

**2002 TRIBAL LAW & GOVERNANCE CONFERENCE  
CASE RECONSIDERATION**

**BEFORE THE SUPREME COURT OF  
THE AMERICAN INDIAN NATIONS**

**Suquamish Indian Tribe,  
Petitioner**

**v.**

**Oliphant et al.,  
Respondents.**

**2002 Term**

**Case No. 02-1**

*First Decided by the  
Supreme Court of the United States of America  
on March 6, 1978  
435 U.S. 191 (1978)*

*To be reargued and re-decided by the  
Supreme Court of the American Indian Nations  
October 5, 2002*

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**RESPONDENTS' BRIEF**

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\* The views expressed herein do not represent those of the author.

**STATEMENT OF THE CASE**

Noted Indian legal scholar Vine Deloria, Jr., has observed that “the Indian argument [in this case]” is “based on an idea of sovereignty having little relation to actual reality.”<sup>1</sup> Careful examination of both the facts of this case and the history of criminal jurisdiction in Indian country reveals the truth of Professor Deloria’s statement.

In this case, the Suquamish Indian Tribe seeks to assert criminal jurisdiction over Mark David Oliphant and Daniel B. Belgarde, two non-Indian residents of the Port Madison Indian Reservation who allegedly committed crimes on the reservation. The United States Supreme Court (referred to hereafter as the “Supreme Court”), having duly considered the matter, held that the tribe, by yielding to the overriding sovereignty of the United States, relinquished the power to try non-Indians for crimes allegedly committed in Indian country.<sup>2</sup> That holding must be affirmed.

The Port Madison (or “Noo-Sohk-Um”) Indian Reservation, located on Puget Sound in Kitsap County, across the waters of Elliott Bay from Seattle, Washington, contains approximately 7,276 acres of land. Only forty-one acres are tribal trust land, and of these, thirty-six are leased to a non-Indian corporation, pursuant to the terms of a fifty-year lease entered into by the tribe in 1969. The remaining five acres of tribal trust land contain a recreational park and other facilities.

Non-Indians own 5,231 acres of land within the reservation, or approximately sixty-seven percent of the 7,235 acres of non-tribal trust land. The remainder consists of allotted lands belonging to Suquamish Indians in severalty and lands dedicated to state and county highways and roads.<sup>3</sup>

The Suquamish Indian tribe has approximately one hundred and fifty enrolled members, of whom only fifty reside on the Port Madison Reservation. By contrast, nearly three thousand non-Indians live on the reservation. Thus, non-Indians outnumber Indians by a ratio of sixty to one.<sup>4</sup>

The roughly three thousand non-Indian citizens of the Port Madison Indian Reservation occupy lands that they purchased, or that their ancestors purchased, after the United States government divided the reservation to make individual allotments for tribal members and sold the remaining lands as surplus to non-Indian homesteaders.<sup>5</sup> Non-Indian landowners have created homes and cities within the reservation. These citizens are not transients consenting to jurisdiction by their temporary presence on the reservation. They are permanent residents of the reservation, and yet they have no voice in the creation, enforcement or adjudication of tribal laws.

It cannot be denied that the contemporary demographics of the Port Madison Reservation are the product of the colonialist policies of the United States government. These policies, including the allotment of lands within the reservation, have had a devastating impact on the Suquamish people. Yet, in spite of this history, this Court

must be guided in its present inquiry by the counsel of former Supreme Court Chief Justice John Marshall:

[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.<sup>6</sup>

For over one hundred and fifty years, the federal and state governments have assumed and exercised jurisdiction over non-Indians who commit crimes in Indian country. During that time, not a single court has upheld concurrent tribal court jurisdiction over non-Indian crimes in Indian country. The treaties and statutes of the United States government are based on the principle that Indian tribes do not have criminal jurisdiction over non-Indians. The United States Attorney General and Solicitor of Indian Affairs have repeatedly affirmed this principle. So, too, must this Court.

### **SUMMARY OF ARGUMENT**

It has been said that before their contact with European colonists, Indian tribes possessed all of the attributes of sovereignty inherent to any nation.<sup>7</sup> However, the courts of the United States have held that Indian tribes have lost, or may be divested of, some or all of their inherent rights and powers in three distinct ways:

First, the Supreme Court has held that Indian tribes, having accepted the protection of the United States, lost those attributes of their original sovereignty that are inconsistent with their status as “domestic dependent nations.”<sup>8</sup> The Supreme Court has found implicit divestiture of inherent tribal sovereignty “where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations [or] alienate their lands to non-Indians without federal consent. . . .”<sup>9</sup>

Second, Indian tribal rights and powers may be ceded by Indian tribes in treaties or agreements with the United States. Through hundreds of treaties, Indian tribes have ceded large tracts of land, and certain rights, to the United States in return for peace with, and the protection of, the United States.

Third, Congress may unilaterally abrogate Indian tribal rights and powers. Inherent tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.”<sup>10</sup> “The power of Congress to divest tribes of any and all of their sovereign attributes is, of course, undisputed.”<sup>11</sup> For example, in 1885 Congress abrogated the Indian tribes’ exclusive jurisdiction over seven so-called “major crimes”

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committed by Indians in Indian country.<sup>12</sup> That exercise of power was upheld by the Supreme Court in *United States v. Kagama*.<sup>13</sup> Further, in the mid-twentieth century, Congress terminated the existence of various Indian groups as federally-recognized tribes.<sup>14</sup>

To summarize, “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”<sup>15</sup>

In this case, Mr. Oliphant and Mr. Belgarde submit that the Suquamish Indian Tribe has been divested, in two distinct ways, of its inherent authority to punish non-Indians for crimes allegedly committed within the Port Madison Indian Reservation.

First, the criminal prosecution of non-Indians on the Port Madison Indian Reservation is within the external sovereignty lost by the Suquamish Indian Tribe by virtue of its status under federal law as a domestic dependent nation. The history of federal Indian relations confirms that the Suquamish Indian Tribe does not have authority to prosecute non-Indians for crimes allegedly committed on its reservation. Nor ought the Tribe have such authority for two reasons: first, the government of which the Suquamish Indian Provisional Court is a part does not provide for the representation of, or permit participation by, non-Indians; and second, the Suquamish courts do not accord non-Indians the full protections of the Bill of Rights.

Through allotment, the United States permitted – indeed encouraged – non-Indians to establish permanent residency within Indian country. Thousands of United States citizens did so on the Port Madison Indian Reservation. Those non-Indians are now and have always been excluded from, and thus external to, the political process of the Suquamish Indian tribe. The exclusion of non-Indians from the Suquamish political process necessarily precludes the tribe from imposing its jurisdiction over them. Further, if subjected to the Suquamish system of criminal justice, non-Indians like Mr. Oliphant and Mr. Belgarde would not be entitled to the basic rights guaranteed by the Bill of Rights. If indigent, they would not enjoy a right to court-appointed counsel, notwithstanding the fact that if convicted, they could be imprisoned for one year and fined up to five thousand dollars. Further, all non-Indians, regardless of their means, would be deprived of their Constitutional right to be tried by an impartial jury of their peers.

Second, even if the Suquamish Indian Tribe has not lost the power to prosecute non-Indians by virtue of the tribe’s dependent status, that power has been abrogated by Congress. In the Trade and Intercourse Acts of the late eighteenth and early nineteenth centuries, Congress implicitly provided exclusive federal court jurisdiction over crimes committed by non-Indians in Indian country. Moreover, in the late nineteenth century, Congress abrogated the Suquamish Indian Tribe’s criminal jurisdiction over non-Indians by allotting the land of the Port Madison Reservation to Indians in severalty, encouraging non-Indian settlement within the reservation and, in essence, destroying

the exclusive governmental authority of the Suquamish Indian Tribe.

Finally, in an alternative argument, respondents submit that even if Congress has not abrogated the Tribe's criminal jurisdiction over non-Indians, the Suquamish Tribe, as presently constituted, does not have such jurisdiction. The Suquamish Tribal Constitution, which was enacted by the Tribe and approved by the Secretary of the Interior, does not include such jurisdiction within the enumerated powers of the tribal government. Moreover, the Tribal Law and Order Code, which attempts to exercise such extra-constitutional jurisdiction, was never approved by the Secretary of the Interior and is therefore invalid.

### **ARGUMENT**

#### **I. THE CRIMINAL PROSECUTION OF NON-INDIANS IS AN ATTRIBUTE OF SOVEREIGNTY LOST BY THE SUQUAMISH INDIAN TRIBE BY VIRTUE OF ITS STATUS AS A "DOMESTIC DEPENDENT NATION"**

The result in this case has been a foregone conclusion since the Supreme Court ruled on the political status of Indian tribes in *Cherokee Nation v. Georgia*.<sup>16</sup> In that case, the Court, per Chief Justice Marshall, held that Indian tribes are not foreign states nor states of the Union, but rather "domestic dependent nations," lacking certain basic attributes of sovereignty.<sup>17</sup> Marshall reasoned as follows:

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; . . .

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to

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his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt 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.<sup>18</sup>

Nearly a century and a half later, in *United States v. Wheeler*, the Supreme Court summarized its now well-established view of the limited sovereignty of Indian tribes. Before colonization, tribes were “self-governing sovereign political communities” with “the inherent power to prescribe laws for their members and to punish infractions of those laws,” but since then:

[t]heir incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others . . . The sovereignty that the Indian tribes retain is of a unique and limited character.<sup>19</sup>

The Court has ruled that most, if not all, external powers of sovereignty were lost by the tribes by virtue of their incorporation within the United States. This proposition was first recognized by the Court in *Johnson v. McIntosh*,<sup>20</sup> in which the Court ruled that Indian tribes do not have the power to alienate title to their lands without the approval of the United States government. Chief Justice Marshall, writing for the Court, described succinctly the effects of European discovery on the Indian tribes:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>21</sup>

In *Worcester v. Georgia*, the Court clarified that tribes do not have the right to engage in trade or diplomacy with foreign nations:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.<sup>22</sup>

Similarly, tribes ought not to have the power to “prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.”<sup>23</sup>

Indian tribes are politically dependent on the United States and incorporated geographically within its exterior boundaries. As such, they are “completely under the sovereignty and dominion of the United States,”<sup>24</sup> and subject to the “irresistible power,”<sup>25</sup> and “overriding sovereignty of the United States.”<sup>26</sup> As the Supreme Court made clear over a century ago in *Kagama*:

[Indian tribes] 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 . . .

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen. . . .

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been

denied; and because it alone can enforce its laws on all the tribes.<sup>27</sup>

The Supreme Court said in *United States v. Mazurie* that the powers of Indian tribes extend “over both their members and their territory.”<sup>28</sup> However, the Court has nowhere said that Indian tribes possess full sovereign powers over their members *and non-members* within their territory. Indeed, this cannot be the case. The exercise of such powers is inconsistent with the dependent status of the Tribe.

**A. The history of federal-Indian relations confirms the principle that the suquamish tribe, as a dependent sovereign, lacks the power to Punish Non-Indians for Crimes Committed in Indian Country**

From the earliest days of our nation’s history, it has been clear that Indian tribes do not possess the inherent power to prosecute non-Indians for crimes committed in Indian country. In its earliest treaties with the Indian tribes, the United States granted tribes a limited measure of criminal jurisdiction over non-Indians; however, Congress has not granted such jurisdiction to tribes since the early nineteenth century. Since that time, criminal jurisdiction over non-Indians in Indian country has remained exclusively in the hands of the federal, state, and territorial governments.

**1. Non-intercourse**

In the early years of our nation, it was the policy of Congress to protect Indian tribes from wrongs committed by non-Indians. For example, in the Northwest Ordinance, passed by the Continental Congress and later incorporated into the laws of the United States, the federal government provided that:

The utmost good faith shall always be observed towards the Indians; . . . they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>29</sup>

Beginning in 1790 and continuing thereafter, Congress provided in the Trade and Intercourse Acts for the federal prosecution of United States citizens who committed crimes within, or trespassed on, Indian lands. As the Supreme Court stated in the decision below in this case, “Congress assumed federal jurisdiction over offenses by non-Indians against Indians which ‘would be punishable by the laws of [the] state

or district . . . if the offense had been committed against a citizen or white inhabitant thereof.”<sup>30</sup>

Non-Indians were permitted to enter Indian reservations only for specific, limited purposes. Those “persons present within tribal territory under federal authority, included agents of the government, both civilian and military, licensed traders and missionaries, and travelers lawfully passing through.”<sup>31</sup> All others were prohibited from settling in Indian country. These provisions of the Trade and Intercourse Acts were intended to discourage non-Indian settlement in Indian country and non-Indian violence against Indians.

This federal commitment to policing Indian country was repeated in numerous treaties of the day. For example, Article III of the 1786 Treaty with the Shawnee provided that:

Any citizen of the United States who shall do any injury to any Indian of the Shawanoe 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.<sup>32</sup>

Some of the early treaties provided that non-Indians who settled illegally on Indian reservations would forfeit the protection of the government of the United States and would be subject to the laws of the tribes upon whose reservations they settled. For example, Article V of the 1785 Treaty of Hopewell with the Cherokee Nation provided that:

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which is hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and Indians may punish him or not as they please.<sup>33</sup>

As to all other non-Indians temporarily within Indian country, jurisdiction was to remain in the United States and not to be vested in the tribe. Article VII of the Treaty of Hopewell provided that:

If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian; such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States; and the punishment shall be in the presence

of some of the Cherokees . . . [and] due notice of the time of such intended punishment shall be sent to some of the tribes.<sup>34</sup>

The federal delegation of criminal jurisdiction to Indian tribes over non-Indians who settled in Indian country was commonplace in the late eighteenth and early nineteenth centuries. For example, the Cherokee Treaty of 1791 provided in Article VIII that: “[i]f any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee’s lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.”<sup>35</sup>

The specific grant by the United States of jurisdiction over non-Indians who settled on Indian reservations implies that such jurisdiction did not exist otherwise. So, too, does the fact that the jurisdictional grant applied only to select non-Indians, that is, those who cast aside the protections of the United States by settling illegally in Indian country.

Only one early treaty allowed an Indian tribe to exercise jurisdiction over non-Indians, other than in the illegal settler context . 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 . . .<sup>36</sup>

Yet, as can be seen, even this treaty provided that non-Indians could only be tried under the auspices of the United States and in a manner fixed by Congress.

Professor Robert Clinton has written that the approach of these early treaties was “inconsistent with an Indian sovereignty concept.”<sup>37</sup> The treaties “predicated criminal jurisdiction for serious offenses not only on land sovereignty concepts, but also on the citizenship of the perpetrator and the victim of the offense.”<sup>38</sup> With few exceptions, tribes could prosecute non-Indians only with the consent of Congress and that consent was granted only when the non-Indians settled illegally in Indian country. Many early treaties contained clauses providing for federal prosecution of Indians who committed serious crimes against non-Indians. Thus, “[j]urisdiction over serious interracial crimes was generally granted to the federal courts during this period.”<sup>39</sup>

## **2. Pourous Boundaries**

The United States' policy of recognizing Indian reservations with fixed boundaries – and then policing those boundaries to keep non-Indian intruders out of Indian country – facilitated the settlement of the continent by non-Indians, minimizing conflict and bloodshed on all sides.

Yet, as the progress of history moved forward, and as the pace of westward expansion increased exponentially, the continued existence of Indian reservations as separate and distinct ethnic enclaves became an impediment to the full use and settlement of the continent by non-Indians. Whites coveted Indian lands for their resources of oil and gold, among other things. More and more Indian lands were taken, and Indians were confined to smaller and smaller reservations. The decreasing boundaries of these reservations were even more difficult for the United States to police as the presence of non-Indian intruders in Indian country became increasingly commonplace.

The allocation of criminal jurisdiction in Indian treaties gradually changed. The criminal jurisdiction of Indian tribes was increasingly confined to intratribal crimes, while jurisdiction over crimes involving non-Indians was reserved by the United States. Professor Clinton has written that:

The later treaties continued and refined earlier patterns by indicating that the tribes had complete sovereignty and jurisdiction over intratribal crimes occurring on the reservations. *However, non-Indians who committed crimes on reservations were generally not subject to tribal authority, but rather were to be tried in federal, state, or territorial courts.*<sup>40</sup>

The treaties between the United States and the Cherokee Nation are illustrative. An 1819 treaty provided that “all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees shall be removed by the United States, and proceeded against according to the provisions of the . . . ‘[A]ct to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.’”<sup>41</sup> An 1835 treaty specified that the laws of the tribe “shall not be considered as extending to such citizens [of the army] as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.”<sup>42</sup> An 1866 treaty provided that:

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The Cherokees also agree that a court or courts may be established by the United States in said territory, with such jurisdiction and organized in such manner as may be prescribed by law: provided, that the judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation, by nativity or 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.<sup>43</sup>

Of the Cherokee treaties, the Supreme Court said in *Talton v. Mayes*:

By treaties and statutes of the United States the right of the Cherokee Nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. *And from this fact there has consequently been conceded to exist in that Nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation.*<sup>44</sup>

The Cherokee were to retain jurisdiction over intertribal offenses, but were not granted jurisdiction over offenses committed by non-Indians in Indian country. The latter category of offenses was to be prosecuted by the United States.

This arrangement was replicated in numerous treaties of the mid-nineteenth century, including the 1868 Fort Laramie Treaty with the Sioux, which provided in relevant part that:

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.<sup>45</sup>

In 1830, the Choctaw Indians tried, unsuccessfully, to persuade Congress to break from this pattern. Their treaty with the United States provided that:

[T]he Choctaws, should this treaty be ratified, 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.<sup>46</sup>

Congress did not accede to that request.

In two opinions referring to the Choctaw treaty of 1830 and the refusal by Congress to grant the tribe the power to try non-Indians for crimes committed in Indian country, the United States Attorney General declared that tribal criminal jurisdiction over non-Indians is not an inherent attribute of Indian sovereignty. Indeed, such jurisdiction, if bestowed by Congress upon tribes, would be inconsistent with the Choctaw treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Choctaws and the dependence of the Choctaw Indians on the United States.<sup>47</sup>

The Treaty of Point Elliot of 1855, like other treaties of its time, affirmed the jurisdiction of the United States over non-Indians offenders in Indian country. In the Treaty, the Suquamish Indian Tribe acknowledged its “dependence on the government of the United States,” and agreed not to shelter offenders against the laws of the United States, but to “deliver them up to the authorities for trial.”<sup>48</sup>

### **3. Allotment and Assimilation**

In 1871, Congress ended the treaty-making period with Indian tribes. Shortly thereafter, in 1887, Congress enacted the General Allotment Act, which authorized the President to divide reservation lands into allotments for individual Indians. So-called “surplus lands” remaining after all allotments were made to the Indians were to be sold to non-Indians. In some cases, Indians agreed to the sale of their surplus lands; in others, they did not. In either event, most reservations were allotted, with vast sections opened for homesteading by non-Indians. Within time, allotted tracts held by Indians were subject to alienation to non-Indians.

No longer would the United States restrict the entry of non-Indians into Indian country. Indeed, it was the will of Congress that non-Indians live near and among the Indians. Members of Congress thought the presence of non-Indians would have a civilizing effect on Indians, breaking up existing pockets of poverty and providing sound models of citizenship and devotion to agriculture, industry, education, and Christianity.

Non-Indian homesteaders were not to be subject to the jurisdiction of the Indian tribes on whose ancestral lands they resided. Even Indian rights activists have conceded as much. One such activist wrote that, “[non-Indian homeowners] under the allotment policy should be classified with those under government protection

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[including government agents, licensed traders, and missionaries]. Therefore, tribal criminal authority over [them] was properly precluded.”<sup>49</sup>

According to Felix Cohen, “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.”<sup>50</sup>

Beginning in 1883, the Bureau of Indian Affairs established Courts of Indian Offenses on many Indian reservations.<sup>51</sup> The law and order regulations promulgated by the Department of the Interior for these courts are explicitly limited to offenses committed by Indians.<sup>52</sup> These regulations have been adopted as tribal law by various tribes.<sup>53</sup>

If it were argued that this whole course of events was colonialist, paternalistic, or oppressive, Mr. Oliphant and Mr. Belgarde would agree. How could they not? And yet, the United States has recognized in itself the power to be colonialist, paternalistic, and even oppressive, and it has exercised that power. And in this case, this exercise of power vested in thousands of non-Indians the right to occupy Indian country – and to do so not as second class citizens, deprived of a vote in a government to which they might be subjected, but instead as American citizens with all the rights guaranteed them by the Constitution of the United States.

Are Mr. Oliphant and Mr. Belgarde to pay the price for our nation’s tragic past? Are their children, and their children’s children, to pay that price? Are they to be subject to a government in which they can have no voice? To the power of a court upon whose juries their peers cannot sit? To an alien process in a foreign court that may or may not guarantee the fundamental civil rights enshrined in the United States Constitution?

Mr. Oliphant and Mr. Belgarde, like all other non-Indians residing on the Port Madison Reservation, are not entitled to vote in tribal elections; they cannot hold tribal office; they cannot be tribal police officers; they have no say in the enactment of laws governing their conduct; and they are denied the right to serve on tribal juries.

In *Reid v. Covert*,<sup>54</sup> the Supreme Court held that to subject United States citizens accompanying the armed forces overseas to trials in overseas military tribunals without the minimum safeguards provided in the Bill of Rights would be unconstitutional.

If Congress cannot itself deprive citizens of these fundamental rights, it cannot rightfully lure non-Indians into Indian country through homesteading, and then, through the exercise of its plenary power over Indian affairs, permit Indian tribes to do so. Mr. Oliphant and Mr. Belgarde submit that the United States may not subject its non-Indian citizens to tribal jurisdiction in this fashion, and hence tribal courts cannot, consistent with their status, exercise criminal jurisdiction over non-Indians.

#### **4. The Modern Era**

Although Congress has, through the Indian Reorganization Act of 1934,<sup>55</sup> permitted the reorganization of Indian tribal governments, it has not granted tribes organized under the Act, like the Suquamish, the power to prosecute non-Indians for crimes allegedly committed in Indian country. Nor ought Congress grant the tribes such power, for its exercise is inconsistent with their dependent status.

##### **B. The Tribe Does Not Have Jurisdiction over Non-Indians because it excludes them from the Tribal Political Community**

The Suquamish Indian Tribe does not possess full sovereign powers over non-Indians who reside on the Port Madison Indian Reservation. This is the case, in part, because the Tribe does not permit non-Indians to participate in the tribal political process. Non-Indians:

cannot participate in tribal government or serve on tribal juries and are not members of the ethnic group exercising sovereign authority, [and] lack the actual and virtual representation that provides the customary nonjudicial protection from governmental abuse in the United States.<sup>56</sup>

This situation is not unique to the Port Madison Indian Reservation. Indeed, a non-Indian resident of the City of Timber Lake on the Cheyenne River Reservation put it as follows:

[The Tribe has] no right to tell me what to do—I'm not Indian! . . . If this were Indian land, it would make sense. But we're a non-Indian town. There is no Indian land here. This is all homestead land, and the tribe was paid for it. I already pay taxes to the State of South Dakota. The tribe doesn't provide us with any services. There's no tribal law enforcement here. I can't vote in tribal elections or on anything else that happens on the reservation.<sup>57</sup>

The exclusion of Non-Indians on the Port Madison Indian Reservation from the political community of the Tribe precludes the tribe from exercising criminal jurisdiction over them. Our forefathers fought, and in some cases died, for the principle that no government ought to be able to tax its constituents without allowing for their representation in the polity's governing bodies. Just as our forefathers proclaimed that there could be "no taxation without representation," Mr. Oliphant and Mr. Belgarde

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proclaim that, in Indian country, there can be no criminal regulation or adjudication without representation.

It is a fundamental tenet of our constitutional democracy that the exercise of power by the sovereign over its subjects is predicated on the right of the subjects to participate fully in the political process. The Fifteenth Amendment to the United States Constitution provides in relevant part that, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.”<sup>58</sup>

Although the Fifteenth Amendment does not apply to Indian tribes, the principles underlying it do.

The Supreme Court has long been concerned with the injustice of allowing governments to judge political outsiders. The Court held in *Ex parte Crow Dog*<sup>59</sup> that prior to the passage of the Major Crimes Act, Indians were not to be tried in the courts of the United States for crimes committed in Indian country. The Court emphasized that Indians were “members of a community, separated by race [and] by tradition . . . from the authority and power [of the United States] which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions. . . .”<sup>60</sup> The Court emphasized that were the United States to exercise jurisdiction over Indians, it would try them “not by their peers, nor by the customs of their people, nor the law of their land, but . . . according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their . . . nature. . . .”<sup>61</sup>

These concerns are equally apt here. Non-Indians cannot be subject to the authority and power of Indian tribal governments in which they enjoy no political representation and whose laws are external and, in some cases, unknown.

The Tribe will no doubt contend that political representation is not always a condition precedent to a government’s exercise of jurisdiction over individuals within its territory. For example, individuals traveling across state lines in this country subject themselves to the jurisdiction of states in which they cannot vote, hold office, or serve on juries. Similarly, individuals traveling abroad subject themselves to the jurisdiction of foreign nations, whose systems of government or notions justice may be alien and unknown.

However, the position of Indian tribes is unlike that of the states of the Union or the foreign nations of the world. Unlike tribes, each state in the Union is a part of the nation’s federated system of government. This system, devised by and for the people, is one in which the citizens of each state are represented in a national

government whose powers, although limited by the Constitution to certain enumerated subject areas, are superior to those of the states. Each state is subject to the Constitution and to the supreme lawmaking power of the federal government, whose power is exercised by the political branches of government, namely the Congress and the Executive. Further, the decisions of the courts of each state are ultimately subject to review by the federal Judiciary through the Supreme Court, whose Justices are nominated by the nationally elected President and confirmed by the Senate. In these important respects, citizens of each state are represented in and by the national government under whose umbrella all state governments operate.

Further, citizens of one state who relocate to another are automatically admitted to citizenship in their new state of residence and endowed with all the attributes of political representation in that state. Among other things, they may vote, hold office, and serve on juries. The same cannot be said for Indian country: non-Indians cannot acquire citizenship or political representation in Indian tribal governments by residing on Indian reservations.

Finally, in respect to the states, our federated system of government is one in which the citizens of each state are guaranteed certain rights and liberties when traveling in their sister states. Each state is subject to the terms and conditions of the United States Constitution and must afford persons within its territory the full protections of the Bill of Rights.

Indian tribes are unlike foreign nations in certain fundamental respects. They are located geographically within the United States, not outside it, and they are politically dependent on the United States.<sup>62</sup> Thus, they do not enjoy the same level of independence as do foreign nations and, as a result, cannot exercise the same level of jurisdiction over nonmembers present in their territories. Further, unlike many foreign nations, Indian tribes do not permit the naturalization of nonmembers who reside in their territories. Thus, tribal exclusion of nonmembers from the political process is permanent and insurmountable.

Given these important distinctions, it cannot be said that the Suquamish Indian Tribe, or any other tribe for that matter, ought to have the same jurisdiction over nonmembers as do states and foreign nations. The power of Indian tribes is limited by their political dependence on the United States and by their anomalous position outside the federated system of government in the United States. The tribes' power cannot be exercised over those individuals who are, by virtue of their race or ethnicity, excluded from the political process of the tribes.

**C. The Tribe Does Not Have Jurisdiction Over Non-Indians because It Does Not Guarantee them the Protections Enumerated in the Bill of Rights**

The United States Constitution guarantees all people certain individual rights against abuses of power by the federal and state governments. Among these rights, most of which are set forth in the Bill of Rights, are the right to court-appointed counsel for indigents in criminal cases and the right to be tried by an impartial jury of one's peers. These and other rights are not guaranteed to non-Indians, like Mr. Oliphant and Mr. Belgarde, who face criminal prosecution in Indian tribal courts.

The federal courts have long held that Indian tribal governments are not bound by the Bill of Rights. The Supreme Court stated in 1978, the same year *Oliphant v. Suquamish Indian Tribe* was decided, that:

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, . . . this Court held that the Fifth Amendment did not “operat[e] upon” “the powers of local self-government enjoyed” by the tribes. . . . In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.<sup>63</sup>

The Supreme Court was quick to note in *Santa Clara Pueblo v. Martinez* that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”<sup>64</sup> Congress exercised that authority when it passed the Indian Civil Rights Act (“ICRA”) in 1968.<sup>65</sup>

The ICRA imposes on tribal governments many of the limitations contained in the Bill of Rights. In numerous respects, the ICRA limits the manner in which Indian tribes can exercise criminal jurisdiction over their members. The Act provides in relevant part that:

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

...

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in

jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

...

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;

(8) . . . deprive any person of liberty . . . without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.<sup>66</sup>

However, the ICRA does not incorporate certain critical protections that the Bill of Rights grants criminal defendants in state or federal court. Foremost among these protections is the right to a trial by an impartial jury. While the ICRA allows a criminal defendant in tribal court to request a trial “by jury of not less than six persons,”<sup>67</sup> the Sixth Amendment goes further, providing that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”<sup>68</sup>

Further, the ICRA denies indigent criminal defendants the right to free appointed counsel. The ICRA provides that a tribal court cannot deny a criminal defendant the right “at his own expense to have the assistance of counsel for his defense.”<sup>69</sup> Indigent defendants are not entitled to court appointed counsel, notwithstanding the fact that if convicted, they may be imprisoned for up to one year.<sup>70</sup> Under the United States Constitution, “defense counsel must be appointed in any criminal prosecution, ‘whether classified as petty, misdemeanor, or felony, . . . that actually leads to imprisonment even for a brief period.’”<sup>71</sup>

To allow Indian tribes to prosecute non-Indians for crimes allegedly committed in Indian country would be to deny non-Indian defendants these and other fundamental rights firmly entrenched in the United States Constitution. Such an anomalous outcome is inconsistent with the dependent, quasi-sovereign status of Indian tribes.

## **II. CONGRESS HAS ABROGATED WHATEVER CRIMINAL JURISDICTION OVER NON-INDIANS THE SUQUAMISH TRIBE MAY HAVE ONCE POSSESSED**

Even if this Court were to find that criminal jurisdiction over non-Indians is *not* an attribute of sovereignty lost by the Suquamish Indian Tribe by virtue of its status as a domestic dependent nation, the Court must nonetheless find that the Tribe has no such jurisdiction because that jurisdiction has been terminated by Congress.

Congress has plenary power over Indian affairs and has exercised that power in a manner inconsistent with the continued existence of tribal criminal jurisdiction over non-Indians.

It is a fundamental principle of federal Indian law that Indian tribes possess “inherent powers of a limited sovereignty which has never been extinguished.”<sup>72</sup> Yet, it is also a fundamental principle of Indian law that Congress may abrogate the inherent, sovereign powers of Indian tribes without the consent of the tribes.

The Supreme Court has employed a strong presumption that such rights are abrogated or modified by congressional action only when Congress has manifested a clear and plain intention to abrogate Indian treaty rights.<sup>73</sup> This intention may be stated in the language of a statute, or it may be found in clear and reliable evidence in the legislative history of a statute. Furthermore, the circumstances surrounding congressional action may also provide evidence of congressional intent.<sup>74</sup>

In the Trade and Intercourse Acts, Congress expressed its intent to divest tribes of whatever criminal jurisdiction over non-Indians they may once have possessed. Those acts vested in the federal government jurisdiction over crimes committed by non-Indians in Indian country. Congress intended this federal jurisdiction to be exclusive, as is evident from the language and structure of the acts themselves and from prevailing policy, as reflected in other acts of Congress, and in the prevailing opinions of the Executive branch and the judiciary.

In the decision below, the Supreme Court summarized the effect of these laws: Beginning with the Trade and Intercourse Act of 1790, . . . Congress assumed federal jurisdiction over offenses by non-Indians against Indians. . . . In 1817, Congress went one step further and extended federal enclave law to the Indian country; the only exception was for “any offence committed by one Indian against another.”

...  
In 1854, . . . 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. . . . 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.<sup>75</sup>

Surely Congress did not intend to allow tribes to retain criminal jurisdiction over non-Indians after the passage of the Trade and Intercourse Acts. The Acts were intended to protect criminal defendants from being tried for the same offense in federal and tribal court. To conclude that Congress intended for tribes to retain jurisdiction over non-Indian criminal defendants would be to conclude that Congress intended only to protect Indians from multiple prosecutions, not non-Indians. The absurdity of this logic confirms Congress' intent to abrogate the right of tribes to prosecute non-Indians for crimes committed in Indian country.

In *Ex parte Mayfield*,<sup>76</sup> the Supreme Court construed the Trade and Intercourse Acts as reserving to the federal courts all crimes committed by non-Indians in Indian country:

The policy of congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be 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 these statutes is to vest in the courts of the [Indian] nation 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.*<sup>77</sup>

That Congress intended federal jurisdiction to be exclusive over non-Indian crimes in Indian country is confirmed by its declarations elsewhere. For example, in the 1960s, Congress enacted legislation providing for the prosecution in federal court of non-Indians who committed hunting crimes on Indian reservations.<sup>78</sup> In its report on the legislation, the Senate stated that such legislation was necessary since non-Indians may not be prosecuted by the tribes themselves:

[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 enforceable 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.<sup>79</sup>

Further, as the Supreme Court articulated below, the prevailing policies of the Executive Branch confirm the view of Congress that Indian tribes lacked jurisdiction over crimes committed by non-Indians.

In implementing the Indian Reorganization Act of 1934, the Department of the Interior counseled tribes that they did not have jurisdiction over non-Indians for crimes within Indian country. During this time, the Courts of Indian Offenses “were retained and extended to more reservations.”<sup>80</sup> The jurisdiction of these courts was limited to offenses committed by Indians. In a 1934 opinion, the Interior Department Solicitor construed tribal powers of self-government to include the power “[t]o administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal Courts.”<sup>81</sup> A 1970 opinion by the Solicitor concluded: “Indian tribes do not possess criminal jurisdiction over non-Indians[;] such jurisdiction lies in either the state or Federal Governments.”<sup>82</sup>

No court – other than the district court and court of appeals in this case – has ever held that Indian tribes have criminal jurisdiction over non-Indians, absent express treaty language or a delegation of congressional power conferring such jurisdiction. Instead, the Supreme Court has held that state courts have jurisdiction over non-Indian crimes in Indian country when the victim is also non-Indian,<sup>83</sup> and that the federal courts have jurisdiction when the victim is Indian.<sup>84</sup>

The only court to address squarely the question of concurrent tribal jurisdiction over non-Indians for crimes committed in Indian country found that tribal courts have no such jurisdiction. In *Ex parte Kenyon*,<sup>85</sup> the court held that to give an Indian tribal court “jurisdiction of the person of an offender, such offender must be an Indian.”<sup>86</sup>

That the legislative, executive, and judicial branches of the United States government share the view that Indian tribes do not have criminal jurisdiction over non-Indians confirms that if such jurisdiction ever existed, it was implicitly divested by Congress in the Trade and Intercourse Acts.

### **III. THE CONSTITUTION OF THE SUQUAMISH TRIBE PROVIDES FOR A GOVERNMENT OF LIMITED POWERS, AMONG WHICH THE POWER TO PROSECUTE NON-INDIANS IS NOT INCLUDED**

Even if this Court were to find that the Suquamish Tribe possesses the inherent, sovereign power to prosecute non-Indians for crimes committed in Indian country, and further that this power has not been abrogated by Congress, the Court must nonetheless affirm the decision below because the Suquamish tribal constitution does not vest the power to prosecute non-Indians in the tribal government.

The Tribe's first written constitution, enacted in 1916, governed the affairs of Indian tribal members, but not non-Indians. Article I of the By-Laws provided in relevant part that "the principal object of this Constitution is to assure the legal tribal rights of all *members*, who in good faith shall be subject to its fundamental spirit by their support."<sup>87</sup>

The Constitution and By-Laws of the Suquamish Indian Tribe, adopted by the Tribe in 1964 and approved by the Secretary of the Interior in 1965, provides for a government of limited powers for the Suquamish people. The government may exercise only those powers enumerated in the Constitution and By-Laws. The power to prosecute non-Indians who commit crimes on the Port Madison Indian Reservation is not among those enumerated powers.

In the proceedings below, Mr. Oliphant and Mr. Belgarde argued that the Suquamish constitution authorizes the governing body of the Tribe "to promulgate and enforce regulations *governing only certain conduct of tribal members*."<sup>88</sup> Article III of the constitution states in relevant part:

The governing body of the Suquamish Indian Tribe shall be known as the Suquamish Tribal Council. The Council shall have the following powers and duties subject to any limitations imposed by applicable state laws or statutes of the United States or the regulations of the Secretary of the Interior:

...

(h) To promulgate and enforce ordinances which shall be subject to approval of the Secretary of the Interior governing the conduct of *members of the Suquamish Indian tribe regarding hunting, fishing, and shell fishing*.<sup>89</sup>

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The Tribe apparently has conceded this point, having submitted no contrary authorities or interpretations of its constitution in the proceedings below.<sup>90</sup>

The omission in the Tribe's constitution of criminal authority over non-Indians bars the Tribe from exercising such authority over Mr. Oliphant and Mr. Belgarde. The Tribe is free to amend its constitution, with the approval of the Secretary of the Interior, but unless and until it does so, it may not exercise powers not enumerated in the constitution.<sup>91</sup>

### CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be affirmed.

Respectfully Submitted,

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\* The views expressed herein do not represent those of the author.

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## Notes

1. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989).
2. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978).
3. *See id.* at 193 n.1.
4. *Id.*
5. *Id.*
6. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832).
7. FELIX S. COHEN, *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 122 (U.S. Dept. of the Interior 1941).
8. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
9. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980).
10. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).
11. *Oliphant v. Schlie*, 544 F.2d 1007, 1015 n.3 (9th Cir. 1976) (Kennedy, dissenting).
12. Major Crimes Act of 1885, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2000)).
13. *United States v. Kagama*, 118 U.S. 375 (1886).
14. 25 U.S.C., ch. 14 (2000).

15. *Wheeler*, 435 U.S. at 323.
16. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
17. *Id.* at 17.
18. *Id.* at 17-18.
19. *Wheeler*, 435 U.S. at 323 (citations omitted).
20. 21 U.S. (8 Wheat.) 543 (1823).
21. *Id.* at 574.
22. *Worcester*, 31 U.S. (6 Pet.) 515, 559 (1832).
23. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).
24. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
25. *Worcester*, 31 U.S. (6 Pet.) at 559.
26. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).
27. *United States v. Kagama*, 118 U.S. 375, 381-85 (1886) (emphasis in original).
28. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).
29. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (1789).
30. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 201 (quoting Trade and Intercourse Act of 1790, 1 Stat. 137, 138 (1790)).
31. Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 501 (1979).
32. Treaty with the Shawnee, 1786, 7 Stat. 26, 26 (1786), reprinted in II CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 17 (AMS Press, Inc. 1904).
33. Treaty with the Cherokee, 1785, 7 Stat. 18, 19 (1785), reprinted in II CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 9 (AMS Press, Inc. 1904).
34. *Id.* at 18, 19 (1785), reprinted in II CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 10 (AMS Press, Inc. 1904).
35. Treaty with the Cherokee, 1791, 7 Stat. 39, 40 (1792), reprinted in II CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 30 (AMS Press, Inc. 1904).
36. Treaty with the Delawares, 1778, 7 Stat. 13, 14 (1778), reprinted in II CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 4 (AMS Press, Inc. 1904) (emphasis added).
37. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 954 (1975).
38. *Id.*
39. *Id.* at 955.
40. Clinton, *supra* note 37, at 957 (emphasis added). See also, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).
41. Treaty with the Cherokee, 1819, 7 Stat. 195, 197 (1819), reprinted in II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 179 (AMS Press, Inc. 1904).
42. Treaty with the Cherokee, 1835, 7 Stat. 478, 481 (1836), reprinted in II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 442 (AMS Press, Inc. 1904).
43. Treaty with the Cherokee, 1866, 14 Stat. 799, 803 (1866), reprinted in II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 946 (AMS Press, Inc. 1904).
44. *Talton v. Mayes*, 163 U.S. 376, 379-80 (1896) (emphasis added).
45. Treaty with the Sioux-Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two

- Kettle, Sans Arcs, and Santee-and Arapaho, 1868, 15 Stat. 635, 635 (1869), *reprinted in* II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 998 (AMS Press, Inc. 1904).
46. Treaty with the Choctaw, 1830, 7 Stat. 333, 334 (1831), *reprinted in* II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 311 (AMS Press, Inc. 1904).
47. *See* 2 U.S. Op. Att’y Gen. 693 (1834); 7 U.S. Op. Att’y Gen. 174 (1855).
48. Treaty with the Dwamish, Suquamish, etc., 1855, 12 Stat. 927, 929 (1859), *reprinted in* II CHARLES J. KAPPLER: INDIAN AFFAIRS: LAWS AND TREATIES 671 (AMS Press, Inc. 1904).
49. Collins, *supra* note 31, at 507.
50. COHEN, *supra* note 7, at 148.
51. *See generally* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 104-25 (Univ. of Nebraska Press 1966).
52. 25 C.F.R. § 11.102 (2003).
53. Oliphant v. Schlie, 544 F.2d 1007, 1016 (9th Cir. 1976) (Kennedy, dissenting) (citing comment to Title 17, Section 1 of the Navajo Tribal Code).
54. Reid v. Covert, 354 U.S. 1 (1957).
55. 25 U.S.C. § 461 (2003).
56. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 6 (1999).
57. FERGUS M. BORDEWICH, KILLING THE WHITE MAN’S INDIAN 97 (Anchor Books Doubleday 1996).
58. U.S. CONST. amend. XV, § 1.
59. Ex parte Kan-Gi-Shun-Ca, 109 U.S. 556 (1883) (this case is otherwise known as Ex parte Crow Dog).
60. *Id.* at 571.
61. *Id.*
62. *See, e.g.*, Cherokee Nation v. Georgia. 30 U.S. (5 Pet.) 1 (1831).
63. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (citations omitted).
64. *Id.* at 56-57 (citing *United States v. Kagama*, *supra* note 13).
65. *See* 25 U.S.C. § 1301, *et seq* (2003).
66. 25 U.S.C. § 1302 (2003).
67. 25 U.S.C. § 1302(10) (2003).
68. U.S. CONST., amend. VI.
69. 25 U.S.C. § 1302(6) (2003).
70. *See* 25 U.S.C. § 1302(7) (2003).
71. Alabama v. Shelton, 535 U.S. 654, 657 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (citations omitted)). *See also* *Scott v. Illinois*, 440 U.S. 367 (1979).
72. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting COHEN, *supra* note 7, at 122).
73. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968).
74. *See* *Rosebud v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975).
75. *Oliphant v. Suquamish*, 435 U.S. 191, 201-03 (citations omitted).
76. Ex parte Mayfield, 141 U.S. 107 (1891).
77. *Id.* at 115-16 (emphasis added).
78. *See* 18 U.S.C. § 1165 (2003).
79. S.REP. NO. 1686, 2-3 (1960) (emphasis added).

80. Collins, *supra* note 31, at 485.
81. 55 I.D. 14, 17 (October 25, 1934).
82. 77 I.D. 113, 115 (August 10, 1970). (This opinion was withdrawn during the pendency of this litigation, but it was not replaced with an inconsistent directive or opinion.)
83. United States v. McBratney, 104 U.S. 621 (1881).
84. Donnelly v. United States, 228 U.S. 243 (1913).
85. Ex parte Kenyon, 14 F. Cas. 353 (C.C. W.D. Ark. 1878) (No. 7,720).
86. *Id.* at 355.
87. Petitioners' Brief at 4a, Oliphant v. Suquamish Indian Tribe, Supreme Court No. 76-5729 (filed Sept. 7, 1977) (emphasis added).
88. Petitioners' Brief at 12, Oliphant v. Suquamish Indian Tribe, Supreme Court No. 76-5729 (filed Sept. 7, 1977) (emphasis in original).
89. Petitioners' Brief at 5a-6a, Oliphant v. Suquamish Indian Tribe, Supreme Court No. 76-5729 (filed Sept. 7, 1977) (emphasis added).
90. *See* Respondents' Brief at 3, 58, Oliphant v. Suquamish Indian Tribe, Supreme Court No. 76-5729 (filed Nov. 4, 1977).
91. The Tribal Law and Order Code, which attempts to exercise such extra-constitutional jurisdiction, was never approved by the Secretary of the Interior and is therefore invalid.