10-1977

Oliphant v. Suquamish Indian Tribe

Lewis F. Powell Jr.

Decision
I could deny as there is no conflict, or I could issue a call for SG's views

There seems to be an
Indian case of first impression

Reasons Back Page

PRELIMINARY MEMORANDUM

June 9
~~Feb. 18~~, Conference
List ~~8~~, 2 Sheet ~~2~~, 1

No. 76-5729

OLIPHAND

v.

SUQUAMISH INDIAN TRIBE

Cert to CA 9 (Duniway, Burns; Kennedy, dissenting)

Cert to W.D. Wash. (Sharp; order accepting magistrate's report)

Federal/Civil (habeas) Timely

Call for views of SG

1. SUMMARY: This case raises the question of whether Indian Tribal Courts have jurisdiction over non-Indians charged with violating Indian law while on Indian Reservations.

2. FACTS: The Suquamish Indian tribe has its reservation in the state of Washington.[1/] The tribe has enacted a tribal law and order

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1/ Approximately ~~one-half~~ 62% of the land within the reservation is owned by non-Indians. The non-Indians population on the reservation vastly out-numbers the Indian population.

I would tend toward waiting for a conflict.

TAB

code to regulate the conduct of persons within its territorial jurisdiction. The code defines as offenses activities which would ordinarily be deemed petty offenses or misdemeanors. In accordance with the "Indian Bill of Rights", penalties for such offenses are limited to a maximum of six months imprisonment and/or a $500 fine. 25 U.S.C. § 1302. The tribe has also established a tribal court (with Indian judges and juries) to try alleged violations of the code. See 25 U.S.C. §§ 1301, 1311.

(a) Oliphant: Petr Oliphant is a non-Indian residing on the Suquamish reservation. During the tribe's 1973 Chief Seattle Days celebration, Oliphant became involved in an altercation on the tribal encampment grounds, which are held in trust by the U.S. for the benefit of the tribe. When a tribal police officer attempted to halt the disturbance, petr assaulted him and was arrested for assaulting a police officer and resisting arrest, both violations of the tribal law and order code. Thereafter, he was arraigned on these charges in the tribal court, and bail was set in the amount of $100 for each charge. Since petr could not post bail, he was incarcerated for a period of five days. He was then released on his own recognizance.

Following his release, petr sought habeas relief in the W.D. Wash. on the ground that the tribal court had no jurisdiction over non-Indians. The dist ct disagreed and denied his petn for habeas. Thereafter, he appealed to CA 9.

(b) Belgrade: Petr Belgrade, also a non-Indian resident of the reservation, was arrested by tribal police on a state highway located within the reservation (unlike Oliphant, the offense and arrest did not take place on Indian trust property) for reckless driving and destruction of tribal property in violation of the tribal law and order code. Shortly

thereafter, he was arraigned on these charges in the tribal court. After posting bond, he was released.

Petr then also sought habeas relief in the W.D. Wash claiming that the tribe had no jurisdiction over him. That court saw no difference for jurisdictional purposes between the Indian trust property on which Oliphant's offense had occurred and the state highway running through the reservation. Hence, it denied relief on the basis of its earlier decision in Oliphant. Petr has filed a petn for cert directly from that ruling.

3. HOLDING BELOW: In CA 9, Oliphant maintained that the Suquamish had no jurisdiction over non-Indians because Congress had never conferred such jurisdiction on them. CA 9 rejected this contention. In its view, the proper inquiry was not whether Congress had conferred such jurisdiction on the tribe, but rather, since the tribes were once "sovereign states" and as such, possessed the inherent power to preserve order by punishing those who violated their laws, whether Congress had limited that power. After reviewing the treaties Congress had made with the Suquamish and the statutes which affected the tribe, CA 9 concluded that Congress had not withdrawn that authority from it. In this regard, it noted: (a) that neither the Treaty of Point Elliot, (establishing the reservation) 12 Stat. 927, nor the Treaty of 1905, (sale of certain tribal lands) 33 Stat. 1078, mentioned the tribes power to try non-Indian criminals while treaties with other tribes had expressly granted or withdrawn that power; (b) that § 4 of the Indian Trade and Intercourse Act, as amended, 18 U.S.C. § 1152, while extending federal law to Indian Country, does not purport to either extinguish tribal jurisdiction or declare federal jurisdiction exclusive;[2/] (c) that the congressional history of § 1152

2/ It distinguished Ex Parte Kenyon, 14 Fed. Cas. 353, relied on by [illegible] on the ground that the offense there involved was

supported the tribe's retention of jurisdiction over non-Indian; (d) that the Indian Civil Rights Act, 25 U.S.C. § 1302, really had no bearing on the question;[3] and (e) that Public Law 280, as modified, 25 U.S.C. § 1321, was equally irrelevant to the inquiry since Washington had ceded whatever jurisdiction it possessed over the tribe back to the U.S. in 1971.[4] In addition, it found that the sections of the tribal code here involved did not conflict with any federal law and that practical considerations supported the existence of jurisdiction since without it, many petty violations by non-Indians would go unpunished. Hence, CA 9 affirmed the dist ct's decision upholding the tribal court's jurisdiction over non-Indians for violations of Indian law committed on trust property.

Judge Kennedy dissented. He could not agree with the majority's basic premise -- that, in the absence of congressional action to the contrary, the tribe possessed the authority asserted here as an incident of its sovereignity. In this regard, he pointed out that a tribal court's criminal jurisdiction over a non-Indian was a rather novel proposition; the last federal court to pass on the question had done so in 1878 and had indicated, in dicta, that the tribal court had no such jurisdiction, Ex Parte Kenyon, 14 Fed. Cas. 353 (W.D. Ark. 1878). Moreover, he noted that while many decisions of this Court spoke of tribal sovereignity, e.g. Worcester v. Ga., 31 U.S. 515, 560-61 (1832), they had done so in the context of determining a state's jurisdiction over Indian lands where the federal gov't had decreed a measure of autonomy for the tribe (a preemption question), and not in the context of a tribe's attempt to

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3/The court rejected petr's claim that he could not receive a fair trial because only Indians would be on the jury as premature.

4/In 1957, Wash. had assumed criminal jurisdiction over the tribe pursuant to § 7 of P.L. 280.

exercise jurisdiction over an individual. In his view, principles developed in the preemption context in order to protect the tribe from state encroachment had little application to the situation presented here because a tribe's power to prosecute non-members was not essential to its identity or its self-governing status. Hence, that the case turned on whether Congress intended tribal courts to exercise criminal jurisdiction over non-members.

J. Kennedy's dissenting,

Turning to this inquiry, he concluded that Congress, while never explicitly saying so, did not intend the tribe to have such jurisdiction. His examination of early Indian statutes and treaties led him to believe that Congress had never recognized the Indians' inherent authority to punish non-Indians. Indeed, he pointed out that during treaty negotiations a number of tribes attempted to secure this power from Congress without success. In light of this background, he argued that the absence of any mention of this particular issue in the statutes and treaties relied on by the majority was not surprising. In addition, he points out numerous references in the legislative history of a number of Indian statutes (as late as 1970) which suggest that the tribes possess no jurisdiction over non-members. Finally, he notes that Congress has consistently evidenced an intent to treat offenses by Indians against each other differently from those involving non-Indians and that this distinction is reflected in the current federal scheme for dealing with offenses on Indian land which exempts purely "Indian" offenses from the operation of federal law unless they fall with the "Major Crimes Act". See 18 U.S.C. § 1152 and § 1153.

4. CONTENTIONS: Petrs reiterate their claim that the tribal court lacks jurisdiction over them. Unfortunately, their attorney has

not done a very good job of presenting their case. At the outset, he maintains that the concept of tribal sovereignity relied on by the majority is somehow unconstitutional. For the most part, however, he argues that whatever sovereignity the tribe originally possessed in this regard has been extinguished over time by the numerous congressional enactments which have extended both state and federal criminal jurisdiction over tribal lands. This claim was rejected by CA 9 which noted that the statutes relied on did not speak to the precise question presented here and thus did not extinguish the tribe's concurrent jurisdiction over offenses. In addition, he claims that Washington's retrocession of jurisdiction back to the U.S. was ineffective as a matter of state law. Throughout, he emphasizes the novelity of the question.

The tribe has filed a response. As might be expected, it argues that the major premise of the CA 9 majority is correct; that this Court has always recognized a tribe's sovereignity in the absence of contrary congressional action, e.g., Williams v. Lee, 358 U.S. 217; U.S. v. Mazurie, 419 U.S. 544; that Congress has never expressly withdrawn the tribe's jurisdiction over petr's offenses; and that the exercise of jurisdiction by the tribe is consistent with Congress' policy of tribal self-government. In addition, it argues that there is no reason for the Court to review the Belgrade case before the 9th Circuit has had an opportunity to do so since the case is distinguishable from Oliphant's and it is not certain that CA 9 will find that decision controlling.

Amicus briefs have been filed by Kitsap County, Wash. (the county in which the reservation is located) and the Wash. AG. The former supports the petn for cert; it points out that the vast majority of the reservation's population are non-Indians (150 Indians; approximately 3000

non-Indians) and merely objects to the Indians attempt to exercise jurisdiction over the majority. The latter supports the tribe; the only interesting point it raises is a suggestion that a tribal court's exercise of jurisdiction over a non-Indian is not as novel as the dissent suggests. However, it offers no figures to support this assertion.

5. DISCUSSION: The issue presented by this case is one of first impression in this Court. Moreover, it would seem to be one of increasing importance as tribal gov't's become more and more active.

On the merits, depending on one's initial premise, both the CA 9 majority and dissent offer rather persuasive arguments in support of their position. On the question of tribal sovereignity, the majority is correct in pointing out that this Court has often spoken of the Indian tribes as soverign nations, who though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress. Worcester, supra. On the other hand, the dissent is correct in noting that those decisions arose in a distinguishable context and that history would seem to suggest that the tribes possessed no jurisdiction over non-Indians. Any analysis of the question is further complicated by the fact that congressional policy toward the Indians has not remained consistent throughout history. Since congressional intent and federal Indian policy are central to the theories of both the majority and dissent, the SG would seem to be an appropriate party to call upon.

Finally, with respect to Belgrade, there would appear to be no reason to deviate from the normal appellate process as the resp tribe suggests.

There is a response.

2/10/77 Ondrasik

CA 9 Oilphant opin
W.D. Wash. Belgrade

We grant the petn
from Oliphant Cat Bilford which is
pending
& increasing importance
unlikely to materially
future

DB

Court CA - 9 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19...

Submitted ....., 19... Announced ....., 19...

FEB 18 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, Petitioner

vs.

THE SUQUAMISH INDIAN TRIBE, ET AL.

11/22/76 - Cert.

SG urges grant of Oliphant only
6/9/77

Views of S.G.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.	SG												
Stewart, J.	SG												
Brennan, J.	SG												
Burger, Ch. J.													

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 76-5729

Submitted ....., 19... Announced ....., 19...

OLIPHANT

vs.

SUQUAMISH INDIAN TRIBE

Brief filed by SG at the invitation of the Court.

Oliphant's crime was committed on Tribal prop. Belgarde's crime was not — but just our petitions

G

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.		✓											
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.		✓											
White, J.		✓											
Stewart, J.		✓											
Brennan, J.		✓											

LFP/lab 1/3/78

No. 76-5729 Oliphant & Belgrade v. Suquamish Indian Tribe

To: Nancy Date: January 3, 1978

From: L.F.P., Jr.

Since we talked about the above case, I have spent about three hours on the rather elaborate briefs. This is not enough study to justify even a tentative conclusion as to whether the question of jurisdiction is settled under the relevant treaties, statutes, and court decisions, but I now do have some "feel" for the case. The purpose of this brief note to you is to make several general observations.

The case is one of considerable importance, perhaps more to the states in which Indian reservations continue to exist than to Indian tribes such as the Suquamish Tribe. It is surprising that the question, as noted in the SG's brief, is one of first impression - addressed in the past only by a dictum in one early federal case. SG's brief p. 8.

The SG's brief also conveys the impression that the question of tribal court jurisdiction is not clearly resolved by

the arguably relevant federal treaties and statutes. The SG supports its argument in favor of jurisdiction by the "main thrust of federal policy" in recent years. The SG makes two specific submissions: (i) that the Treaty of Point Elliott should be read as reserving exclusive criminal jurisdiction to the tribe for offenses not covered by the Major Crimes Act or the Indian Civil Rights Act, and (ii) that the most relevant federal statute - 18 U.S.C. 1152 (the 1854 statute extending federal criminal laws to "Indian Country") may be construed as imposing a concurrent federal jurisdiction in cases like these. Thus, I read the SG's brief as relying in major part on a perception of recent federal policy to accord increased recognition to tribal authority.

If this case is to turn on policy considerations, rather than some firm conclusion drawn from relevant federal law, I would be inclined to weigh heavily the policy arguments in favor of the states. Here, I commend the amicus brief filed by the State of Washington, the state most directly affected by this case. Moreover, the Washington State Attorney General (Slade Gorton) has proved - in perhaps half a dozen cases - to be among the ablest and fairest of the state attorney generals who has argued before us. His description of the Port Madison Indian Reservation reminds me of the analogous condition of the Puyallup Reservation (said to be typical of many reservations in the West). Here, the reservation consists of 7,275 acreas, of which 63% is privately owned fee simple (apparently by non-Indians);

36% remains in allotment status with the patent held in trust by the United States; and only about 1% is tribally owned. Of a total population of 2,928 on the reservation, not more than 150 (the briefs vary between 50 and 150) are members of the Suquamish Tribe. The State of Washington has exercised criminal jurisdiction over the non-Indians on this and similar reservations, and apparently (according to respondent's brief) the tribal courts only recently have resumed the exercise of asserted jurisdiction. The state exercises full jurisdiction over tribal members for compulsory school attendance, public welfare, mental illness, juvenile delinquency, the building, construction and policing of streets and highways, etc.

In terms of policy considerations, it makes no sense to allow 50 to 150 Indians to set up a "tribal court" and assume jurisdiction - whether concurrent or not - over more than 2,800 non-Indians who live within the technical boundary of the reservation, and who own in fee most of the land.

I realize that Indian law is indeed "a law unto itself", and often seems incompatible with broader public interests. I am inclined to accept a large measure of autonomy where the issue involves the preservation of tribal history, culture and the rights of Indians. But this case involves the attempt by a handful of Indians to exercise criminal jurisdiction over non-Indians in a manner, and for purposes, unrelated to the preservation of tribal integrity.

Thus, as you will see, I am inclined - on the basis of my understanding of the case at this time - strongly to favor reversal. Yet, I have not attempted to thread my way through the labyrinth of treaty, statute and case law that may be relevant. I hope it will not be necessary for you to write a bench memo in proportion to the outrageously long briefs for petitioners. My own tentative impression is that the federal statutes fairly can be construed to deny jurisdiction. My guess is that, as the Attorney General of Washington argues, the fundamental error of CA 9 was in viewing "tribal sovereignty" as a geographic concept rather than a personal concept. See amicus brief, pp. 6, 17 et seq.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: FEB 23 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5729

Mark David Oliphant and Daniel B. Belgarde, Petitioners, v. The Suquamish Indian Tribe et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over a hundred Indians. Through a series of treaties in the mid-19th century, these loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, 12 Stat. 927, the Suquamish Indian Tribe relinquished all rights that they might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee-simple by non-Indians, and various roads and public highways maintained by Kitsap County.[1]

[1] According to the District Court's findings of fact, the "Port Madison Indian Reservation consists of approximately 7,276 acres of which approximately 63% thereof is owned in fee-simple absolute by non-Indians and the remaining 37% is Indian owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2,928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State

Received 2/28/78

A fine opinion reflecting a thorough scholarly effort.

Join

The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians.[2] Proceedings are held in the Suquamish Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.[3]

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of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest."

The Suquamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U. S. C. § 348 and 43 U. S. C. §§ 1195–1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation has allowed such sales where the allotments were in heirship, fell to "incompetents," or were surrendered in lieu of other selections. The substantial non-Indians land-holdings on the Reservation is also a result of the lifting of various trust restrictions which has enabled individual Indians to sell their allotments. See 25 U. S. C. §§ 349 and 392.

[2] Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.

[3] In *Talton* v. *Mayes*, 163 U. S. 376 (1896), this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments. Through the Indian Civil Rights Act of 1968, Congress extended many due process guarantees to defendants before Indian tribal courts, but the guarantees are not identical to those set out in the Federal Constitution. Thus, the Act provides for "a trial by jury of not less than six persons," 25 U. S. C. § 1302 (10), but the tribal court is not prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1976, the Suquamish Tribe amended its Law and Order Code to

Both petitioners are non-Indian residents of the Port Madison Reservation. Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal code with "recklessly endangering another person" and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court disagreed with petitioners' argument and denied the petitions. On August 5, 1974, the Court of Appeals for the Ninth Circuit affirmed the denial of habeas corpus in the case of petitioner Oliphant. 544 F. 2d 1007. Petitioner Belgarde's appeal is still pending before the Court of Appeals. We granted certiorari, 431 U. S. 964, to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

I

Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision.[4] Instead, respondents

provide that only Suquamish Tribal members shall serve as jurors in tribal court.

[4] Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and punish non-Indians through the Indian Reorgani-

urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," see, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 552 (1974), the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend

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sation Act of 1934, 25 U. S. C. § 476, and the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302. Neither Act, however, addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians. The Indian Reorganisation Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law." The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.

As respondents note, an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcomm. on Const. Rights of the Senate Judiciary Comm., 89th Cong., 2d Sess., at 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' argument that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or act of Congress.

that jurisdiction to non-Indians.[6] Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance to a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations amongst themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." H. R. Rep. No. 474, 23d Cong., 1st Sess., at 91 (1834).

It is therefore not surprising to find no specific discussion of the problem before us in the volumes of United States Reports. But the problem did not lie entirely dormant for two centuries.

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[6] Of the 127 courts currently operating on Indian reservations, 71 (including the Suquamish Indian Provisional Court) are tribal courts, established and functioning pursuant to tribal legislative powers; 30 are "CFR Courts" operating under the Code of Federal Regulations, 25 CFR § 11 (1977); 16 are traditional courts of the New Mexico pueblos; and 10 are conservation courts. The CFR Courts are the offspring to the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233. See W. Hagan, Indian Police and Judges (1966). By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. 25 CFR § 11.2 (a) (1977). The case before us is concerned only with the criminal jurisdiction of tribal courts.

A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently presumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the tribe "the jurisdiction and government of all the persons and property that may be within their limits." Despite the broad terms of this governmental guarantee, however, the Choctaws at the conclusion of this treaty provision "express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."[6] Such a

[6] The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress. The earliest treaties typically expressly provided that "any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." See, *e. g.*, Treaty with the Shawnee, Art. III, 7 Stat. 26 (1786). While, as elaborated further below, these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes, they would naturally have served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits to the Indian tribes. The same treaties generally provided that "[i]f any citizen of the United States . . . shall settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." See, *e. g.*, Treaty with the Choctaw, Art. IV, 7 Stat. 21 (1786). Far from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory, in contravention of treaty provisions to the contrary. See 5 Annals of Congress 903–904 (April 9, 1796). Later treaties dropped this provision and provided instead that non-Indian settlers would be

request for affirmative congressional authority is inconsistent with respondents' belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty. Faced by attempts

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removed by the United States upon complaint being lodged by the tribe. See, *e. g.*, Treaty with the Sauk and Foxes, 7 Stat. 84 (1804).

As the relationship between Indian tribes and the United States developed through the passage of time, specific provisions for the punishment of non-Indians by the United States, rather than by the tribes, slowly disappeared from the treaties. Thus, for example, none of the treaties signed by Washington Indians in the 1850's explicitly proscribed criminal prosecution and punishment of non-Indians by the Indian tribes. As discussed below, however, several of the treaty provisions can be read as recognizing that criminal jurisdiction over non-Indians would be in the United States rather than in the tribes. The disappearance of provisions explicitly providing for the punishment of non-Indians by the United States, rather than by the Indian tribes, coincides with and is at least partly explained by the extension of federal enclave law over non-Indians in the Trade and Intercourse Acts and the general recognition by Attorneys General and lower federal courts that Indians did not have jurisdiction to try non-Indians. See *infra*, at 8–10. When it was felt necessary to expressly spell out respective jurisdictions, later treaties still provided that criminal jurisdiction over non-Indians would be in the United States. See, *e. g.*, Treaty with the Utah-Tabequache Band, Art. 6, 13 Stat. 673 (1863).

Only one treaty signed by the United States has ever provided for any form of tribal criminal jurisdiction over non-Indians (other than in the illegal settler context noted above). The first treaty signed by the United States with an Indian tribe, the 1778 Treaty with the Delawares, provided that neither party to the treaty could "proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries *of both parties*, as near as can be to the laws, customs and usages of the contracting parties and natural justice: *The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled*, with the assistance of . . . deputies of the Delaware nation . . . ." Treaty with the Delawares, Art. IV, 7 Stat. 13 (1778) (emphasis added). While providing for Delaware participation in the trial of non-Indians, this treaty section established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress.

of the Choctaw Tribe to try non-Indian offenders in the early-1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Opinions of the Attorney General 693 (1834); 7 Opinions of the Attorney General 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians is *inter alia* inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.

At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction.[7] In *Ex parte Kenyon*, 14 Fed. Cases 353 (WD Ark. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians,[8]

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[7] According to Felix Cohen's *Handbook of Federal Indian Law*, "attempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody." F. Cohen, Handbook of Federal Indian Law 148 (United States Dept. of the Interior 1942).

[8] Judge Parker sat as the judge of the United States District Court for the Western District of Arkansas from 1875 until 1896. By reason of the laws of Congress in effect at the time, that particular court handled not only the normal docket of federal cases arising in the Western District of Arkansas, but also had criminal jurisdiction over what was then called the "Indian Territory." This area varied in size during Parker's tenure; at one time it extended as far west as the eastern border of Colorado, and always included substantial parts of what would later become the State of Oklahoma. In the exercise of this jurisdiction over the Indian Territory, the Court in which he sat was necessarily in constant contact with individual Indians, the tribes of which they were members, and the white men who dealt with them and often preyed upon them.

Judge Parker's views of the law were not always upheld by this Court. See II Wigmore on Evidence § 276, at 115–116, n. 3 (3d ed. 1940). A reading of Wigmore, however, indicates that he was as critical of the

held that to give an Indian tribal "court jurisdiction of the person of an offender, such offender must be an Indian." *Id.*, at 355. The conclusion of Judge Parker was reaffirmed only recently in a 1970 Opinion of the Solicitor of the Department of the Interior. See 77 I. D. 113 (1970).[8]

While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians. For the reasons previously stated, there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians because of the absence of formal tribal judicial systems. Instead, Congress' concern was with providing effective protection for the Indians "from the violence of the lawless part of our frontier inhabitants." Seventh Annual Address of President George Washington, I Messages and Papers of the Presidents, 1789–1797, at 181, 185 (1897, J. Richardson, ed.). Without

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decisions of this Court there mentioned as this Court was of the evidentiary rulings of Judge Parker. Nothing in these long forgotten disputes detracts from the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker. One of his biographers, describing the judge's funeral, states that after the grave was filled "[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave." H. Croy, He Hanged Them High (1952).

It may be that Judge Parker's views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject, but we have observed in more than one of our cases that the views of the people on this issue as reflected in the judgments of Congress itself have changed from one era to the next. See *Kake Village* v. *Egan*, 369 U. S. 60, 71–74 (1962). There cannot be the slightest doubt that Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of his court, as well as familiar with the law which governed them. See generally Hell on the Border (1971, J. Gregory & R. Strickland, eds.)

[8] The 1970 Opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal.

such protection, it was felt that "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory." *Ibid.* Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians "which would be punishable in the state or district if committed against a White." In 1817, Congress went one step further and extended federal enclave law to the Indian Country; the only exception was for "any offense committed by one Indian against another." 3 Stat. 383, as amended, 18 U. S. C. § 1152.

It was in the same year that Congress was first directly faced with the prospect of Indians trying non-Indians. In the Western Territory Bill,[10] Congress proposed to create an Indian territory beyond the western-directed destination of the settlers; the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union. In creating by legislation a political territory with broad governing powers, Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area.[11] The reasons were quite practical:

> "Officers, and persons in the service of the United States, and persons required to reside in the Indian coun-

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[10] See H. R. Rep. No. 474, 23d Cong., 1st Sess., at 36 (1834).

[11] The Western Territory Bill, like the early Indian treaties, see n. 6, *supra*, did not extend the protection of the United States to non-Indians who *settled* without Government business in Indian territory. See Western Territory Bill, § 6, in H. R. Rep. No. 474, 23d Cong., 1st Sess., at 35; *id.*, at 18. This exception, like that in the early treaties, was presumably meant to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes. Today, many reservations, including the Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries

try by treaty stipulation, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection be extended." H. R. Rep. No. 474, 23d Cong., 1st Sess., at 18 (1834).

Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.

This unspoken assumption was also evident in other congressional actions during the 19th century. In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. 10 Stat. 270, as amended, 18 U. S. C. § 1152. No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians. Similarly, in the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who

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promoting the assimilation of the Indians into the non-Indian culture. Respondents point to no statute, in comparison to the Western Territory Bill, where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations.

Even as drafted, many Congressmen felt that the Bill was too radical a shift in United States-Indian relations and the Bill was tabled. See 10 Register of Cong. Debates 4779 (June 25, 1834). While the Western Territory Bill was resubmitted several times in revised form, it was never passed. See generally R. Gittinger, The Formation of the State of Oklahoma (1939).

commit certain specified major offenses. 25 Stat. 385, as amended, 18 U. S. C. § 1153. If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses.[12]

In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield*, 141 U. S. 107, 115–116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be

[12] The Major Crimes Act provides that Indians committing any of the enumerated offenses "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, *within the exclusive jurisdiction of the United States*." While the question has never been directly addressed by this Court, courts of appeals have read this language to exclude tribal jurisdiction over the Indian offender. See, *e. g., Sam* v. *United States*, 385 F. 2d 213, 214 (CA10 1967); *Felicia* v. *United States*, 495 F. 2d 353, 354 (CA8 1974).

The legislative history of the original version of the Major Crimes Act, which was introduced as a House amendment to the Indian Appropriation Bill of 1854, creates some confusion on the question of exclusive jurisdiction. As originally worded, the amendment would have provided for trial in the United States courts *"and not otherwise."* Apparently at the suggestion of Congressman Budd, who believed that concurrent jurisdiction in the courts of the United States was sufficient, the words "and not otherwise" were deleted when the amendment was later reintroduced. See 16 Cong. Rec. 934–935 (Jan. 22, 1885). However, as finally accepted by the Senate and passed by both Houses, the amendment did provide that the Indian offender would be punished as any other offender, "within the exclusive jurisdiction of the United States." The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500.

consistent with the safety of the White population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

In a 1960 Senate Report, that body expressly confirmed its assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.[18] In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted that

> "The problem confronting Indian tribes with sizable reservations is that the United States provides no protec-

[18] In 1977, a Congressional Policy Review Commission, citing the lower court decisions in *Oliphant* and *Belgarde*, concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, and 152–154 (1977). However, the Commission's Report does not deny that for almost two hundred years before the lower courts decided *Oliphant* and *Belgarde*, the three branch of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice-Chairman of the Commission noted in dissent, "such general jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." *Id.*, at 587 (dissenting views of Cong. Lloyd Meeds).

tion against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.*

. . . . .

"Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers.

. . . . .

"The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property." S. Rep. No. 1686, 86th Cong., 2d Sess., 2–3 (1960) (emphasis added).

II

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. Cf. *Draper* v. *United States,* 164 U. S. 240, 245–247 (1896); *Morris* v. *Hitchcock,* 194 U. S. 384, 391–393 (1904); *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685, 690 (1965); *DeCoteau* v. *District Cty Ct.,* 420 U. S. 425, 444–445 (1965). "Indian law" draws principally upon the treaties drawn and

executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. *Ibid.*

While in isolation the Treaty of Point Elliott, 12 Stat. 927 (1855), would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction.[14] In the Ninth Article, for example, the Suquamish

[14] When treaties with the Washington Tribes were first contemplated, the Commissioner of Indian Affairs sent instructions to the Commission to Hold Treaties with the Indian Tribes in Washington Territory and in the Blackfoot Country. Included with the instructions were copies of treaties previously negotiated with the Omaha Indians, 10 Stat. 1043, and with the Oto and Missouri Indians, 10 Stat. 1038, which the Commissioner "regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians" and which he felt would "afford valuable suggestions." The criminal provisions of the Treaty of Point Elliott are clearly patterned after the criminal provisions in these "exemplary" treaties, in most respects copying the provisions verbatim. Like the Treaty of Point Elliott, the treaties with the Omaha and with the Oto and Missouri did not specifically address the issue of tribal criminal jurisdiction over non-Indians.

Sometime after the receipt of these instructions, the Washington treaty Commission itself prepared and discussed a draft treaty which specifically provided that "[i]njuries committed by whites towards them [are] not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished." For some unexplained reason, however, in negotiating a treaty with the Indians, the Commission went back to the language used in the two "exemplary" treaties sent by the Commissioner of Indian Affairs. Although respondents contend that the Commission returned to the original language because of tribal opposition to relinquishment of criminal jurisdiction over non-Indians, there is no evidence to support this view of the matter. Instead, it seems probable that the Commission preferred to use the language that had been recommended by the Office of Indian Affairs. As discussed below, the language ultimately used, wherein the Tribe acknowledged their dependence on the United States and promised to be "friendly with all

"acknowledge their dependence on the Government of the United States." As Chief Justice Marshall explained in *Worcester* v. *Georgia*, 6 Pet. 515, 551–552, 554 (1832), such an acknowledgement is not a mere abstract recognition of the United States' sovereignty. "The Indian nations were, from their situation, necessarily dependent on [the United States] for their protection from lawless and injurious intrusions into their country." *Id.*, at 554. By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their reservation. Other provisions of the Treaty also point to the absence of tribal jurisdiction. Thus the tribe "agree[s] not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Read in conjunction with 18 U. S. C. § 1152, which extends federal enclave law to non-Indian offenses on Indian reservations, this provision implies that the Suquamish are to promptly deliver up any non-Indian offender, rather than try and punish him themselves.[18]

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do

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citizens thereof," could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians.

[18] In interpreting Indian treaties and statutes, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973), see *The Kansas Indians*, 5 Wall. 737, 760 (1866); *United States* v. *Nice*, 241 U. S. 591, 599 (1916). But treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history." Cf. *DeCoteau* v. *District Cty Ct.*, 420 U. S. 425, 444 (1975).

not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *The Cherokee Nation* v. *Georgia*, 5 Peters 1, 15 (1831). As we decide today in *United States* v. *Wheeler*, *post*, at —, the power of Indian tribes to govern the lives of their members, including the power to punish members who transgress against their laws, flows from this retained quantum of governing authority and does not rely on affirmative congressional authorization. But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."* 544 F. 2d, at 1009.

Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers*, 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." *Id.*, at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights of complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823).

We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States. In *Johnson* v. *M'Intosh*, *supra*, we noted that the Indian tribes' "power to dispose of the soil at their own will, to whomever they pleased," was inherently lost to the overriding sovereignty of the United States. And in *The Cherokee Nation* v. *Georgia*, *supra*, the Chief Justice observed

that since Indian tribes are "completely under the sovereignty and dominion of the United States. . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." 5 Pet., at 16.

Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "[T]he restrictions upon the right of soil in the Indians, amounts . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*" *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1810) (separate opinion of Johnson, J.). Protection of territory within its external political boundaries is, of course, central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H. R. Rep. No. 474, 23d Cong., 1st Sess., at 18 (1834). It should be no less obvious today, even though present day Indian tribal

courts embody dramatic advances over their historical antecedents.

In *Ex parte Crow Dog*, 109 U. S. 556 (1883), the Court was faced with almost the inverse of the issue before us here—whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land. In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the "nature and circumstances of the case." The United States was seeking to extend United States

> "law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . ." *Id.*, at 571.

These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.

As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents' theory, however, Indian tribes would have been free to try the

same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States.

In summary, respondents' position ignores that

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these two." *United States* v. *Kagama*, 118 U. S. 375, 379 (1886).

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians.[16] But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude

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[16] See 4 National American Indian Court Judges Association, Justice and the American Indian 51–52 (1974); Hearings on S. 1 and S. 1400 (Reform of the Federal Criminal Laws) before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part VIII, p. 6469 *et seq.* (1973).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 23, 1978

Re: No. 76-5726, Oliphant v.
Suquamish Indian Tribe

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 24, 1978

Re: #76-5729 - Pitchess v. The
Superior Court of the
City

Dear Bill,

Please join me in your excellent opinion

on this very difficult subject.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to the Conference

MEMORANDUM TO MR. JUSTICE POWELL

FROM: Nancy

RE: Oliphant opinion Feb. 27, 1978

As I mentioned to you earlier, the crux of this opinion is that upon the formation of the United States, Indian tribes lost their inherent sovereignty insofar as trying non-Indians was concerned.* The opinion draws a distinction between true sovereignty and the limited sovereignty of the Indian tribes, which allowed them to govern themselves but did not include the power to try non-Indians. The opinion does not state that although Indian tribes once might have been sovereign, Congress explicitly took away criminal jurisdiction over non-Indians, either through § 1152 (the interracial ~~crimes~~ crimes statute) or otherwise.

There are certain problems with this approach. I wonder, under the opinion's reasoning, whether a tribe would have criminal jurisdiction over an Indian ~~man~~ who nevertheless is not a member of the tribe asserting jurisdiction. I assume that the tribe would not have such jurisdiction, since it would

9 appeal

* Indians in eighteenth century did not have a judicial system. Any "jurisdiction" they possessed was by virtue of custom & force.

not be a facet of ~~xx~~ self-government.

A theoretical problem is how do we know that whatever inherent criminal jurisdiction Indian tribes possessed was taken away when the United States became sovereign. The first section of the opinion is devoted to this problem, I think; it chronicles the assumptions of people in the 19th ~~century~~ century, who were closer to this issue than we are, that the Indians lacked criminal jurisdiction over non-Indians. I find the 19th century evidence persuasive; there really has ~~no~~ never been much doubt in my mind that 19th century Congresses that enacted Indian legislation and enacted treaties assumed that the Indians could not try non-Indians. Because of this, ~~assumption~~ I had thought before that the Court could say that Congress implicitly took away whatever criminal jurisdiction the Indians might have had in the various Trade and Intercourse Acts in the 19th century. But this approach met with the problem that there was no explicit withdrawal of jurisdiction by Congress, and under the presumption in favor of construing statutes in the Indians' favor, it seemed that such an explicit withdrawal of jurisdiction would have to be found in order to rule against the Indians. It was for this reason that Buzz Thompson, who drafted WHR's opinion, decided to take the approach he did.

The tack that probably will be taken by the dissent is that sovereignty includes all power within a certain territory, and cannot be dissected the way the majority does. Although I would tend to agree with this as a general principle, the

nature of tribal jurisdiction has never been so clear. Tribes obviously lack some of the basic powers of sovereignty, such as the power to dispose of land within the sovereign's territory. For this reason, I do not think the majority's position is untenable in saying that criminal jurisdiction over non-Indians is one of the things that was given up when the tribes accepted the ultimate sovereignty of the United States.

A problem that still remains is that the Court has intimated that Indian courts could assert civil jurisdiction over non-Indians. Of course in the cases involving civil jurisdiction, this Court's holdings mostly have been that the "state" courts could not assert jurisdiction over a dispute between an Indian and a non-Indian that arose on tribal land. It does not necessarily follow that the dispute must be resolved by a tribal court. But I think that fatal conclusion might follow. Buzz does not see an inconsistency between the assertion of civil jurisdiction and the denial of criminal jurisdiction, however, because of the significant difference between civil and criminal proceedings. He draws an analogy (not in the opinion) between civil proceedings and arbitration. Although civil disputes may be submitted to an arbitrator, we would not allow criminal disputes to be so handled. Similarly, it's okay for a tribal court to adjudicate a civil dispute between Indian and non-Indian, because the interests at stake are not comparable to those in a criminal proceeding.

Because I think this is a difficult case, I would recommend that you await the dissent before voting. This is a fairly feeble recommendation, however, because my instinctive feeling is that the majority's result is the correct one. And because of the problems that would attend an attempt to say that Congress actually withdrew Indian criminal jurisdiction over non-Indians, I do not think I could write a decent concurrence along those lines. Buzz told me that he read every word of every 19th century treaty, in addition to all the legislative history of the 19th century Indian statutes, before concluding that the opinion could not be written to say that there was such a withdrawal of jurisdiction. If I were voting, I would want to see the dissent before doing so, just to make sure I understood the arguments for the other point of view; but my hunch is that I would vote with the majority in the end.

Nancy

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 27, 1976

No. 75-5128 - Oliphant v. The Suquamish Indian Tribe

Dear Bill:

Please join me.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 27, 1975

Re: No. 73-5978 - Gilpatrick v. Commissioner

Dear Bill:

Please join me.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

February 28, 1978

No. 76-5727 Oliphant v. Suquamish Indian Tribe

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1978

Dear Bill:

Re: 76-1729 Oliphant v. The Suquamish Indian Tribe

Thurgood advises me he will be content, as I am, with showing that we two dissent.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

							1/26/78	
				Dismissed				
				Signed				

76-5729 Oliphant v. Suquamish Indian

BENCH MEMO

TO: Mr. Justice Powell

FROM: Nancy Bregstein DATE: Jan. 6, 1978

RE: No. 76-5729, Oliphant & Belgarde v. The Suquamish Indian Tribe

I. Introduction

This is a very complicated case, and there is no easy answer. There may not even be an answer, but I will try to point out some of the relevant considerations. This memo will not be able to go into all the intricacies of the relevant (and tangential) treaties and statutes discussed in the briefs of the parties and amici; and my conclusions will be tentative and subject to further illumination at oral argument. I will discuss the issues in the order they are presented in most of the briefs: inherent tribal

sovereignty; assuming such sovereignty, whether it has been relinquished voluntarily by the tribe or taken away by federal statute or treaty; whether exclusive jurisdiction has been vested in the tribe by virtue of the Treaty of Point Elliott; effect of Pub. L. 280 and the various actions taken pursuant to that statute by the State of Washington. First, though, I'll attempt to summarize significant developments in Indian law as they relate to criminal jurisdiction, as background. This summary is taken largely from Clinton, Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 Ariz. L. Rev. 951 (1975). You may be familiar with much of this already.

II. A Summary of Developments in Indian Law

At first, Congress dealt with Indian tribes primarily by treaty. This was consistent with the European practice of treating the tribes as sovereign nations. During the very early period (1778-1796) Congress treated the tribes as sovereign nations; and

> many of the early treaties recognized the Indians' jurisdiction to deal with non-Indians who settled on Indian lands and committed crimes thereon. Such jurisdictional grants apparently assumed that the Indian tribes were sovereign and possessed complete governmental powers over their own lands, including the powers to try non-Indians."

Clinton, at 954. Clinton notes, however, that even during this early period many treaties provided for federal prosecution of Indians who commited crimes against non-Indians on the Indians' land. This observation seems

to indicate that at first Congress was more concerned about asserting federal jurisdiction when the victim was a non-Indian than when the alleged perpetrator was a non-Indian. By 1789, however, a treaty with several Indian tribes provided for the trial in territorial or state court of non-Indians who committed crimes in Indian territory. This treaty also provided that the tribe could try non-Indians who settled in Indian territory illegally, but this really is a distinct situation and not dispositive of jurisdiction to try non-Indians who commit crimes in Indian territory when they were there legally.

After 1796, Clinton says, treaty provisions allowing Indians to try non-Indians virtually disappeared. "The trend was away from a land sovereignty notion of jurisdiction and toward a concept based primarily on the citizenship of the parties." Id. 955. "Federal jurisdiction, which had previously been limited to situations in which the victim was a citizen of the United States, was now extended to cases in which either the perpetrator or the victim was a citizen or resident of the United States." Id.

It could be argued from this pattern that the absence of such a provision, providing for federal prosecution of non-Indians, in the treaty entered into with the Suquamish in 1855 (the Treaty of Point Elliott) indicated that the tribe retained jurisdiction. This point, and the relevance of the Treaty in general, will be discussed in Part IV.A., infra. For now it is sufficient

to note that Clinton is talking about the period around 1796; it may be that by the time the treaty was signed with the Suquamish, it was taken for granted that Indians would not have criminal jurisdiction over non-Indians. This hypothesis is confirmed by the fact that the Cherokees insisted on including a provision in their treaty of 1866 that would give them jurisdiction over intra-tribal matters. If Indian tribes have any inherent sovereignty, surely it would be over such matters; yet a provision to that effect was included. It appears that it is not terribly safe to assume that the reason for the inclusion of a certain provision was that in its absence, the contrary state of affairs would have obtained. It is hard to tell whether provisions were included to confirm the status quo or to change it.

What I find most notable about Clinton's description of this early period is the trend to include treaty provisions for federal prosecution of Indians who committed interracial crimes. Clinton notes that this development constituted a gradual infringement on tribal sovereignty. On the other hand, federal responsibility for prosecuting non-Indians for interracial crimes seems to have been assumed almost from the outset and was not considered as significant an intrusion as the later assertion of jurisdiction over Indians.

The use of treaties ended in 1871, when the House (which had not say in treaty-making) succeeded in enacting a measure that provided that no Indian tribe would

thereafter be recognized as an independent nation with whom the United States could contract by treaty.

Certain federal statutes were enacted even during the treaty-making period. The most important one for our purposes is now codified at 18 U.S.C. § 1152 (the "interracial crimes" section). This provision originally was enacted as part of the Trade and Intercourse Act of 1790. It originally provided for federal prosecution of United States citizens or residents who committed any crime or trespassed on Indian land. Clinton, at 958. The Act was expanded significantly in 1817 to provide for federal prosecution of Indians who committed crimes in Indian territory. "In expressly providing a federal forum for crimes committed by an Indian, Congress expanded federal jurisdiction for the first time to cases in which the defendant was an Indian . . . ." Id. 959. (Note again that Clinton regards the coverage of Indians--not non-Indians--as the significant expansion of federal jurisdiction.) Intra-Indian crimes were specifically excepted. This statute later became part of § 25 of the first permanent Trade and Intercourse Act in 1834, was amended the last time in 1854, and eventually was codified at 18 U.S.C § 1152.

(During this early period the states were not involved in this jurisdiction maze, because Indians had been moving west faster than states. It was not until 1861 that Congress confronted the problem of allocating jurisdiction when an Indian reservation was located in a state and otherwise would be subject to the jurisdiction of

the state; then Congress required states to disclaim jurisdiction over Indian lands as a condition to admission to the Union.)

Clinton's conclusion about the period up to 1871 is:

> "[D]uring this period Congress slowly encroached on the tribal jurisdiction over Indian territory by providing a federal forum for the trial of crimes committed on Indian lands in which either the victim or perpetrator of the crime was a non-Indian. While such enactments began, as did the treaties, by granting federal jurisdiction only where the alleged perpetrator of the crime was non-Indian, by the end of the treaty period both the treaties and the statutes also granted the federal courts criminal jurisdiction if a serious crime were committed by an Indian against the person or property of a non-Indian."

By 1871 Indian juris. over non-Indians curtailed

Id. 961 (emphasis supplied).

The other major statute relevant to this case is the Major Crimes Act, now 18 U.S.C. § 1153. Congress passed the Major Crimes Act in 1885. It was the greatest intrusion into tribal jurisdiction over criminal offenses thus far because it provided for federal jurisdiction even when both the victim and the alleged perpetrator were Indians and the crime took place on Indian land. (Even today, however, it is not clear whether the Major Crimes Act provides for exclusive federal jurisdiction. Several lower courts have so held, but this Court has not addressed the question. In Talton v. Mayes, 163 U.S. 376, however, the Court ruled on a question involving a criminal trial in a tribal court where the offense was murder, and therefore should have been held in federal court if the Major Crimes Act were exclusive, without mentioning why the Major Crimes

Major Crimes Act of 1885 - fed. juris even when victim & Δ were Indians

Not settled whether this is exclusive juris.

Act had not ousted tribal jurisdiction over the offense. The Court probably did not consider the question. Alternatively, it has been suggested that a treaty provision with the Cherokees required that they be allowed to try their own members for major crimes. See Clinton, at 964 n. 75. It is not clear that this should make a difference, however, because unlike § 1152, § 1153 does not carve out an exception to federal jurisdiction for situations where a treaty provision gives exclusive jurisdiction to the tribe. Today the question is not of great practical significance, except for double jeopardy purposes, because the Indian Civil Rights Act of 1968 limited the sentencing power of tribal courts to 6 months in jail or a $500 fine. Thus an Indian could be tried for murder by a tribal court, but he could receive only a minimal sentence.)

Indian Civil Rts Act of 1968 limited sentencing power of tribal courts

II. Inherent Tribal Sovereignty

The parties and amici address the question whether tribes possess inherent sovereignty because they believe it will start the Court off with the correct presumption. Supposedly, if the Court is convinced that Indian tribes possess inherent sovereignty--i.e., independent of and not derived from congressional grant--then it would take explicit congressional action to take away such sovereignty. The parties seem to agree about this. On the other hand, if the Court can be convinced that tribes do not possess inherent sovereignty, and that the focus of

recent cases is simply to evaluate the relevant treaties and statutes, then petrs have a much better chance of winning, because the relevant statutes are not very clear. The Court might then construe the statutes as not granting tribal jurisdiction over alleged crimes by non-Indians.

I am not sure that the respective views of tribal sovereignty are that helpful. Or, perhaps, the concept of tribal sovereignty is such an amorphous and, at least in modern times, weak concept, that it does not take us very far in reaching the correct result in this case. It is acknowledged that the federal government has the power to define and restrict tribal sovereignty, which makes that sovereignty look very much like a grant of authority from Congress, as a practical matter, regardless of the original and theoretical explanation for the tribes' powers. Thus in the end it is most useful simply to attempt to glean Congress' understanding in enacting its various treaties and Indian statutes, without much of a presumption in either direction. The only presumption that should apply is the canon of construction with respect to Indians that statutes should be construed, as much as possible, in the Indians' favor.

The early view of tribal sovereigny was fairly clear and "platonic", McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164. In his two opinions in Cherokee Nation v. Georgia, 5 Pet. 1, and Worcester v. Georgia, 6 Pet. 515, Chief Justice Marshall described the Indian tribes as quasi-sovereign entities. This description was

used, at least in Worcester, to stave off an assertion of state jurisdiction. In subsequent cases, including fairly recent ones, the Court has adhered to the notion that the Indian tribes are sovereign, when the challenge comes from the state in which the tribe is located. A concept of federal preemption (as described in McClanahan) probably would lead to the same result in almost all cases involving attempted assertions of state jurisdiction. See McClanahan, supra, at 172 n. 8:

> "The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. [Citations omitted.] The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction."

In McClanahan the Court described the notion of tribal sovereignty as a "backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172.

Since it is well-settled that the Indian tribes are not subject to the jurisdiction of the states unless Congress specifically so directs, the cases discussing tribal sovereignty in the context of assertions of state jurisdiction are not very helpful in the present context. E.g., Fisher v. District Court, 424 U.S. 382 (1976); McClanahan, supra; Warren Trading Post v. Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1958). The Washington Attorney General suggests that the concept of tribal sovereignty in all these cases was used simply

Tribes not subject to juris. of States absent Congressional authorization

as a "shield to ward off assertions by the states of jurisdiction over Indians." Brief at 9.

Recognizing that not all cases discussing tribal sovereignty have involved assertions of state jurisdiction, he suggests that the concept has been useful in one other area, also not relevant to this case: "It forms the basis for fending off attacks . . . against federal legislation granting special treatment to Indians", e.g., Morton v. Mancari, 417 U.S. 535 (1974) (preference for Indians in the Bureau of Indian Affairs), or in validating the exercise of some congressional power with respect to Indians that might not have been valid with respect to purely voluntary groups, e.g., United States v. Mazurie, 419 U.S. 544 (1975) (delegation of power to the tribe to regulate liquor); United States v. Antelope, U.S. (1977) (validity of Major Crimes Act).

Thus the Washington AG suggests that tribal jurisdiction is merely "personal" (over members of the tribe), and not territorial. But this theory breaks down in light of several decisions of this Court. The Court has allowed the tribes to regulate various aspects of civil conduct on the reservation, and to enforce their law against outsiders. This was true in Mazurie and in Williams v. Lee. In both cases, non-Indians on the reservation were required to submit their disputes with Indians to the tribal court, rather than the state courts. The AG is right, of course, that these decisions are distinguishable from the instant case both because this

But theory that Tribal juris is merely personal doesn't square with our cases involving civil actions

case involves criminal jurisdiction and because this case involves a conflict between federal and tribal authority, not state and tribal authority. But the fact remains that in certain cases, the Court has recognized tribal authority even without a congressional grant. Furthermore, it has been suggested (by Vicki Jackson) that there was not a clear distinction between civil and criminal jurisdiction in 19th century Indian affairs, so that sovereignty would be equally broad with respect to both spheres.

This case involves conflict between federal & tribal authority

Apart from the language in the cases involving attempted assertions of state sovereignty, the Court held in Talton v. Mayes, 163 U.S. 376 (1896), that the Fifth Amendment did not apply to the proceedings of a tribal court, because the court derived its power from tribal sovereignty, not from the federal government; and it held in the Puyullap case that an Indian tribe possesses sovereign immunity, which, though waivable by Congress, exists in the first place independent of congressional grant.

Furthermore, the right of tribes to punish criminal conduct between Indians on the reservation is not challenged. Of course it has been held that jurisdiction over offenses between non-Indians, even if committed on a reservation, is in the states; but this result seems to derive from an interpretation of the congressional enabling legislation admitting states into the Union, and therefore can be interpreted as an explicit congressional withdrawal of jurisdiction from the tribes. See United States v.

McBratney, 104 U.S. 621; Draper v. United States, 164 U.S. 240; New York ex rel. Ray v. Martin, 326 U.S. 496.

Although there is no simple answer to the question whether tribes possess inherent sovereignty or not, I think the answer is that they do. Because it is recognized that Congress has plenary power to shape and limit the tribes' sovereignty, however, the relevant inquiry is into the statutes and treaties relating to Indian criminal jurisdiction. The approach is not as clear-cut as respondents would suggest, however. They combine the inherent sovereignty of the tribe with the canon of construction applicable to Indians and conclude that there must be very clear and explicit congressional action to withdraw the tribe's jurisdiction. But even in the context of state sovereignty, which is more concrete than tribal sovereignty and is explicitly protected by the Tenth Amendment, it is accepted that Congress may preempt state power by action Congress is constitutionally entitled to take. Since Congress' power to regulate Indian affairs is greater than its power to regulate the states, it would seem that less evidence of congressional preemption would be required in the Indian context than in the context of states.

Nancy thinks Tribes do have inherent sovereignty

III. Relevant Statutes

A. 18 U.S.C. § 1152

Section 1152 provides:

> " Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> This section shall not extend to offenses committed by an Indian against the person or property of another Indian, nor to any Indians committing any offense in the Indian country who has been punished by the local laws 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."

This was the provision in effect at the time the Treaty of Point Elliott was signed, because the statute was last revised in 1854 (a year before the Treaty). The 1854 amendment inserted the second exception, for Indians who already had been punished by the tribe.

First I will consider the SG's argument that the Suquamish fall within the third explicit exception to § 1152, and therefore have exclusive jurisdiction over offenses committed on the reservation; then I will consider the effect of § 1152 generally.

A. The treaty exception

Nothing to SGs argument

The SG argues that the Treaty of Point Elliott gave the Suquamish exclusive jurisdiction and therefore § 1152 does not apply by its own terms. I think there is little merit to this argument (so little, in fact, that respondents themselves did not even attempt to make it). The SG's argument seems to be that since the Suquamish possessed full territorial sovereignty up to the time of the Treaty, we have to look to see whether that sovereignty (at least over criminal offenses of non-Indians) was voluntarily surrendered by the tribe or taken away. Because the treaty is silent as to criminal jurisdiction over non-Indians, the SG concludes that there was no voluntary surrender; and the SG sees no action to take away

the sovereignty in the successive forms of the Trade and Intercourse Act that ultimately became § 1152 or in the Treaty itself. (Since this latter argument is also relevant to the statutory analysis simpliciter, I will discuss it in the next section.)

The objection to the SG's view is that silence in the Treaty does not indicate that Congress was leaving criminal jurisdiction in the tribe, but rather that it was assumed that Indians did not have criminal jurisdiction over non-Indians. The SG counters by saying that many treaties were not silent. He also counters the argument suggested in Part II, supra (that by 1855 it was assumed that Indians did not possess criminal jurisdiction over non-Indians) by stating that Indian policy fluctuated and was not always consistent. But it seems to me that the SG's argument, if it proves anything, is that the federal government in general had not taken away criminal jurisdiction over non-Indians, not that the Treaty of Point Elliott specifically provided for exclusive Indian jurisdiction. There is nothing in the Treaty to suggest an explicit reservation of such power to the tribe.

Treaty was silent because it was assumed that Indians did not have juris over non-Indians

(Furthermore, the SG recognizes that this notion of exclusive jurisdiction in the Tribe would have been very hard to honor before enactment of the Indian Civil Rights Act in 1968. The SG's argument--that the subsequent passage of legislation guaranteeing certain procedural safeguards in Indian trials makes acceptance of exclusive jurisdiction in the Tribe more palatable--makes the interpretation of an 1855 treaty turn on legislation passed

more than a century later. This is hard to accept; and it is doubtful that 19th century Americans were more willing to give this kind of jurisdiction to an Indian tribe than 20th century Americans would be. Thus the SG's characterization of the situation as an agreement between Indians and non-Indians that now can be fulfilled because of a fortuitous development sounds somewhat unrealistic.)

B. Section 1152 in general

The SG's alternative contention (along with respondents') is that § 1152 vests jurisdiction in the federal government over crimes taking place on Indian territory, but that this jurisdiction is simply concurrent with tribal jurisdiction. Petrs insist that federal jurisdiction under § 1152 is exclusive. Either conception may be right; all the evidence in either direction is quite equivocal. In following the canon of construction that statutes are to be construed in the Indians' favor, it probably would be advisable to rule that the jurisdiction is concurrent. But there are two objections to this tack, aside from the specific evidence, discussed infra, that congressional intent was to make § 1152 exclusive.

Concurrent jurisdiction argument

First, the Court has recognized that this canon of construction is no more than an aid to construction; it does not license the Court to rule in favor of the Indians when such an interpretation cannot logically be gleaned from the statutory framework. In DeCoteau v. District County Court, 420 U.S. 425, 447, the Court said (emphasis in original):

> "But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the entire reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefits of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent."

The complex pattern of statutes and treaties in the instant case does not contain "clear expressions of tribal and congressional intent", however, so the above quotation is not completely applicable. But this case tests the limits of the canon of construction, because here Congress' underlying understanding seems clear, while its pronouncements were not.

Second, there is difficulty here even in applying the canon of construction. When § 1152 was enacted (in its earlier forms), Congress thought it was doing something good for the Indians. It was recognized that tribal law and courts were not adequate to punish non-Indians who committed crimes in Indian territory; the provision of federal prosecution was viewed as a benefit to the Indians. On the other hand, it would have been hard to argue in the 19th century, and even harder today, that the Indians would not have been more benefitted by the provision of federal prosecution concurrent with tribal authority, than that the federal jurisdiction was meant to oust tribal jurisdiction.

With these caveats in mind, I will examine the arguments for and against exclusive federal jurisdiction.

Arguments in 10_17. § 1152

Ambiguous language

First, there is the language of § 1152 itself. The section provides that the law governing offenses committed "in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country." This language can be interpreted in one of two ways. Petrs argue that the language means that conduct in Indian country is viewed as if it occurred in any place under the sole and exclusive jurisdiction of the United States, i.e., Indian country is subjected to the sole and exclusive jurisdiction of the United States. At first blush this reading seemed implausible to me, because the interpretation offered by respondents seemed more logical. Respondents' interpretation is that the quoted language simply identifies the body of law to be applied in Indian country, i.e., the body of law applicable in federal enclaves. The statute does not convert Indian country into a federal enclave, however, and has nothing to do with whether federal law in Indian country is to be exclusive or concurrent with the resdiuum of sovereignty possessed by tribes. Either interpretation seems plausible; and I would not draw any hard and fast conclusions from the statutory language itself. If the canon of construction in favor of Indians is applied, the ambiguous language probably should be taken to identify the body of law applicable under § 1152, and not to proclaim Indian country to be within the exclusive jurisdiction of the United States.

Second, petrs argue: "To hold that federal jurisdiction over Indian land is exclusive as to the state, but concurrent with tribal jurisdiction discriminates against the natural sovereign rights of state citizens." Petrs' brief at 109. I am not sure I understand this point, but as I understand it, it is wrong. The premise of the argument is that without federal intercession, the state would be sovereign over Indian reservations within the state's borders. This harks back to petr's argument that tribal power comes from the federal government and not from the inherent sovereignty the tribe possessed before conquest. Such an argument, as explained in Part II, supra, seems to be wrong under this Court's decisions.

An argument could be made, however, that since federal legislation preempts state legislation on the same subject, despite the fact that states are at least as sovereign as Indian tribes, why should the result be any different when the federal government legislates with respect to a subject as to which the tribe otherwise would have been sovereign? I suppose the answer to this would be that federal legislation is not preemptive when Congress does not intend it to be; and here it could be argued that Congress intended federal criminal jurisdiction to be concurrent with tribal jurisdiction.

Good point

Third, § 1152 is comprehensive except for three specified exceptions. Federal jurisdiction does not exist when the crime takes place between Indians, when the Indian

already has been punished by the tribe, or when treaty provisions provide for exclusive tribal jurisdiction. The parties have described the second exception as a "double jeopardy" exception. The exception refers only to the previous trial of an Indian by the tribe, not to the previous trial of a non-Indian. Petrs argue, therefore, that since it is inconceivable that Congress wanted to protect Indians from double jeopardy while ignoring the possible double jeopardy plight of a non-Indian, the only rational explanation is that Congress assumed tribes could not try non-Indians.

Respondents have several answers to this. (a) The "double jeopardy" exception was enacted in response to the trial of an Indian who already had been punished by the tribe; Congress' concern was limited by that factual context. (b) Even if the omission of reference to non-Indians was advertant, the explanation might be that Congress was willing to leave punishment of Indians to the tribes, but was not willing to forego punishment of non-Indians, even if they already had been punished by a tribe. (This is a direct rebuttal of petr's view that Congress would have been as concerned, if not more, with the double jeopardy problem of trying non-Indians twice.) (c) It is not apparent that Congress assumed that Indians could not try non-Indians; Congress may well have assumed that Indians would not do so, but this would have been because of lack of inclination rather than lack of power. (Indeed, Vicki Jackson's theory of this case is that Congress did not distinguish between Indian civil and

criminal jurisdiction in the 19th century, because the Indians did not draw that distinction. Rather, they punished their own members by requiring restitution to the injured person and rituals of shaming, etc.--without true criminal trials--and the Indians would not have been motivated to "try" non-Indians in this way.)

I tend to think that conceiving of the second exception as a double jeopardy provision is erroneous. It is more likely that respondents' second point is correct: Congress was not concerned with punishing an Indian who already had been punished by his tribe. On the other hand, the fact that no reference is made to non-Indians <u>is</u> evidence that Congress did not think Indians either could or would try non-Indians.

Fourth, petrs argue that the jurisdiction conferred by § 1152 must have been exclusive because concern was expressed in Congress that the provision might infringe Indian sovereignty, and if there was to be any infringement, it would have to be because no Indian jurisdiction would be left. Simple concurrent jurisdiction would not amount to an infringement. There is no easy answer to this contention. If not for the third exception to § 1152 (for situations where treaties guarantee the tribe exclusive jurisdicton) it might have been argued that even concurrent jurisdiction would infringe the rights of tribe's whose treaties provided for exclusive tribal jurisdiction. But given this exception, petrs' argument has some force. On the other hand, the exception might

have been enacted to assuage the worries of those legislators who were concerned about infringing tribal sovereignty.

Fifth, all the precedents hold that Indians could not try non-Indians. This includes one circuit court decision, Ex Parte Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878), dictum in one Supreme Court decision, In re Mayfield, 141 U.S. 107 (1891), two opinions of the Attorney General, and the opinion of the Solicitor of the Interior (1970) until it was withdrawn after the district court decision in this case. Respondents attack most of the reasoning in these various sources, and their attack is persuasive. In Kenyon, for example, the conduct at issue took place on land outside an Indian reservation, so the decision is not relevant to the assertion of jurisdiction on reservation. On the other hand, the inability of tribes to punish non-Indians has been the law for over a century; and this is the first case challenging the status quo. Perhaps that is evidence in itself of what the 19th century assumptions were, on the part of Congress and the tribes.

But these are not strong precedents

Respondent's main arguments are that since the Trade and Intercourse Acts were enacted for the benefit of the Indians (to provide for punishment of offenders not punished by the tribe), it should not be construed to oust concurrent tribal jurisdiction; that the inclusion in many treaties of a provision divesting the Indians of jurisdiction over non-Indians would not make sense, and would be surplusage, if § 1152 already accomplished that

result; and that until 1854, when the statute was amended to include the exception an Indian who already had been tried, the statute could not possibly have been considered exclusive, because if it was, a tribe's sovereignty over its own members would have been withdrawn.

I find it very difficult to evaluate the relative merits of these competing arguments. I do not think there was affirmative intent on Congress' part to vest jurisdiction of non-Indians in the tribes. But in this context--where tribes started off sovereign--such affirmative intent is not necessary. Congress probably thought either that the situation would not come up (i.e., that tribes would not assert such jurisdiction), or that tribes could not assert such jurisdiction (i.e, that federal jurisdiction over interracial crimes was to be exclusive). In other words, I would imagine that if Congress had been confronted with the question whether tribes should be allowed to assert criminal jurisdiction over non-Indians, it would have answered in the negative. This would follow from the trend, noted in Part II, supra, to vest more and more jurisdiction in the federal government. And, as noted in Part I, federal jurisdiction was asserted over non-Indian defendants, in treaty provisions, before it was asserted over Indian defendants. As a matter of fact, a bill (the Western Territory bill) was rejected, at the same time the 1934 Trade and Intercourse Act was passed, that would have provided for concurrent jurisdiction between the tribes and the federal

Congress would not have intended

government. Petrs say that the bill was rejected partly because of this provision, but we do not really know why the bill was not passed.)

Since Congress did not speak explicitly to this point, the question is whether its tacit assumption that such jurisdiction would or could not be asserted by the tribes is sufficient to oust tribal jurisdiction. I am at an impasse on this point. In a normal case, I think I would conclude that this was sufficient; the question in this case is whether the presumption in favor of a construction favorable to the Indians tips the scale enough to come out the other way.

C. Relevance of § 1153 (the Major Crimes Act)

The SG asserts, brief at 26 n. 19, that the Major Crimes Act is irrelevant to this case because none of the crimes specified in it are involved here. But the SG concedes that the enactment of this statute "shows that the Congress then [in 1885] apparently thought Secion 1152 covered offenses by non-Indians on reservations but not, or not always, offenses by Indians against non-Indians." (Emphasis in original.) This is because the Major Crimes Act applies only to crimes between Indians; the natural assumption therefore is that Congress thought, at the time it passed the Major Crimes Act, that offenses by non-Indians already were covered by § 1152. Petrs draw this very inference.

Petrs also argue that the Major Crimes Act provides for exclusive federal jurisdiction, and therefore

§ 1152 must do the same. Otherwise, only the federal government could try and punish Indians for major crimes, while tribes could punish non-Indians for such major crimes. This makes no sense. The possible flaw in this argument, however, is that this Court has not held that the Major Crimes Act provides for exclusive federal jurisdiction, although the Eighth and Tenth Circuits have so held. Under the Indian Civil Rights Act of 1968, tribal courts may not impose sentences of more than 90 days or $500, or both. This suggests that tribes may not try anyone for major crimes, because otherwise the potential punishment would not fit the crime. It is unlikely that Congress would have considered this a desirable situation. Furthermore, the Major Crimes Act does not contain an exclusion for an Indian who already has been tried. Amicus Kitsap County notes that a logical explanation for this is that Congress thought it was precluding any exercise of tribal jurisdiction over major crimes when it enacted § 1153.

As for legislative history, Kitsap points out that a predecessor of the Major Crimes Act that would have provided for concurrent jurisdiction was rejected. On the other hand, respondents point to legislative history to show that Congress explicitly rejected the idea of making federal jurisdiction over major crimes exclusive. At first a provision in the Act provided that Indians accused of violating laws of the Territory would be tried in the

Territorial courts "and not otherwise". A Congressman objected to this provision, and it was deleted. No explanation is given for the deletion, however.

D. Summary

As indicated in all of the above, I think there is no clear answer to the question whether § 1152 jurisdiction is exclusive or concurrent with tribal jurisdiction. The whole statutory framework makes more sense, I think, if federal jurisdiction over interracial crimes is regarded as exclusive. This follows primarily from the absence of any reference to non-Indians in the exceptions to § 1152 and the anomaly that would result if tribes could try non-Indians for major crimes (because they would have concurrent jurisdiction of crimes committed by non-Indians, which are not covered by § 1153) while they could not try their own members for major crimes. The latter proposition depends on the question whether § 1153 is exclusive, however, and the answer to that question is far from clear.

IV. Constitutional Considerations

A possible way to approach this dilemma is to see which result would cause greater constitutional problems. Although not directly relevant to the threshold jurisdictional question, an answer to the question whether a trial by the tribe would violate petrs' constitutional rights might point the Court in the right direction. Unfortunately, either result seems to portend constitutional problems.

Court. rights

(cert for Indians),

Serious Const. Qs

Yes

If the Court affirms, there will be serious constitutional problems. Aside from all the constitutional challenges that inevitably will be made to the procedures at trial, there are two more basic problems. Non-Indians cannot participate in tribal government and they cannot be on the jury. Neither of these problems could be solved by requiring the participation of non-Indians in tribal governments or on their juries without interfereing with the present federal policy in favor of tribal integrity. If non-Indians had to participate in affairs of tribal government, the tribe would become no more than a unit of local government or a voluntary association. As for the procedures at trial, it as as yet unclear whether the Indian Civil Rights Act will provide safeguards as broad as the constitutional guarantees themselves. This is fine for Indians, who did not have the benefit of constitutional rights at all before the Act, but it amounts to a deprivation of rights for non-Indians.

No vote

Not on juries (9 on jury trial presented)

On the other hand, a ruling in favor of petrs (vs. Indians) would not be wholly without potential constitutional problems. If Congress decides to grant criminal jurisdiction over non-Indians to tribes, it would seem that all constitutional guarantees would have to be provided at such trials. This is because the grant of jurisdiction would be construed as a delegation of part of the criminal jurisdiction of the federal government. But if Congress should decide to confer such jurisdiction on Indian tribes, the problem of the constitutional rights of non-Indians is no greater than if the Court were to affirm.

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V. State Jurisdiction

A final factor that must be mentioned is the claim that the State of Washington has assumed jurisdiction over the Suquamish tribe and reservation pursuant to Pub. L. 280, enacted in 1953. Through this act, Congress mandated certain states to assume jurisdiction over Indian country, and permitted other states (including Washington) to assume such jurisdiction. At first, all that was required to effect an assumption of jurisdiction by the state was state legislation and an amendment of the constitution of those states whose constitutions disclaimed any jurisdiction over Indian lands. The Indian Civil Rights Act of 1968 changed this procedure, to require the consent of tribes for the assumption of jurisdiction; but that requirement is not relevant in this case, where Washington purported to assume jurisdiction over Indian lands before the 1968 Act.

Petra and the state argue that the state validly effected this assumption of jurisdiction. In 1957 the state enacted legislation to assert full civil and criminal jurisdictions over reservations that consented to such an assumption of jurisdiction. [This requirement of consent was a matter of state law, unrelated to the ultimate requirement enacted as part of the Indian Civil Rights Act.] The Suquamish tribe consented, but the state never amended its constitution. In 1963 the state enacted another statute providing for assumption of jurisdiction, regardless of tribal consent; but this statute included an

exemption, except as to eight listed matters (none of which are present here), for "Indians when on their tribal or allotted lands" when those lands are held in trust. The state's jurisdiction thus would extend to Belgarde's case because it took place off tribal or allotted land; it might apply to Oliphant's case, depending on whether the exemption of Indians on tribal land applies only to conduct by Indians or also to conduct involving Indians. The SG notes that the only question in Belgarde would be whether state jurisdiction preempted tribal law and tribal courts or whether the two are concurrent. The SG suggests, correctly I think, that "[t]hese are difficult issues which have not been addressed by the court of appeals, and which may not be appropriate for initial consideration here." SG's brief at 49.

There are all sorts of other complications here, however, involving whether the assumptions of jurisdiction were effective (resps argue that they were not because the Washington constitution was not amended) and whether the state's partial retrocession of jurisdiction (giving up all but the jurisdiction assumed under the 1963 law) was valid. The issue whether Washington's retrocession of jurisdiction is valid is present in the Yakima case, which is being held for Oliphant. The SG urges the Court not to decide this point (if it must be reached) before deciding Yakima. I will not go into all of this, because if the Court decides to hold that the Indians do not have jurisdiction over petrs, it will be unnecessary to decide

whether the federal government (through §§ 1152 and 1153) has jurisdiction or whether the state has jurisdiction.

On the other hand, if all the evidence thus far convinces you that you want to affirm on the ground that § 1152 did not preempt tribal jurisdiction over non-Indians, then it is necessary to consider the state's claim to jurisdiction. The argument would be that Pub. L. 280 and Washington's assumption of jurisdiction displaced tribal jurisdiction; the counter-argument, again, would be that the state and tribal jurisdiction are concurrent. In terms of analysis, it seems to me that the result here should not be any different than the result under § 1152. Pub. L. 280 was intended to give to the state's what the federal government had under § 1152; if § 1152 is viewed as exclusive, the assumption of jurisdiction by the state also should be viewed as exclusive (although, as noted above, this question need not be reached once it is decided that the federal government took away tribal jurisdiction when it enacted § 1152). On the other hand, if § 1152 established concurrent jurisdiction, then the same should be true of the state's jurisdiction assumed pursuant to Pub. L. 280. In short, there is no need for independent analysis of the state's claim to jurisdiction.

N.B.

P.S. There is one point I neglected to mention above, with respect to the Treaty of Point Elliott. Respondents cite evidence that the original proposal for the treaty included

a provision providing for federal prosecution of interracial crimes. This provision was the only one not included in the final version of the treaty. Instead, the only provision mentioning criminal jurisdiction provided: "Tribes may punish offenders of their own Tribe for any offesne committed, according to their own laws, . . ." Respondents argue that this is proof that the tribe was to be allowed to punish non-Indians, because the provision for federal jurisdiction was omitted from the treaty.

The counter-interpretation of this series of events is that the omitted provision was considered unnecessary and was omitted for that reason. This is not terribly persuasive; but, on the other hand, neither is it reasonable to assume that an explicit treaty provision was thought necessary to let the tribe punish its own members, while its ability to punish non-Indians could be assumed without an explicit treaty provision. Again, the contemporaneous understanding is very hard to discern.

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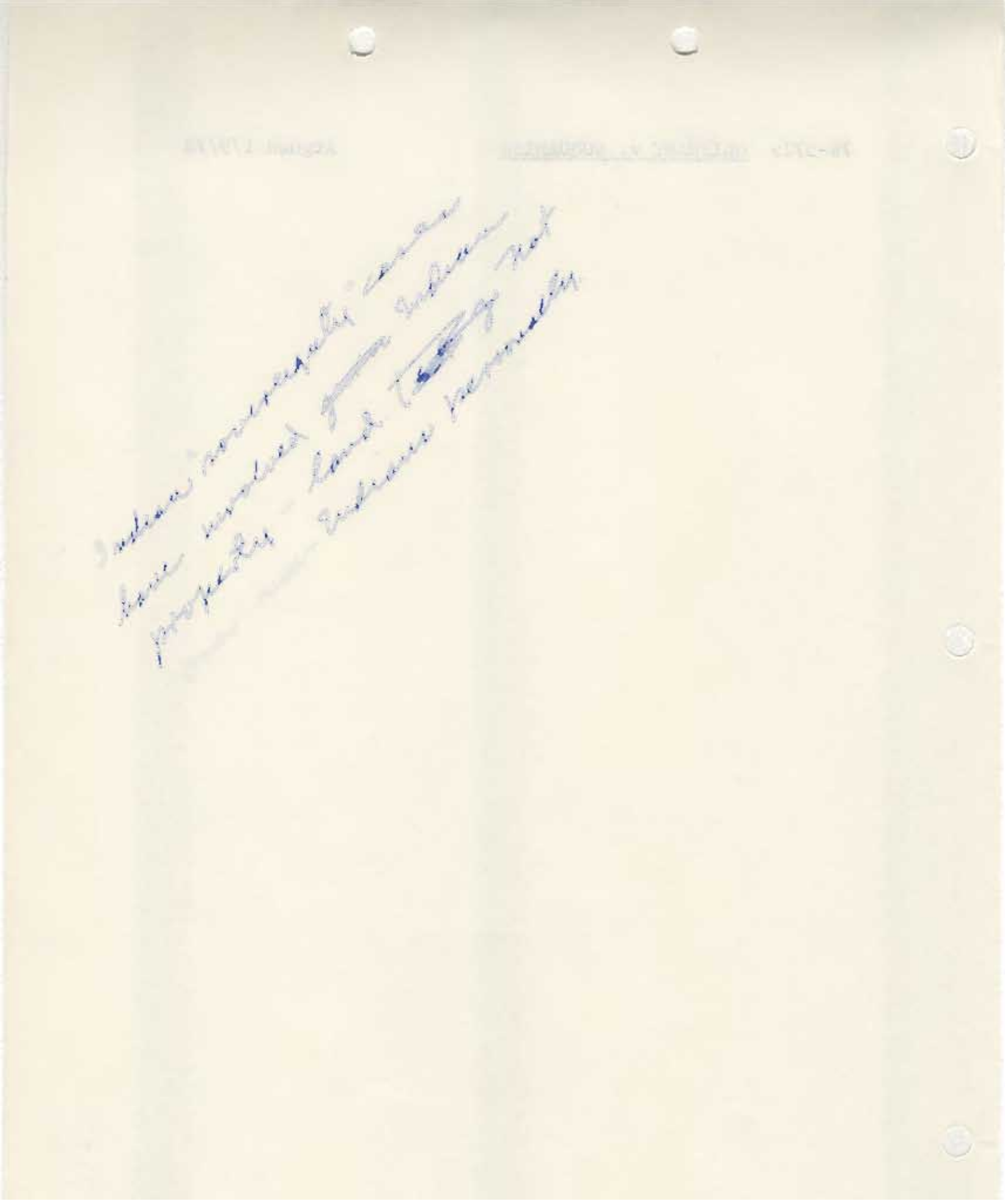

Malone (Retr).

The Tribal court was established in 197 for first time in history of Tribe. Only qualification for judges is high school education.

[Justice White suggested possible distinction bet. crimes against Indians property (e.g. trespass) and disorderly conduct

Malone recognized two distinctions between the Navahoe Tribe that occupies a vast area almost to exclusion of non-Indians & a Tribe such as Suquamish.

Gorton (AG of Washington)

Both As are residents of Reservation - with no vote

Absent a statute or Treaty expressly conferring juris. over non-Indians, none of our cases has recognized such juris.

Also Trade & Intercourse Act took this position

Q (continued)

Only on one occasion have this Court recognized parties' own Indemnity based on the implications of words parties have consciously inserted & adopted in explicit Contractual or Treaty stipulations.

But here, anyway, for that parties, Insurers must bear the cost.

S & L argues a little in Reply as if foreign arbitrators should pay their own Indemnity who lose in Kansas. Actions are sought to discourage litigation.

Tallman v. Thompson, 168 Kan. 376

Ernstoff (Fourth)

There is no right to jury trial — but only as four Justices are specified to assess new practices, and non-Justices of unconstitutional, not allegedly be moved.

Next clearing explicit prior.

Scott (SG)

Powers of Tribes diverse from Indians Sovereignty not applied prior to U.S.

But constitutional taken and changes in post-sovereignty — dominion Tribes and dependent upon U.S. + the powers sovereignty.

Indians Justices are to only on to cases that highlights "federal interests" — Art II, 16

Scope of powers

Article VI Justices

POST-ARGUMENT MEMO

TO: Mr. Justice Powell

FROM: Nancy Jan. 10, 1978

RE: Oliphant

As I mentioned when we talked yesterday, I am leaning in the directing of saying that the tribes have concurrent jurisdiction with the federal government, but ~~a~~ only by a ~~sig~~ slight margin. Several of my reasons are as follows:

(1) As noted in the Wheeler memo, the double jeopardy exception for Indians really is not a double jeopardy exception, because it excepts only Indians who have been punished by the tribe, not Indians who have been vindicated. Thus it seems likely that resps' interpretation of the provision is more accurate than petrs: the federal government simply was not that concerned about punishing an Indian who already had been punished, whereas it would ~~h~~ not want to give up its authority over non-Indians. This makes the failure to include non-Indians in the exception understandable, even on the assumption that they could be tried by a tribe.

(2) Pub. L. 280 vests the states (some mandatorily, some voluntarily) with criminal and civil jurisdiction over Indian tribes that the states previously lacked. If the theory is that this state jurisdiction is exclusive of tribal authority (either because Congress ceded to the states its § 1152 jurisdiction, which may be ~~exi ex~~ exclusive, or because in passing Pub. L. 280 Congress meant the new state jurisdiction to be exclusive), then the Indians have lost their civil jurisdiction as well as their criminal jurisdiction. If ~~that~~ is means the Indians cannot even rule tribal members, it clearly is wrong. Even if it means Indians cannot assert civil authority over non-Indians on the reservation, it threatens to undermine tribal self-government, recognized in Mazurie and Williams v. Lee.

(3) Also with respect to Pub. L. 280: there is legislative history explaining that the reference to "exclusive" state jurisdiction in Pub. L. 280 ~~meant~~ meant exclusive of the federal government. When this was explained, the Interior Department said it did not have the reservations about the bill it had had previously. This may mean that the Interior Department was upset about the idea of depriving Indians of concurrent jurisdiction.

None of this is conclusive, but it is some evidence that can be added to the mix of evidence in the original memo.

N.B.

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Mr. Justice Brennan

Circulate

1/13/78

Mr. Justice White Reverse (Tentative)

Agree with Potter as to result. Going back to 1796, 1802 and 1854 Congress has indicated or implied that Indians can't try non-Indians. We should not imply juries.

Question really is who has burden of proof to obtain Congressional action.

Congressional oversight is plenary.

Mr. Justice Marshall Affirm (tentative)

Mr. Justice Blackmun Reverse

Extremely close. Could turn on one policy judgment. This would tip case in favor of Peta.

This case should not control Wheeler

Mr. Justice Powell Concur (Yes/Reluctant)

Reluctant to agree generally with

P.S. and Rehnq.

I favorably would agree to affirmance

generally. But I should make extremely

emphatic statement that private use is non-Judicial.

Bus fare. Have no survey data. But

the problem is no different than Federal

Govt. Employees. Congress

can deal with this.

Mr. Justice Blackmun Affirm

195 Cambridge Housing complaints

agree with Powell, generally.

Mr. Justice Stevens Reversal

Viewing this as Federal Employee case

can't believe Congress in 1975 thinking

would have intended to subsidize Federal

to buy more Gasoline.