

# BALANCING “PECULIARLY FEDERAL INTERESTS” AND INDIAN SOVEREIGNTY IN CRIMES BY AND AGAINST INDIANS IN INDIAN COUNTRY

## INTRODUCTION

As an indigenous people with their own cultures and systems of governance in a land “discovered” and settled by European nations, American Indian<sup>1</sup> tribes have created unique problems for those governing the American continents<sup>2</sup> from the earliest days of conquest to the present time. One of the major problem areas has always been the relationship between the tribes and the rulers of the colonies and, later, the United States. This Note examines the issue of federal criminal jurisdiction over crimes committed by Indians against Indians in Indian country.<sup>3</sup>

In *United States v. Wadena*,<sup>4</sup> the Eighth Circuit held that federal courts have jurisdiction over violations of all federal criminal statutes of general applicability,<sup>5</sup> even over crimes allegedly committed by Indians against

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1. The author acknowledges that some readers may prefer the term “Native American” to refer to the indigenous peoples of the American continents. After much reflection, however, the author decided to use the term “Indian” throughout this Note for two reasons. First, most Indians use the terms interchangeably; and most Indian organizations use the term “Indian” in their titles.

Second, almost all federal law dealing with Indians uses the term “Indian.” Therefore, the use of the term “Indian” will help avoid confusion.

If the use of “Indian” offends any readers the author sincerely apologizes.

2. This Note, however, will deal solely with Indians in the United States and not with problems and solutions involving Indians in other countries of North and South America.

3. The term “Indian country” is a legal term often used in United States statutes involving Indians. It is defined by the United States Code as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter [18 USCS §§ 1151], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, 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, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994).

4. 152 F.3d 831 (8th Cir. 1998).

5. Statutes of general applicability are those in which the location of the crime does not constitute an element of the crime. *See Stone v. U.S.*, 506 F.2d 561, 563 (8th Cir. 1974). These statutes are what most people would consider an ordinary federal statute that simply makes it illegal, or somehow limits one’s ability, to do specified acts. *See id.* These laws of general applicability differ from laws, such as enclave laws, in which the location of the occurrence is an element of the crime. *See id.*

Indians in Indian country.<sup>6</sup> The court held that federal jurisdiction existed despite the fact that the crime at issue was not one of the enumerated crimes in the Indian Major Crimes Act<sup>7</sup> (“IMCA”), which established federal jurisdiction over Indians for certain major crimes committed by and against Indians in Indian country.<sup>8</sup>

In *Wadena* the Eighth Circuit joined the Sixth and Ninth Circuits perpetuating a three way split.<sup>9</sup> Some circuits find no federal jurisdiction over crimes by and against Indians in Indian country when the crime is not enumerated in the IMCA.<sup>10</sup> The Second and Seventh Circuits find federal jurisdiction over non-enumerated crimes only when federal law seeks to protect a peculiar federal interest.<sup>11</sup>

This Note demonstrates that the Eighth Circuit is correct and that all statutes of general applicability apply to Indians regardless of the fact that the violation occurred in Indian country and that the victim was an Indian. This Note argues that to promote Indian sovereignty, Congress should enact legislation limiting federal jurisdiction over crimes by and against Indians in Indian country to those federal statutes that seek to protect a peculiar federal

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An enclave law applies only within a federal enclave. Federal enclaves are areas in which the federal government has exclusive jurisdiction. Examples of federal enclaves include: military bases, national parks, and federal buildings. In order to prove a violation of an enclave law, it is necessary to prove that the alleged violation occurred within a federal enclave. There is no violation of an enclave law if this element is not met even though all of the other elements of a violation may have been proven. Through enclave laws, the federal government exercises a general police power over the enclaves that it controls. *See* 18 U.S.C. § 7 (1994); 18 U.S.C. § 113 (1994); *Ex parte Gon-Shay-ee*, 130 U.S. 343, 352 (1889); *United States v. Thunderhawk*, 127 F.3d 705 (8th Cir. 1997); *United States v. Begay*, 42 F.3d 487 (9th Cir. 1994); *Stone v. United States*, 506 F.2d 561, 563 (8th Cir. 1974).

6. *See Wadena*, 152 F.3d at 840-42.

7. 18 U.S.C. § 1153. The chapter entitled “Offenses Committed Within Indian Country,” states as follows:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS §§ 2241-48], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

*Id.*

8. *See Wadena*, 152 F.3d at 840.

9. *See id.* at 841.

10. *See, e.g., United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992).

11. *See, e.g., United States v. Smith*, 562 F.2d 453 (7th Cir. 1977).

interest.

Part I of this Note discusses the historical background of federal jurisdiction over Indians, including the increasing tension between federal jurisdiction and the sovereignty of Indian tribes. Part II examines court decisions that form the basis of the circuit split. Part III analyzes the history of this conflict to demonstrate that the Eighth Circuit's solution is correct. Part IV proposes that Congress enact legislation to limit federal jurisdiction over federal statutes of general applicability in cases of crimes by and against Indians to those cases in which there is a peculiar federal interest involved.<sup>12</sup>

## I. HISTORY OF FEDERAL JURISDICTION OVER INDIANS

Some notion of the sovereignty of Indian tribes has existed since the earliest days of the American colonies.<sup>13</sup> Great Britain viewed and treated the Indian nations as sovereign and independent nations.<sup>14</sup> After the Revolutionary War, the United States followed Great Britain in treating Indian tribes as sovereign and independent political communities<sup>15</sup> and governing the Indians through treaties.<sup>16</sup> While the federal government claimed jurisdiction over certain offenses committed by Indians against white

12. This Note will not discuss the issue of federal jurisdiction over lesser-included offenses of the enumerated crimes in the IMCA. *See generally* Keeble v. United States, 412 U.S. 205 (1973) (holding that when a defendant is charged with an enumerated crime, an instruction on a lesser-included offense does not infringe upon the jurisdiction of the tribes). Moreover, this Note will not examine whether or not jurisdiction under the IMCA is exclusive or may be exercised concurrently with tribal jurisdiction. Finally, this Note will not cover the question of state jurisdiction over crimes committed in Indian country within the borders of the state. For a general discussion of these issues, *see generally* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal And State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627 (1998); Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N. DAK. L. REV. 915 (1994); Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response To Jensen And Rosenquist*, 69 N. DAK. L. REV. 939 (1994).

13. *See* Jessie D. Green & Susan Work, Comment, *Inherent Indian Sovereignty*, 4 AM. IND. L. REV. 311 (1976).

14. *See id.* at 320.

15. *See id.*

16. *See id.* at 320-22; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-61 (1832). The fact that the United States viewed the Indians as independent nations and dealt with them through treaties does not mean that they were treated fairly or humanely. The United States government frequently forced Indians to sign treaties against their will, or that they did not understand. Moreover, the government retained the power to ignore or alter its terms when it suited the government. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). A discussion of the abuses heaped on the Indian nations by the United States is beyond the scope of this Note. Instead, this Note focuses on the United States government's claimed legal framework for handling Indian affairs and the goals of the government in applying such framework. The author wishes to acknowledge that such a focus is an oversimplification of reality, for the United States has often acted outside of the framework it established and often in direct violation of the framework it created when dealing with Indian affairs.

persons and vice versa,<sup>17</sup> offenses “by Indians against each other were left to be dealt with by each tribe for itself . . .”<sup>18</sup>

The Supreme Court confirmed the notion that Indian tribes were independent nations in *Worcester v. Georgia*.<sup>19</sup> The Court stated that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . .”<sup>20</sup> Therefore, inherent tribal powers exist independently of a grant from the federal government.<sup>21</sup> It follows that an Indian tribe retains all self-governing powers unless a treaty or act of Congress subsumes power.<sup>22</sup>

Despite this notion of sovereignty, Congress extended federal jurisdiction into Indian country with the Indian General Crimes Act<sup>23</sup> (“IGCA”) in 1817.<sup>24</sup> This Act made federal laws applicable to crimes committed in areas

17. See *United States v. Quiver*, 241 U.S. 602 (1916). In *Quiver* the Court found that the Indian Intercourse Acts of 1796 and 1802 (ch. 30, § 1-22, 1 stat. 469, 469-74 (1796), ch. 13, § 1-22, 2 stat. 139, 139-46 (1802)) provided for punishment of crimes “by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other . . .” *Id.* at 604. See also *Green & Work*, *supra* note 13, at 311.

18. *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883). See also *United States v. Quiver*, 241 U.S. at 602.

19. 31 U.S. (6 Pet.) 515 (1832).

20. *Id.* at 559. The Court went on to state that the Indian Nation’s independence was limited only in its ability to deal with foreign powers. See *id.* at 559. See also *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823), in which the Court held that Indian sovereignty was limited such that Indians could not convey their land to any but the federal government.

21. See *Green & Work*, *supra* note 13, at 311.

22. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982) (“the majority, paraphrasing from the dissent, stated that the established views are that Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe’s dependent status . . .”); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89,94 (8th Cir. 1956) (“Indian tribes . . . still possess their inherent sovereignty excepting only where it has been specifically taken from them, either by treaty or by Congressional Act.”).

23. Act of March 3, 1817, ch. 92, § 1-3, 3 Stat. 383 (1917). The act is alternatively referred to as the Indian Country Crimes Act. The author will use Indian General Crimes Act [hereinafter IGCA] to refer to the statute in this Note.

The current statute reads:

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.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 (1998).

24. See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 363 (1986). The IGCA was later incorporated into the Indian Intercourse Act of 1834, Ch. 161 §25 (4 Stat. 733) and the Act of March 27, 1854, Ch. 26 §3, (10 Stat. 269,270) (1854). See COHEN, *supra* at 363-64.

“within the sole and exclusive jurisdiction of the United States,”<sup>25</sup> known as enclave laws,<sup>26</sup> applicable to Indian country.<sup>27</sup> The IGCA contained an exception in which the enclave laws did not apply to crimes committed in Indian country by an Indian against the person or property of another Indian.<sup>28</sup>

Around this same time period, Congress further dominated the Indian tribes by establishing the Commissioner of Indian Affairs in 1832<sup>29</sup> and the Federal Bureau of Indian Affairs in 1834 (BIA).<sup>30</sup> These and other statutes “narrowed the Indians’ ability to determine their future, deteriorated tribal autonomy, and compelled their status of wardship.”<sup>31</sup>

In 1871, Congress further eroded Indian sovereignty by ending federal recognition of the Indian nations as independent, sovereign entities for treaty purposes.<sup>32</sup> After the enactment of the statute, Congress began to use its legislative power to deal with Indians rather than its treaty power.<sup>33</sup>

Despite the erosion of Indian sovereignty that had already occurred, the power of the United States to interfere in Indian affairs was still limited. In

25. 18 U.S.C. § 1152.

26. See *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (“The Indian Country Crimes Act, 18 U.S.C. § 1152, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country . . .”); *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1975); *Acunia v. United States*, 404 F.2d 140, 141 (9th Cir. 1968). For a discussion of enclave laws, see *supra* note 5.

27. See 18 U.S.C. § 1152 (1998).

28. See 18 U.S.C. § 1152 (1998). The Act also contains exemptions for crimes committed by Indians in Indian country that have been punished according to the laws of the tribe as well as crimes over which a tribe has exclusive jurisdiction by treaty with the United States. See *id.* The exception for crimes by Indians which have been punished according to tribal law was first included in the 1854 Act. See COHEN, *supra* note 24, at 364.

29. See Statute of July 9, 1832, ch. 174, § 1-5, 4 Stat. 564 (1832). The Commissioner was charged with proscribing and managing Indian affairs. See *id.*

30. See Statute of June 30, 1834, ch. 162, § 1-4, 4 Stat. 735-36 (1832). Among other duties, the BIA formed courts of Indian offenses. These courts were American style courts, using American style laws and legal principles. The judges in the BIA courts were appointed by and responsible to the BIA. The BIA, therefore, exerted tremendous pressure upon the judges. See generally Warren H. Cohen & Phillip J. Mause Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818 (1968).

31. Green & Work, *supra* note 13, at 322.

32. See Act of March 3, 1871, ch.120, § 2, 14, 16 Stat. 566, 570-71 (1871). 25 U.S.C. § 71 (1998).

33. The Supreme Court interpreted the statute to allow all pre-1871 treaties to remain valid. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The statute was later amended to reflect this interpretation. See 25 U.S.C. § 71.

One particularly disturbing Congressional power mentioned in the *Lone Wolf* opinion is the ability of Congress unilaterally to abrogate a treaty with an Indian tribe. See *Lone Wolf*, 187 U.S. at 566.

For excellent discussions of the basis for Congress’ power to enact legislation controlling Indian affairs, see David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403 (1994); see also Green & Work, *supra* note 13, at 311.

1883, the Supreme Court held in *Ex Parte Crow Dog*<sup>34</sup> (“*Crow Dog*”), that federal jurisdiction did not exist over an Indian who had murdered another Indian in Indian country.<sup>35</sup> The Court based its decision largely on the text of the IGCA, which did not extend enclave law to situations involving a crime by and against an Indian in Indian country.<sup>36</sup> Thus, even though an enclave statute addressed murder, federal jurisdiction did not exist because of the Indian against Indian exception to the IGCA.<sup>37</sup> The Court held that “to uphold the jurisdiction . . . would be to reverse . . . the general policy of the government towards Indians. . . .”<sup>38</sup>

Many members of Congress disagreed with the decision in *Crow Dog* because they viewed the decision as setting *Crow Dog* free without any punishment or chance of punishment.<sup>39</sup> “[I]n direct response to the decision . . . in *Ex Parte Crow Dog* . . .,”<sup>40</sup> Congress passed the Indian Major Crimes Act (“IMCA”).<sup>41</sup> In its original form,<sup>42</sup> the statute contained seven major crimes<sup>43</sup> over which the federal courts have jurisdiction even when an Indian

34. 109 U.S. 556 (1883).

35. *See id.* at 572.

36. *See id.* at 570.

37. *See id.*

38. *Id.* at 572.

39. *See Keeble v. United States*, 412 U.S. 205, 210 (1973) (citing 16 Cong. Rec. 934 (1885)). *Crow Dog* was released from custody because of the decision in *Crow Dog*, and the custom of the tribe for dealing with a murder was simply that of the blood avenger. *Id.* “[T]he next of kin of the person murdered shall pursue the one who has been guilty of the crime and commit a new murder upon him . . .” *Id.* at 210 (quoting 16 Cong. Rec. 934 (1885)). Spotted Tail, Jr., the son of the Indian slain by *Crow Dog*, later killed another Indian named White Thunder. *See id.*

Congress’s and the court’s views of the *Crow Dog* incident are, however, inaccurate and ethnocentric. In order for a hunting, migratory people to survive, all of the members had to work together for the good of all of the people. *See* SIDNEY L. HARRING, *CROW DOG’S CASE* 104-05 (1994). Therefore, the principal way in which the Sioux resolved criminal disputes was through a process of reconciliation rather than punishment. *See id.* After the killing of Spotted Tail, a tribal council meeting was called and *Crow Dog*’s people agreed to pay a gift of \$600, eight horses, and one blanket to Spotted Tail’s people. *See id.* at 110. Such gifts were not “blood money,” but rather an offer of reconciliation. *See id.* at 105. The purpose of both the council meeting and the gift was to terminate conflict and reintegrate those involved into the tribe. *See id.* at 104. Thus, the case had been settled according to tribal law to the satisfaction of all involved parties. *See id.* The killing of White Thunder by Spotted Tail, Jr. was not a revenge killing. *See id.* at 133. The killing arose from the same factional political struggle from which *Crow Dog*’s killing of Spotted Tail, Sr. arose. *See id.*

40. *Keeble v. United States*, 412 U.S. 205, 209 (1973).

41. The Indian Major Crimes Act was originally passed in 1885 and is currently codified at 18 U.S.C. § 1153 (1998). *See supra* note 7 for the text of the current statute.

42. The statute has been periodically revised and expanded so that it now contains 14 crimes. The current list of crimes includes: “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [which deals with sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury. . . , assault against an individual who has not obtained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this [title 18 which deals with embezzlement and theft]. . . .” 18 U.S.C. § 1153 (1998).

43. The original seven crimes were: murder, manslaughter, rape, assault with intent to kill, arson,

committed the offense against another Indian in Indian country.<sup>44</sup>

The IMCA acted as an exception to the Indian against Indian in Indian country exception found in the IGCA. The IMCA exception applied only to the major crimes enumerated in the IMCA.<sup>45</sup> When the IMCA applied, the crime no longer benefited from the exceptions to the IGCA. Therefore, federal enclave laws applied and the federal courts had jurisdiction to try the case.<sup>46</sup>

Despite congressional attempts to expand federal jurisdiction over Indian crimes, attitudes towards the Indians relaxed in the early part of the twentieth century. In *United States v. Quiver*<sup>47</sup> the Court addressed the issue of federal jurisdiction over an Indian charged with committing adultery with another Indian in Indian country.<sup>48</sup> Adultery was not one of the enumerated crimes of the IMCA.<sup>49</sup> The Court noted congressional history leaving the regulation of Indian domestic affairs to the tribal customs and laws.<sup>50</sup> The Court held that the enumeration of certain offenses in the IMCA implied an intention to exclude other offenses.<sup>51</sup> Because adultery was not one of the IMCA's enumerated offenses, the IMCA did not apply, the Indian against Indian in Indian country exception to the IGCA did apply, and the federal court could not try the defendant for this offense.<sup>52</sup>

Congress shifted towards a policy of allowing more self-government by the Indian tribes by passing the Indian Reorganization Act of 1934 (1934 Act).<sup>53</sup> The 1934 Act gave the Indian tribes the right to adopt constitutions

burglary, and larceny. See *Ex Parte Gon-Shay-ee*, 130 U.S. 343, 349-50 (1889).

44. In *United States v. Kagama*, 118 U.S. 375 (1886), the Supreme Court upheld the IMCA as a legitimate exercise of Congressional power based upon the dependent status of the tribes as wards of the federal government.

For a discussion of the various claimed bases of Congressional ability to regulate the Indian tribes, see Williams *supra* note 33; Green & Work *supra* note 13.

45. See 18 U.S.C. § 1153 (1998). For text of the IMCA see *supra* note 7.

46. See *id.*; 18 U.S.C. § 1152 (1998). For text of the IMCA see *supra* note 7. For text of the IGCA, see *supra* note 23.

47. 241 U.S. 602 (1916).

48. See *Quiver*, 241 U.S. at 602.

49. See *id.* For a list of the original crimes in the statute, see *supra* note 43. For the text of the modern statute, see *supra* note 7.

50. See *Quiver*, 241 U.S. at 602. The Court found that the Indian Intercourse Law of 1796 and 1802 (ch. 30, § 1-22, 1 Stat. 469, 469-74 (1796), ch. 13, § 1-22, 2 Stat. 139, 139-46 (1802)) provided for punishment of crimes "by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other . . ." *Id.* at 604.

51. See *Quiver*, 241 U.S. at 606.

52. See *id.* at 605.

53. 25 U.S.C. § 476, 478 (1998).

Section 476 reads in part:

(a) Adoption; effective date.

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an

and by-laws for self-government.<sup>54</sup> The 1934 Act increased the ability of the tribes to govern themselves.<sup>55</sup> After passage of the 1934 Act, modern tribal courts began to replace the BIA courts, leading to more independence for the Indian tribes.<sup>56</sup>

Two cases that followed the enactment of the 1934 Act demonstrated further the Court's intention to protect Indian sovereignty. First, in *Williams v. Lee*,<sup>57</sup> the Court stated that absent an express act of Congress, it is impossible for a non-Indian sovereign to infringe upon the right of Indian tribes to make their own rules and regulations.<sup>58</sup> Second, in *Morton v. Mancari*,<sup>59</sup> the Court held that it was not unconstitutional discrimination for the BIA to use hiring preferences because the preferences promoted Indian

appropriate constitution and bylaws, and any amendments thereto. . .

(e) Vested rights and powers; advisement of presubmitted budget estimates.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations.

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations.

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, [the date of enactment of this Act] and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. §476 (1998).

Section 478 reads:

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after Jun 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 478 (1998).

54. See 25 U.S.C. § 476, 478 (1998).

55. See *id.*

56. See Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians*, 20 NEW ENG. L. REV. 247, 255-56 (1984).

57. 358 U.S. 217 (1959).

58. *Id.* at 223.

59. 417 U.S. 535 (1974).

self-governance.<sup>60</sup> The Court further stated that the previous paternalistic and dominating approach of the government exploited and destroyed the best interests of the Indian tribes.<sup>61</sup>

In 1975, Congress demonstrated its intent to further Indian sovereignty and self-government by enacting the Indian Self-Determination and Education Act of 1975 ("1975 Act").<sup>62</sup> Congress stated its purpose in passing the Act was to reverse the trend of "prolonged Federal domination of Indian service programs . . . retard[ing] rather than enhac[ing] the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government . . ."<sup>63</sup> Congress further stated that such a trend "has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities."<sup>64</sup>

## II. THE CIRCUIT SPLIT

Part II of this Note addresses the cases that created the three-way circuit

60. *See id.* at 553-54.

61. *See id.* at 553.

62. 25 U.S.C. § 450-50n (1999).

Section 450 of the Act reads:

(a) Findings respecting historical and special legal relationship, and resultant responsibilities.

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) Further findings. The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

*Id.*

63. 25 U.S.C. §450 (1999).

64. *Id.*

split. Courts find either a (1) narrow, (2) intermediate, or (3) broad basis for federal jurisdiction over crimes by and against Indians in Indian country.

#### A. *Narrow Basis of Federal Jurisdiction: The Enumerated Offenses Approach*

The Fourth Circuit held that when an Indian commits a crime against an Indian in Indian country, federal jurisdiction exists only if the crime is enumerated in the IMCA.<sup>65</sup>

In *United States v. Welch*,<sup>66</sup> the defendant, an Indian, was charged with the rape<sup>67</sup> of another Indian in Indian country.<sup>68</sup> The court reviewed the history of the IMCA and cited *United States v. Antelope*<sup>69</sup> for the proposition that when an Indian commits a crime against an Indian in Indian country, federal jurisdiction only exists if the crime is enumerated in the IMCA.<sup>70</sup> The court found that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute . . .”<sup>71</sup> and that the “power to punish offenses against tribal law . . . is an aspect of retained sovereignty . . .”<sup>72</sup> The court held for the defendant, stating that a case with this “factual predicate”<sup>73</sup> must

65. See *United States v. Welch*, 822 F.2d 460 (4th Cir. 1987).

66. 822 F.2d 460 (4th Cir. 1987).

67. Although rape is one of the enumerated crimes of the IMCA, the defendant was not charged under the IMCA or the federal rape statute, but rather under the South Carolina rape statute through the Assimilative Crimes Act. See *Welch*, 822 F.2d. at 461-63. See also 18 U.S.C. § 1153 (1998). For text of the statute see *supra* note 7.

68. See 822 F.2d at 461. The defendant in the case was an adult male accused of first degree rape and sexual offense on a three-year-old Indian child. See *id.* The defendant was tried and convicted under the South Carolina state law definition of rape. See *id.* The elements of the South Carolina definition of rape are not identical to the federal definition of rape in 18 U.S.C. § 2031 (1998). See *id.* at 463. There is no federal equivalent to the state law sexual offense charge. See *id.* Carnal knowledge of a female under the age of 16 is punishable under 18 U.S.C. § 2032 (1998), but this crime is not one of the enumerated crimes of the IMCA nor is it identical to the state charge. See *id.*

Part of the problem in this case arose because of the Assimilative Crimes Act, 18 U.S.C. § 13 (1998). Under this Act, the laws of the state within which a federal enclave is found apply to offenses within the enclave if there is no federal law. See 18 U.S.C. § 13 (1998). The Assimilative Crimes Act is, however, subject to the IGCA and its Indian against Indian in Indian country exception.

For a more complete discussion of the Assimilative Crimes Act, see Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685 (1957); Richard Monette, Comment, *Indian Country Jurisdiction And The Assimilative Crimes Act*, 69 OR. L. REV. 269 (1990); Derek P. Radtke, Note, *State Encroachment Into Tribal Sovereignty By Means Of The Assimilative Crimes Act*, 19 WHITTIER L. REV. 655 (1998).

69. 430 U.S. 641 (1977). “Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts.” *Antelope*, 430 U.S. at 643 n.2.

70. 822 F.2d at 464.

71. *Id.* at 464-65 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

72. *Id.* at 465 (quoting *United States v. Wheeler*, 435 U.S. 313, 326-27 (1978)).

73. The factual predicate to which the court refers is that the crime was committed by an Indian

involve one of the offenses set forth in the Major Crimes Act of 1885, 18 U.S.C. § 1153, for the United States District Court to have jurisdiction.”<sup>74</sup> The court held that when a crime by and against an Indian in Indian country is not one of those enumerated in the IMCA, “then the case is to be resolved by the Indian Tribal Council.”<sup>75</sup>

*B. Intermediate Basis of Federal Jurisdiction: The Peculiarly Federal Interest Approach*

Unlike the Fourth Circuit, the Seventh Circuit, and possibly the Second Circuit, have adopted an approach that allows federal jurisdiction over crimes by Indians against Indians in Indian country even when the crime is not enumerated in the IMCA, provided the statute seeks to protect a peculiarly federal interest.<sup>76</sup>

*United States v. Markiewicz*<sup>77</sup> demonstrates the peculiarly federal interest approach. In *Markiewicz*, the defendant, an Indian, was charged with numerous offenses, most of which were not enumerated in the IMCA.<sup>78</sup> The district court held, like the Eighth Circuit,<sup>79</sup> that federal jurisdiction exists over all federal laws of general applicability, even if the alleged crime was committed by an Indian against an Indian in Indian country.<sup>80</sup> The appellate court reviewed the IGCA’s application of enclave laws to Indian country,<sup>81</sup>

against an Indian in Indian country. See *Welch*, 822 F.2d at 463.

74. *Id.* at 463.

75. *Id.*

76. See *United States v. Markiewicz*, 978 F.2d 786 (2nd Cir. 1992); *United States v. Smith*, 562 F.2d 453 (7th Cir. 1977).

77. 978 F.2d 786 (2nd Cir. 1992).

The court in this case did not explicitly adopt the interpretation described in this section. See *id.* at 800. The court used other means for maintaining federal jurisdiction over the case. See *id.* The court’s language implies that in future cases in which the court is unable to sustain jurisdiction on other bases, it will apply the peculiarly federal interest approach to determine if federal jurisdiction can be maintained. See *id.* at 799-800.

The Seventh Circuit, however, adopted the peculiarly federal interest approach in *United States v. Smith*, 562 F.2d 453 (7th Cir. 1977). The author has chosen to use the Second Circuit’s *Markiewicz* decision as the basis for the discussion of the peculiarly federal interest approach because he believes the case offers a detailed rational look at the rationale behind the peculiarly federal interest test. Additionally, the *Smith* decision is complicated by the question of whether, once federal jurisdiction exists, the federal jurisdiction is concurrent or exclusive. See *Smith*, 562 F.2d at 458.

78. *Markiewicz*, 978 F.2d at 792-93. The defendants were charged with conspiracy to steal tribal funds, conspiracy to violate the federal antiriot act, violating the antiriot act, conspiracy to violate a statute proscribing maliciously damaging or destroying a building affecting interstate commerce, witness tampering, criminal contempt, and perjury. See *id.* at 795-96.

79. For the Eighth Circuit’s approach see *infra* notes 101-25 and accompanying text.

80. See *Markiewicz*, 978 F.2d at 798.

81. The IGCA extended enclave laws to Indian country. See 18 U.S.C. § 1152 (1998). See *supra* notes 23-28 and accompanying text for a discussion of and the text of the IGCA.

*Crow Dog*,<sup>82</sup> the IMCA,<sup>83</sup> and *United States v. Quiver*.<sup>84</sup> The court reasoned that when viewing the IGCA and the IMCA together, the only logical conclusion was that “the relations of the Indians, among themselves . . . is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise.”<sup>85</sup> The court, therefore, rejected the approach finding federal jurisdiction for all federal statutes of general applicability, regardless of the fact that the crime was committed by and against an Indian in Indian country.<sup>86</sup>

The court also reviewed the narrow approach excluding all crimes not enumerated in the IMCA.<sup>87</sup> The court reasoned that this approach was more desirable, but not complete.<sup>88</sup> More specifically, the court reasoned that such a narrow approach was correct in its deference to the Supreme Court’s statement in *Quiver*<sup>89</sup> that the enumeration of some offenses demonstrates exclusions of others.<sup>90</sup> However, the court in *Markiewicz* reasoned that this narrow approach was incomplete and that federal laws of general applicability should provide jurisdiction over crimes by and against Indians in Indian country in one general situation<sup>91</sup> not enumerated in the IMCA: when the federal statute implicated “peculiarly federal” interests.<sup>92</sup>

The court examined legislative history to find support for this approach and found that while discussing the IMCA, Congress stated that “[the IMCA] provides for [F]ederal jurisdiction over the 13 enumerated offenses. . . [j]urisdiction over other offenses rests with the tribe.”<sup>93</sup> The report went on to

82. 109 U.S. 556 (1883). For a brief discussion of *Crow Dog*, see *supra* notes 34-38 and accompanying text.

83. 18 U.S.C. § 1153. See *supra* notes 39-46 for a discussion of the IMCA and text of the statute.

84. 241 U.S. 602 (1916). The Court noted in *Quiver* that the enumeration of certain offenses in the IMCA carried some implication of the desire to exclude others. See *id.* at 606. It appears, however, that the law at issue in *Quiver*, an adultery law, was an enclave law and not a law of general applicability. See *United States v. Wadena*, 152 F.3d 831, 842 n.18 (1998). Therefore, the defendant would have enjoyed the benefit of the Indian against Indian in Indian country exception to the IGCA if it were not an enumerated IMCA offense. See *id.*

85. *Markiewicz*, 978 F.2d at 798 (quoting *Quiver*, 241 U.S. at 605-06).

86. See *id.* at 798-99. This is the broad interpretation discussed in section II.C. of this Note. See *infra* notes 102-25 and accompanying text. One of the most recent examples of this approach is found in *Wadena*, 152 F.3d 831.

87. See *Markiewicz*, 978 F.2d at 799. This is the narrow approach discussed in section II.A. of this Note. See *supra* notes 65-75 and accompanying text.

88. See *Markiewicz*, 978 F.2d at 798-99.

89. 241 U.S. 602 (1916). For a discussion of *Quiver*, see *supra* notes 47-52 and accompanying text.

90. See *Markiewicz*, 978 F.2d at 799-800.

91. See *id.*

92. See *id.*

93. See *id.* at 799 (quoting H.R. Rep. No. 94-1038 at 3 (1976)). This quote seems to support the narrow approach discussed *supra* in Section II.A. of this Note.

list exceptions to this general rule, stating that “[t]he second overriding exception is for crimes that are peculiarly Federal . . . such as assaulting a federal officer . . . or defrauding the United States.”<sup>94</sup>

The court then looked to case law to support the peculiarly federal approach to jurisdiction.<sup>95</sup> The court cited favorably the Seventh Circuit decision in *United States v. Smith*,<sup>96</sup> which explicitly adopts the peculiarly federal interest approach.<sup>97</sup> The court also reasoned that, in *United States v. Wheeler*,<sup>98</sup> the Supreme Court implicitly adopted the peculiarly federal approach.<sup>99</sup> The court did not apply this approach, however, because it was able to maintain jurisdiction on other bases.<sup>100</sup>

### C. Broad Basis for Federal Jurisdiction: General Federal Laws

In the broadest interpretation of the applicable statutes, the Eighth,<sup>101</sup> Sixth,<sup>102</sup> and Ninth<sup>103</sup> Circuits all hold that the IGCA applies only to enclave laws and, therefore, the exception for crimes by and against Indians in Indian country does not apply to general federal laws. These courts hold that federal jurisdiction exists over an Indian charged with violating a federal statute of general applicability in Indian country where the victim was an Indian, even when the crime is not enumerated in the IMCA.<sup>104</sup>

The current number of offenses is 14. See *supra* note 7 for the text of the statute. See *supra* note 42 for a list of the current enumerated crimes.

94. See *Markiewicz*, 978 F.2d at 799 (quoting H.R. Rep. No. 94-1038, at 3 (1976)).

The first exception relates to Public Law 280, which is beyond the scope of this Note. See *supra* note 12.

95. *Markiewicz*, 978 F.2d at 800.

96. 562 F.2d 453 (7th Cir. 1977).

97. See *Markiewicz*, 978 F.2d at 800.

98. 435 U.S. 313 (1978).

99. See *Markiewicz*, 978 F.2d at 800 (citing 435 U.S. 313). The *Wheeler* court did not explicitly adopt or apply the peculiarly federal approach because it maintained jurisdiction on another basis.

100. See *id.* The court was able to maintain jurisdiction over some charges because the victims were not Indians and, therefore, the IGCA Indian against Indian exception did not apply. See *id.* at 800-803. Also, some of the crimes did not occur in Indian country, so the IGCA did not apply. See *id.* Finally, all of the crimes committed by an Indian upon an Indian where the crime occurred in Indian country, were crimes enumerated in the IMCA. See *id.*

101. See *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998); *United States v. Stone*, 112 F.3d 971 (8th Cir. 1997) [hereinafter *U.S. v. Stone*]; *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983); *Stone v. United States*, 506 F.2d 561 (8th Cir. 1974) [hereinafter *Stone v. U.S.*]; *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

102. See *United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994).

103. See *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994); *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991); *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975).

104. See *Wadena*, 152 F.3d 831; *U.S. v. Stone*, 112 F.3d 971; *Begay*, 42 F.3d 486; *Yannott*, 42 F.3d 999; *Young*, 936 F.2d 1050; *Blue*, 722 F.2d 383; *Burns*, 529 F.2d 114; *U.S. 506 F.2d 561*; *White*, 508 F.2d 453.

*United States v. Wadena*<sup>105</sup> is one of the most recent cases addressing federal jurisdiction for crimes neither enumerated in the IMCA nor enclave laws.<sup>106</sup> The defendants in *Wadena* were Indians convicted of several crimes, including conspiracy.<sup>107</sup> The victims of the conspiracy were also Indians, and the actions took place solely in Indian country.<sup>108</sup> Because conspiracy is not enumerated in the IMCA, and because the fact pattern triggered the Indian against Indian in Indian country exception to the IGCA, the defendants claimed the federal courts did not have jurisdiction over that offense.<sup>109</sup>

The court noted that the Eighth Circuit had ruled several times before that the IGCA addresses only enclave laws and that the IGCA exception for crimes by and against Indians in Indian country does not apply to general federal laws.<sup>110</sup> The court discussed the history of the IMCA and the IGCA and noted that other circuits express different interpretations of the statutes.<sup>111</sup> The court decided, however, that its broad interpretation was correct.<sup>112</sup>

The court looked at the Second Circuit's particular federal interest approach,<sup>113</sup> but concluded that, despite its possible validity, such an approach was too difficult to apply.<sup>114</sup> The court then discussed the narrow approach that general federal laws do not apply at all to crimes by and against Indians in Indian country unless the crime is enumerated in the IMCA.<sup>115</sup> The court stated that while this interpretation may have been correct at the time Congress enacted the IGCA, the premise has been discarded.<sup>116</sup>

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105. 152 F.3d 831 (8th Cir. 1998).

106. *See id.*

107. *See id.* at 836-39.

108. *See id.*

109. *See id.* at 839.

110. *See id.* at 840-41.

111. *See Wadena*, 152 F.3d at 841-42.

112. *See id.* at 842.

113. *See id.* at 841. The Second Circuit case to which *Wadena* referred is *United States v. Markiewicz*, 978 F.2d 786 (2nd Cir. 1992). See *supra* notes 76-100 and accompanying text for a discussion of *Markiewicz*.

114. *See Wadena*, 152 F.3d at 841. The court said that the approach "is difficult to apply, given the presumption of jurisdictional authority of Congress to pass federal laws. If Congress passes a federal act . . . there always exists a federal concern and interest." *Id.* at 841 (emphasis in original).

115. *See id.* at 841-42.

116. *See id.* (citing COHEN, *supra* note 24 at 296-97 (1982)). For the earlier view, see *Elks v. Wilkins*, 112 U.S. 94, 99-100 (1884) ("General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.").

Several Supreme court cases have addressed this issue and reversed the original presumption, that general statutes did not apply to Indians unless expressly included, to a presumption that general statutes do apply to Indians, unless expressly excluded. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115-18 (1960); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598,

The court was also influenced by the fact that “many courts of appeal recognize that federal courts may enforce general federal criminal laws against . . . Indians within Indian country.”<sup>117</sup> The court felt that general federal laws applied to Indians.<sup>118</sup> And because the IGCA addressed only enclave laws, the Indian against Indian exception did not apply to general federal laws.<sup>119</sup> The court, therefore, concluded that its original interpretation of the two statutes was correct and federal jurisdiction exists over all general federal crimes even if the crime is committed by and against an Indian in Indian country.<sup>120</sup>

Despite the court’s decision that its previous broad interpretation was correct, the court actually looked at the balance between tribal and federal interests.<sup>121</sup> The court decided that “tribal interests do not outweigh the federal interest in prohibiting . . .” the crimes involved in this case.<sup>122</sup> The court recognized that “[t]here may be other federal-law prosecutions that would implicate important tribal interests.”<sup>123</sup> Despite the court’s rejection of the peculiarly federal interest test, the court seems to be applying the peculiarly federal interest balancing test to justify its position.<sup>124</sup>

### III. ANALYSIS

#### A. *The Broad Interpretation of IGCA and IMCA is Correct.*

The Eighth, Ninth and Sixth Circuits correctly interpret the IGCA and IMCA by holding that the IGCA applies only to federal enclave laws and, therefore, the Indian against Indian in Indian country exception does not

606-07 (1943); *Superintendent of Five Civilized Tribes v. Comm’n of Internal Revenue*, 295 U.S. 418,419-20 (1935).

117. *Wadena*, 152 F.3d at 841(8th Cir. 1998) (citations omitted).

One of the weaknesses with this argument is that half the cases cited were Eighth Circuit cases. *See id.* This amounts to arguing that the court’s interpretation is right because the court decided it that way. The court does, however, cite three Ninth Circuit cases and one Sixth Circuit case. *See id.*

The Court also cited Cohen, *supra* note 24 at 283 for the statement that when no particular Native American right is infringed, Indians are subject to general federal laws. *See Wadena*, 152 F.3d at 841.

118. *See Wadena*, 152 F.3d at 841-42.

119. *See id.* at 842.

120. *See Wadena*, 152 F.3d at 842.

121. *See id.* at 842. The court acknowledged that the Indian-against-Indian “in Indian country exception shows a respect for tribal sovereignty, especially over matters that affect Indians.” *Id.* The court also went on to state that “the application of general federal laws to Native Americans in this case does not implicate the tribal concerns of sovereignty . . . [however,] [t]here may be other federal-law prosecutions that would implicate important tribal interests.” *Id.* (emphasis added).

122. *Id.* at 842.

123. *Id.*

124. *See id.*

apply to federal laws of general applicability.<sup>125</sup> Furthermore, these courts are correct in holding that federal laws of general applicability apply to Indians.

The IGCA extends to Indian country 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 . . . .”<sup>126</sup> The phrase “sole and exclusive jurisdiction of the United States” refers primarily to federal enclaves.<sup>127</sup> Therefore, the IGCA applied federal enclave law to Indian country.<sup>128</sup>

At the time Congress passed the IGCA, federal laws of general applicability did not reach Indians.<sup>129</sup> Over time, however, courts have reversed this view and applied federal laws of general applicability to Indians unless Indians are specifically exempted from the statute.<sup>130</sup>

If an Indian defendant is charged with violation of an enclave law, the IGCA is the basis for the jurisdiction.<sup>131</sup> If the crime was one by and against an Indian in Indian country,<sup>132</sup> federal jurisdiction is removed.<sup>133</sup> The IMCA is, however, an exception to the Indian against Indian in Indian country exception.<sup>134</sup> If the crime is an enclave law which invokes the IGCA, and is one of the crimes enumerated in the IMCA, which revokes the exceptions in the IGCA, jurisdiction attaches even when the crime was by and against an Indian in Indian country.<sup>135</sup>

125. See *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998); *United States v. Stone*, 112 F.3d 971(8th Cir. 1997); *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994); *United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994); *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991); *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983); *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975); *Stone v. United States*, 506 F.2d 561(8th Cir. 1974); *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

126. 18 U.S.C. § 1152 (1998) (emphasis added).

127. See *Negonsott v. Samuels*, 507 U.S. 99,102 (1993) (“The Indian Country Crimes Act, 18 U.S.C. § 1152, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country . . . .”) *Id.*; See *United States v. Wadena*, 152 F.3d 831, 842 (8th Cir. 1998); *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1975); *Acunia v. United States*, 404 F.2d 140, 141 (9th Cir. 1968).

128. See *Negonsott*, 507 U.S. at 102; *Wadena*, 152 F.3d at 842; *Burns*, 529 F.2d at 117; *Acunia*, 404 F.2d at 141.

129. See *Elks v. Wilkins*, 112 U.S. 94, 99-100 (1884) (“General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.”) *Id.* at 100. See also *Wadena*, 152 F.3d at 841.

130. See *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99,115-18 (1960); *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 606-7 (1943); *Superintendent of Five Civilized Tribes v. Comm’n of Internal Revenue*, 295 U.S. 418,419-20 (1935).

131. 18 U.S.C. § 1152 (1998). For the text of the statute see *supra* note 23.

132. Also exempt from the statute are crimes by an Indian in Indian country that has been punished by the local law of the tribe and where treaty stipulations preserve the exclusive jurisdiction to the Indian tribe. See 18 U.S.C. § 1152 (1998).

133. *Id.*

134. See 18 U.S.C. § 1153 (1998). For a discussion of the IMCA, see *supra* notes 39-46 and accompanying text.

135. See 18 U.S.C. § 1152 (1998); 18 U.S.C. § 1153 (1998).

If an Indian defendant is charged with a federal law of general applicability, the IGCA is not invoked.<sup>136</sup> Because the IGCA is not the basis for jurisdiction, the IGCA exceptions do not apply.<sup>137</sup> Because the IGCA exceptions do not apply, the IMCA is not needed to confer jurisdiction over crimes that would normally be exempted under the IGCA.<sup>138</sup> When the crime is a violation of a federal statute of general applicability, neither the IGCA nor the IMCA is invoked and there is jurisdiction regardless of who the violators or victims are.

Therefore, The Eighth, Ninth, and Sixth Circuits correctly interpret the IGCA and the IMCA by holding that the IGCA applies only to federal enclave laws and therefore the Indian against Indian in Indian country exception does not apply to federal laws of general applicability.

### *B. The Narrow Interpretation of the IGCA and IMCA Is Incorrect*

The Fourth Circuit incorrectly held that there is no federal jurisdiction over a crime committed by an Indian against an Indian within Indian country if it is not enumerated in the IMCA.<sup>139</sup>

The Fourth Circuit held that when the crime was by and against an Indian in Indian country federal criminal jurisdiction exists only over crimes enumerated in the IMCA.<sup>140</sup> The court erred in this case by failing to recognize that the IGCA and IMCA apply only to enclave laws.<sup>141</sup> The court erroneously applied the IGCA's Indian against Indian in Indian country exception to a non-enclave law and held that there was no federal jurisdiction unless it was one of the crimes enumerated in the IMCA.<sup>142</sup> This is incorrect because the IGCA applies only to enclave laws and therefore IGCA exceptions—along with IMCA's exceptions to IGCA's exceptions—do not apply to non-enclave law statutes.<sup>143</sup>

136. See *supra* notes 126-30.

137. See *United States v. Wadena*, 152 F.3d 831, 842 (8th Cir. 1998).

138. See *id.*

139. See *United States v. Welch*, 822 F.2d 460 (4th Cir. 1987). See also notes 65-75 and accompanying text.

140. See *Welch*, 822 F.2d at 464.

141. See *supra* notes 126-30, 136-40 and accompanying text.

142. See *Welch*, 822 F.2d at 464-65.

143. See *supra* notes 136-40 and accompanying text.

*C. The Peculiarly Federal Interest Interpretation of the IGCA and IMCA is Incorrect*

The Seventh and Second Circuits incorrectly adopted<sup>144</sup> a peculiarly federal interest approach.<sup>145</sup> This misconception was based primarily on one line in a congressional report that stated this approach.<sup>146</sup> The misconstruction begins with the incorrect narrow approach applied by the Fourth Circuit,<sup>147</sup> and then adds the peculiarly federal interest test<sup>148</sup> to give the federal courts jurisdiction over Indian against Indian crimes not enumerated in the IMCA when the statute seeks to protect a peculiarly federal interest.<sup>149</sup> This approach is incorrect because regardless of whether or not there is a peculiarly federal interest at stake, when a federal law of general applicability is violated, there is federal jurisdiction regardless of the identity of the perpetrator or victim.<sup>150</sup> Therefore, there is no need to determine whether or not a federal statute of general applicability implicates a peculiarly federal interest.

#### IV. PROPOSAL

*A. Congress Should Adopt the Peculiarly Federal Interest Test for Federal Jurisdiction over Crimes By and Against Native Americans in Indian Country*

The assertion that the Indian against Indian in Indian country exception in 18 U.S.C. § 1152<sup>151</sup> applies only to federal enclave laws and that, therefore, federal jurisdiction exists over violations of federal statutes of general applicability in such situations constitutes an infringement of Indian sovereignty. Such an infringement of Indian sovereignty is important because the Supreme Court has ruled that a non-Indian sovereign cannot infringe on Indian sovereignty without an express act of Congress.<sup>152</sup> Congress should

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144. The Second Circuit did not expressly adopt the approach, but only cited it favorably. *See supra* note 77.

145. *See* *United States v. Markiewicz*, 978 F.2d 786 (2nd Cir. 1992); *United States v. Smith*, 562 F.2d 453 (7th Cir. 1977). *See also supra* notes 76-100.

146. *See Markiewicz*, 978 F.2d at 799-800. *See also supra* notes 93-94 and accompanying text.

147. This approach holds there is no federal jurisdiction over a crime by and against an Indian in Indian country unless it is one of the enumerated crimes of the IMCA. *See supra* notes 139-143 and accompanying text.

148. *See Markiewicz*, 978 F.2d at 799-800.

149. *See id.*

150. *See supra* notes 125-41 and accompanying text.

151. 18 U.S.C. § 1152 (1998). For the text of the statute *see supra* note 23.

152. *See Williams v. Lee*, 358 U.S. 217 (1959).

use this power to return to the Indian tribes jurisdiction over crimes by and against Indians in Indian country. This return of power would further the goals of Indian sovereignty and self-government.

During the last century Congress has frequently expressed its desire to further Indian sovereignty. The 1934 Act<sup>153</sup> and the 1975 Act<sup>154</sup> both explicitly state Congress's desire to encourage Indian self-government.

Furthermore, Congress has expressed its support of the peculiarly federal interest approach.<sup>155</sup> While discussing the IMCA, Congress stated that "[the IMCA] provides for Federal jurisdiction over the 13 enumerated offenses. Jurisdiction over other offenses rests with the tribe."<sup>156</sup> The report went on to list exceptions to this general rule stating that "[t]he second overriding exception is for crimes that are peculiarly Federal . . . such as assaulting a federal officer . . . or defrauding the United States."<sup>157</sup> These quotes lead one to the conclusion that at least some members of Congress believe, incorrectly, that the peculiarly federal interest approach is the law today.

The Supreme Court has frequently expressed its support for Indian sovereignty and Congress's attempts to protect the sovereignty of the Indian tribes. In *Williams v. Lee*,<sup>158</sup> the Court stated that absent an express act of Congress, a non-Indian sovereign's infringement of the right of Indian tribes to make their own rules and regulations is not permissible,<sup>159</sup> while in *Morton v. Mancari*,<sup>160</sup> the Court held that hiring preferences in the Bureau of Indian Affairs designed to further promote Indian self-governance did not rise to the level of unconstitutional discrimination.<sup>161</sup> In *Mancari*, the Court further held that the previous paternalistic and dominating approach of the government was exploitive and destructive of the best interests of the Indian tribes.<sup>162</sup>

153. 25 U.S.C. § 476, 478 (1998). See *supra* notes 53-56 and accompanying text for a discussion of the Indian Reorganization Act. For the text of the Act, see *supra* note 53.

154. 25 U.S.C. § 450-450n (1998). See *supra* notes 62-64 and accompanying text for a discussion of the Indian Self-Determination Act.

155. See *United States v. Markiewicz*, 978 F.2d 786, 799-800 (2nd Cir. 1992).

156. *Markiewicz*, 978 F.2d at 799 (quoting H.R. Rep. No. 94-1038 at 3 (1976)). At the time there were only 13 enumerated offenses in the IMCA. 18 U.S.C. § 1153 (1998). The current number of offenses is 14. *Id.* See *supra* note 7 for the text of the statute. See *supra* note 42 for a list of the current enumerated crimes.

157. *Markiewicz*, 978 F.2d at 799 (quoting H.R. Rep. No. 94-1038 at 3 (1976)). The first exception relates to Public Law 280, which is beyond the scope of this Note. See *supra* note 12.

158. 358 U.S. 217 (1959).

159. See *id.* at 217.

160. 417 U.S. 535 (1974).

161. See *id.* at 553-54.

162. See *id.* at 553.

Congress should enact legislation that would expressly state that federal crimes of general applicability do not apply when the perpetrators and victims are Indians and the crime occurred in Indian country. Such legislation would give the Indian tribes the right to deal with crimes within the Indian communities in the way that the tribe feels is appropriate. Crimes that are solely an internal matter would be punishable according to the beliefs, culture, and customs of the affected Indian tribes. The Indian tribes, as quasi-sovereign nations, should have the sole power to deal with such crimes when those crimes do not affect the federal government. In passing such legislation, Congress can protect Native American sovereignty, a goal that Congress and the Supreme Court have expressed and supported throughout the last century.<sup>163</sup>

The removal of federal jurisdiction over crimes by and against Indians in Indian country should not, however, be absolute. It is unlikely that Congress would desire to remove federal jurisdiction over all crimes by and against Indians in Indian country, especially when there is a peculiarly federal interest implicated by a statute. Therefore, if Congress enacts legislation to remove federal jurisdiction over violations of statutes of general applicability by Indians against Indians in Indian country, such legislation should also contain an express proviso that grants federal jurisdiction in such cases when there is a peculiarly federal interest involved.<sup>164</sup>

Some members of Congress have already expressed approval of the peculiarly federal interest approach, and even believe, incorrectly, that such an approach is the law today.<sup>165</sup> Unfortunately, such an expression of approval is insufficient to make the peculiarly federal interest approach the law, because Congress must expressly and affirmatively state its intention to affect Indian sovereignty.<sup>166</sup> Therefore, in addition to removing federal jurisdiction over violations of federal general criminal statutes by and against an Indian in Indian country, Congress should expressly adopt the Seventh and Second Circuits' peculiarly federal interest test.

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163. See *supra* notes 153-62 and accompanying text.

164. Such legislation should state expressly that the exemption from federal jurisdiction does not apply if the statute that has allegedly been violated expressly states that it is to cover Indians.

165. See *United States v. Markiewicz*, 978 F.2d 786, 799-800 (2nd Cir. 1992) (quoting H.R.Rep. No. 94-1038, 94th Cong. 2d Sess. 3 (1976)). See also *supra* notes 155-157 and accompanying text.

166. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (stating that only Congress has the power to infringe upon the sovereignty of the Indian tribes).

Critics, like those in the *Wadena* court,<sup>167</sup> would argue that the peculiarly federal interest approach to jurisdiction over crimes by and against Indians in Indian country is too difficult to apply.<sup>168</sup> Such an approach would, admittedly, be more difficult to apply than the simple approach that is currently the law<sup>169</sup> and the approach that the Fourth Circuit applies.<sup>170</sup> The first problem with this argument is that a rule should not be adopted simply because it is easier to apply than the alternatives. When the alternative rules will result in different holdings, the choice of the rule should depend upon the outcome that is generally desired, not on the convenience to those who administer and judge.

In this situation, the expressed Congressional intent is to further Indian sovereignty and self-government.<sup>171</sup> The *Wadena* approach does not further Indian self-government, but rather severely restricts it.<sup>172</sup> The only two approaches that further Indian sovereignty are the Fourth Circuit's approach<sup>173</sup> and the peculiarly federal interest approach.<sup>174</sup> The Fourth Circuit approach, however, does not recognize that even though Congress desires to promote self-governance, situations exist in which Congress still wants federal jurisdiction due to the peculiarly federal interest involved.<sup>175</sup> The peculiarly federal interest approach is an attempt to balance the goals of Indian sovereignty and protection of peculiarly federal interests. Therefore, because the peculiarly federal interest approach most accurately furthers Congresses desire to protect Indian sovereignty, Congress should choose it as the appropriate method for deciding such issues, regardless of whether or not it is more difficult to apply than the other possible tests.

Although the peculiarly federal interest approach is more difficult to apply than the current approaches to the law, it is not impossible to apply. The approach is simply a balancing test involving Indian sovereignty and peculiarly federal interests. It is no more difficult to apply than the many other tests by which the judiciary seeks to weigh and balance various factors

167. 152 F.3d 831 (8th Cir. 1998). For discussion of *Wadena*, see *supra* notes 101-124 and accompanying text.

168. See *id.* at 841.

169. The approach of the Sixth, Eighth, and Ninth Circuits are the correct approach to the situation currently. See *supra* notes 125-41 and accompanying text.

170. The Fourth Circuit holds that there is no federal jurisdiction over crimes by Indians against Indians in Indian country unless the crime is one of the enumerated crimes in the IMCA. See *supra* notes 65-75 and accompanying text.

171. See *supra* notes 153-157 and accompanying text.

172. See *supra* notes 101-124 and accompanying text.

173. See *supra* notes 65-75 and accompanying text.

174. See *supra* notes 76-100 and accompanying text.

175. See *supra* notes 65-75 and accompanying text.

or competing interests.<sup>176</sup> If the case involved an Indian perpetrator and victim and occurred in Indian country and was not governed by the IMCA, the court would begin with the presumption that there is no federal jurisdiction. The burden would be on the government to show that the statute that was allegedly violated implicated a peculiarly federal interest. The court would then decide if a peculiarly federal interest was involved. The alleged violator should also have an opportunity to show that the peculiarly federal interest is outweighed by the tribal interest in administering its own justice. If the court finds that there is a peculiarly federal interest and a tribal interest involved, the court must then determine which interest dominates. An important factor in balancing the interests would be the seriousness of the crimes with which the two sovereigns would charge the violator. If the two interests are equally compelling, the intention to promote Indian sovereignty should be supreme and there should be no federal jurisdiction.<sup>177</sup>

### CONCLUSION

The Eighth, Ninth, and Sixth Circuits have all correctly interpreted the IGCA and the IMCA by holding that the IGCA applies only to federal enclave laws and therefore the Indian against Indian in Indian country exception does not apply to federal laws of general applicability, and that federal laws of general applicability are therefore applicable to Indians.<sup>178</sup> Such an approach ignores express Congressional intent to promote Indian

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176. The courts use balancing tests in many areas of law. *See, e.g.,* *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999) (peer sexual harassment in schools); *Wyoming v. Houghton*, 526 U.S. 295 (1999) (privacy against government interests in searches); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (3 factor test for due process adequacy of administrative procedures); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (balancing state laws local benefit against the burden on interstate commerce); *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563 (1968) (balancing First Amendment interests of a government employee against the state's efficiency interests as an employer).

177. The easiest example of this test arises in a case in which an Indian assaults a federal officer who is an Indian in Indian country. The defendant would establish that he and the victim are Indians and the event occurred in Indian country. The government would easily establish that protecting federal officers is a peculiarly federal interest. The defendant could also show that the Indian tribe would have an interest in preventing and punishing assaults among its members. The court must balance these two competing interests. In this case, the severity of the crimes would probably be a big factor. Assuming that most courts would consider assaulting a federal officer a much more serious offense than a simple assault, most courts would view the balance in this situation in favor of federal jurisdiction.

178. *See* *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998); *United States v. Stone*, 112 F.3d 971 (8th Cir. 1997); *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994); *United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994); *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991); *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983); *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975); *Stone v. United States*, 506 F.2d 561 (8th Cir. 1974); *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

sovereignty and self-government. Therefore, Congress should enact legislation removing federal jurisdiction over most of the violations of federal general criminal statutes when the actor and victim are Indians in Indian country and should expressly adopt the peculiarly federal interest test.

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