

Subject Matter Jurisdiction And Creative Civil Remedies for Native Victims In Tribal Courts

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In the 2000 Census 4.3 million people (1.5% of the 281.4 million people in the United States) listed themselves as American Indian or as American Indian in combination with some other race.¹ Close to 2.4 million people (or approximately 1% of the United States population) listed themselves solely as American Indian or Alaska Native².

American Indians experience the highest rates of violent crime victimization of any population in the United States.³ Rates of violent victimization for both males and females were higher for American Indians than for all other races⁴.

On average, American Indians experience 1 violent crime for every 10 residents age 12 or older⁵. American Indians faced an offender with a weapon in nearly a third of all violent crime incidents.⁶ Compared to all murder victims, American Indian victims of homicide were more likely to have been killed by a rifle/shotgun or by a knife than other populations⁷.

The rate of violent victimization among American Indian women is more than double that of all other women⁸. Native women suffer the highest rates of domestic violence, stalking, and sexual assault of any population in the United States⁹. Unlike all other populations in the United States, American Indian women are more likely to have been raped or sexually assaulted by a stranger or by an acquaintance than by an intimate partner or family member¹⁰.

It is important to note that the majority of perpetrators of violent and sexual assault crimes against Native people are non-Indians who have been described by their victims as "white."¹¹

¹ *We the People: American Indians and Alaska Natives in the United States. Census 2000 Special Reports.* <http://www.census.gov/prod/2006pubs/censr-28.pdf>

² Ibid

³ The rate of violent crime victimization against American Indians is 2 ½ times that of other populations. American Indians and Crime: A BJS Statistical Profile, 1992 -2002, <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

Paradoxically, tribal courts may not currently exercise criminal jurisdiction over non-Indians who commit the majority of violent and sexual assault crimes against Native people.¹² Therefore, tribal courts often look to creative civil remedies against non-Indian offenders in order to impose some consequences for the illegal and violent conduct.

Basic Civil Jurisdiction In Indian Country

The question of whether a tribal court can exercise civil jurisdiction is a question of federal law¹³. Generally, a tribe can only exercise subject matter jurisdiction over disputes that arise in Indian Country. The federal definition of Indian Country is set forth in 18 U.S.C. §1151:

[T]he term “Indian Country”, as used in this chapter, means (a) all land within the limits of any Indian reservation within 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 same¹⁴.

The United States Supreme Court has ruled that tribes have exclusive jurisdiction over any civil case involving an Indian defendant when the underlying claim arose in Indian Country¹⁵. This includes civil actions brought by non-Indian plaintiffs against Indian defendants. However, it is unclear whether the exclusive civil jurisdiction of tribal courts also extends to Indian defendants who are citizens/members of other tribes¹⁶.

Although non-Indians commit the majority of violent crimes against Native victims,¹⁷ the ability of tribal courts to exercise civil jurisdiction over non-Indians who commit these crimes in Indian Country is complex and unsettled.

The Violence Against Women Act clearly recognizes the power of tribal courts to issue and enforce domestic violence protection orders against non-Indian defendants¹⁸. However, tribes must still make a showing that the court possessed both subject matter and personal jurisdiction over the parties when both issuing and enforcing these orders.

¹² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)

¹³ *National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845 (1985).

¹⁴ 18 U.S.C.A. § 1151

¹⁵ *Williams v. Lee*, 358 U.S. 217 (1959), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)

¹⁶ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)

¹⁷ American Indians and Crime: A BJS Statistical Profile, 1992 -2002,

<http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>

¹⁸ 18 USC § 2265

Two United States Supreme Court cases from the 1980's and 1990's directly address tribal court civil jurisdiction over non-citizens/members and over non-Indian defendants. *Montana v. United States*¹⁹ held that tribal courts have no civil regulatory authority over non-Indian defendants on fee land owned by non-Indians that is located within a reservation unless one of the following factors apply: 1) the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or "other arrangements" or 2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In *Strate v. A-1 Contractors* the United States Supreme Court held that a tribe had no civil jurisdiction over non-members involved in a traffic accident that occurred on non-Indian fee land (a state right-of-way running through the reservation). The Court further held that, absent Congressional direction enlarging tribal court jurisdiction, the civil authority of Indian tribes and their courts over non-Indian fee lands generally does not extend to the activities of non-members of the tribe. Therefore, if neither of the two *Montana* factors listed above apply, tribal courts may not exercise civil jurisdiction over non-members on fee lands²⁰.

Left unaddressed in the above cases is whether tribes may exercise civil jurisdiction over non-Indians and over non-citizen/member Indians in actions arising on tribal lands.

In the absence of any specific guidance from the United States Supreme Court, the most prudent approach is for tribal courts to make specific findings in every civil case as to:

- whether the Due Process requirements of the Indian Civil Rights Act²¹ of notice and opportunity to be heard have been complied with; *and*
- whether the defendant is a citizen/member of the tribe, a non-Indian, or a citizen/member of another tribe; *and*
- whether the incident giving rise to the civil litigation occurred on tribal land, on fee land, or on non-tribal rights-of-way ; *and*
- whether the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, leases, or "other arrangements," *or*
- whether the conduct in question threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

¹⁹ *Montana v. United States*, 450 U.S. 544 (1981)

²⁰ The "Duro fix" returns tribal criminal jurisdiction over non-member Indians on fee lands and on rights-of-way. 25 U.S.C. Sec. 1301(2) and 18 U.S.C. Sec 1151(a). Tribes may therefore possess greater criminal jurisdiction (which involves the loss of personal liberty) than civil jurisdiction over non-citizen/member Indians. Also see *United States v. Lara*, 541 U.S. 193 (2004).

²¹ 25 U.S.C Sec. 1301 et seq.

It can be helpful for tribal court orders to reference any relevant federal and tribal laws relied upon by the court. For example, a tribal court order may reference the court's power to enforce domestic violence protection orders under 18 U.S.C. § 2265 (e) of the Violence Against Women Act in addition to referencing relevant tribal code provisions²².

Referencing applicable federal laws can only help bolster a tribal court's determination of jurisdiction if the matter undergoes federal appellate review²³.

Who Is An "Indian"?

In addition to making a determination as to the location of the incident giving rise to the civil litigation, tribal courts are also tasked with making a determination as to whether the defendant in the civil action is a non-citizen/member "Indian," a non-Indian, or a citizen/member of the tribe.

There are dozens of different definitions of the term "Indian" under federal law. Two of the many examples include:

1. The Indian Child Welfare Act of 1978²⁴ defines an Indian child as a child who is a member or who is eligible for membership in a federally recognized tribe; and
2. The Indian Reorganization Act (IRA) of 1934 (also known as the Wheeler-Howard Act)²⁵ includes in its definition of the term "Indian" the descendents of Indians who resided within the boundaries of any reservation on a specified date.

Commonly, tribes define "Indian" as an enrolled member of a federally recognized tribe or a person eligible for membership. Many tribes utilize the same definition of "Indian" in both the civil and criminal arenas and do not distinguish between citizens/members of their own tribes and citizens/members of other tribes. Tribes may wish to adopt

²² In order to receive the widest possible recognition and enforcement, tribal court protection orders should contain language indicating that the order was issued after a hearing in which the defendant had notice and opportunity to be heard; that the order was issued to restrain the defendant from harassing, stalking, or threatening an intimate partner, or child of such person, or engaging in other contact that would place an intimate partner in reasonable fear of bodily injury to the partner or child; that a finding has been made that the defendant represents a credible threat to the physical safety of the intimate partner or child (or specifically prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury). Tribal orders should also advise defendants of any applicable federal firearms prohibitions.

²⁴ 25 U.S.C. § § 1901-1963

²⁵ 25 U.S.C. § 461 et seq.

separate definitions of the term “Indian” for purposes of exercising civil and criminal jurisdiction.

In the civil context, the definition of the term “Indian” can be broadened in tribal codes to encompass more individuals. Some tribes may even wish to enact codes that allow civil sanctions to be imposed against “any person” committing a prohibited act.

Citizenship/Membership

Tribes are free to determine their own citizenship/membership²⁶. For purposes of civil jurisdiction, tribes may wish to adopt very expansive definitions of who may be considered a citizen/member. It is common for tribal codes to include within their definition of the term “citizen/member” adopted persons as well as lineal descendants of a tribal citizen/member.

Under current federal law, it may also be possible for tribes to “naturalize” citizens/members who otherwise do not meet any of the current federal definitions of an “Indian.” A tribal naturalization law could encompass persons who are married to a tribal citizen/member and/or who reside on tribal lands. A person who wishes to become a naturalized citizen/member would have to take affirmative steps to do so. This would further bolster arguments that the naturalized citizen/member had entered into a consensual relationship with the tribe.

These provisions are not without some consequences. Naturalized citizens or persons encompassed under a broader definition of “citizens/member” would have the right to vote in tribal elections and the responsibility to serve on juries in tribal court. They may also have the right to receive tribal per capita distributions and the right to other tribally funded benefits. Although untested, it may also be possible for tribes to naturalize citizens/ members for limited purposes only.

IV. Contempt of Court

All courts have the inherent power to punish those persons who have shown disrespect to the individual judge or to the judicial system or who have engaged in behaviors which are intended to disrupt the administration of justice. Courts also have the power to take actions to encourage persons to comply with orders previously issued by the court.

Tribal courts can hold persons in both criminal and civil contempt. A person who has committed either civil or criminal contempt of court is referred to as a “contemnor.”

²⁶ *United States v. Wheeler*, 435 U.S. 313 at 322 (1978)

Criminal Contempt

Tribal court judges may hold a person in criminal contempt for acts that are intended to show disrespect to the court and/or to obstruct the administration of justice. The acts must have been committed in the actual presence of the court.

Criminal contempt proceedings are punitive in nature and can result in incarceration and or/a fine. These proceedings are intended to punish past conduct and are usually initiated by the tribal prosecutor. The contemnor is entitled to all of the tribal and Indian Civil Rights Act protections otherwise provided to persons charged with a crime. These include the right to Due Process, the opportunity to obtain legal counsel to assist with the defense, and the right to a trial. The burden of proof in a criminal contempt action is on the tribal prosecutor to prove each and every element of the charge(s) beyond a reasonable doubt. As in other criminal actions, tribal courts may not hold non-Indians in criminal contempt of court.

Criminal contempt of court is also sometimes referred to as “direct contempt” or “summary contempt.” It is a tool available to tribal courts to maintain the orderly administration of justice. Two examples of direct or summary contempt include shouting expletives inside the courtroom while the court is in session or physically attacking (or threatening to physically attack) court personnel in the courtroom while the court is in session. All courts have the inherent power to maintain the safety, order and integrity of the court. In the examples cited above, a tribal court judge could summarily (e.g. immediately) detain a non-Indian contemnor to preserve the safety, integrity, and order of the court..

Civil Contempt

Civil contempt of court differs from criminal contempt in that its purpose is to encourage prospective, future compliance with a previously issued court order. It is remedial in nature and cannot be used to punish. Unlike criminal contempt, civil contempt is not an offense against the dignity of the court. Rather it is a tool that courts may use to encourage or prompt a party to comply with an order that has been previously issued for the benefit of another person or party.

Generally, civil contempt is ordered as a result of a “show cause” hearing. The burden of proof, typically by a preponderance of the evidence, is on the contemnor to demonstrate that the alleged contemptuous behavior was not willful or intentional. The contemnor must further prove that he did not have the ability to comply with the court’s order.

Civil contempt can result in the imposition of fines and/or in the detention of the contemnor. Detention cannot be ordered as punishment. Rather, it can only be ordered as a means to force compliance with a court’s previously issued order. The contemnor “holds the keys to the jail” and can earn his freedom by compliance with the previously

issued court order. Detention is commonly used against contemnors who repeatedly fail or refuse to comply with a court order.

Tribal courts may hold non-Indians, non-citizen/member Indians, and citizens/members in civil contempt of court. Although civil contempt may result in detention, the proceedings are civil in nature and do not trigger the same right to counsel or due process safeguards as in criminal contempt proceedings. Before any civil contemnor may be held in detention, the court must make a finding that the contemnor willingly or intentionally violated the court's order and that he had the ability to comply with the order.

An example: a non-Indian contemnor could be detained in the tribal jail until he made significant progress towards payment of victim restitution previously ordered in a tribal court domestic violence protection order. However, detention could only be ordered after the court made specific findings that the contemnor failed to prove, by a preponderance of the evidence, that he did not willfully violate the order and that he was objectively and reasonably unable to comply with the order.

Whenever a civil contemnor has been incarcerated (especially when the contemnor is a non-citizen/member Indian or non-Indian), tribal court orders should precisely detail:

- the previous relevant order(s) of the court; and
- the conduct that gives rise to the incarceration; and
- the legal authority of the court to impose incarceration; and
- the purpose of the incarceration to encourage compliance with the previously issued order; and
- the act or acts that could be performed by the contemnor that would constitute compliance.

The order should also include a statement that the contemnor will be immediately released from incarceration upon the court's determination that the contemnor is in substantial compliance with the previously issued order.

Tribal codes should clearly distinguish between the civil and criminal contempt powers of the tribal court. The code may also wish to include language recognizing that the power to issue contempt orders is an inherent power of the court necessary to protect the safe, orderly, and respectful administration of justice.

Civil Remedies

In addition to contempt of court, there are numerous other civil "remedies"²⁷ that can be

²⁷ Black's Law Dictionary defines a remedy as "The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."

imposed by tribal courts. This section contains a list of suggested civil remedies designed to provoke further dialogue and discussion in Indian Country. The list of remedies provided in this report is by no means exhaustive. Many of these remedies can also be imposed against Indian defendants who have been convicted of crimes in tribal court criminal proceedings²⁸.

Monetary Penalties

Monetary penalties are civil remedies commonly ordered by state, federal, and tribal courts. In addition to fines, tribal codes may also allow the court to assign attorneys' fees, supervised child visitation costs, and court costs to a defendant found responsible for a civil offense. Fines and costs are payable to the tribe while attorneys' fees are generally made payable to the opposing party.

Fining non-Indian defendants in tribal court civil matters routinely happens when non-Indians violate tribal civil traffic codes. If the tribal code provides for this remedy, a non-Indian who has violated a civil domestic violence code may also be fined by the tribal court.

There are some limits to the amount of a fine that can be imposed on a defendant in a civil action. The Indian Civil Rights Act mirrors the 8th Amendment to the United States Constitution in its prohibition against the imposition of *excessive* fines. 25 U.S.C. §1302 (7).

Community Service

Many tribal codes include language in their preamble that domestic violence and/or other offenses harm the community as well as the victim. Therefore, tribal courts may wish to order community service hours, in addition to fines, for civil offenses committed against the community.

Community service can also be ordered in lieu of fines when the defendant does not have the ability to pay the fine or when payment of the fine would divert funds from restitution or other monies owed to the victim.

Many tribal codes contain language indicating that domestic violence is not traditional. Therefore, tribal courts may wish to impose traditional forms of community service in civil cases. For example, a defendant who has been found to have violated a civil

²⁸ Fines, community service, restitution, shame, injunctions, treatment, and classes are all commonly imposed as part of a criminal sentence against Indian defendants in tribal courts.

protection order may be ordered to cut wood for a community ceremony or to clear and clean ceremonial grounds.

Restitution

Restitution can be ordered in a civil case to make the victim as whole as possible and to compensate her for her losses. It is intended to indemnify the victim for any loss, damage, or injury that occurred as a result of the defendant's conduct.

Restitution orders commonly include ordering the defendant to make payment for a victim's loss of income, healthcare or medical expenses, transportation costs, child care expenses, and repair or replacement of damaged items related to the defendant's unlawful conduct. In some tribal communities, defendants have been ordered to pay restitution to cover the costs of ceremonies or the services of medicine people.

Tribal courts can also order more traditional forms of restitution to compensate the victim for her losses. It can be helpful for tribal codes to contain specific language indicating that traditional forms of restitution can be imposed by the tribal court. Some tribal codes may also wish to detail the traditional forms of restitution that may be imposed.

It is important to note that tribal courts may impose the remedy of restitution against non-Indians, non-citizen/member Indians, and citizens/members. Some traditional forms of restitution in a civil case include ordering the defendant to:

- Gather and deliver firewood
- Hunt or otherwise provide meat or food
- Tend the victim's garden or farm
- Provide access to equipment such as allowing use of a freezer, backhoe, chainsaw, or piece of heavy equipment
- Dig a ditch or well for water
- Pay for ceremonies or contributing specific items for ceremonies to help heal the victim

If the tribal court elects to order restitution, the court order should clearly indicate that restitution was ordered to compensate the victim for her particular losses and was not ordered to punish the defendant.

Shame

Shame can be a very important tool to curb a defendant's behavior. Some tribal

communities traditionally used shame to publicize the defendant's wrongdoing and to prevent future wrongdoing by the defendant and by others.

Tribal courts in civil cases may order the defendant to be subject to some mechanism designed to cause him shame. One extreme example would be ordering the defendant to wear a sign for 30 days that says "I beat my wife and kids" or "I stabbed and robbed an elder."

Injunctions

Tribal courts have the power to issue injunctions prohibiting the defendant from committing, attempting to commit, or threatening to commit specified acts (e.g. contacting a victim, visiting certain locations, attending certain events, committing new crimes, etc.). A domestic violence protection order is one of the more common examples of an injunction issued by tribal courts.

Forfeiture

Tribal criminal and civil codes can contain forfeiture provisions that allow the tribe to seize property that has been used in the commission of a crime. These provisions should be carefully drafted to comply with the Due Process clause of the Indian Civil Rights Act of 1968.

Forfeiture proceedings may take two different forms: criminal and civil. Generally, in a criminal forfeiture proceeding, the property subject to forfeiture must be identified in the criminal complaint to serve as notice to the defendant. The defendant must also be given an opportunity to contest the criminal forfeiture. Additionally, the tribe must give notice of the criminal forfeiture proceedings to all third parties who have an interest in the property (e.g. co-owners, lien holders, etc.).

Civil forfeiture proceedings differ from criminal forfeiture in three respects: (1) Criminal forfeiture proceedings are *in personam* (against the person) and are punitive in nature; (2) Civil forfeiture proceedings are *in rem* (against the property) and are remedial; and (3) No criminal charge or conviction is necessary in civil forfeiture, only a valid seizure based on probable cause that the property was used in the commission of a crime.

Typically, once the property has been seized in a civil forfeiture proceeding, notice of the intended forfeiture is given through publication in a local newspaper for a designated period of time. If no one contests the forfeiture during the allotted time, the property may be disposed of or converted to its own use by the seizing agency. If the civil forfeiture is challenged, then the matter is set for hearing.

The civil forfeiture hearing may require the government to show that it had probable cause to believe the property was used to commit a crime. Once the government makes that showing, the burden then shifts to the owner to show that the property was not used to commit a crime.

The three primary defenses to civil forfeiture include 1.) “innocent owner” (the person did not know and reasonably could not have known that the property would be used in criminal activity); 2.) no probable cause existed to support a lawful seizure of the property; and/or 3.) no nexus between the crime committed and the property.

Forfeiture can be a useful deterrent against criminal activity. The sale of forfeited property can also benefit the tribe by providing supplemental funds that can be placed in a victim’s compensation fund or donated to victim services programs. The forfeited property can also be used by tribal agencies. Forfeited property in civil proceedings commonly includes cash, vehicles, weapons, trailers, and real property.

Exclusion or Banishment

Tribes retain the right to exclude non-Indians (who do not otherwise have a federal right to be present) from tribal lands²⁹. Tribal codes may allow either the court or the legislative branch of government to issue orders banishing or excluding persons from tribal lands. Generally, the term “exclusion” is used for non-Indians and non-citizens/members and banishment is used for citizens/members.

More limited forms of exclusion and banishment may include prohibiting the defendant from being present at tribal government offices or at tribally owned businesses. It may also be possible to issue revocable easements against non-Indians who live on fee lands within the reservation in order to force compliance with a civil order of the court.

Posting of a Peace Bond

Tribal codes may include a civil provision for the posting of a “peace bond.” Peace bonds are a type of surety bond issued against a person who has threatened another person or their property. They can also be issued against someone with a long history of misconduct or who has threatened to breach the peace.

Defendants may be ordered to post a sum of money as a peace bond to ensure compliance with a court order. Upon compliance with the court’s order, the money posted by the defendant will be returned.

²⁹ *Merrion v. Jicarilla Apache Tribe* , 455 U.S. 130, 144-145 (1982).

Civil Commitment

Tribal courts may issue civil commitment orders to forcibly commit a person to a mental health facility for an indeterminate amount of time or to compel a person to receive mental health treatment. The court must typically find, by clear and convincing evidence, that the person is an immediate danger to himself or others prior to issuing the order because of mental illness. Counsel must be provided (if the person cannot afford counsel) and due process must be complied with during the proceedings. The purpose of civil commitment must be to obtain treatment for a person with a mental disorder who, as a result of that disorder, is a danger to himself or others.

Most civil commitment codes allow for private persons to petition the court or for a tribal health officer, law enforcement officer, or judge to initiate proceedings. The civil commitment must be ordered pursuant to a hearing and the person must be allowed an independent psychiatric or psychological examination. The commitment order must be reviewed periodically. Treatment must be provided at the facility where the individual has been committed involuntarily. This remedy can be extremely expensive.

The United States Supreme Court has ruled that sexually violent offenders who have a “mental abnormality” or “personality disorder” may be subject to involuntary civil commitment³⁰. The Supreme Court noted that such proceedings are civil, do not constitute punishment, and do not trigger double jeopardy concerns. The court further noted that the civil commitment statute required considerable evidence of past violent sexual behavior, a present mental inclination to repeat that violent sexual behavior, and required the release of the confined person once he became mentally stable and no longer constituted a danger. The Court also noted that prior criminal conviction is not a pre-requisite for civil commitment of sexually violent predators.

Treatment and Classes

Tribal courts may also issue orders in a civil case for a defendant to attend parenting classes or batterer reeducation programs. Counseling and successful completion of substance abuse or alcohol treatment can also be ordered. Completion of job training courses or GED classes are other available remedies.

Civil Arrest

Tribal courts have the power to issue civil arrest orders against any person for failing to comply with a court’s previously issued order. Pursuant to the civil arrest order, the person can be apprehended and detained by tribal law enforcement for a reasonable amount of time until the court can convene an evidentiary hearing to determine whether

³⁰ *Kansas v. Hendricks*, 521 U.S. 346 (1997)

a violation has occurred. Tribal codes should explicitly recognize the power of tribal courts to issue civil arrest orders. Tribal court judges should include language in the civil arrest order linking its issuance to the prevention of future violations of a previously issued court order.

Civil arrest orders can be an extremely useful tool for tribal courts in domestic violence protection order cases. A tribal court judge can issue the civil arrest order any against person who has violated a previously issued protection order. That person could be detained for a reasonable amount of time until a hearing can be convened.

Civil Regulatory Powers

Tribes also retain considerable powers to regulate persons on tribal lands. Several suggested steps tribes may use to regulate the conduct of persons on tribal lands include:

- removing the name of a person (such as a batterer, a rapist, or someone who has committed child sexual abuse) from the lease of a tribal housing property or reassigning the lease to the victim
- restricting access or rescinding a business license with the tribe
- limiting a person's access to tribally funded benefits (such as barring small business loans or limiting access to the tribally funded gym)
- restricting or rescinding hunting or fishing licenses or privileges
- disenrolling the person as a member of the tribe
- rescinding future per capita disbursements
- restricting access to tribal employment or to certain types of tribal employment (such as positions working with youth, the elderly, or other vulnerable persons)