

Department of Justice
Washington, D.C. 20530

19 JUN 1978

MEMORANDUM FOR BENJAMIN R. CIVILETTI
Deputy Attorney General

Re: Jurisdiction over victimless crimes committed
by non-Indians on Indian reservations

This responds to your memorandum of June 5 concerning jurisdiction over victimless crimes committed by non-Indians on Indian reservations in the wake of Oliphant v. Suquamish Tribe, 98 S. Ct. 1011 (1978). Specifically, you inquired whether the States or the Federal government possess exclusive jurisdiction under such circumstances or whether jurisdiction is concurrent. We have concluded that, although the question is not free from doubt, existing law must be interpreted as placing exclusive jurisdiction in the States.

I.

Section 1152 of title 18 provides in pertinent part:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country

The current version is not of recent vintage, but has roots in the early nineteenth century. 1/

1/ See Act of March 3, 1817, 3 Stat. 383; Act of June 30, 1834, 4 Stat. 733, as amended by Act of March 27, 1854, 10 Stat. 269. See also Trade and Intercourse Act of 1790, 1 Stat. 137 (offenses by non-Indians against Indians).

Despite the apparent sweep of this language when read in conjunction with the Assimilative Crimes Act, 18 U.S.C. § 13, 2/ which renders acts or omissions occurring in areas within Federal jurisdiction federal offenses where they would otherwise be punishable under state law, the Supreme Court has significantly narrowed § 1152's application. Thus, where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the State absent treaty provisions to the contrary. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896). The McBratney rule was given an added gloss by New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), which characterized the prior decisions as "stand[ing]" for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding [18 U.S.C. § 1152]." 326 U.S. at 500. 3/ Despite the fact that the Court's rationale may thus be rooted at least to some extent in basic notions of federalism, subsequent cases have carefully repeated the precise McBratney formula -- non-Indian perpetrator and non-Indian victim -- and have not shed significant light on whether the status

2/ Similar provisions were enacted in 1825, see 4 Stat. 115, in 1866, see 14 Stat. 12, and in 1898, see 30 Stat. 717.

3/ That the Martin discussion is more than a post hoc explanation for the McBratney Court's failure to take the relevant statute into account is suggested by the careful language of United States v. Rogers, 45 U.S. (4 How) 567 (1846), recognizing federal jurisdiction under the early version of § 1152 with regard to a crime committed by a non-Indian against a non-Indian victim on a territorial reservation ("where the country occupied by [the Indian tribes] is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian," *id.* at 572). See also In Re Mayfield, 141 U.S. 107, 112 (1891).

of the defendant alone or his status in conjunction with the presence of a non-Indian victim is critical. 4/

It has, however, been recognized that where a crime is committed in Indian country by a non-Indian against an Indian victim, exclusive federal jurisdiction will lie. United States v. Chavez, 290 U.S. 357 (1933) (theft); United States v. Ramsey, 271 U.S. 467 (1926) (murder); Donnelly v. United States, 228 U.S. 243 (1913) (murder). It has, moreover, been held that McBratney and Draper do not bar federal prosecutions of non-Indians for importing liquor into Indian country. 5/ By analogy to this rule, it might then be contended that whenever a non-Indian commits a "victimless" crime on an Indian reservation, Indian interests in peace and tranquility are sufficiently implicated to bring the case within

4/ See, e.g., United States v. Wheeler, 98 S. Ct. 1079, 1087 n. 21 (1978) ("crimes committed by non-Indians against non-Indians"); United States v. Antelope, 430 U.S. 641, 643 n.2 ("non-Indian charged with committing crimes against other non-Indians"), 644 n.4 ("crimes by non-Indians against other non-Indians"); Village of Kake v. Egan, 369 U.S. 60, 73 (1962) ("murder of one non-Indian by another"); Williams v. United States, 327 U.S. 711, 714 (1946) ("offenses committed on this reservation between persons who are not Indians"); Donnelly v. United States, 228 U.S. 243, 271 (1913) ("offenses committed by white people against whites"). But see United States v. Sutton, 215 U.S. 291, 295 (1909) (characterizing Draper as holding that the state enabling act "did not deprive the State of jurisdiction over crimes committed by others [except] Indians or against Indians").

5/ See Ex Parte Webb, 225 U.S. 665 (1912); United States v. Sutton, 215 U.S. 291 (1909). The reasoning of these cases would not, however, appear to control under the present circumstances, since the question there presented was whether Congress had retained the power under state enabling legislation to control, for the benefit of the Indians, liquor trafficking by Indians and non-Indians alike. The interpretation of § 1152 was not at issue.

federal jurisdiction. 6/ It might also be asserted that the protection of Indian "persons or property" now recognized as the basis for federal jurisdiction is most likely a formulation rooted in historical accident, and that treaties, cases, and statutes adopting this language meant to encompass all conceivable injuries to Indian interests including the intangible injury that results from victimless crimes. Finally, it might be noted that the Court in both McBratney and Draper was careful to limit these holdings to their precise facts, reserving certain questions that arguably include that now at issue, i.e. "the punishment of crimes committed by or against Indians, [and] the protection of the Indians in their improvements," 104 U.S. at 624.

In our judgment, however, this is not the better view. Implicit in the McBratney decision is a judgment that state jurisdiction over non-Indian defendants is to be presumed despite the injurious effect on reservation tranquility that is bound to result from crimes of violence perpetrated by non-Indians against non-Indians within reservation boundaries. Truly victimless crimes such as drug possession or use would have no equivalent disruptive influence, while crimes portending more violence, such as reckless driving or disturbing the peace, would appear no more inherently injurious to Indian interests than murders or assaults perpetrated on the reservation. The logic of the McBratney line of cases also dictates that jurisdiction

6/ The Solicitor of the Interior in an opinion dated April 10, 1978, adopted a related approach in concluding that the United States possesses exclusive jurisdiction over "victimless" crimes by non-Indians on the reservation where such crimes directly affect the Indian community. The opinion cited only policy grounds in support of its conclusion, and did not directly address the significance of the McBratney line of cases with regard to this particular class of crimes. See Memorandum to the Assistant Secretary -- Indian Affairs, "Jurisdiction Over Offenses Committed by Non-Indians Against Indians in Indian Country," at p. 4.

lie in the states. 7/ It was there assumed that matters involving non-Indians that were normally within the control of the older states (including, it would seem clear, victimless crimes) should be similarly treated in the newer states which contained Indian reservations. Federal jurisdiction to protect federal interests, i.e. the control and protection of Indians residing on reservations, was to be the exception, rather than the rule. The focus, as best it can be discerned, was on individual Indian interests, and not on continued federal control over events on the reservation as such. 8/ McBratney may thus most accurately be characterized as adopting a sui generis approach to federal jurisdiction over Indian country which must be honored under the present circumstances despite its failure to conform to the law governing other federal enclaves. 9/

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7/ You have also asked whether concurrent jurisdiction might lie. Although this result is in theory possible, and although the cases have in most cases focused directly on the need for exclusivity of jurisdiction only where Indian defendants are involved, see United States v. Kagama, 118 U.S. 375, 384-385 (1886), we see no basis for distinguishing the approach taken in McBratney, specifying exclusive State jurisdiction with regard to crimes committed by non-Indians against non-Indians, from the present case.

8/ See, e.g., Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930) ("[Indian] reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards"), cited in New York ex rel. Martin v. Ray, supra, 346 U.S. at 499 n.4.

9/ See, e.g., United States v. Barner, 195 F. Supp. 103 (N.D. Cal. 1961) (reckless driving on air force base); United States v. Chapman, 321 F. Supp. 767 (E.D. Va. 1971) (possession of marijuana).