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Anarchy in the tribal border regions – How do federal and state governments handle transnational crime prevention and enforcement in Tribal Border Regions?

Aji M. Drameh

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE UNITED STATES COAST GUARD

ISSUE: ANARCHY IN THE TRIBAL BORDER REGIONS – How do federal and state governments handle transnational crime prevention and enforcement in Tribal Border Regions?

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Fall Semester, 2016

Table of Contents

Bibliography 5

I. Introduction..... 8

 A. Scope..... 8

 B. Summary of Conclusions 8

 i. Question: What are the appropriate charges to bring against smugglers who use Tribal Border Regions to traffic contraband? Answer: Perpetrators trafficking contraband through Tribal Border Regions are charged with smuggling. 8

 ii. Question: Who can apprehend smugglers using Tribal Border Regions to traffic contraband? Answer: Depending on the territory, these smugglers can be apprehended by United States Coast Guard officials, Royal Canadian Mounted Police officers, Tribal law enforcement, or Bureau of Indian Affairs officers..... 9

 iii. Question: Who should prosecute smugglers using Tribal Border Regions to traffic contraband? Answer: Depending on the jurisdiction of arrest, the United States Attorney or the Crown Attorney prosecutes smugglers trafficking contraband through Tribal Border Regions. 9

 iv. Question: How does smuggling contraband through Tribal Border Regions on land compare with Tribal Border Regions on water in terms of legality, crime enforcement, and prevention? Answer: On land when smugglers traffic contraband through Tribal Border Regions they can be apprehended by Tribal law enforcement, Bureau of Indian Affairs officers, the United States Border Patrol, or Royal Canadian Mounted Police officers (should pursuits continue onto land), and smugglers are prosecuted by the United States Attorney. On water when smugglers traffic contraband through Tribal Border Regions they can be apprehended by United States Coast Guard officials or Royal Canadian Mounted Police officers, and smugglers are prosecuted by the United States Attorney or the Crown Attorney. 10

II. Factual Background 12

 A. The United States Coast Guard (USCG) 12

 i. Mission..... 12

 ii. Law Enforcement Authority 13

➤ Title 14 Section 89 and Title 14 Section 99.....	13
iii. Jurisdiction.....	15
➤ Duty to Protect U.S. Waters and Fourth Amendment Concerns ..	15
B. United States Anti-Smuggling Laws	17
➤ Title 18 Section 545 and Title 18 Section 554.....	18
C. Tribal Law.....	18
i. Terms to Consider.....	19
1. Indian	19
2. Indian Tribe.....	21
3. Indian Country	22
ii. Tribal Jurisdiction	22
1. General Crimes Act.....	24
2. Major Crimes Act	25
3. Public Law 280	26
4. General Workings of Policing in Indian Country	27
D. The Bureau of Indian Affairs (BIA)	28
i. Bureau of Indian Affairs’ Law Enforcement Responsibilities	29
ii. Bureau of Indian Affairs’ Jurisdiction to Arrest and Prosecute.....	30
E. Smuggling Meets Tribal Law	31
F. The Royal Canadian Mounted Police (RCMP)	33
G. Integrated Cross-Border Maritime Law Enforcement Operations (Shiprider).....	34
i. How It Works.....	34
ii. Jurisdiction to Arrest and Prosecute	36

III.	Legal Analysis	38
	A. Conclusion I. Question: What are the appropriate charges to bring against smugglers who use Tribal Border Regions to traffic contraband? Answer: Offenders trafficking contraband through Tribal Border Regions are charged with smuggling as a federal crime and not a tribal crime because of a major federal interest in border security.....	38
	B. Conclusion II. Question: Who can apprehend smugglers using Tribal Border Regions to traffic contraband? Answer: Pursuant to authority declared in Title 14 under the United States Code, on U.S. water the United States Coast Guard can apprehend smugglers, and according to Title 14 and 25, on U.S. land tribal law enforcement officers, Bureau of Indian Affairs officers, and/or the U.S. Border Patrol can apprehend smugglers. The Shiprider program allows designated Royal Canadian Mounted Police officers to apprehend smugglers from Canada into the U.S. both on land and water.....	39
	C. Conclusion III. Question: Who should prosecute smugglers using Tribal Border Regions to traffic contraband? Answer: Pursuant to agreement between the U.S. and Canada, when smugglers trafficking contraband through Tribal Border Regions are arrested in U.S. territory the U.S. Attorney prosecutes them, and when these smugglers are arrested in Canadian territory the Crown Attorney prosecutes them.....	42
	D. Conclusion IV. Question: How does smuggling contraband through Tribal Border Regions on land compare with Tribal Border Regions on water in terms of legality, crime enforcement, and prevention? Answer: According to On U.S. land, tribal law enforcement, Bureau of Indian Affairs officers, the United States Border Patrol, and/or Royal Canadian Mounted Police officers apprehend smugglers, and if arrested, the United States Attorney prosecutes smugglers. On U.S. water, United States Coast Guard officials and/or Royal Canadian Mounted Police officers apprehend smugglers, and if arrested, the United States Attorney prosecutes smugglers. If USCG pursuit continues on to Canadian water resulting in arrest, the Crown Attorney prosecutes smugglers.	44
IV.	Review of Topic and Findings.....	45

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I. Introduction

A. Scope

This memorandum discusses how the United States Coast Guard can tackle the issue of perpetrators smuggling illegal items across the border between the United States and Canada, while crossing through Native American territory.¹ Specifically, this memorandum considers how American Indian Law interacts with traditional American federal and state law in regards to smuggling. When delving into this topic it is important to consider how American Indian Law, American federal and state law, and Canadian Law all intermingle. This memorandum concludes that smuggling across the United States border is a major federal interest, which therefore gives the United States Federal Government jurisdiction to investigate and prosecute offenders. Therefore, American Indian Law plays a role when apprehending and sometimes investigating offenders, but fades into the background when prosecuting criminals guilty of this federal offense. However, in order to understand why that is, and also the workings of Tribal Law, this memorandum will still break down how crime is dealt with in Tribal Border Regions alongside U.S. laws. Furthermore, this memorandum explores territorial as well as subject matter jurisdiction for the U.S. Coast Guard in regard to arresting, detaining, and prosecuting perpetrators who smuggle contraband both in and out of the United States.

B. Summary of Conclusions

i. Question: What are the appropriate charges to bring against smugglers who use Tribal Border Regions to traffic contraband?

¹ U.S. Coast Guard Question: An on-going problem is how federal and state governments should handle transnational crime prevention and enforcement in Tribal Border Regions. It is unclear how we legally combat cross border crimes involving indigenous border communities facilitating smuggling of weapons, drugs, humans and alcohol. For example, what are the appropriate charges to bring against smugglers who use the Tribal Border Regions to traffic contraband? Who can apprehend these smugglers? Who should prosecute these smugglers? How does smuggling contraband through Tribal Border Regions on land compare with Tribal Border Regions on water in terms of legality, crime enforcement, and prevention?

Answer: Perpetrators trafficking contraband through Tribal Border Regions are charged with smuggling.

When criminals traffic contraband through Tribal Border Regions, be they Indian or non-Indian, the offense holds the same weight as if the person were to traffic contraband through United States territory outside of Tribal land. Smuggling is still considered a federal offense within American Indian territory and thus violators will be arrested and charged accordingly.

- ii. Question: Who can apprehend smugglers using Tribal Border Regions to traffic contraband? Answer: Depending on the territory, these smugglers can be apprehended by United States Coast Guard officials, Royal Canadian Mounted Police officers, Tribal law enforcement, or Bureau of Indian Affairs officers.**

When apprehending perpetrators trafficking contraband cross-border through Tribal Border Regions, officials of several different law enforcement agencies can apprehend offenders. On the water the United States Coast Guard (USCG) can apprehend smugglers, and so can the Royal Canadian Mounted Police (RCMP) should they be serving on Shiprider vessels. On land, either in Tribal territory or on the shores of Tribal territory, smugglers can also be apprehended by the USCG or RCMP, as well as by Tribal law enforcement officers, the United States Border Patrol, or Bureau of Indian Affairs officials. All of these listed agencies have the authority to arrest and detain smugglers moving through Tribal Border Regions.

- iii. Question: Who should prosecute smugglers using Tribal Border Regions to traffic contraband? Answer: Depending on the jurisdiction of arrest, the United States Attorney or the Crown Attorney prosecutes smugglers trafficking contraband through Tribal Border Regions.**

The federal governments of both the United States and Canada have jurisdiction to prosecute all smugglers using Tribal Border Regions, if offenders are arrested in their jurisdiction. Prosecuting jurisdiction for offenders can still vary on a case-by-case basis, but the

general workings of American and Canadian law set the standard that whichever jurisdiction offenders are arrested and detained in is the jurisdiction that has the authority to prosecute them.² Specifically, in the United States the U.S. Attorney of the applicable district, under the Department of Justice, would prosecute offenders, and in Canada the Crown Attorney of the applicable province, under the Minister of Justice, would prosecute offenders.

The U.S. Attorney can prosecute Indian offenders smuggling within Tribal Border Regions so long as prosecution does not violate tribal rights.³ Even though Tribal Border Regions have their own laws and jurisdiction, their jurisdiction does not apply to smuggling cases because of the nature of the offense of smuggling. Smuggling is considered a “victimless crime” because it is a crime against the United States as a party and no individual suffers. Federal prosecution can happen on Tribal land for victimless crimes regardless of whether the perpetrator is Indian or not. However, Tribal law enforcement officers and Bureau of Indian Affairs (BIA) officers still have jurisdiction to arrest these smugglers and they can assist the Department of Justice in their investigations of smuggling crimes happening in Tribal Border regions; but due to a lack of subject-matter jurisdiction neither Tribal law enforcement officers nor BIA officers can prosecute offenders.

- iv. Question: How does smuggling contraband through Tribal Border Regions on land compare with Tribal Border Regions on water in terms of legality, crime enforcement, and prevention? Answer: On land when smugglers traffic contraband through Tribal Border Regions they can be apprehended by Tribal law enforcement, Bureau of Indian Affairs officers, the United States Border Patrol, or Royal Canadian Mounted Police officers (should pursuits continue onto land), and smugglers are prosecuted by the United States Attorney.**

² Occasionally special cases arise such as massive smuggling operations, in which case The United States Department of Justice and The Canadian Department of Justice must communicate and negotiate how to tackle the problem. (Interview with Lieutenant Michael Walker of the United States Coast Guard Cleveland Branch)

³ See *infra* note 66 and accompanying text.

On water when smugglers traffic contraband through Tribal Border Regions they can be apprehended by United States Coast Guard officials or Royal Canadian Mounted Police officers, and smugglers are prosecuted by the United States Attorney or the Crown Attorney.

When perpetrators traffic contraband on land through Tribal Border Regions they may encounter Bureau of Indian Affairs (BIA) officers, Tribal law enforcement officers, or the United States Border Patrol (USBP).⁴ BIA and Tribal law enforcement officers as well as the USBP have authority to pursue, arrest, and detain offenders.⁵ There is no specific program in place, but the United States and Canada are still working together to combat smugglers on land without violating sovereignty of either country.⁶ When perpetrators traffic contraband through Tribal Border Regions on the water the United States Coast Guard (USCG) has primary jurisdiction and authority because of these regions being located within U.S. territorial waters. USCG officials have the authority, under statutory regulations⁷, to stop and search any vessel within American waters as well as to make arrests. Thus, when offenders attempt to traffic contraband while on water, the USCG can arrest and detain them. When pursuing offenders from the water onto Tribal land, USCG officials still have jurisdiction to continue the pursuit into such territory and make arrests. The Shiprider program agreement between the U.S. and Canada gives USCG officials authority to continue to pursue offenders past U.S. territorial waters and into Canadian

⁴ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS: NATIONAL INSTITUTE OF JUSTICE (U.S.) ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2000), <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 31].

⁵ *Id.*

⁶ Beyond the Border Action Plan: Progress Report on Facilitating the Conduct of Cross-Border Business, GOVERNMENT OF CANADA (2013), <http://www.cic.gc.ca/english/resources/publications/cross-border.asp> (last visited Nov 28, 2016). [Electronic copy provided in accompanying USB flash drive at Source 34].

⁷ See statute cited *infra* note 12.

territorial waters to arrest and detain them.⁸ Furthermore, although the USCG primarily enforces laws on the sea, while in hot pursuit of a smuggler on water, the USCG has authority under Shiprider to continue pursuing offenders into Canadian waters and onto land adjacent to the waters where pursuit began.

II. Factual Background

When considering the criminal procedure regarding smugglers trafficking contraband across the United States border through Tribal Border Regions many separate parties are at play. First, one must understand the duties, responsibilities, law enforcement authority, and jurisdiction of the United States Coast Guard. Second, one must read and understand the United States Anti-Smuggling Laws to tie into the USCG's authority and responsibilities. Third, one must analyze the Tribal legal system and its effects on sovereignty of the U.S., criminal laws, criminal procedure, and law enforcement. Fourth, one must consider the relationship between the Tribal legal system and the U.S. federal legal system with regard to smuggling. Finally, since smuggling through Tribal Border Regions typically happens at the Northern border of the U.S., one must consider U.S. and Canadian sovereignty regarding jurisdiction and authority both on land and on water.

A. The United States Coast Guard

i. Mission

The United States Coast Guard (USCG) is a military branch under the Department of Homeland Security that is responsible for several maritime duties performed in order to defend

⁸ See *infra* note 105 and accompanying text.

United States borders and protect the maritime environment.⁹ The USCG performs eleven official missions¹⁰ all of which assist officials in their overall goal to promote national security. Two of the major responsibilities of the USCG are to enforce federal laws and regulations and to pursue violators of these laws and regulations. The USCG is subject to Title 14 of the United States Code (USC), which gives them the power and jurisdiction to perform their duties and enforce federal laws.¹¹ The primary duties of the USCG are outlined in the USC under Section 2 of Title 14, which states:

The Coast Guard shall:

(1) Enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States... (3) Administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States, covering all matters not specifically delegated by law to some other executive department.¹²

ii. Law Enforcement Authority

Two statutes within Title 14 define the responsibilities of the USCG regarding its law enforcement authority. These statutes give the USCG authority and jurisdiction to pursue and arrest offenders attempting to traffic contraband.

➤ Title 14 Section 89 and Title 14 Section 99

Under Title 14 Section 89 of the USC the law enforcement of the USCG is defined as follows:

⁹ United States Coast Guard, USCG: A MULTI-MISSION FORCE GOCOASTGUARD.COM, <http://www.gocoastguard.com/about-the-coast-guard/discover-our-roles-missions> (last visited Nov 3, 2016).

¹⁰ These eleven missions are Port & Waterway Security, Drug Interdiction, Aids to Navigation, Search & Rescue, Living Marine Resources, Marine Safety, Defense Readiness, Migrant Interdiction, Marine Environmental Protection, Ice Operations, and Law Enforcement (*Supra* note 9).

¹¹ See statute cited *infra* note 13.

¹² 14 USC §2 (1946). [Electronic copy provided in accompanying USB flash drive at Source 1].

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States...Officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board...examine, inspect, and search the vessel and use all necessary force to compel compliance. When...it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel...liable to forfeiture...such vessel or such merchandise, or both, shall be seized.¹³

Section 89 also declares that the officers of the USCG in enforcing any law of the United States shall be acting as agents of the executive department charged with administration of the laws, and are thus subject to all the rules and regulations promulgated by such department with respect to the enforcement of the law.¹⁴ Therefore, the USCG represents the federal government, or more specifically the Department of Homeland Security, in executing their duties and they are to abide by the rules and regulations revolving around the law enforcement activities of such department.

Under Section 99 of Title 14, the USCG's enforcement authority is defined. This section states:

Subject to guidelines approved by the Secretary¹⁵, members of the Coast Guard, in the performance of official duties, may-

(A) make an arrest without warrant for any offense against the United States committed in their presence; and

(B) seize property as otherwise provided by law.¹⁶

¹³ 14 USC §89 (1950). [Electronic copy provided in accompanying USB flash drive at Source 3].

¹⁴ *Id.*

¹⁵ "In this title, the term "Secretary" means the Secretary of the respective department in which the Coast Guard is operating" (14 USC §4 (1950)). [Electronic copy provided in accompanying USB flash drive at Source 2].

¹⁶ 14 USC §99 (2010). [Electronic copy provided in accompanying USB flash drive at Source 4].

Section 99 reinforces the USCG's authority to arrest anyone who commits a crime in their presence without a warrant and to seize any property they feel is in violation of laws.

iii. Jurisdiction

The United States Coast Guard (USCG) is the border water patrol for the United States. Its duty is to protect the safety and security interests of the United States by enforcing U.S. laws on our shores and in U.S. boundary waters.¹⁷ Understanding the jurisdiction and enforcement of the USCG helps break down why its officers have the authority to apprehend smugglers trafficking through Tribal Border Regions.

➤ Duty to Protect U.S. Waters and Fourth Amendment Concerns

In the past there have been questions as to the United States Coast Guard's authority on water in terms of stopping and searching vessels crossing in and out of U.S. waters. As stated earlier in Part II (A)(ii)¹⁸ of the memorandum, the USCG gets its law enforcement authority from the United States Code under Section 89 and 99 of Title 14, which states the USCG has the authority to search any vessel that they feel is violating or planning to violate any laws. However, concerns in the right to privacy have come up and the Supreme Court has addressed these issues through court rulings and decisions. Parties have challenged the USCG's right to stop and board vessels as well as to search them under the Fourth Amendment of the United States Constitution.¹⁹

¹⁷ 14 USC §2(3) (1946). [Electronic copy provided in accompanying USB flash drive at Source 1].

¹⁸ See discussion *supra* Part II.A.ii.

¹⁹ 4th Amendment states under searches and seizures and warrants that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const. Amend IV) [Electronic copy provided in accompanying USB flash drive at Source 17].

Under 14 USC §89 and 14 USC §99 the USCG is given authority to stop and search vessels and make arrests without a warrant in the case of finding criminal law offenses. This authority was challenged in the case of *United States v. Williams*. The defendant was convicted before the United States District Court for the Southern District of Alabama of conspiring to import marijuana and he appealed, but the United States Eleventh Circuit Court of Appeals affirmed the conviction. The Court of Appeals held that:

(1) [The] Coast Guard has statutory authority to seize a foreign vessel in international waters if it has a reasonable suspicion that those aboard the vessel are engaged in a conspiracy to smuggle contraband into the United States...(4) seizure on reasonable suspicion satisfies [the] Fourth Amendment, although reasonable suspicion may not be the minimum standard for seizures on the high seas; (5) even if defendant had some cognizable privacy interest in area of the hold where marijuana was found, the Coast Guard had reasonable grounds to suspect that marijuana would be found therein; (6) search warrant requirement does not apply to searches such as that at issue; and (7) even if search and seizure violated international law, the violation did not deprive federal courts of jurisdiction or require application of the exclusionary rule.²⁰

The court observed that §89 provided statutory authority for the stop of a foreign vessel on the high seas. The court held that the statutory authority was “not limited on its face to American flag vessels,”²¹ because U.S. jurisdiction included any offense that had an effect within the United States.²² Thus a conspiracy to smuggle illegal goods into the U.S. aboard a foreign vessel on the high seas would subject that vessel to U.S. jurisdiction and Coast Guard boarding. However, before boarding a foreign vessel outside of U.S. territorial waters, the court required the Coast Guard to have at least a reasonable suspicion that the vessel was subject to American

²⁰ *United States v. Williams*, 617 F.2d 1063 (1980). [Electronic copy provided in accompanying USB flash drive at Source 27].

²¹ Greg Shelton, *THE UNITED STATES COAST GUARD'S LAW ENFORCEMENT AUTHORITY UNDER 14 U.S.C. § 89: SMUGGLERS' BLUES OR BOATERS' NIGHTMARE?*, WILLIAM AND MARY LAW REVIEW, p. 34, (1993), [Westlaw]. [Electronic copy provided in accompanying USB flash drive at Source 30].

²² *Id.*

law.²³ In *Williams*, the prior sighting of the vessel combined with events occurring shortly after the Coast Guard contacted the vessel by radio, passed the necessary suspicion standard.²⁴ The court also validated the authority to stop under §89 by referring to the history of the statute, the difference in the necessity of stops of land vehicles and water vessels, and similar authority granted by international law.²⁵ *Williams* helped to set the standard that the USCG has broader authority beyond the Fourth Amendment because when Williams tried to argue for a violation of his Fourth Amendment rights the court noted that a privacy interest could not prevail since the intrusion was minimal and necessary.²⁶ On this basis, it was reasonable to conclude that with regard to smugglers trafficking contraband through the U.S., the USCG has a broad authority to stop and search any person or vessel committing this crime as well as to arrest them. Later on in the memorandum I will explain why and how this jurisdiction applies to Tribal Border Regions.²⁷

B. United States Anti-Smuggling Laws

When United States Coast Guard officials arrest offenders attempting to smuggle items into and out of the United States, they act under USC Title 18 Sections 545 and 554, which define the crime of smuggling into and out of the United States as well as its consequences. These laws establish that smuggling is a heavy federal crime that is subjected to federal jurisdiction even when committed in Tribal Border Regions.

²³ *Id.*

²⁴ *United States v. Williams*, 617 F.2d 1063 (1980). [Electronic copy provided in accompanying USB flash drive at Source 27].

²⁵ Shelton, *supra* note 21.

²⁶ *United States v. Williams*, 617 F.2d 1063 (1980). [Electronic copy provided in accompanying USB flash drive at Source 27].

²⁷ See discussion *infra* Part II.E and Part III.B.

➤ **Title 18 Section 545 and Title 18 Section 554²⁸**

Title 18 Section 545 defines the crime of smuggling goods into the United States and its punishment and criminal process. This section states:

(a) Whoever knowingly and willfully, with intent to defraud the United States, smuggles...or attempts to smuggle...into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or (b) Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation...Shall be fined under this title or imprisoned not more than 20 years, or both. (c) Proof of defendant's possession of such goods...shall be deemed evidence sufficient to authorize conviction for violation of this section...²⁹

Title 18 Section 554 defines the crime of smuggling goods out of the United States and the subsequent consequence. This section states:

(a) ...Whoever fraudulently or knowingly exports or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or object contrary to any law or regulation of the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States, shall be fined under this title, imprisoned not more than 10 years, or both.³⁰

C. Tribal Law

American Indian lands and reservations act almost as foreign states when considered in connection with the federal-state governmental structure. American Indians practice certain traditions and norms, and with federally registered reservations, those Indians in those territories

²⁸ Under Section 546 of Title 18 smuggling contraband out of the U.S. and into foreign countries is also outlined as a criminal offense with subsequent punishments [18 USC §546 (1948)].

²⁹ 18 USC §545 (1954). [Electronic copy provided in accompanying USB flash drive at Source 5].

³⁰ 18 USC §554 (2006). [Electronic copy provided in accompanying USB flash drive at Source 6].

are all entitled to their lands under federal regulations. Therefore, certain lands have certain laws that the Indians of those territories abide by as part of their functioning society. In order to understand why the federal government has jurisdiction over smuggling crimes one must consider how Tribal law interacts with federal law.

i. Terms to Consider

“Fundamental to American Indian law are the terms “Indian,” “Indian tribe,” and “Indian Country.””³¹ For purposes of criminal law the existence of federal, state, or tribal jurisdiction depends on where the crime occurred—i.e. whether it occurred in Indian Country—and the status of the defendant, or in some cases the victim, as “Indian” or “non-Indian”. Additionally, there is a system in place for how Indian tribes are federally recognized in the United States. Only federally recognized Indian tribes can have their legal systems recognized by individual state governments. Below are some clarifications of the essential terms—Indian, Indian tribe, and Indian country—to help explain the Tribal legal system.

1. Indian

The question of who is an “Indian” depends largely on the context in which an issue arises. For criminal and many civil law purposes the traditional common law definition controls.³² Traditionally the term “Indian” is often referred to as a race, which caused problems for American Indians because some of them had no conception of race prior to Euro-American contact.³³ When census surveys have been conducted in the past many people indicated that they

³¹ Larry Long, *Chapter 2: Indian, Indian Tribe, and Indian Country*, in *AMERICAN INDIAN LAW DESKBOOK* 48–78, p. 48 (Clay Smith ed., 4 ed. 2008). [Electronic copy provided in accompanying USB flash drive at Source 28].

³² *Id.*

³³ *Id.*

were one-race Indian, multiple-race Indian, or had Indian ancestry.³⁴ One caveat regarding federal law and the definition of “Indian” is that for the purposes of federal Indian law, whether or not a person is an “Indian” may create a special relationship between such person and the federal government by virtue of the government’s obligation.³⁵ Such a relationship together with attending federal regulation is “rooted in the unique status of [an Indian tribe] as a ‘separate people’ with [its] own political institutions.”³⁶ In *United States v. Rogers* the Supreme Court provided structure to this broad concept by holding that:

For purposes of federal criminal jurisdiction, “Indian” status requires more than simple political affiliation, but additionally includes a racial, or ancestral, component. The court thus deemed a white man, who had moved into Indian territory “at a mature age” and adopted the customs of the Cherokee Nation, not an Indian and not eligible to take advantage of an exclusion from federal prosecution for murder for “crimes committed by one Indian against the person or property of another Indian.” It reasoned that “the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race” and “does not speak of members of a tribe, but of the race generally—of the *family of Indians*; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.”³⁷

Courts have struggled with the proper handling of Indian ancestry as a component of Indian status.³⁸ Nonetheless, various federal statutes have defined the term “Indian” for civil administrative purposes.³⁹ Many require tribal membership or eligibility for membership⁴⁰, but one of the most basic, Section 19 of the Indian Reorganization Act (IRA), states:

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at page 50.

³⁷ *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). [Electronic copy provided in accompanying USB flash drive at Source 26].

³⁸ Long, *supra* note 31 at page 49.

³⁹ Long, *supra* note 31 at page 53.

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.⁴¹

For purposes of the IRA’s provisions an “Indian” includes tribal members and those of “one-half or more Indian blood.” Thus, tribal membership is not a prerequisite to Indian status under Section 19⁴² and Indians living on reservations independent of tribes may claim tribal legal rights.

2. Indian Tribe

Since 1979 the Department of the Interior has published listings of federally recognized tribes.⁴³ Tribal status is a “prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.”⁴⁴ “Status as a federally recognized Indian tribe preempts application of many state laws with respect to activities occurring on land set aside for the tribe’s use and tribes possess broad common law immunity from unconsented suits in federal and state courts.”⁴⁵ The Supreme Court defined “tribe” as “a body of Indians of the same or similar race, united in a community under one leadership or

⁴⁰ Long, *supra* note 31 at page 53.

⁴¹ 25 USC §5129 (1934). [Electronic copy provided in accompanying USB flash drive at Source 16].

⁴² The term “Indian” is separate from the term “tribal member” which identifies a person accepted into membership of a recognized Indian Tribe (a status tribes themselves determine). [Larry Long, *Chapter 2: Indian, Indian Tribe, and Indian Country*, in *AMERICAN INDIAN LAW DESKBOOK* 48–78, p. 49 (Clay Smith ed., 4 ed. 2008).]

⁴³ Long, *supra* note 31 at page 61.

⁴⁴ Long, *supra* note 31 at page 61.

⁴⁵ Long, *supra* note 31 at pages 61-62.

government, inhabiting a particular though sometimes ill-defined territory.”⁴⁶ Additionally, there are sixteen states that currently have recognized tribes independent of the federal government.⁴⁷

Only registered tribes can have their Tribal legal systems recognized.

3. Indian Country

Defining the existence of Indian country “is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.”⁴⁸ The term “Indian country” is defined for most federal criminal law purposes under the United States Code, which states:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, 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.⁴⁹

The Supreme Court uses this definition to determine the geographical reach of state and tribal jurisdictions. Therefore, the “Indian country” definition is relevant to each aspect of Indian law unless other law displaces it.⁵⁰

ii. Tribal Jurisdiction

⁴⁶ *Montoya v. United States*, 180 U.S. 261, 266 (1901). [Electronic copy provided in accompanying USB flash drive at Source 21].

⁴⁷ Long, *supra* note 31 at page 67.

⁴⁸ *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm’n*, 829 F.2d 967, 973 (10th Cir. 1987). [Electronic copy provided in accompanying USB flash drive at Source 20].

⁴⁹ 18 USC §1151 (1948). [Electronic copy provided in accompanying USB flash drive at Source 7].

⁵⁰ Long, *supra* note 31 at page 69.

Understanding why federal jurisdiction applies to smuggling in Tribal Border Regions requires the consideration of Tribal jurisdiction as it applies normally to legal situations on Tribal land. In both civil and criminal law, tribal law usually governs when involving Indians on Indian Territory. Federal Statutes generally look to the nature of the offense, location of the offense, and the Indian/non-Indian status of the offender and victim in allocating criminal jurisdiction among federal, state, and tribal authorities. Jurisdiction over crimes committed in Indian country is primarily governed by several federal statutes: (1) the General Crimes Act; (2) the Major Crimes Act; and (3) Public Law 280.^{51 52} Past debates over whether tribes had jurisdiction over nonmember Indians committing crimes against member Indians were settled after the decision in *Duro v. Reina*,⁵³ where the Supreme Court held that “tribes lack inherent authority to prosecute nonmember Indians for offenses committed against members, equating the nonmember Indian’s status to that of non-Indians.”⁵⁴ The *Duro* Court’s conclusion relied on the principle that tribal authority to prosecute member Indians “comes from the consent of its members.”⁵⁵ In response to the decision in *Duro*, Congress amended the Indian Civil Rights Act⁵⁶ to restore Tribal

⁵¹ Larry Long, *Chapter 4: Criminal Law*, in AMERICAN INDIAN LAW DESKBOOK, 141-168, p. 141-142 (Clay Smith ed., 4 ed. 2008). [Electronic copy provided in accompanying USB flash drive at Source 29].

⁵² Also worth noting is the Federal Juvenile Delinquency Act. This Act places most juveniles offenses committed by Indians within Indian country under tribal jurisdiction. If a juvenile offense would fall under the provisions of the General Crimes Act or the Major Crimes Act, the federal government may choose to adjudicate the juvenile in federal court under the Federal Juvenile Delinquency Act. (18 USC §§5031 – 5037) [Larry Long, *Chapter 4: Criminal Law*, in AMERICAN INDIAN LAW DESKBOOK, 141-168, p. 149-150 (Clay Smith ed., 4 ed. 2008). [Electronic copy provided in accompanying USB flash drive at Source 29].]

⁵³ *Duro v. Reina*, 495 U.S. 676 (1990). [Electronic copy provided in accompanying USB flash drive at Source 18].

⁵⁴ Long, *supra* note 51 at page 151.

⁵⁵ *Duro*, *supra* 693 at 45.

⁵⁶ 25 USC §§1301-1303. [Electronic copy provided in accompanying USB flash drive at Sources 11, 11.2, and 11.3].

criminal jurisdiction over nonmember Indians.⁵⁷ Congress amended the Act by modifying the definition of “powers of self-government”⁵⁸ to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”⁵⁹ The federal statutes that govern Tribal lands clarify issues of federal jurisdiction over smuggling through Tribal Border Regions. Additionally, law enforcement jurisdiction within Tribal lands plays a major role in the legal process of combatting smuggling in Tribal Border Regions.

1. General Crimes Act⁶⁰

The General Crimes Act (18 USC §1152 (1940)) reads:

(a) 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.

(b) 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.⁶¹

The term “general laws” in the first paragraph refers only to “those laws, commonly known as federal enclave laws, which are criminal statutes enacted by Congress under its admiralty, maritime, and property powers, governing enclaves such as national parks.”⁶² However, the United States Ninth Circuit Court of Appeals in *United States v. Mitchell* declared that “general

⁵⁷ Long, *supra* note 51 at page 151.

⁵⁸ 25 USC §1301(2) (1968). [Electronic copy provided in accompanying USB flash drive at Source 11].

⁵⁹ *Id.*

⁶⁰ Also sometimes referred to the Federal Enclave Act [18 USC §1152 (1940)]. [Electronic copy provided in accompanying USB flash drive at Source 5].

⁶¹ 18 USC §1152 (1940). [Electronic copy provided in accompanying USB flash drive at Source 5].

⁶² *United States v. Cowboy*, 694 F.2d 1228, 1234 (10th Cir. 1982). [Electronic copy provided in accompanying USB flash drive at Source 22].

laws of the United States which constitute federal crimes regardless of where committed”⁶³ are not included under the term “general laws”.⁶⁴ Nonetheless:

The general rule is that a federal statute of nationwide applicability that is otherwise silent on the question of jurisdiction as to Indian tribes “will not apply to them if: (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations....’ ”⁶⁵

The *Mitchell* Court’s declaration has been upheld as the standard. “Non-enclave laws operate independently of the General Crimes Act and apply unless they violate rights guaranteed by a treaty or rights essential to tribal self-government; [and] even then, the law will apply if it specifically [convinces] Congressional intent to interfere with those rights.”⁶⁶ Most recently the Supreme Court has held that crimes committed by non-Indians against non-Indians are not subject to the General Crimes Act, and that the Indian-against-Indian exception to the Act does not apply when federally prosecuting victimless crimes committed by Indians.⁶⁷ Therefore, it is logical to conclude that smuggling through Tribal Border Regions being a “victimless” crime, because it is against the U.S. as a party, is not subjected to the General Crimes Act.

2. Major Crimes Act

⁶³ *United States v. Mitchell*, 502 F.3d 931, 947-49 (9th Cir. 2007). [Electronic copy provided in accompanying USB flash drive at Source 25].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Long, *supra* note 51 at page 143.

⁶⁷ Long, *supra* note 51 at pages 145-146.

The initial version of the Major Crimes Act was adopted over a century ago (in the late 1800s)⁶⁸ following a court decision in *Ex parte Crow Dog*,⁶⁹ which vacated a murder conviction, subjected to the General Crimes Act where an Indian had murdered another, on the basis of the Act's Indian-against-Indian exception.⁷⁰ The Major Crimes Act makes it unlawful for an Indian to commit certain crimes in Indian country, and such crimes will result in federal punishment or otherwise state punishment. The Act provides:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses...murder...kidnapping, maiming... arson, burglary...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.⁷¹

Although the enumeration of crimes in the Major Crimes Act implies exclusion of those crimes not enumerated, the enumeration covers a broad range of felonies.⁷² The Major Crimes Act proceeds away from the General Crimes Act in that it does not apply to non-Indians and it omits the tribal law punishment and Indian-against-Indian exceptions. The Major Crimes Act clarifies how smuggling through Tribal Border Regions is a major offense and thus cannot fall within the jurisdiction of Tribal government.

3. Public Law 280

⁶⁸ Long, *supra* note 51 at page 147.

⁶⁹ *Ex parte Crow Dog*, 109 U.S. 556 (1883). [Electronic copy provided in accompanying USB flash drive at Source 19].

⁷⁰ Larry Long, *Chapter 4: Criminal Law*, in AMERICAN INDIAN LAW DESKBOOK, 141-168, p. 147 (Clay Smith ed., 4 ed. 2008). [Electronic copy provided in accompanying USB flash drive at Source 29].

⁷¹ 18 USC §1153 (1940). [Electronic copy provided in accompanying USB flash drive at Source 5].

⁷² Long, *supra* note 70.

When considering smuggling through Tribal Border Regions, Public Law 280 cannot apply because smuggling is a federal offense. Thus, states have the jurisdiction only to arrest offenders, not to prosecute them. Congress enacted Public Law 280 in 1953 to address the problem of lawlessness on certain reservations and the absence of adequate law enforcement for tribal institutions.⁷³ Public Law 280 imposes civil and criminal jurisdiction on six states for all or a portion of Indian country within them. Public Law 280 is under Title 18 of the USC and currently states:

a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory...⁷⁴

These states, rather than having Tribal laws in place, instead give the state government jurisdiction over crimes committed in Indian country. The only time that the General Crimes Act or Major Crimes Act are applicable to American Indian lands in these states are when tribes specifically request them and the Attorney General approves.

4. General Workings of Policing in Indian Country

Tribal law enforcement officers and BIA officials have authority and jurisdiction to arrest offenders trafficking contraband through Tribal Border Regions. Members of the police departments on American Indian lands serve reservation communities working under tribal,

⁷³ Long, *supra* note 70 at page 153.

⁷⁴ 18 USC §1162(a) (2010). (States Listed: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) [Electronic copy provided in accompanying USB flash drive at Source 5].

federal, state, county, or municipal jurisdiction.⁷⁵ Each reservation has its own unique way of living and thus depending on which tribe, policing can be different. The police departments serving the majority of reservations are administered either by the Bureau of Indian Affairs (BIA) or by tribes through a contractual agreement with the BIA.⁷⁶ “The criminal justice system within which departments operate is similar to that of non-Indian communities, except for the stricter limits on tribal jurisdiction and the more prominent role of Federal agencies.”⁷⁷

D. Bureau of Indian Affairs

Since the BIA is a large part of Tribal lands, how the agency works within the legal system of Tribal Border Regions is a necessary consideration. The United States has a complex legal and political relationship with American Indian tribes and Alaska Native entities as provided by the U.S. Constitution, treaties, court decisions and federal statutes. The Bureau of Indian Affairs (BIA) is a bureau within the United States Department of the Interior that provides services—directly or through contracts, grants, or compacts—to American Indians and Alaska Natives, and the millions of acres of land held in trust by the United States for such groups. The BIA’s mission is to do what is necessary “to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.”⁷⁸ The Indian Law and Order Commission is an organization within the Bureau of Indian Affairs that works to promote law and order in

⁷⁵ OFFICE OF JUSTICE PROGRAMS: NATIONAL INSTITUTE OF JUSTICE (U.S.) ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2000), p. 7, <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 31].

⁷⁶ *Id.* at page 10.

⁷⁷ *Id.*

⁷⁸ Indian Affairs, INDIANAFFAIRS.GOV, <http://www.bia.gov/whoweare/index.htm> (last visited Nov 3, 2016).

American Indian territories by studying and helping to regulate the criminal justice system within Indian country.⁷⁹

i. Bureau of Indian Affairs' Law Enforcement Responsibilities

Under its responsibilities, the Bureau of Indian Affairs (BIA) has the authority to arrest smugglers crossing through Tribal lands and they are expected to assist the federal government in investigation and prosecution of such offenders. According to the USC under Section 2802 of Title 25, the Secretary of the Interior is responsible for providing and assisting in the provision of law enforcement services in Indian territories.⁸⁰ Section 2802 outlines the other responsibilities of law enforcement in Indian country, including the Office of Justice Services who works with the Secretary of the Interior to provide proper law enforcement and protection. The statute says:

Subject to the provisions of this chapter and other applicable Federal or tribal laws, the responsibilities...in Indian country shall include (1) the enforcement of Federal law and, with the consent of the Indian tribe, tribal law; (2) in cooperation with appropriate Federal and tribal law enforcement agencies, the investigation of offenses against criminal laws of the United States...⁸¹

The Bureau of Indian Affairs operates under the Department of Interior to help regulate law enforcement, the prosecution of crimes, and criminal justice on American Indian lands. Under 25 USC §2802 it has been established that the BIA isn't in place to completely manage and overtake the workings of tribal law and jurisdiction, but instead to work with tribes and their leaders to make sure that regulation and law enforcement falls in line with the goals, traditions, and cultures of American Indian tribes.⁸² Under the BIA, the Office of Justice Services and the

⁷⁹ The Indian Law and Order Commission operates under the United States Code subject to Title 25 Section 2812 [25 USC §2812 (2010)]. [Electronic copy provided in accompanying USB flash drive at Source 15].

⁸⁰ 25 USC §2802 (2010). [Electronic copy provided in accompanying USB flash drive at Source 12].

⁸¹ 25 USC §2802 (2010). [Electronic copy provided in accompanying USB flash drive at Source 12].

⁸² *Id.* at section (c)(11).

Branch of Criminal Investigations are in place to help with the prosecution of crimes on Indian country that fall under the jurisdiction of the General Crimes Act and Major Crimes Act, as well as assist states with jurisdiction under Public Law 280.⁸³ These organizations within the agency also assist the United States Department of Justice in investigating and prosecuting crimes on Indian country where the federal government has the proper jurisdiction to prosecute.⁸⁴

ii. Bureau of Indian Affairs' Jurisdiction to Arrest and Prosecute

The Secretary of the Interior can give law enforcement authority to Bureau of Indian Affairs' officials working on American Indian land. Section 2803 of Title 25 outlines the authority of such law enforcement officials. Section 2803 states that the Secretary may give BIA employees law enforcement responsibilities, and authorize these employees to execute and serve warrants—issued under the laws of the United States or an Indian tribe if authorized by the tribe—relating to a crime committed in Indian country.⁸⁵ Law enforcement employees may also, when requested, assist any federal, tribal, state, or local law enforcement agency in the execution of the laws or regulations the agency administers.⁸⁶ Under the authority of Section 2803, BIA officers can arrest offenders of U.S. federal law and sometimes offenders of tribal law.⁸⁷ As long as the officer has probable cause to believe that the person is committing or has already committed a crime, the officer can make an arrest.⁸⁸ Additionally, if a crime is committed in

⁸³ *Id.* at section (d)(1).

⁸⁴ *Id.*

⁸⁵ 25 USC §2803 (2010). [Electronic copy provided in accompanying USB flash drive at Source 13].

⁸⁶ *Id.*

⁸⁷ *Id.* at section (2).

⁸⁸ *Id.* at section (3)(D)(ii).

front of them or the officer has reason to believe an individual committed—or is in the process of committing—a felony, then the officer can make an arrest.⁸⁹

Under Section 2806 of Title 25 BIA jurisdiction over investigations of criminal law offenses is outlined. This section says that the Secretary of the Interior shall have investigative jurisdiction over offenses against criminal laws of the United States in Indian country subject to an agreement between the Secretary and the Attorney General of the United States.⁹⁰ However, “in exercising the investigative authority conferred by this section, the employees of the [BIA] shall cooperate with the law enforcement agency having primary investigative jurisdiction over the offense committed.”⁹¹ Agreements between the BIA and the Department of Justice, as well as the BIA and tribal governments, determine jurisdiction to prosecute certain offenses. With smugglers moving through American Indian lands, the Department of Justice would have prosecuting jurisdiction.

E. Smuggling Meets Tribal Law

Smuggling is ultimately a federal crime and thus most cases involve the United States Federal Government pressing charges against offenders. The federal government typically has jurisdiction over perpetrators, but when in Tribal border regions there is also Tribal jurisdiction to consider. Under Title 18 Section 545 and 554, smuggling either into or out of the United States is a federal crime. These statutes define smuggling very broadly in terms of territorial jurisdiction, so these statutes carry nationwide applicability as defined under the court’s decision

⁸⁹ *Id.* at section (3)(A)(B).

⁹⁰ 25 USC §2806 (1990). [Electronic copy provided in accompanying USB flash drive at Source 14].

⁹¹ *Id.*

in *United States v. Miller*.⁹² Smuggling has a great federal interest because of national security concerns. In the case *United States v. Miller* the defendants were indicted on charges of money-laundering conspiracies and racketeering in connection with the alleged smuggling of tobacco and alcohol from United States to Canada across an Indian reservation, and the Government sought forfeiture of cash and property. The defendants tried to argue that money laundering and wire fraud could not be subjected to federal jurisdiction because the crime occurred through an American Indian reservation. The defendants further argued that federal criminal jurisdiction did not extend to the charge of a money-laundering conspiracy because “it is neither an enumerated crime under the Federal Enclave Act nor the Major Crimes Act, and the government [had] not demonstrated that it [was] a peculiar federal crime[,] the prosecution of which would protect an independent federal interest.”⁹³ The *Miller* Court decided that for jurisdiction to be at issue an Indian must have committed the offense and non-Indian defendants could not assert that the Court lacked federal criminal jurisdiction based upon the sovereignty rights of the members of the reservation.⁹⁴ The Court further clarified that:

[T]he issue of federal criminal jurisdiction arises only when the offense occurred within Indian country...[T]he indictment alleges that the products were transported from the Reservation into Canada and then sold on the black market. Thus, to the extent the offenses occurred outside the Reservation, defendants cannot claim that the Court lacks jurisdiction over the charged money-laundering conspiracies...[E]ven to the extent that Reservation sovereignty is properly before us, it must give way to federal interests in preventing money laundering involving a scheme to defraud the United States.⁹⁵

⁹² *United States v. Miller*, 26 F.Supp.2d 415 (1998). [Electronic copy provided in accompanying USB flash drive at Source 24].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

Under the smuggling statutes in Title 18 smuggling is described as a scheme to defraud the U.S., thus making it a heavy federal concern. The court's decision in *Miller* supports the standard that when a great federal interest is involved the federal government can prosecute federal offenses as required, regardless of the location of the crime or the offender's status as an Indian or non-Indian. Therefore, smuggling through Tribal Border Regions is under federal jurisdiction.

F. Royal Canadian Mounted Police

The Royal Canadian Mounted Police (RCMP) is the Canadian national police service and an agency of the Ministry of Public Safety Canada.⁹⁶ The RCMP serves as a national, federal, provincial, and municipal policing body for Canada,⁹⁷ with a multi-faceted mandate that is outlined in Section 18 of the Royal Canadian Mounted Police Act.⁹⁸ Among its mandates is providing vital operational support services to other police and law enforcement agencies within Canada and abroad,⁹⁹ which also extends to border security. The RCMP works together with the United States Coast Guard under the Canada-United States Shiprider program, as a commitment to their Beyond the Border Action Plan, to combat the trafficking of contraband within both Canada and the United States.¹⁰⁰ Smugglers move across the border and several Tribal lands are at the northern border of the U.S. where the U.S. and Canada meet. To further develop this topic and how these smugglers are legally dealt with, one must understand the RCMP as a whole and how they work with the USCG to combat these offenders.

⁹⁶ About the RCMP, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/about-ausujet/index-eng.htm> (last visited Nov 3, 2016). [Electronic copy provided in accompanying USB flash drive at Source 33].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

G. Integrated Cross-Border Maritime Law Enforcement Operations

The Canada-U.S. Shiprider program, officially known as Integrated Cross-Border Maritime Law Enforcement Operations, is a representation of a cooperative approach to combating cross border crimes on Canada and United States shared waterways.¹⁰¹ Shiprider permits continuity of enforcement and security operations across the border, facilitating cross-border surveillance and “serving as a force multiplier.”¹⁰² The purpose of the program is to form a partnership between the United States and Canada to combat the issue of smuggling within both territories. As stated by the Integrated Cross-Border Maritime Law Enforcement Operations Agreement between Canada and the United States,

The purpose of this Agreement is to provide the Parties additional means in shared waterways to prevent, detect, suppress, investigate, and prosecute criminal offences or violations of law including, but not limited to, illicit drug trade, migrant smuggling, trafficking of firearms, the smuggling of counterfeit goods and money, and terrorism.¹⁰³

The program was implemented so that in the cases of hot pursuit of offenders there would be no limitations as to how far a USCG official could chase an offender for arrest. The workings of this agreement helps breakdown how the USCG can deal with smugglers trafficking through Tribal Border Regions once they cross the border.

i. How It Works

¹⁰¹ Canada-U.S. Shiprider, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ibet-eipf/shiprider-eng.htm> (last visited Nov 3, 2016). [Electronic copy provided in accompanying USB flash drive at Source 35].

¹⁰² *Id.*

¹⁰³ Framework Agreement On Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of the United States of America and the Government of Canada (2009). [Electronic copy provided in accompanying USB flash drive at Source 37].

The Canada-United States Shiprider program uses vessels jointly crewed by specially trained¹⁰⁴ and designated Royal Canadian Mounted Police (RCMP) officers and United States Coast Guard (USCG) officials who are authorized to enforce the law on both sides of the international boundary line. Working together, RCMP and USCG officers are able to transit back and forth across the Canada-U.S. water border to help secure it from threats to national security, as well as prevent cross-border smuggling and trafficking.¹⁰⁵ In Canadian waters, Shiprider operations are subject to Canadian laws, policies and procedures and all operations are undertaken under the direction and control of the RCMP.¹⁰⁶ In U.S. waters, operations are subject to U.S. laws, policies, and procedures undertaken under the direction and control of the USCG. RCMP vessels designated as Shiprider vessels have a member of the USCG on board and are able to enter U.S. waters to enforce U.S. laws under the supervision of the USCG member.¹⁰⁷ Likewise, USCG vessels designated as Shiprider vessels have a member of the RCMP on board and are able to enter Canadian waters to enforce Canadian laws under the supervision of the RCMP officer.¹⁰⁸ By authorizing these officials to operate on either side of the border, the USCG and RCMP have developed a more efficient means of securing both sides of the border without violating the sovereignty of either nation.

¹⁰⁴ See U.S. Department of Homeland Security “COMMANDANT INSTRUCTION 16705.1” for full outline of training program for USCG officials to participate in Shiprider. [COAST GUARD, COMMANDANT INSTRUCTION 16705.1 (2011). https://www.uscg.mil/directives/ci/16000-16999/CI_16705_1.pdf.] [Electronic copy provided in accompanying USB flash drive at Source 32].

¹⁰⁵ Canada-U.S. Shiprider, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ibet-eipf/shiprider-eng.htm> (last visited Nov 3, 2016). [Electronic copy provided in accompanying USB flash drive at Source 35].

¹⁰⁶ *Id.*

¹⁰⁷ Canada-U.S. Shiprider, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ibet-eipf/shiprider-eng.htm> (last visited Nov 3, 2016). [Electronic copy provided in accompanying USB flash drive at Source 35].

¹⁰⁸ *Id.*

ii. Jurisdiction to Arrest and Prosecute

The Framework Agreement states that integrated cross-border maritime law enforcement operations can only take place in shared waterways, and designated cross-border maritime law enforcement officers can only enforce the domestic laws of the host country¹⁰⁹ within which they find themselves, as directed by a designated cross-border maritime law enforcement officer of the host country.¹¹⁰ The Agreement also outlines that designated cross-border maritime law enforcement officials have jurisdiction and authority on land as well in stating that, “in “urgent and exceptional circumstances”¹¹¹ designated cross-border maritime law enforcement officers may continue activities undertaken in the course of an integrated cross-border maritime law enforcement operation on land adjacent to shared waterways.”¹¹² The only caveat to having authority on land is that whenever designated cross-border maritime officials continue pursuits

¹⁰⁹ “Host country” means: the Party in whose territory an activity in the context of integrated cross-border maritime law enforcement operations is taking place.” (Framework Agreement On Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of the United States of America and the Government of Canada, Article 5 (2009).) [Electronic copy provided in accompanying USB flash drive at Source 37].

¹¹⁰ Framework Agreement On Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of the United States of America and the Government of Canada, Article 3 (2009). [Electronic copy provided in accompanying USB flash drive at Source 37].

¹¹¹ For the purposes of this Article, “urgent and exceptional circumstances” include circumstances in which a designated cross-border maritime law enforcement officer has reasonable grounds to suspect that the continuation of the activities undertaken in the course of integrated cross-border maritime law enforcement operations on land adjacent to shared waterways is necessary to prevent (a) imminent bodily harm or death to any person; (b) the immediate and unlawful flight of persons liable to detention or arrest; or (c) the imminent loss or imminent destruction of evidence (Framework Agreement On Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of the United States of America and the Government of Canada, Article 3 (2009)). [Electronic copy provided in accompanying USB flash drive at Source 37].

¹¹² Framework Agreement On Integrated Cross-Border Maritime Law Enforcement Operations Between the Government of the United States of America and the Government of Canada, Article 3 (2009). [Electronic copy provided in accompanying USB flash drive at Source 37].

onto land they have to notify the appropriate host country law enforcement authorities as soon as “operationally practicable”.¹¹³

With Shiprider in place, USCG vessels can pursue offenders into Canadian waters if need be and arrest them, and RCMP vessels can pursue offenders into U.S. waters if need be and arrest them. However, when offenders are arrested and detained the procedure for arrest and detainment to be applied is that of the jurisdiction where the offender has been captured (“host country”¹¹⁴). Therefore, if a USCG vessel arrests an offender in Canadian waters, then pursuant to the directions of the RCMP officer on board, that offender is subjected to prosecution under Canadian law. Similarly if an RCMP vessel arrests an offender in U.S. waters, then pursuant to the directions of the USCG officer on board, that offender is subjected to prosecution under U.S. law.¹¹⁵ In both of these situations offenders are allowed to contact the Consular Officer of their country of citizenship—i.e. a Canadian citizen arrested in U.S. waters may contact the Canadian Consulate¹¹⁶ and a U.S. citizen arrested in Canadian waters may contact the U.S. Consulate.¹¹⁷ Contacting the Consulate means that offenders will be prosecuted with assurance that their rights are not violated pursuant to their country of citizenship’s rules surrounding the rights of detained individuals.¹¹⁸ However, the Consulate will not protect offenders from being prosecuted in that

¹¹³ *Id.*

¹¹⁴ *Id.* at Article 5.

¹¹⁵ Further verified prosecutorial procedures with Lieutenant Michael Walker of the U.S. Coast Guard Cleveland division.

¹¹⁶ A Guide for Canadians Imprisoned Abroad - Travel.gc.ca, GOVERNMENT OF CANADA (2016), <https://travel.gc.ca/travelling/publications/guide-for-canadians-imprisoned-abroad> (last visited Nov 4, 2016).

¹¹⁷ Arrest of a U.S. Citizen, U.S. EMBASSY & CONSULATES IN CANADA, <https://ca.usembassy.gov/u-s-citizen-services/arrest-of-a-u-s-citizen/> (last visited Nov 4, 2016).

¹¹⁸ *Id.*

host country. Thus, the USCG can arrest smugglers moving through Tribal Border Regions on land and water even after offenders cross the border into Canada.

III. Legal Analysis

A. Conclusion I. Question: What are the appropriate charges to bring against smugglers who use Tribal Border Regions to traffic contraband? Answer: Offenders trafficking contraband through Tribal Border Regions are charged with smuggling as a federal crime and not a tribal crime because of a major federal interest in border security.

Perpetrators trafficking contraband through Tribal Border Regions are arrested and charged with smuggling. Part II (B)(i) of the memorandum outlined the United States smuggling statutes. In terms of territorial jurisdiction these statutes are very broad, and thus they carry nationwide applicability including Tribal territory. Under 18 USC §545 it is stated that “whoever knowingly and willfully, with intent to defraud the United States, smuggles...or attempts to smuggle...into the United States any merchandise which should have been invoiced... shall be fined under this title or imprisoned not more than 20 years, or both.”¹¹⁹ Additionally under 18 USC §554 is it stated that “...whoever fraudulently or knowingly exports or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or object contrary to any law or regulation of the United States...shall be fined under this title, imprisoned not more than 10 years, or both.”¹²⁰ These two statutes leave the territorial jurisdiction question open because it simply criminalizes smuggling into and out of the United States as a whole. Tribal Border Regions fall within United States territory, so smugglers using those lands are subject to these federal laws.

¹¹⁹ 18 USC §545 (1954). [Electronic copy provided in accompanying USB flash drive at Source 5].

¹²⁰ 18 USC §554 (2006). [Electronic copy provided in accompanying USB flash drive at Source 6].

When certain federal crimes committed in Tribal territory are of great interest to the federal government they no longer remain under Tribal jurisdiction, under the Major Crimes Act¹²¹. This is also demonstrated in the case *United States v. Miller*¹²² where the court stated that major schemes to defraud the U.S. fall under federal jurisdiction when committed in American Indian lands.¹²³ Another case that holds this argument true is *United States v. Kendrick*. In *Kendrick* the defendants were appealing charges on a drug conspiracy regarding possession, use, and intent to distribute large portions of heroin. The defendants argued that the federal government did not have jurisdiction, but rather the state of New York had jurisdiction because the defendants were caught on American Indian lands in the state of New York. The court held that “a federal court is not divested of jurisdiction over defendants who are charged with committing general federal crimes on Indian Land [and] [f]ederal courts retain jurisdiction over violations of federal laws of general, non-territorial applicability.”¹²⁴ Therefore, since smuggling statutes have a general, nationwide applicability throughout the United States, offenders smuggling contraband through Tribal Border Regions are subject to such statutes and can be arrested and charged under federal law.

B. Conclusion II. Question: Who can apprehend smugglers using Tribal Border Regions to traffic contraband? Answer: Pursuant to authority declared in Title 14 under the United States Code, on U.S. water the United States Coast Guard can apprehend smugglers, and according to Title 14 and 25, on U.S. land tribal law enforcement officers, Bureau of Indian Affairs officers, and/or the U.S. Border Patrol can apprehend smugglers. The Shiprider program allows designated Royal Canadian Mounted Police officers to apprehend smugglers from Canada into the U.S. both on land and water.

¹²¹ See discussion *supra* Part II.E.

¹²² See case cited and discussion *supra* notes 92-95.

¹²³ See case cited *supra* note 95 and accompanying text.

¹²⁴ *United States v. Kendrick*, 2015 WL 500805 (W.D.N.Y. Feb. 5, 2015). [Electronic copy provided in accompanying USB flash drive at Source 23].

Several different authorities can arrest smuggling offenders moving through Tribal Border Regions. These authorities include the United States Coast Guard (USCG), the Royal Canadian Mounted Police (RCMP), Bureau of Indian Affairs (BIA) officers, and Tribal law enforcement officers.

With maritime smuggling in the United States the primary law enforcement on the water is the USCG. Under 14 USC §89¹²⁵ the USCG has the authority to board both U.S. and foreign vessels on the high seas to make sure that criminal activity is not taking place. A key duty of the USCG is to enforce federal laws and promote border and national security for the United States. Their responsibility is outlined as “the Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States...”¹²⁶ Smuggling being a federal offense under Title 18¹²⁷ falls within the USCG’s jurisdiction to arrest offenders.¹²⁸ When in consideration with American Indian lands, smuggling is still a crime that is under the USCG’s jurisdiction to be arrested.¹²⁹ If offenders are caught trafficking contraband into or out of the U.S. in Tribal waters or on shores of tribal lands¹³⁰ the

¹²⁵ See statute cited *supra* note 13 and accompanying text.

¹²⁶ 14 USC §89 (1950). [Electronic copy provided in accompanying USB flash drive at Source 3].

¹²⁷ 18 USC §545 (1954). [Electronic copy provided in accompanying USB flash drive at Source 5]. 18 USC §554 (2006). [Electronic copy provided in accompanying USB flash drive at Source 6].

¹²⁸ See *supra* note 16 and accompanying text outlining the USCG’s authority to arrest anyone committing a crime.

¹²⁹ See discussion *supra* Conclusion I Part III.A outlining smuggling through Tribal Border Regions as a federal jurisdictional crime.

¹³⁰ Conclusion IV will further break down the differences between smuggling through Tribal Border Regions on land and on water.

USCG still maintains authority to arrest and detain these individuals, regardless of whether they are of Indian or non-Indian status.¹³¹

When the USCG pursues offenders past the U.S. water border with Canada, so long as USCG officers are on a Shiprider vessel they can continue to pursue smugglers through Tribal Border Regions into Canadian waters without violating sovereignty.¹³² Likewise RCMP¹³³ officers from Canada who are on designated Shiprider vessels can pursue smugglers past Canadian waters and into U.S. waters. Thus, should a smuggler coming from Canada attempt to smuggle contraband through Tribal Border Regions into the United States, the RCMP has jurisdiction to apprehend that individual as well.

Moreover, on Tribal lands smugglers can also be arrested by reservation officers, be they Bureau of Indian Affairs (BIA) officers¹³⁴ or tribal law enforcement¹³⁵. The BIA has authority to arrest offenders if caught on tribal lands. As long as BIA officers witness a crime being committed on the reservation they are assigned to, they can pursue the offender.¹³⁶ Their enforcement authority is defined under 25 USC §2803, which states that BIA officers can “execute or serve warrants, summonses, or other orders relating to a crime committed in Indian country and issued under the laws of the United States...or an Indian tribe if authorized by the Indian tribe.”¹³⁷ Furthermore, BIA officers can arrest offenders without a warrant for a crime

¹³¹ See discussion *supra* Part II.E.

¹³² See discussion *supra* Part II.G.i and Part II.G.ii for the explanation of the workings of the Shiprider program.

¹³³ See discussion *supra* Part II.F of the memorandum for the break down of the RCMP.

¹³⁴ See discussion *supra* Part II.D of the memorandum for the explanation of the Bureau of Indian Affairs.

¹³⁵ See discussion *supra* Part II.C.ii.4 for the run down of policing in Indian country.

¹³⁶ See discussion *supra* Part II.D.ii for BIA jurisdiction to arrest.

¹³⁷ 25 USC §2803 (2010). [Electronic copy provided in accompanying USB flash drive at Source 13].

committed in Indian country if “the offense is committed in the presence of the employee, the offense is a felony and the employee has probable cause to believe that the person to be arrested has committed, or is committing, the felony...[and/or] the employee has probable cause to believe that the individual to be arrested has committed, or is committing, the crime...”¹³⁸ Tribal law enforcement officers who are not working under the BIA can also pursue smugglers on Tribal lands. These officials act as police officers for the particular reservation where they are employed.

C. Conclusion III. Question: Who should prosecute smugglers using Tribal Border Regions to traffic contraband? Answer: Pursuant to agreement between the U.S. and Canada, when smugglers trafficking contraband through Tribal Border Regions are arrested in U.S. territory the U.S. Attorney prosecutes them, and when these smugglers are arrested in Canadian territory the Crown Attorney prosecutes them.

The federal government of the arresting jurisdiction prosecutes smugglers using Tribal Border Regions because smuggling is a federal crime. Prosecuting jurisdiction for offenders can sometimes vary on a case-by-case basis, but the general workings of American and Canadian law set the standard that whichever jurisdiction offenders are arrested and detained in is the jurisdiction that has the authority to prosecute them.¹³⁹ Specifically, in the United States the U.S. Attorney of the applicable district, under the Department of Justice, would prosecute offenders, and in Canada the Crown Attorney of the applicable province, under the Minister of Justice, would prosecute offenders.

As mentioned in part II (G), with the Shiprider program in place United States Coast Guard (USCG) officers have jurisdiction to pursue smugglers past the U.S. border into Canada, so long as they are on a Shiprider vessel. However, once offenders are arrested and detained in

¹³⁸ *Id.*

¹³⁹ *See supra* notes 114 and 115 and accompanying text.

Canada the U.S. no longer has jurisdiction to prosecute them. Should smugglers be arrested in Canadian waters they are subjected to Canadian jurisdiction to be prosecuted for smuggling. Should the RCMP pursue offenders into U.S. waters, so long as the RCMP is on a Shiprider vessel they can continue to pursue offenders into U.S. waters without violating sovereignty. However, should they arrest offenders, Canada no longer has jurisdiction in terms of prosecution, but instead offenders are subjected to being prosecuted under U.S. laws and procedures. If Canadian citizens are prosecuted in the U.S. for smuggling they have the right to contact their Canadian Consulate Officer to make sure their rights are not violated and the process works in reverse if U.S. citizens are prosecuted for smuggling in Canada. This does not change any prosecution procedures of the country who has jurisdiction over the prosecution, but it allows those citizens to make sure their rights as defendants are not violated.

The U.S. Attorney can prosecute Indian offenders smuggling within Tribal Border Regions so long as prosecution does not violate tribal rights. Even though Tribal Border Regions have their own laws and jurisdiction, their jurisdiction does not apply to these cases because the smuggling¹⁴⁰ is a crime against the United States, rather than an offense against a specific individual. Federal prosecution can happen on Tribal land for such crimes regardless of whether the perpetrator is Indian or not.¹⁴¹ However, Tribal law enforcement officers and Bureau of Indian Affairs officers still have a duty to assist the Department of Justice in their investigations of smuggling crimes happening in Tribal Border regions. The United States Code outlines this responsibility for the BIA by stating that they have a duty to “cooperate with the law

¹⁴⁰ See discussion *supra* Conclusion I.

¹⁴¹ See *supra* note 67.

enforcement agency having primary investigative jurisdiction over the offense committed.”¹⁴²

However, due to a lack of subject-matter jurisdiction neither the BIA nor Tribal law enforcement can prosecute smugglers moving through Tribal Border Regions.

D. Conclusion IV. Question: How does smuggling contraband through Tribal Border Regions on land compare with Tribal Border Regions on water in terms of legality, crime enforcement, and prevention? Answer: According to On U.S. land, tribal law enforcement, Bureau of Indian Affairs officers, the United States Border Patrol, and/or Royal Canadian Mounted Police officers apprehend smugglers, and if arrested, the United States Attorney prosecutes smugglers. On U.S. water, United States Coast Guard officials and/or Royal Canadian Mounted Police officers apprehend smugglers, and if arrested, the United States Attorney prosecutes smugglers. If USCG pursuit continues on to Canadian water resulting in arrest, the Crown Attorney prosecutes smugglers.

The United States Coast Guard (USCG) is the primary law enforcement on the high seas of the United States. Offenders trafficking contraband into or out of the U.S. on water can be arrested and detained by the USCG and federally prosecuted under the Department of Justice. Should offenders smuggle from American Indian shores into the water or from Tribal Border Regions on the water, such offenders are still subject to USCG jurisdiction and authority whether they are Indian or non-Indian. Furthermore, with maritime smuggling if offenders are caught by the USCG and choose to attempt escape, Shiprider gives USCG officials the jurisdiction to pursue offenders into Canadian waters so long as the USCG vessel is a designated Shiprider vessel. However, once offenders are arrested in Canadian waters, those offenders then become subject to Canadian laws and procedures regarding arrest, detainment, and prosecution. The Shiprider Agreement also gives USCG officials the authority to pursue offenders onto Canadian lands. Should pursuit continue onto land adjacent to the Canadian waterways, in which pursuit began, USCG officials coming off of a Shiprider vessel can continue to chase offenders and arrest them, but they must notify the proper Canadian authorities as soon as practically

¹⁴² 25 USC §2806 (1990). [Electronic copy provided in accompanying USB flash drive at Source 14].

possible.¹⁴³ Moreover, on land, perpetrators trafficking contraband through Tribal Border Regions may encounter Bureau of Indian Affairs officers, Tribal law enforcement officers, or the U.S. Border Patrol (USBP). Each of these officials has authority to pursue, arrest, and detain smugglers. Although no program is set in place, the U.S. and Canada are still working to combat smugglers on land without violating their respective sovereignty.

IV. Review of Topic and Findings

Overall, combatting cross-border smuggling through Tribal Border Regions is similar to combatting cross-border smuggling into the United States in general.

American Indian reservations operate according to their traditions and culture. Federal statutes and agencies assist proper functioning of these reservations. Smuggling is a heavy federal offense and a major national security concern, which is under federal jurisdiction.

Maritime smuggling is just as great of a concern as is smuggling on land. The United States Coast Guard (USCG) executes its missions to combat offenders. The USCG has jurisdiction over Indian offenders both inside and outside of Indian Territory because of the federal concern and interest to the safety of the U.S. as a whole. Tribal law enforcement and Bureau of Indian Affairs (BIA) law enforcement agencies cooperate with federal law enforcement authorities to assist the U.S. maintain national security. Although the federal government has jurisdiction there is still an expectation that officials will abide by American Indian rights when arresting, detaining, investigating, and prosecuting smugglers.

On the water the USCG works with the Royal Canadian Mounted Police to capture offenders and bring them to justice through the Integrated Cross-Border Maritime Law Enforcement Operations—otherwise known as Shiprider. The U.S. and Canadian governments signed an agreement implementing this program in order to assist each other in maintaining

¹⁴³ See discussion *supra* notes 111-113.

border security without violating sovereignty. The program gives U.S. and Canadian maritime officials authority in both U.S. and Canadian waters to enforce the laws against smuggling.

Comparing cross-border smuggling through Tribal Border Regions on the water to regions on land, United States Customs and the United States Border Patrol have authority over smugglers on land. While the U.S. and Canada have not signed an official agreement for pursuing offenders on land, they are aware of the great concern and are working on such an agreement.¹⁴⁴ As far as the USCG pursuing offenders from the water onto land they still have jurisdiction to arrest individuals. On land tribal law enforcement officers as well as BIA officers work to combat crime on reservations and both are expected to arrest offenders and cooperate with the Department of Justice to make sure they are properly charged and prosecuted. Additionally, USCG Shiprider vessels have the authority to pursue offenders onto adjacent Canadian land to their waterways to arrest offenders.

Arresting, detaining, and prosecuting cross-border smugglers is a large and complicated operation. Many factors must be considered to conduct these operations appropriately without violating laws and procedural rules, but when working together authorities have the proper tools to continue to uphold justice and protect national security.

¹⁴⁴ Beyond the Border Action Plan: Progress Report on Facilitating the Conduct of Cross-Border Business, GOVERNMENT OF CANADA (2013), <http://www.cic.gc.ca/english/resources/publications/cross-border.asp> (last visited Nov 28, 2016). [Electronic copy provided in accompanying USB flash drive at Source 34].