



10-1977

United States v. Wheeler

Lewis F. Powell Jr.

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9/7/77

Grant

Mr. Justice:

The SG has filed a Supplemental Memorandum. It points out that the Eighth Circuit has just decided a similar case in which it recognized that the Ninth Circuit's Wheeler decision was directly on point, but refused to follow the Ninth Circuit's holding. The Eighth Circuit case is called United States v. Walking Crow. The Eighth Circuit declared that following the Wheeler case "might mean that the felony jurisdiction conferred on the federal courts . . . could in instances be frustrated by relatively minor prosecutions in tribal courts. Such a situation would be undesirable and might lead to still further congressional encroachment on the jurisdiction of those courts."

The fact that there is now a clear conflict supports your inclination to grant.

Bob

Discuss
Inclined to Grant

Resp. pled guilty ^{in a Tribal Court} to contributing
to delinquency of a minor.

Later, under Major Crimes Act,
U.S. prosecuted Resp. for rape
— involving same factual situation.

CA 9 found D/J & reversed
rape conviction.

U.S. contends that an Indian
Tribal Court is a separate sovereign
jurisdiction, and ~~the~~ therefore

PRELIMINARY MEMORANDUM

Summer List 9, Sheet 1

No. 76-1629

Cert. to CA 9 (Goodwin, Sneed,
East)

UNITED STATES

v.

WHEELER

Issue is imp. because
Indians can plead guilty to lesser
offense in a Federal Criminal Court
and defeat fed. prosecution.

Timely/w. ext.

1. SUMMARY: Double jeopardy is the issue presented:

whether the Fifth Amendment precludes trial for rape in federal
district court following conviction for contributing to the
delinquency of a minor and disorderly conduct under Navajo tribal
law.

2. FACTS: Defendant respondent is a Navajo. He pled
guilty to contributing to the delinquency of a minor and disorderly
conduct before a Navajo tribal court. Over a year later, he
was convicted in a federal district court for statutory rape.
The Major Crimes Act, 18 U.S.C. § 1153, 2032 (1970) makes it

Possible grant. (See last page.)

Bob

a federal offense (with jurisdiction in the federal district court) to commit on an Indian reservation any of a specified list of crimes. Both charges arose out of the same occurrence. The Ninth Circuit overturned the conviction on the grounds of double jeopardy.

3. CONTENTIONS: The Solicitor General petitions for certiorari on two alternate grounds. First, he argues that there is no double jeopardy where the offenses were separate crimes against two separate sovereigns. The Ninth Circuit opinion relies on the Tenth Amendment for the proposition that a power not explicitly given to the federal government is reserved to the states. Hence, all power is to be found in either the states or the federal government. Since Indian tribes are not subject to the control of state governments, the Ninth Circuit concluded that they must exercise a form of federal jurisdiction. Hence, the same sovereign is involved. The Solicitor contends that Indian tribes constitute a third type of sovereign recognized by the Constitution.

Secondly, the Solicitor argues that, even if Indian tribes are held to exercise jurisdiction of a federal nature, the two crimes of which respondent was convicted constitute separate offenses.

4. DISCUSSION:

A. Sovereignty.

1. Jeopardy does not apply to different sovereigns.

In 1847, the Supreme Court in Fox v. Ohio, 5 How. 410, first recognized an exception to the constitutional prohibition against double jeopardy where the two crimes were offenses against

different sovereigns. The same principle has continually been reaffirmed. Abbate v. U.S., 359 U.S. 187 (1959), approved convictions in state and federal court for crimes stemming from the identical set of facts, because "two sovereignties, deriving power from different sources" had been offended, citing U.S. v. Lanza, 260 U.S. 377, 382 (1922). This Court has addressed the question of what is necessary to constitute an independent sovereign in Waller v. Fla., 397 U.S. 387 (1970), where sequential prosecutions in municipal and state court were held to violate the double jeopardy provision. Double jeopardy was involved because "the judicial power to try petitioner on the first charges in municipal court springs from the same organic law that created the state court of general jurisdiction in which petitioner was tried and convicted for a felony."

Waller relied heavily on Grafton v. U.S., 206 U.S. 334 (1907). In Grafton, the courts martial and the territorial court of the Philippines were held to be courts of the same sovereignty for double jeopardy purposes. "[T]he two tribunals that tried the accused exert all their powers under and by authority of the same government--that of the United States." "The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount." 206 U.S. at 334-335.

The test thus appears to be whether the jurisdictions involved originally derived their authority from the same government. Territorial courts, military courts, district courts, and courts for the commonwealth of Puerto Rico (Puerto Rico v. Shell Co., 302 U.S. 253, 264-65 (1937)) have all been held to find their source of authority in the federal government. Only state governments, and the authority exercised by municipalities created by the states, have been found not to derive their authority from the federal government. } note

Indian tribunals must be fitted within this scheme. There is no serious question that the authority of Indian tribunals is not a creature of state law. Either Indian jurisdiction is granted by federal authority, or Indian tribes constitute a third source of sovereignty within our constitutional scheme.

2. Indian Tribunals as a third sovereign.

The Major Crimes Act, supra, was enacted in response to the case of Ex Parte Crow Dog, 109 U.S. 556 (1883). In that case, this Court held that federal jurisdiction did not extend to murder of one Indian by another on a reservation. The Indian tribes were seen to start out with plenary authority. The fact that the Congress could specify certain crimes to be removed from the exclusive jurisdiction of tribal courts does not deny the "residual sovereignty" of the tribe.

In holding that the states could not exert jurisdiction over civil suits by non-Indians against Indians concerning business on the reservation, this Court emphasized the aboriginal authority of the Indian tribes over their own affairs. Williams v. Lee, 358 U.S. 217 (1959). "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs

and hence would infringe on the right of the Indians to govern themselves." 358 U.S. 223. Nevertheless, even when citing Worcester v. Ga., 6 Pet. 515 (1832), the Court's opinion recognizes the pervasive authority of the federal government over Indian affairs. "The whole intercourse between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." 6 Pet. at 561, cited at 358 U.S. at 218-19.

Talton v. Mayes, 163 U.S. 376 (1896), dealt explicitly with whether the existence of federal authority was incompatible with residual sovereignty in Indian tribes. "True it is that in many adjudications of this Court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. . . . But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."

To the extent that there has been federal regulation of crimes on reservations, it has not been through a comprehensive code, but rather by express exceptions to what is conceded otherwise to be, and always to have been, within tribal jurisdiction. That is the viewpoint taken by another panel of the Ninth Circuit in Oliphant v. Schlie, 544 F.2d 1007, 1009 (1976), a case denying habeas relief to a non-Indian taken into custody by tribal police: "The proper approach to the question of tribal criminal jurisdiction is to ask 'first, what the original

POST-ARGUMENT MEMO

TO: Mr. Justice Powell

FROM: Nancy

Jan. 12, 1978

RE: United States v. Wheeler

The argument in this case shifted my thinking significantly and makes me incline in favor of reversal, i.e., a holding that Indian tribes are a separate sovereign for double jeopardy purposes. This result, however, would depend on the opinion in Oliphant not being written to say that tribes do not have inherent sovereignty. To be consistent with a reversal in Wheeler, the opinion in Oliphant would have to say that although tribes had inherent sovereignty (and still do, with respect to intra-Indian matters), § 1152 withdraws from the tribes jurisdiction over non-Indians in criminal matters. (And, of course, if Oliphant comes out saying that the tribes retain concurrent jurisdiction over non-Indians, there would be no conflict at all a reversal in with/Wheeler.)

Although I am not comfortable with the prospect of denominating Indian tribes separate sovereignties (especially such tribes as the Suquamish), JPS' comments and questions at

argument convinced me that the Court would have to overrule Talton v. Mayes, 163 U.S. 376 (1896), to decide in favor of resp in Wheeler, Talton held that the grand jury provision of the Fifth Amendment did not apply to trials of Indians for intra-Indian crimes by tribes. The Court's reasoning is explicit: the Cherokee nation/derives its powers from the federal government, and the plenary nature of Congress' control does not make a difference for purposes of applying the Fifth Amendment to the tribe. ~~Exhibit~~ (I've attached the relevant part of the opinion.) I think the SG is right, too, in saying that Congress' enactment of the Indian Civil Rights Act in 1968 (which conferred some constitutional rights applicable in tribal trials) confirms the validity of Talton, or at least shows that Congress thought Talton was still good law.

It has been suggested that Talton should not apply today because tribes and the nature of federal control ~~has~~ have changed significantly. But I would not want to substitute a modern-day assessment of tribal sovereignty for the assessment of a Court that ~~was~~ was closer to the time when tribes truly were sovereign.

It has also been suggested that the relevance of Talton today is limited by the fact that states were not subject to the Fifth Amendment (through the Fourteenth) at the time Talton was decided. The Court might have thought it strange to apply constitutional requirements in the first eight amendments to Indian tribes, but not to states. Although this

might have occurred to the Talton Court, I do not think it affected the analysis of the decision that much. If Indian tribes were considered instrumentalities of the federal government, then constitutional provisions would apply to the tribes even under Barron v. Baltimore, without regard to the situation with the states. Of course the Court might have been struck by the apparent anomaly of holding tribes but not states to constitutional strictures, but the Court's explicit discussion centered on the fact that tribes are separate sovereigns and not part of the federal government.

I think it would be safe to reverse, unless the Court does want to consider overruling--or going around--Talton.

Nancy

Opinion of the Court.

adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty."

So, also, in "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May 2, 1890, c. 182, 26 Stat. 81, it was provided, in section 30, as follows:

"That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply."

And section 31 of the last mentioned act closes with the following paragraph:

"The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and powers of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is, therefore, clearly not an offence against the United States, but an offence against the local laws of the Cherokee nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have

Opinion of the Court.

no application, for such statutes relate only, if not otherwise specially provided, to grand juries empanelled for the courts of and under the laws of the United States.

The question, therefore, is, does the Fifth Amendment to the Constitution apply to the local legislation of the Cherokee nation so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee nation and recognized to exist in it by the treaties and statutes above referred to. Since the case of Barron v. Baltimore, 7 Pet. 243, it has been settled that the Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the General Government, that is, that the amendment operates solely on the Constitution itself by qualifying the powers of the National Government which the Constitution called into being. To quote the language of Chief Justice Marshall, this amendment is limitative of the "powers granted in the instrument itself and not of distinct governments framed by different persons and for different purposes. If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the General Government, not as applicable to the States." The cases in this court which have sanctioned this view are too well recognized to render it necessary to do more than merely refer to them. *Fox v. Ohio*, 5 How. 410, 424; *Withers v. Buckley*, 20 How. 84; *Twitchell v. The Commonwealth*, 7 Wall. 321; *Edwards v. Elliott*, 21 Wall. 532, 557; *Pearson v. Yewdall*, 95 U. S. 294, 296; *Davis v. Texas*, 139 U. S. 651.

The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Con-

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gress. The repeated adjudications of this court have long since answered the former question in the negative. In *Cherokee Nation v. Georgia*, 5 Pet. 1, which involved the right of the Cherokee nation to maintain an original bill in this court as a foreign State, which was ruled adversely to that right, speaking through Mr. Chief Justice Marshall, this court said (p. 16):

"Is the Cherokee nation a foreign State in the sense in which that term is used in the Constitution?"

"The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a State, and the courts are bound by those acts."

It cannot be doubted, as said in *Worcester v. The State of Georgia*, 6 Pet. 515, 559, that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized. And in that case Chief Justice Marshall also said (p. 559):

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. . . . The very term 'nation,' so generally applied to them, means a 'people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Ind-

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ian nations, and consequently admits their rank among those powers who are capable of making treaties."

In reviewing the whole subject in *Kagama v. United States*, 118 U. S. 375, this court said (p. 381):

"With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they resided."

True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. The fact that the Indian tribes are subject to the dominant authority of Congress, and that their powers of local self government are also operated upon and restrained by the general provisions of the Constitution of the United States, completely answers the argument of inconvenience which was pressed in the discussion at bar. The claim that the finding of an indictment by a grand jury of less than thirteen violates the due process clause of the Fourteenth Amendment is conclusively answered by *Hurtado v. California*, 110 U. S. 516, and *McNulty v. California*, 149

Syllabus.

U. S. 645. The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, were solely matters within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States. Such has been the decision of this court with reference to similar contentions arising upon an indictment and conviction in a state court. *In re Duncan*, 139 U. S. 449. The ruling in that case is equally applicable to the contentions in this particular arising from the record before us.

The counsel for the appellant has very properly abandoned any claim to relief because of alleged errors occurring subsequent to the finding of the indictment. As to the point raised in reference to the date of the commission of the offence as stated in the indictment, the record as corrected shows that the error in question did not exist. It is, therefore, unnecessary to notice the argument based upon the assumption that the indictment charged the offence to have been committed subsequent to the finding of the true bill.

The judgment is—

Affirmed.

MR. JUSTICE HARLAN dissented.

MEYER v. RICHARDS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF LOUISIANA.

No. 39. Submitted October 25, 1894. — Decided May 25, 1896.

A., an alien, sold to B. in New Orleans thirteen bonds of the State of Louisiana, delivered them to him, and received from him payment for them in full. Both parties contemplated the purchase and delivery of valid and

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sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited.' . . . 'It must always be remembered that the various Indian tribes were once independent and sovereign nations' . . . who, though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." 544 F.2d at 1009.

3. Indian authority as federal authority.

Indian tribunals are not free to violate basic due process rights, even if they are not held to all the requirements of federal courts. (See, e.g., Talton v. Mayes, supra.) The application of due process indicates an overriding restriction on tribal "residual authority."

Further, the Ninth Circuit's application of the Tenth Amendment is instructive: Indian jurisdiction must be fit in under either federal or state authority (unless it is construed to be "retained by the people.") In McClanahan v. Arizona State Tax Comm; Comm'n, 411 U.S. 164, 172 (1973), this Court addressed the source of federal authority over Indian matters: "[I]t is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U.S. CONST. ART I § 8, cl. 3; ART. II, § 2, cl. 2" 411 U.S. at 172 n. 7. That of course, does not directly address the source of internal tribal authority, but, in describing the evolution of these concepts, the Court observed, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." It is not contested that the Congress

could remove all authority from Indian tribunals. The fact that it has not done so could be seen as a kind of negative authority or tolerance, which would still involve the federal sovereign sufficiently to warrant the conclusion that the Congress approved (at least tacitly) the prosecution of an individual for violation of tribal law. Then double jeopardy would be involved if another prosecution followed in federal court for the same acts.

The strongest case for this viewpoint is Keeble v. U.S., 412 U.S. 205 (1973). In Keeble, a defendant was held to be entitled to a "lesser included offense" instruction in federal district court even though that lesser offense was exclusively within tribal jurisdiction. The Court held that the Major Crimes Act required those specified crimes to be tried as though they had been committed off the reservation, and part of that treatment involved the usual instruction on lesser included offenses. The government had argued that such an instruction would "infringe the tribe's residual jurisdiction," but the Court was not convinced. Under the reasoning of Keeble, any Indian crime could be adjudicated in a federal district court if it were possibly characterizable as a lesser included offense of one of the "major crimes" listed in the Major Crimes Act. Clearly, that result would not obtain for federal criminal trials involving lesser, included state crimes.

4. Recommendation:

The trend of Keeble and McClanahan is unmistakably away from former concepts of residual sovereignty. Nevertheless, the rules set down in Waller and Grafton for determining identity of sovereignty refer to the source of authority, the place from which it originally "sprang." The Ninth Circuit is divided

within itself on the proper treatment of this question. I recommend that this question is deserving of being resolved by the Court.

B. Lesser and Included Offense.

There is an accepted test for determining whether two offenses are sufficiently similar so that sequential prosecution will constitute a violation of double jeopardy.

"If each statute requires proof of an additional fact which the other does not," then the two offenses are sufficiently different.

The test was first expressed in Morey v. Commonwealth, 108 Mass. 433, and the Supreme Judicial Court's formulation was explicitly adopted by this court in Gavieres v. U.S., 220 U.S. 338 (1911).

The telling point is whether each offense is found to require a unique element of proof, not whether only one offense has a unique element. Gavieres held no double jeopardy for prosecutions involving "behaving in an indecent manner in a public place" and "misbehavior addressed to a public official." It is clearly possible to commit either one of these without committing the other. In Diaz v. U.S., 223 U.S. 442 (1912), a conviction for assault and battery preceded a conviction for homicide. However, the facts are quite sui generis: the victim had still been living at the time of the first prosecution, and the second prosecution was brought upon his death. yes

Applied to the facts here, the Morey test indicates that elements of statutory rape included all the elements of contributing to the delinquency of a minor in the manner in which both offenses were committed. Although rape required more proof, the events of the incident required to prove the delinquency charge were also

necessary to prove the rape charge. The Solicitor's reliance on Blockburger v. U.S., 284 U.S. 299, 304 (1932) (one sale of morphine violated provisions against selling from package other than original, and against selling except in pursuance of a written order) and Henry v. U.S., 215 F.2d 639 (9th Cir. 1954) (facilitation of transportation of and sale of heroin) is misplaced, since the events alleged to constitute proof of one crime did not fit perfectly within the events necessary to prove the other.

The possibility of different offenses is not sufficiently realistic to allow this Court to avoid the sovereignty issue.

4. RECOMMENDATION: Cert should be granted.

NOTE: This case is related to the issue raised in Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), for which cert. has, in separate papers, also been requested. *you*

A response has been filed.

8/8/77
tap

Campbell

CA op in Petn.

Here appears to be a genuine double jeopardy issue here. The SG wants a grant to clear up the sovereignty question, since — in the SG's view — the CA 9's decision allows defendants to escape prosecution for major federal crimes by pleading to relatively minor tribal offenses, which can be defined as lesser included offenses. That would seem to be a serious problem, meriting the attention of this Court.

Bob

G

SUPPLEMENTARY MEMORANDUM

Summer List 9, Sheet 1

Occasioned by supp. mem. of SG

No. 76-1629

Cert to CA 9 (Goodwin, Sneed, East)

UNITED STATES

v.

WHEELER

Fed/CRIM

Timely/ w. ext.

The Solicitor has filed a supplemental memorandum for the purpose of bringing to the Court's attention the decision of the Eighth Circuit in U.S. v. John Walking Crow (Aug. 10, 1977). The case involved prosecution of an Indian in tribal court for simple theft, followed by prosecution in federal district court for robbery under the Indian Major Crimes Act, 18 U.S.C. § 1153.

The filing of the 56's supplemental Memo was noted on the annotation of the original memo. It confirmed your decision to grant.
Bob

This is the same statute that is at issue in United States v. Wheeler. The Eighth Circuit found that there was no question that the two crimes were so related that prosecution for both of them by the same sovereign would constitute a violation of the double jeopardy clause.

However, the court held that the Indian Nations are, for purposes of that clause, independent sovereigns from the government of the United States. The Eighth Circuit realized that it was thus in square conflict with the decision of the Ninth Circuit in Wheeler, but ruled "we disagree with its holding and decline to follow it."

The rationale of the Eighth Circuit was that Indian sovereignty predated federal sovereignty, and has lapsed only to the explicit extent that the federal government has exerted its authority. The Supreme Court ruled that a federal court had no jurisdiction over a murder of an Indian by an Indian in the Dakota Territory in Ex Parte Crow Dog, 109 U.S. 556 (1883). That case occasioned the Indian Major Crimes Act, but the Eighth Circuit relies on it as establishing the independent nature of the Indian sovereignty.

The earlier memorandum recommended that cert. be granted; the presence of a square conflict between the Eighth and Ninth Circuits further supports that recommendation.

In this memo, I will also take the opportunity to note that cert. has been granted in Oliphant v. Suquamish, No. 76-5729, last June 12. That case considers whether Indian Tribal courts have jurisdiction over non-Indians charged with violations of

Indian law while on Indian reservations. The earlier memorandum reported that cert. had been applied for in Oliphant. The briefs were due on August 30. This was already an extension, but to date, no briefs have yet been received.

9/8/77

Campbell

8th Cir. op in
supp. mem. of SG

UNITED STATES

vs.

WHEELER

Also motion for resp for leave to proceed ifp.

Grant

[illegible]

BENCH MEMO

TO: Mr. Justice Powell

FROM: Nancy Bregstein

Jan. 9, 1978

RE: No. 76-1629, United States v. Wheeler

This case presents the question whether it violates the double jeopardy clause of the Fifth Amendment for resp to be tried in federal court for statutory rape when he has been tried and convicted of a lesser included offense by a tribal court. The parties seem to agree that the answer depends on whether the source of authority for the two trials is in the same sovereign, under the reasoning of Abbate v. United States, 359 U.S. 187. The difficulty in the case, as in Oliphant, is in determining the nature of the tribe's "sovereignty".

The most relevant precedents are Abbate, supra, and several cases involving the relationship between sovereignties and their instrumentalities: Grafton v. United States, 206 U.S. 333 (1907); Waller v. Florida, 397 U.S. 387 (1970); and Puerto Rico v. The Shell Co., 302 U.S. 253 (1937). In Grafton the Court held that an Army private could not be tried in a territorial court in the Philippines after having been acquitted of a lesser included offense in a court-martial. The court reasoned: "If . . . a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States." 206 U.S. at 352. In explaining why the situation of territorial and military courts differed from the situation of state and federal courts, the Court said:

"The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount."

Id. at 354 (emphasis supplied). Waller followed Grafton in holding that municipalities derive their authority from the state so that the double jeopardy clause, as applied to the

states, would prohibit trial in a state court after conviction in a municipal court.

The difficulty in applying the principles of the dual sovereignty exception in the context of an Indian tribe is that the tribe's status, and its claim to "sovereignty", is quite ambiguous. As noted in the Oliphant briefs and bench memo, the Court has adverted to tribal sovereignty on many occasions, but usually this has been in support of some action of the federal government that singles out Indian tribes, or in opposition to an assertion of the state's jurisdiction. The former can be explained in terms of Congress' plenary power to regulate Indian affairs; the latter in terms of federal preemption and plenary power over Indians.

Dual sovereignty concept not strictly applicable to Tribe.

The one thing that is clear about tribal sovereignty is that it is not "full" sovereignty. It is widely acknowledged that Congress has plenary power to regulate Indian tribes, and this power includes the power to waive a tribe's sovereign immunity, United States v. United States Fidelity & Guarantee Co., 309 U.S. 506, 512-13; unilaterally to abrogate treaties by statute, Lone Wolf v. Hitchcock, 187 U.S. 553; and to withdraw criminal or civil jurisdiction from the tribe. In view of the plenary nature of Congress' control over Indian tribes, it really cannot be said that tribes are sovereign in the way

A Tribe does not have full sovereignty

that the federal government or the states are. (This is a slightly different question from the one in Oliphant, where tribal sovereignty--if recognized at all--is recognized only because Congress has chosen to let it continue.)

With this in mind, the language in Grafton becomes relevant. Although no one contends that the tribes originally obtained their authority from the federal government, as the Court described the situation to be in Grafton, today the tribes' authority exists at the pleasure of the federal government and according to the vicissitudes of congressional policy.. The same is not true of states. It could be said that the tribes exercise their authority "by the authority of the United States"; and it is clear that federal authority is paramount to that of the tribe, and not just in the sense of federal supremacy. Congress' power over the tribes is plenary, and whatever sovereignty the tribes have is "dependent" on the "dominant" sovereignty of the United States. United States v. United States Fidelity Co, supra, at 512. yes

The third case mentioned above, Puerto Rico V. The Shell Co., involved a prosecution under Puerto Rico's equivalent of the Sherman Act. One of the claims raised by the defendant was it might be subjected to double prosecution, by Puerto Rico and then by the United States. The Court rejected this contention on the ground that a

second prosecution would be barred by the double jeopardy clause. Earlier in the opinion, the Court had described Puerto Rico's powers of self-government and noted that the purpose of two congressional statutes (the Foraker Act and the Organic Act)

"was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. [Citations omitted.] The effect was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the states--as, for example, immunity from suit without their consent. . . . The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures."

302 U.S. at 262. In spite of all these attributes of sovereignty, the Court had no trouble concluding that the principle of Grafton applied because "[b]oth the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Resp. concludes from this that the dual sovereignty exception has been limited to the state/federal context.

The SG suggests, brief at 31 n. 13, that the Shell case might be decided differently today, in view of the fact that Puerto Rico attained "quasi-statehood" in 1952 when Congress "relinquished its control over the

organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States", Examining Board of Engineers v. Flores de Otero, 426 U.S. 572, 597. The SG says that resp's use of the Shell case is "misleading" since resp quotes from Flores in establishing the "quasi-statehood" of Puerto Rico. While the SG's point is well-taken with respect to the degree of independence now recognized in Puerto Rico, the description in the Shell opinion itself of Puerto Rico's powers of self-government before 1952 made Puerto Rico sound as at least as sovereign as an Indian tribe.

*Before 1952
Puerto Rico*

*was at
least as
sovereign as
an Indian tribe*

Thus the sole - and potentially critical - distinction between the case of an Indian tribe and the situations in Grafton, Waller, and Shell, comes down to the original source of the entity's authority. The present extent of exercise of sovereign or quasi-sovereign powers does not differ. In view of the fact that the nature of original tribal sovereignty is far from clear, this seems like a very abstract point on which to rest a decision that the dual sovereignty exception applies in the case of an Indian tribe. The shakiness of this position is aggravated by the disrepute in which the dual sovereignty exception has found itself lately. Since the Court may reconsider this exception sometime in the future, it would not seem

yes

advisable to expand the exception to apply to an entity whose true sovereignty is questionable and whose lack of full sovereignty is undisputed.

The only rationale for recognizing the dual sovereignty exception in this context would be the government's identification of "undesirable consequences" that would ensue if double jeopardy were a bar to federal prosecution in this kind of case. The government claims that Congress would be put to the choice of foregoing federal prosecution of individuals tried by a tribal court (even if the defendant pled guilty in tribal court and received to a relatively minor sentence) or cutting back on the power of tribal courts to try offenders.

SG's

concern

This is a legitimate concern. But if Congress chose the latter alternative, the result would not be terribly different from the state of affairs existing today in the context of major crimes committed by Indians, (the ~~Major~~ Crimes ~~Act~~ Act does not apply to non-Indians) and in certain respects, it would be preferable. As mentioned in the Oliphant memo, it is an open question--at least in this Court--whether the Major Crimes Act (18 U.S.C. § 1153) provides for exclusive federal jurisdiction or concurrent tribal and federal jurisdiction over Indians who commit the enumerated major offenses. Yet even if tribal courts can try Indians for major offenses, they can impose

sentences of not more than 6 months imprisonment and/or a \$500 fine. Part of the reason that an offender can get off lightly by being tried first in a tribal court is that the tribal courts are so limited in their sentencing power. But this is a bad state of affairs even without regard to the double jeopardy problem. It would make much more sense to limit tribal authorities to prosecution for minor offenses, if their sentencing power is to be so circumscribed.

Thus Congress could limit tribal jurisdiction to offenses, enumerated by Congress, that reasonably might be punished within the sentencing authority now possessed by the tribes. Since it seems to be acknowledged that there is not a great deal of federal interest in prosecuting minor offenses, a strict separation of the two jurisdictions (minor offenses in the tribe and major offenses in the federal government) would make a lot more sense than the present situation and would not be an undesirable consequence at all.

Unfortunately, the above solution solves only part of the problem. In this case, for example, resp was charged in tribal court with disorderly conduct and contributing to the delinquency of a minor. If the double jeopardy clause is applicable, the charge on contributing to the delinquency of a minor would be sufficient to bar

the federal prosecution for statutory rape because it is a lesser included offense of rape. Yet there could have been no federal prosecution for the lesser included offense alone, cf. Keeble v. United States, 412 U.S. 205; and while the tribe could have brought the contributing-to-the-delinquency-of-a-minor charge even if the Major Crimes Act provided for exclusive federal jurisdiction over the enumerated crimes.

Aside from the Major Crimes Act, the other primary source of federal authority over alleged offenses that take place on a reservation is 18 U.S.C. § 1152 (the interracial crimes provision). Here there would be significant double jeopardy problems, if, as we have discussed in Oliphant, there is concurrent jurisdiction between the tribe and the federal government. (The supposed "double jeopardy exception" in § 1152 really does not deal with double jeopardy. The exception is for "Indians committing any offense in the Indian country who has been punished by the local laws of the tribe" (emphasis supplied). The exception does not apply when an Indian has been acquitted by the tribe.) In addition, the exception does not mention non-Indians. There, assuming that § 1152 provides for concurrent jurisdiction, the federal government would be hampered in its prosecution of non-Indians for all crimes (major and minor) under § 1152 and its prosecutions of

Indians for major and minor crimes, brought under § 1152, when the defendant had been acquitted by the tribal court. Assuming arguendo that the federal government is not greatly concerned with prosecution of minor crimes, and that Congress could or amend or clarify § 1153 to vest exclusive jurisdiction over major crimes in the federal government, I doubt that courts would allow tribes to prosecute non-Indians for major crimes simply because § 1152 jurisdiction is concurrent (if the Court so holds in Oliphant). By implication from the hypothetical amendment of § 1153 and the limited sentencing power of tribal courts, tribes could not prosecute non-Indians for major crimes. Thus the entire problem probably would come down to two situations: potential double prosecution of (i) non-Indians for minor crimes, ^{and} (ii) Indians who had been acquitted of minor crimes. Since I have assumed as a general matter that the federal government is not concerned about prosecuting the minor offenses, the basic problem would be the preclusion of federal prosecutions for major crimes when the defendant had been tried in tribal court on a charge that amounts to a lesser included offense of the federal charge.

} This
is
the
problem

This strikes ^{me} ~~one~~ as a problem. It is arguable, as a policy matter, that both the federal and tribal governments have an interest in prosecuting an offender

under their respective criminal codes, especially when the definition of offenses is so different (as in the instant case). But I cannot see a real difference between this situation and the situation in Waller v. Florida, supra. There the municipality charged the defendant (who allegedly stole a mural from city hall and paraded it through the streets) with violation of two of its ordinances: destruction of city property and disorderly conduct. After the defendant was convicted and sentenced to 180 days in jail, the state charged him with grand larceny (for which the defendant eventually was sentenced to 6 months to 5 years in jail). Of course Waller is distinguishable on the basic ground that there "the judicial power to try [the defendant] on the first charges in municipal court springs from the same organic law that created the state court of general jurisdiction . . .", 397 U.S. at 393, the same policy arguments made the the SG in Wheeler would apply in Waller. Again, the critical question comes down to whether the original source of authority, rather than the present source of that authority, for all practical purposes, is to be determinative. I suppose it might also be said that tribe members owe a kind of allegiance to their tribe that does not exist in other contexts outside of the state or the federal government. In short, this^{is}/a very difficult issue ~~and~~ whose resolution really might go either way.

I will address only two of the SG's arguments that this case falls within an exception to the double jeopardy clause other than the dual sovereignty exception. (Three of the other/suggested exceptions--

identified in Jeffers v. United States and described in the SG's brief at 44-45--simply are not applicable on the facts of this case. See resp's brief at 42-44.) The two other potential exceptions identified by the SG are (1) WJB's suggestion in Ashe v. Swenson, 397 U.S. 436, 453 n. 7, that an exception to the double jeopardy clause may be "necessary if no single court had jurisdiction of all the alleged crimes" and (2) a proposed exception to take account of the unique federal/Indian relationship.

(1) I am not sure that WJB's suggested exception would apply outside of his "same transaction" theory of double jeopardy. ~~Otherwise, the exception would have applied~~ The Court has not ~~as~~ articulated such a theory, and such an exception would have been applicable in Waller, supra. The municipal and state offenses in Waller were defined ~~separately~~ separately, and neither court had jurisdiction of the offenses cognizable by the other court.

(2) This second exception is described by the SG as applicable in "a middle range of dual-authority cases where the Clause applies in its essentials, but where its impact on prosecution for a greater offense after conviction ~~or~~ for a lesser included offense is not subject to the analysis of Brown [v. Ohio]. For the full explanation of the SG's theory, see its brief at 44-45 n. 26. I do not think this theory will work. The SG suggests this theory for situations where "the two legislative bodies [are] sufficiently separate and independent, and the two statutes which the defendant is accused of violating

sufficiently different in the interests they seek to vindicate, that the approach adopted in Brown v. Ohio for successive prosecutions by 'a State or the Federal Government' may not apply."

Although this is an attractive theory in some respects, it seems that it would apply equally to the differences between military and federal courts, or territorial and federal courts, or small-town municipal courts and state courts.

If ~~the Indian tribes~~ Indian tribes are somehow different from all of these, it would seem better to ~~call~~ call them "sovereign" for purposes of the double jeopardy clause, and thereby to allow multiple prosecutions, than to ~~ex~~ carve out this exception which sounds like it might also apply to the situations the Court already has decided trigger the double jeopardy clause. The only advantage of adopting this theory is that it would be limited to prosecutions for greater and lesser offenses, and would not always allow a second prosecution; but I have not been able to determine the theoretical justification for this theory.

In short, another difficult question as to which I have no certain answer.

N.B.

Argued 1/11/78

D/Q case. Resp. committed ^{assault with intent to} rape on Indian Reservation. He pled guilty to a minor offense under Tribal law.

The U.S. indicted for felony in a DC.

The ~~no~~ offense of contributing to delinquency of a minor is a lesser included offense of the felony of "carnal knowledge".

~~The~~ SG argues there is no D/Q because of dual sovereignty principle. SG argues there is "residual sovereignty" as evidenced by Tribal jurisdiction over certain crimes.

Council for Resp. argues that Tribes are not sovereign in same sense as a state, & that the ~~state~~ double principle has been applied only to state/fed trials. Tribes are "wards" of U.S. subj. to plenary power of Congress.

Talton v. Mayes, 163 U.S. 376 (1896) ~~has~~ held that the Cherokee Tribe had authority - not derived from Fed. Gov't - over ~~over~~ intra-Indian crimes, & therefore 5th Amendment Q/J requirement did not bind Tribes. This case supports SG's position.

We can agree with Gov't here consistently with disagreeing in Oliphant on ground that statute (§ 1152) withdrew jurisdiction over non-Indians

Extremely close case. Inclined to Reverse but will await conference discussion

Chobaucyk (SG)

Responding to WHR, SG said that if ~~we~~ in Sugameish we hold that Tribes may not try a non-Indian such a holding would undermine Govt's position in this case.

This case involves a crime ~~by~~ by an Indian vs. an Indian. Thus, Tribal Court had juric over minor crimes (not covered ~~by~~ by Major Crimes Act) & exclusive juric. Tribal Court has no juric over Major Crimes.

Tribes retain "residual ~~sovereignty~~ sovereignty"

Rebuttal.

~~If we decide~~ Object for

Talton v Maye is said to be controlling.

But see what he said in Rebuttal (not in notes)

O'Toole (Public Defender - for Reck)

Tribe not sovereign - (see Summary
in his Brief)

Relies on language of Indian
Civil Rts Act.

This is different from Oliphant.

A Tribe may have sufficient ^{reserved} sovereignty
to try crimes committed on Reservation
(just as a City may) but this is
not sufficient to meet the Abbate test
that has been applied only in state/fed
situation. A state's sovereignty
is reserved by Court.

Tribe is like a Territory (Philippines)
or a City. (Analogy to City not analogous
because its residents are citizens of state
whereas ~~the~~ Indians have ~~allegiance~~ allegiance
to the Tribe.)

close &
difficult
question

Reverne 6-1²

76-1629 U.S. v. WHEELER

Conf. 1/13/78

The Chief Justice

Reverne

Tribal Court derived its jurisdiction from Tribes.
Dual sovereign doctrine applies

Mr. Justice Brennan

Absent

Mr. Justice Stewart

Reverne

Tribal Court had jurisdiction to try Indians. This power results from fact Fed Govt had never taken this power away.

No conflict with vote in
Oliphant

Mr. Justice White

Reverend

Agrees with Potter

Mr. Justice Marshall

affirm letter 1/16/78

Absent

Mr. Justice Blackmun

~~Reverend~~ Affirm

2.

Different from Olafent issue

Mr. Justice Powell

Reverse

Agree with Potter & Bryan
not inconsistent
with my vote in Oliphant
Talton v May is close to
being controlling.

Mr. Justice Rehnquist

Reverse

No conflict with Oliphant

Mr. Justice Stevens

Reverse

There was no jeopardy
until tried in Fed. Ct. 5th Amendment
doesn't apply to Truber (Stewart
& White disagree with this.)

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1629, United States v. Wheeler

I tentatively vote to affirm the judgment of the Court of Appeals. While I believe that tribes retain certain rights of self-government through a residual sovereignty not deriving from the federal Constitution but pre-existing it, I do not at this time think that different sources of sovereignty necessarily require application of the "dual sovereign" doctrine of Abbate. What strikes me as peculiar about the relationship between the tribes and the federal government is the plenary nature of Congress' authority to act vis-a-vis the tribes. Unlike the states, whose sovereignty (and concomitant police power) is protected and recognized in the Constitution, the tribes continue to possess any criminal jurisdiction at all wholly at the sufferance of the federal government (absent limiting treaty language); and Congress has enacted numerous statutes arguably controlling the tribes' criminal jurisdiction, 18 U.S.C. 1152, 1153, and the manner in which such jurisdiction is exercised, 25 U.S.C. 1301 et seq.

For these reasons, I am presently inclined to believe that the relationship between the tribes and the United States is more comparable to that of the territories and the United States, Grafton v. United States, 206 U.S. 333, or municipalities and states, Waller v. Florida, 397 U.S. 387, than it is to that of the states and the federal government, which, as the SG's office has conceded, are the only full sovereign powers in the United States. My vote is tentative, however, since the majority opinion in this case or developments in Oliphant or Santa Clara may persuade me otherwise.

TM
T.M.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

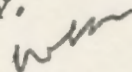
March 2, 1978

Re: No. 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

March 3, 1978

No. 76-1629 United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

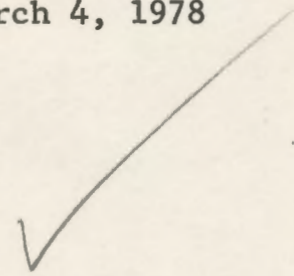
cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1978

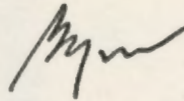
Re: 76-1629 - United States
v. Wheeler



Dear Potter,

Please join me.

Sincerely yours,

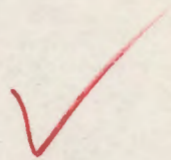


Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 8, 1978

Re: 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Respectfully,

A handwritten signature, likely of Justice John Paul Stevens, is written below the word "Respectfully,".

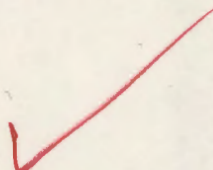
Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1978

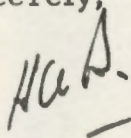


Re: No. 76-1629 - United States v. Wheeler

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

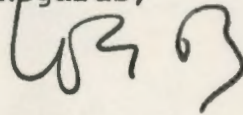
March 14, 1978

Re: 76-1629 - United States v. Wheeler

Dear Potter:

I join. The Oliphant dissent having persuaded only one (myself), it is now "gospel," and unless Thurgood writes as persuasively here as he did (for me) in Oliphant, I bow to heavier, if not better, "firepower".

Regards,



Mr. Justice Stewart

Copies to the Conference

[illegible]