supreme Court ruled that “to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves.” It upheld the exclusive jurisdiction of the Navajo Tribal Court over the collection of a debt owed by an Indian to a non-Indian merchant on the reservation. A new judicial ‘test’ emerged with this case: if the state intrusion does not infringe upon tribal self-government, the state may extend its civil jurisdiction into the reservation.

In the early 1960s, Congress began hearings concerning claims that tribal courts do not afford basic due process rights to Indian criminal defendants. In 1968 following much debate both within and outside the Indian community, Congress passed the Indian Civil Rights Act (ICRA) which established a basic bill of rights

for persons subject to the jurisdiction of Indian tribes. In a sense, it reaffirmed judicial powers of tribal self-government but placed certain standards on tribal courts while providing no funding to enable tribes to restructure or improve their court systems.

At the heart of the Indian Civil Rights Act is the obligation of tribes to provide *due process* and *equal protection* in tribal operations. The ICRA affects tribal court procedures in a number of other ways as well. It requires basic due process rights for defendants, mandates a trial jury system for offenses with potential jail penalties, authorizes defendants in criminal proceedings to use lawyers at their own expense, and requires that laws be applied equally to all persons. It also limited the sentencing to 6 months in jail and/or a \$500 fine upon conviction for any one offense. This limit was later raised to 1 year in jail and/or \$5,000. The ICRA amended Public Law 280 to require tribal consent before states may assume jurisdiction over Indians within Indian country.

By the late 1960s, Congress was embracing a policy of promoting tribal self-government and increasing funding for tribal court operations, though many courts remained under-funded and under-staffed. Most tribes lacked resources to make structural changes required by the ICRA and expanded tribal jurisdiction. The National American Indian Court Judges Association was formed for the purpose of improving tribal court operations at this time.

During the 1970s, both Congress and the U.S. Supreme Court were active in Indian affairs. Congress passed several pieces of significant Indian legislation and the Supreme Court heard an abundance of Indian cases. The Congressional act that most directly affecting tribal courts was the Indian Child Welfare Act. The Act basically requires state courts to notify tribal governments when a “child in need of aid” custody or adoption proceeding is initiated in state court. It also gives tribes the right to intervene in state court custody cases involving tribal children.

Three significant U.S. Supreme cases affecting tribal court jurisdiction from the 1970s were *Oliphant v. Suquamish*, *U.S. v. Wheeler*, and *Santa Clara Pueblo v. Martinez*. A significant setback for tribal jurisdiction was instilled by the decision of the Supreme Court in *Oliphant* case. The Court ruled that Indian tribes have no inherent power to prosecute and punish non-Indians who commit crimes on Indian reservations unless the tribe has been granted such power in a treaty, agreement, or act of Congress. There is no law which specifically removed the tribal power to assert criminal jurisdiction over non-Indians, yet the court ruled that the exercise of this power is “inconsistent with the status” of Indian tribes. For the first time, the Supreme Court declared that a fundamental tribal power could be extinguished by implication. Since tribal governments do not have criminal jurisdiction over non-Indians many tribes began a process to decriminalize their codes.

Shortly after the startling *Oliphant* decision, the Supreme Court issued a ruling that helped to reaffirm the sovereign nature of Indian tribes in *U.S. v. Wheeler*. This case held that because Indian tribal courts and federal courts derive their authority from separate sovereigns, the double jeopardy clause of the U.S. Constitution does not prohibit prosecution in federal court of an Indian defendant already tried and sentenced for the same offense in tribal court. The case arose on the Navajo reservation and involved a crime committed by a Navajo tribal member.

A decidedly positive note for tribal sovereignty was struck in the last major Indian law decision by the Supreme Court in 1978, in *Santa Clara Pueblo v. Martinez*. The case involved a Santa Clara Pueblo woman who brought suit against tribal officials because the tribe denied tribal enrollment to children of female members who marry nonmembers, but not to children of male members who marry nonmembers. In this case, the Court held that the Indian Civil Rights Act does not grant federal courts the power to decide civil rights cases on Indian



reservations except those involving criminal matters where a release from custody is sought. In those cases, a writ of habeas corpus challenging an allegedly unlawful imprisonment is the procedural tool. The Court reasoned that to impose standards of U.S. constitutional law would cause “unnecessary intrusions on tribal governments” and would threaten a tribe’s ability to “maintain itself as a culturally and politically distinct entity.” Tribal courts were identified as the only appropriate forum for applying such ICRA principles as equal protection and due process in a manner consistent with traditional Indian values and customs.

In 1981, the Supreme Court acknowledged that tribal courts have inherent civil authority, even over actions of non-Indians, that affect interests such as “*the political integrity, economic security, and health or welfare of the tribes*” in *Montana v. United States*. The case sets out a test for tribal court judges to use when deciding whether or not to assert civil jurisdiction over activities of non-Natives. The four questions for tribal court judges to ask are: Has the non-Native entered into any consensual relationship with the tribe or its members?; Does this non-Native’s activity threaten or have some direct effect the political integrity of the tribe?; Does this non-Native’s activity threaten or have some direct effect on the economic security of the tribe?; and, Does this non-Native’s activity threaten or have some direct effect on the health or welfare of the tribe? Through this case, the Supreme Court offered guidelines for gaining federal approval of the exercise of tribal court civil jurisdiction, but also put tribes in a defensive position in potentially having to prove affects of non-Native actions on the tribes.

In 1985, the Supreme Court addressed the question of whether or not non-Natives may challenge tribal jurisdiction in federal courts in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*. In this case, the Court held that non-Indians who challenge the tribe’s jurisdiction must first raise the issue in tribal court and exhaust tribal appellate procedures before raising the issue in a

federal court. Although federal courts have the final word regarding the scope of a tribe's jurisdiction, federal courts may not address this question until the tribal courts have done so. Given this ruling, non-Indians who engage in activities should expect that their actions are subject to tribal court jurisdiction. If a tribe does not have a court system, however, non-Indians may be able to take the issue to federal or state court systems right away. Also, exhaustion of tribal court remedies is not required when assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, where the action is obviously out of the scope of tribal jurisdiction, and when exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction.

**In conclusion:**

Modern tribal courts face a tremendous challenge in harmonizing traditional unwritten custom law with the requirements to comply with due process and other conditions placed on them by the Anglo system of justice. They face this challenge on a chronically underfunded basis. The maze of jurisdictional issues in sorting out tribal jurisdiction in relation to state and federal jurisdiction is staggering, with thousands of treaties, statutes, executive orders, court decisions, and agency rulings that all come into play. Dramatically shifting federal policies between assimilation and termination, to self-determination has created a web of contradictory laws.

Through all the surrounding conflicts and confusion, however, tribes have managed to survive, and even flourish. Building and maintaining effective judicial systems is critical to maintaining tribal health. An important element in that effort is that tribes do not need to create Anglo style court systems, but may incorporate more traditional methods of dispute and conflict resolution.

