Class 4: Oliphant v. Suquamish Indian Tribe (Long Version)

Professor Matthew L.M. Fletcher

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?

What are the facts?

Professor answer:

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

What is the holding?

What is the holding?

Professor answer:

- Suquamish Tribe has no authority to prosecute non-Indians

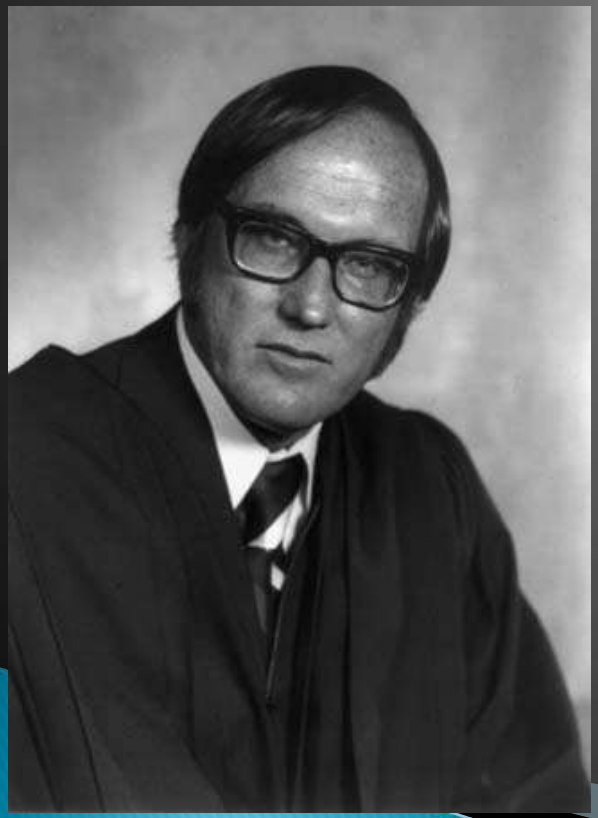
What is the Court's Reasoning?

What is the Court's Reasoning?

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.[1]

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1855 Treaty of Point Elliott

TREATIES.

Treaty between the United States and the Dwámish, Suquámish, 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

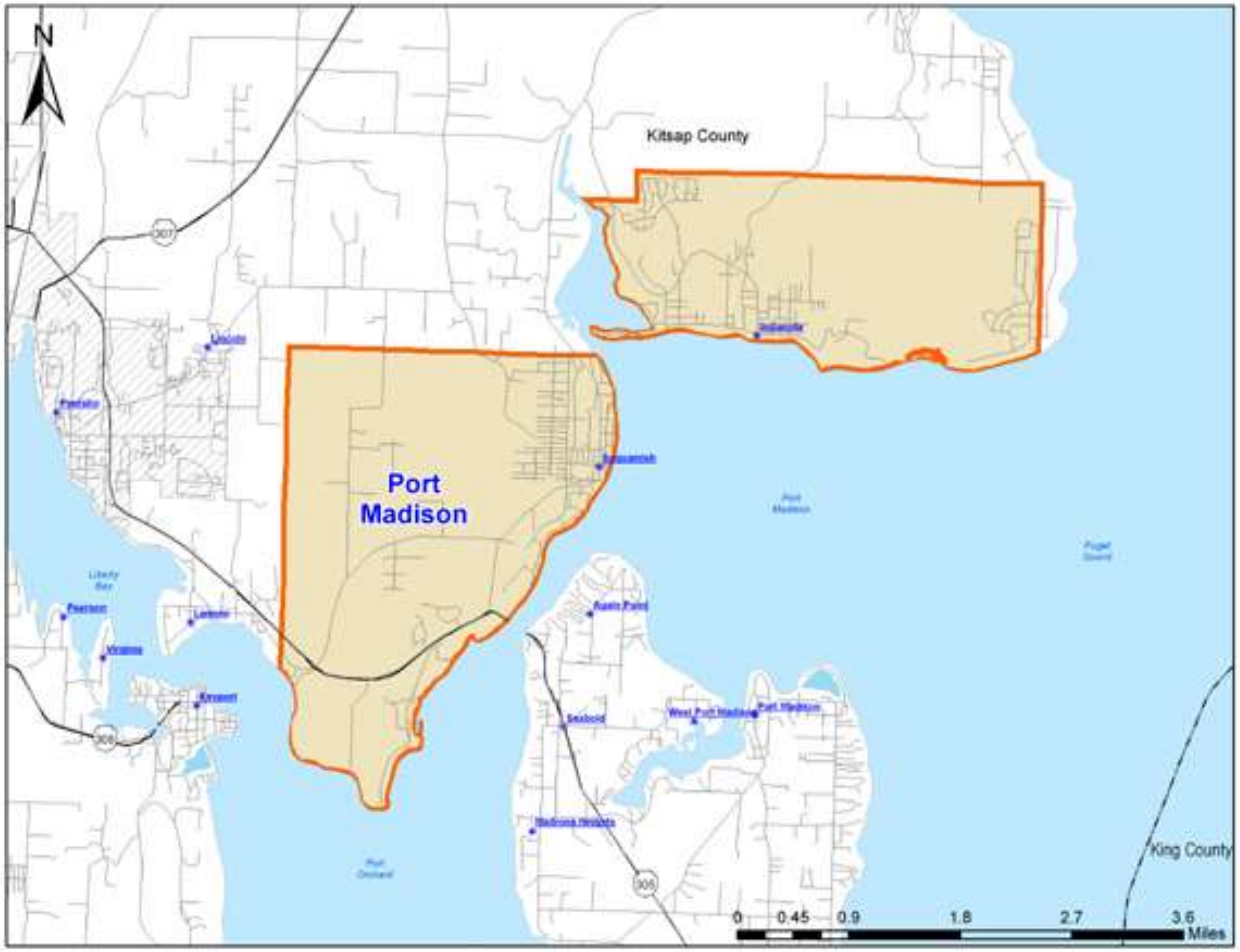
- The Demographics and Geography of the Port Madison Reservation

[1] 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



The Second Paragraph

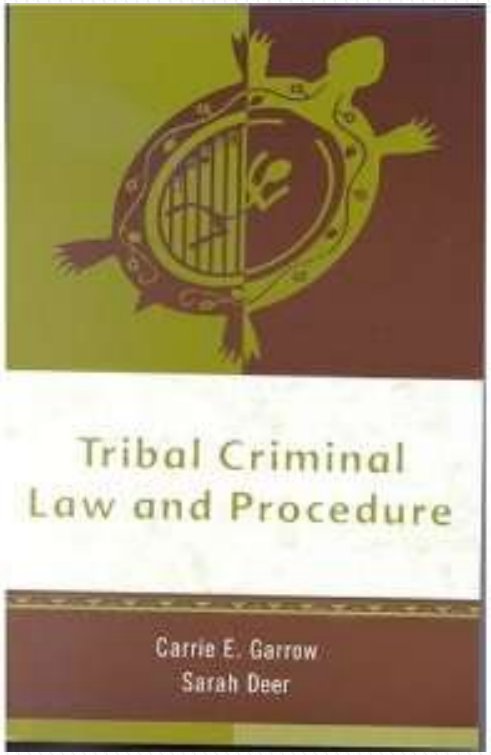
- The Law of the Suquamish Tribe

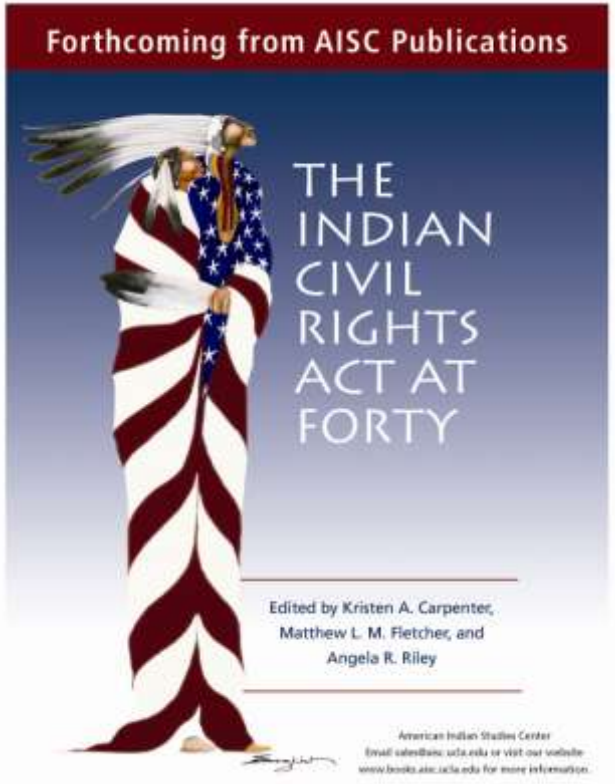
The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians.[2] Proceedings are held in the Suquamish Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U. S. C. § 1302, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings.[3] However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.[4]

[4] The Indian Civil Rights Act of 1968 provides for "a trial by jury of not less than six persons," 25 U. S. C. § 1302 (10), but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

Pages 193–194

Applicable Laws in Tribal Criminal Cases





Law and Order Code

Indian Civil Rights Act

Part I – First Paragraph

- Where do Indian tribes get the authority to prosecute non-Indians?

Part I

I

Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision.[6] Instead, respondents urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," see, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 554 (1974), the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

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Tribal Authority to Prosecute: Act of Congress? Or Treaty?

Footnote 6 in the First Paragraph

- Do any federal statutes recognize tribal power to prosecute non-Indians?

[6] Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and to punish non-Indians through the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. § 476, and the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302. Neither Act, however, addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law." The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.

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

Page 195–196

The most obvious argument is simply that habeas corpus is the only relief mentioned in the language of the statute. Supporting this argument is the longstanding canon of statutory interpretation that the "inclusion of one thing indicates the exclusion of the other" (referred to in shorthand as *expressio unius*).[123] The maxim is a weak one, however. It assumes that the legislature carefully drafts statutes, is aware of all their details, and intends the interpreter to draw the negative inference posited by the canon. It does not recognize that the legislature may only want to guarantee that the matter expressly mentioned becomes positive law.[124]

The Problem with "Negative Inferences"

By the late Phil Frickey, co-originator of the legal field of "legislation."

78 Cal. L. Rev. 1137, 1157-1158 (1990).

Second Paragraph

- The Importance of this Case, or How Often Will It Come Up?

The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.[7] Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

American Indian Tribal Courts

S. Hrg. 110-576

TRIBAL COURTS AND THE ADMINISTRATION OF JUSTICE IN INDIAN COUNTRY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JULY 24, 2008

Printed for the use of the Committee on Indian Affairs

Third Paragraph

- What is the historical context of the Suquamish Tribe's efforts to prosecute Oliphant and Belgarde?

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. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." H. R. Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

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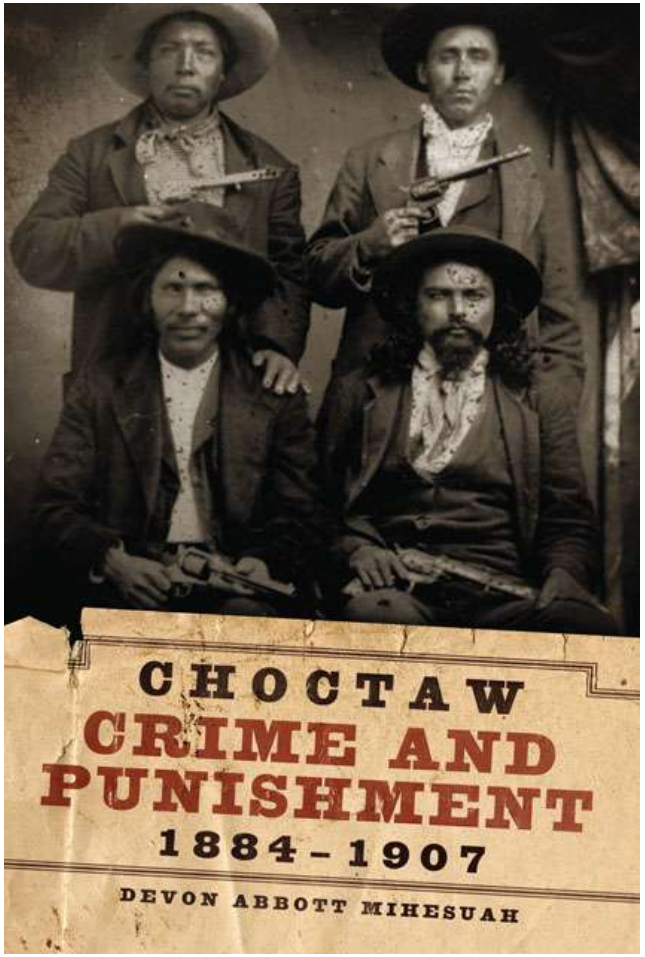
No tradition of criminal law? Hmmm….



And more.

THE NATURE AND EXTENT OF THE EXERCISE OF CRIMINAL JURISDICTION BY THE CHEROKEE SUPREME COURT: 1823-1835

J. MATTHEW MARTIN*

32 N.C. Cent. L. Rev. 27 2009-2010

Oh, and the 1830s were the Terrible Era of "Indian Removal"

Fourth Paragraph – First Half

- Any precedent on this question? No?

It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports. But the problem did not lie entirely dormant for two centuries. A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe "the jurisdiction and government of all the persons and property that may be within their limits." Despite the broad terms of this governmental guarantee, however, the Choctaws at the conclusion of this treaty provision "express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations." [8] Art. 4, 7 Stat. 333 (emphasis added). Such a

Choctaw Removal

Fourth Paragraph – Second Part

- Did the U.S. Attorney General say anything about this?

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

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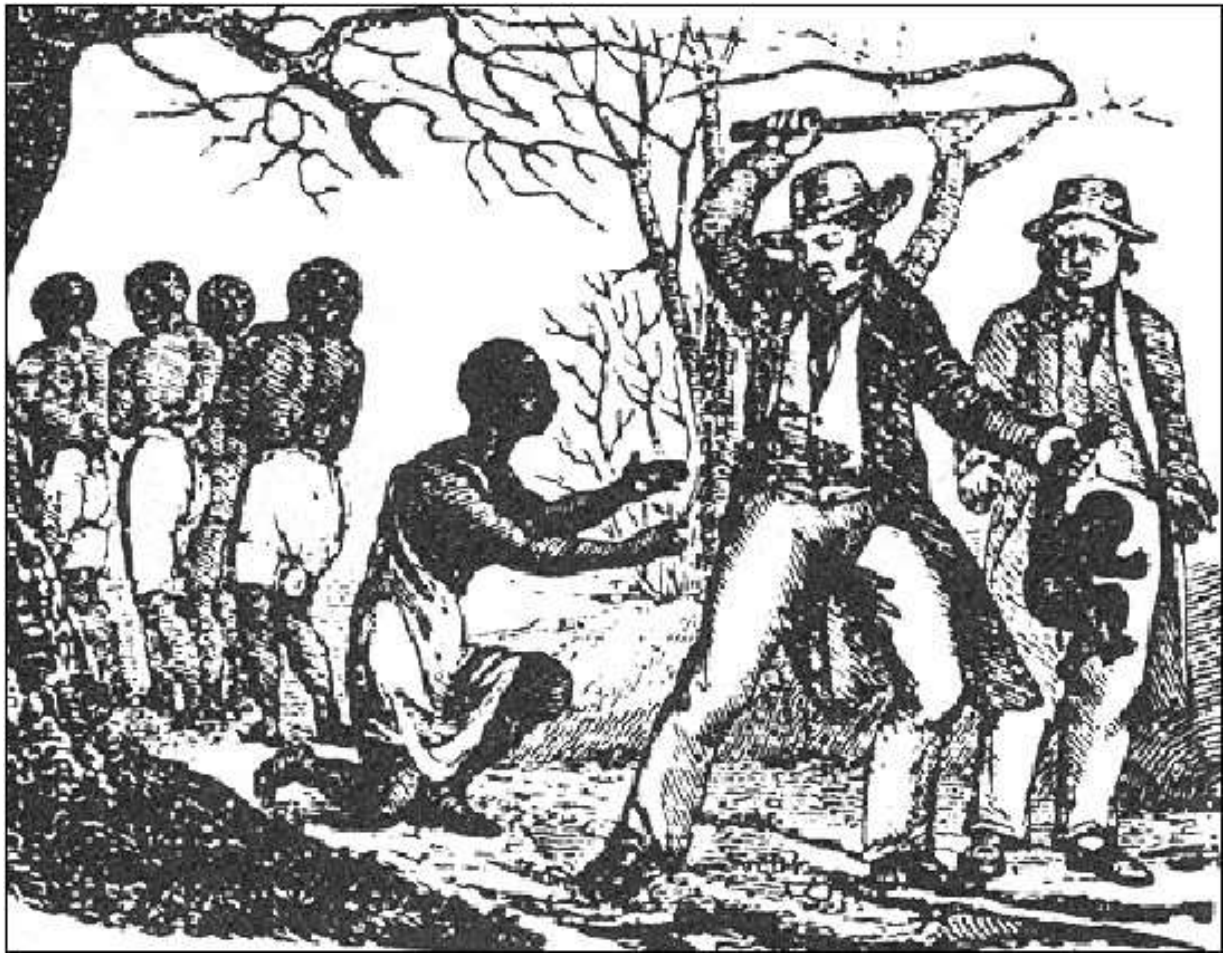
Reliance upon AG's opinions protecting slaveowners



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.[9] 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,[10] 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.[11]

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

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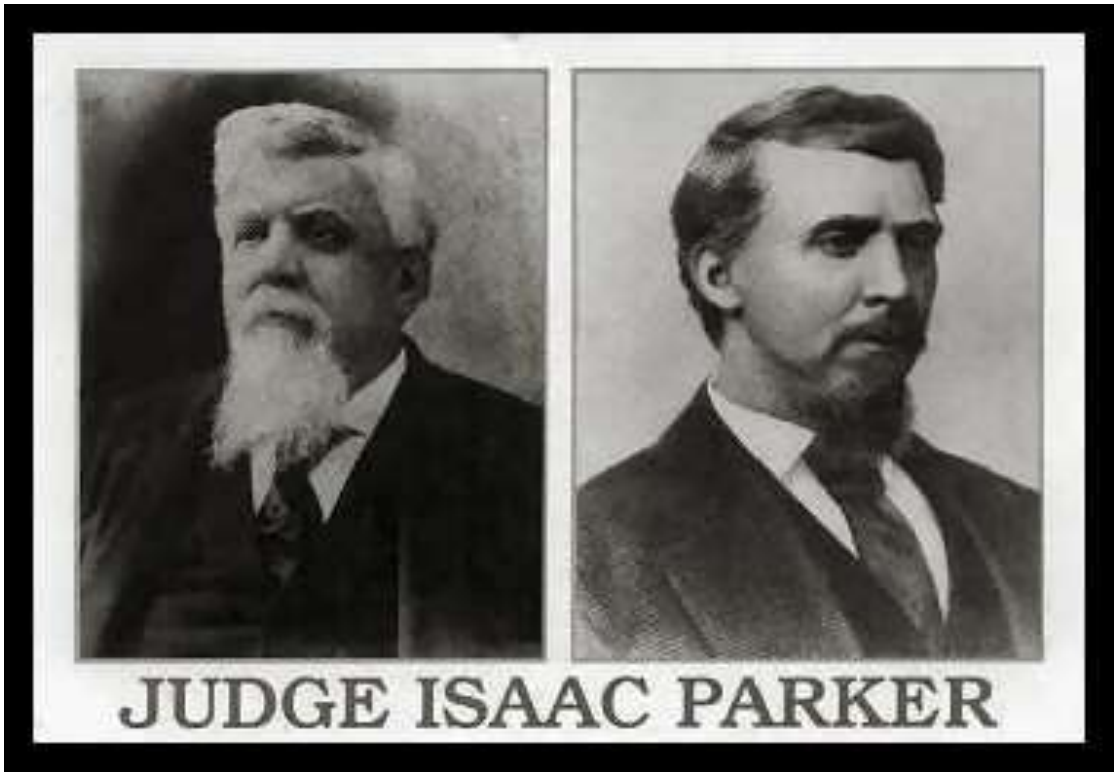
Judge Parker



Excerpt from the 1970 Opinion

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

[1] 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.

Sixth Paragraph

- What did Congress have to say about this, or is there an "Original understanding" about Indian jurisdiction?

While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians. For the reasons previously stated, there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians because of the absence of formal tribal judicial systems. Instead, Congress' concern was with providing effective protection for the Indians "from the violences of the lawless part of our frontier inhabitants." Seventh Annual Address of President George Washington, 1 Messages and Papers of the Presidents, 1789–1897, pp. 181, 185 (J. Richardson ed., 1897). Without such protection, it was felt that "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory." *Ibid.* Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians which "would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof." 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." 3 Stat. 383, now codified, as amended, 18 U. S. C. § 1152.

Framers Feared Being Pushed Into the Sea by the Indians

265. *See* RICHARD C. BROWN, ILLUSTRIOUS AMERICANS: JOHN MARSHALL 213 (1868) ("The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements." (quoting 1828 letter from Chief Justice Marshall to Justice Story)); ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 54-55 (1968) ("Instead [Marshall] excused the displacement which had occurred by the most narrow argument possible: *the Indians' war-like savagery made their physical proximity a mortal danger to the conquering settlers*, and only to the extent of that danger might their lands be appropriated."

Fletcher, *Preconstitutional Federal Law*, 82 Tul. L. Rev. 509, 548 (2009)

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,[12] 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.[13] 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).

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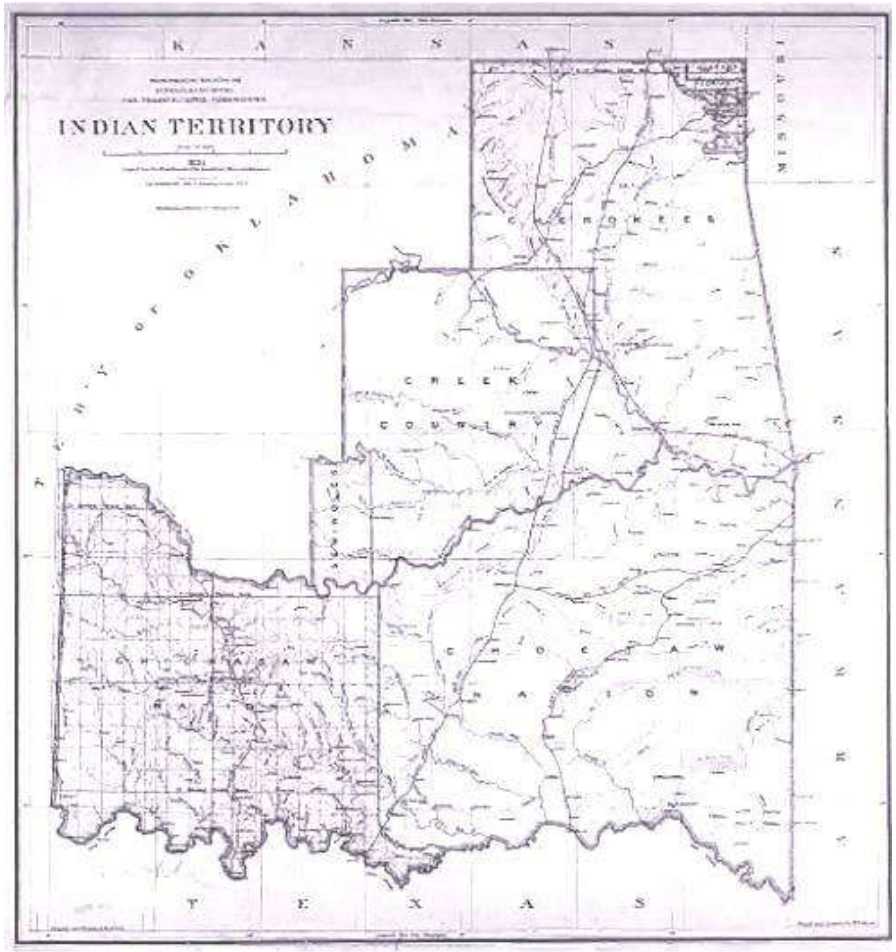
Indian Territory Post-Removal



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?

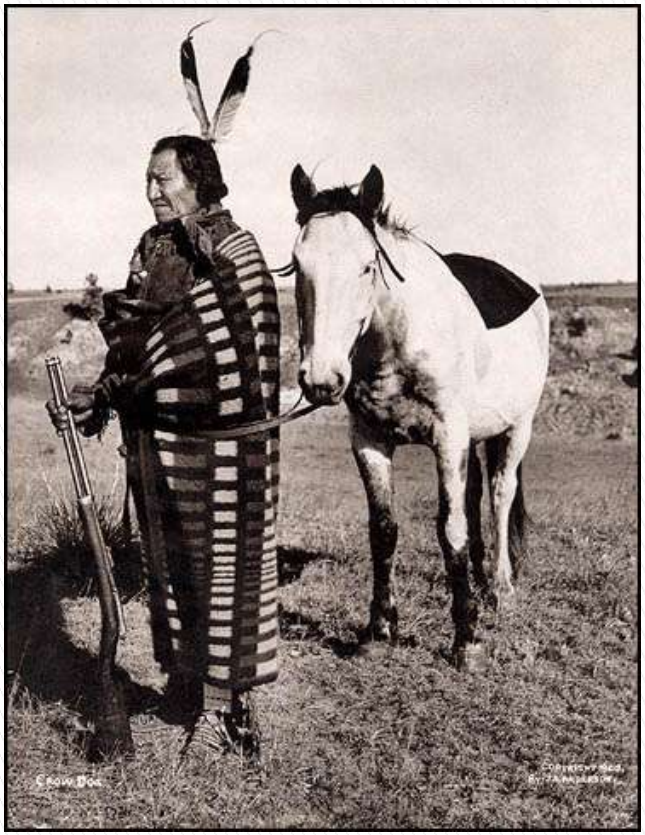
Eighth Paragraph

- Any other examples of Congress's "concern"?

This unspoken assumption was also evident in other congressional actions during the 19th century. In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. § 3, 10 Stat. 270, now codified, as amended, 18 U. S. C. § 1152. No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians. Similarly, in the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who commit certain specified major offenses. Act of Mar. 3, 1885, § 9, 23 Stat. 385, now codified, as amended, 18 U. S. C. § 1153. If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses.[14]

Crow Dog and Spotted Tail

Spotted Tail



Crow Dog

1854 Statute: You Decide

CHAP. XXVI.—*An Act to amend an Act, entitled "An Act to Divide the State of Arkansas into Two Judicial Districts," approved March the third, eighteen hundred and fifty-one.* March 27, 1854. 1851, ch. 24.

SEC. 3. *And be it further enacted,* That nothing contained in the twenty-fifth section of an act entitled "An act to regulate intercourse with the Indian tribes, and preserve peace on the frontiers," approved thirtieth of June, eighteen hundred and thirty-four, shall be construed to extend or apply to said Indian country any of the laws enacted for the District of Columbia, and that nothing contained in the twentieth section of the said act, which provides for the punishment of offences therein specified, shall be construed to extend to any Indian committing said offences in the Indian country, or to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or in any case where, by treaty stipulations, the exclusive jurisdiction over such offences may now or hereafter be secured to said Indian tribes, respectively, and any thing in said act inconsistent with this act be, and the same is hereby repealed.

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

Tenth Paragraph

- Any “smoking guns” of Congressional skepticism of tribal jurisdiction?

In a 1960 Senate Report, that body expressly confirmed its assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.[15] In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted:

> "The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.* *charges.* Further, there are no Federal laws which can be invoked against trespassers.
>
> . . . . .
>
> "The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property." S. Rep. No. 1686, 86th Cong., 2d Sess., 2–3 (1960) (emphasis added).

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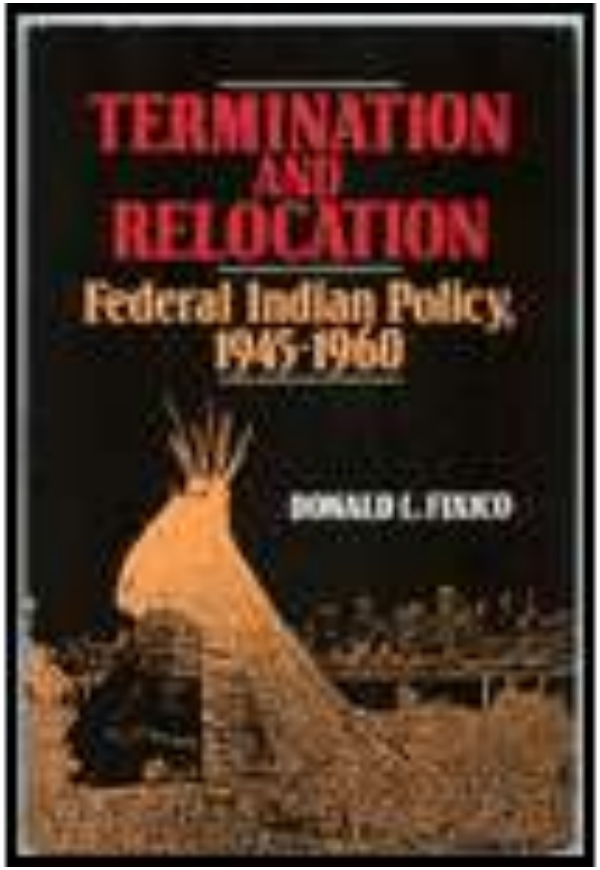
Termination Ended by 1960



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")

[17] 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).

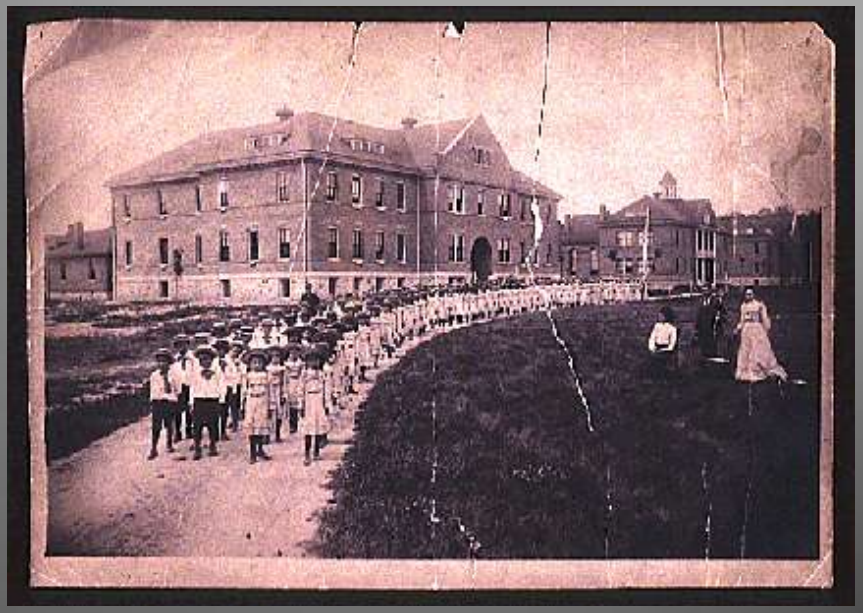
Menominee Tribe v. U.S., 391 U.S. 404, 408 n. 17 (1968)

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 [1] 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.[2]

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

“Inconsistent with their status”



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

Critical Race Theory and *Oliphant*

- Compare *Crow Dog* and *Oliphant* – Justice Rehnqust 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.[1] 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.

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

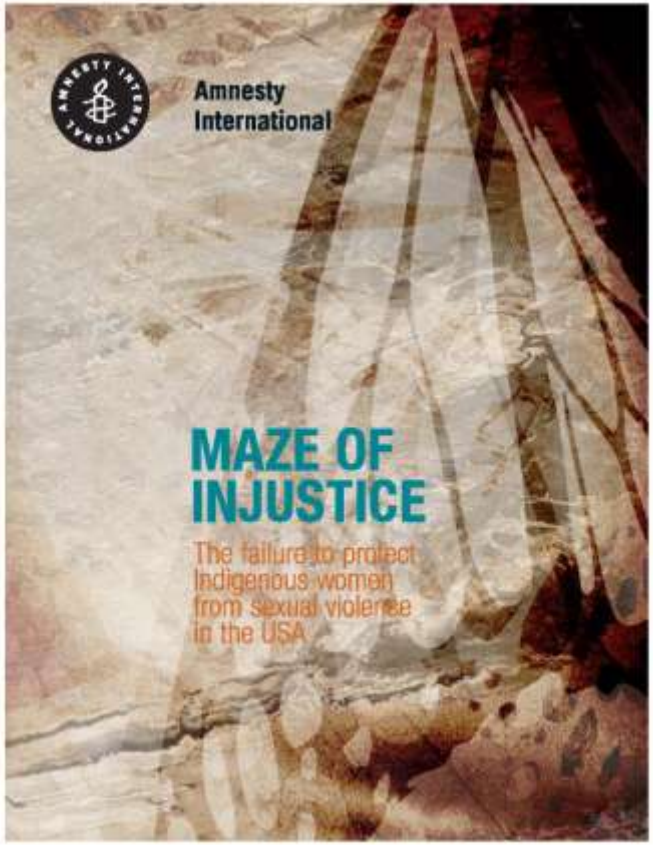
"law by argument and inference only, . . . over aliens and strangers; over the members of a community, separated by race, by tradition, . . . [BY THE INSTINCTS OF A FREE THOUGH SAVAGE LIFE] from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . [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]."[32]

From Williams, *Like a Loaded Weapon* 109 (2005)

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

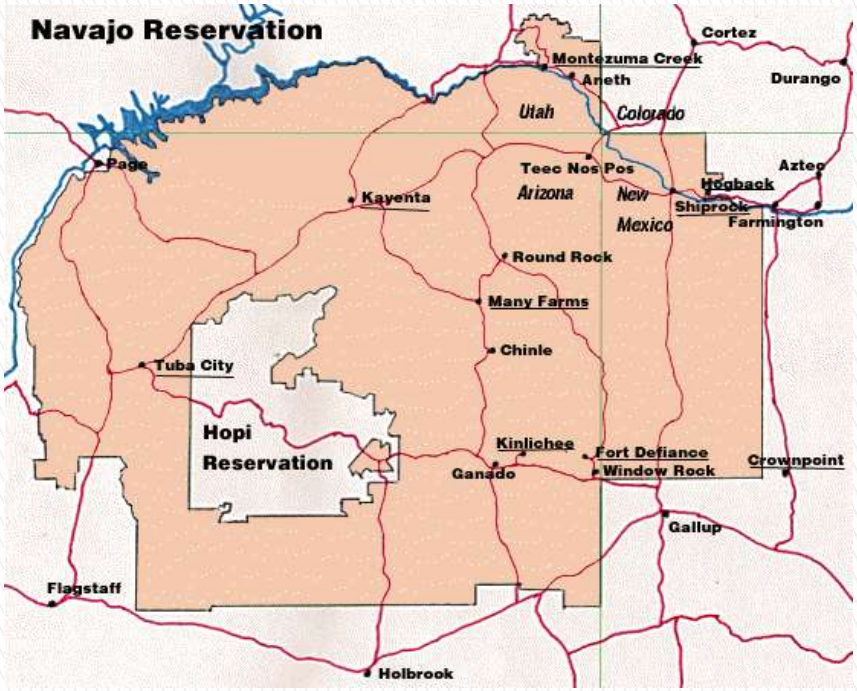
Judicial Minimalism and *Oliphant*

- 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