

Tribal Probationers' Rights and Tribal Probation Officers' Arrest Authority

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Overview

- What is Probation?
- Probationers' Rights: The Constitution and the Indian Civil Rights Act
- Arrest Authority of Probation Officers
- Conclusions

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Probation

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What is Probation? What is not Probation?

- **probation** (16c) 1. *criminal procedure*. A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison, usu. on condition of routinely checking in with a probation officer over a specified time.

Black's Law Dictionary (11th ed. 2019)

- Not Probation:
 - Parole / early release (conditional release from imprisonment before full sentence has been served)
 - Pretrial conditional release (defendant still presumed innocent, retains greater rights compared to persons already convicted of a crime)

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Conditions of Probation

- Standard conditions
 - Place: Don't leave jurisdiction, notify of change of address
 - Status: Report to probation officer, honest reports,
 - Behavior: No alcohol, drugs, weapons; seek or maintain employment
- Special conditions (often related to specific crime):
 - Addiction counseling
 - Payment of legal obligations (restitution, child support, etc.)
 - Consent to search of residence, vehicle, electronic devices, etc.
 - Sex offenders: Limited or prohibited access to minors, limitations on internet use

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Probationer Rights

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Individual Rights under the Constitution

- Fourth Amendment
 - Right against unreasonable search-and-seizure
 - Right to probable cause determination
- Fifth Amendment
 - Right against double jeopardy
 - Right to remain silent
 - Right to due process
- Sixth Amendment
 - Right to speedy, public trial
 - Right to a jury
 - Right to confront, call witnesses
 - Right to an attorney

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Probationers' Rights under the Constitution

- *Mempa v. Rhay*, 389 U.S. 128 (1967)
 - Probationer has 6th Amendment right to an attorney at combined revocation/sentencing hearing
- *Morrissey v. Brewer*, 408 U.S. 471 (1972)
 - Parolee has 5th Amendment (due process) right to hearing on parole revocation
- *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)
 - “[A] probationer, like a parolee, is entitled to a preliminary hearing and a final revocation hearing, under the conditions specified in [*Morrissey*].”
 - Probation officer “has been entrusted traditionally with broad discretion . . . to recommend or even declare revocation.”
 - Probationer was not entitled to attorney at revocation hearing

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Probationers' Rights under the Constitution: First Amendment

- *United States ex rel. Means v. Solem*, 440 F. Supp. 544 (1977)
 - Defendant convicted of rioting, out on bail pending appeal
 - Special condition of bail: “refrain from participating in any American Indian Movement activities” except fund raising, Int’l Indian Treaty Org., AIM activity within courts
 - Court held that bail conditions infringed First Amendment right to “pure speech”; not even prisoners subject to such limitations
- *Aldape v. State*, 535 P.3d 1184 (Nev. 2023)
 - Special condition of probation for sex offenders: Cannot access internet or possess any device capable of accessing internet without probation officer’s permission (condition imposed by statute)
 - Court struck down statute, called it a “perfect example of the impropriety of a blanket internet ban.”

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Indian Civil Rights Act (ICRA)

- *Talton v. Mayes*, 163 U.S. 376 (1896)
 - Talton (a Cherokee citizen) indicted by a five-person grand jury of Cherokee Nation and convicted of murder
 - Talton petitions for writ of habeas corpus, alleging violation of his 5th Amendment (due process) right
 - “[A]s the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated on by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.
- Indian Civil Rights Act (1968) enacted to protect individual rights against infringement by Tribal governments

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ICRA Rights of Defendants (part 1)

- 25 U.S.C. § 1302(a) **In general**

No Indian tribe in exercising powers of self-government shall—

- 1) [freedom of exercise of religion, speech, press, assembly, petition]
- 2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- 3) subject any person for the same offense to be twice put in jeopardy;
- 4) compel any person in any criminal case to be a witness against himself;
- 5) [due process against takings]

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ICRA Rights of Defendants (part 2)

- 25 U.S.C. § 1302(a) **In general**

No Indian tribe in exercising powers of self-government shall—

- 6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));
- 7) [limitations on sentencing]
- 8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- 9) [no bills of attainder or ex post facto laws]
- 10) deny to any person accused of an offense punishable by imprisonment the right . . . to a trial by jury of not less than six persons

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Tribal Courts and Probationers' Rights: Conditions of Probation

- *Jack v. Colville Confederated Tribes*, 2002 WL 34546014 (Colville 2002)
 - “[I]t is within the discretion of the Trial Court to ask the defendant questions about his compliance [with probation conditions] and to consider his testimony, or lack of testimony, when deciding if he has complied with its order. The defendant has no right to remain silent at post conviction hearings.”
- *Eastern Band of Cherokee Indians v. Reed*, 2004 WL 5807676 (EBCI 2004)
 - Mrs. Reed, as condition of probation, agreed to warrantless searches.
 - Mr. Reed (Defendant) was arrested and evidence gathered from warrantless search when Mrs. Reed was not home
 - Court held that Mrs. Reed, through probation conditions, “diminished [Mr. Reed’s] right to privacy in their marital premises,” but diminishment “only applies in the presence of Mrs. Reed.”

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Tribal Courts and Probationers' Rights

- *Sinquah v. Hopi Tribe*, 2000 WL 35734274 (Hopi 2000)
 - At combined probation revocation and arraignment, Defendant (who had an attorney, at his own expense) agreed to proceed without his attorney
 - Defendant later petitioned for writ of habeas corpus, alleging violation of right to an attorney
 - Court held:
 - Right to counsel applies to probation revocation hearing
 - Trial court failed to follow proper steps for proceeding without attorney
- *Swinomish Indian Tribal Cmty v. Stone*, 2007 WL 8080602 (Swin. 2007)
 - Defendant with deferred sentencing admitted to probation violations at hearing without attorney
 - Court refused to require attorney at hearing, but approved of appointment for sentencing

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Arrest Authority

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Powers of Probation Officers: Little Traverse Bay Band of Odawa Indians

- Little Traverse Bay Band of Odawa Rules of Criminal Procedure
Rule 1.504 Probation Supervision
 1. The probation officer may upon direct knowledge or receipt of reliable information take into custody a person who the probation officer reasonably believes has violated terms of presentencing release. Said person must be brought before the Court for confirmation of detention within 72 court hours and to establish succeeding court dates as required by these rules.
 2. The probation officer may upon direct knowledge or receipt of reliable information take a probationer into custody for violation of probation. The probation officer must file a petition for revocation of probation listing the reasons for violation and the basis for violation. Said petition will proceed through the Court on the same time schedule as a criminal complaint.

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Powers of Probation Officers: Confederated Tribes of Colville Reservation

- Colville Confederated Tribal Code § 1-1-179 Incarceration
 - d) Violations of alternative forms of incarceration: The Department of Probation and Parole shall monitor each individual permitted an alternative form of incarceration. Probation officers shall have authority to request a warrant of arrest for defendant for any violation of conditions place[d] on such alternative forms of incarceration.
 - e) The Tribal Court shall issue such arrest warrant where the probation officer files an affidavit and request for warrant.
- Colville Confederated Tribal Code § 5-2-75 Duties and Powers of Probation Officers
 - Probation officers shall have the powers of police officers for purposes of this Juvenile Code but shall, whenever possible, refrain from exercising such powers except in urgent situations in which a regular police officer is not immediately available.

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Powers of Probation Officers: Poarch Band of Creek Indians

- Poarch Band of Creek Indians Code § 3-3-8
Revocation of Participation in Drug Court
 - a) Upon a recommendation from the Drug Court Team that the defendant's participation in Drug Court should be revoked, the Tribal Prosecutor shall file a petition in Drug Court showing probable cause that a defendant has violated the terms or conditions of Drug Court. The Drug Court Judge shall order a hearing on revocation. The order must require the defendant to appear at a specified time and place for the hearing. A copy of the petition and the order setting the hearing shall be personally served by the Tribal Police or by certified mail. The Drug Court Judge may also issue an arrest warrant directing any peace officer or probation officer to arrest the defendant and bring the defendant before the court.

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Powers of Probation Officers: Mashantucket Pequot

- 2 Mashantucket Pequot Tribal Laws ch. 1, § 25 Probation
 - d. Tribal probation officers and other persons may file complaints with the tribal prosecutor for alleged violations of probation. The tribal prosecutor may apply for an arrest warrant for persons alleged to be in violation of probation. After arrest or upon notice of an alleged violation of probation, whichever is later, a probation revocation hearing shall be held.

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Tribes with Probation Officer Arrest Authority

- Choctaw Nation in Oklahoma
- Confederated Tribes of the Chehalis Reservation
- Sac and Fox Nation
- Sault Ste. Marie Tribe of Chippewa
- Seminole Nation of Oklahoma
- Swinomish Indian Tribal Community

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Tribes with Probation Officer Conditional Arrest Authority

- Cherokee Nation of Oklahoma
- Port Gamble S'Klallam Tribe
- Suquamish Tribe
- Tulalip Tribes of Washington

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Tribes with no Probation Officer Arrest Authority

- Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation
- Chitimacha Tribe of Louisiana
- Confederated Tribes of the Umitila Indian Reservation
- Eastern Band of Cherokee Indians in North Carolina
- Grand Traverse Band of Ottawa and Chippewa Indians
- Kickapoo Tribe of Oklahoma
- Little Traverse Bay Band of Odawa Indians
- Lower Elwha Klallam Tribe
- Muscogee (Creek) Nation
- Nottawaseppi Huron Band of the Potawatomi
- Pascua Yaqui Tribe
- Santa Clara Pueblo
- Standing Rock Sioux Tribe

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Conclusions

- Probationers have greatly reduced rights; conditions of probation may supersede acknowledged rights (Constitutional, ICRA, or Tribal)
- Probation officers have those powers conferred upon them by Tribal Government; look to Tribal Code to determine arrest authority

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Questions?

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