Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decisions in Oliphant, Wheeler, and Martinez

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THREE RIVERS NATIONAL MONUMENT, NEW MEXICO
PHOTO BY LAWRENCE BACA.

After thirty years, the three Supreme Court decisions issued in Spring 1978 still retain their monumental impact on federal Indian policy and the practice of federal Indian law. *Oliphant*, *Wheeler*, and *Martinez* will continue to represent some of the modern cornerstones of present and future Indian law decisions and policy due to the critical importance of the issues "resolved" and concepts of tribal sovereignty pronounced in the decisions. At the same time, these three critically important Indian law decisions seem to tug policy makers and courts in opposite directions in the context of tribal sovereignty in the 21st century.

In spring 1978, tribal leaders and attorneys practicing in the area of federal Indian law were still in the process of digesting the opinions handed down by the Supreme Court in three distinct but equally important decisions. All three decisions have maintained their impact on Indian country today, despite other significant changes in Supreme Court case law, congressional policy related to Indian country, and the constantly evolving creature that is federal Indian law. The three cases, *Oliphant v. Suquamish Indian Tribe, Wheeler v. United States,* and *Santa Clara Pueblo v. Martinez,*[1] all have their special place in Indian law, and based upon the current issues facing Indian country, these cases will play a significant role in the future of tribal sovereignty in the 21st century.

Scholars of federal Indian law and Indian lawyers long ago reached standard conclusions about these cases. Some general thoughts that may arise among these scholars and lawyers include the following: *Oliphant,* terrible, what a corruption of federal Indian law; *Wheeler,* not terrible, at least the Court affirmed the tripartite sovereign status of tribes in the United States; *Martinez,* one of the best modern Indian law decisions upholding tribal sovereignty and tribal customs. Certainly everybody, including those who do not practice federal Indian law, is entitled to an opinion about these decisions, but, to put "opinions" in perspective, it is helpful to look at a segment of a brief opposing the grant of certiorari in the case of *United States v. Red Lake Band of Chippewa Indians.*[2] The Red Lake Band was "withholding" records maintained during hearings before the Court of Indian Offenses; when the Bureau of Indian Affairs sought the return of the records, the Red Lake Band asserted sovereign immunity. In support of the argument that Indian tribes do not have sovereign immunity from suit against the United States, the United States, in one sentence of its brief, cited these three Indian law cases that had been decided in spring 1978:

> It follows a fortiori that sovereign immunity does not insulate an Indian Tribe from a suit brought by the United States, because Indian Tribes, unlike the States, are "fully subordinated to the sovereignty of the United States" (*Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978)) and their sovereign powers are subject to plenary control by the United States. *Santa Clara Pueblo,* 436 U.S. at 56; *United States v. Wheeler,* 435 U.S. 313, 323 (1978).[3]

To most scholars and practitioners of Indian law this view is not close to what these three cases stand for, yet this is how the solicitor general's office represented them in the Red Lake case. Over the course of time, case law decisions can take on a persona of their own. For example, cases such as *Marbury v. Madison*[4] or *Hadley v. Baxendale*[5] are etched in an attorney's memory, standing for general propositions related to the U.S. Constitution or contract law. *Oliphant* can be cited for many, often conflicting, propositions and represents all that is unusual about federal Indian law. Over the past three decades, the Supreme Court appears to have elevated these three cases involving Indian law, in particular *Oliphant,* to the status of foundational Indian law that stand for general propositions in the minds of scholars and practitioners of federal Indian law.

Oliphant v. Suquamish Indian Tribe: Thirty Years of Ensuring That Tribes are Acting Consistent with "Their Dependent Status" and Preventing Tribes from Effectively Policing and Protecting Indian Country

Who has criminal jurisdiction in Indian country—the state, the federal government, or the tribe? Because of *Oliphant,* this question is not easily answered—even 30 years after the decision. Of the three cases that are the subject of this article, it seems that more scholarship (and consternation) is dedicated to the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe* than to the others. More than likely, this attention is attributable to the devastating blow to tribal sovereignty that *Oliphant* left in its wake and the corresponding mess that the ruling created.

Authors of several articles make the argument that the *Oliphant* decision was critically flawed in a number of ways and call for the reversal or rehearing of the case. One highly respected Indian law scholar states that the *Oliphant* decision is an "embarrassment" to the nation's highest court.[6] It seems obvious, and at the very least reasonable to conclude, that some members of the Court had reached their decision at the moment the Court accepted the case and simply scoured through Indian Law decisions to support their conclusion in a manner inconsistent with several bedrock principles of Indian law. For example, *Oliphant* marked the first time the Court held that "activities within the tribe's territory that unquestionably impacted the tribe were not within the tribe's authority to address."[7]

The facts of the *Oliphant* case involve non-Indians participating, on their own volition, in a tribal celebration known as "Chief Seattle Days," which occurs entirely within the boundaries of the sovereign territory of the Suquamish Tribe (the Port Madison Reservation). The Suquamish Tribal Police arrested Mark David Oliphant for assaulting (punching) a tribal officer and resisting arrest. The tribal police arrested the other defendant, Daniel B. Belgarde, for the equivalent of reckless endangerment after a high-speed chase through the reservation ended when Belgarde slammed into a tribal police cruiser. Both of the defendants applied for a writ of habeas corpus to the federal court, arguing that the tribal court could not exercise criminal jurisdiction over them as non-Indians—despite the obvious safety and welfare concerns of the tribe, the tribe's citizens, and all the participants involved in the tribal celebrations.

Throughout the entire proceedings and during oral argument before the Supreme Court, attorneys for the Suquamish tribe valiantly argued that the tribe's exercise of criminal jurisdiction over all individuals or entities, including non-Indians, derived from retained inherent powers and had not been extinguished by any express act of

Congress. Two 19th-century opinions by the solicitor general and one 19th-century federal district judge had opined that tribes could not have criminal jurisdiction, but the realities of tribal sovereignty have long changed since that era.[8] After all, in *Williams v. Lee*,[9] a unanimous Supreme Court decision held that, absent congressional intent, Indians have the right to govern themselves and make their own laws. Justice Rehnquist wrote the opinion and admitted that any treaty provisions alone would not deprive the tribe of criminal jurisdiction over non-Indians.[10] In order to maneuver around this fact, Justice Rehnquist stated that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and those powers 'inconsistent with their status'* as dependant Indian tribes."[11]

The Court simply found its way around the arguments that focused on the retained inherent sovereignty of tribes and the fact that the lack of tribal criminal jurisdiction over non-Indians would severely impinge such sovereignty (as well as the efficient exercise of law enforcement in Indian country). Instead, the Court elected to focus, at least in part, on a historical view of tribal courts and tribal criminal jurisdiction unprecedented in federal Indian law at that time. According to the ruling, "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system."

In addition to framing the issue to include facts that were not relevant to the exercise of criminal jurisdiction in Indian country, the Supreme Court buttressed its reasoning by relying on policy factors created by the Court. The Court stated that the Suquamish tribe had "relinquished all rights" it might have had in the Port Madison reservation by treaty and, as a result, the reservation is now made up of a checkerboard of tribal lands, non-Indian fee lands, and roads maintained by the county and the state of Washington.[12] After rereading the *Oliphant* Court's opinion, one cannot avoid noting the similarities between certain "facts" used by the Court to "support" its opinion and the non-Indian demographics on which the D.C. Circuit Court of Appeals relied in a recent decision detrimental to tribal sovereignty in the case of *San Manuel Bingo v. National Labor Relations Board*.[13] In this case, the D.C. Circuit held that the number of non-Indian customers and non-Indian employees was a strong factor that led to the conclusion that the National Labor Relations Act applied to the San Manuel Band as the owner of the gaming operation. The *San Manuel* court analyzed the applicability of the National Labor Relations Act (one of many statutes of general applicability that does not refer to Indian tribes specifically) to tribal governments and tribal businesses.

The facts that were not relevant on which the *Oliphant* Court relied included statistics of non-Indian land ownership and non-Indian population that supplied the basis for reference to these statistics in *San Manuel*:

> Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.
>
> According to the District Court's findings of fact "[The] Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest."[14]

It is interesting to compare the Supreme Court's statement in its *Oliphant* ruling with the D.C. Circuit's in the *San Manuel* case:

> "When a tribe is fulfilling traditionally tribal or governmental functions" that do not "involve non-Indians [or] substantially affect interstate commerce, the Board's interest in effectuating the policies of the [NLRA] is likely to be lower." *Id.* at 1063. The Board considered the location of the tribal government's activity (that is, whether on or off the Tribe's reservation) relevant but not determinative. *Id.* Because here "the casino is a typical commercial enterprise [that] employs non-Indians[ ] and ... caters to non-Indian customers..." *Id.*, the Board found the exercise of jurisdiction appropriate.[15]

It seems as if *Oliphant* laid the foundation for the new analysis that federal courts now frequently undertake—that is, whether tribal sovereignty will affect non-Indians. In retrospect, over the past three decades, the *Oliphant* decision has provided many a heartache (and heartburn) for Indian tribes, tribal leaders, and tribal attorneys. On the one hand, many defense attorneys representing a non-Indian client for an alleged crime within Indian country welcome the *Oliphant* opinion as a bright-line test for the murky waters of Indian law. The decision permits the defense attorney to disregard the tribal entity entirely and focus only on whether state or federal jurisdiction applies to the particular circumstance.

On the other hand, for tribal governments and tribal police, *Oliphant* has led to forced reliance on the federal

government and on state governments to prosecute crimes committed by non-Indians on tribal land; and these prosecutions do not occur frequently. Over the past three decades, the federal government and state governments (and their respective political subdivisions) have consistently proved to be ineffective in prosecuting these types of crimes by non-Indians. High-profile newspaper accounts have documented the struggle of states and the federal government to curtail non-Indian crimes on tribal land and the inability of a tribe's citizens to gain access to their own tribal court systems or to any court system in order to get justice.[16]

In one case, for example, a non-Indian allegedly raped a citizen of the Cherokee Nation in Oklahoma. Even though the crime allegedly occurred on tribal land and involved a tribal citizen, according to the *Oliphant* decision, the tribal court lacked jurisdiction to prosecute this non-Indian for his criminal conduct. Imagine the uproar if the state of California were unable to prosecute and convict murderers and rapists who committed these crimes within California simply because such individuals were not citizens of California? Yet, this is exactly the problem facing tribes and tribal citizens today, even though tribal court systems are better funded, organized, and equipped to handle such matters since the days of *Oliphant*. The *Oliphant* decision has allowed non-Indians to engage in criminal activities on tribal lands with a certain amount of impunity while the tribal governments and tribal citizens can only stand by and watch, hoping the state or the federal government will prosecute the accused.[17]

The *Oliphant* Court, moreover, seemed to suggest that tribal courts are unable to properly proceed with non-Indian criminal proceedings because these courts lack knowledge of legal procedure. The sophistication of tribal court systems today are such that non-Indian defendants are afforded substantial protections to ensure due process. The Indian Civil Rights Act provides that tribes must adhere to a list of protections similar to those included in the Bill of Rights in the U.S. Constitution. The defendant's right to counsel, as provided by the government, is the requirement that is omitted from the act. Nevertheless, even though the Indian Civil Rights Act does not provide a right to counsel for a defendant in tribal court, many tribes actually provide counsel to defendants in their courts.

Over the past three decades, the *Oliphant* opinion has provided the foundational law for a variety of decisions that have operated in a way that has judicially divested the tribes of their inherent sovereignty. For instance, in *Montana v. United States*,[18] the Supreme Court expanded the reach of the *Oliphant* decision, stating the following: "Though *Oliphant* only determined inherent tribal authority in criminal matters, [] the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The broad dictum in *Oliphant* has been used to support the holdings in several cases that either limited the tribes' civil regulatory authority or civil adjudicatory authority on the basis that tribes may not exercise criminal jurisdiction over non-Indians.[19]

Despite the jurisdictional issues that arise as a result of the *Oliphant* decision, however, many tribes have been able to create a mechanism that allows jurisdictional problems to evaporate. It is interesting to consider two hypothetical examples of the overly complex jurisdictional questions created by the Court's decision in *Oliphant*. The first hypothetical set of facts involves an Indian who is driving a car and a county police officer who notices that the car is swerving on a road that is outside the reservation. The Indian speeds up and manages to cross over into the reservation onto land held by the Indian's tribe. If the county police officer attempts to arrest the Indian, any such arrest should be invalid, because the county officer does not have any jurisdiction whatsoever to arrest an Indian within Indian country, despite any fresh or hot pursuit authority that may exist in the case of non-Indians.[20]

Another set of facts can serve as the second hypothetical example of the problem of jurisdiction resulting from the *Oliphant* ruling: An Indian is walking along the north side of a reservation road, which road serves as a boundary of the reservation, with the south side constituting the territory of the state. The Indian is assaulted by a group of non-Indians, but the exact location of the assault is not clear. If the assault occurred on the north side of the road, the federal government has jurisdiction to prosecute the crime because crimes committed by an Indian against a non-Indian or vice versa within Indian country are within the exclusive jurisdiction of the federal government.[21] If the assault occurred on the south side of the road, the state has jurisdiction regardless of the circumstances. What happens if an assault occurs on the north side of the road, but the Indian victim crossed the center line of the highway to the south side, and that is where an actual battery takes place? Does the federal government have jurisdiction to prosecute the assault but not the battery? In both cases, if the tribe had jurisdiction, the tribe and the state could work out the specifics of which court has the jurisdictional authority to prosecute the case without the federal government's involvement, which is required when a non-Indian commits a crime against an Indian or vice versa.

The enabling mechanism that many tribes have discovered is the ability of tribes to negotiate and enter into cross-deputization agreements with local units of government, such as counties, townships, or cities. This way to deal with problems arising from the *Oliphant* decision is certainly not new, but it is an avenue that has not been widely used. My own tribe, the Grand Traverse Band of Ottawa and Chippewa Indians, however, has successfully negotiated and implemented cross-deputization agreements with many of the surrounding counties in the state.[22] These agreements allow nontribal county, city, or township law enforcement officials to stop, arrest, and issue citations to Indians within Indian country. Conversely, tribal law enforcement can stop, arrest, and issue citations to non-Indians on Indian land and, in some cases, outside the boundaries of the reservation. In essence, the way the agreements are implemented is simple. Any cross-depu-

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tized law enforcement official can arrest a person for committing a crime; after the arrest, the prosecutors will sort out which court is the proper venue and will determine which law the individual will be charged with violating. In this way, offenders may be brought to justice effectively.

Thus, there are ways that the jurisdictional problems associated with *Oliphant* can dissipate. The real task is getting the tribe and the local entity to come to the table to negotiate such an agreement. In many cases, hard feelings still exist between the tribe and the non-Indian community, and even the appearance of friendliness may be a political slippery slope for both tribal and nontribal elected officials. County officials will often argue that the training standards for tribal police don't live up to the county's own standards. But these assertions are simply conjecture based on ignorance of the certification standards established by the tribe and the U.S. Bureau of Indian Affairs. In other cases, the tribes are reluctant to give up any ground in terms of allowing local nontribal police officers the ability to have any authority on the reservation. The solution boils down to the policy adopted by the tribe's governing body; but 30 years later, the issue is that *Oliphant* can be overcome if the desire is present.

Greasing the Wheels of Tribal Sovereignty as One of Tripartite Sovereigns

In *Wheeler v. United States*,[23] the Supreme Court unanimously held that the Double Jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prevent tribal governments or the federal government from both prosecuting crimes committed by tribal members. The Court keenly stated that all Indian tribes retain inherent sovereign powers that have never been extinguished and, therefore, tribes have the inherent power to prescribe laws and punish those who violate those laws, as any sovereign would.[24] Despite the context of the timing and language of the *Oliphant* decision, much of the verbiage and language of the *Wheeler* opinion, which was released on March 22, 1978, just two weeks after the release of the Court's decision in *Oliphant*—is surprisingly favorable to tribal sovereignty. At the same time, however, a careful review of the *Wheeler* ruling supports the notion that the *Oliphant* opinion had already been written, at least in Justice Rehnquist's mind, and the *Wheeler* opinion was written to account for some the discrepancies in *Oliphant*.

Wheeler v. United States involved Anthony Robert Wheeler, the defendant, who was a citizen of the Navajo Nation and was convicted in Navajo tribal court for contributing to the delinquency of a minor. Subsequent to his conviction by the tribal court, a federal grand jury indicted Wheeler for the crime of statutory rape arising from exactly the same incident. In the case heard by the Supreme Court, Wheeler argued that the conviction by the tribal court, an arm of the federal government, barred any further federal prosecution.

The Court rejected this argument, relying on two doctrines. The first was the well-established principle that states that one sovereign may prosecute an individual for the same acts that may have prompted a prosecution by the federal government—the second sovereign—and vice versa.[25] The Court's decision in *Wheeler* applied this doctrine to prosecutions by an Indian tribe and the federal government as the laws of separate sovereigns deriving authority to prosecute from separate and distinct sources. In the context of the federal government and the collective states, the Court held that an individual, as a citizen of the United States and also of the state or territory, owes allegiance to two sovereigns; therefore, the individual may be prosecuted for any infraction of the laws of either sovereign.[26] Essentially, Anthony Robert Wheeler owed "allegiance" to both the Navajo Nation and the United States, because he was a citizen of both sovereigns; therefore, he was subject to prosecution for the violation of each sovereign's laws.

More important, the Court expanded the *Oliphant* concept of tribes acting "inconsistent with their status" through the pronouncement of the "implicit divesture" exception in *Wheeler*. The *Wheeler* Court stated that "the areas in which such implicit divesture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe."[27] Arguably, "implicit divestiture" occurs when Congress has not expressly limited tribal sovereignty; however, as a policy matter, the Court viewed tribal jurisdiction over non-Indians or even by non-member Indians to be inconsistent with tribes' status as dependents and the "justifiable expectations" of non-Indians.

What is clear, at least to some degree, is that the Court recognized tribal governments as separate sovereigns that have retained at least some inherent sovereign powers and tribal sovereignty. In addition, according to the Court, such authority does not stem from any congressional delegation, authorization, or treaty provision. The Court, however, attempted to further expand its rhetoric about implicit divesture from *Oliphant* and *Wheeler* in *Duro v.*

Reina.[28] The *Duro* Court further eroded tribal sovereignty by applying the *Oliphant* and *Wheeler* rulings in way that would prevent the tribe from prosecuting an Indian who was not a member of the tribe. *Duro* created a jurisdictional gap in which the federal government, the state, or the tribe all lacked the authority to prosecute a nonmember Indian, unless the crimes was one of the 14 enumerated crimes listed in the Major Crimes Act.[29]

After the *Duro* decision was handed down, however, the collective voice of Indian country descended upon Congress urging members to curtail the Supreme Court's clear attack on tribal sovereignty. Congress responded with an amendment to the Indian Civil Rights Act, also known as the "*Duro* fix," which reaffirms tribal authority and the tribe's criminal jurisdiction over all Indians. The amendment specifically provided that "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" directly contradicted and overruled the Court's decision in *Duro*.[30] The amendment was subsequently upheld by the Court in *United States v. Lara*[31] and, to some degree, upheld by the denial of certiorari by the Court in *Means v. Navajo Nation*[32] and *Morris v. Tanner*.[33]

The Good and the Bad of *Santa Clara Pueblo v. Martinez*

The Supreme Court heard yet another case involving Indian law at about the same time that the Court was considering the *Oliphant* and *Wheeler* cases: *Santa Clara Pueblo v. Martinez*.[34] The oral argument for this case took place on Nov. 29, 1977—41 and 43 days, respectively, before the oral arguments of the other two related cases—but the *Martinez* decision was released in May 1978, whereas the *Oliphant* and *Wheeler* decisions were released two months earlier. Why did the Supreme Court take longer to decide the *Martinez* case? Certainly, the Court did not reach a consensus as to the holding, because Justice White dissented and Justice Rehnquist omitted his concurrence from the third part of the opinion, which provided an analysis of the "settled" law of tribal sovereign immunity. It may be that the Court was being careful to review the language used to determine that tribes have the right to define their citizenship (or membership) even in light of the facts of the *Martinez* case. Perhaps, as some scholars have argued, the Court was certain that, in light of the facts of the case, this decision would prompt Congress to amend the Indian Civil Rights Act immediately and provide a federal court forum for disputes related to tribal citizenship or membership.[35]

Santa Clara Pueblo v. Martinez was a case involving Julia Martinez, a citizen of the Santa Clara Pueblo, who married a Navajo man and continued to reside within the territory of the Santa Clara tribe with her children. Pursuant to the Santa Clara tribal enrollment ordinance, the children were not eligible for citizenship in the tribe, because their father was not a citizen. The Santa Clara Pueblo's first written enrollment ordinance was enacted in 1935 and was amended in 1939 to exclude the children of female Santa Clara citizens who were married to men who were not members of the pueblo. Any children of male Santa Clara citizens married to women who were not members, however, were still eligible for enrollment. In order for the Martinez children to receive health care and any other governmental benefits or services, the children had to be tribal citizens. The Martinez family was unable to have the enrollment ordinance amended and therefore filed suit in federal court in an attempt to gain the protections afforded by the Indian Civil Rights Act. The Martinez family asserted that the ordinance discriminated against her and her family on the basis of sex and ancestry.

The decision in *Martinez* is often cited as a landmark victory for Indian law and a modern cornerstone of tribal sovereignty. *Martinez* is still hailed as affirmation that, despite Congress' exercising its "plenary power" with regard to Indian affairs and policy, not even Congress can meddle in the way a tribe determines its enrollment and who may be a tribal citizen. The discriminatory overtones of the *Martinez* decision, however, scar its power as testament to tribal sovereignty. Why the Supreme Court would uphold tribal sovereignty in case such as *Martinez* instead of criminal jurisdiction over non-Indians (as in *Oliphant*) or exemptions from taxation for land reacquired by tribes within their historical boundaries[36] is both unclear and inconsistent.

A plethora of published articles have detailed the Court's indirect support of discriminatory tribal customs. Other studies analyze the Court's guise of protecting tribal sovereignty from intrusion by federal courts into intratribal disputes and affairs absent an express congressional intention to do so.[37] Some of these articles put the Supreme Court's analysis to the test, some argue from a non-Indian feminist stance, and others argue from an Indian feminist point of view. What is clear is that there are many issues that have been left unresolved by the Court's opinion in Martinez.

To some, the *Martinez* case represents what is wrong with Indian law and tribal sovereignty. Under general notions of anti-discrimination policies, no state, county, or local government would be able to get away with such gender discrimination. Few would argue that a determination that children of a female citizen of Michigan are not entitled to benefits because the father is from Ohio, but that children of male Michigan citizens are eligible, does not constitute gender discrimination.

Issues involving enrollment and citizenship in Indian tribes, however, are the broad and overarching concepts looked upon when referring to *Martinez* as a landmark decision upholding tribal sovereignty. Putting the discriminatory overtones aside as well, the *Martinez* decision is the oft-cited authority when tribal members attempt to have their citizenship or enrollment case heard in federal court pursuant to the Indian Civil Rights Act. More often than not, such cases are dismissed for lack of jurisdiction, because tribal courts retain the exclusive authority to hear disputes related to citizenship in a tribe.

Tribes across the country have varying levels of citizenship—ranging from the various pueblos that have stringent requirements for blood quantum, proficiency in the tribal language, and residency, to the tribes requiring no

more than proof that a person is a descendant of a citizen of tribe. Either way, tribal enrollment and citizenship remain an absolute, not quasi, aspect of the sovereignty tribes continue to exercise.

This aspect of sovereignty, however, is continually being pressed and questioned now that some tribes and tribal citizens have been made very wealthy through Indian gaming enterprises and the Indian Gaming Regulatory Act. Barring a citizen from enrolling in a tribe curbs an individual's ability to receive any governmental services such as health care, housing, or other benefits or detriments of one's political status as a federally recognized Indian—and these include per capita distributions of gaming revenue. Some tribes recently acknowledged that have been accused of limiting the number of citizens in the tribe because of per capita distributions resulting from gaming and that these tribes enroll only those who have applied for citizenship by a certain date, even though many others are eligible for tribal citizenship pursuant to the tribe's constitution. Other tribal governments have been accused of not enrolling citizens simply because the tribes want to increase individual per capita distributions. As of right now, however, *Martinez* is solid law that is applied regularly. All disputes related to citizenship, membership, or enrollment are to be heard in tribal court.

What Should We Do Now?

Three decades have passed since the Supreme Court handed down its rulings in the *Oliphant, Wheeler,* and *Martinez* cases, and, after 30 years, there are problems that have been resolved and others that have not been resolved by these decisions. The *Oliphant* decision continues to haunt tribes and tribal citizens. How many times can a non-Indian go unpunished for crimes committed in Indian country before Congress recognizes the ability of tribes to prosecute all those who violate the law within Indian country in a fair and consistent manner? Why is the percentage of Indians versus non-Indians on the reservation relevant? Who has jurisdiction over the defendant because he or she crossed the road that forms the boundary? Because of the Supreme Court's ruling in *Oliphant,* these questions are frequently raised and answered. Tribal courts, in most cases, are the venue that is more efficient than other non-Indian courts when it comes to handling civil and criminal disputes that arise on Indian reservations.

One can only imagine the outcome if, in the case of *United States v. Wheeler,* the federal government had first prosecuted the accused and then the tribe initiated its own prosecution. The tribe may have lost and been placed in a situation in which even more reliance is placed on the federal government to prosecute crimes occurring in Indian country. If tribes were not considered a part of the tripartite system of sovereigns in this country, tribes would not have jurisdiction over anybody. The *Wheeler* decision, which the Supreme Court recently reaffirmed in *United States v. Lara,*[38] remains critical to the legal understanding and underpinning of tribes as sovereigns. It is critical to continue to cite to *Wheeler* when inherent powers reserved by tribes are attacked. One slip and the Court could easily determine that all powers of tribes devolve from the federal government to tribe, thus further eroding tribal sovereignty.

What if *Santa Clara Pueblo v. Martinez* had been decided differently. Would all tribes be need required to have a federally mandated requirements for blood quantum, residency, or language proficiency? What would happen to the tribes that have lost their language? Would allowing a federal forum to hear disputes over citizenship really encroach on tribal sovereignty? And with the rise of gaming enterprises and economic prosperity for a minority of tribes—combined with the national notoriety given to disputes involving enrollment in tribes—Congress may very well decide to do something about the issue. Instead of concentrating on per capita gaming distributions, tribal governments and tribal leaders need to focus on the ultimate prize: ensuring that tribal citizens receive essential governmental services. If tribal leaders fail to meet this challenge, then the current status of tribes as sovereigns could be gutted with the proverbial stroke of a pen. **TFL**

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Endnotes

[1] *Wheeler v. United States,* 435 U.S. 191 (1978); oral argument held Monday, Jan. 9, 1978; decision issued Monday, March 6, 1978. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 313 (1978); oral argument held Wednesday, January 11, 1978; decision issued: Wednesday, March 22, 1978. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); oral argument held Tuesday, Nov., 29, 1977; decision issued Monday, May 15, 1978.

[2] *United States v. Red Lake Band of Chippewa Indians,* 827 F.2d 380 (8th Cir. 1987).

[3] Memorandum for the United States in Opposition to Petition for Certiorari, *Red Lake Band of Chippewa Indians, et al v. United States,* Charles Fried (February 1988).

[4] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

[5] *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145 (1854).

[6] Judith V. Royster, Oliphant *and its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court,* 13 Kan J.L. & Pub. Pol'y 59, 60, 62 (2003–2004) (the author uses the terms "embarrassment" and "unquestionably impacted").

[7]*See*, for example, *Id.*, n. 6; Steven M. Johnson, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291 (1979); William D. Holyoak, *Tribal Sovereignty and the Supreme Court's 1977--1978 Term*, 1978 BYU L. REV. 911 (1978); Russel Lawrence Barsh and James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); John P. LaVelle, *Petitioner's Brief: Reargument of* Oliphant v. Suquamish Indian Tribe, 13 KAN. J.L. & PUB. POL'Y 69 (2003); Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); 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 (1999).

[8]*See Ex parte Kenyon*, 14 Fed. Cas. 453 (No. 7,720) (W.D. Ark. 1878) (dicta).

[9]*Williams v. Lee*, 358 U.S. 217, 220 (1959).

[10]*Oliphant*, 435 U.S. at 208.

[11]*Id.* (emphasis in original).

[12]*Id.* at 192–193.

[13]*San Manuel Bingo v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007).

[14]*Oliphant* at 192–193.

[15]*San Manuel*, 475 F.3d at 1310 (bracketing in the original).

[16]*See* Ralph Blumenthal, *For Indian Victims of Sexual Assault, A Tangled Legal Path*, NEW YORK TIMES (April 25, 2007); Sarah Kershaw, *Drug Traffickers Find Haven in Shadows of Indian Country*, NEW YORK TIMES (Feb. 19, 2006).

[17]*See* Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. PUB. POL'Y 121, 128 (2004–2005); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U.L. REV. 455 (2004–2005); Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 3 (2004).

[18]*Montana v. United States*, 450 U.S. 544 (1981).

[19]*See*, for example, *Brendale v. Confederated Tribes and Band of Yakama Nation*, 492 U.S. 408 (1989); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). At this point, however, the Court has not issued the civil jurisdiction equivalent of *Oliphant*, but many practitioners of Indian law are very concerned with the Court's recent grant of certiorari in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 829 (2008). Other scholars and practitioners of Indian law are optimistic that the Court will reaffirm the exercise of civil jurisdiction over non-Indians, the topic that was at issue in Plains.

[20]*See* Judith Royster and Rory SnowArrow Fausett, *Fresh Pursuit onto Native American Reservations: State Rights to Pursue Savage Hostile Indian Marauders across the Border*, 59 U. COLO. L. REV. 191 (1988).

[21]If the crime had involved an Indian perpetrator and an Indian victim, the tribe and the federal government would have concurrent jurisdiction to prosecute the perpetrator.

[22]*See* Michael L. Barker and Kenneth Mullen, *Cross-Deputization in Indian Country*, 16 POLICE STUD.: INT'L REV. POLICE DEV. 157 (1993); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems* 37 ARIZ. ST. L.J. 1047, 1107 n. 355 (2005); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreement*, 82 U. DET. MERCY L. REV. 1 (2004–2005); Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 60 n. 152 (2007) (Grand Traverse Band agreements).

[23]*Wheeler* at 313.

[24]*Id.* at 322–323; *see also Talton v. Mayes*, 163 U.S. 376 (1896).

[25]*See Bartkus v. Illinois*, 359 U.S. 121 (1959); and *Abbate v. United States*, 359 U.S. 187 (1959).

[26]*See Moore v. Illinois*, 55 U.S. (14 How.) 13, 19–20 (1852).

[27]*Wheeler* at 326. More than likely, the use of the term "nonmember" as opposed to "non-Indian" was not intended to deny tribes' criminal jurisdiction over anyone but "members" as evinced by the Court's decisions in *Duro v. Reina* and *United States v. Lara*.

[28]*Duro v. Reina*, 495 U.S. 676 (1990).

[29]The Major Crimes Act is codified at 18 U.S.C. § 1153.

[30]*See* 25 U.S.C. § 1301.

[31]*United States v. Lara* 541 U.S. 193 (2004) (holding that Congress' amendment to the Indian Civil Rights Act stating that tribes retain the authority to prosecute nonmember Indians was a retained inherent power and not a power delegated from the United States to tribes overturning the Court's decision in *Duro v. Reina* that tribes could not prosecute nonmember Indians).

[32]*Means v. Navajo Nation* 432 F.3d 924 (9th Cir. 2005).

[33]*Morris v. Tanner* 160 Fed. Appx. 600 (9th Cir. 2005) (unpublished); *see also*, Matthew Fletcher, Means *Case: A Supreme Affirmation of Tribal Authority*, INDIAN COUNTRY TODAY, October 20, 2006 (discussing the affirmation of tribal sovereignty by the Court's refusal to hear the appeals).

[34]*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[35]*See* Laurence, *supra*, n. 7.

[36]*See City of Sherrill v. Oneida Nation of N.Y.*, 544 U.S. 197 (2005).

[37]*See* Laurence, *supra*, n. 7; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez: *Twenty-five Years of Disparate Cultural Visions: An Essay Introducing the Case of Re-argument Before the American Indian Nations Supreme Court*, 14 KAN. J.L. & PUB. POL'Y 49 (2004–2005); Francine R. Skenandore, *Revisiting* Santa Clara Pueblo v. Martinez: *Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347 (2002); Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004-2005).