

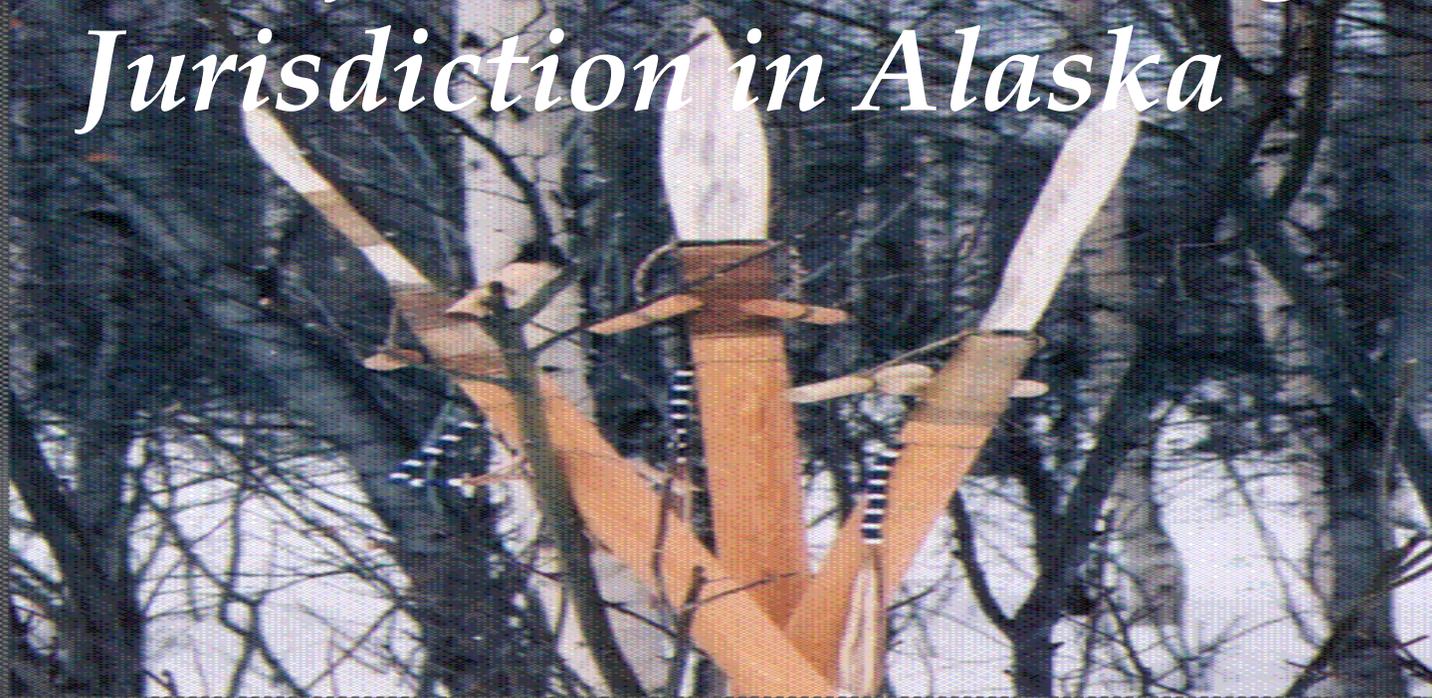
AVCP Tribal Justice Master Series Training
Part 2: Code Development and Drafting

July 21, 1:00 PM – 3:30 PM
Skype Teleconference

AVCP TRIBAL JUSTICE MASTER SERIES TRAINING – PART 2
DAY ONE - JULY 21, 2020

- 1:00 P.M.** **WELCOME AND PRAYER**
Denise Nerby, AVCP Tribal Justice Manager
- 1:05 P.M.** **FOUNDATIONS OF SOVEREIGNTY AND JURISDICTION**
Kevin Illingworth
- 1:30 P.M** **Q &A**
- 1:40 P.M.** **TRADITIONAL FORMS OF ORGANIZATION – *Separation of Powers and***
Different Tribal Government Models
Lisa Lang & Darlene Daniel
- 2:20 P. M.** **Q & A**
- 2:30 P.M.** **INDIAN CIVIL RIGHTS ACT AND ALASKA CASE LAW**
Kevin Illingworth,
- 3:15 P.M.** **QUESTIONS AND ANSWER SESSION**
- 3:30 P.M.** **END OF DAY 1**

Foundations of Inherent Sovereignty and Jurisdiction in Alaska



Tribal Management Program

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What is Jurisdiction?

Authority:

jurisdiction literally means the
“authority to speak the law”

Responsibility



Tribal Authority

Tribal governments have authority from two separate sources:

Inherent Authority:

a recognition by the federal government that **tribal authority existed prior** to the formation of the US government and continues today. This is also referred to as **Inherent Sovereignty**.

Delegated Authority:

additional authority granted to tribal governments by the US government.

Inherent Authority

"Perhaps the most basic principles of all Indian law supported by a host of decisions...is the principle that those powers which are lawfully vested in an Indian tribes are not, in general delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.

What is not expressly limited [by Congress] remains within the domain of tribal sovereignty." - *Felix Cohen, Handbook on Federal Indian Law*

What is Tribal Sovereignty?

Inherent Sovereignty is a recognition by the federal government that tribal authority existed prior to the formation of the US government.

-This means Indian governments have inherent sovereignty that does not come from any other government, but rather from the people themselves.

"Indian tribes have inherent powers deriving from a sovereign status. Their claim to sovereignty long pre-dates that of our own government." -US Supreme Court in *McClanahan v.*

Arizona Tax Commission

Jurisdiction: The ability to make and enforce your own laws

Jurisdiction Over People

- In *John v Baker* (1999), the Alaska Supreme Court held that Tribes in Alaska have jurisdiction over the 'domestic relations' of its members, regardless of territorial jurisdiction.

Jurisdiction Over Land

- In the *Venette Tax* case, the US Supreme Court held lands conveyed under ANCSA are not "Indian country" and that the tribal government had no jurisdiction over the land. The state of Alaska has jurisdiction over ANCSA lands in Alaska.
 - Trust Lands and all Indian Allotments are Indian Country

Tribal Authority over People: Citizen based Jurisdiction

- Tribes clearly have jurisdiction to protect and provide for their citizens, even in the absence of Indian Country.



Tribal Authority over People: Citizen based Jurisdiction

“The custody dispute between Ms. John and Mr. Baker lies at the **core of sovereignty** -- a tribe's ‘inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.’

...

Northway Village has jurisdiction to hear this dispute because **the right to determine custody of Indian children... "infringes on tribal self-governance."**

• Alaska Supreme Court in *John v Baker*



Examples of Domestic Relations of Tribal Members cases heard by Alaska Tribal Courts:

- Adoptions
- Child Custody
- Child Protection
- ICWA Intervention
- Marriages/Divorces
- Probate/Inheritance
- Domestic Violence
- Cultural Protections



Child Custody

Tribal courts may be asked to settle custody disputes between parents or to formalize child custody agreements between parents.

Because of *John v. Baker*, Tribes in Alaska have clear jurisdiction over custody disputes between parents of tribal children

“We hold that Alaska Native tribes, by virtue of their *inherent powers as sovereign nations*, do possess that authority...

Tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.” -*Alaska Supreme Court*

Adoptions

Tribes in Alaska have been doing adoptions for centuries.

Tribal Courts can issue Orders of Adoption. The State of Alaska should issue a new Birth Certificate

“The Kaltag court’s adoption orders are entitled to full faith and credit, and the Bureau shall grant said status to the adoption order by issuing ...a substitute birth certificate.”

- Judge Burgess- Kaltag Case, 2008
 - October 2010 The **US Supreme Court declined to hear the case, leaving the decision intact.**

Child Protection

“...tribes retain concurrent jurisdiction to legislate, to initiate, and to adjudicate CINA cases in tribal courts. There is nothing in ICWA that prohibits or limits tribes from passing laws that would allow the tribe to initiate CINA cases in tribal court.”

•Alaska Superior Court- Tanana Case, May 2007

•we hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country.”

•Alaska Supreme Court 3/4/2011

*In Most Cases Several Tribes can have Jurisdiction
over children:*



Tribes should have their own rules for sharing jurisdiction over children's cases with other tribes

Examples of other civil cases heard by Alaska Tribal Courts:

Tribal Courts exercise Powers of Self-Government by hearing civil cases protecting the **Health and Welfare** of the Tribe or Tribal members:

- Domestic Violence
- Assault/Disorderly Conduct
- Juvenile Delinquency
- Vandalism
- Misuse of Firearm
- Trespass
- Drug and Alcohol Regulation



Banishment: Removal

Removal under Inherent Tribal Authority: Tribal governments can order the removal of an individual from the village, it is solely up to the tribe to enforce this removal.

Removal under Delegated Federal Authority, VAWA: All public safety officers must enforce a properly executed tribal protective order, including removal provisions.

2019 Togiak case:

“the court concludes that all of Plaintiff’s claims against the Tribe [for enforcing tribal court banishment] and the individual defendants acting in their official capacities as officers and employees of the Tribe are barred by the doctrine of tribal sovereign immunity. Plaintiff has not proved that the court has subject matter jurisdiction over these claims, so they will be dismissed pursuant to Rule 12(b)(1).”

Tribal Authority: Youth

- Tribes have inherent authority over their youth- in the same way they have inherent authority over child protection and adoption

Courts call this *in loco parentis*,
Latin for “in the place of a parent”



Some Types of Cases Involving Youth

- Vandalism
- Underage Drinking
- Fighting
- School Problems
- Bullying
- Curfew



Prevention

You can step in early, when kids really need help,
before they get into real trouble.



Examples of other cases heard by Alaska Tribal Courts:

- Contract Disputes
- Employment Disputes
- Environmental Regulation
- Natural Resource Regulation & Management - Stewardship
- Fish and Wildlife Regulation/Protection
- Cultural Protections





TRIBAL MANAGEMENT PROGRAM

University of Alaska Fairbanks

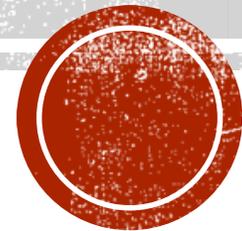
Quayana

TRIBAL CODE DEVELOPMENT

AVCP Master Series: Code Development

Day One Session One: Ka'illjuus & Darlene

Presentation: Ka'illjuus via teleconference: July 2020



OVERVIEW OF PRESENTATION

- Introduction of Presentation & Presenters:
- Day One: Class One: Ka'illjuus & Darlene Daniel
- Part One: Traditional Tribal Court Structures & Separation of Power:
 - Structures: Traditional TC vs. Western Court structures
 - Separation of Powers: Why is this important?
 - Introduce Darlene Daniels to explain example of a Traditional Court putting into place a local ordinance (code) Slide 7
- Part Two: Local Code: Alcohol & Drug Ordinance: Darlene Daniel



TRADITIONAL TRIBAL COURTS

- Alaska Has Wide Variety from Traditional to None at All
- **Traditional Tribal Courts range in structure and are flexible**
- **2020 and the Covid-Virus have brought many changes to our communities**
 - Diversion/Peacemaking Gaining Recognition by Tribes & States
 - Positive Alternative
 - Offers cultured guidance and support
 - Seeks Balance
 - Community based solutions
 - Many Constitutions Based on IRA model
 - TTC/Peacemaking for Youth Wellness & Drug Courts
- Western Modern Court: Many Tribal Courts are modeled after State Courts
- Does not work for our Alaskan Natives
- Adversarial: Someone loses
- Unjust as shown by incarceration rates
- Does not use our traditional values to find balance
- Based on individuals no sense of community
- Does nothing to address local issues
- Based on Separation of Power & Boilerplate Constitutions: Both Non-Native Ideas
- No consistent funding sources & limited jurisdiction



TRADITIONAL TRIBAL COURT

Traditional Court: Structure & Separation of Power

- Traditional Tribal Courts
- Non-IRA: Community Based
- IRA: The majority in Alaska were adopted in the 1930's and the Tribal Council serves as the Tribal Court.
- Little to no separation of Power
- First time funding 2016 Tribal Court assessment funding, little to no funding to date.

Western Model: Structure & Separation of Power

- Three separate units:
- Law makers or legislative
- Judicial or enforcers of law
- Executive or administrative
-



TRADITIONAL TRIBAL COURT STRUCTURE

- Lead by People of our Community
- May or may not have a written Constitution; Based on our values
 - Think about what your cultural top five values and think about incorporating those into your justice system. Use your language and interpret your language to incorporate code. If not written then try to record for future generations in your language to be translated.
- Elected Tribal Council (elected by the people of the community)
 - Criteria for selecting judges/panels is important
- Traditional Knowledge and Systems utilized to **restore balance & heal**



SEPARATION OF POWERS=SOP=IDEA

Traditional Tribal Courts

- Tribes with Traditional Tribal Courts
 - Use their own language and base outcomes on values found within their words
 - Struggle with the ideas that are imposed upon them about western justice
 - Aim to heal or restore balance
 - Underfunded to conduct court
 - IRA's have constitutions created without thought to SOP

Western Style Courts

- They are founded on excluding our people and used to incarcerate
- They are founded on taking our natural resources, our land and children from us.
- Founded on a model of three separate units to ensure they are in balance, Legislative, Executive and Judicial. Concepts the villages struggle incorporating.



SUMMARY & INTRODUCE DARLENE



- Traditional Tribal Court Structures
- Separation of Powers
- Example of Regulation/Code/Rules for Your Community
- Introduce Darlene Daniel: Biography



DARLENE: TRIBAL CODE OF REGULATIONS

- Kongiganak Traditional Council
- Traditional Tribal Council
- Tribal Court
- Based on Yupik language and values
- In existence from the beginning of time
- Dealing with local issues
- Regulation or Code was adopted for the Native Village of Kongiganak and the Kongiganak Traditional Council
- Steps for Becoming Code/Regulation
- Chapter 20: Liquor and Drug Control



TRADITIONAL VILLAGE KONG: CODE EXAMPLE

Traditional Approach to Problem

- Included the Community
- How do we fix this problem?
- What are we required to do to create an answer?
- How does it fit together to work for our community?

Questions & Resources

- Depending on where you are in the process of code development, we have a few resources to share with you
- Beginning
- Intermediate
- Advanced



TRIBAL CODE REGULATIONS

CHAPTER 20: LIQUOR AND DRUG CONTROL

20.00 PURPOSE: The purpose of this regulation is to regulate importation and deportation of liquor and illegal drugs in or out of the Native village of Kongiganak and to exercise Article IX of the Native Village of Kongiganak Tribal Constitution.

20.01 REGULATION: No person or persons will transport to or from, or cause to be transported to or from the Native Village of Kongiganak, intoxicating liquor or illegal drugs as defined within the Kongiganak Tribal Code of Regulations or harmful substances for the purpose of selling or consuming such intoxicating liquor, illegal drugs or substances within the boundaries of the Native Village of Kongiganak.

20.05 POSSESSION: No person or persons will possess by consumption or otherwise intoxicating liquor, illegal drugs or substances within the boundaries of the Native Village of Kongiganak.

20.10 MINOR CONSUMING ALCOHOL/DRUGS: No person or persons under the age of twenty-three (23) shall consume or possess intoxicating liquor/drugs within the boundaries of the Native Village of Kongiganak.

20.15 FURNISHING LIQUOR/DRUGS TO MINOR: No person or persons shall furnish liquor/drug(s) to a person(s) under the age of twenty-three (23). Adults supplying liquor/drugs to person(s) who are under the age to possess liquor/drugs will be prosecuted by evidence being turned over to the appropriate law enforcement agency for criminal prosecution.



20.20 SEARCH AND SEIZURE: In order to protect the peace and dignity of the people and the village, and to the full extent permissible by law, all persons entering the jurisdiction of the Native Village of Kongiganak, shall be subject to search for intoxicating liquor, drugs or substances by tribal officials: provided, however the tribal official shall utilize the least intrusive means reasonably possible to conduct all searches either at search house or at home (if not searched at search house) and shall take special precaution when searching medical personnel, medical equipment, or confidential records unless there is independent information indicating drugs or alcohol are being imported in violation of this chapter.

20.25 CONFISCATION AND FORFEITURE: The Tribal Court may order the confiscation and forfeiture of vehicle or other instruments used by the members or non-members to assist in accomplishing violations of this chapter. The Tribal Court may also require that the court hold such vehicles or instruments for a reasonable time as evidenced when a party is charged with violating this chapter. Other potential confiscation and forfeitures may include and are not limited to the following:

- A.) Confiscation of liquor illegal drugs:
- B.) Forfeiture and destruction of liquor or illegal drugs:
- C.) Confiscation and forfeiture of any other method of transport of liquor or illegal drugs.



20.03 COMPLAINS AND ENFORCEMENT: This chapter shall be enforced as a civil matter under Section 125.25 of this code. In addition to village enforcement of this chapter, the President of the Kongiganak Traditional Council is authorized to request enforcement of 18 USC 1161 (or any subsequently enacted federal regulation of intoxicating beverages in Indian Country) in the event this section is violated by:

- A.) Introducing, selling, or possessing intoxicating beverages/drugs within Indian Country of Native Village of Kongiganak contrary to this chapter, and
- B.) Such a determination is found pursuant to the Tribal Judicial Code, and
- C.) Said person fails to comply with a duly entered Tribal Court Order.

Enforcement of this Chapter is permitted by authorizing, in the absence or unavailability of law enforcement, individuals to search and seize liquor and illegal drugs as recommended by the President and approved by the Kongiganak Traditional Council members through resolution.

20.23 IMPOUND FINES/FEES: The impound fees are as follows: **\$150.00** for underage driving, speeding and driving under influence (DUI). **\$500.00** per bottle of alcohol or ounce of drugs and impound fee of **\$500.00** for use of ATV, Snowmobile, boat or plane with outboard motor. Fines and fees to be paid in full before releasing impounded items.



WRAP-UP: CLOSING THOUGHTS

Traditional Court: Why They Work

- Community Based
- Ideas of Balance/Restoring Harmony
- Utilizing local values & language
- Thinking in our own ways
- Focus on utilizing community resources (or lack of resources)
- Deals with issues in community

Separation of Powers:

- Idea is based on three separate units and adversarial in nature (one against the other)
- Those who write the law: Legislative
- Those who put the laws into place: Judicial
- Executives: Separated for Balance
- Systems put into place without the resources to run the systems: Legal, judicial and executive.



ADDITIONAL RESOURCES CODES: SEPARATE HANDOUT: UPON REQUEST

Beginning:

- **ALSC: Video Link:** Tanana Chiefs Tribal Court Documents: Codes by ALSC
- **Articles:** The Role of Tribal Courts In the Justice System, B.J. Jones <http://icctc.org/Tribal%20Courts.pdf>

Intermediate & Advanced

- Please request additional resource page



The Indian Civil Rights Act and Alaska Case Law



Tribal Management Program

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Tribal Management
Program

Indian Civil Rights Act

Passed by Congress in 1968 in order to impose requirements similar to the US Constitution on Tribal Governments

In 2010, Congress passed the Tribal Law and order Act

- The Tribal Law and Order Act of 2010 makes several amendments to the Indian Civil Rights Act of 1968 to enhance tribal sentencing authority.

3 parts to the Indian Civil Rights Act:

§ 1301. Definitions

§ 1302. Constitutional Rights

§ 1303. Habeas Corpus

§ 1302. *Constitutional Rights*

- Free Exercise of Religion, Speech, Press
- Probable Cause and a Court Issued Warrant for any Search or Seizure
- Must provide Due Process
- Additional procedural requirements for criminal jurisdiction
- Limit on \$ amount of fines and jail time
 1. Under original ICRA of 1968
 2. Under Enhanced sentencing of TLOA of 2010

This Presentation will focus on the impacts of the of the Indian Civil Rights Act on Alaska Tribes, with a focus on **Due Process** and case law from the Alaska Supreme Court

Why are we talking about Due Process?

Because if you have **Jurisdiction** and you provide **Due Process**, the State of Alaska **must** recognize the decisions of your tribal court.

What is Due Process?

- The actual legal proceedings that protect individual rights and liberties.
- The process that your Tribe provides to make sure that everyone is treated fairly by your Court

What is Due Process?

3 Requirements of Due Process

1. **Notice**- must tell the person about the hearing
2. **Opportunity to be Heard**-must give the person a chance to tell their side of the story
3. **Fair and Impartial Hearing**- must be held in normal fashion and no conflict of interest

What is Notice?

Notice- Letting the person know when and where there is a hearing and what it is about.

Ways that Notice can be provided:

- Mail
- Personal service
- Phone
- Published notice



What is the Opportunity to be Heard?

Opportunity to be Heard:

~must give the person a chance to tell their side of the story.

~If they choose not to come to the hearing or not to speak, that is their choice... you are required to give them the opportunity.

~no pre-determined outcome.

What is a Conflict of Interest?

A Conflict of Interest occurs when a Judge is too close to a situation to be fair:

1. Immediate Family members (1st degree?)
2. Strong Personal Relationship
3. Direct financial, political or personal interest

~ It is up to your Tribe to define what is too close.

~ If a Judge cannot be fair (or will be seen by all as unfair) the Judge should step down and not hear the case.

Not sure if there is a Conflict of Interest?

If you are unsure if hearing a case would be a conflict of interest, you should ask yourself two questions:

1. Can I be fair?
2. Will the community see me as being fair?



Conflict of Interest: Judges of the _____ Tribal Court shall remove themselves from hearing a case involving first degree relatives including parents, children, spouses or significant others, siblings, grandparents, grandchildren, and anyone living in their same home, except that in emergency situations where temporary decisions are made, Judges may be so related. Judges shall remove themselves from any cases in which they have any significant, direct, personal financial or other interest. Judges shall remove themselves from hearing a case in which they cannot be fair for any reason. If a Judge refuses to remove his or herself from a case where they have a conflict of interest, the remaining tribal court judges may hold that Judge in contempt of court and temporarily or permanently remove him or her from her position as Judge. This Conflict of Interest shall not apply to Judges who participate in Circle Sentencing.

Best Practices in Due Process... beyond the minimum

1. Keep Good Records
2. Follow Your Court Rules
3. Explain Your Decision
4. Protect Confidentiality



The Alaska Supreme Court on Due Process:

“But this Due Process analysis in no way requires tribes to use procedures identical to ours in their courts...

[state] courts should strive to respect the **cultural differences** that influence tribal jurisprudence, as well as to recognize the **practical limits** experienced by smaller court systems.” ~*Alaska*

Supreme Court in John v. Baker 1999

From the Alaska Supreme Court:

Tribes "have power to make their own substantive law in internal matters, and to enforce that law in their own forums." And tribal courts may also have jurisdiction to "resolve civil disputes involving nonmembers, including non-Indians" when the civil actions involve essential self-governance matters such as membership or other areas where "the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination."

- Alaska Supreme Court, *John v Baker*

...More from the Alaska Supreme Court

“The United States Supreme Court has similarly ‘rejected . . . attacks on tribal court jurisdiction’ based on allegations of ‘local bias and incompetence’ ...

We therefore reject any hint of inadequacy of review that might be inferred from the State’s characterization of the Minto Tribal Court as a “ ‘relational’ tribal court that applies unwritten, cultural law” and “is unfamiliar with core Western jurisdictional concepts.” --~*Alaska Supreme Court in Parks v Simmonds 2014*

... Even More from the Alaska Supreme Court

“The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine. The requirements for th[e futility] exception are rigorous; . . . a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.[104]” (Quoting 1st Circuit)

Indian Civil Rights Act

§ 1301. *Definitions*

...

2. "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

In general, Tribes in Alaska exercise civil jurisdiction to ensure public safety and work with the State if there is a serious crime leading to incarceration.

However, in 1991 Congress made clear that Tribal Courts have criminal jurisdiction:

Congress added the language "...and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" to the definition of "powers of self-government."

This Congressional *Duro*-fix restored tribal court criminal jurisdiction over all Indians (members and non-members).

What does the Alaska Supreme Court have to say?

“But the powers of self-government, including the power to prescribe and enforce internal criminal laws... are not such powers as would necessarily be lost by virtue of a tribe's dependent status.”

•Alaska Supreme Court in John v. Baker 1999

That's not to say tribal criminal jurisdiction in Alaska is clear, it is not.

However it is clear that Tribes in Alaska, as everywhere in the US, have the authority and responsibility to provide for public safety and to protect and ensure the rights of their tribal citizens

Indian Civil Rights Act

§ 1303. *Habeas corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

- Habeas corpus allows a person incarcerated by a Tribe to appeal to federal courts. All other actions by a Tribe must first be challenged in tribal court: exhaustion of tribal remedies

What type of Justice System may a Tribe use?

What you choose!

- Tribes can enforce their laws through their own justice systems.

The only requirement is that the Tribe have Jurisdiction and that the Tribal Justice System provide “Due Process”

1. Notice
2. Opportunity to to be heard
3. Fair and impartial hearing

Even if the path isn't always straight forward or easy:

If your Tribe has jurisdiction and if your tribe provides Due Process, the State of Alaska will respect the decision of your justice system!



Quayana!



tribal.uaf.edu

**Indian Civil Rights Act as Amended by the Tribal Law and Order Act
July 29, 2010**

The Tribal Law and Order Act of 2010 makes several amendments to the Indian Civil Rights Act of 1968 to enhance tribal sentencing authority. In order to assist tribes in understanding these important changes to federal law, NCAI provides the following demonstration of how the Tribal Law and Order Act amends the Indian Civil Rights Act. The amendments to ICRA marked in **bold**.

This document is intended only as a guide for tribal leaders on the passage of the Tribal Law and Order Act. It is not an official version of either the Indian Civil Rights Act or the Tribal Law and Order Act. Tribal leaders should consult federal legal sources once the Act has been codified to see where and how the provisions of the Tribal Law and Order Act are incorporated into existing federal law.

25 U.S.C. § 1301 - Definitions

For purposes of this subchapter, the term--

- (1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) “Indian court” means any Indian tribal court or court of Indian offense; and
- (4) “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1302 – Constitutional Rights

(a) IN GENERAL.--No Indian tribe in exercising powers of self-government shall--

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense **(except as provided in subsection (b))**;

DELETED: ~~(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;~~

INSERTED:

- (7)
 - (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;**
 - (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;**
 - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or**
 - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;**
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) OFFENSES SUBJECT TO GREATER THAN 1-YEAR IMPRISONMENT OR A FINE GREATER THAN \$5,000.—A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1

offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) SENTENCES.—In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correction center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian

tribes) not later than 180 days after the date of enactment of the Tribal Law and Order Act of 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) **DEFINITION OF OFFENSE.**—In this section, the term ‘offense’ means a violation of a criminal law.

(f) **EFFECT OF SECTION.**—Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S.C. § 1303 – Habeas Corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.