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NOTES

CRIMINAL JURISDICTION OVER NONMEMBER INDIANS: THE LEGAL VOID AFTER *DURO V. REINA*

Douglas B. Cubberley*

Introduction

Native Americans continually struggle against domination to retain legal and political autonomy as well as to preserve their cultural uniqueness. Since the Marshall Court's Cherokee decisions,¹ the Supreme Court has been the protector of tribal rights against governmental encroachment on tribal sovereignty. Ironically, as tribes begin to use more of their sovereign powers, which lay dormant for over a century, the Supreme Court has formulated a new policy to divest Indians of those powers. *Duro v. Reina*² is the latest in a series of cases putting new limitations on Indian legal and political autonomy.

Although the federal government has vacillated between policies of assimilation and self-determination, the assimilationist ideological justifications have remained relatively constant.³ Historically, judicial divestment of tribal criminal jurisdiction over nonmember Indians cannot be justified. In light of current Congressional policies that foster tribal autonomy, the justification for judicial divestment is not apparent. What is apparent, however, is that the legal and political ramifications to the tribes will be immediate and significant.⁴ This note examines the historical context of criminal jurisdiction over nonmember Indians, reviews the *Duro* decision, and discusses future options.

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1. Two cases involving the Cherokee Nation have become known as the Cherokee decisions. They are: *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).

2. 110 S. Ct. 2053 (1990).

3. See generally Deloria, *The Era of Self-Determination: An Overview*, in *INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191-94* (K. Philp ed., 1985).

4. Within days of the *Duro* decision, Russell Means filed a motion to dismiss in Navajo tribal court for an assault and battery charge. *Daily Oklahoman*, June 2, 1990, at 8, col. 1.

*Historical Roots of Criminal Jurisdiction
Over Nonmember Indians*

Source of Tribal Sovereignty

Sovereignty is the power to make, administer and enforce legal rules applicable to people and territory.⁵ Indian sovereignty is not a federal power;⁶ it was not constitutionally or statutorily created. The framework for recognition of Indian tribal sovereignty within the federal system is found in Chief Justice Marshall's Cherokee decisions.⁷ Since the beginning of the Republic, "Indian tribes consistently were considered as distinct, independent political communities retaining their original natural rights."⁸ The power of self-government is inherent in the tribal legal status.⁹

As long as tribes were complete and independent, tribal criminal jurisdiction was similar to that of any sovereign nation. Tribes could punish their citizens or any aliens within their borders according to tribal customs.¹⁰ However, tribal sover-

5. O'Connell, *Tribal Sovereignty*, INDIAN L. SUPPORT CENTER REP., Feb., 1988, at 1 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

6. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896):

Although possessed of . . . attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. . . . But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers federal powers arising from and created by the Constitution of the United States.

7. See *supra* note 1. See also Bransky, *Tribal Court Jurisdiction*, INDIAN L. SUPPORT CENTER REP., Dec. 1988, at 1.

8. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982). Cohen explains that apart from the doctrine of preemption the most significant factor is the role of tribal sovereignty within the federal system:

Federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes, and the Supreme Court has held that this "tradition of sovereignty" is the "backdrop against which the applicable treaties and federal statutes must be read." If the state laws were applied to Indians in Indian country, retained self-government would be greatly restricted and have little importance, its actual status in many circumstances outside Indian country. For this reason broad preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty.

Id. at 273 (citations omitted).

9. Pipestem, *The Mythology of the Oklahoma Indians Revisited: A Survey of the Legal Status of Indians Ten Years Later*, in ANNUAL SOVEREIGNTY SYMPOSIUM, § VI, at 9-Pipestem (1988) (looseleaf collection of material presented at first annual training session, held in Oklahoma City, Okla. on June 1-3, 1988).

10. F. COHEN, *supra* note 8, at 146.

eighty is not absolute.¹¹ Marshall described the relationship between the federal government and a tribe as that of a “ward to a guardian”; the tribe had a right to its land until that right was extinguished by the federal government.¹² Until extinguished, the Indian nations “were distinct political communities, having territorial boundaries, within which their authority is exclusive.”¹³

Three fundamental principles of modern tribal sovereignty are derived from these early decisions: “(1) an Indian tribe possesses . . . all powers of any sovereign state; (2) conquest . . . terminates the external powers of the sovereignty of the tribe . . . but does not itself affect the internal sovereignty of the tribe; (3) these powers are subject to qualification by treaties and by express legislation of Congress.”¹⁴ These principles still affect Indian tribes today and are still a source of debate.¹⁵ *Duro* debates the internal-external dichotomy of sovereignty in the context of criminal jurisdiction.

Limitations on Tribal Sovereignty

Treaty Period

During the treaty period, several factors shaped the federal-tribal relationship, diminishing tribal sovereignty. First, until the end of this period, the government treated Indian tribes as foreign governments. While treaties granted concessions to the government, nonetheless, the tribes continued to be viewed as autonomous sovereign nations. Second, while the tribes won legal protection from the Supreme Court against state intrusions on their autonomy, they lost against federal policies of removal and reservation. Third, only one criminal statute was enacted during this period, which ensured that non-Indians would be tried by anglo courts, not by the Indians. Finally, the rise of the assimilationist ideology¹⁶ and anglo demands for Indian lands

11. Bransky, *supra* note 7, at 2.

12. *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

13. *Worcester*, 31 U.S. (6 Pet.) at 557.

14. F. COHEN, *supra* note 8, at 241. Further limitations are found in the federal common law and tribal constitutions. O’Connell, *Tribal Sovereignty*, INDIAN L. SUPPORT CENTER REP., Feb., 1987, at 1, 3-6 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

15. McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139 (1990). McSloy discusses Congressional power over Indian sovereignty and the lack of legal underpinnings for the exercise of that power from the Constitution, treaty or international law.

16. Assimilation as an ideology grew out of the 19th century reform movement belief that Indians should adopt the habits of civilization and be brought into the mainstream of civilization. See generally F. COHEN, *supra* note 8, at 127-43.

fostered policies that justified the government's increasing control over all facets of Indian life, bringing the treaty period to an end.¹⁷

Between 1778¹⁸ and 1871,¹⁹ the United States ratified 370 Indian treaties.²⁰ These treaties are accorded the same dignity as that given to treaties with foreign governments.²¹ Yet in recognition of the unequal bargaining position of the tribe in the federal trust relationship, they differ from foreign treaties in two important ways.²² First, treaties are construed in favor of the Indians.²³ Second, there must be a clear and specific showing of the intent to abrogate, either in later legislation or treaties, before courts will allow treaty abrogation.²⁴

Until the last decade of the treaty-making period, treaties were framed in the language of international diplomacy, which recognized tribal autonomy.²⁵ Early treaties recognized Indians'

17. *Id.* at 128.

18. Treaty between the United States and the Delawares, Sept. 17, 1778, 7 Stat. 13.

19. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1988)). The Act states, in pertinent part:

Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Id. at 566.

20. Note, *Tribal Court Criminal Jurisdiction Over Non-Indians: Testing the Limits of Retained Sovereignty*, 90 CORNELL L. REV. 89, 90 (1980).

21. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876). See, e.g., *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

22. *Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 617 (1975), reprinted in D. GETCHES & G. WILKERSON, *supra* note 22, at 63.

23. F. COHEN, *supra* note 8, at 63. E.g., *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (treaties should be construed as Indians would have understood them); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (ambiguous expressions must be resolved in favor of Indians). Similar favorable rules have been applied to agreements, statutes and executive orders. F. COHEN, *supra* note 8, at 283.

24. F. COHEN, *supra* note 8, at 63 (citing *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979)).

25. Cf., REPORT OF THE COMMITTEE REGULATING THE INDIAN DEPARTMENT, H.R. REP. NO. 474, 23d Cong., 1st Sess. 14-22 (1834). The report states, in pertinent part:

The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations.

Officers, and persons [in service in Indian Country] by treaty stipulations,

power to make war, peace and friendship, and mutual assistance pacts.²⁶ Treaties included provisions fixing boundaries, providing for passports, extradition, and even relations with third powers.²⁷ Some expressly recognized Indian jurisdiction over non-Indians dwelling on Indian lands.²⁸ Other treaties recognized that neither nation would punish offenders who were citizens of the other nation.²⁹

From 1776 to 1849, all treaty limitations upon tribal self-government were in some way related to intercourse with non-Indians.³⁰ Several treaties granted federal jurisdiction over crimes

must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely traveling in the Indian country the same protection is extended.

....

As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

There is one other exception necessary to preserve peace among the tribes, and a good understanding with the bordering States. A right is reserved to the Governor to reprieve and the President to pardon, any member of another tribe, or a citizen of the United States, who may be the Indian laws be convicted of any capital offense. The danger of leaving the punishment of death to the judgment of tribes who are not accustomed to measure degrees of guilt, especially against other than members of the tribe, is too obvious to need comment.

Id., reprinted in M. PRICE, NATIVE AMERICAN LAW MANUAL 465 (1970).

26. F. COHEN, *supra* note 8, at 64-65.

27. *Id.* at 65 & n.36. *E.g.*, Treaty with the Kioways, Ka-ta-kas, and Ta-wa-ka-ros, May 26, 1837, art. 9, 7 Stat. 533, 535 (recognizing relations between the tribes and the Republic of Mexico); Treaty with the Comanches and Witchetaws, Aug. 24, 1835, art. 9, 7 Stat. 474, 475 (recognizing friendly relations between those tribes and the Republic of Mexico). The provision for relations with Mexico in both treaties is interesting in light of the fact that both were entered into several years after Marshall's pronouncement of tribal dependency in *Worcester*.

28. *See, e.g.*, Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamias, Eel-river, Weas, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. VI, 7 Stat. 49, 52; Treaty with the Cherokees, July 2, 1791, art. VIII, 7 Stat. 39, 40; Treaty with the Creeks, Aug. 7, 1790, art. VI, 7 Stat. 35, 36; Treaty with the Shawnees, Jan. 31, 1786, art. VII, 7 Stat. 27; Treaty with the Chickasaws, Jan. 10, 1786, art. IV, 7 Stat. 25; Treaty with the Choctaws, Jan. 3, 1786, art. IV, 7 Stat. 22; Treaty with the Cherokees, Nov. 28, 1785, art. V, 7 Stat. 19; Treaty with the Wyandots, Delawares, Chippewas, and Ottawas, Jan. 21, 1785, art. V, 7 Stat. 17. Note, *supra* note 17, at 90 n.12. *See, e.g.*, M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN, 265-66 (2d ed. 1983).

29. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; F. COHEN, *supra* note 8, at 67 n.53.

30. F. COHEN, *supra* note 8, at 68.

committed by U.S. citizens in Indian Country,³¹ or granted state and territorial jurisdiction over both Indians and non-Indians committing interracial crimes of robbery or murder within Indian territory.³² Several treaties provided that the tribe consisted of all persons in the community.³³

Later treaties, however, reflected an increased usurpation of tribal powers, abandoning established distinctions between internal and external powers.³⁴ Some treaties explicitly delineated tribal criminal jurisdiction.³⁵ The most important intrusion into tribal autonomy occurred in treaties after 1853, which allotted tribal land.³⁶ These treaties reflected the federal government's intent to terminate and assimilate tribes by weakening tribal power.³⁷ Moreover, intrusions occurred in treaties which gave Congress or the President significant power over the tribes,³⁸ including the power to settle intertribal disputes³⁹ and punish intratribal crimes committed in Indian territory.⁴⁰

31. Treaty with the Choctaws, Sept. 27, 1830, arts. 6-8, 7 Stat. 333-34; F. COHEN, *supra* note 8, at 67 n.54.

32. Treaty with the Wiandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, Jan. 9, 1789, art. 5, 7 Stat. 28, 29. See F. COHEN, *supra* note 8, at 67 n.55.

33. Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478; Treaty with the Choctaws, Sept. 27, 1830, art. 4, 7 Stat. 333; Treaty with the Creeks, Aug. 7, 1790, art. 8-9, 7 Stat. 35, 37; Treaty with the Shawnees, Jan. 31, 1786, art. 3, 7 Stat. 26.

34. F. COHEN, *supra* note 8, at 69.

35. These provisions reflected tribal fear of losing their autonomy against state encroachment. See, e.g., Treaty with the Cherokees, July 19, 1866, art. XIII, 14 Stat. 799, 803, which provided:

[T]he judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.

See also Treaty with the Pottawatomie, Feb. 27, 1867, art. III, 15 Stat. 531. Treaties with the Creeks, Seminoles, Choctaws and Chickasaws contained a provision recognizing the tribes' "unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all . . . white persons, or otherwise, members of . . . [t]he tribe." Treaty with the Creeks and Seminoles Tribes, Aug. 7, 1856, art. XV, 11 Stat. 703-04. This provision can also be found in Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 611-13.

36. F. COHEN, *supra* note 8, at 69 n.66.

37. *Id.* at 98-99. Cf. DOCUMENTS OF UNITED STATES INDIAN POLICY 89, 89-92 (F. Prucha 2d ed. 1990) [hereinafter INDIAN POLICY] (doc. no. 62, an extract from the *Annual Report of the Commissioner of Indian Affairs* for 1856).

38. F. COHEN, *supra* note 8, at 66, nn. 41, 42.

39. See, e.g., Treaty with the O'Gallala Indians, Oct. 28, 1865, art. 3, 14 Stat. 747-48; Comment, *Jurisdiction Over Nonmember Indians on Reservation*, 1980 ARIZ. ST. L. REV. 727, 739 n.77. See also F. COHEN, *supra* note 8, at 98-102.

40. Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. 15, 11 Stat. 699, 703-04; Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 622, 612. F. COHEN, *supra* note 8, 67 n.55.

It cannot be inferred from these later treaties that the federal government gained jurisdiction over all intertribal crimes.⁴¹ An attorney general's opinion supported Indian jurisdiction over Indian against Indian crimes⁴² and, in reviewing this period, the Supreme Court held that it became the settled policy of Congress to permit Indian against Indian offenses to be dealt with according to tribal customs and laws.⁴³ It is inconceivable that the government had implicit jurisdiction over all intertribal crimes when it was unable to fulfill its explicit treaty terms, such as policing territorial borders against anglo encroachment and violence.⁴⁴ Therefore, these later treaties only reflect the Interior

41. One commentator points out that prior to 1789, treaty provisions regarding federal jurisdiction spoke in generalities of Indians, i.e., offenses committed between Indians and United States citizens, while later treaties provided for federal jurisdiction over offenses by or against tribal member. See Comment, *supra* note 39, at 737-38. From these 23 latter type of treaties, the commentator infers that Congress intended to clearly assume jurisdiction over intertribal crimes. This only accounts for one-tenth of the treaties made; others do not include this language. Without explicit language, the federal government has not assumed jurisdiction over those tribes. At best, these treaty provisions point to inconsistencies in the government's Indian treaty writing and varied intentions of the writers.

42. An attorney general's opinion rendered in 1855 assured the Choctaw nation of their exclusive criminal jurisdiction over Indian against Indian crimes. 7 Op. Att'y Gen. 174, 180 (1855). The opinion states, in pertinent part:

The United States assure to the Choctaw Nation "the jurisdiction and government of all the persons and property which may be within their limits west, * * and secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States, and except such as may be, and which have been, enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs." . . . Can there be anything more explicit? The general rule is competency of the local jurisdiction, saving exceptions. Exception is to be shown. If a thing be not taken out by exception, it remains in the general rule. . . .

. . . [Congress] has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters [over non-Indians], and omitting to take jurisdiction in civil matters.

Id. But see Comment, *supra* note 39, at 737-40.

43. *United States v. Quiver*, 241 U.S. 602, 604 (1916).

44. F. COHEN, *supra* note 8, at 64 (quoting L. SCHMECKEBIER, *THE OFFICE OF INDIAN AFFAIRS* 62 (1927)).

One of the defects of the treaty system was that agreements were continually being made which were not carried into effect. This was due in part to inefficient administration, in part to the failure of Congress to make the necessary appropriations, and in part to the inherent difficulties presented by the nature of the problem. . . .

Some of the stipulations of almost all treaties which it was impossible to carry out were those guaranteeing the Indians against the intrusion of

Department's increased control over criminal matters involving Indian intercourse with non-Indians.

Notwithstanding the Marshall court's Cherokee decisions, political forces in the federal government prevailed over Indian interests and many Indian tribes lost their lands to removal and reservation, which, as early as 1830, became the official policy of the government.⁴⁵ These policies grew in response to demands for more Indian land for settlement. Removing Indians to reservations was perceived as a method of civilization and assimilation.⁴⁶ Later, however, reservations were viewed as a way to exercise "strict reformatory control" and to isolate the Indians from the settlers.⁴⁷ Yet increasing pressure to open the reservations to commercial exploitation and settlement led to the demise of these policies.⁴⁸

Only one statute dealt with criminal jurisdiction in Indian Country.⁴⁹ As originally promulgated, the Trade and Intercourse

the white settlers and providing for the punishment of white persons committing offenses against the Indians. As to the exterior boundaries reserved to the Indians were thousands of miles of extent, it was impossible to police this area in such a way as to prevent trespass or to secure evidence against offenders.

Id. Cf. INDIAN POLICY, supra note 37, at 89-92 (from doc. no. 62, an extract from the Annual Report of the Commissioner of Indian Affairs for 1856).

45. F. COHEN, *supra* note 8, at 122.

46. In 1851, Commissioner Lea stated that "if timely measures were taken for the proper location and management of these tribes, they may, at no distant period, become an intelligent and Christian people," leading to their ultimate incorporation into the great body of our citizen population. *Id.* at 123 n.474.

47. In 1872, Commissioner Walker viewed the reservation as a place where Indians were "under a strict reformatory control by the agents of the Government" and isolated them from "influences inimical to peace and virtue." *Id.* at 125 n.488.

48. *Id.* at 132-33. Commissioner Walker stated that when Indians abandoned their "roving state" and became agriculturists, they would need less reservation land, and the surplus could be sold to non-Indians. *Id.* at 125 n.489.

49. Indian Country was first defined in the 1834 Trade and Intercourse Act. Section 1 states:

[A]ll that part of the United States west of the Mississippi, and not within the State of Missouri and Louisiana, or the territory of Arkansas, and, also that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

1834 Trade and Intercourse Act, ch. 161, § 1, 4 Stat. 729.

This definition was omitted from the 1874 revision of the act. Also, a statutory definition was finally enacted in 1948, which states:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within

Act of 1790,⁵⁰ sections 5 and 6, provided for federal jurisdiction over non-Indians committing crimes in "any town, settlement or territory belonging to any nation or tribe of Indians."⁵¹ Despite several reenactments, Congress declined to add intertribal crimes to its jurisdiction.⁵²

As amended in 1817,⁵³ section 2 excepted crimes "committed by one Indian against another, within any Indian boundary." In enacting the 1817 Act, Congress intended to exclude Indian against Indian crime from federal jurisdiction,⁵⁴ without distin-

the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all independent Indian communities within the borders [sic] of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (Supp. III 1946). For a discussion of the definition of Indian Country, see F. COHEN, *supra* note 8, at 27-31.

50. Act of July 22, 1790, ch. 33, 1 Stat. 137.

51. F. COHEN, *supra* note 8, at 110-11.

52. See also Act of May 19, 1796, ch. 30, 1 Stat. 469, which included a new provision making Indians who crossed state or territorial lines and committing certain enumerated crimes liable under federal law. It also provided for concurrent tribal jurisdiction. F. COHEN, *supra* note 8, at 112 n.401. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139, § 21, 2 Stat. 139, 146, carried forward the previous provisions and added the prohibition against liquor sales to Indians. This act was amended again by Act of May 6, 1822, ch. 54, 3 Stat. 679. Revisions 32 years later, in Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 269, 270, added the tribal punishment and treaty exceptions. The current statute has not been substantially amended since 1854. F. COHEN, *supra* note 8, at 288.

53. Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383. The act stated that it should not be construed "to affect any treaty now in force" with any Indian tribe. *Id.*

54. H.R. REP. NO. 474, 23d Cong., 1st Sess. 13 (1834) which stated:

In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision, By the act of 3d March, 1817, the criminal laws of the United States were extended to *all persons* in Indian country, without exception, and by that act, as well as that 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to

guishing between intratribal and intertribal crime. In construing the reworded 1834 Act,⁵⁵ the Supreme Court held that it “does not speak of members of a tribe but of the race generally, of the family of Indians, and it is intended to leave them, both as regards their own tribe and other tribes also, to be governed by Indian usage and customs.”⁵⁶

Subsequent revisions made no distinction between tribal members and nonmembers.⁵⁷ Congress had many opportunities to make an intertribal distinction or expand federal criminal jurisdiction to encompass intertribal crimes. When viewed in entirety, the history surrounding treaty-making and the Trade and Intercourse Act, as viewed by contemporaries of that period, points to an acknowledged lack of federal jurisdiction over intertribal

offenses committed by Indians against Indians, *at any place* within their own limits.

Id., reprinted in F. COHEN, *supra* note 8, at 116-17 n.437 (emphasis original).

55. Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729. The act provides:

That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Id. at 733.

56. *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846). The Court stated a white man adopted by the Indians, while remaining amenable to the criminal jurisdiction of the United States, may, by becoming entitled to certain privileges in the tribe, “make himself amenable to their laws and usages.” *Id.* at 573. *Cf.*, F. COHEN, *supra* note 8, at 338-39 (act did not limit tribal authority over offenses covered by the Act, public policy of the period respected tribal self-government, and due to remoteness of tribes from federal authority, tribes were left to themselves with little interference.) *See also Crimes Committed by Indians*, 17 Op. Att’y Gen. 184-85 (1854) (concurrent jurisdiction of the federal government and Indian tribe over an adopted white man); Note, *supra* note 17, at 94-95; M. PRICE & R. CLINTON, *supra* note 28, at 208-12.

57. The current statute, known as the Indian Country Crimes Act, provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 (1988).

crimes, despite the desires of government officials or the few attempts under several treaties.⁵⁸

Crow Dog and the Major Crimes Act

The treaty period ended by enactment of the Appropriations Act of March 3, 1871.⁵⁹ The end of the treaty period was the result of residual hostility of the Secretary of Interior over tribal alliances with the Confederate States and the House of Representatives' resentment of the Senate's exclusive power over Indian affairs.⁶⁰ The Act terminated Indians' external sovereign power to make treaties,⁶¹ but did not impair previously made treaties,⁶² nor end the Indians' special status. The federal government continued to deal with Indians through agreements, statutes, and executive orders, which had the same legal effect as treaties.⁶³

The desire to assimilate Indians into anglo society strongly influenced public policy.⁶⁴ A major goal of the proponents was

58. No authority by statute was given to the executive branch to obtain jurisdiction over intertribal crimes. Through rules of construction, if treaty rights are to be modified, this must be stated in the language of the statute, *Frost v. Wenié*, 157 U.S. 46, 60 (1985); *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 740 (1875), or by clear and reliable evidence in the legislative history of a statute. None was forthcoming during this period. Federal executive officials are limited to the authority conferred on them by statute. F. COHEN, *supra* note 8, at 222-24. *But see* Comment, *supra* note 39, at 743-45.

59. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1988)), which provides, in pertinent part:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Id.

60. F. COHEN, *supra* note 8, at 105-07.

61. 55 Interior Dec. 14, 22 n.1 (G. Warren ed. 1934).

62. F. COHEN, *supra* note 8, at 60-61.

63. *Id.* at 107, 127. The Salt River Pima-Maricopa reservation was established by the Act of February 28, 1859, which "appropriated \$10,000 in gifts and \$1,000 for a boundary survey for the Pima and Maricopa in recognition of their assistance to the United States travelers and explorers in their territory." 64,000 acres were set aside for their reservation. R. DEMALLIE, *A PIMA AND MARICOPA CHRONOLOGY 1-3* (1946). An 1883 executive order set aside the lands of the present reservation, incorporating lands assigned under the 1859 Act and executive orders of 1876, 1879 and 1882, totaling 350,026 acres. Executive Order, Nov. 15, 1883, *reprinted in* I. C. KAPPLER, *INDIAN AFFAIRS: LAWS & TREATIES 808* (2d ed. 1904).

64. Assimilation was not a new ideology. It had been propagated by many prom-

to extend to Indians all laws that applied to anglos.⁶⁵ Despite this goal, the exception to federal jurisdiction over intraracial Indian crimes, inadvertently omitted in the 1873 revision, was reinstated in the 1875 Trade and Intercourse Act.⁶⁶ Also, a predecessor to the Major Crimes Act⁶⁷ was rejected by Congress in 1874 because it conflicted with tribal jurisdiction.⁶⁸

The Supreme Court's ruling in *Ex parte Crow Dog*⁶⁹ galvanized the assimilationist political forces. The *Crow Dog* Court overturned a territorial court murder conviction against Crow Dog, a Brule Sioux who killed another tribal member. In denying the authority of the federal court to punish Indian-against-Indian crimes, the Court acknowledged that the tribe retained their self-government to maintain "order and peace among their own members."⁷⁰ Furthermore, the "bad man" clause, article I in the treaty, did not operate to invoke federal jurisdiction.⁷¹ Thus, Crow Dog was only subject to traditional tribal law which required restitution.⁷²

inent government officials. Assimilation was officially sanctioned as early as the Act of March 3, 1819, titled "[a]n Act making the provision for civilization of the Indian Tribes adjoined the frontier settlements." F. COHEN, *supra* note 8, at 121. See INDIAN POLICY, *supra* note 37, at 63 (doc. no. 47, an extract from the *Annual Report of the Commissioner of Indian Affairs* for 1832); *id.* at 89-95 (doc. no. 62, an extract from the *Annual Report of the Commissioner of Indian Affairs* for 1856).

65. F. COHEN, *supra* note 8, at 128. See, e.g., INDIAN POLICY, *supra* note 37, at 144-46 (doc. no. 87, an extract from the *Annual Report of the Commissioner of Indian Affairs* for 1874).

66. Act of Feb. 18, 1875, ch. 80, 18 Stat. 318. See Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 962 n.67 (1975).

67. See *infra* note 69.

68. S. REP. NO. 367, 43d Cong., 1st Sess. (1874). See M. PRICE & R. CLINTON, *supra* note 28, at 206 n.2. See also Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 223-24 (1990).

69. 109 U.S. 556 (1882).

70. F. COHEN, *supra* note 8, at 250 n.1 (citing *Crow Dog*, 109 U.S. at 568). For a historical review of *Crow Dog*, see generally Harring, *supra* note 68.

71. *Crow Dog*, 109 U.S. at 567-68. The "bad man" clause was inserted in many treaties, allowing the federal government jurisdiction over white and Indian criminals. In pertinent part, this clause states:

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

Id. at 563.

72. Harring, *supra* note 68, at 199.

Consequently, the Attorney General in the following year advised that an Indian must be set free for murdering an Indian of a different tribe on a third tribe's land, unless one of the tribes could find jurisdiction. The federal government had no jurisdiction.⁷³

Capitalizing on public sentiment from *Crow Dog*⁷⁴ and intensive lobbying effort by the assimilationists, Congress enacted the Federal Major Crimes Act.⁷⁵ The Act provided for concurrent federal jurisdiction with Indian tribes⁷⁶ over seven enumerated crimes occurring in Indian Country, regardless of race.⁷⁷ Tribes

73. 17 Op. Att'y Gen. 566, 567 (1884).

74. Harring, *supra* note 68, at 192-96. While most authorities write that the Major Crime Act was due to "public outrage," Harring found little. Rather, there appeared to be an orchestrated campaign on the part of the bureaucracy to gain control over the reservations.

75. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385, which provided:

That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

76. Concurrent jurisdiction is supported by legislative history. In amending the 1885 bill to delete the words "and not otherwise" from the phrase, "shall be tried therefor in the same courts and in the same manner and not otherwise," the sponsor explained:

The effects of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunal of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases.

16 CONG. REC. 934 (1885), reprinted in M. PRICE & R. CLINTON, *supra* note 28, at 206. *Talton v. Mayes*, 163 U.S. 376 (1896), appears to confirm concurrent jurisdiction by sustaining the murder conviction of a Cherokee in the Cherokee Nation court. See also F. COHEN, *supra* note 8, at 339-41.

77. Currently the Act covers 14 crimes. Section 1153 provides in part:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, man-

continue to have exclusive jurisdiction over Indian-against-Indian minor crimes.⁷⁸

The Supreme Court justified this intrusion into the internal powers of the tribe, citing the tribe's dependent status as ward of the United States, dependent on the United States even for its "political rights."⁷⁹ From this relationship arose the government's plenary power over Indian affairs and its duty to protect the Indians.⁸⁰ However, despite federal plenary power over Indian affairs and specific statute authority, Indian jurisdiction over minor Indian against Indian crimes was not taken away by act or implication.

Assimilation and Reorganization

The Dawes General Allotment Act⁸¹ brought assimilation into full legal force. It was enacted with the purpose of ultimately dissolving Indian tribes and reservations.⁸² The Act allotted reservation land to each tribal member under a twenty-five year trusteeship; the remainder was sold to non-Indians.⁸³ At the end

slaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (1988).

78. Taylor, *Criminal Jurisdiction*, in *MANUAL FOR INDIAN LAW* at D-2, D-4 (1976).

79. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

80. *Kagama*, 118 U.S. at 384-85. The Court stated:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre [sic] of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (plenary authority over tribal relations of Indians has been exercised by Congress from the beginning, and has always been deemed political, not subject to control by the judiciary). While this power may be plenary, it is not absolute. *United States v. Alcea Band of Tillamoks*, 329 U.S. 40, 54 (1946) (plurality opinion). See M. PRICE & R. CLINTON, *supra* note 28, at 131-34.

81. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1988)).

82. M. PRICE & R. CLINTON, *supra* note 28, at 78.

83. Allotment was not a new idea; it was written into several treaties. E.g., *INDIAN POLICY*, *supra* note 37, at 88 (reprint of Treaty with the Oto and Missouri Indians). Allotment was also proposed by several Indian Commissioners. *Id.* at 147, 153, 155.

of the trusteeship a patent in fee was to be issued and the state would assume all jurisdiction.⁸⁴

The Dawes Act did not apply to the Indian Territory. However, later legislation allotted the Indian Territory land and suspended tribal governments in anticipation of Oklahoma statehood.⁸⁵ Significantly, the Oklahoma Organic Act gave the Oklahoma Territory jurisdiction over intertribal crimes but not intratribal crimes.⁸⁶ However, Indians were given a right of appeal directly to federal court when the dispute involved only members of different tribes.⁸⁷

The Dawes Act, combined with section 17 of the Oklahoma Enabling Act,⁸⁸ conferred concurrent state and federal criminal jurisdiction over those cases not exclusive to the federal courts, when cases involved citizens or members of different, non-affiliated tribes.⁸⁹ Therefore, the Oklahoma Territory tribes lost their inherent power only because of the specific statutory language.⁹⁰ Tribes elsewhere, however, retained intertribal jurisdiction.

84. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 390 (codified as amended at 25 U.S.C. § 349 (1988)). The Act states that "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . ." See Note, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 663, 682-83 (1978). During the 47 years of the Act's existence, over 50% of the tribal land left Indian control. This resulted in a randomly distributed, checkerboard pattern of Indian and non-Indian ownership that is the hallmark of many modern reservations. See *Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 16-18 (1934) (memo of J. Collier) (total Indian land holdings were cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934), reprinted in D. GETCHES & C. WILKINSON, *supra* note 22, at 116-18.

85. M. PRICE & R. CLINTON, *supra* note 28, at 80. See, e.g., Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137; Act of July 1, 1902, ch., 1375, 32 Stat. 716; Act of July 1, 1902, ch. 1362, 32 Stat. 641; Act of July 1, 1902, ch. 1361, 32 Stat. 636; Act of June 28, 1898, ch. 517, 30 Stat. 495; Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. See generally, F. COHEN, *supra* note 8, at 770-96 (ch. 14).

86. Act of May 2, 1890, ch. 182, §§ 12, 30-31, 26 Stat. 88, 94-96.

87. Pipestem, *supra* note 9, at 24.

88. Act of June 6, 1906, ch. 335, 34 Stat. 267.

89. Pipestem, *The Journey from Ex parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 31 (1978).

90. This is supported by a Solicitor General's opinion written by Cohen. I U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, at 1074, 1075 (1979) [hereinafter OPINIONS OF THE SOLICITOR] (opinion dated Sept. 5, 1941). "[Oklahoma state] courts had no jurisdiction on the reservations which they do not have in other states, except possibly for crimes by Indians against Indians of other tribes (by virtue of the 1890 Act)." *Id.*

The result of assimilation was the demise of tribal authority over the reservation.⁹¹ The Interior Department tightened its control over the lives and property of Indians.⁹² Federal administrative courts,⁹³ or in some cases state courts,⁹⁴ were substituted for traditional Indian justice. Assimilation culminated in the granting of citizenship to Indians in 1924.⁹⁵ Subsequently, assimilation was recognized as a failure and Congress enacted the Indian Reorganization Act of 1934 (IRA),⁹⁶ to reverse its consequences. The IRA extended the trust periods⁹⁷ and revived tribal governments by allowing tribes to enact constitutions and form governments.⁹⁸ Out of the IRA, 161 tribal constitutions and 131 tribal corporate charters were drafted and approved by the Bureau of Indian Affairs (BIA).⁹⁹

Administratively, tribal criminal jurisdiction over all Indians was recognized by the federal government. A 1934 Interior Department decision concluded that the tribes had the responsibility for law and order on the reservation unless it was taken

91. President Theodore Roosevelt described it as "a mighty pulverizing engine to break up the tribal mass." F. COHEN, *supra* note 8, at 143.

92. V. DELORIA, JR., *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 248 (1985).

93. Courts of Indian offenses were started in the late 1800s with regulations promulgated by the Secretary of the Interior. Indian judges were appointed by agents. It was designed to supplant the tribal governments and to suppress customary and religious practices. The early courts were thought of as "mere educational and disciplinary instrumentalities, by which the government . . . is endeavoring to improve and elevate the condition to these dependent tribes." Currently, the courts operate under the residual sovereignty of the tribes rather than the federal government. F. COHEN, *supra* note 8, at 239, 251. See generally Riehl & Parker, *Tribal Courts*, in *MANUAL OF INDIAN LAW* A-1, A-2-5 (1976); *INDIAN POLICY*, *supra* note 37, at 186 (doc. no. 115, a reprint of the federal *Rules of Indian Courts* issued on Aug. 17, 1892).

94. See, e.g., *United States v. McBratney*, 104 U.S. 621 (1882) (notwithstanding § 1152, state court had exclusive jurisdiction over crimes committed by non-Indians on Indian reservation land within its borders due to a lack of disclaimer in its enabling legislation). While not specifically due to assimilation, the policy originated in the political climate and ideology of the time. In *McBratney*, the Court allowed state jurisdiction in Indian Country for the first time, despite Marshall's preemption policy in the Cherokee decisions.

95. Act of June 1, 1924, ch. 233, 43 Stat. 253.

96. Wheeler-Howard Act, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)); Oklahoma Welfare Act of 1936, ch. 831, 49 Stat. 1967 (codified as amended at 25 U.S.C. §§ 501-505 (1988)).

97. 25 U.S.C. § 461 (1988).

98. 25 U.S.C. § 476 (1988). For modern criticism that tribal constitutional government precludes traditional Indian law, see V. DELORIA, *supra* note 92; L. FRENCH, *INDIANS AND CRIMINAL JUSTICE* (1982).

99. M. PRICE & R. CLINTON, *supra* note 28, at 82-84.

over by the states or the federal government.¹⁰⁰ Also, a 1938 solicitor general's opinion stated that a federally-recognized Indian tribal member, not a member of the tribe which owned the reservation, still was subject to the reservation tribal court, not state court.¹⁰¹

Additionally, the federal government assumed that tribes had the power to govern intertribal relationships.¹⁰² In 1941, the Solicitor General affirmed tribal power to conduct intertribal relations through the use of intertribal extradition of criminals. This power was qualified, however, by the fact that tribal police

100. 55 Interior Dec. 14 (1934):

Over all lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.

....
It is clear that the original criminal jurisdiction of the Indian tribes has never been transferred to the state. The principle that a State has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument.

....
The basic provision of Federal law with regard to Indian offenses are found in sections 217 and 218 of the U.S. Code., title 25 [25 U.S.C. sec. 1152]. . . . These provisions recognize that, with respect to crimes committed by one Indian against the person or property of another, the jurisdiction of the tribe is plenary.

....
Responsibility for law and order is therefore squarely on the Indian tribe, unless this field of jurisdiction has been taken over by the States or the Federal government.

The difficulty of this situation has prompted agitation for the extension of Federal or State laws over the Indian country, which has continued for at least five decades, without success. The propriety of the object sought is not here in question, but the agitation itself is evidence of the large area of human conduct which must be left in anarchy if it be held that tribal authority to deal with such conduct had disappeared. Fortunately, such tribal authority has been repeatedly recognized by the courts. . . .

Only specific legislation terminating or transferring such jurisdiction can limit the force of tribal law.

Id. at 50-62 (citations omitted).

101. I OPINIONS OF THE SOLICITOR, *supra* note 90, at 872-73 (opinion dated Feb. 17, 1938, stating that unaffiliated Indians are subject to the jurisdiction of state court; affiliate-members of federal recognized tribes are subject to tribal jurisdiction); *id.* at 849 (opinion dated Aug. 26, 1938, stating that Indian court has no jurisdiction over non-ward Indians).

102. Article VI, § 1(a) of the Hopi Constitution, which was approved by the BIA, gave the Tribal Council authority to speak and negotiate for the tribe with federal, states and local governments and other tribes. HOPÍ CONST. art. VI, § 1(a). *But see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

had no authority to hold a fugitive outside of reservation boundaries.¹⁰³ Only extradition between tribes where the reservations are contiguous was legal.¹⁰⁴ Consequently, because the power to conduct intertribal relations has been recognized by the federal government, and because if the power to conduct external relations has been terminated, this power must be a part of the internal powers of a tribe.

Moreover, tribal constitutions, promulgated pursuant to BIA guidelines and subject to BIA approval, contained provisions recognizing jurisdiction over all Indians within reservation boundaries.¹⁰⁵ The Salt River Pima-Maricopa Constitution recognized the tribal power "to lay down criminal and civil codes of ordinances governing the conduct of members of the Community and nonmember Indians of the Community."¹⁰⁶ Therefore, at a minimum, both federal and tribal governments conducted their actions under the assumption that the tribes retained criminal jurisdiction over minor crimes involving Indians of federally-recognized tribes.¹⁰⁷

Termination and Public Law 280

Quickly, criticism of the newly-revived tribal powers led to a call for termination of tribal status.¹⁰⁸ Several events occurred

103. I OPINIONS OF THE SOLICITOR, *supra* note 90, at 1066-67 (opinion dated Aug. 14, 1941, written by F. Cohen). *See e.g.*, 18 Op. Att'y Gen. 440 (1886) (power of tribal police, employed to maintain order and prevent illegal liquor traffic, does not extend beyond reservation border).

104. I OPINIONS OF THE SOLICITOR, *supra* note 90, at 1067 (opinion dated Aug. 14, 1941).

105. One criticism lodged against the BIA was that "the constitutions prepared by the Indian Bureau officials for adoption by the Indians were so filled with the impositions of the Department that there was little room for the ideas of the Indians, yet the constitutions were supposed to be Indian-made." *Hearings on S. 2103 Before the Committee on Indian Affairs*, H.R. 76th Cong., 3d Sess. (1940), reprinted in M. PRICE & R. CLINTON, *supra* note 25, at 81-82.

106. SALT RIVER PIMA-MARICOPA CONST. art. V, § 2(k), reprinted in IV CHARTERS, CONSTITUTIONS, AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA 55-56 (G. Fay, ed. 1967). The constitution was approved by the Indian Comm'r on May 17, 1940, and by the Assistant Interior Secretary on June 11, 1940.

107. That is exactly the situation in *Duro*.

108. *See supra* note 99. The hearing summary concluded with the following:

Fundamentally the so-called Wheeler-Howard Act attempts to set up a state or a nation within a nation which is contrary to the intents and purposes of the American Republic. No doubt but that the Indians should be helped and given every assistance possible but in no way should they be set up as a governing power within the United States of America. They shall be permitted to have a part in their own affairs as to government in

to strip reorganized tribes of their power and legal existence. During the 1940s, statutes were enacted giving jurisdiction over specific reservations to the states.¹⁰⁹ Further encroachment came in 1946, when the Supreme Court extended the Assimilative Crimes Act of 1825¹¹⁰ to Indian Country.¹¹¹ The Act incorporated state law into the federal criminal code as a supplement to those federal criminal laws applicable to federal enclaves, which includes Indian Country.¹¹² During the 1950s, Congress enacted statutes to terminate specific tribes, subjecting them to state authority.¹¹³

Additionally, Public Law 83-280,¹¹⁴ as enacted, transferred some elements of criminal and civil jurisdictional power over Indians to the states.¹¹⁵ Public Law 280 granted criminal juris-

the same way as any domestic organization exists within a State or Commonwealth but not to be independent or apart therefrom.

Id. See M. PRICE & R. CLINTON, *supra* note 28, at 81-82. See generally F. COHEN, *supra* note 8, at 152-80.

109. M. PRICE & R. CLINTON, *supra* note 28, at 85-86. See, e.g., Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1988)); Act of July 2, 1948, ch. 809, 62 Stat. 1224, (codified at 25 U.S.C. § 232 (1988)) (§§ 232, 233 granted civil and criminal jurisdiction to New York state over all reservations within state); Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (civil and criminal jurisdiction over Agua Caliente Reservation in California); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Sac and Fox Reservation in Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (Devil's Lake Reservation in North Dakota); Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (1988)) (all reservations in Kansas).

110. Ch. 65, 4 Stat. 115 (codified at 18 U.S.C. § 13, (1982)) which provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

111. *Williams v. United States*, 372 U.S. 711, 713-14 (1946). Cf. F. COHEN, *supra* note 8, at 290-94 (questioning the validity of the application of § 13 to Indian Country).

112. F. COHEN, *supra* note 8, at 164.

113. M. PRICE & R. CLINTON, *supra* note 28, at 86. See, e.g., Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. § 564 (1988)); Act of June 17, 1954, ch. 303, 68 Stat. 250 (Menominee); Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (codified at 25 U.S.C. § 971 (1988)) (Ponca). In all, approximately 109 tribes were terminated, affecting 11,466 members and 3.2% of trust land. *Id.*

114. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1976)); 28 U.S.C. § 1360 (1976).

115. Mandatory states include California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was later added. Eight states which had disclaimers in their constitutions were given permission to repeal the disclaimer, and any other state not having jurisdiction

diction over offenses by or against Indians to the same extent as the state's jurisdiction outside Indian Country.¹¹⁶ The legislation enacting Public Law 280 specifically provided that the Indian Major Crimes Act and the Assimilative Crimes Act do not apply to areas subject to the new law.¹¹⁷

Yet tribes did not lose all of their power through termination. Public Law 280 states have been precluded from exercising regulatory jurisdiction over the tribes.¹¹⁸ Also, tribal jurisdiction remains concurrent with the state to the same extent that it is concurrent with the federal government.¹¹⁹ Additionally, the federal government continues to recognize tribal constitutions as the source of tribal power.¹²⁰ So tribes could assert criminal jurisdiction over nonmember Indians if allowed by tribal constitutions. Therefore, many tribes survived this period without severe encroachment on their autonomy.

Self-Determination

Termination was recognized as a failure by the end of the 1950s. Beginning with the Kennedy Administration, new policies were formulated and legislation enacted for self-determination, human and natural resource development on the reservation, and restoration of rights.¹²¹ The most important legislation from

over Indians could obtain jurisdiction by passing affirmative legislation. Oklahoma is a disclaimer state that failed to repeal its disclaimer. See also F. COHEN, *supra* note 8, at 362-72; Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975); Note, *Washington's Public Law 280 Jurisdiction on Indian Reservation*, 53 WASH. L. REV. 701 (1978). Ten optional states accepted some degree of jurisdiction: Arizona (air and water pollution only); Florida (full Public Law 280); Idaho (over seven subject areas and full Public Law 280 with tribal consent); Iowa (civil jurisdiction over Sac and Fox reservation); Montana (criminal jurisdiction over Flathead Reservation); Nevada (full Public Law 280, but retroceded for most reservations); North Dakota (civil only subject to tribal consent); South Dakota (criminal and civil causes of actions arising on the highways, but subsequently invalidated by the state supreme court); Utah (post-1968 statute accepting jurisdiction on tribal consent); and Washington (full Public Law 280 over Indians on non-trust land and limited jurisdiction on trust land to only eight subject areas). F. COHEN, *supra* note 8, at 362-63 n.125.

116. 18 U.S.C. § 1162(b) (1988). See 25 U.S.C. § 1321(b) (1988); COHEN, *supra* note 8, at 365.

117. F. COHEN, *supra* note 8, at 365.

118. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976).

119. F. COHEN, *supra* note 8, at 367.

120. II OPINIONS OF THE SOLICITOR, *supra* note 90 at 1637 (opinion dated May 7, 1954, stating that a tribe cannot assert jurisdiction and levy criminal sanctions against nonmember only because ordinance did not comport with tribal constitution).

121. F. COHEN, *supra* note 8, at 181-88.

this period is the Indian Civil Rights Act (ICRA),¹²² which limits the conduct of the tribe toward its members by extending to the tribes many of the provisions found in the Bill of Rights.¹²³

Among those protections afforded to tribal members are due process and equal protection rights. Criminal penalties are limited to six months imprisonment and a \$500 fine. The ICRA does not extend first amendment protections, nor does it guarantee a right to a grand jury indictment or counsel except at the defendants' own expense.¹²⁴ The ICRA ends unilateral state assumption of Public Law 280 jurisdiction and allows those states which assumed jurisdiction to retrocede it back to the federal government.¹²⁵ However, no provision limits the tribe from exercising criminal jurisdiction over nonmember Indians.

Therefore, in reviewing the historical relationship between the federal government and the Indians, an underlying premise has been that tribes retained criminal jurisdiction over minor crimes committed by nonmember Indians unless specifically preempted by federal statute, or unless the tribal constitution limited the jurisdiction of the tribe. Nothing in this history reversed this premise, until *Duro*.

Statement of the Case

The *Duro* decision arose from a conflict between rulings of the Ninth and Eighth Circuit Courts of Appeals. In 1987, the Ninth Circuit held in *Duro v. Reina*¹²⁶ that a tribe had criminal jurisdiction over a nonmember Indian. In May, 1988, the Eighth Circuit ruled, in *Greywater v. Joshua*,¹²⁷ against a tribal court retaining criminal jurisdiction over a nonmember Indian. One month later, the Ninth Circuit revised its prior opinion, still holding for jurisdiction.¹²⁸ A rehearing was subsequently denied.¹²⁹

Albert Duro is an enrolled member of the Torrez-Martinez Band of Mission Indians. He lived on the Salt River reservation

122. Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303 (1988)).

123. West, Jr., *Tribal Powers*, in *MANUAL OF INDIAN LAW A-3* (1976). Prior to the ICRA, courts generally held that specific provisions of the Constitution did not apply to Indian tribes. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896) (fifth amendment does not apply to the Cherokee Nation).

124. F. COHEN, *supra* note 8, at 203.

125. 25 U.S.C. § 1323 (1988).

126. 821 F.2d 1358 (9th Cir. 1987).

127. 846 F.2d 486 (8th Cir. 1988).

128. 851 F.2d 1136 (9th Cir. 1988).

129. 860 F.2d 1463 (9th Cir. 1988).

with his girlfriend, who is a member of the Salt River Pima-Maricopa Indian Community. He worked for the Community's construction company. On June 18, 1984, criminal complaints against Duro were filed in the Community's tribal court and in the United States District Court for the District of Arizona. In tribal court, Duro was charged with one misdemeanor count of discharge of a firearm within the reservation boundary. He was charged in district court with murder and aiding and abetting murder under 18 U.S.C. §§ 2, 1111, 1153. The basis for each charge was the shooting and killing of a fourteen-year-old enrolled member of the Gila River Indian Tribe.

Subsequent to his arrest, the grand jury indictment against Duro for first degree murder was dismissed without prejudice in district court on a motion by the United States. Duro was placed in the custody of the Salt River Department of Public Safety. Edward Reina was the Community's Chief of Police. Duro's motion to dismiss for lack of criminal jurisdiction was denied in tribal court on October 19, 1985. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. In granting the writ, the district court found that the assertion of jurisdiction over a nonmember was an impermissible violation of equal protection under the ICRA.¹³⁰

On appeal, the Ninth Circuit reversed the district court. In its revised decision, the Ninth Circuit concluded that despite the language of *Oliphant*, Congress would have explicitly divested the tribes of jurisdiction over nonmembers if it had intended to do so. Thus, without explicit divestiture, the tribes retained criminal jurisdiction over Indian-against-Indian crimes without regard to membership.¹³¹ The court further rejected Duro's equal protection claim, stating that due to his tribal membership in another tribe and significant contacts with this tribe, criminal jurisdiction was not based upon an impermissible racial classification. Further, a rational basis existed for the extension of jurisdiction over nonmembers.¹³²

On appeal, the Supreme Court was presented with the issue of whether an Indian tribe had criminal jurisdiction over a nonmember Indian. Consequently, the Court held that tribal courts have no criminal jurisdiction over nonmember Indians.¹³³

130. *Duro*, 110 S. Ct. at 2058.

131. *Duro*, 851 F.2d at 1136.

132. *Id.*

133. *Duro*, 110 S. Ct. at 2056.

Decision of the Case

Justice Kennedy, writing for the majority,¹³⁴ began his analysis by adopting the rationales of *Oliphant v. Suquamish Indian Tribe*¹³⁵ and *United States v. Wheeler*¹³⁶ to support the holding.¹³⁷ *Wheeler* specifically held that a tribe “cannot try nonmembers in tribal courts.”¹³⁸ While full territorial sovereignty includes the power to enforce all laws against all that come within its border, tribes are limited sovereigns.¹³⁹ Tribes retain only the power needed to control internal relations, and preserve customs and social order.¹⁴⁰ Enforcement of internal criminal laws necessarily involves only relations among members.¹⁴¹ Relations between an Indian tribe and a nonmember have been implicitly divested, due to the tribe’s dependent status.¹⁴²

Despite the fact that tribes have greater retained power in exercising civil jurisdiction, the exercise of criminal jurisdiction is unlike civil jurisdiction, which usually arises through consensual relationships of property ownership, commercial dealings, contracts, leases, or other relationships.¹⁴³ Rather, criminal jurisdiction involves a direct intrusion on personal liberties.¹⁴⁴ Thus, Indian tribes have no criminal jurisdiction over nonmember Indians.

The argument that historical evidence supports tribal jurisdiction was rejected. Broad statute and program definitions, case law, and Court of Indian Offenses jurisdiction that do not distinguish between Indians, at most, show a past tendency to treat Indians as an undifferentiated class.¹⁴⁵ Quoting from *Washington v. Confederated Tribes of the Colville Indian Reservation*, Justice Kennedy wrote that falling within the definition of Indian for purposes of the Indian Reorganization Act does not evidence congressional intent to exempt Indians from state taxation.¹⁴⁶

134. Rehnquist, C.J., and White, Blackmun, Stevens, O’Connor and Scalia, J.J., joined in the decision.

135. 435 U.S. 191 (1978).

136. 435 U.S. 313 (1978).

137. *Duro*, 110 S. Ct. at 2058.

138. *Id.* at 2059 (quoting *Wheeler*, 435 U.S. at 326).

139. *Id.* at 2060.

140. *Id.*

141. *Id.*

142. *Id.* (quoting *Wheeler*, 435 U.S. at 326).

143. *Id.* at 2061 (quoting *United States v. Montana*, 450 U.S. 544, 565 (1981)).

144. *Id.*

145. *Id.* at 2062.

146. *Id.* (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980)).

Similarly, it does not sustain criminal jurisdiction over Indians.¹⁴⁷ Historically, the federal government gave little attention to intertribal matters.¹⁴⁸ Additionally, notwithstanding the solicitor general's opinion which supported tribal jurisdiction over members, evidence of criminal jurisdiction over nonmembers is not clear. Taken as a whole, Kennedy found that the opinions do not support external criminal jurisdiction as part of the modern tribal court function.¹⁴⁹

Kennedy stated that Duro is a United States citizen. Despite this status, Congress has a right to legislate regarding benefits and burdens for Indians as a class. Absent such legislation, however, Indians, like all other citizens, are protected from unwarranted intrusions on their personal liberties.¹⁵⁰ Since a criminal trial is a serious intrusion on personal liberty, the Court refused to treat nonmembers differently from non-Indian citizens. An Indian tribe derives its power from the consent of its members, and that consent delimits tribal power.¹⁵¹

Kennedy noted that the Constitution does not extend to tribal governments. The ICRA does not afford full constitutional protections to a defendant in tribal court, including a right to counsel for indigent defendants. Also, tribal courts are often subject to tribal governments and to unspoken customs and practices.¹⁵² Further, case law suggests that there is a limit on Congress' ability to subject citizens to tribal courts that do not guarantee full constitutional protections. Congress has not delegated authority to criminally try nonmembers, and thus tribes have no criminal jurisdiction over nonmembers.¹⁵³

Kennedy stated that tribes enjoy greater power over members than any other governmental body in the U.S. because the Bill of Rights does not extend to tribal governments. Thus, this is one more reason to deny jurisdiction over those who have not given their consent to be governed.¹⁵⁴ Enrollment in another tribe is not enough to implicate jurisdiction because tribes are not mere fungible groups. Wide variations of customs, language, and history separate these groups. Thus, consent to jurisdiction by membership in one tribe does not imply consent to submit

147. *Id.*

148. *Id.*

149. *Id.* at 2063.

150. *Id.*

151. *Id.* at 2063-64.

152. *Id.* at 2064 (quoting F. COHEN, *supra* note 8, at 334-35).

153. *Id.*

154. *Id.*

to another's jurisdiction.¹⁵⁵ Finally, any jurisdictional void created by this decision is a void of convenience. Therefore, it is for Congress, not the Court, to address the problem of a potential jurisdictional void.¹⁵⁶

Justice Brennan dissented, writing that tribal powers are inherent sovereign powers, subject to complete defeasance by Congress. Until Congress acts, however, tribes retain all aspects of sovereignty not withdrawn by treaty or statute, or by implication of their dependent status.¹⁵⁷ Tribes have no inherent power to enter into direct diplomatic or commercial relations with a foreign nation.¹⁵⁸ They are implicitly divested of their power over external relations because of the overriding interests of the federal government.¹⁵⁹

Tribes retain the power to prescribe and enforce internal criminal laws, Brennan stated.¹⁶⁰ While they lost criminal jurisdiction over non-Indians, tribes have not necessarily lost criminal jurisdiction over nonmember Indians.¹⁶¹ *Oliphant* cannot be read to divest tribes of jurisdiction over all nonmembers because the analysis was only based on Congressional action in relation to non-Indians.¹⁶² The language cited by the majority from *Wheeler* was only a misstatement of the holding in *Oliphant*. Any pronouncement regarding the lack of jurisdiction over nonmembers was dicta.¹⁶³

Brennan also contended that Indians gave up their power to try non-Indians, except in a manner acceptable to Congress, by submitting to the government's overriding sovereignty. However, consideration of the statutes shows that the tribes were not similarly divested of jurisdiction over nonmembers.¹⁶⁴ In 18 U.S.C. § 1152,¹⁶⁵ Indian-against-Indian crime was explicitly exempted from federal jurisdiction.¹⁶⁶ Title 18 U.S.C. § 1153 was

155. *Id.* at 2064-65.

156. *Id.* at 2066.

157. *Id.* at 2066-67 (Brennen, J., dissenting) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)).

158. *Id.* at 2067 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832)).

159. *Id.* (quoting *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 109 S. Ct. 2994, 3019 (1989)).

160. *Id.* (quoting *Wheeler*, 435 U.S. at 326).

161. *Id.*

162. *Id.* at 2067-68.

163. *Id.* at 2067 n.1.

164. *Id.* at 2068.

165. For the history of this statute, see *supra* notes 56-72 and accompanying text.

166. *Duro*, 110 S. Ct. at 2068.

enacted in response to *Ex parte Crow Dog*,¹⁶⁷ which found no federal jurisdiction. Section 1153 gave the federal courts jurisdiction over certain interracial crimes. Thus, in *Oliphant*, the Court found implicit divestiture of tribal jurisdiction due to these positive acts. However, the opposite is true for nonmember Indians.¹⁶⁸

Consistently, Congress has exempted Indian-against-Indian crimes, Brennan stated. This infers that the tribes retain jurisdiction over all Indians.¹⁶⁹ The majority's argument that the federal statute is not dispositive on the question of tribal power is inconsistent with the *Oliphant* pronouncement that the statutes evidenced the "'commonly held presumption' that the tribes ceded their power over non-Indians."¹⁷⁰ By refusing to draw this inference, the majority has created a jurisdictional void. This void is relevant to discerning Congressional intent, not for finding jurisdiction.¹⁷¹ Treaties and statutes must be read in light of the common notions and assumptions of the day. By not differentiating between members and nonmembers, it can be logically assumed that Congress did not view tribal power as limited only to tribal members.¹⁷²

In responding to Kennedy's argument that tribal jurisdiction over citizens is inconsistent with tribal dependent status, Brennan noted that in *Oliphant*, tribes, in submitting to the overriding federal sovereignty, gave up all jurisdiction over non-Indians, except that which is acceptable to Congress. Thus, it is not citizenship but the acceptability to Congress which subjects one to tribal jurisdiction.¹⁷³ Also, while prosecution of non-Indians is unacceptable to Congress, prosecution of all Indians in tribal court is acceptable.¹⁷⁴

Finally, if implicitly divested of jurisdiction over citizens who are nonmembers, then the tribes also also are divested implicitly of jurisdiction over members, Brennan stated.¹⁷⁵ Participation in tribal government does not constitute a knowing waiver of constitutional rights.¹⁷⁶ Consent to jurisdiction due to tribal

167. 109 U.S. 556 (1883).

168. *Duro*, 110 S. Ct. at 2068-69.

169. *Id.* at 2069.

170. *Id.*

171. *Id.* at 2070.

172. *Id.*

173. *Id.*

174. *Id.* at 2071.

175. *Id.*

176. *Id.*

government participation has never been a prerequisite for civil jurisdiction, nor is participation in the political process a prerequisite for criminal jurisdiction by a sovereign.¹⁷⁷

Analysis

The *Duro* decision is a logical extension of the Court's continued reduction of tribal court jurisdiction. The basis for *Duro* is *Oliphant* and *Wheeler*, both of which have been criticized¹⁷⁸ for diverging from accepted Indian precedent. It is not logical to infer that criminal jurisdiction was withdrawn over nonmember Indians because it was withdrawn statutorily over non-Indians. It is not doubted that the Court meant to include nonmember Indians in its development of the divestiture doctrine. But using dicta to broaden the holding of *Oliphant* does not make this expansion precedent or good law.

In determining whether minor crimes jurisdiction over non-Indians had been withdrawn, the *Oliphant* Court ignored the lower court's use of the traditional preemption analysis¹⁷⁹ and

177. *Id.*

178. Clinton, *State Power Over Indian Reservations: A Critical Comment on the Burger Court Doctrine*, 26 S.D.L. REV. 434 (1981). Clinton wrote:

The decisions of the Burger Court . . . have almost destroyed . . . Marshall's analytical framework. The recent cases have ignored the intent of the Indian commerce clause and authorized substantial state jurisdiction over non-Indians and even some state power over Indians in Indian country. Moreover, the . . . opinions have failed to replace *Worcester* with any clear analytical test, leaving in their wake a turbulent backwater of confusing decisions that necessarily engender not only further litigation but on-going tension between the states and the Indian tribes.

Id. at 439-40. See also Fetzer, *Jurisdictional Decisions in Indian Law: The Importance of Extralegal Factors In Judicial Decision Making*, 9 AM. INDIAN L. REV. 253, 272 (1981) (In 10 out of 11 cases decided between 1973 and 1982, demographics played a part in the decisions; the greater the ratio of non-Indians to Indians involved, the greater the chance the court will rule in the non-Indians' favor despite precedent).

179. Preemption is based on the exercise of constitutional authority from the commerce clause coupled with the supremacy clause of article VI, clause 2. D. GETCHES & C. WILKERSON, *supra* note 22, at 332. Preemption was first outlined by J. Marshall:

The Cherokee nation then is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). Subsequent decisions have upheld this doctrine. See *United States v. Kagama*, 118 U.S. 375, 383-84 (1885). See also *Native Am. Church v. Navajo Tribe*, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.")

held that while treaty provisions by themselves would not be sufficient to divest the tribe of all criminal jurisdiction, "precedent satisfies us that even ignoring treaties and congressional policy, Indians do not have criminal jurisdiction over non-Indians *absent affirmative delegation of such power from Congress.*"¹⁸⁰ The Court used dependent status language found in several cases to infer no inherent power without delegation.¹⁸¹

However, delegation of inherent sovereign power before it can be exercised is inapposite to prior case law¹⁸² and legal authority such as Cohen, cited only two weeks later by this Court in *Wheeler*: "The power of Indian tribes are . . . *inherent powers of a limited sovereignty which has never been extinguished.*"¹⁸³ Because the power over minor crimes has never been withdrawn or extinguished by Congress, under traditional analysis, the tribe should retain that power.

Despite this authority, the *Oliphant* Court, supporting its decision with the dissent from *Fletcher v. Peck*,¹⁸⁴ held that as a general principle, "[b]y submitting to the overriding sovereignty of the United States Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."¹⁸⁵ Thus, Indians were divested of all sovereign power over non-Indians.¹⁸⁶

The *Wheeler* Court, using the divestiture doctrine, held that there was no double jeopardy involved in the concurrent federal and Indian prosecution arising out of a rape committed on the Navajo reservation.¹⁸⁷ Tribal exercise of criminal jurisdiction over a member was done as a part of its retained inherent power and not as an adjunct of the federal government.¹⁸⁸ But those areas of sovereignty implicitly divested by virtue of their dependent status involve relations between members and nonmem-

180. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (emphasis added).

181. See, e.g., *Worcester*, 31 U.S. (6 Pet.) at 551-52, 554; *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846); *United States v. Kagama*, 118 U.S. 375, 379 (1886).

182. See, e.g., *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896).

183. *United States v. Wheeler*, 435 U.S. 313, 327 (1978) (quoting F. COHEN, *supra* note 8, at 122) (emphasis in original).

184. 10 U.S. (6 Cranch) 87 (1810).

185. *Oliphant*, 435 U.S. at 207.

186. Note, *Zoning: Controlling Land Use on the Checkerboard: The Zoning Powers of Indian Tribes After Montana v. United States*, 10 AM. INDIAN L. REV. 187, 198 (1982).

187. *Wheeler*, 435 U.S. at 314-16.

188. *Id.* at 328.

bers.¹⁸⁹ This mischaracterization of the *Oliphant* holding has been used by the Court to further its divestiture policy when in fact the holding pertained only to non-Indians. Thus *Duro* rests upon a questionable foundation.

History cannot be ignored nor revised. The tradition of sovereignty is the backdrop against which applicable treaties and statutes must be read.¹⁹⁰ Historically, *Duro* is unsupportable. Jurisdiction over minor crimes committed by nonmember Indians has never been statutorily withdrawn. Through treaties and legislation such as the Major Crimes Act,¹⁹¹ only the inherent tribal power to try non-Indians and Indians for major crimes in tribal courts has been withdrawn.¹⁹²

Intertribal relations issues are not new. Several treaties explicitly addressed intertribal affairs, granting jurisdiction to the federal government.¹⁹³ Outside of these treaties, several solicitor general opinions have specifically found no federal jurisdiction over intertribal crimes.¹⁹⁴ A basic premise of Indian law has been that tribes retain power unless specifically preempted. The common understanding has been that the federal government had no general jurisdiction over intertribal crimes.¹⁹⁵ Without preemption, the tribes retain jurisdiction over nonmember Indians.

As the dissent correctly pointed out, the broad definition of "Indian" is not dispositive on the issue of jurisdiction. Rather, it supports a congressional presumption that Indians retain that which is not specifically withdrawn. It is unlikely that Congress intended to create a jurisdictional void, nor did Congress presume that jurisdiction was limited to member Indians.¹⁹⁶ Rather,

189. *Id.* at 316.

Indians can no longer freely alienate to non-Indians the land the Indians occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.

Id.

190. F. COHEN, *supra* note 8, at 273.

191. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385 (codified as amended at 18 U.S.C. §§ 1151-1153 (1988)).

192. F. COHEN, *supra* note 8, at 252-57. See generally Taylor, *supra* note 78; Bransky, *supra* note 7.

193. See *supra* note 37.

194. See *supra* note 97.

195. See *supra* notes 53, 69-77, 97-98, and accompanying text.

196. See *supra* note 97.

treaties and statutes have been construed to uphold the right of self-government. When construing the intent of the IRA and other statutes with broad definitional bases, the recognition of power or the excepting of it always must be read in light of sovereignty. This implicates retention, not divestiture, of sovereign power.

Further, even though implicit divestiture is the law, and tribes have been divested of external relations due to their dependent status, it cannot be assumed that jurisdiction over nonmember Indians constitutes external relations. Historically and in diplomatic parlance, Indians were presumed to have lost their right to negotiate and treat with foreign governments.¹⁹⁷ The treaty-making power was inconsistent with tribal dependence because it interfered with U.S. foreign policy and peace with United States neighbors. Yet, despite this fact, a few Indian treaties specifically recognized tribal treaties with foreign governments and were excepted from the common presumption.¹⁹⁸ Also, until explicitly divested in 1871, tribes used their external power to negotiate with the federal government. Even the *Wheeler* Court, in explaining *Oliphant*, stated that external relations historically were "commercial and governmental relations with foreign governments."¹⁹⁹

Some treaties addressed intertribal disputes and granted to the federal government the right to mediate these disputes.²⁰⁰ Most treaties, however, lacked this specific granting language. Justice Brennan pointed out that in 1834, Congress rejected a bill that would have removed all Indians to land west of the Mississippi River and granted to the federal government the right to punish intertribal crimes.²⁰¹ Because it was rejected, it must be presumed that the tribes retained the right to punish intertribal crimes. Even the Supreme Court has noted previously that the federal government does not have jurisdiction over intertribal crimes.²⁰² When Congress wanted to divest the tribes of intertribal juris-

197. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

198. See *supra* note 26.

199. *Wheeler*, 435 U.S. at 326. "They cannot enter into direct commercial or governmental relations worth foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts." The juxtaposition of these two could mean that the jurisdiction over nonmembers is distinct from external relations. Nonetheless, the latter is a misstatement of *Oliphant* and has nothing to do with Indians being subject to jurisdiction.

200. See *supra* note 37.

201. *Duro*, 110 S. Ct. at 2069 n.2.

202. *United States v. Quiver*, 241 U.S. 602 (1916).

diction, they specifically did so, as in the Treaty with the Cherokees and the Oklahoma Organic Act. This supports a presumption of retention.

Moreover, the actions of the executive branch show that only relations with foreign governments were divested, not intertribal relations. The government has encouraged intertribal compacts to settle disputes. Tribal constitutions promulgated under the IRA and approved by the BIA granted tribes the authority to enter into relationships with federal, states, and local governments, as well as other tribes.²⁰³ If external relations that are “necessarily divested” include intertribal relations, then it is inconsistent to recognize tribal power to enter into compacts with any governmental entity, including state and local governments or other tribes. Likewise, it is also inconsistent to recognize tribal jurisdiction over anyone but a tribal member. Thus, it cannot be inferred logically that divestiture of the power over external relations includes that over nonmember Indians.

A more important, yet no less refutable, argument is that tribes do not have the power to subject nonmember citizens to tribal court because of the less than full constitutional protections provided to a defendant. The *Duro* Court held that tribal jurisdiction over nonmember Indians conflicts with the overriding interest of the federal government in protecting its citizens against unwarranted intrusions on their liberty.²⁰⁴ It is agreed that constitutional guarantees do not extend to the tribal government.²⁰⁵ The Bill of Rights pertains only to the relationship between the federal government and its citizens.²⁰⁶ The fourteenth amendment extended those guarantees to state governments after the civil war. Prior to that extension, out-of-state citizens were similarly situated to nonmember Indians. Neither were able to participate in government. Yet, prior to the fourteenth amendment, a state court had jurisdiction over out-of-state U.S. citizens, and could prosecute to the full extent of its law even though it afforded less than full United States constitutional guarantees. Therefore, in the similarly analogous situ-

203. See *supra* notes 99-103.

204. It is ironic that this Court appears to be more concerned with form over substance. One wishes that this Court become as concerned with having effective legal council in state death penalty cases as they do about having counsel for misdemeanor tribal trials. What can be more of an unwarranted intrusion than death? For a recent critique of death penalty representation, see *THE NAT'L L.J.* 30-44 (June 11, 1990).

205. F. COHEN, *supra* note 8, at 664 n.11.

206. *Barron v. Mayor & City Council*, 32 U.S. (7 Pet.) 243 (1833).

ation, a tribe should be able to prosecute a nonmember Indian without violating the U.S. Constitution.

Second, when constitutionally-guaranteed protections are given up, it must be knowingly done. As Justice Brennan has asserted, participation in government is not a prerequisite to the exercise of criminal jurisdiction.²⁰⁷ Nor can consent to be governed, that is, being a member, constitute an intelligent and knowing waiver of constitutional rights.²⁰⁸ If one could give up constitutional protections just by being a citizen, then these protections would be worthless, because they could be waived without actual knowledge of waiver.

Finally, consent is irrelevant. Congress has the plenary power over Indian affairs.²⁰⁹ The majority admits that it is within Congress' power to grant jurisdiction over nonmember Indians.²¹⁰ Therefore, jurisdiction can be granted despite the lack of consent. This undermines the majority view. While Congress has clearly legislated that jurisdiction over non-Indians is unacceptable, it has not done so with nonmember Indians. The conclusion must be that jurisdiction is retained.

Discussion

Considering the pronouncements of this Court, *Duro* was not unexpected. *Duro* represents conservative judicial activism, molding the law away from a broad definition of tribal sovereignty to a narrow definition which was not intended by Congress. The Burger and Rehnquist Courts have done what the terminationists and assimilationists in the last hundred years could not do. Yet with the current Court makeup, the precedent of the *Oliphant*, *Wheeler* and *Duro* trilogy will not be soon overruled. Clinton's critique that the Burger Court has almost destroyed Marshall's analytical framework holds no less true today for the Rehnquist Court.²¹¹

Nothing more affects the internal peace and prosperity of a community than lawlessness. It is ironic that this Court has held that the tribe retains civil jurisdiction over non-Indians when

207. *Duro*, 110 S. Ct. at 2071.

208. *Id.* at 2071 n.4.

209. See *supra* note 62.

210. *Duro*, 110 S. Ct. at 2060. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) ("by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress").

211. See *supra* note 173.

their conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.²¹² Yet the murder of a resident nonmember by another resident nonmember is not enough to implicate criminal jurisdiction.

Several approaches can be taken to counteract this detour from traditional preemption analysis. First, Congress can be lobbied to enact a jurisdictional statute that affirms tribal criminal jurisdiction over nonmembers. This might have a respectable chance of passage because of the budget constraints at both the federal and state level. Justice Kennedy's warning—that Congress might not have the authority to subject citizens to jurisdictions which guarantee less than full protection—should not govern Indian actions. This is, however, an indication of his agenda.

Second, Congress could grant full constitutional protections to defendants in tribal criminal courts through a revision of the ICRA. Passage would undercut the constitutional protection argument because jurisdiction would not be inconsistent with the overriding interests of the federal government in safeguarding citizens from unwarranted intrusions on their personal liberties. However, this would entail further encroachment on the internal sovereignty of each tribe's power to select its own form of government.

Congressional lobbying for a change cannot be done unilaterally. The Indian community must come together and form a consensus on what legislation should be requested. All viewpoints need to be represented. A liability with congressional action is that the tribes could get more than they wanted because of the varied political interests involved. The resulting legislation might encroach further on autonomy rather than reaffirm it. Therefore, any request to Congress must be carefully planned by the full tribal community.

Third, tribes can enter into compacts with other tribes exchanging jurisdictional reciprocity. In this way, each tribal member will have consented to jurisdiction through their participation in their own tribal government, at least under the *Duro* analysis. This might be a workable short-term solution because it would include more nonmembers within jurisdiction than this decision allows.

A less desirable alternative from the viewpoint of tribal autonomy would be granting jurisdiction to the states under Public

212. United States v. Montana, 450 U.S. 544, 565-66 (1981).

Law 280. This is less desirable because it allows a termination era law to intrude further on sovereignty. Even if granted, the states might not want jurisdiction because of their own fiscal constraints. Then, the legal void would continue.

An even less desirable alternative would be closing tribal borders and ejecting all nonmember Indians. Many nonmember Indians live and work on the reservations. They have strong ties to the tribe through marriage and community involvement. They only lack political involvement to be subject to jurisdiction. By ejecting these nonmembers, the community is further disrupted, skilled workers are lost, and either families are separated or spousal members must also leave. While the tribe has the uncontested right to say who may enter, many federal contracts and services depend upon a broad definition of who is an Indian, and denial of access to those services or that job may in fact be discriminatory.

Alternatively, the tribes can make nonmember Indians members of the tribe, based on residence. Tribes have complete power over who is a member.²¹³ If one is deemed a member, then there is no problem under *Duro*. However, this could have a detrimental effect on tribal resources, and on political and cultural autonomy. Many benefits accrue to those who are members only, including sharing in mineral royalties and many government services. Adding more people to the roles strains an already taxed system. And if blood quantum is no longer required, smaller tribes could easily be overwhelmed by those who are today nonmembers. Member Indians could lose political control and cultural distinctiveness.

Conclusion

In this era of Supreme Court animosity toward tribal sovereignty, the tribes will have to look to Congress rather than the Courts to protect their inherent sovereign powers. This is ironic because, for many years, while Congress vacillated between policies of assimilation and self-determination, the Court has protected Indian rights against governmental encroachment and termination.²¹⁴ Clearly the Rehnquist Court is not the Indians' protector.

213. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

214. M. PRICE & R. CLINTON, *supra* note 28, at 454.