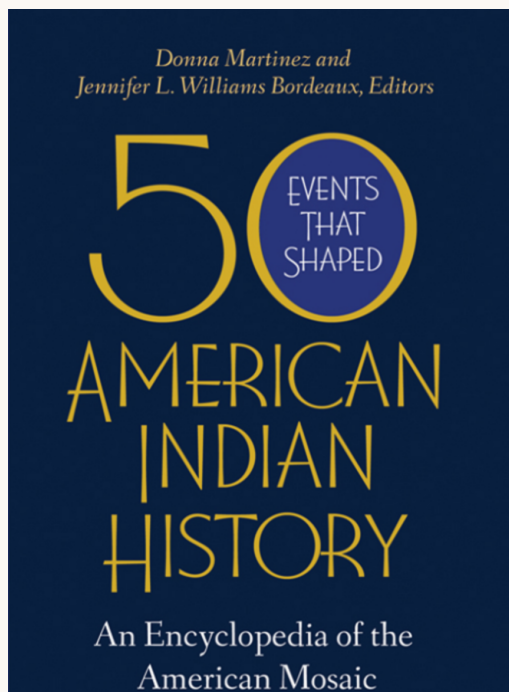




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Amy L. Casselman

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Oliphant v. Suquamish, 1978

Amy Casselman

[...]

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 as 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.