

# Class 4: Oliphant v. Suquamish Indian Tribe

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# Oliphant Question Presented


- ▶ Does the Suquamish Indian Tribe have authority to prosecute non-Indians for crimes committed on the Port Madison Reservation?

# What are the facts?



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Professor answer:

1. Two non-Indians
  2. Allegedly committed crime
  3. On Port Madison Reservation
  4. Tribe initiated prosecution
- 

# What is the holding?



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Professor answer:

- ▶ Suquamish Tribe has no authority to prosecute non-Indians

# What is the Court's Reasoning?



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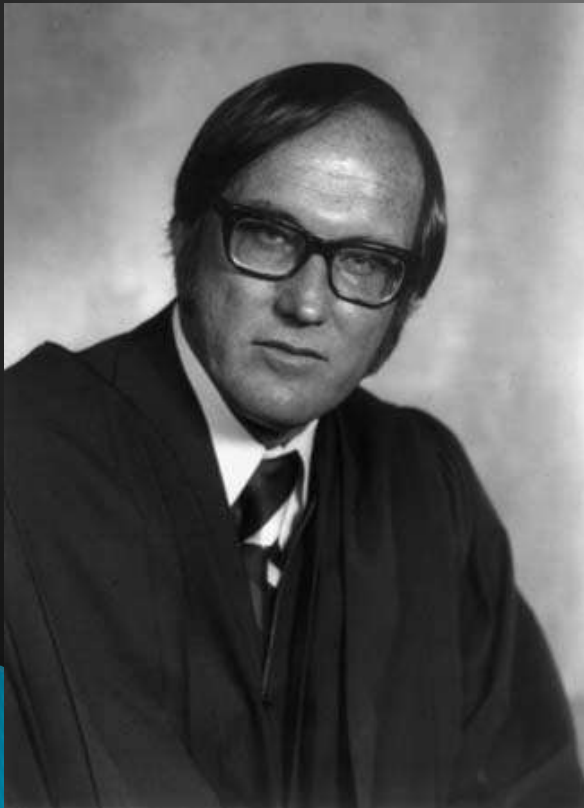
Professor's short answer:

- ▶ Congress, Executive branch, and federal courts have “shared assumption” that Indian tribes cannot prosecute



# Justice Rehnquist's Opinion: Selected Paragraphs

»» Dissecting a judicial opinion



# First Paragraph

- »» The Introduction to the Suquamish Tribe as a Treaty Tribe

# (Introduction)

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, 12 Stat. 927, the Suquamish Indian Tribe relinquished all rights that it might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.<sup>1</sup>

# 1855 Treaty of Point Elliott

## TREATIES.

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*Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.*

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: Jan. 22, 1855.

# The First Footnote

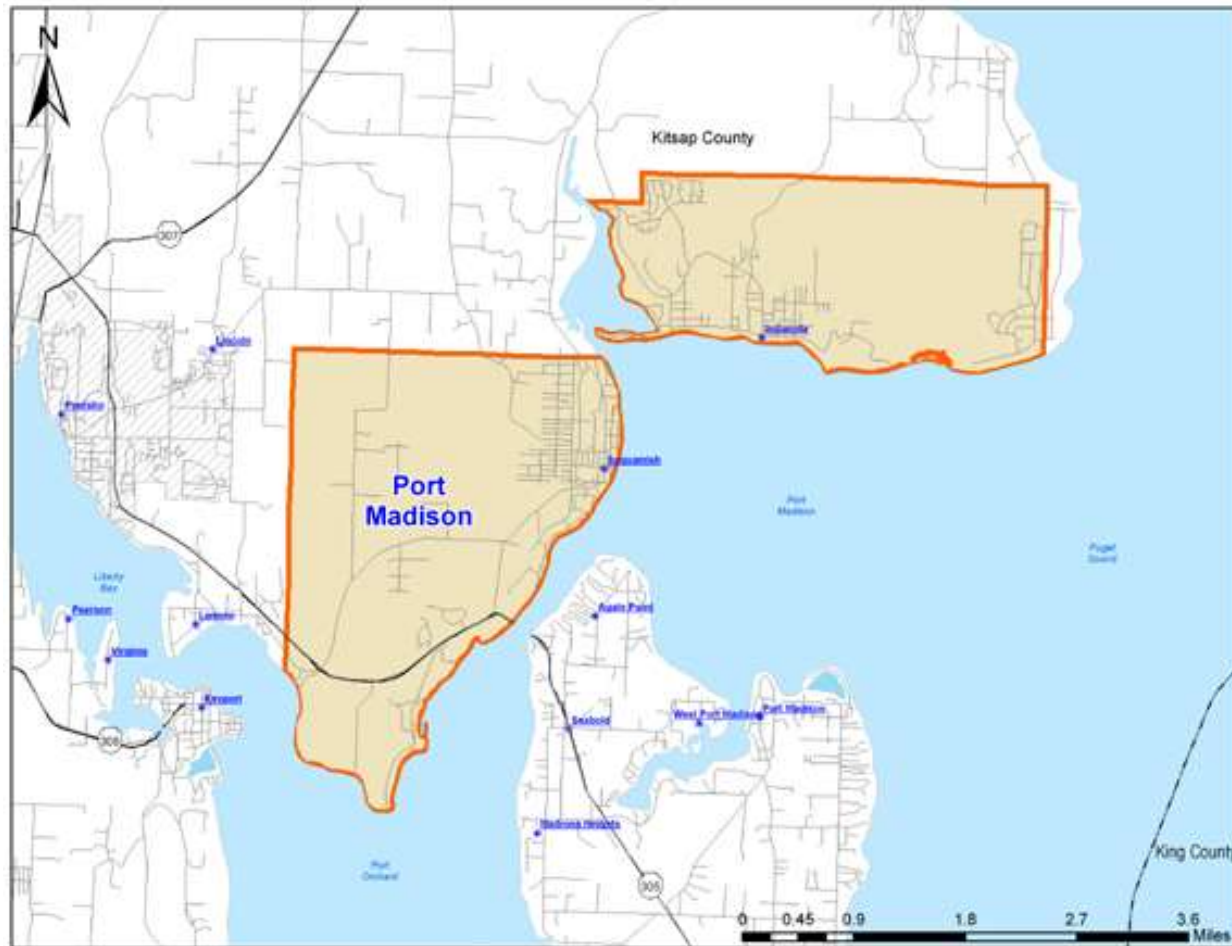
»» The Demographics and  
Geography of the Port  
Madison Reservation

<sup>1</sup> According to the District Court's findings of fact: "[The] Port 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." App. 75.

## Footnote 1

First paragraph

# Port Madison Reservation: Home of Suquamish Tribe



# Fifth Paragraph

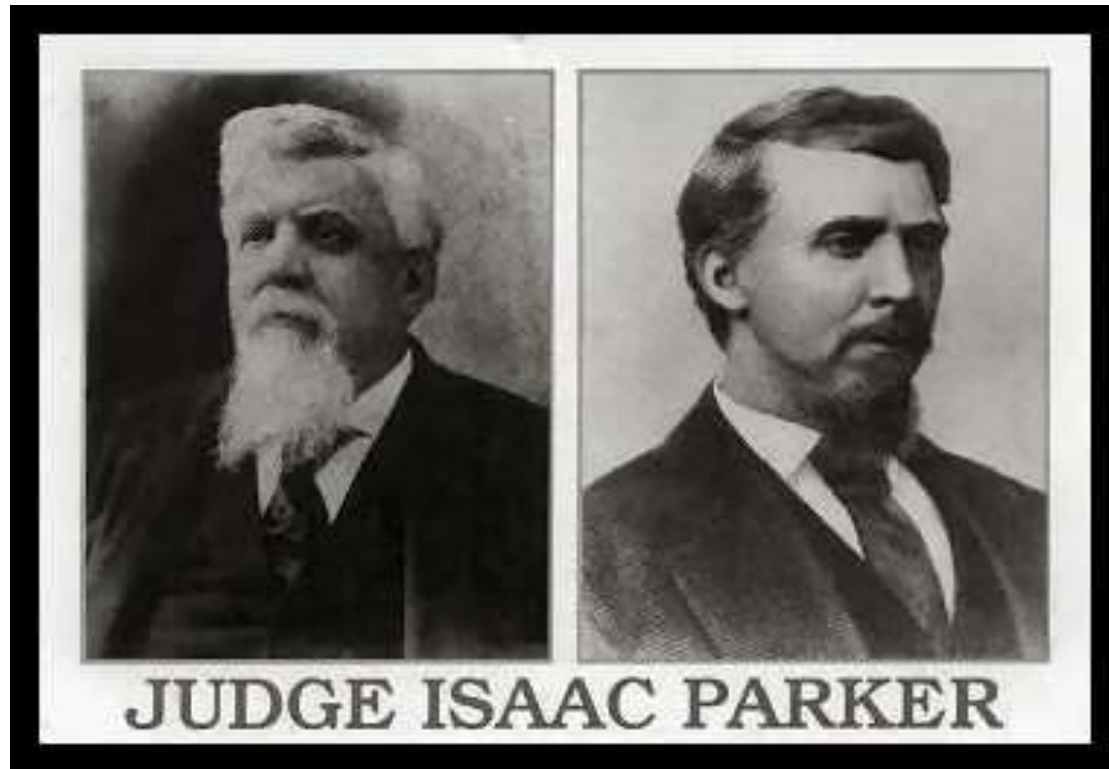
- » Any cases *at all* talk about tribal criminal jurisdiction over non-Indians?



At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction.<sup>9</sup> In *Ex parte Kenyon*, 14 F. Cas. 353 (No. 7,720) (WD Ark. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians,<sup>10</sup> held that to give an Indian tribal court “jurisdiction of the person of an offender, such offender must be an Indian.” *Id.*, at 355. The conclusion of Judge Parker was reaffirmed only recently in a 1970 opinion of the Solicitor of the Department of the Interior. See *Criminal Jurisdiction of Indian Tribes over Non-Indians*, 77 I. D. 113.<sup>11</sup>

<sup>11</sup> The 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal.

# Judge Parker



# Excerpt from the 1970 Opinion

\* This opinion was withdrawn by the Solicitor on January 25, 1974.

<sup>1</sup> It should be noted that the question of tribal jurisdiction discussed in this memorandum relates to action by tribes in the exercise of remaining sovereign authority and does not relate to Courts of Indian Offenses which are courts established by the Secretary and by the provision of 25 CFR Part 11 exercise jurisdiction over Indians only. See *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1888). Further, not all Indian groups organized under the Indian Reorganization Act, 48 Stat. 987, retained sovereign authority if they were not recognized as sovereign prior to being reorganized. See *Federal Indian Law*, Interior Department (1958). p. 411. fn. 36. In organizing under written constitutions most tribes have limited criminal jurisdiction of their laws and courts to Indians.

# Seventh Paragraph – First Part

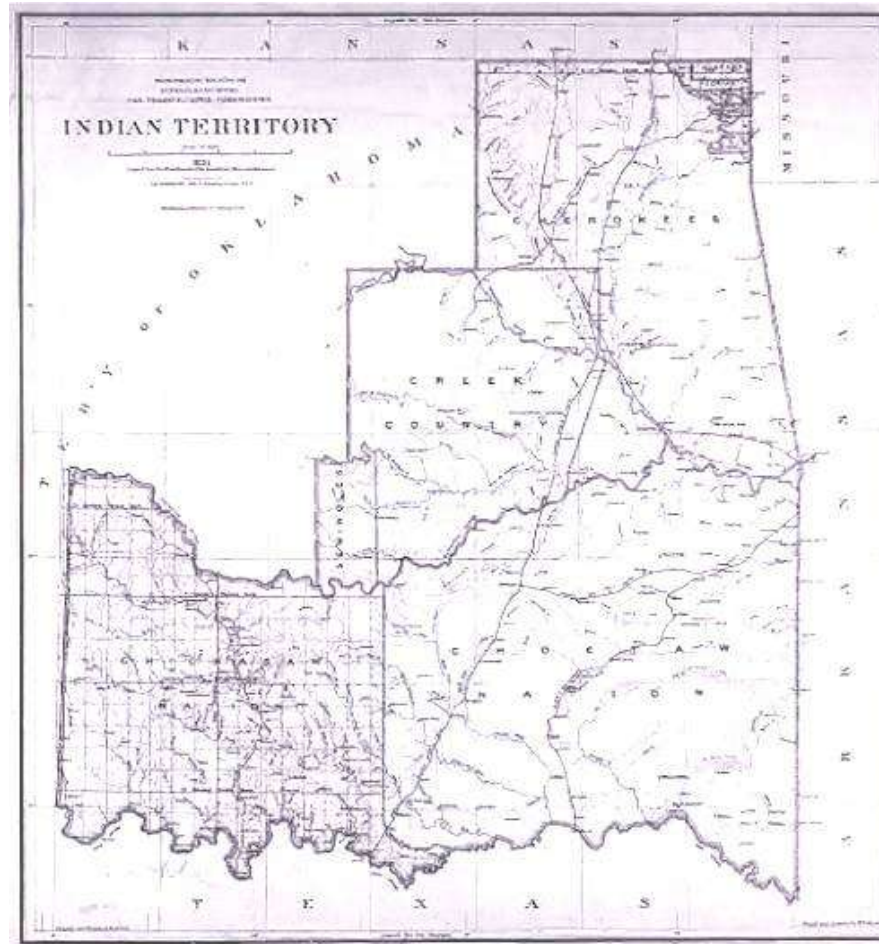
- » Did Congress *ever* legislate about tribal criminal jurisdiction over non-Indians?

It was in 1834 that Congress was first directly faced with the prospect of Indians trying non-Indians. In the Western Territory bill,<sup>12</sup> Congress proposed to create an Indian territory beyond the western-directed destination of the settlers; the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union. While the bill would have created a political territory with broad governing powers, Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area.<sup>13</sup> The reasons were quite practical:

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

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

# Indian Territory Post-Removal



Where is Suquamish on this map?



# Seventh Paragraph – Second Part

- » Ok, Congress didn't *legislate*, but they expressed concern. Who wouldn't?

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



# A Failed Bill?



# Ninth Paragraph

- » Did the U.S. Supreme Court ever say anything about it?

In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield*, 141 U. S. 107, 115–116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country “such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.” The “general object” of the congressional statutes was to allow Indian nations criminal “jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.” *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

# *Mayfield*



Adultery

Dicta

# Part II

## – First Paragraph

»» So, what *is* the law?

## II

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. Cf. *Draper v. United States*, 164 U. S. 240, 245–247 (1896); *Morris v. Hitchcock*, 194 U. S. 384, 391–393 (1904); *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U. S. 685, 690 (1965); *DeCoteau v. District County Court*, 420 U. S. 425, 444–445 (1975). “Indian law” draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. *Ibid.*

# Apparently, Silence is Bad



FUN FACT:

did you know that the sound most people call "silence" is actually the sound that mountain lions make when they walk around outside your house?

# Third Paragraph

- » So what about the 1855 Treaty of Point Elliott?



By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of “quasi-sovereign” authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 15 (1831). But the tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers “*inconsistent with their status.*” *Oliphant v. Schlie*, 544 F. 2d, at 1009 (emphasis added).

# Indian Treaty Interpretation and Ambiguity (Including “Silence”)

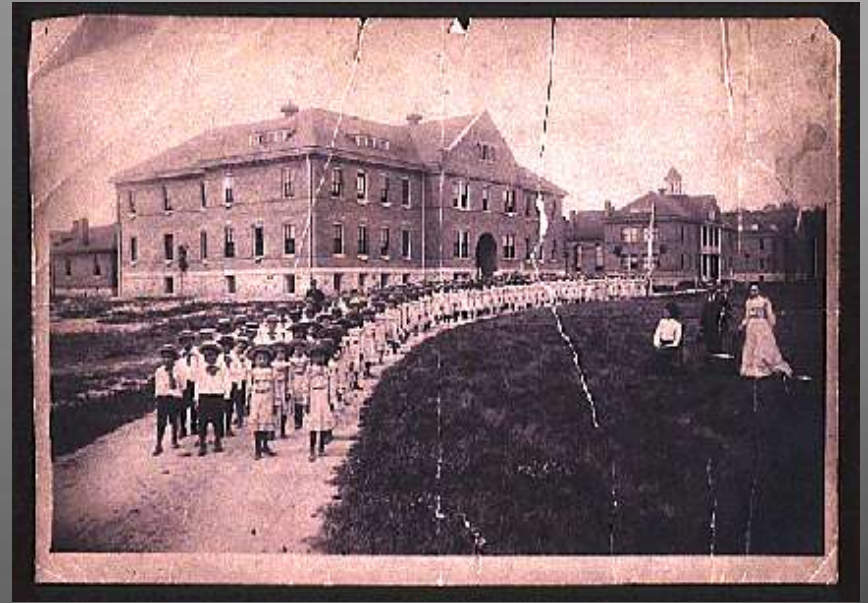
<sup>17</sup> In interpreting Indian treaties and statutes, “[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” *McClanahan v. Arizona State Tax Comm’n*, 411 U. S. 164, 174 (1973), see *Kansas Indians*, 5 Wall. 737, 760 (1866); *United States v. Nice*, 241 U. S. 591, 599 (1916). But treaty and statutory provisions which are not clear on their face may “be clear from the surrounding circumstances and legislative history.” Cf. *DeCoteau v. District County Court*, 420 U. S. 425, 444 (1975).

Menominee Tribe v. U.S., 391 U.S. 404, 408  
n. 17 (1968)

# Example of Treaty “Silence”

are held.” Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims<sup>1</sup> that the language “to be held as Indian lands are held” includes the right to fish and to hunt. The record shows that the lands covered by the Wolf River Treaty of 1854 were selected precisely because they had an abundance of game. See *Menominee Tribe v. United States*, 95 Ct. Cl. 232, 240–241 (1941). The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.<sup>2</sup>

# “Inconsistent with their status”



Mount Pleasant Indian School: Indians as “wards” to the Federal government “guardian”

# Judicial Minimalism and *Oliphant*

»» Did the Supreme Court decide too much?

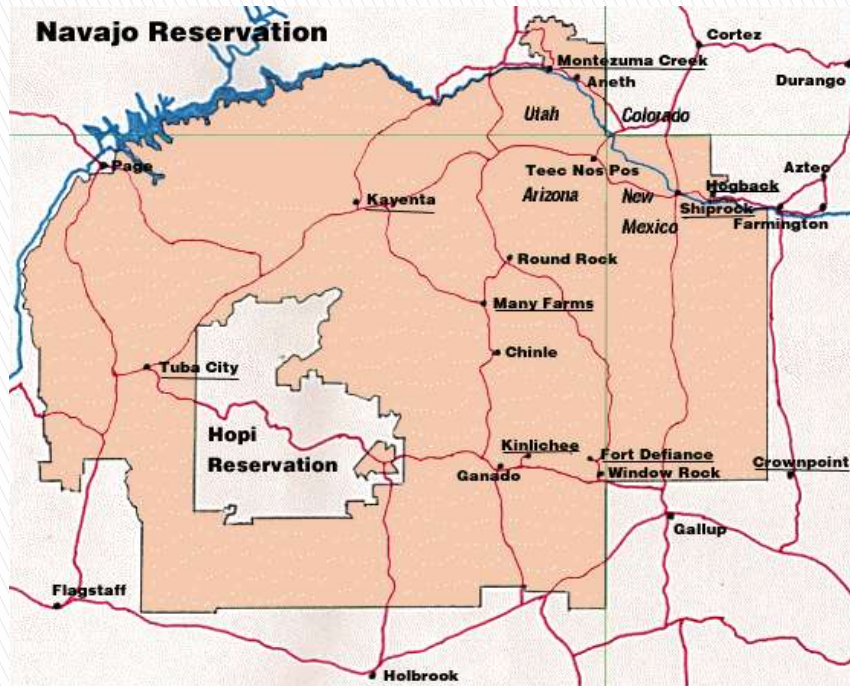
# Judicial Minimalism versus Bright-Line Rules



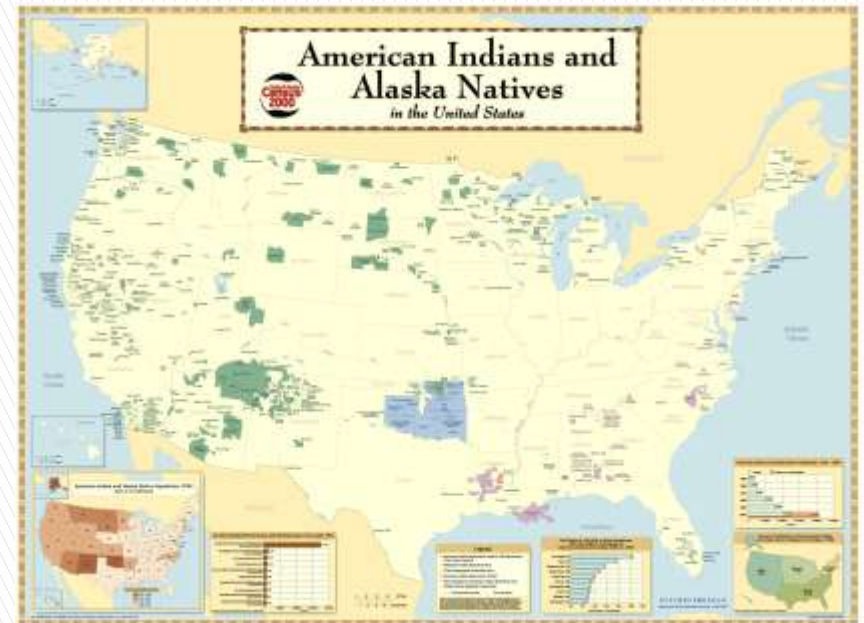
Cass Sunstein's office



# *Oliphant* Applies to ALL Tribes



Navajo Reservation



Indian Country

# Critical Race Theory and *Oliphant*

- » Compare *Crow Dog* and *Oliphant* – Justice Rehnquist did.



In *Ex parte Crow Dog*, 109 U. S. 556 (1883), the Court was faced with almost the inverse of the issue before us here—whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land.<sup>1</sup> In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the “nature and circumstances of the case.” The United States was seeking to extend United States

“law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of

their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .” *Id.*, at 571.

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

The United States was seeking in *Crow Dog* to extend U.S.

“law by argument and inference only, . . . over aliens and strangers; over the members of a community, separated by race, by tradition, . . . [BY THE INSTINCTS OF A FREE THOUGH SAVAGE LIFE] from the authority and power 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, AND MAKES NO ALLOWANCE FOR THEIR INABILITY TO UNDERSTAND IT]. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . [SUPERIORS OF] a different race, 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 SAVAGE NATURE; ONE WHICH MEASURES THE RED MAN’S REVENGE BY THE MAXIMS OF THE WHITE MAN’S MORALITY].”<sup>32</sup>


# Feminist Legal Theory and *Oliphant*

»» Who suffers the most from  
*Oliphant*?

# *Oliphant's* Impact on Women



# How Did THAT Happen?

1. Oliphant Applies to *All* Tribes, Not Just Suquamish
  2. No tribal or state jurisdiction over Non-Indians, leaving exclusive federal jurisdiction
  3. Federal prosecutors focus on drugs, kidnapping, bank robberies, and terrorism
  4. NOT Indian country domestic violence
- 

# Also, Almost Physically Impossible

- ▶ Try driving from Grand Rapids to Marquette or Escanaba or Watersmeet to investigate sexual assault ... in the middle of winter



W.D. Mich. Service area