

Civil Commitment of American Indians

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Introduction

This paper discusses the civil commitment of American Indians who reside on various reservations in the United States. A primary focus is their unique status as citizens and, as a result, the jurisdictional issues which have arisen in attempts to effect commitment of community members in need of psychiatric treatment. The problems are quite different from those facing non-Indian citizens, where jurisdictional authorities are well-established and commonly recognized. In the latter's case, recent civil commitment cases have been waged over due-process safeguards, the nature of the test for commitment, the severity of the burden of proof, and the prediction of dangerousness.

The manner in which civil commitment is presently managed on American Indian reservations has led to considerable conflict over jurisdiction among the federal government, tribal communities, and individual states. As mental health professionals, we should be concerned with the outcome of such jurisdictional disputes, especially as translated into controlling law, and with how these laws affect mentally ill individuals, their families, and communities. Further, we should be equally concerned about those instances in which it appears that no controlling law applies. Indeed, there appear to be reservation communities without civil commitment processes.

This paper represents our preliminary inquiry into some of these problem areas. It begins with a brief review of the *Red Dog* decision, a case that illustrates the nature and potential ramifications of the jurisdictional disputes mentioned above. The discussion turns to Public Law 83-280 and subsequent changes in the control of, as well as responsibility for, civil and criminal law enforcement on reservations. A case study is then described, depicting the informal processes and problems in the commitment of a mentally ill American Indian who lives on a reservation where there is no controlling law. Lastly, this paper

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concludes as a very tentative projection of future courses in developing civil commitment statutes specific to such communities.

The Red Dog Decisions

In September, 1977, United States District Court Judge Andrew W. Bogue of the District of South Dakota decided the case of *Georgia White as Guardian Ad Litem for Florence Red Dog, an incompetent person, v. Joseph Califano et al. and Richard Kneip et al.*¹ This case embodied many of the significant jurisdictional conflicts that plague the civil commitment of allegedly mentally ill American Indians who reside on their respective reservations. Judge Bogue's decision is an important one, with wide-ranging implications, and thus deserves careful review.

On April 13, 1976, an Indian Health Service psychologist concluded that Florence Red Dog, a Sioux resident of the Pine Ridge Reservation, was mentally ill and in need of immediate treatment, for her own protection as well as that of other community members. The psychologist attempted to file a petition for commitment with the Fall River County, South Dakota Board of Mental Illness, enabling emergency commitment of Florence Red Dog to a state facility. Board officials refused to issue a petition for commitment, claiming that they had no jurisdiction since Florence Red Dog was an Indian person residing on a federally established reservation not subject to county authority. Two days later, an Oglala Sioux Tribal Court judge presided over a hearing regarding the need for her emergency commitment. The tribal court judge found that she needed immediate treatment and ordered her committed to the County Mental Health Center. County authorities would not honor his order, again stating that Florence Red Dog fell beyond their control. The local commissioners repeatedly argued that they did not have jurisdiction over an Indian person who lives in "Indian country."²

The plaintiff's legal theory in this case was based on an equal protection argument. They contended that Florence Red Dog was a citizen of the State of South Dakota, had rights as a citizen of that state, and was entitled to equal protection from abuse and neglect by state officials.

The state defendants contended that they were unable to provide the equal protection that Florence Red Dog demanded because they lacked jurisdiction over either civil or criminal actions of an Indian person residing in Indian country. Moreover, they argued, an equal protection argument could not apply since "federal law requires that Florence Red Dog be treated differently from other South Dakota citizens precisely because she is an Indian person residing in Indian country."³ Their position was upheld early in the decision by an analysis which concluded that the gathering of information necessary to an adequate determination by a civil commitment court would constitute unwarranted intrusion into Indian country and could potentially undermine tribal sovereignty.

Having determined that the state lacked jurisdiction, the focus shifted

to the responsibility of the federal defendants. The issues between Florence Red Dog and the federal government were not jurisdictional. The agreed question was as follows:

Whether federal defendants have a duty under statute and/or regulation to provide directly or by contract for inpatient mental health care to reservation Indians who require involuntary civil commitment for treatment or who because of mental illness constitute a serious danger to themselves and/or others⁴

The judge found in favor of the plaintiff. His decision rested in large part upon the history of the provision of both direct and contract health care to American Indians by the Indian Health Service.

Briefly, health care delivery to American Indians attracted federal concern as early as 1832, when Congress authorized the Army to administer smallpox vaccinations to native populations. In exchange for tribal lands surrendered during the 1800's and 1900's, specific services — particularly health care and education — were guaranteed by the United States government. The War Department initially administered Indian health programs; this responsibility was later transferred to the Bureau of Indian Affairs, within the Department of Interior in 1849. In 1955, after severe criticism of the quality of care provided to Indian people by the Bureau, a special Division of Indian Health was established as part of the Department of Health, Education, and Welfare, and was later renamed the Indian Health Service.⁵ It currently provides inpatient and outpatient care to more than three-quarter million American Indians, urban and rural.⁶

The court cited this relationship between the federal government and Indian people as one example of the former's general obligation to the latter, and found clear responsibility for health care delivery.⁷ Given the previous decision that the state had no jurisdiction to commit Florence Red Dog, it concluded that the federal government could not abandon her: "where the state cannot act, the federal government must."⁸ The court recognized, however, that the agency in question — the Indian Health Service — had no adequate treatment facilities for persons committed involuntarily. Priorities were suggested, indicating that the plight of Florence Red Dog was extreme and surely of immediate concern as she suffered from "the most wretched human condition requiring health care; *i.e.*, insanity."⁹

The final judgment of the court in this case was presented in three paragraphs:

It is further **ADJUDGED AND DECLARED** that State and County officials in the State of South Dakota do not have jurisdiction to accept or act upon applications for the involuntary commitment of an allegedly mentally ill Indian person when the

allegedly mentally ill Indian person at the time of application for involuntary commitment resides in Indian country and is physically present in Indian country as defined by 18 U.S.C. 1151.

It is further **ADJUDGED AND DECLARED** that the Federal Defendants in the above entitled case have a legal responsibility to insure that there are commitment procedures that comport with due process and to provide inpatient treatment in a secured setting for an Indian person residing in Indian country, as defined by 18 U.S.C. 1151, whenever an Indian person residing in Indian country in the judgment of the Indian Health Service officials requires such treatment.

It is further **ADJUDGED AND DECLARED** that Federal Defendants have a legal responsibility to pay for the cost of inpatient mental health care for an Indian person who resides in Indian country when that Indian person is civilly committed by State officials by virtue of his or her physical presence outside of Indian country.

The federal defendants petitioned the Eighth Circuit Court of Appeals for a rehearing of the case; their appeal was denied. In early 1979, the Justice Department decided not to bring the case for appeal to the United States Supreme Court. These decisions rendered Judge Bogue's judgment controlling in the Eighth Circuit, with potential relevance to other jurisdictions.

Public Law 83-280

Prior to the adoption of Public Law 83-280 in 1953, with few exceptions, jurisdiction over civil and criminal matters resided either in the tribes themselves or in the federal government. This special circumstance can be traced through a series of decisions beginning in the early part of the last century.

In *Cherokee Nation v. State of Georgia*, Chief Justice John Marshall described the unique status of American Indian tribes in the United States as "domestic dependent nations," implying that they are sovereign, yet subject at the same time.¹⁰ *Worcester v. State of Georgia* further extended this view, a case in which Marshall concluded that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive."¹¹ The question at issue was whether the State of Georgia could enforce its laws within the boundaries of the Cherokee reservation. The Supreme Court held that it could not:

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force and which the citizens of Georgia

have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.¹²

Thus, Indian tribes, on their respective reservations, were perceived as distinct nations with certain powers common to any sovereign state. Forcible conquest rendered them subject to the legislative powers of the United States as granted by the Constitution, enabling Congress “to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes.”¹³ But, except as expressly qualified by Congress, their right to self-government was thought largely intact and inviolable. Hence, the states adjacent to reservations exercised no jurisdiction over Indian residents. It was a matter between the latter and the federal government.

However, states did not always lack some areas of jurisdictional control:

The general notion . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted . . . with diverse concrete situations.¹⁴

In 1886, state criminal law was deemed applicable to offenses committed by Indian people off their reservations.¹⁵ It was also held applicable to offenses committed on reservations by non-Indians against non-Indians.¹⁶ With regard to civil matters, Indians were permitted to sue non-Indians in state courts.¹⁷

Yet, despite these variances, the general policy remained as set forth in *Worcester*. Cohen concisely summarizes the inherent principles:

Control of Indian affairs has been delegated, under the Constitution, to the Federal Government . . . state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.¹⁸

On several occasions, Congress has passed legislation authorizing state jurisdiction over various tribal matters. For example, it provided that state descent and distribution laws would apply to lands allotted under the General Allotment Act of 1887. Furthermore, in 1929, it authorized individual states to enforce their respective quarantine and sanitation

laws, to ensure compulsory school attendance, and to conduct inspections of health and educational facilities on Indian reservations.¹⁹ In 1940, Congress granted the state of Kansas criminal jurisdiction over all offenses committed on reservations within its boundaries.²⁰

After World War II, a number of special grants of jurisdiction to the states were authorized by Congress, reflecting a growing mood of termination. Between 1946 and 1948, North Dakota, Iowa, and New York were given criminal jurisdiction over offenses on the Devil Lake, Sac and Fox, and all New York reservations, respectively.^{21.22.23} In 1949, the state of California was granted both criminal and civil jurisdiction for the Agua Caliente Indian Reservation;²⁴ one year later, civil jurisdiction was also transferred from the federal government to the state of New York for all reservations within its bounds.²⁵

In 1952, the House adopted a resolution instructing its Committee on Interior and Insular Affairs to examine "the manner in which the Bureau of Indian Affairs has performed its functions and studying the various tribes, bands, and groups of Indians to determine their qualifications for management of their own affairs without further supervision of the Federal government."²⁶ The committee's final report outlined the following recommendations for future changes in federal policy:

It is the belief of the committee that all legislation dealing with Indian affairs should be directed to the ending of a segregated race set aside from other citizens. It is the recommended policy of this committee that the Indians be assimilated into the Nation's social and economic life. The objectives in bringing about the ending of the Indian segregation are: (1) the end of wardship or trust status as not acceptable to our American way of life; and (2) the assumption by individual Indians of all duties, obligations, and privileges of all citizens.²⁷

In 1953, termination of treaty negotiated federal-tribal relationships was openly supported, as indicated by the following statement:

It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.²⁸

The policy recommendations noted above were eventually enacted as Public Law 83-280.

The 83rd Congress passed Public Law 83-280 in late 1953.^{29.30.31} In effect, it authorized the transfer of civil and criminal law enforcement

jurisdiction, either in whole or in part, from the federal government to various states, in most cases without tribal approval. The states included under the law were divided into three categories:

1. *Certain states which were granted mandatory assumption of jurisdiction.* These were California, Alaska (upon statehood), Wisconsin, Oregon (except for the Warm Springs Reservation), Minnesota (except for the Red Lake Reservation), and Nebraska.

2. *Certain states which had state constitutional disclaimers of jurisdiction over Indian tribes.* Montana was empowered to assume criminal jurisdiction only over consenting tribes (to date, none have so consented). Utah assumed civil and criminal jurisdiction only upon tribal consent. Washington assumed civil and criminal jurisdiction in eight specific areas, including civil commitment. In this last instance, tribes were also able to request that the state of Washington be given total jurisdiction over all of their affairs.

3. *Certain states which had no constitutional disclaimers.* Florida assumed total civil and criminal jurisdiction over all tribal affairs. Idaho assumed civil and criminal jurisdiction in seven specific subject areas. Nevada assumed civil and criminal jurisdiction upon tribal request. Nevada has since adopted a law that provides for retrocession of state jurisdiction on all of its reservations.

Public Law 83-280 led to a rush of jurisdictional transfers, resulting in the dissolution of 61 Indian tribes, groups, rancherios, and allotments. However, it soon became apparent that assimilation did not necessarily follow and could not be legislated. The legislation in question, for the most part, lacked Indian participation as well as a means by which to mediate conflicts between states and tribes.

Having seen this effort fail, President Johnson initiated a different course for future federal policy. He proposed "a new goal for our Indian programs; a goal that ends the old debate about termination and stresses self-determination."³² In 1968, with Johnson's support, the Indian Civil Rights Act was passed, authorizing tribes to either deny or approve transfers of jurisdictional control. It also enabled state governments to return jurisdiction to individual tribes through retrocession of Public Law 83-280. Subsequent presidential actions, notably Nixon's 1970 congressional address, further hastened the move towards Indian self-determination.³³ In 1975, Congress enacted the Indian Self-Determination and Educational Assistance Act which recognizes the rights of Indian tribes to handle their own affairs and to exercise self-determination to the greatest possible extent.

Several recent reviews describe the evolution of these federal-tribal-state relationships in much more thorough fashion.^{34,35} Court decisions such as *Red Dog* highlight some of the issues that have been engendered by the resulting confusion over jurisdictional authority and responsibility. Anecdotal evidence suggests that similar events occur regularly, but have not been brought forth for litigation.

A Case in Point

Our work, through a community psychiatry program and the National Center for American Indian and Alaska Native Mental Health Research, brings us into almost daily contact with reservation communities in the Pacific Northwest as well as across the country. Conversations with local mental health staff have emphasized widespread concern about jurisdictional conflicts and subsequent inaction in their attempts to effect the commitment of allegedly mentally ill Indian persons for treatment. The diversity of circumstances is striking; yet the personal struggles of individuals and families seem common costs. A case is presented here to illustrate one of the ways in which such matters can proceed. It is drawn from a southwestern Pueblo community not named in Public Law 83-280 and occurred within the last two years.

A young adult Pueblo male, a legal resident of and physically present on tribal land, was repeatedly arrested by Pueblo police for disorderly conduct, having feigned numerous public assaults. Local mental health officials deemed him dangerous to himself and to other community members. The family requested that the Pueblo governor assist them in his being committed to ensure treatment, which could not be provided through existing outpatient-oriented services. The federal government was unable to act unless the young man committed one of 14 felony offenses outlined under the Ten Major Crimes Act. Law enforcement would then have become the responsibility of the Federal Bureau of Investigation. The Pueblo governor subsequently asked the sheriff's office of an adjacent county to take custody of the subject for transportation to a state mental health hospital. The sheriff refused, indicating that he lacked jurisdiction on Pueblo land and over legally and physically resident tribal members. Tribal police had no jurisdiction off Pueblo land. The young man was released from jail. His movements, however, were monitored by local law enforcement agents. The sheriff was advised by the tribal police of the subject's first venture off Pueblo land. He was taken into custody and, at his family's request, committed to the state hospital for psychiatric evaluation.

A contest over financial responsibility for the young man's care soon replaced jurisdictional disputes. The state hospital administration sought to determine whom to bill for services. The subject's family could ill-afford to pay; hence, the hospital asked for reimbursement from the Indian Health Service. The rationale was essentially the same as that argued by state defendants in *Red Dog*: given the special relationship between Indian people and the federal government, the latter is obligated to pay the former's costs for treatment in state institutions. The Indian Health Service countered that an Indian person enjoys a right to equality under the law as an American citizen, which extends to him/her the protection of Federal and State constitutions. Furthermore, they contended that the Indian Health Service is, by Congressional mandate, a residual health care program, to be employed only after all services for

which the individual is eligible from other sources have been exhausted. Before these differences were resolved, the young man escaped from the hospital and returned to his pueblo. The family — torn apart by the pressures brought about first over jurisdiction, then financial responsibility — rescinded the commitment order. Three weeks later, the subject was killed in a local bar, having instigated a fight with its patrons.

Conclusion

Placed in the context of jurisdictional control — whether characterized by Public Law 83-280 or more recent efforts towards self-determination, the *Red Dog* decision has several important implications for the form and financing of civil commitment of allegedly mentally ill American Indians. Among states and reservations not named in Public Law 83-280, the burden falls upon the federal government to develop commitment statutes, to provide court resources for related hearings, and either to construct the necessary treatment facilities or to contract appropriate hospital care. We anticipate many situations in which the line of least resistance, so vividly outlined by Stone's³⁶ review of the effects of rapid deinstitutionalization, will apply to the situations faced by tribal members residing on their respective reservations.

There appears to be a *de facto* absence of any civil commitment procedures on some non-Public Law 83-280 reservations. The case discussed herein underscores the various tolls of severe untreated mental illness. We know of other examples. Traditional forms of social control may be resurrected to cope with the aberrant behavior of community members. Jails have long been the most frequent response, albeit ineffective in the long run. Clearly, these circumstances demand our immediate attention.

Such pessimism is just beginning to yield to new possibilities for redefining federal, state, and tribal relationships under recent legislation, of which the 1975 Indian Self-Determination Act is an example. Opportunities for the creative sharing of justice administration may be developed between federal and tribal courts.³⁷ Community standards for civil commitment may be incorporated into new controlling law. Exciting research and policy questions follow; *e.g.*, Can civil commitment statutes be developed that combine due process safeguards with cross-cultural definitions of mental illness and cross-culturally relevant treatments?

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