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2003

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Recommended Citation
13 Kan. J. L. & Pub. Policy 59 (2003).

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Oliphant and Its Discontents: An Essay Introducing the Case for Reargument before the American Indian Nations Supreme Court

Judith V. Royster[1]

If anything ever proved the old adage that people fear that which they do not understand, it is the Supreme Court's approach to tribal authority over non-Indians. And if any decision illustrates that approach, it is the case reargued to the American Indian Nations Supreme Court at the University of Kansas Tribal Law and Governance Conference, the infamous *Oliphant v. Suquamish Indian Tribe*,[2] that began it all.

The facts of *Oliphant* are straightforward. Mark David Oliphant and his co-defendant were on the Port Madison Reservation during the Suquamish Tribe's annual celebration. Tribal police arrested both men in separate incidents. Oliphant was charged with assaulting a tribal officer and resisting arrest. The other man was charged with reckless endangerment and injury to tribal property after he led tribal police on a high-speed chase that ended when he crashed into a tribal police car. Both men sought a writ of habeas corpus in federal district court. The district court denied the petitions, the Ninth Circuit affirmed in Oliphant's case, and the Supreme Court took the cases on review.[3]

I imagine the justices moving from bewilderment to indignation. There is a Far Side cartoon that illustrates what they must have felt. A few settlers with guns are hunkered down by their covered wagons; the wagons are pierced with flaming arrows setting the wagon covers afire. One man looks at another and says: "Hey, they're lighting their arrows. Can they DO that?"[4] I imagine Justice Rehnquist[5] with that same look of outraged incredulity on his face. "Hey, they're prosecuting some white kid. Can they DO that?" Unfortunately for Indian tribes, Justice Rehnquist was in a position to answer that question. His answer, of course, was "No."

I. AN INTRODUCTION TO OLIPHANT

The basic holding of *Oliphant* is as straightforward as its facts: Indian tribes have no criminal jurisdiction over non-Indians. In all likelihood, the case was decided on the basis of the demographics. The Court began its decision with a recitation of facts not technically relevant to its ultimate outcome. It noted that the Port Madison Reservation had been subject to allotment; that almost two-thirds of the reservation land was owned by non-Indians; that the state of Washington provided schools, roads, and public utilities to the reservation; and that non-Indians on the reservation

outnumbered tribal citizens by a ratio of nearly sixty to one. Nothing in those facts was germane to the categorical assertion that tribes may not exercise any criminal jurisdiction over non-Indians. The facts were, however, pertinent to the Court's outrage over the Suquamish Tribe's exercise of criminal jurisdiction over Oliphant and his co-defendant.

Over a one-paragraph dissent,[6] the Court offered a fairly elaborate three-pronged rationale for its decision. The first prong was the notion that all three branches of the federal government shared a common historical understanding that tribes could not exercise criminal jurisdiction over non-Indians. This was arguably the most indecent piece of "reasoning" that the Court has ever produced.[7] It is a textbook model of how to obscure unfavorable law, relegate contrary facts and precedent to footnotes, and argue using only highly selective snippets that support the preferred position.[8] As a lawyer's brief, this is probably ethical. As a decision by the nation's highest court, it is an embarrassment. *Oliphant* is in that sense a transformative opinion. Anyone who reads it can never look at the Court in quite the same way again.

The second prong of the Court's approach rested on the Suquamish Tribe's treaty. In the Treaty of Point Elliott, the tribe acknowledged its dependence on the United States, a standard treaty provision of the time that the Court interpreted "in all probability" as recognizing exclusive United States criminal jurisdiction over non-Indians.[9] Abandoning the Indian law canons of construction that call for treaties to be construed in favor of the tribes,[10] the Court instead found that the Suquamish treaty should be read against a backdrop of the common federal understanding that Indian tribes had no criminal jurisdiction over non-Indians.

The third prong, however, was the heart of the Court's decision. The common historical understanding was "not conclusive" by itself,[11] and the treaty, standing alone, was "probably not . . . sufficient" either.[12] But waiting in the wings was the notion of "intrinsic limitations" on tribal governmental powers.[13] Indian tribes are, within federal law, "quasi-sovereign" governments dependent upon the United States.[14] They may exercise only those governmental powers not "inconsistent with" that dependent status.[15] Consequently, the Court held that Indian tribes "necessarily" lost the authority to prosecute non-Indians for offenses committed within tribal territories.[16]

II. THE IMPACTS OF OLIPHANT

The impacts of *Oliphant* over the twenty-five years since the decision was handed down have been wide-ranging and severe. The decision has impacted law enforcement in Indian country, undermined the territorial integrity of tribal governments, and launched the Supreme Court's on-going efforts to sweep away much of tribal civil jurisdiction over non-tribal citizens.

A. Law Enforcement Impacts

The law enforcement impacts of *Oliphant* have seriously compromised safety within Indian country. If Indian tribes do not have authority to prosecute non-Indians for crimes committed within Indian country, that task falls either to the state or the federal government. Neither is capable of performing it well.

As a general rule, the creation of Indian country preempts state authority, at least as to matters involving Indians. Congress may authorize state jurisdiction over such matters, but unless it has done so, federal and tribal authority are exclusive. With respect to criminal jurisdiction, the Indian Country Crimes Act authorizes federal prosecution of non-Indians who commit crimes against Indians.[17] Under a judicially-crafted exception, states exercise criminal jurisdiction over crimes between non-Indians on the theory that those crimes do not impact tribal interests.[18] States operating under a grant of jurisdiction under Public Law 280[19] (PL-280) or similar legislation[20] have the same criminal authority within Indian country as they do without it, and thus may prosecute all crimes committed by non-Indians. Relatively few states, however, have taken criminal jurisdiction under PL-280, so criminal authority over non-Indians post-*Oliphant* is usually split between the federal and state governments.

Neither government holds the resources, and neither has generally demonstrated the will to prosecute minor crimes non-Indians commit on reservations. Although serious crimes may be addressed promptly, relatively minor or nuisance crimes, such as drag racing, open containers of alcohol, and prostitution, are often below the radar of a remote U.S. attorney or county prosecutor who is saddled with limited resources. Tribal governments, which are in the best position to detect, deter, and prosecute these crimes, are unable to do so under the holding of *Oliphant.*

The law enforcement problem will likely grow worse. In the aftermath of the events of September 11, 2001, Attorney General John Ashcroft announced a reorientation of the Federal Bureau of Investigation's responsibilities from more traditional law enforcement activities toward increasing anti-terrorism functions.[21] The FBI, however, is the primary investigative agency for crimes in Indian country committed by non-Indians against Indians. If its mission shifts away from basic law enforcement, the impacts on already-strapped resources in Indian country could be severe.

An additional law enforcement impact arises from the nature of the crime allegedly committed by Mark David Oliphant. He assaulted a tribal cop. Virtually every jurisdiction considers assault on a law enforcement officer a special crime.[22] Those assaults are not just personal assaults, but assaults against the government itself. *Oliphant* deprives tribes of the opportunity afforded to every other government: to treat an assault on its own officers as a heightened form of crime. Tribal governments

cannot prosecute non-Indians for a crime against the authority of the government itself. Instead, they are dependent upon the federal government or a state government utilizing PL-280, to prosecute these crimes as ordinary assaults, if they are prosecuted at all.

B. The Loss of Territorial Sovereignty

Although *Oliphant* is arguably the most serious judicial onslaught on tribal territorial sovereignty, it was not the first attack on this jurisdiction. The first onslaught is traceable to the 1881 decision in *United States v. McBratney.*[23] Under what has come to be known as the *McBratney* rule, the Court created an exception to exclusive federal/tribal jurisdiction within Indian country. The Court ruled that crimes committed in Indian country solely between non-Indians were within the jurisdiction of the states, on a theory that activities not involving Indians do not impact the concerns or interests of the Indian tribes. The absurdity of that theory should be obvious: no other government is required to ignore crimes committed within its boundaries between non-citizens. Nonetheless, with that one important exception, the Court left the territorial integrity of the tribes intact.

Oliphant, the second judicial onslaught, changed that. This was no crime between non-citizens; this was a crime against an officer of the tribal government itself. Whatever the legitimacy of *McBratney*, its rationale cannot possibly be extended to crimes against the tribe and its citizens. *Oliphant* thus marks the first time the Court ruled that activities within a tribe's territory that unquestionably impacted the tribe were not within the tribe's authority to address.

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the Court ruled that activities within a tribe's territory that unquestionably impacted the tribe were not within the tribe's authority to address.

III. OPENING THE DOOR FOR THE LOSS OF CIVIL AUTHORITY

For a short time, it appeared that *Oliphant* and its inroads on territorial sovereignty were confined to criminal jurisdiction. The Court made much of potential "unwarranted intrusions on [non-Indians'] personal liberty," a criminal law concern.[25] Additionally, *Williams v. Lee* offset Oliphant on the civil side.[26] In *Williams*, the Court held that a civil lawsuit by a non-Indian plaintiff against an Indian defendant for a cause of action arising in Indian country was within the exclusive jurisdiction of the tribal court. The Court determined that state jurisdiction would interfere with "the right of reservation Indians to make their own laws and be ruled by them."[27]

Then came *Montana v. United States*.[28] Only three years after *Oliphant*, the Court extended to tribal legislative and regulatory jurisdiction *Oliphant's* notion that tribes had lost jurisdiction inconsistent with tribal dependent status.[29] Noting its judicially created approach of "implicit divestiture," the Court determined that only the rights "to protect tribal self-government or to control internal relations" are consistent with tribal status.[30]

The Court did not, however, create the same categorical rule prohibiting tribal legislative jurisdiction over non-tribal citizens that it had announced in the criminal context. Instead, it found a "general proposition" against such civil jurisdiction.[31] But the general proposition only extended to lands held in fee by nonmembers of the tribe, and even it could be overridden by congressional action or by the inherent rights of Indian tribes to protect their self-government. The Court produced its now-famous "*Montana* exceptions:" two broad-based situations in which it indicated that Indian tribes would retain civil jurisdiction over non-tribal citizens:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[32]

It thus appeared that the Court in *Montana*, although unnecessarily extending *Oliphant* to civil jurisdiction, had at least done so in a way that would preserve tribal

jurisdiction over core tribal governmental functions. Over the years, however, *Montana* has proved the more cruel of the decisions. *Oliphant* was an amputation; *Montana* has been slow torture. The *Montana* exceptions held out hope, although "bait" is perhaps more accurate of a term, that tribes would continue to exercise civil jurisdiction over all persons throughout their territories where tribal interests were at stake. Having established the exceptions, the Court has spent the last twenty-five years picking away at them until virtually nothing is left.

In *Montana*, the Court held that the Crow Tribe had no authority to regulate hunting and fishing by non-tribal citizens on fee lands within the reservation. The activity of hunting and fishing on fee land neither involved consensual relationships nor had direct effects on core tribal governmental interests. A few years later, the Court revisited the second "direct effects" exception in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.[33] The plurality determined that tribes could only zone fee land within their reservations if they could demonstrate that the particular proposed use of the parcel of land would "imperil" those core interests.[34] Nearly a decade later, in *Strate v. A-1 Contractors*, the Court rejected both exceptions, finding that the tribal court did not have jurisdiction over a civil lawsuit between two non-Indian parties to an automobile accident on a state highway running through the reservation.[35] It found no consensual relationship from the fact that one party to the accident was an employee of a contractor working for the tribe, because the accident did not arise out of the contractual relationship, and the other party to the accident was a stranger to that relationship. The Court noted that careless driving would "surely jeopardize the safety of tribal members,"[36] but that was nonetheless insufficient to constitute direct effects on core tribal governmental interests.

Most recently, the Court decided a pair of cases implicating the *Montana* exceptions. In *Nevada v. Hicks*, the Court found no consensual relationship existed, even though the state law enforcement officers obtained tribal court consent to the service of a search warrant on trust property, because the intergovernmental cooperation was not a "private" consensual arrangement.[37] The same year, the Court held in *Atkinson Trading Co. v. Shirley*[38] that nonmember guests of a nonmember hotel on fee land within the reservation had no consensual relationship with the tribe, even though the tribe provided governmental services to the hotel and its guests. The Court also stated that it did not see how the direct effects exception could be implicated.

This series of cases presents a remarkable litany of frustrated hopes. The Court refuses to say what types of activities by nonmembers on fee lands would meet the *Montana* exceptions. Instead, it allows tribes to make argument after argument, always finding the tribes' positions insufficient. To add to the injury, the Court has recently given up any pretense of analysis. Jeopardy, it finds, is not enough to show effects on health and welfare. Hotel guests who use tribal services do not have a consensual relationship because if they did, "the exception would swallow the rule."[39] The same

situation does not create direct effects on any core tribal governmental interests simply because the Court "fail[s] to see how" it might.[40]

At the same time that the Court has been picking away at the substance of the *Montana* exceptions, it has been doing the same thing to the lands to which *Montana* applies. *Montana* itself was very clear that tribal civil authority over nonmembers was inconsistent with tribal status only on lands that had passed into fee status as a result of the federal allotment policy of the late nineteenth and early twentieth centuries.[41] The Court determined that Congress could not have intended for non-Indians invited to settle in Indian country to be subject to tribal jurisdiction.

In 1993, the Court abandoned its narrow view of the lands on which tribal authority over nonmembers was inconsistent with tribal status. In *South Dakota v. Bourland*, the Court applied the *Montana* exceptions to land owned in fee by the federal government, taken for a flood control project.[42] The reason the land was in fee status was irrelevant; *Montana* governed whenever title to the land at issue was vested in fee to nonmembers of the tribe. In *Strate*, the Court went further. The land at issue in that case was a state highway running through the reservation. Although the right of way was on trust land, the Court held that it was the jurisdictional equivalent of fee land because the tribe had lost any "gate keeping right" to exclude the public from the highway.[43]

Most recently, and most disturbingly, the Court found *Montana* applicable on trust lands. In *Hicks*,[44] the question was whether a tribal member could sue state game wardens in tribal court for alleged damage to his personal property when they served him with a search warrant in connection with an off-reservation crime. The warrant was served, and the alleged damage occurred, on trust land within the reservation. The Court, in deciding that the tribal court did not have jurisdiction, noted that the status of the land on which nonmember activity takes place "is only one factor to consider;" the fact that the land was in trust status "is not alone enough" to guarantee tribal jurisdiction.[45] *Hicks* can be readily confined to its facts: state officials serving process in connection with an off-reservation crime. The majority opinion recognized this limited nature of the holding;[46] Justice Ginsburg's concurrence emphasized it;[47] and Justice O'Connor's concurrence argued that the majority had not given due weight to the trust status of land at issue.[48] Nonetheless, the majority opinion contains fairly categorical language, and not one of the justices maintained that the trust status of the land, in and of itself, barred state jurisdiction without congressional consent. Moreover, Justice Souter argued that *Montana* should apply to all assertions of tribal authority over nonmembers, even on "tribal or trust land."[49]

The Court, in other words, has made substantial inroads on tribal civil jurisdiction over non-tribal citizens. Those incursions can be laid squarely at *Oliphant*'s feet. In that 1978 decision, the Court set the framework: Indian tribes may not exercise powers inconsistent with their status, and criminal jurisdiction over non-

Indians is inconsistent. This judicial divestiture of tribal powers was then transferred to civil jurisdiction. Initially, it appeared to be applied less destructively, by limiting instead of eliminating tribal governmental authority. The steady march of the Court's decisions since, however, has moved civil jurisdiction closer to criminal. Unless that progress is reversed, *Oliphant* may soon be the rule in civil matters as well as in criminal law.

IV. FINAL NOTE

The reasons to reargue and reconsider *Oliphant* should be apparent. Not only is the Court's decision itself a morass of bad reasoning, but the case and its subsequent impacts have hampered law enforcement, deprived tribes of the fundamental sovereign right of territorial integrity, and virtually eliminated tribal civil authority over nonmembers on fee lands or their equivalent. *Oliphant* is not, of course, the first terrible decision the Court has ever made in Indian law. Occasionally, Congress will override bad law,[50] or the Court itself will even repudiate old decisions that offend modern sensibilities.[51] We can only hope that one of these scenarios becomes *Oliphant's* ultimate fate.

Notes

1. Professor of Law and Co-Director, Native American Law Center, University of Tulsa College of Law. This essay is based on remarks at the 5th Annual Tribal Law and Governance Conference at the University of Kansas, October 5, 2002.
2. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The decision has been subject to severe, well-deserved scholarly critique. *See, e.g.*, Russel L. Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).
3. *Oliphant*, 435 U.S. at 194-95. The co-defendant's case was still pending before the Ninth Circuit when his petition for certiorari was granted. *Id.* at 195.
4. GARY LARSON, THE FAR SIDE GALLERY 108 (Far Works, Inc. 1984).
5. Justice Rehnquist, now Chief Justice, wrote the opinion of the Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 192.
6. Justice Marshall, joined by the Chief Justice, dissented; Justice Brennan took no part in the decision. *Id.* at 212.
7. *See generally* Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993) (meticulously deconstructing the Court's approach point-by-point);. Professor Maxfield's analysis is well worth reading, but will not be repeated here.
8. My personal favorite is the Court's use of the legislative history of an early nineteenth century bill

that was never enacted into law. *See Oliphant*, 435 U.S. at 201-02. The fact that Congress repeatedly failed to enact the law was mentioned only in a footnote. *Id.* at 202 n.13.

9. *Id.* at 206-07.
10. FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221-24 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982).
11. *Oliphant*, 435 U.S. at 206.
12. *Id.* at 208.
13. *Id.* at 209.
14. *Id.* at 208 (quoting Cherokee Nation v. Georgia, 30 U.S. 1,15 (1831)).
15. *Id.* at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976) (Court's emphasis deleted)).
16. *Id.* at 210.
17. 18 U.S.C. § 1152 (2003).
18. *See* United States v. McBratney, 104 U.S. 621 (1881).
19. 18 U.S.C. § 1162 (2003).
20. *See, e.g.*, The Kansas Act, 18 U.S.C. § 3243 (2003).
21. *See, e.g.*, Statement of the Hon. John Ashcroft, Attorney General, United States Dep't of Justice, before the Senate Judiciary Committee, July 25, 2002 (2002 WL 20319389). *See also* Christopher Newton, *Terrorism Fight Saps FBI's War on Drugs*, SUN-SENT., July 31, 2002, at 11A.
22. *See, e.g.*, 18 U.S.C. § 111 (2003) (assault of a federal officer); KAN. STAT. ANN. § 21-3409 (2002) (assault of a law enforcement officer).
23. *McBratney*, 104 U.S. 621 (1881). *See also* New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896).
24. *McBratney*, 104 U.S. 621 (1881). *See also* New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896).
25. *Oliphant*, 435 U.S. at 210 (1978).
26. Williams v. Lee, 358 U.S. 217 (1959).
27. *Id.* at 220. *See id.* at 223.
28. *See* Montana v. United States, 450 U.S. 544 (1981).
29. *Id.* at 565.
30. *Id.* at 564 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).
31. *Id.* at 565.
32. *Id.* at 565-66 (citations omitted).
33. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).
34. *Id.* at 431.
35. Strate v. A-1 Contractors, 520 U.S. 438 (1997).
36. *Id.* at 458.
37. Nevada v. Hicks, 533 U.S. 353, 359 n.3 (2001).
38. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).
39. *Id.* at 655.
40. *See id.* at 657.
41. *See Montana*, 450 U.S. at n.9 (1981); *see also Brendale*, 492 U.S. 408. On the allotment policy and its effects, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (Spring 1995).

42. South Dakota v. Bourland, 508 U.S. 679 (1993).
43. *Strate*, 520 U.S. at 456.
44. *Hicks*, 533 U.S. 353.
45. *Id.* at 360.
46. *Id.* at 358 n.2.
47. *Id.* at 386. The "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." (Ginsburg, J., concurring) (quoting the majority). *Id.* at 358 n.2.
48. *Id.* at 392, 395. Justice O'Connor was joined by Justices Stevens and Breyer. *Id.* at 387.
49. *Id.* at 375-76 (Souter, J., concurring). Justice Souter was joined by Justices Kennedy and Thomas. *Id.* *See also* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 659-60 (2001) (Souter, J., concurring).
50. *See, e.g.*, 25 U.S.C. § 1301(2) (2001) (recognizing the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians"). This statute overruled Duro v. Reina, 495 U.S. 676 (1990), which held that tribes had no inherent criminal jurisdiction over nonmember Indians.
51. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (repudiating the assumption of congressional "good faith" in the taking of tribal lands, which was presumed in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (repudiating the notion that tribal treaty rights are inconsistent with state control over natural resources and thus do not survive statehood, as recognized in Ward v. Race Horse, 163 U.S. 504 (1896)).