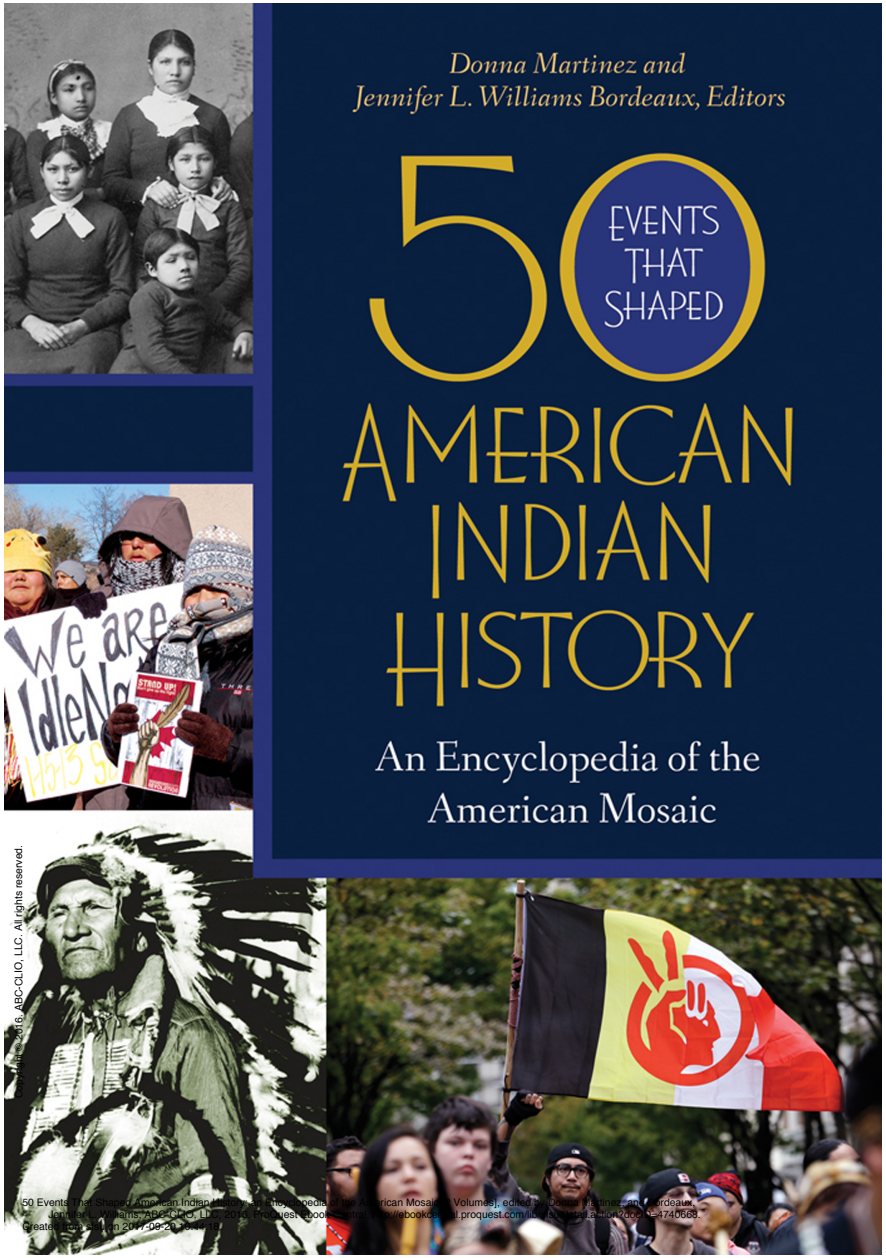

50 Events That Shaped American Indian History

An Encyclopedia of the American Mosaic

Volumes 1 and 2

Donna Martinez and Jennifer L. Williams Bordeaux, Editors

GREENWOOD™
An Imprint of ABC-CLIO, LLC
Santa Barbara, California • Denver, Colorado

50 Events That Shaped American Indian History: an Encyclopedia of the American Mosaic [2 Volumes], edited by Donna Martinez, and Bordeaux, Jennifer L. Williams, ABC-CLIO, LLC, 2016. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/sfsu/detail.action?docID=4740668.
Created from sfsu on 2017-09-20 10:43:27.

Library of Congress Cataloging-in-Publication Data

Names: Martinez, Donna, editor of compilation. | Bordeaux, Jennifer L. Williams, editor of compilation.
Title: 50 events that shaped American Indian history : an encyclopedia of the American mosaic / Donna Martinez and Jennifer L. Williams Bordeaux, editors.
Other titles: Fifty events that shaped American Indian history
Description: Santa Barbara, California : Greenwood, an imprint of ABC-CLIO, LLC, [2017] | Includes bibliographical references and index.
Identifiers: LCCN 2016025425 (print) | LCCN 2016026268 (ebook) | ISBN 9781440835766 (set : hardback : acid-free paper) | ISBN 9781440846496 (volume 1 : hardback : acid-free paper) | ISBN 9781440846502 (volume 2 : hardback : acid-free paper) | ISBN 9781440835773 (ebook (set))
Subjects: LCSH: Indians of North America—History—Encyclopedias. | United States—Ethnic relations—History—Encyclopedias. | BISAC: SOCIAL SCIENCE / Ethnic Studies / Asian American Studies. | SOCIAL SCIENCE / Ethnic Studies / General.
Classification: LCC E77 .A125 2017 (print) | LCC E77 (ebook) | DDC 305.800973—dc23
LC record available at https://lccn.loc.gov/2016025425

ISBN: 978-1-4408-3576-6 (set)
ISBN: 978-1-4408-4649-6 (Volume 1)
ISBN: 978-1-4408-4650-2 (Volume 2)
EISBN: 978-1-4408-3577-3

21 20 19 18 17 1 2 3 4 5

This book is also available as an eBook.

Greenwood
An Imprint of ABC-CLIO, LLC

ABC-CLIO, LLC
130 Cremona Drive, P.O. Box 1911
Santa Barbara, California 93116-1911
www.abc-clio.com

This book is printed on acid-free paper ♾

Manufactured in the United States of America

Contents

U.S. Department of the Interior. *Casting Light upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory*. Minneapolis: Bureau of Indian Affairs, 1991.
Whaley, Rick and Walter Bresette. *Walleye Warriors*. Philadelphia: New Society Publishers 1994.
Wilkinson, Charles. "To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa." Oliver Rundell Lecture. Madison: University of Wisconsin Law School, Continuing Education and Outreach, 1990.
Wisconsin Advisory Committee to the United States Commission on Civil Rights, *Discrimination against Chippewa Indians in Northern Wisconsin Summary Report.* Madison: Advisory Committee to the United States Commission on Civil Rights, 1989.

Oliphant v. Suquamish, 1978

Amy Casselman

Chronology

1786 The Treaty of Hopewell is signed with the Choctaw Nation. The treaty states that the Choctaws have criminal jurisdiction over non-Indians who settle on their land.

1788 The Constitution of the United States of America is ratified. Article I recognizes American Indian political sovereignty, and Article VI grants Congress the power to make treaties with Indian nations.

1831 The United States Supreme Court issues a ruling in *Cherokee Nation v. Georgia*. It rules that American Indian nations are not fully sovereign entities but instead "domestic dependent nations" whose relationship to the federal government resembles that of a "ward to his guardian."

1832 The United States Supreme Court issues a ruling in *Worcester v. Georgia*. It rules that states do not have criminal jurisdiction in Indian country.

1855 The Treaty of Point Elliott is signed between the Suquamish Indian tribe (among others) and the United States. The treaty establishes the Suquamish Indian tribe's Port Madison Indian Reservation.

1871 The Indian Appropriations Act becomes law and ends the process of treaty making with Indian tribes.

1885 The Major Crimes Act becomes law and extends federal jurisdiction over all "major crimes" in Indian country, including crimes committed by an Indian against an Indian. The law does not preclude dual jurisdiction with tribal governments.

1887 The General Allotment Act (also known as the Dawes Act) becomes law. It starts the process of land division and privatization in Indian country and causes massive land loss for Native People. It dramatically affects the Suquamish tribe as a large number of non-Indians settle on the Port Madison Indian Reservation.

1903 The United States Supreme Court issues a ruling in *Lone Wolf v. Hitchcock.* It rules that Congress has plenary power to abrogate (break) treaties with American Indian nations.

1953 Public Law 280 becomes law. It forces six states to assume criminal jurisdiction over some or all of the Indian country within its borders. State governments assume criminal jurisdiction over Indian country for the first time. Subsequently, some states voluntarily adopt the law; others retrocede or alter its application.

1968 The Indian Civil Rights Act becomes law, extending most of the U.S. Bill of Rights to Indians in Indian country. It limits tribal sentencing authority to no more than a $500 fine and six months in jail for a single offense. This is later amended to a $15,000 fine and three years in jail under the Tribal Law and Order Act of 2010.

1973 The Suquamish establish a Law and Order Code that covers a variety of criminal offenses and extends criminal jurisdiction over both Indians and non-Indians.

1973 Mark Oliphant is allegedly involved in a drunken brawl and is arrested by Suquamish Tribal Police on the Port Madison Indian Reservation. He is incarcerated for five days in lieu of $200 bail.

1976 In *Oliphant v. Schlie,* Mark Oliphant appeals for a writ of habeas corpus to the Ninth Circuit Court of appeals. He argues that as a non-Indian, the Suquamish lack criminal jurisdiction over him. The Ninth Circuit denies his request.

1978 Mark Oliphant appeals the Ninth Circuit's decision to the United States Supreme Court in *Oliphant v. Suquamish*. The Court sides with Oliphant, reversing the Ninth Circuit Court's decision, and ruling that all Indian tribes lack criminal jurisdiction over non-Indians unless specifically authorized by Congress.

1990 The United States Supreme Court issues a ruling in *Duro v. Reina.* It holds that tribal criminal jurisdiction is limited to members of the prosecuting tribe. In response, Congress passes the "Duro Fix," extending tribal criminal jurisdiction over all Indians, regardless of membership.

2010 The Tribal Law and Order Act of 2010 becomes law. It addresses epidemic levels of Indian country crime and jurisdictional challenges by increasing coordination among tribal, state, and federal agencies. It specifically upholds the ruling in *Oliphant v. Suquamish.*

2013 The Violence Against Women Reauthorization Act of 2013 becomes law. Among other things, the law addresses epidemic levels of violence against Native women in Indian country by granting participating tribes special domestic-violence criminal jurisdiction over non-Indians.

Tribal Criminal Jurisdiction: *Oliphant v. Suquamish*

Mark Oliphant v. The Suquamish Indian Tribe (Oliphant v. Suquamish) is a 1978 United States Supreme Court case concerning tribal criminal jurisdiction. The plaintiff, Mark David Oliphant, argued that as a non-Indian his arrest by Suquamish tribal police on the Port Madison Indian Reservation in Washington State was unlawful because the tribal government lacked criminal jurisdiction. In contrast, the Suquamish Indian tribe asserted that as a federally recognized tribe, they possessed the inherent sovereignty to prosecute crimes committed on their land, regardless of the racial identity of the perpetrator. In a six-to-two decision, the United States Supreme Court ruled in favor of Oliphant, holding that tribal governments do not have criminal jurisdiction over non-Indians unless specifically authorized by Congress. The ruling in *Oliphant* is a significant event in the history of American Indian political sovereignty and has had far-reaching consequences for American Indian people and governments.

The 1978 *Oliphant* decision stems from an alleged altercation that transpired during the annual Chief Seattle Days celebration on the Port Madison Indian Reservation of the Suquamish Indian tribe. At approximately 4:30 a.m. on August 19, 1973, Mark Oliphant was allegedly involved in a drunken brawl with attendees who were camped on Suquamish land. This alleged altercation led to Oliphant's arrest by Suquamish tribal police, who charged him with assaulting a police officer and resisting arrest. Pursuant to a contract with the nearby City of Bremerton, Oliphant was incarcerated in an off-reservation jail in lieu of $200 bail, and after five days he was released on his own recognizance.

Oliphant challenged Suquamish tribal jurisdiction, arguing that tribal governments do not have the authority to prosecute crimes committed by non-Indian perpetrators. He appealed his case to the United States District Court for the Western District of Washington and was denied a writ of habeas corpus. He then appealed his case to the Ninth Circuit Court of appeals in *Mark David Oliphant v. Edward Schlie (Oliphant v. Schlie),* which also denied his request.

In *Oliphant v. Schlie,* the court issued a near unanimous ruling upholding Suquamish tribal jurisdiction over crimes committed on tribal land. To arrive at this conclusion, the court reviewed treaties and congressional acts and evaluated Oliphant's argument on the basis of congressional trends, constitutionality, and practical considerations. It determined that no treaty or congressional act had extinguished the Suquamish's inherent sovereign right to exercise criminal jurisdiction on their land. Further analysis revealed that strengthening tribal criminal justice systems was consistent with congressional trends toward supporting tribal communities and bolstering law and order in Indian country (the legal term for Indian reservations and other land within the boundaries of Indian communities). As a practical consideration, the court also noted that tribal criminal jurisdiction over non-Indians in Indian country was necessary for public safety, since federal institutions (the alternative to tribal police) were not designed for local law enforcement.

Oliphant then appealed his case to the United States Supreme Court in *Mark Oliphant v. The Suquamish Indian Tribe*. The issue before the court remained the extent to which an Indian tribe may exercise criminal jurisdiction over non-Indians for crimes committed on Indian land. There were a number of possible outcomes. The Court could take a broad approach and issue a ruling applicable to all federally recognized tribes unilaterally confirming or denying the right of criminal jurisdiction. Alternatively, the Court could issue a narrower ruling specific to jurisdiction in this particular case without applying it to all Indian tribes. Finally, it could have accepted the Suquamish tribe's argument for a "subject matter jurisdiction test" that could ascertain which cases warranted tribal jurisdiction.

Ultimately, the Supreme Court opted for a unilateral holding overturning the lower courts' rulings and prohibiting all Indian tribes from exercising criminal jurisdiction over non-Indians unless specifically authorized by Congress. Justice William Rehnquist authored the majority opinion (with Justices Stewart, White, Blackmun, Powell and Stevens concurring). To arrive at this conclusion, the Supreme Court rejected the Ninth Circuit Court's analysis of treaties, congressional acts, congressional trends, and other factors.

The U.S. Supreme Court's reasoning rested on a radically different notion of tribal sovereignty vis-à-vis the lower courts. The Ninth Circuit Court adhered to the longstanding legal principle that tribes maintain all of their rights as sovereign nations except those that have been specifically ceded via treaty or explicitly extinguished by Congress. And since the Suquamish had never relinquished criminal jurisdiction by treaty or by statute, and since maintaining law and order is *sine qua non* (essential and inherent) to political sovereignty, the Ninth Circuit Court rejected Oliphant's claim. In contrast, the U.S. Supreme Court interpreted tribal sovereignty to exist to the extent of what was *granted to* tribes by Congress and via treaty. Since the Court could not supply a treaty or Congressional action that

specifically *conferred* criminal jurisdiction upon the Suquamish, they assumed that it did not exist.

The Supreme Court's radically different interpretation of tribal sovereignty was based in part on the assumption that tribes had no formal system of law and order until recently. As such, the Court reasoned that criminal jurisdiction could not have been assumed to be part of the tribe's inherent sovereignty during the treaty-making process because at the time, a modern notion of criminal jurisdiction did not exist for Native People. The Court's holding also rested on the argument that exercising criminal jurisdiction over non-Indians was inconsistent with their status as "domestic dependent nations" (political entities that are not fully sovereign due to their dependence on the United States).

The Supreme Court bolstered its argument by using primary documents to develop a doctrine of implicit divestment. Its rationale held that tribal rights could be implicitly terminated—even without explicit Congressional action—if those rights were deemed inconsistent with their status. As the majority opinion noted, "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions" (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204).

Curiously, some of the primary documentation to support the doctrine of implicit divestment came from congressional testimony over policy that was debated but never became law, and from treaties that themselves specified tribal criminal jurisdiction over non-Indians. For example, the Court cited the 1786 Treaty with the Choctaws that states, "If any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." While this language appears to confirm criminal jurisdiction for tribal governments, the Court used it to argue the opposite. Instead, the Court proffered that since these provisions became less prevalent over time, their gradual absence supported the doctrine of implicit divestment. Finally, while the Court's analysis centered on developing an *implicit* understanding of Congressional intent during an *historic* era, it appeared to ignore the argument presented in both the Suquamish tribe's brief and the opinion of the Ninth Circuit Court, that *contemporary* congressional policy was *explicitly* investing in tribal self-sufficiency and sovereignty.

Justice Thurgood Marshall authored the dissenting opinion with Chief Justice Warren Burger concurring. (Justice Brennan did not participate.) The dissent rested on the same argument as the lower court in *Oliphant v. Schlie*, that in the absence of explicitly ceding criminal jurisdiction over non-Indians, Indian tribes are assumed to maintain it.

Oliphant in Context

Local criminal jurisdictional authority is a fundamental right in most American communities. Recognizing that justice is best meted out at the local level, most American cities are governed by municipal regulations that are policed by city law enforcement in accordance with state and federal law. With some exceptions, such was the case for tribal governments prior to *Oliphant* where most crimes perpetrated in Indian country fell under tribal criminal jurisdiction regardless of the racial identity or tribal membership of the perpetrator. Before *Oliphant*, non-Indians who committed crimes could expect to be arrested, tried, and convicted in tribal court under the doctrine of implied consent (the notion that one forfeits the jurisdiction of one entity and assumes the jurisdiction of another when crossing a border into a new state or country). After *Oliphant,* tribes retained the ability to prosecute crimes committed by Indians in Indian country but were prohibited from exerting jurisdiction over non-Indian perpetrators.

After *Oliphant*, state and federal entities were tasked with adjudicating all non-Indian perpetrated crime on tribal land. Unfortunately, state and federal governments generally failed to fulfill their new roles in Indian country law enforcement. As a result, crime in Indian country has steadily increased, and in some cases reached epidemic levels. This is especially true for offenses such as drug production and trafficking, assault, and other violent crimes. Of particular concern is the level of sexual assault and domestic violence perpetrated against Indian women by non-Indian men. The interracial aspect of this crime is a statistical anomaly in the

Sidebar 1: Jurisdictional Authority for Crimes Committed in Indian Country* after *Oliphant v. Suquamish*

	Indian Perpetrator	Non-Indian Perpetrator
Indian Victim	Tribe+Concurrent State or Federal†	Exclusive State or Federal†‡
Non-Indian Victim	Tribe+Concurrent State or Federal†	Exclusive State or Federal†

* Indian Country is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government." See 18 U.S.C. § 1151.
† State jurisdiction is determined by Public Law 280 status.
‡ Unless the assault qualifies for Title IX exemptions for special domestic violence jurisdiction under the Violence Against Women Reauthorization Act of 2013.
Note—In rare cases it is possible for the U.S. Military to also assert criminal jurisdiction. For example, see *Lavetta Elk v. United States*. No. 05-186L 2009.

United States and is partially explained by the climate of race-based impunity created under *Oliphant*.

Historically, American Indian nations exercised effective local jurisdiction over the people and activities on their land. Even after contact with Europeans, the inherent sovereignty of American Indian nations remained intact and acknowledged by alien governments. Article 1 of the Constitution of the United States recognizes American Indian political sovereignty, and the more than 400 treaties signed between Native nations and the United States reaffirm the sovereign status of American Indian nations. However, changing views of Native People in the context of 19th-century westward expansion led to steady encroachment into American Indian political sovereignty and criminal jurisdiction, ultimately paving the way for the *Oliphant* decision.

One of the earliest and most significant inroads to American Indian sovereignty was the 1831 U.S. Supreme Court case *Cherokee Nation v. Georgia.* Though Native nations were once viewed as *pre* and *extra*-Constitutional (existing both before the birth of the United States as a country, and independent from the sovereignty it draws from the Constitution), the ruling in this case instead deemed Native nations "domestic dependent nations." As a result, the sovereignty of American Indian nations is now significantly limited in that they may no longer function as fully sovereign entities, but rather as distinct communities with limited political sovereignty under the supremacy of United States federal law. The *Cherokee Nation* case was foundational to the *Oliphant* decision, with the majority's argument resting in large part on the status of American Indian nations as "domestic dependent nations."

After *Cherokee Nation,* additional law and policy significantly limited tribal criminal jurisdictional authority in Indian country. The Major Crimes Act of 1885, 1953's Public Law 280, and the Indian Civil Rights Act of 1968 limited the types of crimes that could be adjudicated in tribal court, transferred criminal jurisdiction over certain crimes to state governments, and limited tribal sentencing authority. The ruling in *Oliphant* builds on previous laws to further restrict tribal criminal jurisdiction by specifying race as a jurisdictional determinant.

As the result of *Oliphant,* Indian country is unique in that it is virtually the only place in the world in which a perpetrator can commit a crime in a community yet have no legal accountability to the local government. Coupled with other earlier laws limiting tribal jurisdiction, *Oliphant* creates an exceptional legal framework in which the location, type of crime, and the racial identity of perpetrator(s) and victim(s) must be determined in order to adjudicate crime. Under this schema, crimes committed by non-Indians against Indians are especially difficult to prosecute. Consequently, not only has Indian country crime increased in general, but crime perpetrated by *non*-Indians against Indians has also increased in particular.

Sidebar 2: Who Is An "Indian"? Congress's "Duro Fix"

The ruling in *Oliphant v. Suquamish* held that Indian tribes lack criminal jurisdiction over non-Indians and instead limited their ability to adjudicate crime over "Indian" people only. However, the ruling did not specify who would be considered "Indian" for the purpose of criminal jurisdiction, leading to additional complications for law enforcement. This issue was at the heart of the 1990 U.S. Supreme Court case *Duro v. Reina,* in which Albert Duro allegedly killed a 14-year-old boy in the Salt River Pima Maricopa Indian Community. The Court ruled that though Duro was a member of the Torres-Martinez Desert Cahuilla Indians, he was not a member of the prosecuting tribe and was therefore immune to their jurisdiction. This ruling further limited tribal sovereignty in that it restricted tribal jurisdiction to crime committed by tribal members only. In response, Congress passed what is now known as the "Duro Fix," which restored tribal criminal jurisdiction over all "Indians" regardless of membership with the adjudicating tribe. Despite the "Duro Fix," ambiguity remains because federal, state, and tribal definitions of "Indian" vary significantly throughout the country. Thus, a definition of who an "Indian" is for the purposes of criminal jurisdiction under *Oliphant* remains unclear.

Notably, the Oliphant case itself is a clear example of the public safety challenges stemming from the Supreme Court's ruling. Mark Oliphant was living on Indian land, attending an event hosted by an Indian community, and was arrested for allegedly assaulting an Indian member of that community. Yet, in *Oliphant v. Suquamish,* the Supreme Court ruled that as a non-Indian, Oliphant should have no criminal accountability to that Indian community. Prior to the alleged assault, the Suquamish tribe requested police support from the Bureau of Indian Affairs (the federal agency responsible for managing tribal land). This request was denied, leaving the Suquamish tribal police as the only law enforcement agency on duty during Oliphant's alleged assault. And though the Supreme Court ruled that Oliphant's case falls under federal jurisdiction, the federal government did not prosecute him. Here, the federal government failed in both policing and prosecution, thus allowing crime perpetrated by a non-Indian against an Indian to be met with impunity.

Tribal governments, state and federal legislators, and Native activists have pursued a variety of methods to address crime in Indian country in the wake of *Oliphant,*

including strengthening tribal civil codes, advocating for better state and federal policing, promoting increased sovereignty drawn from treaty rights, and lobbying Congress for legislative changes. Significant progress was made along those lines in 2010 when President Obama signed the Tribal Law and Order Act (TLOA) into law. The TLOA is a federal law that addresses Indian country crime by increasing communication between law enforcement agencies, compiling federal declination and Indian country crime statistics, facilitating cross-deputization agreements, and increasing funding for tribal justice institutions. The law specifically upholds the *Oliphant* ruling, stating, "Nothing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians" (25 U.S.C. 2801 § 206), and instead frames addressing jurisdictional challenges post-*Oliphant* through increased coordination among tribes, states, and the federal government.

To many, The TLOA represented significant progress in addressing crime in Indian country. However, many tribal advocates argued that it still did not do enough to address crime committed by non-Indian perpetrators, especially as it relates to epidemic levels of violence against Indian women. In response, Congress passed Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). Title IX: Safety for Indian Women extends special tribal criminal jurisdiction over non-Indian perpetrators of dating violence, domestic violence, and violations of protection orders. Title IX applies to non-Indian perpetrators of said crimes who live or work on Indian land or are a "spouse, intimate partner, or dating partner" of an Indian on tribal land (Public Law 113–4 § 904).

Though limited in scope, Title IX has received serious criticism by some members of Congress and others who view it as a threat to non-Indian civil liberties. In contrast, Title IX has garnered praise from tribal governments and Indian people as a significant restoration and recognition of the sovereignty they have always possessed. Since its passage, several tribal governments have exercised special domestic violence jurisdiction under Title IX and have used it to arrest and prosecute non-Indian perpetrators.

Though Title IX's significance is usually read in terms of its challenge to *Oliphant*, it is important to note that nothing in VAWA 2013 extends criminal jurisdiction over crimes like those allegedly perpetrated by Mark Oliphant. Even though he lived on the Port Madison Indian Reservation, his alleged assault of a tribal police officer was not domestic in nature and therefore would not fall under Title IX. Additionally, Title IX—rather than streamline Indian country jurisdiction—adds more layers to an already complex jurisdictional scheme that remains mostly intact. Per Title IX, in addition to the location of the crime, the type of crime, and the racial identities of the persons involved, law enforcement must also now factor the nature of the crime (domestic/non domestic) and the relationships between the perpetrator, the victim, and the tribal community in order to determine jurisdiction. However,

despite this persistent complexity, it is clear that VAWA 2013 is a significant shift in federal Indian policy. Not only is it a legislative check on the anti-tribal sovereignty trend characteristic of the Rehnquist court, but it also significantly shifts the trajectory of federal Indian law toward meaningful investments in American Indian sovereignty.

Today, the ruling in *Oliphant v. Suquamish* remains one of the most significant events that have shaped American Indian history. Historically, it fundamentally altered the way that tribal sovereignty was viewed by the federal government, resulting in challenges to public safety in Indian country that persist to this day. In the face of these challenges, it also spurred advocacy from tribal governments, Indian people, and their allies to continue to invest in tribal sovereignty and ensure law and order in tribal communities. The result of that advocacy—notably the TLOA and VAWA 2013—has dramatically reshaped the trajectory of American Indian tribal sovereignty towards self-determination for Indian nations.

Biography

Sarah Deer (1972–)

Sarah Deer is a citizen of the Muscogee (Creek) Nation and is one of the most influential figures in the modern anti-violence movement for Native women, especially as it relates to law and policy. Deer is a lawyer, author, activist, and law professor at William Mitchell College of Law in St. Paul, Minnesota. In 2014, she was awarded the prestigious MacArthur Fellowship for her work in tribal justice and anti-violence advocacy. Her work has resulted in some of the most significant changes in federal Indian policy in recent history. Today, she continues to advocate for tribal governments and American Indian women.

Since receiving her law degree from the University of Kansas, Deer has published extensively in both tribal law and federal Indian policy. Her work traces the impact of American colonization on traditional indigenous justice systems, and challenges the way that federal Indian policy has divested American Indian governments of political sovereignty. Deer incorporates gender into her analysis, comparing the experience of Native women under traditional tribal justice systems to their experience within the modern American justice system. In doing so, her work highlights the way that American law and federal Indian policy have shaped the epidemic levels of violence against Native women in Indian country. As such, she advocates for a survivor-centered model of justice within a context of reinvigorating tribal sovereignty, expanding tribal criminal jurisdiction, and reforming federal Indian law.

The outcome of *Oliphant v. Suquamish* figures prominently in Sarah Deer's work. Deer situates the case as one of many that divested tribal nations of their inherent

sovereignty and produced a jurisdictional structure that creates a public safety crisis in Indian country. Her analysis of *Oliphant* illustrates the way that an already complex jurisdictional structure has been racialized, creating a climate of race-based impunity for non-Indian criminals. This, she notes, is particularly gendered in that *Oliphant* disproportionately affects Native women targeted by non-Native men.

Sarah Deer was instrumental in data collection and analysis for Amnesty International's groundbreaking 2007 report *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*. As a co-author of the project, Deer collected data from all over the nation to reveal the complex nature of jurisdiction in Indian country and the way that it impacts Native women. Through statistical data, interviews, and legal analysis, Deer and her colleagues revolutionized the discourse on violence against Native women by framing it as an international human rights issue. In doing so, Deer was instrumental in garnering national and international attention to an issue relatively unknown outside of the Native community.

After *Maze of Injustice*, Deer continued to advocate for anti-violence strategies in Indian country. She testified before Congress and authored additional publications demonstrating the need to revitalize tribal justice systems in order to combat epidemic levels of violence against Native women. Her work on *Maze of Injustice* and subsequent activism directly led to significant changes in federal Indian policy through the Tribal Law and Order Act of 2010 (TLOA) and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).

The TLOA invests in American Indian sovereignty to increase tribal sentencing authority, improve services for American Indian women, develop federal accountability to American Indian governments and citizens, coordinate policing between multiple agencies, and bolster funding to tribal governments to help maintain law and order. As a result, tribal governments have more resources to adjudicate crime in their communities and hold the federal government accountable to its responsibility to protect Native women.

The passage of the TLOA was hailed as a major victory for Native women and Indian country communities. However, it failed to fully address the jurisdictional complications identified in *Maze of Injustice* and did nothing to address the outcome of *Oliphant v. Suquamish*. As such, Deer continued to lobby Congress and was instrumental in the passage of VAWA 2013.

VAWA 2013 builds on The TLOA by expanding tribal jurisdiction over non-Indian perpetrators for some of the most common crimes committed against Native women. In doing so, it challenges the Supreme Court's ruling in *Oliphant* and addresses public safety in Indian country by re-investing in tribal sovereignty.

The impact of Sarah Deer's work is broad and far-reaching. Deer has radically redirected federal Indian policy and advocated for Native women in the context of re-Indigenizing tribal law. In her moving essay "What She Says, It Be Law," Deer discusses her own tribe's traditional law as it relates to jurisdiction and violence against Native women. Deer points out that, unlike the modern justice system, the Muscogee (Creek) Nation traditionally shaped law around the experience of the survivor and her vision of justice. As such, she pushes the boundaries of what "justice" means for Native women and tribal governments in order to shape a more vibrant future for Native People as a whole. (*See also* Deer's biography in Tribal Law and Order Act, 2010.)

DOCUMENT EXCERPTS

The Suquamish Indian tribe's Legal Brief

The following is an excerpt from the Suquamish Indian tribe's legal brief submitted to the Ninth Circuit Court of Appeals. The brief outlines details of the alleged incident involving Mark Oliphant as well as the Suquamish tribe's argument for criminal jurisdiction over non-Indians.

Appellant was arrested at approximately 4:30 A.M. The only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the tribe and its courts, there could have been no law enforcement whatsoever on the Reservation during this major gathering which clearly created a potentially dangerous situation with regard to law enforcement. Public safety is an underpinning of a political entity. If tribal members cannot protect themselves from offenders, there will be powerful motivation for such tribal members to leave the Reservation, thereby counteracting the express Congressional policy of improving the quality of Reservation life [. . .]

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non- Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence. Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdictional division

between federal, state and tribal governments over the offense is not clear, and where the peace and dignity of the government affected is not his own but that of the Indian tribe [. . .]

Traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct, and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows.

Source: Suquamish Tribal Brief, pp. 27–28, as quoted in *Oliphant v Schlie,* 544 F.2d 1007 (Ninth Circuit 1976): 9, 10.

The Ninth Circuit Court's Ruling in *Oliphant v. Schlie* (1976)

Below are excerpts from Ninth Circuit Court's ruling in Oliphant v. Schlie. *The decision relies on the assumption that tribes maintain all of their rights as sovereign nations unless those rights have been specifically ceded via treaty or explicitly extinguished by Congress.*

Oliphant argues that the Suquamish have no jurisdiction over non-Indians because Congress never conferred such jurisdiction on them. This misstates the problem. The proper approach to the question of tribal criminal jurisdiction is to ask "first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited" [. . .]"It must always be remembered that the various Indian tribes were once independent and sovereign nations . . ." [. . .] who, though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress [. . .]

The question is not whether Congress has conferred jurisdiction upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question therefore is, did Congress (or a treaty) take that jurisdiction away? The dissent points to no action by the Congress, and no treaty language, depriving the tribe of jurisdiction [. . .]

Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed.

Source: Oliphant v. Schlie, 544 F.2d 1007 (Ninth Circuit 1976): 1, 3.

Circuit Judge Kennedy's Dissenting Opinion in *Oliphant v. Schlie* (1976)

Below are excerpts from Ninth Circuit Court Judge Anthony Kennedy's dissenting opinion in Oliphant v. Schlie. *Kennedy's dissent challenged the notion of inherent criminal jurisdiction proffered in the majority decision. He would later become an associate Justice of the Supreme Court of the United States under President Ronald Reagan.*

The concept of sovereignty applicable to Indian tribes need not include the power to prosecute nonmembers. This power, unlike the ability to maintain law and order on the reservation and to exclude undesirable nonmembers, is not essential to the tribe's identity or its self-governing status. [. . .] Therefore I do not find the doctrine of tribal sovereignty analytically helpful in this context and instead find it necessary to look directly at the applicable legislation to determine whether Congress intended the tribal courts to have the power to exercise jurisdiction over nonmembers [. . .]

I am persuaded that Indian tribal courts were not intended to have jurisdiction over non- Indians. Although Congress has never explicitly so provided, it has repeatedly acted in accord with this premise. Unlike the majority, I would not require an express congressional withdrawal of jurisdiction. A presumption in favor of any inherent, general jurisdiction for tribal courts is wholly inconsistent with the juridical relations between the federal government and the Indian tribes that has existed for the past 100 years. Viewing tribal courts in their historical and cultural context, in light of the fact that virtually no white man appears to have been tried by an Indian tribunal in the past century, congressional silence on this point can hardly be viewed as assent.

Source: Oliphant v. Schlie, 544 F.2d 1007 (Ninth Circuit 1976): 12, 19.

Justice Rehnquist's Majority Opinion in *Oliphant v. Suquamish* (1978)

Below are excerpts from the majority opinion in Oliphant v. Suquamish, *authored by Justice William Rehnquist. Rehnquist was joined by Justices Stewart, White, Blackmun, Powell, and Stevens.*

While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions [. . .]

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government [. . .] But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments [. . .]

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. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents. [. . .]

We recognize that some Indian tribal court systems have become increasingly sophisticated, and resemble in many respects their state counterparts. We also acknowledge that, with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians [. . .] But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. The judgments below are therefore *Reversed.*

Source: Oliphant v Suquamish Indian Tribe, 435 U.S. 191 (1978): 205, 209, 211–13.

Justice Marshall's Dissenting Opinion in *Oliphant v. Suquamish* (1978)

The following is Justice Thurgood Marshall's dissenting opinion in Oliphant v. Suquamish. *Marshall's reasoning is congruent with the rationale of the Ninth Circuit Court of Appeals. Chief Justice Burger joined Marshall in dissent. Justice Brennan did not participate.*

I agree with the court below that the "power to preserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish originally possessed" [. . .] In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy, as a necessary aspect of their retained sovereignty, the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.

Source: Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978): 213.

See also: Tribal Law and Order Act, 2010; Violence Against Women Act, Title IX: Safety for Indian Women, 2013

Further Reading

Amnesty International. *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA*. New York: Amnesty International Publications, 2007.

Barker, Joanne, ed. *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*. Lincoln, NE: University of Nebraska Press, 2005.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Deer, Sarah. "What She Say, It Be Law." *Mending the Sacred Hoop Newsletter*. 4.2 (2000): 1.

Deer, Sarah. "Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law." *Suffolk University Law Review* 38 (2005): 459.

Deer, Sarah and Carrie E. Garrow. *Tribal Criminal Law and Procedure*. New York: Altamira Press, 2007.

Goldberg, Carole, Kevin K. Washburn, and Philip P. Frickey, eds. *Indian Law Stories*. St. Paul: Foundation Press, 2011.

Indian Country Defined. 18 U.S.C. § 1151.

Johnson, Steven. "Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant." *American Indian Law Review* 7.2 (1979): 291–317.

Lavetta Elk v. United States. No. 05-186L (U.S. Court of Federal Claims, 2009).

Oliphant v. Schlie, 544 F.2d 1007 (Ninth Circuit 1976).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Pevar, Stephen L. *The Rights of Indians and tribes*. Oxford, UK: Oxford University Press, 2012.

Tribal Law and Order Act of 2010 P.L. 111–211, 25 U.S.C. 2801.

Violence Against Women Reauthorization Act of 2013 P.L. 113–14.

Worcester v. Georgia, 31 U.S. 515 (1832).