

**Criminal Justice on Tribal Lands
and for Native American and Alaska Native (NA/AN) Populations
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Legal Responsibility

The United States recognizes three types of domestic sovereign governments: federal, tribal, and state. State sovereignty includes both county and municipal governments. [1] On tribal land, criminal justice for serious crimes is primarily a federal affair. Cases that fall outside of federal and tribal jurisdiction belong to the state. This is a complex issue and is explored in more detail later in this report in the “Jurisdictional Issues” section.

How is the Criminal Justice System Funded and Provided on Tribal Land?

About 400 separate tribal justice systems exist in the United States. The Bureau of Indian Affairs (BIA) does not manage tribal justice systems; however, tribal courts are partially funded through Public Law 638 Tribal Priority Allocations. Policing is funded by the BIA and by tribes. Often, BIA agents and tribal police work together on tribal land.

Tribal courts and police departments have been underfunded for decades, and do not provide a complete range of services. For example, the Navajo Nation needs 775 police officers to provide adequate policing services on its tribal territory, according to a recent assessment report commissioned by the tribe. [2] It currently has fewer than 200 officers to police an area of approximately 25,000 square miles, a territory that is larger than the area of 10 states in the Union. Officers on tribal land are also often required to respond to calls that do not provide addresses, with directions that rely on landmarks such as windmills or colors of homes. [2]

This underfunding is despite the fact that Native Americans living on tribal land are disproportionately in need of criminal justice services. This is especially true in areas where a boom in extractive industries (gas and oil) has brought large numbers of non-Natives to tribal land in concentrated so-called “man camps.” [3] In particular, domestic violence stands out as an area where more resources are desperately needed. [4]

Budget Issues

According to the United States Department of the Interior, the Biden Administration has proposed significant increases in funding for tribal criminal justice and supporting services in its 2022 budget. [5]

“The budget also proposes \$507.1 million for Public Safety and Justice activities under the BIA’s Office of Justice Services (OJS), an increase of \$58.4 million from the FY 2021 enacted level, \$462.3 million for 191 law enforcement and 96 corrections programs serving 227 Tribes and \$43.2 million for Tribal courts. Of the amount available for law enforcement, \$259.5 million is for criminal investigations and police services, including \$10 million to implement public safety changes resulting from the *McGirt v. Oklahoma* Supreme Court decision; and \$26.8 million is for Tribal Justice Support programs including \$5.0 million for Violence Against Women Act (VAWA) training and strategies to protect women in Indian communities. The

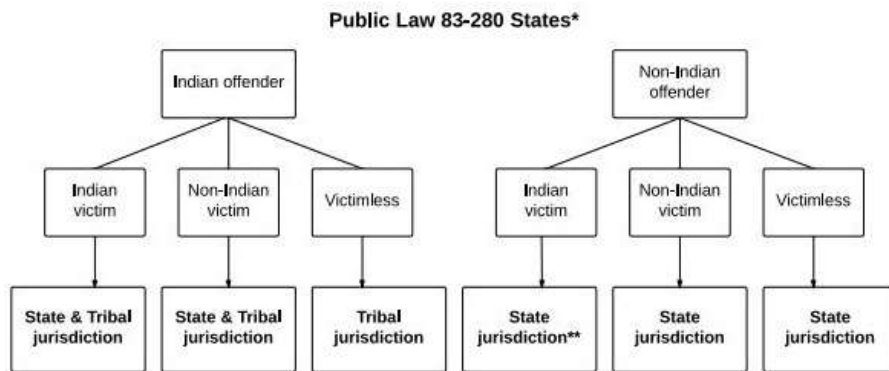
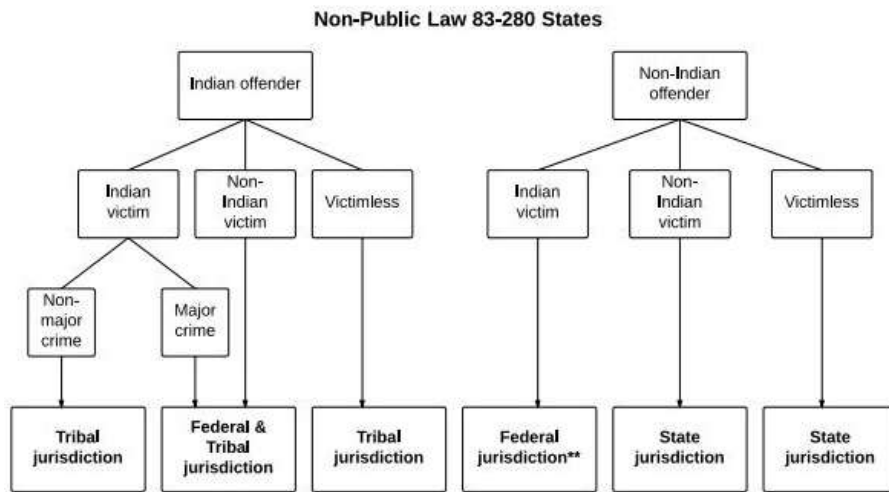
budget request proposes to invest \$16.5 million for Law Enforcement programs and Special Initiatives to support missing and murdered indigenous persons casework. The newly formed Missing and Murdered Unit (MMU) within OJS provides leadership and direction for cross-department and interagency coordination to put the full weight of the Federal government into investigating and resolving these cases. In response to an observed increase in drug activity on Indian lands, the request includes \$14.9 million to support reducing drug trafficking and drug-related crime in Tribal communities.” [5]

Jurisdictional Issues

In the 2004 legal decision *United States v. Lara*, the Supreme Court held that tribal courts have criminal jurisdiction over all members of federally recognized tribes. It also held that both tribes and the federal government could prosecute a Native individual who committed crimes on tribal land. [6] The 1978 Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, is important because it held that tribal courts do not have jurisdiction over non-Natives who commit crimes on tribal land. [7] This decision was partially abrogated by Congress when it reauthorized the Violence Against Women Act (VAWA) in 2013, which recognizes that tribes have criminal jurisdiction over non-Natives who perpetrate crimes of domestic violence against Native people. However, VAWA has not yet been reauthorized. A more recent development is the *United States v. Cooley* decision of 2021, which holds that a tribal police officer has authority to detain temporarily and to search non-Native persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law. [8] In addition to the *Cooley* decision, the Supreme Court has also made other recent decisions supporting tribal sovereignty and enforcing treaty rights. One example is the 2020 *McGirt v. Oklahoma* opinion authored by Neil Gorsuch. It asserts that the original boundaries of the land assigned to Native American tribes who were forcibly moved to Oklahoma “remains ‘Indian Country’” for the purposes of the Major Crimes Act. [9] The Major Crimes Act denies state governments the jurisdiction to prosecute certain crimes that occur on tribal reservations.

An important distinction when comparing jurisdictional authority between states and tribes is PL-280 status. “In 1953, six states took over the federal government’s duties and were granted criminal and some civil jurisdiction over reservations within their states. The so-called PL-280 states (based on the law’s origins in Public Law 83-280) include Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. According to the U.S. Census, these six states represented about 24% of the American Indian and Alaska Native population in the United States in 2016. The law also expanded criminal jurisdiction in “optional PL-280” states, granting Florida, Idaho, and Washington the option to assume partial or whole jurisdiction of reservations.” [10]

The extreme complexity and overlapping nature of tribal, state, and federal jurisdictions is summarized by the following flowchart [10]:



* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of "Optional 280" status is shown in this chart.
 ** Under the *Violence Against Women Act Reauthorization of 2013* (VAWA Amendments), after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.

Source: The Tribal Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*

Missing and Murdered Native People and Criminal Justice on Tribal Land

An area of particular interest to New Mexico which highlights the budget and jurisdictional issues in the criminal justice system is the resolution of cases of missing and murdered Native people on tribal land. This is an issue that has long been present in Native communities but has only reached prominence nationally in the press and in politics within the last 5 years. A groundbreaking report from the National Institute of Justice in 2016 found that almost 85% of Native women had experienced violence in their lifetimes. [11] In 2017, the Urban Indian Health Institute found that both Albuquerque and Gallup ranked in the top 10 U.S. cities for missing and murdered Native women and girls. [12] These findings, combined with a grassroots effort by Native communities across the country, and an earlier campaign around the issue in Canada [13], created the impetus for the present focus and research on missing and murdered Native people in the United States and New Mexico.

Cases of missing and murdered Native people are complicated by several factors:

- 1) Victims who are Native are often misclassified as Asian, Hispanic, or Black by law enforcement, making it difficult to obtain a clear picture of the extent of the problem.
- 2) Overlapping jurisdictions, as outlined earlier in this report, mean that federal authorities are not always immediately involved in a case of a missing or murdered Native person.
- 3) The time lapse between federal authorities assuming responsibility for a case and investigation of a case often means that cases are dropped for lack of evidence.
- 4) A centuries-long history of colonization and genocide has meant that criminals and (historically) law enforcement have devalued and deprioritized the lives of Native people.
- 5) An increased risk of sexual assault, domestic violence, and sex trafficking in Native communities, especially for Native women, puts Native people at a greater risk for both intimate partner homicide and homicide by strangers.
- 6) All of the above factors combine to create an incentive for predators to reside in tribal land and/or “border towns” which are next to tribal land, as they know that they are much more likely to get away with crimes of sexual violence, domestic violence, and homicide. [14]
- 7) When missing Native women are found alive, there are almost no available resources for rehabilitation of sex trafficking victims. [15]

Task forces to examine the issue of missing and murdered Native people currently exist at both the federal and the state levels. In New Mexico, the Missing and Murdered Indigenous Women and Relatives (MMIWR) Task Force was established by HB 278 in 2019 and reestablished by executive order 201 in May of 2021. The task force would like to see mandatory MMIWR reporting to the state from all law enforcement agencies. [16] Currently, not all law enforcement agencies report data on MMIWR. [14] In December of 2020, the MMIWR Task Force issued a comprehensive report on the state of the MMIWR issue in New Mexico, which the LWVNM Tribal Law Study group recommends for further reading on the topic. [14]

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