Administering Criminal Justice in Remote Alaska Native Villages: Problems and Possibilities

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Introduction

Because of a reduction in oil revenues, Alaska's state government has had to reduce government services. The law enforcement and prosecutorial agencies of the state have not escaped the budget reduction process and their capabilities have been diminished. While these reductions have surely had an adverse effect upon the maintenance of law and order in urban areas of the state, the effect upon some rural communities may be virtually to eliminate the prosecution of crimes committed there except for the most serious. Even under healthy budgetary conditions, the remote locations of Alaska's villages make the delivery of justice services difficult. Although the state is sensitive to the need and has developed unique programs such as the Village Public Safety Officer program to address Alaska's responsibility (Marenin and Copus, 1992), there is emerging the recognition that state effort alone is not capable of ensuring a just, efficient, and responsive system of justice in rural Alaska. Alternatives are needed.

For Alaska Native villages, tribal law enforcement and prosecution of at least selected crimes may be a practical way of filling the void in the delivery of justice services, a void which will inevitably get worse with the decline of oil revenues. However, a federal law, Public Law 280 (hereinafter PL 280), creates obstacles that interfere with tribal prosecution of criminal behavior. Examining how PL 280, ironically a law with the purpose of enhancing law and order in village Alaska, interferes with villages assuming criminal jurisdiction is in part the purpose of this paper. This interference exists even when the state and the tribes may both agree local control is desirable. First, however, developing an informed opinion of PL 280 will necessitate a historical investigation into why Alaska ever became a PL 280 state, when originally this intrusive legislation did not include Alaska.

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The History of Alaska's Inclusion In PL 280

On 8 August 1958, President Dwight D. Eisenhower signed H.R. 9139 into law, which added Alaska to Public Law 280. PL 280, familiar to all who are involved in "Indian Justice," was originally passed in 1953. PL 280 required five states, namely California, Minnesota, Nebraska, Oregon and Wisconsin, to assume criminal and civil jurisdiction over Indian Country within their respective state boundaries. PL 280 was itself part of a larger movement to terminate the special trust relationship shared by the Federal government and Indians, a trust dating back to the early 1800s. Fittingly, the blanket policy of which PL 280 is a part was referred to as "Termination" (Fixico, 1986). Given the climate of our current civilization in which termination has become a euphemism for assassination, the historical use of the word "termination" is not without its irony (Copus and Sullenberger, 1991).

PL 280 was passed in a time when there was a frenzy of reform legislation. As presented by DeLoria and Lytle, when the Republicans captured the White House in 1952, they immediately set out to make drastic reforms in a host of federal programs. They viewed federal Indian programs as an area especially in need of their reform efforts (DeLoria and Lytle, 1983, p. 17).

The public reason given for PL 280 is clearly seen in the House Report prepared in 1953, for all practical purposes the major piece of Congressional testimony offered before passage. In reference to the five original PL 280 states, the House of the US Congress was assured:

> These states lack jurisdiction to prosecute Indians for most offenses committed on Indian Reservations or other Indian Country by or against Indians, but cases of offenses committed by Indians against Indians that jurisdiction is limited to the 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny. As a practical matter, the enforcement of law and order among the Indians in the Indian Country has been left largely to the Indian groups themselves. In many states, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on states indicating an ability and willingness to accept such responsibility (H.R. Rep. No. 848, 1953).

Besides specifying the original five states to which PL 280 would apply, the original legislation provided that any other state could

similarly assume jurisdiction by its own legislative actions. Indians were appalled by this lack of representation in future state adoptions of PL 280 and demanded their "consultation" be a key part of any future application of the intrusive law. The Indian concerns were noted by President Eisenhower, who signed PL 280 into law anyway. Eisenhower commented, in justification of his signing, that the legislation had a basic purpose which was "still another step in granting complete political equality to all Indians in our nation" (Prucha, 1984, p. 1045). Upon the President's urging, the Senate, in the First Session of the Eighty-fourth Congress, 1954, introduced an amendment that went further than the "consultation" asked for by the President and specified "consent" would, in the future, be needed by those Indians affected by future additions to PL 280. After spirited debate, the measure was defeated but some fifteen years later was included in the Indian Civil Rights Act of 1968. This was ten years after Alaska was added; consequently, the addition of Alaska as a PL 280 state did not require the consent of Alaska Natives.

PL 280 was an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally-protected wards. As wards, a status *enjoyed* since the nineteenth-century decisions of Chief Justice John Marshall in the Cherokee Nation cases, Indians in Indian Country were subject only to Federal or Tribal jurisdiction (Goldberg, 1975, p. 537). As Goldberg notes, the compromise was viewed as less than satisfactory by both sides of the issue:

> From the outset, PL 280 left both the Indians and the states dissatisfied, the Indians because they did not want state jurisdiction thrust upon them against their will, the states because they resented the remaining federal protection which seemed to deprive them of the ability to finance their newly acquired powers (Goldberg, 1975, p. 538).[1]

Goldberg, writing in 1975, noted the inevitable conflict between states and Indians "over the scope of jurisdiction offered by PL 280 and the means by which transfers of jurisdiction were to be effected" (Goldberg, 1975, p. 538). That conflict occurred is evidenced by a growing body of case law and controversy concerned over which perspective of PL 280, the Indian or the non-Indian, will prevail. This leads to the question of why Alaska would seek to be admitted to the "PL 280 Club"?

Precipitating Factors Leading to Alaska's Inclusion in PL 280

The spark that eventually led to Alaska becoming a mandatory PL 280 state was a charge of statutory rape that occurred in the Alaska village of Tyonek and culminated in a 1957 federal trial. Located on the northwest shore of Cook Inlet, west of Alaska's largest city of Anchorage, Tyonek had an estimated population of 200 people, of whom 90 percent were Native (Federal Field Committee, 1967). Territorial authorities arrested Emil McCord, 23 years old, and Andrew Nickanorka, 29 years old, both residents of Tyonek, and accused them of carnal knowledge of a fourteen year old female. There was no dispute as to the fact the defendants and the female were full-blooded Native Alaskans, qualifying for the special status afforded to all Native Americans. The defendants asked the federal district court, the Honorable Judge J. L. McCarrey presiding, to free them, based on a two-pronged argument. First, the village of Tyonek was claimed to be "Indian Country." This claim was buttressed by the fact that the village was within limits of an area set aside for the tribe's use by an executive order issued in 1915. Tyonek had an active local traditional elected council form of government; and, the village fell within the scope of the definition of "Indian Country" in 18 U.S.C., sec. 1151.[2] As a result of Tyonek being "Indian Country" and the alleged offense being between Indians, the petitioners argued only Federal jurisdiction was applicable, not Territorial jurisdiction.

The second prong of the argument considered the Federal jurisdiction question. McCord and Nickanorka claimed that under federal law there was no prohibition of their behaviour. The Territory argued that statutory rape was prohibited by the Major Crimes Act, which gave the Federal Courts jurisdiction over Indian offenses within Indian Country for Congressionally-delineated crimes (listed H.R. Rep. No. 848, 1953 quote, p. 119, this article). Simply put, the defendants, McCord and Nickanorka, noted that while rape was listed, statutory rape was not.

Judge McCarrey handed down his opinion on 15 May 1957 (in Re: McCord). McCarrey found for the petitioners on each of the two points raised. Regarding the issue of "Indian Country," Judge McCarrey found an absence of any US Congressional denial of that status to the Tribe. McCarrey's rejection of the prosecution's contention that "Indian Country" was a concept meant to apply only to the lower 48 states was important. As he summarized: "The prosecution's argument that Alaska Natives have a different status than Indians of the States is a rather novel concept which I regard as

inaccurate" (in Re: McCord, p. 135).

McCarrey also found against the Territory on the question of statutory rape being prohibited by the Major Crimes Act. One of the original ten major crimes was rape and the Territory argued that statutory rape was meant to be included in the crime of rape. The defendants countered that if Congress had meant to include statutory rape, it would have clearly said such. The honorable judge concluded, in accordance with principles of strict interpretation of the law and an analysis of precedent, that "the reasoning adopted in these cases is quite convincing. . .[and] would certainly indicate that Congress preferred to leave this matter to the tribal courts." Thus statutory rape was a tribal matter while rape was a federal concern. In either case, Territorial intrusion was not justified.

Judge McCarrey then "warned" the Indian peoples of Alaska that only in Tribes governed by an operational tribal unit (government) would he deny imposition of territorial jurisdiction. At that time, few Tribes in Alaska had the Tyonek level of self-government. McCarrey stated:

> This decision should not be interpreted by members of the Native groups, be they Indian or Eskimo, as a general removal of the territorial penal authority over them, for the reason that this court will take judicial notice that there are few tribal organizations in Alaska that are functioning strictly within Indian Country as defined in 18 U.S.C., sec. 1151 et seq. As I have said, only when the offense fits distinctly within the provisions of the applicable federal law will Territorial jurisdiction be ousted. Testimony indicates that the Tyonek area, unlike most areas inhabited by Alaska Natives, has been set aside for the use of and is governed by an operational tribal unit. Under these conditions, I can see no alternative but to order the release of the petitioners (in Re: McCord, p. 136).

Initiating the Legislation Leading to Inclusion

The first indication of a concern with the McCord and Nickanorka decision came from Henry J. Camarot, Executive Director of the Alaska Legislative Council in Juneau. Camarot apparently sent Territorial Representative Bob Bartlett a copy of the McCord decision with an expression of concern about the implications and consequences. In a letter dated 24 May 1957, Bartlett wrote Camarot acknowledging receipt of the case material and assured Camarot of his interest: "I shall read the opinion with great interest and expect to be writing you further about this after having done so" (Bartlett

and Camarot, 24 May 1957). In several weeks, on 6 June 1957, Bartlett again wrote to Camarot, reaffirming his support of "the objective sought" (Bartlett and Camarot, 6 June 1957). Although Bartlett did not specify the "objective," it is reasonable to believe he was referring to the jurisdiction of the Territory in Indian Country. At this time Bartlett was also concerned that the effort for statehood not in any way be jeopardized and wrote to Camarot that he intended to "let the whole matter go over for the time being" (Bartlett and Camarot, 6 June 1957). Camarot agreed and told Bartlett, in a letter dated 18 June 1957, that he understood Bartlett's desire to wait until the Statehood Bill passed (Bartlett and Camarot, 18 June 1957).

Others, however, were not as willing to let the McCord decision stand unchallenged. In a letter dated 23 July 1957, Hugh Wade, Treasurer of the Territory, contacted Bartlett (Bartlett and Wade, 23 July 1957). There is no indication that the communication between Bartlett and Camarot was known to Wade. In his letter, Wade revealed what had apparently been an ongoing discussion about the McCord case with Walter Walsh. Walsh was an attorney in the Department of Interior and was to become instrumental in seeing that the jurisdictional question was not postponed any longer than necessary. Walsh had suggested (through Wade) that Bartlett introduce legislation to nullify the precedent status of Judge McCarrey's decision in the McCord case. Wade did not pull any punches in relaying to Bartlett his own observations on what had transpired in Anchorage on behalf of McCord and Nickanorka. Critically, Wade wrote, "You [Bartlett] will recall all the lawyers in Anchorage came to the aid of some Natives who were charged with statutory rape and McCarrey came out with a purely political opinion which held that Tyonek was Indian Country and that the laws of the Territory did not apply" (Bartlett and Wade, 23 July 1957). Wade went on to write,

> Walter [Walsh] seems to think there is a move underfoot to get around the liquor laws of the Territory which might allow liquor to be sold in the Native villages without complying with the Territory's liquor laws. Of course there are other situations which might be equally as bad if someone wanted to take advantage of this decision. It looks to me that it would not be too bad a political move for you to think about introducing such legislation (Bartlett and Wade, 23 July 1957).

Bartlett did not wait long to reply to Wade's letter, showing his own sentiments were similar to Wade's and Walsh's. Bartlett wrote back on 26 July 1957, "To go back to the Tyonek decision. I

remember even yet my amazement at reading it. It was ok that the boys had been dismissed but the reasoning the judge used was tortuous. You are right, something has to be done" (Bartlett and Wade, 26 July 1957).

The 26 July 1957 letter is the first instance of Bartlett communicating directly with Attorney Walter Walsh. He wrote, "Hugh Wade has written me concerning conversation between you in respect to the Tyonek decision. I agree with you wholeheartedly that the void which has been created by that decision must be filled and that as promptly as possible" (Bartlett and Walsh, 26 July 1957). He went on to suggest that a draft bill be sent directly to him for submission to Congress.

> If you have been doing the drafting on your own and there have been no official involvements it might be that you might prefer in the interest of saving time in sending me the draft of the bill and that unless [Rex] Lee [Legislative Commissioner of the Bureau of Indian Affairs] had some other solutions to propose I could put it in before adjournment of Congress (Bartlett and Walsh, 26 July 1957).

Within several days Bartlett received a letter from Walsh dated 29 July 1957. It was marked "Personal and Confidential" and intended for Bartlett's eyes only. The letter contained a draft of a bill that was the first instance of actual language preparing the way for the inclusion of the Territory under the jurisdictional grant given by PL 280 to the five other states. The letter was confidential because of Walsh's position in the bureaucracy of the Department of the Interior. Walsh was a staff attorney for the Office of the Solicitor in the Juneau Region and apparently was in no position to bypass his superior in a direct contact with the Territorial Representative. Nevertheless, it appears Walsh was, in a large part, the initiator of what was to become Alaska's inclusion in PL 280. This is even though Walsh's original draft bill was not a PL 280 Amendment but a piece of stand-alone legislation to have the US Congress declare Territorial jurisdiction in Alaska's Indian Country.

Bartlett was concerned about the protocol of introducing a bill written by a staff attorney, a bill that had not been through the proper bureaucratic channels. On 2 August 1957, only several days after receiving the draft from Walsh, Bartlett wrote back: "It will not do for me to introduce this bill on my own motion. To do so necessarily would involve you because others at Juneau and in Washington would recognize your handiwork and realize we had been in correspondence" (Bartlett and Walsh, 8 August 1957). He said

he would contact Rex Lee, urge him to submit a bill, and hope it would be the same one Walsh had written.

Lee responded to Bartlett on 5 August with a short note and a draft bill that would amend PL 280 to include Alaska. Lee cautioned that the draft bill had not been cleared through the Secretary of the Interior or through the Bureau of Budget, "We are not making any commitment with respect to it at this time" (Bartlett and Lee, 5 August 1957). Nevertheless, it may be assumed that it was Lee, or at least those in close association with and through him, who came up with the idea of amending PL 280.

The very next day, 6 August, Bartlett wrote to both Lee and Walsh. He thanked Lee for the proposed bill but confided his feelings to Walsh. "Although that draft is in altogether different phraseology from the one you prepared, I think it better to introduce the Department's version in order to protect you from any possible accusation that you and I were working on this privately" (Bartlett and Walsh, 6 August 1957). Thus H. R. 9139 (PL 280 Amended) was born![3]

The Congressional History of H.R. 9139

One would think, even in light of the low key and somewhat surreptitious development of H.R. 9139, the issue would have drawn some Congressional debate. Such was not the case. Its consideration consisted of testimony contained in two reports submitted by the House Committee on the Judiciary (H.R. Rep. No. 2043 and Senate report 1872, 1958). Both committee reports contained a copy of an earlier report from Roger Ernst, Assistant Secretary of the Interior dated 25 February 1958. For all practical purposes both reports were identical, recommending passage of the proposed bill with no deletions. Ernst reviewed the situation of villages having no tribal courts, police, or criminal code, emphasizing that the Territory had been providing the services and implied the villages and the Territory desired this to continue. Ernst wrote:

> As the Territorial government has for many years been responsible for maintaining law and order in the Native villages as well as in the rest of Alaska, and as Natives have never exercised that function and are not prepared to exercise it, the court's decision has left them without protection to which they are accustomed and to which they are entitled as citizens of the Territory (Senate report 1892, 1958).

The tone could easily be interpreted as one of condescension and/or protectionism. The image of Native Alaskans portrayed in the reports

was enough to convince the Congress of their duty to provide tribes in Alaska with basic law and order services through the gracious offering of the Territory. H.R. 9139 passed the House on 7 July 1958 and the Senate on 28 july 1958. It was signed into law by President Eisenhower on 8 August 1958.

The Reaction of the Native Community

PL 280 directly affects the Native community. It is a challenge to the very issues of local control and sovereignty, issues that are gaining momentum in the Alaska Native political agenda of the 1990s. PL 280 was, in effect, a piece of "termination legislation." With PL 280 in place, the state wields tremendous power over the workings of local civil and criminal matters. The power is mandated to the state by the federal government via Congress' plenary power over Native Americans and, in this case, Native Alaskans. After the original passage of the PL 280, American Natives throughout the country raised their voices in objection to the passage of such intrusive legislation without their consideration. As noted above, Native Americans were guaranteed, by the Civil Rights Act of 1968, they would be consulted about any future extension of PL 280. This, however, was not the case in 1958 Alaska.

The Native community was made aware of H. R. 9139 by Representative Bartlett as early as 22 August 1957 (Bartlett and Jackson, 22 August 1957). Copies of the bill were sent to Thomas L. Jackson, Grand President, Alaska Native Brotherhood and other members of the Native leadership. However, in a letter dated 4 August 1958, four days before the bill became law, Jackson wrote to Helen L. Peterson of the National Congress of American Indians, Washington, D.C. (Jackson and Peterson, 4 August 1958). (Peterson had previously contacted Jackson asking about the involvement of the Brotherhood and offering the assistance of NCAI to lobby against H. R. 9139.) Jackson's response was instructive in its brevity. He asked that NCAI not voice an objection to the bill until such time as legal advice could be obtained and, in the last sentence, added, "Which unfortunately we do not have available" (Jackson and Peterson, 4 August 1958). Jackson may have been responding from an assimilationist viewpoint long held by the Alaska Native Brotherhood. When the Brotherhood was founded in 1912, the founders were acculturated Natives who insisted, as Philip writes, "the reservation system and tribalism had to be eliminated before the natives could become first class citizens" (Philip, 1981, p. 313).

It can only be concluded, due to the lack of political organization and/or the political orientation of the Brotherhood, the Native leadership had little input into the political process of H.R. 9139. If the same issue were to surface again, there is little doubt the situation would be quite different with perhaps a different outcome. However, as history has unfolded, PL 280 is a reality. Its existence begs the question of its effect and the possible need to reconsider a law that was passed in historical circumstances fraught with a paucity of consideration of what was best for Native Alaskans, a law that experience suggests may not fit the needs of a modern and changing Alaska.

PL 280 in a Changing Economic Environment

Alaskans are painfully aware of the present and anticipated future budgetary woes of the State. Alaska obtains approximately eighty percent of its State revenues from oil royalties and, as these royalties decline, its ability to provide services also declines, particularly public safety services. Despite being essential, the two agencies primarily responsible for the provision and maintenance of public safety in the State, the Chief Prosecutor's Office and the Department of Public Safety, have not been exempt from the budget-crunching process.

The Fairbanks District Attorney's Office is representative of what is occurring in prosecutors' offices throughout Alaska. In addition to serving the immediate Fairbanks area, the office provides prosecutorial services to over fifty villages throughout Alaska's vast Interior and North Slope. In the 1991-92 fiscal year, the office suffered a ten percent reduction in its budget. Even before the budget reduction, the Office was prioritizing cases as a way of determining which would be prosecuted and which would not. The budget reduction has increased the use of prioritization. Like Fairbanks, other district attorneys' offices also have responsibility for prosecuting cases arising in village Alaska. Prioritization of cases undoubtedly will take into account where the crime has been committed. In fact, it seems probable that the effect may be amplified for the Native villages. In prioritizing cases, the Fairbanks District Attorney's Office considers the financial cost of prosecuting a case. For crime occurring in the majority of Alaska Native villages in the Fairbanks district, prosecution entails transportation and other logistical costs associated with having the offender tried in Fairbanks. Consequently, for identical crimes, one occurring in Fairbanks and one occurring in a village

hundreds of air miles for Fairbanks, the prosecution of crimes arising in the village will be enormously more expensive and is therefore likely to be of low priority because of the greater expense (Davis, 1992).

The budget reductions have an even greater impact on the ability of the Department of Public Safety to provide law enforcement services to the villages. But for a few exceptions, law enforcement in the villages is provided by Alaska State Troopers or Village Public Safety Officers supervised by the State Troopers (Marenin and Copus, 1991). There are no Troopers stationed north of the Brooks Range on Alaska's vast North Slope. Services there are provided by the municipal government located in Barrow. South of the Brooks Range, only several of the villages periodically have Troopers stationed in them on a full-time basis. The Village Public Safety Officer (VPSO) program is an attempt to have some presence of law enforcement in each village. Additionally, the VPSO is responsible for fire and search and rescue services. Only one of every three Interior villages has such an officer, a ratio expected to get worse. The absence of both a Trooper and a Public Safety Officer means most villages are without any State authorized or recognized law enforcement official.[4]

In the absence of any law enforcement official in a village, a state law enforcement response to even the most minor of crimes requires a Trooper or a VPSO to travel to the village. Obviously, even if the State were not experiencing financial difficulties, economics would dictate limiting official State responses to offenses for which the response expenses were warranted, measured by the seriousness of the crime. In fact, the Troopers have had to limit their immediate responses to life-threatening situations. In all other situations, the Troopers prioritize crimes according to their seriousness and time of commission, and investigate when and if their resources allow. It has been observed that village residents lose faith in the ability of the State to meet its PL 280 mandated responsibilities to provide law enforcement services and, consequently, may not report crimes (Tanner, 1992). These realities were not part of the considerations in 1957, realities perhaps divined by Judge McCarrey.

With the oil revenue decline predicted to continue, the situation can only get worse. Consequently, alternatives need to be developed to fill the law and order void. In most states, the answer would be to develop local municipal-type police and court systems. Three problems, however, stand in the way of this approach. The first is lack of money. Second, many villages are small, some having a populations of only fifty or fewer. It would make little sense to develop full

justice systems for these tiny villages. The third obstacle is the Alaska Constitution, which mandates a unified court system and prohibits the establishment of local courts (Alaska Constitution, Article IV, Sec. 1). A solution would be to use systems outside the reach of State jurisdiction, namely federally-recognized systems such as tribal courts and tribal law enforcement.

As an alternative, tribal justices systems have an important advantage above and beyond that of economics. For village Alaska, a tribal system has legitimacy in the eyes of villagers because it belongs to them. The authors' own experiences in working with Native villages interested in strengthening their tribal governments, indicate that villagers often feel the laws of the State are those of a foreign nation being imposed upon them.[5] This perception of being subjected to a foreign justice system is exacerbated by having most offenders transported out of the village, at the time of arrest, to receive a trial by a jury having little in common with the villagers, and the prosecutor, public defender and judge all strangers. The option of bringing the court to the village is little better. Notwithstanding the prohibitive cost of flying in judges, prosecutors, defense attorneys and clerks, villagers see a strange form of the adversary system at work. The court members, including the defense attorney, are seen as forming a team working against the interests of the defendant. The members arrive on the same plane, socialize together, take their meals together, and are quartered together. From the village viewpoint, it is difficult to see how the village interest is served (Angell, 1981, pp 55-56). The basic philosophy of the adversary system of justice is, itself, foreign to most village residents. Like Native Americans in the lower forty-eight, Alaska Native culture has a different perspective on what justice is, or at least ought to be. The Native view of justice demands a special blending of tribal traditions, customs, and laws (Vine and DeLoria, 1983, p. 149) having evolved over centuries. Contrary to the Anglo system of justice, the village goal is to heal and re-establish harmony and not to stigmatize and wreak retribution.

A logical consequence of the perception of being subjected to a foreign law and order system is a reluctance to cooperate with or use state services, even when those services are available. It seems probable that a tribal justice system has the potential of being more efficient and responsive to the village needs than a State-imposed system.[6] The community would at least feel the system belonged to them. Thus the use of tribal government to maintain law and order can serve to enfranchise Native villagers and at the same time fill the

void left by the curtailment of State services.

PL 280 clouds the issue of local control by traditional village governments. The problem posed by PL 280 is that the language granting Alaska jurisdiction over Indian Country may be exclusive or concurrent with the villages'. If exclusive, villages are prohibited by PL 280 from exercising tribal criminal jurisdiction. If concurrent, criminal jurisdiction would be shared by the villages and the State. The confusion over exclusive versus concurrent jurisdiction arises from recent interpretations, by legal scholars, of the provision versus the language of an amendment to PL 280 and its accompanying legislative history. It is an issue that needs settling.

The premier authority on federal Indian law, Felix Cohen's *Handbook of Indian Law* (hereinafter Cohen's), recognizes a 1970 amendment to PL 280 may support an inference of exclusive jurisdiction. However, Cohen eventually concludes the statute itself is not definitive as to the exclusion of tribal criminal jurisdiction. He suggests PL 280's proper interpretation should allow for tribal exercise of criminal jurisdiction (Cohen, 1982, p. 345). A recent 8th Circuit Court of Appeals decision supports the concurrent jurisdiction interpretation. The decision noted that ambiguities in federal law are to be generously construed in favor of tribal sovereignty. An extension of this principle would hold in favor of the village having concurrent jurisdiction (Walker, 1990, p. 675).

Despite Cohen's assertion that PL 280 allows concurrent jurisdiction, the 1970 Amendment certainly appears to indicate Congress intended PL 280 to exclude tribal criminal jurisdiction. The Amendment specifically grants criminal misdemeanor jurisdiction to the tribal government on the Annette Island Reserve of Alaska (18 USC sec. 1162, 1984). The implication is the other tribes in Alaska do not have jurisdiction over criminal matters. Prior to the enactment of the 1970 Amendment, Interior Under Secretary Fred J. Russell, in response to the then proposed Amendment, indicated PL 280's application to Alaska removed federal and tribal criminal jurisdiction, and the proposed amendment would "reinvest" the Metlakatla Community Council with local legislative and police powers (Russell and Eastland, 1970). Clearly, the Under Secretary viewed PL 280 as having stripped Alaskan Native tribal governments of their inherent criminal jurisdiction. This view then gives support to the exclusive jurisdiction interpretation, whether the villages or the State desire such. The importance of this point is, if this view prevails, the state has to assume jurisdiction and hence the attendant costs.

A solution for removing the PL 280-created obstacles to the exer-

cise of tribal criminal jurisdiction in Native villages is to once again amend PL 280. This time it should be amended to specify all tribes in Alaska have concurrent criminal jurisdiction, similar to the jurisdiction now exercised by the Metlakatla Community Council. Justification for such an Amendment has, to some degree, already been provided in supporting arguments for the 1970 Amendment to PL 280 that granted misdemeanor jurisdiction to the Metlakatla Community Council. In recommending Metlakatla be granted misdemeanor jurisdiction, House Report No. 91-1545 noted the location of the community "creates a serious isolation problem, resulting in the lack of adequate law and order services for members of the Indian community, especially as such services relate to minor crimes" (House of Rep. Report 1545). (Under Secretary Russell indicated the limited manpower of the State police made it impossible for the State to deal effectively with minor crimes in the isolated community of Metlakatla.) In addressing the House of Representatives, Congressman Donohue emphasized the need for local law and order to "keep minor offenders in line, whose violation of local ordinances are leading to a breakdown of order in the community" (Cong. Rec. 116) In general, the isolation of the villages from State law enforcement facilities, the inability of the State to deal effectively with minor crimes in isolated villages, and the breakdown of order in the community caused by a failure to prosecute minor offenses, all lead to the conclusion that the U.S. Congress should consider amending PL 280.

The legislative history of the 1970 amendment to PL 280 suggests yet another justification for further amendment. The House Report accompanying the 1970 Amendment, which provided Metlakatla with misdemeanor jurisdiction, implies prior to the inclusion of Alaska as a mandatory PL 280 state, a study was conducted indicating most of the tribes lacked a machinery for providing law and order. The House Report subsequently noted that by happenstance the Metlakatla Community Council's ability to maintain law and order had been overlooked by Congress, and "none of the officers of the Metlakatla Indian Community were contacted before the enactment of Public Law 85-615 concerning the proposed law" (House of Rep. Report 1545).[7] The House Report reflects an assumption that Alaska tribes were consulted before the imposition of PL 280 and that Metlakatla was the exception. In fact, the history of the inclusion of Alaska in PL 280 suggests Alaska Natives, in general, were only peripherally consulted. Since the later lack of consultation with the Metlakatla Community Council was grounds to amend PL 280 in

1970, it would seem this same consideration argues for a general amendment pertaining to all Alaska Native villages.

Scope of Tribal Jurisdiction

If PL 280 were to be reconsidered, one basic question that needs to be answered is whether tribal criminal jurisdiction should be limited to misdemeanor jurisdiction. The US Supreme Court has held that limitations on a tribe's power to punish its own members must be clearly set forth by Congress (Quiver, 1916, p. 606). Furthermore, ambiguities in federal law are to be construed in favor of tribal sovereignty (White Mountain Apache Tribe, 1980, pp 143-4). These two principles of federal Indian law dictate against inferred limitations of tribal sovereign powers. In contradiction to these principles, PL 280, as well as the Major Crimes Act, has been used to infer diminishment of tribal criminal jurisdiction.[8] Consequently, any change to PL 280 should address tribal criminal jurisdiction in general, with Congress specifying the extent of criminal jurisdiction, i.e., violations, misdemeanors, and/or felonies. To do otherwise will invite years of costly litigation.

In addition to specifically addressing the question of tribal criminal jurisdiction in Alaska, clarification is further needed on two directly-related issues. They are: 1) what constitutes a federally-recognized tribe in Alaska; and 2) what constitutes Indian Country in Alaska. The application of PL 280 already implies that federally-recognized tribes and Indian Country exist in Alaska. The original concern of the proponents of including Alaska in PL 280 certainly recognized Indian Country exists in Alaska, as did Judge McCarrey. Yet, even today, that implied existence is accepted by few Alaskans outside the Native community.

The controversy within Alaska over the two issues is best illustrated by the disparate way in which the federal courts and the Alaska Supreme Court have viewed the issue of federal recognition of tribes in Alaska. In Native Village of Stevens v. A. M. P., the Alaska Supreme Court indicated that, other than the Native community Metlakatla, few, if any, Native villages in Alaska qualified as federally-recognized tribes (Native Village of Stevens, 1988, p. 34). In contrast, the 9th Circuit Court of Appeals in Native Village of Noatak v. Hoffman suggested that all Alaska Native villages eligible to receive land as a village corporation under the Alaska Native Claims Settlement Act (hereinafter ANCSA) may be considered to be federally-recognized tribes (Native Village of Noatak, 1990). Under the

state court system, Alaska may have only one federally-recognized tribe; under the federal court system, Alaska may have more than 200 recognized tribes.

Alternatives and Remedies Other Than Amending PL 280

If changes are not made to PL 280, the State of Alaska can still address the jurisdictional question through changes to State policy. Working jointly, tribal governments and the State of Alaska can create a regulatory mechanism that, in effect, would permit tribal governments to operate as though they had criminal jurisdiction. There are three areas in which State policy would have to be changed. They first would be State recognition of Alaska tribal sovereignty. The second change would require the State judiciary to extend the concept of comity to tribal court decisions. The third and final area of policy change would require the State judiciary to apply an analysis, developed by the federal courts, to the question of whether a law is criminal in nature for PL 280 purposes. Each of the three required policy changes is discussed in turn.

Sovereignty recognition requires nothing more than the Governor of Alaska proclaiming, as State policy, the recognition of tribal government as sovereign. This recognition is not prohibited by PL 280 nor any other federal law. Recognition is a necessary step to circumvent the state's constitution's prohibition of local court systems (Article IV, Section 1, Alaska State Constitution). In fact, one governor, Steve Cowper, did order his administration to approach working with tribes much as though they were sovereign (Cowper, Administrative Order 123, 1990). This has turned out to be the exception, not being adopted by the succeeding administration.

The second change involves the legal concept of comity. In general, comity is the principle that courts of one jurisdiction will recognize and enforce laws and judicial decisions of another, not out of obligation but out of deference and mutual respect. In the present context, comity would involve state courts showing deference and respect for the laws and judicial decisions of the tribes. Extending comity to tribal courts requires the Alaska Supreme Court to endorse the extension of comity to tribal decisions. The application of comity has been endorsed by the Oregon State judiciary, and its guidelines for according comity to tribal court decisions could be applied in Alaska. In Red Fox v. Red Fox, the Oregon courts were faced with the issue of whether a divorce decree issued by a tribal court should bar a state court from holding a divorce proceeding with regard to

the same marriage. The Oregon court, finding for tribal civil jurisdiction, dismissed the divorce proceeding by according comity to a tribal court decision: 1) the tribal court decision must have had subject matter and personal jurisdiction to hear the case; 2) the tribal court decision must not have been obtained fraudulently; 3) notions of basic fairness (notice and a hearing) must be part of the tribal court process; 4) the court decision must not contravene state public policy (Red Fox, 1975, p. 921). Applying the guidelines enunciated by the court in Red Fox allows state courts to avoid unnecessary duplication of litigation and yet, if the state observed any suggestion of unfairness in the tribal process or the ultimate tribal decision is repugnant to state policies, the state court can choose not to recognize the offending tribal court decision. Clearly, the Oregon approach applied in Red Fox can be beneficial to the State of Alaska as well as to Alaska tribal governments and tribal needs.

To accomplish the third change, whether a behaviour even comes under PL 280, requires an analysis of tribal ordinances in a manner that would tend to characterize them as regulatory rather than criminal. By doing this, in conjunction with extending comity to tribal court decisions and possibly issuing state court orders incorporating tribal court decisions, minor crimes in villages could be handled as tribal regulatory offenses with remedies that might be enforced through state court orders if needed. The US Supreme Court has already endorsed such an analysis and applied it to the question of whether a state's law was criminal in nature and thus automatically applicable to Indian Country in a mandatory PL 280 state. Using the same type of analysis, but applying it to the question of whether a tribal ordinance is criminal in nature, could result in a large number of tribal ordinances being classified as regulatory, not criminal, in nature.

PL 280 specifically addresses state criminal and civil jurisdiction in Indian Country and, on the surface, appears to provide the PL 280 states with complete jurisdiction in Indian Country. States initially assumed that the PL 280 grant of civil jurisdiction included the regulatory jurisdiction to tax and regulate activities in Indian Country. However, this authority was challenged and, in Bryan v. Itasca County (Bryan, 1972, p. 385), the US Supreme Court stated the civil jurisdiction grant of PL 280 encompasses only the authority to hear private litigation. Thus, the Court characterizes state regulatory authority in Indian Country as being outside PL 280's scope (Bryan, 1972, p. 390). Consequently, PL 280 states do not automatically have regulatory jurisdiction in Indian Country.

After the Bryan v. Itasca County case, the criminal laws, civil procedural laws, and common-law concepts of PL 280 states automatically applied in Indian Country; regulatory laws, however, did not. This disparate treatment of regulatory law by PL 280 raised the issue of which state laws were criminal laws and which were regulatory laws. In Cabazon, an Indian tribe challenged the application of California's bingo laws to Indian Country. Despite the State's characterization of the bingo laws as criminal statutes and their violation as misdemeanors, the Tribe contended that the bingo laws were merely regulatory laws and should not be applied to the Tribe. The Court ultimately agreed with the Tribe (Cabazon, 1987, p. 212).

At first blush, the California bingo laws certainly appear to be criminal laws. Criminal laws have been characterized as having three basic traits: 1) they are written enactments of government, 2) they provide for the regulation or channelling of human behaviour; and 3) they provide for punishment of offenders (Rich, 1979, p. 8). The California bingo laws seem to possess these traits, and yet the Court determined these laws should not be classified as criminal, at least with regard to PL 280 and Indian Country. In light of this, the analysis, endorsed and used by the Court in deciding the California bingo laws were not criminal laws, represents a significant departure from traditional concepts of what constitutes a criminal statute.

This significant departure from traditional concepts involved using a prohibitory/regulatory analysis to determine whether a law was criminal in the context of PL 280. If the law is determined to be prohibitory in nature then it falls within PL 280 criminal jurisdiction. If the law is regulatory in nature it then falls outside PL 280 criminal jurisdiction. For a law to be prohibitory, it apparently must be a complete prohibition of an activity. In contrast, a law is regulatory if it imposes certain restrictions upon an activity to avoid abuses. The analysis focuses on California's intent in having the law and ultimately relies on a probing examination of the State's public policy with regard to bingo. In Cabazon, the Court looked past the State's classification of the law as a criminal misdemeanor and scrutinized California's overall gambling policy. Noting that California permitted some forms of gambling (bingo, state-operated lotteries, pari-mutual horse race betting, etc.) while expressly prohibiting certain others, the Court concluded gambling (and specifically bingo) was not viewed as an inherent evil to be altogether prohibited. Therefore, the general gambling and bingo laws were regulatory in nature.

Although the prohibitory/regulatory analysis generally requires a complete prohibition of an activity for a law to be criminal, an

exception to the general rule has been recognized by the courts. The Ninth Circuit Court of Appeals has found a state statute to be prohibitory (and hence criminal) despite its permitting certain community organizations to conduct the activity. In United States v. Marcyes, the Circuit Court held the laws of the State of Washington prohibiting the use or sale of fireworks, except for community displays, was criminal in nature and thus applied to Indian Country. In concluding the fireworks statute was prohibitory, the court emphasized the intent of the statute was to completely prohibit the general public from using or selling fireworks (Marcyes, 1977, p. 1364).

Taking both the general prohibitory/regulatory analysis expressed in Cabazon and the exception expressed in Marcyes suggests that laws that govern activities can be treated in one of two ways. First, statutes can prohibit an activity or behaviour and provide some exceptions to the proscription. Alternatively, statutes can generally permit an activity or behavior and specify some restrictions upon it. In the former instance, the statute would be characterized as criminal and the exceptions as defenses to the crime. In the latter, the statute would be identified as regulatory and the restrictions as limitations upon the activity or behavior intended to prevent undesirable consequences. Breaches of the restrictions would be viewed as civil rather than criminal violations.

While the focus of litigation about PL 280's criminal jurisdiction has been the classification of state laws as criminal or regulatory, a logical extension of that litigation is to apply the analysis used in it to classify tribal laws as well. The analysis, which tends to narrow the criminal class of laws, will be beneficial to efforts to maintain law and order in village Alaska. Presumably, in Alaska, where tribal criminal jurisdiction may not even exist over tribal members (except in the case of Metlakatla), this analysis provides for greater tribal powers by classifying as regulatory those tribal laws that otherwise might be classified as criminal and hence, under PL 280, outside the tribe's jurisdiction.

To illustrate the application of the prohibitory/regulatory analysis to village ordinances, consider the following. Suppose the behavior of concern is driving a snow machine while intoxicated. Since Alaska has a criminal statute that prohibits this behavior, under PL 280 the village would have no jurisdiction. However, if the village had an ordinance that allowed the use of snow machines in the village with the exception that one could not drive while intoxicated, then the ordinance would likely be regulatory under the Cabazon analysis. If the behavior then occurred, the village could legally enforce its

sanctions under tribal ordinance. Another example of a criminal act under State law is shoplifting. A village could pass an ordinance regulating how its members shop at the general store, and specifically except shopping without paying. In this way any activity the village wished to control could be regulated.

If the prohibitory/regulatory analysis is used to classify tribal laws, the question remains of what penalties are permissable for violations of regulatory laws. Under a strict prohibitory/regulatory analysis the severity of the punishment is not a determining factor, even imprisonment might be possible. The US Supreme Court, however, has clearly indicated imprisonment of citizens is of grave concern to the Court,[9] and it is unlikely that tribal ordinances would be construed as regulatory if imprisonment of offenders were possible. Unlike imprisonment, monetary fines, forfeiture of property or community service are not necessarily penal sanctions. In Resek v. State, the Alaska Supreme Court uses language suggesting fines and forfeitures, not depending upon the defendant's degree of culpability, are not criminal penalties (Resek, 1985), and have been held not to be penal sanctions, even when the property forfeited is of substantial value (Constantine, 1987). Forfeiture provisions can pose a very strong deterrent to violation of regulatory laws. Therefore, Alaska Native groups should explore the civil penalty limits of fines and forfeitures as a means of regulating the activities of Natives and non-Natives alike.

Conclusions

The inclusion of Alaska into Public Law 280 has determined the nature of the relationship between the State, the Federal Government and the Alaska Native villages since 1958. In the year of its passage and for the immediately following years, the relationship between the new State and Native Alaskans might be accurately described as benign. Until the newly-created State of Alaska began selecting the lands due it under the Statehood Act, the discovery of oil in 1958 and the Alaska Native Claims Settlement Act of 1971, the descendants of Alaska's aboriginal inhabitants historically have participated but little in Alaska's economic or political development (Naske and Slotnick, 1979, p. 195). As a consequence, much of the culture and control of services like justice has been lost. Since 1971 there has been a resurgence of interest and political activity concerning issues ranging from subsistence to tribal courts and total sovereignty.

At a time when State maintenance of law and order in Alaska vil-

lages needs to be supplemented by tribal criminal justice systems, PL 280 is a barrier to using such systems and an infringement of Alaska Native efforts at self-government. This barrier exists even if Alaska wanted to encourage self-government efforts. If local justice services are to be developed in village Alaska, PL 280 should be amended to specifically recognize that Alaska Native tribes have concurrent criminal jurisdiction over crime committed within Indian Country when the crime involves only Native peoples. To eliminate the need for litigation over issues of federal recognition of tribes in Alaska and the existence of Indian Country in Alaska, an amendment to PL 280 should also include provisions clearly defining what constitutes federally recognized tribes and Indian Country in Alaska.

If amending PL 280 is not a political possibility at this time, alternatives are available. Alaska state policies could be adopted which will lessen the impact of PL 280 by narrowing the definition of criminal when it is applied to tribal regulatory laws. If the State will recognize the sovereign powers of Alaska Native government, use the prohibitory/regulatory analysis to classify tribal laws as being regulatory rather than criminal, and extend comity to decisions of Alaska Native tribal courts, the State of Alaska and Alaska tribal governments, working together, can circumvent the tribal criminal jurisdiction issue created by PL 280.

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Endnotes

1. The financial restraint referred to by Goldberg is the limited taxing authority of states in Indian Country.

2. 18 U.S.C. Sec. 1151 defines Indian Country as follows:

   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

   (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state;

   (c) all Indian allotments, the Indian titles to which have not been

extinguished, including rights-of-way running through the same.

3. H. R. 9139 was the original bill designation and sometimes used to refer to the Amendment of PL 280 making Alaska a mandatory state.

4. Few villages are incorporated as First Class Cities and have a state-supported municipal police department. With budget reductions these services may also be threatened.

5. These conclusions are based on personal observations by the authors during personal visits to Alaska's villages.

6. This potential is recognized notwithstanding the concerns about tribal courts. Smallness of the village, kinship-based problems, lack of formal training, and limited resources are real problems. However, they are problems of the communities and the authors' experience indicates the communities have the ability to overcome these problems.

7. Public Law 85-615 is the 1958 Amendment of PL 280, which makes Alaska a PL 280 state. Before passage PL 85-615 was H. R. 9139.

8. The Major Crimes Act, 18 U.S.C. Sec. 1153 (1984), provides for federal jurisdiction over fourteen crimes committed in Indian Country by an Indian. Although the statue does not specify that tribal jurisdiction over major crimes occurring in Indian country is diminished, the statute has been used to infer tribal jurisdiction over major crimes has been diminished (See Cohen, 1982, p. 302).

9. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the US Supreme Court determined that Indian tribes do not have criminal jurisdiction over non-Indians. The Court held tribes to not have the inherent right to punish non-Indians. The Court appeared most concerned with imprisonment of non-Indians by tribal government. Thus, any attempt to characterize offenses that result in imprisonment as regulatory in nature will assuredly encounter opposition in the federal courts.

References

Angell, John E. *Public Safety and the Justice System in Alaskan Native Villages*, Cincinnati: Pilgrimage (1981).

Bartlett, Bob and Henry Camarot. Personal Correspondence. Bartlett Collection, Archives, University of Alaska Fairbanks.

Bartlett, Bob and Hugh Wade. Personal Correspondence. Bartlett Collection, Archives, University of Alaska Fairbanks.

Bartlett, Bob and Rex Lee. Personal Correspondence. Bartlett Collection, Archives, University of Alaska Fairbanks.

Bartlett, Bob and Thomas Jackson. Personal Correspondence. Bartlett Collection, Archives, University of Alaska Fairbanks.

Bartlett, Bob and Walter Walsh. Personal Correspondence. Bartlett Collection, Archives, University of Alaska Fairbanks.

Bryan v. Itasca County, Minnesota, 426 US 373 (1976).

Cabazon Band of Mission Indians, California v., 480 US 202 (1987).

Cohen, F. 1982. *Handbook of Federal Indian Law*, The Michie Company.

Cong. Rec., Vol. 116, pp 353-54 (1970).

Constantine v. State, 739 P.2d 188 (Alaska 1987).

Copus, Gary and Thomas Sullenberger. "History of PL 280 in Alaska." Unpublished paper (1991).

Cowper, Steven. Administrative Order No. 123. 10 September 1990.

Davis, Harry, State District Attorney, State of Alaska, Fairbanks, Alaska. Personal interview. November 1992.

Deloria, Vine Jr. and Clifford M. Lytle. *American Indians, American Justice*. Texas (1983).

Federal Field Committee for Development in Planning Alaska. "Villages in Alaska and Other Places Having a Native Population of 25 or More — Estimates, 1967." Anchorage, Alaska.

Fixico, Donald L. *"Termination and Relocation": Federal Indian Policy, 1945-1960*. University of New Mexico (1986).

Goldberg, Carole E. "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," *UCLA Law Review* 22 (1975).

H. R. Rep. No. 848, 83rd Cong. 1st Sess., 5-6 (1953), *US Code Cong. and Admin. News* (1953), pp 2409, 2411-12.

H. R. Rep. 1545, *US Code Cong. and Admin. News* (1970), p 4783.

H. R. Rep. No. 2043, *Civil and Criminal Jurisdiction Over Indian Country in Alaska*. House Committee on the Judiciary. 85th Congress, 2nd Session.

In Re McCord, 151 F. Supp. 132 (D.C. AK 1957).

Jackson, Thomas and Helen Peterson. Personal Correspondence. Bartlett Collection. Archives, University of Alaska.

Marcyes, United States v., 557 F.2d 1361 (9th Cir. 1977).

Marenin, Otwin and Gary Copus. "Policing Rural Alaska: The Village Public Safety Officer (VPSO) Program." *American Journal of Police* X(4) (1991).

Naske, Claus-M. and Hermann E. Slotnick. *Alaska—A History of the 49th State*.

Eerdmans Publishing Co. (1979).

Native Village of Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990), reversed on separate grounds as *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991).

Native Village of Stevens v. A. M. P., 757 P. 2d 32 (Alaska 1988).

Philip, Kenneth. "The New Deal and Alaska Natives: 1936-1945." *Pacific Historical Review* L(3) (August 1981).

Prucha, Francis P. *The Great Father*. University of Nebraska Press (1984).

Quiver, United States v., 241 US 602 (1916).

Red Fox v. Red Fox, 542 P.2d 918 (Or. 1975).

Resek v. State, 106 P.2d 288 (Alaska 1985).

Rich, Vernon. *Law and the Administration of Justice*. 2nd ed. Wiley (1979).

Russell, Fred. Letter to Hon. James O. Eastland, *US Code Congress and Admin. News*, pp 4783, 4786 (1970).

Senate Report No. 1872, "Amending the Law With Respect to Civil and Criminal Jurisdiction Over Indian Country in Alaska." 85th Congress, 2nd Session.

Tanner, Warren. Sergeant, Rural Unit Supervisor, Alaska State Troopers, Fairbanks, Alaska. Personal Interview (November 1992).

Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990).

White Mountain Apache Tribe v. Bracker, 448 US 136 (1980).